Faculty Scholarship

Winter 1-2018

Unmarked: Criminal Record Clearing and Employment Outcomes Criminal Law/Criminology

Jeffrey Selbin
Berkeley Law

Justin McCrary
Berkeley Law

Joshua Epstein

CRIMINAL LAW/CRIMINOLOGY

UNMARKED? CRIMINAL RECORD CLEARING AND EMPLOYMENT OUTCOMES

JEFFREY SELBIN
JUSTIN MCCRARY
JOSHUA EPSTEIN*

An estimated one in three American adults has a criminal record. While some records are for serious offenses, most are for arrests or relatively low-level misdemeanors. In an era of heightened security concerns, easily available data, and increased criminal background checks, these records act as a substantial barrier to gainful employment and other opportunities. Harvard sociologist Devah Pager describes people with criminal records as "marked" with a negative job credential.

In response to this problem, lawyers have launched unmarking programs to help people take advantage of legal record clearing remedies. We studied a random sample of participants in one such program to analyze the impact of the record clearing intervention on employment outcomes. Using methods to control for selection bias and the effects of changes in the economy in our data, we found evidence that: (1) the record clearing intervention boosted participants' employment rates and average real earnings, and (2) people sought record clearing remedies after a period of

---

suppressed earnings.

More research needs to be done to understand the durability of the positive impact and its effects in different local settings and labor markets, but these findings suggest that the record clearing intervention makes a meaningful difference in employment outcomes for people with criminal records. The findings also suggest the importance of early intervention to increase employment opportunities for people with criminal records. Such interventions might include more legal services, but they might also include record clearing by operation of law or another mechanism that does not put the onus of unmarking on the person with a criminal record.

INTRODUCTION

The United States has the highest rate of incarceration in the developed world.[1] Almost seven million Americans are in prison or under correctional supervision.[2] People of color in general and African-Americans in particular are grossly overrepresented in the prison population.[3] Mass incarceration is widely viewed as discriminatory, costly, and inhumane, and facilitating the reentry of people released from prison has become a bipartisan concern.[4]

Mass incarceration and reentry, however, are only the tip of the criminal justice iceberg, obscuring the underlying and broader phenomenon of mass criminalization.[5] The FBI reports that almost 74 million people, or nearly

---

[1] ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2 (11th ed. 2016) (finding that the prison population rate in the United States at the end of 2015—698 per 100,000—was lower only than that of the East African archipelago of Seychelles).

[2] Danielle Kaeble et al., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 1 (2016), http://www.bjs.gov/content/pub/pdf/cpus14.pdf.

[3] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, at 1 (2015), http://www.bjs.gov/content/pub/pdf/p14_Summary.pdf ("Black men had the highest imprisonment rate in every age group and were in state or federal facilities 3.8 to 10.5 times more often than white men and 1.4 to 3.1 times more often than Hispanic men . . . [B]lack females were between 1.6 and 4.1 times more likely to be imprisoned than white females across all age groups.").

[4] *See, e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010) (signed by President Obama to reduce the racially-driven disparity in the sentencing of crack and cocaine related offenses); Second Chance Act of 2007, Pub. L. No. 110–199, 122 Stat. 657 (2007) (signed by President Bush to provide grants to organizations facilitating prison reentry); U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4–5 (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf (recommending reform of the criminal justice system through conservation of prosecutorial and law enforcement resources for the most serious crimes, sentencing reform, alternatives to incarceration, and support of reentry initiatives to reduce recidivism). *But see* Perry Bacon, Jr., *Are Bipartisan Efforts on Criminal Justice Reform at an Impasse?*, NBC NEWS (June 6, 2016), http://www.nbcnews.com/meet-the-press/are-bipartisan-efforts-criminal-justice-reform-impasse-n584921 (arguing that bipartisan criminal justice reform efforts have stalled). The mass incarceration phenomenon was popularized with the publication of MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

[5] Mass criminalization has received renewed attention recently. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1056–69 (2015) (noting that, while many jurisdictions are shortening drug sentences and closing prisons, people convicted of nonjailable misdemeanors still often face more discrete punitive measures such as probation,

one-third of American adults, have a criminal record, mostly for arrests not leading to a conviction and misdemeanors.[6] Evidence suggests that by the age of twenty-three, almost one-half of all African-American and Latino men, more than one-third of white men, and almost one in eight women have been arrested.[7]

Maintained in court files or as records of arrests and prosecutions ("RAP sheets") in state and federal repositories, criminal records create collateral consequences that often serve as lifelong obstacles to a range of benefits and opportunities.[8] Harvard sociologist Devah Pager and others have documented the particularly harmful effect of criminal records on employment outcomes.[9] Although the specific labor market effects vary across demographic groups and by sectors of the economy, people with criminal records of any kind experience lower employment rates and earnings than people without such records. According to Pager, criminal records "mark" their owners with a negative job credential.[10]

Because criminal records can exist indefinitely, employment barriers

---

fines, criminal records, and collateral consequences); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325 (2015). But overcriminalization and its harmful effects are not new concepts and concerns. *See* Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 157 (1967) (arguing that "[t]he use of criminal law to enforce morals, to provide social services, and to avoid legal restraints on law enforcement, to take just three examples, has tended both to be inefficient and to produce grave handicaps for enforcement of the criminal law against genuinely threatening conduct."); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712 (2005) (describing overcriminalization as a socio-political phenomenon).

[6] FED. BUREAU OF INVESTIGATION, NEXT GENERATION IDENTIFICATION MONTHLY FACT SHEET, AUGUST 2017 MONTHLY STATISTICS (2017), https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view (showing that, as of the date of the fact sheet, there were 73, 796, 661 unique criminal records in the database).

[7] Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 476 (2014).

[8] *See generally* Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 NAT'L INST. JUST. J. 25 (Sept. 2013), https://www.ncjrs.gov/pdffiles1/nij/241927.pdf.

[9] *See, e.g.*, DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 17 (2007); Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions on Screening Practices: Evidence from Los Angeles, in* BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 117, 122 (Shawn Bushway et al. eds., 2007); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 299–300 (2011).

[10] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942 (2003). Pager's audit study also found striking disparities in treatment by race. African-Americans with and without criminal records fared much worse in receiving employment callbacks than their white counterparts. "In fact, even whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%)." *Id.* at 958.

can last a lifetime. NYU law professor James Jacobs calls this phenomenon "the eternal criminal record."[11] Further, public access to such records is a uniquely American phenomenon. European countries maintain criminal records, but court files and data in official public repositories are treated as highly personal. Criminal records can only be released to the person with the record, or to the police, prosecutors, or judges, and under limited circumstances.[12] The United States is even more exceptional in making arrest records publicly available.[13]

Policymakers have responded to the durability and accessibility of criminal records with strategies to reduce their collateral consequences, especially their negative impact on employment outcomes. States are updating and expanding a variety of record clearing remedies that mostly predate the modern era in which such records have become ubiquitous and consequential.[14] Some jurisdictions have begun to limit the use of criminal records by employers in the hiring process. Though employers may still conduct criminal background checks toward the end of the hiring process, so-called "ban-the-box" policies typically forbid employers from asking about criminal history in the early stages, including on the job application and during initial interviews.[15]

---

[11] JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 4 (2015).

[12] *Id.* at 159; *see also* James Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 142–43 (2008) (explaining that European prison and probation services, along with customs offices, will often have access to criminal record information and that some European Union countries require the person with a criminal record to provide a reason for requesting access to it—e.g., a desire to obtain a hunting permit or verify the accuracy of what is in the record).

[13] *See* Jacobs & Blitsa, *supra* note 12, at 160, 194–208 (noting that no other country makes such records available and that the U.S. approach "is dictated by the First Amendment and by constitutional, political, and cultural commitment to governmental, especially judicial, transparency").

[14] RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014, at 23 (2014), http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf (describing how twenty-two states and the District of Columbia enacted such laws between 2009 and 2014).

[15] *See* NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 18 (Jan. 12, 2015), https://fas.org/sgp/crs/misc/RL34287.pdf (describing federal efforts to incentivize hiring of people with records, which include the Work Opportunity Tax Credits Program and the Federal Bonding Program); BETH AVERY & PHIL HERNANDEZ, NAT'L EMP. LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE HIRING POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (Aug. 2017), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf. The federal government and several state governments, including California, now offer tax breaks to companies that hire people with criminal records. *See, e.g.,* Cal. Rev. & Tax.

Lawyers have responded to the criminal records problem by establishing programs to help people obtain record clearing remedies.[16] Such remedies are generally available to people with records of arrests or relatively minor infractions, misdemeanors, and low-level felonies.[17] The goal of record clearing programs is to provide clients with a "clean slate" when seeking employment, licensing, promotions, and other opportunities.[18] The promise of the record clearing intervention is that it will help people with criminal records gain access to more and better jobs, which in turn will reduce social and economic hardship for individuals, families, and society.

While it is clear that people with criminal records face significant labor market barriers, we are just beginning to understand if, how, and for whom interventions such as ban-the-box policies and criminal record clearing improve employment outcomes. In fact, recent evidence suggests that the impact of ban-the-box policies may be mixed. In the absence of screening job applicants based on criminal records, researchers have found that employers may engage in so-called "statistical discrimination," disfavoring minority job applicants relative to white applicants.[19] These findings remind us that interventions can have uncertain and unintended consequences.[20]

Code § 17053.34 (2012) (providing that a qualifying employer who hires a person with a criminal record may claim a tax credit).

[16] *See infra* Section II.

[17] *See* Margaret Love, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CTR., (Mar. 9, 2017), http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey/ (providing an overview of record clearing remedies nationwide).

[18] REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU'RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 34 (Dec. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf.

[19] *See generally* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, MICH. L. & ECON. RES. PAPER SERIES (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795 (a study of employment callback rates in New York and New Jersey before and after enactment of ban-the-box policies; while such rates did increase for African-American applicants after enactment, they increased at a higher rate for white applicants, suggesting employers were discriminating against African-American applicants in the absence of being able to use criminal records as a screening mechanism); Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (Jan. 2017), *available at* https://ssrn.com/abstract=2812811 (finding that ban-the-box policies decrease the probability of being employed by 5.1% for young, low-skilled African-American men, and by 2.9% for young, low-skilled Hispanic men, supporting the hypothesis that employers statistically discriminate against certain demographic groups when applicants' criminal history is unavailable).

[20] The authors of a leading ban-the-box study acknowledge that their research does not necessarily answer questions about the effect of the intervention on actual employment

Lawyers have developed criminal record clearing programs under the assumption that unmarking reduces barriers to employment for people with criminal records, but we actually know very little about the relationship between record clearing and employment outcomes.[21] It is unlikely that employers make hiring decisions based solely on the presence of a criminal record, independent of other considerations. In addition, a criminal record may interact simultaneously or synergistically with a host of other characteristics that can impact employment opportunities and outcomes, such as race, education, and work history.[22]

To begin to answer whether the record clearing intervention improves employment outcomes for people with criminal records, we conducted a retrospective timeframe study of a random sample of several hundred clients who received legal assistance from the East Bay Community Law Center's Clean Slate Clinic in Alameda County (Oakland), California. We gathered and analyzed clients' employment rates and average real earnings reported to the Social Security Administration before and after assistance by the clinic. By doing this with four cohorts of clients over time, we in effect created treatment groups (those who received the record clearing intervention) and control groups (those who had yet to receive the intervention), which allows us to say something meaningful about employment outcomes related to the intervention.

---

outcomes. *See* Agan & Starr, *supra* note 19, at 32. Their research focuses on initial employer responses in scheduling callbacks, not on applicants getting a job. *Id.* The National Employment Law Project and other ban-the-box advocates have criticized those who invoke the findings of the Agan and Starr study to call for the repeal of ban-the-box. *Id. See also* BETH AVERY & MAURICE EMSELLEM, THE NAT'L EMP. L. PROJECT, RACIAL PROFILING IN HIRING: A CRITIQUE OF NEW "BAN THE BOX" STUDIES (Aug. 11, 2016), *available at* http://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies (arguing that the central problem illuminated by critiques of the ban-the-box policy is not the policy itself but the tendency to associate blackness with criminality in the hiring process and arguing further that ban-the-box is working by increasing employment opportunities for people with records while changing the attitudes of employers).

[21] Our study is part of a nascent empirical literature assessing the relationship between record clearing and employment outcomes. The closest analog we are aware of is Charles E. Loeffler et al., *Estimating the Labor Market Effects of the Criminal Record Expungement and Sealing* (Nov. 2015) (unpublished manuscript on file with the authors) (examining a large cohort of clients screened by a legal aid office and comparing eligible and ineligible applicants to identify a short-term improvement in employment probabilities based on statewide Unemployment Insurance wage data). We are aware of at least two record clearing programs that have undergone quantitative evaluations. *See infra* note 182.

[22] In the ban-the-box context, as noted above, recent studies have demonstrated the relationship between employment strategies and racial discrimination. *See supra* notes 19 and 20 and accompanying text. One research team found, however, that education (a GED) and employment history (job gap) did not have a significant impact on job callbacks. *See* Agan & Starr, *supra* note 19, at 28.

While there are limits to our data and method, we can report at least two important findings about the relationship between the record clearing intervention and employment outcomes:

First, the record clearing intervention appeared to boost both average employment rates and average earnings. Average employment rates grew in the years after the intervention from roughly 75% to 80%-85%. For reasons that are not clear, employment rates declined slightly three years after the intervention, though they were still above baseline rates. Average real earnings increased slightly during the first year of the intervention and rose rapidly thereafter—within three years of participation, earnings grew from $4,000 below baseline to nearly $2,000 above baseline, a significant magnitude ($6,000) equal to roughly one-third of total average earnings.

Second, participants sought the record clearing remedy after a period of suppressed earnings, in spite of relatively active and stable employment rates.[23] Their formal incomes were very low from the outset, averaging less than 40% of earnings among local residents. In the wake of the early 2000s recession, participants' average annual earnings fell from roughly $20,000 to $18,000.[24] Average earnings increased to over $22,000 leading up to the great recession but plummeted to just over $14,000 in 2009. This precipitous drop during the great recession was much more rapid and sharp for those with criminal records than for all local residents, likely as a result of the fragile labor market for people with criminal records. When controlling for other factors, participants' average real earnings are about 20 percent ($4,000) below their baseline earnings ($18,000) prior to seeking record clearing.

Such evidence supports arguments for expanding the availability of the intervention. The record clearing intervention might be even more impactful if it were available sooner to help prevent declining earnings and more effective if it were available by operation of law or another mechanism that did not put the burden of unmarking on the person with a criminal record. These relatively simple approaches—more programs, earlier intervention, and automatic clearing—could increase the number of people availing themselves of remedies that reduce the negative employment consequences of criminal records.

In Part I of this Article, we describe the criminal records problem in the United States, where tens of millions of people have relatively minor records that serve as a barrier to employment and other opportunities. In Part II, we describe the record clearing intervention, which is designed to overcome the barriers described in Part I. In Part III, we profile the East Bay Community

---

[23] This phenomenon is consistent with the literature on job training programs, which we discuss in more detail below. *See infra* note 248 and accompanying text.

[24] All figures are in 2015 dollars.

Law Center's Clean Slate Clinic, a record clearing program that served as the site of inquiry for this study. In Part IV, we explain our study methods to measure the impact of the record clearing intervention on employment outcomes. In Part V, we detail our findings and consider their implications for policy and research.

I. MARKING: THE CRIMINAL RECORDS PROBLEM

The criminal records problem in the United States is the product of several converging trends in recent decades. Federal and state policies fueled a dramatic increase in civilian encounters with law enforcement, which disproportionately impacted communities of color.[25]   Records of these encounters have become easily accessible due to the vast information-sharing infrastructure made possible by the internet and facilitated by permissive state and federal laws. Further, the 9/11 terrorist attacks and ensuing security fears increased the demand for publicly available criminal records.[26]

Although criminal records take many forms, our study is concerned primarily with those maintained in courthouses, which form the basis for RAP sheets stored in state and federal repositories.[27] Easy access to such criminal record information is a uniquely American phenomenon that enables discrimination and imposes hardship on people with criminal records in almost every sector of society.[28] Barriers to employment for people with criminal records are particularly high, as background checks have become a routine and often dispositive feature of the job application process.[29] These obstacles serve as an ongoing form of punishment for people with criminal records.

In this Part, we explore the factors that contributed to the criminal records problem, the collateral consequences of criminal records, and the special employment challenges facing people with criminal records.

A. MASS CRIMINALIZATION AND RECORDS

Since the mid-1960s, tens of millions of people have been arrested and

---

[25]   *See* JACOBS, *supra* note 11, at 2 (explaining that the war on drugs and adoption of zero tolerance and broken windows approaches to crime management disproportionately impacted African-Americans—in some cities, as many as 80% of young African-American men have a record).

[26]   *Id.* at 6 (highlighting how Congress responded to the 9/11 terrorist attacks by passing laws subjecting around one million workers to background checks).

[27]   *Id.* at 11 (describing the myriad forms of criminal records in addition to court records and RAP sheets, including criminal intelligence databases, police blotters, presentence reports, prosecutors' files, probation files, and jail and prison databases).

[28]   *Id.* at 5 (describing American exceptionalism regarding access to criminal records).

[29]   *See infra* notes 77–85 and accompanying text.

prosecuted for relatively low-level offenses.[30]   This surge in civilian encounters with the criminal justice system is attributable at least in part to changes in state and federal policy rather than an increase in criminal behavior.[31] In the wake of President Johnson's "war against crime,"[32] local law enforcement agencies swelled with federal Law Enforcement Assistance Administration grant money,[33] which critics argued was used to militarize the police.[34] These grants grew from $300 million in 1968 to $1.25 billion in 1974.[35]

Federal and state financial support of law enforcement continued to pour in under President Reagan's implementation of the racially charged "war on drugs" and prevailing "tough on crime" political attitudes.[36] In 1981,

---

[30]   *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (Apr. 2009), *available at* https://www.nacdl.org/reports/misdemeanor (estimating that between 1972 and 2006, the number of annual non-traffic related misdemeanor prosecutions rose from 5 million to 10.5 million); Robert LaFountain et al., NAT'L CTR. FOR ST. CTS. *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 24 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/ CSP_DEC.ashx (revealing that in 2010, 77.8% of all cases in seventeen state courts systems were misdemeanors); Natapoff, *supra* note 5, at 1057 (estimating that 10 million misdemeanor cases are filed annually in the United States, representing about 80% of state dockets); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (describing how the criminal justice system has remained busy by targeting petty misdemeanor offenses even as rates of serious crimes declined over the last two decades).

[31]   *See* Stephen Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, *in* DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 65 (Stephen Raphael & Michael A. Stoll eds., 2008); HUMAN RIGHTS WATCH, *The Role of Violent Crime in U.S. Incarceration Rates* (May 2000), https://www.hrw.org/legacy/reports/2000/usa/ Rcedrg00-02.htm#TopOfPage. *But see* ALEXANDER, *supra* note 4, at 41 (acknowledging rising crime rates in the 1960s).

[32]   *See, e.g.*, Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), http://time.com/3746059/war-on-crime-history/.

[33]   The Omnibus Crime Control and Safe Streets Act of 1968 created the Law Enforcement Assistance Administration and made it the conduit for grants that facilitated officer recruitment, training, and equipment purchases. *See* The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197 (1968).

[34]   MALCOLM FEELEY & AUSTIN SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968–1978 137 (1980) (describing how liberal critics of the Nixon administration viewed the purchase of anti-riot and military grade gear as an attempt to subdue legitimate anti-war and civil rights protests). *But see id.* at 137–38 (observing that local expenditures of grant money veered away from equipment and police forces in the late 1970s).

[35]   Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13 (1999). LEAA grants surged, but they were still a relatively small fraction of overall police budgets. During the same time that the number of officers increased, so did violent and property crime.

[36]   *See* PAGER, *supra* note 9, at 18 (explaining that a discourse that placed the blame for crime on the moral failings of the individual, rather than on society, helped drive the rise of

President Reagan signed into law the Military Cooperation with Law Enforcement Act, which granted police forces access to military weaponry and intelligence in exchange for a promise to prioritize drug law enforcement.[37] The Byrne grant program enticed the same commitment from local police forces through millions of dollars in federal aid.[38] In some instances, federal funding was directly tied to arrest rates, fueling an increase in apprehensions.[39]

These changes to federal and state funding for law enforcement coincided with an overhaul of penal laws.[40] The federal Sentencing Reform Act of 1984 rejected judicial discretion in favor of mandatory minimum sentences for crimes that were previously punished with community service and supervision,[41] and state legislatures followed suit.[42] State and federal penal codes also expanded to include new crimes as lawmakers sought to assuage public fears of epidemic crime.[43] As a result of increased policing,

---

tough on crime politics); *see also* Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough On Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 1, 3, 16–19 (2013).

[37] Military Cooperation with Law Enforcement Act Pub. L. No. 97–86, 95 Stat. 1099 (1981); ALEXANDER, *supra* note 4, at 77.

[38] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1968) (authorizing the Byrne Grant Program); ALEXANDER, *supra* note 4, at 77; *see also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42 (1998) (explaining that the Byrne program became the conduit for federal aid to local law enforcement after the Law Enforcement Assistance Administration expired in 1982; federal funds under Byrne had to go towards waging the Drug War, unlike grants under the LEAA).

[39] *See* ALEXANDER, *supra* note 4, at 77 (summarizing a 2001 report in Wisconsin that found that the extent of federal funds for local law enforcement was positively correlated with the number of drug arrests); *id.* at 78–79 (describing the Comprehensive Drug Abuse Prevention Control Act of 1970 as the origin of modern drug forfeiture laws and explaining that paramilitary drug raids increased from about 300 in 1972 to 3,000 in 1980); RODNEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 221–22 (2013). Lax drug forfeiture laws encouraged police departments to keep the spoils of increasingly frequent drug raids.

[40] *See* JEREMY TRAVIS, BUT THEY ALL COME BACK 22 (2005) (explaining how electoral politics shaped crime policy in the aftermath of urban riots and protests, resulting in the collapse of discretionary sentencing).

[41] MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 1:5 (2016). The introduction to the Sentencing Guidelines predicted that the guidelines would apply to 90% of federal criminal cases, although the ultimate goal was to cover all of them. *See* U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 1.5 (1987). *But see* Stanley Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 97 (1988) (explaining that the guidelines were quickly amended to exclude class B and C misdemeanors).

[42] Mauer, *supra* note 35, at 11.

[43] *See* THE SMART ON CRIME COAL., THE CONSTITUTION PROJECT, SMART ON CRIME: RECOMMENDATIONS   FOR   THE   ADMINISTRATION   AND   CONGRESS   2   (2011),

harsher punishments, and expanded crimes, more people than ever came into contact with the criminal justice system, often for relatively minor offenses.

The newly expansive reach of the criminal justice system and subsequent increase in the number of people with criminal records was accompanied by an equally dramatic transformation in the availability of criminal history information. Technological developments—such as the replacement of manual record keeping with more automated court and criminal justice systems—have enabled unprecedented access to and dissemination of criminal records.[44] Perhaps most importantly, the Internet has greatly increased the ease of a criminal record check, replacing a trip to the courthouse in some states with a cursory online search.[45]

Technological advances might have had little impact on the availability of criminal records without developments in state and federal law that have facilitated organization of and public access to massive quantities of criminal record data. In 1967, President Johnson's Commission on Law Enforcement and Administration of Justice made the case for an efficient nationwide system for sharing criminal history information.[46] Because such a system would be defined by the information it received from the states, the Department of Justice issued regulations in the mid-1970s requiring states to

---

https://constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf (documenting the expansion of the federal criminal code); Mauer, *supra* note 35, at 15 (elucidating the relationship between the media's sensationalistic coverage of crime and public support for harsh penal policy); Roberts, *supra* note 30, at 1090 (noting the growth in misdemeanor crimes); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 532 (2001) (describing how the public's perception of increasing criminality can trigger lawmakers to add new crimes to penal codes in an effort to comfort voters).

[44] NAT'L CONSORTIUM FOR JUST. INFO. & STAT., REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 29 (2005), http://www.search.org/files/pdf/RNTFCSCJRI.pdf.

[45] The internet also provides a forum for advertising commercial background check services, augmenting awareness of their availability. *Id.* at 14. Note that in some states, including California, background check companies are still required to review records in person at the courthouse. *See* CAL. CIV. CODE § 1786.18(c) (West 2002) (requiring background check companies to verify the accuracy of arrest, indictment, and conviction records prior to producing a report about those records); *id.* at § 1786.28(a) (requiring background check companies transmitting criminal record information to indicate the source of the information—which may be a court—and the date it was publicized); *id.* at § 1786.28(b) (requiring background check companies that are furnishing criminal record information to a prospective employer to maintain procedures designed to ensure that the information that the companies provide is current).

[46] JACOBS, *supra* note 11, at 40 (describing how this push for a nationwide system resulted in a national RAP sheet system called the Interstate Identification Index, which allows a law enforcement officer anywhere in the country to check, almost instantaneously, whether a suspect has a criminal record in any jurisdiction).

maintain accurate and complete criminal records.[47]

States responded by establishing central repositories for criminal record storage and adopting their own laws concerning dissemination of such information.[48] These laws occupy a spectrum ranging from laxity (allowing disclosure of every non-expunged record on file) to strict regulation (limiting public disclosure to adult conviction data that are less than ten years old).[49] Notably, however, these restrictions apply only to the criminal records housed in state repositories. They do not apply to criminal records in the courthouses themselves, which historically have been open for constitutional and policy reasons.[50] Today, court records in forty-eight states are easily accessible online.[51]

If state and federal law enforcement policies and priorities increased the number of people with criminal records, and law and technology expanded ease of access to such records, post-9/11 security fears increased the demand for records.[52] In the wake of the 2001 attacks, Congress passed laws requiring background checks on truck drivers transporting hazardous materials (the Patriot Act),[53] workers with access to secure portions of the airport (the Aviation and Transportation Security Act),[54] and people who work with biological agents.[55] Private employers turned to background check companies more frequently after the attacks, adding security fears to the list of business justifications for conducting the checks.[56]

---

[47] *See* 28 C.F.R. § 20.21(a) (1976).

[48] NAT'L CONSORTIUM FOR JUST. INFO. & STAT., *supra* note 44, at 38 (describing how the DOJ regulations gave states the freedom to develop their own laws).

[49] *Id.* at 40.

[50] Policy reasons include maintenance of the public's trust in the integrity of the judicial system and insulation from attempts to usurp the courts for private purposes. *See id.* at 45; *see also* Richmond Newspapers, Inc. v. Virginia., 448 U.S. 555, 580 (1980) (holding that there is a First Amendment right of access to criminal trials.

[51] *Privacy/Public Access to Court Records: State Links*, NAT. CTR. FOR ST. CTS., http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx (last visited May 16, 2016) (providing a list of forty-eight states plus the federal government that offer online links to court records).

[52] NAT'L CONSORTIUM FOR JUST. INFO. & STAT., *supra* note 44, at 1.

[53] *See* 49 U.S.C. § 5103a (2001). At the time of its passage, the law subjected an estimated 3.5 million employees to background checks. Ruth Graham, *How Criminal Records Hold Americans Back*, BOS. GLOBE (Mar. 8, 2015), https://www.bostonglobe.com/ideas/2015/03/08/how-criminal-records-hold-americans-back/bFnOmPhZKeimlafcPU5mmI/story.html.

[54] 49 U.S.C. § 5103a(d) (2001); *id.* at § 114(f)(12).

[55] Public Health Security & Bioterrorism Preparedness & Response Act of 2002, Pub. L. 107–188, 116 Stat. 594 (2002).

[56] For example, two days after 9/11, Empire International spent $40,000 on background checks for its 500 drivers; within a week of the attacks, Comforce Corporation ordered background checks on all employees in the information technology or internet security divisions. Eve Tahmincioglu, *Tense Employers Step Up Background Checks*, N.Y. TIMES (Oct.

Background check companies benefited from heightened security concerns. ChoicePoint, for example, reported a 30% increase in business from security firms immediately after 9/11, and HireCheck reported a 25% increase in business overall.[57] Background check companies registered surging revenue associated with employee screening even as hiring faltered in the economy overall.[58] In the post-9/11 era of heightened security, new safety worries fueled expansion in an already growing criminal record information industry.[59]

B. COLLATERAL CONSEQUENCES OF CRIMINAL RECORDS

Taken together, aggressive criminalization, advanced technology, a permissive legal framework, and heightened security concerns have left a huge number of Americans marked by criminal records. According to the Federal Bureau of Investigation, approximately 74 million Americans, or almost one of every three adults, have files in the nation's master criminal database.[60] The FBI adds 10,000 to 12,000 new names every day.[61] As of its most recent report on the issue, the U.S. Department of Justice identified more than 105 million people with state criminal record files, including more than 100 million records that are automated, although individuals may have records in more than one state.[62]

While arrest and prosecution records are widespread across the adult population, mass criminalization is heavily racialized. By the age of twenty-three, almost half of all African-American men (49%) and Latino men (44%) have been arrested.[63] In San Francisco in 2013, 45.5% of all females arrested were African-American even though they made up only 5.8% of the total

---

3, 2001), http://www.nytimes.com/2001/10/03/business/management-tense-employers-step-up-background-checks.html. *See also* NAT'L CONSORTIUM FOR JUST. INFO. & STAT., *supra* note 44, at 35 (explaining that businesses often point to their bottom line to justify background checks, emphasizing the cost of negligent hiring lawsuits, wasted training resources due to recidivism-related employee turnover, and employee theft).

[57]   Tahmincioglu, *supra* note 56.

[58]   NAT'L CONSORTIUM FOR JUST. INFO. & STAT., *supra* note 44, at 32.

[59]   Tahmincioglu, *supra* note 56 (describing the pre-9/11 growth in criminal background checks due to employers' efforts to decrease liability associated with negligent hiring law-suits).

[60]   FED. BUREAU OF INVESTIGATION, *supra* note 6, at 1.

[61]   Gary Fields & John Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402.

[62]   *See* U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014: A CRIMINAL JUSTICE INFORMATION POLICY REPORT 2 (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf.

[63]   Brame et al., *supra* note 7.

female population.[64]   These disparities exist even when controlling for underlying criminal activity,[65] so people of color are overrepresented among those who are forced to navigate the increasingly intricate web of consequences associated with a criminal record.

The consequences flowing from a criminal record extend beyond any court-ordered punishment.   These indirect consequences of an arrest or prosecution are labeled "collateral," and they are so myriad that Congress tasked the National Institute of Justice with cataloging them in a nationwide inventory.[66] Across the nation, according to inventory estimates, people with criminal records are subjected to roughly 45,000 sanctions, disabilities, disqualifications, or other negative consequences.[67]   This total does not provide a complete picture because private actors such as landlords and employers can discriminate against people with criminal records even in the absence of any state-promulgated law or rule.[68]

Significantly, collateral consequences attach not only to felonies, but also to misdemeanors, which comprise roughly 80% of state court criminal dockets.[69] California law, for example, includes at least ninety mandatory

---

[64]   MICHAEL MALES, CTR. ON JUV. & CRIM. JUST., SAN FRANCISCO'S DISPROPORTIONATE ARREST OF AFRICAN AMERICAN WOMEN PERSISTS 1 (2015), http://www.cjcj.org/uploads/cjcj/documents/disproportionate_arrests_in_san_francisco.pdf.

[65]   For example, despite similar rates of marijuana use, African-Americans were almost four times as likely as whites to be arrested for possession of marijuana between 2001 and 2010. EZEKIEL EDWARDS ET AL., AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

[66]   *See Project Description*, JUSTICE CTR.: THE COUNCIL OF ST. GOV'TS, http://www.abacollateralconsequences.org/description/#fn1 (last visited May 17, 2016) (describing how a provision of the Court Security Improvement Act of 2007 directed the National Institute of Justice to create the inventory [Public Law 110–177, Jan. 7, 2008]; the American Bar Association ended up winning the contract).

[67]   *Nat'l Inventory of the Collateral Consequences of Conviction*, JUSTICE CTR: THE COUNCIL OF ST. GOV'TS, http://www.abacollateralconsequences.org (last visited Sept. 12, 2017); *see also* LOVE ET AL., *supra* note 41, at § 1:2 (the introduction to the leading treatise on collateral consequences).

[68] The Equal Employment Opportunity Commission warned in 2012 that such discrimination in the employment setting, even when applied consistently against all people with records, may be illegal under Title VII of the Civil Rights Act of 1964 given the extreme likelihood of a disparate impact on racial minorities. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I; *see also* David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 12 (2008) (roughly four of every five landlords in the private market use background checks to screen prospective tenants).

[69]   Natapoff, *supra* note 5, at 1057; *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 108 (2012) (estimating that in California, misdemeanors comprise 75 to

and 382 discretionary consequences associated with misdemeanor convictions.[70] In California, a misdemeanor conviction can lead to job loss, disqualification from unemployment insurance,[71] revocation of the right to bear arms,[72] and disqualification from serving as an alternative caregiver to a child.[73] A misdemeanor drug offense like simple possession can make a student ineligible for federal loans.[74]

The consequences associated with misdemeanor convictions must be considered in light of the high volume of such cases moving through the criminal justice system and attendant concerns about due process. Ninety-five percent of misdemeanor convictions are the result of people who have pleaded guilty, often after speaking with a public defender for a few minutes, or in some cases, not at all.[75] With dockets overflowing, lower courts fail to adequately scrutinize misdemeanor convictions and all too often approve ill-advised plea agreements.[76] Even people not convicted of misdemeanors can suffer a range of collateral consequences from going through the system, which raises serious questions about fairness and undue burdens.[77]

80% of filed cases).

[70] *See California*, JUSTICE CTR.: THE COUNCIL OF STATE GOV'TS, http://www.abacollateralconsequences.org/search/?jurisdiction=10 (last visited June 5, 2016).

[71] *See* CAL. UNEMP. INS. CODE § 1030.1 (1968).

[72] *See* CAL. PENAL CODE § 28905 (2010) (listing roughly forty misdemeanor convictions that trigger a ten-year ban on the right to bear arms).

[73] CAL. CODE REGS. tit. 22, § 89378 (2002).

[74] 20 U.S.C. § 1091(r)(1) (2006).

[75] *See* ALISA SMITH ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 7 (2011) (characterizing misdemeanor courts in twenty-one Florida counties as "constitution-free zones" where two-thirds of defendants plead guilty or no contest at their arraignments—which last only three minutes—80% of the time); K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. OF L. & SOC. CHANGE 271, 294–95 (2009) (explaining that though public defenders in New York City theoretically have about 19.5 minutes with each client pre-arraignment—during which they must review the client's file, interview the client, explain potential charges and responses, make bail arrangements, speak with family members in the court, confer with the district attorney regarding potential dispositions and present the case to the court—in practice, plea deals are so routine that many clients get even less time with their attorney); Natapoff, *supra* note 5, at 1064.

[76] Natapoff, *supra* note 5, at 1064.

[77] *See* Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. OF SOC. 351, 386 (2013) (analyzing the flow of misdemeanor cases through the criminal court in New York City and discovering that such a system affects even many people who have not been convicted, marking them with a record, subjecting them to time-consuming procedural hassle, and requiring compliance with court-dictated terms).

C. CRIMINAL RECORDS AND EMPLOYMENT

Background checks have become a routine component of the job hunt for Americans, making it difficult for many people with criminal records to find work. As noted above, background checks mandated by federal law have increased since 9/11,[78] and state law trends are similar. Under the authority of a 1972 federal law, state legislatures have enacted over 1,600 statutes requiring background checks by law enforcement agencies, including the FBI.[79] Many of these statutes require background checks for licensed positions or employment in licensed facilities, affecting aspiring nurses, caregivers, custodians, pet groomers, security guards, and barbers, to name a few.[80] A criminal record can also render a person ineligible for government jobs.[81]

In the private sector, criminal background checks have become the norm. According to a 2012 survey conducted by the Society of Human Resources Management, an organization of mostly large employers, 87% of its randomly selected members conducted criminal background checks on some prospective employees and 69% conduct such checks on all employees.[82] Some employers discriminate further by telling people with

---

[78] *See supra* notes 52–59 and accompanying text.

[79] *See* 28 C.F.R. § 0.85(j) (West 2017) (granting the Director of the FBI the power to exchange criminal record information with the states); Madeleine Neighly & Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment*, THE NAT'L EMP. L. PROJECT 7 (July 2013), http://www.nelp.org/content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf; *see also* 28 C.F.R. § 50.12(a)(West 2017) (specifying that the exchange of such information can be used for employment and licensing-related inquiries).

[80] *See* U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *supra* note 62, at Table 17 (cataloging state laws requiring fingerprint-based background checks for nurses/elder caregivers (thirty-seven jurisdictions); daycare providers (forty-two jurisdictions); caregivers at residential facilities (thirty-five jurisdictions); school teachers (forty-eight jurisdictions); nonteaching school employees, including volunteers (forty jurisdictions); volunteers working with children (thirty-one jurisdictions); prospective foster care parents (forty-eight jurisdictions); prospective adoptive parents (forty-seven jurisdictions); relative caregivers (twenty-one jurisdictions); and hazardous materials licensees (twenty-one jurisdictions)). Among the top six licensed professions in California by number are nurses (400,134), teachers (295,025), security guards (282,189), and cosmetologists (254,271). *See also* LITTLE HOOVER COMM'N, REPORT #234, OCTOBER 2016: JOBS FOR CALIFORNIANS: STRATEGIES TO EASE OCCUPATIONAL LICENSING BARRIERS 17 (2016), http://www.lhc.ca.gov/report/jobs-californians-strategies-ease-occupational-licensing-barriers.

[81] *See* LOVE ET AL., *supra* note 41, at § 2:8.

[82] *See* SOC'Y FOR HUM. RESOURCE MGMT., BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS (2012), *available at* https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminal backgroundcheck.aspx.

criminal records, including misdemeanors, not to apply at all.[83]

These trends have resulted in a massive number of criminal background checks. The FBI released almost 17 million RAP sheets for the purpose of employment and licensing background checks in 2012, a more than sixfold increase since 2002.[84] The California Attorney General processed over 2 million background checks in 2014.[85] That same year, three of the largest background check companies for private employers reported screening 56 million individuals nationwide.[86]

Inaccuracies in criminal history information exacerbate the employment prospects of people with records. One study estimated that the failure to update arrest records (to reflect that the arrest did not result in a conviction) prejudices 600,000 people each year, and approximately one half of the records in the FBI's database are incomplete in some way.[87] These inaccuracies stem from deficiencies in states' administration of records, on which the FBI relies to update its database.[88] Private background check companies often share inaccurate information—according to critics, reports produced by commercial screening companies frequently contain information about the wrong person, report sealed records, omit the most recent disposition of a case, render data in a misleading manner, misclassify the type of offense (e.g., they report a misdemeanor as a felony), or report information protected from disclosure by consumer and privacy laws.[89]

---

[83] For example, a survey of Craigslist job ads revealed that employers large and small frequently single out people with records by using language like: "DO NOT APPLY WITH ANY MISDEMEANORS/FELONIES." *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, THE NAT'L EMP. L. PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1. As noted above, this practice may be unlawful under the Equal Employment Opportunity Commission's most recent enforcement guidance for Title VII of the Civil Rights Act of 1964, which requires an individualized assessment of a criminal record's relevance to the job opportunity. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 68.

[84] *See* Neighly & Emsellem, *supra* note 79, at 8.

[85] "During the 2014 calender [sic] year, the Department of Justice (DOJ) processed more than 2.1 million applicant fingerprint transactions." *See Applicant Agencies*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/fingerprints/agencies (last visited Nov. 5, 2016).

[86] *See* Max Mihelich, *Special Report: More 'Background' Noise*, WORKFORCE (Sept. 5, 2014), http://www.workforce.com/2014/09/05/special-report-more-background-noise/.

[87] Neighly & Emsellem, *supra* note 79, at 3; *see also* JACOBS *supra* note 11, at 42 (explaining that in 2012, only eighteen states had rap sheet databases that reported final dispositions for more than 80% of arrests).

[88] Neighly & Emsellem, *supra* note 79, at 2.

[89] *See* PERSIS YU & SHARON DIETRICH, NAT'L CONSUMER L. CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 15 (2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf; *cf.* Cal. Civ. Code § 1786.1 et seq. (1975) (the California Investigative Consumer

Though most research has focused on the impact of a prison record on employment opportunities, including low applicant callback rates and depressed wages over time,[90] criminal records of arrests and misdemeanors can also serve as significant barriers to employment.[91] A minor criminal record can prevent a qualified applicant from being interviewed or getting a job.[92] Even an employer who expresses a willingness to hire applicants with criminal records may not actually do so.[93] A minor criminal record may also be the basis of a licensing board's denial or revocation of a professional

---

Reporting Agencies Act regulates background checks conducted by private companies); 15 U.S.C. § 1681 et seq. (1970) (the federal Fair Credit Reporting Act regulates the criminal background check industry and the reports that it produces on prospective employees).

[90] *See, e.g.*, SCOTT DECKER ET AL., CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT 36 (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf (finding that a prison record marginally decreased women's chances of obtaining employment across racial groups); PAGER, *supra* note 9, at 61–70 (finding in a landmark audit study of employers in Milwaukee that a prison record decreases chances of receiving a callback by 50% for white males and 60% for African-American males); Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257, 271 (2011) (finding that within the studied cohort, the wages of African-American ex-inmates grew 21% more slowly than did those of white ex-inmates); Bruce Western, *Mass Imprisonment and Economic Inequality*, 74 SOC. RES. 509, 524 (2007) (explaining that African-American and Hispanic men who have spent time in prison work about eight weeks less each year than African-American and Hispanic men who have not spent time in prison, while white men who have spent time in prison work only five weeks less each year than white men who have not).

[91] *See* DECKER ET AL., *supra* note 90, at 53 (fourteen of forty-nine employers said they probably would not hire someone who had been arrested and an additional four said that they definitely would not); Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637 (2014) (finding that a record of a misdemeanor arrest reduced the chance of a callback for white and African-American males by 4%).

[92] *See* Holzer et al., *supra* note 9, at 117, 122 (revealing that over 40% of surveyed employers in Los Angeles definitely would not or probably would not be willing to hire someone with a criminal record); Sarah Esther Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175, 191 (2015) (finding that about 30% of "natural organizations"—employers who have no explicit policy on treatment of criminal records in hiring—filtered out applicants with misdemeanor records in deciding who to call back); Natapoff, *supra* note 5, at 113 (explaining that the majority of employers conduct background checks and many choose not to interview people convicted of misdemeanors); Roberts, *supra* note 9, at 299–300 (describing how employers easily access criminal record information online and use it to avoid hiring people with records).

[93] *See* Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do,* 70 AM. SOC. REV. 355, 364, 367 (2005) (finding that employers who had expressed a willingness in their survey responses to hire those with criminal records were in practice just as unlikely to hire them as those who had responded to the contrary); Lageson et al., *supra* note 92, at 191 (showing that 78% of employers who expressed a willingness to hire applicants with criminal records did not call back any of the applicants with misdemeanor records).

license.[94] And although background check companies are not supposed to report most criminal history information in California (including a misdemeanor conviction) after seven years,[95] a California regulatory licensing agency can require that such information be available to prospective employers indefinitely.[96]

Criminal records follow tens of millions of Americans like a shadow, long after their arrest or any punishment associated with their crime has been completed. Criminal records stigmatize people and create collateral consequences that limit their opportunities. Even when a criminal record does not serve as a complete bar to employment, it can affect employment opportunities and earnings over time.[97] In recent years, some states have responded to this problem by enacting laws designed to mitigate the negative effect of a criminal record on employment outcomes, yet obstacles persist for many.

In the next Part, we discuss record clearing, or "unmarking," which has emerged in an effort to help people with criminal records overcome barriers to employment.

II. UNMARKING: THE RECORD CLEARING REMEDY

Criminal record clearing remedies of one kind or another are available in all fifty states.[98] While the efficacy of judicial record clearing is the focus of our inquiry, non-judicial remedies are available to people with records, including executive pardon and administrative appeal.[99] Judicial, executive, and administrative remedies differ across the states and offer varying degrees of relief from the penalties and collateral consequences associated with a criminal record.[100]

---

[94] *See* CAL. BUS. & PROF. CODE § 480 (West 1974) (allowing a licensing board that regulates a license covered by the code to reject an application based on any conviction); *California, supra* note 70 (showing that there are fifty mandatory consequences in the realm of professional licensing for people with misdemeanor convictions).

[95] *See* CAL. CIV. CODE § 1786.18(a)(7) (West 1975).

[96] *See id.* at § 1786.18(b)(2).

[97] *See generally* SHAWN BUSHWAY ET AL., RUSSELL SAGE, BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA (2007); Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal-Record: Stigma Reports among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387 (2016).

[98] LOVE ET AL., *supra* note 41, at § 7:1.

[99] *Id.* at § 7:2.

[100] As Loeffler et al., *supra* note 21, at 5–6 point out, people with criminal records have also used informal, non-legal strategies to overcome employment obstacles. *See generally* ROBERT SAMPSON & JOHN LAUB, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003) (describing how, before the age of the background check, the studied group of juvenile delinquents was able to pass as non-criminal and thereby avoid labor market

The executive pardon— a form of unmarking theoretically available in every state—is rarely used.[101] Few governors regularly exercise their pardon power, and perhaps because of this, few people apply to be pardoned.[102] Use of the presidential pardon, which is the exclusive remedy available for people convicted in federal court or in a military court-martial proceeding, has also waned considerably in a trend that began during the Reagan administration.[103] Pardons generally are reserved for salient cases (e.g., evidence of innocence in association with many years served) and are neither numerous enough nor targeted in such a way as to address the large number of people with criminal records consisting of relatively minor offenses.

Administrative agencies offer people with criminal records another potential source of relief. An individual facing denial or rescission of a professional license or clearance to work in a licensed facility can generally file an appeal.[104] However, the laws, regulations, and practices vary from state to state, within states, and across licensing entities. Although administrative remedies are of increasing interest to policymakers seeking to expand employment opportunities, they remain opaque and inaccessible to many people with criminal records.[105]

---

discrimination); SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001) (observing that many people who have refrained from recidivating often seek jobs for which their criminal record will not serve as an obstacle); NEAL SHOVER, AGING CRIMINALS 75–76 (1985) (arguing that a group of people who repeatedly committed property crimes eventually benefited from stigma erosion—a process by which a marked person's perceived criminality dissipates with time).

[101] *See* Ex Parte Garland, 71 U.S. 333, 380 (1866) (holding that pardon not only terminates punishment, but eradicates guilt so that "in the eye of the law the offender is as innocent as if he had never committed the offence"). In every state but one, the state constitution is the source of the power to pardon. *See* LOVE ET AL., *supra* note 41, at § 7:6.

[102] Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1720–21 (2003) (explaining how the pardon application process has become increasingly difficult to navigate, often requiring a substantial time commitment, submission to background checks and invasive procedures, and completion of large amounts of paperwork).

[103] *See* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1170–71 (2010). *But see President Obama Announces Single Largest Set of Clemency Grants Since Taking Office*, CLEMENCY PROJECT 2014 (Aug. 3, 2016), https://justiceroundtable.org/news-item/president-obama-announces-single-largest-set-of-clemency-grants-since-taking-office/ (noting that President Obama has commuted 562 sentences, more than any president since Calvin Coolidge).

[104] LOVE ET AL., *supra* note 41, at § 7:5.

[105] *See* U.S. DEP'T OF THE TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015), https://obamawhitehouse. archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. Administrative rules can also protect people with criminal records from discrimination. For example, California's Department of Fair Employment and Housing is currently considering changes to rules that would supplement the guidance issued by the Equal Employment Opportunity

It is difficult to generalize about the wide variety of judicial record clearing remedies. Such remedies predate the modern criminal records problem, and they go by many names—expungement, expunction, dismissal, vacatur, sealing, annulment, and set-asides. The benefits of the record clearing remedies are equally varied. In some states, "sealing" and "expungement" are synonymous, yet these terms can also have distinct meanings, with "expungement" entailing the destruction of a record to which "sealing" would merely prohibit access.[106]

Sealing and expungement remedies often permit people to state on some employment applications that they have never been convicted when asked about their criminal record history.[107] Vacatur, set-aside and annulment are forgiveness remedies.[108] Under such remedies, people may still need to disclose a criminal conviction when asked about it, but in theory they are relieved from some forms of legally sanctioned discrimination.[109]

In this Part, we provide a brief overview of judicial record clearing. We describe recent developments in public defender offices, civil legal aid programs, and law school clinics designed to help people with criminal records seek such judicial remedies as a means of overcoming the collateral consequences outlined earlier. Finally, we note efforts by the federal government to support and expand record clearing interventions.

Commission to limit the use of criminal records in the hiring process. *See generally* FAIR EMP. & HOUS. COUNCIL, FURTHER MODIFICATIONS TO TEXT OF PROPOSED CONSIDERATION OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS REGULATION (Sept. 7, 2016).

[106] *See* SUBRAMANIAN ET AL., *supra* note 14, at 18.

[107] The National Council on Crime and Delinquency proposed a model act in 1962 that exemplifies this approach to rehabilitation. *See* Nat'l Council on Crime & Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 CRIME & DELINQ. 97, 100 (1962). Advocates of the "forget" approach to criminal record clearing remedies argue that the ability of a person with a criminal record to reintegrate into society should not depend on whether others are able to forgive. *See* JENNY ROBERTS, NAT'L ASS'N OF CRIM. DEF. LAW., COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 48–49 (2014), *available at* https://www.nacdl.org/restoration/roadmapreport/.

[108] *See* Love, *supra* note 102, at 1705 (arguing that forgiveness-oriented remedies are superior to forgetting remedies like expungement because they do not proceed on the awkward fiction—increasingly untenable in the information age—that the past can be re-written). The American Law Institute's Model Penal Code advocated for a forgiveness-driven approach. *See* MODEL PENAL CODE § 306.6(3)(f) (1962) (stating that the code does not justify a defendant in saying that he or she has not been convicted of a crime, unless he or she also mentions the forgiveness granted by the model penal code). *But see* Roberts, *supra* note 5, at 338–41 (arguing that forgiveness is a conceptually strained approach in light of a flawed and racially discriminatory criminal justice system in which culpability may be unrelated to a criminal record).

[109] *See* MODEL PENAL CODE § 306.6 (allowing the court to enter an order relieving the beneficiary of "any disqualification or disability imposed by law"); *see also* LOVE ET AL., *supra* note 41, at § 7:21.

A. JUDICIAL RECORD CLEARING REMEDIES

All states provide an unmarking remedy for at least some people with records of arrests and prosecutions, typically for arrests alone or less serious crimes. In some states the remedies are very limited, but two-thirds of states provide for sealing of records of arrests that did not lead to a conviction, which happens either automatically or after a discretionary court order.[110] Twenty-six states and Puerto Rico provide for judicial record clearing of minor offenses, ranging from infractions to misdemeanors.[111]

Few states provide judicial record clearing remedies for felony convictions and under much more narrow circumstances.[112] Even in those states, violent crimes and sex offenses generally do not qualify, and expunged records can still be accessed for the purposes of sentencing a repeat offender.[113] Despite the range of judicial record clearing mechanisms in the states, there is no expungement mechanism for records of federal arrests and prosecutions.[114]

Recently, some state legislatures have begun expanding the scope of judicial remedies. According to a survey of state laws conducted by the Vera Institute, from 2009 to 2014, twenty-three states and the District of Columbia enacted a total of thirty-seven new laws that create or expand record clearing

---

[110] LOVE ET AL., *supra* note 41, at § 7:21. In the majority of those states, sealing can happen even after a defendant pleads guilty as part of deferred sentencing or adjudication. *Id.*

[111] *Id.* at Chart 4, App. A.

[112] *See* Love, *supra* note 102, at 1717 (explaining that the shift in political attitudes towards crime around the time of the Sentencing Reform Act of 1984 caused legislatures to begin weakening their expungement statutes).

[113] LOVE ET AL., *supra* note 41, at § 7:17. Puerto Rico has the most expansive record clearing scheme, allowing for expungement of even violent felony offenses if five years have elapsed since the sentence was served and the person has a "good reputation within the community." *Id.*; P.R. LAWS ANN. tit. 34, §§ 1725a-2 (1974).

[114] LOVE ET AL., *supra* note 41, at § 7:17. Even non-conviction records, such as an arrest without an indictment, cannot be cleared. *Id.* at § 7:20. However, federal judges can mitigate the negative effects of a criminal record in other ways. *See* Order Denying Motion to Expunge at 2, Jane Doe v. United States, No. 1:15-MC-01174 (E.D.N.Y. 2016) (in which a now retired federal judge cited congressional and executive reentry efforts to support his granting of a "federal certificate of rehabilitation" for a defendant he had sentenced years before who had subsequently struggled in the job market). And in 2014 the U.S. Sentencing Commission— an independent agency of the federal judicial branch—voted to reduce the sentencing guidelines for many federal drug offenses and made the reform retroactive. In late 2015, those changes resulted in the release of over 6,000 people who were in federal prison. *See* Michael Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES (Oct. 6, 2015), http://www.nytimes.com/2015/10/07/us/us-to-release-6000-inmates-under-new-sentencing-guidelines.html; The Marshall Project, *What You Need to Know About the New Federal Prisoner Release*, THE MARSHALL PROJECT (Oct. 29, 2015), https://www.themarshallproject.org/2015/10/06/what-you-need-to-know-about-the-new-federal-prisoner-release#.AFxv6CN2H.

remedies.[115] Examples of such laws include extending record clearing eligibility to people with prior convictions (as opposed to first-time offenders) and juveniles,[116] reducing the waiting periods preceding eligibility, clarifying the effect of criminal record clearance, and lowering the burden of proof required to clear a record.[117]

B. LEGAL INTERVENTION FOR PEOPLE WITH CRIMINAL RECORDS

Lawyers in multiple settings have developed specialized initiatives to assist people seeking criminal record clearing remedies. Some public defender offices have moved in the direction of holistic defense, including providing post-conviction record clearing assistance to clients.[118] Civil legal aid programs, traditionally focused on non-criminal matters, have begun helping clients to overcome the collateral consequences of criminal records.[119] And law school teaching clinics have launched record clearing projects as part of the response to mass criminalization in their communities.[120]

---

[115] *See* SUBRAMANIAN ET AL., *supra* note 14, at 13; Joshua Gaines, *Excessive filing fees frustrate new expungement schemes,* COLLATERAL CONSEQUENCES RES. CTR. (June 3, 2016), http://ccresourcecenter.org/2016/06/03/excessive-fees-frustrate-purpose-of-expungement-laws/ (lamenting the often prohibitively expensive filing fees associated with expungement in Kentucky, Louisiana, and Tennessee). *But see* Margaret Colgate Love, *States "rethinking" collateral consequences? Vera Institute jumps the gun,* COLLATERAL CONSEQUENCES RES. CTR. (Jan. 7, 2015), http://ccresourcecenter.org/2015/01/07/states-rethinking-collateral-consequences-not-fast-vera-institute/ (arguing that the Vera Institute's report provides an overly optimistic picture of the landscape of state law collateral consequences and suffers from methodological flaws).

[116] *See* Assem. 1945, Cal. State Leg., 2015–2016 Sess. (Cal. 2016) (clarifying that a juvenile criminal record that has been sealed according to Welfare and Institutions Code section 781 or 786 may only be revealed to the extent permitted by those sections).

[117] *See* SUBRAMANIAN ET AL., *supra* note 14, at 13–17; Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels,* 10 HARV. L. & POL'Y REV. 361 (2016).

[118] *See infra* notes 122–26.

[119] *See infra* note 129.

[120] In addition to public defenders, civil legal aid programs, and law school clinics, private sector attorneys have begun offering criminal record clearing services in recent years. For example, the Fresh Start Law Center was founded in 2011 and focuses exclusively on criminal record clearing in California. *California Record Expungement,* FRESH START LAW CTR., http://freshstartlawcenter.com/ (last visited Apr. 10, 2016). Criminal defense firms have also started offering such services. For example, the Shouse California Law Group specializes in criminal record clearing and has offices throughout the state. *Expungement of Criminal Records in California Penal Code 1203.4 PC,* SHOUSE CAL. LAW GRP., http://www.shouselaw.com/expunge-criminal-records.html (last visited Apr. 10, 2016). More research is needed to determine the extent of private sector criminal record clearing services, but it appears that as the need for such assistance grows, the private sector will meet some of the demand, at least for people who can afford to hire a lawyer.

In the public defender setting, some offices have recently expanded the traditional model of criminal defense representation. As awareness of the collateral consequences of criminal records has grown, public defenders are embracing a holistic approach to representation that extends beyond the confines of the criminal case.[121] Holistic representation has been described as an effort to identify and treat the issues that brought the client into contact with the criminal justice system in the first place in order to reduce harm and prevent future criminal behavior.[122] Public defender offices are beginning to offer record clearing services to mitigate the impact of collateral consequences, despite the fact that these civil penalties technically fall outside the domain of criminal defense work.[123]

A comprehensive picture of record clearing work in public defender offices is hard to paint due to variations in local jurisdictions. The Bronx Defenders in New York City pioneered holistic representation, including expungement services, in its Civil Action Practice.[124] The San Francisco Public Defender's Office launched its Clean Slate Program in 1999; in 2015, the program served over 6,570 people, obtaining sets asides and dismissals of 514 convictions and reducing forty-six felonies to misdemeanors.[125] Public defender offices operate record clearing programs in other California cities,[126] and in the District of Columbia, Philadelphia, and Cincinnati.[127]

---

[121] *See* Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004). This embrace may not always be voluntary. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that public defenders must inform their clients when a plea poses a risk of deportation).

[122] Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067 (2003).

[123] *Id.* at 1073–74.

[124] *Civil Action Practice*, THE BRONX DEFENDERS, http://www.bronxdefenders.org/our-work/civil-action-practice/ (last visited Apr. 10, 2016).

[125] S.F. PUB. DEFENDER'S OFF., 2015 ANNUAL REPORT 2016 CALENDAR: PUBLIC DEFENDERS, http://sfpublicdefender.org/wp-content/uploads/sites/2/2016/01/2015-Report-2016-Calendar.pdf (last visited Apr. 10, 2016).

[126] For example, the Orange County Public Defender's Office operates the New Leaf Program and "assists those who are seeking a fresh start and improved opportunities for employment, professional licensing or consumer credit." *New Leaf Program*, ORANGE COUNTY PUB. DEFENDER, http://www.pubdef.ocgov.com/programs/new_leaf_program/ default.htm (last visited Apr. 10, 2016). The Alameda County Public Defender operates a collaborative record clearing clinic with the East Bay Community Law Center. *Clean Slate Program*, ALAMEDA COUNTY PUB. DEFENDER, http://www.co.alameda.ca.us/defender/ services/cleanslate.htm (last visited Apr. 10, 2016).

[127] *Defender Ass'n of Phila.*, JUV. LAW CTR., http://www.jlc.org/resources/county-resource-guide/philadelphia/defender-association-philadelphia (last visited Apr. 10, 2016); *Fresh Start Expungement Clinic*, HAMILTON COUNTY PUB. DEFENDER, http://www.hamiltoncountypd.org/index.php?page=fresh-start-2 (last visited Apr. 10, 2016);

On the civil side, record clearing services have recently proliferated in legal aid programs, many of which are funded by the federal Legal Services Corporation ("LSC"). Although LSC-funded programs cannot represent clients in criminal law matters, grantees are not prohibited from handling criminal record clearing designed to address the civil collateral consequences of prior arrests and convictions.[128] Based on the most recent data compiled by the agency, more than two dozen record clearing legal aid programs are operating in nineteen states.[129]

Community Legal Services ("CLS") of Philadelphia is a non-LSC funded civil legal aid program with a holistic approach to advocacy. CLS seeks record expungement on behalf of individual clients and advocates for systemic reform.[130] In 2014, of the 1,400 people who sought help from CLS with employment problems, over two-thirds had problems that stemmed from their criminal records.[131] CLS has also filed lawsuits against a background check company that was reporting expunged records and against LexisNexis for its operation of a retail theft database which contained records for many innocent people and erected industry wide employment barriers.[132]

Law school clinics have also launched record clearing programs of various kinds. At least three dozen law schools now operate such a clinic, and many pioneered programs in their geographic areas.[133] The clinics

---

The Civil Legal Services Division, PUB. DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, http://www.pdsdc.org/about-us/legal-services/civil-legal-services-division (last visited Apr. 10, 2016). Not all states allow public defenders to provide record clearing services. For instance, under Illinois law, the Office of the State Appellate Defender does not have the authority to represent a client in a petition to expunge or seal a record. *See* 20 Ill. Comp. State. 2630/11 (2004); 725 Ill. Comp. Stat. 105/10.6 (2003). Instead, the Office is required to provide clients with information about the expungement process and other entities that might be able to aid in their representation. *Id.*

[128] *See* 45 C.F.R. §§ 1613.1–4 (2014).

[129] *Legal Aid Reentry Projects for people with criminal records and other significant barriers to employment*, AM. BAR ASS'N, http://www.americanbar.org/groups/probono _public_service/resources/volunteer_opportunities/reentry_projects.html (last visited Apr. 10, 2016). Not all of these programs are LSC-funded, and the list does not include LSC *pro bono* projects operating in collaboration with local and state bar associations or bar foundations.

[130] For example, CLS developed a model statute that would automatically seal records of non-violent misdemeanors after ten years. *See* COMMUNITY LEGAL SERVS. OF PHILA., ANNUAL REPORT 2015 17, https://clsphila.org/sites/default/files/annual-reports/2015_CLS_AR.pdf (last visited on Nov. 5, 2016). Though Pennsylvania's legislature did not ultimately enact the automatic sealing bill, it did recently pass a law allowing people with certain misdemeanor convictions to petition to have those records sealed, but only if they have not been arrested or prosecuted for ten years since the later of the relevant conviction or release from supervision. 18 PA. CONS. STAT. § 9122.1 (2016).

[131] *See* COMMUNITY LEGAL SERVS. OF PHILA., *supra* note 130, at 17.

[132] *Id.*

[133] The March 2016 survey of law school clinical programs is on file with the authors. Of

deliver a wide range of legal services, including record clearing and assistance with other collateral consequences of criminal records.[134] Like the civil legal aid programs, this figure likely undercounts the field, as new clinics are opening and other clinics may provide record clearing services without identifying them as such. An example of one of the early law school record clearing clinics is the East Bay Community Law Center's Clean Slate Clinic, which we describe in more detail in Part III.

C. FEDERAL SUPPORT FOR RECORD CLEARING INTERVENTIONS

The federal government is supporting record clearing legal services directly and indirectly through a number of related and bipartisan initiatives. President Bush signed into law the Second Chance Act of 2007, which gives grants to organizations providing services to people with criminal records.[135] Since 2009, organizations in forty-nine states have received these grants.[136] In 2010, U.S. Attorney General Eric Holder convened the Federal Interagency Reentry Council to coordinate executive branch efforts and to promote effective policies.[137] The establishment of the council was premised on an acknowledgement of the collateral consequences of a criminal record.[138] The wide range of federal agencies and offices represented in the council reflects both the reach of the criminal records problem and the growth of programs being developed to address it.

---

all U.S. law schools surveyed (approximately 200), forty-one responded saying that they operate clinics that clear records or provide related criminal justice remedies.

[133]   *Id.*
[134]   *Id.*
[135]   *See* Second Chance Act of 2007, Pub. L. No. 110–199, 122 Stat. 657 (2007).
[136]   *Second Chance Act Grant Program*, THE NAT'L REENTRY RES. CTR., https://csgjusticecenter.org/nrrc/projects/second-chance-act/ (last visited Apr. 17, 2016).
[137]   The following agencies and offices have representation in the council: the Departments of Justice, Interior, Agriculture, Labor, Health and Human Services, Housing and Urban Development, Education, Commerce and Veterans Affairs, the Offices of National Drug Control Policy, Faith-Based and Neighborhood Partnerships, Personnel Management, Management and Budget, the Social Security Administration, Domestic Policy Council, Equal Employment Opportunity Commission, Internal Revenue Service, Federal Trade Commission, Interagency Council on Homelessness, Small Business Administration, Court Services and Offender Supervision Agency, Consumer Financial Protection Bureau, and the Corporation for National and Community Service.
[138]   *Federal Interagency Reentry Council*, NAT'L REENTRY RES. CTR., http://csgjusticecenter.org/nrrc/projects/firc/ (last visited Apr. 17, 2016). In 2014, Attorney General Holder exhorted Attorneys General from every state in the nation to mitigate or eliminate "unnecessary collateral consequences" whenever possible. *Justice News: Remarks as Prepared for Delivery by Attorney General Eric Holder at the National Association of Attorneys General Winter Meeting*, U.S. DEP'T OF JUST. (Feb. 25, 2014), https://www.justice.gov/opa/speech/remarks-prepared-delivery-attorney-general-eric-holder-national-association-attorneys.

Federal support manifests itself principally in grants that pass through a variety of agencies. The Department of Justice administers Second Chance Act grant funds for community organizations and specialty courts, drug treatment diversion programs, substance-abuse programs, and career training and mentoring.[139] The Department of Labor operates the Young Offender Reentry Demonstration Grant Program, offers employers tax incentives to hire people with records, and provides them with liability insurance.[140] The Department of Education provides states with funds to educate out-of-school adults, 20% of which states can dedicate to people with criminal records.[141] The Department of Housing and Urban Development funds the Community Development Block Grant Program, through which grantees can provide housing for people with criminal records.[142] Finally, the Department of Health and Human Services funds the Young Offender Reentry Program and many other programs and grants that are designed to help those struggling with substance abuse.[143]

In 2012, the White House and U.S. Department of Justice convened the Legal Aid Interagency Roundtable ("LAIR") "to raise federal agencies' awareness of how civil legal aid can help advance a wide range of federal objectives including improved access to health and housing, education and employment, family stability, and community well-being."[144] According to LAIR's 2014 case study, civil legal aid programs should help people with record clearing to improve their job prospects and other opportunities.[145] In

---

[139] *See* JAMES, *supra* note 14.

[140] *Id.* at 19.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] The Roundtable was launched to explore how civil legal aid could advance a range of federal objectives (including access to employment) and involved the collaboration of seventeen federal agencies. U.S. DEP'T OF JUSTICE, WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE TOOLKIT (Oct. 14, 2015), http://www.justice.gov/atj/legal-aid-interagency-roundtable-toolkit.

[145] *Id.*; *see also* U.S. DEP'T OF JUST. ACCESS TO JUST. INITIATIVE, CIVIL LEGAL AID SUPPORTS FEDERAL EFFORTS TO HELP PEOPLE WITH CRIMINAL RECORDS MAKE A SUCCESSFUL REENTRY (2014), http://www.justice.gov/sites/default/files/atj/legacy/2014/04/16/reentry-case-study.pdf. The case study also recommends correcting inaccurate records and working with employers to address discrimination against people with criminal records. *Id.* Federal grants that support job training and mentor programs for people with criminal records at the U.S. Department of Labor and U.S. Department of Justice now include civil legal aid as an allowable use of funds. *Id.* In early 2016, the Department of Labor posted a Request for Information about a contract for the implementation of an online National Clean Slate Clearinghouse, which would consolidate information on currently available reentry services and collaborate with service providers to improve their functions. *Nat'l Clean Slate Clearinghouse,* FED. BUS. OPPORTUNITIES (Feb. 26, 2016), https://www.fbo.gov/index?s=opportunity&mode=form&id=5fe5279b511aac5d4de962cc1c243f85&tab=core&_cview=0.

February 2016, the LAIR released a report summarizing the results of a two-day workshop on civil legal aid.[146] Among a number of research priorities, the report recommended funding for studies of "the consequences of sealing or expunging criminal records," including "whether expungement improves employment outcomes."[147]

Record clearing remedies are generally available to the large number of people with records of arrests or relatively minor infractions, misdemeanors, and low-level felonies. Legal services providers—public defenders, civil legal aid lawyers, and law school clinics—have developed a new subspecialty to help people with criminal records avail themselves of these remedies. And the federal government is devoting time, expertise, and resources to the effort. As more resources are being devoted to criminal record clearing, questions about its efficacy, such as the ones our study measures, take on greater urgency.

In the next Part, we describe in some detail a community-based law school clinic as an example of a project designed to help people with criminal records overcome collateral consequences generally and employment barriers in particular. The clinic served as the research site for this study.

III. A CRIMINAL RECORD CLEARING CLINIC

The East Bay Community Law Center ("EBCLC") is a non-profit clinic affiliated with the UC Berkeley School of Law.[148] Founded by law students in 1988, EBCLC has a dual teaching-service mission. Each year, the clinic trains and supervises more than 100 Berkeley Law students who in turn provide free legal assistance to several thousand low-income residents in Alameda County, California.[149]

Over time, EBCLC's services have evolved from bread and butter civil legal aid issues like housing and welfare to a broad range of legal problems facing low-income community members, including health, consumer,

---

[146] U.S. DEP'T OF JUST. NAT'L INST. OF JUST. & OFF. FOR ACCESS TO JUST., WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE: CIVIL LEGAL AID RESEARCH WORKSHOP REPORT (2016), https://www.ncjrs.gov/pdffiles1/nij/249776.pdf.

[147] *Id.* at 16.

[148] Current information about EBCLC is available on the organization's website: http://ebclc.org/.

[149] Students launched the clinic in the 1980s to increase clinical learning opportunities at the Law School and to fill the gap left by the closure of the LSC-funded neighborhood legal aid office in Berkeley. For published accounts of EBCLC's history, see Angela P. Harris, Margaretta Lin & Jeffrey Selbin, *From 'The Art of War' to 'Being Peace': Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2093 (2007); Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 120 (1998).

immigration, and community economic development. In 2001, an EBCLC lawyer and her students recognized the growing collateral consequences of mass criminalization in the client community. They started a project to assist people who were cycling in and out of the criminal justice system without legal help. For example, they represented homeless people charged with infractions and misdemeanors in traffic court.

These early interventions revealed the need for a general record clearing practice, as client after client appeared to be held back from jobs and other opportunities based on criminal records for relatively minor offenses. After piloting the provision of such services, EBCLC launched the Clean Slate Clinic at a 2005 public summit and record clearing event co-sponsored by U.S. Congresswoman Barbara Lee. More than 900 people with criminal records attended the event.[150] The clinic began assisting people with a range of record remedies, including dismissals, felony reductions, certificates of rehabilitation, and pardons.[151] Since the 2005 launch, the clinic has trained more than 150 law students and served almost 10,000 clients.[152]

In this Part, we describe the Clean Slate Clinic's service goals and methods, the local client population, and California's main record clearing remedies.[153] In light of earlier descriptions of the emerging field in public defender programs, civil legal aid offices, and law school clinics, we discuss how EBCLC's intervention model at the time of the study was generally representative of criminal record clearing programs.

A. GOALS AND METHODS

EBCLC's Clean Slate Clinic was one of the first law school clinics to provide criminal record clearing legal services. Since its formal launch in 2005, the clinic has been animated by two distinct but related goals. As described above, research confirms that people with criminal records face significant barriers to jobs, education, housing, and civic participation. The first and primary goal of the clinic is to increase access to employment and other opportunities. Our study measures the employment outcomes of the record clearing intervention.

Second, the criminal justice system exacts a heavy psychosocial toll on

---

[150]   *Clean Slate*, E. BAY CMTY. L. CTR., http://ebclc.org/about/the-work/economic-security-opportunity/clean-slate/ (last visited Oct. 23, 2016).

[151]   *Clean Slate @ 10: Supporting Successful Reentry Then and Now*, E. BAY CMTY. L. CTR., http://ebclc.org/support-us/campaigns/clean-slate-10/then-and-now/ (last visited Oct. 23, 2016).

[152]   *Id.*

[153]   Interview with Eliza Hersh, EBCLC Clean Slate Clinic Director, in Berkeley, Cal. (Dec. 11, 2015) (providing much of the information in this section about the clinic).

participants, forcing them to undergo various forms of status degradation that undermine their human dignity.[154] These rituals strip people's self-esteem and individuality, relegating them to the status of criminals. By providing record clearing services, the clinic aims to reduce the social stigma and psychological harms associated with involvement in the criminal justice system.[155] This goal is the subject of a companion study not discussed further here.[156]

To achieve these opportunity-increasing and dignity-enhancing goals, the clinic has developed a multi-modal service delivery model that includes community outreach and education, law reform litigation, and policy advocacy. The clinic's outreach and education work involves staffing community-based workshops and weekend events for people with criminal records, and training for stakeholders, such as workforce development partners, elected officials, and law enforcement agencies. The clinic also trains other legal services providers, including public defender offices and community agencies. In collaboration with partner organizations, the clinic engages in policy advocacy and impact litigation to expand the rights of and protections for people with criminal records and to reduce the collateral consequences of criminal records.[157]

The heart of the clinic's delivery model—which informs all other aspects—is direct representation of people with criminal records, which we describe in the following subsections.

---

[154] *See* Harold Garfinkle, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956) (describing punishment as a "status degradation ceremony" that places criminality at the center of the punished person's identity); Shadd Maruna, *Reentry as a Rite of Passage*, 13 PUNISHMENT & SOC'Y 3, 11 (2011) (theorizing that Anglo-American cultures are particularly bad at welcoming people who have been convicted of criminal offenses back into society because they lack needed reintegration rituals); *see also* Amy Myrick, *Facing Your Criminal Record: Expungement and the Collateral Problem of Wrongfully Represented Self*, 47 L. & SOC'Y 73, 102 (2013) (finding that people who encounter their criminal records in the record clearing process often discover that their record is a static and inaccurate depiction of their identities).

[155] *See* Maruna, *supra* note 154, at 14 (arguing that reintegration rituals can have the emotional and symbolic significance necessary to facilitate healing).

[156] In the companion study, one of the authors is measuring the status enhancing benefits of the record clearing intervention, with a particular focus on the role of the record clearing process. Keramet Reiter et al., *Redemption Song: The Qualitative Impact of Reentry Legal Services and Status Enhancement Rituals on People with Criminal Records* (July 21, 2014) (unpublished manuscript on file with authors).

[157] For example, the clinic has participated in campaigns to increase civic engagement for voters and jurors, foster juvenile reentry, and rationalize licensing requirements for people with criminal records. Interview with Eliza Hersh, *supra* note 153.

B. CLIENTS AND REMEDIES

The Clean Slate Clinic serves clients in Alameda County, California, which is home to more than 1.6 million people.[158] The county seat and largest city is Oakland, and the county is one of the most racially diverse in the country.[159] The cities and communities within Alameda County are heterogeneous, with pockets of great wealth and deep poverty. In 2015, one in eight county residents lived in poverty, which is below the state average, but poorer areas of the County have disproportionately high rates of unemployment, especially among African-Americans.[160]

Like their counterparts in communities around California and across the country, Alameda County residents have high rates of involvement with the criminal justice system. From 2005 through 2014, an average of 33,812 people were arrested annually for misdemeanor offenses and roughly one third of arrestees were African-American.[161] Many people arrested for misdemeanors end up on informal court probation—Alameda County's Probation Department estimated that about 41,000 people were on such probation in 2013.[162] Overall, local nonprofits estimate that roughly 375,000 Alameda County adults have a criminal record.[163]

---

[158] *QuickFacts: Alameda County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/06001,00 (last visited Sept. 13, 2017).

[159] The U.S. Census Bureau estimates that in 2015, the county was 51.3% White, 29.5% Asian, 11.8% African-American, 1.1% American Indian and Native Alaskan, 1% Native Hawaiian and Pacific Islander, and 5.3% multi-racial. *Id.* Further, 22.6% of people identified as being Hispanic or Latino—a category that the Census treats as non-racial. *Id.*

[160] *Id.* Though the unemployment rate in Alameda County is currently down to 4.3%, it is much higher in poorer, largely African-American areas of the county. *See* Chris Roberts, *Report: Black unemployment in Bay Area more than three times the average*, EXAMINER (Mar. 6, 2015), http://archives.sfexaminer.com/sanfrancisco/report-black-unemployment-in-bay-area-more-than-three-times-the-average/Content?oid=2922602 (stating that the unemployment rate for African-Americans in the Bay Area was 19%, which was three times the average unemployment rate of other races); *see also Alameda County Profile*, ST. OF CAL. EMP. DEV. DEP'T, http://www.labormarketinfo.edd.ca.gov/cgi/databrowsing/localareaprofile qsresults.asp?selectdarea=Alameda+County&selectedindex=1&menuchoice=localarea pro&state=true&geogarea=0604000001&countyname= (last visited Oct. 23, 2016); *Economic Development & Jobs*, YOUTH UPRISING, http://www.youthuprising.org/issues-responses/economic-development-jobs/ (last visited Oct. 23, 2016) (stating that in East Oakland, unemployment rates exceed 50% in some areas).

[161] *County Map*, OPEN JUST., https://openjustice.doj.ca.gov/agencies/county-map (filtered by "all arrests") (last visited Nov. 9, 2016).

[162] ALAMEDA CTY. PROB. DEP'T, ROAD TO RE-ENTRY: ALAMEDA COUNTY ADULT RE-ENTRY STRATEGIC PLAN 10 (2014), https://www.acgov.org/probation/documents/ReEntry StrategicPlan-BoardApproved3-11-14.pdf. Alameda County's Probation Department also has data on people who have been convicted of more serious crimes—as of July of 2013, there were 12,390 people on felony probation (5,270 of whom required supervision), 1,860 people on state parole, and 500 people on federal probation. *Id.*

[163] Sam Levin, *East Bay Businesses That Give Applicants a Fair Chance*, E. BAY EXPRESS

People seeking record clearing services in the Clean Slate Clinic fall into several broad, overlapping categories.[164] Some people have an arrest or conviction for a single bad moment, like petty theft, a bar fight, public drunkenness, or a DUI. Some have a string of arrests and convictions related to substance addiction (and supporting the addiction), such as non-violent drug and alcohol offenses, property offenses like shoplifting, or prostitution.

Women, in particular, might have a welfare fraud conviction for failure to report income or to repay an overpayment. Young men, in particular, might have records with vehicle-related arrests and convictions for offenses like driving on a suspended license, failure to appear (on traffic tickets), or joyriding. According to advocates, these convictions tend to cascade, in part because of the employment barriers for people with criminal records.

In light of these community demographics and needs, the Clean Slate Clinic assists people seeking two kinds of record clearing remedies. The first remedy is a post-conviction set-aside and dismissal for convictions that did not result in prison sentences.[165] The second remedy is a felony reduction.[166]

1. Set Aside and Dismissal

Under the California Penal Code, people convicted of certain infractions, misdemeanors, or felonies that did not result in a state prison sentence can petition the court to set aside and dismiss the convictions.[167] Dismissal petitions fall into mandatory and discretionary categories. The court must grant the dismissal petition if probation is completed (including payment of all fines, fees, and restitution), the petitioner is not serving another sentence (or on probation), and the petitioner has no charges pending in another case.[168] Under certain circumstances, where all probation terms

---

(June 10, 2015), http://www.eastbayexpress.com/oakland/east-bay-businesses-that-give-applicants-a-fair-chance/Content?oid=4330428.

[164] Clean Slate Clinic Director Eliza Hersh provided general background information about the clinic's clients. Interview with Eliza Hersh, Director of EBCLC's Clean Slate Clinic, in Berkeley, Cal. (Oct. 7, 2016).

[165] Set-aside and dismissal remedies require either that no probation was imposed, that probation has been completed, or that early termination of probation has been obtained under CAL. PENAL CODE § 1203.3. *See* CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.41 (West 2017).

[166] CAL. PENAL CODE § 17(b) (West 2011).

[167] These remedies are codified in California Penal Code sections 1203.4, 1203.4a, and 1203.41. While these sections differ slightly in eligibility requirements and impact, we will refer to this relief generally as dismissals. Certain misdemeanor and felony sexual offenses do not qualify, and neither do infractions. CAL. PENAL CODE §§ 1203.4, 1203.4a, 1203.41 (2017).

[168] *See* CAL. PENAL CODE § 1203.4(a)(1); *id.* at § 1203.4(a) (petitioners with convictions who never received probation are also eligible for dismissals if: (1) the conviction is a misdemeanor or an infraction; (2) it has been at least one year since the date of conviction; and (3) the petitioner complied fully with the sentence of the court, is not currently serving

have not been completed, the court still has discretion to set aside and dismiss a conviction.[169]

Although the dismissal remedy is often referred to as "expungement," it does not result in the destruction of the criminal record. Instead, the dismissal releases the person "from all penalties and disabilities" resulting from the conviction.[170] The dismissal is supposed to be entered into the criminal record and reflected on state and federal RAP sheets, enabling the successful petitioner to answer "no" to an inquiry about conviction history on applications for most private employment.[171] Some dismissals, however, will

---

another sentence, not currently charged with another offense, and has obeyed the law and lived an honest and upright life since the time of conviction, or in the interests of justice); *id.* at § 1203.41 (petitioners convicted pursuant to section 1170(h) are eligible for dismissals if: (1) the concluding portion of petitioner's sentence was suspended under section 1170(h)(5); (2) it has been a year or two, depending on the type of felony conviction, since completion of the sentence; and (3) the petitioner is not currently incarcerated, under supervision, or charged with a new offense).

[169] CAL. PENAL CODE § 1203.4(a)(1) (for convictions where the petitioner received probation but did not get an early release, did not fulfill all the conditions of probation, and was not convicted of any offense listed in the Vehicle Code sections 12810(a)–(e), but: (1) paid all the fines, restitution, and reimbursements ordered by the court as part of the sentence; and (2) is not currently charged with, on probation for, or serving a sentence for any other offense).

[170] *Id.* However, California legislators and courts have limited the scope of this release from disabilities. *See* CAL. EVID. CODE § 788(c) (West 2005) (mandating that dismissal of a conviction under section 1203.4 does not prevent a defendant from being impeached with the conviction if he takes the stand in his own defense in a subsequent criminal trial); CAL. PENAL CODE § 290.007 (West 2012) (stating that a dismissal under § 1203.4 does not eliminate the requirement to register for a sex offense); *id.* at § 299(f) (requiring a person found guilty of a qualifying offense to provide specimens, samples, or prints even if the offense was dismissed under 1203.4); CAL. VEH. CODE § 13555 (West 2017) (providing that dismissal under 1203.4 does not affect any revocation or suspension of driver's privileges); Brownrigg v. U.S. Immigration & Naturalization Serv., 356 F.2d 877, 878 (9th Cir. 1966) (holding that a conviction under 1203.4 does not prohibit the federal government from examining the conviction for immigration purposes); People v. Frawley, 98 Cal. Rptr. 2d 555, 559–60 (Cal. Ct. App. 2000) (explaining that a dismissal "does not, properly speaking, 'expunge' the prior conviction . . ." and that the relief a dismissal provides has substantial limits, as it cannot prevent the "dismissed" crime from being used as a prior conviction, relieve the beneficiary of the obligation to disclose the dismissed conviction in an application for a professional license, or reinstate the right to possess firearms); People v. Diaz, 49 Cal. Rptr. 2d 252, 255 (Cal. Ct. App. 1996) (holding that a conviction dismissed under 1203.4 could still be considered a "strike"); People v. Majado, 70 P.2d 1015, 1017 (Cal. Dist. Ct. App. 1937) (holding that a 1203.4 expungement does not prevent the use of a prior conviction from being admitted as a "similar" offense in subsequent prosecution).

[171] Danielle Jones, *When the Fallout of Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 255 (2015). The right to say no is not in the statute; the California Labor Code forbids an employer from asking about a dismissed conviction, with exceptions for a number of public positions. CAL. LAB. CODE § 432.7 (West 2017). The California Penal Code specifies the conditions under which dismissed convictions

show up in subsequent prosecutions and must be disclosed on a questionnaire in an application for licensure or public office.[172] Because more than 20% of California's 19 million workers require a license—and California has particularly onerous licensing requirements for jobs typically held by people of modest means[173]—the dismissal remedy on its face does not eliminate barriers to all forms of employment.

2. Felony Reduction

Under California Penal Code section 17(b), people convicted of certain felonies and not sentenced to state prison may be eligible to reduce the felony to a misdemeanor.[174] Felony reduction applies only to convictions for crimes that could have been charged as either a felony or a misdemeanor and only if all felony charges in the same case are eligible.[175] Factors the judge considers in granting felony reductions include the nature and seriousness of the offense, the defendant's attitude toward the crime that has been committed,

---

must still be disclosed, including "in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission." CAL. PENAL CODE § 1203.4(a)(1). Under the legal principle of *expressio unius est exclusio alterius*, people are not required to disclose dismissed convictions to private employers. *See* People v. Arata, 60 Cal. Rptr. 3d 160, 167 (Cal. Ct. App. 2007) (stating that dismissal under 1203.4 allows a defendant to "truthfully represent to friends, acquaintances and private sector employers that he has no conviction" (quoting People v. Acuna, 92 Cal. Rptr. 2d 224, 227 (Cal. Ct. App. 2000))).

   [172] *See* CAL. PENAL CODE § 1203.4(a)(1). Dismissals under § 1203.4 also do not exempt people required by law to register as sex offenders from doing so. People v. Hamdon, 171 Cal. Rptr. 3d 95, 100 (Cal. Ct. App. 2014) (holding that the sex registration requirement was not a penalty or disability under 1203.4 because the primary purpose of the requirement was to ensure public safety). Dismissals under 1203.4 also do not, in general, undo the consequences of conviction for the purpose of immigration proceedings. Ramirez-Castro v. Immigration & Naturalization Serv., 287 F.3d 1172, 1175 (9th Cir. 2002) (explaining that the general rule is that state law expungements do not affect the immigration consequences of a conviction). *But see* CAL. BUS. & PROF. CODE § 480(c) (West 2015) (mandating, after recent amendment, that a licensing board may not deny a person a license "solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code.").

   [173] *See generally* Morris M. Kleiner, *Reforming Occupational Licensing Policies*, HAMILTON PROJECT 9 (Jan. 2015), *available at* http://www.hamiltonproject.org/papers/reforming_occupational_licensing_policies. Although California does not have as high a percentage of workers in licensed professions as many other states, it is the third most restrictive state behind only Louisiana and Arizona in licensing requirements "for occupations traditionally entered into by people of modest means . . . defined by the Bureau of Labor Statistics as making less than the national average income." LITTLE HOOVER COMM'N, JOBS FOR CALIFORNIANS: STRATEGIES TO EASE OCCUPATIONAL LICENSING BARRIERS 15–16 (Oct. 2016), http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/234/Report234.pdf.

   [174] CAL. PENAL CODE § 17(b), § 19.8.

   [175] *Id.* at § 17(b).

and his or her behavior during the trial.[176]

Felony reductions are an important remedy for a couple of reasons. Because some employers ask only about felony convictions, the reduction to a misdemeanor allows a person to answer "no" when asked about such convictions even if they have not obtained full dismissal of the conviction.[177] A felony reduction can also restore an individual's right to serve on a jury and to possess a firearm.[178]

Despite these benefits, the felony reduction remedy is also limited in important ways. A felony reduction is not retroactive and does not mitigate all of the collateral consequences of the newly created misdemeanor record. Some licensing laws expressly limit the impact of felony reduction. Further, despite the reduction, the physical record of the original designation of a felony conviction is not expunged or erased from court and law enforcement records. Rather, the reduction or reclassification is listed along with the felony as a subsequent disposition.

C. RECORD CLEARING PROCESS

To seek the record clearing remedies described above, legal service providers generally obtain a client's RAP sheet, which should be a complete record of adult involvement in the criminal justice system. Advocates review RAP sheets for accuracy and jurisdiction and to check eligibility for a dismissal, felony reduction, or other record clearing remedy. Next, they prepare a formal petition for all eligible remedies.[179] In addition to the petition, advocates advise and assist the client to obtain supporting documentation in the form of letters, declarations, and other testimonials, or evidence demonstrating rehabilitation and the need for the requested relief. As needed, advocates represent petitioners in court to pursue available

---

[176] People v. Superior Court, 928 P.2d 1171, 1176 (Cal. 1997).

[177] Jones, *supra* note 171, at 255.

[178] *See* CAL. PENAL CODE § 17(b) (stating that when a crime meets all of the relevant conditions, it is a misdemeanor "for all purposes"); *id.* at § 203(a)(5) (excluding people convicted of felonies from serving as trial jurors unless their civil rights have been restored); *id.* at § 29800 (making it a felony offense to own, purchase, receive, or possess a firearm after one has been convicted of a felony).

[179] For dismissal of records under Penal Code sections 1203.4, 1203.4a, and felony reductions under Penal Code section 17b, the form is "CR-180," available at http://www.courts.ca.gov/documents/cr180.pdf. The Clean Slate Clinic occasionally serves clients with convictions eligible for dismissal or reduction even if they have other convictions that are not eligible for relief. This typically happens if clients have newer convictions eligible for relief and older convictions that are ineligible for relief but which should not be reported to employers because they occurred more than seven years ago. E-mail from Eliza Hersh, Dir. of EBCLC's Clean Slate Clinic, to Jeffrey Selbin, Clinical Professor of Law, UC Berkeley School of Law (Jan. 30, 2017) (on file with author).

remedies.

While record clearing programs vary across states and within jurisdictions, EBCLC's Clean Slate Clinic is a fairly representative example of the growing field in public defender offices, civil legal aid programs, and law school clinics. Like the San Francisco Public Defender's Office and Community Legal Services of Philadelphia described above, the Clean Slate Clinic is a high volume provider that focuses services on people who are disproportionately impacted by criminal records. And like the others, the clinic helps clients avail themselves of core record clearing remedies.

The Clean Slate Clinic, therefore, was an appropriate setting in which to study the record clearing intervention. In fact, there is a growing movement to evaluate outcomes in civil legal aid programs, where client demand far outstrips scarce resources, and providers and funders need better data to make key resource allocation decisions.[180] Law school clinics affiliated with research universities are obvious sites of inquiry with access to the requisite expertise to mount meaningful research protocols.[181]

In the next Part, we describe our study, including its method, population sample, and limits.

IV. A CRIMINAL RECORD CLEARING STUDY

As described above, tens of millions of American adults have a criminal record of arrest or prosecution, mostly for relatively minor offenses. These records serve as barriers to a range of benefits and opportunities, especially in the labor market. Record clearing programs like the East Bay Community Law Center's Clean Slate Clinic are designed to improve employment outcomes for people with criminal records, but we know surprisingly little about if, how, and for whom these interventions deliver on their promise.

Some record clearing programs have conducted outcome evaluations.[182]

---

[180] Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2232–34 (2013); Jeffrey Selbin et al., *Service Delivery, Resource Allocation and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 54–61 (2012) [hereinafter Selbin et al., *Resource Allocation and Access to Justice*]; Jeffrey Selbin et al., *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*, CTR. FOR AM. PROGRESS (2011), https://www.americanprogress.org/issues/civil-liberties/report/2011/06/22/9707/access-to-evidence/.

[181] Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WISC. L. REV. 145, 162 (2013); Jeffrey Selbin & Jeanne Charn, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, MGMT. INFO. EXCH. J. 28, 29–31 (2007).

[182] For example, an outside review of the San Francisco Public Defender Office's Clean Slate Program found that 90% of clients' petitions (mostly dismissals and felony reductions) were granted, removing "significant barriers for Clean Slate clients to employment, housing, public benefits, civic participation, immigration, and the attainment of other social, legal, and

EBCLC, for example, evaluates its Clean Slate Clinic through a variety of methods, including client satisfaction surveys and client focus groups.[183] While record clearing programs appear to be providing important services to their clients, the research to date does not tell us much about the relationship between the intervention and employment outcomes.[184]

Our study attempts to help fill this void. We measured Clean Slate Clinic participants' average employment rates and earnings reported to the Social Security Administration before and after record clearing, using a well-established method frequently deployed to study the effect of job-training programs on employment outcomes.[185] By doing so, we hoped to answer some basic questions about the impact of the record clearing intervention on employment outcomes.

In this Part, we describe our research design, which is observational in nature and compares early adopters of the record clearing intervention to late adopters. We also describe our sample subjects, our data source, and the limits of our method, population, and data.

A. METHOD

The goal in studying the effect of a program intervention is to measure the difference between two otherwise identical people: one who participates in the intervention and one who does not. Our study is retrospective and observational, using a timeframe research design—in this case, early

---

personal goals." LFA GRP., CLEAN SLATE PROGRAM OFF. OF THE PUB. DEFENDER CITY & COUNTY OF S.F., 2007–2008 EVALUATION FINDINGS 6 (2009), http://sfpublicdefender.org/wp-content/uploads/sites/2/2009/05/clean-slate-evaluation-final-report.pdf. A Stanford cost-benefit analysis of a record clearing program in Santa Clara County found that former clients who received a dismissal reported to the provider an increase in annual income of $6,190. MEYLI CHAPIN ET AL., A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 23 (March 2014), *available at* https://publicpolicy.stanford.edu/publications/cost-benefit-analysis-criminal-record-expungement-santa-clara-county.

[183] A review of several hundred survey forms and three focus group reports reveals a high level of client satisfaction with both the service and outcomes. *See* Reiter et al., *supra* note 156.

[184] The San Francisco Public Defender Office study equates a successful process outcome (a petition granted) with the desired outcome measure (removing barriers to employment and other opportunities). LFA GRP., *supra* note 182. The Stanford Santa Clara study does not control for key variables, including selection effects, which makes it impossible to draw a causal inference between the intervention and the reported outcome. CHAPIN ET AL., *supra* note 182. EBCLC's program evaluation focuses primarily on client satisfaction. *See* Reiter et al., *supra* note 156.

[185] *See* Orley Ashenfelter, *Estimating the Effect of Training Programs on Earnings*, 60 REV. ECON. & STAT. 47, 48 (1978) (a study using Social Security Administration ("SSA") data to determine the effect of job training programs on earnings, assuming that the SSA's data are an accurate reflection of earning potential over time, but noting that the records are capped at the Social Security taxable maximum, a fact that is less relevant for low-income workers).

adopters versus late adopters—to measure the impact of the Clean Slate Clinic's record clearing intervention on employment outcomes. For reasons described in more detail in Appendix A, we did not use other methods, such as a randomized controlled trial or a match group, which have different strengths and weaknesses than our approach.

Our early-versus-late adopters approach makes comparisons between groups of participants that are organized according to when they began the intervention. If the intervention has an effect, then the effect should appear in the order in which the intervention was received. Thus, a group that has yet to begin the intervention can serve as a comparison group for the group that has already begun the intervention.

As compared with other methodologies drawing upon other types of comparison groups, our approach has two important advantages. First, the employment outcomes are uniform—our comparison groups are all eventually served and we have participants' social security numbers, so we can measure their average employment rates and earnings in an apples-to-apples way. This alleviates some of our concerns about internal validity. Second, the participants come from a common economic environment and are otherwise similarly situated (except for the date they sought the intervention). This alleviates some concerns about external validity.

However, to measure the effect of the intervention using this model, we must account for pre-intervention differences between the people in the temporally divided groups. In order to do this, we use pre-intervention data on the outcomes that the study will measure (in our case, employment rates and average earnings). Any differences in these measures between the temporally divided groups before the intervention takes place are attributable to selection bias and cannot logically be attributed to the intervention (because it has not yet occurred).

Having established the average differences between the groups of participants prior to the intervention, this method assumes that these differences remain constant (or time-invariant). The impact of the intervention can then be measured by taking the difference between the change in the first group's employment rates and earnings before and after the intervention and the change over the same period in any of the comparison groups' employment rates and earnings, which have not yet been affected by the intervention. This method, which is sometimes called "difference-in-differences,"[186] effectively extracts the effects of pre-study differences between participants, thus leaving the impact of the intervention.

---

[186] *See generally* James Heckman et al., *Sources of Selection Bias in Evaluating Social Programs: An Interpretation of Conventional Measures and Evidence on the Effectiveness of Matching as a Program Evaluation Method*, 93 PROC. NAT'L ACAD. SCI. U.S. 13416 (1996).

For more detail on our method, validity, hypotheses and modeling about how the record clearing intervention might impact employment rates and earnings, see Appendix B.

B. SAMPLE

We drew our sample from clients served by the East Bay Community Law Center's Clean Slate Clinic. The clinic serves 1,000 or more clients a year with a variety of criminal record clearing matters. For individual participants (clients), the clinic provides assistance, including referrals, counsel and advice, brief service, and full representation. In consultation with Clean Slate Clinic lawyers, we had to make choices about which case types and forms of intervention to include in our study.

The subjects in our study represent a random sample of just over 10% (264/2,575) of the people who received legal assistance in the clinic during the twenty-four-month period from July 1, 2007 through June 30, 2009.[187] Participants were eligible for inclusion in the subject pool if they received representation from the clinic—not just a referral or counsel and advice—to obtain at least one of the principal California record clearing remedies described above (the dismissal of a criminal record and/or a felony reduction). Working with EBCLC staff, we obtained basic client demographic data on the total pool of eligible clients and the sample group from an electronic case management system and paper case files.[188]

From the batch of 264 clients, we requested aggregate, anonymized, annual employment rate and earnings data from the Social Security Administration Office of Research, Evaluation, and Statistics ("SSA"). We received such data for 235 people, including 147 men and eighty-eight women. We did not receive data for the twenty-nine clients whose social security numbers and dates of birth did not match the SSA records. The SSA data cover a period that begins in 2000, well before the record clearing intervention, and ends in 2011, two to four years after the intervention.[189]

---

[187] The research protocol was reviewed and approved by the University of California, Berkeley Committee for the Protection of Human Subjects.

[188] We identified an initial sample of 364 participants, or roughly one in eight participants during the two-year period. We selected clients served within the time period by relative prevalence of their last name, beginning with each letter of the alphabet. This weighted randomization procedure accorded with EBCLC's practice of keeping files alphabetized by last initial for each year. We did not initially exclude participants based on the presence or absence of a social security number in the file. However, after reviewing the paper files of the 364 participants in the original sample, we reduced our sample to the 264 clients who had sufficient identifying information to obtain employment rate and earnings data from the Social Security Administration (a single social security number and date of birth).

[189] As noted above, we are awaiting updated data through 2015 from the SSA.

Table 1 displays statistics for the four cohorts we studied.

Table 1. Statistics by Cohort Sample

Cohort	Timing of Service	N	Fraction Female	Average Age	Fraction Employed 2000-06	2007-11	Average Real Earnings 2000-06	2007-11
1	2007h2	28	0.43	40.2	0.75	0.69	$16,738	$15,064
2	2008h1	85	0.33	38.6	0.76	0.74	22,106	18,875
3	2008h2	55	0.25	41.2	0.75	0.67	15,428	14,042
4	2009h1	67	0.51	43.6	0.76	0.69	20,427	15,335
All		235	0.37	40.8	0.75	0.70	$19,425	$16,280

Notes: Statistics based on SSA data. Average real earnings deflated using Bay Area CPI-U from BLS. Denominator for average real earnings is all participants (not only those with positive earnings). Fraction employed is the percent of participants with positive earnings.

The first cohort was served in the second half of 2007 (July 1 to December 31, 2007), the second cohort was served in the first half of 2008 (January 1 to June 30, 2008), the third cohort was served in the second half of 2008 (July 1 to December 31, 2008), and the fourth cohort was served in the first half of 2009 (January 1 to June 30, 2009). The cohorts range in size from twenty-eight participants (Cohort 1) to eighty-five participants (Cohort 2).

The four cohorts are somewhat heterogeneous with respect to time-invariant (constant) characteristics. The fraction of the cohort that is female ranges from a quarter (Cohort 3) to just over a half (Cohort 4), with an average across the cohorts of 37%. Average age also varies across cohort from thirty-eight years (Cohort 2) to forty-three years (Cohort 4), but averages just over forty years. Although we know that 57% of the clients in our original sample were African-American, our cohort sizes were too small to obtain race and ethnicity from SSA while adhering to its requirements of anonymized data.[190]

Clean Slate participants are working—two-thirds to three-quarters are employed in the formal sector—but they have very low average earnings, generally around $18,000 in 2015 dollars (adjusted for inflation across the entire study period).[191] This measure of formal earnings is an average across

---

[190] The quality of SSA's race and ethnicity data is notoriously unreliable for a variety of reasons. *See* Patricia P. Martin, *Why Researchers Now Rely on Surveys for Race Data on OASDI and SSI Programs: A Comparison of Four Major Surveys*, Soc. Sec. Off. of Ret. & Disability Pol'y (Jan. 2016), https://www.ssa.gov/policy/docs/rsnotes/rsn2016-01.html.

[191] SSA earnings data are nominal (not adjusted for inflation). To compare changes over time, we convert nominal earnings to real earnings (adjusted for inflation) using data from the Bureau of Labor Statistics on the Consumer Price Index—All Urban Consumers for San Francisco-Oakland-San Jose. This is the narrowest geography for which information on price

all program participants—even those with zero earnings. The purpose of using this type of average, as opposed to one limited to the subset of those working, is that one potential mechanism by which the record clearing intervention might improve labor market outcomes for participants is by increasing their chances of formal employment. In such a context, average earnings across all program participants is the cleanest measure of labor market success.

The average employment rates and earnings mask some variation across cohorts and time, as the numbers in Table 1 show. The fraction employed— here measured as the fraction of participants with positive formal earnings— was 75% or 76% for each cohort in the 2000-2006 period. In the 2007-2011 period, the fraction employed was down five percentage points on average across cohorts to around 70%, with variations ranging from 67% in Cohort 3 to 74% in Cohort 2.

In terms of earnings, Cohorts 1 and 3 have lower averages than Cohorts 2 and 4, closer to $15,000 than $20,000. Not surprisingly, average earnings in all cohorts were higher in years before the great recession than after. Across cohorts, average earnings in 2000-2006 were over $19,000 and fell to just over $16,000 in 2007-2011.

Figures 1A and 1B explore the temporal dimension of these patterns in greater detail, contrasting our sample of participants with labor market outcomes for Alameda County more generally.[192]

Figure 1A presents the time series of employment to population ratios, or the ratio of people working to the total population, for our sample of Clean Slate participants and for Alameda County as a whole.

---

levels is available. All figures cited in the paper are in 2015 dollars. *Consumer Price Index*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., http://www.bls.gov/cpi/ (last visited Oct. 9, 2017).
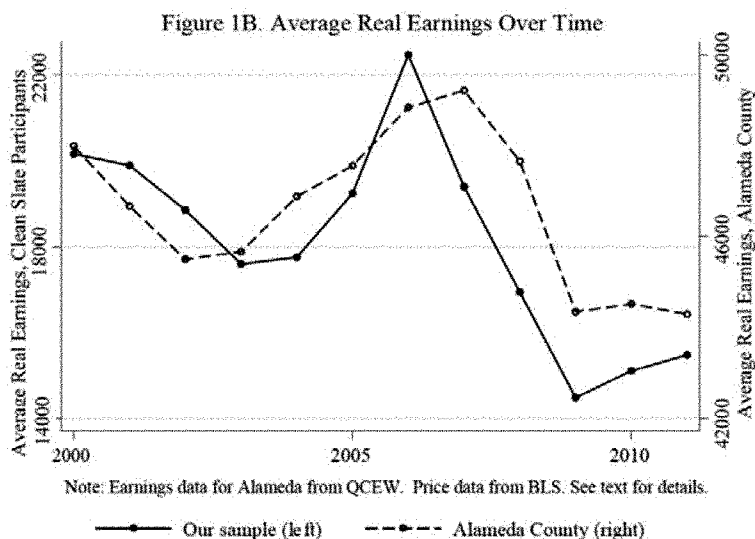
[192] In Figures 1A and 1B, we use the population of those aged eighteen to sixty-five, even though many of those people are not in the labor force.

Figure 1A. Employment to Population Ratios Over Time

Note: See text for details.

———●——— Our sample   — —●— — Alameda County
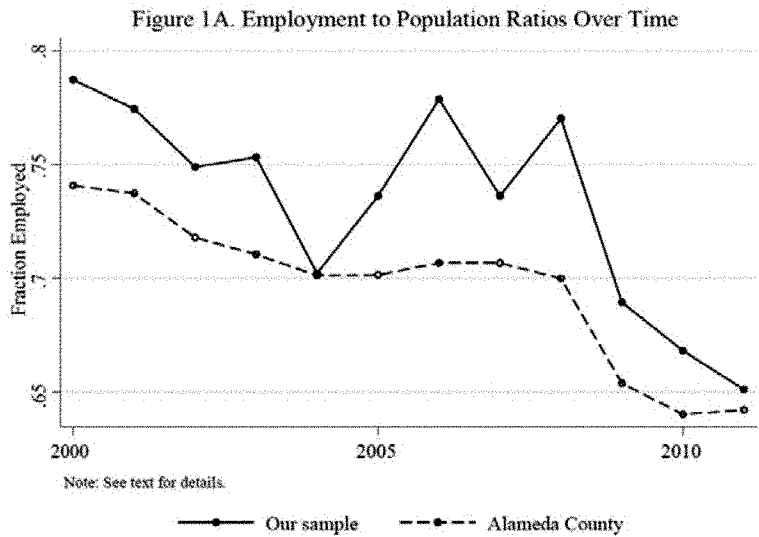
The level of employment (measured as fraction employed) in our sample is similar to that of the general population and the overall trajectories of those levels are also highly similar. That may be prior grounds for suspecting that the levels and trends would be dissimilar—after all, Clean Slate participants self-select a treatment indicating an interest in work (although they struggle to obtain it), while it is possible that Alameda County residents as a whole are less interested in work (yet may have an easier time obtaining it). Nonetheless, the year-to-year fluctuations in the two series are very similar.[193]

Figure 1B presents the time series of average real earnings.

---

[193] The time series correlation of the two is over 0.90. In the interest of transparency, Appendix Figures 1 and 2 in Appendix C provide a graphical display of the raw data on employment rates and earnings that we obtained from the SSA. These data are a time series for each of the Clean Slate cohorts.

Figure 1B. Average Real Earnings Over Time

Note: Earnings data for Alameda from QCEW. Price data from BLS. See text for details.

——•—— Our sample (left)   ——•——— Alameda County (right)

Each solid circle is the weighted average of real earnings across the four cohorts, with weights equal to the size of the cohort. In the wake of the early 2000s recession, participant earnings fell about $2,000 in 2015 dollars, from roughly $20,000 to $18,000. Earnings increased over $4,000 leading up to the great recession, but plummeted from 2006 to 2009, falling from over $22,000 to just over $14,000, before rebounding slightly in 2010 and 2011.

While average real earnings for our sample of participants are extremely low relative to all residents of Alameda County, the trends are generally similar.[194] The earnings levels are so different that placing the two series on the same axis would mask fluctuation over time, so we present our sample of Clean Slate participants on the left-hand y-axis and Alameda County residents on the right-hand y-axis. Earnings for Alameda County residents in 2000 were roughly $48,000 in 2015 dollars, suggesting that the earnings power of Clean Slate participants is about 40 percent of the earnings of all

---

[194] To obtain a measure of earnings akin to average real earnings based on SSA data, we use Bureau of Labor Statistics data drawn from the Quarterly Census of Employment and Wages (QCEW) program. This program covers approximately 98% of formal sector earnings and, like the SSA data, is based off of W2 forms filed by individuals and employers. We take total earnings from the QCEW for Alameda County (the most granular geography corresponding to EBCLC) and normalize it by estimated population ages eighteen to sixty-five. We do so using straight line interpolation between total population on Census Day 2000 and 2010, further discounted by the 25% and 10% of Alameda that was below age eighteen and above age sixty-five, respectively. *Quarterly Census of Employment and Wages*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., http://www.bls.gov/cew/ (last visited Oct. 9, 2017).

residents.[195]

Presenting the data this way allows us to see that the earnings power of Alameda County residents and of Clean Slate participants exhibit similar patterns over time.[196] But in the wake of the great recession, real earnings outcomes for Clean Slate participants worsened much more rapidly and sharply than earnings for all county residents, underscoring the fragile labor market for workers with criminal records. Clean Slate participants and county residents experienced a small improvement in the labor market in 2010 and 2011.

C. LIMITS

As described above, the early-versus-late adopters study design is a standard econometric methodology used to analyze non-randomized programs.[197] We use the design here because of our interest in labor market outcomes for people with criminal records. But we also are taking advantage of access to client information through a law school-affiliated, community-based clinic and the availability of SSA earnings and employment rate data. Nevertheless, we make several assumptions that influence our findings.

First, the study methodology is observational rather than experimental, meaning that the underlying model has the potential to affect the substantive conclusions. In particular, one key modelling assumption allowing for unbiased estimation of program effects is that, controlling for the influences of the overall Bay Area economy, the date on which EBCLC clients avail themselves of EBCLC services is random. This assumption can be understood as implying that, conditional on other controls, simple knowledge of the date clients arrive at EBCLC tells us nothing about their future employment rates and earnings. As we discuss below, our findings are somewhat at odds with this assumption and are more consistent with what is known in the labor economics literature as an "Ashenfelter dip."[198]

Second, we assume that EBCLC's intervention at the time was broadly representative of other record clearing programs in the field. We have described above why we think this assumption is a reasonable one, but the Clean Slate Clinic could be different in any number of ways from other programs. The active participation of student advocates may impact

---

[195] Because Clean Slate participants are substantially more likely to be in the labor market than all Alameda residents aged eighteen to sixty-five, their average real earnings are in reality even lower than 40% of the real earnings of all County residents.

[196] The time series correlation of the two is just below 0.81.

[197] *See* Louis S. Jacobson et al., *Earnings Losses of Displaced Workers*, 83 AM. ECON. REV. 685, 692–95 (1993).

[198] *See generally* Ashenfelter, *supra* note 185, *infra* note 246, and accompanying text.

outcomes (for better or worse), though this would presumably be true in other clinical programs (but perhaps not in public defender and civil legal aid offices).[199] Choices about which clients to serve and the scope of services to provide introduce a range of selection effects on the provider side that are difficult to control for and generalize about.

In addition, record clearing and fair hiring laws vary considerably by state. Even within jurisdictions, their application can differ by courthouse and judge. We also have no way of knowing whether the intervention is more or less effective in a rising or falling labor market, much less how it operates relative to different local hiring practices.

In the next Part, we describe our findings and consider their implications for policy and research.

V. FINDINGS AND IMPLICATIONS

Our research design takes advantage of the staggered timing of the Clean Slate Clinic intervention to measure its effects on participants' average employment rates and real earnings. Though the study has limits, described above, we found that: (1) the record clearing intervention appears to boost both average employment rates and real earnings, though the durability of these increases is not yet known; and (2) participants sought the record clearing remedy after a period of suppressed earnings, in spite of relatively active and stable employment rates.

In this Part, we review the findings in more detail, and we discuss their implications for record clearing policy and research.

A. FINDINGS

As previously noted, there is some heterogeneity in our sample. For example, different cohorts of Clean Slate participants have different gender composition and different employment rates, earnings, and trajectories. There is also substantial variation in labor market outcomes over time, and these year-to-year changes are not necessarily common to all cohorts. Because Clean Slate participants receive services at different times, however,

---

[199] *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2124 (2012) (considering the role of student advocates in finding that a law school clinic's offer of representation to claimants in unemployment insurance appeals hearings had no statistically significant impact on the chance that claimants would prevail in their appeals, although such offers did delay proceedings); *Sponsor Preferences*, EQUAL JUST. WORKS, http://www.equaljusticeworks.org/post-grad/equal-justice-works-fellowships/apply/sponsorship (last visited Sept. 20, 2017). Record clearing programs in some public defender offices are staffed by paralegals and law student interns, and the Equal Justice Works record clearing fellowship program is staffed with recent law graduates.

temporal differences and program effects are distinguishable.[200]

We observed four cohorts for a dozen years, 2000 to 2011 inclusive and so had forty-eight data points corresponding to our 235 Clean Slate Clinic participants. The econometric method we employed was a weighted multivariate regression that sought to apportion explanatory credit among time-invariant cohort differences (fixed characteristics of the participants unrelated to the intervention), cohort-invariant time differences (changes in the larger economy), and program effects (the impact of the record clearing intervention on employment outcomes). In equation form, the specific regression model we employed can be written as:

$$Y_{ct} = \mu_c + \lambda_t + \sum_{j=-5}^{3} \theta_j D_{ct}^j + \varepsilon_{ct}$$

<div align="center">Equation 1</div>

The regression uses weights proportional to cohort size, which is appropriate for this context. Using a weighted regression replicates what would be obtained from an individual-level regression in which we imputed to that individual the cohort-specific outcome. We explain the regression model in more detail in Appendix D.

---

[200] *See generally* Jacobson et al., *supra* note 197, at 692–95.

1. Average Employment Rates

Figure 2A presents program effects for participant employment rates (positive earnings).
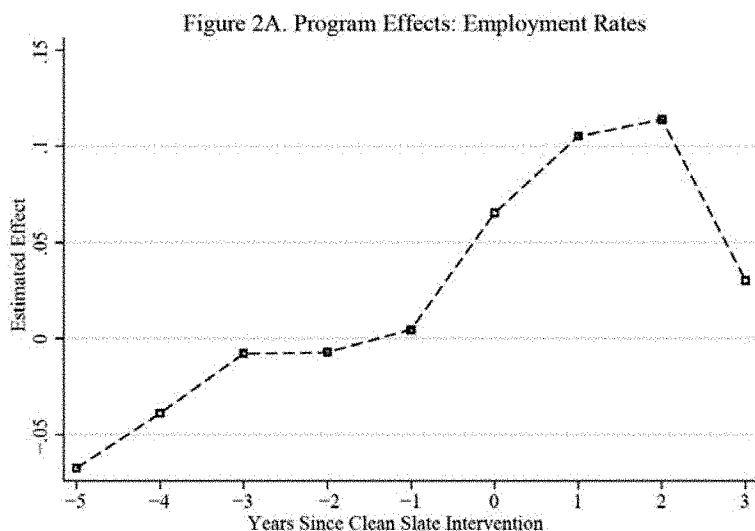
Figure 2A. Program Effects: Employment Rates

The x-axis is labeled "Years Since Clean Slate Intervention," with 0 representing the year of intervention (and corresponding to the j index). The y-axis is labeled "Estimated Effect" and gives the percentage rate of employment (positive earnings) of the estimated program effects, with 0 representing the baseline employment rate.[201] As a reminder, the SSA data allow us to observe the number of individuals with positive formal sector earnings. Our measure of the employment rate is simply the ratio of individuals with positive earnings to all individuals in the cohort.

The results in Figure 2A show that in the years leading up to Clean Slate treatment, there is a somewhat lower rate of employment than at baseline. This effect is strongest four and five years before treatment and is essentially zero in the three years just before treatment. Putting this result together with the low average real earnings from Figure 2B below, it appears as though participants are working at roughly the same rate but are losing earning power. This likely reflects nominal wage cuts, or perhaps challenges with obtaining enough hours, because the average real earnings effects are simply too large to reflect inflation.

Notably, in the years after Clean Slate treatment, the employment rate is generally above baseline. The effects are economically large, roughly five

---

[201] Our method for establishing the baseline employment rate is described in Appendix D.

to ten percentage points. To be concrete about the size of the effect, refer back to Table 1 and recall that our study population has an employment rate of about 75%. The estimates in Figure 2A suggest that the Clean Slate intervention increases employment from the 75% baseline to 80% or 85%.

2. Average Real Earnings

Figure 2B is analogous to Figure 2A, but Figure 2B provides a graphical presentation of the estimated program effects (θ_j in Equation 1) for participant average real earnings.
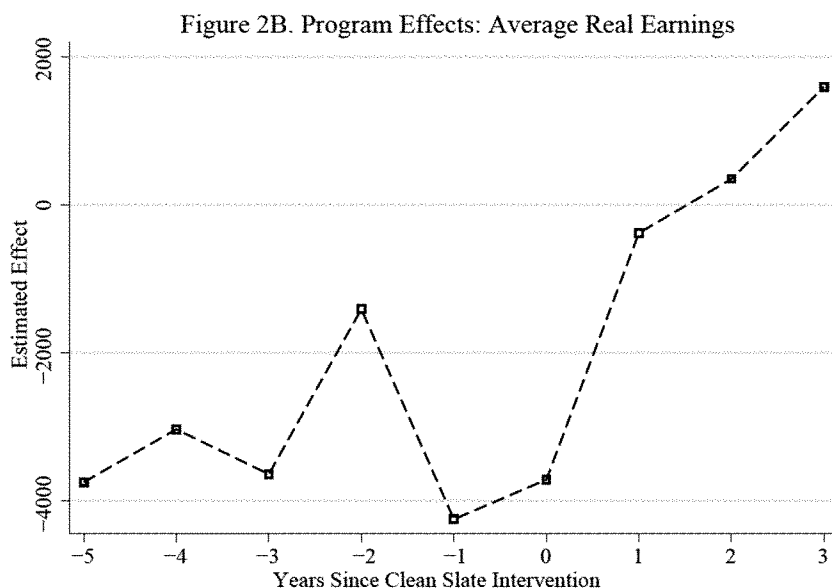
Figure 2B. Program Effects: Average Real Earnings

The x-axis is labeled "Years Since Clean Slate Intervention," with 0 representing the year of intervention (and corresponding to the j index). The y-axis is labeled "Estimated Effect" and gives the actual dollar value of the estimated program effects, with 0 representing baseline earnings.[202] As a reminder, our measure of average real earnings is best thought of as total formal sector earnings for the cohort, relative to all individuals in the cohort. It is not average real earnings for the subset of the cohort that is working in the formal sector.

While our sample size does not allow for precise estimation, Figure 2B reveals several interesting patterns. First, in the years leading up to Clean Slate intervention, average real earnings are low relative to baseline earnings. The magnitude of the shortfall is quite large in economic terms—roughly

---

[202] Again, our method for establishing baseline earnings is described in Appendix D.

$4,000, or about a fifth of typical earnings in this sample, which is an already meager $18,000 or so (but cf., Table 1).

Second, average real earnings tick up slightly in the year of treatment and then grow rapidly. By three years after treatment, earnings have risen from $4,000 below baseline to nearly $2,000 above baseline. The size of this swing—nearly $6,000—is a very large magnitude, roughly a third of total average earnings.

These results are consistent with a simple theory of program participation and impact. The first component of this theory has to do with the low earnings relative to baseline in the years prior to Clean Slate treatment. Our theory is that the challenging labor market for people with criminal records motivates them to seek help in clearing their record. The second component of this theory has to do with the high earnings relative to baseline in the years subsequent to Clean Slate treatment. Our theory is that the Clean Slate intervention helped improve labor market outcomes for participants.

The intervention theory is not the only theory that is consistent with these findings. Although it seems implausible in the light of the employment rate data, depressed earnings in the years leading up to the intervention could mean that individuals chose to drop out of the labor force in anticipation of participating in Clean Slate. Or perhaps the Clean Slate intervention simply coincides with other activities or attributes. Under this account, the high earnings relative to baseline in the years subsequent to the Clean Slate intervention have little to do with the record clearing itself and instead reflect the positive effects of the motivation and organization that leads individuals to seek the intervention in the first place.[203]

We note a couple of interesting differences between the findings on employment rates and earnings. First, while Figure 2A shows a large increase in the employment rate in the year of the Clean Slate intervention— about 6.5 percentage points—Figure 2B shows a very small effect on average real earnings in the same year. These effect sizes suggest that those working are seeing declines in average real earnings the year of the Clean Slate intervention, while previously non-working participants are newly able to find work. It is also possible that the employment rate effects in the year of the Clean Slate intervention are primarily due to individuals gaining employment late in the calendar year—captured as positive SSA earnings (an on/off switch)—while the average earnings increase associated with employment over time does not reveal itself until the calendar year after

---

[203] In Appendix D, we discuss research designs that might allow one to distinguish these different accounts.

Clean Slate intervention. We cannot know for sure what explains the differences, but the employment rate increase precedes the earnings increase.

The effects on employment rates and average earnings three years after the intervention also show some differences. Figure 2A indicates that average employment rates are beginning to fall at that point relative to where they were one and two years out, while Figure 2B indicates that average real earnings are higher three years after intervention than at baseline by almost $2,000. These results might indicate that the Clean Slate intervention has short-term labor market effects that fade over time. However, we are not confident that strong interpretation on these effects is warranted at this point.

To summarize these findings, Clean Slate Clinic participants experience a significant (if imprecise) increase in average employment rates (Figure 2A) and average real earnings (Figure 2B) immediately following the record clearing intervention, with employment rates declining three years out (Figure 2A) for unknown reasons. Clean Slate Clinic participants experience a period of suppressed earnings relative to their baseline in the years immediately preceding the record clearing intervention (Figure 2B) in spite of relatively active employment (Figure 2A). This is consistent with findings from the job training literature about an earnings dip prior to program participation.[204]

B. POLICY IMPLICATIONS

The criminal records problem and remedies are multifaceted, and we only measure the effects of one intervention (EBCLC's record clearing services, including dismissals and felony reductions) on one set of outcomes (employment rates and earnings as reported to the Social Security Administration) in one jurisdiction (Alameda County, California). While a full exploration of prescriptions is beyond the scope of this study, we sketch here some possible policy implications of our findings, including more record clearing services, earlier intervention and expanded and improved remedies. In recent years, advocates have been pressing for many of these reforms,[205] and our findings suggest that such reforms improve employment outcomes.

First, given the apparent positive impact of the intervention on employment rates and earnings, state and local jurisdictions should increase the availability of record clearing services. The current patchwork of record clearing programs is the product of innovative lawyers and programs, but is not systematic, and many people with records have nowhere to get help. Policymakers should strive to increase private, governmental, and

---

[204] *See* Ashenfelter, *supra* note 185, at 48.

[205] *See* VALLAS & DIETRICH, *supra* note 18, at 34–48.

philanthropic resources to expand and rationalize a record clearing delivery system.

The federal government has taken modest steps to facilitate such a system. In 2012, the U.S. Department of Justice issued policy guidance to recipients of Second Chance Act funds allowing them to pay for record clearing and other legal services to help people with criminal records overcome barriers to employment.[206] In 2014, AmeriCorps awarded a grant to the non-profit Equal Justice Works for the "Employment Opportunity Legal Corps."[207] The program supports approximately thirty-seven lawyers and 380 law students at placements in programs that assist people with criminal records in removing barriers to jobs.[208]

Second, the earnings dip experienced by people with criminal records prior to unmarking means that earlier intervention could increase wages and reduce harm. Record clearing assistance, for example, could be provided as a regular part of workforce development.[209] The University of Maryland's Reentry Clinic staffs bi-weekly expungement workshops at the federally funded American Jobs Center (One Stop) in Baltimore. With sufficient resources and partnerships, such a model could be extended to many of the nation's nearly 2,500 One Stops.

Advocates have also pushed states to shorten the waiting time for record clearing, which can help people with records and reduce recidivism.[210] In 2015, New Jersey reduced the expungement waiting period for both

---

[206] U.S. DEP'T OF JUSTICE, *Office of Justice Programs, Policy: Allowable Uses for Second Chance Act Program Grant Funds* (May 17, 2012). Such a use of funds continues to be permitted in 2017. U.S. DEP'T OF JUSTICE, SECOND CHANCE ACT COMPREHENSIVE COMMUNITY-BASED ADULT REENTRY PROGRAM FY 2017 COMPETITIVE GRANT ANNOUNCEMENT 9 (2017), https://www.bja.gov/funding/communityreentry17.pdf.

[207] Elle Hogan, *AmeriCorps Awards Equal Justice Works with Grant to Fund Employment Opportunity Legal Corps*, EQUAL JUSTICE WORKS (May 7, 2014), http://www.equaljusticeworks.org/news/blog/EmploymentOpportunityLegalCorps. Participating legal aid organizations and Equal Justice Works will supplement the $1.4 million federal grant for a total budget of $2.5 million for three years. Karen Sloan, *Program to Help Job-Seekers Expunge Criminal Records*, NAT'L L.J. (May 6, 2014), http://www.nationallawjournal.com/id=1202654226256/Program+To+Help+JobSeekers+Expunge+Criminal+Records%3Fmcode=1202617074964&curindex=1&curpage=ALL.

[208] E-mail from Anne Bloom, Dir. of Pub. Programs for Equal Justice Works, to Josh Epstein, law student at UC Berkeley School of Law (June 17, 2016) (on file with authors). In its first two years, the program reports lifting almost 30,000 barriers on behalf of more than 10,000 people with criminal records. E-mail from Toya Lynch, Sen. Program Manager for Equal Justice Works, to Josh Epstein, law student at UC Berkeley School of Law (Oct. 18, 2016) (on file with authors).

[209] CAREERONESTOP, https://www.careeronestop.org/ (last visited Nov. 9, 2016).

[210] Most recidivism occurs within three years of completing a sentence. *See* JACOBS, *supra* note 11, at 131 (explaining that people who have just completed a sentence are in immediate need of help).

misdemeanors and felonies though an "early pathway" option;[211] in 2016, Missouri significantly reduced the waiting period for expungable felonies and misdemeanors.[212] We do not know how many Clean Slate participants sought assistance as soon as they were legally eligible or if they waited for other reasons, but our findings suggest that earlier record clearing as a result of shorter waiting times could reduce the earnings dip.

Third, our findings regarding both the benefits of the intervention and the harm of delay are consistent with a number of efforts to expand and improve record clearing remedies. U.S. Senators Rand Paul and Corey Booker introduced the Record Expungement Designed to Enhance Employment Act to permit sealing of nonviolent convictions, which would create a record clearing remedy for federal offenses.[213] States as diverse as Indiana, Louisiana, and Kentucky recently extended record clearing eligibility to people with certain felony convictions,[214] and Maryland and Pennsylvania expanded their record sealing and expungement.[215]

To increase the reach and benefits of unmarking, jurisdictions could permit automatic record clearing by operation of law.[216] Connecticut permits erasure of records for all cases in which a person is found not guilty or the charge is dismissed, Arkansas presumptively expunges most misdemeanors absent a showing of clear and convincing evidence by the prosecutor, and New Jersey permits both automatic and immediate expungement of non-conviction records and immediate expungement after successful

---

[211] *See* 2015 N.J. Laws ch. 261 (reducing the wait from ten to five years for a felony and five to three years for a misdemeanor if a court finds expungement "is in the public interest, giving due consideration to the nature of the offense, and the applicant's character and conduct since the conviction").

[212] *See* MO. REV. STAT. § 640.140 (2011) (reducing the wait from twenty years to seven years following completion of a felony sentence, and from ten to three years following completion of a misdemeanor sentence, though limiting the number of lifetime expungements and the effect of expungement and permitting some employers and licensing agencies to consider expunged convictions).

[213] REDEEM Act, S. 2567, 113th Cong. (2014).

[214] IND. CODE § 35-38-9 (2015); H.R. 40, 16 Reg. Sess. (Ky. 2016), 2016 Ky. Acts ch. 94; LA. CODE CRIM. PROC. ANN. art. 971 et seq. (2014). Unfortunately, some states still charge a high fee for record clearing—in Kentucky, the filing fee for an expungement motion is $500— which undermines access to the remedy, especially for low-income people. *See* H.R. 40, 16 Reg. Sess. (Ky. 2016), 2016 Ky. Acts ch. 94.

[215] S. 1005, 2016 Sess. (Md. 2016), 2016 Md. Laws ch. 515; S. 166, 2015 Reg. Sess. (Pa. 2015), 2016 Pa. Laws 10, No. 5. States are also clarifying how cleared records are to be treated in the employment context, including non-disclosure on the part of the applicant and non-discrimination on the part of the employer. *See* SUBRAMANIAN ET AL., *supra* note 14, at 13– 17.

[216] European countries automatically seal most criminal records. JACOBS *supra* note 11, at 119.

completion of drug court.[217] The most ambitious automatic sealing bills to date were introduced in Pennsylvania.[218] Under the "Clean Slate" bills, both misdemeanor and felony convictions would be automatically sealed from public use after a set period of time and assuming no further convictions.[219]

However, even as states take remedial measures on mass criminalization, they continue to add crimes and collateral consequences.[220] On the front end of the process, jurisdictions could reduce the creation of criminal records through a variety of strategies, including decriminalization.[221] On the back end of the process, unmarking only works if courthouses, public repositories, and private background check companies maintain and share accurate records.[222]

To regulate the use of criminal records by employers, state and local jurisdictions have adopted fair hiring measures such as ban-the-box and licensing reforms, and they have incentivized hiring of people with criminal

---

[217] CONN GEN. STAT. § 54-142a (1976); 88th Gen. Assemb., Reg. Sess. (Ark. 2011); H.R. 1608, 2015 N.J. Laws ch. 261.

[218] *See* S. 1197, 2015 Reg. Sess. (Pa. 2015); H.R. 1984, 2015 Reg. Sess. (Pa. 2015).

[219] CMTY. LEGAL SERV. OF PHILA., *Employment: "Clean Slate" Bills Introduced in Pennsylvania* (Apr. 13, 2016), https://clsphila.org/news/clean-slate-bills-introduced-pennsylvania. *But see* Love, *supra* note 102, at 1726 (arguing against forgetting remedies like expungement because they rewrite history, downplay concerns about public safety, ignore the reach of technology, and miss opportunities to reintegrate people with criminal records).

[220] *See* SUBRAMANIAN ET AL., *supra* note 14, at 2 (explaining that in spite of efforts in some states to mitigate the collateral consequences associated with criminal records, new crimes and attendant collateral consequences continue to be added each year); Love, *supra* note 115 (arguing that the Vera Institute's report provides an inaccurately optimistic picture of the landscape of state law collateral consequences and suffers from methodological flaws).

[221] To reduce the need for unmarking, states can decriminalize certain activities (like marijuana use), reclassify appropriate crimes (from felonies to misdemeanors and misdemeanors to infractions), and create alternatives to arrests (warning) and prosecution (like pretrial diversion). *See* JACOBS *supra* note 11, at 94–98 (describing these strategies); *see also* SUBRAMANIAN ET AL., *supra* note 14, at 21 (mentioning states that have built relief mechanisms into the "front-end" of the criminal justice process).

[222] Critics argue that the FBI database (compiled of state records) is inaccurate and that background check companies report mistaken information about people and their records, often in violation of consumer and privacy laws. *See* YU & DIETRICH, *supra* note 89, at 15 (critiquing the accuracy of records provided by private background check companies); Roberts, *supra* note 5, at 344 (for a discussion of problems with the FBI database). Congress has considered but failed to enact legislation to improve the accuracy of the FBI criminal database and criminal background checks. *See* Roberts, *supra* note 5, at 344 (discussing Congressional attempts to improve the accuracy of the FBI database, including references to the Fairness and Accuracy in Employment Background Checks Act and the Accurate Background Check Act, neither of which was enacted). Even records correctly cleared in public repositories may linger for use by background check companies in proprietary industry databases. *See generally* Sharon M. Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, SHRIVER CTR. (Apr. 2015); Jones, *supra* note 171, at 255.

records through tax credits and negligent hiring mitigation for employers.[223] In general, reformers have proposed individualized screening that more closely ties the inquiry about a person's criminal record to the relevant employment opportunity.[224] As is evident from some of the recent studies of ban-the-box policies, much remains to be done to end racial discrimination in the employment setting beyond fair hiring initiatives and record clearing for people with criminal records.[225]

C. RESEARCH IMPLICATIONS

Our findings raise a number of unanswered questions. These questions fall into several categories, including who benefits from the intervention, the durability of the program effects, the relevance of our findings in other legal settings and labor markets (including opportunities to study differences between jurisdictions), and other possible program effects. All of these are ripe for further research.

First, because of the aggregate nature of our data, we do not know within the sample if some people benefited more than others from the intervention. Does the nature of the underlying record matter? Perhaps some kinds of cleared records are stickier than others in the context of employment outcomes. Because discrimination by employers clearly still operates in the face of fair hiring policies, do the employment outcomes of unmarking vary by the race, gender, or other characteristics of program participants?

Second, we do not yet know enough about the durability of the program

---

[223] SUBRAMANIAN, *supra* note 14, at 23 (describing how twenty-two states and the District of Columbia enacted such laws between 2009 and 2014). More than 150 local jurisdictions and twenty-nine states restrict the use of criminal records in the early stages of the hiring process. AVERY & HERNANDEZ, *supra* note 15, at 1. States have also begun heeding the call to ease licensing restrictions. *Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages,* THE WHITE HOUSE (June 17, 2016), https://www.whitehouse.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting. The Obama Administration issued a directive to all federal departments and agencies to ensure that "agencies with statutory authority to grant or deny occupation licenses . . . to revise their procedures to provide that such licenses are not denied presumptively by reason of an applicant's criminal record." *Presidential Memorandum – Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals,* THE WHITE HOUSE, (Apr. 29, 2016), https://www.whitehouse.gov/the-press-office/2016/04/29/presidential-memorandum-promoting-rehabilitation-and-reintegration.

[224] *See, e.g.,* NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIF. LAW COMM'N, THE UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010), http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf (adopted by the American Bar Association in 2010 and designed to rationalize and clarify state policies and practices regarding collateral consequences).

[225] *Supra* notes 19 and 20 and accompanying text.

effects. Will the average employment rates and earnings stay above baseline, rise further, or fade? Perhaps employment rates and earnings reflect greater short-term motivation and heightened effort rather than improved labor market opportunities. If more data and research determine that the effects of the intervention are ephemeral, what might be done to sustain earnings and employment in the medium to long term?

Third, while we believe that EBCLC's Clean Slate Clinic is generally representative of other record clearing programs, there are many other external variables to consider. As noted above, local laws and practices vary widely in terms of record creation (enforcement, charging, and sentencing), record clearing (eligibility and granting), and record reporting (accuracy and availability).[226] Labor market conditions and sorting vary by time and place, and employers in certain subsectors may be indifferent to an applicant's criminal record.[227] Any attempt to generalize findings about the effects of a local criminal record clearing program should be undertaken with caution.

Fourth, the heterogeneity of local laws and practices actually presents opportunities for natural experiments regarding discrete policy choices and program outcomes. For example, researchers could study program effects in states with different record clearing regimes to better understand the conditions under which remedies yield benefits. We might also measure the relative effectiveness of state and federal job training grantees that include legal record clearing to achieve program goals.[228]

Fifth, we did not study other possible benefits of the record clearing intervention. For example, we would expect increased earnings to yield increased tax revenues. In fact, neighboring jurisdictions might even compete to expand employment opportunities for residents with criminal records.[229] Higher wages would presumably generate greater economic

---

[226] For an example in an analogous setting, see Alec C. Ewald, *Rights Restoration and the Entanglement of U.S. Criminal and Civil Law: A Study of New York's "Certificates of Relief*,*"* 41 L. & SOC. INQUIRY 5, 6 (2016) (arguing that differences in the ways that judges and probation officers award administrative "Certificates of Relief" in New York arise from local agreements, individual discretion, and legal ambiguity).

[227] For example, researchers have found that racial discrimination is more pronounced in service industry or "front of the house" jobs where employers are reluctant to hire African-American men. Devah Pager, Bruce Western & David Pedulla, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 1 U. CHI. LEGAL F. 317, 336 (2009) (noting that employers may be "concerned about the soft skills of black men, or . . . relying on assumptions about what their customers or clients prefer"). Recent research suggests that participants who began but did not complete a record clearing process still benefited from improved employment outcomes in sectors of the economy where the existence of a record may be less impactful. Loeffler et al., *supra* note 21, at 3.

[228] Thank you to Karen Lash for this suggestion.

[229] Thank you to Jenny Roberts for this insight. E-mail from Jenny Roberts, Professor of

activity in neighborhoods with record clearers, creating a multiplier effect that increases community wealth. Because evidence suggests that employment opportunities for people with criminal records reduce recidivism,[230] we would also expect a range of criminal justice-related cost savings.[231]

Finally, and related to additional benefits, it is important to remember that record clearing programs typically have a number of goals, not all of which can be measured by employment rates and earnings. In a companion qualitative study underway, preliminary data from surveys, focus groups, and in-depth interviews suggest that EBCLC's Clean Slate Clinic clients place a high dignity value on clearing their criminal records.[232] That is, the relative merit of such programs should be assessed more broadly than their impact on employment outcomes alone. In fact, the status enhancement that comes with record clearing may be a critical element in providing people with criminal records the confidence or other positive attributes needed to be more successful in the job market.

CONCLUSION

Criminal records are ubiquitous and consequential for tens of millions of people, especially in the employment context where they limit opportunities and suppress earnings. Addressing these negative consequences has become an important public policy goal. Legal services

---

Law, American Univ. Washington College of Law, to Jeffrey Selbin, Clinical Professor of Law, UC Berkeley School of Law (July 20, 2016) (on file with author).

[230] *See* Lahny Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 162 (2011) (finding that within a group of people convicted of federal offenses, those who secured post release employment recidivated at a rate of 25% while those who did not recidivated at a rate of 50%); *see generally* Garima Siwach, 37th Fall Research Conference Panel Paper, *Criminal Background Checks and Recidivism: Evidence from Direct Access Care in New York State*, ASS'N PUB. POL'Y ANALYSIS & MGMT. (2015) (finding that being denied work at the New York Department of Health increased the likelihood of re-arrest within the next three years for applicants with criminal records).

[231] *See, e.g.*, ECON. LEAGUE OF GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA, 8 (2011), http://economyleague. org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf (estimating the economic impact of hiring people with criminal records, including "avoided costs in the form of avoided spending on criminal justice agencies, social services, and government cash transfers, as well as prevented victim costs.").

[232] Reiter et al., *supra* note 156. *See also* Ericka Adams et al., *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC'Y 23, 27, 43 (2017) (finding that the process of record clearing facilitates cognitive transformation and the affirmation of a new identity); Ispa-Landa & Loeffler, *supra* note 97, at 406–09 (finding that stigma motivates people with criminal records to seek expungement remedies).

providers have developed record clearing programs as a mitigation strategy. Public defenders, civil legal aid offices, and law school clinics are assisting people with criminal records to seek legal remedies to dismiss or expunge records of past arrests and prosecutions. During this period of growth and experimentation, and with so much at stake, it is important to know if, how, and for whom this unmarking intervention works.

Our study sheds light on these questions. With the limits and trade-offs involved in any research method, our findings suggest that the record clearing intervention delivers on its promise. People with criminal records seek the unmarking remedy after a period of declining earnings, in spite of active labor market participation. During or immediately after the intervention, average employment rates and earnings appear to rise, though the staying power of such increases is still unclear.

This study cannot begin to answer all of the significant questions about effective record clearing interventions and policies. Nevertheless, it provides initial baseline data that can inform unmarking policies and practices while identifying additional avenues and methods for research. Over time, we hope this will assist communities and lawmakers to implement more targeted and effective strategies to help people with criminal records overcome barriers to employment and other opportunities.

APPENDICES

A. RESEARCH METHODS

In any study of the effect of a program intervention on a participant, one can imagine two states of affairs. In the first, a person eligible for the intervention participates in it. In the second, the same individual does not participate in the intervention and is therefore not affected by it. The impact of the intervention would be the difference between these two states of affairs.

The impossibility of having the same person both participate and not participate in an intervention is often referred to as the Fundamental Problem of Causal Inference, with the problem being that further assumptions are needed to evaluate the causal effect of any program.[233] This generic evaluation problem can be thought of as a problem of "internal validity." A research design is internally valid for estimating the effect of a program if it provides an unbiased estimate of the effect of the program for those who participated in it.[234]

An altogether different evaluation challenge pertains to the "external validity" of the study. The problem of external validity is that even an internally valid research design can fail to deliver an unbiased estimate of the measurement of interest because the effect of the program differs across populations and the study population was not the population of interest. This is a kind of selection effect, and it may confound our ability to measure the treatment effect.

For instance, in the context of EBCLC's Clean Slate Clinic, one could imagine that those who sought assistance were more proactive and ambitious than other eligible people who did not seek assistance. It might be that these qualities are associated with particularly pronounced effects of the program intervention. Thus, any study regarding the impact of an intervention must wrestle with two serious evaluation challenges: (1) the internal validity counterfactual question: "What would have happened if the individuals who sought out the intervention had not done so?" and (2) the external validity extrapolation question: "Is the study population the population of interest?"

---

[233] This notion of a program effect on an outcome has a complicated and contested intellectual history. The "two states of affairs" idea, discussed above, originates with Jerzy Neyman, but the notion and some related ideas are often referred to as the Rubin Causal Model. *See generally* Guido W. Imbens, *Nonparametric Estimation of Average Treatment Effects Under Exogeneity: A Review*, 86 REV. OF ECON. & STAT. 4 (2004) (for citations to the early literature); *see also* Jeffrey Smith, *A Critical Survey of Empirical Methods for Evaluating Active Labor Market Policies*, 136 SWISS J. ECON. & STAT. 247, 248 (2000).

[234] There may also be contexts where internal validity pertains to the ability to obtain an unbiased estimate of a related population or sub-population, but we do not cover that case here.

Researchers have experimented with different methods in an effort to solve or minimize these problems, particularly that of internal validity. Each of the approaches discussed below uses a different way to develop a comparison group that compellingly approximates the impossible counter-factual of what would have happened had intervention participants abstained from participation. We describe these methods because they help to explain some of the strengths and limits of our study design.

1. Randomized Controlled Trials

The randomized controlled trial ("RCT") is generally viewed as the ideal way to overcome the evaluation problems described above. In an RCT, some fraction of people seeking participation in a program are randomly admitted or denied.[235] Denied individuals then serve as a control group and their outcomes are compared with those of participants.[236]

Randomization overcomes the concern that hidden characteristics (like social networks, tenacity, or gumption) are producing the outcome attributed to the intervention. Although people in both the experimental and control groups have sought out the intervention (and therefore may have different dispositions from the larger pool of eligible participants), a randomized filter, like a coin toss, is not privy to these dispositional differences. As a result, these hidden characteristics will be distributed roughly evenly between the experimental and control groups and their effect can be discounted, leaving the impact of the intervention.

Despite the appeal of this model, it is not always effective or even available in practice. People in the experimental group sometimes abandon the intervention before it is complete, and those in the control group might find a comparable intervention elsewhere.[237] Further, implementing a randomized controlled trial means denying people access to a program or intervention that might help them. Organizations like EBCLC's Clean Slate Clinic strive not to turn away people eligible for services, making it hard to establish the classic control group. Job training programs in the 1960s and

---

[235] In perhaps the most well-known RCT study of a civil legal aid intervention, researchers randomized an offer of assistance, not the intervention itself (to try to limit the selection effects of subsequent participation). Greiner & Pattanayak, *supra* note 199, at 2118.

[236] See *id.* for a robust defense of the use of RCTs in studying interventions in civil legal aid. *But see* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 106–12 (2013) (for a critique describing the limits of RCTs in this setting).

[237] Raphael & Stoll, *supra* note 31, at 14; Selbin et al., *Resource Allocation and Access to Justice*, *supra* note 180, at 51–53 (describing these concerns with respect to the Greiner & Pattanayak RCT design in the unemployment insurance context).

70s were likewise unable to conduct randomized controlled trials.[238]

Because randomization is often unavailable, researchers have found other ways to construct a meaningful comparison group, such as methods built around assumptions of "selection on observables" (econometric parlance) or "conditional independence" (statistical parlance).[239] We discuss this type of approach next. There are a large number of competing approaches in the field, but we focus on matching because it is emblematic of the general approach.[240]

2. Matching

Matching tries to solve the evaluation problem by linking each intervention participant with a non-participant doppelgänger. For each program participant, the goal is to find a person from a pool of possible controls who is so similar that evaluating the individual's outcomes is akin to evaluating what would have happened had the participant herself not participated. This amounts to assuming that—within narrow groups defined based on available characteristics—there is randomization into treatment and control units.[241]

Matching is based on those characteristics observable to the researcher (such as age, gender, ethnicity, zip code, or perhaps socioeconomic status). Even assuming that the researcher has access to the relevant set of observables, the method for selecting which match from among many candidates is complicated. Any time there is more than a single characteristic, there is no unique definition of "close" and thus a variety of choices can be justified. Moreover, there is often vigorous disagreement regarding which variables are to be matched on.[242]

Debate about the efficacy of matching has taken up the more general challenge to "selection on observables" approaches posed in a famous article by Robert LaLonde.[243] In that article, LaLonde compares the results of an

---

[238] *See* Ashenfelter, *supra* note 185, at 48.

[239] *See* Imbens, *supra* note 233, at 4.

[240] *See generally* Matias Busso et al., *New Evidence on the Finite Sample Properties of Propensity Score Reweighting and Matching Estimators*, 96 REV. ECON. & STAT. 885 (2014) (reviewing many of these approaches, with a focus on their finite sample performance).

[241] That membership in groups is based on observable characteristics gives rise to the "selection on observables" terminology. *See* Imbens, *supra* note 233, at 4. Program participants and controls are assumed to differ systematically only because of those variables observed by the researcher.

[242] *See* Raphael & Stoll, *supra* note 31, at 21 (labeling this the "problem of variable selection").

[243] *See* Robert J. LaLonde, *Evaluating the Econometric Evaluations of Training Programs with Experimental Data*, 76 AM. ECON. REV. 604, 617–18 (1986).

RCT that measured the impact on earnings of an employment training program with those of many different econometric techniques, all of which invoke "selection on observables" (matching). LaLonde shows that the training effect estimated by these models is sensitive to the composition of the comparison group as well as to the variables used in adjusting for differences between the treatment and control group.[244] This is especially problematic because absent the experimental results LaLonde used as a benchmark for evaluating the accuracy of different matching models, the researcher has no principled way of choosing between the models. To get things right would require either good luck or advanced knowledge of the intervention's impact, the unavailability of which motivates estimation in the first place.

More recent arguments hinge on whether updates to "selection on observables" techniques can be used to replicate the findings of an RCT (e.g., propensity matching, which matches people in the treatment and comparison groups based on their estimated probability of participating in the relevant program, given their observables). Despite an exceedingly lengthy discussion in the academic literature, there is not yet consensus on a valid substitute for experimental methods, giving rise to the notion of "the LaLonde critique."[245]

Even after these theoretical challenges to the matching model have been set aside, researchers can still face practical problems. Much of the debate initiated by LaLonde concerns the problem of having to choose between different ways of matching study participants. Yet this is irrelevant if the data used to select a match is not detailed enough to enable a good match in the first place. In LaLonde's context, comparison groups were selected from population surveys like the Current Population Survey and the Continuous Work History Sample, both of which are random samples.[246] Pulling a comparison group out of a population survey was easier in the context of job

---

[244] *Id.* at 614.

[245] *See* Rajeev H. Dehejia & Sadek Wahba, *Causal Effects in Nonexperimental Studies: Reevaluating the Evaluation of Training Programs,* 94 J. AM. STAT. ASS'N 1053 (1999) (arguing that the estimates of the training program's impact produced by propensity matching are comparable to the experimental benchmark estimate); *see also* Donald B. Rubin & Neal Thomas, *Combining Propensity Score Matching with Additional Adjustments for Prognostic Covariates,* 95 J. AM. STAT. ASS'N 573 (2000) (for a more recent defense of propensity score matching). *But see* James Heckman et al., *Sources of Selection Bias in Evaluating Social Programs: An Interpretation of Conventional Measures and Evidence on the Effectiveness of Matching as a Program Evaluation Method,* 93 PROC. NAT'L ACAD. SCI. U.S. 13416 (1996) (finding that propensity matching eliminates some but not all of the selection bias, which distorts the estimated impact of the studied intervention).

[246] *See* Ashenfelter, *supra* note 185, at 48 (on the Continuous Work History Sample); *see also* LaLonde, *supra* note 243, at 611 (on the Current Population Survey).

training programs because so many people have experienced a spell of unemployment at some point in their lives and this fact facilitates matching based on income trajectory.

The criminal records context is more challenging than the canonical job training example. Although tens of millions of adults have criminal records, the subset of adults who could avail themselves of a record clearing remedy is often hard to ascertain, because few surveys ask questions regarding a criminal record. This makes it all the more difficult to find in a standard population survey an appropriate comparison group from the participant's local economic environment.[247]

Assuming the researcher can find an appropriate comparison group, the potential for inconsistency in the measurement of outcomes poses an even thornier problem. For instance, in our study, we obtained participants' earnings data from the Social Security Administration. This approach to measurement was only possible because we had their social security numbers ("SSN") and dates of birth. We do not know the SSNs of non-participants, and in most contexts, a researcher would be in a like position. If participants in our study had been matched using a population survey, we would have had to use the survey-reported earnings of the comparison group due to the unavailability of SSNs. And if survey-reported earnings and the Social Security Administration's earnings data differ from one another, estimated differences between participants and the comparison group might reflect less the role of the intervention of interest and more the way earnings were measured.

B. EARLY-VERSUS-LATE ADOPTERS HYPOTHESIS AND MODELLING

To develop intuition regarding our early-versus-late adopters approach, first consider two hypothetical scenarios in which the record clearing intervention might affect earnings. In the first scenario, having participated in the program allows a person access to a job they might not otherwise have been able to access. In this scenario, participation leads to a permanent increase in earnings (we assume the person retains the job for which they are newly eligible). People signing up earlier receive an earnings bump earlier.

This first scenario is depicted graphically in Appendix Figure 1. We describe the study sample in more detail later, but our four cohorts of program participants were "treated" (served by EBCLC's Clean Slate Clinic) in the 2nd half of 2007 (Cohort 1), the first half of 2008 (Cohort 2), the second half of 2008 (Cohort 3) and the first half of 2009 (Cohort 4), respectively. In

---

[247] *See* Raphael & Stoll, *supra* note 31, at 382 (describing the difficulty of finding a comparison group in population surveys).

Appendix Figure 1, the earnings bump for Cohort 1 is labeled ABC.

Appendix Figure 1. Hypothetical Earnings Trajectories: Permanent Increase
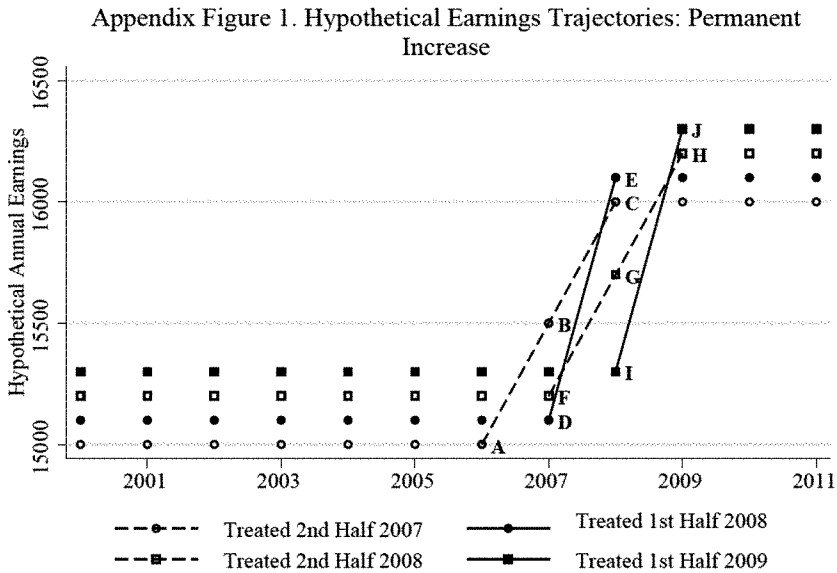
We assume that the earnings bump phases in halfway in 2007 because people in this cohort were not treated until halfway through the year. For graphical purposes, we have also assumed that each successive cohort has earnings $100 above that of the cohort preceding them. This has nothing to do with the record clearing intervention; it is simply an assumption that the different cohorts might have time-invariant differences reflecting a compendium of factors unrelated to the program of interest, and it allows for a clearer picture of the relative trajectories of each cohort.

Turning to Cohort 2, the earnings bump is depicted in Appendix Figure 1 with the label "DE." Earnings for this cohort adjust in a more punctuated way than for Cohort 1—rising in one year rather than in two—because the timing of treatment aligns with the onset of the calendar year. Cohorts 3 and 4 are analogous to Cohorts 1 and 2, but their earnings bumps are shifted forward by one calendar year on the x-axis. To maintain a focus on ideas, we have assumed there is no statistical "noise" associated with any of the estimates.

The second scenario is depicted graphically in Appendix Figure 2. Here, the record clearing intervention hypothetically boosts earnings only temporarily (i.e., only during participation in the actual program). In the figure, the earnings bump for Cohort 1 is labeled ABC again. Rather than being a bump that is consistent with long-run earnings improvement, here, the bump is ephemeral, fading after the half-year in the program. This might

be consistent with the notion that earnings respond less to the labor market opportunities participants might be able to avail themselves of, and more to the immediate fact of counseling and the enthusiasm of a presumptive peak in personal organization and efficacy. The earnings bumps for Cohorts 2, 3, and 4, labeled "DEF," "GHI," and "JKL," respectively, are similarly ephemeral. Cohorts 2 and 3 experience the bump in the same year because both are treated for a portion of 2008 (the first and second half of the year, respectively).

Appendix Figure 2. Hypothetical Earnings Trajectories: Temporary Increase
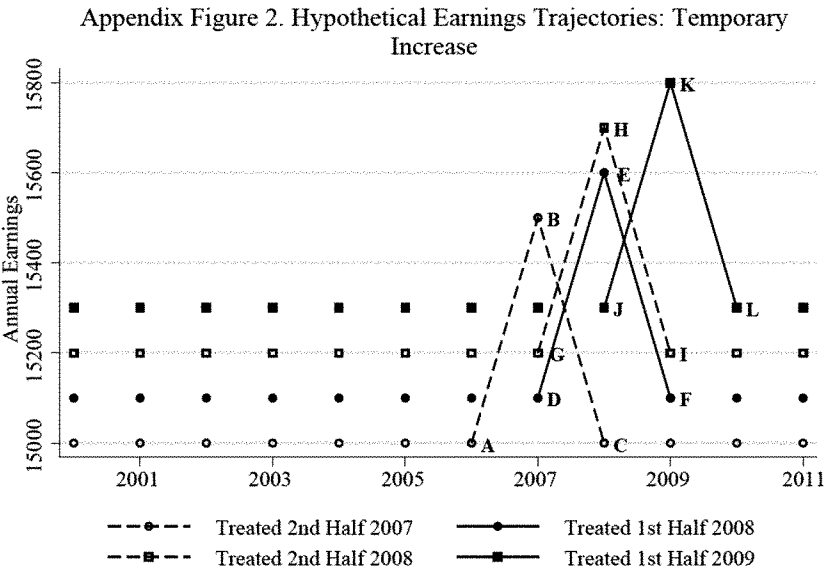
Both of these scenarios assume that program participants seeking assistance at different dates are ex ante similar to one another (the $100 differential between cohorts in Appendix Figure 1 was for graphical purposes). There is, however, a long line of research in job training programs that indicates individuals self-select into seeking assistance based on their earnings or employment trajectories. In particular, a well-known empirical pattern is for individuals to be more likely to avail themselves of training programs in the years subsequent to a "dip" in their earnings. This pattern is often referred to as the "Ashenfelter dip" after Orley Ashenfelter, a leading author in the early literature on the effect of job trainings programs on the earnings of program participants.[248]

---

[248]   *See* Ashenfelter, *supra* note 185, at 55 (observing the pre-job training dip in earnings for the first time); Orley Ashenfelter & David Card, *Using the Longitudinal Structure of Earnings to Estimate the Effect of Training Programs*, 67 REV. OF ECON. & STATS. 648, 650

To appreciate what the Ashenfelter dip might look like, Appendix
Figure 3 depicts earnings for each cohort over time. In the figure, we have
assumed that program participants experience a decline in earnings prior to
availing themselves of the Clean Slate intervention. We have also assumed
that the earnings decline does not continue after the program begins.

Appendix Figure 3. Hypothetical Earnings Trajectories: Self Selection
and no Program Effects
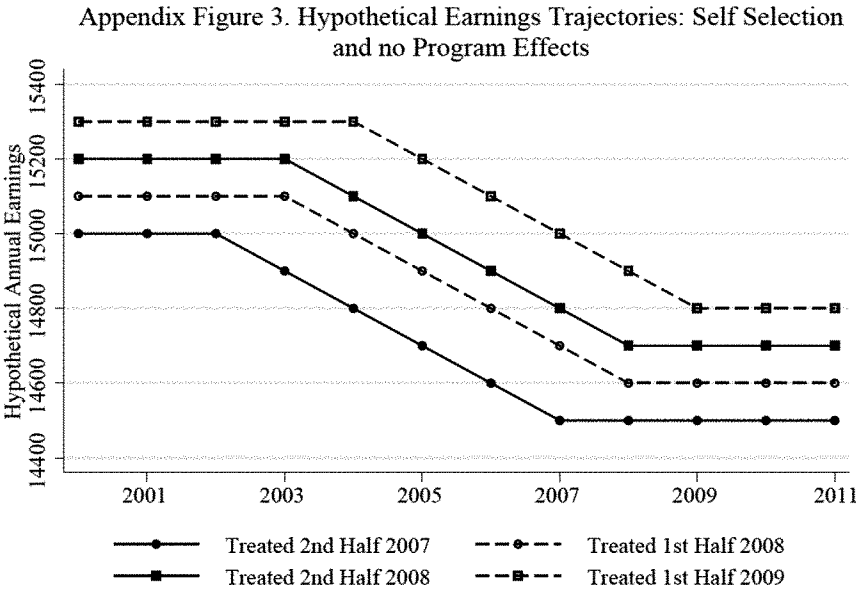
The pattern depicted in Appendix Figure 3 could arise through two quite
distinct (if related) causal mechanisms. Under the first mechanism, the
program might itself stem the earnings slide in a causal way (e.g., preserving
employment options in an increasingly challenging economy). Under the
second mechanism, program participation is just a marker of other life
choices. A participant confronting an earnings slide (e.g., due to decreases
in hours available from an employer or job loss) might take that reality as a
"wake-up call" and engage in several life changes at the same time. For
example, a person might seek help from her friends or a local church at the
same time as she is availing herself of record clearing services.

(1985) (confirming the dip in the context of another job training program); Laurie J. Bassi,
Estimating the Effect of Training Programs with Non-Random Selection, 66 REV. OF ECON. &
STAT. 36, 43 (1984); James J. Heckman et al., *The Economics and Econometrics of Active
Labor Market Participants*, 3 HANDBOOK OF LABOR ECON. 1865, 1892–93 (1999) (showing
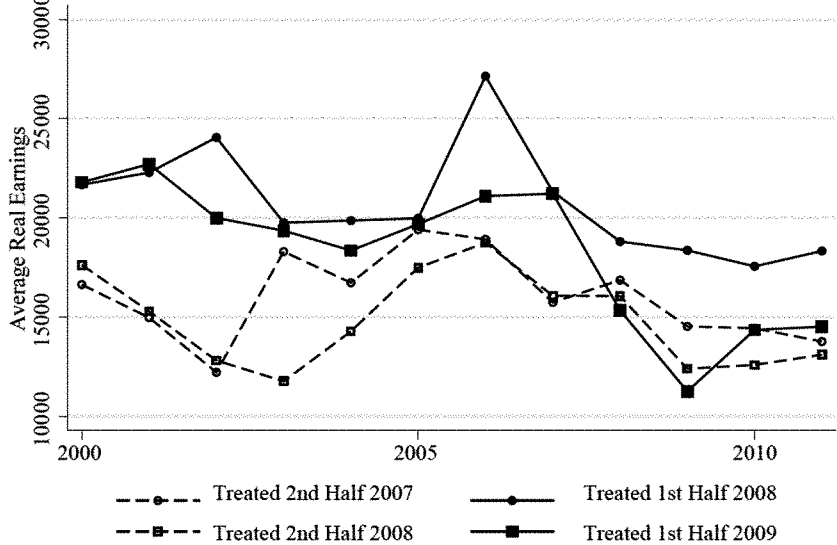the dip in a variety of training programs from around the world);

C. OTHER FIGURES

Appendix Figures 4 and 5 display raw aggregate data from the SSA.

Appendix Figure 4. Fraction Employed by Cohort

Legend:
- − − ●− − Treated 2nd Half 2007
- − −■− − Treated 2nd Half 2008
- ──●── Treated 1st Half 2008
- ──■── Treated 1st Half 2009

Appendix Figure 5. Average Real Earnings by Cohort

Legend:
- − − ●− − Treated 2nd Half 2007
- − −■− − Treated 2nd Half 2008
- ──●── Treated 1st Half 2008
- ──■── Treated 1st Half 2009

D. REGRESSION MODEL AND FUTURE RESEARCH

In this appendix, we discuss in greater detail the regression model we used in the study. We also consider what such modelling might look with alternative data sources, particularly microdata on individual labor market outcomes for those obtaining treatment and those not obtaining treatment. With the data available in our study, we used the following equation:

<div align="center">

Equation 1

$$Y_{ct} = \mu_c + \lambda_t + \sum_{j=-5}^{3} \theta_j D_{ct}^j + \varepsilon_{ct}$$

</div>

In Equation 1, the Roman letters Y_{ct} and each of the D_{ct}^j represent data, whereas the Greek letters μ_c, λ_t and each of the θ_j represent parameters to be estimated.[249] The remaining term ε_{ct} is a residual term that indicates the anticipated lack of a perfect fit of the regression model. The dependent variable Y_{ct} is a labor market outcome for cohort c in year t and is taken to be either average real earnings for a cohort in a year, or the employment to population ratio for a cohort in a year. The covariates D_{ct}^j are indicators, sometimes also referred to as dummy variables, which are either zero or one, with one "indicating" a particular state. Here, the particular state being indicated is that for cohort c, the year t is j years after Clean Slate treatment. For example, D_{ct}^0 is zero unless it is the year in which the given cohort is receiving Clean Slate treatment; D_{ct}^1 is zero unless it is one year after treatment; and D_{ct}^{-1} is zero unless it is the year before treatment. Intuitively, one can think of these covariates as leads and lags of treatment indicators.

The parameters of interest in this model are the θ_j, which correspond to estimated program effects. For example, suppose the outcome were average real earnings. Then θ_0 estimates the difference in average real earnings between the year of Clean Slate treatment and in the baseline years; θ_1 estimates the difference in average real earnings between the year after Clean Slate treatment and in the baseline years; and θ_{-1} estimates the difference in average real earnings between the year before Clean Slate treatment and in the baseline years.

This then raises the question: what are the baseline years? Baseline years are all years that fall outside the period five years before treatment to three years after treatment. Intuitively, one can think of the baseline as corresponding to average earnings several years before Clean Slate

---

[249] In the display, the summation symbol $\sum$ is a shorthand way of writing $\theta_{-5} D_{ct}^{-5} + \theta_{-4} D_{ct}^{-4} + \ldots + \theta_3 D_{ct}^3$ without having to write out all the terms indicated by the ellipsis.

treatment.[250] The program effects prior to treatment can be thought of as estimating selection effects, while those subsequent to treatment can be thought of as estimating an admixture of selection and program effects. For example, suppose that individuals chose randomly when to seek Clean Slate services. Then the time path of earnings would fail to predict the year in which an individual receives treatment, and the leads would be expected to be statistically indistinct from zero.

A final question is how to choose the endpoints of the leads and lags, which here we have taken to be -5 and 3. The choice of endpoints reflects competing considerations. On the one hand, the wider the window used to estimate program effects, the more informative the estimates might be regarding the path of earnings leading up to and subsequent to program participation. On the other hand, the wider that window, the fewer observations are represented in the baseline, and this may lead to more noise and possibly an estimate that is less robust to the exclusion of specific data points. Another aspect of choosing the endpoints is that because treatment occurs between 2007 and 2009, and we have data from 2000 to 2011, we can effectively estimate more leads than we can lags. If we have data through 2014, for example, then we might well have chosen a right-hand endpoint of 5 or 6 rather than 3.[251]

Future research seeking to advance our knowledge of the effects of record clearing interventions might focus on alternative data sources and alternative research designs. Regarding alternative data sources, ideally microdata on individual labor market outcomes would be available, both for those obtaining treatment as well as those not obtaining treatment. Regarding alternative research designs, the gold standard for understanding program impacts remains random assignment, but there are different ways of implementing random assignment, and there are also close cousins of random assignment that may be more consistent with the goals of program administrators. If microdata on individual outcomes could be combined with random assignment, a great deal could be learned about the labor market impacts of these programs.[252]

---

[250] The baseline is 2000–2001 and 2011 for Cohort 1, 2000–2002 for Cohorts 2 and 3, and 2000–2003 for Cohort 4.

[251] We hope to receive additional SSA employment rate and earnings data for our cohorts, which would allow us to modify the right-hand endpoint accordingly.

[252] For the sake of concreteness, we refer to "earnings" instead of "labor market outcomes" but the discussion here is intended to be methodological in nature and thus pertains to any outcome that could be collected. In principle, that could also involve survey data on labor market outcomes, or even on outcomes that are not directly about labor market success but are valuable in and of themselves (e.g., on self-reported dignity). We anticipate that cost reasons

Suppose first that earnings are only available for those involved in the program. As discussed above, this will typically be the case in any context involving administrative data, for the simple reason that program administrators possess identifying information for participants, but may not for non-participants. To appreciate the value of data on individuals rather than on cohort, consider the role of "cohort indicators" in Equation 1—that is, the μ_c parameters. Cohort indicators are intended to capture time invariant unobserved heterogeneity across cohorts c. This plays a more minor role in estimation, but a potentially major role in inference.

This is a general conclusion and is not specific to our data or sample, however, for the sake of concreteness, consider the regression results undergirding Figure 3. One can estimate the θ_j parameters with or without cohort indicators; this is simply estimating two alternative multivariate regressions. The estimated θ_j parameters obtained these two ways are highly similar to one another: viewing the 9 estimated θ_j parameters as data, they have a correlation coefficient over 0.99. However, the regression with the cohort indicators included shows much better fit overall (e.g., an R-squared of 0.89 as opposed to 0.46 without the cohort indicators) and this can greatly improve the precision of the estimated effects.

To summarize, if information on individual earnings is available, but only for program participants, precision of the estimates is likely to improve if the researcher has access to individual-level data, rather than cohort-level data. Had we possessed data on individual earnings on participants only, we would have estimated a minor variation on Equation 1:

<div align="center">

Equation 2

$$Y_{it} = \mu_i + \lambda_t + \sum_{j=-5}^{3} \theta_j D_{ct}^j + \varepsilon_{it}$$

</div>

Here, individuals are indexed by i. This would have involved a data set with n=2,820 observations rather than n=48, and would have involved estimating 234 μ_i parameters using an unweighted regression rather than estimating 3 μ_c parameters using a regression with cohort weights.[253] Despite

---

will prevent most researchers from being able to survey participants and that administrative data will be the basis for measuring labor market outcomes.

[253] For technical reasons, the number of parameters to be estimated is one less than the number of individuals or cohorts. The contrast between these regressions also clarifies an old rule of regressions—the R-square is only sometimes valuable as a measure of goodness of fit. The R-square from the cohort-level regression is inflated by virtue of the fact that the individual-level variation is "hidden" from the regression by the aggregation to cohort-level data.

these superficial differences, the core notions of identification in these two approaches are similar, and the estimates are likely to be similar.

Suppose next that earnings are available for participants as well as non-participants. The extent to which that additional information is valuable hinges on the extent to which non-participants' earnings approximate participants' earnings had they not obtained treatment. In terms of observational statements (as opposed to statements regarding hypothetical scenarios), non-participants are more likely to be valuable to the researcher when their background characteristics and, more critically, the path of their earnings leading up to treatment, are more similar.[254]

Sometimes non-participants are drawn from people who initiate contact with program administrators and fail to follow through with treatment. Such a group is presumably not as similar to participants as if treatment was randomized, but is likely to be an improvement on a comparison group drawn randomly from the local labor market. Recall that in our first example, with data on only participants, the value of individual data was primarily about improved precision. Here, access to a comparison group would likely have an important effect on three different things: precision, robustness, and identification.

Precision would improve in this example for two different reasons. As before, the ability to estimate individual effects rather than cohort effects is likely to improve precision. In addition, however, there is likely to be a substantial gain in the precision of the estimated year effects, or the λ_t parameters in Equations 1 or 2. This is important because in using an early-late adopter research design, the year effects tend to covary substantially with the estimated program effects. This is a challenge for estimation, and improving the precision of the year effects spills over to improve the precision of the program effects.

For the same reason, adding information on non-participants improves robustness. The estimated year effects in a model estimated using data on only participants can be sensitive to a small number of data points. If data on non-participants are available, the year effects are less fragile. As before, this improved robustness in the estimated year effects spills over to improved robustness in the estimated program effects.

---

[254] *See* Imbens, *supra* note 233, at 7. The hypothetical statement given is the accurate one: the critical assumption is that non-participants' earnings subsequent to treatment mimic what participants' earnings would have been in the absence of treatment, or "counterfactual earnings." Assuming that non-participants can be used to estimate counterfactual earnings becomes less plausible if background characteristics of non-participants are dissimilar to those of participants, or if earnings of non-participants prior to treatment exhibit different levels or trajectories than those of participants.

Finally, identification itself may be improved. By "identification," we simply mean the ability to obtain an approximately unbiased estimate of the program effects. Again, this depends on the similarity between the participants and the comparison non-participants.