

## THE IRONIC PROMISE OF THE THIRTEENTH AMENDMENT FOR OFFENDER ANTI-DISCRIMINATION LAW

by  
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*Policymakers and legal scholars agree that persistent private discrimination against persons convicted of crimes is a significant public policy concern. Persons convicted of crimes are routinely shut out of legitimate labor and housing markets, precipitating recidivist behavior and other social ills. In an attempt to curtail these practices, local and state governments have enacted anti-discrimination legislation designed to protect offenders' access to these markets. Local legislative efforts have, however, proven inadequate to quell discrimination against this group, prompting calls for a federal response. This Article identifies a source of law supporting broad-ranging federal anti-discrimination legislation in this area—the Thirteenth Amendment. The goal of this Article is to provide a historical basis for linking market exclusion to slavery and other forms of citizen subordination. Its scholarly contributions lie at the intersection of two previously disparate academic projects: The call to expand the categories of private conduct that Congress is empowered to curtail under Section 2 of the Thirteenth Amendment and the call to consider seriously the historical antecedents in civil death, slavery, and Jim Crow for modern trends of hyper-conviction and incarceration, and collateral and incidental consequences. This Article links these important scholarly conversations and posits that the anti-subordination principles explicit in the Amendment's text and history can inform more aggressive efforts to dismantle some of the private barriers to reintegration for convicted persons. By examining the pernicious effects of private discrimination on offenders, it shows that these forms of discrimination mimic characteristics of American chattel slavery and warrant swift federal intervention.*

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## I. INTRODUCTION

Myths about offenders and their predisposition for crime permeate public policy and the public imagination.<sup>1</sup> While frequently referred to as a monolithic group, the population of convicted persons is composed of a variety of persons, of all ages and backgrounds, whose offenses range from serious, violent felonies to mere “violations.” Notwithstanding their divergent culpabilities, individuals convicted of criminal offenses are, as a class, implicitly or explicitly excluded from individual liberties and protections afforded by law to citizens. These exclusions—found in federal and state constitutions, statutes, and administrative rules, and in judicial decisions interpreting the constitutionality of such restrictions<sup>2</sup>—effectively diminish the citizenship, liberty, property, reputation, and personhood of the offender under law. This subordination of liberty and

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<sup>1</sup> Sharon Dolovich has argued that perceptions of offenders as “subhuman” or “monsters” elide distinctions between and among persons who have been convicted of crimes. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 288–310 (2011) (exploring the making of criminals into “monsters” and its detrimental effect on penal policy).

<sup>2</sup> For an overview of consequences resulting from federal convictions, see AM. BAR ASS’N, *INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS* (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>.

property interests for convicted persons is substantial, irrespective of the magnitude of the offense or whether the underlying conviction resulted in a custodial sentence of incarceration.

The notion that convicted persons suffer persistent post-conviction subordination under public law is not novel; over the past two decades, a considerable “collateral consequences” scholarship has emerged around this subject.<sup>3</sup> Federal, state, and local laws prescribe over 38,000 civil and administrative consequences incidental to a criminal conviction in the United States.<sup>4</sup> The term “collateral consequences” has come to represent the universe of civil sanctions, liabilities, vulnerabilities, disabilities, and penalties that accompany criminal convictions and that (individually or in tandem) affect offenders’ life cycles.<sup>5</sup> These sanctions encompass restrictions and prohibitions on a number of significant rights and privileges, including: infringement or abrogation of the right to vote;<sup>6</sup> exclusion from jury service;<sup>7</sup> revocation of driver’s licenses;<sup>8</sup> public registration<sup>9</sup>

<sup>3</sup> See *infra* notes 29–34 and accompanying text.

<sup>4</sup> Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, Written Testimony for Equal Employment Opportunity Commission 4 (July 26, 2011), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm>.

<sup>5</sup> See *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (“What renders the plea’s . . . effects ‘collateral’ is not that they arise ‘virtually by operation of law,’ but the fact that [it] is ‘not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he has no responsibility.’” (quoting *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976))); Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* 64–65 (2005).

<sup>6</sup> Nearly six million U.S. citizens are disenfranchised because of their convict status. See CHRISTOPHER UGGEN ET AL., *THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010*, at 1 (2012), available at [http://www.sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf) (estimating that, as of December 31, 2010, 5.85 million Americans were disenfranchised under criminal disenfranchisement laws); see, e.g., N.Y. ELEC. LAW §§ 5-106(2)–(4) (McKinney 2007) (revoking right to vote for any person convicted of a felony under New York state law, federal law, or any other state’s laws, until pardoned or expiration of maximum sentence of imprisonment).

<sup>7</sup> Forty-eight states and the District of Columbia ban convicted felons from jury service; thirty-one of those states impose a lifetime ban on jury service for felons. See Darren Wheelock, *A Jury of One’s “Peers”: The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 336 (2011) (“At the state level, the majority of states ban current felons from serving on juries (forty-eight out of fifty states and the District of Columbia); thirty-one states ban individuals with felon status from serving on a jury for life.”).

<sup>8</sup> See, e.g., 23 U.S.C. § 159 (2006) (requiring states to enact legislation suspending driver’s licenses of persons convicted of drug crimes or else lose federal highway funds).

<sup>9</sup> Sex offender registration laws, popularly known as “Megan’s Laws,” exist in some form under the laws of each of the 50 states and the federal government. See 42 U.S.C. § 16913(a) (2006) (requiring that sex offenders register “in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student,” and, initially, in jurisdiction in which convicted, if different from jurisdiction where offenders resides); SCOTT MATSON WITH ROXANNE LIEB, *WASH. STATE INST. FOR PUB. POLICY, COMMUNITY NOTIFICATION IN WASHINGTON*

and geospatial housing restrictions for individuals convicted of certain crimes (including, but not limited to, sex crimes);<sup>10</sup> divestment from public pension programs;<sup>11</sup> restrictions on the ability to maintain familial relations (including the custody of children);<sup>12</sup> enhanced penalties for future convictions;<sup>13</sup> exclusion and suspension from certain professions;<sup>14</sup>

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STATE: 1996 SURVEY OF LAW ENFORCEMENT 1 (1996), *available at* <http://www.wsipp.wa.gov/rptfiles/sle.pdf> (“All states now require released sex offenders to register with law enforcement or state agencies.”).

<sup>10</sup> See MARCUS NIETO & DAVID JUNG, CAL. RES. BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 3 (2006), *available at* <http://www.library.ca.gov/crb/06/08/06-008.pdf> (noting that, as of 2006, 22 states had enacted geographical restrictions on sex offenders’ residency); *see, e.g.*, CAL. PENAL CODE § 3003(g) (West 2011) (barring “high-risk” paroled sex offenders from living within a one-half mile radius of any school); CAL. WELF. & INST. CODE § 6608.5(d), (f) (West 2010) (barring a “sexually violent predator” or a serious paroled sex offender from living within a one-fourth mile radius of a school). In 2010, after widespread publicity concerning a convicted sex offender “tent city” under a bridge in the city of Miami, Miami-Dade County enacted legislation easing geographical restrictions on sex offender residences. *See* Catharine Skipp, *A Law for the Sex Offenders Under a Miami Bridge*, TIME (Feb. 1, 2010), <http://www.time.com/time/nation/article/0,8599,1957778,00.html> (“A new law takes effect on Monday that supersedes the county’s 24 municipal ordinances, many of which make it all but impossible for offenders to find housing.”). In some jurisdictions, individuals convicted of offenses unrelated to sex are required to register. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 128 (2003) (“Illinois, for example, now requires sex offenders and those convicted of first-degree murder of a victim under 18 to register. Some states also require all drug addicts, persons convicted of arson or domestic violence, and those designated mentally ill to register.”).

<sup>11</sup> *See, e.g.*, N.Y.C. ADMIN. CODE § 13-161a(6)(b)–(6)(c) (2007) (permitting immediate divestment from retirement pension program for any pre-retirement New York City Transit Authority employee convicted of criminal felony offense).

<sup>12</sup> The Adoption and Safe Families Act (ASFA) of 1997 requires states to abide by expedited timelines to place children in permanent homes whether through reunification or adoption or guardianship and termination of parental rights. *See* 42 U.S.C. §§ 671, 675 (2006). If children are in foster care for 15 of the most recent 22 months, a petition to terminate parental rights must be filed. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 11 (2007), *available at* [www.gao.gov/new.items/d07816.pdf](http://www.gao.gov/new.items/d07816.pdf) (explaining mandate, under ASFA, that states file petition to terminate parental rights for children in foster care for 15 of the most recent 22 months). The racial implications of the legislative mandate are staggering: Over 44% of all children with incarcerated parents in this country are African American. *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf> (reporting that, of 1.7 million children with a parent in prison at midyear 2007, over 767,000 were African American).

<sup>13</sup> The Federal Sentencing Guidelines, for example, include a graduated “criminal history category” which substantially increases the suggested custodial sentence as the criminal history category increases. U.S. SENTENCING COMM. GUIDELINES MANUAL § 4A1.1 (2013).

debarment from state and federal occupational licensing programs and grant programs;<sup>15</sup> loss of the right to hold public office;<sup>16</sup> restrictions on access to public housing<sup>17</sup> and federal student financial aid for post-secondary education;<sup>18</sup> restrictions on access to public benefits (including food assistance);<sup>19</sup> and deportation.<sup>20</sup>

The propriety of the expansive web of civil collateral consequences is, increasingly, a subject of intense debate in policy circles.<sup>21</sup> Proponents for the imposition and expansion of civil collateral sanctions maintain that neither the states nor the federal government has done enough to reduce the future likelihood of reoffending or victimization.<sup>22</sup> Offender

<sup>14</sup> See, e.g., CONN. GEN. STAT. ANN. § 20-294 (West 2008) (authorizing suspension of architecture license if license holder is convicted of felony offense); § 20-86h (authorizing Department of Public Health to take professional disciplinary action against any midwife convicted of felony offense). See generally Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 194–200 (1995) (discussing classification of state occupational licensing laws and how “criminal convictions” and “good moral character” statutes pose significant obstacles to reentering offender’s attempts to obtain license).

<sup>15</sup> See, e.g., 42 U.S.C. § 1320a-7 (2006) (listing mandatory and permissive exclusions from participation in Medicare, Medicaid, or any state health care program based on felony conviction relating to, *inter alia*, health care fraud or controlled substances).

<sup>16</sup> See, e.g., TEX. ELEC. CODE ANN. § 141.001(a)(4) (West 2009) (“To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must . . . have not been finally convicted of a felony . . .”).

<sup>17</sup> See Anti-Drug Abuse Act of 1988, 42 U.S.C. § 1437d(l) (2006) (permitting eviction from public housing for “criminal activity” by tenants or their guests).

<sup>18</sup> Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 8021, 120 Stat. 4 (2006) (denying federal student financial aid to any student who is convicted for a misdemeanor or felony drug offense while receiving financial aid); Higher Education Amendment of 1998, Pub. L. No. 105-244, § 483, 112 Stat. 1581 (1998) (denying federal student financial aid to any student who has been “convicted of any offense under Federal or State law involving the possession or sale of a controlled substance”).

<sup>19</sup> See 21 U.S.C. § 862a(a)(1), (a)(d) (2006) (prohibiting anyone convicted of a drug-related felony offense from receiving Temporary Assistance for Needy Families (TANF), unless states opt out of or modify the ban); 21 U.S.C. § 862a(a)(2), (d) (denying individuals convicted of drug felonies access to benefits under the food stamp program unless states opt out of or modify the ban). Nine states enforce a lifetime ban on food stamps on the basis of the federal ban. *After Prison: Roadblocks to Reentry*, LEGAL ACTION CTR. (2009), <http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=5>.

<sup>20</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandates deportation for legal permanent residents sentenced to a year or more for “aggravated felonies,” and crimes involving “moral turpitude.” Pub. L. No. 104-132, § 435, 110 Stat. 1214 (1996).

<sup>21</sup> For example, in 2010, the Supreme Court held that defense counsel had a duty to inform defendants invited to enter plea negotiations of certain collateral consequences of their choices. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

<sup>22</sup> See, e.g., Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834, 836 (2007) (noting that proponents of blanket restrictions on sex offenders maintain that such measures “are a necessary weapon in the state’s arsenal to protect the health and safety of

advocates, in contrast, argue that the web of “invisible punishments” associated with criminal convictions in the U.S. “exact[s] a terrible toll”<sup>23</sup> and exacerbates (if not propagates) recidivist behavior and the alienation of the offender from societal behavioral norms.<sup>24</sup> The wisdom of these policies is further scrutinized, in part, because the number of people affected by these initiatives are staggering: Each year, roughly ten million new criminal cases—of which nearly 75% involve misdemeanor offenses

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society’s youngest and most vulnerable members from offenders who pose known risks”); Kyle Miller, *Nozzolio Fights to Enact Increased Sex Offenders Penalties*, LANSING STAR (May 4, 2012), <http://www.lansingstar.com/news-archive/8442-nozzolio-fights-to-enact-increased-sex-offenders-penalties> (reporting Michigan legislature’s adoption of new restrictions expanding public access to private information of individuals convicted of sex crimes).

<sup>23</sup> James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 28–31 (2012).

<sup>24</sup> For example, research suggests that sex offender registration schemes have limited deterrent effect. See, e.g., ELIZABETH J. LETOURNEAU ET AL., EVALUATING THE EFFECTIVENESS OF SEX OFFENDER REGISTRATION AND NOTIFICATION POLICIES FOR REDUCING SEXUAL VIOLENCE AGAINST WOMEN 2–3 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> (finding that, although a “significant deterrent effect” was achieved in the first ten years of South Carolina’s registration and notification enactment, there was no significant decline associated with implementation of the state’s online offender registry); KRISTEN M. ZGOBA & KAREN BACHAR, NAT’L INST. OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION: LIMITED EFFECTS IN NEW JERSEY (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225402.pdf> (finding that New Jersey’s registration requirements “did not reduce the number of rearrests for sex offenses, nor did it have any demonstrable effect on the time between when sex offenders were released from prison and the time they were rearrested for any new offense, such as a drug, theft or sex offense”); Sabra Micah Barnett, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 392 (2004) (suggesting that “barriers to rehabilitation” lead to recidivism); Darryl K. Brown, *Cost–Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 346 (2004) (arguing that diminished job prospects and circumscribed opportunities to fully reintegrate “may increase the odds of recidivism”); J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 164–65 (2011) (finding that notification laws may not disrupt sex offender behavior and may increase recidivism among registered sex offenders by reducing relative attractiveness of law-abiding behavior); see also Republican National Committee, *We Believe in America: 2012 Republican Platform*, REPUBLICAN NAT’L COMM. 38, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (“[M]ore attention must be paid to the process of restoring those individuals to the community. Prisons should do more than punish; they should attempt to rehabilitate and institute proven prisoner reentry systems to reduce recidivism and future victimization.”). President George W. Bush recognized as much in his January 2004 State of the Union address: “We know from long experience that if [ex-offenders] can’t find work, or a home, or help, they are much more likely to commit more crime . . . .” 150 Cong. Rec. S37 (2004). The debate is, however, a nuanced one: There are, for example, those who support increasing employment and economic opportunities for offenders, through job creation and job training programs, but who take no issue with the imposition of collateral consequences related to employment.

es—are closed by state prosecutors.<sup>25</sup> Arrests leading to such cases are also highly prevalent: A recent study by the journal *Pediatrics* estimates that more than 30% of Americans will be arrested by age 23.<sup>26</sup>

The enduring impact of tickets, violations, detentions, arrests, and convictions, or “criminal exposure,”<sup>27</sup> on the post-release experiences of arrested, adjudicated, and incarcerated individuals has also been the subject of intense examination by a cadre of committed scholars and advocates.<sup>28</sup> Overwhelmingly, that “consequences” scholarship has targeted the altered life cycles of individuals with criminal histories. Gabriel “Jack” Chin has argued, for example, that the cumulative effect of these public law enactments has engendered a modern “civil death” for convicted persons: Excluded and perpetually sanctioned through the operation of public law, convicted persons in the modern era suffer from harsher,<sup>29</sup>

<sup>25</sup> STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 6 (2006), available at <http://www.bjs.gov/content/pub/pdf/psc05.pdf> (stating that, in 2005, “[p]rosecutors reported closing 2.4 million” felony cases and “and nearly 7.5 million misdemeanor cases”).

<sup>26</sup> Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 *PEDIATRICS* 21, 25 (2012), available at <http://pediatrics.aappublications.org/content/early/2011/12/14/peds.2010-3710.full.pdf> (“Our primary conclusion is that arrest experiences are common among American youth . . .”).

<sup>27</sup> I have previously employed the term “criminal exposure” to describe “any experience of arrest, detention, conviction (resulting in probation or suspended sentences), or incarceration.” See Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 *N.Y.U. L. REV.* 1237, 1238 n.3 (2005).

<sup>28</sup> See AMERICAN BAR ASSOCIATION, *INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION: FEDERAL LAWS AND REGULATIONS* 9 (2009); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney Lind eds., 2002); HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 2 (1998), available at [http://www.sentencingproject.org/doc/file/fvt/fd\\_losingthevote.pdf](http://www.sentencingproject.org/doc/file/fvt/fd_losingthevote.pdf) (describing disenfranchisement as among “collateral ‘civil’ consequences” accompanying felony conviction); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 *J. GENDER RACE & JUST.* 253, 253 (2002) (describing collateral consequences as “the most significant penalties resulting from a criminal conviction”); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 *CRIME & JUST.* 121, 122 (1999) (analyzing aggregate effects of mass incarceration); J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 *CRIM. JUST.*, Fall 2009, at 42, 42; 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, 585–87 (2006); Marisa Baldaccini, *Reentry and the Collateral Consequences of the Criminal Process in New York State* (2007) (unpublished Student Capstone J.), available at [http://www.nyls.edu/documents/justice-action-center/student\\_capstone\\_journal/capstone060702.pdf](http://www.nyls.edu/documents/justice-action-center/student_capstone_journal/capstone060702.pdf); Paul N. Samuels & Debbie A. Mukamal, *After Prison: Roadblocks to Reentry*, *LEGAL ACTION CTR.* (2004), [http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf) (including comprehensive listing of civil collateral consequences by state).

<sup>29</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 *U. PA. L. REV.* 1789, 1806 (2012) (“Loss of legal status is more

more pervasive, and more intrusive penalties and sanctions as a result of their convicted status than in earlier periods of American history when the “extinction of civil rights”<sup>30</sup> was a codified punishment under law.<sup>31</sup>

Critics point to high rates of recidivism, persistent unemployment, urban decline, and the racially disparate effects of these trends as cause for special concern.<sup>32</sup> Michelle Alexander has argued that certain features of American criminal law policy and administration—including the “war on drugs,” mass conviction, hyper-incarceration, and the resulting web of collateral consequences—have precipitated vast racial disparities, imposing a form of caste-like subordination that she terms “the new Jim Crow.”<sup>33</sup> According to Alexander, this “rebirth of caste” is merely the nation’s current preferred method of race-based social control, notwithstanding contemporary claims that the administration of justice in the U.S. is “colorblind.”<sup>34</sup>

With its pointed focus on the subordination of convicted persons under public law, the scholarship on mass conviction, collateral consequences, and offender reentry has, however, given little attention to the cumulative ramifications of discrimination against convicts in the private realm.<sup>35</sup> Offenders’ efforts to navigate the tangled web of public subordination under the law are impacted by, and constitutive of, their ability to secure access to private markets, including housing, financial services, and employment. The aggregation of these forms of market and property discrimination further subordinate offenders through economic and social exclusion, precipitating another form of status subordination—social

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important, ironically, for relatively less serious crimes. If a person is sentenced to twenty-five years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as a chiropractor when she is released. But to a person sentenced to unsupervised probation and a \$250 fine for a minor offense, losing her city job or being unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative can be disastrous.”)

<sup>30</sup> *Id.* at 1794 (quoting *Avery v. Everett*, 18 N.E. 148, 150 (N.Y. 1888)).

<sup>31</sup> See Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 968 n.1 (1937) (listing civil death statutes from 18 states).

<sup>32</sup> African American men are the largest incarcerated population in the U.S. See PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, PRISONERS IN 2010, at 7, 27 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf> (reporting that, in 2010, black men outnumbered all other subgroups of incarcerated persons). African Americans are also subject to arrest twice as often as white Americans. See D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (observing that annual arrest rate among African Americans is more than twice that of white Americans).

<sup>33</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 56–58 (Rev. Ed. 2012).

<sup>34</sup> *Id.* at 100.

<sup>35</sup> One exception is a book that examines effects of offender subordination on offenders, families, and communities. See TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

death, a concept closely correlative with the institution of human slavery.<sup>36</sup>

The Thirteenth Amendment is the constitutional provision that most naturally suggests itself to one who would seek redress for forms of subordination “closely correlative” to slavery. Section 1 of the Amendment explicitly prohibits the institution: *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*<sup>37</sup> Section 2 empowers Congress to effectuate the prohibition: *Congress shall have power to enforce this article by appropriate legislation.*<sup>38</sup> The Amendment is a potent basis upon which to ground anti-discrimination legislation targeting arbitrary private market exclusion for three reasons. First, the Thirteenth Amendment (unlike the Fourteenth Amendment) has no state action requirement, and unquestionably reaches private harms.<sup>39</sup> Second, the Thirteenth Amendment has a unique applicability to efforts targeting market discrimination by small employers and landlords that is bound by neither the dictates of existing federal anti-discrimination legislation (namely, Title VII of the Civil Rights Act of 1964 and the Fair Housing Act of 1968) nor judicial interpretations of such law. Finally, Thirteenth Amendment claims do not require proof of disparate treatment towards, or disparate impact on, a protected group—theories of discrimination under federal employment and fair housing law that place

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<sup>36</sup> See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 38–45 (1982). “Social death” is a by-product of the forced alienation and dehumanization of disfavored and dispossessed groups precedent or attendant to their enslavement. Patterson examined the practice and culture of slavery in 66 distinct slave societies throughout premodern and modern human history. While not exhaustive, Patterson’s typology is unparalleled in its exposition of dominant features presenting across multiple slave societies.

<sup>37</sup> U.S. CONST. amend. XIII, § 1.

<sup>38</sup> U.S. CONST. amend. XIII, § 2.

<sup>39</sup> Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1643–44 (2012) (“Unlike the Fourteenth Amendment, the Thirteenth Amendment has no state action requirement. This distinction renders a variety of harms, such as private violence against women, cognizable only under the Thirteenth.”). Even in the context of state actions, convicted persons have not been recognized by the Supreme Court as a suspect class deserving of heightened scrutiny in the equal protection context, and several of the Courts of Appeals have determined that state classifications resulting in disparate treatment for felons are reviewable only under a rational basis standard. See, e.g., *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983), cert. denied, 464 U.S. 963 (1983) (“It follows that the standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard.”); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (“Therefore, we conclude that selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest.”).

a substantial, and frequently, infeasible, evidentiary burden upon plaintiffs in these cases.<sup>40</sup>

And yet, despite its promise for anti-discrimination legislation targeting these harms, it could well be thought paradoxical to infer from the Amendment's prohibition on slavery a more specific prohibition on private market discrimination against convicted persons.<sup>41</sup> After all, the Amendment is commonly construed to target race-based chattel slavery exclusively. Moreover, the Amendment includes within Section 1 an exception to its prohibition on slavery or involuntary servitude where imposed "as a punishment for crime."<sup>42</sup> This Article seeks to resolve this seeming paradox by demonstrating: (1) that constrained access to labor and property markets was central to the Reconstruction Congress's understanding of the systematic barriers to freedom for formerly enslaved people; and (2) that the convict exception in Section 1 is no barrier to legislative efforts to curb discrimination given both courts' insistence that collateral sanctions (including discrimination) against convicted persons are regulatory and not punitive and the obvious disconnect between private sector discrimination and the state's authority to impose "punishment for crime." We should understand the Thirteenth Amendment to do more than prohibit race-based chattel slavery: Although the federal courts have single-handedly (and arguably, artificially) constrained the scope of the Amendment's protections, its earliest invocations, including the Reconstruction-era Civil Rights Acts, place access to labor and property markets at the center of the Amendment's anti-subordination and anti-slavery project.

Scholars have argued persuasively over the last two decades that the Thirteenth Amendment empowers Congress to curtail broad categories of subordinative private conduct.<sup>43</sup> This Article argues that the Amendment's history, its contemporary milieu, as well as its inherent anti-subordinative principles ought to be construed to extend its applicability to certain forms of offender subordination, including the exclusion of offenders from private markets. Local legislative efforts are ill-suited to

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<sup>40</sup> See, e.g., Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 112 (2012) ("Proof of [discriminatory] intent is rarely direct. It is usually circumstantial, even multidetermined."); Martin J. Katz, *Gross Disunity*, 114 PENN. ST. L. REV. 857, 881 (2010) (noting that causation in disparate treatment suits occurs in the mind of "decisionmaker/defendant" who controls most of the relevant evidence); Paul J. Sopher, *Matters of Perspective: Restoring Plaintiffs' Stories to Individual Disparate Treatment Law*, 84 TEMP. L. REV. 1031, 1051 (2012) ("Moreover, direct evidence of discrimination is rare, and the defendant largely controls most of the evidence.").

<sup>41</sup> This Article uses the terms "convicted persons," "convicts," "offenders," and "ex-offenders" interchangeably to refer to individuals who have had a final judgment of conviction in a criminal case issued against them.

<sup>42</sup> U.S. CONST. amend. XIII, § 1.

<sup>43</sup> E.g., Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 53 (2006); Tesis, *supra* note 39, at 1643–44.

address the systemic implications of market exclusion for this mushrooming population, suggesting that federal intervention is warranted.

This Article proceeds in four parts. Part II tracks the current calls among scholars to expand the Amendment's scope beyond racial slavery to include other forms of both racial and nonracial subordination. Part III documents the aggregate effects of market discrimination against persons with criminal histories, and argues that a federal legislative response is warranted. This section articulates the Thirteenth Amendment's contemporary relevance for efforts to (or effects that) exclude blacks (and others) from private labor and housing markets. Part IV explores the historical linkages between antebellum chattel slavery and limited market access in the United States and elsewhere. This history has received short shrift in those cases considering the scope of the Amendment's protections, including the *Civil Rights Cases*,<sup>44</sup> resulting in judicial pronouncements erroneously cabining the Amendment's reach. Part V explores further the historical association of convicts with slavery, and considers some of the more troubling externalities associated with market discrimination against this group.

## II. BEYOND SLAVERY: THE PROMISE OF THE THIRTEENTH AMENDMENT

This call to consider an expansive construction of the Thirteenth Amendment's grant of legislative authority is supported by the emergence over the past 20 years of a robust scholarship advocating a reconsideration of the Amendment's outer limits. Much of that scholarship, perhaps unsurprisingly, targets racialized harms suffered by African Americans and other minorities, including broad-based civil rights claims,<sup>45</sup> race-based peremptory jury challenges,<sup>46</sup> environmental racism,<sup>47</sup> and racial disparities in medical care.<sup>48</sup> At the same time, there has developed a growing consensus among scholars that the Thirteenth Amendment goes beyond race, and its mandate has been linked to abortion,<sup>49</sup>

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<sup>44</sup> 109 U.S. 3 (1883).

<sup>45</sup> See Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 *RUTGERS L. REV.* 387, 398 (1967).

<sup>46</sup> See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 *CORNELL L. REV.* 1 (1990) (arguing that race-based peremptory jury challenges violate the Amendment).

<sup>47</sup> See Marco Masoni, *The Green Badge of Slavery*, 2 *GEO. J. ON FIGHTING POVERTY* 97 (1994) (arguing that environmental degradation of black residential communities is remnant of slavery).

<sup>48</sup> See Larry J. Pittman, *A Thirteenth Amendment Challenge to both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 *ST. LOUIS U. L.J.* 131 (2003) (arguing that racial disparities in medical care violates Thirteenth Amendment).

<sup>49</sup> See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 *NW. U. L. REV.* 480, 484 (1990) ("When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the Thirteenth Amendment.")

the shackling of pregnant prisoners,<sup>50</sup> intimate partner violence,<sup>51</sup> surrogacy,<sup>52</sup> labor rights,<sup>53</sup> habeas claims for actual innocence,<sup>54</sup> police-informant relationships,<sup>55</sup> and bankruptcy.<sup>56</sup>

These scholars contend that the Amendment's promise is universal and can be deemed to apply to broad categories of group-based subjugation of citizens in this country. Public and private forms of sex and gender subordination are among the behaviors most commonly targeted by this scholarship. Marcellene Hearn, for example, argued in 1998 that the federal Violence Against Women Act<sup>57</sup>—later deemed an unconstitutional exercise of Congress's legislative authority under the Commerce Clause in *United States v. Morrison*<sup>58</sup>—was an *appropriate* exercise of Congressional authority under Section 2 of the Thirteenth Amendment.<sup>59</sup> In *Gender Discrimination and the Thirteenth Amendment*, Alexander Tsesis similarly argued that the courts' conception of the Thirteenth Amendment's

<sup>50</sup> See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012) (arguing that the Thirteenth Amendment should inform Eighth Amendment analysis of prisoner abuse claims involving the shackling of pregnant prisoners).

<sup>51</sup> Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 209 (1992) (arguing that "battered women . . . were held in involuntary servitude.").

<sup>52</sup> Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 467 (2004) (arguing that surrogacy violates Amendment's prohibition against slavery and human trafficking).

<sup>53</sup> James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1552–65 (2010) (arguing that the principles articulated in *Pollock v. Williams*, 322 U.S. 4, 5 (1944)—including the rights of workers to quit and strike—fits within the Amendment's ban on involuntary servitude).

<sup>54</sup> Caitlin Plummer & Imran Syed, *"Shifted Science" and Post-Conviction Relief*, 8 STAN. J. C.R. & C.L. 259, 295 (2012) (arguing that although the Amendment "has not yet been recognized as a grounds for habeas relief for an actually innocent prisoner," it may be the "most ready path to a remedy").

<sup>55</sup> See Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681 (2010) (arguing that law enforcement agents demanding informant cooperation under threat of more severe criminal punishment violates Amendment's prohibition on involuntary servitude).

<sup>56</sup> See Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 483 (2005) ("Since the passage of the 1978 Bankruptcy Code, conventional wisdom has held, as an article of faith grounded in fundamental bankruptcy policy, that a provision allowing initiation of an involuntary chapter 13 case would violate the Thirteenth Amendment's prohibition on involuntary servitude.").

<sup>57</sup> Violence Against Women Act (VAWA), 42 U.S.C. §§ 13931–14040 (1994).

<sup>58</sup> 529 U.S. 598, 601–02, 627 (2000).

<sup>59</sup> Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1144 (1998) ("Accordingly, Congress possesses constitutional authority to enact those parts of the VAWA civil rights remedy that provide relief for women and girls in severely abusive relationships. Other forms of modern violence against women, such as one-time rapes and assaults, may also be reachable as incidents of the modern involuntary servitude of severe battering." (citation omitted)).

grant of legislative authority should be expanded to include gender and sex discrimination.<sup>60</sup>

Other legal scholars are similarly calling for an expansion of the conduct deemed prohibited by the Amendment's dictate. William M. Carter, Jr., for example, has called for adoption of a racially remedial construction of the Amendment—one that can support remedies for a broad range of public and private harms, including police misconduct towards minorities and racially-restrictive land uses.<sup>61</sup> In *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidence of Slavery*, Carter argues that the Amendment's history suggests that even whites engaged in anti-racist activism or speech ought to fall within the classes of persons covered under its protections and grant of congressional legislative authority.<sup>62</sup>

Carter's argument is persuasive: Throughout the antebellum south, whites accused of abolitionist, anti-racist, or overly familiar behavior involving slaves and free blacks were penalized under law for their transgressions.<sup>63</sup> Alabama's Slave Code of 1833, for example, provided that white persons "found in company with slaves" were to be formally and criminally "charged" and required to "forfeit and pay twenty dollars for every such offence."<sup>64</sup> Carter challenges us to look closer at the Amendment's history and the range of conduct towards disfavored groups (irrespective of race) originally thought to require federal constitutional intervention, and contends that "viewing the Thirteenth Amendment as solely the province of African-Americans oversimplifies constitutional history."<sup>65</sup>

Implying limitations upon the Amendment's authority also oversimplifies judicial precedent in this area. In *United States v. Nelson*,<sup>66</sup> the Second Circuit noted, in *dicta*, that although the Amendment was ratified in

<sup>60</sup> Tthesis, *supra* note 39, at 1643–44.

<sup>61</sup> See, e.g., William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 20–21 (2011) (describing the Supreme Court's failure to recognize a remedy for racially expressive harm in restrictive uses of public land in *City of Memphis v. Greene*, 451 U.S. 100 (1981)).

<sup>62</sup> William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 36–38 (2011).

<sup>63</sup> See, e.g., Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399, 408 (1979) (detailing the drafters' intent to "safeguard whites" who had acted against slavery).

<sup>64</sup> Alabama Slave Code of 1833 § 10 ("If any white person, free negro or mulatto, shall at any time be found in company with slaves, at any unlawful meeting, such person being thereof convicted before any justice of the peace, shall forfeit and pay twenty dollars for every such offence, to the informer, recoverable with costs before such justice.")

<sup>65</sup> Carter, *supra* note 62, at 22.

<sup>66</sup> 277 F.3d 164 (2d Cir. 2002). *Nelson* involved the question of whether a federal hate-crime statute, enacted pursuant to congressional authority under Section 2 of the Thirteenth Amendment, was unconstitutional as applied to defendants accused of stabbing to death an Orthodox Jewish graduate student during a riot in Brooklyn. *Id.* at 168–69.

the context of American racial slavery, the Amendment's judicial construction "has not been so limited."<sup>67</sup>

And the Supreme Court early on held that although "negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter," and would apply equally to "Mexican peonage or the Chinese coolie labor system."<sup>68</sup>

The *Nelson* court's race neutral construction of the Amendment's prohibition was reaffirmed in *Hodges v. United States*, where the Court described the Amendment as proclaiming "the denunciation of a condition, and not a declaration in favor of a particular people."<sup>69</sup>

While scholars have rigorously considered the application of the Thirteenth Amendment outside the context of racial slavery, none have suggested its relevance in the context of convict subordination. This Article is the first to do so. Notwithstanding this scholarly avoidance, neither their silences, nor that of the Amendment's framers on this point, should be dispositive. The context of the ratification debates—the persistence of race-based chattel slavery in the South—informs but does not limit our conception of the Amendment's possibilities in modern times.<sup>70</sup> Moreover, the framers' reluctance to share the freedom ethic espoused in the Amendment with other groups, including women and noncitizens, "does not undermine Congress's current ability to exercise the Thirteenth Amendment's authority to end any form of subordination."<sup>71</sup>

### III. THE CASE FOR FEDERAL OFFENDER ANTI-DISCRIMINATION LAW

This call to expand the categories of conduct that Congress is empowered to regulate under Section 2 of the Amendment is motivated by empirical and qualitative data demonstrating the prevalence of offender status discrimination in labor and housing markets.

#### A. Labor Market Exclusion

Offender status discrimination functions as a major impediment to securing and retaining free market employment for formerly incarcerated or never incarcerated convicted persons.<sup>72</sup> Among those whose crim-

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<sup>67</sup> *Id.* at 176.

<sup>68</sup> *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873)).

<sup>69</sup> *Hodges v. United States*, 203 U.S. 1, 16–17 (1906).

<sup>70</sup> Tthesis, *supra* note 39, at 1646 ("In this sense, whether the framers contemplated future generations applying the Thirteenth Amendment to gender equality is not determinative of its normative value.").

<sup>71</sup> *Id.* at 1647.

<sup>72</sup> See Devah Pager, *The Mark of a Criminal Record* 30 (Ctr. for Demography & Ecology, Working Paper No. 2002-05 Aug. 2002), available at <http://www.ssc.wisc.edu/cde/cdewp/2002-05.pdf> ("The finding that ex-offenders are only one-half to one-third as likely as non-offenders to be considered by employers suggests that a

inal exposure has resulted in incarceration, employment rates have, admittedly, historically been low. Although available data is limited, sociologists estimate that “employment rates in any week averaged about 60% during the 1980s among all young men who had previously been incarcerated, and only about 45% among young black men. These estimates are about 20–25 percentage points lower than those of [non-incarcerated] young men.”<sup>73</sup>

Among those whose arrest or conviction did *not* result in incarceration, history of a criminal conviction under state or federal law forecloses significant employment opportunities. Under federal law, a convicted person may lose or be disqualified from federal public office or employment.<sup>74</sup> Similarly, seven states categorically bar persons convicted of felony offenses from any form of public employment;<sup>75</sup> four other states bar persons convicted of certain felony offenses from any form of public employment.<sup>76</sup> Municipalities also maintain statutory or regulatory bans on public employment for certain categories of convicted persons.<sup>77</sup>

criminal record indeed presents a major barrier to employment.”); Deborah Periman, *The Hidden Impact of a Criminal Conviction: A Brief Overview of Collateral Consequences in Alaska*, UNIV. OF ALASKA ANCHORAGE JUST. CTR. 6 (2007), <http://justice.uaa.alaska.edu/workingpapers/wp06.collateral.pdf> (“Private employers in all sectors of the economy have historically discriminated against those with a criminal history.”); see also Joan Petersilia, *Hard Time: Ex-Offenders Returning Home After Prison*, CORRECTIONS TODAY 67–69 (Apr. 2005), [http://www.caction.org/rrt\\_new/professionals/articles/PETERSILIA-RETURNING%20HOME.pdf](http://www.caction.org/rrt_new/professionals/articles/PETERSILIA-RETURNING%20HOME.pdf) (describing obstacles faced by convicts after release from prison, including seeking employment and housing).

<sup>73</sup> Harry J. Holzer et al., *Employment Barriers Facing Ex-Offenders*, URBAN INST. 3, 3 n.1 (2003), [http://www.urban.org/UploadedPDF/410855\\_holzer.pdf](http://www.urban.org/UploadedPDF/410855_holzer.pdf) (reporting research on data of 1979 cohort of the National Longitudinal Survey of Youth).

<sup>74</sup> U.S. DEP’T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 2–9 (2000), available at [http://www.justice.gov/pardon/collateral\\_consequences.pdf](http://www.justice.gov/pardon/collateral_consequences.pdf) (cataloging federal law providing for loss of, or disqualification from, federal office or employment).

<sup>75</sup> DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 260–63 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>. The states are Alabama, Arkansas, Indiana, Iowa, Nevada, Ohio, and South Carolina.

<sup>76</sup> *Id.* The category of disqualifying crimes can be broad (in Delaware, for example, persons convicted of “an infamous crime” are barred from public employment, and in Georgia the ban applies to those convicted of a felony involving “moral turpitude”) or narrow (in Kentucky it applies only to felons convicted of bribery). An “infamous crime” under Delaware case law is one involving a felony. Although all “infamous crimes” are felonies, not all felonies are “infamous crimes.” See *McLaughlin v. Dep’t of Elections*, No. 728 CIV.A., 1970 WL 104909, at \*1 (Del. Super. Ct. Oct. 15, 1970), *rev’d other grounds sub nom.* *Fonville v. McLaughlin*, 270 A.2d 529 (Del. Super. Ct. 1970) (“[A]n infamous crime, as that phrase is used in our Constitution (Art. 2, Sec. 21), includes only felony convictions, without deciding that all felony convictions are necessarily infamous.”); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1612 (2004).

<sup>77</sup> See *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1001–18 (1970).

Private employers are not insulated from government regulatory regimes that limit labor market access for convicted persons. Federal law bars companies that receive Medicare payments from hiring any person with a felony drug conviction; even companies that hire persons with misdemeanor drug convictions may be excluded from the Medicare program.<sup>78</sup> Federal law also bars persons convicted of an expansive list of offenses, including misdemeanor drug offenses, from employment “in any capacity of any labor organization” for 13 years after such conviction or after the end of any related term of incarceration.<sup>79</sup> At the state level, regulatory schemes covering broad categories of labor require categorical discrimination against persons with criminal convictions. The state of Texas, for example, bars anyone who has been convicted of any offense (felony or misdemeanor) from working at a daycare facility in any capacity.<sup>80</sup> Similar limitations foreclose legitimate entrepreneurial activity by convicted persons. In Wisconsin, state law prohibits anyone who has been convicted of any offense from obtaining a business liquor or beer license, a mainstay of successful restaurateurs.<sup>81</sup>

Occupational licensing schemes erect another barrier to private employment opportunities for individuals with criminal exposure. Occupational licenses typically require that licensing agencies assess the “fitness” and “character” of applicants. In California, nearly 200 different occupations require a special license or credential;<sup>82</sup> in New York,

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<sup>78</sup> 42 U.S.C. § 1320a-7(a)–(b).

<sup>79</sup> 29 U.S.C. § 504(a).

<sup>80</sup> TEX. HUM. RES. CODE § 42.158 (2013); see also Eric Dexheimer, *Texas Ex-Offenders are Denied Job Licenses*, STATESMAN (Apr. 11, 2011), <http://www.statesman.com/news/news/special-reports/texas-ex-offenders-are-denied-job-licenses/nRY5B/> (reporting that “[t]housands of applicants are denied state licenses to work in more than 100 occupations every year because of their criminal pasts, a number that advocates say understates the true volume because others don’t bother applying”). Texas’s criminal code covers a broad range of conduct. Under state law, public intoxication, shoplifting, disorderly conduct (including “using abusive, indecent, profane, or vulgar language in a public place”), and being a minor in possession of alcohol are among the offenses categorized as Class C misdemeanors. See TEX. PENAL CODE ANN. §§ 31.02, 42.01, 49.02 (West 2011); TEX. ALCO. BEV. CODE ANN. § 106.05 (West 2007).

<sup>81</sup> WIS. STAT. ANN. §§ 125.04, 125.28(2)(a) (West 2006); see also Glenn Collins, *Liquor License Delays Add to Restaurants’ Pain*, N.Y. TIMES, Aug. 5, 2009, at D1 (“Customarily, alcohol could generate 10 to 30 percent of revenue at a restaurant and 40 to 50 percent of the profit, and owners are losing not only money but also potential customers who recoil from a dry establishment.”).

<sup>82</sup> Adam B. Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives*, REASON FOUNDATION 5 (2007), <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf>; STATE OF CAL. EMP’T DEV. DEP’T, <http://www.labormarketinfo.edd.ca.gov/Content.asp?pageid=1010> (listing “approximately 200 occupations licensed by the Boards and Commissions associated with the California Department of Consumer Affairs”).

283 jobs are restricted for people with felony convictions.<sup>83</sup> Many of these occupations—including barbering, accounting, home building, general contracting, and embalming—require criminal background checks as part of the examination of a candidate’s character.<sup>84</sup>

Even state bar associations—which regulate attorney admissions—require disclosure of criminal history (including arrests and convictions). Admission to the Bar is dependent not only upon satisfactory performance on a state bar examination, but also upon an examination of the applicant’s moral character. The good character requirement forces every applicant seeking admission to practice law to “demonstrat[e] to the appropriate body in charge that he or she possesses the character needed to successfully and ethically practice law.”<sup>85</sup> Individuals with even minor marijuana possession or public intoxication convictions may find their admissions delayed or denied based on their failure to satisfy this character requirement.<sup>86</sup>

These seemingly harsh restrictions on employment opportunities for persons who, depending on parole or probation conditions, may be required to secure and retain work are brought into sharp relief when one considers how easy it is to discriminate against this population. At the end of 2008, the states held nearly 100 million criminal history records on individuals.<sup>87</sup> These records “describe an arrest and all subsequent actions concerning each criminal event that are positively identifiable to an individual.”<sup>88</sup> While easily accessible, criminal records are

<sup>83</sup> CLEAR, *supra* note 35, at 58 (“[I]n New York, there are 283 restricted jobs for people with prior felony convictions . . .”).

<sup>84</sup> ARIZ. REV. STAT. § 32-1122(H) (West 2012); Karol Lucken & Lucille M. Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 LAW & POL’Y 46, 53 (2008).

<sup>85</sup> Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 488 (2000); see also Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1219 (2008) (“[P]rior criminal conduct is far and away the most common indicator of bad moral character for character committees . . .”).

<sup>86</sup> This is not to dispute that certain offenses may render an individual unsuited for a specific workplace. Arguably, a car thief is not suitable for employment in an auto dealership; a high school teacher convicted of having sex with students is not suitable for employment in a youth education setting. But, as noted by Todd Clear and others, many employment restrictions limiting offender access to private labor markets “seem to make little sense.” CLEAR, *supra* note 35, at 58.

<sup>87</sup> See U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008, at 3 (2009), available at <http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf> (“[O]ver 92 million individual offenders were in the criminal history files of the State criminal history repositories on December 31, 2008. (An individual offender may have records in more than one State).”).

<sup>88</sup> GERARD F. RAMKER, U.S. DEP’T OF JUSTICE, IMPROVING CRIMINAL HISTORY RECORDS FOR BACKGROUND CHECKS, 2005, at 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ichrbc05.pdf>; see also James B. Jacobs & Dimitra Blitsa, *US, EU & UK Employment Vetting as Strategy for Preventing Convicted Sex Offenders from Gaining*

frequently wrong, and individuals falsely or mistakenly accused of criminal behavior, or whose records contain erroneous or sealed information, have few remedies under law.<sup>89</sup> The proliferation of both the types of records being maintained in public and private repositories, as well as the availability of low-cost or no-cost access to such records, contributes to private discrimination against convicted persons:<sup>90</sup> “The more people who are arrested, prosecuted, convicted, and especially incarcerated, the larger is the criminally stigmatized underclass screened

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*Access to Children*, 20 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 265, 266 (2012) (noting that the U.S. “makes all criminal history records publicly accessible”).

<sup>89</sup> James Jacobs has written extensively about the proliferation of criminal records. See, e.g., James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 416–18 (2006); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008); James B. Jacobs & Daniel P. Curtin, *Remediating Defamation by Law Enforcement: Fall Out from the Wen Ho Lee, Steven Hatfill and Brandon Mayfield Settlements*, 46 CRIM. L. BULL. 223, 224 (2010) (discussing remedies available to persons who have been “publicly but erroneously branded as criminals”).

<sup>90</sup> U.S. DEP’T OF JUSTICE, *supra* note 87, at 3 (“An individual offender may have records in more than one State.”). For example, the Dru Sjodin National Sex Offender Public Website (NSOPW) was established by the Department of Justice to link state, tribal, and territorial sex offender registries. “Anyone can access the NSOPW online and free of charge to obtain information about previously convicted sex offenders who live in any community in the US.” Jacobs & Blitsa, *supra* note 88, at 268–69. There is a proliferation of federal agency demands for disclosure of criminal exposure. Some federal agencies require that individuals seeking assistance under federal financial programs disclose their criminal background. The Small Business Administration (SBA), for example, requires that all applicants for SBA financial assistance complete and submit to their lender a “statement of personal history,” commonly known as a Form 912. See SMALL BUS. ADMIN., OMB APPROVAL NO. 3245-0178, STATEMENT OF PERSONAL HISTORY, available at [http://www.sba.gov/sites/default/files/tools\\_sbf\\_finasst912.pdf](http://www.sba.gov/sites/default/files/tools_sbf_finasst912.pdf); see also SBA Business Loans, 13 C.F.R. § 120.160 (2013). This requirement extends not only to individuals who seek direct SBA assistance, but also to individuals who seek private loans that the lender anticipates may be eligible for SBA assistance or insurance. The form 912 requests information regarding the applicant’s current and previous addresses, names used, and citizenship status. The form also requests disclosure of the applicant’s criminal history: whether the applicant is currently or ever has been “under indictment, on parole or probation”; whether the applicant ever has been “charged with, and/or arrested for, any criminal offense other than a minor motor vehicle violation,” and, if so, an inquiry into the nature of the crime for which applicant was arrested; and whether the applicant has ever been convicted, placed on pretrial diversion, or placed on any form of probation, including adjudication withheld pending probation, for any criminal offense other than a minor vehicle violation. The SBA reasons that the criminal history provisions of the Form 912 indicate both the applicant’s willingness and ability to pay their debts and whether they abided by the laws of their community. This information is required not only of the applicant herself, but also of each partner (if a partnership) and each officer, director, or individual who holds at least 20% of the company’s equity. 13 C.F.R. § 120.160. There are, however, no guidelines or other indication of how such information will be used in determinations of eligibility; it is unclear whether the SBA uses such information in its initial screening process, whether such information only comes into play for borderline applicants, or whether such information is ever preclusive of further consideration.

out of legitimate opportunities, steered toward criminal careers and further incarceration.”<sup>91</sup> In one study, more than 92% of employers polled reported that they conduct criminal background checks on employees.<sup>92</sup> In another survey, more than 40% of employers indicated their unwillingness to hire an applicant with a felony criminal record, irrespective of the offense.<sup>93</sup>

Those employers who report an unwillingness to hire individuals with criminal exposure justify their conduct with concerns over legal liability under the tort theories of negligent hiring, supervision, or retention.<sup>94</sup> Under the theory of *respondeat superior*, an employer may be held liable for the tortious or criminal conduct of an employee if that conduct was foreseeable, occurred within the scope of the worker’s employment or on the employer’s premises, and caused harm to a third party.<sup>95</sup> A claim for negligent hiring “is based on the principle that an employer is liable for the harm resulting from its employee’s negligent acts ‘in the employment of improper persons or instrumentalities in work involving risk of harm to others.’”<sup>96</sup> Courts adjudicating such claims generally consider whether the employer exercised reasonable care in choosing or retaining an employee for the particular duties to

<sup>91</sup> Jacobs, *supra* note 89, at 387 (footnote omitted).

<sup>92</sup> *Background Checking: Conducting Criminal Background Checks*, SOC’Y FOR HUMAN RES. MGMT. 3 (Jan. 22, 2010), [http://www.slideshare.net/shrm/background-check-criminal?from=share\\_email](http://www.slideshare.net/shrm/background-check-criminal?from=share_email) (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates).

<sup>93</sup> See Holzer, *supra* note 73, at 6–7 (describing results of employer survey where over 40% of the employers indicated that they would “probably not” or “definitely not” be willing to hire any applicant with a criminal record). Thirty-five percent of employers in Holzer’s study indicated that their response depended on the applicant’s crime. *Id.* at 7; see also CLEAR, *supra* note 35 at 134 (“The [employment] situation is complicated further because there are so few businesses located in these high-incarceration communities and fewer still that are willing to take a chance on hiring an employee with a criminal record.”).

<sup>94</sup> Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions*, 21 J. CONTEMP. CRIM. JUST. 6, 8 (2005).

<sup>95</sup> RESTATEMENT (THIRD) OF AGENCY § 7.05 cmt. a–b (2006); see also Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 750 (Fla. Dist. Ct. App. 1991) (“Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others.” (quoting Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1239–40 (Fla. Dist. Ct. App. 1980))); Jacobs & Blitsa, *supra* note 88, at 267 (“Businesses have a strong incentive to purchase this information because they are strictly liable for the injuries caused by employees acting within the scope of employment . . .”).

<sup>96</sup> 10 LABOR AND EMPLOYMENT LAW § 270.03(3)(b)(i) (Matthew Bender ed., 2009) (quoting RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958)); see also RESTATEMENT (SECOND) OF TORTS § 317 (1965).

be performed.<sup>97</sup> Similarly, claims for negligent retention are based upon the idea that a principal should incur liability when it places an employee, who it knows or should have known is predisposed to committing a wrong, in a position in which the employee can commit a wrong against, and cause harm to, a third party.<sup>98</sup> As of 2010, 49 of the 50 states recognized the separate tort actions of negligent hiring and negligent retention.<sup>99</sup> In some states, the tort gives rise to a statutory duty to conduct background checks. In Nevada, for example, an employer who fails to conduct “a reasonable background check” of a prospective employee has *per se* breached this duty.<sup>100</sup>

The near universality of negligent hiring, supervision, and retention schemes among the states suggests that employers’ hesitance to hire individuals with violent criminal exposure may be rational and reasonably self-interested. Such well-founded risk aversion, however, fails to fully explain a reluctance to hire *any individuals* with any criminal history; this is especially important because nonviolent crimes comprise an overwhelming majority of all convictions in the United States.<sup>101</sup> Just as state-imposed mandatory restrictions on employment opportunities for convicted persons are overinclusive—banning entire classes of offenders and failing to permit individualized considerations of type or severity of crime, elapsed time since offense, culpability of the offender, or rehabilitation progress—employer anti-conviction bias has the potential to be overly broad.<sup>102</sup>

<sup>97</sup> 10 LABOR AND EMPLOYMENT LAW, § 270.03(3)(b)(ii).

<sup>98</sup> *Id.* § 270.03(3)(c).

<sup>99</sup> Nesheba M. Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis*, AM. BAR ASS’N 113–14 (Nov. 6, 2010), <http://abalel.omnibooksonline.com/2010/data/papers/087.pdf> (reporting that Maine was the only jurisdiction that did not recognize the torts of negligent hiring or negligent supervision).

<sup>100</sup> *See* Hall v. SSF, Inc., 930 P.2d 94, 98 (Nev. 1996) (“The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position.’ An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee’s dangerous propensities.” (citation omitted) (quoting Burnett v. C.B.A. Sec. Serv., 820 P.2d 750, 752 (Nev. 1991))); *see also* State ex rel. W. Va. State Police v. Taylor, 499 S.E.2d 283, 289 & n.7 (W. Va. 1997).

<sup>101</sup> *See* MATTHEW R. DUROSE & CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 1 (2004), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pnoesp.pdf> (noting that three out of four persons leaving state prison have been convicted of a nonviolent crime, with property offenders and drug offenders each accounting for approximately one-third of all those exiting such institutions).

<sup>102</sup> These barriers to the labor market are exacerbated by “supply-side barriers” to full market participation by individuals with criminal exposure. Holzer, *supra* note 73, at 4. Characteristics common to individuals who have been convicted of crimes include: limited work and education experience; mental and physical health deficiencies; history of alcohol and substance dependency; and history of trauma. Sociologists estimate that 70% of offenders and ex-offenders fail to complete high school. *Id.* at 5; *see also* *Model Education: Supportive Basic Skills Program*, N.Y. CITY CTR.

As state and local governments attempt to come to grips with exploding convict populations<sup>103</sup> and the macro- and micro-economic, social, and political effects of conviction and criminalization, the role of private discrimination against convicted persons has become increasingly salient.<sup>104</sup> Ex-offenders with jobs recidivate at markedly lower levels

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FOR ECON. OPPORTUNITY, [http://www.nyc.gov/html/ceo/html/programs/cuny\\_baaisc\\_skill.shtm](http://www.nyc.gov/html/ceo/html/programs/cuny_baaisc_skill.shtm). Members of this group also lack consistent work experience; as a result, their skill sets are collectively low and “more suitable for service-industry and manufacturing positions, whereas technological innovation has changed the landscape of the economy and favors more highly skilled employees.” Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 20 (2012).

For those who have been incarcerated, poor social and “soft” skills also function to limit employability; the U.S. Department of Health and Human Services has described this phenomenon as “alienat[ion] from mainstream institutions,” “feelings of failure and hopelessness,” and “cynic[ism].” Nancy K. Young, *Tip 38: Integrating Substance Abuse Treatment and Vocational Services: Treatment Improvement Protocol (TIP) Series, No. 38*, CTR. FOR SUBSTANCE ABUSE TREATMENT ch. 8 (2000), available at <http://www.ncbi.nlm.nih.gov/books/NBK64287>. This alienation is compounded by alcohol and substance dependency: In 1997, more than half of all state prison inmates had used illicit drugs in the month prior to arrest, and another 16% claimed to have committed their offenses to purchase drugs. *Id.* Substance abusers among this group frequently exhibit dual diagnoses of addiction and mental illness: In 2002, the Bureau of Justice Statistics reported that 64% of all jail inmates had a recent “mental health problem.” DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>; ERIN BAGALMAN & ANGELA NAPILI, CONG. RESEARCH SERV., R43047, PREVALENCE OF MENTAL ILLNESS IN THE UNITED STATES: DATA SOURCES AND ESTIMATES 5 (2013). One study found that the incidence of serious mental illnesses among adults entering jails is three to six times higher than it is in the general population. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 764 (2009); see also BAGALMAN & NAPILI, *supra* at 5. Offenders who have been incarcerated face additional challenges, as these “supply-side barriers” are exacerbated by cuts to funding rehabilitation, counseling, and job readiness services and programs in state and federal prisons. ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 176 (2008); Young, *supra* ch. 8.

These “supply-side barriers” need not unnecessarily impede employability for this population. Substance abuse and physical and mental health conditions are covered conditions under state and federal anti-disability discrimination rules: If an offender’s conviction was rooted in a history of substance abuse, that past substance abuse may qualify as a disability under state and federal law, and people with disabilities enjoy greater protection against discrimination under the Americans with Disabilities Act. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12102, 12111 (2006).

<sup>103</sup> See JENIFER WARREN ET AL., PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 35, (2008), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf).

<sup>104</sup> A 2003 study demonstrated that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. Pager, *supra* note 72, at 46. Pager matched pairs of young Black and White men as “testers” for her study. *Id.* at 44. The “testers” in Pager’s study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. *Id.* at 45. The study showed that White

than unemployed offenders,<sup>105</sup> and gainful employment is frequently cited as the most important element to successful offender reentry.<sup>106</sup> Communities with stable employment rates are less likely to experience foreclosure and the instability and economic drain occasioned by mortgage defaults.<sup>107</sup> Moreover, “[t]he erosion of local labor markets” is itself criminogenic, as economic hardship has been identified as “one of the strongest geographic predictors of crime rates.”<sup>108</sup>

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job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who *did not have* a criminal record. *Id.* at 46. See also Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009), available at [www.princeton.edu/~pager/annals\\_sequencingdisadvantage.pdf](http://www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf) (finding that among Black and White testers with similar backgrounds and criminal records, “the negative effect of a criminal conviction is substantially larger for blacks than whites . . . . [T]he magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)”); *id.* at 200–01 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma of a criminal record by establishing rapport with the hiring official); *Meeting of November 20, 2008 on Employment Discrimination Faced by Individuals with Arrest and Conviction*, Equal Emp’t Opportunity Comm’n (statement of Devah Pager), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm> (discussing the results of the *Sequencing Disadvantage* study); Devah Pager & Bruce Western, *Race at Work: Realities of Race and Criminal Record in the NYC Job Market*, NYC COMM’N ON HUM. RTS. 6 (2006), [http://www.nyc.gov/html/cchr/pdf/race\\_report\\_web.pdf](http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf) (finding that White testers with a felony conviction were called back 13% of the time, Hispanic testers without a criminal record were called back 14% of the time, and Black testers without a criminal record were called back 10% of the time); Webb Hubbell, *The Mark of Cain*, 16 CRIM. JUST., Fall 2001, at 33, 34 (2001) (“Either they work or they go back to jail.”) (quoting Raul Russi, Probation Commissioner under former New York City Mayor Rudolph Giuliani, as remarking of ex-offenders).

<sup>105</sup> See, e.g., Thomas K. Arnold, *Dynamic Effects of Employment Status of Recidivism Rates*, CORRECTIONS RES. & CONSULTING SERVS. 5 (2010), [http://www.correctionsresearch.com/Files/Dynamic\\_Effects\\_of\\_Employment\\_Status\\_of\\_Recidivism\\_Rates.pdf](http://www.correctionsresearch.com/Files/Dynamic_Effects_of_Employment_Status_of_Recidivism_Rates.pdf); Eric J. Lichtenberger, *Impact of Employment on Recidivism in Virginia*, VA TECH. CTR. FOR ASSESSMENT, EVALUATION & EDUC. PROGRAMMING 1 (2005), [http://www.oarfairfax.org/images/docs/impact\\_of\\_employment\\_on\\_recidivism\\_in\\_virginia.pdf](http://www.oarfairfax.org/images/docs/impact_of_employment_on_recidivism_in_virginia.pdf) (reporting data showing that unemployed offenders are three times as likely to recidivate as employed offenders).

<sup>106</sup> Greg Pogarsky, *Criminal Records, Employment, & Recidivism*, 5 CRIMINOLOGY & PUB. POL’Y 479, 479 (2006).

<sup>107</sup> See Andrew Martin, *For the Jobless, Little U.S. Help on Foreclosure*, N.Y. TIMES (June 4, 2011), [www.nytimes.com/2011/06/05/business/economy/05housing.html](http://www.nytimes.com/2011/06/05/business/economy/05housing.html) (reporting that the “the primary cause of foreclosures is unemployment”); see also Ingrid Gould Ellen, et al., *Do Foreclosures Cause Crime?*, 74 J. URBAN ECON. 59 (2013) (finding that additional foreclosures lead to additional total crimes, violent crimes, and public order crimes and that the largest effects are in neighborhoods with moderate or high levels of crime, and blocks with concentrated foreclosure activity).

<sup>108</sup> CLEAR, *supra* note 35, at 109.

## B. Housing Market Exclusion

Eviction or exclusion from public or government subsidized housing, local land use and zoning restrictions, offender residency requirements, and private market discrimination compound poorer offenders' reentry challenges.<sup>109</sup> A quarter of all released prisoners will experience homelessness during the first year of their release.<sup>110</sup> The California Department of Corrections estimates that 50% of the state's parolees in large urban areas are homeless.<sup>111</sup> Housing stability plays a critical role in preventing recidivism and further victimization; it has been termed the "lynchpin that holds the reintegration process together."<sup>112</sup> At the same time, housing instability compounded by lack of housing choice precipitates crime: An early study by the Centre for Housing Policy at York University (UK) found that offenders in subadequate housing or homelessness are more than twice as likely to recidivate within their first year of release over offenders with a stable place to live.<sup>113</sup>

### 1. Public and Federally Subsidized Housing

As with labor, government regulation of housing markets has also severely proscribed the availability of affordable housing for individuals with criminal histories. There are only approximately 1.2 million public housing units in the U.S.—less than 1% of the total national housing stock.<sup>114</sup> Federal law currently requires that public housing authorities consider criminal exposure when making housing access and eviction determinations.<sup>115</sup> Similarly, the federal Anti-Drug Abuse Act of 1988

<sup>109</sup> Scholars in this area note that convicts access to private housing markets has been "virtually ignored in discussions about reentry." THOMPSON, *supra* note 102, at 83.

<sup>110</sup> PETERSILIA, *supra* note 10, at 121.

<sup>111</sup> *Id.* at 122.

<sup>112</sup> TRAVIS, *supra* note 5, at 219 (quoting Katharine H. Bradley et al., *No Place Like Home: Housing and the Ex-Prisoner*, CMTY. RES. FOR JUSTICE (2001), [http://b.3cdn.net/crjustice/a5b5d8fa98ed957505\\_hqm6b5qp2.pdf](http://b.3cdn.net/crjustice/a5b5d8fa98ed957505_hqm6b5qp2.pdf)).

<sup>113</sup> Ctr. for Hous. Pol'y, *The Housing Needs of Ex-Prisoners*, 178 HOUSING RESEARCH 2 (April 1996), available at <http://www.jrf.org.uk/sites/files/jrf/h178.pdf>.

<sup>114</sup> U.S. DEP'T OF HOUS. & URBAN DEV., *HUD's Public Housing Program*, [http://portal.hud.gov/hudportal/HUD?src=/topics/rental\\_assistance/phprog](http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog); U.S. CENSUS BUREAU, *Housing Vacancies and Home Ownership: Table 982. Total Housing Inventory for the United States: 1990 to 2010* (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0982.pdf>.

<sup>115</sup> Currently, federal law requires that local and municipal public housing authorities (PHAs) enforce a lifetime ban on public housing for three categories of offenders: (1) individuals who are currently using illicit drugs, (2) individuals subject to a lifetime sex offender registry requirement, and (3) persons convicted of producing or manufacturing methamphetamine on public housing premises. 42 U.S.C. § 13661(b)(1)(A)–(B) (2006); 24 C.F.R. § 960.204(a); *see also* 24 C.F.R. § 982.553(a)(1) (2009); 42 U.S.C. § 13663 (2006); 42 U.S.C. § 1437n(f) (2006).

In addition, the U.S. Department of Housing and Urban Development (HUD) requires that PHAs develop and enforce standards that bar admission to public housing residency if any member of the household is currently using or has recently used illicit drugs, or if the PHA "has reasonable cause to believe" that an individual's illegal drug

permits public housing authorities to evict residents who are involved in “criminal activity.”<sup>116</sup> The ban on “criminal activity”, however defined by the housing authority, extends from residents to their guests, and such “activity” on the part of a guest is grounds for eviction.

HUD has also granted substantial discretion to discriminate to private landlords who rent to tenants in government-subsidized (Section 8) units.<sup>117</sup> The federal Fair Housing Act permits landlords to refuse tenancy to any person whose tenancy would compromise the “health or safety” of other residents, a complex factual determination for which HUD has issued only limited guidance for landlords.<sup>118</sup> Although the Fair Housing Act prohibits actions that result in disparate treatment or disparate impact for protected groups—including families with children and members of minority groups—bringing such cases to judgment is difficult because, as noted above, direct evidence of discrimination is difficult to obtain.<sup>119</sup>

The federal Anti-Drug Abuse Act, and its successors in the public housing context, was enacted for the purpose of ensuring that public housing projects would be “drug free.” By banning drug users and their associates from the premises, so the thinking went, public housing authorities could better control criminal elements and violence on the property; vulnerable communities would be better protected from the

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use will “interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.” 42 U.S.C. § 13662(a)(2) (2006); *see also* 24 C.F.R. § 960.204(a) (2009); 24 C.F.R. § 982.553(a)(ii)(A)–(B) (2013). A household will also be barred from public housing for at least three years if one of its members was evicted from federally assisted housing for drug-related criminal activity, unless the PHA determines that the offender successfully completed a supervised drug rehabilitation program approved by the PHA. 24 C.F.R. § 960.204(a). Under HUD’s “One-Strike” policy, PHAs are required to include a provision in all residential leases stating that if any member of a household, or a guest of that household, engages in “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity,” the entire household may be evicted, regardless of whether the activity takes place on or off the premises. 42 U.S.C. § 1437d(l) (2006); *see also* Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (holding that 42 U.S.C. § 1437d(l)(6) grants PHAs the discretion to evict tenants for “drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity”).

<sup>116</sup> *See* 42 U.S.C. § 1437d(l) (permitting eviction from public housing for “criminal activity” by tenants or their guests).

<sup>117</sup> Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 193 (2009) (“Because the housing search takes place outside the monitoring of the local public housing authority, PHA, it is likely that private landlords who choose to discriminate against regular (non-voucher) renters based on past convictions would apply a similar disqualification criterion to HCV program participants.”).

<sup>118</sup> U.S. DEP’T OF HOUS. & URBAN DEV. ET AL., *supra* note 114, at 17, 202.

<sup>119</sup> *See, e.g.*, Gertner, *supra* note 40, at 112; Katz, *supra* note 40, at 881; Sopher, *supra* note 40, at 1051.

consequences of the illegal drug trade.<sup>120</sup> These policies have not, however, led to decreased crime or drug use in public housing facilities.

## 2. Geospatial Restrictions

Geospatial restrictions on offenders' residency further affect the availability and accessibility of private housing stock for convicted persons, regardless of income. Geospatial restrictions ban certain convicted offenders—typically sex offenders—from living within a certain distance (*e.g.*, one-half or one-quarter mile) of certain landmarks, typically schools. In California, certain sex offenders are barred from living within a one-quarter mile radius of any school.<sup>121</sup> As of 2006, 22 states enacted geographical restrictions on sex offenders' residency.<sup>122</sup> The severity of the restricted zones varies from jurisdiction to jurisdiction. For instance, Iowa law bans registered sex offenders from living within 2,000 feet of a school or daycare.<sup>123</sup> Meanwhile, under Rhode Island law, it is a felony for any person required to register as a sex offender to reside within 300 feet of any school.<sup>124</sup> According to one observer, Georgia maintains “one of the strictest policies in the nation.”<sup>125</sup> Sex offenders in the state found to be “living, employed, or loitering” within 100 feet of a bus stop, skating rink, swimming pool, or church can face up to 30 years in prison.<sup>126</sup>

Some municipalities have gone beyond residential restrictions and have embraced “presence restrictions,” which ban an offender from being *present* within a certain distance of a landmark. In 2008, the City Attorney of San Diego proposed legislation that would prohibit sex offenders “from being present within 300 feet of a public or private school, daycare facility, facility providing children’s services, libraries, video arcades, playgrounds, parks, and amusement centers.”<sup>127</sup> In 2010,

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<sup>120</sup> Cf. Jacqueline A. Berenson & Paul S. Appelbaum, *A Geospatial Analysis of the Impact of Sex Offender Residency Restrictions in Two New York Counties*, 35 LAW & HUM. BEHAV. 235, 236 (2011) (“The theoretical basis for residence restrictions can be explained in terms of the general criminological principle of *distance decay*, *i.e.*, that on average criminals commit their crimes with decreasing frequency the greater the distance from their place of residence.”).

<sup>121</sup> See, *e.g.*, CAL. WELF. & INST. CODE § 6608.5(f) (barring a “sexually violent predator” or a serious paroled sex offender from living within a one-fourth mile radius of a school); CAL. PENAL CODE § 3003(g) (barring “high risk” paroled sex offenders from living within a one-half mile radius of any school).

<sup>122</sup> See NIETO & JUNG, *supra* note 10, at 3.

<sup>123</sup> COUNCIL OF STATE GOV'TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY & PRACTICE 9 (2010), available at <http://www.csom.org/pubs/csg%20final%20report.pdf>.

<sup>124</sup> R.I. GEN. LAWS. § 11-37.1-10(c) (2012).

<sup>125</sup> COUNCIL OF STATE GOV'TS, *supra* note 123, at 9.

<sup>126</sup> *Id.*

<sup>127</sup> Report from Mary T. Nuesca, Deputy City Att’y, on Proposed Sex Offender Ordinance to the Honorable Mayor and City Council of San Diego (Jan. 24, 2008), available at <http://www.sandiego.gov/cityattorney/pdf/sexoffenderreport.pdf>.

after widespread publicity concerning a convicted sex offender “tent city” under a bridge in Miami, Miami-Dade County enacted legislation easing municipal geographical restrictions on offender housing.<sup>128</sup>

Notwithstanding their ubiquity, offender residency restrictions have not functioned to curtail victimization and sex crimes.<sup>129</sup> In Iowa, for example, strict residency restrictions resulted in a serious unintended consequence, as at-risk offenders disappeared from the purview of regulators and began living “underground,”<sup>130</sup> in unregistered and unknown locations.<sup>131</sup> In addition, the cost of enforcing residency restrictions was determined to outweigh its benefit: In 2006, the Iowa County Attorneys Association issued a statement that the residency restrictions do “not provide the protection that was originally intended and the cost of enforcing the requirements and the unintended effects on families of offenders warrant replacing the restrictions with more effective protective measures.”<sup>132</sup> Social science research demonstrates that offenders with residential and familial stability—which can be disrupted by restrictions on housing access and geospatial limitations—are less likely to commit new offenses. In Iowa, following the enactment of its sex offender residency restrictions, approximately 6,000 offenders and their families were displaced, and many offenders were rendered homeless.<sup>133</sup> These regulatory policies have produced inefficient and ineffective results as well as distortions that undermine their purpose.

<sup>128</sup> See Skipp, *supra* note 10 (“A new law takes effect on Monday that supersedes the county’s 24 municipal ordinances, many of which make it all but impossible for offenders to find housing.”).

<sup>129</sup> See, e.g., Grant Duwe, *Residency Restrictions and Sex Offender Recidivism: Implications for Public Safety*, 2 GEOGRAPHY & PUB. SAFETY, May 2009, at 6, 8 (reporting field results suggesting that “residency restrictions would have, at best, only a marginal effect on sexual recidivism”); see also Lisa Henderson, Comment, *Sex Offenders: You Are Now Free to Move About the Country. An Analysis of Doe v. Miller’s Effects on Sex Offender Residential Restrictions*, 73 UMKC L. REV. 797, 811–13 (2005) (arguing that residency restrictions are both overly inclusive and unsupported by criminological evidence).

<sup>130</sup> COUNCIL OF STATE GOV’TS, *supra* note 123, at 9.

<sup>131</sup> Jill S. Levenson & David A. D’Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor’s New Clothes?*, 18 CRIM. JUST. POL’Y REV. 168, 184 (2007) (“Within 6 months, the number of sex offenders whose whereabouts were unknown had nearly tripled across the state.”).

<sup>132</sup> Corwin Ritchie, *Statement on Sex Offender Residency Restrictions in Iowa*, IOWA CNTY. ATTORNEYS ASS’N 1 (Dec. 11, 2006), available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf>.

<sup>133</sup> Levenson & D’Amora, *supra* note 131, at 184; Jill Levenson, *Sex Offender Residency Restrictions Impede Safety Goals*, JURIST (Feb. 2, 2012), <http://jurist.org/hotline/2012/02/jill-levenson-sexoffenders-residency.php>. In some jurisdictions, sex offender residency restrictions render “off limits” over 95% of available residential housing locations. Berenson & Appelbaum, *supra* note 120, at 242 (reporting research finding that in the city of Schenectady, New York, 97.21% of residential parcels were located within a restricted zone).

### 3. *Private Market Exclusion*

Even where public law regulatory schemes and geographic restrictions are not implicated in the availability of housing for ex-offenders, private landlords discriminate against convicted persons.<sup>134</sup> In one 2005 study, 80% of landlords reported screening prospective tenants for criminal histories.<sup>135</sup> Offenders cite “discrimination due to a criminal record” with more frequency than any other factor when asked about their concerns in securing housing.<sup>136</sup> Landlords typically rely upon easy access to criminal background information during the prospective tenant screening process; “the brochure of a leading company boasts in its brochure that its ‘Resident Data’ screening service combines criminal, proprietary, and credit data for over 200 million convictions associated with more than 62 million unique individuals, to which it adds approximately 22,000 new records daily.”<sup>137</sup> The low-cost availability of such services “makes it a tempting . . . method of tenant selection.”<sup>138</sup> “Rental application forms, structured by checklists and blank spaces for personal characteristics and financial data, have become so ubiquitous that they can seem unavoidable . . . .”<sup>139</sup> One leading property management company reportedly has a policy of conducting criminal background checks on “each of the nearly 25,000 applicants seeking to rent or renew leases on over 20,000 apartment units it owns or manages across seven states.”<sup>140</sup>

Researchers attribute the proliferation of tenant background checks to the expansion of “landlord duties and corresponding liabilities over time.”<sup>141</sup> This shift is seen most strikingly in the reimagining of landlord responsibilities under the implied warranty of habitability and nuisance doctrines; under these property law theories, private landlords have become vested with what one author has termed a “public policing responsibility.”<sup>142</sup>

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<sup>134</sup> Oyama, *supra* note 117, at 183 (“For many individuals with criminal records, both the recent growth in tenant screening practices and high expense make renting in the private market extremely difficult.”).

<sup>135</sup> David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 12 (2008) (“In 2005, the National Multi-Housing Council (NMHC) (one of three major professional associations for rental housing) surveyed its members about their crime prevention practices, and 80 percent reported that they screen prospective tenants for criminal histories.”).

<sup>136</sup> Oyama, *supra* note 117.

<sup>137</sup> *Id.* at 187–88.

<sup>138</sup> *Id.* at 189.

<sup>139</sup> Thacher, *supra* note 135, at 11 (describing shift from “amateur owners” to “professional property managers” and the concomitant increase in systematized data gathering respecting prospective tenants).

<sup>140</sup> Oyama, *supra* note 117, at 192 n.55 (quoting a customer feedback form from a background search company).

<sup>141</sup> *Id.* at 190.

<sup>142</sup> B. A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 686–87

This public policing role for private landlords can have a substantial impact on offenders' access to secure housing.<sup>143</sup> In addition to foreclosing housing choice, offenders' vulnerability to private discrimination in the housing market precipitates familial alienation. Housing access practices that preclude initial or continued occupancy for individuals who have been convicted of crimes may function to alienate those persons from their families: As recognized by HUD in its PHA Guidebook, a family "might opt to remove the member who could not pass the criminal history check rather than lose their rights to public housing."<sup>144</sup>

### C. *The Promise of Offender Anti-Discrimination Law*

The prevalence of private discrimination against offenders is further demonstrated by the recent surge in legislative efforts to address the indiscriminate exclusion of persons with criminal histories from housing and employment markets. Many jurisdictions have taken a proactive role in enacting anti-discrimination legislation to protect individuals convicted of crimes from certain forms of private harm, especially

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(1992); Oyama, *supra* note 117, at 191; *see also* Thacher, *supra* note 135, at 6–7, 13–18 (describing phenomenon of "private crime control" by tenant screening in the context of persons convicted of crime).

<sup>143</sup> These exclusions are compounded by more "supply-side" market barriers affecting convicts. More than 10% of all new commitments to jails and prisons are homeless prior to their incarceration. Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 140 (2004). Metraux and Culhane noted that in a study that examined prison to shelter crossover, the Massachusetts Housing and Shelter Alliance reported that 9.3%, 10.5%, and 6.3% of all state prison releases in Massachusetts directly proceeded a shelter stay. *Id.* Released prisoners with a history of homelessness were five times as likely to experience post-release homelessness as released prisoners with no immediate history of homeless in the months prior to commitment. *Id.* at 142, 147–48. Metraux and Culhane's study looked at the link between homelessness and incarceration among persons released to New York City from the New York state prison system. The labor market barriers described above also lead to depressed wages for convicted persons. Sociologist Bruce Western is among those at the forefront of this research: Using data from the National Longitudinal Survey of Youth, 1983–1999, Western determined that incarceration reduces the rate of wage growth by nearly 30%. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 541 (2002); *see also* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA xii (2006) (characterizing American penal policy as having "a systematic state influence on wages and employment"). Reduced earning capacity and depressed wages further limit market access to private housing stock and relegate many offenders to housing dependency and frequently, homelessness. Since housing access is often touted as the "lynchpin that holds the reintegration process together," this issue has assumed critical public safety importance. Bradley et al., *supra* note 112, at 1; *see* Thacher, *supra* note 135, at 6 ("[F]rom the perspective of ex-convicts themselves, landlord screening is an especially significant form of institutional exclusion because housing (along with employment) ranks as one [of] the most important needs it impinges upon.").

<sup>144</sup> U.S. DEP'T OF HOUS. & URBAN DEV. ET AL., *supra* note 114, at 56 n.23.

in the area of employment. The state of New York, for example, prohibits employers and public agencies from denying an individual a job or occupational license based on an arrest alone.<sup>145</sup>

Similar protective efforts are gaining traction in other jurisdictions. “Ban the Box” initiatives—which support the enactment of legislation prohibiting employers from inquiring about a job applicant’s criminal history on initial job applications—are one example. Although critics maintain that “ban the box” initiatives increase the transactional costs to employers of hiring, proponents of these measures have garnered significant support at the local and state level.<sup>146</sup> As of November 2013, ten states,<sup>147</sup> together with localities in 22 states and the District of Columbia, have adopted “ban the box” legislation or administrative rules.<sup>148</sup>

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<sup>145</sup> N.Y. CORRECT. LAW § 752 (McKinney 2003). In addition to its protections relating to the adverse use of arrest history in employment decisions, New York also prohibits discrimination in employment based on convictions, and requires employers (regardless of size) to consider applicants for jobs on a case-by-case basis, unless the nature of the offense is related to the job (e.g., child sex offender applying for daycare worker position). *See id.* With the exception of law enforcement organizations, employers in New York are prohibited from even inquiring about arrests. N.Y. EXEC. LAW § 296 (McKinney 2010). New York City also protects individuals arrested for, or convicted of, crimes from adverse licensure or employment decisions that rely on “moral character” for determinations of eligibility. N.Y.C. ADMIN. CODE § 8-107(10) (2003).

<sup>146</sup> *See, e.g.,* Allen Smith, *Reactions to EEOC’s ‘Ban the Box’ Suggestion Differ*, SOC’Y FOR HUMAN RES. MGMT 1 (May 18, 2012), <http://www.shrm.org/legalissues/federalresources/pages/reactionstoeocssuggestion.aspx> (quoting critics of EEOC enforcement guidance on grounds that “the later in the hiring process the employer delays asking job-related questions of the applicant, the greater the cost to the employer of making hiring decisions.”).

<sup>147</sup> California, Colorado, Connecticut, Hawaii, Minnesota, Maryland, Massachusetts, New Mexico, and Rhode Island have enacted statewide “ban the box” legislation, prohibiting inquiries into criminal status on initial employment applications. Illinois has promulgated an administrative rule crafted to have the same effect. *Statewide Ban the Box: Reducing Unfair Barriers to Employment of People with Criminal Records*, NAT’L EMP’T LAW PROJECT (Nov. 2013), <http://nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf>. In Minnesota, legislation extending the prohibition to private employers takes effect in January 2014. In advance of the mandate, the Minneapolis-based Target Corporation announced in October 2013 its plans to “ban the box” from job applications at all of its U.S. stores. *Target Corporation Announces New ‘Ban the Box’ Policy, Setting Example for Large Corporations Across the U.S.*, NAT’L EMP’T LAW PROJECT (Oct. 29, 2013), <http://www.nelp.org/page/-/Press%20Releases/2013/PR-Target-Ban-the-Box.pdf>.

<sup>148</sup> *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Barriers to Employment of People with Criminal Records*, NAT’L EMP’T LAW PROJECT (Feb. 6, 2012), [http://nelp.3cdn.net/abddb6b65a14826f92\\_n5m6bz5bp.pdf](http://nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf). The city of Philadelphia, for example, prohibits inquiries into criminal history on initial applications by all employers—whether public or private. *Id.* at 16–17. In Boston, public employers and private government contractors are prohibited from making the inquiry on initial applications. *Id.* at 2.

In recognition of this growing concern, and to assist employers with compliance in hiring, in 2012, the federal Equal Employment Opportunity Commission (EEOC)—in its first statement that certain uses of applicants' criminal histories in employment decisions are unlawfully discriminatory—issued revised enforcement guidelines for employers explaining the circumstances under which an employment policy that is crime-specific can be justified.<sup>149</sup> In its guidance, the EEOC recommends that “employers not ask about convictions on job applications,” because of the potential racially disparate effects of using criminal convictions as a proxy for employability.<sup>150</sup>

On the heels of the publication of the EEOC guidance, in July 2012, Representative Hansen Clarke (MI) introduced H.R. 6220, a federal “Ban the Box Act” that would have prohibited an employer from inquiring directly or indirectly “whether [an] applicant has ever been convicted of a criminal offense.”<sup>151</sup> The legislation included two exceptions. First, it permitted employers to inquire of an applicant’s conviction history “after a conditional offer for employment has been extended,”<sup>152</sup> a provision that functioned to delay the criminal background inquiry until after applications and interviews were completed and reviewed and an offer of employment had been made. Second, it provided that an employer could inquire of an applicant’s conviction history “where the granting of employment may involve an unreasonable risk to the safety of specific individuals or to the general public.”<sup>153</sup>

The proposed legislation also included rulemaking guidance authorizing the EEOC to promulgate rules “defining categories of employment where an individual’s past criminal history may involve an unreasonable risk to the safety of specific individuals or to the general public.”<sup>154</sup> The inclusion of this rulemaking guidance in the proposed bill indicates that the legislation was intended to regulate only those workplaces that are subject to the jurisdiction of the EEOC—workplaces with more than 15 employees. The rulemaking guidance also makes plain that the legislation was proposed pursuant to Congress’s

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<sup>149</sup> In the years since the enactment of the Civil Rights Act of 1964, the EEOC has published enforcement guidance notices that proclaimed that blanket bans on hiring people with criminal convictions had a disparate impact on minority groups and was, therefore, unlawful under Title VII. EQUAL EMP’T OPPORTUNITY COMM’N (EEOC), ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 3, 29 n.15 (2012), available at [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

<sup>150</sup> *Id.* at 13–14.

<sup>151</sup> Ban the Box Act, H.R. 6220, 112th Cong. §§ 1–2 (as introduced July 26, 2012). The legislation was cosponsored by Representatives Conyers, Rush, Rangel, Wilson, and Ellison. The bill died in committee, and has not been reintroduced. 158 Hist. of Bills H.R. 6220 (2012).

<sup>152</sup> Ban the Box Act, H.R. 6220, 112th Cong. § 2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 3.

authority under the constitution's Commerce Clause to regulate interstate commerce.<sup>155</sup>

The Thirteenth Amendment is a more appropriate constitutional basis for such legislation. Congress's Commerce Clause powers are insufficient to combat employment discrimination against individuals with criminal exposure for two reasons. First, by proposing the federal "ban the box" legislation pursuant to its commerce authority, Congress has *a priori* limited its reach: small businesses—those that employ fewer than 15 employees and would be exempt from the legislative mandate—are catalysts of job creation and economic growth.<sup>156</sup> During the most recent economic downturn, for example, small businesses were responsible for creating more jobs than larger employers.<sup>157</sup> In addition, as former U.S. Senator Winston L. Prouty (VT) noted during debates over the Civil Rights Act of 1964,<sup>158</sup> the Thirteenth Amendment is a better source of law than the Commerce Clause for certain forms of discrimination:

Throughout the course of the hearings many witnesses expressed the hope that we would act to remove the vicious affronts to human dignity which result from discriminations in public accommodations. If we accept a bill based on the commerce clause alone we run the risk of supplanting them with new affronts to human dignity.<sup>159</sup>

Moreover, the exceptions embedded in the Clarke bill did not foreclose discriminatory practices; they merely delayed the exercise of blanket, arbitrary bans. A prospective employee in receipt of a conditional offer of employment may still be shut out of the workplace on the basis of his or her arrest or conviction record, with the employer incurring no liability or obligation under the law.

Although H.R. 6220 never made it out of committee, the proposed legislation presents an opportunity to consider the ideal scope of a nu-

<sup>155</sup> See *id.* § 5. Finally, the legislation mandates that the EEOC devise "factors to be considered by employers in assessing whether an individual's past criminal history poses such an unreasonable risk." *Id.* § 3.

<sup>156</sup> See Scott Shane, *Small Business Job Creation Is Stronger Than We Think*, BLOOMBERG BUSINESSWEEK (Apr. 26, 2012), <http://www.businessweek.com/articles/2012-04-26/small-business-job-creation-is-stronger-than-we-think>; see also Merrill F. Hoopengardner, Note, *Nontraditional Venture Capital: An Economic Development Strategy for Alaska*, 20 ALASKA L. REV. 357, 357 (2003) ("Small businesses add jobs, strengthen the tax base, and improve overall quality of life for many members of the surrounding community.").

<sup>157</sup> Small employers are also less likely to have designated human resources professionals on the staff, suggesting that the adoption of blanket prohibitory practices respecting offenders are less likely to be challenged within the workplace. See Robb Mandelbaum, *U.S. Push on Illegal Bias Against Hiring Those with Criminal Records*, N.Y. TIMES, June 21, 2012, at B8. Anecdotal evidence suggests that small business owners are unaware of the EEOC's position on blanket hiring bans. *Id.*

<sup>158</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241 (1964).

<sup>159</sup> S. Rep. No. 88-872, pt. 2, at 3–4 (1964) (individual views of Sen. Winston L. Prouty).

anced federal legislative response to the issues identified here. In the area of housing, for example, few jurisdictions have successfully taken steps to regulate private discrimination against persons with criminal histories. In Wisconsin, both the City of Madison (the state capitol and home to the flagship campus of the University of Wisconsin) and Dane County enacted legislation prohibiting blanket private housing discrimination against offenders.<sup>160</sup> In the wake of these enactments, the state legislature enacted 2011 Wisconsin Act 107, expressly prohibiting local government limitations on private landlords' use of criminal history information.<sup>161</sup> In April 2011, the San Francisco Human Rights Commission voted unanimously to send a letter to the city's Board of Supervisors urging the enactment of legislation prohibiting employment and housing discrimination against persons with arrest and conviction records; as of November 2013, none had been enacted.<sup>162</sup> In June 2013, the City of Seattle enacted legislation "banning the box" on initial employment applications.<sup>163</sup> The city had considered a broader ban on the use of arrest and conviction records in housing and labor markets in 2010, a legislative effort that failed to garner necessary support for its passage.<sup>164</sup>

Federal intervention to address market failures is typically appropriate where local regulatory attempts fall short. State legislative interventions regarding private market discrimination against offenders vary widely in scope and strength, and existing protections have been

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<sup>160</sup> See MADISON, WIS., ORDINANCES § 39.03 (Dec. 15, 1992).

<sup>161</sup> WIS. STAT. ANN. § 66.0104(2)(a)(1), (2) (West 2012) (banning any local government law which "[p]rohibits a landlord from, or places limitations on a landlord with respect to, obtaining and using or attempting to obtain and use any of the following information with respect to a tenant or prospective tenant: . . . Court records, including arrest and conviction records, to which there is public access. . . [or] Limits how far back in time a prospective tenant's credit information, conviction record, or previous housing may be taken into account by a landlord.").

<sup>162</sup> *Reduce Barriers for Persons with Prior Arrest and Conviction Records*, S.F. HUM. RTS. COMM'N, <http://www.sf-hrc.org/index.aspx?page=145>; Sudhin Thanawala, *SF Mulls Ban on Discrimination Against Ex-Cons*, HUFFINGTON POST (July 24, 2011), [http://www.huffingtonpost.com/2011/07/24/san-francisco-mulls-ban-discrimination-ex-con-ban\\_n\\_908139.html](http://www.huffingtonpost.com/2011/07/24/san-francisco-mulls-ban-discrimination-ex-con-ban_n_908139.html). While the city's Board of Supervisors adopted a resolution in 2005 prohibiting inquiries into criminal history on initial public employment and public contractor applications, no similar ban applies in the private employment or housing context.

<sup>163</sup> See Lynn Thompson, *City Council Approves Crime-Check Hiring Bill*, SEATTLE TIMES (Jun. 10, 2013), <http://blogs.seattletimes.com/today/2013/06/city-council-approves-crime-check-hiring-bill/>. The Seattle legislation became effective November 1, 2013. See Seattle Municipal Code 14.17.010, *et seq.* (2013), available at <http://clerk.seattle.gov/~public/code1.htm>; City of Seattle Ordinance No. 124201, available at [http://clerk.seattle.gov/~archives/Ordinances/Ord\\_124201.pdf](http://clerk.seattle.gov/~archives/Ordinances/Ord_124201.pdf).

<sup>164</sup> See SEATTLE OFFICE OF CIVIL RTS., CONVICTION/ARREST RECORDS: POLICY PROPOSAL (2010), available at [http://www.seattle.gov/civilrights/Documents/CR\\_JNpresentation\\_11-30-2010.pdf](http://www.seattle.gov/civilrights/Documents/CR_JNpresentation_11-30-2010.pdf).

termed both “inconsistent” and “insufficient.”<sup>165</sup> Local anti-discrimination initiatives benefiting this population are only narrowly effective, and several have either failed outright (as in Wisconsin) or have been stalled or weakened by opposition. An expansion of Thirteenth Amendment jurisprudence to address discrimination of this type could support federal legislative initiatives in the face of challenges from more powerful constituencies.

#### IV. SLAVERY, MARKETS, AND PROPERTY: THE HISTORICAL BASIS FOR THE THIRTEENTH AMENDMENT’S APPLICATION TO MARKET DISCRIMINATION

An expansive interpretation of the Amendment’s prohibition ought to be grounded in its contemporary milieu. This Part considers the linkages between antebellum slavery and exclusionary contractual behavior, and suggests that the enactment of the Thirteenth Amendment had contemporary relevance to efforts to exclude blacks (and others) from private labor and housing markets. Contemporary public meaning of its terms, the ratification debates, and Congress’s pronouncements regarding the Amendment’s scope in the Civil Rights Act of 1866<sup>166</sup> suggest that the Reconstruction Congress held an expansive understanding of the Amendment’s relevance to the subordinative effects of contractual exclusion and discrimination. This history supports a construction of the Amendment’s scope that includes modern exclusionary market practices towards disfavored groups.

##### A. “Badges and Incidents”

Congressional authority to target subordination mimicking slavery through legislation is found in Section 2 of the Amendment, which gives Congress the power “to enforce this article by appropriate legislation.”<sup>167</sup> In the *Civil Rights Cases* of 1883, the Supreme Court held that Section 2 empowered Congress to not only enact legislation to prohibit chattel slavery and involuntary servitude, but also “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>168</sup> Here, the Court presumed that the precise meaning of “badges and incidents of slavery” was known to its readers, explaining that the “long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents.”<sup>169</sup>

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<sup>165</sup> Christine Neylon O’Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 993 (2007) (concluding that existing protections against employment discrimination targeting offenders “are both inconsistent and, in many cases, insufficient”).

<sup>166</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

<sup>167</sup> U.S. CONST. amend. XIII, § 2.

<sup>168</sup> *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>169</sup> *Id.* at 22.

The Court was, however, silent on what, precisely, was to be included under the umbrella of regulable behavior remediable by Congress's Section 2 powers.

Jennifer Mason McAward has, more recently, undertaken to identify the historical antecedents, usages, and "original public meanings" of the terms "badges" and "incidents."<sup>170</sup> Among these were limitations on access to labor and property for free blacks. In 1853, the Supreme Court of Georgia articulated how the spectre of slavery propagated "the most humiliating incidents of [free black] degradation":

He has neither vote nor voice in forming the laws by which he is governed. He is not allowed to keep or carry fire-arms. He cannot preach or exhort without a special license, on pain of imprisonment, fine and corporeal punishment. He cannot be employed in mixing or vending drugs or medicines of any description. . . . To employ a free person of color to set up type in a printing office, or any other labor requiring a knowledge of reading or writing, subjects the offender to a fine . . . .<sup>171</sup>

McAward demonstrates that, whereas during slavery, the term "badge of slavery" was almost synonymous with perceptible African or African-descended phenotypical features, after emancipation, the public meaning of the term "badge of slavery" came to include, among other things, private discrimination and citizen subordination.<sup>172</sup> For example, during the ratification debates over the Thirteenth Amendment, Senator James Harlan of Iowa asserted that the proposed amendment targeted slavery as well as its "necessary incident[s],"<sup>173</sup> including the inability to "acquir[e] and hold[] property."<sup>174</sup>

Slavery and market exclusion were inextricably linked in the discourse of emancipation. During the ratification debates, Senator Harlan was joined in his sentiments by Senator Trumbull, who argued that market exclusions and limitations on mobility were incidental to freedom: "It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell . . . ."<sup>175</sup> Under the slave codes of the various states, slaves were prohibited from owning most forms of prop-

<sup>170</sup> Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 568 (2012).

<sup>171</sup> Bryan v. Walton, 14 Ga. 185, 202–03 (1853).

<sup>172</sup> McAward, *supra* note 170, at 577–78 ("Skin color was no longer a badge of slavery. Instead, the term was used to reference ways in which southern governments and white citizens endeavored to reimpose upon freed slaves the incidents of slavery or, more generally, to restrict their rights in such a way as to mark them as a subordinate brand of citizens.") (emphasis added) (footnote omitted); see also Tsesis, *supra* note 39, at 1650 nn.34–35 (noting usages of the term "incidents of slavery" in the antebellum era).

<sup>173</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1440, 1439–40 (1864) (statement of Sen. James Harlan).

<sup>174</sup> *Id.* at 1439.

<sup>175</sup> CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (statement of Sen. Lyman Trumbull).

erty, and trading with slaves was starkly prohibited.<sup>176</sup> The Alabama Slave Code of 1833 ordered: “No person whatsoever shall buy, sell, or receive, of, to, or from a slave, any commodity whatsoever . . . .”<sup>177</sup> Augusta, Georgia enacted legislation barring enslaved and free people of color from “keeping a shop and selling, bartering, or trading in any way,” and made the offense punishable by whipping and confinement in the local jail.<sup>178</sup> South Carolina colonial law on this subject was even more strict, providing that no slave “shall presume to buy, sell, deal, traffic, barter, exchange or use commerce for any goods, wares, provisions, grain, victuals, or commodities, of any sort of kind whatsoever.”<sup>179</sup>

These strictures were not limited to the enslaved: Free blacks’ and whites’ market access was also circumscribed as a function of the institution. Alabama’s Slave Code of 1833, for example, forbade free blacks from “retail[ing] any kind of spirituous liquors within this state.”<sup>180</sup> Georgia’s slave code forbade any person of color, “whether free or slave,” to preach the gospel unless they “first obtain a written certificate from three ordained ministers of the gospel of their own order, in which certificate shall be set forth the *good moral character* of the applicant, his pious deportment, and his ability to teach the gospel.”<sup>181</sup> In South Carolina, it was illegal to rent a boardingroom to a slave, and offending parties were required to forfeit \$20 for the offense.<sup>182</sup> Local authorities also enforced geographic restrictions on where blacks could live.<sup>183</sup> In New Orleans, local law forbade the rental of sleeping quarters

<sup>176</sup> See, e.g., Louisiana Black Code of 1806, § 15, *reprinted in* LA. CONSTITUTIONAL & ANTI-FANATICAL SOC’Y, DIGEST OF THE LAWS RELATIVE TO SLAVES AND FREE PEOPLE OF COLOUR IN THE STATE OF LOUISIANA 4 (1835); An Act to Amend the Black Code, § 1, *reprinted in* LA. CONSTITUTIONAL & ANTI-FANATICAL SOC’Y, DIGEST OF THE LAWS RELATIVE TO SLAVES AND FREE PEOPLE OF COLOUR IN THE STATE OF LOUISIANA 23 (1835) (“It shall not be lawful for any slave in this State, to sell, barter, exchange, give, deposit, or offer to sell, whatever, without the authority of his, her, or their owner . . .”).

<sup>177</sup> Alabama Slave Code of 1833 § 12, *reprinted in* JOHN G. AIKEN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 393 (2d ed. 1836) [hereinafter Alabama Slave Code].

<sup>178</sup> *Slave Narratives: A Folk History of Slavery in the United States from Interviews with Former Slaves*, FEDERAL WRITER’S PROJECT (July 3, 2006), <http://www.gutenberg.org/files/18485/18485-h/18485-h.htm>.

<sup>179</sup> An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province [hereinafter South Carolina Slave Code] No. 670, 7 S.C. STAT. § XXX (McCord 1840).

<sup>180</sup> Alabama Slave Code § 26.

<sup>181</sup> 1845 Ga. Laws, ch. XXXIV, art. I, § 2(16) (1848) (emphasis added). It was also illegal to rent to slaves. *Id.* ch XXXII, § VI (37) (“No slave or slaves shall be permitted to rent or hire any house, room, store, or plantation, on his or her own account, or to be used or occupied by any slave or slaves; and any person or persons who shall let or hire any house, room, or plantation, to any slave or slaves, or to any free person, to be occupied by any slave or slaves, every person so offending shall forfeit and pay to the informer, a sum of twenty pounds.”).

<sup>182</sup> South Carolina Slave Code No. 670, 7 S.C. STAT. § XLII (McCord 1840).

<sup>183</sup> See Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 474 (1997)

to slaves, “even with the permission of his or her owner.”<sup>184</sup> Just as restrictions on property and market access were characteristic of antebellum slavery, so too were occupational restrictions. States throughout the South foreclosed whole categories of labor for enslaved and free black workers.<sup>185</sup>

The text of the Civil Rights Act of 1866<sup>186</sup> reinforced the role of private contractual acts in this anti-subordination project. Congress listed among the Act’s protections the right “to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>187</sup> These rights were to be inviolate against public and private deprivations.<sup>188</sup> The Act levied criminal punishment against any person (acting under “color of any law” or “custom”) subjecting citizens to the deprivations of any rights protected by Section 1.<sup>189</sup> Representative James Wilson of Iowa had argued during the ratification debates that Section 2 of the Amendment authorized Congress to “enforce and sanction[]” emancipation through legislation.<sup>190</sup> Alexander Tsesis has persuasively argued that Wilson

(“Local authorities used every available weapon to keep the blacks divided; housing was simply the physical expression of this racial policy.” (quoting Richard C. Wade, *Racial Segregation in the Ante-bellum South*, in *THE RISE OF THE GHETTO* 10 (John H. Bracey, Jr. et al. eds., 1971)).

<sup>184</sup> City Laws, reprinted in LA. CONSTITUTIONAL & ANTI-FANATICAL SOC’Y, DIGEST OF THE LAWS RELATIVE TO SLAVES AND FREE PEOPLE OF COLOUR IN THE STATE OF LOUISIANA 28 (1835).

<sup>185</sup> See Kinoy, *supra* note 45, at 405 n.55 (1967) (providing extensive historical examples of how enslaved and free blacks were treated differently under law in the slave south).

<sup>186</sup> Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

<sup>187</sup> *Id.* § 1.

<sup>188</sup> William M. Carter has argued that the judiciary has “concurrent power” with Congress to give meaning to the “badges and incidents” language. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1319 (2007). This interpretation has been sustained by the Supreme Court. *Id.* at 1322. Courts interpreting 42 U.S.C. § 1981—the statute derived from the 1866 Act—have held that the legislation targets exclusionary conduct in private markets. *Id.* at 1326, 1358.

<sup>189</sup> Civil Rights Act of 1866 § 2. The inclusion of “custom” among the proscribed motivations behind such deprivations suggests that Congress intended the Act’s protections to extend beyond public law limitations on citizenship to include private conduct having a subordinative purpose. In analyzing the text of a statute, courts are guided by the canon of statutory construction that maintains that all parts of a statute should be construed “as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.” YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>. In Section 2 of the Act, “custom” is listed separately and severally with “law,” “statute,” “ordinance,” and “regulation;” accordingly, each of these must be imbued with distinct meaning. The inclusion of “custom” among these should not be read as superfluous; by “custom,” Congress intended to capture private discriminatory conduct—steeped not in law, but in longstanding practice—within the Act’s protections. Carter, *supra* note 188, at 1333–35.

<sup>190</sup> CONG. GLOBE, *supra* note 173, at 1324 (statement of Rep. James F. Wilson).

“clearly thought that Section 2 enabled Congress to do far more than simply liberate slaves from forced labor.”<sup>191</sup> Wilson’s remarks invite us to consider how the Amendment’s ideals of equality, liberty, and property ought to be applied to other dispossessed citizen populations, including persons accused or convicted of crimes.

### B. *Judicial Constraints on the Amendment’s Scope*

Despite these contemporaneous expansive conceptualizations of the incidents of slavery and subordination targeted by emancipation, the Thirteenth Amendment, and the Amendment’s enforcement legislation, courts have consistently constrained Section 2’s reach.

In the *Civil Rights Cases*, the Supreme Court famously held that the Amendment did not empower Congress to legislate against private discrimination in public life:

It would be running the slavery argument into the ground to make [the Thirteenth Amendment] apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.<sup>192</sup>

Ceding any responsibility for guarantees of black civil rights protections to the states, the Bradley Court—in what Arthur Kinoy famously called “a stroke of juridical wish fulfillment”<sup>193</sup>—effectively eliminated

<sup>191</sup> Tsesis, *supra* note 39, at 1648 (quoting Wilson’s remarks that Congress’s powers under Section 2 would end “everything connected with [slavery] or pertaining to it.”); CONG. GLOBE, *supra* note 173, at 1324 (statement of Rep. James F. Wilson).

<sup>192</sup> The *Civil Rights Cases*, 109 U.S. 3, 24–25 (1883). Interestingly, scholars have largely ignored that the defense for the rail company alleged to have denied a black woman (Mrs. Robinson who was traveling in the company of her fair-skinned black husband) access to a locomotive “ladies car” was that “the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; the judge charged the jury, in substance, that if this was the conductor’s *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company.” *Id.* at 5 (emphasis in original). As noted by Jerome McCristal Culp, Jr., this remaking of Mrs. Robinson as a prostitute and of Mr. Robinson (who could “pass”) as white served to justify and legitimate the exclusionary behavior of the conductor. See Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not to Become Justice Sandra Day O’Connor*, 1 DUKE J. GENDER L. & POL’Y 21, 30 (1994); see also Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 LAW & SOC. INQUIRY 377, 387 (1999) (“In the nineteenth-century South, and in Tennessee in particular, bad character was partly a euphemism for a woman’s race and class status.”). Similar efforts to legitimize discriminatory behavior on the grounds of imputed criminality or character deficiency would be captured by the intervention advocated in this Article.

<sup>193</sup> Kinoy, *supra* note 45, at 402.

the perceived need for legislative protections of civil rights pursuant to Congress's authority under the Thirteenth Amendment.

Even before the *Civil Rights Cases*, however, federal courts had imposed limitations on interpretations of Congressional authority under Section 2. In 1871, the Court held in *Blyew v. United States* that the Amendment was not violated where a state court refused to hear testimony from black witnesses in a murder case involving white defendants and black victims.<sup>194</sup> In 1874, Justice Bradley, riding circuit in *United States v. Cruikshank*, ruled that Congress had no authority—under either the Thirteenth or Fifteenth Amendments—to enact legislation criminalizing private acts of violence against blacks absent discriminatory racial intent, notwithstanding the absence of any “intent” language from either amendment.<sup>195</sup> In *Dauphin v. Key*, the Supreme Court of the District of Columbia characterized the Thirteenth Amendment as among those constitutional provisions establishing “restrictions upon the States,”<sup>196</sup> but not upon private parties. Eight years later, the trial court in *Le Grand v. United States* held that Section 2 failed to authorize Congressional enactment of the Force Act of 1871, and characterized the statute as a “law which would punish any private citizen for an invasion of the rights of his fellow-citizen conferred by the state of which both were residents.”<sup>197</sup> In 1875, a federal court in Tennessee (in one of the cases that would be consolidated for the *Civil Rights Cases*) held that the Civil Rights Act of 1875<sup>198</sup>—which criminalized discrimination on the basis of race in places of public accommodation—was an improper ex-

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<sup>194</sup> *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871). In *Blyew*, two white defendants were accused of axing to death a black family in 1868, including a blind 90-year-old woman. Testimony presented at trial suggested that one of the defendants “thought there would soon be another war about the niggers; that when it did come he intended to go to killing niggers, and he was not sure that he would not begin his work of killing them before the war should actually commence.” *Id.* at 584–85.

<sup>195</sup> *United States v. Cruikshank*, 25 F. Cas. 707, 708, 712 (C.C.D. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875) (“To constitute an offense, therefore, of which congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.”).

<sup>196</sup> *Dauphin v. Key*, 11 D.C. (MacArth. & M.) 203, 209 (1880); *see also Ex parte Virginia*, 100 U.S. 339, 360–61 (1879) (noting that, with respect to the Thirteenth and Fourteenth Amendments, “[a]side from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States.”).

<sup>197</sup> *Le Grand v. United States*, 12 F. 577, 582–83 (1882).

<sup>198</sup> Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335–37 (1875).

ercise of Congressional authority under Section 2.<sup>199</sup> To the present day, these decisions have not been overturned.

The line of limiting cases culminating in the *Civil Rights Cases* is, however, not determinative on the questions presented in this Article. In *Jones v. Alfred Mayer Co.*—a case challenging a white homeowner’s refusal to sell real property to a black prospective buyer—the Court held that Section 2 granted Congress the power “rationally to determine what are the badges and incidents of slavery” and to abolish them.<sup>200</sup> According to the Court in *Jones*, primary among these badges and incidents were limitations on property rights and access to property markets: “whatever else they may have encompassed, the badges and incidents of slavery—its ‘burdens and disabilities’—included restraints upon ‘those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.’”<sup>201</sup> The *Jones* Court’s focus on property restrictions elevated infringement of property rights to a form of subordination approximating an incident of slavery. In Part IV, *infra*, I argue that the aggregated effects of private discrimination in housing markets similarly approximate an incident of slavery, and that this conduct falls within Congress’s power to address with legislation.

Despite its potential for addressing discriminatory private conduct of the type discussed here, the federal courts have only applied the Civil Rights Act of 1866<sup>202</sup> and its modern versions—42 U.S.C. §§ 1981 and 1982—to cases of ethnic or racial discrimination. These enacting statutes have not been invoked successfully to challenge other forms of discrimination, notwithstanding that neither § 1981 nor § 1982 restricts its guarantees on the basis of race.<sup>203</sup>

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<sup>199</sup> Charge to the Grand Jury—Civil Rights Act, 30 F. Cas. 1005, 1006 (C.C.W.D. Tenn. 1875) (No. 18,260), *aff’d sub nom*, *The Civil Rights Cases*, 109 U.S. 3 (1883) (“We conclude with confidence that the thirteenth amendment did not authorize congress to interfere with the private and internal regulations of theater managers, hotel keepers, or common carriers within the state.”).

<sup>200</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).

<sup>201</sup> *Id.* at 441 (quoting *The Civil Rights Cases*, 109 U.S. at 22).

<sup>202</sup> 14 Stat. 27 (1866).

<sup>203</sup> 42 U.S.C. § 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”); 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”); *accord* Tsesis, *supra* note 39, at 1659 (observing that the “language of the statutes . . . does not require such a narrow construction”).

### C. *The Amendment's Ironic Promise*

Notwithstanding the seeming ossification of its jurisprudence, the Thirteenth Amendment remains an unlikely source of law for the legislative action advocated here. The text of the Amendment includes a “convict exception,” which some courts and legislators have interpreted as a sanction for public law subordination of convicted persons.<sup>204</sup> The “ironic promise” is that the constitutional provision explicitly granting states authority to coerce forced labor from convicts as punishment within its first section is the same amendment granting Congress the authority to limit other forms of subordination levied upon this same group in its second section.

By its text, the Punishment Clause provides an exception only “as a punishment for crime,” and not for civil, regulatory, or private discriminatory treatment of formerly convicted people.<sup>205</sup> The Supreme Court has consistently held that civil and regulatory collateral consequences, including those that infringe offenders’ abilities to enter housing and labor contracts, are *not* punishment; by this reasoning, discrimination (public or private) is not punishment.<sup>206</sup> The Punishment Clause, therefore, does not textually preclude an interpretation of the Amendment that provides a basis for a legislative prohibition against aggregated private discrimination of this kind for this group.<sup>207</sup>

## V. THE NEW SLAVE: CONVICTS AND CONTRACTUAL EXCLUSION IN THE MARKETPLACE

As states and local governments attempt to come to grips with exploding convict populations<sup>208</sup> and the economic, social, and political effects of criminalization, mass conviction, and hyper criminalization, the role of private discrimination against persons with criminal exposure has become increasingly salient. This Part considers the historical subordination of persons convicted of crimes—including a longstanding association of such persons with the institution of slavery—as well as the cumulative effects of excluding offenders from private markets, and

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<sup>204</sup> U.S. CONST. amend. XIII, § 1; Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 877 (2012).

<sup>205</sup> U.S. CONST. amend. XIII, § 1.

<sup>206</sup> See, e.g., *Smith v. Doe*, 538 U.S. 84, 102 (2003) (holding that Alaska’s “Megan’s Law” did not violate Ex Post Facto Clause because it was regulatory rather than punitive); see also Chin, *supra* note 29, at 1811 (“Because collateral consequences are not, strictly speaking, punishment, existing limitations may be imposed retroactively on people not subject to them at the time of conviction.”).

<sup>207</sup> This analysis similarly applies to the enacting legislation passed in the wake of the Thirteenth Amendment respecting private discrimination. Section 2 of the Civil Rights Act of 1866 includes the same “convict exception” language as the Amendment. Armstrong, *supra* note 204, at 877; see also Civil Rights Act of 1866 § 2.

<sup>208</sup> See WARREN ET AL., *supra* note 103, at 35, tbl. A-7 (comparing U.S. incarcerated population with that of other countries).

suggests that the more pernicious aspects of this phenomenon deserve federal legislative attention.

### A. *The Old Slave*

This section considers historical linkages between the status of “convict” and that of “slave,” and argues that courts’ constructions of the Amendment’s text reflects an early American discursive tradition that reduced people convicted of crimes to the status of slave. Since the Amendment’s ratification in 1865, courts construing the convict exception consistently have determined that the Amendment grants no protections to convicted persons seeking relief from forced punitive labor regimes at the hands of prison, probation, and parole administrators.<sup>209</sup> Modern courts read no temporal limitations into the Amendment’s grant of state authority. Under current precedent, persons convicted of certain crimes, and sentenced to a custodial term of incarceration, may at the completion of their criminal sentence subsequently be forcibly confined for an indefinite term of civil commitment.<sup>210</sup> New sanctions may be imposed upon convicted persons even if those sanctions were not in effect at the time of conviction.<sup>211</sup> More troublingly, the Amendment has been construed to provide no protection, even for pretrial de-

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<sup>209</sup> See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 176 (2003) (“[T]he Thirteenth Amendment expressly permitted prisoners to be reduced to the status of slaves . . . .”); *id.* at 177 (“American constitutional law formally embraced the idea that convicts were to be reduced to slaves in 1865—the year of the completion of the second revolution in America, the shining date in the history of American abolitionism.”); see also *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”); *Van Hoorelbeke v. Hawk*, No. 95-2291, 1995 WL 676041, at \*4 (7th Cir. Nov. 9, 1995) (dismissing prisoner’s claim that he had been made a “slave” as noncognizable under the Thirteenth Amendment, since the prisoner has “no rights” pursuant to the Punishment Clause); *Wendt v. Lynaugh*, 841 F.2d 619, 621 (5th Cir. 1988); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (noting that the Thirteenth Amendment is inapplicable in prisons); *Mitchell v. San Jose Immigration & Customs Enforcement Dir.*, No. C 07-3843 SI (pr), 2007 WL 2746745, at \*2 (N.D. Cal. Sept. 20, 2007) (noting, in *dicta*, that “[p]risoners who are duly tried, convicted and sentenced for the commission of a crime have no federally protected right not to work”).

<sup>210</sup> *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (holding that civil commitment programs are constitutional if the commitment is non-punitive). Currently, there are at least 20 states with civil commitment schemes for certain categories of sex offenders. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 675 (2008) (noting that, among the web of collateral consequences liable to attach to an offender upon conviction, “[i]nvoluntary commitment is perhaps the harshest.”).

<sup>211</sup> See, e.g., Chin, *supra* note 29, at 1811 (“Because collateral consequences are not, strictly speaking, punishment, existing limitations may be imposed retroactively on people not subject to them at the time of conviction.”).

tainees and other non-convicted persons, from punitive coerced labor at the hands of the state.<sup>212</sup>

With few exceptions, courts have opined on the scope of Section 1's "duly convicted" language only in the context of challenges to coerced labor regimes for convicted persons. In those cases, courts interpreting the Amendment have found that it authorizes the state to force convicts to work.<sup>213</sup> While courts construe the exception as aggrandizing the power of the state over the body of the convict, there is another, related line of judicial reasoning that construes the exception as extinguishing convict-plaintiffs' causes of action for alleged violations of the constitutional prohibition on slavery. In the most well-known of these, *Ruffin v. Commonwealth*,<sup>214</sup> Justice Christian of the Virginia Supreme Court wrote that prison inmates had no natural rights: "They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land."<sup>215</sup> Subsequent history similarly suggests that the Amendment was understood in its early years to sanction a reduction to slave status for incarcerated persons:

The absence of suits brought under the main prohibition in the Thirteenth Amendment or of federal legislation under section two to challenge the slave-like conditions imposed on prisoners in the decades after passage of the amendment squares much more easily with the notion that the punishment clause allowed slavery than that it only allowed something less.<sup>216</sup>

The contemporary public understanding of the Thirteenth Amendment, therefore, accepted that slavery, as a condition, was constitutionally permissible when the class of people to be enslaved were prison inmates.

The Amendment was not the Reconstruction Congress's only pronouncement preserving the degradation of convicts under law. The Civil Rights Act of 1866, enacted less than six months after the ratification

<sup>212</sup> See, e.g., *Ford v. Nassau Cnty. Exec.*, 41 F. Supp. 2d 392, 401 (E.D.N.Y. 1999) (holding that requiring pretrial detainee to either work or be placed into segregation did not violate the Thirteenth Amendment); *Allen v. Mayberg*, No. 1:06-CV-01801-BLW-LMB, 2010 WL 500467, at \*12 (E.D. Cal. Feb. 8, 2010) ("The law is clear that prisoners may be required to work and that any compensation for their labor exists by grace of the state. There is no authority to justify a digression from this well established law when the case involves [a civilly committed 'sexually violent predator'], rather than a prisoner." (citations omitted)); see also Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 435-43 (2009).

<sup>213</sup> *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) ("Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude.").

<sup>214</sup> 62 Va. (21 Gratt) 790 (1871).

<sup>215</sup> *Id.* at 796.

<sup>216</sup> Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1022 (2009).

of the Thirteenth Amendment, similarly codified the abrogation of citizenship rights for individuals convicted of crimes.<sup>217</sup> The Act did not merely remove convicts from the community of citizens; while Section 1 of the Act excluded convicts from certain privileges deemed to be incidental to citizenship—including property and contract rights and the right to sue—Section 2 went further, sanctioning rights deprivations and disparate punishments for persons who had “at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime,” even if that condition was associated with a prior conviction or sentence of incarceration.<sup>218</sup> Section 2 of the 1866 Act, with its seemingly perpetual license for denigrating the rights and privileges of convicted persons, is the antecedent for modern collateral sanctions and private discrimination against this class.

Section 4 of the Act ensured that convicts’ challenges to rights deprivations and disparate punishment would have no federal enforcement or judicial support. Here, in a provision that charged the federal courts and federal officers with enforcement of the Act’s protections, Congress specifically excepted persons held in servitude “as a punishment for crime” from the class of persons deserving rights protection.<sup>219</sup>

These pronouncements are not, however, dispositive on the question of whether Congress can protect the ability of persons who are not currently incarcerated to participate in legitimate markets. The framers’ loyalty to forced labor at the hands of the state was reflective of the time. Early American criminal codes bound up incarceration with forced labor.<sup>220</sup> In 1787, the year the Northwest Ordinance<sup>221</sup> was adopt-

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<sup>217</sup> Civil Rights Act of 1866 § 1 (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”). The Reconstruction Act of 1867 included a provision that required “rebel States” to host constitutional conventions including all voting aged males, except those persons “disfranchised for participation in the rebellion or for felony at common law.” Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428 (1867).

<sup>218</sup> Civil Rights Act of 1866 § 2.

<sup>219</sup> *Id.*

<sup>220</sup> Raghunath, *supra* note 212, at 399 (“In earlier times, the protections of the Constitution were denied to prisoners compelled to work because the beneficial value of the prisoners’ labor was owned by the prison; i.e., they were enslaved by the state.” (footnote omitted)).

<sup>221</sup> An Ordinance for the Government of the Territory of the United States North West of the River Ohio (Jul. 13, 1787), *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 334 (1787).

ed, incarceration and “hard labor” were inextricably linked—custodial sentences typically included a requirement that the convict work.<sup>222</sup> This marriage of prisons and forced labor<sup>223</sup> was similarly practiced in England: When the first plan for a penitentiary system was proposed in 1779 by Sir William Blackstone and others, the preamble of the law passed in Parliament articulated the purpose of this institution—“to oblige them to labor, and as far as may be, learn them some useful trade.”<sup>224</sup> A theoretical strand of early nineteenth century criminal law and policy conflated the status of “convict” with that of “slave.”<sup>225</sup> Writing in 1821, privateersman Gamaliel Bradford advised that the proper means of “governing” prison inmates was “to let them know, and continually make them feel, that they have no rights; that, by their vices and violations of law, they have forfeited their liberty, and all the privileges of freemen. That they are slaves and outlaws.”<sup>226</sup>

This view regarding prisoners as “slaves of the State” has persisted: As recently as 2012, the district court in South Carolina held that a prisoner’s claim alleging “if you are legally convicted to the [Department of Corrections] you become a legal slave of that state,” was “subject to summary dismissal as frivolous” on the grounds that the Amendment “by its plain language, does not apply to a convicted criminal.”<sup>227</sup> There is only a single reported case in the modern era that acknowledged “that a prisoner might retain Thirteenth Amendment

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<sup>222</sup> See *United States v. Moreland*, 258 U.S. 433, 445 (1922) (Brandeis, J., dissenting) (noting that “[c]onfinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period . . . for offences not deemed serious.”); *id.* at 448–49 (Brandeis, J., dissenting) (stating that, in 1786, Pennsylvania enacted penal reform measures which “substitut[ed] imprisonment for death, as the penalty for some of the lesser felonies . . . provided specifically that the imprisonment should be attended by ‘continuous hard labor publicly and disgracefully imposed.’ Hard labor as thus prescribed and practiced was merely an instrument of disgrace.” (quoting Act of Sept. 15, 1786, 12)).

<sup>223</sup> See ELINOR MYERS MCGINN, *AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871–1940*, at 53 (1993) (noting that in early America, “incarceration and inmate labor became bedfellows for a variety of reasons”).

<sup>224</sup> *Capital Punishment*, 1 *THE AMERICAN MAGAZINE OF USEFUL AND ENTERTAINING KNOWLEDGE* 581 (3d ed. 1834).

<sup>225</sup> E. Stagg Whitin, *The Caged Man: A Summary of Existing Legislation in the United States on the Treatment of Prisoners*, 3 *PROC. ACAD. POL. SCI.* 255, 276 (1913) (“The prisoner is the property of the state or a subdivision of the state while he is in penal servitude.”).

<sup>226</sup> GALAMIEL BRADFORD, *STATE PRISONS AND THE PENITENTIARY SYSTEM VINDICATED* 43 (1835).

<sup>227</sup> *Cox v. United States*, No. 3:12-50-TMC-JRM, 2012 WL 1158864, at \*2 (D.S.C. Mar. 13, 2012); see also *Erdman v. Martin*, 52 F. App’x. 801, 803–04 (6th Cir. 2002) (holding that, where an inmate’s prison wages were garnished “up to an amount equal to the actual cost of confinement,” his claim that he was a “slave to the state” was “meritless”).

rights while incarcerated;<sup>228</sup> and far from having precedential or persuasive value on this point, this decision has been called “an anomaly in federal jurisprudence.”<sup>229</sup> This persistent association of persons convicted of crimes with slaves and slavery ought to give us pause.

### B. *Racial Implications and Echoes*

The expansive web of collateral and private consequences for convicted persons may also effectuate a form of racial exclusion, which is, itself, unconstitutional. First, criminal punishment is “concentrated” in poor, urban locales.<sup>230</sup> Second, racial bias permeates housing and labor markets to such an extent that convict status is an unreliable (and arguably illegitimate) proxy. Devah Pager and Bruce Western have demonstrated that employers that rely on criminal background checks to screen job candidates maintain a “strong reluctance . . . to hire applicants with criminal records, especially when considering black ex-offenders.”<sup>231</sup> Pager and Western further suggest that racial stereotypes determine which offenders receive employment opportunities. Pager and Western’s research demonstrated that when compared to white offenders, black offenders with identical educational, employment, and criminal records are “significantly less likely to be invited to interview,”<sup>232</sup> a personal contact interaction demonstrated to have a substantial effect on employer perception of people with criminal convic-

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<sup>228</sup> Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 622 (2008) (citing *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990)).

<sup>229</sup> *Ali v. Johnson*, 259 F.3d 317, 317–18 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”); see also *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973) (stating that “[t]he Thirteenth Amendment, if read literally, suggests that the States may treat their prisoners as slaves,” but noting that the Eighth and Fourteenth Amendments mitigate this harsh interpretation of the Thirteenth Amendment). But see *Robertson v. Baldwin*, 165 U.S. 275, 292 (1897) (Harlan, J., dissenting) (“[S]lavery cannot exist in any form within the United States. . . . As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the Constitution.”).

<sup>230</sup> Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, DAEDALUS, Summer 2010, at 20, 26, 27 (“[Incarceration] is increased in certain social contexts in ways that cannot be explained by crime.”). This pervasive, geolocated concentration of law enforcement and punishment mechanisms in certain neighborhoods is a formidable counter to suggestions that the arguments presented here elide or ignore how offenders’ own antisocial behavior leads to their convictions. The structural causes of mass conviction and incarceration have been articulated convincingly by William Stuntz, Michelle Alexander and others. See ALEXANDER, *supra* note 33; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 244–81 (2011).

<sup>231</sup> Pager et al., *supra* note 104, at 209.

<sup>232</sup> *Id.*

tions.<sup>233</sup> According to Pager, “[t]he effect of race in these findings is strikingly large.”<sup>234</sup> Only 14% of black men without criminal records were called back, a proportion equal to or less than even the number of whites *with* a criminal background.<sup>235</sup> In the housing market, there remain similar biases, both subtle and overt, against minorities.<sup>236</sup>

If employers’ or landlords’ conscious or unconscious bias conflates racial minority status with criminality, then criminality is an illegitimate marker for suitability for either employment or housing. Michelle Alexander, in *The New Jim Crow*, argues that the “war on drugs” has consecrated a second-class status for people of color, as demonstrated by their disproportionate numbers among those convicted and incarcerated for crimes involving drugs.<sup>237</sup> Alexander identifies a direct link between racial control mechanisms beginning with slavery and resulting in current trends of mass conviction and incarceration. This subordinate status is reinforced by public law collateral consequences, and perhaps more insidiously, by private exclusion from labor and housing markets.<sup>238</sup> These mechanisms, whether enshrined in law or custom, mimic characteristics of slavery and should have a remedy under the Thirteenth Amendment.<sup>239</sup>

This is especially true of those forms of exclusion used during slavery to subjugate blacks. As argued above, state and local law enshrining restrictions on movement were central to control and surveillance over slave conduct. The Alabama Slave Code of 1833, for example, forbade

<sup>233</sup> *Id.* at 200–01 (“Personal contact thus seems to play an important role in mediating the effects of criminal stigma in the hiring process.”).

<sup>234</sup> Pager, *supra* note 72, at 26.

<sup>235</sup> *Id.* at 26–27; *see also* Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92, 92–93, 110 (2010) (suggesting that individuals who have been incarcerated are more likely to be perceived as black, a characteristic associated “with negative traits.”).

<sup>236</sup> *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 96–109 (1993) (describing anti-black bias in urban housing markets that persists despite fair housing legislation); *id.* at 109 (concluding that “discrimination against blacks is widespread and continues at very high levels in urban housing markets”).

<sup>237</sup> *See* ALEXANDER, *supra* note 33, at 14; *see also* HUM. RTS. WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* Table 5 (2000), *available at* <http://www.hrw.org/reports/2000/usa/> (finding that, in three states and the District of Columbia, black men are incarcerated for drug crimes at rate 20 to 49 times that of white men).

<sup>238</sup> Sharon Dolovich has argued that exclusion and control are similarly central to, and detrimental for, American penal policy. *See* Dolovich, *supra* note 1, at 264 (“In some cases, exclusion and control may be an appropriate public policy tool. But four decades of the American experiment with mass incarceration have demonstrated that exclusion and control is more often than not an inadvisable policy response.”).

<sup>239</sup> *See* Carter, *supra* note 188, at 1317–18 (2007) (arguing that the greater the relationship challenged conduct affecting non-African-Americans has to conditions under antebellum racial slavery, the greater the claim to protections of the Thirteenth Amendment).

any slave from “go[ing] from the tenement of his master or other person with whom he lives, without a pass.”<sup>240</sup> Slaves found on plantations not belonging to their owners, “without leave in writing,” could be given “ten lashes or his or her bare back, for every such offence.”<sup>241</sup>

## VI. CONCLUSION

In addition to the public safety and racial justice benefits of encouraging stable housing and employment among offenders, there are also individual personhood benefits to market access. The availability of, and personal access to, property and markets is fundamental to modern notions of human engagement.<sup>242</sup> Akhil Amar has argued that market access is a necessary element of the Thirteenth Amendment’s promise: “[F]or one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence. Economic independence is necessary if the citizen is to be able to deliberate on the common good . . . .”<sup>243</sup> According to Amar, the Amendment should be construed “to guarantee each American a certain minimum stake in society.”<sup>244</sup> In effect, the terms of market relationships implicate the conditions of citizenship.<sup>245</sup>

In no areas are the pernicious effects of market exclusion as stark, or local efforts targeting this exclusion as deficient, as in labor and housing discrimination against convicted persons. The persistent subordination and market exclusion of convicted persons, and in some cases, non-convicted persons only *accused* of crimes, fosters not only the

<sup>240</sup> Alabama Slave Code § 5.

<sup>241</sup> *Id.* § 6.

<sup>242</sup> See, e.g., RALPH C. CLONTZ, JR., EQUAL CREDIT OPPORTUNITY MANUAL 1–3, ¶ 1.02[1] (3d ed., 1979) (“The ability to obtain credit has become . . . the threshold to participation as a full-fledged member of society.”).

<sup>243</sup> Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38 (1990).

<sup>244</sup> *Id.* at 40; see also Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 984 (2002) (arguing that the Thirteenth Amendment “promote[s] economic independence and social mobility”).

<sup>245</sup> See EDWARD J. BLAKELY, PLANNING LOCAL ECONOMIC DEVELOPMENT 2 (2d ed. 1994) (“The promise of a job and economic security are the hallmarks of citizenship.”); see also LLOYD KLEIN, IT’S ALL IN THE CARDS: CONSUMER CREDIT AND THE AMERICAN EXPERIENCE 8 (1999) (“Consumer credit functions as a credentialing device that legitimates status attainment . . . .”). Entrepreneurs are also likely to be involved in civic and political activities. See, e.g., Andrzej Rychard, *Entrepreneurs, Consumers and Civility: The Case of Poland*, in MARKETS AND CIVIL SOCIETY: THE EUROPEAN EXPERIENCE IN COMPARATIVE PERSPECTIVE (Victor Perez Diaz ed., 2009); Daniel J. Monti, Jr., et al., *Civic Capitalism: Entrepreneurs, Their Ventures and Communities*, 12 J. DEV. ENTREPRENEURSHIP 353 (2007); Charles M. Tolbert, et al., *Civic Community in Small-Town America: How Civic Welfare Is Influenced by Local Capitalism and Civic Engagement*, 67 RURAL SOC. 90 (2002).

public law “civil death” theorized by Gabriel “Jack” Chin,<sup>246</sup> but also cultivates the imposition of a form of “social death” or societal exclusion, invisibility, and subordination.<sup>247</sup> The text and history of the Thirteenth Amendment suggests its salience for a variety of anti-subordinative initiatives, including social death occasioned by labor and housing market exclusion.<sup>248</sup>

In the absence of a commitment to anti-subordination principles, affirmative efforts under law to curb arbitrary discrimination against the growing masses of people with criminal arrests or convictions (and other societally-disfavored groups) may never realize their “full promise as a means of disrupting the perpetuation of disadvantaged classes.”<sup>249</sup> Congress has the tools to ensure that such practices do not serve illegitimate interests—including, *inter alia*, stigmatization, punishment, and racial or ethnic bias (whether implicit or explicit)—and that such practices do not precipitate widespread public safety issues. The aspirations and letter of the Thirteenth Amendment offer a possible way through.

<sup>246</sup> See Chin, *supra* note 29, at 1790 (arguing that persons convicted of crimes suffer “civil death” in the form of collateral consequences).

<sup>247</sup> While distinct in its manifestations, this form of social death approximating slavery is normatively no less an affront to human dignity and justice and no less deserving of sustained attention than other subordinative practices which have, in recent years, garnered considerable remedies under domestic and international law.

<sup>248</sup> See PATTERSON, *supra* note 36, at 45–51. Patterson examined the practice and culture of slavery in 66 distinct slave societies throughout premodern and modern human history. While not exhaustive, Patterson’s typology is unparalleled in its exposition of dominant features presenting across multiple slave societies. Among those, the primary characteristic of the slave—liminality—is also one that is implicated by housing and job discrimination against convicted persons. Liminality is systematic, institutionalized marginality: In this iteration, such marginality dominates the phase immediately following conviction, and can extend for the life of the offender, irrespective of the sentence, as noted above. See Geneva Brown, Issue Brief, *The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, AM. CONST. SOC’Y FOR LAW & POL’Y 7, 14 (2010), <http://www.acslaw.org/sites/default/files/Brown%20issue%20brief%20-%20Intersectionality.pdf> (“Drug offender status laws further stigmatize a population seeking to participate in society, and often leave little to no legitimate means for reintegration.”). For persons who have been convicted of crimes, this form of marginality can be geographic, spatial, political, or psychological. Geographic and spatial liminality affects all offenders. See discussion *supra* Part III. Housing insecurity segregates convicted persons into “neighborhoods characterized by criminogenic conditions—conditions that increase their likelihood of becoming ensnared in the criminal justice system.” George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1749 (2012). See generally Todd R. Clear et al., *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335 (2001) (examining spatial impact of incarceration and exploring problems associated with removing and returning offenders to communities suffering from high rates of incarceration). In Patterson’s typology, liminality renders the convict “socially dead” and remakes her in ways similar to that of the slave.

<sup>249</sup> Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 568 (2012).

The Amendment's remedial promise has yet to be fully realized, and legal scholars have a critical role to play in advocating for its salience before Congress and the courts.<sup>250</sup> The anti-subordination principles explicit in the Amendment's text and its history can inform more robust efforts to "disrupt" the disadvantages targeted in offender anti-discrimination initiatives such as "ban the box" and other similar measures.

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<sup>250</sup> See James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 190 (2011) ("To put the point positively, scholars may have a crucial role to play in puzzling out these unfamiliar and difficult questions, so as to unblock the development of Thirteenth Amendment jurisprudence.").