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The Gendered Burdens of Conviction and Collateral Consequences on Employment

Joni Hersch

Erin E. Meyers

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THE GENDERED BURDENS OF CONVICTION AND COLLATERAL
CONSEQUENCES ON EMPLOYMENT

Joni Hersch and Erin E. Meyers†*

Vanderbilt Law School

Ex-offenders are subject to a wide range of employment restrictions that limit the ability of individuals with a criminal background to earn a living. This Article argues that women involved in the criminal justice system likely suffer a greater income-related burden from criminal conviction than do men. This disproportionate burden arises in occupations that women typically pursue, both through formal pathways, such as restrictions on occupational licensing, and through informal pathways, such as employers' unwillingness to hire those with a criminal record. In addition, women have access to far fewer vocational programs while incarcerated. Further exacerbating this burden is that women involved in the criminal justice system tend to be a more vulnerable population and are more likely to be responsible for children than their male counterparts, making legal restrictions on access to public assistance that would support employment more burdensome for women. We propose programs and policies that may ameliorate these gendered income burdens of criminal conviction, including reforms to occupational licensing, improved access to public assistance, reforms to prison labor opportunities, improvements in labor market information sharing, and expanded employer liability protection.

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I. INTRODUCTION

Despite the United States making up only 5% of the world's population, it contains 20% of the world's prisoners,¹ and approximately one in twenty people will serve time in prison in their lifetime.² The issue extends further, as the likelihood of being convicted of a crime and subjected to the related indirect consequences is much higher than incarceration statistics reflect.³ Staggering statistics such as these have pushed the topic of criminal justice and prison reform to the forefront of many

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1 *Compare U.S. World Population Clock*, U.S. CENSUS BUREAU, (last accessed Feb. 11, 2019), <https://www.census.gov/popclock/> (showing the current U.S. population and current world population), *with ROY WALMSLEY, INST. FOR CRIM. POL'Y RES., WORLD PRISON POPULATION LIST*, (12th ed. 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf (showing that of the 10.74 million total prisoners in the world, the U.S. has more than 2.1 million prisoners).

2 Thomas P. Bonczar & Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison*, BUREAU JUST. STAT. (Mar. 6, 1997), <https://www.bjs.gov/content/pub/pdf/Llgsfp.pdf>.

3 Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, BUREAU JUST. STAT. 2 (Apr. 26, 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> (noting that in 2016, there were more than twice as many individuals on probation or parole (4.7 million) than in jail or prison (2.2 million)).

policymakers' minds. Yet, another group of astounding statistics has garnered significantly less attention. Unemployment rates for convicted persons, and specifically those who have been formerly incarcerated, are abysmal. For the formerly incarcerated, unemployment ranges from 18.4% among white men to 43.6% among black women.⁴ For formerly incarcerated women, the problem is particularly pervasive, with the unemployment rate for this population of women ranging from five to six times greater than their corresponding demographic group in the general population.⁵

Criminal justice reform efforts focus on a range of targets, with recidivism rates often viewed as a benchmark of the system's success or failure. However, when it comes to integrating individuals with criminal records into society, society's expectations and its actions diverge. On one hand, society largely expects individuals convicted of crimes to find stable employment to support themselves in order to avoid committing further crime.⁶ Indeed, employment is often a condition for probation or parole.⁷ On the other hand, employers often perform background checks and generally only express limited willingness to hire applicants with a criminal record.⁸

In this sense, our expectations regarding the employment of those with a criminal record represents a variant of the classic collective action problem. A social welfare perspective implies that in order to reduce recidivism, society would be best off if individuals convicted of crimes secured gainful employment, but employers are often unwilling to individually accept the perceived risks associated with integrating them into society.⁹ This reluctance poses a barrier to convicted persons in securing an income, making it difficult to meet basic needs. It's no wonder that recidivism rates hover around 75%.¹⁰

4 Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>. This represents the share of unemployed individuals among those who are actively seeking a job.

5 *Id.*

6 Many studies have documented the role of employment in successful reentry and desistance to criminal activity. See Gina Curcio & April Pattavina, *Still Paying for the Past: Examining Gender Differences in Employment Among Individuals with a Criminal Record*, WOMEN & CRIM. JUST., Apr. 18, 2018; JEFFREY D. MORENOFF & DAVID D. HARDING, NAT'L INST. JUST., FINAL TECHNICAL REPORT: NEIGHBORHOODS, RECIDIVISM, AND EMPLOYMENT AMONG RETURNING PRISONERS 2 (2011) (showing that employment "substantially reduced the risk of all recidivism outcomes"); Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 371, 372 (2008); Mindi N. Thompson & Devon L. Cummings, *Enhancing Career Development of Individuals Who Have Criminal Records*, 58 CAREER DEV'T Q. 209 (Mar. 2010).

7 18 U.S.C. § 3563(b)(4) (2018) (listing as a discretionary condition of probation that the defendant "work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment").

8 Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453–54 (2006) (showing more than 60% of surveyed employers report that they probably or definitely would not hire ex-offenders); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942–59 (2003) (matched pairs of men differing by race (black or white) applied to real jobs; study shows that a criminal record substantially lowers the likelihood of receiving a callback, with the negative impact greatest for black men).

9 See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 329–32 (2009) (describing unspoken discrimination against those with a criminal record).

10 MARIEL ALPER & MATTHEW R. DUROSE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD 6 (2018) (showing that of the 401,288 state prisoners released in 2005, 68% were arrested within three years, 79% within six years, and 83% within nine years).

Collateral consequences—formal restrictions generally incorporated into laws and rules—take this paradox a step further by codifying civil penalties that make a convicted individual’s ability to live in society exceedingly difficult.¹¹ For example, convicted persons are denied certain types of occupational licenses based on their criminal record—a clear hurdle to achieving stable employment in many occupations. Further, access to widely used and often essential public assistance programs are also restricted, placing additional limits on the non-crime options available to convicted persons to provide for themselves and their families.¹² Importantly, these consequences attach with conviction of certain crimes, regardless of whether an individual is incarcerated.¹³

Together, difficulties encountered in the labor market combined with specific collateral consequences make up an important set of indirect consequences of conviction that pose barriers to securing an income after criminal conviction. This Article discusses these indirect consequences of conviction, and argues that the impact of both difficulties in the labor market (defined for purposes of this Article as *informal barriers to income*) and collateral consequences (defined for purposes of this Article as *formal barriers to income*) differ by gender.

Specifically, this Article argues that women involved in the criminal justice system likely bear an indirect burden from criminal conviction that exceeds that of similarly situated men. Such a burden flows through both formal pathways, such as restrictions on occupational licensing or public assistance, and informal pathways, such as employers’ unwillingness to hire those with a criminal record in the types of occupations that women typically pursue.¹⁴ Further exacerbating this burden is the fact that women involved in the criminal justice system tend to be a more vulnerable population and are more likely to be responsible for children than their male counterparts.¹⁵

Part II provides a brief outline of issues surrounding women and the criminal justice system. This part discusses how the United States criminal justice system has evolved based on the assumption that offenders are mainly male, leaving issues specific to women secondary to those of men. Part III discusses the history and justifications of collateral consequence laws, which make up the formal barriers to income discussed in Part IV. Part IV provides an overview of barriers to income for those with criminal records. These barriers include codified collateral consequences in addition to informal barriers to income, which reflect stigma and perceived risks surrounding employing convicted individuals. Part IV further combines what is understood about gender differences in society, women’s experiences in criminal

11 Note that this Article follows the Model Penal Code’s definition of collateral consequences, and thus this Article’s definition excludes any “informal, locally imposed, private, and extralegal consequences of conviction.” See MODEL PENAL CODE: SENTENCING § 6X Collateral Consequences of Criminal Conviction at 238 (AM. L. INST., Proposed Official Draft 2017), https://www.ali.org/media/filer_public/44/2d/442dfd99-bd01-40d9-b6ad-e6efb99c4f1d/mps_sentencing_pfd_onlineccprovisions.pdf.

12 See *infra* Section IV.A.

13 See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Gabriel J. Chin, *Collateral Consequences*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., forthcoming); Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014), <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/> (explaining that collateral consequences attach to felony convictions and some misdemeanor convictions).

14 SHAWN M. FLOWER, NAT’L INST. OF CORRECTIONS, GENDER-RESPONSIVE STRATEGIES FOR WOMEN OFFENDERS, EMPLOYMENT AND FEMALE OFFENDERS: AN UPDATE OF THE EMPIRICAL RESEARCH (2010).

15 See *infra* Section II.A.

justice, and barriers to income, arguing that the indirect consequences of conviction exert a burden on women above and beyond their burden on men. Part V discusses policy implications, and Part VI briefly concludes.

II. WOMEN AND THE CRIMINAL JUSTICE SYSTEM

A. WOMEN IN THE CRIMINAL JUSTICE SYSTEM: A SNAPSHOT

A number of distinct patterns exist involving gender differences in crime and corrections. These patterns emerge early and are documented within the juvenile justice system. Girls involved in the juvenile justice system are typically arrested for less serious crimes than boys, such as “simple assault, property offenses, status offenses (e.g., running away, curfew violations, and underage drinking), and technical violations (e.g., contempt, probation, and post-release supervision violations).”¹⁶ For girls, childhood abuse is one of the most common risk factors associated with involvement in the juvenile justice system.¹⁷

These differences continue later in life, and women in the criminal justice system are generally more vulnerable than their male counterparts. For instance, they tend to be socially and economically marginalized, with victimization in their pasts.¹⁸ Co-occurring substance abuse and mental health disorders abound for female offenders at rates much higher than their male counterparts.¹⁹

While women involved in the criminal justice system are more vulnerable on average than men, they are also more likely to hold greater responsibility for young children. In 2004, 52% of women in federal prisons reported that, in the month before their arrest, they were living in a single-parent household.²⁰ In comparison, only 18% of men reported this.²¹

Finally, women’s criminal histories differ from men, with the average male offender having a longer and more violent criminal history than the average female offender.²² Conversely, female offenders tend to be “more likely to be incarcerated for property and drug offenses” than male offenders.²³ Notably for this Article’s purposes, many of the formal barriers to income attach to drug-related convictions specifically.²⁴

16 OFFICE OF THE JUVENILE DEF., REPRESENTING GIRLS IN THE JUVENILE JUSTICE SYSTEM 2–3 (2012).

17 *Id.* at 3.

18 See Kristy Holtfreter & Katelyn A. Wattanaporn, *The Transition from Prison to Community Initiative: An Examination of Gender Responsiveness for Female Offender Reentry*, 41 CRIM. JUST. & BEHAV. 41, 42 (2013).

19 Michele Staton, Carl Leukefeld & J. Matthew Webster, *Substance Use, Health, and Mental Health: Problems and Service Utilization Among Incarcerated Women*, 47 INT. J. OFFENDER THERAPY & COMP. CRIM. 224 (2003); Nena Messina, William Burdon, Garo Hagopian & Michael Prendergast, *Predictors of Prison-Based Treatment Outcomes: A Comparison of Men and Women Participants*, 32 AM. J. DRUG & ALCOHOL ABUSE 7 (2006).

20 LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN 16 (Revised 2010).

21 *Id.*

22 See SHAWN M. FLOWER, EMPLOYMENT AND FEMALE OFFENDERS: AN UPDATE OF THE EMPIRICAL RESEARCH 3 (2010).

23 *See id.*

24 *See infra* Part IV.C (discussing welfare restrictions related to drug convictions).

In terms of sentencing, women are more likely to be sentenced to probation or parole than men. In 2015, 84% of women under correctional supervision were on probation or parole, as compared with approximately 67% of men.²⁵ Within gender, there are substantial differences by race. As is the case for men, black women are substantially more likely than white women to be incarcerated.²⁶

B. A MALE-CENTRIC APPROACH TO PUNISHMENT

Most policy initiatives on the criminal justice system in the United States focus on men, likely due to the fact that historically, men have been convicted of crimes at much higher rates than women.²⁷ Relatedly, there exists far less research on female offenders than men.²⁸ However, the population of women involved in the criminal justice system has increased dramatically over the past few decades. For instance, the women's state prison population grew by 834% between 1978 and 2015—a growth rate double that of men.²⁹ Further, many recent policy initiatives aimed at reducing incarceration and recidivism have impacted men significantly more than women.³⁰ And while women still only make up 7% of the prison population, they represent 25% of individuals on probation, a status that leaves them at risk of experiencing indirect consequences of conviction.³¹

The focus on men in researching and designing criminal justice policy is not novel. For decades, solutions to issues specific to women in the criminal justice system have not been codified, but rather have been limited to advocacy group reports and lawsuits claiming constitutional violations.³² For instance, the federal government did not ban the shackling of pregnant women until 2018 with the passage of the First Step Act, and only eighteen states had addressed the issue beforehand,³³

25 ALEKS KAJSTURA, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2017 4 (2017), https://www.aclu.org/sites/default/files/field_document/womenprisonreport_final.pdf.

26 ASHA DUMONTHIER, CHANDRA CHILDERS & JESSICA MILLI, INST. FOR WOMEN'S POL'Y RES., THE STATUS OF BLACK WOMEN IN THE UNITED STATES 122 (2017); *Incarcerated Women and Girls*, THE SENTENCING PROJECT (May 10, 2018), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (showing that in 2016, the imprisonment rate for black women (96 per 100,000) was twice the rate for white women (49 per 100,000)).

27 BARBARA E. BLOOM & STEPHANE S. COVINGTON, CTR. FOR GENDER AND JUSTICE, GENDER-SPECIFIC PROGRAMMING FOR FEMALE OFFENDERS: WHAT IS IT AND WHY IS IT IMPORTANT? 1 (2018) ("The neglect of women in criminal justice research has been justified on the grounds that they account for only a small fraction of arrests and commit fewer crimes than males."); Solveig Spjeldnes & Sara Goodkind, *Gender Differences and Offender Reentry: A Review of the Literature*, 48 J. OFFENDER REHABILITATION 314, 315 (2009) ("Reintegration programs have primarily focused on men's needs because historically men have been incarcerated at rates far greater than women.").

28 For examples of research on female offenders, see, e.g., Curcio & Pattavina, *supra* note 6; Sarah Wittig Galgano, *Barriers to Reintegration: An Audit Study of the Impact of Race and Offender Status on Employment Opportunities for Women*, 30 SOC. THOUGHT & RES. 21 (2009); Robert J. Lalonde & Rosa M. Cho, *The Impact of Incarceration in State Prison on the Employment Prospects of Women*, 24 J. QUANT. CRIM. 243 (2008).

29 Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

30 *Id.* ("While recent reforms have reduced the total number of people in state prisons since 2009, almost all of the decrease has been among men.").

31 E. ANN. CARSON, U.S. DEP'T JUSTICE, PRISONERS IN 2016 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>; DANIELLE KAEBLE, U.S. DEP'T JUSTICE, PROBATION & PAROLE IN THE UNITED STATES, 2016, at 17, 24 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

32 See, e.g., *Klinger v. Neb. Dep't of Corr. Servs.*, 31 F.3d 727 (8th Cir. 1994).

33 AM. CIVIL LIBERTIES UNION, THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS, <https://www.aclu.org/other/aclu-briefing-paper-shackling-pregnant-women->

despite the ACLU's description of the practice as "dangerous and inhumane."³⁴ Similarly, federal prisons were not mandated to provide free sanitary products to female prisoners prior to the passage of the First Step Act.

Another criminal justice issue affecting women that has received some attention is the disparity in vocational training programs in men's and women's prisons.³⁵ For example, a 2018 report found that the Texas offers twenty-one academic and vocational programs³⁶ to incarcerated men, while offering only two to women—office administration and culinary arts/hospitality management.³⁷ One reason set forth to justify programming disparities is the fact that women make up a small percentage of the incarcerated population.³⁸ Regardless of the validity of this argument, these disparities nonetheless contribute to fewer employment prospects for women upon reentry.³⁹

C. POSTCONVICTION OUTCOMES

Of the research that does exist on female offenders, most studies are limited to the population of incarcerated or formerly incarcerated women. There is little research on outcomes for women with criminal convictions who were not sentenced to prison, despite recent statistics showing that 75% of women under correctional supervision are on probation—a sentence that is not associated with initial incarceration.⁴⁰ Existing post-release studies examine outcomes after release from prison, including income, recidivism, employment status, and health.

A thirty-state survey by the Bureau of Justice Statistics finds that the percentage of women who are re-arrested in the first year following release from state prison is a full ten percentage points lower relative to men.⁴¹ However, by the second year, the rates of re-arrest are nearly identical.⁴² One development that may occur during this time frame is a disparity in securing jobs in the long run, causing women to "catch up" to men in terms of recidivism rates. Providing one data point of support for this theory is a 2009 study of inmates being released from prison in Texas, which found that 36% of women were working at two to four months post-release, compared to

girls-us-prisons-jails-youth-detention-centers; *see also* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

³⁴ *Id.*

³⁵ Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 599 (2007) ("The programs in women's prisons prepare women for the most underpaid and unstable jobs in society, such as sewing and cooking.")

³⁶ Programs for men include, for example, cabinet making, construction carpentry, electronics, auto body, truck driving, data processing, horticulture, and substance abuse counseling. Lindsey Linder, *An Unsupported Population: The Treatment of Women in Texas' Criminal Justice System*, TX. CRIM. JUST. COALITION 17 (Apr. 2018), <https://www.texasjc.org/sites/default/files/publications/TCJC-Womens-Part-2.pdf>.

³⁷ *Id.*

³⁸ Adam Harris, *Women in Prison Take Home Economics, While Men Take Carpentry*, ATLANTIC (Apr. 30, 2018), <https://www.theatlantic.com/education/archive/2018/04/the-continuing-disparity-in-womens-prison-education/559274/>.

³⁹ *Id.*

⁴⁰ KAJSTURA, *supra* note 25, at 4.

⁴¹ ALPER & DUROSE, *supra* note 10, at 6.

⁴² *Id.*

48% of men.⁴³ This disparity diverged even more drastically at eight to ten months post-release, with 34% of women and 60% of men being employed.⁴⁴

Indeed, multiple additional studies have uncovered a general pattern of inferior employment outcomes for female offenders as compared to male offenders. A 2003 study used the 1997 National Longitudinal Survey of Youth (NLSY), finding that women who had been jailed suffered higher penalties than men in the labor market in the form of wages.⁴⁵ A 2008 study found that only 62% of female offenders surveyed—as compared to 76% of male offenders—had obtained any employment within the ten months following release from prison.⁴⁶ Further, a 2018 study, which also uses the 1997 NLSY data, found that the employment consequences of a criminal record differed by gender, with drug offenses detrimental to women’s employment, but not men’s.⁴⁷

III. COLLATERAL CONSEQUENCES

A. HISTORY

Legal scholars often cite four basic goals of criminal punishment: rehabilitation, deterrence, incapacitation, and retribution.⁴⁸ The prominence of each of these four goals within the United States criminal justice system has ebbed and flowed throughout history. Arguably, the most pivotal change was a major shift from a rehabilitative focus to a punitive focus—encompassing deterrence, incapacitation, and retribution—in the 1970s.⁴⁹

Following this shift was a dramatic expansion of civil penalties accompanying a criminal conviction, known collectively as collateral consequences.⁵⁰ Collateral

43 NANCY G. LA VIGNE, LISA E. BROOKS & TRACEY L. SHOLLENBERGER, *WOMEN ON THE OUTSIDE: UNDERSTANDING THE EXPERIENCES OF FEMALE PRISONERS RETURNING TO HOUSTON, TEXAS* 5 (2009).

44 *Id.* at 5. Notably this study diverged from the pattern of recidivism found in the Bureau of Justice Statistics study, with women being twice as likely to recidivate as men within the first year of release. *Id.* at 3.

45 See Scott Davies & Julian Tanner, *The Long Arm of the Law: Effects of Labeling on Employment*, 44 *SOC. Q.* 385, 397–98 (2003).

46 See KAMALA MALLIK-KANE & CHRISTY A. VISHER, *URBAN INST., HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION* 14 (2008), <https://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.pdf>.

PDF.

47 Curcio & Pattavina, *supra* note 6.

48 Rehabilitation’s motive is for involvement in the criminal justice system or related diversion-based systems to promote a shift in an individual’s values and actions for the better. This goal envisions a criminal justice involved individual emerging from probation, prison, or parole as an improved (i.e., more likely to obtain work and less likely to commit crimes) member of society. Deterrence represents the idea that either past experience with punishment or threat of punishment will incentivize an individual to avoid committing crimes. Incapacitation captures the notion that while an individual is in jail or prison, he or she is incapable of committing crimes in society for the simple reason that he or she is not present in general society. Finally, retribution assigns value to the idea of moral justice—that individuals deserve to be punished for wrongdoing, and that punishment may bring some solace to victims or society as a whole. See WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, *DEFINING CRIMES* 5 (2d ed. 2014). See generally John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 *LAW & HUM. BEHAV.* 659 (2000).

49 DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2002).

50 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, 1716–17 (2003) (“For the next two decades [beginning in the early 1980s], the official government position would be that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.”).

consequences (also called collateral sanctions) refer to “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.”⁵¹ Of note is the characterization of these penalties as distinctly noncriminal—despite many scholars’ disagreement with this characterization⁵²—leaving many protections offered by the criminal justice system inapplicable to these sanctions.⁵³ For instance, with the exception of deportation, a defendant is not entitled to be warned about the collateral consequences stemming from a conviction,⁵⁴ leaving the imposition of such consequences unknown at the plea bargaining stage.⁵⁵

Collateral consequences impact many facets of post-conviction life, and include ineligibility for or loss of employment licensing; ineligibility for certain public benefits, such as food and housing assistance; and loss of privileges related to citizenship, among others.⁵⁶ While collateral consequences have a long history in the United States justice system, their current scope reaches far beyond their original purpose,⁵⁷ and they carry the potential to “burden individuals for the rest of their lives,” long after their sentence has been served.⁵⁸

This Article focuses specifically on collateral consequences that create barriers to obtaining income for convicted individuals—specifically, restrictions to occupational licenses, required criminal background checks, and restrictions to public assistance, such as Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), and public housing. The next section discusses the debated rationales for criminal punishment in relation to these specific collateral consequences.

B. JUSTIFICATIONS AND CRITICISMS

The realization that collateral consequences may be counterproductive has prompted a 2015 American Bar Association (ABA) summit,⁵⁹ as well as policy reform among some states.⁶⁰ Most criticism of collateral consequences centers on

51 *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, AM. BAR ASSOC. (Dec. 5, 2018), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_collateral_blk/#1.1.

52 See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. (forthcoming 2019).

53 Murray, *supra* note 52, at *18 (“[C]lassifying collateral consequences as criminal punishment would result in serious practical challenges in the administration of the criminal justice system because it would force courts to critically assess plea-bargaining doctrines and the responsibilities of the parties involved.”).

54 See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

55 See MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 4 (2018).

56 See NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.csgjusticecenter.org/> (last visited Mar. 25, 2019).

57 See generally, Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010).

58 *Id.* at 1215–17.

59 AM. BAR ASS’N, NATIONAL SUMMIT ON COLLATERAL CONSEQUENCES CONFERENCE REPORT 3 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/cc_national_summit_report.pdf (“It is up to the criminal justice community to help ensure that the criminal justice system itself does not perpetuate recidivism via arbitrary and draconian sentencing and collateral consequences.”).

60 Nicole D. Porter, *Top Trends in State Criminal Justice Reform*, SENTENCING PROJECT (Jan. 16, 2019),

the fact that they prevent ex-prisoners' successful reentry into society.⁶¹ Few, if any, would argue that all crimes should be punished with a life sentence. Inevitably following this premise is the fact that many individuals with criminal records will, at some point, live as free members of society. In fact, less than half of defendants convicted of felonies—and even fewer convicted of misdemeanors—are sentenced to prison, and the average sentence handed down by state courts is less than five years.⁶²

In order to function successfully in society, individuals need to be able to secure basic needs, such as housing and food. Provisions limiting employment options and public assistance create barriers to securing a stable income, which is necessary to provide for basic needs. Indeed, access to sources of basic support have been demonstrated to reduce recidivism. Specifically, a recent study finds that drug offenders who are fully eligible for food stamps at the time of their release are 13.1% less likely to return to prison within one year, as compared to their counterparts who are not fully eligible.⁶³

Despite the burdens created by collateral consequences and related criticisms, they are defended on the grounds that they serve legitimate purposes, especially as a method to prevent future criminal activities. Returning to the goals of criminal punishment, the goal of incapacitation provides the soundest basis for justifying collateral consequences, while rehabilitation and deterrence provide shaky justifications at best. Some scholars argue that collateral consequences are truly retributive in nature, but this theory does not square with the Court's characterization of collateral consequences as noncriminal and non-punitive. We discuss each of these possible justifications in turn.

Most defensible is the suggestion that employment collateral consequences serve an incapacitation-like purpose and exist to protect the public from future crime.⁶⁴ Not all conditions that may lead to criminal activity can be readily rehabilitated. For example, many crimes are a consequence of drug addiction,⁶⁵ and treatment for drug addiction shows high relapse rates and oftentimes little success. As such, it would be in the public interest to prevent those convicted of drug crimes from employment in jobs in which they would have unfettered access to drugs or where drug impairment would put others at risk.

Occupational restrictions may be the most defensible collateral consequence under the theory of incapacitation, given that some types of employment may create a risk—whether actual or perceived—when job activities are related to the convicted crime. Restrictions on public housing may also potentially be defended using this

<https://www.sentencingproject.org/publications/top-trends-state-criminal-justice-reform-2018/>.

61 See, e.g., Karol Lucken & Lucille M. Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 LAW & POL'Y 46, 48 (2008) ("The unemployment rate, estimated at 25 to 40 percent, is shaped by a number of factors, many of which relate to the offender's lack of job preparedness. Another significant factor, however, is the existence of collateral sanctions in the form of statutory and regulatory barriers to employment." (internal citations omitted)).

62 Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 238 (2018).

63 Crystal S. Yang, *Does Public Assistance Reduce Recidivism*, 107 AM. ECON. REV. 551, 553 (2017).

64 Lucken & Ponte, *supra* note 61, at 52 ("It is clear that work enables the support of families and the development of pro-social roles and support systems. It is also clear that risks posed by certain ex-offenders and employment restrictions are legitimate.").

65 Messina et al., *supra* note 19, at 8 (showing that substance abuse is the "strongest predictor of recidivism for both men and women").

justification, on the basis of insulating other public-housing tenants from future crime. However, restrictions on welfare, such as TANF and SNAP, seem entirely removed from an incapacitation standpoint. Restricting receipt of government funds to subsidize food, childcare, and housing appears entirely unrelated to the goal of incapacitation.

Considering the rehabilitative objective, it is clear that any restrictions that limit or prevent an ex-offender from pursuing an occupation they are otherwise qualified for creates a deterrent to rehabilitation.⁶⁶ It is thus difficult to identify any rehabilitative goals met by occupational collateral consequences, and in fact seems antithetical to the goal of rehabilitation. Similarly, restrictions to public assistance would be difficult, if not impossible, to be justified on a rehabilitative basis.

From a deterrence standpoint, evidence that potential criminal behavior is deterred by fear of severe consequences is sparse. A 2017 literature review finds ample evidence that crime is responsive to changes in police presence and the existence of alternative labor market opportunities, but finds little evidence supporting the idea that potential offenders are swayed by changes in the severity of punishment.⁶⁷ In fact, studies largely show that the possibility of long prison sentences or even the death penalty have little effect on criminal decision making.⁶⁸ It is far less likely that potential criminal behavior will be deterred out of concern over the possibility of being denied an occupational license. With a single exception, attorneys are not required to inform their clients of collateral consequences at the plea-bargaining stage.⁶⁹ Additionally, the web of collateral consequences is so complex it is unlikely that potential offenders would have an awareness of the extent of potential consequences, let alone factor them into their decision-making process at the time of deciding whether to commit a crime.

Society may view retribution as a justification for collateral consequences, as some may deem it unfair or inappropriate to allow ex-offenders to practice certain occupations or receive certain welfare benefits. In fact, in light of the #MeToo movement, a number of actors and artists have lost jobs and status for actions that were not subject to immediate criminal consequences, and are not directly related to the merit of their art, but have nonetheless been sanctioned in the public arena.⁷⁰ But the strength of society's preference for retribution likely varies widely based on the type of crime. Society is likely to condemn for life a Bernie Madoff⁷¹ or a Jerry Sandusky,⁷² and would support unlimited restrictions on their future employment

66 It is widely accepted that occupational collateral consequences do not serve a rehabilitative goal. See Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 251 (2015); Velmer S. Burton et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52 (1987).

67 See Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5, 32 (2017).

68 *Id.* at 28.

69 See *supra* note 55 and accompanying text.

70 See e.g., Maria Elena Fernandez, *The House of Cards Team Wrote Their Final Season. Then They Wrote It Again*, VULTURE (Nov. 5, 2018), <https://www.vulture.com/2018/11/house-of-cards-final-season-without-kevin-spacey.html> (showing the actions taken by Netflix immediately following the sexual assault accusations against Kevin Spacey that led to Netflix producers rewriting Spacey out of the final season of *House of Cards*).

71 Edith Honan & Dan Wilchins, *Bernard Madoff Arrested Over Alleged \$50 Billion Fraud*, REUTERS (Dec. 11, 2008), <https://www.reuters.com/article/us-madoff-arrest/bernard-madoff-arrested-over-alleged-50-billion-fraud-idUSTRE4BA7IK20081212>.

72 Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012),

should they be released from prison. But society is less likely to view retributive justice in preventing someone convicted of theft from employment as a hairdresser.⁷³ Even supposing that retribution was a desirable and justified goal of collateral consequences, it would fail as a justification due to the framing of collateral consequences as purely civil and non-punitive.

In sum, as designed and implemented, the scope of collateral consequences that pose barriers to income likely extend well beyond any legitimate purpose. Making matters even more difficult for convicted individuals are employment-related informal barriers to income.

IV. BARRIERS TO INCOME AND THEIR GENDERED EFFECTS

While the net benefit (or cost) of collateral consequences may be debated, it is undeniable that a number of collateral consequences pose barriers to obtaining a stable income for convicted individuals. The two most common forms of income—employment and government assistance—may be drastically limited as the result of a criminal conviction. This section discusses three barriers to income potentially experienced by individuals convicted of a crime. Two of these barriers exist formally as collateral consequences, one of which affects employment and one of which affects government assistance. The third barrier to income arises through informal, non-legal pathways via employer preferences, and affects the ability of individuals with criminal records to secure employment.

As discussed in Part II, the literature has suggested that women in the criminal justice system make up an especially marginalized population.⁷⁴ Even before accounting for the barriers to employment and public assistance discussed below, female offenders are likely to be more in need of a stable income—due to their heightened single parenthood status—and less likely to obtain it—due to marginalization, pasts of victimization, and mental health issues. In discussing each of the formal and informal barriers to income, this Part describes the ways in which they exert an additional increased burden on women.

A. OCCUPATIONAL COLLATERAL CONSEQUENCES

For purposes of this Article, *occupational collateral consequences* are defined as any law that restricts—either automatically or with discretion—a criminal justice involved individual's ability to obtain employment, by (1) limiting access to occupational licenses and certificates on the basis of criminal record; (2) restricting employment in a certain field; or (3) requiring criminal background checks for certain employment types.

Formal occupational collateral consequences manifest in a variety of ways that vary by state or locality and by occupation. A 2016 National Employment Law Project (NELP) report estimated the number of state occupational collateral consequences at over 27,000,⁷⁵ an overwhelming number that shines a spotlight on

<https://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>.

⁷³ Cf. Ashley Nerbovig, *License to Clip*, MARSHALL PROJECT (July 10, 2018), <https://www.themarshallproject.org/2018/07/10/license-to-clip> (highlighting the story of Rosemarie Abruzzese, who was denied a cosmetology license because of a past felony drug conviction and appealed the decision to the Pennsylvania Commonwealth Court).

⁷⁴ See *supra* Part II.

⁷⁵ Michelle Natividad Rodriguez & Beth Avery, *Unlicensed and Untapped: Removing Barriers to State*

the scope, variety, and uncertainty that characterize the vast web of collateral consequences. That same report found that of state occupational licensing restrictions surveyed, 19,000 restrictions were indefinite and 11,000 were mandatory, leaving licensing agencies no discretion in license denial.⁷⁶

These restrictions affect a number of occupations. For example, in Ohio, a felony conviction of any kind disqualifies an individual from obtaining a teaching license for five years.⁷⁷ In many states, the state nursing license board may deny a license if the applicant has a felony conviction of any kind or a misdemeanor substantially related to nursing.⁷⁸ Nursing assistant licenses may also be affected.⁷⁹ In addition to denial of licenses by professional associations, there are federal and state laws that prohibit employment in a wide range of occupations including within the financial sector, medical field, skilled trade, and personal service industry.⁸⁰

Further compounding the barriers created by occupational licensing restrictions is the uncertainty of its scope and application. Many websites that provide information for individuals with a felony record in search of jobs include posts on specific occupations, answering whether an individual with a criminal record can get a job as, for example, a nurse.⁸¹ For many occupations, the answer is extremely uncertain.⁸² This may dissuade convicted individuals from pursuing jobs that require licenses, given the uncertain payoff associated with many of these jobs. For single parents, such uncertainty may prove more of a deterrent than to those who are only providing for themselves.

Three of the most common occupations for women are licensed—nurses, teachers, and nursing aides.⁸³ In contrast, only one of the top five occupations for men involves licensing—commercial truck drivers.⁸⁴ Despite requiring a license, individuals with criminal records are rarely denied a commercial driver's license. Many websites that provide information for individuals with felonies highlight truck driving as a potentially lucrative career.⁸⁵

Additionally, although rehabilitation in the form of educational and job training is considered an important step to reducing recidivism, one of the most common forms of training taken by female prisoners is cosmetology. In all states, those practicing cosmetology are required to be licensed by the State, and most or all states

Occupational Licenses for People with Records, NELP (Apr. 26, 2016), <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>.

⁷⁶ *Id.*

⁷⁷ OHIO REV. CODE ANN. § 3301-20-01 (West 2009).

⁷⁸ ALA. CODE § 34-21-25(b)(1)(b) & (c) (YEAR); CAL. BUS. & PROF. CODE § 2761(f) (West 2001).

⁷⁹ ARIZ. ADMIN. CODE § 32-1646 (2016) (three-year ban on nursing assistant license if convicted of felony).

⁸⁰ FLOWER, *supra* note 14; Jeffrey M. Hahn, *Pre-employment Information Services: Employers Beware?* 17 EMP. REL. L.J. 45 (1991).

⁸¹ For an example of this type of advice, see, e.g., *Can a Felon Become a Nurse?*, HELPFORFELONS.ORG, <https://helpforfelons.org/can-a-felon-become-a-nurse/> (last visited Feb. 25, 2019).

⁸² *Id.* (“Some felons have become nurses while others have been turned down. As with many instances involving felons, the answer can be complicated . . . but ‘in general,’ **It’s somewhat possible for felon can become a nurse five years after the completion of their sentence.**” (emphasis in original)).

⁸³ See *Most Common Occupations for Women*, U.S. DEP’T LAB., https://www.dol.gov/wb/stats/most_common_occupations_for_women.htm (last visited Apr. 9, 2019).

⁸⁴ *Id.*

⁸⁵ See *Can a Felon Become a Truck Driver?*, JOBSFORFELONSHUB.COM, <https://www.jobsforfelonshub.com/can-felon-become-truck-driver/> (last visited Apr. 9, 2019).

restrict licensing for ex-offenders.⁸⁶ Other programs offered in prison, such as carpentry, are largely unavailable to women, as they are offered exclusively in men's prisons.⁸⁷ Interestingly, Pennsylvania requires candidates for cosmetology licenses to be of good moral character, although there is no such requirement for barbers.⁸⁸

Not only does occupational licensing provide access to jobs that would otherwise be inaccessible, but it also is generally shown to increase wages.⁸⁹ Thus, via restricted occupational licensing, convicted individuals have fewer job opportunities and are likely to earn lower wages, potentially depressing convicted women's opportunities more than men's.

B. EMPLOYER PREFERENCES

Many employers exhibit a preference for hiring employees without criminal records.⁹⁰ This fact has been shown time-and-time again via resume studies and surveys. Thus, even if an ex-offender can secure an occupational license or chooses to pursue a career that does not require one, he or she may face an additional hurdle during the job hunt. Criminal background checking provides an indirect method of restricting employment, even when any criminal history bears no relation to the expectations of the job under consideration and when criminal history does not preclude employment in that job under any formal requirement.

One main reason hypothesized for these employer preferences is that of liability, with survey evidence supporting this hypothesis.⁹¹ Some courts have held employers liable for criminal acts committed by an employee while at work in cases when the employee had a prior criminal record.⁹² Indeed, such liability may alter insurance rates for companies that choose to hire ex-offenders.

Specifically, access to some jobs that would typically require bonding and insurance may indirectly be limited because insurers may not offer insurance to

⁸⁶ Cf. Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 535 (2005) (discussing a hypothetical released prisoner who undertakes either HVAC or barber vocational training while in prison, and is later denied a license for either profession upon release).

⁸⁷ Harris, *supra* note 38.

⁸⁸ *Pennsylvania Fresh Start*, INST. JUSTICE, <https://ij.org/case/pennsylvania-collateral-consequences/> (last visited Mar. 28, 2019).

⁸⁹ See Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S175 (2013) (showing that occupational licensing is associated with 18% higher wages); Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142 (2016); Brandon Pizzola & Alexander Tarbarok, *Occupational Licensing Causes a Wage Premium: Evidence from a Natural Experiment in Colorado's Funeral Services Industry*, 50 INT. REV. L. & ECON. 50 (2017). But see Beth Redbird, *The New Closed Shop? The Economic and Structural Effects of Occupational Licensure*, 82 AM. SOC. REV. 600 (2017).

⁹⁰ See Holzer, Raphael & Stoll, *supra* note 8; Pager, *supra* note 8.

⁹¹ Joe Palazzolo, *Criminal Records Haunt Hiring Initiative*, WALL ST. J. (July 12, 2015), <https://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255?mobile=y> ("In a 2012 survey by the Society for Human Resource Management, two thirds of employers reported using criminal background checks. Roughly half of those said their top reason for conducting background checks was to avoid legal liability.")

⁹² See, e.g., *Schechter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 431 (D.C. 2006) ("Especially where, as in this case, the employer knows that the employee will have free and independent access into the homes of its customers, the employer has an obligation to make reasonable efforts to inquire into such employee's past employment and past record.")

employers who knowingly hire ex-offenders.⁹³ Potential employers may either be unable to obtain general liability insurance for their business or face higher insurance rates should they hire an individual with a criminal record.⁹⁴ Of relevance to employment of women, professional cleaning services are typically bonded and insured.⁹⁵ This means that an occupation that would otherwise be available to women with low education may be out of reach because of the unavailability of insurance.

Additionally, occupational licenses that are controlled by a professional, private association that has in its discretion the authority to withhold or revoke licenses pose barriers. A prominent example is the ABA, which requires testation of “good moral character” before granting a license to practice law.⁹⁶

Gender differences in employment opportunities emerge when examining statistical differences in occupation types and industries between men and women. Among employers, there are differences by industry in willingness to hire convicted individuals. For example, three studies found that employers in the service industry were significantly less willing to hire ex-offenders than those in manufacturing, construction, or transportation.⁹⁷ One industry that is regularly described as promising for individuals with criminal records is construction, which is dominated by men.⁹⁸

Many occupations that involve interaction with customers or a caretaking aspect tend to be dominated by women.⁹⁹ Of the most common full-time occupations for women, three of the top five—teachers, nurses, and nursing/home health aides—are likely incredibly difficult to obtain work in with a criminal record, both from a licensing and an employer preference perspective.¹⁰⁰ While there is no specific research on willingness to hire convicted individuals in jobs that involve caretaking, it is not difficult to imagine that employers whose employees work with vulnerable populations would be most concerned with liability issues.

93 Employers have sometimes been held responsible for criminal acts of employees. See cases summarized in Holzer, Raphael & Stoll, *supra* note 8, at 453–54; See also Palazzolo, *supra* note 91 (WSJ investigation on business insurance policies and criminal records).

94 See THE FEDERAL BONDING PROGRAM, *About the FBP*, <http://bonds4jobs.com/about-us/faqs#1461691375872-085ca70e-9c131461694227044> (“Insurance companies may not cover risky job applicants under commercial crime insurance (also referred to as a fidelity bond) purchased by employers to protect themselves against employee dishonesty.”); Alex Wright, *What “Ban the Box” Really Means for Employers*, RISK&INSURANCE.com (Aug. 30, 2018) <https://riskandinsurance.com/ban-the-box-laws-make-employers-walk-a-fine-line/> (cautioning insurers about potential liability for insureds’ employees’ criminal acts).

95 See INSUREON, <https://buildingservices.insureon.com/> (last visited Mar. 28, 2019).

96 See NAT’L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS’N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 5–7 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf.

97 Holzer, Raphael & Stoll, *supra* note 8; Stoll & Bushway, *supra* note 6; Eric Lichtenberger, *Where Do Ex-Offenders Find Jobs? An Industrial Profile of the Employers of Ex-Offenders in Virginia*, 57 J. CORRECTIONAL EDUC. 297 (2006).

98 See, e.g., PRISCILLIA HUNT, ROSANNA SMART, LISA JONSSON & FLAVIA TSANG, *Incentivizing Employers to Hire Ex-Offenders*, RAND CORPORATION (2018), https://www.rand.org/pubs/research_briefs/RB10003.html.

99 See Paula England, Michelle Budig & Nancy Folbre, *Wages of Virtue: The Relative Pay of Care Work*, 49 SOCIAL PROBLEMS 455, 455 (2002).

100 *Most Common Occupations for Women*, U.S. DEP’T LAB., https://www.dol.gov/wb/stats/most_common_occupations_for_women.htm (last visited Jan. 12, 2019); Matt Rocheleau, *Chart: The Percentage of Women and Men in Each Profession*, BOSTON GLOBE (Mar. 7, 2017), <https://www.bostonglobe.com/metro/2017/03/06/chart-the-percentage-women-and-men-each-profession/GBX22YsW10XaeHghwXfE4H/story.html>.

C. PUBLIC ASSISTANCE

Should employment prove unattainable, government assistance is available in either the short or long term in order to lessen the burden of poverty. However, upon conviction, many individuals either lose or experience restrictions on assistance from government programs. For instance, § 115 of the Personal Work & Responsibility Act of 1996 eliminates eligibility for welfare benefits and food stamps for individuals convicted of a controlled substance felony, including possession.¹⁰¹ States have the option to opt out or adopt a modified version of this provision, and many states have done so—twenty-one states opted out of the food-stamp ban, while thirteen states plus D.C. opted out of the welfare ban.¹⁰² Other states have modified the provision by conditioning receipt of these benefits after conviction on successful completion of a substance abuse treatment program.¹⁰³ However, individuals convicted of drug felonies—who are disproportionately women¹⁰⁴—are still denied at least partial benefits in most states, and are denied full benefits in some.¹⁰⁵

Title 42 U.S.C. § 13661(c) provides significant leeway to the public housing authority to deny applicants to federal housing based on certain types of criminal histories.¹⁰⁶ In practice, such leeway is exercised in a vague and exclusionary manner.¹⁰⁷ Of note with respect to housing restrictions is that they exert restrictions on an individual's entire family. A family that includes an individual with a criminal record may be entirely denied or evicted from public housing based on the single individual—an outcome that is especially problematic for convicted parents. This contrasts with SNAP benefits, for which other members of an excluded individual's family are still eligible.

Given that women with criminal records are often single parents, they require some form of childcare while working. However, many states have restrictions on childcare subsidies available to those with criminal records.¹⁰⁸ Specifically, TANF

101 Yang, *supra* note 63, at 551 (citing Personal and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105).

102 LOVE, ROBERTS & LOGAN, *supra* note 55, at § 2:18 (“Under federal law, any person convicted ‘of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance’ is permanently ineligible for TANF or SNAP funds.”).

103 *Id.*

104 See Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 284 (2011) (noting a higher percentage of women incarcerated for a drug charge than men); Torrey McConnell, Note, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 505 (2017) (“[W]omen in prison are more likely than men (24% versus 15%) to be serving a sentence for a drug charge.”).

105 Yang, *supra* note 63, online appendix, Table A1.

106 42 U.S.C. § 13661(c) (2018) (providing that the housing authority may deny an application for public housing if it finds that “during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises”).

107 LOVE, ROBERTS & LOGAN, *supra* note 55, at § 2:17.

108 See, e.g., WASH. STATE INST. FOR PUB. POLICY, DECLINING USE OF SUBSIDIZED CHILD CARE: THE ROLE OF CRIMINAL BACKGROUND CHECKS 6 (2005), http://www.wsipp.wa.gov/ReportFile/904/Wsipp_Declining-Use-of-Subsidized-Child-Care-The-Role-of-Criminal-Background-Checks_Full-Report.pdf; cf. Rosie Flores, *Why a Criminal Record Shouldn't Disqualify Someone from Public Assistance*, NATION (Sept. 2, 2015), <https://www.thenation.com/article/why-a-criminal-record-shouldnt-disqualify-someone-from-public-assistance/> (“[T]his April, California lifted the lifetime ban on TANF and SNAP [for individuals with a felony drug conviction]. . . . For me, the biggest change is the childcare help that I am able to receive for the first time. After my release and getting sober . . . it was hard for me to find work [and] he missed out on the great opportunities

includes childcare subsidies and is one form of welfare that can be limited by a conviction. Subsidies to low income families for childcare has been shown to increase employment of women with young children.¹⁰⁹ Based on these facts, one can intuit that restrictions to childcare subsidies based on a criminal conviction make obtaining employment—an already difficult pursuit, as outlined above—even more difficult for single mothers.

V. IMPLICATIONS

Current employment outcomes for convicted individuals suggest that ample room for improvement exists, especially in terms of employment for convicted women. Despite the criminal justice system's current shortcomings, a review of some policies that are in existence is instructive in considering how employment outcomes might be improved. While the majority of the criminal justice system operates at the state level, federal-level policies can serve as a template for state-based reform. As such, this Part reviews examples of existing policies at both the state and federal level related to employment for convicted individuals, and discusses how they might be expanded upon or altered in order to improve outcomes.

Policies related to convicted individuals' ability to secure income that are discussed in this Part include (a) occupational licensing restrictions, (b) welfare eligibility restrictions, (c) the prison labor system, (d) information mechanisms in the labor market, including ban-the-box policies and certificates of rehabilitation, and (e) employer liability and risk sharing. Finally, this section concludes with a brief discussion of general considerations that can help shape future directions in policy making with an eye toward improving employment outcomes for convicted individuals. Carefully crafted policies can benefit convicted women in particular, given their disadvantaged position in the labor market and higher need for income to support dependent children.

A. STATE LICENSING REFORMS

Many states have reformed collateral consequence laws relating to occupational licensing in response to criticism. Reforms vary and include features such as prohibiting licensure denial based solely on a criminal record, unless the conviction directly relates to the occupation; prohibiting consideration of some criminal record information during the licensing process; considering factors such as relevance to the occupation, time since the offense, and evidence of rehabilitation; and procedural protections such as required explanations for denial and provision of an appeals process.¹¹⁰

While such provisions certainly are more desirable than a blanket ban on occupational licenses, they still leave convicted individuals with immense uncertainty in pursuing careers that require occupational licenses. The sheer number of collateral consequences licensing laws on the books highlights this problem.

offered through childcare programs.”).

109 MARÍA E. ENCHAUTEGUI, NINA CHIEN, KIMBERLY BURGESS & ROBIN GHERTNER, U.S. DEPT HEALTH & HUM. SERV., EFFECTS OF THE CCDF SUBSIDY PROGRAM ON THE EMPLOYMENT OUTCOMES OF LOW INCOME MOTHERS 2 (2016).

110 See *50-State Comparison: Consideration of Criminal Records in Licensing and Employment*, RESTORATION RTS. PROJECT, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> (last visited Mar. 28, 2019).

Individuals with convictions are likely reluctant to pursue occupations that require licenses, which may be denied on a discretionary basis. A system in which laws are simpler and more transparent could help to alleviate some of the problem.

For instance, further reforms might consider policies such as ignoring criminal records for certain crimes after a certain time period. Alternatively, outlining specific considerations or requirements that make a criminal record inapplicable to a licensing decision could be helpful. Any system in which a clear path towards license eligibility will reduce uncertainty and make convicted individuals more likely to pursue opportunities in licensed occupations.

B. PUBLIC ASSISTANCE AND CHILDCARE

TANF provides financial assistance to pregnant women and families, and is at least partially restricted in the vast majority of states for individuals with felony drug convictions. The benefits provided by TANF include “help with food, housing, home energy, child care, job training, and more.”¹¹¹ Limited access to affordable childcare is likely to prove detrimental for single parents. Harm in this situation will either manifest in the parent’s inability to obtain sufficient employment or in the child(ren) experiencing unsupervised time. Given that women—including those with criminal convictions—are more likely to be single parents, lack of realistic childcare options likely burdens them more than men.¹¹²

Beyond simply affecting a parent’s ability to obtain employment, restricting an individual’s access to subsidized childcare seems counterintuitive. Subsidized childcare could potentially help to mitigate some of these issues. As such, the current restrictions imposed on childcare subsidies under TANF for convicted women is antithetical to the goal of allowing them to provide for themselves and integrate them and their families in society. In fact, providing additional childcare options for convicted women could be a possible option for closing the gap in employment.

C. RETHINKING PRISON LABOR

Prison labor is a highly controversial issue. Critics express justifiable outrage at a system in which prisoners are vulnerable to exploitation by private and government entities, with wages set at as little as \$0.08 an hour.¹¹³ On the flipside of the debate, work while in prison can provide some income, and perhaps more important, also provide skills training. Prisoners have been employed in activities including telemarketing, manufacturing of circuit boards, and garment production.¹¹⁴ At the state level, Tennessee provides an example. A private company, Tricor, contracts

111 See *Government Benefits*, USA.GOV, <https://www.usa.gov/benefits#item-36602> (last visited Apr. 9, 2019).

112 In addition to affecting convicted women more than convicted men, lack of access to childcare likely affects black women more than white women, as black women are more likely than white women to be single parents. Thus, the burden created by restrictions on post-incarceration employment falls more heavily on black women’s families due to the higher cost of failing to obtain employment, but also due to the time restrictions that childcare pose on their ability to obtain employment.

113 For example, California allows payments from \$0.08 cents per hour to \$0.37 cents per hour. *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POLICY INITIATIVE, https://www.prison-policy.org/reports/wage_policies.html (last visited Apr. 3, 2019).

114 David Leonhardt, *As Prison Labor Grows, So Does the Debate*, N.Y. TIMES (Mar. 19, 2000), <https://www.nytimes.com/2000/03/19/business/as-prison-labor-grows-so-does-the-debate.html?module=inline>.

with state agencies and private sector companies to employ incarcerated individuals in jobs in functions such as call centers and textile production, while providing skills training and support for post-release job placement.¹¹⁵ An international example takes this a step further. Women who are released from prison in Peru and were employed by Pietà, a fashion company, while incarcerated can continue to work for the company upon release.¹¹⁶

At the federal level, the Bureau of Prisons operates Federal Prison Industries (FPI).¹¹⁷ FPI was created by federal statute in 1934 and describes its role as providing skills training in diverse factory setting while also contributing to safety and security by keeping inmates constructively employed. As reported in the *New York Times*,¹¹⁸ FPI earned \$500 million in sales in 2016 from production of mattresses, eyeglasses, road signs, body armor, and other products for government agencies. However, the pay remains low, at roughly \$0.90 an hour.

One approach to harnessing potentially valuable skills training while mitigating concerns over exploitation would be to explicitly require firms that pay below market wages to prisoners to hire them after their release for some mandated time period, or else make whole the difference between pay while in prison and the statutory federal minimum wage.

Given the differences in bargaining power and resulting potential for exploitation, such a policy would need to be approached with care. However, given that prison labor seems to be an entrenched reality in the United States prison system, an altered system that meets the objective of providing valued employment skills—and perhaps even guaranteed employment upon release—warrants consideration.

D. INFORMATION SHARING IN THE LABOR MARKET

Ban-the-box laws limit employers from inquiring about criminal history at an early stage of the hiring process.¹¹⁹ Although the intent of these laws is to expand opportunities for those with a criminal record by requiring potential employers to make individual assessments about applicants' qualifications for the job, research has shown that these laws have had the unintended consequence of leading to lower hiring of minority workers.¹²⁰ Thus, while ban-the-box laws may have some benefit in improving employment opportunities for those with a criminal history, they come with a potentially large cost.

Because ban-the-box policies seem to result in the unintended effect of reduced employment of black males, as firms statistically discriminate against potential

115 *Tricor Programs*, TRICOR, <http://www.tricor.org/content/tricor-programs>.

116 Elizabeth Paton & Andrea Zarate, *Made on the Inside, Worn on the Outside*, N.Y. TIMES (Feb. 21, 2019),

<https://www.nytimes.com/2019/02/21/fashion/prison-labor-fashion-brands.html>.

117 *Federal Prison Industries*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/org_fpi.jsp (last visited Apr. 3, 2019).

118 Paton & Zarate, *supra* note 116.

119 Joni Hersch & Blair Druhan Bullock, *The Law and Economics of Employment Discrimination Law*, OXFORD RES. ENCYCLOPEDIAS: ECON. & FIN. (Feb. 2019), <http://oxfordre.com/economics/abstract/10.1093/acrefore/9780190625979.001.0001/acrefore-9780190625979-e-374>.

120 Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. ECON. 191, 191 (2018); see also Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (Nat'l Bureau of Econ. Research, Working Paper No. 22469, 2016), <https://www.nber.org/papers/w22469>.

employees perceived as higher risk of being an ex-offender, it is worthwhile to consider whether more direct signals of rehabilitation or employability may be better mechanisms for enhancing employment opportunities.

Certificates of rehabilitation are provided by six states and are intended to remove occupational barriers by indicating that the ex-offender has been rehabilitated or made a commitment to rehabilitation.¹²¹ Eligibility for a certificate require job training and educational programs to demonstrate qualifications for the jobs. Ohio has gone a step further to address employment collateral consequences by creating and issuing a “Certificate for Qualification of Employment” (CQE). These certificates have the dual purpose of providing limited relief from employment collateral consequences faced by the ex-offender and providing the prospective employer with immunity from negligent hiring claims.¹²²

The value of certificates of qualification for employment, especially in light of ban-the-box laws, can be somewhat inferred from a study of occupational licenses in ban-the-box states. Employers may rely on whether a candidate has a valid employment license to provide information about non-offender status. One study shows that in states with felony bans on occupational licenses, the greatest positive effect on wages of occupational licenses is for African-American men in ban-the-box states.¹²³ The reasoning is that employers can use licensing to provide information about non-offender status when they are otherwise prohibited from ascertaining this information early in the hiring process by ban-the-box laws, as they would otherwise avoid hiring African-American men altogether because of their greater likelihood of a criminal record.¹²⁴

It is further instructive to consider the mechanism underlying ban-the-box policies. At their core, they seek to improve outcomes for convicted individuals by suppressing information in the marketplace. Information suppression, however, comes with the costs described above. In contrast, certificates of rehabilitation seek to *improve* information sharing in the marketplace, while also helping convicted individuals obtain employment. Thus, information about risk is more clearly conveyed, improving outcomes at a lower cost than ban-the-box laws.

E. LIABILITY CONSIDERATIONS

The Federal Bonding Program has helped to place 52,000 at-risk jobseekers¹²⁵ using a “unique hiring incentive tool.”¹²⁶ It provides subsidies to employers who hire individuals with criminal convictions by covering liability due to “any type of stealing: theft, forgery, larceny, and embezzlement, as long as the employee intends

121 These states are Arizona, California, Illinois, Nevada, New Jersey and New York. *Certificates of Rehabilitation*, LEGAL ACTION CTR., <https://lac.org/toolkits/certificates/certificates.htm#state> (last visited Apr. 3, 2019).

122 Ohio provides for CQE under Senate Bill 337, effective September 29, 2012, <https://drc.ohio.gov/Portals/0/CQE/SB337Fact.pdf?ver=2016-09-14-164318-850>.

123 Peter Q. Blair & Bobby W. Chung, *Job Market Signaling Through Occupational Licensing* (Nat'l Bureau of Econ. Research, Working Paper No. 24791, 2018) (manuscript at 3), <https://www.nber.org/papers/w24791>.

124 See Agan & Starr, *supra* note 120; Doleac & Hansen, *supra* note 120.

125 *About the FBP*, FED. BONDING PROGRAM, <http://bonds4jobs.com/about-us> (last visited Apr. 4, 2019) (defining at-risk jobseekers as “Justice-involved citizens; Individuals in recovery from substance use disorders; Welfare recipients; Individuals with poor credit records; Economically disadvantaged youth and adults who lack work histories; Individuals dishonorably discharged from the military”).

126 *Id.*

to cause the employer a loss and personally gain from his or her actions.”¹²⁷ However, coverage is limited to employee theft and, notably, does not cover insurance due to liability.¹²⁸ Thus, this program does not address any burden women face due to their heavy involvement in caretaking occupations, which involve potential liability due to interacting with vulnerable populations.

A better understanding of the true risks of employing convicted individuals could help spread those risks across society, which collectively enjoys the benefits of reduced recidivism. Certificates of rehabilitation and information sharing in the market could help communicate individualized risks in a more precise manner than ban-the-box policies.

F. UNDERLYING CONSIDERATIONS

1. UNDERSTANDING GENDER-SPECIFIC NEEDS

Many criminal justice experts have highlighted the need for a gender-specific approach to addressing women’s issues in prison. However, in the realm of gender-focused criminal justice legislation, progress is slow. Policy reforms that are gender neutral on their face may benefit men, who tend to be the focus of criminal justice policy making, while having a reduced impact for women. The recently passed First Step Act illustrates.

In December 2018, Congress passed the First Step Act, which implements what many have described as “sweeping criminal justice reform” to the federal system.¹²⁹ The First Step Act of 2018 has been highlighted by the media and includes a number of provisions geared toward improving reentry for incarcerated individuals. Some provisions in the Act specifically seek to improve employment outcomes for individuals upon release.

For example, the First Step Act provides earned time credit for vocational and education training while in prison, which incentivizes preparation for employment upon release. However, the impact of this provision on women’s employment prospects may be limited, given the limited scope of vocational and educational programs in women’s prisons.¹³⁰ Thus, while this reform appears gender neutral, it is likely to benefit men in a manner above and beyond women.

In terms of women’s issues, the Act does prohibit shackling of pregnant women and mandates provision of feminine sanitary products for incarcerated women. However, the fact that some women in federal prisons presumably did not have access to free feminine sanitary products until late 2018 speaks for itself. Future legislation at both the state and federal levels should take a more proactive approach to legislating with female-specific issues in mind.

Finally, of note is that few of the reforms in the First Step Act affect any of the previously discussed income barriers. For instance, the Act does not alter any law

¹²⁷ *What is Fidelity Bonding?*, FED. BONDING PROGRAM, <http://bonds4jobs.com/about-us/faqs#1461691375774-2478a7ef-a7201461694227044> (last visited Apr. 4, 2019).

¹²⁸ *Id.*

¹²⁹ See Rebecca Shabad & Phil Helsel, *Senate Passes Sweeping Criminal Justice Reform Bill*, NBC NEWS (Dec. 19, 2018, 9:02 PM), <https://www.nbcnews.com/news/us-news/senate-passes-sweeping-criminal-justice-reform-bill-n949586>. But see Natasha Lennard, *The First Step Act Is Not Sweeping Criminal Justice Reform—and the Risk Is That It Becomes the Only Step*, INTERCEPT (Dec. 19, 2018, 9:18 AM), <https://theintercept.com/2018/12/19/first-step-act-criminal-justice-reform-bill/>.

¹³⁰ See *supra* Part II.B.

related to collateral consequences, including both restrictions on employment licensing and restrictions on public assistance.¹³¹

Policy-making could benefit by considering issues specific to women, and especially those issues that pertain to the labor market, when pursuing further criminal justice reform. An unemployment rate of 43.6% for preciously incarcerated black women and 23.2% for preciously incarcerated white women—a statistic that notably only includes individuals who are *actively seeking work*—indicates that there is ample room to improve labor market outcomes for the population of convicted women.

2. INCORPORATE CRIMINAL JUSTICE INVOLVED INDIVIDUALS IN THE POLICY-MAKING PROCESS

Individuals with firsthand experience in the relevant issues—in this case, convicted women and men—should help to inform policy decisions.¹³² One successful example of a model that follows this comes from the Indiana Women’s Prison.¹³³ There, a group of women who were taking a college course while incarcerated drafted a policy proposal intended to provide stable housing for women upon release from the prison.¹³⁴ The general premise of the program was intended to solve two issues—a mass of abandoned homes in certain Indianapolis neighborhoods, and unstable housing that is typical for women released from prison.

After much effort, they pitched their proposal via videotaped testimony to the state legislature, who unanimously passed the proposal. The program is now up and running, and involves providing “education and practice in building trades and residential maintenance,” “rehabilitating abandoned homes,” and ultimately, earning their own homes via “sweat equity.”¹³⁵ While this is a rare example of an “everyone wins” situation in policy-making, the fact that the program was a product of individuals who understand and have experienced the issues at hand likely contributed to its success.

VI. CONCLUSION

Clearly, criminal conviction poses distinct barriers to income that are difficult to surmount. While past research has pointed out convicted women’s worse employment outcomes, most such research has pinpointed their underlying characteristics—such as mental health and substance use issues—as the cause.

This Article argues that in addition to underlying differences between the population of convicted women and convicted men, the indirect consequences of conviction exert a burden on women that differs from—and may exceed—the burden experienced by men. Licensing restrictions, stigma, and perceived risk in hiring

¹³¹ See Murray, *supra* note 52.

¹³² *Female Inmates in Indiana Pitch Plan to Rehab Empty Houses – And Their Lives*, NPR (Nov. 2, 2017), <https://www.npr.org/2017/11/01/559901323/female-inmates-in-indiana-pitch-plan-to-rehab-empty-houses-and-their-lives> (“Women in prison aren’t thought of as public policy experts,” she said. “But who knows more than they do about key issues like domestic violence, inner-city ‘food deserts,’ and what it takes for a mother to survive with her children on the streets of Indianapolis after she is released from prison?”).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Program Description*, CONSTRUCTING OUR FUTURE, <https://constructingourfuture.org/program-description> (last visited Feb. 27, 2019).

decisions in female-dominated occupations and industries, along with barriers to childcare subsidies are all likely to exert a heightened burden on women. To the extent that women continue to become an increasing share of the convicted population, this problem will only grow.

Many reasons exist to reconsider policies affecting convicted persons' access to income. Most progress in this realm is likely to be made through legislative initiatives due to the collective action-esque nature of employing convicted individuals. Thoughtful legislation will involve both reflecting on past policies' successes and shortcomings, and acknowledging gender differences in the burdens stemming from the indirect consequences of conviction.