

# THE REINTEGRATIVE STATE

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## ABSTRACT

*Public concern has mounted about the essentially permanent stigma created by a criminal record. This is no small problem when the U.S. criminal history database currently stores seventy-seven million criminal records, and poor people and people of color constitute a severely disproportionate number of them. A criminal record makes it harder for people to find housing, get hired, attend college, and reunite with their families. Yet these very things have the greatest chance of helping people lead law-abiding lives and reducing recidivism. Scholars, legislators, and advocates have confronted this problem by arguing for reforms that give people with a conviction a second chance. States have responded. By one count, from 1994 to 2014, over forty state legislatures passed 155 statutes to mitigate the civil collateral consequences of a criminal record. Although states have recognized that they have an interest in reintegrating their citizens with convictions, most people with criminal records cannot return to full citizenship. The stigma of a conviction follows them for a lifetime, even for the most minor crimes.*

*This Article takes a systematic look at state reforms and integrates them into a more workable and effective whole, which I call the Reintegrative State. It makes four contributions to the growing literature on collateral consequences and criminal records. First, it argues that there is a state interest, if not obligation, to create an intentional and sequenced process to remove civil legal disabilities triggered by a conviction and to mitigate the permanency of public criminal records. Second, this Article argues that reintegrating people with*

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*convictions back into society is consistent with the state's interest in punishment and public safety, especially in light of criminology research showing that a significant number of people stop committing crimes. Third, it critiques current state experiments with reentry initiatives as piecemeal, discretionary, inadministrable, and limited to a narrow segment of people with criminal records. Fourth and finally, this Article argues that the state can and should be the external force that destigmatizes a person with a conviction by reestablishing that person's legal status. To do so effectively, the state must incorporate reintegration approaches throughout the criminal justice system—not just after sentencing or after release. The Reintegrative State envisions a holistic framework for helping those with criminal records re-assimilate into society.*

INTRODUCTION .....	1317
I. REINTEGRATION AS A STATE INTEREST .....	1323
A. <i>Distinct from Reentry and Rehabilitation</i> .....	1324
1. <i>Reentry Focuses on Reality Facing Prisoners;</i> <i>Reintegration Focuses on the Role of the State</i> .....	1325
2. <i>Rehabilitation Focuses on the Person; Reintegration</i> <i>Focuses on the State</i> .....	1326
B. <i>State Action Creating a Permanent Second Class Status</i> <i>Based on Conviction</i> .....	1328
1. <i>Impact of State Collateral Sanctions and</i> <i>Discretionary Disqualifications</i> .....	1331
2. <i>Impact of the Permanent Criminal Record</i> .....	1335
C. <i>Rationales Supporting Reintegration</i> .....	1337
1. <i>Public Safety Rationale</i> .....	1338
2. <i>Just Punishment Rationale</i> .....	1341
3. <i>Economic Rationale</i> .....	1344
4. <i>Racial Equity Rationale</i> .....	1346
5. <i>Moral Rationale</i> .....	1349
II. THE STATE INTEREST IN REINTEGRATION .....	1350
A. <i>An Integral Part of a State's Penal Interests</i> .....	1350
B. <i>Establishing Reintegration as a Function of Parole</i> <i>and Probation</i> .....	1353
C. <i>Developing Social Services Programs and a Judicial Function</i> <i>that Enable Reintegration</i> .....	1356
III. REINTEGRATIVE LEGISLATION IN THREE PHASES OF THE CRIMINAL JUSTICE SYSTEM .....	1358
A. <i>Pre-Conviction Relief Mechanisms</i> .....	1359

1. <i>Non-Conviction Offenses</i> .....	1359
2. <i>Deferred Prosecution</i> .....	1361
3. <i>Dismissed Charges, Acquittals, and Nolle Prosecutions</i> ..	1363
B. <i>Sentencing Relief Mechanisms</i> .....	1364
1. <i>Judicial Diversion</i> .....	1365
2. <i>Sentencing Orders to Remove Civil Disabilities</i> .....	1366
C. <i>Post-Conviction Relief Mechanisms</i> .....	1369
1. <i>Expungement, Set-Asides, and Pardons</i> .....	1369
2. <i>Administrative Restoration of Rights</i> .....	1374
3. <i>Limiting Discrimination on the Basis of Conviction</i> .....	1377
IV. A REINTEGRATION MODEL .....	1381
A. <i>A Holistic Framework</i> .....	1381
1. <i>A Pre-Sentencing Reintegration Approach</i> .....	1382
2. <i>A Sentencing Reintegration Approach</i> .....	1383
3. <i>A Post-Sentencing Reintegration Approach</i> .....	1384
B. <i>Characteristics of the Reintegrative State</i> .....	1386
1. <i>Limiting Discretion</i> .....	1386
2. <i>Reducing or Waiving Court Costs and Fees</i> .....	1387
3. <i>Grappling with Interstate Issues</i> .....	1388
4. <i>Reintegrating the Habitual or Serious Offender</i> .....	1388
CONCLUSION .....	1389

## INTRODUCTION

We are in a reentry moment. From pontiffs to pundits, public dialogue reflects concern for how we treat people with convictions. In his first speech to Congress in 2015, Pope Francis stated that “society can only benefit from the rehabilitation of those convicted of crimes . . . . [A] just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.”<sup>1</sup> Comedian John Oliver aired a news segment on his HBO news series, *Last Week Tonight*, that discussed the obstacles to reentry and concluded “[o]ver 95% of all prisoners will eventually be released, so it’s in everyone’s interest that we try to give them a better chance of success. Because under the

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<sup>1</sup> Mark Berman, *Pope Francis Tells Congress ‘Every Life Is Sacred,’ Says the Death Penalty Should Be Abolished*, WASH. POST (Sept. 24, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/09/24/pope-francis-tells-congress-the-death-penalty-should-be-abolished/>.

current system, if they do manage to overcome all the obstacles we've set, it's a minor miracle."<sup>2</sup>

This public concern does not signal a shift to “go soft on crime.” It simply recognizes that a significant number of people with convictions stop committing crimes, and that saddling them with a lifelong public criminal record and state-created statutory obstacles to fully reintegrating may be counterproductive, inefficient, and unfair. Further compelling the need for reform is the fact that the criminal justice system has long been critiqued for its disproportionate impact on poor people of color and their communities.

Even the National District Attorneys Association acknowledges the impediment of these post-conviction civil collateral consequences.<sup>3</sup> Some states have added lifting collateral consequences to the responsibilities of prosecutors or probation officers as a way to mitigate the impact of a criminal conviction after a person's criminal sentence is complete. For example, in Tennessee, prosecutors are tasked by statute to help people expunge charges and convictions from their records,<sup>4</sup> and in New York, probation officers help people apply for Certificates of Good Conduct that remove civil obstacles to being awarded a state employment license or securing housing.<sup>5</sup>

This Article takes a systematic look at state reforms that currently exist and integrates them into a more workable and effective whole, which I call the Reintegrative State. The Reintegrative State recognizes a state's interest in helping individuals reintegrate back into society after a conviction by restoring rights and privileges lost by a conviction, removing collateral consequences, and mitigating the permanency of public criminal records. The Reintegrative State develops a holistic framework sequencing reintegration approaches throughout the criminal justice system—not just after sentencing or after release—that are automatic, proportional, and intentional.

This Article contributes to the growing literature<sup>6</sup> on collateral consequences and criminal records by framing the debate over collateral consequences and

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<sup>2</sup> Last Week Tonight with John Oliver, *Prisoner Re-entry*, YOUTUBE (Nov. 8, 2015), <https://www.youtube.com/watch?v=gJtYRxH5G2k>.

<sup>3</sup> See NAT'L DIST. ATTORNEYS ASS'N, POLICY POSITIONS ON PRISONER REENTRY ISSUES (2005), [http://www.ndaa.org/pdf/policy\\_position\\_prisoner\\_reentry\\_july\\_17\\_05.pdf](http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf); see also Robert M. A. Johnson, *A Prosecutor's Expanded Responsibilities Under Padilla*, 31 ST. LOUIS U. PUB. L. REV. 129, 134–36 (2001).

<sup>4</sup> TENN. CODE ANN. § 40-32-101(g)(7)–(8) (2016).

<sup>5</sup> N.Y. CORRECT. LAW §§ 705(1), 753 (McKinney 2014).

<sup>6</sup> See, e.g., DANIEL P. MEARS & JOSHUA C. COCHRAN, PRISONER REENTRY IN THE ERA OF MASS INCARCERATION (2015); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISON REENTRY

criminal records from the perspective of the state, and not from the perspective of individuals with criminal records. To develop that thesis, first, this Article argues that there is a state interest, if not an obligation, to create an intentional and sequenced process to remove civil legal disabilities triggered by a conviction and to mitigate the permanency of public criminal records. Second, this Article argues that reintegrating people with convictions back into society is consistent with the state's interest in punishment and public safety, especially in light of criminology research showing that a significant number of people stop committing crimes.<sup>7</sup> Third, it critiques current state experiments with reentry initiatives as piecemeal, discretionary, inadministrable, and limited to a narrow segment of people with criminal records. Fourth and finally, this Article argues that the state can and should be the external force that destigmatizes a person with a conviction by reestablishing that person's pre-conviction legal status. To do so effectively, the state must incorporate reintegration approaches throughout the criminal justice system—not just after sentencing or after release. The Reintegrative State envisions a holistic framework for helping those with criminal records re-assimilate into society.

Here is the reintegration problem in a nutshell. Once a conviction is entered in criminal court, even for some of the most minor offenses, like public intoxication, disorderly conduct, or even speeding,<sup>8</sup> a criminal record is created. The U.S. criminal history database holds over 100 million criminal records.<sup>9</sup> And with today's technology, criminal records have become accessible to anyone willing to pay for them, through state public records searches or

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(2003); PRISONER REENTRY AND CRIME IN AMERICA (Jeremy Travis & Christy Visher eds., 2005); ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008).

<sup>7</sup> See, e.g., Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recombination*, in PRISONER REENTRY AND CRIME IN AMERICA 50, 73 (Jeremy Travis & Christy Visher eds., 2005).

<sup>8</sup> For instance, in some states, a speeding violation may result in a misdemeanor conviction that remains permanently on a person's criminal history. See GA. CODE ANN. § 40-6-1 (2016) (making certain speeding violations a misdemeanor); N.C. GEN. STAT. ANN. § 20-141(j1) (2006) ("A person who drives a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit . . . or over 80 miles per hour is guilty of a Class 3 misdemeanor."); TENN. CODE ANN. § 55-8-152(f)(2) (2016) (defining minor speeding violations as a Class C misdemeanor); VA. CODE ANN. § 46.2-862 (2016) (defining a misdemeanor of reckless driving as driving 20 miles per hour over the speed limit or above eighty miles per hour).

<sup>9</sup> BUREAU OF JUSTICE STATISTICS, DOJ, *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS*, 2012, at 3 (2014), <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>; see also Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

thousands of online private databases.<sup>10</sup> Even expunged records can remain in private databases.<sup>11</sup>

These records mark the millions of individuals in this country who have not been restored to their pre-conviction legal status because a single, even minor, conviction alone can trigger a web of collateral consequences, a fact that defendants rarely know at the time they enter a plea or are sentenced.<sup>12</sup> Moreover, these state-created, post-conviction consequences are often unrelated to a person's specific criminal misconduct,<sup>13</sup> so hundreds of consequences can impact someone convicted of a minor crime and someone convicted of a violent felony in just the same way and with the same force. This overbreadth undermines successful reintegration. Consider a person convicted of illegally selling a game ticket outside a baseball stadium. The criminal punishment for this minor offense may only be unsupervised probation for six months. As a result of the conviction, however, the person may be barred from public housing, may lose his security guard license, and may be subject to excessive court costs, which if unpaid can result in a loss of his driver's license.<sup>14</sup> Such obstacles to finding housing and employment are two primary factors preventing successful social reentry. This example is illustrative of the many types of civil statutory consequences that are counterproductive to reintegrating people with convictions, and can be more severe than the criminal punishment itself.

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<sup>10</sup> See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 73 (2015) (“[T]here is now an entrenched private sector infrastructure of commercial information vendors that meets and stokes demand for criminal background checks.”); see also Martin Kaste, *Digital Data Make for a Really Permanent Record*, NPR (Oct. 29, 2009, 9:26 AM), <http://www.npr.org/templates/story/story.php?storyId=114276194>.

<sup>11</sup> Kaste, *supra* note 10. And because public and private records are not systematically updated, these records may not be accurate and often fail to remove those who have been restored to their pre-conviction status by expungement or other forms of relief from their convictions. See Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 *TEMP. L. REV.* 403, 413 (2015) (noting that private information companies “run largely unregulated and are generally not required to update their records,” and “[b]ecause of this lack of oversight, criminal records are often produced with omitted or misinterpreted information”).

<sup>12</sup> See Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 *B.U. L. REV.* 623, 629–30 (2006); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 *N.Y.U. REV. L. & SOC. CHANGE* 585, 589–91 (2006); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16–17 (Marc Maurer & Meda Chesney-Lind eds., 2002).

<sup>13</sup> See *infra* Part I.C.2.

<sup>14</sup> See *infra* Part I.B.1.

A national ABA project completed in 2013 catalogued over 45,000 collateral consequences<sup>15</sup> nationwide, most of which were created in the last twenty years.<sup>16</sup> Scholars have illuminated the negative impact of this web of civil consequences,<sup>17</sup> which mitigates against full reintegration. Many point out that these post-conviction consequences need significant legislative attention.<sup>18</sup>

Incrementally, state legislatures are responding to the call for change. Over the past twenty years, states have amended their criminal statutes to include reintegration or reentry as a goal of their criminal justice system, alongside the longstanding goals of rehabilitation, retribution, and deterrence.<sup>19</sup> States have also attempted to advance reintegration by passing expungement statutes, funding job placement reentry programs, restoring voting rights, passing anti-discrimination laws, and establishing administrative relief mechanisms that reduce civil sanctions and disabilities.<sup>20</sup> By one count, from 2009 to 2014, over forty state legislatures passed 155 statutes to remove or reduce collateral consequences of a criminal record.<sup>21</sup> But these changes still fall short of doing the work of reintegration.

The policymakers and scholars who advocate for reform of collateral consequences and critique the ubiquity of criminal records frame the debate as a necessary balance between the state's purported interest in collateral

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<sup>15</sup> ABA CRIMINAL JUSTICE SECTION, NATIONAL SUMMIT ON COLLATERAL CONSEQUENCES 9–10 (2015), [http://www.americanbar.org/content/dam/aba/events/criminal\\_justice/summit\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/criminal_justice/summit_brochure.authcheckdam.pdf). Collateral consequences often refer to “both those consequences that occur by operation of law at the time of conviction . . . and those that occur as a result of some subsequent intervening event or discretionary decision.” AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7 (3d ed. 2004) [hereinafter ABA STANDARDS], <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>.

<sup>16</sup> *Project Description—National Inventory of Collateral Consequences of Conviction (“NICCC”)*, COUNCIL OF ST. GOV’TS JUSTICE CTR., <https://niccc.csjusticecenter.org/description/> (last visited Feb. 28, 2016).

<sup>17</sup> Although “collateral consequences” is used throughout the literature, I prefer to use the terms “post-conviction civil consequences” or “civil sanctions, forfeitures, or disabilities,” because those terms more accurately describe how these state statutes function and impact people with criminal records.

<sup>18</sup> See, e.g., Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 161–63 (1999); Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 83, 84–85 (Joan Petersilia & Kevin R. Reitz eds., 2012); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 603 (1997); Pinard, *supra* note 12, at 689; Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 304–06 (2004).

<sup>19</sup> See *infra* Part I.

<sup>20</sup> See RAM SUBRAMANIAN, REBECCA MORENO & SOPHIA GEBRESELASSIE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CONVICTION, 2009–2014 (2014).

<sup>21</sup> *Id.* at 4, 11, 30.

consequences to protect the public from future criminality and the individual's interest in removing the state-created barriers.<sup>22</sup> This Article reframes the debate over reintegration by presenting it solely from a state's interests. Building on the states' and legal scholars' partial solutions, this Article offers a more comprehensive and sequenced approach: the Reintegrative State.

The Reintegrative State embraces reintegration as a state interest, alongside punishment, from the very beginning of a person's interaction with the criminal justice system. It balances reintegration with the longstanding objectives of the criminal justice system: retribution, deterrence, and rehabilitation. In doing so, the Reintegrative State makes collateral consequences proportional to the severity of the offense, offers individuals notice about collateral consequences prior to sentencing, and offers individuals with criminal records a path to removing them at some point after their sentence is complete.

To describe the path to the Reintegrative State, this Article proceeds in four parts. Part I presents why states have an interest, if not an obligation, to remove civil disabilities after a conviction and eliminate the discriminatory use of the public criminal record. This interest and the various means of furthering it are referred to in this Article as reintegration. Reintegration is consistent with, but distinct from, the more commonly explored post-conviction concepts of reentry and rehabilitation. This Part explains how reintegration is a more robust concept and then describes two ways that post-conviction state action contributes to a permanent stigmatized status through state-created collateral consequences and state-endorsed accessibility of a person's criminal record. This Article contends that such state action, which sets up obstacles to full reintegration post-conviction, is a key factor that gives rise to a state interest in reintegration. Principles of public safety, economic efficiency, racial equity, and widely shared moral principles all support the concept that the state that punishes should also commit itself to reintegration.

Part II then argues that recognition of reintegration as a valid state interest is already implicit in state statutes that offer three different visions of the state's obligation to reintegrate people with convictions. The first presents the legislative approach: reintegration is integral to the criminal justice system from arrest to conviction. The second views reintegration as a part of the state's executive function: reintegration is a part of the paroling and probation authority after a conviction is entered. And the third views reintegration as essential to the

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<sup>22</sup> See *infra* Part I.C.1; see also Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015).



state's role after a person is released, which includes a judiciary function. Reentry courts and statutes permitting sentencing judges to expunge criminal records have emerged as a means for the judicial branch to engage in the reintegration function. Each of these interrelated visions incorporates reintegration, alongside the state's interest in punishment, as a necessary counterpart. These statutes present reintegration as the state's interest in balancing reintegration and punishment. The Reintegrative State reinstates a person's status lost through conviction, and at the same time protects the public from recidivism.

Part III identifies reintegrative approaches occurring in discrete phases of the criminal justice process: 1) before sentencing, 2) at sentencing, and 3) after a sentence is complete. Part III shows that existing statutory schemes are too piecemeal, discretionary, and limited. This Part then shows how each phase informs the reintegrative ideal. The reforms of the Reintegrative State are grounded in empirical research that shows that the state's current approach is not only unjust but also a waste of state resources. The severity of current obstacles is not only unnecessary to avoid public harm, but can potentially lead to recidivism. Drawing upon the strengths and weaknesses of these already existing statutes, Part IV proposes the essential characteristics of the Reintegrative State and argues that states must adopt a holistic approach of reintegration that incorporates reintegration intentionally and sequentially throughout the three phases of the criminal justice system, from arrest to reentry.

## I. REINTEGRATION AS A STATE INTEREST

It hardly breaks new ground to assert that the state has an interest in helping its citizens with convictions to become fully functioning members of society. What is often obscured, however, is the state's own role in making it difficult for that to happen. State action continues to sanction a person long after a criminal sentence is over through two primary mechanisms: civil consequences of a conviction and the creation and use of public criminal records as a proxy for future offending behavior. Both mechanisms are described in more detail in Part I.B. The state's continued role post-conviction gives it not just a general interest in helping people with convictions, but a specific interest in removing those continuing sanctions when the harm they cause outweighs their benefit. As discussed in Part IV, to further this interest, the Reintegrative State should intentionally sequence ways before, at, and after sentencing to mitigate the civil consequences of a conviction and discrimination based solely on a public criminal record.

The state's interest in reintegration—the restoration of legal rights lost by function of a criminal conviction—is also supported by commonly recognized state interests in public safety, equity, efficiency, just punishment, and morality described in Part I.C. Each rationale shows how reintegration benefits not just the person with the criminal record, but also society more broadly, especially under-resourced and minority communities.

Reintegration does not have to be immediate in all cases. Public safety concerns can dictate an incremental approach that is proportional to the seriousness of the crime. But for many low-level, non-violent, and first-time offenders, this process can and should be immediate and need not extend beyond a person's criminal sentence. To calibrate the pace of reintegration and administer it more equitably, the Reintegrative State should draw from much neglected criminology research discussed below.

This section is divided into three parts that lay a foundation for the need for state action that reintegrates people with convictions. First, I clarify the definition of reintegration by explaining what reintegration is not, distinguishing reintegration from commonly associated concepts of reentry and rehabilitation. Second, I describe the state action that makes the state's interest in restoring a person to a non-criminal status not only apparent but also compelling. Third, and perhaps most critically, I identify five rationales that further support a state interest in reintegrating people with convictions.

#### A. *Distinct from Reentry and Rehabilitation*

Before describing how state action gives rise to an interest in reintegration, I want to explain what I mean by reintegration. To begin, I explain first how reintegration is *not* reentry or rehabilitation, two words that are often used interchangeably with reintegration by academics, politicians, and even in state statutes. Reentry and rehabilitation are consistent with reintegration, but their focus is on the individual, not the state. Reintegration 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.<sup>23</sup>

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<sup>23</sup> See *infra* Part I.A.1–2.

1. *Reentry Focuses on Reality Facing Prisoners; Reintegration Focuses on the Role of the State*

Reintegration is a more robust concept than reentry, although reentry can be a necessary part of the reintegration process. As a leading scholar in the field, Jeremy Travis, explains, “[r]eentry is not a form of supervision, like parole. Reentry is not a goal, like rehabilitation or reintegration. Reentry is not an option.”<sup>24</sup> Reentry is merely the “process of leaving prison and returning to society.”<sup>25</sup> The vast majority of people who are incarcerated will return to society whether or not they are reintegrated back into their communities socially, politically, or economically.<sup>26</sup>

In other words, reentry is simply a statement of the prison reality that the United States faces today.<sup>27</sup> Over 600,000 prisoners are released nationally each year, a reality that states need to address.<sup>28</sup> But a reentry focus does little to address how states should respond or whether the state has any obligation to those released.

Second, federal and state reentry initiatives focus exclusively on people returning home from prison.<sup>29</sup> They highlight a need for state action only at the back end of the criminal justice process, after people have served their time in prison. Reentry overlooks that a criminal record creates significant legal obstacles, even if a person spends no time in jail or prison.<sup>30</sup>

Indeed, released prisoners are only a fraction of the people with criminal convictions. Reentry does not account for the 850,000 people estimated to be on parole, the “staggering—and growing—3.9 million people on probation,” or the “over 11 million people cycl[ing] through local jails each year.”<sup>31</sup>

Reintegration, on the other hand, centers the state’s responsibility for the entry of a conviction onto a public criminal record and the resulting collateral

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<sup>24</sup> JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY, at xxi (2005).

<sup>25</sup> *Id.*

<sup>26</sup> PETERSILIA, *supra* note 6, at 3.

<sup>27</sup> See TRAVIS, *supra* note 24, at xxi–xxii (describing the differences between reentry and reintegration and rehabilitation).

<sup>28</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POL’Y INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html>.

<sup>29</sup> TRAVIS, *supra* note 24, at xxii.

<sup>30</sup> See *infra* Part I.B.

<sup>31</sup> Wagner & Rabuy, *supra* note 28 (emphasis omitted).

consequences. The goal of the Reintegrative State is to respond to the reality that all people with criminal convictions, whether they have served time, whether the convictions are minor or severe, whether there is one conviction or many, suffer a social, political, and economic stigma created or permitted by the state.<sup>32</sup>

## 2. *Rehabilitation Focuses on the Person; Reintegration Focuses on the State*

Unlike reentry, rehabilitation describes a goal, and not just the reality that a person in prison is most likely at some point coming home. Rehabilitation, like reintegration, can require the state to act or to fund services, therapy, or programming to treat and reform a person with a conviction. So the goal of rehabilitation in the broad sense is not necessarily inconsistent with reintegration—but the focus of rehabilitation is on the individual with a conviction and the individual’s need to reform from criminal behaviors. As discussed below, rehabilitation historically does not require the state to “rehabilitate” a person’s legal status as well, removing or reducing collateral consequences in the way that reintegration does.

During the 1960s and 1970s, states endorsed a rehabilitative ideal as an integral part of the criminal justice system.<sup>33</sup> A person’s status as an “offender” created a state obligation to treat and to rehabilitate.<sup>34</sup> This approach viewed prisons as a place of correction and reform, and states funded social-service programs aimed at changing people through therapy or building social capacity.<sup>35</sup> Frontline caseworkers in prisons and parole and probation offices were required to have social work training to help “correct” or rehabilitate offenders.<sup>36</sup> That goal was signaled even in the name given to many prisons in that era—the Department of Corrections. California and Ohio, for example, have the Department of Rehabilitation and Corrections. Prisons were expensive institutions with a lot of programing to prepare people for release, and parole

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<sup>32</sup> See Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014) (“The single most dangerous thing people think is that if they get a conviction and don’t go to jail they won’t face issues . . . .” And yet, misdemeanor convictions can trigger the same legal hindrances, known as collateral consequences, as felonies.”).

<sup>33</sup> See Sarah Glazer, *Sentencing Reform*, 24 CQ RESEARCHER 27, 30–31 (2014), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2014011000>.

<sup>34</sup> See Glazer, *supra* note 33, at 33 (discussing the attempt to eliminate the root causes of crime, like poverty, by giving offenders jobs and education).

<sup>35</sup> TONY WARD & SHADD MARUNA, REHABILITATION: BEYOND THE RISK PARADIGM 8 (2007).

<sup>36</sup> See *id.* at 23.

and probation officers had low caseloads.<sup>37</sup> Parole and probation officers were seen as agents of change, not policing authorities as they are now.<sup>38</sup>

The rehabilitative ideal was, rightly or wrongly, seen as a failed endeavor,<sup>39</sup> which reversed the role of prisons and paroling authorities. A now-infamous article by Robert Martinson in 1974<sup>40</sup> purported to analyze the outcomes of 231 studies to determine the effectiveness of rehabilitative programs on reducing recidivism.<sup>41</sup> As reported in numerous press accounts, he concluded that “nothing” works.<sup>42</sup> Although Martinson ultimately recanted this conclusion,<sup>43</sup> and the committee he worked with presented a more nuanced result, he became the leader “among a series of critiques from the political Left, Right and Center that helped to usher in an era of ‘nothing works’ pessimism and ‘lock ‘em up’ punitiveness.”<sup>44</sup> The criminal justice policies of the 1980s and 1990s focused on incapacitation and retribution to guide sentencing principles.<sup>45</sup> And while funding for rehabilitation efforts decreased with significantly fewer programs offered to prisoners during those decades, collateral consequences statutes increased exponentially during the era of the “tough-on-crime” politics in the ‘80s and ‘90s.

Rehabilitation as a state interest resurfaces at times in reentry discourse. It is worth noting, though, that the Interstate Agreement on Detainers and the Interstate Compact for the Supervision of Adult Offenders, both in Article 1, continue to adhere to rehabilitation as a goal.<sup>46</sup> And many states are a party to those agreements.<sup>47</sup> But rehabilitation efforts are expensive, and both sides of

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<sup>37</sup> LEANNE FIFTAL ALARID & ROLANDO V. DEL CARMEN, *COMMUNITY-BASED CORRECTIONS* 90 (8th ed. 2011).

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *PUB. INT.* 22 (1974).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 24–25.

<sup>42</sup> *Id.* at 48–49.

<sup>43</sup> Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *HOFSTRA L. REV.* 243, 254 (1979).

<sup>44</sup> WARD & MARUNA, *supra* note 35, at 8; see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 69, 71, 73 (2001).

<sup>45</sup> GARLAND, *supra* note 44, at 72.

<sup>46</sup> Interstate Agreement on Detainers Act, Pub. L. No. 91-538, § 2, 84 Stat. 1397, 1397 (1970); INTERSTATE COMPACT FOR THE SUPERVISION OF ADULT OFFENDERS, art. I (INTERSTATE COMM’N FOR ADULT OFFENDER SUPERVISION 1998).

<sup>47</sup> *Agreement on Detainers*, NAT’L CTR. FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/Compact.aspx?id=1> (last visited Feb. 23, 2017); *Interstate Compact for Adult Offender Supervision*, NAT’L CTR. FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/Compact.aspx?id=70> (last visited Feb. 23, 2017).

the political aisle still seem skeptical of rehabilitation. And the state's obligation to rehabilitate or "fix" a person limits the state's role to a social work model that does not remove the legal and political obstacles erected by state statutes.

Reintegration is not inconsistent with the goal of rehabilitation in a broad sense. Both want to structure the penal system and release in a way that helps people make it, without reoffending, once they are finished with their criminal sentence. But the focus of reintegration differs in a significant way. It does not look to "reform" people with convictions because they have some inherently bad character or lack of employable skills. Rather, the focus of the Reintegrative State is to restore a person with a criminal conviction to the person's pre-conviction legal status to the extent possible by removing legal barriers created by the state.

*B. State Action Creating a Permanent Second Class Status Based on Conviction*

At the Congressional hearings for the Second Chance Act, Calvin Moore, a man with multiple convictions, testified that he was finding it impossible to get a job with a criminal record: "In short, the decisions that I made 30 plus years ago—and that I have already paid for—are still preventing me from moving forward and getting a second chance."<sup>48</sup> Scholars have characterized the impact of a conviction that Calvin Moore describes as a second-class status, endorsed by the state specifically through statutes that allow automatic or discretionary civil legal sanctions based on a conviction and more generally through the public proliferation of the criminal records.<sup>49</sup>

Many justifications have been offered for this reduced status. First, the person's criminal act was voluntary. Second, their criminal behavior implicates their moral character. Third, their unlawful conduct makes them deserving of reduced status because convictions are strong indicators of reoffending.<sup>50</sup> And relatedly, there is a strong state interest in keeping the public safe from future harm by people who have violated the law.<sup>51</sup> People, by virtue of past criminal

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<sup>48</sup> *Barriers to Reentry for Ex-Convicts: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. 45 (2010) (statement of Calvin Moore, D.C. Employment Justice Center).

<sup>49</sup> Demleitner, *supra* note 18, at 154, 158–59 ("Their exclusion from the labor market and additional burdens imposed upon them have led to their status as outcasts.").

<sup>50</sup> Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *CRIMINOLOGY* 575, 576 (1996).

<sup>51</sup> See *infra* Part II.C.

conduct, are seen as having “immutable and essentially flawed natures.”<sup>52</sup> A criminal underclass status is also perpetuated by the many “societal pressures to maintain a distance between ‘us’ and ‘them.’”<sup>53</sup> Even the nomenclature used to describe people with convictions underscores this point. In public and academic discourse alike, people with criminal convictions are referred to as ex-offenders, ex-convicts, deviants, incorrigibles, superpredators, or career criminals.<sup>54</sup> All of these terms permanently label people with criminal records as unredeemable long after their criminal sentences have been served.<sup>55</sup>

The stigma facing people with convictions goes beyond the use of words. State obstacles to reintegration exemplify what sociologist John Braithwaite considers counterproductive stigmatic shaming.<sup>56</sup> Braithwaite argues that there is and always has been a place for shaming in the criminal justice system.<sup>57</sup> The ritualistic stages leading to conviction—arrest, incarceration, arraignment, trial or plea, conviction, and sentencing—engage all of the participants in the criminal justice system—judge, prosecutor, defendant, defense attorney, and the public—in shaming. From arrest and booking to public arraignment and trial to sentencing and incarceration, individuals participate in certain negative, punitive rituals that mark their entry into the criminal justice system. The system is careful to document this process from the initial arrest or citation to the final execution on a rap sheet. Yet, once released from the system, no reintegrative ritual takes place. No public documentation or public ceremony acknowledges a person’s exit from the system and reintegration to full citizenship, as though there is no way to remove the criminal stigma.

The initial process of public shaming which has been a part of criminal punishment throughout time is not in and of itself bad. But Braithwaite argues that the current model of stigmatic shaming “creates outcasts, where ‘criminal’

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<sup>52</sup> SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 4 (2001).

<sup>53</sup> TRAVIS, *supra* note 24, at 250.

<sup>54</sup> GARLAND, *supra* note 44, at 42–44 (describing the rise of the “delinquent,” “criminal character,” and “psychopathic offender”); MARUNA, *supra* note 52, at 4 (describing how people with convictions are referred to as “superpredators,” “career criminals,” and “incorrigibles”).

<sup>55</sup> JACOBS, *supra* note 10, at 4 (“A criminal record is for life . . .”); TRAVIS, *supra* note 24, at xxvi; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799 (2012) (“Every conviction implies a permanent change, because these disabilities will ‘carry through life.’”).

<sup>56</sup> See John Braithwaite, *Shame and Modernity*, 33 BRIT. J. CRIMINOLOGY 1, 1 (1993).

<sup>57</sup> See *id.*

becomes a master status trait that drives out all other identities.”<sup>58</sup> This process of public shaming stands in sharp contrast to what Braithwaite calls “reintegrative shaming,” which “is disapproval dispensed with an ongoing relationship with the offender based on respect, shaming which focuses on the evil of the deed rather than on the offender as an irremediably evil person.”<sup>59</sup>

Although this Article focuses on the state’s role in generating and mitigating the legally endorsed stigma created by a conviction, the stigma facing those with a criminal history does not derive solely from the state. Convictions create a social and economic stigma as well.<sup>60</sup> Socially, people look up the criminal history of neighbors, babysitters, and even dating prospects because of the inferences that they assume can be drawn from a person’s criminal past. Economically, potential employers pull criminal records to help them make hiring decisions. They may fear that a record exposes them to negligence-in-hiring suits. Even where state laws protect employers from these suits and forbid employers from denying applications based on a conviction alone, an employer still can reject applicants if their criminal offenses are “directly related” to the job sought.<sup>61</sup> Our culture, beyond the action of the state, views a criminal record as more than just an “evil deed,” as Braithwaite suggests, but as a sign of a person’s bad character and propensity to reoffend, which is inherent and largely unredeemable.

The role convictions play in our culture also differs from that role in other countries. For example, in Spain, criminal convictions are not public.<sup>62</sup> Defendants are anonymous in court decisions, which only use a defendant’s initials, similar to how court cases for juveniles are reported in the United States.<sup>63</sup> The identity of the defendant is protected, and the criminal sentence suffices to punish a person for a crime.<sup>64</sup> No post-conviction civil consequences deprive people of rights or benefits after their time is served, and no publically retrievable record exists.<sup>65</sup> Privacy prevails over public access, and access is

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<sup>58</sup> *Id.*; GARLAND, *supra* note 44, at 9 (“Forms of public shaming and humiliation that for decades have been regarded as obsolete and excessively demeaning are valued by their political proponents today precisely because of their unambiguously punitive character.”).

<sup>59</sup> Braithwaite, *supra* note 56, at 1.

<sup>60</sup> Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1889–90 (2015).

<sup>61</sup> *See infra* Part III.

<sup>62</sup> JACOBS, *supra* note 10, at 164.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 169.

<sup>65</sup> *Id.* at 172.



viewed as an obstacle to employment, and therefore, access to criminal histories would be counterproductive because it would impede successful reintegration.<sup>66</sup> Spain's approach highlights the critical role the state can play in shaping the cultural understanding of convictions and the accessibility of criminal records.

The centrality of the state's role suggests that, if our cultural perception of a person's conviction status is to be changed, the state also needs to play a role, and even take the lead, in removing the criminal stigma. Reintegrative approaches would undo or reduce legal stigma created by collateral consequences, which is a product of state action. For some people with records, depending on the dangerousness of the offense, the state could ensure that collateral consequences are either not triggered at all, or if they are triggered, that they are related to or proportionate to the criminal act. For minor, non-violent offenses, the state could determine that the conviction record should not be made public; for others, the state could prohibit discriminatory "criminal" inferences that can be drawn from viewing a person's criminal record after a certain period of good conduct post-sentence. Without such rational processes for balancing the state's interests in reintegration and protecting the public from future harm, people with convictions are essentially placed in what one scholar termed "internal exile."<sup>67</sup> An exile is currently legally sanctioned by the state through dozens of post-conviction, civil collateral sanctions triggered by a conviction, and the unfettered dissemination of the public criminal record itself. The two primary examples of stigmatizing state action are the subject of the next two subsections.

### *1. Impact of State Collateral Sanctions and Discretionary Disqualifications*

As early as colonial times, legislatures passed laws "denying convicted offenders the right to enter into contracts, automatically dissolving their marriages, and barring them from a wide variety of jobs and benefits."<sup>68</sup> As part of the post-Civil War Reconstruction Amendments, the Fourteenth Amendment permitted states to deny the right to vote to those who participated "in rebellion,

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<sup>66</sup> For a more direct comparison of Spain and the United States, see James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 PUNISHMENT & SOC'Y 3 (2012).

<sup>67</sup> Demleitner, *supra* note 18, at 153–54; see also ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEF. SERV. FOR D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009) [hereinafter INTERNAL EXILE], <http://www.americanbar.org/content/dam/aba/migrated/cccs/interalexile.authcheckdam.pdf>.

<sup>68</sup> Travis, *supra* note 12, at 17–18.

or other crime.”<sup>69</sup> Civil hurdles upon release from prison are not new, but the scope of today’s problem is.<sup>70</sup>

Legal scholars,<sup>71</sup> as well as countless ABA and state bar association reports,<sup>72</sup> have identified the wide-range of civil consequences facing people with criminal convictions. For example, a college student convicted of a drug possession misdemeanor who completed a sentence of six months of probation may be refused financial aid, and a homeless person convicted of public intoxication may be denied a single occupancy public housing unit. Both refusals are triggered and permitted or required by state law.

According to a 2003 ABA report, collateral consequences take two forms: (1) collateral sanctions, and (2) discretionary disqualifications.<sup>73</sup> A collateral sanction is “a legal penalty, disability or disadvantage . . . imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.”<sup>74</sup> A discretionary disqualification is a “penalty, disability, or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.”<sup>75</sup> These consequences are legal disabilities that occur “by operation of law” because of a conviction, but are not part of the sentence for the crime.<sup>76</sup> Since the tough-on-crime criminal justice era, these state and federal statutes have exponentially increased<sup>77</sup> and are viewed as continuing to punish people well after their formal criminal sentences are over.<sup>78</sup> These laws have been characterized by many

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<sup>69</sup> U.S. CONST. amend. XIV; *see also* PIPPA HOLLOWAY, FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 2 (2014).

<sup>70</sup> Margaret Colgate Love, *The Debt that Can Never Be Repaid: A Report Card on the Collateral Consequences of Conviction*, CRIM. JUST., Fall 2006, at 16, 17 (describing the “growing appreciation of the role of legal barriers in frustrating offender reentry”).

<sup>71</sup> *See, e.g.*, sources cited *supra* note 6.

<sup>72</sup> *E.g.*, 2007 COLLATERAL SANCTIONS COMM., MINN. LEGISLATURE, CRIMINAL RECORDS AND EMPLOYMENT IN MINNESOTA (2008), <http://archive.leg.state.mn.us/docs/2008/mandated/080082.pdf>; INTERNAL EXILE, *supra* note 67; N.Y. STATE BAR ASS’N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857>.

<sup>73</sup> ABA STANDARDS, *supra* note 15, at 1.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Travis, *supra* note 12, at 16; *see also* Pinard, *supra* note 12, at 624 n.1; Pinard & Thompson, *supra* note 12, at 586; Thompson, *supra* note 18, at 258.

<sup>77</sup> Pinard & Thompson, *supra* note 12, at 587–88 (noting that “the last two decades have witnessed the[] dramatic expansion” of such civil punishments, which can be linked to the “tough on crime” and “war on drugs” movements).

<sup>78</sup> PETERSILIA, *supra* note 6, at 9; Thompson, *supra* note 6, at 80; Travis, *supra* note 12, at 16–17.

different names—collateral consequences, invisible punishments, internal exile,<sup>79</sup> civil death,<sup>80</sup> and civil sanctions.<sup>81</sup>

For people with convictions, these civil consequences are anything but collateral and are often more severe than the criminal sanction itself.<sup>82</sup> For example, a misdemeanor for shoplifting that results in a criminal sentence of two days of community service can have more traumatic results after the sentence is over if the defendant is a parent in public housing who is evicted. A barber convicted of an aggravated assault felony who serves ten years in prison with good behavior can be denied a barber's license by the state when released on parole. These are examples of how state statutes continue punishment and, taken as a whole, create a new status post-conviction created by collateral sanctions and discretionary disqualifications, which are not disclosed when a person is sentenced and are not considered a part of criminal punishment.

The increase in these “invisible punishments” has been so dramatic that few states have an exhaustive list of their own laws.<sup>83</sup> This fact prompted the American Bar Association, in collaboration with George Washington University, to develop a comprehensive, searchable website that catalogues the 48,229 civil statutes in every state and the four U.S. territories.<sup>84</sup> The numbers, at a glance, are striking—873 state statutes create barriers to reintegration in Mississippi; 1201 in Florida; 1314 in New York; and 1831 in California.<sup>85</sup>

Perhaps, the most significant examples of a state-created, second-class status are laws that deny people with convictions the right to engage fully as political participants after their convictions. These laws deny people the right to vote,<sup>86</sup>

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<sup>79</sup> Demleitner, *supra* note 18; INTERNAL EXILE, *supra* note 67.

<sup>80</sup> Chin, *supra* note 55, at 1790.

<sup>81</sup> See MARUNA, *supra* note 52, at 5; Travis, *supra* note 12, at 16.

<sup>82</sup> Pinard & Thompson, *supra* note 12, at 590 (“[C]ollateral consequences . . . often outlast the direct sentences imposed on defendants.”).

<sup>83</sup> Florida, Ohio, and North Carolina have catalogued their statutes. MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, & PRACTICE app. A (2013); see also NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 30 (2014), <https://www.nacdl.org/restoration/roadmapreport/>.

<sup>84</sup> *National Inventory of the Collateral Consequences of Conviction*, COUNCIL OF ST. GOV'TS JUSTICE CTR. [hereinafter *National Inventory*], <https://niccc.csgjusticecenter.org/> (last visited Mar. 28, 2017) (follow arrow hyperlink; then click “Search Multiple Jurisdictions”).

<sup>85</sup> *Id.* (follow arrow hyperlink; then select Mississippi, Florida, New York, or California).

<sup>86</sup> Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329, 330 (2007).

hold public office,<sup>87</sup> or sit on juries,<sup>88</sup> making them partial citizens.<sup>89</sup> One in forty-one adults in the United States—five million citizens—have “currently or permanently lost their voting rights as a result of a felony conviction.”<sup>90</sup> And these laws disproportionately impact the poor and people of color: 7.7% of black adults have lost their rights to vote, four times the national average.<sup>91</sup>

State and federal statutes create barriers to reentry in the areas of life that are most critical to successful reintegration—family reunification, employment, and housing. Some of the most numerous and counterproductive barriers to reintegration are employment-related. State agencies throughout the country have the discretion to deny or revoke employment licenses in hundreds of industries because of a person’s criminal history. For example, if a person has a security guard license and is arrested for a class A misdemeanor in New York, the arrest alone can prompt notice to the licensing agency that results in a license suspension.<sup>92</sup> Even if a person is convicted of a class A misdemeanor, does that necessarily mean there is a relationship between the offense and the employment such that the person is incapable of working as a security guard? For many states, the answer is yes.

This section does not attempt to catalogue all of the ways that state and federal legislation has created a second-class status for people with convictions. Numerous scholars have written extensively about this topic.<sup>93</sup> This section simply argues that the state creates a range of civil legal obstacles post-conviction that make reintegration more difficult, if not impossible.

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<sup>87</sup> Andrea Steinacker, Note, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 804–08.

<sup>88</sup> Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 (2013).

<sup>89</sup> Chin, *supra* note 86, at 330; ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 1 (2009), [http://brennan.3cdn.net/8782cc82daf02b9431\\_29m6ibzbu.pdf](http://brennan.3cdn.net/8782cc82daf02b9431_29m6ibzbu.pdf); *see also* RYAN S. KING, THE SENTENCING PROJECT, A DECADE OF REFORM: FELONY DISENFRANCHISEMENT POLICY IN THE UNITED STATES 1 (2006), [http://www.sentencingproject.org/pdfs/FVR\\_Decade\\_Reform.pdf](http://www.sentencingproject.org/pdfs/FVR_Decade_Reform.pdf); THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998).

<sup>90</sup> THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf>.

<sup>91</sup> *Id.*

<sup>92</sup> N.Y. GEN. BUS. LAW § 89-1(4)(a) (McKinney 2012).

<sup>93</sup> *See sources cited supra* note 6.

## 2. *Impact of the Permanent Criminal Record*

Originally, a criminal record, more colloquially known as a “rap sheet,” was created “by and for the police.”<sup>94</sup> Law enforcement agencies developed and maintained their own local systems of record keeping. State systems coordinating information from local agencies did not exist until the 1930s,<sup>95</sup> and the massive shift in computerizing and sharing criminal histories nationally did not occur until the 1960s.<sup>96</sup>

After the creation of a searchable national system of criminal records, the FBI denied access to “non-law enforcement agencies” until Congress, in the 1970s, allowed FBI background checks to be disseminated to certain industries, like banks, security regulators, child-care services, and housing authorities.<sup>97</sup> States eventually followed suit, expanding the categories of people who could buy FBI criminal records exponentially.<sup>98</sup> But these background checks were not immediately retrievable, because they required fingerprints taken by the police or “certified private compan[ies].”<sup>99</sup>

Criminal court records, on the other hand, were always accessible to the public in theory, but rarely retrieved in practice.<sup>100</sup> It was prohibitively time-consuming until states started to centralize the records in electronic databases.<sup>101</sup>

Over the past couple of decades this reality has changed. States began selling daily court dockets to online companies or offering them by bulk download.<sup>102</sup> Connecticut requires an annual subscription and provides monthly updates.<sup>103</sup> Some of the twenty-six states with unified, electronic state criminal record systems have online searchable databases that only require a name or identification number.<sup>104</sup> At least thirteen states make rap sheets accessible

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<sup>94</sup> JACOBS, *supra* note 10, at 38 (including a discussion of the history of the “rap sheet” and the evolution of the publically accessible criminal record).

<sup>95</sup> *Id.* at 41.

<sup>96</sup> *Id.* at 40–41 (explaining the origins of the “nationally integrated system for sharing individual criminal history information” that assigned “state criminal record repositories primary responsibility for collecting and maintaining . . . information” and enabled “states to access each other’s criminal record databases”).

<sup>97</sup> *Id.* at 43.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 45–46.

<sup>100</sup> *Id.* at 56.

<sup>101</sup> *Id.* (noting that only twenty-six states have unified court systems with statewide searchable databases).

<sup>102</sup> *Id.* at 58.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 57–58. There is a danger of misidentification with requiring so little information to pull criminal information. See NAT’L CONSUMER LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND

online.<sup>105</sup> In Kansas, for example, for only \$20, a person can purchase a criminal record.<sup>106</sup> With the advent of the Internet, the accessibility of public records expanded significantly.<sup>107</sup> Searchable private online databases number potentially in the thousands and sell all kinds of court records, including criminal histories, inexpensively.<sup>108</sup>

Because of their original purpose, criminal records often include coding and jargon meant for law enforcement, making it difficult for laypeople to decipher the charges and, ultimately, the disposition in a case.<sup>109</sup> Records can be inaccurate or incomplete, making these documents less than ideal for employers, landlords, or other private actors to understand and rely on.

A critical problem for reintegration purposes is that these databases may not be updated to remove expunged or sealed records.<sup>110</sup> Some companies charge over \$399 to remove “mug shots” taken at arrest and to correct for expunged records.<sup>111</sup>

Although employment has been correlated with lowering recidivism rates,<sup>112</sup> studies show that the accessibility of the public criminal record significantly hurts a person’s employment chances. One study found that 86% of companies conduct criminal background checks on some applicants and 69% conduct

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CHECKING COMPANIES HARM WORKERS AND BUSINESSES 6, 15 (2012), <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

<sup>105</sup> *Id.* at 51.

<sup>106</sup> *Id.*

<sup>107</sup> James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 186 (2008).

<sup>108</sup> *Id.*; SEARCH, NAT’L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 7 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>; see also Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), [http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0).

<sup>109</sup> JACOBS, *supra* note 10, at 47–48.

<sup>110</sup> JACOBS, *supra* note 10, at 131; Margaret Colgate Love, *Expungement of Criminal Records: “The Big Lie”*, CRIME REP. (June 23, 2011), <http://www.thecrimereport.org/viewpoints/2011-06-expungement-of-criminal-records-the-big-lie>; Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 750 (2012) (“A growing industry of private companies that conduct background checks purchase and store criminal records in their databases without any mechanism for removing expunged records.”); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 345.

<sup>111</sup> Uggem & Stewart, *supra* note 60, at 1890–91 (“Even the simplest interaction with the justice system can therefore result in an indefinite, if not permanent, online posting of one’s photograph and charges.”).

<sup>112</sup> Christopher Uggem, Sara Wakefield & Bruce Western, *Work and Family Perspectives on Reentry*, in PRISONER REENTRY AND CRIME IN AMERICA 209, 211–15 (Jeremy Travis & Christy Visser eds., 2005).

criminal background checks on all applicants.<sup>113</sup> And research shows that a person is at least 50% less likely to receive even a callback for an interview if the employer knows about a felony conviction.<sup>114</sup> That number increases if the person with the record is African-American.<sup>115</sup>

The explosion of criminal records may come at a real cost nationally.<sup>116</sup> Given the number of people with records and their difficulty finding employment, one study estimated that the economy in 2008 lost 1.5 to 1.7 million employees.<sup>117</sup> Another study shows the impact of incarceration on poverty levels, estimating that poverty would have declined by 20%.<sup>118</sup>

In sum, over the past fifty years, federal and state action has increased the proliferation of the eternal criminal record.<sup>119</sup> The accessibility of inexpensive criminal records is an obstacle to reintegration. It has incentivized employers, landlords, and even private individuals to pull a person's criminal history as an indicator of their risk of future offending and moral character. But in comparison to a credit report that monitors actions and financial behavior over time to indicate financial risk, a criminal history is merely a jumble of codes, at times inaccurate, that tells a person nothing about how the information on the report relates to risk.<sup>120</sup>

### C. Rationales Supporting Reintegration

The state's interest in reintegration does not rest solely on the state's own role in creating civil consequences for convictions and disseminating criminal records. That interest is supported by five rationales that draw on state interests and values that are already well established. These rationales also suggest that the state does not have to choose between helping people with records and

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<sup>113</sup> *SHRM Finds Fewer Employers Using Background Checks in Hiring*, SOC'Y FOR HUM. RESOURCES MGMT. (July 19, 2012), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/backgroundchecks.aspx>; see also JACOBS, *supra* note 10, at 6.

<sup>114</sup> See Jenny Roberts, *supra* note 114, at 331.

<sup>115</sup> *Id.*; see also *infra* Part I.C.

<sup>116</sup> Roberts, *supra* note 114, at 333 (“[I]t [i]s surprising ‘how little people know about [the economic impact of a criminal record] and how little it gets talked about in terms of anti-poverty.’” (quoting Gary Fields, *Retiree’s Phantom Arrest Record Is Finally Expunged*, WALL ST. J. (Dec. 1, 2014), <https://www.wsj.com/articles/retirees-phantom-arrest-record-is-finally-expunged-1417478846>)).

<sup>117</sup> *Id.* at 332 n.63.

<sup>118</sup> *Id.* at 332.

<sup>119</sup> See JACOBS, *supra* note 10, at 4.

<sup>120</sup> See *id.* at 74 (analogizing a criminal record to a credit report).

protecting the safety of the community at large. A sound reintegration strategy can accomplish both.

### 1. *Public Safety Rationale*

A tension does exist between the state's interest in reintegrating a person with a conviction and the state's interest in protecting the public from future harm. After all, no one contends that a person's criminal past *never* has bearing on his or her conduct in the future. At the same time, few would dispute that state action that unnecessarily hinders reintegration actually undermines public safety by increasing the risk of recidivism. The Reintegrative State can alleviate this tension by taking into account the research of criminologists who study which criminal records predict future criminal behavior. This research finds that the vast majority of people with records stop committing crimes, that factors like age and employment matter, and that after six to ten years, most people with convictions are no more likely to commit a crime than those who have no criminal history. Those findings suggest that treating all convictions and all defendants the same imposes significant social costs without any corresponding benefit.

A virtually undisputed finding in criminology is that people age out of crime.<sup>121</sup> Experts who study desistance,<sup>122</sup> the process by which people stop committing crime,<sup>123</sup> calculate that 85% of people will age out of criminal behavior by the time they are twenty-eight years old.<sup>124</sup> The classic arc of criminal activity, especially for crimes like petty theft, robbery, or drug dealing, is that people begin offending in their teens, continue through late adolescence, and stop by the time they are thirty years old.<sup>125</sup>

In one line of desistance research, criminologists argue that the "age-crime curve" drives most of desistance, and it has been "unchanged for at least 150

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<sup>121</sup> See, e.g., MARUNA, *supra* note 52, at 20.

<sup>122</sup> Shawn D. Bushway et al., *An Empirical Framework for Studying Desistance as a Process*, 39 CRIMINOLOGY 491, 492 (2001) (describing desistance as the process by which people arrive at a state of non-offending); see also MARUNA, *supra* note 52, at 6–7 (explaining that desistance from crime is "the process by which stigmatized, former offenders are able to 'make good' and create new lives for themselves").

<sup>123</sup> See WARD & MARUNA, *supra* note 35, at 4.

<sup>124</sup> *Id.* at 13; see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009).

<sup>125</sup> MARUNA, *supra* note 52, at 20. For a description of the literature covering the life-course conceptions of criminal behavior, see Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 530 (2000).



years.”<sup>126</sup> Looking at crime trajectories of delinquent boys followed from age seven to seventy, Sampson and Laub showed that “crime declines with age *even for active offenders*,” refuting arguments in the literature that repeat offenders never desist from crime.<sup>127</sup> In fact, new evidence shows that a significant number desist quickly after their last conviction.<sup>128</sup>

In addition to age, life changes, like employment and marriage, are significant predictors of desisting from crime.<sup>129</sup> In fact, research supports that desistence and the “successful reintegration of these (mostly) men depends in part on their ability to find and maintain gainful employment.”<sup>130</sup> One study showed that people twenty-seven years old or older with criminal records were less likely to be rearrested and reconvicted “when provided with marginal employment opportunities” than similarly situated people with prior convictions who were not employed.<sup>131</sup>

Recent studies about the impact of employment reentry programs show that participants who enroll within three months of release from prison present a decline in recidivism.<sup>132</sup> Another recent study compared people with extensive criminal histories who completed a job reentry program, Center for Employment Opportunities (CEO), in New York City with people who dropped out.<sup>133</sup> The evidence showed that completers had “much better employment outcomes than CEO noncompleters in years two and three of the follow-up period.”<sup>134</sup> The researchers concluded that employers could use program completion as a signal of desistence.<sup>135</sup>

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<sup>126</sup> MARUNA, *supra* note 52, at 20; *see also* Michael Gottfredson & Travis Hirschi, *The True Value of Lambda Would Appear to Be Zero: An Essay on Career Criminals, Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics*, 24 CRIMINOLOGY 213 (1986) (arguing that data shows even people with extensive criminal histories desist as they age).

<sup>127</sup> Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 585 (2003).

<sup>128</sup> Shawn D. Bushway & Robert Apel, *A Signaling Perspective on Employment-Based Reentry Programming*, 11 CRIMINOLOGY & PUB. POL’Y 21, 39 (2012).

<sup>129</sup> Bushway & Apel, *supra* note 128; Uggen, Wakefield & Western, *supra* note 112, at 215–16.

<sup>130</sup> Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL’Y 371, 372 (2008); *see also* JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31–34 (2001), [http://research.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://research.urban.org/UploadedPDF/from_prison_to_home.pdf); Shawn Bushway & Peter Reuter, *Labor Markets and Crime Risk Factors*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING 6-1, 6-3 (1997).

<sup>131</sup> Uggen, *supra* note 125, at 529, 542.

<sup>132</sup> Bushway & Apel, *supra* note 128, at 38.

<sup>133</sup> *Id.* at 36.

<sup>134</sup> *Id.* at 23.

<sup>135</sup> *Id.* at 36.

Studies about recidivism, not desistence, are often the ones cited when politicians talk about the state's interest in public safety, because data consistently show that people with criminal records have a high probability of reoffending, and much of that reoffending occurs within the first three years after release.<sup>136</sup> More recent recidivism studies, though, take a more nuanced approach by looking at the timing of future offenses to show that the probability of reoffense decreases as time passes. For example, a study of 962 people convicted of felonies in New Jersey shows that the 50% who were arrested again were rearrested within 2.2 years of the prior offense.<sup>137</sup> Thirty percent of the 962 people were not rearrested over the course of twenty years.<sup>138</sup>

Another related line of recidivism research shows that, on average, after seven to ten years without committing a new offense, a person with a criminal record is no more likely to be convicted of a crime than someone who never had a criminal history.<sup>139</sup> Using longitudinal data of eighteen-year-olds first arrested in 1980 and hazard rates, Blumstein and Nakamura compared a group of eighteen-year-olds with arrest histories to one sample of eighteen-year-olds in the general population and another sample of eighteen-year-olds who were never arrested.<sup>140</sup> Hazard rates measure the probability over time that someone who "has stayed clean will be arrested."<sup>141</sup> Looking at the hazard rates of these groups over time, the researchers examined when the group with arrests posed no more risk for a new arrest than their never-arrested counterparts.<sup>142</sup> They looked at rates separately for robbery, aggravated assault, and burglary to see whether the rates of redemption differed based on the type of crime.<sup>143</sup> Those arrested for robbery began to look like their never-arrested counterparts in 7.7 years; those

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<sup>136</sup> Blumstein & Nakamura, *supra* note 124, at 331 ("Two studies that tracked released U.S. prisoners show that of all those who were rearrested in the first 3 years, approximately two thirds were arrested in the first year, which indicates the declining recidivism rate over time.").

<sup>137</sup> *Id.* (citing DON M. GOTTFREDSON, NAT'L INST. OF JUSTICE, NO. NCJ 178889, EFFECTS OF JUDGES' SENTENCING DECISIONS ON CRIMINAL CAREERS 4 (1999), <https://www.ncjrs.gov/pdffiles1/nij/178889.pdf>).

<sup>138</sup> *Id.*

<sup>139</sup> Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 33 (2011) ("Offenders do eventually look like nonoffenders, usually after a spell of between 7 and 10 years of nonoffending.").

<sup>140</sup> Blumstein & Nakamura, *supra* note 124, at 349–50.

<sup>141</sup> Alfred Blumstein & Kiminori Nakamura, 'Redemption' in an Era of Widespread Criminal Background Checks, 263 NAT'L INST. JUST. J. 10, 12 (2009), <http://www.communityalternatives.org/pdf/employers/NIJ-Blumstein-Nakamura-relevance-of-remote-conviction.pdf>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

arrested for aggravated assault looked the same after 4.3 years; and those arrested for burglary looked the same after only 3.8 years.<sup>144</sup>

The findings from a different study looking at a wider age range of people with convictions supported Blumstein and Nakamura's results.<sup>145</sup> A study conducted by Bushway and colleagues showed that young people with one offense were no more likely than their non-offending counterparts to be convicted of a new crime after ten years; first offenders over forty required only two years of no new offenses to look like the control group with no criminal history; people with one to three convictions converge with non-offenders around thirteen years; and people with four or more convictions converge at the earliest after twenty-three years.<sup>146</sup> This new body of research challenges inferences that all convictions predict future criminal behavior equally. It creates "an opportunity to think about when an ex-offender might be 'redeemed' for employment purposes—that is, when his or her criminal record empirically may be shown to be irrelevant as a factor in a hiring decision."<sup>147</sup>

More broadly, the research on desistance and recidivism shows that not all people with criminal records create the same level of risk, so they do not fit a one-size-fits-all policy approach.<sup>148</sup> And creating unnecessary obstacles to employment could actually contribute to recidivism rates.<sup>149</sup> Criminologists have long argued that criminal justice policies do not account for what we know about people who commit crimes.<sup>150</sup> This research supports a more nuanced approach to civil sanctions and disqualifications. A criminal record alone should not serve as an automatic and permanent predictor of future criminal conduct.

## 2. *Just Punishment Rationale*

From the perspective of punishment theory, civil consequences of a conviction are not just. Even under the most retributivist theory, just punishment must be proportionate to the criminal act, the defendant must have notice of the punishment, and the punishment, except in the extreme cases of a life sentence

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<sup>144</sup> *Id.*

<sup>145</sup> Bushway, Nieuwebeerta & Blokland, *supra* note 139, at 52.

<sup>146</sup> *Id.*

<sup>147</sup> Blumstein & Nakamura, *supra* note 141, at 14.

<sup>148</sup> Bushway, Nieuwebeerta & Blokland, *supra* note 139, at 52.

<sup>149</sup> *Id.* at 56 ("[I]f offenders are banned [from jobs] and find that their conventional opportunities are blocked, then they might become more likely to recidivate.").

<sup>150</sup> See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010).

or the death penalty, must have finality.<sup>151</sup> Many civil consequences lack all three characteristics.<sup>152</sup>

Civil sanctions and discretionary disqualifications are not designed to be proportionate to the criminal offense that triggers them. They are imposed based on the existence of a felony or misdemeanor conviction, regardless of the nature or circumstances of the offense.<sup>153</sup> The only degree of proportionality that exists is that more sanctions apply to felony convictions than misdemeanors.<sup>154</sup>

Proportionality is most problematic for defendants charged with misdemeanors and low-level, non-violent felony offenses. The legal system views most misdemeanors as “petty offenses,”<sup>155</sup> and punishment is minor.<sup>156</sup> People rarely serve time in jail, which under federal statute cannot exceed six months and under state statutes is not more than a year. Similarly, the sentencing range for low-level felonies is not severe, especially for someone without prior convictions.<sup>157</sup> For these defendants, the conviction on their public record becomes the most significant part of criminal punishment because the criminal record can last a lifetime, and triggers hundreds of discretionary civil sanctions that bear no direct relationship to the criminal act.<sup>158</sup>

Florida, for example, has 1201 statutes catalogued in the National Inventory of Collateral Consequences of Conviction.<sup>159</sup> Of these civil sanctions, 532 are automatic and mandatory when a conviction is entered, and 507 are discretionary; 268 apply to any misdemeanor, and 508 apply to any felony

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<sup>151</sup> RICHARD L. LIPPKE, TAMING THE PRESUMPTION OF INNOCENCE 214–15 (2016).

<sup>152</sup> *Id.* at 214.

<sup>153</sup> See Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 355–56 (2011).

<sup>154</sup> To see the dramatic difference of sanctions applied to misdemeanors (8958) as compared to felonies (18,963), see *National Inventory*, *supra* note 84 (follow arrow hyperlink; then select “Search Multiple Jurisdictions”; then select “Any Misdemeanor” under “Offenses” and compare that result to “Any Felony”).

<sup>155</sup> See *Cheff v. Schnackenberg*, 384 U.S. 373, 379 (1966) (explaining that actual petty offenses max out punishment at six months).

<sup>156</sup> See John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 1–3 (2013) (describing how the legal system defines the seriousness of a case solely based on the fact incarceration); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325 (2012) (“The legal system devalues misdemeanor convictions . . . explicitly by labeling them ‘petty’ and by denying various procedural rights.”).

<sup>157</sup> 18 U.S.C. § 3561 (2012); Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 779–80 (2016).

<sup>158</sup> Natapoff, *supra* note 156, at 1325 (“[T]he individual acquires a criminal record that can follow him or her for a lifetime.”); see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 288–89, 292 (2011).

<sup>159</sup> *National Inventory*, *supra* note 84 (follow arrow hyperlink; then select Florida).

conviction.<sup>160</sup> Thus, a person convicted of any misdemeanor can face potentially 268 civil sanctions, including the denial of dozens of employment licenses, eviction from a mobile home, ineligibility to serve as someone's guardian, and expulsion from a Florida college.<sup>161</sup> These civil consequences of a conviction are not characterized by proportionality or finality.

The fact that hundreds of civil consequences attach to misdemeanors is significant because, as many commentators have noted, misdemeanor courts are “broken” and in “crisis.”<sup>162</sup> And the majority of cases are actually misdemeanor cases—a number that is growing.<sup>163</sup> In each of the seventeen state courts systems examined in 2010, over 64% of the criminal caseloads were misdemeanor cases.<sup>164</sup>

Civil sanctions are also imposed without notice. Because they are not a part of criminal sentencing, no notice of civil sanctions is offered prior to or at sentencing, prompting one scholar to call civil consequences “invisible punishments.”<sup>165</sup> Defendants are not the only ones who do not know the civil consequences of their convictions. Civil disability statutes “have been promulgated with little coordination in disparate sections of state and federal codes, which makes it difficult for anyone to identify all of the penalties and

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<sup>160</sup> *Id.*

<sup>161</sup> For a list of laws authorizing these denials, see *National Inventory*, *supra* note 84 (follow arrow hyperlink; then select Florida; then select “Any Misdemeanor” under “Offenses”).

<sup>162</sup> See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), <https://www.nacdl.org/reports/misdemeanor/>; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (“There is a misdemeanor crisis in the United States.”).

<sup>163</sup> Roberts, *supra* note 158, at 280–82 (2011) (citing a recent study that “estimated that the volume of misdemeanor cases nationwide has risen from five to more than ten million between 1972 and 2006”). There is a growing literature on the impact of misdemeanor courts on defendants. See, e.g., Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1752–54 (2013); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 464–66 (2007); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 283–86 (2009); John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 20 (Erik Luna & Marianne L. Wade eds., 2012); Natapoff, *supra* note 156, at 1315–17.

<sup>164</sup> ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), [http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp\\_dec.ashx](http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp_dec.ashx) (also showing that in North Carolina, Arizona, and Washington, the percentage of misdemeanor cases were 92%, 89%, and 87%, respectively).

<sup>165</sup> Travis, *supra* note 12, *passim*; see also Roberts, *supra* note 163, at 306–07 (explaining that in many jurisdictions, pleas and sentencing for misdemeanors happen at an arraignment, offering a defendant little time for legal counsel before a plea).

disabilities that may be triggered by a criminal record for a certain offense.”<sup>166</sup> This lack of notice is inconsistent with the Supreme Court’s decision in *Padilla v. Kentucky*, which requires notice of at least certain civil consequences—those affecting immigration status—prior to sentencing.<sup>167</sup> In *Padilla*, the majority found deportation to be such a severe, entangled, and integral consequence of the defendant’s conviction that a defendant has not received the effective counsel guaranteed by the Sixth Amendment unless his attorney has advised him of it.<sup>168</sup> After *Padilla*, defense attorneys have to inform defendants of this civil consequence even though deportation is not a part of the criminal sentence.<sup>169</sup> The decision continues to raise questions about whether other “invisible punishments” give rise to constitutionally required notice.<sup>170</sup>

Regardless of whether it is unconstitutional, though, a lack of notice is unjust.<sup>171</sup> The Reintegrative State would align civil sanctions with the characteristics of just punishment by making them temporary and proportional to the offense, and giving defendants notice of them prior to sentencing.

### 3. *Economic Rationale*

Perhaps the most politically compelling rationale for reintegration is that reintegrative reforms could reduce the exploding costs of state criminal justice budgets. From 1977 to 2010, as the prison population in the United States grew from 300,000 to 1.5 million, the annual cost of corrections rose to \$75 billion.<sup>172</sup>

These costs have been crippling for some states, especially after the recent financial crisis that dramatically shrunk their budgets.<sup>173</sup> As a result, prison

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<sup>166</sup> *Project Description*, *supra* note 16; Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 678 (2008) (“[C]ollateral consequences are scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.”); *see also* Pinard, *supra* note 12, at 639 n.91.

<sup>167</sup> 559 U.S. 356, 373–74 (2010).

<sup>168</sup> *Id.* at 374.

<sup>169</sup> *See id.* at 364.

<sup>170</sup> Travis, *supra* note 12, at 15–17.

<sup>171</sup> ABA STANDARDS, *supra* note 15, at 25–28.

<sup>172</sup> Cecilia Klingele, *Criminal Law: Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1016–17, 1017 n.7 (2013); *see also* JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

<sup>173</sup> Klingele, *supra* note 172, at 1017.

populations in some states exceed prison or budget capacities.<sup>174</sup> The most vivid example of overcrowding is California's prison system, which was designed to house 80,000 inmates, but by 2010 housed double that.<sup>175</sup> In *Plata v. Brown*, the Supreme Court found this excessive prison population a violation of the Eighth Amendment, because inmates could not access adequate medical resources.<sup>176</sup> But this problem is not unique to California.

Reintegrative approaches can reduce the cost of prison systems by encouraging states to shift resources from incarceration to community supervision, which is significantly cheaper.<sup>177</sup> As reflected in the state statutes described in Part II, many states already see this potential, and are funding an expansion and diversification of their community supervision dockets.<sup>178</sup> Through the federal Justice Reinvestment Initiative, states are incentivized to reduce prison populations, and the seventeen participating states project savings of up to \$4.6 billion.<sup>179</sup> Some states are funding evidence-based programs that design supervision around risk assessments.<sup>180</sup> For example, officers with people placed as high risk would have lower caseloads and require more individual monitoring.<sup>181</sup> Other states are replacing technical violations with administrative sanctions because technical violations, not new crimes, accounted for almost 20% of the population who reoffended in 1998.<sup>182</sup>

The shift to community alternatives to prison is a reintegrative approach because it reduces the disruption of a person's life. A person can continue to work and keep family ties, two factors that encourage desistance from crime. Reintegration policies that lower barriers to employment, housing, and education have the potential to encourage desistance and lower recidivism, which can in turn reduce states' criminal justice budgets long term.

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<sup>174</sup> VERA INST. OF JUSTICE, THE POTENTIAL OF COMMUNITY CORRECTIONS TO IMPROVE SAFETY AND REDUCE INCARCERATION 4 (2013), <http://archive.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>.

<sup>175</sup> *Brown v. Plata*, 563 U.S. 493, 502 (2011).

<sup>176</sup> *Id.* at 507–08 (citing the district court's finding that constitutionally deficient medical care had fatal consequences, with one inmate dying every six to seven days).

<sup>177</sup> Klingele, *supra* note 172, at 1019.

<sup>178</sup> *See infra* Part II.B.

<sup>179</sup> W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 76 (2014).

<sup>180</sup> VERA INST. OF JUSTICE, *supra* note 174, at 26.

<sup>181</sup> *Id.* at 18.

<sup>182</sup> *Id.* at 13–14.

#### 4. Racial Equity Rationale

A central critique of the criminal justice system is that the system is fraught with conscious and unconscious racial bias at every point of discretionary contact with a defendant, from arrest to sentencing.<sup>183</sup> The recent and overdue attention to police shootings of young black men evidences this point.<sup>184</sup> After reviewing our criminal justice system's reliance on the discretion of police, prosecutors, and judges, William Stuntz concluded that "[d]iscretionary justice too often amounts to discriminatory justice."<sup>185</sup> The continuing consequences of a conviction and the stigma of a criminal record perpetuate that discrimination. By removing them, the Reintegrative State helps remedy it.

As early as *Yick Wo v. Hopkins*<sup>186</sup> in 1886, the Supreme Court has decided cases challenging racial bias in prosecutorial discretion and sentencing.<sup>187</sup> For example, in *Batson v. Kentucky*,<sup>188</sup> holding that the use of the peremptory challenges by prosecutors purposefully to remove African Americans from juries violates the Equal Protection Clause of the Fourteenth Amendment, Justice Marshall explained in his concurrence:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.<sup>189</sup>

And commenting on *McCleskey v. Kemp*,<sup>190</sup> where the court rejected "stark statistical evidence of race discrimination in the implementation of the death penalty,"<sup>191</sup> Justice Scalia, who agreed with the majority, explained:

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<sup>183</sup> Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16–18 (1998) (discussing the role of race and racism in prosecutorial decisions). The following discussion of Supreme Court jurisprudence in my article draws on the arguments made by Angela Davis.

<sup>184</sup> See, e.g., Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, but No*, *WASH. POST* (July 26, 2016, 6:41 AM), <https://www.washingtonpost.com/amphtml/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/>.

<sup>185</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5 (2011).

<sup>186</sup> 118 U.S. 356 (1886) (finding racial discrimination in violation of the Fourteenth Amendment because of prosecutorial discretion); Davis, *supra* note 183, at 44–45.

<sup>187</sup> See Davis, *supra* note 183, at 42–48 (discussing the Supreme Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996), which failed to find proof of racial bias in prosecutorial decisions).

<sup>188</sup> 476 U.S. 79, 89 (1986).

<sup>189</sup> *Id.* at 106 (Marshall, J., concurring).

<sup>190</sup> 481 U.S. 279 (1987).

<sup>191</sup> Davis, *supra* note 183, at 48.



[I]t is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable[.] I cannot honestly say that all I need is more proof.<sup>192</sup>

Even when they do not find discriminatory intent, these Supreme Court cases underscore that the “dominating feature of the American criminal justice system is its deep racial disparities.”<sup>193</sup> These disparities persist today. African-American and Latino men are three times more likely to be searched during a traffic stop than white men.<sup>194</sup> African-Americans make up 37% of the prison population but only 13.6% of the overall population.<sup>195</sup> The Bureau of Justice Statistics estimates that one in three African-American men and one in six Latino men will be incarcerated over the course of their lifetimes, compared to one in seventeen white men.<sup>196</sup>

The data on drug crimes presents a striking example of this race disparity. African Americans are more likely to be prosecuted and sentenced for drug crimes, they are not more likely than people of other races to commit drug crimes.<sup>197</sup> For example, as to marijuana use, African Americans and white Americans report roughly equal use, African Americans are four times more likely to be incarcerated for marijuana possession, a minor, non-violent crime.<sup>198</sup> And as calculated in 2010, states spend roughly about \$3.6 billion in enforcing marijuana possession laws.<sup>199</sup>

Given this racial disparity in the criminal justice system, a criminal record disproportionately stigmatizes people of color, a stigma that affects the families

<sup>192</sup> *Id.* at 50 (quoting Justice Scalia’s Memorandum to the Conference, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811)).

<sup>193</sup> Roberts, *supra* note 114, at 331 (describing the disproportionate impact of race).

<sup>194</sup> *Traffic Stops*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=702> (last visited Feb. 4, 2017).

<sup>195</sup> E. ANN CARSON, DOJ, NO. NCJ 247282, PRISONERS IN 2013 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

<sup>196</sup> SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

<sup>197</sup> Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002).

<sup>198</sup> *The War on Marijuana in Black and White*, ACLU, <https://www.aclu.org/report/war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white> (last visited Mar. 4, 2016); *see also* Roberts, *supra* note 114, at 331 (“Marijuana possession is a particularly important example because of the minor, victimless nature of the crime (and of course, it is not a crime in a growing number of jurisdictions) . . .”).

<sup>199</sup> *The War on Marijuana in Black and White*, *supra* note 198.

and communities of those with records.<sup>200</sup> In finding employment, this stigma is profound. One study using testers applying to hundreds of entry-level jobs<sup>201</sup> showed racial bias at multiple points of interaction during the application process, finding that African-American applicants were 50% less likely to get callbacks than equally qualified white applicants.<sup>202</sup> African-American and Latino applicants with no criminal record “fared no better than a white applicant just released from prison.”<sup>203</sup>

Recognizing the double penalty of race and record, the EEOC issued Enforcement Guidance in 2012 about the “use of an individual’s criminal history in making employment decisions . . . under Title VII of the Civil Rights Act.”<sup>204</sup> This guidance, which has been widely used by both job seekers and employers alike, gives examples of unlawful discriminatory uses of criminal records.<sup>205</sup> One example covers when employers cannot treat applicants with the same criminal-history records differently based on race or other protected class status.<sup>206</sup> A second example covers when an employer’s reliance on criminal records cannot lead to an exclusion of applications disproportionately by race unless the employer can show that the exclusion is job related or consistent with business necessity.<sup>207</sup> Although none of the 2012 guidance was new, the repackaging brought significant attention to the illegal use of convictions as the sole reason for job rejections and the potential of illegally using race in a disproportionate manner.<sup>208</sup>

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<sup>200</sup> Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 965, 969 (2013) (noting that “poor individuals of color disproportionately bear the mark of a criminal record” and that these burdens “disproportionately disrupt families and communities of color”).

<sup>201</sup> Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 781 (2009). Some of the jobs included in the study were a line cook, automobile salesman, warehouse worker, and clerk at an electronics store. *Id.* at 787–89.

<sup>202</sup> *Id.* at 792. A prior study by Pager in 2001 in Milwaukee found similar results: a criminal record significantly decreased an applicant’s likelihood for a callback, by a rate of 50% for white applicants, and 60% for black applicants. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 67, 69 (2007). This study also showed that black applicants without a record were equally as likely to get a job as white applicant with a criminal record. *Id.* at 90–91.

<sup>203</sup> Pager, Western & Bonikowski, *supra* note 201, at 792–93.

<sup>204</sup> OFFICE OF LEGAL COUNSEL, EEOC, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2012).

<sup>205</sup> *Id.*; see also Pinard, *supra* note 200, at 983.

<sup>206</sup> OFFICE OF LEGAL COUNSEL, *supra* note 204, at 6–8 (2012).

<sup>207</sup> *Id.* at 8.

<sup>208</sup> Pinard, *supra* note 200, at 983 (“The revised guidance . . . has been used in attempts to educate employers about the illegality of imposing blanket bans on hiring individuals with arrest or conviction records.”).

The use of criminal records has an economic and social cost for poor communities of color. Incarceration “has broken families, . . . eroded economic strength, soured attitudes toward society, and . . . increased rather than decreased crime.”<sup>209</sup> By removing or mitigating the impact of criminal records, the Reintegrative State would contribute to reducing this disparate racial impact and to giving greater credibility to the criminal justice system overall.

### 5. *Moral Rationale*

The Pope’s call for “the rehabilitation of those convicted of crimes”<sup>210</sup> echoes concepts of redemption and forgiveness that are deeply rooted in America’s Judeo-Christian traditions.<sup>211</sup> Core values dating back to our colonial past include notions of starting over, moving to a new frontier, and wiping a slate clean.<sup>212</sup> Even in 2004, President George W. Bush, in his State of the Union address, described America as “the land of second chance,” explaining that “when the gates of the prison open, the path ahead should lead to a better life.”<sup>213</sup>

The values of redemption and forgiveness are reflected in the long-standing powers granted to the executive branch to pardon and grant clemency. Alexander Hamilton explained the importance of pardons in the *Federalist Papers*:

[T]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.<sup>214</sup>

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<sup>209</sup> TODD R. CLEAR, *IMPRISONING COMMUNITIES, HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 5 (2007).

<sup>210</sup> See Berman, *supra* note 1.

<sup>211</sup> See, e.g., Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 1–2 (2008) (citing places in the Torah, Bible, and Qur’an where forgiveness is a central tenant).

<sup>212</sup> Meg Leta Ambrose, Nicole Friess & Jill Van Matre, *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 99, 122–23 (2013) (explaining that core American values from the pioneer histories, including wiping a slate clean and starting anew, “are in stark contrast with existing data production, collection, retention, and retrieval practices” associated with criminal records).

<sup>213</sup> Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004).

<sup>214</sup> See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1360 (2008) (quoting THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Barkow explains that “[i]ndeed, executive clemency is even more relevant today than in the past because of the decline of parole and probation and the increasingly harsh collateral consequences of incarceration.” *Id.*

Admittedly, those pardon and clemency powers have rarely been exercised by the President or by state governors (in contrast to their exercise in European countries).<sup>215</sup> Still, legal scholars have consistently looked to redemption as a way to justify removing obstacles to reentry.<sup>216</sup> Forgiveness is appealing because it recognizes the wrongful conduct as distinct from the actor, and “paves the way for the offender to return to the moral fold.”<sup>217</sup> Although America’s criminal justice system has consistently moved away from forgiveness and redemption, reintegration could be the vehicle for incorporating these principles of mercy without displacing the dominant penal principle of retribution.

## II. THE STATE INTEREST IN REINTEGRATION

For the first time in the reentry literature, Part II identifies exactly how reintegration surfaces as a state interest in three different types of legislation: (1) statutes specifying the state’s criminal justice goals, (2) statutes governing the state’s paroling and probation function, and (3) statutes establishing social services reentry programs. Some states have passed only one type of reintegration legislation; others have passed all three because these visions are consistent with each other. The primary difference is that they pinpoint reintegration at temporally different places in the criminal justice system.

### A. *An Integral Part of a State’s Penal Interests*

Taking a legislative approach, several states have explicitly included reintegration as a primary criminal justice penal objective, sometimes directly alongside longstanding principles of punishment like retribution,<sup>218</sup>

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<sup>215</sup> See Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 3 (2015); see also MARGARET COLGATE LOVE, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, TOWARD A MORE PERFECT UNION: A PROGRESSIVE BLUEPRINT FOR THE SECOND TERM 3 (2013), [https://www.acslaw.org/sites/default/files/Love\\_-\\_Reinvigorating\\_the\\_Federal\\_Pardon\\_Process\\_0.pdf](https://www.acslaw.org/sites/default/files/Love_-_Reinvigorating_the_Federal_Pardon_Process_0.pdf) [<http://perma.cc/GH4K-RF9R>]; Paul Rosenzweig, *A Federalist Conception of the Pardon Power*, 89 HERITAGE FOUND. LEGAL MEMORANDUM, Dec. 4, 2012, at 1, 2, <http://www.heritage.org/research/reports/2012/12/a-federalist-conception-of-the-pardon-power>.

<sup>216</sup> See THOMPSON, *supra* note 6; Blumstein & Nakamura, *supra* note 124, at 328–29; Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 759 (2011).

<sup>217</sup> Roberts, *supra* note 114, at 339 (quoting Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 329 (2007)).

<sup>218</sup> See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992) (defining retribution as “a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity”).

incapacitation,<sup>219</sup> and deterrence.<sup>220</sup> Many states commit to reintegrate because they intend for successful reintegration to reduce recidivism rates,<sup>221</sup> which is consistent with the state's function to protect society from future offenses. Reintegration can serve as an important bridge from punishment to restoration of citizenship, allowing the state to reduce civil punishment associated with convictions while protecting law-abiding state residents.

For example, Louisiana's statute declaring the "goals of incarceration" was amended recently to add the concept of reintegration. Originally, the goals listed were "[t]o protect the citizens of the state of Louisiana, . . . [t]o punish conduct which is defined as criminal, . . . [and] [t]o deter future [illegal] conduct."<sup>222</sup> In the past decade, though, the legislature added a fourth goal: "[t]o rehabilitate offenders so that they may be reintroduced into society as law-abiding citizens."<sup>223</sup>

The statute expressly "recognizes that when ex-offenders return to their communities and families, they face numerous challenges to their successful reentry into the community. Among these challenges, the most difficult to overcome are the barriers to employment."<sup>224</sup> Given this recognition, the statute concludes that it "shall be the public policy of [the] state to promote initiatives that will provide ex-offenders with the support and services necessary to allow them to find employment and make healthy connections with their families and communities."<sup>225</sup> Thus, the goal of reintegration, not just punishment and rehabilitation, is explicitly defined and included as a part of Louisiana's criminal justice goals.

In defining the general purposes of its criminal laws, the New York legislature added reintegration in 2006 to the more obvious objectives of offering people "fair warning" about what constitutes a crime, defining the

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<sup>219</sup> See David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 917 (2013) ("Incapacitation is the simplest of the mechanisms by which incarceration impacts crime. The physical separation of inmates from the general population precludes those inmates from committing crime on the public.").

<sup>220</sup> See *id.* at 916 (defining deterrence as "the reduction in crime that occurs due to the expectation of punishment").

<sup>221</sup> See, e.g., LA. STAT. ANN. § 15:745.1(C) (2015) (declaring rehabilitation a state policy aimed at "break[ing] the cycle of criminal recidivism").

<sup>222</sup> Act of May 30, 2014, H.B. No. 781, 2014 La. Advance Legis. Serv. 342 (codified at LA. STAT. ANN. § 15:745.1(C)).

<sup>223</sup> LA. STAT. ANN. § 15:745.1(A)(4) (2015).

<sup>224</sup> § 15:745.1(B).

<sup>225</sup> § 15:745.1(D).

“mental state which constitute[s] each offense,” and “differentiat[ing] . . . between serious and minor offenses.”<sup>226</sup> The general purposes of New York’s criminal laws now include “the rehabilitation of those convicted[] [and] the promotion of their successful and productive reentry and reintegration into society.”<sup>227</sup>

Legislation in Colorado and New Jersey also endorses a direct link between a fair criminal justice system and reintegration. In Colorado, the “general assembly finds and declares that . . . [s]uccessful offender reentry into society is critical to the criminal justice system.”<sup>228</sup> In New Jersey, the legislature “finds and declares that” preparing people for “release and reintegration into the community . . . encourage[s] a more unified system of criminal justice.”<sup>229</sup>

Similarly, in Connecticut, the purposes of sentencing include “the provision of meaningful and effective rehabilitation and reintegration of the offender.”<sup>230</sup> In Kansas, the statutory role of prisons is “to rehabilitate, train, treat, educate and prepare persons convicted of felony in this state for entry or reentry into the social and economic system of the community.”<sup>231</sup> In New Jersey, the purpose and construction section of the statutes governing its Department of Corrections explains that prisons “shall . . . provide for the custody, care, discipline, training and treatment of adult offenders” to prepare them for “reintegration” into the community.<sup>232</sup>

These statutes have been passed by states representing a range of political perspectives, in different corners of the country, with large and small populations. These states have not only recognized that they have an interest in reintegration, but have also drawn a direct link between reintegration and long-held public policy goals of the state’s criminal justice system, including protecting public safety and reducing costs of the criminal justice system.

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<sup>226</sup> N.Y. PENAL LAW § 1.05 (McKinney 2009). These objectives connect to characteristics of fair punishment including notice of the criminal act and its elements, and proportionality to the seriousness of the crime.

<sup>227</sup> *Id.*

<sup>228</sup> 2009 Colo. Sess. Laws 2216.

<sup>229</sup> N.J. STAT. ANN. § 30:1B-3 (West 2008).

<sup>230</sup> CONN. GEN. STAT. § 54-300 (2017).

<sup>231</sup> KAN. STAT. ANN. § 75-5201 (2016).

<sup>232</sup> N.J. STAT. ANN. § 30:1B-3.

### B. *Establishing Reintegration as a Function of Parole and Probation*

In addition to states that now include reintegration as a goal in their criminal justice statutes, some states have passed statutes including reintegration as a part of their parole or probation process, which is a part of the state's executive function. The connection between reintegration and state punishment is most apparent in these statutes.

Historically, parole and probation officers have been responsible for a person's reintegration after conviction. But this role has shifted dramatically over time.<sup>233</sup> Prior to the seventies, parole and probation officers were similar to social workers, often referred to as "change agents" and tasked with diagnosing and rehabilitating probationers and parolees.<sup>234</sup> A sentence of probation or a decision to parole a person from prison was seen as a form of leniency.<sup>235</sup> Since the 1980s, the focus of both parole and probation has become more punitive, mirroring the more retributive approach to sentencing generally.<sup>236</sup> Parole and probation officers manage a high volume of individuals and are tasked primarily with monitoring behavior and compliance with supervision conditions to ensure public safety, rather than to aid in rehabilitation.<sup>237</sup>

Adding reintegration as a goal of parole and probation signals a shift in the goals for the paroling and probation authorities, establishing a dual function of supervision and reintegration. New Jersey's parole supervision legislation requires that each parolee "be assigned a level of supervision appropriate to maintain public safety, reduce the likelihood of recidivism and to ensure the parolee's positive reintegration into the community."<sup>238</sup> In Alabama, paroling authorities are required to set up rules and conditions to provide both "intensive supervision" and "placement of an inmate in the community" with the goal of aiding "the reintegration of the inmate into society."<sup>239</sup> Maine's parole legislation is similarly unequivocal: it defines parole as "a system designed to provide *both* supervision *and* assistance to the parolee in his re-establishment into the community."<sup>240</sup> North Carolina's statute recognizes that "post-release supervision" has many objectives: "to monitor and control the prisoner in the

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<sup>233</sup> ALARID & DEL CARMEN, *supra* note 37, at 91; PETERSILIA, *supra* note 6, at 77.

<sup>234</sup> ALARID & DEL CARMEN, *supra* note 37, at 91.

<sup>235</sup> *Id.*

<sup>236</sup> *See* PETERSILIA, *supra* note 6, at 90.

<sup>237</sup> *See* ALARID & DEL CARMEN, *supra* note 37, at 91.

<sup>238</sup> N.J. ADMIN. CODE § 10A:72-2.2 (2017).

<sup>239</sup> ALA. CODE § 15-18-112 (2011).

<sup>240</sup> 03-208-001 ME. CODE R. § I.A (LexisNexis 2017) (emphasis added).

community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education."<sup>241</sup>

Probation differs from parole in that probation offers a possibility for supervision in the community as an alternative to a prison sentence. In 2013, for example, almost five million people were on state or federal probation or parole.<sup>242</sup> Many state statutes also include reintegration in their state's probation function. California's probation statute, for example, asserts that the "primary considerations in the granting of probation" include "[t]he safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation," and "the interests of justice, including punishment, *reintegration* of the offender into the community, and enforcement of conditions of probation."<sup>243</sup>

Some state statutes offer more explicit instruction about the reintegrative obligations of parole and probation authorities. Arkansas's legislation requires the parole board to "establish written policies and procedures . . . designed to enhance public safety and to assist the parolees in reintegrating into society."<sup>244</sup> Parole supervision in Illinois includes "a continuum of treatment and program services to assist the offender with successful reintegration into society."<sup>245</sup> Colorado's division of parole "shall" provide "assistance in securing employment, housing, and such other services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety."<sup>246</sup>

A growing number of states also endorse a shift from prison sentences to community-based and evidence-based alternatives that function like probation and parole and add a risk assessment test to determine the needed level of supervision. Legislation supporting these non-prison alternatives directly links reintegration to cost savings.<sup>247</sup>

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<sup>241</sup> N.C. GEN. STAT. ANN. § 15A-1368 (2011).

<sup>242</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, DOJ, No. NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> ("About 1 in 51 adults was on probation or parole at yearend 2013, compared to 1 in 110 adults incarcerated in prison or local jail.").

<sup>243</sup> CAL. PENAL CODE § 1202.7 (West 2017) (emphasis added).

<sup>244</sup> ARK. CODE ANN. § 16-93-712 (2017).

<sup>245</sup> ILL. ADMIN. CODE tit. 20, § 470.70 (2017).

<sup>246</sup> COLO. REV. STAT. § 17-22.5-403 (2016).

<sup>247</sup> See, e.g., CAL. PENAL CODE § 3450 (West 2017).



For example, the California legislature explains its shift to new evidence-based and community-based initiatives after conviction as a way to “improve public safety outcomes among adult felon parolees and . . . facilitate their successful reintegration back into society,” while also “manag[ing] and allocat[ing] criminal justice populations more cost effectively.”<sup>248</sup> A California legislative finding supports this goal: “Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.”<sup>249</sup> Community-based punishment, on the other hand, can include a range of less-expensive alternatives, from “[s]hort-term flash incarceration in jail” for less than ten days, to electronic monitoring and work-release programs.<sup>250</sup> Supervision is cheaper for the state and less disruptive to a person’s life, requiring fewer intensive reentry resources.

In Mississippi, the legislature formed a council to “create effective strategies to assist former inmates in their return to the general population, to reduce the recidivism rates of inmates, to increase public safety, and to reduce budgetary constraints presently created by prison-related costs.”<sup>251</sup> States including Kentucky, Illinois, New Hampshire, and Washington passed statutes that “codified the use of a risk and needs assessment tool” to justify increased community placement and supervision proportionate to risk of re-offense.<sup>252</sup>

While only about 10% of the entire criminal justice system budget goes to probation or parole, two-thirds of the individuals in the criminal justice system fall under parole or probation’s supervision.<sup>253</sup> This is a significant factor in whether the authorities tasked with reintegration can achieve that goal.

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<sup>248</sup> *Id.*

<sup>249</sup> PENAL § 17.5. California’s legislative findings about recidivism support that the “period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship.” PENAL § 3074.

<sup>250</sup> *Id.*

<sup>251</sup> MISS. CODE ANN. § 47-7-101 (2017).

<sup>252</sup> CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 12 (2012), [http://www.vera.org/sites/default/files/resources/downloads/Price\\_of\\_Prisons\\_updated\\_version\\_072512.pdf](http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf).

<sup>253</sup> PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS, 1 (2009), <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

C. *Developing Social Services Programs and a Judicial Function that Enables Reintegration*

The most common place for reintegration to surface in state legislation is in statutes that authorize funding for state, local, or community-based reentry initiatives. Many state statutes were prompted by Congress's passage of the 2007 Second Chance Act (SCA),<sup>254</sup> which appropriated over \$475 million to support reentry programs that "help people returning from prison and jail to safely and successfully reintegrate into the community."<sup>255</sup> This Act was introduced by President Bush's 2004 State of the Union address<sup>256</sup> and garnered significant bipartisan support.<sup>257</sup> Mentoring programs and reentry demonstration programs serve the vast majority of people under the SCA grants, but other programs include career assistance programs, mental health and drug treatment programs, and reentry courts.<sup>258</sup>

Many states fund similar programs to assist in reintegrating people with convictions. Some, like Montana, Oregon, and Tennessee, require reentry planning as an essential part of release.<sup>259</sup> Nebraska, Pennsylvania, Ohio, and Vermont offer examples of states with legislation requiring prisons to hire reentry coordinators or contract with outside organizations to work with inmates on reentry planning.<sup>260</sup> In these states, reintegration begins before the inmate is released.

Texas specifically requires the department of corrections to "develop and adopt a comprehensive plan [for each inmate] to reduce recidivism and

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<sup>254</sup> For an analysis of SCA, see generally Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL., Summer 2009, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2344739](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344739). In April 2008, the Second Chance Act was signed into law to authorize federal, state, and local grant programs to fund education, employment, and alcohol and drug treatment services for people reintegrating into communities from prison. *Id.*; Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008). The Act also requires states and localities receiving funds to examine their statutory barriers to reentry in a variety of areas.

<sup>255</sup> *The Second Chance Act*, BUREAU JUST. ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=90#horizontalTab4](https://www.bja.gov/ProgramDetails.aspx?Program_ID=90#horizontalTab4) (last visited Jan. 24, 2017); see also LOVE, ROBERTS & KLINGELE, *supra* note 83, § 9:2, at 505.

<sup>256</sup> See *supra* Part I.C.5.

<sup>257</sup> Rob Portman & Danny K. Davis, *Reauthorizing the Second Chance Act Is Essential to More Successful Prisoner Reentry*, ROLL CALL (Oct. 6, 2015, 8:29 AM), [http://www.rollcall.com/news/reauthorizing\\_the\\_second\\_chance\\_act\\_is\\_essential\\_to\\_more\\_successful-244058-1.html](http://www.rollcall.com/news/reauthorizing_the_second_chance_act_is_essential_to_more_successful-244058-1.html) (discussing Republican senator from Ohio and Democratic representative from Illinois urging passage of the bill reauthorizing SCA).

<sup>258</sup> *Id.*

<sup>259</sup> MONT. CODE ANN. § 46-23-901 (2015); OR. ADMIN. R. 291-207-0030 (2017); TENN. CODE ANN. § 41-1-412 (2016).

<sup>260</sup> NEB. REV. STAT. § 83-903 (2014); OHIO REV. CODE ANN. § 5120.034 (LexisNexis 2017); 37 PA. CODE § 94.2 (2017); VT. STAT. ANN. tit. 13, § 3272 (2017).

ensure . . . successful reentry and reintegration.”<sup>261</sup> In Ohio, the prison facilities fall under the Department of Rehabilitation and Correction, emphasizing the dual role of prisons to supervise and reintegrate. The Ohio reentry statute requires “a written reentry plan for the inmate to help guide the inmate’s rehabilitation program during imprisonment, to assist in the inmate’s reentry into the community, and to assess the inmate’s needs upon release.”<sup>262</sup> Louisiana also developed a holistic approach through the Offender Reentry Support Pilot Program, offering a range of services to inmates, including an education and job skills plan, employment preparation prior to release, and help with housing, substance abuse treatment, and family reunification.<sup>263</sup>

Some state funding for reintegration provides a more targeted approach, offering post-incarceration mental health services,<sup>264</sup> drug treatment programs,<sup>265</sup> housing assistance,<sup>266</sup> and job search help.<sup>267</sup> For example, in Colorado, appropriations were allocated for “[c]ommunity-based mental health consultants to provide assistance with case planning and to consult with and train community parole officers concerning how to secure appropriate and available mental health services for parolees in the community.”<sup>268</sup> In New Mexico, the legislature focused on developing a program that offered early release for inmates willing to enter a drug court program.<sup>269</sup> In addition to their role in problem-solving drug courts, which often have a reentry component, judges have played a significant role in reintegration more directly. As Part III describes in greater detail, judges are often responsible under state statutes for mitigating collateral consequences at sentencing, and granting expungement petitions and certificates that relieve civil disabilities triggered by a conviction.<sup>270</sup> In addition,

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<sup>261</sup> TEX. GOV’T CODE ANN. § 501.092 (West 2017).

<sup>262</sup> OHIO REV. CODE ANN. § 5120.113 (LexisNexis 2017).

<sup>263</sup> LA. STAT. ANN. § 15:745.2 (2016).

<sup>264</sup> See CAL. PENAL CODE § 17.5 (West 2017); COLO. REV. STAT. § 17-33-101 (2016); HAW. REV. STAT. ANN. § 353H-4 (2016); IDAHO ADMIN. CODE r. 06.02.03.012 (2017); KAN. STAT. ANN. § 75-52,112 (2017); NEB. REV. STAT. § 83-903 (2017); N.Y. CORRECT. LAW § 71-a (McKinney 2014); WASH. REV. CODE § 72.09.280 (2017); CAL. CODE REGS. tit. 15, § 3610 (2017).

<sup>265</sup> See CONN. GEN. STAT. § 18-81 (2017); N.Y. CORRECT. LAW § 71-a (McKinney 2014); OHIO REV. CODE ANN. § 5120.035 (LexisNexis 2017); 61 PA. CONS. STAT. ANN. § 4105 (2016).

<sup>266</sup> See ARK. ADMIN. CODE 004.00.2-892; CAL. PENAL CODE § 2985 (West 2017); WASH. REV. CODE § 72.09.280 (2017).

<sup>267</sup> See, e.g., CAL. PENAL CODE § 17.5 (West 2017); LA. STAT. ANN. § 15:827.1 (2016); 103 MASS. CODE REGS. 464.01 (2016); NEB. REV. STAT. § 83-904 (2017); WASH. REV. CODE § 72.09.280 (2017).

<sup>268</sup> COLO. REV. STAT. § 17-33-101 (2016).

<sup>269</sup> N.M. STAT. ANN. § 31-21-27 (2016).

<sup>270</sup> See *supra* Part III.A–C.

Reentry Courts were piloted in 2000 through a federal reentry grant initiative.<sup>271</sup> Currently, many state and federal jurisdictions have established reentry courts to directly involve judges in helping people reassimilate after their sentence is complete.<sup>272</sup>

These examples by no means offer a comprehensive list of state grants for reintegrating inmates using social services programs or the judicial role in reintegration. But they show that federal and state governments already fund a patchwork of different programs and strategies to assist individuals with reintegrating back into society.

### III. REINTEGRATIVE LEGISLATION IN THREE PHASES OF THE CRIMINAL JUSTICE SYSTEM

In addition to expressly identifying reintegration as a state interest, states have incorporated reintegration approaches in three phases of the criminal justice system: pre-conviction, at sentencing, and after a criminal sentence is served. This Part presents concrete examples of how states reintegrate individuals. In the public sphere, this often takes one of three forms: (1) pre-conviction relief mechanisms that avoid the creation of a criminal record altogether; (2) sentencing relief mechanisms that mitigate or eliminate the impact of state-created collateral consequences post-conviction; and (3) post-conviction relief mechanisms that expunge criminal records entirely or certify a person's rehabilitation or reintegration. Extending beyond the public sphere, a growing number of states have passed laws that limit a private employer's ability to discriminate against people with convictions.

In addition to describing state reintegration mechanisms, this Part also critiques each approach. Ultimately, this Part shows that no single state offers a comprehensive, intentional approach to reintegration. The approaches already in place, however, inform and frame a more holistic Reintegrative State described and advocated for in Part IV.

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<sup>271</sup> Melissa A. Knopp, *Breaking the Cycle: Ohio Reentry Courts*, 4 Ohio N.U. L. Rev. 738, 748–50 (2015).

<sup>272</sup> *Id.*

### A. *Pre-Conviction Relief Mechanisms*

Pre-conviction relief occurs when a person is arrested, charged, and at times punished for an offense, but a public criminal record is not created.<sup>273</sup> There is no record because ultimately the charges are dismissed, sometimes after some condition of punishment is met. No conviction exists to trigger civil collateral consequences, like the removal of the right to vote or the denial of a state employment license. The absence of a conviction also reduces the chance that private entities like employers, schools, and landlords will discriminate against the person. This state action meets the goals of reintegration because the state has actively created a mechanism to avoid a criminal record, eliminating the need for a person to *reintegrate* for relatively minor crimes with minor criminal punishments.<sup>274</sup>

State statutes authorize pre-conviction relief in primarily three ways: (1) by incorporating offenses that do not generate a conviction into their penal code; (2) by offering pre-sentence relief mechanisms formally or informally, that result in a dismissal of a charge; and (3) by removing dismissals from criminal records.

#### 1. *Non-Conviction Offenses*

New York's penal code offers an example of the first approach. It creates an offense category labeled "violations" that are distinct from misdemeanors and felonies and are, by definition, not "criminal."<sup>275</sup> Only misdemeanors and felonies prompt the creation of a public criminal record; violations do not.<sup>276</sup> Violations cover minor offenses, other than traffic infractions, punishable mostly by fines or at most by a jail sentence of fifteen days.<sup>277</sup> These violations keep minor offenses like disorderly conduct,<sup>278</sup> trespass,<sup>279</sup> possession of

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<sup>273</sup> When a person is arrested for a crime, the most common process begins with a charging decision by a prosecutor, which is usually followed by plea negotiations with defense counsel. Those negotiations can result in a defendant pleading guilty to a crime, the prosecutor dismissing the charges, or the case going to trial. If a person pleads guilty or is found guilty at trial, she has a conviction on her criminal record.

<sup>274</sup> See, e.g., Anthony Doniger, *Alternative Justice*, 52 BOS. BAR J., Jan./Feb. 2008, at 2, 2.

<sup>275</sup> N.Y. PENAL LAW § 10.00(3), (5) (McKinney 2013).

<sup>276</sup> § 10.00(5).

<sup>277</sup> § 10.00(3) ("'Violation' means an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.").

<sup>278</sup> § 240.20 (McKinney 2009) ("Disorderly conduct is a violation.").

<sup>279</sup> § 140.05 (McKinney 2009) ("Trespass is a violation.").

marijuana,<sup>280</sup> and loitering,<sup>281</sup> off a person's criminal record, thereby preventing collateral consequences. They also offer defendants the possibility to plead higher-level charges down to a non-conviction offense.

Similarly, in Ohio some misdemeanors are labeled by statute as "minor misdemeanor[s]"<sup>282</sup> and do not create a criminal record.<sup>283</sup> Minor misdemeanors are defined by fairly minor punishment, including a fine of less than \$150 and community service.<sup>284</sup> These minor offenses mirror New York's violations and include disorderly conduct,<sup>285</sup> unlawful open containers,<sup>286</sup> public intoxication,<sup>287</sup> and marijuana possession.<sup>288</sup> As one example, the marijuana possession statute makes clear that:

Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege . . . .<sup>289</sup>

Although no criminal record is accessible to the public, the records of arrest and the ultimate disposition of minor misdemeanors or violations are not destroyed. Law enforcement retains this information. These records could be useful to police and prosecutors if the person commits a new offense, and to judges for future sentencing.

Penal statutes that define certain offenses as not worthy of inclusion on a criminal record serve a reintegrative purpose. In most states, the offenses listed as violations in New York or minor misdemeanors in Ohio would be misdemeanor convictions that create a permanent public criminal record. For low-level offenses like loitering or disorderly conduct, the criminal punishment of a \$150 fine, time served, or community service is minor, but the civil collateral effects can last for years or even be permanent. This could make

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<sup>280</sup> § 221.05 (McKinney 2009) ("Unlawful possession of marihuana is a violation . . . .").

<sup>281</sup> § 240.35 (McKinney 2010) ("Loitering is a violation.").

<sup>282</sup> OHIO REV. CODE ANN. § 2901.02(G)(2) (LexisNexis 2017).

<sup>283</sup> § 2953.31 (LexisNexis 2017) ("For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor . . . is not a conviction.").

<sup>284</sup> § 2901.02(G)(2) (A minor misdemeanor is punishable by "a fine not exceeding one hundred fifty dollars, community service . . . or a financial sanction other than a fine . . .").

<sup>285</sup> § 2917.11(E)(2) (LexisNexis 2017) ("[D]isorderly conduct is a minor misdemeanor.").

<sup>286</sup> § 4301.62 (LexisNexis 2017).

<sup>287</sup> § 2917.11(B) (LexisNexis 2017).

<sup>288</sup> § 2925.11(C)(3)(a) (LexisNexis 2017) ("[P]ossession of marihuana is a minor misdemeanor.").

<sup>289</sup> § 2925.11(D).

reintegration for someone with a minor offense who never served jail as difficult as reintegration for someone who is convicted of a felony sentenced to a two-year prison term because both have a criminal record. Employers may not know or care to distinguish between convictions, especially if convictions of any kind expose them to potential negligence-in-hiring lawsuits. Although the criminal punishment is intended to be proportionate to the offense level, state-created civil sanctions are often disproportionate.<sup>290</sup> Avoiding the imposition of civil collateral sanctions in the first place may be more efficient and effective for the Reintegrative State. The next two examples of pre-plea relief serve the same reintegrative objective.

## 2. *Deferred Prosecution*

Another form of pre-conviction relief, referred to by many names, including deferred prosecution, pretrial diversion, or pretrial intervention,<sup>291</sup> can be informal or authorized by statute or court rule.<sup>292</sup> Under deferred prosecution statutes, the defendant does not plead to a charged offense. No criminal judgment is formally entered by a judge. Rather the defense and prosecution agree pre-plea that if a condition is met, the case will be dismissed.<sup>293</sup> Conditions imposed on the defendant can be defined by the statute or negotiated. They can include paying restitution, completing a rehabilitation program, performing community service, or simply not reoffending for a certain period of time.<sup>294</sup> Prosecution is suspended and the case is ultimately dismissed, unless the defendant does not satisfy the conditions (at which time the case can continue to be prosecuted).

Pre-trial diversion programs vary by state. In Tennessee, for example, there is both informal and formal deferred prosecution. A non-statutory disposition sometimes referred to as a “pass and dismiss” exists in some jurisdictions, allowing an informal agreement to exist between the prosecution and defense

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<sup>290</sup> See *supra* Part I.C.2.

<sup>291</sup> 4 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 13.6(a), at 266 (4th ed. 2015).

<sup>292</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:16, at 424–25; see also Debra T. Landis, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant’s Consent to Noncriminal Alternative*, 4 A.L.R. 4th 147, 151 (1981) (“Prosecutors have long employed diversion on an informal, individual basis . . .”).

<sup>293</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:22, at 437.

<sup>294</sup> Landis, *supra* note 292, at 150 (explaining that a diversion is created through “a statute or court rule authorizing pretrial diversion or intervention programs providing for the suspension or dismissal of a criminal prosecution subject to the defendant’s consent to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives” (footnotes omitted)).

that places conditions on the defendant in exchange for dismissing the case.<sup>295</sup> The pretrial diversion statute, however, is very detailed and specific about who is “qualified” for deferred prosecution based on a person’s charge and previous criminal history.<sup>296</sup> Felony charges are not eligible,<sup>297</sup> and the Tennessee Bureau of Investigation certifies each eligible person for diversion. In addition to requiring a ten dollar per month payment, not to exceed two years, the statute requires that the defendant meet at least one of nine conditions, which include not committing another offense, paying court costs, drug testing, or wearing a monitoring device.<sup>298</sup> Once the conditions are met, the judge is required to send an order of dismissal for expungement.<sup>299</sup>

New York’s statute, on the other hand, authorizes the court to enter an “adjournment in contemplation of dismissal” (ACD) that “adjourns” the case “with a view to ultimate dismissal of the accusatory instrument in furtherance of justice.”<sup>300</sup> The prosecution must consent to an ACD, but no reason is required.<sup>301</sup> With the exception of certain charges,<sup>302</sup> ACDs impose no specific conditions on the defendant. If the case is not brought back to the docket within six months or a year, depending on the charge,<sup>303</sup> the case is dismissed and

shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.<sup>304</sup>

Pretrial diversion programs seek to efficiently dispose of cases, “conserving scarce prosecutorial and judicial resources and . . . dealing more effectively with

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<sup>295</sup> See TENN. CODE ANN. §§ 40-15-103, 40-35-313 (2016) (codifying formal judicial diversion and discussing informal prosecutorial diversion); see also *State v. Robinson*, 328 S.W.3d 513, 519 (Tenn. Crim. App. 2010) (“Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor.”).

<sup>296</sup> TENN. CODE ANN. § 40-15-105(a)(1)(B) (2016).

<sup>297</sup> § 40-15-105(a)(1)(B)(iii).

<sup>298</sup> §§ 40-15-105(a)(1)(A), 40-15-105(a)(2).

<sup>299</sup> § 40-15-105(a)(3).

<sup>300</sup> N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2017). The timing of the dismissal depends on the case. Most cases will be dismissed in six months.

<sup>301</sup> PETER PREISER, PRACTICE COMMENTARY, N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2015).

<sup>302</sup> See N.Y. CRIM. PROC. LAW § 170.55(3)–(7).

<sup>303</sup> PREISER, *supra* note 301. The case is not docketed. The speedy trial clock is tolled.

<sup>304</sup> N.Y. CRIM. PROC. LAW § 170.55(8).



certain offenders.”<sup>305</sup> Assuming the defendant committed the charged offense, pretrial diversion offers a real benefit and serves a reintegrative goal by requiring punishment without creating a record.

One potentially problematic result from these pretrial diversion statutes is that an innocent defendant may agree to diversion to avoid any risk of being found guilty at trial, essentially accepting punishment in exchange for the guarantee of a dismissal. A person may feel compelled to take a deferred prosecution if it is required for publically funded drug treatment or mental health programs.<sup>306</sup> Another critique of these statutes is that they are administered in a “haphazard way,” and this discretionary characteristic can lead to treating similarly situated defendants differently.<sup>307</sup>

### 3. *Dismissed Charges, Acquittals, and Nolle Prosecutions*

The third type of preconviction statutory relief is offered through state statutes that expunge or seal dismissed charges, acquittals, and “nolle prossed” charges<sup>308</sup> from public criminal records. State statutes address these non-convictions in three ways. The minority of states and the federal government do not expunge, seal, or remove dismissed charges from a person’s criminal history.<sup>309</sup> For example, in Arizona, a record may note that the charges were dismissed, but this is not automatic or mandatory.<sup>310</sup>

The vast majority of state statutes, however, provide for removal of dismissed cases either automatically or by filing a separate petition to the court. In Hawaii, arrests not leading to a conviction can be expunged as if the person was never arrested.<sup>311</sup> Some of these expansive statutes, like Tennessee’s, are not automatic, but allow a person to petition the court to expunge a dismissal provided that court costs are paid in full.<sup>312</sup>

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<sup>305</sup> LAFAVE, *supra* note 291, § 13.6(a), at 266.

<sup>306</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:22, at 439.

<sup>307</sup> LAFAVE, *supra* note 291, § 13.6(a), at 266.

<sup>308</sup> *See Scheibler v. Steinburg*, 167 S.W. 866, 866 (Tenn. 1914) (defining nolle prosequi as “a formal declaration of record by the prosecuting officer by which he declares that he will no further prosecute the case, either as to some of the counts of the indictment or as to some of the defendants, or all together”).

<sup>309</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:20, at 434. No law for expunging dismissed records exists in Idaho, Montana, North Dakota, or Wisconsin. *Id.* at 434 n.2.

<sup>310</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:20, at 434 n.2.

<sup>311</sup> *Id.* app. A-148.

<sup>312</sup> *See* TENN. CODE ANN. § 40-32-101(a)(1)(A) (2016).

A few statutes allow only a limited expungement of dismissals. A common version is Florida's statute, which removes dismissals only for first offenders.<sup>313</sup> North Carolina authorizes an expungement for a dismissal if a person has no prior felony convictions.<sup>314</sup> Alaska allows a removal of a dismissal only in cases of mistaken identity or false accusation.<sup>315</sup>

Leaving a dismissed conviction on a person's criminal history runs counter to reintegrative goals even if it serves other state interests, like that of deterrence. Although the dismissal will not trigger state civil consequences, the dismissal can impact a decision of a private actor like an employer or landlord. Seeing even unfounded charges could lead to a conscious or unconscious inference that the person has the potential for criminal liability or poor moral character. A retailer seeing a dismissed assault or shoplifting charge may see it as a risk to hire a person who was charged with a crime that could endanger their customers.

Pre-conviction relief statutes are helpful to the goal of reintegration. Their greatest potential lies in their ability, at the front end of the criminal justice system, to avoid the creation of a record and to prevent state-created civil disabilities. But they are by no means sufficient. Some of these mechanisms fail to be effective for reintegration because they are not automatic. Others apply only to certain offenders, are limited in scope, and may be too discretionary or coercive. Plus, they vary dramatically by state, which means even the same term in one state can mean something very different in another.

### *B. Sentencing Relief Mechanisms*

Sentencing offers another opportunity to avoid the creation of a criminal record or mitigate the extent of a conviction's civil disabilities or sanctions. With sentencing mechanisms, a major difference is that the judge plays a prominent role in deciding whether to mitigate the consequences of a conviction. State statutes authorize relief at sentencing in two ways: (1) judicial diversion that converts a plea into a dismissal, if conditions are met, so that no conviction is ultimately entered; and (2) orders for relief from disabilities, which can remove specified statutory obstacles arising from a person's conviction. Sentencing relief mechanisms can serve different reintegrative goals because the civil disabilities can be proportioned to the criminal offense. In this way, state judges

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<sup>313</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:20, at 435 n.8 (noting exceptions to the first offender requirement).

<sup>314</sup> *Id.*

<sup>315</sup> See ALASKA STAT. § 12.62.180(b) (2016).

are the decisionmakers who ultimately authorize the civil consequences of a conviction at sentencing.

### 1. *Judicial Diversion*

The two major differences between judicial diversion and deferred prosecution are that judicial diversion requires a guilty plea and, in some states, the approval of the judge. The ultimate benefit of successful completion of judicial diversion can be the same as that of deferred prosecution—once a person satisfies the terms of punishment, the judge can remove the plea and dismiss the charge.<sup>316</sup>

State statutes limit diversion to certain offenses and first offenders. Most focus solely on offering diversion for misdemeanor offenses, but twenty-four states include specific felonies.<sup>317</sup> One of the most expansive examples is Vermont’s deferred sentencing statute that excludes only one crime, sexual assault of a child, and immediately “strikes” the record of guilt upon completion of the conditions and expunges the record provided restitution is paid.<sup>318</sup> North Carolina, like several states, focuses its deferred adjudication on first offenders in misdemeanor or felony drug cases, and once the conditions are met, the charges are dismissed, and no conviction is entered on the public record.<sup>319</sup> But North Carolina has a limited expungement statute, even for dismissals, so the dismissal can remain on the record. Similarly, the Federal First Offender Act offers diversion to individuals charged with certain drug offenses for the first time.<sup>320</sup>

The requirement to plead guilty as a condition of judicial diversion is significant if a person fails to meet the other conditions set by the statute. In this case, a person’s disposition of diversion is automatically converted into a conviction,<sup>321</sup> and a public record of the conviction bears the same civil consequences as someone who just pleads to the conviction. So the benefit of a

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<sup>316</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:22, at 440 (using “pretrial diversion” and “deferred prosecution” interchangeably to refer to a no-plea form of pre-conviction relief, and the term “deferred adjudication” to refer to relief requiring a guilty plea and satisfaction of conditions before dismissal). I use deferred prosecution to refer to all pre-plea mechanisms, and “judicial diversion” to refer to relief requiring a plea.

<sup>317</sup> *Id.* § 7:22, at 441; *see also* 18 U.S.C. § 3607 (2012) (providing for deferred judgment under federal law of drug offenses falling under 21 U.S.C. § 844(a) (2012)).

<sup>318</sup> VT. STAT. ANN. tit. 13, § 7041 (2017).

<sup>319</sup> N.C. GEN. STAT. § 90-96(a) (2013).

<sup>320</sup> 18 U.S.C. § 3607.

<sup>321</sup> *See, e.g.*, N.C. GEN. STAT. § 90-96(a).

diversion is that no conviction results from the charges, but the stakes for failure are higher than in a deferred prosecution, where there is no plea and the case is still open for adjudication. Prosecutors, on the other hand, prefer this automatic and definite resolution of the case after a failure to comply, which does not follow from a delayed prosecution.<sup>322</sup> The plea offers a bigger stick for the defendant to comply and finality of the case even with non-compliance. The prosecutor does not have to renegotiate a plea or have a trial, making it a more efficient use of prosecutorial or judicial resources.

Most states offer sealing or expungement of a diversion.<sup>323</sup> While the diversion remains on the record, the word “diversion” appears on a criminal history until it is expunged. This can be significant if a person reading a criminal history, like an employer, does not understand the meaning of a diversion. Even states that allow expungement may require a person to petition to expunge a diversion, rather than automatically remove the non-conviction.<sup>324</sup> Others also attach a hefty cost for filing.<sup>325</sup>

## 2. Sentencing Orders to Remove Civil Disabilities

One rare and underutilized sentencing relief mechanism allows a judge at the time of sentencing to mitigate or remove civil state disabilities triggered by a conviction before the conviction creates an obstacle for reintegration.<sup>326</sup>

New York<sup>327</sup> and Illinois<sup>328</sup> offer examples of this type of sentencing relief through what both states call a Certificate of Relief from Disabilities (CRD). New York’s statute covers individuals convicted of any number of misdemeanors but at most one felony.<sup>329</sup> There is no limit to the number of CRDs a person can apply for, but they have to apply for a certificate for each

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<sup>322</sup> See *id.*

<sup>323</sup> *E.g., id.*

<sup>324</sup> See, e.g., N.C. GEN. STAT. § 15A-145.2 (2014).

<sup>325</sup> See TENN. CODE ANN. § 40-32-101(g)(10) (2016) (requiring payment of \$350 plus court costs and fees when filing a petition to expunge a diversion); see also *Diversions, Expungements, & Dispositions*, TENN. BUREAU INVESTIGATION, <https://www.tn.gov/tbi/article/diversions-expungements#sthash.E6OxiHSV.dpuf> (last visited Apr. 14, 2017).

<sup>326</sup> See ABA STANDARDS, *supra* note 15, at 2, 5.

<sup>327</sup> N.Y. CORRECT. LAW § 702(1) (McKinney 2014) (“Such certificate may be issued (i) at the time sentence is pronounced, in which case it may grant relief from forfeitures, as well as from disabilities, or (ii) at any time thereafter . . . .”); see also Radice, *supra* note 110, at 727–30.

<sup>328</sup> 730 ILL. COMP. STAT. 5/5-5.5-15(a) (2016) (“The certificate may be issued (i) at the time sentence is pronounced, in which case it may grant relief from disabilities, or (ii) at any time thereafter . . . .”).

<sup>329</sup> N.Y. CORRECT. LAW §§ 700, 702(1).

misdemeanor or felony, which can be an onerous requirement.<sup>330</sup> And CRDs only remove automatic civil sanctions, not discretionary ones—a strange distinction made by the statute.<sup>331</sup> New York, however, is the only state to attach a legal enforcement mechanism to the certificate: issuance of the certificate creates a rebuttable presumption of rehabilitation.<sup>332</sup> Given this presumption, discriminating against people with CRDs because of their convictions is more difficult and requires the employer, state agency, or other authority to articulate the specific rationale for the denial based on eight statutorily defined factors.<sup>333</sup> On the other hand, a CRD also protects employers from negligence-in-hiring lawsuits.<sup>334</sup>

The Illinois statute, largely based on New York’s law, applies to a broader range of convictions, excluding only violent and sexual offenses, and it offers a similarly defined presumption of rehabilitation.<sup>335</sup> It is more limited in its reach though, applying only to twenty-seven state licenses.<sup>336</sup> The certificate also specifies which disability it relieves and does not offer general relief of all disabilities.<sup>337</sup>

Two model statutes, the Uniform Collateral Consequences of Convictions Act (UCCCA) and the Model Penal Code (MPC), offer additional examples of sentencing relief mechanisms. The MPC endorses a “process for obtaining review of, and relief from, any discretionary disqualification.”<sup>338</sup> The UCCCA creates “order[s] of limited relief,” which would be granted as early as sentencing to mitigate far-reaching civil consequences—“employment,

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<sup>330</sup> Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 730 (2012).

<sup>331</sup> N.Y. CORRECT. LAW § 701(3); *see also* N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1983, at 254 (1983) (“Section 701 of the Corrections Law prohibits automatic forfeitures of a license, upon the granting of a certificate of relief from disabilities . . . .”); Radice, *supra* note 110, at 753.

<sup>332</sup> N.Y. CORRECT. LAW § 753(2).

<sup>333</sup> § 753(1); Radice, *supra* note 110, at 752–53.

<sup>334</sup> *See* N.Y. EXEC. LAW § 296(15) (McKinney 2016) (providing for presumption of excluding prior criminal history from evidence of negligence in hiring when the employer has complied with the statutory non-discrimination policy, including consideration of certificate of rehabilitation).

<sup>335</sup> 730 ILL. COMP. STAT. ANN. 5/5-5.5-5 (2016); LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:23, at 445 n.4.

<sup>336</sup> *Id.*; *see also* MARGARET LOVE & APRIL FRAZIER, ABA COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 4 (2006) (explaining the process for certification).

<sup>337</sup> 730 ILL. COMP. STAT. ANN. 5/5-5.5-15.

<sup>338</sup> ABA STANDARDS, *supra* note 15, at 5–6.

education, housing, public benefit, or occupational licensing.”<sup>339</sup> Despite their immediate reintegrative potential, few states have such relief mechanisms.<sup>340</sup>

As one example of how these certificates can be useful, dozens of jobs require state-issued employment licenses that can be lost automatically or at the discretion of the licensing board if a person is convicted of a crime.<sup>341</sup> Home-health aides,<sup>342</sup> barbers,<sup>343</sup> truck drivers,<sup>344</sup> security guards,<sup>345</sup> funeral directors,<sup>346</sup> school bus drivers,<sup>347</sup> and taxi drivers<sup>348</sup> all require a license. Given the authority to issue a limited or full administrative relief certificate or order, the sentencing judge could consider the impact of losing the license relative to the nature and severity of the crime and issue the certificate to remove just one specific disability or all civil disabilities related to a conviction. For a person convicted of a crime that is unrelated to their license, the certificate of relief could effectively keep them from being immediately unemployed.

The most problematic part of these limited relief mechanisms is that they are not automatically triggered by low-level offenses. Defense attorneys must know what civil collateral consequences will disadvantage their clients and must establish the need for the certificate. Additionally, sentencing judges must be willing to use their discretion to offer relief. The track record in both New York and Illinois for issuing certificates has not been promising for reintegration.<sup>349</sup>

The potential of these certificates is that they can be individualized toward a particular defendant’s circumstances to ensure the civil consequences are calibrated with the criminal punishment, meeting the objectives of reintegration. Lack of employment strongly correlates with recidivism rates, making it part of the state’s interest to consider sentencing options that do not create civil

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<sup>339</sup> UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010), [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

<sup>340</sup> See *id.* § 10.

<sup>341</sup> Radice, *supra* note 110, at 752–53 (describing the rarity of certificates of relief at sentencing in New York).

<sup>342</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 415.31 (2017).

<sup>343</sup> See N.Y. GEN. BUS. LAW § 432 (McKinney 2012).

<sup>344</sup> See N.Y. VEH. & TRAF. LAW § 503 (McKinney 2017).

<sup>345</sup> See, e.g., *id.* tit. 9, § 6029.6.

<sup>346</sup> See, e.g., N.Y. PUB. HEALTH LAW § 3450 (McKinney 2012).

<sup>347</sup> See, e.g., N.Y. VEH. & TRAF. LAW § 509-CC (McKinney 2016).

<sup>348</sup> See 52 PA. CODE § 1021.4 (2017).

<sup>349</sup> LOVE & FRAZIER, *supra* note 336, at 4; Radice, *supra* note 110, at 756.

consequences that are more long term, punitive, or disproportionate to the crime than the criminal penalty.

### *C. Post-Conviction Relief Mechanisms*

The area where states have invested the most time in creating relief mechanisms to mute the impact of civil sanctions is after the criminal punishment is complete. States authorize different degrees of legal reintegration after a sentence is complete in three main ways: (1) statutes that expunge, set-aside, vacate, or pardon convictions; (2) statutes that authorize administrative restoration of rights; and (3) statutes that prohibit discrimination based a criminal record. Expungement, set-asides, vacatur, or pardons actually have the power of removing certain convictions from *public* criminal records, most commonly after a statutorily defined period of “good conduct” during which a person does not commit a new offense.<sup>350</sup> Administrative relief mechanisms are issued to remove statutory barriers without removing the conviction itself from the public records after a conviction-free period.<sup>351</sup> Antidiscrimination statutes do nothing at all to alter a criminal record or remove civil disabilities tied to them. Instead, they set legal limitations on how public and private actors can discriminate against people with convictions.<sup>352</sup>

#### *1. Expungement, Set-Asides, and Pardons*

Expungement, set-asides, vacatur, and pardons allow one or more convictions to be removed from a person’s public criminal history. Very rarely though are these criminal records erased completely, similar to the treatment of the records of Ohio’s minor misdemeanors and New York’s violations. Most often, states retain non-public records related to these convictions, including police reports, prosecution files, and fingerprints, and allow their release for certain employment like law enforcement, government jobs, and military service. They serve a continued law enforcement purpose for future state and federal prosecution and sentencing enhancements even if they are not viewable by the public.<sup>353</sup>

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<sup>350</sup> See *infra* Part III.C.1.

<sup>351</sup> See *infra* Part III.C.2.

<sup>352</sup> See *infra* Part III.C.3.

<sup>353</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:17, at 429.

Expungement statutes originated in the 1940s when the concept was first applied to juvenile offenses.<sup>354</sup> Most states currently allow expungement or sealing of juvenile delinquency records.<sup>355</sup> And over the past two decades, state legislatures on both sides of the political aisle have passed expungement statutes to eliminate the permanency of an adult criminal record. But no state offers the possibility of automatic and complete expungement of criminal records even after a certain time period has passed without a new conviction. These statutes are an example of how the state interest to reintegrate and to protect the public can be in tension and requires the state to choose between both objectives.

Expungement statutes vary dramatically by state. They differ in terms of who is eligible, when they can apply, whether the expungement is automatic or discretionary, and whether evidence of “rehabilitation” must be submitted. The most expansive expungement statute is arguably Puerto Rico’s because it allows even violent felonies to be expunged, and depending on the severity of the offense, expungement can occur as quickly as one year after the offense provided no new convictions occur, or up to twenty years afterward for the most violent crimes.<sup>356</sup>

In Kansas, more than one conviction, which includes a non-specified number of misdemeanors and many felonies, can be expunged provided that anywhere from two to ten years have lapsed since the end of the sentence, and the person has paid related court costs.<sup>357</sup> Also in 2017, Montana passed an expungement statute allowing multiple misdemeanor convictions to be expunged as a one time opportunity.<sup>358</sup> This expungement destroys all records even for law enforcement and licensing agencies.<sup>359</sup> Over thirty states since 2012 have enacted “some form of record-closing law,” or expanded existing laws.<sup>360</sup> In Massachusetts, misdemeanors can be sealed after five years of good conduct, and felonies after

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<sup>354</sup> *Id.* at 426.

<sup>355</sup> *Id.* at 430–31.

<sup>356</sup> *Id.*

<sup>357</sup> KAN. STAT. ANN. § 21-6614(a)–(d) (2016) (providing a three to five year waiting period for misdemeanors and eligible A, B, and C felonies and a ten-year waiting period for DUI felonies). Crimes excluded from eligibility include only the most serious listed felonies in subsection (e), including rape, murder, manslaughter, and criminal sodomy. § 21-6614(e).

<sup>358</sup> *Montana Just Authorized Expungement of Adult Convictions*, COLLATERAL CONSEQUENCES RESOURCE CENTER (May 1, 2017), <http://ccresourcecenter.org/2017/05/01/montana-latest-to-authorize-expungement-of-adult-convictions/>.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*



ten years.<sup>361</sup> New York in 2017 passed a sealing statute allowing an individual to ask a court to seal up to two convictions, only one of which can be a felony, after a 10-year waiting period.<sup>362</sup> Although the vast majority of states exclude serious felonies, at least six states allow sealing of serious felonies.<sup>363</sup>

The most common form of expungement, though, is more limited and applies either to individuals who are deemed eligible “first offenders” or people who commit a specific type of crime, like low-level drug offenses or non-violent offenses.<sup>364</sup> The first-offender expungement statutes are premised on a similar logic to that of diversion cases. These statutes offer a second chance to individuals who have only one, minor, non-violent conviction on their record. After a period of time passes without a new offense, the person can apply for an expungement.

Many states have similar, limited first-offender expungement provisions. Tennessee’s statute offers expungement for most misdemeanors and also specifically enumerated class E felonies, provided a person has only one conviction on her record,<sup>365</sup> after five crime-free years have passed from the end of the criminal sentence.<sup>366</sup> The very limited federal expungement statute, the Federal First Offender Act, expunges only misdemeanor drug offenses for individuals who were under twenty-one years old at the time of the conviction.<sup>367</sup>

The concept of expungement has received increasing attention in the media. Because there are so many variations from state to state, individuals with convictions and the people viewing their records may not understand how

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<sup>361</sup> MASS. GEN. LAWS ch. 276, § 100A (2017). For Nevada’s similar statutory scheme, see NEV. REV. STAT. §§ 179.245, 179.285, 179.301 (2016).

<sup>362</sup> N.Y. CRIM. PROC. LAW § 160.59(2)(a) (Consol. 2017) (establishing the first robust sealing provision in New York); see also *New York Surprises with Broad New Sealing Law*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Apr. 19, 2017), <http://ccresourcecenter.org/2017/04/19/new-york-surprises-with-broad-new-sealing-law/>. The new law excludes violent felonies, sex offenses, and Class A felonies. N.Y. CRIM. PROC. LAW § 160.59(1)(a).

<sup>363</sup> The states that expunge serious felonies are Indiana, Idaho, Minnesota, Utah, Vermont, and Washington. See LOVE, ROBERTS & KLINGELE, *supra* note 83, app. A-7.

<sup>364</sup> *Id.* § 7:16, at 425.

<sup>365</sup> TENN. CODE ANN. § 40-32-101 (2016) (explaining that an eligible person is “[a] person who was convicted of more than one (1) of the offenses listed in this subdivision (g)(1), if the conduct upon which each conviction is based occurred contemporaneously, occurred at the same location, represented a single continuous criminal episode with a single criminal intent, and all such convictions are eligible for expunction . . .”). This one conviction rule includes federal and out-of-state convictions as well. *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> 18 U.S.C. § 3607(c) (2012); Roberts, *supra* note 114, at 324–25 (“There is no general federal sealing or expungement statute and only one narrow provision allowing individuals who were under 21 at the time of the offense to expunge a federal record for a misdemeanor drug charge.”).

expungement and other relief mechanisms work and to whom they apply. If an employer, for example, sees an old conviction on a record, employers may be concerned with why it is not expunged and assume that the person was not worthy of expungement, causing an unnecessary negative inference about the applicant. In reality, though, most expungement statutes are limited and are not automatic, making those old convictions either ineligible for the expungement, or creating a burden on the person to petition for it.<sup>368</sup> In some states, the real hurdle is the expungement application itself, which is difficult to complete without the help of a lawyer. In other states, the fee for filing an expungement petition is prohibitively expensive.<sup>369</sup>

Set-asides and pardons are rare, but in different ways. They are included in this section because they provide two additional models of how states have opted to remove convictions from a public criminal record. A set-aside, also called a vacatur or annulment, is rare because few states have them. These statutes permit a sentencing judge to remove a guilty plea and set it aside, vacate, or annul it. This resembles the Model Penal Code's vacatur recommendation for mitigating the impact of convictions.<sup>370</sup> In some states, like California, a vacatur does not remove a public record, but instead converts the conviction to a dismissal.<sup>371</sup> In Washington, every offender is eligible to apply to vacate the record of conviction, and in New Hampshire, set-asides place a person in the same position they were in pre-arrest, removing all civil consequences of a conviction.<sup>372</sup>

As described earlier in Part I, in theory, executive pardons are available in every state, but very rarely are pardons granted. Only fourteen states process

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<sup>368</sup> See TENN. CODE ANN. § 40-32-101(g)(1)(E)(2)-(4).

<sup>369</sup> For instance, compare Tennessee and Ohio. In some jurisdictions in Tennessee, an expunged conviction cost \$450 in 2017 (part of that figure is a statutory fee and the other is an administrative fee that is county specific). See *Expungement Information*, KNOX COUNTY CRIM. COURT, <https://www.knoxcounty.org/criminalcourt/services/expungement.php> (last visited Mar. 28, 2017). In Ohio, filing fees range from \$50-\$125 depending on the county and may be waived if a person provides proof of indigency in some counties. See OHIO EX-OFFENDER REENTRY COALITION, INSTRUCTIONS FOR SEALING A CRIMINAL RECORD, <http://www.reentrycoalition.ohio.gov/docs/expunge.pdf> (last visited Apr. 15, 2017). (These figures do not include the cost of hiring an attorney); *Clerk of Courts Fees*, FULTON COUNTY OHIO, <http://www.fultoncountyoh.com/index.aspx?NID=553> (last visited May 2, 2017) (assessing \$125 for expunging a criminal record, including the state fee).

<sup>370</sup> See Margaret Colgate Love, *Starting Over with A Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1711-13 (2003).

<sup>371</sup> CAL. PENAL CODE § 1203.4 (West 2017); LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:21, at 436.

<sup>372</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 7:21, at 436.

pardons regularly.<sup>373</sup> As a result, very few eligible people apply.<sup>374</sup> A pardon, though, is one of the most comprehensive forms of relief in that there are no restrictions on who can apply, and it restores a person's legal status as though the person "never committed the offence."<sup>375</sup>

In several states, including Kansas, Nevada, New Hampshire, and Massachusetts, people with expunged, set-aside, or pardoned records are returned to their pre-arrest status, as if they were not arrested or convicted.<sup>376</sup> This language has the potential to restore all civil disabilities attached to the conviction. Some states go further and permit a person to deny a conviction and the preceding arrest.<sup>377</sup> But as discussed below, this new legal status can be problematic for both the person with a record and a person or entity pulling the record.

Each of these three mechanisms purports to remove a conviction from a public criminal record. They fail to succeed, though, if the older, non-expunged record is accessible to the public through other means. Most states, even those with broad expungement authority, facilitate the sale of records of arrests and convictions by providing them as publicly accessible information.<sup>378</sup> When a dismissal or conviction is expunged, rarely do states have laws requiring private companies to remove expunged records.<sup>379</sup> These lingering records become especially problematic in states where people can deny a conviction, but an employer ultimately sees the conviction on a background check. Dishonesty on an application is generally a legal justification for denying a person a state benefit or a job.<sup>380</sup> An applicant relying on the expungement may not realize that the non-disclosure caused the rejection and may not have a chance to explain the expungement issue.

Critics of expungement, even those who ultimately support reintegration and believe that old or minor convictions should not permanently change a person's legal status, oppose treating a conviction as a legal fiction.<sup>381</sup> Some doubt that

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<sup>373</sup> *Id.* § 7:12, at 415.

<sup>374</sup> *Id.* § 7:12, at 417.

<sup>375</sup> *Id.* § 7:6, at 398.

<sup>376</sup> *See id.* § 7:17, at 429; *see also* *Kansas v. Divine*, 246 P.3d 692, 695 (Kan. 2011).

<sup>377</sup> N.C. GEN. STAT. § 15A-153 (2013).

<sup>378</sup> *See Roberts*, *supra* note 114, at 328–29.

<sup>379</sup> *See id.* at 345–46.

<sup>380</sup> *Id.* at 342.

<sup>381</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 529 (2010) (explaining that opponents of expungement argue that it "seeks to

with today's technology "criminal record information can effectively be suppressed."<sup>382</sup> But others argue that background checks are so inaccurate that job applicants take a great risk by not revealing criminal history information that can still be found on the Internet.<sup>383</sup>

## 2. *Administrative Restoration of Rights*

Growing in popularity are administrative certificates that partially or fully restore civil statutory disabilities (similar to Certificates of Relief from Disabilities<sup>384</sup>). The major difference is their timing—they are available only after a criminal sentence is served, court costs and fees are paid, and a crime-free waiting period, usually proportioned to the seriousness of the offense, has been exhausted.<sup>385</sup> They are issued by sentencing courts, parole boards, or committees formed specifically to review certificate applications.<sup>386</sup> Some of them even "certify" that a person is rehabilitated and is unlikely to reoffend.<sup>387</sup> For some states, the passage of time without a new conviction serves as the primary evidence of rehabilitation.<sup>388</sup> In other states, the application requires additional "proof" of rehabilitation that can range from evidence of a consistent work history to recommendation letters and character references.<sup>389</sup>

As one example, New York issues Certificates of Good Conduct (CGC) at the discretion of sentencing judges or parole boards for applicants who present rehabilitation evidence and have cleared a waiting period of one to five years depending on the severity of the crime.<sup>390</sup> Like a CRD issued at sentencing, this certificate has legal teeth through an enforceable, rebuttable presumption of rehabilitation.<sup>391</sup> To further incentivize employers to hire people with convictions, New York passed a negligence-in-hiring statute that offers employers a defense if a hired applicant has one of the New York CGCs.<sup>392</sup>

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rewrite history, establishing that something did not happen although it really did,' and, by essentially erasing the conviction from public view, 'devalue[s] legitimate public safety concerns'" (footnotes omitted).

<sup>382</sup> Jacobs, *supra* note 10, at 131.

<sup>383</sup> *Id.*

<sup>384</sup> See *supra* notes 327–36 and accompanying text.

<sup>385</sup> Radice, *supra* note 110, at 727; see also LOVE & FRAZIER, *supra* note 336, at 3–6.

<sup>386</sup> LOVE & FRAZIER, *supra* note 336, at 3–6.

<sup>387</sup> See, e.g., *id.* at 5–6.

<sup>388</sup> See *id.* at 7.

<sup>389</sup> See generally LOVE & FRAZIER, *supra* note 336.

<sup>390</sup> *Id.* at 3.

<sup>391</sup> *Id.*

<sup>392</sup> Radice, *supra* note 110, at 745.

A handful of states offer similar discretionary, post-conviction, administrative relief mechanisms with their own unique characteristics.<sup>393</sup> For example, California’s statute authorizes a Certificate of Rehabilitation as the first step to a pardon.<sup>394</sup> It can remove significant civil disabilities to state licensing for people with felony convictions, and can serve as evidence of rehabilitation for private employers.<sup>395</sup> Like those issued in New York, the certificates issued in Illinois, North Carolina, and Ohio provide immunity to employers worried about negligence-in-hiring lawsuits.<sup>396</sup> New Jersey’s certificate removes licensing barriers even if a person has out-of-state offenses.<sup>397</sup>

The Uniform Collateral Consequences of Conviction Act, similar to its sentencing relief order,<sup>398</sup> also presents a model statute to create a Certificate of Restoration of Rights that provides civil relief after a period of good conduct.<sup>399</sup> This certificate is issued by a non-judicial administrative authority.<sup>400</sup> The Model Penal Code endorses a similar certificate by the sentencing court.<sup>401</sup>

As an alternative approach to these more encompassing certificates, some states have recently authorized a more limited Certificate of Employability targeted specifically at encouraging private employers to hire people with convictions. The certificate seeks to act as the state’s stamp of approval that these individuals have a low-risk of reoffending. One of the most expansive versions passed in 2015 is Michigan’s certificate. The certificate serves as evidence that “an employer did not act negligently in hiring.”<sup>402</sup> These

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<sup>393</sup> California, Connecticut, Illinois, Nevada, and Ohio all offer these mechanisms. See LOVE & FRAZIER, *supra* note 336.

<sup>394</sup> CAL. PENAL CODE § 4852.17 (West 2017); LOVE & FRAZIER, *supra* note 336, at 5.

<sup>395</sup> CAL. PENAL CODE §§ 4852.16, 4853 (deeming issuance of a certificate to be an application for a full pardon that restores all rights and privileges of citizenship); cf. PENAL § 4852.17 (explaining that the certificate does not seal or remove the conviction from a criminal record). For an example of San Diego’s application form, see SUPERIOR COURT OF CAL. CTY. OF SAN DIEGO, CERTIFICATE OF REHABILITATION & PARDON INFORMATION PACKET (2014), <http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/FORMS/CRIMINALFORMS/PKT016.PDF>.

<sup>396</sup> For more on negligence statutes, see *infra* notes 402–06 and accompanying text.

<sup>397</sup> N.J. STAT. ANN. §§ 2A:168A-1, 2A:168A-7-16 (West 2011).

<sup>398</sup> See UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010), [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

<sup>399</sup> *Id.* § 11.

<sup>400</sup> See *id.* § 11(b).

<sup>401</sup> Love, *supra* note 370, at 1711–13.

<sup>402</sup> SENATE FISCAL AGENCY, MICH. LEGISLATURE, PRISONER EMPLOYABILITY: BILL ANALYSIS (2014), <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/Senate/pdf/2013-SFA-5216-F.pdf>; see also MICH. COMP. LAWS §§ 338.42, 600.2956a, 791.234d (2017).

certificates, valid for four years, are issued to individuals thirty days prior to parole, given evidence that they have had no major conduct violation in prison and completed a job-training course.<sup>403</sup> Connecticut's certificate of rehabilitation can be awarded by the Board of Pardon or Parole at any time before or after the sentence is served.<sup>404</sup> It is considered a provisional pardon—usually this certificate is issued earlier than a pardon, is tailored to remove specific sanctions or disqualifications, and provides a rebuttable presumption of rehabilitation.<sup>405</sup>

The value of Certificates of Employability in Michigan and Connecticut is two-fold. They are immediately issued once a prison sentence is complete, when the potential for recidivism is highest and employment is a solid indicator that a person will not reoffend. Additionally, they are legally enforceable given the presumption of rehabilitation created. Other, more limited, Certificates of Employability still offer benefits against negligence-in-hiring lawsuits and remove statutory licensing barriers.<sup>406</sup>

The biggest critique of administrative certificates overall is that most certificates are not enforceable, making them at best symbolic of rehabilitation because employers still learn about the conviction. However, the new EEOC guidance described in Part I gives employers examples of how to determine if a conviction is related to a job.<sup>407</sup> This guidance makes clear that it is illegal for a conviction to be the sole reason for denying a person a job, and presents examples of when a conviction can be a legitimate factor for rejecting an applicant.

In addition to enforceability issues, administrability is problematic as well. In some states, either certificates are not issued regularly even with hundreds of eligible applicants, or there is a delay between filing an application and award a certificate.<sup>408</sup> One researcher described New Jersey's certificates as not operationally useful because they are rarely sought or granted.<sup>409</sup> Even in New York, where certificates were first created in the 1940s, potential applicants

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<sup>403</sup> § 791.234d(2), (3).

<sup>404</sup> CONN. GEN. STAT. § 54-130a (2017).

<sup>405</sup> §§ 54-130a, 54-130e.

<sup>406</sup> See, e.g., TENN. CODE ANN. § 40-29-107 (2016) (offering a certificate that protects employers against negligence in hiring suits); see also OHIO ADMIN. CODE 5120-14-01, 5120-15-01 (2013) (creating a "Certificate of Achievement and Employability" and a "Certificate of Qualification for Employment").

<sup>407</sup> OFFICE OF LEGAL COUNSEL, *supra* note 204, at 1.

<sup>408</sup> See LOVE & FRAZIER, *supra* note 336.

<sup>409</sup> *Id.* at 2, 5–6.

today do not know that they exist, find the application process too difficult to understand, or feel they are just a piece of paper and will not really help them.<sup>410</sup> Also, most certificate programs are discretionary, and applicants can in theory be rejected without sufficient proof of rehabilitation, even though statutes do not adequately define what that evidence should be.<sup>411</sup> These flaws dilute the overall potential of these certificates to reintegrate people even with low-level convictions.

### 3. *Limiting Discrimination on the Basis of Conviction*

Three types of statutes aim to reintegrate people with convictions by either prohibiting discrimination on the basis of convictions or incentivizing the hiring of people with convictions: anti-discrimination statutes, “ban-the-box” legislation, and immunity from negligence-in-hiring statutes. They do not remove convictions from a public criminal record, and they do not certify that a person has been rehabilitated. Rather, they present conditions under which a government authority, like a licensing body, or a private actor, like an employer, cannot or should not use a conviction as a reason to deny a person a state license, public sector job, or private employment.

Although more than thirty states offer some form of protection against discrimination based on conviction,<sup>412</sup> the majority of state statutes are limited to public jobs and licensing agencies.<sup>413</sup> The value of these anti-discrimination statutes is that they signal that state employers are not using conviction status for automatic job rejections, and they can mitigate civil statutes that allow discretionary denials of licenses.

The problem with most state statutes is that they begin with general statements prohibiting the use of convictions to reject applicants in public employment or licensing, but then include broad exceptions to the prohibition. Kentucky,<sup>414</sup> Florida,<sup>415</sup> Minnesota,<sup>416</sup> and Connecticut<sup>417</sup> do not permit

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<sup>410</sup> Radice, *supra* note 110, at 765–67.

<sup>411</sup> *Id.* at 762–63.

<sup>412</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 6:16, at 363.

<sup>413</sup> For a list of nine examples of public bans on discrimination by conviction, see LEGAL ACTION CTR., OVERVIEW OF STATE LAWS THAT BAN DISCRIMINATION BY EMPLOYERS, [http://lac.org/toolkits/standards/Fourteen\\_State\\_Laws.pdf](http://lac.org/toolkits/standards/Fourteen_State_Laws.pdf).

<sup>414</sup> KY. REV. STAT. ANN. § 335B.020 (West 2017).

<sup>415</sup> FLA. STAT. § 112.011 (2017).

<sup>416</sup> MINN. STAT. § 364.03 (2016).

<sup>417</sup> CONN. GEN. STAT. § 46a-80(c) (2017).

discrimination “solely” because of a conviction.<sup>418</sup> But all four states carve out exceptions, often undefined, for convictions that “directly relate,” “substantially relate,” or have a “reasonable relationship” to the job or license sought.<sup>419</sup>

Kentucky’s statute is an example of one of the most deceptively restrictive bans. It begins with “[n]o person shall be disqualified . . . solely because of a prior conviction of a crime, *unless*,” and then lists two very encompassing exceptions.<sup>420</sup> One exception lists crimes that are not protected at all, including all “felonies, high misdemeanors, and misdemeanors for which a jail sentence may be imposed,” as well as crimes of moral turpitude,<sup>421</sup> covering the bulk of the criminal code. The other exception allows disqualification for a crime that “directly relates” to the job or license.<sup>422</sup> The otherwise vague term of “directly relates” is defined in Kentucky by three equally vague factors assessing: the seriousness of the crime, the relationship between the crime and the purpose of regulating the position, and the relationship of the crime to carrying out the duties of the job or license.<sup>423</sup>

Colorado’s statute has a different model in that it requires state agencies to determine if an applicant is a finalist or should receive a conditional offer prior to conducting a background check.<sup>424</sup> Once a conviction surfaces though, the Colorado statute adds two additional factors to Kentucky’s three: (1) the time since the conviction, and (2) any evidence of rehabilitation or good conduct offered by the applicant.<sup>425</sup> Through this complicated mechanism of accepting

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<sup>418</sup> New Mexico states this a little differently; it does not permit a conviction to be an “an automatic bar” for a job or license. *See* N.M. STAT. ANN. § 28-2-3 (2017).

<sup>419</sup> *See, e.g.*, CONN. GEN. STAT. § 46a-80(c) (“A person may be denied . . . after considering . . . the nature of the crime and its relationship to the job for which the person has applied . . .”); FLA. STAT. § 112.011 (“[A] person may be denied employment . . . by reason of the prior conviction for a crime if the crime was . . . directly related to the position of employment sought.”); KY. REV. STAT. ANN. § 335B.020(1) (“No person shall be disqualified . . . unless the crime for which convicted . . . directly relates to the position of employment sought or the occupation for which the license is sought.”); MINN. STAT. § 364.03 (“[N]o person shall be disqualified . . . unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.”).

<sup>420</sup> KY. REV. STAT. ANN. § 335B.020(1).

<sup>421</sup> § 335B.010(4).

<sup>422</sup> § 335B.020(1).

<sup>423</sup> § 335B.020(2) (“In determining if a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority shall consider: (a) The nature and seriousness of the crime for which the individual was convicted; (b) The relationship of the crime to the purposes of regulating the position of public employment sought or the occupation for which the license is sought; (c) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.”).

<sup>424</sup> COLO. REV. STAT. § 24-5-101(3)(b) (2016).

<sup>425</sup> § 24-5-101(4).



an applicant conditionally and then conducting a five-factor balancing test, Colorado intends “to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society.”<sup>426</sup> Although this is clearly a reintegrative goal, the approach may be so complicated that it is hard to challenge denials based on conviction.

In addition to balancing tests, most states explicitly list public jobs that exclude people with convictions, resolving a tension between reintegration and public safety. Some of the most common positions are, not surprisingly, jobs where public safety is at a premium, and include teachers, law enforcement officers, and jobs working with at-risk populations, including the elderly.

Only six states prohibit both public and private employers from discriminating solely on the basis of convictions.<sup>427</sup> Of these six, Wisconsin’s statute includes the prohibition from discriminating on the basis of conviction in its general employment discrimination statute: “no employer . . . may engage in any act of employment discrimination . . . on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, [or] *conviction record*.”<sup>428</sup> The statute then explains under § 111.335 that it is illegal to deny employment to a person “convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.”<sup>429</sup>

New York<sup>430</sup> and Pennsylvania<sup>431</sup> have an additional provision that entitles an applicant with a record to a statement of reasons for the job or license denial. New York also explicitly prohibits any denial based on an arrest or dismissed charge.<sup>432</sup>

Hawaii’s anti-discrimination statute is the most robust in that it requires even private employers to delay background checks until after a conditional offer is made, and it forbids employers from considering convictions older than ten

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<sup>426</sup> § 24-5-101(2).

<sup>427</sup> HAW. REV. STAT. § 378-2.5(b)–(d) (2017); KAN. STAT. ANN. § 22-4710(f) (2017); MASS. GEN. LAWS ch. 151B, § 4(9) (2017); N.Y. CORRECT. LAW §§ 750–753 (McKinney 2014); N.Y. EXEC. LAW § 296(15) (McKinney 2017); 18 PA. CONS. STAT. § 9125 (2017); WIS. STAT. §§ 111.321, 111.335 (2017); *see also* LOVE, ROBERTS & KLINGELE, *supra* note 83, § 6:15, at 360–63.

<sup>428</sup> WIS. STAT. § 111.321 (emphasis added).

<sup>429</sup> § 111.335.

<sup>430</sup> N.Y. CORRECT. LAW § 754.

<sup>431</sup> 18 PA. CONS. STAT. § 9125(c).

<sup>432</sup> N.Y. EXEC. LAW § 296(16).

years.<sup>433</sup> Other statutes establish a specific period of time after a conviction that creates an automatic presumption of rehabilitation or prima facie evidence of rehabilitation.<sup>434</sup> In Massachusetts, an employer cannot ask about misdemeanors after five years,<sup>435</sup> in Washington, convictions older than ten years cannot be considered by employers or licensing agencies.<sup>436</sup> California prohibits the use of convictions that were sealed or set aside.<sup>437</sup>

“Ban-the-Box” legislation is similar to some of these anti-discrimination statutes in that it limits the use of criminal records. This legislation includes city or state laws that require employers to remove the “box” that asks about prior arrests and convictions on job applications.<sup>438</sup> The employer or state agency must consider an application or offer conditional employment before pulling a person’s criminal history.<sup>439</sup> The concept behind “banning-the-box” is that decisionmakers will look more fully at an applicant’s qualifications for a position, and not immediately reject someone because of an arrest or conviction.<sup>440</sup> Most current ban-the-box legislation applies to public employers, but a growing number are including private employers, too.<sup>441</sup> Currently, over 150 cities and counties have ban-the-box legislation, nine of which ban the box on all private job applications as well.<sup>442</sup>

A legitimate objection to hiring a person with a conviction is an employer’s potential exposure to a negligence-in-hiring lawsuit. Some states have passed negligence-in-hiring laws that offer immunity to employers if they hire someone with a conviction, provided that the employer completes some level of due diligence.<sup>443</sup> Often these incentivizing statutes occur in states, like New York, that offer other protections to those with convictions.<sup>444</sup>

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<sup>433</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, § 6:17, at 367 & n.2.

<sup>434</sup> *Id.* § 6:16, at 364 & n.7.

<sup>435</sup> *Id.* § 6:14, at 359 n.4.

<sup>436</sup> *Id.* § 6:17, at 367 n.2.

<sup>437</sup> *Id.* § 6:17, at 367 n.1.

<sup>438</sup> *See* Pinard, *supra* note 200, at 985.

<sup>439</sup> *See id.* at 985–86.

<sup>440</sup> *See id.* at 986 & n.121.

<sup>441</sup> *Id.* at 986.

<sup>442</sup> Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT, <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (last visited Apr. 17, 2017).

<sup>443</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, at 362.

<sup>444</sup> N.Y. EXEC. LAW § 296(15) (McKinney 2017).

Ultimately, the range of state initiatives described in this part provides insight into creating a Reintegrative State. But these legislative relief efforts fall short because they are discretionary, limit eligibility for reintegration, and work in a piecemeal way before, at, or after sentencing. Part IV offers a holistic framework accounting for these weaknesses that aims to make both civil consequences of convictions and the use of the criminal record less permanent.

#### IV. A REINTEGRATION MODEL

Part III shows that the United States is not a purely punitive state. Most civil disabilities are discretionary, and some states have begun to lessen the permanency of the criminal record with targeted expungement statutes, administrative mechanisms “certifying” rehabilitation, and anti-discrimination statutes.<sup>445</sup> The Reintegrative State can borrow from this range of approaches and intentionally sequence them throughout the three phases of the criminal justice system. Aligning civil consequences of convictions with principles of fair punishment requires that these consequences be proportionate to the severity of a criminal act and that defendants be given notice of them at sentencing. Criminology research should help guide how to remove a conviction’s civil consequences and public records over time. And making relief mechanisms more automatic and less discretionary can allow them to be more cost-effective, administratively efficient, and racially equitable.

To this end, Part IV.A identifies characteristics of a more supportive reintegrative state by identifying key points of state-endorsed reintegration throughout the criminal justice system, from arrest to reentry. Part IV.B argues that the Reintegrative State must be concerned with (1) permitting discretion that can perpetuate inequalities by race and class; (2) reducing prohibitive costs and fees associated with reintegrative relief; (3) tackling interstate recognition problems created by the range of relief options available; and (4) reintegrating people with serious or repeat offenses.

##### A. *A Holistic Framework*

The statutes described in Part III show how states are doing some of the work of reintegration. Part IV.A presents how to sequence these options before, at, and after sentencing.

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<sup>445</sup> See *supra* Part III.

### 1. *A Pre-Sentencing Reintegration Approach*

After a person is arrested, states can limit the creation of a criminal record by decriminalizing misdemeanors and automatically removing dismissed cases from criminal records. Ohio's "minor misdemeanors" and New York's "violations" decriminalize minor misdemeanors that are non-violent, victimless, quality-of-life crimes.<sup>446</sup> Given that criminal court is largely a misdemeanor court, this shift would dramatically limit the stigma of a criminal record to more serious offenses that raise greater concerns for public safety.

Decriminalization would make minor misdemeanors more like traffic offenses, saving the state money.<sup>447</sup> As with traffic offenses, prosecuting non-conviction charges would not trigger criminal procedure protections, like preliminary probable cause hearings and appointing counsel, that all misdemeanor and felony convictions require, dramatically reducing the cost of misdemeanor dockets. For the person charged, the creation of a permanent criminal record is bargained away for less due process.

Proponents of Fourth and Sixth Amendment rights may balk at decriminalization, arguing that it comes at too great a cost.<sup>448</sup> But this worry may exaggerate the current reality of misdemeanor courts, which constitute 90% of criminal court dockets.<sup>449</sup> Public defenders are overburdened by high caseloads in many jurisdictions and cannot give them all adequate attention.<sup>450</sup> The result is what has been referred to as "meet 'em and greet 'em and plead 'em" encounters between appointed counsel and defendants, resulting in plea agreements at arraignment before cases are investigated or constitutional issues are explored.<sup>451</sup> The tradeoff between procedural rights and the stigma of a conviction may be overstated.

An additional reintegration approach that the study of state legislation revealed is that automatically removing dismissed cases from a person's record is not common.<sup>452</sup> From a reintegration perspective, placing a permanent mark

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<sup>446</sup> Alexandra Natapoff, *Misdemeanor Criminalization*, 68 VAND. L. REV. 1055, 1057 (2015).

<sup>447</sup> *Id.* at 1058, 1067.

<sup>448</sup> *Id.* at 1059 ("[Decriminalization] makes it possible to reach more offenders by simplifying the charging process and eliminating counsel, along with other forms of due process.").

<sup>449</sup> LAFONTAIN ET AL., *supra* note 164, at 24; *cf.* Natapoff, *supra* note 156, at 1320–21 (suggesting that misdemeanors appear on court dockets at a rate four to five times as frequent as felonies).

<sup>450</sup> *See* Natapoff, *supra* note 156, at 1343.

<sup>451</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 n.10 (2006).

<sup>452</sup> *See supra* notes 368–72 and accompanying text.

on a public criminal record for charges that the state does not prove or pursue, or a person does not plead guilty to, is disproportionate to the decision to dismiss in criminal court. Because cases are dismissed for reasons other than innocence—the evidence was suppressed, for example—dismissed cases could inform public and private employers about potential risk based just on an arrest. Notations of dismissal on records do not explain the cause, and these charges will draw disproportionately negative inferences before a person can explain the circumstance. One of the oldest studies examining the impact of a criminal record on employment rejections showed that although a person with an acquittal (a type of dismissal) fared better than a person with a conviction, they were less likely to be hired than a person with no record at all.<sup>453</sup> Dismissals make a difference for reintegration.

## 2. *A Sentencing Reintegration Approach*

Part III described two reintegrative sentencing approaches: first-offender diversion statutes and certificates that relieve disabilities. Diversion statutes offer positive incentives to both the defendant, who is offered a second chance, and to prosecutors, whose case is closed regardless of whether a defendant meets the conditions of diversion or not.<sup>454</sup> This reintegrative approach is consistent with desistance research showing that a significant portion of people with one conviction do not reoffend.<sup>455</sup>

Certificates of Relief from Disabilities are helpful at sentencing because they allow a sentencing judge to tailor the civil consequences to the criminal offense.<sup>456</sup> These certificates encourage prosecutors and defense attorneys to consider the civil consequences during plea-bargaining as a part of criminal punishment. *Padilla*<sup>457</sup> signaled the significant need for the defense bar to counsel defendants about civil consequences as a part of plea decisions.

Current certificate statutes either require defense counsel to identify a specific disability<sup>458</sup> to be lifted or all of them will be imposed.<sup>459</sup> An alternative approach would be to change the default. Judges would be supplied with a “civil

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<sup>453</sup> Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 135–36 (1962).

<sup>454</sup> LOVE, ROBERTS & KLINGELE, *supra* note 83, at 440.

<sup>455</sup> See *supra* notes 121–24 and accompanying text.

<sup>456</sup> Radice, *supra* note 110, at 727–30.

<sup>457</sup> See *supra* notes 167–69 and accompanying text.

<sup>458</sup> See *supra* notes 335–37 and accompanying text.

<sup>459</sup> *Id.*

consequences checklist” and be required to individualize the civil sanctions to each defendant or none would apply. Judges could also decide how long the civil sanction would last. This practice not only would give defendant’s notice of civil consequences and likely bring them into plea negotiations, but also would calibrate the consequences to the offense. Prosecutors and defense attorneys could agree on what consequences, if any, would be included in a plea agreement, or each could make arguments at sentencing for which ones should apply.

### 3. *A Post-Sentencing Reintegration Approach*

Although states rarely employ all three post-sentencing restorative mechanisms, different combinations of expungement statutes, administrative relief mechanisms, and anti-discrimination statutes can help states sequence reintegration over time. After a crime-free period, expungement statutes currently remove convictions, primarily for first offenders and people convicted of low-level crimes. The Reintegrative State would expand these statutes to include more serious offenses, similar to Puerto Rico’s statute.<sup>460</sup> This statute expunges minor convictions after only one year, and incrementally increases the waiting period as the offense level increases, giving the most serious felonies a twenty-year waiting period.<sup>461</sup>

For expungements to be effective in reintegrating people with convictions, states have to tackle the intractable problem of private online companies that do not update their records.<sup>462</sup> Because many of these companies qualify as consumer reporting agencies, they fall under the Fair Credit Reporting Act, which requires companies to report accurate information.<sup>463</sup> Enforcement under this act could help ensure that expunged records are removed.<sup>464</sup> States also can explicitly include criminal record accuracy under their own fair credit reporting statutes.<sup>465</sup> Making sure that fair reporting legislation applies to criminal records and beefing up enforcement can make a difference.<sup>466</sup> States can also condition

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<sup>460</sup> See *supra* note 356 and accompanying text.

<sup>461</sup> *Id.*

<sup>462</sup> Roberts, *supra* note 114, at 345 (“Perhaps the most difficult challenge when it comes to limiting access to sealed or expunged records is effective regulation of companies that buy and sell criminal records for profit.”). Jenny Roberts comprehensively discusses the challenges that confront sealing and expunging records. *Id.* at 343–47.

<sup>463</sup> *Id.* at 345.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 345–46.

buying criminal records on updating them, and charge hefty fines to companies who fail to remove expunged records.<sup>467</sup> To ensure that companies update their records, state criminal record databases also have to be updated and periodically reviewed for inaccuracies, which frequently occur and contribute to the problem.

Because expungement often requires a waiting period and recidivism is likely to happen quickly after a conviction, Certificates of Relief can be issued more immediately after a criminal sentence is complete to help “certify” employability. These certificates, combined with anti-discrimination laws, can offer employers “proof” of rehabilitation that protects them from negligence-in-hiring lawsuits. Like Certificates of Employability in Colorado and Connecticut, they can be issued at the completion of a sentence, provided there is a clear and realistic showing that the person is committed to reintegration.<sup>468</sup> Completing a job-training program in prison or upon reentry would be a good proxy for “signaling” desistance.<sup>469</sup>

For people who served lengthy sentences for serious felony convictions, the Reintegrative State would have to confront a more serious question about when and how to restore rights and disabilities. For this population, certificates could be less automatic, and require a higher evidentiary showing that a person is committed to change. The certificate program should describe types of “proof” that people with convictions could obtain to warrant restoration. That said, for some serious convictions, the interest in public safety could override restoring all disabilities. Certificates of relief could be tailored and limit restoration to areas that are not substantially related to the offending behavior.

Anti-discrimination statutes serve as good examples of how the Reintegrative State can protect people with records from discrimination solely based on records.<sup>470</sup> States that require employers to write letters explaining a rejection give added incentives for employers to consider factors surrounding the conviction before rejecting candidates. This can ensure that the employer’s decisions are consistent with the factors laid out by the statute. Setting actual time limits beyond which convictions cannot be considered could strengthen these statutes. They could provide, for example, that seven-year-old misdemeanors and ten-year-old felonies cannot be a basis for an application rejection. Additionally, regulatory bodies could create more specific guidelines

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<sup>467</sup> *Id.*

<sup>468</sup> *See supra* notes 132–35 and accompanying text.

<sup>469</sup> *See supra* notes 132–35 and accompanying text.

<sup>470</sup> *See supra* notes 427–37 and accompanying text.

that help employers understand how to weigh the factors that allow for rejecting an applicant.

### *B. Characteristics of the Reintegrative State*

The focus on reintegration sheds light on a number of issues that consistently burden a person's ability to reintegrate even when relief mechanisms are available. The Reintegrative State should reduce discretion when implementing any restoration mechanism, remove insurmountable court costs and fees, and address difficult issues regarding how to treat another state's restoration of rights.

#### *1. Limiting Discretion*

Recidivism studies support a reintegrative state where civil disabilities are temporary, automatically removed, and tailored to an offense. Yet many of the state's reintegration statutes are discretionary.<sup>471</sup> Diversion is not automatic.<sup>472</sup> Judges and prosecutors have discretion about whether or not to apply diversion statutes to first offenders.<sup>473</sup> Most administrative certificate programs that offer relief from disabilities are discretionary and based on "proof of rehabilitation," although what constitutes proof is usually not spelled out in the statute.<sup>474</sup> And most civil disabilities are discretionary, leaving the decision to issue an employment license, for example, in the hands of regulatory agencies.

Discretion, especially in the criminal justice system, can lead to inequitable treatment of defendants and people with records post-conviction. From police decisions about who to stop and frisk, to judges' decisions about the length of incarceration, the criminal justice system's discretionary nature has been linked historically to its disproportionate impact on poor people of color.<sup>475</sup> There is no reason to believe that this would not be the case for reintegrative decisions given that the same actors make these decisions. Discretionary administrative processes allow regulators outside the criminal justice system to make decisions that are often difficult to review. And discretionary processes are more administratively time-consuming and costly than automatic procedures.

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<sup>471</sup> See *supra* Part III.

<sup>472</sup> See, e.g., N.C. GEN. STAT. § 90-96(a) (2013) (authorizing the court to determine whether an offender is appropriate for diversion).

<sup>473</sup> See *id.*

<sup>474</sup> See *supra* note 411 and accompanying text.

<sup>475</sup> See STUNTZ, *supra* note 185, at 41–62; Pinard, *supra* note 200, at 964–65.



The Reintegrative State should consider when discretion would make a difference. For example, where criminal conduct is minor and a person does not pick up a new offense for a certain period of “good conduct,” the record could be automatically expunged and not require the filing of a petition. On the other hand, the Reintegrative State may want people with more extensive criminal histories to complete an administrative review to “certify” their reintegration, given that research shows that desistence for people with more than four convictions takes significantly longer than for those with only a few minor ones.<sup>476</sup>

Making restoration mechanisms automatic would shift the burden from the person with the conviction to the state. It would also remove discretion from judges, prosecutors, and regulators, whose decisions can lead to inequitable results.

## 2. *Reducing or Waiving Court Costs and Fees*

Although not readily apparent from any of the states’ reintegration reform efforts described in Part III, court costs and fees create virtually insurmountable obstacles for reintegration.<sup>477</sup> Throughout the country, criminal courts assess fines and fees for processing cases that are often impossible for poor defendants to pay.<sup>478</sup> Interest accrues on these debts, and people with convictions in some jurisdictions are even incarcerated for not being able to pay.<sup>479</sup> Legal scholars as well as the Department of Justice criticize local court jurisdictions as more concerned with “revenue collection than justice.”<sup>480</sup>

These fines and fees negatively impact reintegration. Many states do not expunge records, even dismissals, until the court costs and fees from a conviction are paid.<sup>481</sup> Others charge exorbitant fees for expunging records that make it impossible for poor people to apply.<sup>482</sup> And a disparity exists between states that do not charge for relief and states that do. The Reintegrative State must consider how to make “ability to pay” determinations for defendants before

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<sup>476</sup> Bushway, Nieuwebeerta & Blokland, *supra* note 139, at 51.

<sup>477</sup> See Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 493 (2016).

<sup>478</sup> *Id.* at 492–93.

<sup>479</sup> *Id.* at 493.

<sup>480</sup> *Id.* at 487; see also Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177.

<sup>481</sup> See, e.g., TENN. CODE ANN. § 40-32-101(g)(10) (2016).

<sup>482</sup> See, e.g., *Diversions, Expungements, & Dispositions*, *supra* note 325 (charging \$350 for expunging diversions).

court costs are assessed. If a person is indigent, the costs should be waived. If states find it politically unpalatable to remove court costs entirely, they should ensure that costs are proportionate to income and converted to civil debt that does not impede a person from applying for expungement or certificates of relief that they would otherwise be eligible for.

### 3. *Grappling with Interstate Issues*

A difficult question for states will be whether they should recognize the post-conviction restoration of rights granted by another state.<sup>483</sup> Vermont's recognition of another state's restoration of rights offers an example of how complicated the question can become. In one part, Vermont's statute recognizes post-conviction relief granted by another state immediately if authorized by operation of statute, but only recognizes relief by courts if the relief order is on the "grounds of rehabilitation or good behavior."<sup>484</sup> Not all court-issued relief uses these factors as criteria, and even those that do may mean different things.<sup>485</sup> The rationale for the distinction between recognizing all statutory relief but only some forms of judicial relief is unclear, and can easily result in interstate recognition that is not equitable.

Another example of a potential unfair result is related to jury service. A person convicted of a felony in Vermont can restore the right to serve on a jury only through a pardon.<sup>486</sup> But a person with a felony in another state, under this new recognition statute, can move to Vermont and be eligible to serve on a jury if the out-of-state resident's right was restored by a relief statute that restores the right to serve on a jury upon completion of a sentence.<sup>487</sup> The thorny problem of interstate restoration of rights is beyond the scope of this Article, but it serves as an example of additional issues that states will need to address with the growing number of state-issued relief mechanisms.

### 4. *Reintegrating the Habitual or Serious Offender*

As laid out above, the Reintegrative State would admittedly do the most work for people with low-level, non-violent convictions. That is consistent with

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<sup>483</sup> For an extensive treatment of the state and federal issues implicated by interstate recognition of restored civil rights, see Wayne A. Logan, "When Mercy Seasons Justice": *Interstate Recognition of Ex-Offender Rights*, 49 U.C. DAVIS L. REV. 1 (2015).

<sup>484</sup> *Id.* at 45 (quoting VT. STAT. ANN. tit.13, § 8009(e) (2016)).

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

current politically palpable reforms for people with convictions. For example, as described above, most states only expunge records of “first offenders” or people with low-level offenses. Other states require waiting periods of seven to ten years of good conduct before they are willing to make changes to a person’s legal status as an “offender.” The focus on minor offenses also aligns with the criminology research on desistance. In many ways, this focus would make a major difference because the vast majority of people with convictions are people with misdemeanors or minor felonies. They are people who spend little to no time in jail.

Focusing complete reintegration on this population, however, leaves open the obvious question about whether the Reintegrative State would ever fully reintegrate a person released who committed a rape of a child or committed felony murder. To some extent, though, the question of how to reintegrate “the worst offenders” may be moot because they are much less likely to be released from prison. For the most part, the reality is that federal and state sentencing for the most serious felonies result in life sentences that no longer offer the possibility of parole. Yet, there still will be individuals convicted of crimes against persons who will be released, and they will certainly create the biggest obstacle to a truly reintegrative ideal. Criminology research will need to do more to study the likelihood of recidivism for this population to help guide policymakers. Under the reintegrative approach set out in this Article, though, the Reintegrative State does not aim to fully reintegrate every person with a conviction. But even this population should benefit from the characteristics of the Reintegrative State. They should be afforded a warning prior to sentencing of the extensive collateral sanctions facing them, and collateral consequences facing them upon release should be proportional to the severity of their offense and rationally related to the type of crime they committed. This subset of the population with criminal records, although small, will be subject to the greatest number of collateral consequences, making it harder, if not impossible, for this population—potentially the most vulnerable population to recidivism—to reintegrate.

#### CONCLUSION

To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.

Were we to enter the hidden world of punishment, we should be startled by what we see.<sup>488</sup>

Over the past three decades, scholars, legislatures, and advocates have exposed the startling hidden world of post-conviction punishment. The reintegrative legislation discussed in Part III shows the ways that the state can make this punishment more visible at sentencing, more proportionate to the offense, more administratively efficient, and more equitable.

Reintegration will inevitably be caught between the state's interests in reintegrating all people with criminal records and in protecting society from future offenses. These dual purposes are not necessarily in conflict. The Reintegrative State would view these objectives as equally important and mutually supportive. Restoring people to their preconviction status over time is consistent with society's interest in reducing recidivism and encouraging desistance from crime. Ultimately, this Article aims to contribute to this reentry moment by arguing that the goal of the Reintegrative State is to establish points throughout the criminal justice process, from sentencing to reentry, that mitigate and ultimately remove the stigma of a conviction.

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<sup>488</sup> Justice Anthony Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html).