

COLLATERAL CONSEQUENCES AND COLLATERAL HARM: THE COVID-19 PANDEMIC AS A CATALYST FOR EQUITABLE REINTEGRATION REFORM

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I. INTRODUCTION

Collateral consequences are sanctions imposed upon an individual outside the realm of formal sentencing that often have far more severe, long-lasting, and wide-ranging impacts than direct forms of criminal punishment.¹ While some collateral consequences are connected to the offense that has been committed, critics argue that many of these consequences are instead arbitrary and may undermine the goals of the criminal justice system, including public safety and fairness.² Fairness concerns are further heightened due to stark disparities in the impacts of collateral consequences on individuals of particular racial and socioeconomic backgrounds.³

For many, having a criminal record “serves as a perpetual badge of infamy, even serving to impugn reputation beyond the grave.”⁴ This “badge of infamy” precludes justice-involved individuals from accessing a breadth of rights and opportunities, frequently causing devastating aggregate and intergenerational effects on ex-offenders’ families and communities.⁵ Because approximately one-third of Americans have a

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1. See Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 238–42 (2018) (comparing the impacts of directly imposed criminal penalties to the impacts of collateral consequences).

2. E.g., *Reducing the Impact of Collateral Consequences of Convictions*, ABA (Dec. 11, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/reducing-the-impact-of-collateral-consequences-of-convictions/ (“When properly administered, [collateral consequences] can play an important role in achieving articulable government objectives. But many such sanctions bear no relation to an underlying offense and undermine such goals.”).

3. See Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 964–65 (2013) (describing the disproportionately heavy burden of collateral consequences carried by poor individuals of color).

4. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1106 (2013).

5. See *id.*

criminal record,⁶ the effects of collateral consequences can seep into every facet of American life, even for those who have never been convicted.⁷ For these reasons, reintegration—the restoration of rights lost as a consequence of criminal justice involvement—is an imperative part of criminal justice reform.⁸ Recently, measures intended to ease the burden of having a criminal record have picked up steam in legislatures across the country.⁹ Some scholars fear, however, that many of these new mechanisms may be less advantageous to certain groups of ex-offenders, serving to exacerbate, rather than fix, the socioeconomic and racial inequities that exist both within and outside of the criminal justice system.¹⁰

The COVID-19 pandemic both magnified and illuminated the deadly and far-reaching effects that criminal justice involvement and the collateral consequences that follow have had on ex-offenders and their communities,¹¹ especially those that have historically been the most severely affected by these disadvantages.¹² Consequently, the pandemic demonstrated an urgent need for relief from the heavy burden of having a criminal record—specifically, relief that is broadly available, widely accessible, and effective for *all* ex-offenders.¹³ As the detrimental effects

6. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461 (2020) (estimating that 19 to 24 million Americans currently have felony conviction records, and when non-conviction arrests are factored in, one-third of American adults have a criminal record).

7. *See id.* at 2471.

8. *See* Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1324 (2017) (differentiating “re-entry,” which narrowly focuses on an individual ex-offender returning home from incarceration, from “reintegration,” which is “a more robust and comprehensive state goal that requires the state to take action that restores rights and privileges lost by virtue of a conviction and removes collateral sanctions and discretionary disabilities” and relates more broadly to *all* individuals with criminal records, regardless of whether they have been incarcerated).

9. *E.g.*, MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RSCH. CTR., THE REINTEGRATION AGENDA DURING PANDEMIC: CRIMINAL RECORDS REFORMS IN 2020 1 (2021), https://ccresourcecenter.org/wp-content/uploads/2021/01/CCRC_The-Reintegration-Agenda-During-Pandemic_2020-Reforms.pdf (tracking recent legislative trends in reintegration-related reforms throughout the United States).

10. *E.g.*, Colleen Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 577 (2020); Prescott & Starr, *supra* note 6, at 2548.

11. *See* Cynthia A. Golembeski et al., *Food Insecurity and Collateral Consequences of Punishment Amidst the COVID-19 Pandemic*, 12 WORLD MED. & HEALTH POL’Y 357, 358 (2020) (“[C]ollateral consequences... compromise the health, well-being, and safety of individuals and their communities, especially amidst the COVID-19 pandemic.”).

12. *Id.*; LEN ENGEL ET AL., RACIAL DISPARITIES AND COVID-19 4 (2020), <https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Racial-Disparities-and-COVID-19-Report.pdf> (finding that racial imbalances within the criminal justice system both contributed to, and were exacerbated by, COVID-19’s disparate impact on poor people of color).

13. *See* Fernando Nunez, *Reentering During a Pandemic*, 68 UCLA L. REV. DISCOURSE 144, 146 (2020) (describing the heightened need for accessible record-relief in the midst of the pandemic, in order to avoid “increas[ing] the existing racial disparities in access to jobs, housing, and other important areas of life”).

of collateral consequences continue to become more visible to the general public, it is critical that future efforts to mitigate these effects sufficiently account for the many structural, systemic, and multidimensional race and class inequities inextricably intertwined with the American criminal justice system and frequently impact reintegration outcomes.¹⁴

Part II of this Article provides a brief overview of some of the most significant effects of collateral consequences, as well as the race and class disparities that commonly influence the impact these consequences have on particular individuals and communities. Part III explains various recently passed and proposed reintegration-focused legislation at the state and federal levels, as well as concerns that these measures may lead to disparate outcomes. Part IV discusses the devastating effects of criminal justice involvement and persistent collateral consequences through the lens of the COVID-19 pandemic. Part V proposes that the federal government, as part of its national response to the pandemic, should enact an expungement statute that places a distinct focus on equity. Equitably available reintegration measures would benefit not only those individuals with criminal records, but all of society,¹⁵ which is particularly important as the nation begins to rebuild in the wake of current public health and economic crises.

II. COLLATERAL CONSEQUENCES: BACKGROUND

Collateral consequences are a combination of formal and informal disadvantages that restrict individuals with criminal records from accessing a breadth of rights, opportunities, and resources.¹⁶ These consequences may attach as a result of felony or misdemeanor convictions, as well as non-conviction arrests and juvenile delinquency adjudications.¹⁷ Over forty thousand formal collateral consequences

14. See Prescott & Starr, *supra* note 6, at 2554–55.

15. See Radice, *supra* note 8, at 1324.

16. See generally Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, & RELEASE 371, 387 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf.

17. Chin, *supra* note 1, at 260; Juv. Just. Ctr., *The Florida Juvenile Collateral Consequences Checklist*, <https://www.nacdl.org/getattachment/5058ad74-4bd5-4bdb-b818-88f219119144/florida-juvenile-collateral-consequences-checklist.pdf> (last visited Mar. 28, 2022) (explaining the immediate and long-term consequences of juvenile court involvement).

exist,¹⁸ which include restrictions on an ex-offender's ability to vote, serve on juries, hold public office, receive a pension, obtain employment, retain custody of children, drive a car, obtain student aid, and receive public assistance.¹⁹ These laws vary from state to state, but many are required by federal law.²⁰ Even when these formal legal and regulatory barriers are inapplicable or can be surmounted, having a criminal record nevertheless has a negative impact on an ex-offender's access to opportunities due to the stigma that employers, landlords, other decision-makers, and society at large attach to individuals who have been involved in the criminal justice system.²¹

A. Economic Stability and Housing

Criminal justice involvement frequently has a profoundly negative and long-lasting economic impact.²² Court fees and incarceration-related expenses often diminish any wealth an individual may have had before exposure to the criminal justice system.²³ Then, the persistent collateral consequences that follow often serve to prevent an ex-offender from ever achieving financial stability or mobility.²⁴

Likely, the most prevalent and harmful impact of collateral consequences is an inability to obtain gainful employment.²⁵ Tens of thousands of formal legal bars to employment exist, including those that deem ex-offenders ineligible to enter particular professions or obtain

18. *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> (follow the hyperlink to the website; click the "search" button above the "duration" box; results contained next to the "next page" button) (last visited Mar. 28, 2022) (a comprehensive inventory of state and federal policies relating to collateral consequences of a criminal conviction).

19. *Id.*; Chin, *supra* note 1, at 235. Non-citizen individuals convicted of a crime also face the daunting collateral consequences of deportation and an ineligibility to naturalize. See 8 U.S.C. § 1227(a)(2) (authorizing the deportation of those convicted of certain criminal offenses); McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 796 (2011).

20. Prescott & Starr, *supra* note 6, at 2471; *Collateral Consequences Inventory*, *supra* note 18 (follow hyperlink in note 18; next to "description" box click-box "include federal consequences" to get results) (when "jurisdiction" is limited to "federal," identifying 1,049 collateral consequences that are imposed by 941 federal laws and policies).

21. Logan, *supra* note 4, at 1104 (distinguishing between formal and informal collateral consequences and explaining the severely detrimental impacts of the latter).

22. *E.g.*, Logan, *supra* note 4, at 1107.

23. Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, PRISON POL'Y INST. (Apr. 26, 2016), <https://www.prisonpolicy.org/blog/2016/04/26/wealth/>.

24. Logan, *supra* note 4, at 1107.

25. See Jeffrey Selbin et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 4 (2018) (describing the "particularly harmful effect of criminal records on employment outcomes").

various licenses or permits necessary to do business.²⁶ Informal nonlegal barriers to employment include personal stigma and bias against justice-involved individuals, which in addition to impacting individual hiring decisions, may also be codified in internal hiring policies that systematically exclude ex-offenders.²⁷ Additional collateral consequences, like an inability to obtain a driver's license, may further reduce an ex-offender's likelihood of obtaining or keeping a job.²⁸ As a result of these barriers, individuals with criminal records have far higher unemployment rates than the general public, and even when able to obtain work, far lower lifetime earnings.²⁹ Education helps mitigate the stigma of having a criminal record, but collateral consequences often prevent an ex-offender from being accepted into school or receiving necessary student loans or grants.³⁰

Aside from the difficulties in obtaining housing that result simply from a lack of financial resources, a criminal record may serve as an additional bar to finding a stable place to live due to both formal

26. NICK SIBILLA, INST. FOR JUST., *BARRED FROM WORKING: A NATIONWIDE STUDY OF OCCUPATIONAL LICENSING BARRIERS FOR EX-OFFENDERS* (2020) (analyzing occupational licensing restrictions that bar ex-offenders from entering hundreds of professions); Ifeoma Ajunwa, *The Modern Day Scarlett Letter*, 83 *FORDHAM L. REV.* 2999, 3010 (2015) (identifying additional professions that federal law prevents ex-offenders from entering). Some conviction-related federal law barriers to employment include: 5 U.S.C. § 7371 (barred from working as a law enforcement officer); 18 U.S.C. § 1033(e) (barred from working in the insurance industry); 42 U.S.C. § 1320a-7 (barred from providing health care services paid for by Medicare); 12 U.S.C. § 1829 (barred from working at FDIC-insured institutions in any capacity, including food concessions); 20 U.S.C. § 7115 (barred from working in elementary and secondary schools); 49 U.S.C. § 44936(b) (barred from working in an airport); and 10 U.S.C. § 504 (barred from serving in the military).

27. See Samuel K. Baier, *Reducing Employment Barriers for People with Criminal Records*, 46 *J. CORP. L.* 219, 221–22 (2020) (explaining employers' reluctance to hiring ex-offenders); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 *N.Y.U. J. LEGIS. & PUB. POL'Y.* 177, 177 (2008) (describing a criminal record as a "negative curriculum vitae"). In addition to categorically barring ex-offenders from certain professions, federal law also imposes mandatory criminal history checks for applicants seeking to enter some industries. *E.g.*, 42 U.S.C. § 13041 (childcare industry); 49 U.S.C. § 5103a (hazardous materials transportation industry).

28. See *Debt-Related Driving Restrictions Make Everyday Life Impossible*, FREE TO DRIVE, <https://www.freetodrive.org/about/#page-content> (last visited Mar. 28, 2021) (explaining that most states "suspend, revoke, or refuse to renew driver's licenses" as a consequence of an inability to pay the fines and fees resulting from misdemeanor and felony convictions, which frequently has the effect of "cost[ing] people their livelihoods").

29. Logan, *supra* note 4, at 1108; 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> (finding that in 2018, the unemployment rate for formerly incarcerated individuals was 27.3%, over five times higher than the general public's unemployment rate of 5.2%); Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS (2018), <https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration/> (finding that only 55% of individuals released from prison have any earnings, and those with employment often earn less than minimum wage).

30. See, *e.g.*, 20 U.S.C. § 1091(r) (barring students convicted of some drug offenses from receiving student aid); Anjuwa, *supra* note 26, at 3020 (explaining additional education-related barriers that result from having a criminal record).

collateral consequences and informal record-related stigma.³¹ Individuals with criminal records, especially those that have been incarcerated, are far more likely than the general public to end up homeless, further compounding pre-existing difficulties in obtaining work.³²

B. Health

Like employment and housing, formal and informal collateral consequences may also serve to restrict an ex-offender from accessing the resources necessary to maintain good health.³³ Criminal justice involvement and the stress of difficult reintegration have been found to have negative impacts on both the physical and mental health of ex-offenders.³⁴ Incarceration frequently contributes to poor health outcomes, but the collateral consequences of having a criminal record have been linked to health complications for even ex-offenders who have never been incarcerated.³⁵

Food insecurity is common among justice-involved individuals and “is associated with increased risks for chronic disease and overall poorer health.”³⁶ To supplement an inadequate income, many individuals with criminal records need public assistance like Supplemental Nutrition Assistance Program (SNAP) benefits, formerly known as food stamps.³⁷ However, over one hundred SNAP-related formal collateral

31. Logan, *supra* note 4, at 1108 (“The fact of criminal conviction, ex-convicts report, serves as the single greatest impediment to securing housing.”); Katherine Kuhl, *The War on Affordable Housing?: How Anti-Drug Policies Put Families in Federally Subsidized Housing at Risk of Eviction, and Methods for Mitigating These Collateral Consequences*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 521, 529 (2019) (explaining several federal laws that preclude ex-offenders from accessing housing). One such law is 42 U.S.C. § 1437f(d)(1)(B)(iii), which authorizes landlords to terminate the lease of an individual receiving public housing benefits in the event of “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises” by other tenants or neighbors, as well as “any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control.” *Id.*

32. Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INST. (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> (noting that housing insecurity amongst ex-offenders “destabilizes” the entire process of reintegration).

33. See generally Golembeski, *supra* note 11, at 358; Amy L. Katzen, *African American Men’s Health and Incarceration: Access to Care Upon Reentry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER L. & JUST. 221, 231 (2011).

34. David A. Singleton, *Restoring Humanity by Forgetting the Past*, 81 OHIO ST. L.J. 1011, 1013–14 (2020) (describing the mental and physical health struggles resulting from difficult reintegration); Daniel C. Semenza, *How Does Reentry Get Under the Skin? Cumulative Reintegration Barriers and Health in a Sample of Recently Incarcerated Men*, 243 SOC. SCI. & MED. 1, 6 (2019).

35. See Golembeski, *supra* note 11, at 358.

36. *Id.* at 359.

37. *Id.* at 363–64.

consequences exist nationwide,³⁸ which serve to preclude even the most impoverished ex-offenders and their families from accessing adequate food and have been explicitly linked to poorer physical and mental health.³⁹ Even those ex-offenders not categorically banned from receiving SNAP benefits may nevertheless be ineligible to receive them, due to work requirements that “render[] the underemployed or informally employed people with prior convictions, especially vulnerable to food insecurity” and its related health consequences, regardless of how diligently such an individual seeks work.⁴⁰

Justice-involved individuals may also face increased difficulties with access to adequate medical treatment, despite often having a heightened need for healthcare.⁴¹ This results not only from the general socioeconomic oppression that often results from having a criminal record, but also because of specific formal policies in place in many jurisdictions.⁴² An individual may be denied access to federal and state medical benefit programs, including Medicaid, for any “criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct,” or for any “criminal offense consisting of a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”⁴³ Further, incarcerated individuals automatically lose Medicaid benefits and, upon release, those benefits may not be reinstated in some states.⁴⁴ Finally, discrimination within the healthcare system against those with criminal records may also negatively impact healthcare access.⁴⁵

38. *Id.* at 362–63. Among these bans is 21 U.S.C. § 862a, which permanently precludes individuals convicted of felony drug offenses from receiving SNAP and Temporary Assistance for Needy Families (TANF) benefits. 21 U.S.C. § 862(a); 42 U.S.C. § 601(a).

39. Golembeski, *supra* note 11, at 363; Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J. 301, 324 (2019), <https://www.aeaweb.org/articles?id=10.1257/pol.20170490>.

40. Golembeski, *supra* note 11, at 360–61.

41. See Alisha Desai et al., *Releasing Individuals from Incarceration During COVID-19: Pandemic-Related Challenges and Recommendations for Promoting Successful Reentry*, 27 PSYCH., PUB. POL’Y, & L. 242, 244 (2021).

42. Katzen, *supra* note 33, at 231–32.

43. 42 U.S.C. §§ 1320a-7(a)(4), (b)(1)–(3).

44. Ashwin Vasani, “Medicare for All” Is Missing a Vital Group: The Incarcerated, MARSHALL PROJECT (Mar. 21, 2019), <https://www.themarshallproject.org/2019/03/21/medicare-for-all-is-missing-a-vital-group-the-incarcerated>.

45. See Joseph W. Frank et al., *Discrimination Based on Criminal Record and Healthcare Utilization Among Men Recently Released from Prison: A Descriptive Study*, HEALTH & JUST., Dec. 2014, at 7, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4308970/>.

C. Recidivism and Community

The oppressive effects of collateral consequences have been found to lead to high rates of recidivism.⁴⁶ Numerous studies have shown that an inability to obtain financial security,⁴⁷ social acceptance,⁴⁸ and basic needs like food,⁴⁹ healthcare,⁵⁰ and housing⁵¹ often lead individuals to re-offend. In some cases, the effects of collateral consequences make future criminal conduct virtually unavoidable, as many crimes are inextricably intertwined with poverty, like “quality of life” offenses.⁵² Even those who do not commit any new crimes may nevertheless be re-arrested for a technical violation of their conditions of release, which often requires the payment of various fees or to obtain housing—burdens that may be impossible for an individual facing economic hardship to fulfill.⁵³

The effects of collateral consequences frequently spill over onto the families and communities of ex-offenders, resulting in widespread socioeconomic, housing, and health-related repercussions.⁵⁴ Not only does this harm family and community members of ex-offenders who have never committed crimes, it simultaneously leads to more crime in

46. NATHAN JAMES, CONG. RSCH. SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 12–16 (2015).

47. *Id.*; Jason M. Williams et al., “It’s Hard Out Here if You’re a Black Felon”: A Critical Examination of Black Male Reentry, 99 PRISON J. 437, 448 (2019) (compiling “decades of research [that] identify employment as a key factor to successful reentry and lowering rates of recidivism”).

48. Tony Ward & Claire Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model*, 9 PSYCH., CRIME & L. 125 (2003).

49. Tuttle, *supra* note 39, at 307.

50. Erkmen G. Aslim et al., *The Effect of Public Health Insurance on Criminal Recidivism*, GEO. MASON UNIV. L. & ECON. RSCH. PAPER SERIES, July 2021, at 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3425457.

51. Kuhl, *supra* note 31, at 530; George Lipsitz, “In an Avalanche Every Snowflake Pleads Not Guilty”: Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights, 59 UCLA L. REV. 1746, 1754–56 (2012).

52. See Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFF. REV. 41, 59 (2017); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson’s “Masculinity as Prison,”* 3 CAL. L. REV. CIR. 184, 188 (2012) (explaining that many parts of the criminal justice system are inextricably tied to poverty and race, resulting in “prisons [that] are full of low-income people and people of color who were prosecuted for crimes of poverty and minor drug use”).

53. *E.g.*, Chin, *supra* note 16, at 387; Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 125 (2014).

54. See Logan, *supra* note 4, at 1108 (describing secondary stigma and ostracism experienced by third parties); Chin, *supra* note 16, at 372, 376 (finding that collateral consequences can impact the health and well-being of entire families and communities).

affected communities.⁵⁵ In turn, communities ravaged by the effects of collateral consequences are less able to assist in facilitating the safe and successful reintegration of a community member.⁵⁶

D. Disparities in the Effects of Collateral Consequences

Although imposed on individuals of all backgrounds, collateral consequences often affect different ex-offenders with varying levels of force.⁵⁷ Due to systemic bias and other inequities that exist both within and outside of the criminal justice system, people of color and economically disadvantaged individuals are disproportionately harmed by the effects of collateral consequences.⁵⁸

Collateral consequences are generally more likely to be imposed on members of these groups due to disparities existing in every step of the criminal justice process.⁵⁹ Racial bias is both embedded into various criminal laws and policies, as well as exhibited in discretionary decisions made by law enforcement, prosecutors, juries, and judges.⁶⁰ As a result, poor people of color are “disproportionately injected into the criminal justice system and remain stuck in it.”⁶¹ Members of these groups are also found to suffer from additional or more severe collateral consequences.⁶² Several collateral consequences attach only to repeat offenders, those convicted of higher-level crimes like felonies, and those with drug-related convictions—all of which poor people of color experience at higher rates.⁶³ The laws and policies that impose formal

55. See Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 449 (1998) (arguing that mass incarceration weakens community ties and diminishes the social and cultural capital within a community, thus leading to less informal social control and more crime).

56. *Id.*

57. Logan, *supra* note 4, at 1112 (noting that the “onerousness” of collateral consequences is often “individualized”).

58. See, e.g., Pinard, *supra* note 3, at 967–68; Prescott & Starr, *supra* note 6, at 2471; Williams, *supra* note 47, at 442.

59. Nadia Woods, *The Presence of Racial Disparities at Every Decisional Phase of the Criminal Legal System*, 26 PUB. INT. L. REP. 1 (2020) (explaining the racial disparities throughout the criminal justice system and their harmful effects); SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (analyzing various racial disparities in policing, sentencing, and collateral consequences).

60. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002).

61. Pinard, *supra* note 3, at 968.

62. *Id.* at 969.

63. *Criminal Justice Fact Sheet*, NAT'L ASS'N ADVANCEMENT OF COLORED PEOPLE (2020), <https://www.naacp.org/criminal-justice-fact-sheet> (explaining that Black Americans represent just 5% of drug users, but 29% of those arrested for drug offenses “and 33% of those incarcerated for drug offenses”).

collateral consequences have historically been both enacted *and* enforced to specifically target poor people of color.⁶⁴

Poor individuals of color are also found to suffer more severely from the effects of informal collateral consequences like criminal record stigma.⁶⁵ People of color already face racial discrimination and related disparities in applying for jobs, housing, and education opportunities, which are then compounded by the stigma of having a criminal record.⁶⁶ Then, when one such individual is convicted of a crime and labeled a “criminal,” historically banned forms of discrimination suddenly become legally and socially acceptable.⁶⁷ Empirical studies have found that while criminal records reduce employment prospects overall, that negative impact is “substantially larger” for Black Americans.⁶⁸ The disproportionately heavy burden of collateral consequences on people of color has been identified as “a significant contributor to racial disparities in employment and other socioeconomic outcomes.”⁶⁹

Race and class disparities result in a worsening of the effects of collateral consequences for individuals, but they also exacerbate, compound, and perpetuate existing forms of oppression and inequality.⁷⁰ Because individuals suffering from collateral consequences are often clustered in segregated communities, their combined individual disadvantages over decades of racially-disparate criminal justice involvement and the persistent collateral consequences that follow have compounded each other and led to the deeply entrenched and intergenerational social and economic marginalization of disproportionately poor communities of color.⁷¹ In turn, these

64. Chin, *supra* note 60, at 271 (“The drug laws were initially created as a part of Jim Crow. . . . Now, drug laws are freighted with the harshest and most numerous collateral consequences. And although the drug laws are systematically unenforced, the resources seem to be disproportionately aimed at African Americans.”); *id.* (“[D]uring the segregation era, collateral consequences such as felony disenfranchisement were gerrymandered to target African Americans.”).

65. Pinard, *supra* note 3, at 964.

66. *Id.* at 965; Ajunwa, *supra* note 26, at 2999.

67. MICHELLE ALEXANDER, *THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 138 (The New Press 2010) (“A criminal record today authorizes precisely the forms of discrimination we supposedly left behind . . . [criminals] are the one social group in America we have permission to hate.”).

68. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *ANNALS AM. ACAD. POL. & SOC. SCI.* 195, 199 (2009) (finding that a criminal record reduces the likelihood of a call-back or a job offer for white applicants by 30%, as compared to 60% for Black applicants).

69. Prescott & Starr, *supra* note 6, at 2471.

70. See Pinard, *supra* note 3, at 964–65.

71. *Id.* at 970; Prescott & Starr, *supra* note 6, at 2471.

communities experience even greater systemic economic⁷² and health-related inequities,⁷³ worsened stigma,⁷⁴ and more racially disproportionate over-policing and criminal justice involvement.⁷⁵ As a result, individuals of color often face heightened intersectional oppression during reintegration based not only on their criminal record, but also systemic economic disadvantage *and* racial bias.⁷⁶ This consequently makes both formal and informal collateral consequences all the more debilitating to members of affected communities.⁷⁷

III. LEGISLATIVE EFFORTS TO AMELIORATE THE IMPACT OF A CRIMINAL RECORD

Over the last several decades, there has been a bipartisan and nationwide consensus on the need for criminal justice reform.⁷⁸ A major impetus of this movement has been an acknowledgment that America has an over-incarceration problem, requiring a widespread push toward reducing jail and prison populations.⁷⁹ More recently, the federal and state levels have increased efforts to ease the burdensome collateral consequences of criminal records, in light of the growing acknowledgment that criminal records frequently stand in the way of

72. Williams, *supra* note 47, at 451 (explaining that in large part due to mass incarceration, “Black men have long been the embodiment of economic deprivation”). Cf. Rachel Siegel, *Wealth Gaps Between Black and White Families Persisted Even at the Height of the Economic Expansion*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/business/2020/09/28/wealth-gap-fed/> (finding that in 2019, median family wealth for a white American family was eight times that of a Black family).

73. Katzen, *supra* note 33, at 231; Golembeski, *supra* note 11, at 357–58 (describing disproportionate criminal justice involvement as a fundamental “social-structural driver of health inequity”).

74. Pinard, *supra* note 3, at 970.

75. *Id.* at 971; Woods, *supra* note 59, at 4–5.

76. See Williams, *supra* note 47, at 438; Pinard, *supra* note 3, at 988.

77. Pinard, *supra* note 3, at 976; Chin, *supra* note 60, at 271.

78. See, e.g., *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AM. CIV. LIBERTIES UNION (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> (finding that 91% of polled Americans, including those on both ends of the political spectrum, believe “the criminal justice system has problems that need fixing”).

79. Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE 4, 19 (2020) (“[P]ublic condemnation of mass incarceration ha[s] become commonplace and policymakers across the political spectrum [have] joined the call for change.”). The federal government has made several efforts to address this issue, including the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). See NATHAN JAMES, CONG. RSCH. SERV., RL 45558, *THE FIRST STEP ACT OF 2018: AN OVERVIEW 1* (2019) (describing the First Step Act as “the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population”).

many necessary opportunities for ex-offenders.⁸⁰ States have largely taken the lead in enacting reintegration-based reforms, but the federal government has begun to follow suit in recent years.⁸¹

Several states have directly eliminated some individual collateral consequences by removing various criminal record-related bans on public assistance and student loans.⁸² The federal government has made some progress on this front by recently passing legislation lifting the restrictions on Pell grant access for people with certain crimes on their records.⁸³ However, federal-level criminal record bans on other types of student aid, as well as subsidized housing, food stamps, health care, and other forms of assistance, still stand.⁸⁴

Many states have also enacted ban-the-box laws, which reduce some barriers to employment and housing by removing questions about an individual's criminal history from initial applications and interviews.⁸⁵ The federal government recently passed the Fair Chance Act, which operates essentially as a ban-the-box law for federal employers requiring employers to consider applicants' qualifications prior to asking about their criminal histories.⁸⁶

80. Chin, *supra* note 1, at 234 ("After decades of obscurity, collateral consequences seem to be moving into the spotlight of the United States legal system.")

81. See *Reintegration Reform Returns to Pre-Pandemic Levels in First Half of 2021*, COLLATERAL CONSEQUENCES RSCH. CTR. (July 23, 2021), <https://ccresourcecenter.org/2021/07/23/reintegration-reform-returns-to-pre-pandemic-levels-in-first-half-of-2021/> (describing recent state-level reintegration reforms, but noting that "[m]eanwhile, in stark contrast to this prolific state lawmaking, Congress has done little to address the challenges of reintegration for more than a decade").

82. See Meghan Looney Paresky, *Changing Welfare as We Know It, Again: Reforming the Welfare Reform Act to Provide All Drug Felons Access to Food Stamps*, 58 B.C. L. REV. 1659 (2017) (explaining some of these state actions); Golembeski, *supra* note 11, at 360 (noting that some states have either overturned or modified SNAP bans after recognizing that such policies, described as "relics of the War on Drugs," frequently "have deleterious impacts, such as recidivism, food insecurity, and poor mental and physical health outcomes"). See generally 21 U.S.C. § 862a(d)(A) (authorizing states to opt out of felony drug bans on public assistance).

83. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2021) (making significant changes to the Higher Education Act, including to the financial aid eligibility of college students with criminal convictions).

84. Golembeski, *supra* note 11, at 358 (explaining the many federal law bans on public assistance that are still in effect).

85. Katie J. MacDowell, *Thinking Beyond Ban the Box: How to Alleviate Disproportionate Sentencing to Assist Ex-Offenders in Rejoining Society*, 25 GEO. MASON L. REV. 809, 818 (2018). A background check is still typically conducted prior to finalizing a hire. *Id.*

86. Fair Chance to Compete for Jobs Act, Pub. L. No. 116-92, Fair Chance to Compete for Jobs Act, Pub. L. No. 116-92, § 9202, 133 Stat. 1198, 1606 (2019). *But see* COLLATERAL CONSEQUENCES RSCH. CTR., A REINTEGRATION AGENDA FOR THE 117TH CONGRESS: CRIMINAL RECORD RELIEF, FEDERAL BENEFITS, & EMPLOYMENT 5 (2021), <https://ccresourcecenter.org/2021/02/08/ccrc-proposes-a-reintegration-agenda-for-the-117th-congress/> (explaining that efficacy of this law may be limited because Congress has not provided workable standards as to when a conditional offer may be withdrawn based on criminal history, or what criminal records may be considered).

Another recent state-level trend is enacting or expanding expungement laws, which allows for the clearing of certain criminal records some period of time after a sentence has been served.⁸⁷ State expungement policies vary, but most expunged records no longer appear in third-party background checks and are shielded from public view—including employers, housing officials, and educational institutions.⁸⁸ The Federal First Offender Act provides an expungement mechanism for some federal offenses, but it only applies to an extremely limited subset of cases—namely, misdemeanor drug possession, the first offense of an individual who was under the age of twenty-one at the time the offense was committed, and who has since successfully completed probation.⁸⁹ However, there is currently no comprehensive expungement statute at the federal level, and federal courts lack the inherent authority to expunge valid federal convictions.⁹⁰ As a result, there is typically no legal remedy or process for clearing the vast majority of federal records, aside from presidential pardons, which are highly unreliable and seldom granted.⁹¹ Many scholars have expressed the need for a general federal expungement statute,⁹² with several federal expungement bills proposed in recent years, but none have yet been enacted.⁹³

A. Equity Concerns in Proposed and Enacted Reintegration Reforms

The enacted and proposed federal and state reintegration-focused reforms are undoubtedly laudable and important in the ongoing quest

87. See generally Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 369 (2016).

88. *Id.* at 370–73.

89. See 18 U.S.C. § 3607.

90. See COLLATERAL CONSEQUENCES RSCH. CTR., *supra* note 86, at 4; Chin, *supra* note 16, at 391 (explaining that this lack of authority has “proved frustrating for some federal courts”).

91. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193–95 (2010) (describing how the use of presidential pardons have abated since 1980 and the various forms of unfairness that exist in the pardons that are granted); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 775–77 (2011) (noting that the pardon “has become a phantom remedy in most states and in the federal system”).

92. *E.g.*, COLLATERAL CONSEQUENCES RSCH. CTR., *supra* note 86, at 2; Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155 (2010); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008).

93. *E.g.*, Clean Slate Act of 2021, H.R. 2864, 117th Cong. (2021) (a proposed statute that would allow for the sealing of certain federal records after completing all terms of sentence); COLLATERAL CONSEQUENCES RSCH. CTR., *supra* note 86, at 2–3 (discussing some recently-proposed federal expungement laws and their limitations).

to improve the housing and employment outcomes for individuals with criminal records. However, some of these measures have raised concerns, due to inherent disparities that may make these measures less helpful to certain individuals with criminal records.⁹⁴

Ban-the-box laws have been some of the most prevalent reintegration-focused reforms in recent years, including on the federal level.⁹⁵ However, experts have expressed concerns that these measures may harm, rather than help, employment outcomes for individuals of color.⁹⁶ A recent study found that, although designed to do the opposite, ban-the-box laws actually increased racial discrimination, and in turn, exacerbated existing racial disparities in the hiring process.⁹⁷ Without an ability to review the criminal record of all applicants, employers instead used race-based assumptions as a proxy for criminal history.⁹⁸ This may be harmful not only to ex-offenders of color but also to people of color *without* criminal records.⁹⁹

Expungement, on the other hand, has been found to be effective in helping ex-offenders of all races escape the burden of their criminal records.¹⁰⁰ Because expungement still allows employers and other decision-makers to view the criminal history of applicant pools, generally, there is less of an incentive to use racially-biased proxies to fill a complete void of information that exists with ban-the-box applications.¹⁰¹ Expungement is beneficial because it allows for the sweeping away of an enormous range of collateral consequences at once, including those that are scattered within tens of thousands of laws and regulations, as well as some of the much harder to identify stigma-related consequences.¹⁰² Because racial bias is often a compounding factor in both formal and informal collateral consequences, expungement is particularly valuable for individuals of color, as it allows

94. See Prescott & Starr, *supra* note 6, at 2554–55; Chien, *supra* note 10, at 576–77.

95. Annelies Goger et al., *A Better Path Forward for Criminal Justice: Prisoner Reentry*, BROOKINGS (Apr. 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-prisoner-reentry/>.

96. *Id.*; Prescott & Starr, *supra* note 6, at 2548–49.

97. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 222 (2018).

98. *Id.* at 223.

99. *Id.* at 222–23; Golembeski, *supra* note 11, at 363.

100. See Leah Abrams, *Who Gets the Job? Examining the Relationship Between Automatic Expungement Policies and Racial Discrimination in N.C. 7* (Dec. 6, 2019) (Honors thesis, Stanford School of Public Policy at Duke University) (on file with DukeSpace, Duke University) (finding that automatic expungement increased favorability toward Black job applicants with criminal records).

101. *Id.*; Prescott & Starr, *supra* note 6, at 2462.

102. See Chin, *supra* note 16, at 371 (“Collateral consequences are so numerous and scattered as to be virtually uncountable.”); Pinard, *supra* note 3, at 992–95.

these individuals to pursue opportunities “as though their convictions did not exist.”¹⁰³ When reviewing applications or background checks, most employers, landlords, and other decisionmakers are not naturally going to take into account the historically prevalent racial disparities in arrests and convictions when assessing the potential risk of hiring or renting to an applicant of color who has a criminal record—expungement makes that largely unrealistic consideration unnecessary.¹⁰⁴

The record relief that comes from expungement allows an ex-offender to “pursue [a] law-abiding [life], and regain equal status” by removing many barriers to obtaining gainful employment, stable housing, education opportunities, and community acceptance.¹⁰⁵ This serves as an important first step in remedying the factors that often lead to criminal behavior, arrests, and convictions in the first place—a lack of social and economic opportunity.¹⁰⁶ Empirical studies show that not only do ex-offenders who receive expungement have higher employment rates—they also receive higher wages, which benefits ex-offenders, their communities, and the economy at large.¹⁰⁷ Studies have also found that individuals who receive expungements exhibit lower recidivism rates, which improves public safety and helps reduce jail and prison population levels.¹⁰⁸ In light of these benefits, expungement is viewed as a valuable tool that benefits the public at large and helps bridge the many race and class disparities that disproportionately burden economically disadvantaged communities and communities of color.¹⁰⁹

According to experts, however, all these valuable potential benefits are only achievable when expungement laws are broadly available and accessible—a circumstance that they fear has not been a reality thus

103. Prescott & Starr, *supra* note 6, at 2463; Pinard, *supra* note 3, at 992 (“Unlike other important measures—such as . . . ban the box laws, which rightfully aim to protect job applicants from the sting of their criminal records—expungement and sealing actually take the criminal record off the table. . . . [T]his is critically important for individuals of color.”).

104. *Compare* ALFRED BLUMSTEIN & KIMINORI NAKAMURA, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RACIAL DIFFERENCES 87 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/240100.pdf> (“[E]mployers should be aware that the racial difference in arrest prevalence does not accurately reflect the risk difference of [many] white and black applicants.”), *with* Pinard, *supra* note 3, at 996 (finding that consideration to be less than realistic, and fortunately unnecessary when expungement is granted).

105. Chin, *supra* note 16, at 371.

106. *Id.*; Keelia Lee, *Pandemic, Protests, and Prison Reform? Why 2020 Is a Catalyst to Rethink Drug Policy*, 33 ST. THOMAS L. REV. 1, 11 (2020).

107. Prescott & Starr, *supra* note 6, at 2462–515 (finding that individuals who have been granted expungement experienced a higher likelihood of employment and a 22% increase in wages).

108. *Id.* at 2515.

109. *Id.* at 2549.

far.¹¹⁰ Enacted and proposed expungement laws across the country vary widely on a number of factors, but typically have strict eligibility and procedural requirements, which may make expungement out of reach for certain groups of ex-offenders.¹¹¹

Most expungement provisions are only available for non-conviction arrests or misdemeanors, and are often limited to one-time offenders or those who have not had subsequent arrests after the offense sought to be expunged.¹¹² However, disparities in policing, prosecution, and sentencing—as well as re-arrests for technical violations, like revocation of parole¹¹³—may make economically disadvantaged individuals and individuals of color disproportionately less able to fit these eligibility criteria, further entrenching the disparities that already exist.¹¹⁴ The vast majority of expungement provisions also require an individual to have first completed all terms of his or her sentence before being deemed eligible for expungement.¹¹⁵ Often these terms include full payment of high court debts, which could have disparate effects based on one's access to resources.¹¹⁶

Even individuals who *are* eligible for expungement may nevertheless face extremely high practical barriers to accessing or receiving relief. While some recently enacted and proposed

110. *Id.* at 2554–55 (“Our empirical results suggest that expungement is a powerful policy lever for redressing these negative consequences, without risk (and possibly with benefits) to public safety. But expungement will only realize its full potential and make a serious dent in these large-scale social problems if we make it available much more broadly and much more easily.”); Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform Is Effective Criminal Justice Reform*, 52 ARIZ. ST. L.J. 741, 757 (2020); Melanie Lekocevic, *State Lawmakers Consider Clean Slate Act that Would Expunge Criminal Records*, NNY 360 (May 9, 2021), https://www.nny360.com/news/statenews/state-lawmakers-consider-clean-slate-act-that-would-expunge-criminal-records/article_9266c3fa-9737-5ba7-aad8-44664ed70539.html (“[S]tates with *broadly* available expungement of criminal records show lower rates of recidivism.”) (emphasis added).

111. See Prescott & Starr, *supra* note 6, at 2462.

112. Chien, *supra* note 10, at 547.

113. Woods, *supra* note 59, at 16 (finding that Black Americans are nearly three times more likely to be revoked from probation).

114. Chien, *supra* note 10, at 520 (“[A]pplication of the expungement criteria to minor but not major offenses can also have the effect of exacerbating, not narrowing, existing racial disparities within the population of people with records, while improving them within the general population.”).

115. *E.g.*, UTAH CODE § 77-40-105(4) (2022); N.M. STAT. § 29-3A-5(A) (2022); MO. STAT. § 610.140(5)(3) (2022); IND. CODE § 35-38-9-2(e)(3) (2022).

116. Chien, *supra* note 10, at 578 (“For poor defendants, repayment requirements can present insurmountable structural barriers to second chances.”); Jenny Montoya Tansey & Katherine Carlin, CODE FOR AM., CLOSING THE DELIVERY GAP 23 (2018), <https://oecd-opsi.org/wp-content/uploads/2018/09/Closing-the-Delivery-Gap.pdf> (finding that based on a survey of expungement seekers, almost 40% of respondents owing fines were unable to pay); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 125 (2014) (“Paying off a restitution obligation, which often is all that remains for a convicted defendant to have completed her sentence, becomes an insurmountable hurdle.”).

expungement provisions allow for automatic expungement, such relief is typically limited to a very small subset of offenses.¹¹⁷ Thus, the vast majority of individuals seeking expungement must endure a judicial process that is often extremely time-consuming, intimidating, and expensive.¹¹⁸ A primary concern regarding non-automatic expungement is that many individuals seeking expungement do not have the time or resources necessary to navigate the court system in order to obtain the relief that is offered.¹¹⁹ An economically disadvantaged ex-offender may be unable to afford counsel, court fees, and other costs associated with this process—like child care and transportation—that can typically add up to thousands of dollars.¹²⁰ Because most expungement processes are quite complicated, an individual that has the help of an attorney is far better positioned to receive expungement.¹²¹ However, public defenders do not generally help with expungement, and legal aid clinics often lack the time, resources, or authority to assist with the process.¹²² Individuals applying for expungement may also need to take a substantial amount of time away from looking for work or working, which is particularly risky for those who may only be precariously employed to begin with.¹²³

Another concern is that the bias that exists elsewhere in the criminal justice system may affect the outcome of an expungement application—or at least contribute to a person feeling discouraged to apply because of past experiences or general distrust of the system.¹²⁴ Police often process expungement applications, courts make discretionary decisions as to whether to grant expungement, and prosecutors can show up to court to contest expungement petitions.¹²⁵ Another possible deterrent is that individuals may suffer from trauma that is triggered by going through the criminal justice system again, especially when doing so requires re-visiting the same police stations and courthouses where distressing events have occurred in the past.¹²⁶

117. Chien, *supra* note 10, at 578; *Dozens of New Expungement Laws Already Enacted in 2021*, COLLATERAL CONSEQUENCES RSCH. CTR. (July 7, 2021), <https://ccresourcecenter.org/2021/07/07/dozens-of-new-expungement-laws-already-enacted-in-2021/> (explaining various state-level expungement law provisions).

118. Chien, *supra* note 10, at 565 n.221; Prescott & Starr, *supra* note 6, at 2503–05.

119. Prescott & Starr, *supra* note 6, at 2504.

120. *Id.*

121. Berman & Kreit, *supra* note 110, at 760.

122. *See id.* at 758; Prescott & Starr, *supra* note 6, at 2506.

123. Prescott & Starr, *supra* note 6, at 2507.

124. *Id.* at 2462; Berman & Kreit, *supra* note 110, at 742–43.

125. Prescott & Starr, *supra* note 6, at 2483; Berman & Kreit, *supra* note 110, at 760 (noting that actors within the criminal justice system “wield substantial influence over the number of people who benefit from [certain] expungement provision[s]”).

126. Prescott & Starr, *supra* note 6, at 2504–05.

Especially for members of communities that are frequently policed and prosecuted more often and more harshly,¹²⁷ negative attitudes about the legal system, however justified, may preclude an individual from seeking relief.¹²⁸

Studies have found that when expungement exists in a jurisdiction, only a small population of ex-offenders are eligible. Amongst the eligible, an often miniscule subpopulation takes the required steps to seek expungement, and then, only a certain percentage of that group is actually granted relief.¹²⁹ This generalized lack of relief is known as the “second chance gap” and may affect ex-offenders of all walks of life.¹³⁰ However, because many expungement barriers are only heightened for certain groups of ex-offenders, scholars fear that there is also a “*second* second chance gap,” which may have the unfortunate consequence of “exacerbating, rather than reducing and ultimately eliminating, ‘unwarranted racial disparities across the criminal justice system.’”¹³¹

In sum, the same racial and economic inequities that often exacerbate the ubiquity, magnitude, and scope of collateral consequences may also make those burdens perpetual.¹³² As the reintegration reform movement gains momentum across the country, it may not be adequately ensuring that the vast majority of ex-offenders, including those with the greatest need, will find its new relief mechanisms feasible and beneficial.¹³³ One possible impediment to achieving widely accessible and beneficial relief mechanisms is that ex-offenders themselves, especially those facing intersectional forms of oppression, often lack legal, political, economic, and social power. This power is necessary to influence the trajectory of future policies and reforms, ensuring they account for the unique needs and experiences of ex-offenders.¹³⁴ Even the most well-meaning lawmakers may be disconnected from the unique struggles and needs of their

127. See Lee, *supra* note 106, at 20 (“Black people make up 24% of those killed by police, an average of three people per day, despite accounting for only 13% of the population.”).

128. See Prescott & Starr, *supra* note 6, at 2504–05.

129. *Id.* at 2552 (finding that only 6.5% of those eligible for expungement actually obtained it within five years of eligibility); Chien, *supra* note 10, at 524.

130. See Chien, *supra* note 10, at 573.

131. *Id.* at 576–78.

132. Prescott & Starr, *supra* note 6, at 2507.

133. See, e.g., Berman & Kreit, *supra* note 110, at 756 (describing expungement laws that are broadly accessible as the exception, rather than the rule, despite other areas of criminal justice reform picking up steam).

134. See Prescott & Starr, *supra* note 6, at 2507; Kristen Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 DENV. L. REV. 337, 399–400 (2021).

socioeconomically diverse constituents.¹³⁵ Additionally, because justice-involved individuals remain socially marginalized, they often cannot even attempt to break the many stigmas that may be associated with them, which may further preclude equitable and effective reform.¹³⁶

IV. THE COVID-19 PANDEMIC AND COLLATERAL CONSEQUENCES

When the COVID-19 pandemic first swept across the United States, public officials determined that jail and prison populations urgently needed to be reduced because of the severe risks created by the rapidly-spreading virus.¹³⁷ In response to pushes from advocates and experts, as well as the threat of legal consequences, corrections officials and policymakers took steps to reduce new entries to correctional facilities and allow for the early release of already-incarcerated people.¹³⁸ As a result of these efforts, tens of thousands of incarcerated people with low-level offenses, little time left on their sentences, or a heightened susceptibility to COVID-related complications were released from custody early.¹³⁹

Early release and the opportunity to avoid severe illness or death in custody was undoubtedly beneficial to the individuals who received

135. Nelson & Segil, *supra* note 134, at 400.

136. *Id.* Public perception of justice-involved populations, which may be inextricably intertwined with racial animus and other biases, significantly influences the shaping of the legal landscape that relates to ex-offenders. Peter S. Lehmann et al., *Public Opinion on Criminal Records and Employment: A Test of Competing Theoretical Models*, 66 CRIME & DELINQ. 995, 998 (2020) (“[R]acial animus . . . has continued to affect perceptions of Black criminality as well as attitudes toward criminal justice policy.”) (citation omitted); Alexander L. Burton et al., *Beyond the New Jim Crow: Public Support for Removing and Regulating Collateral Consequences*, 84 FED. PROB. 19, 30 (2020) (explaining that although some “[r]acially resentful whites” may oppose such reforms, greater interpersonal contact between ex-offenders and the general public fosters public belief in “redeemability,” which results in greater support of inclusionary reintegration policies).

137. Nelson & Segil, *supra* note 134, at 378. Since the beginning of the pandemic, jails and prisons were home to the largest outbreaks of COVID-19 infections in the country. *E.g.*, Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 603 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249> (finding that COVID-19 infection rates in prisons were more than five times higher than that of the general public); Sharon Dolovich et al., *UCLA Law Covid-19 Behind Bars Data Project*, UCLA SCH. OF L., <https://law.ucla.edu/centers/criminal-justice/criminal-justice-program/related-programs/covid-19-behind-bars-data-project/> (last visited Apr. 11, 2022) (tracking the confirmed COVID-19 cases and deaths of incarcerated individuals and staff at facilities across the country).

138. Nelson & Segil, *supra* note 134, at 380; *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html> [hereinafter *Policy Changes*] (tracking incarceration-related responses to the pandemic, including early release mechanisms).

139. *Policy Changes*, *supra* note 138; Dolovich, *supra* note 79, at 16–17.

such relief.¹⁴⁰ However, for these newly-released individuals, as well as the tens of millions of other ex-offenders also facing the lasting impacts of criminal-justice involvement,¹⁴¹ the pandemic presented new and worsened challenges in nearly every facet of life.¹⁴² With the entire country competing for limited resources and many previously-available reintegration support systems shuttered or overburdened, many ex-offenders were left with a greater-than-ever need for employment, housing, food, healthcare, and other necessities. They also experienced massively amplified difficulties in obtaining these things.¹⁴³

A. Record-Relief: Heightened Need and Heightened Challenges

The public health crisis and economic devastation that resulted from the pandemic further exacerbated and perpetuated collateral consequences, especially for the ex-offenders and communities that already suffer from their effects the most.¹⁴⁴ The pandemic forced much of the country, including many individuals with criminal records, back into job and housing markets that are already hostile to ex-offenders.¹⁴⁵ Then, ex-offenders had to face heightened competition for these resources—not only with other ex-offenders, including the unusually large population of recently-released individuals, but also with an extraordinarily large population of people who did not have the stigma of a criminal record.¹⁴⁶ Competing for these opportunities was even

140. An unfortunate (yet frankly, less than surprising) finding is that there were racial disparities in who received early release from incarceration due to COVID-related concerns. Alissa Rivera, *Prisons Remain Crowded While Early Releases Exacerbate Racial Inequity*, RESTORE JUST. (June 15, 2021), <https://restorejustice.org/early-releases-exacerbate-racial-inequity/> (In Illinois, “[w]hite people are 62 percent more likely to be released early than Black people and 79 percent more likely to be released early than Latino people.”); Engel et al., *supra* note 12, at 3 (similarly finding that even as jail and prison populations began to fall, “there were increases in the proportion of people [still incarcerated] who were Black,” which may exacerbate existing racial disparities in the criminal justice system).

141. See generally Prescott & Starr, *supra* note 6.

142. See, e.g., Nunez, *supra* note 13, at 146.

143. *Id.* While most Americans received various forms of financial relief to ease pandemic-related difficulties, justice-involved individuals were often left out of these efforts. See Han Lu, *Radical Inequality, Records, and Recovery*, NAT’L EMP. L. PROJECT (Oct. 2020), <http://stage.nelp.org/publication/radical-inequality-records-recovery/> (explaining how ex-offenders were treated in the context of various federal pandemic recovery efforts).

144. See Nunez, *supra* note 13, at 146.

145. See *id.* at 151.

146. E.g., Charisse Jones, *You Just Want to . . . Have a Chance’: Ex-offenders Struggle to Find Jobs Amid COVID-19*, USA TODAY (Feb. 3, 2021), <https://www.usatoday.com/story/money/2021/02/03/unemployment-ex-offenders-among-many-struggling-find-work/6656724002/> (describing the heightened struggles faced by many ex-offenders in finding employment in a post-pandemic job market); Justin Stabley, *People Leaving Prison Have a Hard Time Getting Jobs. The Pandemic Has*

more difficult for individuals facing intersectional stigmas, as the high demand for necessities, like employment and housing, allowed for discrimination based on factors like racial bias in addition to the ex-offender stigma.¹⁴⁷

Like collateral consequences, the pandemic had starkly disparate impacts based on race and class,¹⁴⁸ with its harshest effects felt by low-income communities and communities of color.¹⁴⁹ Although financial, housing, and food insecurity skyrocketed across the United States generally, available data shows that communities of color suffered the most severely from these impacts.¹⁵⁰ These communities also faced heightened challenges due to the high volume of individuals who were released from incarceration early due to COVID-19 precautions and disproportionately live in these areas.¹⁵¹ Newly released individuals had heightened needs but were often entering communities that were even less capable of facilitating successful reintegration than usual due to their own similarly heightened needs and correspondingly high burdens on already-strained resources.¹⁵²

In light of these challenges, the pandemic presented a greater-than-ever urgency for record relief, especially for ex-offenders whose intersectional identities create complex socioeconomic barriers to

Made Things Worse, PBS (Mar. 31, 2021), <https://www.pbs.org/newshour/economy/people-leaving-prison-have-a-hard-time-getting-jobs-the-pandemic-has-made-things-worse> (explaining that people without criminal records who got laid off during the pandemic took the lower-level jobs that are typically the only option for many ex-offenders).

147. Compare Jones, *supra* note 146 (explaining that people with criminal records are usually the first to get fired during an economic downturn), with Kenneth A. Couch & Robert Fairlie, *Last Hired, First Fired? Black-White Unemployment and the Business Cycle*, 47 DEMOGRAPHY 227, 231 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000014/pdf/dem-47-0227.pdf> (explaining that Black workers are often the first to be fired during an economic downturn).

148. See Nicole A. Pangborn & Christopher M. Rea, *Race, Gender, and New Essential Workers During COVID-19*, CONTEXTS (Apr. 6, 2020), <https://contexts.org/blog/inequality-during-the-coronavirus-pandemic/#rea> (“COVID-19 has transformed the world for all of us, but the data make it clear: it is not transforming in the same way for everyone.”).

149. E.g., Sebastian D. Romano et al., *Trends in Racial and Ethnic Disparities in COVID-19 Hospitalizations*, 70 MORBIDITY AND MORTALITY WKLY. REP. 560 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015e2-H.pdf>.

150. *Id.*; Adrian Carrasquillo, *Nearly Two-Thirds of Latinos Have Lost Jobs or Face Economic Hardship Due to Coronavirus Outbreak, Poll Finds*, NEWSWEEK (Apr. 17, 2020), <https://www.newsweek.com/nearly-two-thirds-latinos-have-lost-jobs-face-economic-hardship-due-coronavirus-outbreak-poll-1498417>; Golembeski, *supra* note 11, at 360–61.

151. Desai, *supra* note 41, at 244.

152. *See id.* at 242 (“COVID-19 has drastically altered the communities to which reentering individuals are returning, and the needs of reentry populations are changing accordingly.”); Goger, *supra* note 95; Golembeski, *supra* note 11, at 358 (“The increase in prisons and jails releasing or diverting populations combined with the economic, health, and social challenges of COVID-19 may increase disproportionate health and economic burdens among communities with limited resources.”).

achieving economic, health, and housing security.¹⁵³ The pandemic also created new barriers to receiving that relief and worsened some of the existing disparities that already make access to expungement less feasible for particular groups.¹⁵⁴ Courts, notaries, police stations, legal aid clinics, and other offices that are typically necessary as part of a non-automatic expungement process were often closed or had moved their services online due to the pandemic, making them largely inaccessible to many ex-offenders.¹⁵⁵ Many previously available support systems designed to help with reintegration-related matters, like non-automatic expungement, were severely limited as well, along with childcare providers and public transportation options.¹⁵⁶ Taking time off from work or looking for work also became more daunting than usual, due to the general precarity of the job market.¹⁵⁷

While some of these barriers have abated as courts and offices gradually return to in-person operation, the pandemic's widespread economic devastation likely made it far more difficult for many economically disadvantaged ex-offenders to pay the fines and fees that are necessary to complete "terms of service" and become eligible for expungement in many jurisdictions.¹⁵⁸ Increased difficulties in paying these fines and fees also created heightened risks of re-arrest for technical violations, which would similarly affect expungement eligibility in many jurisdictions.¹⁵⁹ While a few jurisdictions reduced fines and fees during the pandemic in light of this pervasive economic vulnerability, many fines, fees, and expenses related to probation and

153. See Nunez, *supra* note 13, at 146.

154. *Id.* at 147.

155. *Id.*; Goger, *supra* note 95 ("Many [support systems] have shifted service delivery online to prevent community spread, but people with conviction records often face barriers to accessing online resources, including the lack of a stable internet connection or limited familiarity with technology."); Quinton Chandler, *A Former Oklahoma Prisoner Struggles to Find His Feet During the Pandemic*, STATE IMPACT OKLA. (Aug. 13, 2020), <https://stateimpact.npr.org/oklahoma/2020/08/13/a-former-oklahoma-prisoner-struggles-to-find-his-feet-during-the-pandemic/> (discussing the lack of reintegration services during the pandemic, including those that typically help ex-offenders obtain copies of birth certificates and identification).

156. Goger, *supra* note 95; Akua Amaning, *Advancing Clean Slate: The Need for Automatic Record Clearance During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (June 25, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/06/25/486857/advancing-clean-slate-need-automatic-record-clearance-coronavirus-pandemic/>.

157. Nunez, *supra* note 13, at 144.

158. See *id.* at 149.

159. See *COVID-19 Fines & Fees Policy Tracker*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/covid-19-policy-tracker/reform-tracker/> (last visited Apr. 11, 2022).

parole actually increased.¹⁶⁰ As a result, even during this time of widespread desperation, relief from record-related restrictions and stigma became even less achievable for many individuals. This may further entrench existing disparities in access to jobs, housing, and other necessities, especially during the unpredictable aftermath of the crisis.¹⁶¹

B. Socioeconomic Oppression and Its Wide-Ranging Impacts

To many, the COVID-19 era demonstrated the immense tragedy and devastation that exists at the intersection of a global pandemic and the “epidemics” of mass conviction and systemic inequality.¹⁶² The Centers for Disease Control (CDC) lists systemic discrimination in criminal justice systems as one of the key inequities that put racial minority groups at increased risk of contracting, spreading, and dying of COVID-19.¹⁶³ Similarly, the racial wealth gap, which is also commonly attributed to decades of racially disproportionate criminal justice involvement and persistent collateral consequences, was widely viewed as a key contributor to racial disparities in a person’s ability to weather the health and economic challenges of the pandemic.¹⁶⁴

The socioeconomic oppression that is commonly experienced as a result of criminal justice involvement and difficult reintegration was not only exacerbated during the pandemic, but also drew widespread attention because of its broader impacts on the nation at large.¹⁶⁵ Many

160. *Id.*; Wanda Bertram, *Returning from Prison and Jail Is Hard During Normal Times—It’s Even More Difficult During COVID-19*, PRISON POL’Y INITIATIVE (Sept. 2, 2020), <https://www.prisonpolicy.org/blog/2020/09/02/covidreentry/> (explaining the heightened costs related to probation and parole during the pandemic).

161. See Nunez, *supra* note 13, at 144.

162. Nelson & Segil, *supra* note 134, at 341, 390; *id.* at 377 (describing the pandemic as a “magnifying glass for all the problems in the American criminal justice system”); Lee, *supra* note 106, at 19; Golembeski, *supra* note 11, at 358 (finding that “the intersecting and cumulative adverse consequences” experienced by people and communities of color as a result of disproportionate harm from collateral consequences was further evidenced by the racial disparities that existed in COVID-related outcomes).

163. *Health Equity Considerations & Racial & Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

164. Barbara Stark, *Inequality, COVID-19, and Human Rights: Whose Lives Matter?*, 27 ILSA J. INT’L & COMPAR. L. 251, 256–57 (2021); Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>.

165. See Kimberly Higuera, *The Privilege of Social Distancing*, 19 CONTEXTS 22, 24 (Apr. 16, 2020), <https://contexts.org/blog/inequality-during-the-coronavirus-pandemic/#kim>; Cassie M. Chew,

persistent collateral consequences—like a lack of stable financial resources, inadequate access to housing, food, and healthcare, and a higher likelihood of having pre-existing medical conditions or working at lower-wage “essential” jobs¹⁶⁶—were identified as key indicators that an individual was more likely to contract and spread COVID-19.¹⁶⁷ These challenges, in turn, affected the public health of the broader population.¹⁶⁸ The socioeconomic oppression of justice-involved individuals and communities also caused a greater than usual burden on the broader economy and prevented large segments of the population from contributing to the nation’s economic recovery.¹⁶⁹ Further, because several factors commonly linked to recidivism were at an all-time high during the pandemic,¹⁷⁰ public safety concerns regarding the difficulties of reintegration were heightened. This impacted many attempts by public officials to reduce jail and prison populations in response to the risks of the pandemic.¹⁷¹ When officials were unable to reduce incarcerated populations in order to control severe COVID-19

The Pandemic Prompted Calls to Release Prisoners. But the Reentry Support Wasn’t There, CTR. FOR HEALTH JOURNALISM (May 7, 2021), <https://centerforhealthjournalism.org/2021/04/30/pandemic-prompted-calls-release-more-prisoners-supports-needed-reentry-just-aren-t-there> (“[T]he social inequalities revealed by the COVID-19 pandemic, along with greater awareness of systems that feed mass incarceration,” including collateral consequences and difficult reintegration, “have sparked some conversation”).

166. *E.g.*, Golembeski, *supra* note 11, at 364.

167. *Id.* at 359; Stark, *supra* note 164, at 257–58; EMILY A. WANG ET AL., DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 94–96 (2020), <http://nap.edu/25945>; Carey L. Biron, ‘Nowhere To Go’: U.S. Pandemic Prison Releases Prompt Housing Concerns, THOMPSON REUTERS FOUND. NEWS (June 29, 2020), <https://news.trust.org/item/20200629091519-8i41c/>; Laura Hawks et al., COVID-19 in Prisons and Jails in the United States, 180 JAMA INTERNAL MED. 1041 (2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271>; CTR. FOR JUST. RSCH. & BLACK PUB. DEF. ASS’N, SAVE BLACK LIVES: RACE, COVID-19 AND CRIMINAL JUSTICE 9 (2020), https://assets-global.website-files.com/5ef1f236f51b59892a5aec87/5f2ad414c2a6e64680c5cdf5_CJR%20BPDA%20Save%20Black%20Lives.pdf.

168. *See, e.g.*, Golembeski, *supra* note 11, at 359.

169. *See, e.g., id.*; Abbie Vansickle, *A New Tactic to Fight Coronavirus: Send the Homeless from Jails to Hotels*, MARSHALL PROJECT (Apr. 6, 2020), <https://www.themarshallproject.org/2020/04/03/a-new-tactic-to-fight-coronavirus-send-the-homeless-from-jails-to-hotels> (describing one of the added costs many governments had to incur in preventing ex-offenders from spreading the virus). It is estimated that upward of \$78 billion in annual GDP is lost due to work barriers associated with criminal records in the average year, a figure that is undoubtedly far higher and more impactful during the pandemic and recession. *See* Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, CTR. FOR ECON. & POL’Y RSCH. 13 (June 2016), <https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

170. *See* Desai, *supra* note 41, at 244.

171. Dolovich, *supra* note 79, at 5–6; Nelson & Segil, *supra* note 134, at 382 (describing public panic about the perceived likelihood of ex-offenders committing new crimes, and the resulting slow-down of many decarceration efforts).

outbreaks, the virus spread to broader communities and compounded existing public health issues.¹⁷²

V. CALL FOR CHANGE

While certainly an “unprecedented” situation, the COVID-19 pandemic merely brought widespread exposure to the many racial and socioeconomic inequities and injustices that are ever-present in the daily realities of many ex-offenders and members of similarly oppressed groups.¹⁷³ Consequently, it demonstrated that no issue in this country can be viewed through a socioeconomically or racially “neutral” lens.¹⁷⁴ It is now more clear than ever that these realities must be accounted for and integrated into future policy reforms, including those related to reintegration.

A. Lessons in Equity from Public Health Experts

Early data and research related to the pandemic were presented from a socioeconomically and racially neutral standpoint, but public health experts quickly learned that those statistics and findings needed adjusting to demonstrate and account for the stark discrepancies that exist across race and class lines and affect outcomes.¹⁷⁵ Only when these factors were accounted for could public health experts see the full extent of those drastically disparate outcomes and adjust future protocols and recommendations accordingly, with a focus on health equity.¹⁷⁶ Public health experts have similarly explained the need for equitable distribution of medical supplies and vaccinations, to ensure that the

172. Dolovich, *supra* note 79, at 5–6; Nelson & Segil, *supra* note 134, at 383; Chew, *supra* note 165 (“But even as the quick spread of a deadly virus seemed like a worthy catalyst for policy change that could lead to reevaluation of risk and ultimately allow people out of prisons who might not need to be there, the lack of investments in reentry health care, housing, jobs and education made it impossible to release as many as a third of people from the state’s overcrowded prisons and jails.”).

173. See Higuera, *supra* note 165, at 24; *Inequities Exposed: How COVID-19 Widened Racial Inequities in Education, Health, and the Workforce: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. 1–2 (2020) (statement of Valerie Wilson, Dir. of the Program on Race, Ethnicity, & the Econ., Econ. Pol’y Inst.) [hereinafter *Hearings*].

174. *Hearings*, *supra* note 173, at 11 (“The fallacy of race-neutral policy is further exposed by COVID-19.”).

175. CTR. FOR JUST. RSCH., *supra* note 165, at 6. Some believe that we still do not even know the full extent of these disparate impacts, in large part due to the lack of demographic-based reporting and tracking in early COVID-19 data, especially for incarcerated and homeless populations. See Ibram X. Kendi, *We Still Don’t Know Who the Coronavirus’s Victims Were*, ATLANTIC (May 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/we-still-dont-know-who-the-coronaviruss-victims-were/618776/>; LEN ENGEL ET AL., *supra* note 12, at 4.

176. CTR. FOR JUST. RSCH., *supra* note 165, at 6.

groups that have particularly heightened needs are prioritized appropriately.¹⁷⁷ The reason that these equitable measures are necessary, according to the World Health Organization and other experts, is that colorblind policies and frameworks often perpetuate and exacerbate existing disparities and injustices.¹⁷⁸ Ignoring those underlying inequities, public health experts fear, could cause harm lasting far beyond the end of the pandemic.¹⁷⁹

The racial and socioeconomic disparities exposed during the COVID-19 pandemic have explicitly demonstrated that the United States lacks health equity.¹⁸⁰ The CDC has explicitly committed to “understanding and appropriately addressing the needs of *all* populations, according to specific cultural, linguistic, and environmental factors,” in order to ensure more equitable health outcomes.¹⁸¹ When equity is “integrated across all public health efforts,” the CDC adds, “all communities will be stronger, safer, healthier, and more resilient.”¹⁸²

Just as the pandemic brought the need for equity-focused practices and policies to the forefront of public health, it similarly demanded a national conversation about the intersection of race, class, and the criminal justice system.¹⁸³ Criminal justice policymakers should take heed of the recommendations set forth by public health experts and place a similar focus on equity, recognizing that a culturally-sensitive lens can help avoid perpetuating and exacerbating the very disparities that require such a view to begin with.¹⁸⁴

Similar to the healthcare system, race and class inequities are inextricably intertwined into the criminal justice system, and frequently result in severely disparate outcomes.¹⁸⁵ When racial and socioeconomic dimensions of any social phenomena are overlooked or not accounted

177. NAT'L ACAD. SCI., ENG'G, & MED., FRAMEWORK FOR EQUITABLE ALLOCATION OF COVID-19 VACCINE FOR THE NOVEL CORONAVIRUS 1-2 (HELENE GAYLE, WILLIAM FOEGE, LISA BROWN & BENJAMIN KAHN EDS., 2020).

178. Harald Schmidt et al., *Is It Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?*, 324 JAMA 2023, 2023 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2771874> (citing WORLD HEALTH ORG., VALUES FRAMEWORK FOR THE ALLOCATION AND PRIORITIZATION OF COVID-19 VACCINATION (2020), https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf?ua=1).

179. *Id.*

180. *Health Equity Considerations & Racial & Ethnic Minority Groups*, *supra* note 161.

181. *Id.* (emphasis added).

182. *Id.*

183. See Goger, *supra* note 95.

184. See *Hearings*, *supra* note 173.

185. Pinar, *supra* note 3, at 968; CTR. FOR JUST. RSCH., *supra* note 165, at 6; *Health Equity Considerations & Racial & Ethnic Minority Groups*, *supra* note 161 (noting there is racial discrimination in both healthcare and criminal justice).

for, a bias is inevitably created in favor of majority populations.¹⁸⁶ This has historically occurred in both the healthcare and criminal justice systems.¹⁸⁷ For example, the laws and policies that impose collateral consequences are facially neutral without making note of race and class.¹⁸⁸ These policies have nonetheless had extremely disproportionate effects on particular groups and exacerbated and perpetuated race and class inequities, including those that were put on full display during the pandemic.¹⁸⁹ Thus, it is critical that new criminal justice laws and policies, including those intended to sweep away the often unjust effects of collateral consequences, do *not* worsen or perpetuate the disparities that instead should be mitigated.¹⁹⁰

B. Proposed Statute

As part of its national response to the pandemic, the federal government should demonstrate a strong and unequivocal push toward equitable reintegration reform. It should spearhead this movement by enacting impactful legislation that accounts for the distinct experiences and needs of ex-offenders in light of the many systemic inequities that exist, including those that are linked to America's historical legacy of mass conviction.¹⁹¹ Such legislation would be a general expungement statute that includes the following provisions.

It should allow for the automatic expungement of a broad range of criminal records, including drug-related offenses and many felony offenses, which are disproportionately held by poor individuals of color.¹⁹² Automatic expungement is necessary to ensure that all eligible individuals receive relief, including those who struggle to take advantage of enacted and proposed expungement provisions due to heightened challenges, impediments, and hesitations in the petition

186. See Govind Persad et al., *Fairly Prioritizing Groups for Access to COVID-19 Vaccines*, 324 JAMA 1601, 1602 (2020), <https://jamanetwork.com/journals/jama/article-abstract/2770684>; CTR. FOR JUST. RSCH., *supra* note 165, at 6.

187. CTR. FOR JUST. RSCH., *supra* note 165, at 7.

188. See Chin, *supra* note 16, at 379.

189. See *id.*; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 457 (2013) (“[D]ecisionmakers in the United States failed to foresee the collective impact of [collateral] consequences when they expanded them dramatically in the 1980s and 1990s. They also failed to account for the disproportionate impact these consequences would have on individuals and communities of color.”).

190. See Kendi, *supra* note 173 (“Policy equality only replicates and amplifies the inequality that is there from the start. Policy equity, on the other hand, repairs that inequality.”).

191. See Williams, *supra* note 47, at 452 (arguing that future policy initiatives must incorporate historical context in order to “foresee and prevent the repetition and continued institutionalization of racialized harms that society claims to no longer support”).

192. See Pinard, *supra* note 3, at 997; Chien, *supra* note 10, at 520.

process.¹⁹³ Some recently proposed federal expungement laws have included automatic expungement provisions, but typically only for a very small subset of minor drug-related offenses.¹⁹⁴ This is an important first step, but these criteria should be further expanded to account for the full extent of the War on Drugs and other injustices.¹⁹⁵

The statute should also allow for discretionary court authority to expunge any records that are not included in the statute's parameters, including those of repeat offenders and offenses that are qualified as "violent."¹⁹⁶ Higher-level crimes are frequently left out of criminal justice reforms, including those focused on reintegration, which many believe serves to exacerbate race and class inequities and may actually undermine, rather than benefit, public safety interests.¹⁹⁷ Federal courts would be well-suited to determine whether expungement poses a threat to public safety on a case-by-case basis, after evaluating the relevant facts and circumstances, and should not be restricted by categorical preclusions.¹⁹⁸

Finally, the statute should not require the full payment of court debt. This requirement, found in the vast majority of proposed and enacted expungement provisions on the federal and state levels, often serves as a "poverty penalty," directly entrenching socioeconomic disparities.¹⁹⁹ Instead, fines, fees, and other court debt should be payable after expungement relief is received, when an individual has a higher earning potential and will be in a far better position to repay any debts

193. See Chien, *supra* note 10, at 520; Prescott & Starr, *supra* note 6, at 2549; Berman & Kreit, *supra* note 110, at 762.

194. *E.g.*, Clean Slate Act of 2021, H.R. 2864, 117th Cong. (2021); MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

195. See Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 386–87 (2020).

196. The Clean Slate Act of 2021, arguably the most comprehensive expungement statute that has been proposed on the federal level, categorically restricts relief to "non-violent offenses." H.R. 2864, 117th Cong. (2021). However, "the definition of 'crimes of violence' under federal law is both exceedingly broad and vague." COLLATERAL CONSEQUENCES RSCH. CTR., *supra* note 86; 18 U.S.C. § 16, 924(e); Murray, *supra* note 87, at 374 (noting that the United States Code's definition of violent crime is frequently litigated, which may be problematic for future federal expungement legislation that targets only nonviolent criminal records).

197. *E.g.*, Nelson & Segil, *supra* note 134, at 375; Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625, 2627 (2020); Chien, *supra* note 10, at 520.

198. See COLLATERAL CONSEQUENCES RSCH. CTR., *supra* note 86.

199. See Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 UCLA L. REV. 2, 7–8 (2018) (referring to fees and fines imposed on indigent defendants as a "poverty penalty"); Casey Witte & Emily Mooney, *It's Time for the Next Step in Clean Slate Reform*, R STREET (Sept. 9, 2020), <https://www.rstreet.org/2020/09/09/its-time-for-the-next-step-in-clean-slate-reform/> ("[T]his policy disadvantages the state's poorest residents while favoring those with means. It's estimated that this one requirement is responsible for disqualifying half of [one state's] pool of otherwise eligible misdemeanor cases from automatic sealing.")

owed.²⁰⁰ Considering the pandemic and its lasting effects have driven many already economically-disadvantaged ex-offenders further into poverty, requiring the many costs associated with non-automatic expungement or automatic expungement be paid pre-expungement would only serve to exacerbate and perpetuate existing inequities.

C. Potential Benefits of Equitable Reintegration

Providing a more equitable opportunity to escape the effects of collateral consequences is an important step in improving all outcomes, including public safety, public health, and the economy, while simultaneously ensuring fairness and justice.²⁰¹ The primary benefit of a federal-level comprehensive and equitable expungement statute is that it would address the current lack of record relief for many of those with federal convictions, while avoiding the creation of potentially unfair barriers to access and eligibility, like those commonly found in other expungement laws. Additionally, it would send an important message to state and local policymakers that equitable reintegration is a top nationwide priority, and that future reforms must be available, accessible, and beneficial to all ex-offenders, regardless of their access to resources, or possible biases that exist elsewhere in the system. Further, providing a full and fair opportunity to reintegrate into society ensures that in the future, affected individuals themselves will be able to play a larger role in guiding the trajectory of criminal justice reform efforts.²⁰²

Record relief allows an individual to more easily escape various forms of economic and social oppression, which is often what leads to criminal behavior in the first place. Moreover, these forms of economic and social oppression can result in broader harms to public health and the economy, as occurred during the pandemic.²⁰³ When individuals who are affected by collateral consequences most often and most severely have access to expungement, they will be better able to meet their needs, build law-abiding and productive lives, and contribute to rebuilding their communities.²⁰⁴ Thus, not only does allowing for more

200. See Witte & Mooney, *supra* note 199.

201. See Lekocevic, *supra* note 110.

202. See CTR. FOR JUST. RSCH., *supra* note 165, at 10.

203. See *id.*; Logan, *supra* note 4, at 1107 (“More recent research makes clear that stigma can have a self-fulfilling criminogenic effect, predisposing individuals to become the deviants they were branded to be.”).

204. *Hearings*, *supra* note 173 (“The robust economic recovery [of disadvantaged individuals and their communities] is directly tied to our ability to secure the health and safety of [those] communities and workplaces across the country.”).

meaningful and equitable opportunities to reintegrate into society avoid perpetuating and exacerbating existing disparities, it also provides an opportunity to eventually close those disparities, which can further benefit public safety, public health, and the economy.²⁰⁵ These goals are especially important as we navigate through the lasting effects of the pandemic,²⁰⁶ in the event of the next catastrophe or economic downturn,²⁰⁷ and as criminal justice reform efforts continue.²⁰⁸

D. Research Needs and Opportunities

An essential requirement of equity-improvement policies is that relevant outcomes are “closely monitor[ed],” to determine “whether that policy is having the intended effects post-implementation.”²⁰⁹ Enacting a federal expungement statute would provide an important opportunity to conduct centralized and comprehensive research as to the effects and potential of expungement, including the effectiveness of such reforms for members of marginalized communities. This can be used both to improve federal law, and to help states make better-informed and more consistent expungement-related policy decisions in the future.²¹⁰

The federal government should conduct research on several factors that are crucial to better understanding “a diverse range of [reintegration] experiences, the factors and practices that lead to better or more equitable outcomes, and the legal and policy barriers” that may

205. *Id.* (“By centering the needs of those who face the greatest economic harm, the overall effectiveness of any policy response is likely improved as it serves to minimize disparities by race, ethnicity, gender, and class.”); Nelson & Segil, *supra* note 134, at 351 (explaining that systemic racism and poverty are both criminogenic risk factors); Barkow, *supra* note 197, at 2632 (explaining that previous criminal justice reforms aimed at providing racial justice also had a positive impact on public safety).

206. *See* Stabley, *supra* note 144 (noting that by March 2021 the job market had improved for the general population of Americans, but for individuals with criminal records, unemployment was “still just as bad as it was at the peak of the pandemic, if not worse”).

207. *See* Dolovich, *supra* note 79.

208. The pandemic demonstrated promise for continued and increased efforts to reduce mass incarceration levels. *See id.* (explaining how the decarceration efforts that took place during the pandemic demonstrate that “with sufficient political will, meaningful reductions [in incarceration levels] are possible”).

209. *Hearings*, *supra* note 173.

210. *See* Goger, *supra* note 95, at 73. Because the vast majority of those with criminal records will be directly affected by state expungement laws, the current high variance in expungement provisions from state-to-state has important implications for both equity and public safety. *See id.* at 72. “Eliminating racial disparities in our criminal justice system and improving reentry outcomes requires a wholesale rethinking of our orientation toward criminal justice, rather than piecemeal reforms or isolated new programs.” *Id.* Greater uniformity would, in turn, also allow for even broader and more comprehensive research to be conducted about the efficacy of certain types of expungement, like automatic provisions.

serve to undermine future equitable reintegration efforts.²¹¹ One example of a key area that requires ongoing and comprehensive research is in tracking and analyzing post-expungement employment and other socioeconomic outcomes.²¹² This would allow for a better understanding of the efficacy of expungement for individuals of various race and class demographics, which would help to ensure that unintended disparate outcomes are avoided,²¹³ and allow policymakers to conduct well-informed cost-benefit analyses.²¹⁴ An equally important need is for ongoing research on the recidivism outcomes of those who receive relief in order to gain a clear understanding of the public safety implications of broadly available expungement.²¹⁵

In enacting expungement laws, policymakers must perform what can be a difficult balancing act in seeking to protect public safety by preventing high-risk individuals from receiving relief, while also avoiding undermining public safety by excluding lower-risk individuals from socioeconomic stability.²¹⁶ At the same time, fairness and equity interests must be considered, which are often directly pitted against public safety interests.²¹⁷ Thus, it is critical that impartial and accurate empirical data are available, allowing policymakers to ensure that future policies are well-informed and best serve all interests and goals.²¹⁸

The previously conducted empirical studies on the efficacy of expungement have expressed limitations that include a lack of access to necessary data, as well as complications resulting from variances within currently-available state-level data, which makes it difficult to track and compare cross-state post-expungement outcomes.²¹⁹ The federal government is in an ideal position to conduct this research because of its sweeping access to relevant data, its ability to use substantial resources

211. *Id.* at 78.

212. Prescott & Starr, *supra* note 6, at 2549.

213. *See id.* at 2550 (explaining that while broad expungement is necessary to avoid unfair outcomes, an *overbroad* expungement statute could possibly lead to increased racial discrimination similar to the unfortunate outcome of the ban-the-box study).

214. *Id.*; Chien, *supra* note 10, at 538.

215. Prescott & Starr, *supra* note 6, at 2510.

216. Chin, *supra* note 16, at 390.

217. *See* Chien, *supra* note 10, at 526; Barkow, *supra* note 197, at 2627; Williams, *supra* note 47, at 451 (“With mass incarceration, criminal justice mechanisms of punishment have further legitimized economic deprivation as a status ranking for Black men, under the guise of public safety.”).

218. *See* Prescott & Starr, *supra* note 6, at 2550; Chin, *supra* note 16, at 373.

219. *E.g.*, Prescott & Starr, *supra* note 6, at 2484 (noting that this study was limited to relying on a small subset of Michigan unemployment records and criminal records to determine post-expungement employment and public safety outcomes, which left out a lot of information that would have been relevant and likely meaningful).

in conducting research,²²⁰ and its large stake in achieving objectively accurate results that can be used to benefit the entire country. While single-state studies on expungement outcomes are helpful, “national-level studies” are known to better provide the most “comprehensive overview” of reintegration-related outcomes.²²¹

If a federal organization like BJS were to conduct this research, it could also create an efficient and universal data system to be used to track and analyze expungement outcomes with greater consistency.²²² Experts have noted that the current lack of consistency in the measurement of reintegration-related outcomes makes it challenging to compare across studies because “they often do not systematically assess outcomes in the same ways.”²²³ One crucial inconsistency that has historically been found in reintegration-related research is that different researchers have varying definitions of “recidivism,” which is particularly problematic as policymakers often rely heavily on recidivism rates when making decisions.²²⁴ Some researchers include in recidivism statistics technical violations of parole, which has little to do with public safety and may serve to disadvantage economically disadvantaged people and exacerbate disparities.²²⁵ Greater consistency in the measurement and analysis of these outcomes could further help to avoid policies and decisions that are based on erroneous or misleading conclusions.²²⁶

220. The Second Chance Reauthorization Act, Pub. L. No. 115-391, 132 Stat. 5222 (2018), reauthorized yearly \$5 million appropriations for reentry-related research projects by the Bureau of Justice Statistics (BJS) and National Institute of Justice (NIJ) through 2023. JAMES, *supra* note 79 at 14–15.

221. JAMES, *supra* note 46, at 6. In the past, the Bureau of Justice Statistics (BJS) has been able to conduct the most “comprehensive national-level recidivism studies,” due to its ability to assess larger samples for longer follow-up periods. *Id.*

222. See Goger, *supra* note 95.

223. *Id.*

224. JAMES, *supra* note 46, at 21 (“[P]olicy makers often focus on reducing recidivism. The focus on reducing recidivism, however, is complicated by the fact that there are different definitions of recidivism.”).

225. *Id.* at 5–6, 9.

226. See Goger, *supra* note 95. BJS has historically been very clear in distinguishing between different types of recidivism in its data and analysis, which helps to avoid this type of problem. JAMES, *supra* note 46, at 9. Additional and updated federal standards and regulations for this type of research would also be helpful in reducing these discrepancies and their potentially harmful effects. See *id.* at 21 (“Whether technical violations should be considered a measure of recidivism or whether recidivism should be confined to the commission of new crimes has engendered much debate within the criminal justice field.”).

VI. CONCLUSION

The devastating impacts of the COVID-19 pandemic will undoubtedly continue to be felt by many for the foreseeable future. But eventually, as is the case with even the most extreme catastrophes, these effects will end. On the other hand, without dramatic systemic reform, the deeply-rooted structural inequities that were highlighted during the pandemic will persist and again worsen during future times of crisis. The best path forward—perhaps the *only* path forward—requires us to use the painful lessons learned during this crisis to better prepare ourselves for future crises, while attempting in good faith to right some of the many wrongs that have resulted from the criminal justice system's legacy of discriminatory harm.

In recent years, the federal government has pledged to support reintegration reform, as well as racial and economic justice initiatives.²²⁷ The enactment of an equity-focused expungement statute would be an excellent way for the federal government to provide tangible support for those promises. By prioritizing equitable reintegration reform on a national level, establishing empirical data as to its safety and efficacy, and facilitating successful reintegration, the nation as a whole will be better positioned to heal from the effects of the pandemic, as well as additional past harms that have similarly had lasting impacts on many Americans.

227. See, e.g., *A Proclamation on Second Chance Month, 2021*, WHITE HOUSE (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/31/a-proclamation-on-second-chance-month-2021/>; *Remarks by President Biden at Signing of the Juneteenth National Independence Day Act*, WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/17/remarks-by-president-biden-at-signing-of-the-juneteenth-national-independence-day-act/>.