

# CAPITALIZING ON CRIMINAL JUSTICE

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## ABSTRACT

*The U.S. criminal justice system “piles on.” It punishes too many for too long. Much criminal law scholarship focuses on the problem of excessive punishment. Yet for the low-level offenses that dominate state court workloads, much of the harm caused by arrests and convictions arises outside the formal criminal sentence. It stems from spiraling hidden penalties and the impact of a criminal record. The key question is not just why the state over-punishes, but rather why so many different institutions—law enforcement institutions as well as civil regulatory agencies and private actors—find it valuable to do so. This Article argues that the reach of the criminal justice system is not just the product of overly punitive laws, but also the product of institutions capitalizing on criminal law decisions for their own ends. Criminal law is meant to serve a public purpose, but in practice, key institutions create, disseminate, and rely on low-level criminal records because they offer a source of revenue or provide a cost-effective way of achieving discrete administrative objectives. These incentives drive and expand the reach of the criminal justice system, even as they work in tension with the state’s sentencing goals. This dynamic creates obvious harm. But it also benefits key actors, such as municipalities, privatized probation companies, background check providers, employers, and others who have incentives to maintain the system as it is. This Article identifies how organizational incentives lead a host of institutions to capitalize on criminal law decisions, and it argues that reform efforts must, as a central goal, recognize and respond to these incentives.*

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## INTRODUCTION

The U.S. criminal justice system “pil[es] on.”<sup>1</sup> Police over-arrest, and the state over-imprisons. Commentators denounce “the challenge of over-criminalization; of over-incarceration; and over-sentencing.”<sup>2</sup> An ideologically diverse coalition views the criminal justice system as far too large.<sup>3</sup> The Heritage Foundation, the Koch Foundation, and the

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1. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1872 (2015).

2. Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, BOS. REV. (June 8, 2015), <http://bostonreview.net/books-ideas/marie-gottschalk-neoliberal-prison-reform-caught> [https://perma.cc/7JXH-MKZJ] (quoting Senator Mike Lee, “an influential Tea Party Republican”); Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES (Nov. 23, 2009) (“The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree . . . . Witness the broad and strong support from such varied groups as the Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the A.B.A., the Cato Institute, the Federalist Society and the A.C.L.U.” (quoting Dick Thornburgh, attorney general under Presidents Ronald Reagan and George H.W. Bush)).

3. See, e.g., MICHAEL B. MUKASEY & PAUL J. LARKIN, JR., THE HERITAGE FOUND., THE PERILS OF OVERCRIMINALIZATION 1 (2015), <http://www.heritage.org/report/the-perils-overcriminalization> [https://perma.cc/77P3-Y3AJ]; Charles G. Koch & Mark V. Holden, *The Overcriminalization of America: How to Reduce Poverty and Improve Race Relations by Rethinking Our Justice System*, POLITICO (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991> [https://perma.cc/95RK-7SMY].

American Civil Liberties Union, among others, denounce the overcriminalization of America.<sup>4</sup> Commentators agree that the harms of excessive punishment reach well beyond prison walls.<sup>5</sup> Criminal penalties can trigger economic loss, break up families, damage communities, erode faith in the police, and lead to outcomes that appear arbitrary and procedurally unfair.<sup>6</sup> Those released from prison can face collateral consequences long after the sentence has been served.<sup>7</sup>

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4. Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 541 (2005) (“The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL), two groups with very distinct missions, joined together . . . to examine the topic of overcriminalization.”). Others likewise warn that overbroad criminal laws make it possible for anyone to be treated “like a criminal.” See, e.g., Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE, “THE AIMS OF THE CRIMINAL LAW” 43–56 (Timothy Lynch ed., 2009); Cara Sullivan, *Criminalizing America: How Big Government Makes a Criminal out of Every American*, AM. LEGIS. EXCH. COUNCIL (Nov. 12, 2013), <https://www.alec.org/article/criminalizing-america> [<https://perma.cc/Z3QW-5EGP>]. For examples of other criticisms, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 58 (2010) (arguing that the criminal justice system is designed to promote racial subordination); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 1–2 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that collateral consequences function as an invisible form of punishment); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

5. Though commentators on the right and left agree on the need for criminal justice reform, there are important differences between their approaches. For a discussion of these differences, see MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 2–3 (2015).

6. The literature is far too voluminous to catalogue here. For selected recent contributions, see Monica C. Bell, *Police Reform & the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2068–73 (2017); Tracey L. Meares, Tom R. Tyler & Jacob Gardner, *Lawful or Fair? How Cops & Laypeople Perceive Policing*, 105 J. CRIM. LAW & CRIMINOLOGY 297, 307–11 (2016).

7. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (arguing that collateral consequences can be far more meaningful than the formal criminal sentence); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1208–09 (2016) (cataloguing different types of collateral consequences); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 306–09 (2015); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–94 (2010); 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, 593–98 (2006); J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035, 1038–41, 1055–58 (2016) (discussing sex offender registries); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 720–23 (2008) (arguing that the severity of a collateral consequence should be relevant in determining a defendant’s constitutional criminal procedure rights); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479–80 (2005); see also MARGARET COLGATE LOVE,

In the past fifty years, overcriminalization has become the dominant conceptual framework for understanding the reach of the U.S. criminal justice system.<sup>8</sup> Critics warn about the impact of overbroad criminal laws and their potential to suppress individual rights,<sup>9</sup> and about the devastating toll of mass incarceration and its potential to operate as a new form of “civil death” or as the “new Jim Crow.”<sup>10</sup>

The overcriminalization framework is powerful. It draws attention to the problem of excessive punishment, well beyond what can be justified by the state’s sentencing goals. Yet in focusing on excessive criminal penalties, this framework is also incomplete. It obscures how harm unfolds for the low-level offenses that consume the bulk of state criminal court caseloads.<sup>11</sup> For these offenses, the criminal penalty itself may not appear disproportionate, at least as an initial matter. Rather, harm arises over time, including from spiraling criminal justice debt and ubiquitous reliance on criminal records by employers and others. The key question is not why the “state” imposes so much harm; it is why so many actors—police and prosecutors, as well as private actors and regulatory agencies—find it valuable to do so.

This Article argues that the reach of the criminal justice system is not only the product of the state “piling on.” It is also the product of disaggregated institutions—both state and nonstate actors—making choices that they view as rational responses to discrete organizational incentives. That is not to say that these incentives themselves are

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JENNY M. ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013) (cataloguing collateral consequences).

8. See Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 597–98 (2011) (describing rhetoric relating to being “smart on crime” as a welcome change from rhetoric relating to being “tough” on crime); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962) [hereinafter Kadish, *Legal Norm*]; Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 17 (1967); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 791 (2012). See generally *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. Comm. on the Judiciary*, 111th Cong. (2010); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2009) (arguing that American criminal punishment is increasingly unjust and excessive and is in need of limiting principles).

9. Kozinski & Tseytlin, *supra* note 4, at 43–56; Sullivan, *supra* note 4.

10. ALEXANDER, *supra* note 4, at 58; Chin, *supra* note 4, at 1790.

11. This Article uses the term “low-level” arrests to refer to arrests below the grade of felony. It encompasses both misdemeanors (typically punished by a maximum of a year in prison, and in practice, punished by little or no prison time) as well as infractions or violations (noncriminal offenses in penal law, typically punished by a fine).

desirable, nor that they create rational public policy outcomes. Rather, the organizational logic that motivates key institutions is distinct from—and often in tension with—the sentencing interests of the state.

In theory, criminal justice decisions—arrests, convictions, and the use of criminal records—should reflect the state’s interest in punishment, such as in deterring crime. The institutions that generate and rely on criminal records are at times motivated by these concerns. But they also pursue other goals. They value arrests and their attendant criminal records as a source of revenue, as a way to demonstrate productivity, or because they offer a relatively low-cost way to monitor and manage populations over time. State actors, in effect, wear two hats; at times, they respond to public safety interests, but at other times, they respond to other incentives, particularly perceived financial incentives. Once criminal records are created, noncriminal legal institutions have incentives to appropriate them for a host of reasons. Criminal records fulfill a credentialing function. They offer a relatively cheap way to select job applicants, manage risk, insulate against liability for torts such as negligent hiring, and allocate scarce resources such as public benefits. The process of checking records can ease psychological anxiety about crime and, in some cases, it can deter crime. The financial benefits of this system are diffuse; they are experienced by employers, landlords, and regulatory agencies such as those tasked with providing professional licenses. The costs, meanwhile, are disproportionately experienced by the poor and people of color, who are the most likely both to be arrested and to experience disproportionate penalties as the result of a criminal record.<sup>12</sup>

Because criminal law theory tends to conceptualize criminal punishment as driven by the state’s interest in the abstract, it has overlooked the importance of disaggregated interest group preferences in maintaining the current system. By contrast, in other areas of policy, scholars and courts recognize how rational interest group preferences lead to policies that deviate from the state’s interest. To offer an imperfect analogy, consider the funding structure for public schools. If public education seeks to provide each child with an equal

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12. See *Poverty and Opportunity Profile, Americans with Criminal Records*, SENTENCING PROJECT, <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [https://perma.cc/CK6X-NZBJ] (reporting that “[b]lack men are six times more likely to be incarcerated than white men, and Hispanic men are 2.5 times more likely to be incarcerated than white men”). See generally Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (arguing that poor African Americans are disproportionately the targets of mass incarceration).

opportunity,<sup>13</sup> then a funding structure tied to local property taxes misses the mark. It permits significant funding disparities.<sup>14</sup> Yet reform requires more than assessing how these disparities undercut society's interest in education.<sup>15</sup> It also requires identifying the interests of stakeholders, such as homeowners or local governments in well-funded districts.<sup>16</sup> These stakeholders have interests in maintaining a system that promotes their own interests, even when they recognize that it is not an optimal system overall, one that accounts for the interests of society at large.

This Article seeks to expand discussions of overcriminalization beyond the role of the state. It seeks to identify and account for the interests of stakeholders in maintaining the reach of the low-level criminal justice system. Stakeholders are not just interest groups like victims' rights organizations that seek laws that are "tough on crime." They also include those who value access to criminal records for a variety of reasons.

The influence of key stakeholders has important implications for reform. For one, it calls into question the extent to which low-level arrests and convictions fulfill an appropriate public purpose. Key institutions such as police, prosecutors, privatized probation companies, background check providers, and others extract value from

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13. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (describing education as "perhaps the most important function of state and local governments" and stating that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

14. Cory Turner et al., *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016, 5:00 AM), <http://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [<https://perma.cc/KC4M-QXJF>] (discussing how differences in local funding means that the state invests far more per student in wealthier districts, and offering an example of a district that invests \$9794 per student, while a wealthier district an hour away invests \$28,639 per student).

15. Funding disparities have been criticized for undercutting the state's interest in promoting equality of opportunity. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J. dissenting).

*Id.*

16. For a discussion of the local politics of access to schools, see Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES (June 9, 2016) <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/QQ4U-XKXL>] ("In a city where white children are only 15 percent of the more than one million public-school students, half of them are clustered in just 11 percent of the schools, which not coincidentally include many of the city's top performers."). *See also* Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1446 (2014) (discussing local governments in high property tax areas as stakeholders).

the process of creating and using criminal records. This creates the risk that the criminal justice process is being imposed not for the benefit of the public, but for the benefit of particular institutions.<sup>17</sup> This dynamic also affects the methods used by scholars to evaluate the need for reform. In particular, it calls into question the efficacy of cost-benefit analysis, which has in recent years spurred reform by showing how the costs of mass incarceration do not produce corresponding societal benefits. Yet this type of cost-benefit analysis may not work in the context of low-level arrests and collateral consequences. That is because disaggregated institutions stand to derive significant benefits from criminal justice decisions, regardless of their overarching costs. Responding to overcriminalization thus may require key institutions to change their practices, including by removing access to criminal record information that many find valuable.

This Article proceeds as follows: Part I argues for a more expansive understanding of overcriminalization. In particular, it argues for focusing on low-level offenses, where the initial criminal punishment may not appear excessive, and for taking into account actors other than police, prosecutors, and judges. Part II identifies how key institutions use criminal justice decisions instrumentally. They use the criminal justice system to generate revenue, keep down costs, or achieve other organizational objectives. It argues that these decisions reflect a certain organizational logic, although the sum of these decisions does not make for rational policy overall. Part III examines the implications of these dynamics for misdemeanor reform. It argues for the importance of identifying stakeholders in the current system. Stakeholders include those with a vested financial interest in the criminal justice system, such as privatized probation companies and the background check industry, as well as others who gain significant value from widespread access to records. It also questions whether cost-benefit analysis—which has been an important force in spurring reform targeted at mass incarceration—is of similar use in the context of low-level offenses. Lastly, it preliminarily considers potential avenues for realigning the interests of stakeholders with those of the state.

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17. By “institution,” this Article refers to formal organizations, whose purpose and structure are defined by an external set of rules. For a similar approach, see SHARON DOLOVICH & ALEXANDRA NATAPOFF, *NEW CRIMINAL JUSTICE THINKING* 3–4 (2017) (arguing that the “full range of relevant law” governing criminal justice decisions includes not only the formal criminal punishment, but also “the laws establishing the terms of the penalties as actually served, along with the civil remedies, collateral consequences and disabilities, and all the laws of all the institutions—civil as well as criminal—that make up the socio-criminal complex”).

## I. THE ROLE OF THE STATE

The dominant overcriminalization framework focuses on the state's role in creating excessive criminal punishment. It has been enormously influential in illuminating the financial, psychological, and other burdens of mass incarceration, as well as its disparate impact on the poor and people of color. This Part briefly introduces the framework. It argues that while the overcriminalization account has a great deal of explanatory power, it is also incomplete. The overcriminalization account is state focused, particularly felony focused. This focus risks obscuring how harm unfolds from low-level arrests, where the initial formal penalty is typically minimal. Harm arises over time, including through the use of criminal records. In addition, the overcriminalization framework tends to take a bird's eye view of the criminal justice system; it focuses on the aggregate costs and benefits of the system as a whole. This approach is effective in demonstrating how the costs of the system outweigh its benefits. However, it risks obscuring the powerful incentives that lead discrete actors to create, disseminate, and rely on criminal records. As Part II discusses, these incentives are key to understanding why the system remains in place.

A. *The Overcriminalization Framework*

It's a familiar story by now. The U.S. criminal justice system is a colossus, its reach unprecedented by both global and historical measures.<sup>18</sup> The United States houses approximately one-fifth of the world's prisoners.<sup>19</sup> Yet incarceration represents just a fraction of the criminal justice system. About 1 percent of the U.S. adult population—2.3 million Americans—lives in prisons or jails. Almost twice as many—four million people—are on probation.<sup>20</sup> Approximately one

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18. See LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> [<https://perma.cc/THA8-HAKJ>] (reporting that approximately one out of every thirty-five adults in the United States, or approximately 3 percent of the adult population, is under some form of correctional supervision—probation, parole, or incarceration); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/us/23prison.html> [<https://perma.cc/DY8Q-VUN4>].

19. ROY WALMSELY, INST. FOR CRIMINAL JUSTICE POLICY, WORLD PRISON POPULATION LIST 5 (11th ed., 2016), [http://prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf) [<https://perma.cc/T4WN-UCZ7>]. See generally Sharon Dolovich, *Foreward: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 254 & n. 114 (2009) (discussing American prison conditions).

20. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, DEP'T



out of every thirty-five adults live under some form of corrective supervision—incarceration, probation, or parole.<sup>21</sup> An estimated one out of every three people will be arrested by the time they reach the age of twenty-three.<sup>22</sup> For African Americans, the number is closer to one in two.<sup>23</sup>

In the past fifty years, overcriminalization has become the dominant conceptual framework for understanding this dynamic. First coined by Professor Sanford Kadish in 1962, the concept of overcriminalization focuses on using criminal sanctions—the “heavy artillery of society”—to reach conduct that could be better regulated by other means.<sup>24</sup> While there is no single definition of overcriminalization, common hallmarks include overbroad criminal laws, grossly disproportionate punishment, and excessive delegation of discretion to law enforcement officers.<sup>25</sup> This, in turn, leads to arbitrary

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OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 2 (2014), <https://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<https://perma.cc/8KUW-N3F9>].

21. See GLAZE & HERBERMAN, *supra* note 18, at 1.

22. Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

23. Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

24. Kadish, *Legal Norm*, *supra* note 8, at 909; Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 721 (2013); Luna, *supra* note 8, at 785 (“As far as I can tell, Sanford Kadish coined the term ‘overcriminalization’ in a 1962 article in the *Harvard Law Review*, where he noted the phenomenon of ‘criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern.’”); see also Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 738 (1981) (describing criminal law as the “heavy artillery of society”); Fernando Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV. 123, 125 (2011) (defining overcriminalization as “too much criminal law”); Josh Shepherd, *The Government vs. YOU*, DAILY SIGNAL (June 14, 2013), [http://dailysignal.com/2013/06/14/morning-bell-the-government-vs-you/?\\_ga=1.173785766.444958766.1482949459](http://dailysignal.com/2013/06/14/morning-bell-the-government-vs-you/?_ga=1.173785766.444958766.1482949459) [<https://perma.cc/DC2H-WBS8>] (describing overcriminalization and activism to counteract it).

25. Professor Sara Sun Beale defines overcriminalization as characterized by: “(1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).” Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005). Similarly, Erik Luna defines overcriminalization as characterized by the following characteristics: “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pre-textual enforcement of petty violations.” Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

outcomes, such as arrest decisions that reflect variation in officer discretion rather than variation in the underlying conduct.<sup>26</sup> This dynamic also undermines the moral force of the criminal justice system and its deterrent effect.<sup>27</sup>

Overcriminalization also creates other harm. Mass incarceration causes employers to lose out on potential workers. Families break up. It exposes prisoners to the threat of sexual and physical abuse.<sup>28</sup> And the cycle perpetuates itself. Prisoners are unlikely to gain valuable skills while in prison, and employers are unlikely to hire those with criminal records or with employment gaps.<sup>29</sup> This, in turn, can lead to recidivism.<sup>30</sup>

Critics warn that the financial outlay necessary to support mass incarceration is enormous. As President Barack Obama recently put it: “If one includes the cost of jail and prison at the state and local level, the total U.S. budget for incarceration rises to a staggering \$81 billion, enough to fund transformative initiatives like universal preschool for every three- and four-year old in America . . . .”<sup>31</sup>

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26. Luna, *supra* note 25, at 723–24.

27. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (empirical study demonstrating that the public obeys the law largely because of its perceived moral legitimacy, not due to a fear of getting caught and punished); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1877 (1992) (arguing that “the criminal law should not be overused” for fairness considerations because “overuse will impair the criminal law’s nondeterrent functions”); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1802 (1992) (advocating for limiting criminal law to clearly egregious cases where civil damages would be ineffective).

28. ALLEN J. BECK & CANDACE JOHNSON, *DEP’T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS*, 2008, at 8 (2012), [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z\\_Personal/Huus/svrfsp08%5B1%5D.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/svrfsp08%5B1%5D.pdf) [https://perma.cc/9MS7-X85U] (finding that 10 percent of inmates experienced sexual abuse in prison); Jennifer M. Chacón, *Producing Liminal Legality*, 92 *DENV. L. REV.* 709, 745–46 (2015) (discussing the potential for physical, emotional, and sexual abuse in prison).

29. LAW ENF’T LEADERS TO REDUCE CRIME & INCARCERATION, *FIGHTING CRIME & STRENGTHENING CRIMINAL JUSTICE: AGENDA FOR THE NEW ADMINISTRATION* 11 (2017).

30. *Id.* at 5 (“Bloated prison populations harm more than they protect. . . . The country spends \$274 billion per year on its criminal justice systems, without ensuring the required public safety gains.”). See generally Loretta E. Lynch, U.S. Att’y Gen., *Addressing National Reentry Week Event in Philadelphia* (Apr. 25, 2016) (discussing how collateral consequences for former prisoners, such as the inability to work or obtain housing, can promote recidivism).

31. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 *HARV. L. REV.* 811, 818 (2017) (citations omitted); see also Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 *MINN. L. REV.* 1837, 1843 (2015) (“State and federal correctional costs now exceed \$80 billion per year. After adding judicial, legal, and police costs, this amount climbs to \$260 billion annually.” (footnotes omitted)); Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, *PRISON POL’Y INITIATIVE* (Jan. 25, 2017),

Despite these costs, the barriers to reform are daunting. There are many reasons why overbroad criminal laws proliferate. Politics provides one common explanation. Lawmakers face pressure to demonstrate that they are “tough on crime.” Another explanation focuses on lawmakers’ incentives to use the rhetoric of crime control to generate support for public policy choices that are actually motivated by the desire to manage the poor and people of color.<sup>32</sup> Lawmakers and prosecutors have reason to prefer broad criminal laws because they allow prosecutors and police to exercise significant discretion over their caseloads.<sup>33</sup> Another explanation is dysfunction in the lawmaking process. Lawmakers tend to write overinclusive laws without sufficient regard to the laws already in place. A criminal law may appear reasonable when viewed in isolation, but “may turn out to be utterly unreasonable when it is considered against the background of laws already on the books.”<sup>34</sup>

### B. *The Missing Picture*

The overcriminalization critique has a great deal of power. It highlights the gap between the state’s rationales for punishment and its actual use of criminal sanctions. Yet in today’s world—where criminal records are seamlessly transmitted and the impact of a criminal record can last for decades—it is also incomplete. The overcriminalization account tends to focus on the state’s role in imposing too much punishment, specifically its role in imposing lengthy felony sentences. This risks obscuring the impact of low-level arrests and of collateral consequences triggered by those arrests.

Low-level offenses matter because of their volume, and because they tend to trigger harm in a different manner than felonies. In terms

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<https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/9LTN-MDF6>] (breaking down the cost of various portions of the criminal justice system).

32. See generally ALEXANDER, *supra* note 4, at 58 (arguing that the government’s preoccupation with crime and drug offenses created a pathway for governance through penal sanctions against minority communities); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (arguing that crime control has become a “strategic” issue, with the rhetoric of crime control used to justify policies that are in fact motivated by reasons unrelated to crime control).

33. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (describing “the story of American criminal law” as “a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes”).

34. Larkin, *supra* note 24, at 722.

of volume, minor offenses dominate the practices of state courts.<sup>35</sup> As Professor Alexandra Natapoff discusses, misdemeanors outnumber felonies by a ratio of about five to one.<sup>36</sup> Approximately 80 percent of state caseloads consist of minor offenses.<sup>37</sup> Offenses like suspended license cases, disorderly conduct, minor drug possession, and minor assault commonly trigger jail time, but they do not typically trigger a hefty formal sanction.<sup>38</sup> Instead, the top concern for many defendants is whether a conviction will trigger deportation or pose a barrier to obtaining work, renting a home in public housing, or seeking a student loan.<sup>39</sup>

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35. Professor William Stuntz described criminal law as “not one field but two. The first consists of a few core crimes . . . murder, manslaughter, rape, [etc.] . . . The second consists of everything else. Criminal law courses, criminal law literature, and popular conversation about crime focus heavily on the first. The second dominates criminal codes.” Stuntz, *supra* note 33, at 514.

36. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) [hereinafter Natapoff, *Misdemeanor Decriminalization*]; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–22 (2012) [hereinafter Natapoff, *Misdemeanors*] (summarizing research indicating that “the world of misdemeanors looks to be about four or five times the size of the world of felonies.”).

37. R. LAFOUNTAIN, R. SCHAUFFLER, S. STRICKLAND & K. HOLT, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), [http://www.courtstatistics.org/media/Microsites/Files/CSP/DATA%20PDF/CSP\\_DEC.ashx](http://www.courtstatistics.org/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx) [<http://perma.cc/HQ5P-XLCX>] (showing that misdemeanors significantly outnumber felonies in the criminal caseloads of seventeen selected states); R. LAFOUNTAIN, R. SCHAUFFLER, S. STRICKLAND, C. BROMAGE, S. GIBSON & A. MASON, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/Other-Pages//media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<http://perma.cc/4PWV-5BNS>] (showing that misdemeanor cases constitute an “overwhelming majority of criminal caseloads”); Victor Eugene Flango, *Trends in State Courts: Judicial Roles for Modern Courts*, NAT’L CTR. FOR STATE CTS., <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx> [<http://perma.cc/4ZQN-SU4S>] (“Approximately [80] percent of criminal cases are misdemeanors.”).

38. Natapoff, *Misdemeanors*, *supra* note 36, at 1321 (describing jail as a “crucial feature of the misdemeanor landscape”).

39. *See, e.g.*, JAMES JACOBS, THE ETERNAL CRIMINAL RECORD 3 (2015) (“For many, perhaps the majority of, defendants the most serious consequence of an arrest is the resulting criminal record.”); Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 815 (2015); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, J. GENDER RACE & JUST., Fall 2002, at 253, 253–54 (explaining why collateral consequences may matter more for a low-level drug arrest than the formal sentence); Robert M.A. Johnson, *A Prosecutor’s Expanded Responsibilities Under Padilla*, 31 ST. LOUIS U. PUB. L. REV. 129, 132 (2011) (offering examples of the inability to find employment, housing, deportation, and revocation of a driver’s license as civil consequences that “are often far greater than any consequence imposed by a judge at sentencing.”); Natapoff, *Misdemeanor Decriminalization*, *supra* note 36, at 1089 (discussing how contact with the criminal justice system can be “devastating to an offender’s employment and financial future”); Jenny Roberts, *Why Misdemeanors Matter*:

These penalties are relatively new. They are distinct from the inevitable harms that have always accompanied the process of arrest. Any contact with the criminal justice system can trigger embarrassment, stress, anxiety, or damage to reputation.<sup>40</sup> As former Labor Secretary Ray Donovan famously asked after his high-publicity trial and acquittal, “Which office do I go to get my reputation back?”<sup>41</sup> To some extent, this type of intangible harm will inevitably arise from even the most justified prosecutions.

Today, however, contact with the criminal justice system triggers systemic, formalized, and enduring harm in a way that was not possible prior to the “big data” revolution.<sup>42</sup> Criminal records create harm starting from the moment of arrest.<sup>43</sup> Arrest data are widely transmitted, and arrests alone can trigger stiff penalties regardless of whether charges are ultimately dismissed.<sup>44</sup>

Traditional criminal law theory is poorly situated to understand how criminal records and collateral consequences affect the experience of punishment. Criminal law theory focuses on a limited set of state actors: lawmakers who write criminal laws, police who make arrests,

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*Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–300 (2011) (describing how minor misdemeanors can lead to “major consequences” including deportation, the ability to “find and keep” work, and to access or remain in public housing).

40. For a discussion of dignitary harm, see Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 326–27 (2016) (Police are permitted to require “every arrestee entering a jail to be required to strip, open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals to enable officers to search for scars, tattoos, and contraband, regardless of the risk he may pose.”) (citing *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 316, 333–38 (2012)).

41. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), <http://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html> [<https://perma.cc/7DHR-JQVH>]. Further, psychological harm is not limited to the accused. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1383 (2002) (noting “[t]raditional criminal law theories . . . make [no] place for the collateral consequences visited upon others when an offender is punished,” and arguing that they should).

42. See Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 354 (2015) (discussing how electronic data “reveals information about individuals that simply was not knowable in previous generations”); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089 (2002) (discussing law enforcement’s ability to obtain sensitive data from third parties).

43. Criminal history records are defined as “identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release.” 42 U.S.C. § 14616(I)(4)(A) (2012).

44. Jain, *supra* note 39, at 826–44 (discussing civil penalties triggered by arrest alone); see also CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/XJE8-48TV>] (discussing the impact of bail on arrestees).

prosecutors who bring charges and plea bargain, and judges and juries.<sup>45</sup> That is because no one lands in prison without first being prosecuted and sentenced. By contrast, harm from low-level offenses arises at many different points in time and from an array of different actors.

The state plays an important role in triggering formal punishment, as well as in triggering nonpenal harm that is deeply enmeshed with criminal punishment.<sup>46</sup> In some cases, the state mandates that convictions trigger certain noncriminal penalties. This occurs, for instance, when a legal rule mandates deportation or removal from public housing following a conviction.<sup>47</sup> In other cases, legal rules incentivize private actors or civil regulatory bodies to take enforcement action, such as through mandatory background checks for certain occupations or licenses.<sup>48</sup> And in other cases, private actors choose to impose civil penalties absent any overt state regulation, though their reliance on criminal records is made possible because of access to state databases.<sup>49</sup> The formal criminal penalty is just one aspect of how the criminal justice system regulates arrested individuals.

For defendants, the consequences of a criminal record can last long after any criminal sentence is complete.<sup>50</sup> Consider the following examples, collected primarily from a 2014 report that examined the impact of collateral consequences on a number of different communities: A twenty-five-year-old conviction for possessing twenty-five dollars of cocaine cost Chicago resident Darrell Langdon a job as

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45. Cf. DOLOVICH & NATAPOFF, *supra* note 17, at 3 (arguing for expanding the focus of criminal law scholarship to include “civil remedies, collateral consequences and disabilities,” rather than focusing solely on the formal criminal justice process).

46. The Supreme Court has recognized this dynamic in the context of deportation. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court ruled that deportation is so “enmeshed” with the criminal justice system that defense attorneys have a Sixth Amendment obligation to warn defendants if a plea agreement may trigger mandatory deportation. *Id.* at 365.

47. The criminal conviction at issue in *Padilla* mandated deportation. *Id.* at 366.

48. See 24 C.F.R. § 966.4(l)(5)(i)(B) (2017) (requiring public housing leases to contain language that prohibits drug-related activity on or off the premises); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 209 (2008) (offering examples of the Patriot Act and other federal laws that require background checks).

49. Wayne Logan describes this type of discretionary penalty—one that is not formally imposed by the state but that falls within “the gamut of negative social, economic, medical, and psychological consequences of conviction”—as an informal “collateral consequence.” Wayne Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013).

50. See JACOBS, *supra* note 39, at 195–207 (2015) (discussing injuries resulting from public access to arrest information, even absent convictions).

a school boiler-room engineer.<sup>51</sup> A fifteen-year-old nonviolent drug conviction barred Florida mother Jessica Chappione from volunteering at her children's school.<sup>52</sup> Low-level arrests can also trigger steep penalties even without conviction. Bronx resident Michailon Rue, for instance, was never convicted of a crime, but he lost his \$17-an-hour job as a maintenance worker because of the repeated court dates for his criminal case.<sup>53</sup>

These cases illustrate how the creation of a criminal record—both through the process of arrest and conviction—can hold a significance that is distinct from the act of punishment. The complaint is not that the state made an incorrect decision to punish, nor that the formal punishment itself was excessive or inappropriate. Rather, contact with the criminal justice system triggered penalties that the defendant experienced as a grossly disproportionate and unjustified form of punishment.

In sum, the overcriminalization framework, with its focus on overbroad laws and excessive criminal penalties, risks obscuring important aspects of low-level criminal cases. It also takes a narrow view of the relevant players—police, prosecutors, and others who administer punishment. This approach overlooks the many different institutions that impose harm through low-level offenses and their collateral consequences. As the next Part discusses, the incentives of these institutions are key to understanding why the system remains in place.

## II. INSTITUTIONAL INCENTIVES AND THE MARK OF A CRIMINAL RECORD

In the context of misdemeanors, overcriminalization is not just the product of overbroad laws or excessive penalties. It is also the product of discrete choices to treat criminal records as valuable commodities. This Part identifies the incentives and institutional design features that

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51. NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 19 (2014), <http://www.nacdl.org/restoration/roadmapreport> [<https://perma.cc/4AGW-PZEJ>] (collecting testimony from over 150 witnesses in six cities regarding the impact of collateral consequences). Langdon was eventually able to get his job back, with the assistance of "a dedicated attorney, a sympathetic judge, and media attention." *Id.* at 22.

52. *Id.*

53. William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html> [<https://perma.cc/668Q-Z6FZ>].

facilitate overcriminalization in this context. First, the criminal justice bureaucracy is just one of many that process criminal records. Thus, even when the key players within any given criminal justice system—police, prosecutors, and judges—reach dispositions that reflect appropriate penal aims, other legal institutions have the ability to magnify the impact of a criminal record. Criminal justice actors have little ability to control the full impact of a record, including when it cuts against their sentencing objectives.

Second, both criminal law enforcement institutions and others have incentives to use criminal records for reasons that are distinct from the state's interest in punishment. Criminal records are at times created and used to promote public safety or to serve retributive ends. But other considerations, particularly financial incentives, skew decisions at every stage of the process. Money can skew decisions to make arrests, affect who ends up with an arrest record, and play a critical role in decisions relating to bail and the imposition of probation. Once criminal records are created, financial incentives drive how those records are used. The process is furthered by the privatization of key aspects of criminal justice industry, as well as by the privatized background check industry. It is also driven by institutions that rely on records to lower costs, generate revenue, and monitor risk. This dynamic undermines the public purposes of punishment. It creates the risk of harm being imposed not for the benefit of the community at large, but rather for the benefit of particular institutions—law enforcement agencies, private actors, privatized commercial background check providers, and others who extract value from the use of criminal records.

This Part first explains how interactions between criminal and noncriminal legal institutions prevent prosecutors and judges from controlling the full impact of a criminal record. The bulk of this Part then discusses the organizational incentives, with a focus on financial incentives, that magnify the impact of low-level arrests and convictions. Lastly, it explains how these at times conflicting uses of the criminal justice system are not subject to meaningful regulatory oversight.

#### *A. Institutional Structure*

Discussions of the institutional structure of criminal law commonly focus on the division of power between various actors



tasked with formal law enforcement power.<sup>54</sup> Within any given law enforcement bureaucracy, actors work together to achieve their agency's goals: police, prosecutors, judges, and others work together to create dispositions that reflect the agency's priorities. The process is flawed, by many measures, but there is a process.<sup>55</sup>

By contrast, there is no single process that governs the use and impact of criminal records. The relevant institutions include criminal justice agencies as well as those with no formal law enforcement power at all. Decisions made by actors outside the formal criminal justice process thus have the potential to undercut the sentencing goals of judges and prosecutors.

Easy access to criminal records allows institutions outside the formal criminal justice system to have a profound impact on criminal record-holders. The United States is a global outlier in making criminal record history widely available.<sup>56</sup> In the relatively recent past, a person who wanted to check a criminal record needed to seek out a paper file from the courthouse. But today, criminal records are easily and cheaply transmitted electronically, allowing widespread access.<sup>57</sup> Virtually all employers conduct background checks on some or all employees,<sup>58</sup> including in ways that are overbroad.<sup>59</sup> Immigration enforcement

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54. See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 195–202 (2017) (describing fragmentation of decisionmaking authority between federal and state law enforcement officials, as well as between enforcement officials within any given agency). See generally Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011) (discussing the allocation of power between local, state, and federal prosecutors).

55. See, e.g., MALCOLM M. FEELEY THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 154–66 (1992) (describing the process that goes into evaluating the “worth” of a misdemeanor in the observed New Haven court).

56. See JACOBS, *supra* note 39, at 159 (comparing U.S. and European practice regarding criminal records); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 34 (2016) (discussing post-1970s trends that made criminal histories “a distinctive facet of American penal policy”).

57. This dynamic applies to the “Big Data” phenomenon generally; it is not unique to criminal records. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002) (discussing how the Internet revolution made public records much more accessible).

58. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002: ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 6 (2012) [hereinafter EEOC Enforcement Guidance] (noting that over 90 percent of employers conduct background checks on at least some employees).

59. In 2010, for instance, a class action alleged that the U.S. Census Bureau disqualified all applicants with *any* previous arrest history—regardless of the offense or when it occurred—unless the applicant could provide “official” records of the disposition within thirty days. Second

officials check the immigration status of every person arrested for any crime in order to select some noncitizens for removal.<sup>60</sup> Landlords and public housing authorities also restrict eligibility based on criminal records.<sup>61</sup> The criminal justice bureaucracy is just one of many distinct bureaucratic processes that determine the impact of a criminal record.

This dynamic has feedback effects on the criminal justice process. First, it means that prosecutors, defendants, judges, and defense attorneys have incomplete information about the full impact of a particular sentence. Some defendants find out about serious noncriminal penalties only after accepting a plea. Joseph Abraham, for instance, a sixty-seven-year-old schoolteacher, pled to misdemeanor charges that imposed probation, but he learned only after the fact that the plea also triggered mandatory pension loss—an additional penalty of \$1500 a month for the rest of his life.<sup>62</sup> Abraham's situation is not unique. Minor misdemeanor pleas can also trigger serious consequences such as sex offender registration or occupational license restrictions.<sup>63</sup> With the important exception of mandatory deportation,

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Amended Class Action Complaint at 1, *Houser v. Blank*, No. 1:10-cv-3105 (FM) (S.D.N.Y. Sept. 21, 2012). This practice barred 700,000 applicants from work and had a predictable disparate impact on African American and Latino applicants. *Id.* at 2; *see also* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, *Houser v. Blank*, No. 1:10-cv-03105 (FM) (S.D.N.Y. Sept. 21, 2012) (discussing factual background and the terms of the settlement). In 2008, BMW adopted a policy that required existing workers at a South Carolina plant to undergo background checks, and it automatically eliminated those with a range of criminal records, regardless of the date of the offense or the strength of the applicant's subsequent work history at BMW. Press Release, U.S. Equal Emp't Opportunity Comm'n, *BMW to Pay \$1.6 Million & Offer Jobs to Settle Fed. Race Discrimination Lawsuit* (Sept. 8, 2015) [hereinafter EEOC Press Release], <https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm> [<https://perma.cc/NA8S-ZYZU>]. Approximately 80 percent of the workers eliminated by this policy were black. *Id.*

60. Christopher Lasch et al., *Understanding Sanctuary Cities*, 58 B.C. L. REV. (forthcoming 2018) (manuscript at 23–26), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3045527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045527) [<https://perma.cc/LL8R-EGGP>] (discussing Secure Communities); *see Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> [<https://perma.cc/KES4-JB5Y>] (explaining that the Secure Communities program checks the fingerprints of arrested individuals against the fingerprints in the Department of Homeland Security database).

61. Complaint at 2, *Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-6410 (E.D.N.Y. Oct. 30, 2014) (challenging under the Fair Housing Act policy barring tenants with criminal records); *see also* United States of America's Statement of Interest, *Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 1:14-cv-6410 (E.D.N.Y. filed Oct. 18, 2016).

62. *Pennsylvania v. Abraham*, 62 A.3d 343, 344 (Pa. 2012); Brief of Appellant, *Abraham*, 62 A.3d 343; *see also* Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 92–96 (2011) (discussing the lower court decisions in the *Abraham* case).

63. Roberts, *supra* note 7, at 683 (discussing how certain misdemeanor charges can trigger sex offender registration); *see also* MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY,

defense attorneys are not required to warn defendants about noncriminal penalties triggered by guilty pleas.<sup>64</sup> This creates the possibility that defendants will be in the dark about important collateral consequences when making the decision to plead guilty.

Second, even when fully informed, judges, prosecutors, and others have limited control over how criminal records are used. They lack the ability to regulate effectively the impact of a criminal record. A 2016 decision by Judge John Gleeson is illustrative.<sup>65</sup> Fifty-seven-year-old “Jane Doe” was convicted in October 2002 of a one-time act of insurance fraud.<sup>66</sup> Doe participated in a staged car accident and falsely claimed to be injured.<sup>67</sup> She served a fifteen-month sentence and paid restitution.<sup>68</sup> But thirteen years after she completed her sentence, she found that her criminal record prevented her from working as a nurse.<sup>69</sup> Over twelve different employers or agencies rejected her application because of her record.<sup>70</sup>

In Doe’s case, the formal criminal punishment was of a fixed length, but the employment penalty was not. When reviewing her sentence, Judge Gleeson commented that he had “no intention to sentence her to the unending hardship she has endured in the job market.”<sup>71</sup> He attempted to ameliorate the employment penalty by creating what he described as the first “federal certificate of rehabilitation.”<sup>72</sup> His stated hope was that the certificate would demonstrate to employers that he had closely reviewed her case and determined she posed no risk of recidivism.<sup>73</sup>

Doe’s case illustrates how the use of a criminal record can

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UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 6 (2016), <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> [<https://perma.cc/4LTS-AXHU>] (noting that one-quarter of American workers require occupational licenses and explaining how misdemeanor convictions can pose a barrier).

64. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that defense attorneys must advise defendants if a plea will trigger mandatory deportation).

65. *See Doe v. United States*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016).

66. *Id.* at 433–44.

67. *Id.*

68. *Id.* at 434.

69. *See id.* at 434–39.

70. *See id.* In some instances, she obtained a nursing job only to be fired after the employer conducted a mandatory background check. *Id.* at 428.

71. *Id.* at 429.

72. *See id.*

73. *Id.* at 441–42.

undercut the state's rationales for punishment, such as retribution or deterrence. Assuming deterrence works,<sup>74</sup> criminal punishment ought to be proportionate to the offense. One view of criminal sanctions is that they are meant to be more of a deterrent than civil sanctions. According to this view, "criminal law works as a 'backup' . . . [when] civil sanctions are likely to prove ineffective."<sup>75</sup> This view assumes that defendants need to have a way of predicting penalties to be deterred. This assumption, however, does not hold when defendants face hidden civil penalties.<sup>76</sup> This dynamic also works against retributive rationales for punishment. If the criminal penalty alone is meant to punish the defendant, then the combined impact of civil and criminal penalties risks going well beyond what would be retributively justified. As Judge Gleeson put it:

I sentenced Doe to incarceration and supervision to punish her for committing a federal offense, to deter her from breaking the law again—and to help her achieve the latter goal. It seems that the sentence had its intended effect; aside from the conviction in this case, Doe's record is clean.<sup>77</sup>

The sentencing goals—retribution and deterrence—had been met; from his perspective, the employment penalty was "piling on."

Employers, however, had reason to view the health fraud conviction as a good proxy for her fitness to work as a nurse. This was particularly true in Doe's case, since her conviction also triggered professional discipline and a temporary suspension of her nursing license.<sup>78</sup> These two red flags—the conviction plus the professional discipline based on the conviction—effectively rendered her unemployable as a nurse. Employers may not have intended their decision not to hire Doe to function as punishment, but from Doe's

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74. There is a large literature calling into question whether deterrence works at all. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) (offering reasons why deterrence arguments "draw incessant fire from academic theorists").

75. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 786 (1997); *see also* Jules L. Coleman, *Crimes, Kickers, and Transaction Structures*, in CRIMINAL JUSTICE: NOMOS XXVII 313, 318 (J. Roland Pennock & John W. Chapman eds., 1985) ("In this view, the criminal law is parasitic upon tort law: crimes are defined in terms primarily of torts. Criminal sanctions are 'kickers' imposed in addition to tort liability to foster compliance.").

76. Prescott, *supra* note 7, at 1046–47 (explaining that, in principle, offenders need to have a way to predict the consequences of committing a crime in order to be deterred).

77. *Doe*, 168 F. Supp. 3d at 441.

78. The professional discipline was based only on the conviction, not on any misconduct during the scope of her employment. *Id.* at 434–35.

perspective and the perspective of the sentencing judge, it did.

In the criminal justice system, sentencing judges wield significant power. They can decide whether a defendant will end up in prison. They can determine the amount of restitution she will have to pay. But in the absence of an effective mechanism for expunging criminal records, judges exercise no similar control over how other actors treat criminal records. In Doe's case, employers could choose to rely on the certificate of rehabilitation, but it carries no legal weight.

Enmeshed civil and criminal penalties also matter because they undermine the efficacy of existing institutional checks on law enforcement decisions. Criminal procedure is meant to guard against overreach by law enforcement. But it plays no role in regulating how private actors or civil legal institutions rely on arrests or convictions. In addition, civil penalties create the possibility for enforcement actions designed to skirt the requirements of criminal procedure. For instance, police who prioritize deportation may work with immigration enforcement officials and prioritize arrests that they suspect will result in deportation, regardless of whether criminal charges are pursued.<sup>79</sup> Or prosecutors may work with immigration enforcement officials to avoid *Miranda* requirements.<sup>80</sup> The availability of the civil sanction can magnify criminal law enforcement power.

Thus, for all the time, expense, and resources law enforcement institutions invest in processing cases and determining dispositions, they determine only one aspect of the reach of the criminal penalty. The criminal justice system generates criminal records, but other institutions play a key role in determining the impact of those records. The next Section turns to why it is that so many actors find criminal records to be valuable.

### *B. Institutional Incentives*

In theory, criminal law is meant to fulfill a public purpose; it is not meant to be a "free market where private parties vie for goods and

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79. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1845 (2011) (arguing that in the case of immigration enforcement, "[f]rom the arresting officer's point of view, [an] arrest remains meaningful in that the effort and resources devoted to the arrest lead to a tangible result, even if that result is civil removal rather than a criminal conviction").

80. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1308-13 (2010) (discussing how criminal law enforcement officials and immigration enforcement officials may coordinate and share information in ways that "disrupt *Miranda*'s practical application").

services with their own dollars.”<sup>81</sup> In practice, however, many actors—police, prosecutors, local court officials, bail companies, private probation companies, criminal database providers, and myriad others—pursue arrests, and they create and disseminate criminal records not for public reasons, but for private ones. They create and use criminal records to achieve their own goals more quickly and cheaply.

This process is facilitated by the mark of a criminal record, meaning the creation of official records about a person’s arrest and conviction history. The marking process introduces a label, “record holder,” or “ex-con,” that categorizes groups based on selective information about their prior encounters with law enforcement. This process is distinct from the experience of arrest and imprisonment itself.<sup>82</sup> By connecting individuals to records, the marking process allows institutions to easily classify record-holders for their own purposes. In addition to the actual tangible act of creating criminal records, the marking process also serves a signaling function. It permits institutions to regulate groups in ways that serve their own objectives.

The marking process serves multiple, and at times conflicting, ends. It fulfills a public purpose when it communicates a public pronouncement of moral condemnation or when it permits risk assessment. It serves a nonpublic purpose when it offers key institutions the opportunity to capture revenue or serve their own organizational incentives. Criminal records, in effect, become commodities. Once created, they offer a way to reduce costs, obtain competitive advantages, reduce potential tort liability, and efficiently allocate scarce resources. These are significant benefits, but they do not serve society at large. They may come at the expense of other important interests, such as proportionality in punishment and procedural fairness. The balance of this Section explores these dynamics by discussing how the marking process serves discrete organizational objectives both within and outside of the criminal justice system.

1. *Marking and Criminal Justice Decisions.* In the criminal justice system, the marking process begins with an arrest record, which creates

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81. Larkin, *supra* note 24, at 722.

82. Dolovich, *supra* note 19, at 237 (discussing the experience of imprisonment as objectifying).

a tangible notation of contact with the criminal justice system.<sup>83</sup> Some marks are temporary, such as charges that are subsequently dismissed and expunged. Others are more enduring, in the form of a criminal conviction.

The marking process can serve an important public safety function. Criminal records provide a way to conduct risk assessment and evaluate the propensity for future criminal activity.<sup>84</sup> Some police departments prioritize low-level arrests because they subscribe to a “broken windows” theory of policing or because they view low-level arrests as a way to collect data on groups of individuals over time.<sup>85</sup>

The marking process also serves nonpublic interests. It permits a host of actors to use the negative “credential” of a criminal record in ways that serve their own organizational interests.<sup>86</sup> One way this occurs is through law enforcement appropriation of criminal records as a means of generating revenue.

Profit-driven police tactics received national attention after the U.S. Department of Justice issued its 2015 report on policing practices in Ferguson, Missouri.<sup>87</sup> The report depicted a criminal justice system permeated by both racial bias and financial considerations.<sup>88</sup> High-level

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83. Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 353 (2013) (noting the marking process “involves the generation, maintenance, and regular use of official records about a person’s criminal justice contacts for critical decisions” by law enforcement, such as about what type of disposition to offer).

84. In the early 1990s, Professors Malcolm Feeley and Jonathan Simon described the “new penology” as turning away from “responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender” and instead being preoccupied with “techniques to identify, classify, and manage groupings sorted by dangerousness.” Malcom M. Feeley & Jonathon Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992).

85. See Ferguson, *supra* note 42, at 395 (discussing how collecting data on individuals perceived to be high risk can help police use resources efficiently and address crime proactively). For a related argument in the context of prosecutorial behavior, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 644–49 (2014) (prosecutors use repeated contacts with the criminal justice system as a way to “manage” defendants over time).

86. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 4–5 (2007).

87. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter DOJ Report on Ferguson]; Editorial Op-Ed, *The Problem Is Bigger Than Ferguson*, N.Y. TIMES (Mar. 12, 2015) (describing how municipalities target poor and minority communities for low-level offenses to drive revenue).

88. DOJ Report on Ferguson, *supra* note 87, at 2. Police officers brought charges against African Americans for purported offenses such as “Manner of Walking,” failing to wear a seatbelt in a parked car, and even for “Making a False Declaration” for giving the short form of name—for example “Mike” instead of “Michael.” *Id.* at 3, 62. The report also included additional

police officials repeatedly instructed officers to focus on revenue generation and to make up for budget shortfalls through ticket-writing.<sup>89</sup>

While Ferguson has become perhaps the best-known example, it is hardly unique in relying on low-level arrests to generate revenue.<sup>90</sup> One criticism of order-maintenance or data-driven policing is that it incentivizes high-volume arrests as a way to demonstrate officer productivity. Departments that fail to meet the prior year's quota can run the risk of budget cuts. John Eterno, a former NYPD police captain, offered this criticism: “[O]fficers are challenged to match or exceed what they did the previous year, month and week. Words like ‘productivity’ are code for quotas. Supervisors must exceed last year’s ‘productivity.’”<sup>91</sup> Departments send cues to officers that the high-volume low-level arrests will be rewarded, which in turn, drive officers to engage in precisely those types of arrests. In some cases, as in Ferguson, pressure to collect fines, meet quotas, or seize assets leads to unlawful behavior.<sup>92</sup>

Once arrest records are created, financial incentives affect case processing and disposition. The vast majority of states impose “user fees” for services commonly understood to be part of criminal justice expenditures, such as for use of a public defender, for “room and board” for jail and prison, and for the arrested individual’s probation and parole supervision.<sup>93</sup> Criminal courts seek revenue from arrested

evidence of racial bias, such as the disproportionate use of force against African Americans and emails containing racial epithets. *Id.* at 5.

89. *Id.* at 2 (“City Finance Director wrote to Chief Jackson that ‘unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. . . . Given that we are looking at a substantial sales tax shortfall, it’s not an insignificant issue.’”).

90. See LAWYERS’ COMM. FOR CIVIL RIGHTS, NOT JUST A FERGUSON PROBLEM—HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 9–10 (2015); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 350 (2014).

91. John A. Eterno, Opinion, *Policing by the Numbers*, N.Y. TIMES (June 17, 2012), <http://www.nytimes.com/2012/06/18/opinion/the-nypds-obsession-with-numbers.html> [https://perma.cc/V4JD-YKYJ].

92. ALEXANDER, *supra* note 4, at 80 (noting that one officer testified in a California police misconduct case that the pressure to meet quotas led officers in his unit to behave “more or less like a wolf pack” and take “anything and everything we saw on the street corner”).

93. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1185–96 (2014) (surveying legal financial obligations); Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 59 (2013) (“Just as guests in a hotel must pay . . . for their travel to and from the hotel and to participate in activities during their stay, inmates are increasingly saddled with many, even most, of the costs related to the process of convicting, detaining, and releasing them.”); Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price*, N.P.R. (May 19, 2014),



individuals through booking fees at the time of arrest, bail administrative fees, dismissal fees, public defender application fees, court fees, disability and translation fees, jail and administrative fees, and postconviction fees.<sup>94</sup> In Florida, courts charge fees of at least \$50 for misdemeanors and \$100 for felonies.<sup>95</sup> North Carolina charges \$200 for failing to appear in court, \$25 for late payment of a court fine, and \$20 for setting up an installment payment plan.<sup>96</sup> Illinois permits judges to assess a 15 percent penalty on late payments, plus a 30 percent collection fee.<sup>97</sup> A number of states also charge for using legal services. Two-thirds of states, for instance, permit judges to charge defendants for at least a portion of the cost of their own public defender.<sup>98</sup>

From the perspective of the defendant, the fees function as an extension of the criminal justice penalty. In an egregious example, a Pennsylvania defendant ended up owing \$2,464—over three times the amount of her original fine—in hidden fees.<sup>99</sup> The locality charged over twenty-six separate fees, broken down into itemized expenses such as “Automation Fee,” “Sheriff Costs,” “Postage Fee,” “Police Transport,” “Drug Fee,” “Plea [Bargain Fee],” and “Police Drug Fee,” among others.<sup>100</sup> While this case is an outlier, even far smaller dollar amounts can be insurmountable for the poor.<sup>101</sup>

The fees create incentives for localities to run the criminal justice system like a business, one that creates value through imposing costs, tracking payments, and imposing additional sanctions for failure to pay. The risk is that arrest decisions are based on the institution’s own

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<http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [https://perma.cc/HQ6G-7CA3] (stating that forty-three states and the District of Columbia permit defendants to be billed for a public defender, forty-one states permit inmates to be “charged room and board for jail and prison stays,” and in at least forty-four states, “offenders can get billed for their own probation and parole supervision”); see also Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 746–50 (2017) (discussing how distribution schemes for public defenders do not effectively allocate resources to the indigent).

94. Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1492–1503 (2016).

95. ALICIA BANNON, REBEKAH DILLER & MITALI NAGRECHA, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7* (2010).

96. *Id.*

97. *Id.*

98. ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 42* (2016).

99. BANNON ET AL., *supra* note 95, at 1, 9.

100. *Id.* at 9.

101. Colgan, *supra* note 90, at 293 (discussing tradeoffs poor debtors make in paying the criminal justice debt or paying for necessities).

organizational interest in generating revenue, rather than public considerations about safety. This is particularly true when the fees directly fund the criminal justice system. In Arizona, the majority of criminal court surcharges go to a “criminal justice enhancement fund.”<sup>102</sup> In Allegan County, Michigan, the fees go toward “the salaries of court employees, for heat, telephones, copy machines and even to underwrite the cost of the county employees’ fitness gym.”<sup>103</sup> An Allegan County court administrator put it this way: “The only reason that the court is . . . doing business at that point in time is because that defendant has come in and is a user of those services. [The defendants] don’t necessarily see themselves as customer[s] because, obviously, they’re not choosing to be there. But in reality they are.”<sup>104</sup>

These funding incentives can operate to set a dollar amount on avoiding the mark of a criminal conviction. A recent federal lawsuit challenging practices in Woodridge, Illinois, is illustrative. The plaintiff, who was arrested on misdemeanor shoplifting charges, was required to pay a \$30 fee simply for the arrest and booking procedure. He then had to pay an additional \$785 for a year-long period of court supervision. All charges were dismissed at the end of the year, but he did not receive any of his money back.<sup>105</sup> Paying the fee is a necessary condition of engaging in court supervision and avoiding the mark of a criminal conviction.

Financial incentives can lead to the overuse of probation, which currently affects twice as many people as incarceration.<sup>106</sup> Some probation services are completely privatized. A recent report estimated that in Georgia alone, probation companies earned at least \$40 million in revenue from fees charged to probationers.<sup>107</sup> A single

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102. HARRIS, *supra* note 98, at 42.

103. Shapiro, *supra* note 93.

104. Christina Hoag, *Jailing Debtors: Should People Be Jailed for Unpaid Fines?*, 26 CQ RESEARCHER 745, 747–48 (2016), <http://library.cqpress.com/cqresearcher/getpdf.php?id=cqresrre2016091600> [<https://perma.cc/T7WW-SAG2>] (discussing the case of Frederick Cunningham, who was ordered to pay \$1000 in “court costs” for forging a prescription).

105. *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 545–46 (7th Cir. 2014) (en banc) (plurality opinion) (per curiam).

106. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292 (2016) (citing approximately four million people are on probation as opposed to 2.2 million incarcerated); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 930 (2016).

107. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 4 (2014), [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [<https://perma.cc/N29L-WLRX>].

company earned an estimated \$1 million from a single court in Dekalb County, Georgia.<sup>108</sup> Probation companies typically enter “flat fee” contracts with the locality, meaning that the probationer must pay a flat fee for supervision, separate and apart from any fines owed as part of the punishment.<sup>109</sup> The typical fee in Georgia is \$35 per month.<sup>110</sup> In Montana, the fees can be as high as \$100 per month.<sup>111</sup>

Private probation companies are motivated by their bottom line, just like any other business. They have incentives to treat those on probation as debtors. They have incentives to impose late fees for missed payments as a matter of course, rather than asking whether the fees serve the public interest. One judge, in evaluating these practices, described probation as a “judicially sanctioned extortion racket.”<sup>112</sup>

Similar incentives lead to the overuse of money bail. The bail bond industry collects an estimated \$1.4 billion a year in revenue annually.<sup>113</sup> For-profit bail agents charge a nonrefundable fee of approximately 10 percent of the bond amount, and at times, charge a higher percentage for low bail amounts.<sup>114</sup> For the arrested individual, the fees are a sunk cost that must be paid regardless of whether the charges are dismissed.<sup>115</sup> For bail bondsman, however, the fees are simply income.

Federal funding incentives also play a role in shaping the types of records police officers generate. As a general matter, localities have significant discretion to define and pursue their own law enforcement objectives. Yet federal funding incentives lead police to prioritize

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108. *Id.* at 17.

109. *Id.* at 23–24.

110. *Id.* at 24.

111. *Id.*

112. Terry Carter, *Privatized Probation Becomes a Spiral of Added Fees and Jail Time*, A.B.A. J. (Oct. 2014), [http://www.abajournal.com/magazine/article/probationers\\_prison\\_privatized\\_supervision\\_becomes\\_a\\_spiral\\_of\\_added\\_fees\\_j](http://www.abajournal.com/magazine/article/probationers_prison_privatized_supervision_becomes_a_spiral_of_added_fees_j) [<https://perma.cc/WF7L-RNLV>] (quoting Shelby County Circuit Court Judge Hub Harrington).

113. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL STREET J. (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/9ETT-8FCZ>]; Wagner & Rabuy, *supra* note 31

114. *O'Donnell v. Harris City*, No. CV H-16-1414, 2017 WL 1735456, at \*6 n.4 (S.D. Tex. Apr. 28, 2017) (“[C]ommercial sureties in Harris County [housing the third largest jail in the United States] typically charge a nonrefundable premium of 10 percent of the total value of the bond, but for low money bail amounts, such as those at the lower end of the misdemeanor bail schedule, bondsmen charge a premium higher than 10 percent.”).

115. Fields & Emshwiller, *supra* note 113 (discussing the case of Jose Hernandez, who was mistakenly arrested on sexual assault charges). The prosecutor eventually conceded that the police got the “wrong Jose Hernandez” and dropped the charges. In the meantime, Hernandez’s wife paid a bail bondsman a nonrefundable fee of \$22,500 to get him out of jail. *Id.*

certain types of arrests. A federal funding program established in 1988, the Edward Byrne Memorial Justice Assistance Grant Program, is the “leading source of federal funding” for a range of local law enforcement programs, including drug enforcement.<sup>116</sup> In exchange for grants, localities submit quarterly assessments that demonstrate productivity. Funding is tied to drug-related arrests, regardless of the type of drug. Marijuana arrests, which made up half of all drug arrests in 2013, provide one important source of revenue.<sup>117</sup> Given the prevalence of marijuana use, low-level marijuana arrests are the easiest to make in high volume. Police departments thus have financial incentives to prioritize marijuana arrests, even if marijuana use itself is not a high crime priority, because these arrests offer a way to demonstrate officer productivity.<sup>118</sup>

Similarly, federal funding incentives have the potential to affect how localities police immigration enforcement. In July 2017, the Department of Justice announced that “sanctuary” jurisdictions would lose their funding if they did not “change their policies and partner with federal law enforcement.”<sup>119</sup> The stated goal was to threaten federal funding withdrawal as a means to alter local policing practices.<sup>120</sup>

In both the context of drug enforcement and immigration enforcement, the threat of receiving or losing federal funding can affect what types of law enforcement actions are taken. It can affect the types of marks created by the criminal justice system in the first place.

In addition to affecting who receives the mark of an arrest record, financial incentives also play an important role in the plea bargaining process. Well over 90 percent of criminal convictions result from guilty pleas rather than trials.<sup>121</sup> As Professor Darryl Brown observes, the

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116. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK & WHITE* 73 (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> [<https://perma.cc/L67K-DUBG>].

117. *Id.* at 101–02.

118. *Id.* at 11.

119. Press Release, U.S. Dep’t. of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs, (July 25, 2017) <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/7TKZ-XYEA>]; Lasch et al., *supra* note 60 (manuscript at 11).

120. Some localities responded by filing suit and arguing that the threatened funding cuts would undermine their ability to determine how to fulfill their law enforcement priorities. Lasch et al., *supra* note 60 (manuscript at 11–12).

121. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 *YALE L.J.* 2650, 2663 (2013) (describing *Frye* as making the “important statement that . . . ‘the negotiation of a plea bargain,

rules and rationales for plea agreements reflect an “overt, enthusiastic embrace—remarkably uniform across U.S. jurisdictions—of the market as the metaphor and framework for the law of negotiated guilty pleas.”<sup>122</sup>

In theory, “parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount.”<sup>123</sup> The “price” of a plea should reflect factors such as the defendant’s culpability and the likelihood of acquittal at trial. But plea bargains also reflect other interests. Prosecutors and defense attorneys value pleas because they keep down costs and allow them to handle more volume.<sup>124</sup> Factors such as workloads, the local office’s priorities, and agency costs can all lead prosecutors to pursue plea bargains that they might not pursue if the only factor at play was the predicted outcome at trial.<sup>125</sup>

In the context of misdemeanor processing, prosecutors also have incentives to view trial delays as desirable. In an empirical study of New York misdemeanor courts, Professor Issa Kohler-Hausmann explores this dynamic and argues that one function of misdemeanor processing is to “construct a record of criminal justice encounters” and thus “determine over time who is low risk and who is high risk, and thus in need of closer monitoring and perhaps formal sanctioning in the future.”<sup>126</sup>

Put differently, lost time—the time a criminal case is pending before it proceeds to trial or reaches a disposition—is not merely an externality of the criminal justice process. It can be purposeful. In New York misdemeanor courts, it provides a way for prosecutors to monitor risk. By keeping criminal cases pending, prosecutors gain the opportunity to monitor defendants over time and to gather information about their behavior. If the defendant is not rearrested while the case is pending, the prosecutor is more likely to drop minor charges. If, however, the defendant is arrested again while the case is open, that additional arrest provides more information for the prosecutor

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rather than the unfolding of a trial, is almost always the critical point for a defendant” (quoting *Frye*, 132 S. Ct. at 1407)).

122. DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 91 (2015).

123. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

124. Stuntz, *supra* note 33, at 535.

125. Bibas, *supra* note 123, at 2464.

126. Kohler-Hausmann, *supra* note 85, at 624.

regarding the defendant's purported risk. Prosecutors thus use lengthy delays as part of a strategy to "manage" defendants, rather than to adjudicate charges at trial.<sup>127</sup> They deliberately lengthen how long the mark of an arrest is present, because they view it as a valuable way to determine whether or not to seek the more enduring mark of a criminal conviction.

Some prosecutors also obtain financial benefits through case processing. Some localities hire private lawyers to work as public prosecutors. In Ferguson, Missouri, for instance, the local prosecutors were "private lawyers who charged the city by the hour and faced no cap on how much they could bill."<sup>128</sup> This creates an obvious risk: prosecutors whose paychecks rise directly with the number of cases they file have incentives to file more cases to inflate their pay, regardless of the public's interest.<sup>129</sup>

Prosecutors in some localities also profit from diversion. Diversion is intended to offer a way for defendants charged with minor offenses, such as writing bad checks, to avoid a criminal conviction.<sup>130</sup> In practice, however, some programs are also a source of revenue. An investigation into diversion practices in Houston County, Alabama, found that the diversion practices generated one million dollars for the local prosecutor's office over the course of five years.<sup>131</sup>

In another program, California prosecutors essentially rented their letterhead to third-party debt collectors, who threatened criminal charges against consumers who bounce checks at retailers such as Walmart and Target.<sup>132</sup> The letters bore a district attorney's seal and signature but had never been reviewed by a prosecutor, nor had there ever been an independent determination that the recipient intended to defraud.<sup>133</sup> The monetary amounts of the bad checks were typically

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127. *Id.*

128. JOHN PFAFF, LOCKED IN 128 (2017).

129. *Cf.* Stuntz, *supra* note 33, at 535 (observing that prosecutors paid by the hour "would find it in their interest to trump up charges in order to inflate their pay").

130. Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html?mcubz=3> [<https://perma.cc/2Y6E-7L6X>]

131. Shaila Dewan & Andrew W. Lehren, *Alabama Prosecutor Sets the Penalties and Fills the Coffers*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/alabama-prosecutor-valeska-criminal-justice-reform.html> [<https://perma.cc/3FSW-H4XN>].

132. Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. TIMES (Sept. 15, 2012), [http://www.nytimes.com/2012/09/16/business/in-prosecutors-debt-collectors-find-a-partner.html?\\_r=2&hp](http://www.nytimes.com/2012/09/16/business/in-prosecutors-debt-collectors-find-a-partner.html?_r=2&hp) [<https://perma.cc/3RQU-2DTT>].

133. *Id.*

insignificant—less than \$100.<sup>134</sup> Private debt collectors drafted the letters, collected the fines, and shared a portion of the proceeds with the District Attorney's office.<sup>135</sup>

In sum, the mark of a criminal record is closely related to organizational objectives, particularly financial incentives. These incentives can skew arrest decisions away from those that would take place if local law enforcement agencies focused only on public safety concerns. Institutional incentives also affect case processing. Defendants who can pay fines or afford diversion are likely to receive a temporary mark; after the completion of the program and payment of the fees, the case will be dismissed. Those who cannot afford to pay are likely to receive a more enduring mark, in the form of a criminal conviction.

2. *Marking Outside the Criminal Justice System.* Outside of the law enforcement context, criminal records continue to serve a dual role. The mark of a criminal record can be used for public safety reasons. It can prevent those who pose a safety risk from obtaining firearms or working in professions where they are likely to pose a danger. The marking process, however, also fulfills a credentialing function unrelated to public safety, such as when it is used as a proxy for characteristics an employer might value, such as reliability or good judgment. It offers a way to generate revenue for the background check industry. It also provides a way to promote regulatory compliance, minimize legal liability, and allocate scarce resources.

Every state maintains a criminal record repository that contains identifying information about arrests.<sup>136</sup> States either provide or sell these records to private background check companies, who in turn profit from the ubiquitous use of background checks.<sup>137</sup> The upshot of all this is that one out of every three Americans appear in the criminal justice database.<sup>138</sup> As the Wall Street Journal recently put it, “America

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134. *Id.*

135. *Del Campo v. Kennedy*, 517 F.3d 1070, 1072 (9th Cir. 2008); Silver-Greenberg, *supra* note 132 (discussing how prosecutors in charge of diversion programs benefit financially from those programs).

136. JACOBS, *supra* note 39, at 37.

137. Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 364 (2016) (discussing the sale of criminal record information).

138. Fields & Emshwiller, *supra* note 113; Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT 1 (2011), <http://www.nelp.org/content/uploads/>

has a rap sheet.”<sup>139</sup>

The background check industry plays a key role in disseminating records. Like any business, background check providers profit from reliance on their services.<sup>140</sup> The National Association of Professional Background Screeners, the trade association for commercial background screeners, offers a number of reasons for why employers and housing providers benefit from background checks. Background checks offer a way to ensure “compliance with housing, licensing, and employment laws and regulations.”<sup>141</sup> They help employers and housing providers make informed decisions and mitigate risk. The trade association also emphasizes how background checks can promote business interests: “[W]e live in an electronic world where . . . negative publicity and headlines spread quickly. The first question posed by media in any workplace violence situation is whether there was a background check — the ‘wrong’ answer can [be] devastat[ing].”<sup>142</sup>

Some background check providers also financially benefit by charging fees to remove outdated or erroneous records. For instance, John and Jessica Keir paid over \$2000 to various background check providers in ultimately futile efforts to remove their mug shot and criminal records after they were acquitted of “keying” a car.<sup>143</sup>

Employers and housing providers are two of the main industries that conduct background checks.<sup>144</sup> Virtually all employers—92 percent—report conducting background checks on some or all

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2015/03/65\_Million\_Need\_Not\_Apply.pdf [https://perma.cc/P229-BHXA] (noting that more than 25 percent of the U.S. adult population has a criminal record).

139. Fields & Emshwiller, *supra* note 113.

140. The profits are significant. Aaron Elstein, *Background Check Industry Under Scrutiny as Profits Soar*, CRAIN’S (June 23, 2013), <http://www.crainsnewyork.com/article/20130623/FINANCE/306239972/background-check-industry-under-scrutiny-as-profits-soar> [https://perma.cc/QLQ6-Y7EH] (“[One company’s] revenue has rocketed to nearly \$250 million from just \$7.5 million in 2001, for a compounded annual growth rate of 34 [percent]—1 percentage point more than Apple’s over the same period.”); *see also* JACOBS, *supra* note 39, at 71 (stating that trade association for commercial background check providers reported annual revenue at \$4 billion).

141. *About Screening*, NAT’L ASS’N PROF. BACKGROUND SCREENERs (2016), <https://www.napbs.com/resources/about-screening/> [https://perma.cc/N9GH-QBBV].

142. *Id.*

143. Fields & Emshwiller, *supra* note 113.

144. The trade association for professional background screeners specifies that it was established to serve the interests of “companies offering employment and tenant background screening services.” *Who We Are*, NAT’L ASS’N PROF. BACKGROUND SCREENERs (2016), <https://pubs.napbs.com/pub.cfm?id=0B0F2865-01D2-205F-7ECE-9B60FCACD74F> [https://perma.cc/57Z4-PVVD].



employees.<sup>145</sup> These employers report using background checks to combat theft, fraud, and preventing workplace violence, as well as to comply with state and federal law, and the desire to avoid liability for employee negligence.<sup>146</sup>

As employers recognize, a complex web of federal, state, and local laws and regulations mandates that agencies and private actors check criminal records and deny certain opportunities to criminal record-holders. Employers are also responsible for torts committed by their employees within the scope of employment.<sup>147</sup> In addition, under negligent retention and hiring laws, employers may be responsible for employee misconduct if they failed to foresee that the employee posed a risk.<sup>148</sup> Criminal records offer a way to identify employee propensity for misconduct. Background checks can help employers learn if a potential worker poses a safety risk, and they can help employers comply with regulations that prohibit record-holders from working in certain industries.<sup>149</sup>

Public housing administrators have similar incentives. By conducting background checks at the time a housing application is submitted and by engaging in ongoing screening of arrest activity, they gain a way to comply with federal regulations and to screen for dangerous tenants.<sup>150</sup>

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145. EEOC Enforcement Guidance, *supra* note 58, at 6; *see also* SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING – THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS 2 (2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx> [<https://perma.cc/A6NH-3RK3>] (reporting close to 70 percent of surveyed employers conduct background checks on all job applicants).

146. EEOC Enforcement Guidance, *supra* note 58, at 6; *see also* SOC'Y FOR HUMAN RES. MGMT., *supra* note 145, at 6 (noting that surveyed employers reported the primary reasons for conducting background checks include negligent hiring liability, ensuring safe work environment, preventing theft, compliance with applicable state law, and evaluating the overall trustworthiness of the applicant).

147. *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982) (discussing respondeat superior liability for torts that occur within the scope of employment); Benjamin Levin, *Criminal Employment Law*, CARDOZO L. REV. (forthcoming) (manuscript at 15–16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2944840](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944840) [<https://perma.cc/V4EA-AP2P>] (collecting cases discussing the doctrine of respondeat superior in the context of background checks).

148. RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (AM. LAW INST. 1965) (noting that in some cases an employer may risk liability if he continues to employ those “who, to [the employer’s] knowledge, are in the habit of misconducting themselves in a manner dangerous to others”).

149. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1503–05 (2003) (outlining several such regulations).

150. 42 U.S.C. § 13661(c) (2012) (indicating that admission may be denied to those who have

The interests in complying with regulations, avoiding liability, or promoting safety, however, do not fully explain how employers and housing providers actually use criminal records. For one, employers and housing providers routinely impose bans that are broader than required (or even permitted) by law. For instance, some housing providers bar applicants whose only criminal histories are low-level arrests that did not result in conviction.<sup>151</sup> Some also evict entire households after one member's arrest,<sup>152</sup> and they engage in disqualifications based simply on the existence of a criminal record, rather than conducting an individualized assessment of risk.<sup>153</sup> Overbroad bans create the risk of violating antidiscrimination laws. Criminal records are not race neutral. African American and Hispanic men are arrested at rates significantly higher than whites.<sup>154</sup> Blanket

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“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 by other residents”).

151. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1–2 (2016) [hereinafter HUD Office of General Counsel Guidance], [https://www.hud.gov/sites/documents/ HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/7YSN-XVCD>] (noting that formerly incarcerated individuals encounter significant barriers to housing, and that in some cases, individuals are barred merely because of prior arrests that did not result in conviction); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491 (2010) (citing examples of statutes, ordinances, and policies which penalize citizens arrested but not convicted); *See generally* AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS (2016), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf) [<https://perma.cc/EFN4-D5DM>]; MARIE CLAIRE TRAN LEUNG, WHEN DISCRETION MEANS DENIAL, FEDERALLY SUBSIDIZED HOUSING (2015), <http://povertylaw.org/files/docs/WDMD-final.pdf> [<https://perma.cc/9XDG-EUZ5>].

152. Dep't. of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (upholding a “one-strike” eviction policy, which permits eviction of entire households from public housing based on the off-premises, nonviolent drug arrest of a single member).

153. Both the U.S. Department of Housing and Urban Development (HUD) and the EEOC have warned against the overbroad use of criminal records, including arrests not resulting in convictions. *See* HUD Office of General Counsel Guidance, *supra* note 151, at 2, 5–6; EEOC Enforcement Guidance, *supra* note 58, at 8–20 (discussing disparate impact liability for overbroad bans); *see also* Lahny R. Silva, *Criminal Histories in Public Housing*, 2015 WIS. L. REV. 375, 387 (2015) (discussing lack of individualized assessment of criminal record history in the public housing context).

154. Brame, *supra* note 23, at 478; EEOC Enforcement Guidance, *supra* note 58, at 3 (citing statistics that “1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men” (citations omitted)).

bans run the risk of having a disparate impact on a protected class.<sup>155</sup>

For easily replaced workers, employers might view a “no hire” strategy as the best approach to criminal records, given the perceived complexity of the regulatory landscape surrounding criminal background checks. Employers might perceive an overbroad ban as more time efficient than meeting with prospective employees, reviewing their records, and determining if they actually pose a risk.<sup>156</sup> In an influential sociological study, Professor Devah Pager found that employers spent very little time engaging in an individualized assessment of entry-level workers. Rather, the presence of a nonviolent drug conviction itself significantly reduced access to jobs such as wait staff, service workers, warehouse workers, delivery drivers, or kitchen staff.<sup>157</sup> The presence of the record itself reduced callbacks for whites by 50 percent—meaning that half the time, “employers were unwilling to consider equally qualified applicants simply on the basis of their criminal background.”<sup>158</sup> For African Americans, a criminal record presented an even more severe disadvantage. Only one out of three black applicants with a criminal record received a callback.<sup>159</sup> Overwhelmingly, employers chose to eliminate applicants on the presence of the criminal record alone, rather than taking the time to call references or inquire further into the nature of the conviction.<sup>160</sup>

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155. *Id.* at 8–20.

156. This dynamic is not limited to the criminal justice context—it is the product of technological changes that permit an ever-broader array of actors to obtain information about individuals and to use them to make other decisions. *See, e.g.,* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 3–4 (2014) (discussing algorithms that score individuals by various metrics and use them to evaluate decisions such as hiring a job candidate to the likelihood of prison recidivism); Ferguson, *supra* note 42, at 333 (“Just as law enforcement agencies now collect and electronically analyze more personal data, so do private, third-party organizations.”); Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1735 (2015) (“Database screening and digital watchlisting systems are increasingly used to determine who can work, vote, fly, etc.”); Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 6 (2014) (discussing how immigration control has become an “information-centered and technology-driven enterprise . . . [that subjects] both noncitizens and U.S. citizens . . . to collection and analysis of extensive quantities of personal information for immigration control and other purposes”).

157. *See* PAGER, *supra* note 86, at 68.

158. *Id.* Pager used matched pairs of white and black college students as “testers,” who were given identical resumes. *Id.* at 67.

159. *Id.* at 69.

160. *Id.* at 68. Pager did find some exceptions to the overall trend that criminal records served as disqualifiers. For instance, in one case, an employer discouraged a white tester with no criminal record from applying for a cleaning job because it involved “a great deal of dirty work,” but then offered a tester with a criminal record the job “on the spot.” *Id.*

Some companies also require long-time employees to submit to background checks, and they fire those who do not have clean criminal records.<sup>161</sup> This approach is overbroad; it is not reasonably related to a business necessity.<sup>162</sup> This is particularly true for long-time employees with a demonstrated work history. The decision reflects an administrative judgment that it is cheaper to hire others than to make an individualized determination about risk. It may also reflect a seemingly race-neutral reason for what is in fact employment discrimination based on race.

Employers and housing providers may also rely on criminal records because they want to identify groups that deserve scarce resources. Public housing provides one example. There is a serious shortage of public housing. Approximately 4.6 million federally subsidized housing units are available for 45 million people living at or below the federal poverty line.<sup>163</sup> Background checks serve as a fast, inexpensive way to choose applicants and deselect others. The Department of Housing and Urban Development's (HUD) "One Strike and You're Out" policy uses criminal background histories as a way to select recipients of scarce resources. It states that the policy offers a reasonable way to "allocate scarce resources to those who play by the rules" as well as to promote community safety.<sup>164</sup> The criminal record is used as a proxy for undesirability.<sup>165</sup> Landlords use criminal records to establish which applications ought to be prioritized, as well as to make risk assessments.

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161. EEOC Press Release, *supra* note 59 (discussing a consent decree with BMW after an EEOC finding that such a policy disproportionately harmed African American workers).

162. EEOC Enforcement Guidance, *supra* note 58, at 1–2.

163. Silva, *supra* note 153, at 379; *see also* CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 12 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf> [<https://perma.cc/2VFL-PE4V>] (showing 45 million people at or below poverty line); *Who Lives in Federally Assisted Housing?: Characteristics of Households Assisted by HUD Programs*, HOUS. SPOTLIGHT, Nov. 2012, at 1, <http://nlhrc.org/sites/default/files/HousingSpotlight2-2.pdf> [<https://perma.cc/DLX6-EDPS>] (4.6 million federally subsidized housing units).

164. U.S. HOUS. & URBAN DEV., "ONE STRIKE AND YOU'RE OUT" POLICY IN PUBLIC HOUSING 3 (1996), *reprinted in* OFFICE OF PUB. & INDIAN HOUS., NOTICE PIH 96-16 (HA), "ONE STRIKE AND YOU'RE OUT" SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (HAS) (1996).

165. Douglas Martin, *Innocent People Lose Homes: Law's Strange Twist*, N.Y. TIMES (Mar. 11, 1992), <http://www.nytimes.com/1992/03/11/nyregion/about-new-york-innocent-people-lose-homes-law-s-strange-twist.html> [<https://perma.cc/B4TW-JA2R>] ("People who commit crimes have no right to public housing," [former HUD official] Ms. [Laura] Blackburne said before her resignation. "Why should I keep some creep in there who doesn't care about decent living?").

In sum, the mark of a criminal record is widely valued, not only for public purposes—deterring crime—but also for other ends. It serves a credentialing function, and it permits a host of industries to make hiring decisions in a way they perceive as cost-effective.

### C. *Regulatory Oversight*

Even though low-level criminal records are widely created and disseminated, key aspects of the process are not subject to meaningful oversight. The problem is not only that “sloppy” misdemeanor courts do not provide meaningful access to defense counsel or comport with the requirements of criminal procedure.<sup>166</sup> It is also that agencies making misdemeanor-justice decisions pursue their own interests, but no one considers how those decisions affect society at large.

First, there is of course no single agency tasked with mediating the impact of low-level arrest decisions. Harm from criminal justice decisions stems from a variety of different sources, but no one examines how those harms aggregate and whether the combined impact of civil and criminal consequences serves societal interests. Part of the problem is information deficits. It is hard to predict at the time of an arrest how that arrest may spiral in in unanticipated ways. Defendants who agree to probation or diversion programs may be overoptimistic about their ability to comply with the requisite conditions, including payments. Once a payment plan is in place, defendants may be unable to modify it if they find the payments unmanageable.

Second, criminal law enforcement agencies at times lack incentives to gather data and examine the efficacy of policies geared toward collecting criminal justice debt. Law enforcement agencies have incentives to demonstrate productivity, but they lack similar incentives to collect data that considers the full social cost of certain law enforcement tactics.<sup>167</sup> A 2010 study examining the low-level criminal justice process in fifteen different states found that not one state system

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166. Natapoff, *Misdemeanor Decriminalization*, *supra* note 36, at 1063–64 (“[The] massive, influential [misdemeanor justice] apparatus does not obey the standard rules of criminal law and procedure. Unlike its felony counterpart, the misdemeanor arena is severely underregulated, informal, and sloppy.”).

167. Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 361 (2004) (arguing that criminal law enforcement officials have incentives to avoid knowledge “about the social costs of enforcement” because “[a]s long as those costs remain hidden, the net benefits of enforcement, for which enforcement officials get political credit, appear more substantial”).

had any organized way of measuring the efficacy of criminal justice fines.<sup>168</sup> This lack of oversight extended to tracking the costs of criminal debt collection.<sup>169</sup> This means that even as these agencies pursued policies based on perceived financial incentives, they lacked crucial information about the financial efficacy of those policies.<sup>170</sup>

Ineffective oversight of criminal record data itself contributes to the problem. The FBI adds between 10,000 and 12,000 new names to its criminal record database every day.<sup>171</sup> There are approximately 80 million individuals in the database altogether.<sup>172</sup> Despite being easy to access, these records consist of notoriously bad data.<sup>173</sup> Criminal records repositories are rife with inaccuracies and mistaken identity information, as well as old, expunged, and dismissed arrest records. Nearly 50 percent of the records in the FBI database are incomplete.<sup>174</sup>

Correcting mistaken criminal records can be extremely difficult. The most disturbing instances of this phenomenon arise for those who have been “jailed by mistake.”<sup>175</sup> In Los Angeles, more than 1480 people were arrested due to inaccurate records over a five-year period.<sup>176</sup> In St. Louis, residents who had been mistakenly arrested due to common names collectively spent more than 2000 days in jail from

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168. BANNON ET AL., *supra* note 95, at 10–11.

169. *Id.* at 10.

170. *Id.* at 10–13.

171. Fields & Emshwiller, *supra* note 113.

172. *Id.*

173. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 344.

174. MAURICE EMSELLEM & MADELINE NEIGHLY, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 3 (2013), <http://www.nelp.org/publication/wanted-accurate-fbi-background-checks-for-employment/> [<https://perma.cc/8EAQ-EWZ7>] (reporting that fifty percent of criminal records in the FBI database are incomplete); *see also* Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), <http://www.nytimes.com/2006/10/17/us/17expunge.html> [<http://perma.cc/7MNT-DYFW>] (explaining that such incomplete records persist in commercial electronic databases).

175. Robert Patrick & Jennifer S. Mann, *Jailed by Mistake*, ST. LOUIS POST-DISPATCH (Oct. 26, 2013), [http://www.stltoday.com/news/multimedia/special/st-louis-wrongful-arrests-mount-as-fingerprint-mismatches-are-ignored/html\\_b153a232-208f-5d0b-86a1-ba3256f7a941.html](http://www.stltoday.com/news/multimedia/special/st-louis-wrongful-arrests-mount-as-fingerprint-mismatches-are-ignored/html_b153a232-208f-5d0b-86a1-ba3256f7a941.html) [<http://perma.cc/2GRQ-XCEN>].

176. Robert Faturechi & Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011), <http://articles.latimes.com/2011/dec/25/local/la-me-wrong-id-20111225> [<http://perma.cc/MY73-RBVY>]; *see also* Dan Frosch, *Mistaken Identity Cases at Heart of Denver Lawsuit over Wrongful Arrests*, N.Y. TIMES (Feb. 16, 2012), <http://www.nytimes.com/2012/02/16/us/lawsuit-in-denver-over-hundreds-of-mistaken-arrests.html> [<http://perma.cc/W8ZP-432C>] (reporting systemic cases of mistaken arrest warrant information, based on common names or misspellings).

2005 to 2013, or an average of about three weeks each.<sup>177</sup> One man alone was imprisoned for 211 days.<sup>178</sup> Similar dynamics occur with civil penalties, with people being wrongfully denied access to public housing, to employment, or being held in immigration custody on the basis of an inaccurate or incomplete record.<sup>179</sup> Despite these well-documented problems with criminal record data, there is no agency tasked with systemically checking criminal records and ensuring accuracy.

By contrast, law enforcement agencies publish considerable data about how many criminal records they produce. Policymakers can state with certainty how many people are incarcerated at any given time. They can track how many people are convicted of particular offenses. They can compare sentence lengths. But there is no similar way of tracking the consequences of criminal records. There is no database that shows how many people with minor records have been denied access to work as a result of those records. Lack of effective oversight of criminal records necessarily means that, to some extent, the scope of the problem remains hidden, and it remains more difficult to address.

### III. IMPLICATIONS FOR MISDEMEANOR REFORM

For the low-level offenses that constitute the bulk of state court workloads, the overcriminalization problem is not confined to overbroad laws and to policies that are excessively punitive by design. Rather, it is also the product of flawed institutional incentives. In the aggregate, criminal justice penalties can cause enormous and unjustified harm. But when viewed at the micro-level, as a series of discrete choices, they also create powerful benefits for key institutions.

This dynamic affects criminal justice reform in several ways. First, it means that criminal justice reform will require identifying and responding to the incentives of key institutions with an interest in maintaining the system as it is. Identifying stakeholders is necessary to determining whether criminal justice decisions are actually fulfilling their intended public purpose, or whether they are instead merely

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177. Patrick & Mann, *supra* note 175.

178. *Id.*

179. *Id.*; Silva, *supra* note 153, at 386, 389 (describing inaccuracies in criminal record data that affect access to public housing); Eyder Peralta, *You Say You're an American, But What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016, 12:29 PM), <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported> [https://perma.cc/EJE9-XQVM].

erving the organizational interests of discrete actors. Second, it also affects the methods by which scholars demonstrate the need for criminal justice reform. One important method of triggering reform is cost-benefit analysis, which has been influential in demonstrating that punishment should not be imposed when its societal costs outweigh its societal benefits. This type of aggregate cost-benefit analysis, however, may be of limited use in the context of misdemeanors and collateral consequences. Stakeholders have incentives to use criminal records in ways that serve their own interests, regardless of the cost to society as a whole. This Part considers these dynamics, and it then preliminarily evaluates possibilities for either reducing the influence of stakeholders or realigning their incentives with those of the state.

### A. *Identifying Stakeholders*

Stakeholders—those with a vested interest in the current system—play an important role in maintaining the misdemeanor system. Even as low-level arrests and convictions create significant harm for the poor,<sup>180</sup> they benefit others who reap economic rewards from being able to rely on criminal records. These actors, in effect, become stakeholders in maintaining the system as it is.

Stakeholders need not be motivated by punitive intentions. While some stakeholders appropriate criminal records as a race-neutral means of effecting decisions that are actually motivated by racial and socioeconomic bias,<sup>181</sup> others do so because their primary aim is to pursue their own objectives. They are unaware of or indifferent to the systemic costs, or they choose to privilege their own organizational incentives above other concerns.

Some stakeholders are easy to identify, such as privatized probation companies or the private bail bond industry. They have a direct financial stake in criminal justice decisions, one that is visibly at

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180. See generally LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (George Steinmetz & Julia Adams eds., 2009) (arguing that the criminal justice system takes a punitive approach to managing the poor).

181. BACK ON THE ROAD CALIFORNIA, STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 1 (2016), [http://www.ebclc.org/wp-content/uploads/2016/04/Stopped\\_Fined\\_Arrested\\_BOTRCA.pdf](http://www.ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf) [<https://perma.cc/H6ET-GTPB>] (documenting racial disparities in police stops for “failure to pay” offenses in a number of cities). For instance, in San Francisco, where the population is 5.8 percent black, 48.7 percent of arrests are for a “failure to appear/pay.” *Id.*; see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477–78 (2000) (showing that racial minorities in poor urban areas were disproportionately the subject of police stops).



odds with the public purpose of punishment. Other stakeholders are more difficult to identify. They benefit in less tangible ways. They participate in or support the current system because they perceive it as promoting their interests.

The problem is partially distributive and partially perceptual. As a distributive matter, the current system creates enormous value for a range of institutions, but its benefits are not distributed in an equitable way. The misdemeanor process regulates poverty, not just crime. The vast majority of those arrested are poor. Two-thirds of those in jail earned less than \$12,000 in the year before their arrest.<sup>182</sup> More than half of state prisoners in 1997 earned less than \$1,000 in the month before their arrest.<sup>183</sup> Seventy-five percent of state prisoners lack a high school degree.<sup>184</sup> Racial minorities are much more likely to remain in jail because they cannot afford bail.<sup>185</sup> For the poor, the impact of a low-level offense can be devastating. Outcomes can appear arbitrary and procedurally unfair.

Policies that disproportionately affect the poor, however, may not appear unreasonable or punitive in the abstract. Unlike prison time, where judges and lawmakers can compare sentence lengths to the severity of the crime and determine if the outcome is grossly disproportionate, collateral consequences and low-level penalties are much harder to assess.<sup>186</sup> The same penalty does not affect everyone equally. This dynamic is particularly true with fines. A system of escalating fines is a rational way to deter socially undesirable behavior for those who can afford to pay. Those who pay fines up front avoid hidden or escalating late fees. They are also less likely to end up with a

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182. NAT'L CONSUMER LAW CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 5 (2016), <http://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf> [<https://perma.cc/9QZL-39Q3>].

183. Butler, *supra* note 12, at 2181 (citing statistic showing that “35 [percent] of state inmates were unemployed in the month before their arrest, compared to the national unemployment rate of 4.9%”).

184. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 3 (2003), [https://www.campaignforyouthjustice.org/collateral-consequences/images/resources/Educational\\_and\\_Correctional\\_Populations.pdf](https://www.campaignforyouthjustice.org/collateral-consequences/images/resources/Educational_and_Correctional_Populations.pdf) [<https://perma.cc/W5J2-YQ5A>].

185. JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 2–4 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/X9HS-67A6>].

186. *See, e.g.,* Ewing v. California, 538 U.S. 11, 28 (2003) (evaluating the “gravity of the offense compared to the harshness of the penalty” for purposes of determining whether a criminal penalty is grossly disproportionate). Gross disproportionality is a difficult standard to meet, given that it encompasses only “extreme sentences.” *Id.* at 21.

criminal record because they can participate in diversion programs or because, in some cases, prosecutors drop charges for first-time arrestees or those who have a work history. If they do end up with a criminal record, they may be less likely to experience immediate harm to their ability to work or to their housing prospects. Poor people are also far more likely to make tradeoffs with other opportunities when paying criminal justice debt. An indigent defendant who faces fines and fees might have to choose between paying for food and public transportation, or paying the debt. By contrast, those with the means to pay do not make similar tradeoffs.<sup>187</sup>

Fines are not the only aspect of low-level penalties that disproportionately affect the poor. Collateral consequences triggered by low-level arrests can likewise have distributive effects. A single drug arrest can result in the eviction of an entire family from public housing, but it will have no impact on the family of a homeowner.<sup>188</sup> A minor arrest may put a low-skilled worker out of a job, but not a skilled worker who is hard to replace.

These distributive dynamics, in turn, affect perceptions about whether low-level arrests and their collateral consequences are desirable or whether they are grossly disproportionate.<sup>189</sup> Those who do not experience cascading consequences may not perceive the system as costly. Instead, they may view the low-level criminal justice system as meeting objectives they value—saving money, raising revenue, monitoring for risk, making hiring decisions efficiently, and allocating scarce resources, among others. From their perspective, the marginal benefits of having this system may well outweigh the costs.

### *B. Cost-Benefit Analysis*

The influence of stakeholders affects the procedures used by scholars to evaluate the need for criminal justice reform. In particular, it affects the methodology of cost-benefit analysis, which has in recent years played a major role in criminal justice reform. Cost-benefit analysis “refer[s] to a regulatory impact assessment procedure that

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187. JESSICA FEIERMAN ET AL., JUVENILE JUSTICE CTR., DEBTORS’ PRISON FOR KIDS?: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [https://perma.cc/6MXE-RV4Z].

188. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

189. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106, 1118-26 (2008) (discussing how “informational and incentive” disparities create racialized bases of knowledge and lead blacks and whites to perceive the same experience differently).

calls for officials to identify the full range of effects of government policy, so that they have information about consequences before making decisions.”<sup>190</sup> In recent years, cost-benefit analysis has been particularly influential in highlighting the costs of mass incarceration.<sup>191</sup> For instance, in response to budget constraints and the high cost of prison, a number of states have explored ways to save costs by reducing the prison population.<sup>192</sup> In the context of mass incarceration, the costs are easy to see: family breakup, the price of prisons, loss of an otherwise accessible workforce, among others. Cost-benefit analysis in the criminal justice system evaluates the full range of costs of criminal punishment and assesses whether punishment produces corresponding benefits to society. But this approach to cost-benefit analysis may not work in spurring reform of enmeshed low-level offenses and collateral consequences. That is because the interests of key actors differ from the state’s interests in the abstract. In addition, not all actors view costs or benefits in the same way.

One way to implement cost-benefit analysis is to focus on tradeoffs between choosing criminal sanctions versus civil sanctions in regulating behavior. Professor Darryl Brown explores this dynamic in assessing the tradeoffs between incarceration and other means of regulation. He argues that, too often, lawmakers fail to recognize the full costs of the criminal justice system, including the impact of incarceration on families or the labor market.<sup>193</sup> A growing body of criminal law scholarship applies cost-benefit analysis to various contexts including bail,<sup>194</sup> pretrial detention,<sup>195</sup> and postconviction incarceration,<sup>196</sup> and seeks to account for the full range of social harm triggered by criminal justice decisions.

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190. Brown, *supra* note 167, at 348; Brown, *supra* note 41, at 1383 (arguing that criminal law theory should recognize the harm that is imposed on third parties when an offender is punished).

191. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 892–901 (2015) (summarizing developments in applying cost-benefit analysis to the criminal law); see also Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 596 (2012) (describing how awareness of “[t]he fiscal and human consequences” of criminal law have led to reforms designed to reduce mass incarceration).

192. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 191–92, nn.4–5 & 8 (2013) (citing examples).

193. Brown, *supra* note 167, at 348; Brown, *supra* note 41, at 1383 (arguing that criminal law theory should recognize the harm that is imposed on third parties when an offender is punished).

194. See Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).

195. See Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B. U. L. REV. 1 (2017).

196. See David S. Abrams, *The Imprisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905 (2013) (examining incarceration policy changes under the cost-benefit analysis framework).

This literature has been highly influential in identifying the costs of criminal justice enforcement. Some costs are borne by defendants and their families.<sup>197</sup> Other costs are systemic, such as legitimacy costs. Policing scholars note that communities may be less likely to obey laws in general if they perceive policing decisions as illegitimate.<sup>198</sup> Policing decisions that disproportionately affect African American communities can lead to legal estrangement and undermine social inclusion.<sup>199</sup> Criminal justice decisions also reduce access to opportunity. Monetary sanctions and low-level arrests impose social and economic burdens and can also play a role in promoting residential segregation.<sup>200</sup>

Cost-benefit analysis offers one valuable way to analyze whether the benefits of criminalization are worth their cost. However, this method of analysis may be of limited use in addressing the problems related to misdemeanors and collateral consequences. First, it is not clear that reducing the costs of law enforcement expenditures will necessarily reduce the size of the criminal justice system. Low-level arrests and fine-only offenses are already perceived as valuable, low-cost alternatives to prison time.<sup>201</sup> Precisely because low-level offenses require fewer law enforcement resources as compared to felonies, the state is able to process a higher volume of them.<sup>202</sup> Thus, lowering the costs of law enforcement can contribute to what Professor Alexandra

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197. In an empirical study on designing an optimal bail system, Professor Crystal Yang takes such an approach by looking expansively at the costs of pretrial detention. Professor Yang's taxonomy of costs includes harm to the defendant, such as loss of freedom, the collateral consequences of detention such as lost productivity and disruption of the labor force, harm to families and communities of the incarcerated individual, as well as the administrative costs of detention. Yang, *supra* note 194.

198. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 294–95 (2003) (“[M]inority group members are less willing to accept the decisions of legal authorities and less satisfied with those authorities with whom they deal.” (citations omitted)).

199. Bell, *supra* note 6, at 2066–67.

200. See generally Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE (2017) (discussing the effect of policing on residential segregation).

201. U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/928J-V579>] (discussing the need to lower costs by finding alternatives to incarceration).

202. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 185–86 (2014) (discussing how cheaper procedures, such as substituting plea bargains for trials, lowers procedural costs but expands the volume of cases beyond the point considered optimal).

Natapoff describes as “net-widening”—it can expand the reach of the criminal justice system well beyond the point that would be considered optimal.<sup>203</sup>

Second, in implementing cost-benefit analysis, the perspective that matters is not that of the “state” in the aggregate. Rather, it is the perspective of the front-line actors responsible for making key decisions. The institutions responsible for making cost-benefit assessments have incentives to prioritize their own immediate perceived costs and benefits but not to look to the interests of society at large.<sup>204</sup> Police officers who are financially incentivized to prioritize low-level arrests, for instance, may fail to examine how policing practices harm communities and diminish police legitimacy over time.<sup>205</sup> Cost-benefit analysis, in other words, only works if the institutions responsible for making critical law enforcement decisions—including decisions to arrest as well as to rely on criminal records—have incentives to care about the interests of society at large, rather than their own organizational incentives. Public institutions, such as the police, should have such incentives. Private actors, such as privatized probation companies, the bail industry, background check providers, and employers and landlords, by contrast, have clear incentives to privilege their own organizational interests.

Another problem is that there may not be a single optimal way of sanctioning.<sup>206</sup> The state’s interest in punishment is not the same as the interests of the institutions that exercise decisionmaking authority over the processes of punishment. In some cases, institutions may not agree over whether certain secondary effects of contact with the criminal justice system are “costs” versus “benefits.”

Immigration scholars have been keenly attuned to these dynamics. In contrast to the criminal law’s focus on aggregate assessments of costs and benefits, a rich immigration-enforcement literature analyzes the significance of variation in the goals of various actors—federal, state, local, public and private actors.<sup>207</sup> An important body of scholarship

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203. Natapoff, *Misdemeanor Decriminalization*, *supra* note 36, at 1059 (arguing that misdemeanor decriminalization leads to net-widening).

204. Indeed, as Darryl Brown argues, they may have incentives to actively avoid considering the social costs of punishment. Brown, *supra* note 167, at 361.

205. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 777 (2012); Harmon, *supra* note 191, at 873.

206. Steiker, *supra* note 75, at 780 (discussing the rise of “economic analysis of law, which strives for a single model of optimal sanctioning that transcends old categories”).

207. For selected contributions to this literature, see Ingrid Eagly, *Immigrant Protective*

discusses how immigration-enforcement actors view enforcement choices in strategic ways, through the lens of their own incentives and commitments.

For instance, private employers who check immigration paperwork do not share the same goals as federal immigration authorities. Some employers have economic incentives to hire undocumented workers, whom they can underpay, and to use the threat of enforcement to deter those same workers from seeking to enforce fair labor standards.<sup>208</sup> Some localities do not share the same goals as federal immigration officials; they have incentives to encourage immigrant workers to migrate and fulfill labor shortages, regardless of whether those same immigrants are targets of federal enforcement efforts.<sup>209</sup> In the “cimmigration” context, both immigration enforcement officials and criminal law enforcement officials have incentives to use either the immigration-enforcement or criminal law enforcement system instrumentally.<sup>210</sup> Criminal law enforcement actors have incentives to appropriate deportation as a crime-control tool when it eases prosecution, rather than based on considerations of whether deportation is actually appropriate.<sup>211</sup>

Similarly, in the low-level arrest context, institutions also appropriate criminal justice decisions for their own purposes. From the perspective of the state’s sentencing goals, long delays in misdemeanor courts are an unintended social harm that is ancillary to the criminal justice process. It is a negative externality of the criminal justice

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*Policies in Criminal Justice*, 95 TEX. L. REV. 245, 254–74 (2016); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 683–98 (2015); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146–56 (2013); Motomura, *supra* note 79 at 1858; Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977–78 (2004); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 574–75 (2008) (discussing the federal immigration enforcement “exclusivity lie”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1090–93 (2004).

208. See generally Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009) (detailing how employers retaliate against unauthorized employees who attempt to assert their employment rights); Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 552 (2012) (discussing how devolving immigration enforcement discretion to employers can come at the expense of protecting workers).

209. Rodriguez, *supra* note 207, at 577.

210. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012) (describing “ad hoc instrumentalism” in the cimmigration context).

211. *Id.* (“Law enforcement agents, prosecutors, and immigration officials are encouraged to see criminal law and immigration law simply as different kinds of tools, and to use whichever tool works best against a particular offender or suspect.”).

process, one that imposes significant harm on defendants. But delays can also be appropriated by prosecutors as a desirable, informal form of punishment. Long delays also provide prosecutors with the leverage needed to induce defendants to take quick pleas, and they can function as a way to monitor defendants over time.<sup>212</sup> Similar dynamics unfold with collateral consequences. Some prosecutors purposely substitute low-level charges that carry steep collateral consequences for more serious criminal charges. This allows prosecutors to save time and money because they do not have to gather additional evidence that might be required to prove a more serious case.<sup>213</sup>

Likewise, although job loss after a criminal sentence is complete is commonly seen as a secondary or unintended aspect of punishment, some employers value criminal record checks precisely because they provide a way to eliminate applicants. Employers have powerful incentives to conduct background checks and to rely on them as proxies for worker fitness. Harm that arises outside of the formal criminal sentence is thus not merely an externality of criminal justice decisions. It can be appropriated by key institutions to serve their own purposes. As long as key decisionmakers view the current system as beneficial to their own organizational interests, they have incentives to maintain the system as it is, regardless of its societal cost.

### C. *Realigning Incentives*

Recognizing the disconnect between the state's sentencing goals and the interests of stakeholders leads to two potential, and frequently overlapping, avenues for reform. The first avenue seeks to reduce the influence of various institutions on criminal justice decisions. The second seeks to realign the incentives of key stakeholders with the sentencing interests of the state. This Article's goal is not to advocate for either type of reform over the other, but rather to illustrate how existing reform proposals might fit within either avenue and to highlight how they might work.

There are a number of ways to reduce the ability of different

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212. Kohler-Hausmann, *supra* note 85, at 646–47 (discussing open arrests as functioning to “manage” defendants over time); Kohler-Hausmann, *supra* note 83, at 374.

213. Eagly, *supra* note 80, at 1306–19 (discussing relaxed procedural norms in immigration enforcement as compared to criminal enforcement, which in turn create incentives for criminal law prosecutors to use the immigration system instrumentally); Jain, *supra* note 7, at 1221–25 (discussing the collateral enforcement model); Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 795–822 (2016) (describing the practice of “strategic undercharging”); Sklansky, *supra* note 210, at 202.

institutions to appropriate criminal records for their own purposes. One is to reduce the influence of financial incentives in criminal justice practices altogether. In Ferguson, for instance, the consent decree aimed to do this by requiring that the municipality publicly post all fees, conduct ability-to-pay determinations, and prohibit the use of municipal arrests as a means to collecting civil court debt.<sup>214</sup> Other reforms in this vein including removing private actors from influencing criminal justice decisions, such as by removing or restricting the influence of the bail bond industry or the privatized probation industry.

More far-reaching approaches to limiting the number of stakeholders include changing the reach of the criminal law, either by substantive law reform or by changing front-end policing practices. Police and lawmakers who evaluate the full range of harms that arise from low-level arrest decisions may choose not to arrest, or they may pursue nonpenal alternatives that avoid generating a criminal record.<sup>215</sup> New York County prosecutors took this approach by recently indicating that they would routinely decline to pursue low-level turnstile jumping charges, which had previously been one of the top misdemeanor charges in Manhattan County.<sup>216</sup> The stated goal was to obtain “more fair outcomes without sacrificing public safety.”<sup>217</sup> The approach works by reducing the number of criminal records created in the first place.

Another approach is to reduce access to criminal records. A number of jurisdictions have taken this approach in recent years through reforms such as ban-the-box, expungement, or sealing laws, including laws that restrict access to nonconviction records.<sup>218</sup> The mechanisms vary, but as a general matter, they function by either removing criminal record information from state databases or by preventing access to criminal records under certain circumstances.

While reducing access to criminal records is promising, this

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214. Consent Decree at 83–85, *United States v. Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016), <https://www.justice.gov/opa/file/833431/download> [<https://perma.cc/UEV8-H4BG>].

215. For an exploration of this approach, see Harmon, *supra* note 40.

216. James C. McKinley, Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (June 30, 2017), [https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html?\\_r=0](https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html?_r=0) [<https://perma.cc/268U-T6SV>].

217. *Id.* (quoting Manhattan District Attorney Cyrus R. Vance Jr.)

218. COLLATERAL CONSEQUENCES RES. CTR., *FOUR YEARS OF SECOND CHANCE REFORMS, 2013-2016: RESTORATION OF RIGHTS & RELIEF FROM COLLATERAL CONSEQUENCES 2-3* (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf> [<https://perma.cc/AZ4W-4N7T>].



approach faces practical obstacles to implementation. One challenge is underenforcement; employers who perceive records as valuable continue to rely on criminal history in ways that are overbroad. Some employers ask about criminal records even when prohibited from doing so, or they use internet searches to access records that have been expunged but remain accessible.<sup>219</sup> Without implicit bias training, some research shows that hiring personnel prohibited from asking about criminal history may engage in racial discrimination, because they use race as a proxy for criminal history.<sup>220</sup> Thus, implementing meaningful restrictions on the use of criminal background checks will likely require the state to do more than simply expunge existing criminal records.

The second route seeks to align the incentives of existing stakeholders with those of the state. Some reform initiatives take this approach by seeking to persuade companies that it is in their business interest to hire record holders. They highlight research that record holders make more committed or motivated employees because they are aware that they have fewer employment options.<sup>221</sup> The goal is for employers to agree voluntarily not to inquire about criminal history in the initial application form and thereby narrow the impact of a criminal record on employment.

The realignment approach also encompasses tort reform and reductions in state-mandated collateral consequences. If employers do not perceive background checks as helpful in complying with licensing and other regulations, they may stop routinely conducting background screening. Similarly, tort reform may reduce reliance on background checks. If background checks do not insulate against negligent hiring liability, employers may find the process of conducting background

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219. Adam M. Gershowitz, *The Intake Prosecutor: Prosecutorial Screening Before The Police Make Warrantless Arrests* 19–20 (William & Mary Law School Research Paper No. 09-362, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3037172&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037172&download=yes) [<https://perma.cc/94TK-JUM7>] (collecting evidence to show that “the internet remembers” arrest history regardless of whether they are dismissed or expunged).

220. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 4 (Univ. of Mich. Law & Econ., Research Paper No. 16-012, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795) [<https://perma.cc/XP63-4ZK7>] (finding that ban the box increases racial discrimination in callbacks).

221. AM. CIVIL LIBERTIES UNION, *BACK TO BUSINESS: HOW HIRING FORMERLY INCARCERATED JOB SEEKERS BENEFITS YOUR COMPANY* 8–9 (2017), [https://www.aclu.org/sites/default/files/field\\_document/060917-trone-reportweb\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf) [<https://perma.cc/D645-DJRV>] (“At Total Wine & More, human resources managers found that annual turnover was on average 12.2 percent lower for employees with criminal records. Electronic Recyclers International (ERI) saw a similar outcome: by adopting a program to recruit employees with criminal histories it reduced turnover from 25 percent to . . . 11 percent.” (footnotes omitted)).

checks less valuable overall.<sup>222</sup>

Other methods of realignment include raising the cost of conducting background checks. One way to do this is to raise the price of accessing criminal records. Another is to penalize the overbroad use of criminal records, such as through rigorous enforcement of antidiscrimination laws in cases where criminal record screening creates a disparate impact. The realignment approach may also include promoting information about the legal risks of using criminal records in overbroad ways. The background check industry has an incentive to emphasize negligence liability, but there is no equivalent private industry with a stake in emphasizing the potential for violating antidiscrimination laws. Employers thus may overestimate the risk of negligent retention and hiring liability and underestimate the risk of violating antidiscrimination laws. Raising awareness of the monetary costs of violating antidiscrimination law—as well as actually increasing the likelihood that those who violate antidiscrimination law will face sanctions—could curb uses of criminal records that do not align with the state’s interest in punishment.<sup>223</sup>

These reforms have the potential to reduce the impact of a criminal record. They also, however, require stakeholders to give up information that they perceive as valuable or to incur the costs associated with changing their existing practices. Unlike reductions in mass incarceration, which have been conceptualized as a way to save costs for the state while also avoiding unnecessarily punitive policies, meaningful reform in the misdemeanor context will require that key institutions change practices that they view as being in their immediate interest.

## CONCLUSION

The criminal justice system is often viewed largely as the product of overly punitive laws and excessive punishment. This perspective is powerful, particularly in the context of excessive prison sentences. It does not, however, fully account for the practices of low-level criminal

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222. *Id.* at 13–14 (collecting examples of negligent hiring reform in a number of states that is designed to facilitate hiring criminal record-holders).

223. The penalties for antidiscrimination violations can be significant. The U.S. Census Bureau recently settled an antidiscrimination lawsuit based on its overbroad criminal records policy for \$15 million in damages. Tanzina Vega, *Census Settles Hiring Lawsuit Over Criminal Records*, CNN MONEY (Apr. 19, 2016, 6:16 PM), <http://money.cnn.com/2016/04/19/news/economy/census-bureau-hiring-lawsuit-settlement/index.html> [<https://perma.cc/8WW2-KT39>].

courts and for ubiquitous collateral consequences. This Article suggests that the problem is not only “too much” state action and overcriminalization; it is also institutional incentives that do not align with the public goals of promoting safety and seeking proportionate sentences. Addressing this dynamic requires first recognizing that key decisionmakers have goals that deviate from the state’s sentencing goals; they do not all share an interest in promoting retribution or deterrence for society at large. Meaningful reform requires not only acknowledging the impact that the current system has on the poor and people of color, but also recognizing that the current system advances the perceived organizational ends of key actors. The cost-benefit calculus for key actors does not align with the cost-benefit analysis of the state as a whole. Reform thus will require stakeholders who benefit from the current system to relinquish those perceived benefits for the interests of a more equitable system as a whole.