



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 103 | Number 5

Article 2

6-1-2025

False Criminalization and the Erosion of Community Equity

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FALSE CRIMINALIZATION AND THE EROSION OF COMMUNITY EQUITY*

DEBORAH N. ARCHER** & DANIEL S. HARAWA***

The ever-expanding yet increasingly amorphous nature of criminal records is a driver of inequity in America. Criminal records are a significant barrier to community participation. They impact whether you can vote or serve on a jury, where you can live, and if you can work. And as criminal records become more easily accessible (yet less readily verifiable) thanks to the internet, the barriers criminal records pose to broader community participation grow increasingly insurmountable.

While there are myriad problems with using criminal records to determine social worthiness, this Essay focuses on the fact that what “counts” as a criminal record is overly expansive and ever growing. Criminal records do not just consist of criminal convictions. They may include contacts with the criminal legal system more broadly, such as arrests. They may include government interactions that are not criminal at all, including what would normally fall under school discipline and contact with the family regulation system. The ever-growing definition of criminal records reflects society’s increasing tendency to turn what it perceives as deviant behavior into “crime” and then use those “crimes” to limit one’s ability to engage in full civic participation. Further compounding the issue, inaccuracies in criminal records abound in the digital age. And given the racialized nature of criminal law enforcement, it is easy to see how criminal records contribute to racial injustice.

Many harms flow from the increased use of criminal records. While one could focus on the harms posed to the individual laboring with a criminal record, this Essay thinks more broadly about the harms criminal records pose to families and communities, particularly communities of color. As this Essay explains, criminal records work to minimize collective power, deplete community wealth, and stymie community voice. Thus, this Essay concludes that limiting (if not

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We are grateful to Jalen Banks, Janet Ceron, and Mahalia Mathelier for the research support, and to the *North Carolina Law Review* editors for convening the symposium and for their thoughtful edits. We gratefully acknowledge support from the Filomen D’Agostino and Max E. Greenberg Research Fund, New York University School of Law.

eliminating) the use of criminal records in various decision-making processes is not just important for individual justice; it is a necessary prerequisite to community equity more broadly.

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INTRODUCTION

Monique Lewis had dreams of being a preschool teacher.¹ But a drug possession arrest from a decade ago, when Ms. Lewis was just looking to “make a little extra money,” has ruined her chances.² Ms. Lewis has long finished serving her fifteen-month sentence, but the conviction has effectively prohibited her from getting the license necessary to teach in a school.³ While Ms. Lewis says she learned her lesson and “has not turned back ever since,” because of her criminal record, she has struggled “to secure a job with enough income to pay the rent and put food on the table for her family.”⁴ She gets by

1. Cara Tabachnick, *Employment for Some Americans with Criminal Records Is ‘Nearly Impossible,’ Survey Says*, CBS NEWS (May 26, 2023, 9:01 AM), <https://www.cbsnews.com/news/employment-difficulties-americans-criminal-records/> [<https://perma.cc/M2BK-USQP>].

2. *Id.*

3. *Id.* There is a labyrinth of laws and regulations that vary by state and dictate how criminal records affect what jobs or professional licenses one can hold. See, e.g., *50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> [<https://perma.cc/948Z-BFA3>]. Some of these laws and regulations are exceedingly vague, allowing employers to disqualify people based on their “character” or whether the conviction is “related” to the job. *Id.* All that is to say, even if a person in Ms. Lewis’s position could get a job or professional license in one state, there is no guarantee that she could be gainfully employed or receive the same license in another state.

4. Tabachnick, *supra* note 1 (quotation marks omitted).

day-by-day working two minimum-wage jobs in an effort to provide for her and her kids.⁵

Mark Johnson was applying for a job as a truck driver.⁶ A decorated military veteran and family man, Mr. Johnson was told the job was his—pending a successful background check.⁷ He never got the job.⁸ His criminal background check came back, which wrongly showed him as having been convicted of “indecent assault and battery on [a] child under 14 years of age,” and “sexual abuse in the first degree.”⁹ The company that completed Mr. Johnson’s background check provided the record of the wrong guy.¹⁰ The background check company refused to correct the record, leaving Mr. Johnson with no choice but to sue.¹¹ It took a year-long battle for Mr. Johnson to correct the erroneous report.¹² By then, the job he so wanted was long gone.

Francine Almash started homeschooling her son, who is autistic, after a school crisis counselor pinned him to a wall and broke his thumb.¹³ When her son did not return to school, school officials called the state’s child abuse hotline

5. *Id.*

6. Olivera Perkins, *Errors in Background Checks Cost Job Seekers*, CLEVELAND.COM, https://www.cleveland.com/business/2012/12/job_applicants_lose_out_as_err_1.html [<https://perma.cc/C4YD-H8HF>] (last updated Dec. 15, 2012, 7:20 PM).

7. *Id.*

8. *Id.*

9. Motion for Preliminary Approval of Proposed Class Settlement, Certification of a Class for the Purpose of Settlement, and Approval of Form and Manner of Notice at 3, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288 (N.D. Ohio Nov. 12, 2013), Doc. 36.

10. Perkins, *supra* note 6. Mr. Johnson contacted the company that provided the background check and received a rote email response: “If the disputed information is in fact incorrect or incomplete, [the company] will swiftly take appropriate steps to either remove or update that information.” *Id.* And Mr. Johnson described a subsequent conversation with a company investigator as being offensively dismissive. *Id.* Because the background check industry is unregulated, there is no comprehensive data on how often mistakes like these are made. ARIEL NELSON, NAT’L CONSUMER L. CTR., *BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING* 15 (2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf> [<https://perma.cc/H6T3-8AWZ>]. In a recent study of regulated and unregulated background checks, researchers found that “nearly every participant (90 percent and 92 percent, respectively) had at least one false-negative error.” Sarah Lageson & Robert Stewart, *The Problem with Criminal Records: Discrepancies Between State Reports and Private-Sector Background Checks*, 62 *CRIMINOLOGY* 5, 27 (2024). These widespread inaccuracies prompted the Consumer Financial Protection Bureau to issue guidance to consumer reporting companies on how to better ensure accurate and reliable reporting. See *CFPB Addresses Inaccurate Background Check Reports and Sloppy Credit File Sharing Practices*, CONSUMER FIN. PROT. BUREAU (Jan. 11, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-addresses-inaccurate-background-check-reports-and-sloppy-credit-file-sharing-practices/> [<https://perma.cc/32Z9-FP3F>].

11. See Perkins, *supra* note 6.

12. *Id.*

13. ABIGAIL KRAMER, CTR. FOR N.Y. CITY AFFS., *THE N.Y. SCH., BANNED FOR 28 YEARS: HOW CHILD WELFARE ACCUSATIONS KEEP WOMEN OUT OF THE WORKFORCE* 1 (2019), <https://www.centernyc.org/s/Banned28Years.pdf> [<https://perma.cc/Q8G9-5YGQ>].

to report Ms. Almash for neglecting her child's education.¹⁴ The child and family services agency commenced an investigation, during which Ms. Almash showed proof that she was homeschooling her child.¹⁵ The proof was apparently satisfactory—Ms. Almash was never arrested and no case was ever filed.¹⁶ Ms. Almash was never adjudicated guilty of any offense.¹⁷ Yet her name was still added to a registry of people investigated for child abuse or neglect based on the unfounded report alone, which then showed up on all her subsequent background checks, causing Ms. Almash to be shut out of many jobs to which she applied.¹⁸

* * *

The stories above are unfortunately not one-offs. One in every three adults in the United States has a “criminal record—which can be an arrest record, criminal charges, or a conviction.”¹⁹ And the use of these records is pervasive throughout our society.²⁰ A criminal record can affect whether one can vote or serve on a jury, where one can live, and if one can work.²¹ A criminal record will exacerbate one's punishment if rearrested.²² That a past conviction still haunts someone long after their sentence has been served flies in the face of rehabilitation, a supposed core aim of our criminal legal system.²³ Accordingly, a number of scholars have written about how criminal records often act like a

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Again, there is little centralized data on how often people appear on these types of registries where misconduct that is not even criminal shows up in background checks. But in the same year of Ms. Almash's investigation, there were nearly 50,000 investigations that resulted in “indicated cases”—meaning they would show up on the child welfare registry in New York alone. *Id.* at 2.

19. See *Criminal Records and Reentry Toolkit*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit> [<https://perma.cc/5FPY-RSKU> (staff-uploaded archive)] (last updated Mar. 18, 2025).

20. See, e.g., Eugene Volokh, *The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power*, 3 J. FREE SPEECH L. 197, 213 (2023) (“[A] nationwide employee background checks have gotten cheaper, they have in effect become mandatory for many employers.”); Yvette N.A. Pappoe, *The Scarlet Letter “E”: How Tenancy Screening Policies Exacerbate Housing Inequity for Evicted Black Women*, 103 B.U. L. REV. 269, 276 (2023) (“Landlords have fully embraced ‘tenant screening’—the practice of gathering background information about tenants before making decisions to offer or decline housing. Such background reports, which are frequently called tenant screening reports, chronicle a potential tenant's criminal background, creditworthiness, and history of past evictions.”).

21. See generally Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315 (2019) (explaining the negative impacts of a criminal record and how such consequences contribute to systemic oppression and inequality).

22. See, e.g., Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 525 (2014) (“Punishing prior offenders more severely than first offenders is a principle that legislatures in this country have endorsed with unique enthusiasm.”).

23. See Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 679 (2021).

“scarlet letter,” rendering those convicted of crime, who are disproportionately Black, Brown, and low income, to languish on the periphery of society.²⁴

Further fanning the flames of injustice, what is recorded on background checks and treated similarly to criminal convictions is ever expanding. For example, arrests often show up on a background check even if the charges were eventually dropped.²⁵ Contacts with the family regulation system may show up regardless of whether one was adjudicated involved in misconduct.²⁶ Even one’s history of behavior in school may come back to bite them in the future.²⁷ And while these contacts are not “criminal,” for the purposes of many of life’s basic necessities—education, employment, and housing—they are often treated indistinguishably from a criminal conviction. In other words, the wealth of deleterious information that is included as part of criminal background checks is effectively “redefining crime and criminals.”²⁸

Compounding this problem even further is the fact that information has become more diffuse and harder to verify or correct in the digital age. As more and more companies engage in record scraping, collection, and dissemination, the risk of criminal records being inaccurate grows greater, especially if one’s name is somewhat common.²⁹ This means that a person may be forced to wear the scarlet letter of a criminal record despite having never been convicted of a crime. And once the erroneous information is out there, the internet has made it near-impossible to fully correct the record, meaning there will always be the risk that someone will hold an untrue criminal past against someone who has never engaged in criminalized conduct.³⁰

When the literature focuses on the harms of criminal records, it often homes in on the harms to individuals: an individual’s inability to vote or serve

24. See, e.g., Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 2999 (2015); Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1226 (2006).

25. Deborah A. Widiss, Griggs at *Midlife*, 113 MICH. L. REV. 993, 1010 (2015) (“Although many individuals who are arrested are never convicted of a crime, arrests generally show up on criminal background checks.”).

26. See, e.g., Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021).

27. See Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 208 (2015).

28. Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788, 824 (2020) [hereinafter Archer, *Exile from Main Street*].

29. See Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1776 (2023) [hereinafter Lageson, *Criminally Bad Data*].

30. See Sarah Esther Lageson, *The Purgatory of Digital Punishment*, SLATE (June 24, 2020, 10:59 AM), <https://slate.com/technology/2020/06/criminal-justice-records-online-digital-punishment.html> [https://perma.cc/W92P-MF2G] (“Eventually, background checks will probably get better, due to consumer demand and improvements to information technologies. But the reality for the short term is that millions of people in America will spend the rest of their lives digitally marked, their identities warehoused into vast collections of mug shots, jailhouse rosters, and court documents. There is no easy escape from digital punishment—punishment that is perpetual, and not determined by judge or jury.”).

on a jury, obtain employment, or find a place to live.³¹ Criminal records are incredibly stigmatizing and marginalizing. And of course, the focus on the individual harms make sense, as the concrete harm that people face as a result of a criminal record—accurate or otherwise—is a pressing problem that deserves widespread attention, especially because the harms that flow from the use of criminal records is not borne equally along racial lines.³² Because people of color, and Black people in particular, are overpoliced in America, they are stopped more often, arrested more frequently, prosecuted more harshly, and punished more severely,³³ the use of criminal background checks further exacerbates the racially subordinating nature of the criminal legal system.

This Essay adds another layer to this important conversation. It zooms out to contemplate the harms criminal records pose to the *collective* and argues that criminal records act as a real barrier to community equity. Because as one of us once said, “focusing on aggregating individual harms falls short in terms of both right and remedy.”³⁴ When considered collectively, criminal records harm families, exacerbate wealth gaps, and minimize communal power. Criminal records harm the health of the collective, acting as a stubborn barrier to economic and political empowerment. Therefore, eliminating the use of criminal records when determining social worthiness is not only important from an individualistic perspective, but it is a necessary prerequisite to establishing a flourishing and equitable multiracial democracy.

This Essay makes these points over the course of two parts. Part I provides a descriptive account of how expansive criminal records have become, often including far more than just criminal convictions. It then describes how this explosion in what counts as a criminal record is exacerbated by the fact that, in a digital age, criminal records are more easily accessible and more prone to be inaccurate than ever before. Part II then explores that, in addition to the real individual harms that criminal records pose, there are communal harms that undermine any broader notion of equity. This part details how the increasing

31. See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 37 (2019); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1792 (2012); Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 4 (2018); Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 48 (2015); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175 (2019) [hereinafter Archer, *The New Housing Segregation*].

32. See, e.g., Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1329 (2004); Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1346 (2017).

33. See Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (2023).

34. Deborah N. Archer & Joseph R. Schottenfeld, *Defending Home: Toward a Theory of Community Equity*, 92 U. CHI. L. REV. (forthcoming 2025) (manuscript at 2) (on file with the North Carolina Law Review).

use of criminal records increases police power over communities of color, minimizes the investment in overly policed and criminalized communities, saps the political power of those communities, and alienates people of color from civic participation and community engagement. As this Essay concludes, the *communal* harms that flow from the use of criminal records should be an important part of any conversation over what to do about the pressing problem of criminal records.

I. THE AMORPHOUS NATURE OF “CRIMINAL” RECORDS

Before understanding how the use of criminal records acts as a barrier to community equity, it is important to understand the scope of the problem. Criminal records are used in a variety of ways. Many employers, licensing boards, and landlords conduct criminal record background checks on their applicants.³⁵ A criminal background check must be completed before an adoption or foster care agency places a child in one’s home.³⁶ For states with felony disenfranchisement laws, a criminal record is relevant to whether one can vote.³⁷ And a criminal record may determine whether a person can exercise their constitutional right to bear arms.³⁸ In other words, a person’s criminal record and what is on it (accurate or not) can affect where they work, are licensed, and live, and whether they can have children, vote, or own a gun.

Scholars have long argued that the overuse of criminal records to determine whether and to what extent one can participate in society is anathema to any understanding of rehabilitation—the use of criminal backgrounds to determine social worthiness punishes people long after they have served their time.³⁹ Scholars and civil rights advocacy groups have also described how the pervasive use of criminal backgrounds has a disproportionate effect on people of color given the systemic overpolicing of people of color, rendering background checks and the use of criminal records a pressing racial justice

35. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815 (2015) [hereinafter Jain, *Arrests as Regulation*].

36. See *Criminal Background Checks for Adoption by State*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption-laws-by-state/criminal-background-checks/> [<https://perma.cc/EL6T-DFZ8>].

37. See, e.g., Hadar Aviram, Allyson Bragg & Chelsea Lewis, *Felon Disenfranchisement*, 13 ANN. REV. L. & SOC. SCI. 295, 295 (2017).

38. See generally Laura G. Abelson, *Reevaluating Felon-in-Possession Laws After Bruen and the War on Drugs*, 15 U.C. IRVINE L. REV. (forthcoming 2025) (on file with the North Carolina Law Review) (discussing federal law criminalizing gun possession by convicted felons).

39. See, e.g., Ingrid Cepero, *Banning the Box: Restricting the Use of Criminal Background Checks in Employment Decisions in Spite of Employers’ Prerogatives*, 10 FIU L. REV. 729, 744 (2015); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 26 (2016); Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 248 (2012).

issue.⁴⁰ Indeed, several courts have recognized racial discrimination disparate impact claims based on employers' use of criminal background checks.⁴¹

This Essay fully embraces these criticisms concerning the use of criminal records. But rather than rehashing those arguments here, this Essay focuses on two other harms that flow from the use of criminal records, which are especially pronounced in the digital age: (A) what is treated as "criminal" has expanded far beyond convictions; and (B) the accuracy of criminal records is far more contested. The two problems, while independent, combine together to create a massive web of communal disenfranchisement. Because, now, not only is more conduct treated as "criminal," but that "criminal" conduct is easier to use against someone as it is spread across the internet and scraped and collected by unregulated companies that will provide the records at relatively no cost without robust mechanisms in place to ensure the records' accuracy.

A. *The Expansive Nature of What Counts as "Criminal"*

When a criminal background check is run, more than criminal convictions often show up in the results. This section provides three examples of nonconvictions that may show up on a background check that are treated as "criminal": (1) arrests; (2) family regulation system contacts; and (3) school discipline.

1. Arrests

First, arrests are often reported in background checks. Professor Eisha Jain describes how, when running criminal background checks, employers, landlords, and social service agencies will rely on a record of an arrest to deny services.⁴² As Professor Jain explains: "Noncriminal justice actors . . . value arrest [records] because they are relatively easy and inexpensive to access and because [noncriminal justice actors] regard arrests as proxies for information they value,

40. See, e.g., Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 168–69 (2021); Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 199 (2014) (employment); Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 192 (2014) (housing); RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, THURGOOD MARSHALL INST., *BARRED FROM WORK: THE DISCRIMINATORY IMPACTS OF CRIMINAL RECORD BACKGROUND CHECKS IN EMPLOYMENT* 3 (2023), <https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf> [<https://perma.cc/5K3A-VQVV> (staff-uploaded archive)]; *Resolution Supporting Elimination of the Use of Criminal Background Checks to Systematically Exclude Individuals with Criminal Records from Employment Opportunities*, NAT'L ASSOC. ADVANCEMENT COLORED PEOPLE (2021), <https://naacp.org/resources/supporting-elimination-use-criminal-background-checks-systematically-exclude-individuals> [<https://perma.cc/8M7Y-8M8K>].

41. See *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 217 n.3 (2d Cir. 2020) (Chin, J., dissenting) (collecting cases).

42. See Jain, *Arrests as Regulation*, *supra* note 35, at 815.

such as the potential for violence, unreliability, or instability.”⁴³ The problem with using arrest records is perhaps obvious, but still worth explaining: an arrest does not mean one is guilty of anything, and even after an arrest, a person still carries a constitutional presumption of innocence.⁴⁴ More to the point, as a factual matter, most arrests do *not* result in conviction.⁴⁵ For example, in 2021, *eighty-six percent* of felony arrests in New York resulted in dismissal.⁴⁶ Therefore, the use of arrests as a marker of social worthiness risks potentially punishing someone despite them having done nothing wrong.

There are also stark racial justice implications that come with considering arrest records as part of a background check.⁴⁷ Because people of color are overpoliced, they are more likely to have arrest records than white people.⁴⁸ Take the story of Edward Franklin, for example.⁴⁹ Mr. Franklin, who is African American, worked for the City of Evanston, Illinois, for over twenty years as a driver with the City of Evanston’s sanitation division.⁵⁰ City officials learned from the local newspaper that Mr. Franklin had been arrested for possessing a small amount of marijuana.⁵¹ They fired him as a result, asserting that he violated the city’s drug policy.⁵² The charges against Mr. Franklin were eventually dropped, but by then, he had already lost his job.⁵³ This is just one way that background checks work to punish people who are not “criminal.”

2. Family Regulation System Contacts

Second, contacts with the family regulation system may also appear on background checks. Professor Dorothy Roberts started referring to the “child welfare system” as the “family regulation system” because, like the criminal legal system, it “is designed to regulate and punish [B]lack and other

43. *Id.*

44. *See generally* Estelle v. Williams, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”).

45. *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 3 (2000) (“[I]n a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution.”).

46. *See* Scott Hechinger, Opinion, *‘Felony Arrest’ Data Shouldn’t Determine Criminal Justice Policy*, CITY & STATE N.Y. (May 27, 2023), <https://www.cityandstateny.com/opinion/2023/05/opinion-felony-arrest-data-shouldnt-determine-criminal-justice-policy/386862/> [https://perma.cc/R5LA-P55D].

47. *See* Jain, *Arrests as Regulation*, *supra* note 35, at 820.

48. *See id.*; *see also* Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 926 (2019).

49. *See* Franklin v. City of Evanston, 384 F.3d 838, 841–42 (7th Cir. 2004).

50. *Id.* at 841.

51. *Id.*

52. *Id.* at 842.

53. *Id.*

marginalized people.”⁵⁴ As she explained, the family regulation system is “an integral part of the U.S. carceral regime” that “regulates millions of marginalized people through intrusive investigations, monitoring and forcible removal of children from their homes to be placed in foster care, group homes and ‘therapeutic’ detention facilities.”⁵⁵

Consistent with Professor Roberts’s carceral reframing of the family regulation system,⁵⁶ contact with the family regulation system can appear on criminal background checks.⁵⁷ As an example, a practitioner from New York, Michelle Burrell, explained that once Child Protective Services begins an investigation, and if they report “some credible evidence” of abuse or neglect, that record exists in perpetuity and can be included as part of one’s background check.⁵⁸ Further demonstrating just how intermingled the criminal and family regulation systems are, arrests for abuse/neglect crimes can lead to placement on registries and databases of people who have mistreated children, “amounting to a blacklist for many jobs,” even if there is no conviction or the allegations turn out to be unfounded.⁵⁹ Thus, just the fact that an investigation was instigated can serve as a permanent barrier to employment in certain fields, or even prevent someone from adopting a child.⁶⁰

3. School Discipline

Finally, school disciplinary records can show up on background checks and be used against the recordholder later. There is a general understanding that

54. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-familyregulation/44480> [<https://perma.cc/EE2D-DHH5>] [hereinafter Roberts, *Abolishing Family Regulation*]. See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (describing the racial harms inflicted by the family regulation (or child welfare) system).

55. Roberts, *Abolishing Family Regulation*, *supra* note 54.

56. Others have used a similar framing. See, e.g., S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1103 (2022); Anna Arons, *An Unintended Abolition: Family Regulation During the Covid-19 Crisis*, 12 COLUM. J. RACE & L.F. 1, 5–7 (2022); Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 770 (2021); Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 503 (2021).

57. Nicole E. Imperatore, Note, *Parents Under Pressure: Why CPS Needs to Tell Parents Their Rights Before Walking in the Door*, 51 HOFSTRA L. REV. 541, 554 (2023).

58. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 132 (2019).

59. Nikita Stewart, *The Child Abuse Charge Was Dismissed. But It Can Still Cost You a Job*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/nyregion/ny-child-abuse-database.html> [<https://perma.cc/6HGK-QGKR> (staff-uploaded, dark archive)].

60. *Id.*; see also Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1489 n.6 (2023).

school disciplinary records are supposed to be private.⁶¹ Because kids are less culpable, society generally does not hold what kids do against them for the rest of their lives.⁶² But that is only true for some kids. With the “criminalization of school discipline,” misbehavior that used to be handled by schools internally is now often outsourced to professional law enforcement agencies resulting in contacts with the criminal legal system.⁶³ “[S]chools have criminalized normal adolescent behavior: pushing and shoving has become battery, swiping a classmate’s headphones has become theft or robbery, and talking back to staff has become disorderly conduct or obstructing.”⁶⁴

When juvenile misconduct is criminalized, it is also formalized and memorialized, meaning what would otherwise be considered garden-variety school misconduct can affect youth who engaged in misconduct (and their families) well into adulthood.⁶⁵ While most states have some mechanism to expunge juvenile records, expungement is rarely foolproof, and, thus, a juvenile record can show up on background checks, making it “harder, if not impossible, for a person to get a job, secure housing, serve in the military, receive college financial aid or be granted a state occupational license.”⁶⁶ And given that schools with more Black and Brown students are more likely to have police in them,⁶⁷ and in light of the criminalization of Black youth more broadly,⁶⁸ one can easily see how the increasing criminalization of school discipline is also a pressing racial justice issue.⁶⁹

61. See Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified as amended at 20 U.S.C. § 1232g).

62. See generally *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the death penalty unconstitutional when used on juveniles).

63. Lapp, *supra* note 27, at 213.

64. *Id.* at 212–13.

65. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 541–42 (2004).

66. Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 368, 408–09 (2018).

67. See Evie Blad, *Schools with More Black and Latino Students Likelier to Have Police*, EDUC. WEEK (Apr. 7, 2023), <https://www.edweek.org/leadership/schools-with-more-black-and-latino-schools-likelier-to-have-police/2023/04> [<https://perma.cc/S6AD-VNBT>].

68. See generally KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021) (analyzing racist policing in America and its various deleterious effects on Black youth).

69. See Natane Eaddy, *Future Interrupted: How Juvenile Records Disproportionately Affect Youth of Color*, JUV. L. CTR.: BLOG (Apr. 10, 2018), <https://jlc.org/news/future-interrupted-how-juvenile-records-disproportionately-affect-youth-color> [<https://perma.cc/47PU-5XTD> (staff-uploaded archive)]. For background check purposes, one particularly troubling way that Black and Brown youth are criminalized is through the use of gang databases. Young people “are placed into gang databases without notice or process based on broad and vague criteria such as the color of their clothing or having tattoos. The result is often the criminalization of youth and friendship.” Archer, *Exile from Main Street*, *supra* note 28, at 828. And once a person ends up on one of these databases, the information “can easily migrate to other public and private databases.” Lapp, *supra* note 27, at 212. For example, it was

The expanded nature of what counts as “criminal” for purposes of background checks is the perfect example of “mass criminalization,” where what counts as criminal morphs and grows, expanding the reach of the criminal legal system far beyond its perceived boundaries.⁷⁰ But while the ever-expanding nature of criminal records is a huge problem, it is not the only problem. The information contained in these records is often inaccurate, which only exacerbates the effects of mass criminalization in the digital age.

B. *The Accuracy of Criminal Records Is Hard to Determine*

The risk of inaccuracy of criminal records in conjunction with how profuse records are in the digital age, amplifies the harms that these records create. To start, consider the fact that the government records that are reported on a background check are not always accurate. As Professor Sarah Lageson explains, errors can infect government records in multiple ways—the records may be missing information, factually incorrect, or not meant to be disclosed.⁷¹ Add on to that the fact that the criminal legal system is not one system, but many separate systems with various forms of record keeping, and it is easy to see how the chance of error creeping into the system increases.⁷² Add on top of *that* the fact that now, the risk of error grows even higher as more than just involvement in crime is included in a background check.⁷³ Not to mention that once the data is online, it is near impossible to scrub from the internet.⁷⁴

Then, there is the question of how various actors who request background checks go about getting the records. Today, a plethora of private companies provide background check services.⁷⁵ Indeed, it is a billion-dollar industry.⁷⁶ As Professor Lageson also explains, these services often involve “web scraping”: extracting information from public sources, and then reporting the outcomes.⁷⁷ But web scraping itself does nothing to verify the accuracy of the information,

discovered that “information collected [in one police gang database] ha[d] been shared with employers, landlords, Public Housing and Section 8, and school administrators.” *Id.* (quoting YOUTH JUST. COAL., TRACKED AND TRAPPED: YOUTH OF COLOR, GANG DATABASES AND GANG INJUNCTIONS 6 (2012), <https://youthjusticela.org/wp-content/uploads/2012/12/TrackedandTrapped.pdf> [<https://perma.cc/7FDX-65G8>]).

70. See Archer, *Exile from Main Street*, *supra* note 28, at 823–24.

71. Lageson, *Criminally Bad Data*, *supra* note 29, at 1775.

72. *Id.*

73. See *supra* Section I.A (discussing the ways arrests, family regulation system contacts, and school discipline are included on a background check).

74. Alexander Tsisis, *Data Subjects’ Privacy Rights: Regulation of Personal Data Retention and Erasure*, 90 U. COLO. L. REV. 593, 600 (2019).

75. See Lageson & Stewart, *supra* note 10, at 8.

76. Alexander Govdysh, *Background Check Services in the US—Market Research Report*, IBISWORLD, <https://www.ibisworld.com/united-states/industry/background-check-services/6058/> [<https://perma.cc/QCL8-33Z6>] (last updated Aug. 2024).

77. Lageson, *Criminally Bad Data*, *supra* note 29, at 1778.

and thus these companies “both exacerbate criminal record error introduced at the state level and create new error through sloppy data matching techniques.”⁷⁸

A recent lawsuit against RentGrow, a “tenant-screening company used by low-income housing landlords,” bears this out.⁷⁹ A lawsuit filed in the District of Columbia alleges that the company provides “unvetted public records” as part of its background check services, “compil[ing] data from third parties rather than collecting it directly.”⁸⁰ The reported inaccuracy rate alleged in the lawsuit is startling—“not less than 13 percent, affecting more than 10 million people.”⁸¹

Or, consider another recent lawsuit filed against ADP Screening & Selection Services, Inc. (“ADP”).⁸² ADP provides background checks for employment, advertising itself as “us[ing] the most comprehensive data in the industry.”⁸³ When ADP ran a background check for Nathan Mott, it inaccurately reported to his prospective employer that he had been convicted of murder.⁸⁴ And this was not the first time ADP had provided patently incorrect information to an employer. Just the year before, it settled another lawsuit, this time a proposed class action filed by Pedro Ramos, after ADP falsely reported that he was a convicted drug dealer.⁸⁵

Of course, inaccurate criminal records and background checks have real life consequences: people in the above examples were denied shelter and the ability to earn a living. While these consequences are both tragic and important, the next part looks beyond the individual and considers the broader communal harms that result from amorphous criminal records in the digital age.

78. *Id.* at 1779.

79. Todd Feathers, *Landlords Froze Out Good Renters Due to Bad Data from Screening Company, Lawsuit Alleges*, GIZMODO (Oct. 3, 2024), <https://gizmodo.com/major-tenant-screening-companys-bad-data-is-hurting-low-income-renters-lawsuit-alleges-2000506878> [<https://perma.cc/W4MG-HEJT>].

80. Complaint at 2, 7, *Nat’l Ass’n of Consumer Advocs. v. RentGrow, Inc.*, No. 2024-CAB-006253 (D.C. Super. Ct. Oct. 1, 2024).

81. *Id.* at 7.

82. Kate Tornone, *ADP Settles Lawsuit Alleging Background Check Incorrectly Reported Job Seeker Was a Convicted Murderer*, HR DIVE (July 25, 2024), <https://www.hrdiver.com/news/adp-background-check-error/722418/> [<https://perma.cc/36KS-ZNFJ>].

83. *Smart, Easy, and Human HR Solutions You Can Trust*, ADP, <https://www.adp.com/how-we-differ.aspx> [<https://perma.cc/U8SR-M6XW> (staff-uploaded archive)].

84. *See* Tornone, *supra* note 82.

85. Emilie Shumway, *ADP Settles Lawsuit Alleging Background Check Incorrectly Reported Job Seeker Was Drug Dealer*, HR DIVE, <https://www.hrdiver.com/news/adp-background-check-incorrect-falsely-alleged-job-seeker-was-drug-dealer-lawsuit/650556/> [<https://perma.cc/T78F-MYUS>] (last updated Nov. 15, 2023); Complaint at 6, *Ramos v. ADP Screening & Selection Servs., Inc.*, No. 3:23-cv-00610 (D. Conn. May 10, 2023).

II. FROM COLLATERAL CONSEQUENCES TO THE EROSION OF COMMUNITY EQUITY

Scholars and policymakers have devoted considerable attention to understanding the individual collateral consequences of criminal records.⁸⁶ And this is for good reason. Under the weight of our aggressively carceral regime, individuals with criminal records, and those whom that regime has otherwise ensnared, must navigate an all-encompassing web of policies and practices that prevents them from accessing the mainstays of an economically and socially vibrant life. From prohibitions against receipt of government benefits to felon disenfranchisement rules and exclusion from public and private housing to restrictions on employment and disqualification for educational grants, criminal records create barriers that reinforce cycles of racial inequality and poverty.⁸⁷ The effects are utterly devastating for those who are trapped in the web of criminalization.

This list of collateral consequences is compounded by social stigma and stereotyping that feed private discrimination and limit the ability of criminalized people to make connections and access the supportive networks that are critical to living a full, stable, and meaningful life. Criminalized people, especially those who have been incarcerated, are presumed dangerous, considered untrustworthy and aggressive, and greeted with suspicion and hostility.⁸⁸ This stereotyping complicates their participation in the life of their communities and consigns them “to the margins of legitimate society.”⁸⁹ When taken together, the regime of false criminalization makes it impossible for an ever-increasing swath of Americans to live with dignity and security.

The impact of false criminalization is not borne equally along racial lines. The overpolicing of Black and Brown communities—as experienced through

86. See, e.g., Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: Restoring the Social Safety Net for Ex-Offenders, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 529–46 (2006) (discussing barriers to reentry); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 258 (2004).

87. Archer, *Exile from Main Street*, *supra* note 28, at 791; Jain, *Arrests as Regulation*, *supra* note 35, at 811–12; Archer & Williams, *supra* note 86, at 534–46 (discussing barriers to reentry); Thompson, *supra* note 86, at 258.

88. Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269 (2009) (discussing the stigma associated with prior incarceration).

89. 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, 590 (2006); see also Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 243–46 (2010) (arguing that the barriers to reentry contribute to the high rates of recidivism); Thompson, *supra* note 86, at 273 (explaining that the social isolation faced by people with criminal convictions “effectively relegate[s] ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society”); Lyles-Chockley, *supra* note 88, at 271.

practices such as overreliance on “stop, question and frisk,” racial disparities in arrests, and the school-to-prison pipeline—leads to disproportionate engagement with the criminal legal system, even absent conviction.⁹⁰ People of color are also convicted and incarcerated at much higher rates than white people.⁹¹ And there is a well-documented history of policymakers imposing more significant criminal penalties on crimes associated with Black and Brown communities.⁹² As a result, Black and Brown people are much more likely to have criminal records than white people in a way that their relative engagement in criminal activity cannot explain.⁹³

There is also a spatial dimension to the challenges of false criminalization and the expanding and often meaningless conception of criminal records. Black people, especially those who are economically marginalized, are disproportionately likely to live in racially segregated communities.⁹⁴ Moreover, a disproportionate number of incarcerated people come from a relatively small number of communities.⁹⁵ The social and economic impacts of

90. See *A Closer Look at Stop-and-Frisk in NYC*, ACLU N.Y. (Dec. 12, 2022), <https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc> [<https://perma.cc/MZ6S-K3WT>] (“From 2003-2023, 90 percent of people stopped by the NYPD were people of color.”); NAZGOL GHANDNOOSH & CELESTE BARRY, THE SENT’G PROJECT, ONE IN FIVE: DISPARITIES IN CRIME AND POLICING 9 (2023), <https://www.sentencingproject.org/app/uploads/2023/11/One-in-Five-Disparities-in-Crime-and-Policing.pdf> [<https://perma.cc/CNR9-589N>] (“[P]eople of color are more likely to be arrested even for conduct that they do not engage in at higher rates than whites, as previously noted with drug offenses, and as discussed below regarding traffic stops, pedestrian stops, and with policing in schools. These forms of policing produce a high prevalence of arrests with uneven distribution. By age 23, 49% of African American men had been arrested, in contrast to 38% of white men . . .”).

91. Leah Wang, *Updated Charts Show the Magnitude of Prison and Jail Racial Disparities, Pretrial Populations, Correctional Control, and More*, PRISON POL’Y INITIATIVE (Apr. 1, 2024), <https://www.prisonpolicy.org/blog/2024/04/01/updated-charts/> [<https://perma.cc/G4LH-CZS7>] (“[T]he national incarceration of Black people is *six times the rate of white people* and more than twice the rate in every state.”).

92. See U.S. SENT’G COMM’N, 2023 DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 4 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf [<https://perma.cc/PCE7-B5N2>] (“Black males received sentences 13.4 percent longer, and Hispanic males received sentences 11.2 percent longer, than White males. Hispanic females received sentences 27.8 percent longer than White females . . .”).

93. See GHANDNOOSH & BARRY, *supra* note 90, at 9.

94. Archer, *The New Housing Segregation*, *supra* note 31, at 176; SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 1–6 (2021).

95. TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 41–43 (2013); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004) [hereinafter Roberts, *Mass Incarceration*]; Todd R. Clear, Dina R. Rose, Elin Waring & Kristin Scully, *Coercive Mobility and Crime*, 20 JUST. Q. 33, 38 (2003).

the United States' commitment to mass criminalization⁹⁶—including the weight of false criminalization and expanded criminal records—are heavily borne by Black and Brown communities.⁹⁷

These consequences are not only felt by those individuals who are unreasonably branded as “criminals.” Rather, the impact that expanded criminal records has on stability, prosperity, and belonging flows from the individuals directly impacted to their families and, more broadly, to their communities. We must expand our lens and consider how expansive contact with the criminal legal system creates barriers to community equity. Where individuals are denied opportunities for social connection, false criminalization tears at the social fabric of Black and Brown communities. Where individuals are denied access to the mainstays of an economically vibrant life, false criminalization deprives their communities of the collective contributions those individuals might otherwise offer, further concentrating poverty and economic marginalization. Where individuals who have been convicted of a crime are disenfranchised, the spatial concentration of false criminalization disempowers communities and entrenches political subordination.

The spatial concentration of these burdens fuels systemic inequalities within communities of color. There are collateral consequences for the community when individual sanctions and exclusion accumulate among community residents. Together, these compounded harms undermine the foundation of a healthy, vibrant, and equitable community.

A. *Defining the Threat to Community Equity*

Community equity refers to the combination of networks, investments, and structures that support a community as it dreams and builds together.⁹⁸ Community equity functions as a resource for breaking the cycles of discrimination, destruction, and neglect experienced so often by Black and Brown communities, supporting more equitable foundations for a just and vibrant future.⁹⁹ The question of whether community members have access to critical infrastructure that connects them to opportunity is at the heart of community equity. It asks whether community members have access to the drivers of economic and social mobility, including excellent and effective schools; good-paying jobs with benefits and opportunities for advancement; the

96. Mass criminalization has been defined as “the criminalization of relatively nonserious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.” Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016) [hereinafter Carbado, *Blue-on-Black Violence*].

97. See Roberts, *Mass Incarceration*, *supra* note 95, at 1281–97 (discussing the social effects of imprisonment in predominantly Black communities).

98. See Archer & Schottenfeld, *supra* note 34 (manuscript at 2).

99. *Id.*

social networks that give our lives meaning and connect us to opportunities; the financial capital that is essential to start and sustain businesses, purchase a home, and build wealth; and the ability to live with safety, respect, and dignity.¹⁰⁰

In the marginalized communities that bear the weight of false criminalization, the answer to these questions is far too often “no.” The expanding definition of criminal records, and the resulting criminalization, undermine several of the pillars of a strong community, including wealth, education, housing, family strength, and civic engagement. Subversion of these pillars impedes the ability of criminalized people to engage in the systems and spaces that bring communities together.

Beyond expanded and meaningless definitions of criminal activity, the ever-accumulating badges of criminality borne within Black and Brown communities, and the concomitant concentration of collateral consequences, tear at the infrastructure of community equity, further marginalizing these communities. As policymakers overcategorize certain activities as crimes, resources that might otherwise be focused on making productive investments in those communities are instead focused on controlling their residents. In turn, an increasing number of community members are fed into a system that treats these “criminal records” as justification for oppression and exclusion. Rather than sustaining the infrastructure of opportunity, this section shows how false criminalization and the expansion of criminal records (1) expand the reach of police and their authority to influence and shape communities of color and (2) minimize economic investment, hamper collective action, undermine civic engagement, and feed the stigmatization of already stigmatized communities that ultimately erodes community equity.

1. Empowering Police Officers to Shape the Future of Communities of Color

Overly inclusive definitions of criminal records feed the broadening of police authority into schools, the private housing market, and community spaces. Crime becomes the overarching paradigm through which communities of color are governed. This expansion of police influence and authority, and its disproportionate focus on people of color, risk deepening the alienation and displacement experienced by residents of predominantly Black and Brown communities.

Racism is a defining feature of American society, and the criminal legal system is not immune. Indeed, the United States has a general problem of

100. See *The Community Equity Initiative*, N.Y.U. SCH. L., <https://www.law.nyu.edu/centers/community-equity-initiative> [<https://perma.cc/E7KN-224W>].

racialized policing—including stops, frisks, arrests, and violence.¹⁰¹ People of color are stigmatized, brutalized, and burdened with fines and arrest records at an alarming rate.¹⁰² Officers too frequently rely on racial stereotypes that make people of color presumptive suspects.¹⁰³

Racialized policing—and the increased criminal legal system contacts for people of color that results—is intertwined with and exacerbated by another defining characteristic of our system of mass criminalization: the overcriminalization of arguably harmless behavior and the broad deployment of police to fight the “crimes” that result. By adopting overly expansive definitions of criminal activity, the criminal legal system ensnares people who have not engaged in activities that meet traditional notions of “crime.”¹⁰⁴ According to Professor Devon Carbado, “mass criminalization enables the police to arrest African-Americans not only through the criminalization of non-serious conduct,

101. I. Bennett Capers, *Race, Policing and Technology*, 95 N.C. L. REV. 1241, 1255–57 (2017) (providing evidence of racial profiling in New York, New York, Los Angeles, California, Philadelphia, Pennsylvania, Boston, Massachusetts, Minnesota, Maryland, North Carolina, New Jersey, and other American cities); Bennett L. Gershman, *Use of Race in “Stop-and-Frisk”: Stereotypical Beliefs Linger, but How Far Can the Police Go?*, N.Y. STATE BAR ASS’N J., March/April 2000, at 42, 42 (explaining a New York State Attorney General’s office study finding that Blacks were over six times more likely to be stopped than whites and Hispanics were more than four times as likely to be stopped than whites); John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 381 (2001) (finding that the number of nonwhites arrested remains unchanged by changes in the number of white and nonwhite police officers).

102. Sejla Rizvic, *Fines and Fees Are an Impediment to Justice, Experts Say*, FORDHAM L. SCH.: FORDHAM L. NEWS (Dec. 20, 2023), <https://news.law.fordham.edu/blog/2023/12/20/fines-and-fees-are-an-impediment-to-justice-experts-say> [<https://perma.cc/7UP5-33HT>] (“State and local court fees disproportionately affect people of color and when people can’t pay them, they face additional fees and ruined credit, making it hard to rent a home, or buy a car, and in some scenarios can even lead to incarceration.”); GHANDNOOSH & BARRY, *supra* note 90, at 8–11.

103. Archer, *The New Housing Segregation*, *supra* note 31, at 204; Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 HARV. C.R.-C.L. L. REV. 159, 163 (2016) (explaining the variables that “converge to render African Americans vulnerable to repeated police interactions”); Capers, *supra* note 101, at 1254–55 (discussing the problems with and evidence of racial profiling); Kevin R. Johnson, *Race Profiling in Immigration Enforcement*, 28 HUM. RTS. 23, 23 (2001) (discussing how the United States Supreme Court “opened the door to Border Patrol reliance on race” in conducting immigration stops).

104. See Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 551 (2017) [hereinafter Carbado, *Predatory Policing*] (“Mass criminalization enables the police to arrest African-Americans not only through the criminalization of non-serious conduct, but also through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state.”); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 364 (2016) (“[I]t is insufficient to understand the incursion of mass criminalization into the lives of poor black women without analyzing the interplay of the criminal justice system and other state systems. These systems include welfare offices, public schools, child welfare agencies, public housing, and the family courts, to name just a few.”); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325 (“Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United States, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization.”).

but also through the diffusion of criminal justice officials, norms, and strategies into the structure and organization of the welfare state.”¹⁰⁵ Indeed, mass criminalization criminalizes people for spitting, sleeping, and walking.¹⁰⁶ The result is a criminal legal system that intersects with our lives too frequently and too harshly.

In this way, criminalization has become the paradigm through which communities of color are governed. This new paradigm for governing is a societal evolution of the tradition of police characterizing social problems as criminal and then using the framework of crime and criminal history to control access to resources, opportunity, health, and community. Arrest and punishment are often rooted in race and poverty, and they have become the default response to a range of social challenges, with the police serving as first responders, mental health professionals, and disciplinarians.¹⁰⁷ Moreover, police intervention is also the default response to children engaged in typical adolescent behavior and a range of “disruptive” behavior.¹⁰⁸

The more we criminalize innocuous behavior and overpolice certain communities, the more likely it is that the label of criminality can become attached to entire communities.¹⁰⁹ As communities are defined as “bad neighborhoods,” the public becomes more accepting of invasive strategies of control that are supposedly needed to make the bad neighborhoods safe, or at least to prevent their pervasive criminality from seeping into other neighborhoods. These policies rely on expanding definitions of crime, criminal law-based responses to social problems, and the increased use of “criminalizing narratives.”¹¹⁰ Policymakers respond by giving police departments outsized power to determine who can and cannot live in certain communities, which

105. Carbado, *Predatory Policing*, *supra* note 104, at 551.

106. Archer, *Exile from Main Street*, *supra* note 28, at 825; Carbado, *Blue-on-Black Violence*, *supra* note 96, at 1487–88 (listing the types of nonserious behaviors that localities have criminalized); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 707 (2005) (listing “non-criminal behavior” for which people have been arrested or strip-searched, including loitering and violating subway rules).

107. See PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA, at xiii (2017) (“Low-income people are arrested for minor violations that are only annoyances for people with means but are disastrous for the poor and near poor . . .”); Carbado, *Blue-on-Black Violence*, *supra* note 96, at 1487 (noting that certain nonserious activities are policed by “criminal justice actors”).

108. See Lapp, *supra* note 27, at 212–13.

109. Archer, *Exile from Main Street*, *supra* note 28, at 530–33.

110. Criminalizing narratives are the stories we tell about the nature of crime and the people alleged to perpetuate it. ANDREA J. RITCHIE & BETH E. RITCHIE, BARNARD CTR. FOR RSCH. ON WOMEN, THE CRISIS OF CRIMINALIZATION: A CALL FOR A COMPREHENSIVE PHILANTHROPIC RESPONSE 9 (2017), <https://bcw.barnard.edu/wp-content/nfs/reports/NFS9-Challenging-Criminalization-Funding-Perspectives.pdf> [<https://perma.cc/N5EU-9RZ2>] (“Criminalization is the social and political process by which society determines which actions or behaviors—and by who—will be punished by the state.”).

children are allowed to stay in school, whether parents can visit their children's school, or who can access funds to pay for college or buy a home. And the public acquiesces in the name of public safety.¹¹¹

Once again, the burdens extend beyond those who develop criminal records through unnecessary police encounters. As more people living in these overburdened neighborhoods come to fear more frequent interactions with the police, the risk of racial stigma grows. The indignity of regular police contact and a lack of control creates a state of being “a disfavored or dishonored individual in the eyes of society.”¹¹² People of color are denied the right to live freely, “unencumbered by racial stigma and by the status of subordination.”¹¹³ Expanding definitions of criminal activity—combined with racialized policing—risk turning routine tasks—“living while Black”—not only into sources of anxiety, trauma, and indignity, but into the justification for further criminalization and exclusion from essential institutions and opportunities.¹¹⁴

Professor Monica Bell has argued that the policing of low-income people of color has led these groups to see themselves as “essentially stateless—unprotected by the law and its enforcers and marginal to the project of making

111. See Deborah N. Archer, “Crime Free” Housing Ordinances, Explained, APPEAL (Feb. 17, 2021), <https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained/> [<https://perma.cc/5MWY-3GP3>].

112. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004); see also Elise C. Boddie, *Ordinariness as Equality*, 93 IND. L.J. 57, 60 (2018) (“When stigma is internalized, it corrupts one’s sense of self. . . . Thus, racially stigmatized persons are not only externally diminished by social judgments but also become agents of their own debasement.” (footnotes omitted)).

113. Boddie, *supra* note 112, at 58; see also Aris Folley, *Woman Reportedly Arrested After Harassing Two Women for Speaking Spanish*, HILL (Oct. 4, 2018, 10:17 AM), <https://thehill.com/blogs/blog-briefing-room/news/409865-white-woman-arrested-after-harassing-two-women-for-speaking> [<https://perma.cc/M9ZV-JJT6> (staff-uploaded archive)]; Jessica Guynn, *BBQ Becky, Permit Patty and Why the Internet Is Shaming White People Who Police People ‘Simply for Being Black,’* USA TODAY, <https://www.usatoday.com/story/tech/2018/07/18/bbq-becky-permit-patty-and-why-internet-shaming-white-people-who-police-black-people/793574002/> [<https://perma.cc/CA49-GMR3>] (last updated July 23, 2018, 12:17 PM); Alanne Orjoux, Paul P. Murphy & Ray Sanchez, *Attorney in Rant That Went Viral Says He’s Not a Racist and Offers an Apology*, CNN, <https://www.cnn.com/2018/05/22/us/aaron-schlossberg-attorney-racist-rant-apology/index.html> [<https://perma.cc/4X7U-BS4M>] (last updated May 22, 2018, 7:11 PM).

114. See Boddie, *supra* note 112, at 60. In explaining the importance of “ordinariness” in achieving equality, Elise Boddie examines the story of Philando Castile, a Black man who was shot and killed in his car by a police officer in St. Paul, Minnesota, during a traffic stop. *Id.* Mr. Castile had been stopped by the police more than forty-six times before that day, with only six of the forty-six stops for offenses an officer could have observed before pulling him over. *Id.* In describing the way these forty-six stops may have eroded Mr. Castile’s dignity and the burden of stigma, Boddie asks:

Did the possibility of being pulled over occupy his thoughts as he was driving? Did he plan how he would respond—what he would say and how he would act if the police stopped him again? Did he ever feel demeaned or humiliated by the police in prior stops? And, if so, did the sight of a police car make him anxious or fearful?

Id.

American society.”¹¹⁵ This experience of “legal estrangement” is a result of policing as a collective institutional venture.¹¹⁶ The expansion of police power—ushered in by overly expansive definitions of criminal records and the migration of criminal enforcement into our schools, housing markets, and community institutions—threatens to spread that sense of estrangement and statelessness across Black and Brown communities.

2. Minimizing Economic Investment, Political Power, Civic Participation, and Community Engagement

Expanding and amorphous definitions of criminal records also work to disenfranchise communities politically, further undermining community equity and communities’ ability to access what they need and fight for what they deserve. Entire communities are labeled as criminal. For both individuals and communities, the result is an erosion of civic engagement—the methods by which community members come together to make decisions as a collective—and a diminution of political power. The use of criminal records as a screening mechanism may also result in “systems avoidance”¹¹⁷ through which the criminal legal system drives social stratification.

As of 2022, approximately 4.4 million people in the United States have been disenfranchised because of a criminal conviction.¹¹⁸ As of the same year, forty-eight states have limited the voting rights of people with a felony conviction.¹¹⁹ The impact on Black people, Black communities, and Black political power is staggering. One in nineteen voting-aged Black people is disenfranchised because of a conviction in America.¹²⁰ And in Alabama, Arizona, Florida, Kentucky, South Dakota, Tennessee, and Virginia, more than one in ten Black people is disenfranchised because of a conviction.¹²¹

115. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017).

116. *Id.* at 2058.

117. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 370, 373, 375 (2014).

118. NICOLE D. PORTER, ALISON PARKER, TREY WALK, JONATHAN TOPAZ, JENNIFER TURNER, CASEY SMITH, MAKAYLA LARONDE-KING, SABRINA PEARCE & JULIE EBENSTEIN, THE SENT’G PROJECT, OUT OF STEP: U.S. POLICY ON VOTING RIGHTS IN GLOBAL PERSPECTIVE 4 (2024), <https://www.sentencingproject.org/app/uploads/2024/08/Out-of-Step-U.S.-Policy-on-Voting-Rights-in-Global-Perspective.pdf> [https://perma.cc/ZZ4B-N5SR].

119. *Id.*

120. Lily Stockridge, *Bipartisan Support for Restoring Voting Rights to Former Felons*, CITIZEN DATA (Apr. 30, 2024), <https://citizendata.com/report/bipartisan-support-for-restoring-voting-rights-to-former-felons/> [https://perma.cc/WRE6-3DUE].

121. CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ROBERT STEWART, THE SENT’G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS (2022), <https://www.sentencingproject.org/app/uploads/2024/03/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf> [https://perma.cc/RH5Y-VUEW].

The impact of disenfranchisement laws is deepened because the disenfranchised are concentrated in communities that are already marginalized.¹²² This is coupled with the criminalizing and disempowering impact of the expansive conception and use of criminal records. Together, disenfranchisement and false criminalization undermine the political power of Black and Brown communities, diminishing their ability to collectively assert their rights, expand their opportunities, and shape public policy. As communities' pathways to civic engagement and political influence are impeded, they lose the ability to defend themselves from bearing the burdens of racism and systemic inequality. Whenever a road needs to be built or a waste transfer station needs to be constructed, these communities become "the path of least resistance" because they lack the power and influence that community voting strength brings.¹²³ The result is "the demobilization of entire neighborhoods"—both for those directly caught up in the criminal legal system and their neighbors who are not.¹²⁴

When Black and Brown communities are able to overcome these forces and exercise their collective strength, their efforts are faced with further criminalization. A perennial response to demonstrations of political power by Black and Brown communities has been to suppress that power.¹²⁵ These efforts have always enlisted the help of the criminal legal system and relied on the criminalization of Black and Brown people. In the wake of historic protests by Black people and their allies following the murder of George Floyd, states around the country took steps to criminalize protests and dissent.¹²⁶ One study found that voter suppression policies are positively correlated with "racial threat" effects: the use of heightened social controls enacted against minority groups as they accumulate economic and political power or grow in size.¹²⁷

122. BURCH, *supra* note 95, at 176–78.

123. See DEBORAH N. ARCHER, *DIVIDING LINES: HOW TRANSPORTATION INFRASTRUCTURE REINFORCES RACIAL INEQUALITY* 6 (2025); Archer & Schottenfeld, *supra* note 34 (manuscript at 34–35).

124. *Back Cover Synopsis* of BURCH, *supra* note 95.

125. Deborah N. Archer, "Black Rage" and the Architecture of Racial Oppression, in *FIGHT THE POWER: LAW AND POLICY THROUGH HIP HOP SONGS* 231, 243 (Gregory S. Parks & Frank Rudy Cooper eds., 2022).

126. Sophie Quinton, *Eight States Enact Anti-Protest Laws*, STATELINE (June 21, 2021, 12:00 AM), <https://stateline.org/2021/06/21/eight-states-enact-anti-protest-laws/> [<https://perma.cc/3T7D-72VK> (staff-uploaded archive)]; Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protestors (and Absolve Motorists Who Hit Them)*, N.Y. TIMES, <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [<https://perma.cc/QGS9-GP2J>] (staff-uploaded, dark archive)] (last updated June 23, 2023).

127. See generally Jeffrey S. Nowacki, Danielle Creech & Megan Parks, *Political Climate, Voter Suppression Policies and Federal Sentencing Outcomes*, 60 BRIT. J. CRIMINOLOGY 1155 (2020) (explaining that racial threat effects are enhanced in districts with voter suppression policies).

These social controls include increased arrest rates, police activity, or heightened criminal punishments.¹²⁸

The expansion of criminal records also limits community engagement by reducing criminalized people's access to places and services that are "policed" by using criminal records as screens for access.¹²⁹ Criminal background checks have become widely used for governing access to community and service institutions in the United States. The expanded definition of crime, and, therefore, the reach of the criminal legal system, may result in "function creep" where criminal records are used to control and limit access.¹³⁰ As a result, people with criminal legal system contacts that may be categorized as criminal records are less likely to participate in civic institutions.

Even where criminal records are not an actual bar to access, people with criminal legal system contacts might act on fear that it does or be concerned that their criminalized status will be interrogated in a demeaning and stigmatizing way. As a result, criminalized people may decline to access beneficial social networks and community support systems, alienating themselves from their community and the institutions designed to support them and their families.¹³¹ A strong community needs thriving and supportive networks, but it also needs residents who are able and willing to take advantage of those networks. This tool of community equity requires a sense of inclusion and belonging. The expansive use of criminal records and false criminalization undermines community equity by undermining inclusion and belonging.

The use of criminal records as screens may also result in a form of "system avoidance."¹³² Under this theory, community members who have had contact with the criminal legal system, or who fear false criminalization, avoid engaging with "surveilling institutions" that keep formal records. They forgo the medical, financial, employment, and educational opportunities those institutions provide.¹³³ A vicious cycle ensues. Because the criminal legal system has a disproportionate impact on Black and Brown communities, "system avoidance

128. *Id.* at 1157. This practice includes efforts to criminalize voter registration activities, laws such as those in Georgia making it illegal to give water to people waiting in line to vote, and the threatened and actual criminal prosecution for people who vote "illegally," particularly formerly incarcerated people who may erroneously believe their disenfranchisement has been lifted following their return to the community. See Kelly Mena, Fredreka Schouten, Dianne Gallagher & Pamela Kirkland, *Georgia Republicans Speed Sweeping Elections Bill Restricting Voting Access into Law*, <https://www.cnn.com/2021/03/25/politics/georgia-state-house-voting-bill-passage/index.html> CNN, [https://perma.cc/D3WK-5FZ3] (last updated Mar. 26, 2021, 6:30 AM).

129. David McElhattan, *The Proliferation of Criminal Background Check Laws in the United States*, 127 AM. J. SOCIO. 1037, 1038 (2022).

130. *Id.* at 1039.

131. See John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 14 J. LAB. & SOC'Y 87, 93 (2011).

132. Brayne, *supra* note 117, at 367–68, 385.

133. *Id.* at 372.

is a potential mechanism through which the criminal justice system contributes to social stratification: it severs an already marginalized subpopulation from institutions that are pivotal to desistance from crime and their own integration into broader society.¹³⁴

This phenomenon has been documented in the context of parental involvement in a child's education. Many school districts conduct some level of criminal history screening before a parent can enter the school building or volunteer to support school-sponsored activities.¹³⁵ For example, the Big Walnut Local School District in Ohio requires that parents go through an online criminal history check in order to volunteer for a classroom celebration, help to organize library books, or volunteer with the parent-teacher organization.¹³⁶ In Prince George's County, Maryland, public schools, parents who want to volunteer or chaperone a field trip must be fingerprinted and screened, often at their own expense.¹³⁷

While some parents are blocked from entering into their children's school because of a criminal background check, other parents may opt out of participating in school activities because they do not want to be "found out." That is so even when their criminal record would not create a legal barrier to entry or they have not engaged in behavior that would have ordinarily generated anything approximating a criminal record.¹³⁸

There is a cost when parents are prevented or discouraged from participating in their children's schools. Research shows that comprehensive parent engagement in school can impact student outcomes.¹³⁹ More broadly, parental involvement in civic institutions, like public schools, meaningfully contributes to children's well-being.¹⁴⁰ In the school setting, parents advocate for educational resources such as additional tutoring services; they fundraise to make improvements to school buildings, and they demonstrate strong social connections to their children. A parent's involvement in their child's school is

134. *Id.* at 367.

135. *See, e.g., Volunteers & Visitors*, SNOHOMISH SCH. DIST., <https://www.sno.wednet.edu/get-involved/volunteers-visitors> [<https://perma.cc/V25M-XPYV>].

136. *Volunteer Information*, BIG WALNUT LOC. SCHS., <https://www.bwls.net/VolunteerInformation.aspx> [<https://perma.cc/3YWH-Z6F8>].

137. *See, e.g., Fingerprint & Background*, HYATTSVILLE ELEMENTARY SCH., <https://ektron.pgcps.org/Hyattsville-ES/Fingerprint---Background/> [<https://perma.cc/5DNM-3ZNB>].

138. Sarah Esther Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 131–32 (2016) [hereinafter Lageson, *Found Out*].

139. *See, e.g.,* Nermeen E. El Nokali, Heather J. Bachman & Elizabeth Votruba-Drzal, *Parent Involvement and Children's Academic and Social Development in Elementary School*, 81 CHILD DEV. 988, 989 (2010) ("[P]ositive associations between parent involvement and academic achievement have been demonstrated repeatedly."); NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT 1 (Anne T. Henderson & Nancy Berla eds., 1994).

140. Lageson, *Found Out*, *supra* note 138, at 127.

especially important in school districts where school administrators and teachers do not look like or do not share a lived experience with their students. Despite the benefits a child, the school, and the overall community gain from parental involvement in the community's schools, parents with online or easily accessible criminal records purposefully avoid situations where someone will search their name online.¹⁴¹

CONCLUSION

The expansion of criminal records represents one of the most significant obstacles to opportunity and equity, impacting both individuals and their communities. Widening definitions of what constitutes a criminal record disproportionately ensnare already-marginalized communities and exacerbate cycles of disadvantage. As the concept of criminality expands, and as easy access to criminal records becomes more routine, the individual and community-based injuries grow more pronounced.

False criminalization and the pervasive use of criminal records as a tool for exclusion strip communities of their agency, drain their economic resources, and suppress their voices in critical conversations about justice, equity, and their own future. Ending mass criminalization, reducing access to "criminal" records, and abridging what decision-making processes can rely on those records, is essential to individual fairness and community equity.

141. *Id.* at 130.

