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## The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion

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THE PRICE OF CARCERAL CITIZENSHIP:  
PUNISHMENT, SURVEILLANCE, AND SOCIAL WELFARE  
POLICY IN AN AGE OF CARCERAL EXPANSION

*Reuben Jonathan Miller\** & *Amanda Alexander\*\**

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INTRODUCTION

The unprecedented rise in the number of people held in U.S. jails and prisons has garnered considerable attention from policy makers, activists, and academics alike. Signaled in part by Michelle Alexander’s *New York Times* bestseller, *The New Jim Crow*, and the unlikely coalition of activists, policy makers, celebrities, and business leaders on both sides of the political aisle who have pledged to end mass incarceration in our lifetime, the prison system has returned to public policy discourse in a way that was unforeseen less than a decade ago. On any given day in 2014, just over 2.3 million people were held in U.S. jails and prisons.<sup>1</sup> This figure represents a tenfold increase in the inmate census since 1973, and about 22 percent of the world’s prisoner population.<sup>2</sup> Unfortunately, while the causes and consequences of mass incarceration warrant rigorous examination, the focus on arrest and imprisonment has left a curious, yet equally historic phe-

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1. Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis & Todd Minton, *Correctional Populations in the United States, 2014*, BUREAU OF JUSTICE STATISTICS, at Table 1 (rev. ed. Jan. 21, 2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

2. See THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 36 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); see also Roy Walmsley, *World Prison Population List*, INT’L CTR. FOR PRISON STUD. 36 (2013), [http://www.apcca.org/uploads/10th\\_Edition\\_2013.pdf](http://www.apcca.org/uploads/10th_Edition_2013.pdf).

nomenon hidden in plain sight—the rise of a supervised society, and with it, an alternate track of citizenship.

More than 600,000 people are released from prison each year.<sup>3</sup> They join the 4.7 million Americans living in their home communities who are supervised through probation or parole services.<sup>4</sup> These former prisoners are subject to re-arrest and re-incarceration should they violate a condition of their release.<sup>5</sup> These technical violations accounted for 26 percent of all prison admissions in 2014,<sup>6</sup> and included failure to report to one's probation or parole officer, leaving the state for any reason without permission, submitting a positive urine test for drugs or alcohol, missing an appointment at a social service agency, owning a firearm, and associating with known offenders—a difficult task given the high U.S. incarceration rate and the concentration of former prisoners in poor urban communities.<sup>7</sup>

Notwithstanding the sheer number of former prisoners supervised in their home communities, or the restraints imposed by criminal records on their social and geographic mobility,<sup>8</sup> to capture the scope and consequence of carceral expansion, one must widen his or her lens. Changing the unit of analysis from a point-in-time count to the number of people annually admitted and discharged from penal institutions reveals the more than 11 million people annually processed through the nation's more than 3,000 county jail facilities.<sup>9</sup> A staggering 19.8 million people are estimated to have a felony conviction,<sup>10</sup> and up to 100 million U.S. residents may

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3. Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, A PRISON POL'Y INITIATIVE (Mar. 12, 2014), <http://www.prisonpolicy.org/reports/pie.html>.

4. See Danielle Kaeble, Laura M. Maruschak & Thomas P. Bonczar, *Probation and Parole in the United States, 2014*, U.S. DEP'T OF JUSTICE 1 (Nov. 2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

5. See Ryken Grattet, Joan Petersilia, Jeffrey Lin & Marlene Beckman, *Parole Violations and Revocations in California: Analysis and Suggestions for Action*, 73 FED. PROBATION 2, 4 (2009); Jonah Aaron Siegel, *Prisoner Reentry, Parole Violations, and the Persistence of the Surveillance State 2-4* (Oct. 2014) (unpublished Ph.D. dissertation, University of Michigan) (on file with the National Criminal Justice Reference Service); see also EDWARD J. LATESSA & PAULA SMITH, *CORRECTIONS IN THE COMMUNITY* (4th ed. 2007).

6. See E. Ann Carson, *Prisoners in 2014*, U.S. DEP'T OF JUSTICE 10 (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

7. See Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DEADALUS 20 (2010); see also Paul Street, *Race, Prison, and Poverty: The Race to Incarcerate in an Age of Correctional Keynesianism*, HISTORY IS A WEAPON (2003), <http://www.historyisaweapon.com/defcon1/streeracripov.html>.

8. See Jeffrey Morenoff & David Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. OF SOC. 411 (2014).

9. Todd D. Minton & Zhen Zheng, *Jail Inmates at Midyear 2014: Statistical Tables*, U.S. DEP'T OF JUSTICE 8-10 (June 2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

10. Sarah Shannon et al., *Growth in the U.S. Ex-felon and Ex-prisoner Population, 1948-2010*, POPULATION ASS'N OF AM., <http://paa2011.princeton.edu/papers/111687> (last visited Feb. 10, 2016).

have a criminal record.<sup>11</sup> These records—whether for felony offenses, misdemeanors, or arrests without conviction (non-conviction records)—are easily accessible by landlords, employers, and government officials through inexpensive criminal background checks.<sup>12</sup> Even pre-trial records have been shown to negatively impact hiring decisions, the granting of state licensure, and access to essential goods and services.<sup>13</sup> Many more are counted among the ranks of those supervised through the more than 3,500 specialized courts that offer alternative mandatory treatment programs in lieu of incarceration, such as drug and mental health courts, domestic violence treatment, and mandated domestic violence programs.<sup>14</sup> Furthermore, websites posting the mug shots of pretrial detainees accused of offenses, ranging from sexual assault and murder to failure to pay child support and public urination, raise important questions about the privacy rights of the criminalized poor,<sup>15</sup> while criminal justice contact has been shown to have deleterious implications on the health and well-being of the partners, children, and neighbors of incarcerated and formerly incarcerated people.<sup>16</sup> In sum, a full third of all U.S. adults are subject to some form of

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11. HALF IN TEN & THE SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 1, [http://www.sentencingproject.org/doc/publications/cc\\_HiT\\_CriminalRecords\\_profile\\_1.pdf](http://www.sentencingproject.org/doc/publications/cc_HiT_CriminalRecords_profile_1.pdf) (last visited Mar. 9, 2016).

12. See Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).

13. See *id.*; see also Paula Marutto & Kelly Hannah-Moffat, *Expanding Punishment through the Disclosure of Non-Conviction Records in Police Background Checks* (2015) (presented at the American Society of Criminology Annual Conference).

14. See West Huddleston and Douglas B. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, NAT'L DRUG COURT INST. 37 (July 2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.pdf>. For a discussion of the broader implications of the emergence of these kinds of community programs, see Reuben Miller & Gwendolyn Purifoye, *Carceral Devolution and the Transformation of Urban America*, in THE VOLUNTARY SECTOR IN PRISONS ENCOURAGING INSTITUTIONAL AND PERSONAL CHANGE (Laura Abrams, Emma Hughes, Michelle Inderbitzin & Rosie Meek, eds.) (forthcoming 2016).

15. Many state and federal agencies provide data on parents with outstanding child support obligations. For example, the Illinois Department of Healthcare and Family Services Division of Child Support Enforcement posts photographs of parents with child support delinquency along with the amount of support they are presumed to owe on the website [www.deadbeatsillinois.com](http://www.deadbeatsillinois.com). Clicking on the pictures of “deadbeat” parents allows you to access their last known address, a description of their appearance, the last child support payment they submitted, and the number of children they have. See *id.* Like state agencies posting pictures of parents with delinquent child support payments, commercial mug shot websites have emerged, posting booking photographs of detainees after their arrests, some of which charge fees for their removal. *Mug Shots and Booking Photo Websites*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 11, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>.

16. SARAH WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2013) (discussing the impact of mass incarceration on prisoners' children); see also Sampson & Loeffler, *supra* note 7, at 29 (discussing the feedback loop between incarceration and concentrated disadvantage);

criminal justice supervision, rendering them vulnerable to legal and extra-legal forms of exclusion, stigma, and formal and informal sanctions.<sup>17</sup>

Contemplating what life must be like under the conditions of carceral expansion, punishment and society scholars have reimagined the era of mass incarceration as an age of “mass supervision.”<sup>18</sup> Criminologists Fergus McNeill and Kristen Beyens have described mass supervision as the set of legal sanctions used to manage formerly incarcerated people in their home communities.<sup>19</sup> Attending to the explosion of probation services in the United States, sociologist Michelle Phelps has described similar, domestic phenomena as mass probation or mass penal control, pushing the field to reconsider “the scale and form of criminal justice supervision states employ.”<sup>20</sup> This work reveals how post-incarceration management strategies widen the net of the prison and introduce new regimes of control, while identifying and disentangling the after effects of post-release correctional supervision from that of imprisonment itself. These studies give the careful scholar a framework to better understand how legal subjects are managed after their sentences through formal criminal justice actors and agencies.

Advancing and considerably expanding this work on the post-incarceration experience, we lay bare the stakes of carceral expansion, asking, “What do these new modes of supervision, punishment and control produce?” Attending to the legal and extralegal sanctions imposed on the criminalized poor, their families, and the communities to which they return; the host of actors administering such sanctions; and the outcomes produced through legal exclusion and stigma, we find that carceral expansion has in part produced a new form of citizenship for the Black and Brown poor—what we refer to as carceral citizenship.

In the sections that follow, we trace the contours of carceral citizenship, identifying the experiences and outcomes of the criminal justice system’s target population. Following Wacquant,<sup>21</sup> we examine the mechanisms that uniquely mark carceral citizens for selection, sorting them for criminal justice processing by class, race, and geography. We then

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MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* (2009) (discussing incarceration’s impact on family and community members).

17. THE SENTENCING PROJECT, *AMERICANS WITH CRIMINAL RECORDS: POVERTY AND OPPORTUNITY PROFILE 1* (2015), [http://www.sentencingproject.org/doc/publications/cc\\_HiT\\_CriminalRecords\\_profile\\_1.pdf](http://www.sentencingproject.org/doc/publications/cc_HiT_CriminalRecords_profile_1.pdf).

18. See Fergus McNeill & Kristel Beyens, *Introduction: Studying Mass Supervision*, in *OFFENDER SUPERVISION IN EUROPE 3* (Fergus McNeill & Kristel Beyens eds., 2013) (focusing on former prisoners in continental Europe).

19. *Id.*

20. Michelle Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment 3* (Minn. Population Ctr., Working Paper No. 2014-4), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2476051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476051).

21. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *DAEDALUS* 74, 74 (2010).

examine the role that third parties, including service providers, the universe of organizational and institutional resources marshaled to manage them, and prisoners' families play in the supervision of this population. After raising questions about the tenuous ground upon which these processes of legal exclusion rest, given that the mere accusation of guilt (i.e., arrest without conviction) draws an increasingly large population of largely Black and Brown people into this alternate citizenship category, we conclude with a discussion of its broader implications.

### I. ON CARCERAL CITIZENSHIP

In an essay on carceral citizenship and global apartheid, critical geographer Jenna Lloyd writes:

Black and Latino communities (particularly, though not exclusively) live with the burden of a vast system of criminalization, policing, and carceral immobilization . . . . The power of criminalization does not necessarily strip citizenship to the point of statelessness (as was Arendt's concern), but it does *strip and differentiate rights among citizens*.<sup>22</sup>

Advancing Michael Omi and Howard Winant's racial formation theory,<sup>23</sup> Lloyd exhibits how the creation, embodiment, transformation, and destruction of racial categories occur at the regional level through U.S. immigration policy, using Haiti as a case study. Lloyd's work demonstrates how "criminalization . . . serves as a means to rationalize the repressive restructuring of the social welfare state, stripping entitlements from underserving citizens."<sup>24</sup>

Extending but modifying this analytic, we argue that U.S. crime control policies have produced a novel form of citizenship in the carceral age based on the *presumption* that one has committed a crime. Thus, while the Fourteenth Amendment defines citizenship as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof,"<sup>25</sup> carceral citizenship is an alternate citizenship track unique to the largely raced and gendered targets of the criminal justice system who are marked by a criminal record. We find that constraints on the participation of the criminalized poor in the political economy and social life of the spaces in which they live are not based on any combination of, or any one protected legal status. That is, their exclusion from education, public welfare, social

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22. Jenna M. Lloyd, *Carceral Citizenship in an Age of Global Apartheid*, OCCASION: RACE SPACE SCALE 1, 5 (2015), <http://arcade.stanford.edu/occasion/carceral-citizenship-age-global-apartheid>.

23. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55 (2d ed. 1994).

24. Lloyd, *supra* note 22, at 5.

25. U.S. CONST. amend. XIV, §1.

services, and the housing and labor market is not based on their race, gender, ability, or any other axis of difference recognized by the U.S. legal system as a protected social category.

Folk notions of race presume ancestry.<sup>26</sup> Racism, or “the theory and practice of applying a social, civic, or legal double standard based on ancestry, and . . . the ideology surrounding [that] double standard,” rests on similar presumptions.<sup>27</sup> Carceral citizenship, however, rests on a presumption of action—in this case the presumption that one has broken a law. Therefore, while carceral citizenship interacts with race, and other axes of difference like class and gender in obvious ways,<sup>28</sup> it is not simply one new form of racial domination built in the image of slavery, or a racial project that produces a new racial category. Carceral citizenship is instead a novel *social arrangement* produced by crime control *practices* born in the era of mass incarceration and its community analogue, mass supervision. Unlike citizenship under the Fourteenth Amendment, which is based on ancestry (via birthright), it is a new form of citizenship based on the presumed actions of its class. Differential treatment of the carceral citizen is therefore based solely on his or her status as a legal offender, or someone who has been presumed to have broken a law,<sup>29</sup> and is arguably constitutionally justified.<sup>30</sup>

The carceral citizen is *not* a second-class citizen in a traditional sense. Carceral citizenship does not engender a constitutional contradiction, where one’s citizenship rights are not enforced, and he or she may therefore invoke protections from the state based on their right to full social, civic and economic participation. Rather, the carceral citizen has unique rights, responsibilities, and claims that he or she is permitted to make on the state. The carceral citizen, then, does not inhabit a racial category (a

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26. We refer to race, as it is operationalized in the United States, following the historian and sociologist duo Barbara and Karen Fields. See BARBARA FIELDS & KAREN FIELDS, *RACECRAFT: THE SOUL OF AMERICAN INEQUALITY* (2012), for an in-depth discussion of how race is marshaled to explain the social conditions and treatment of groups.

27. *Id.* at 25–26.

28. Hedwig Lee et al., *Racial Inequalities in Connectedness to Imprisoned Individuals in the United States*, *DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE* 269, 271 (2015).

29. Presumption is important here and is central to our analysis. The findings from investigations conducted by the network of attorneys and legal scholars working on the National Registry of Exonerations show that there have been more than 1,700 exonerations since 1989. See *Summary View*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Mar. 2, 2016). One could (and arguably should) read this as meaning that even when convicted, guilt is a presumption.

30. While the Fourteenth Amendment states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” it continues, “nor shall any state deprive any person of life, liberty, or property, *without due process of law.*” U.S. CONST. amend. XIV §1 (emphasis added). The Thirteenth Amendment similarly states, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII §1 (emphasis added).

category based on perceived ancestry) but an alternate citizenship track and a novel form of citizenship. This is an important distinction. The carceral citizen experiences social, political, and economic life in ways that are unique to members of his or her class, and are not typically shared by even the most marginalized people who have traditionally been marked by their race, religion, ethnicity, or gender. Indeed, the carceral citizen is a novel legal and social category that has emerged in the age of mass incarceration. Carceral citizens face constitutionally justified forms of exclusion based solely on the presumption of legal guilt at some point in their lifetimes.

This peculiar social arrangement has resulted from three key processes that operate in formal and informal ways. First, the circulation of people between confinement and disadvantaged communities exacerbate already existing social inequalities, signaling greater police presence and the repeated cycle of arrest and incarceration.<sup>31</sup> Second, the mark of a criminal record constrains the mobility of the criminalized poor, activating third parties in their management and exclusion.<sup>32</sup> Third, “[s]hifts in social welfare and criminal justice policy have at once hollowed out rehabilitative services and expanded the reach of the state, ensuring that former prisoners’ family and friendship networks are the resource of first and last resort in their transition from prison back home.”<sup>33</sup>

## II. PUTTING MASS SUPERVISION IN ITS PLACE

Carceral expansion has been theorized as an instrument of domination that promotes inequality across class and racial strata<sup>34</sup> and as a geographic solution used to address social problems.<sup>35</sup> The prison, along with its corollary institutions of surveillance and control, have been viewed as a relatively unified form of poverty governance,<sup>36</sup> producing particular ways

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31. Reuben J. Miller, *Devolving the Carceral State: Race, Prisoner Reentry, and the Micro-Politics of Urban Poverty Management*, 16 PUNISHMENT & SOC’Y 305, 312 (2014); see also Jamie Peck & Nik Theodore, *Carceral Chicago: Making the Ex-offender Employability Crisis*, 32 INT’L J. URB. & REGIONAL RES. 251, 257-58 (2008).

32. Reuben J. Miller, Janice Williams Miller, Jelena Zeleskov Djoric & Desmond Patton, *Baldwin’s Mill Race, Punishment, and the Pedagogy of Repression, 1965–2015*, 39 HUMAN. & SOC’Y 456, 462 (2015).

33. LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 59 (2009); see also *id.*

34. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, 1 COLOR LINES 11 (1998).

35. RUTH WILSON GLMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 11 (2006).

36. See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 97-98 (2001); WACQUANT, *supra* note 33; Katherine Beckett & Bruce Western, *Governing Social Marginality Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44 (2001).



of being in the social world,<sup>37</sup> and a regulatory valve, disciplining low-wage workers. Wacquant finds that these processes render poor, unskilled Black laborers “redundant” through social exclusion, a changing political economy, and the state’s abdication of responsibility for their social and economic outcomes.<sup>38</sup> Unskilled Black men are therefore the most “suitable targets” for criminal justice intervention, selected first by class, second by race, and third by geography.<sup>39</sup> Wacquant’s thesis is compelling. More than two-thirds of former prisoners live at or below half of the U.S. poverty line,<sup>40</sup> with 80 percent qualifying as indigent for the purposes of legal representation.<sup>41</sup> The Black imprisonment rate is roughly six times that of Whites<sup>42</sup> and, when incarcerated, Blacks serve lengthier sentences.<sup>43</sup> Furthermore, states with stingier welfare expenditures typically have higher rates of incarceration.<sup>44</sup> Noting these trends, Wacquant admonishes scholars to “reconnect social and penal policies” in order to “grasp the new politics of marginality.”<sup>45</sup>

The outcomes associated with these “new politics” are jarring. People in prison are overwhelmingly poor.<sup>46</sup> Half are estimated to have a diagnosable mental health issue.<sup>47</sup> A recent study found that former prisoners are 129 times more likely to die of a drug overdose and twelve times more likely to die of any other cause within just two weeks of their release than members of the general population.<sup>48</sup>

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37. See MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

38. Wacquant, *Deadly Symbiosis*, *supra* note 36, at 97.

39. Loïc Wacquant, *Class, Race, and Hyperincarceration in Revanchist America*, 28 *SOCIALISM AND DEMOCRACY* 35, 78 (2010).

40. WACQUANT, *supra* note 33, at 70.

41. Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, U.S. DEP’T OF JUSTICE 1, 4 (1996).

42. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001*, at 1 (2003), <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

43. M. Marit Rehani & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 6 *J. POL. ECON.* 1320, 1329 (2014).

44. Beckett & Western, *supra* note 36, at 44-45.

45. Loïc Wacquant, *The Wedding of Welfare and Prisonfare in the 21st Century*, 16 *J. OF POVERTY* 236, 237 (2012).

46. WACQUANT, *supra* note 33, at 70; see also Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <http://www.prisonpolicy.org/reports/income.html> (analyzing Bureau of Justice Statistics data to find that, in 2014, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41 percent less than non-incarcerated people of similar ages).

47. Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates: Bureau of Justice Statistics Special Report*, U.S. DEP’T OF JUSTICE OFF. OF JUSTICE PROGRAMS 1 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

48. Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 *ANN. REV. OF PUB. HEALTH* 325, 331 (2012).

Straining federal, state, and county budgets,<sup>49</sup> mass incarceration extends a host of burdens to entire communities due to heightened rates of unemployment,<sup>50</sup> the loss of wages,<sup>51</sup> family disruption,<sup>52</sup> and the increased risk for health and mental health problems associated with imprisonment.<sup>53</sup> For example, sociologist and demographer Evelyn Patterson's recent study shows that for every year an inmate serves in prison he or she loses up to two years of life expectancy.<sup>54</sup> Further complicating matters, former prisoners are released into notoriously disadvantaged spaces, and particularly into the so-called inner city.<sup>55</sup> For example, Paul Street's study of the effects of mass incarceration on poor communities in Chicago revealed that the neighborhoods where the highest concentration of arrests took place were nearly identical to the neighborhoods where most prisoners returned.<sup>56</sup> Criminologists and urban sociologists have found similar trends in large cities across the nation.<sup>57</sup>

These spaces, which service providers refer to as "receiving communities,"<sup>58</sup> are either the few places willing to host former prisoners when they return, or they simply lack the political power to resist the return of prisoners to their already disadvantaged spaces. Either way, in states like Michigan, where the prison population exceeds 45,000, nearly one-third of all prisoners are arrested from and returned to eight disadvantaged zip codes, all of which are within the Detroit city limits.<sup>59</sup> This is despite the city representing just seven percent of the state's population.<sup>60</sup> In Illinois,

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49. JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POL'Y RES., *THE HIGH BUDGETARY COST OF INCARCERATION* 1, 10 (2010).

50. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 108-130 (Russell Sage Foundation, 1st ed. 2006); see also Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 *ANN REV. OF SOC.* 387 (2010).

51. B. Western & Becky Pettit, *Incarceration & Social Inequality*, 139 *DAEDALUS* 8, 12-13 (2010).

52. Michael Massoglia, Brianna Remster & Ryan D. King, *Stigma or Separation?: Understanding the Incarceration-Divorce Relationship*, 90 *SOC. FORCES* 133, 134 (2011).

53. Dumont et al., *supra* note 48, at 329.

54. Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 *AM. J. OF PUB. HEALTH* 523, 526 (2013).

55. Miller et al., *supra* note 32; see also Sampson & Loeffler, *supra* note 7, at 29.

56. Street, *supra* note 7.

57. Sampson & Loeffler, *supra* note 7, at 29; JEREMY TRAVIS, BRUCE WESTERN & STEVE REDDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 283, 287 (2014).

58. See Peck & Theodore, *supra* note 31, at 254.

59. Amy L. Solomon, Gillian L. Thomson & Sinead Keegan, *Prisoner Reentry in Michigan*, *URB. INST.*, vi-vii, 34 (2004), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411172-Prisoner-Reentry-in-Michigan.pdf>.

60. *QuickFacts: Detroit city, Michigan*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/2622000> (last visited Mar. 9, 2016) (estimating the Detroit population to be 680,250 as of July 1, 2014); *QuickFacts: Michigan*, U.S. CENSUS BUREAU, <http://www>

where roughly 35,000 prisoners are annually discharged, more than half return to Chicago and more than a third return to just six of seventy-seven Chicago community areas.<sup>61</sup> Mirroring national trends, these neighborhoods have poverty, crime, and unemployment rates at three times the national average. Black people comprise no less than 90 percent of these neighborhoods, save two, where 90 percent of the residents were Black or Latino.<sup>62</sup> Similar trends can be found in most large cities.

Even the universe of human service agencies tasked with addressing former prisoners needs—prisoner reentry programs in criminal justice parlance—are overwhelmingly located in these neighborhoods.<sup>63</sup> As a result, prisoners are now arrested from, returned to, and provided rehabilitation services all within the low-rent districts they learn to call home.<sup>64</sup> While one could claim this phenomenon simply scratches an itch—that is, programming is located in areas with great need—this social arrangement raises important questions about the containment of the criminalized poor in disadvantaged, largely urban spaces. Furthermore, the proliferation of reentry programming as the rehabilitative strategy of choice in the current age implicates the loose networks of public and private welfare state actors and organizations in the management and control of the criminalized poor. While these more interventionist, community-based behavioral management strategies speak to how a new series of actors and institutions have emerged to manage the carceral citizen, urban policing practices speak most clearly to how this group is sorted for criminal justice selection.

### III. POLICING SUITABLE TARGETS

Racial disparities in arrest and incarceration are staggering. A recent study estimating arrest rates of Black and White youth found that 49 percent of Black men will be arrested for a non-traffic violation by their 23rd birthday, compared with 38 percent of White men.<sup>65</sup> A look across age categories reveals that Blacks are twice as likely to be arrested as Whites<sup>66</sup> and remain six times more likely to be incarcerated.<sup>67</sup> Policing research has consistently supported these findings and provides evidence of one mecha-

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.census.gov/quickfacts/table/PST045215/26 (last visited Mar. 9, 2016) (estimating the Michigan population to be 9,922,576 as of July 1, 2015).

61. Nancy G. La Vigne et al., *A Portrait of Prisoner Reentry in Illinois*, URB. INST. RES. REP. 1, 51 (2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410662-A-Portrait-of-Prisoner-Reentry-in-Illinois.pdf>.

62. Miller, *supra* note 31, at 314.

63. *Id.* at 312, 314.

64. *Id.*

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

66. *Uniform Crime Reports, Table 43a-c*, FBI (2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2013/crime-in-the-u.s.-2013/tables/table-43>.

67. BONCZAR, *supra* note 42.

nism that explains them. Blacks and Latinos are stopped, frisked, and arrested at much higher rates than Whites, although they represent a smaller share of the general population and are less likely to have weapons when searched.<sup>68</sup> This pattern persists even when controlling for suspects' actual involvement in the crimes for which they were questioned<sup>69</sup> or for crime rates in the areas where they were stopped.<sup>70</sup> Put differently, racial disparities in street-level criminal justice contact remain even when controlling for the guilt of the presumed offender, the racial descriptors used by crime victims to relay who committed actual crimes, or the recent history of crimes committed by members of their presumed racial group in the given area. At the same time, law enforcement practices like "hot-spot"<sup>71</sup> and "order maintenance"<sup>72</sup> policing ensure the concentration of police in poor, racialized spaces. Thus, the kinds of crimes associated with the overwhelmingly poor people that cycle in and out of jails and lockup facilities, like drug use, public urination, and trespassing, are met by arrests, fines, court fees, and eventual incarcerations, perpetuating these trends.

Arrest records and misdemeanor offenses alone are enough for some employers, government officials, and landlords to exclude the accused from

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68. Editorial, *Racial Discrimination in Stop and Frisk*, N.Y. TIMES (Aug. 13, 2013), [http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html?\\_r=0](http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html?_r=0).

69. See generally Richard J. Lundman & Robert L. Kaufman, *Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions*, 41 CRIMINOLOGY 195 (2003) (examining self-reports of drivers stopped by police officers and finding that Blacks and Latinos were not only disproportionately stopped but also were less likely than Whites to view the stops as legitimate or the officers who stopped them as acting properly); Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice: Understanding Racial Disparities in New York City's Stop-and-Frisk Policy* (2015), <https://5harad.com/papers/frisky.pdf> (estimating the likelihood that suspects were stopped in New York City due to reasonable officer suspicion that the suspect had a weapon and finding in 44 percent of stops that roughly 1 percent of suspects had a weapon and that Blacks and Latinos were disproportionately represented among these "low hit" stops); N.Y. TIMES, *supra* note 68.

70. See Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813 (2007) (analyzing data from 125,000 pedestrian stops in New York City and finding that Blacks and Latinos were more likely to be stopped by police than Whites, even when controlling for racial differences in crime participation in the areas in which the stops occurred).

71. John E. Eck et al., *Mapping Crime: Understanding Hot Spots*, NAT'L INST. OF JUSTICE 1, 2 (2005), <https://www.ncjrs.gov/pdffiles1/nij/209393.pdf> ("Though no common definition of the term hot spot of crime exists, the common understanding is that a hot spot is an area that has a greater than average number of criminal or disorder events, or an area where people have a higher than average risk of victimization.").

72. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-maintenance Policing New York Style*, 97 MICH. L. R. 291, 301 (1998). Harcourt defines order maintenance policing as "a law-enforcement strategy that seeks to create public order by aggressively enforcing laws against public drunkenness, loitering, vandalism, littering, public urination, panhandling, prostitution, and other minor misdemeanors." *Id.*

jobs, housing, and government licensure.<sup>73</sup> The collateral consequences of a felony conviction are all the more severe, excluding former prisoners from meaningful participation in social, civic, and economic life.<sup>74</sup> The long-term effects of imprisonment on poor racial and ethnic minorities cannot be overstated. It is by now well known that Blacks and Latinos, at just 30 percent of the U.S. population, represent nearly 60 percent of the nation's prisoners.<sup>75</sup> Subsequently, they disproportionately shoulder the burdens associated with imprisonment, which range from chronic unemployment and near-intractable poverty, to housing instability and poor health and mental health care access.<sup>76</sup> If imprisonment rates were held constant, nearly one in three Black men born after 2001 would spend some time in jail or prison, along with one in eighteen Black women—about five times the rate of similarly situated Whites.<sup>77</sup> More insidious, incarceration's spillover effects extend well beyond the suspected “legal offender,”<sup>78</sup> affecting their partners, children, and extended family members.<sup>79</sup> Indeed, 44 percent of Black women and 32 percent of Black men have a family member who has been incarcerated,<sup>80</sup> while one in nine Black children has an incarcerated parent,<sup>81</sup> extending disadvantage across generations.

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73. Marutto, *supra* note 13; Uggen, *supra* note 12.

74. *Commerce, Justice, Sci., and Related Agencies Appropriations for 2010: Hearings Before a H.R. Subcomm. of the Comm. on Appropriations*, 111th Cong. 405-06 (2009) (statement of Jeremy Travis, President, John Jay College of Criminal Justice).

75. LAUREN E. GLAZE & ERINN J. HABERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONS: KEY FACTS AT A GLANCE (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

76. Devah Pager, et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) (“Two key findings emerge from the audit results. First, as in earlier research, a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics. Across teams, a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent (28 vs. 15 percent). Second, the negative effect of a criminal conviction is substantially larger for blacks than for whites. As shown in Figure 1, the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent). This interaction between race and criminal record is large and statistically significant, which indicates that the penalty of a criminal record is more disabling for black job seekers than whites.”); Dumont et al., *supra* note 48, at 327-31; *see also* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2006).

77. BONCZAR, *supra* note 42.

78. Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. LAW SOC. SCI. 271, 272 (2007).

79. WAKEFIELD & WILDEMAN, *supra* note 16.

80. Lee et al., *supra* note 28.

81. WAKEFIELD & WILDEMAN, *supra* note 16, at 32.

Carceral expansion has therefore facilitated the emergence of an impoverished, racialized, and denigrated social category that is both materially and symbolically stranded. This is in part due to shifting trends in liability law, making the owner, employer, or state agency responsible for the conduct of those whom they house, employ, or license.<sup>82</sup> It is also likely facilitated by the emergence and proliferation of inexpensive criminal background checks<sup>83</sup> and public expectations that responsible stakeholders will access criminal records and withhold access to the criminalized poor.<sup>84</sup> For whatever reasons these practices exist, once arrested, this group becomes subject to legal practices that exclude them from full social, civic, and economic participation. The concentration of criminal justice resources in poor inner-city communities, coupled with the propensity of police officers to stop, frisk, and arrest Black and Brown residents, ensure that the people subject to these forms of exclusion are disproportionately poor Black and Brown people.

#### IV. ON RISK AND RESPONSIBILITY

Given the consequences associated with having a criminal record, carceral expansion has produced a jobless, maligned, and socially excluded class subject to the vagaries of a flexible economy, the retrenchment of social welfare benefits, and the volatility of the low-wage labor market.<sup>85</sup> A recent report from the American Bar Foundation revealed that nearly 45,000 laws restrict former prisoners' mobility.<sup>86</sup> The domain of these policies range from limiting the franchise to diminishing access to housing, food, employment, and education.<sup>87</sup> These legal restrictions dictate where former prisoners can live, what kinds of occupations they can take up, and with whom they can associate.<sup>88</sup> Further complicating matters, there are nowhere near the community resources needed to adequately address the challenges former prisoners face during reentry.<sup>89</sup>

Limited availability of treatment, housing, employment, and mental health services facilitates the reliance of former prisoners on already vul-

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82. See David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 *LAW & SOC. INQUIRY* 5 (2008).

83. Uggen, *supra* note 12, at 628.

84. Thacher, *supra* note 82, at 10.

85. WACQUANT, *supra* note 33, at 140.

86. *Collateral Consequences of Criminal Convictions and the Problem of Over-Criminalization of Federal Law: Hearing Before the H.R. Comm. on the Judiciary Task Force on Over-Criminalization*, 113th Cong. 15 (2014) (testimony of Mathias H., Heck, Jr. on behalf of the A.B.A.).

87. *Id.* at 23.

88. *Id.* at 21.

89. See Faye S. Taxman, Matthew L. Perdoni & Lana D. Harrison, *Drug Treatment Services for Adult Offenders: The State of the State*, 32 *J. SUBSTANCE ABUSE TREATMENT* 239 (2007).

nerable networks of care.<sup>90</sup> Prisoners' families are thereby made responsible to support them as they attempt to become integrated in their home communities.<sup>91</sup> At the same time, their exclusion from welfare benefits, sustainable labor, housing, and education render their personal networks as the primary mechanism of their rehabilitation, a role the state once at least rhetorically played.<sup>92</sup> When the state does fund rehabilitative programs, it does so through contracts with private nonprofit, community-based vendors.<sup>93</sup>

Despite increasing in number during the age of mass supervision, there are not enough community-based prisoner reentry programs to address returning prisoners' needs.<sup>94</sup> Thus, the state—represented by corrections officers, the police, and the courts—has off-loaded its capacity to respond to the needs of former prisoners onto the actors least able to do so. This support network consists of other former prisoners, their families, their community members, and the human services agencies that attempt to address social problems associated with incarceration through social service provision. As a result, the rehabilitation of prisoners “has been outsourced and privatized, moving from within prison walls into the . . . church basements . . . and community centers” of the post-industrial city.<sup>95</sup>

Reentry service providers—some of whom are contracted through the state, but most of whom operate within a private, nonprofit organization—now serve the public function of supervising, monitoring, and addressing the needs of former prisoners.<sup>96</sup> Given their limited capacity to take on the largely structural dilemmas former prisoners face, these organizations employ their resources to take on the kinds of problems they can address—former prisoners' psychological dispositions, their ability to form pro-social relationships, and the practical “soft skills” associated with acquiring employment and housing.<sup>97</sup> This is accomplished through the employment of psychosocial skills groups, various cognitive interventions, and processes of socialization that occur within reentry sites.<sup>98</sup> This approach, commonly referred to as human capital investment, is a community development and poverty reduction strategy that seeks to enhance participants' cognitive skills, such as their ability to resolve conflict in the workplace,

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90. See Rebecca L. Naser & Nancy G. La Vigne, *Family Support in the Prisoner Re-entry Process: Expectations and Realities*, 43 J. OFFENDER REHABILITATION 93 (2006).

91. *Id.*

92. FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 14 (1981).

93. See LYNNE HANEY, *OFFENDING WOMEN* 16 (2010).

94. See Naser & La Vigne, *supra* note 90.

95. Miller, *supra* note 31, at 308.

96. *Id.*

97. *Id.* at 315.

98. See La Vigne et al., *supra* note 61, at 151.

and their non-cognitive skills, like their mental toughness, trustworthiness, and grit to ameliorate social problems like poverty, unemployment, community violence, and housing insecurity by enhancing the skill sets of people.<sup>99</sup>

While these strategies have been linked with increases in former prisoners' self esteem and general sense of agency,<sup>100</sup> which are outcomes associated with criminal desistance,<sup>101</sup> the processes of legal and extralegal exclusion that former prisoners encounter largely occur outside the jurisdiction of the reentry program. Human capital interventions can neither remove criminal stigma nor change former prisoners' compromised legal status. With structural barriers left firmly in place, these interventions responsabilize former prisoners, making them responsible for social outcomes largely outside of their control.<sup>102</sup> At the same time, changes in penal policy have resulted in the reduction of rehabilitative programming offered *inside* prisons<sup>103</sup> and a simultaneous increase in the number of, and the state's reliance on, private, nonprofit, community-based reentry programs in the reintegration of released inmates.<sup>104</sup> The reentry program has therefore taken on the responsibility the state once assumed to ensure the social, civic, and economic inclusion of prisoners after release, without ever addressing the underlying conditions that contribute to former prisoners' all too frequent re-arrest, re-incarceration, and repeated return from jail or prison.<sup>105</sup>

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99. See GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* (3d ed., Univ. of Chicago Press 1994); James Heckman, *Doing It Right: Job Training and Education*, 135 *NATIONAL AFFAIRS* 86, 88 (1999); James Heckman & Yona Rubinstein, *The Importance of Noncognitive Skills: Lessons from the GED Testing Program*, 91 *THE AM. ECON. REV.* 145, 145-49 (2001); Eric Lichtenberger & Scott Weygandt, *Offender Workforce Development Services Make an Impact*, 73 *CORRECTIONS TODAY* 66, 66 (2011); Lance Lochner, *Education, Work, and Crime: A Human Capital Approach*, 45 *INT'L ECON. REV.* 811, 811 (2004).

100. Philip Young P. Hong, Dara Lewis & Sanomi Choi, *Employment Hope as an Empowerment Pathway to Self-Sufficiency Among Ex-offenders*, 53 *J. OF OFFENDER REHABILITATION* 317, 320 (2014).

101. FERGUS MCNEILL ET AL., *INST. OF RES. & INNOVATION TO SOC. SERV., HOW AND WHY PEOPLE STOP OFFENDING: DISCOVERY DESISTANCE 2* (2012) (providing evidence summary to support social services in Scotland).

102. See Mona Lynch, *Rehabilitation As Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practices*, 2 *PUNISHMENT & SOC'Y* 40, 53 (2000).

103. See Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *LAW & SOC'Y REV.* 33, 34 (2011).

104. See Miller et al., *supra* note 32, at 460.

105. See *id.*



## V. OF PENOLOGICAL INTERESTS AND VARIED STAKES

A clear legal framework governs the power of wardens to punish and surveil people while they are incarcerated.<sup>106</sup> This framework derives in part from the U.S. Supreme Court's decision in *Wolff v. McDonnell*, where the Court found that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."<sup>107</sup> The *Wolff* decision, write scholars Michael B. Mushlin and Naomi Roslyn Galtz, "aided by the influx of lawyers to the field of civil rights enforcement, unleashed litigation that helped, among other things, to improve prison medical care, remedy horrendous overcrowding, and increase professionalism in prison administration."<sup>108</sup> Among the rights noted in *Wolff*, prisoners retained the rights to religious freedom, to access the courts and legal counsel, to protections against racial discrimination, and to due process.<sup>109</sup>

In *Procunier v. Martinez*, the Supreme Court described governmental interests as "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners."<sup>110</sup> The Court later drew upon this definition in *Turner v. Safley* when it held that prison administrators may create a regulation that impinges on a prisoner's constitutional rights, so long as it is reasonably related to legitimate penological interests.<sup>111</sup> Surveying Court decisions in *Turner's* wake, Mushlin and Galtz describe how penological interests have been used to deny prisoners' rights that would be considered constitutional violations were the defendants not prisoners.<sup>112</sup> They explain that "the Court has held under *Turner* that inmates can be medicated against their will, their publications censored, and family visits suspended for years at a stretch."<sup>113</sup>

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106. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the U.S. Supreme Court held that administrative policies may infringe upon the constitutional rights of people in prison, so long as the policies or regulations serve a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). This gives prison wardens and corrections officials wide latitude in determining all details of a person's daily life while they are incarcerated, including their communications, visits, possessions, and activities. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (upholding Michigan Department of Corrections' ban on visits from minor nieces and nephews because the regulations bear a rational relation to legitimate penological interests).

107. 418 U.S. 539, 555-56 (1974).

108. Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 *FORDHAM URB. L. J.* 27, 32 (2009).

109. 418 U.S. at 556.

110. 416 U.S. 396, 412 (1974).

111. 482 U.S. 78, 89 (1987).

112. Mushlin & Galtz, *supra* note 108, at 33.

113. *Id.* at 33 (citing *Washington v. Harper*, 494 U.S. 210, 227 (1990), *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989), and *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003)).

Wardens have control over the movement of those in state custody, and wardens are among the final arbiters of the rights they may access, the goods and services they receive while in custody, and the outcomes of the grievances they file for reparation. Upon reentry, a web of third-party actors replaces the prison warden with varied stakes in the health and well-being of the formerly incarcerated and their access to goods and services. We conceptualize these third parties as the loose network of employers, landlords, social service providers, local officials administering state licensure, social service providers, and the families and friends of the formerly incarcerated.<sup>114</sup> Due to the thousands of laws and ordinances that allow for the legal exclusion of formerly incarcerated people from certain types of employment, subsidized housing, state licensure, education, and public welfare services,<sup>115</sup> third-party actors have inordinate power over the social, civic, and economic mobility of people with criminal records.

While parole officers, social service providers, employers, landlords, and family members hold inordinate power over the fate of the carceral citizen, each has very different stakes in that person's future—and in the prospect of his return to prison. If a tenant goes back to prison, the landlord can find another renter to take his place. Parole officers and social workers have large caseloads and often have little time or capacity to become invested in the success of a particular returning citizen.<sup>116</sup> For these third parties, the stakes are relatively low when they exercise their discretion to report behavior—or suspected behavior—to a parole officer or a judge.

While third-party reentry organizations serve the public function of supervising and monitoring formerly incarcerated people, they are largely comprised of private actors with contractual relationships with the state.<sup>117</sup> Thus, the relationship between the carceral citizen and third-party non-profit agencies is framed as one between service provider and client or consumer.<sup>118</sup> An agency's relationship with individual returning citizens is

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114. Miller et al., *supra* note 32, at 463.

115. Heck, *supra* note 86, at 2-3, 5, 7, 9.

116. See Faith Lutze, *Professional Lives of Community Corrections Officers: The Invisible Side of Reentry* 52 (2013) (“Without knowledge about the offender [due to large caseloads], officers may find it best to err on the side of caution and sanction an offender because it is easier and less likely to be criticized if something goes wrong later.”).

117. Miller traces the rise of these partnerships through reforms in criminal justice and social welfare policy. Described as “carceral devolution,” Miller suggests the emergence and proliferation of this new social arrangement represents an offloading of carceral authority—in this case the right and responsibility to rehabilitate offenders—onto community-based actors and organizations. Miller, *supra* note 31, at 308. Similarly, sociologist Lynne Haney describes this practice as “governing from a distance,” and such programs as “carceral satellites,” or private nonprofit actors contracted through the state do the work of managing inmates and former inmates in community. HANEY, *supra* note 93, at 87.

118. See Hugh McLaughlin, *What's in a Name: 'Client,' 'Patient,' 'Customer,' 'Consumer,' 'Expert by Experience,' 'Service User'—What's Next?*, 39 BRIT. J. SOC. WORK 1101 (2009).

not governed by a framework of rights or constitutional protections. And while the nonprofit service agency depends upon the availability of certain categories of returning citizens to fill its caseloads, it does not require the continued freedom of any particular individual. In essence, while these agencies depend upon the existence of clients and caseloads, their stake in an individual's successful discharge from parole is low.

It should be noted that social service providers can be held liable for the actions of their clients should they cause harm to other program residents or members of their communities.<sup>119</sup> For example, Sam Dolnick, an investigative reporter for the *New York Times*, wrote a scathing series on New Jersey's system of privately run halfway houses, calling for greater oversight and questioning the ethics of its operation and management.<sup>120</sup> More recently, a prominent halfway house in Chicago was sued for \$18 million after a convicted sex offender who was receiving services at the facility absconded from parole and sexually assaulted three women.<sup>121</sup>

Operating on a shoestring budget, public disregard and lawsuits from community members threaten the sustainability of a given reentry organization. Held liable for the actions of their residents, reentry programs are incentivized to operate in ways that privilege community safety, rather than the freedoms, rights, and thriving of their clientele. These organizations, however, are not prisons. When service providers and formerly incarcerated program participants are asked about the central mission of reentry programs, they report, almost without exception, that reentry programs exist to help their clients "change their lives."<sup>122</sup> This more rehabilitative mission does not neatly align with the expectations of public safety to which they are held accountable.

Even considering the consequences for social service providers should clients cause harm to themselves or others in a given community, family members conscripted into the management of returning citizens have very different stakes. The role that family members play in supporting returning citizens cannot be overstated. A 2015 study found that "[r]eentry programs, nonprofits, and faith-based organizations combined did not provide housing and other support at the levels that families did."<sup>123</sup> Two-thirds of formerly incarcerated individuals relied on the sup-

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119. See, e.g., Steve Schmadeke & Todd Lighty, *Cook County Jury Awards \$18 Million to Three Rape Victims*, CHI. TRIB. (July 17, 2015, 6:45 AM), <http://www.chicagotribune.com/news/local/breaking/ct-multimillion-verdict-halfway-house-met-20150716-story.html>.

120. Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2012), <http://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html>.

121. Schmadeke & Lighty, *supra* note 119.

122. Miller, *supra* note 31, at 322.

123. SANETA DEVIUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, *WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9* (2015), <http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf>.

port of family members to find housing after release.<sup>124</sup> More than half lived with family members when they left prison.<sup>125</sup> This support may entail grave costs for family members, including housing insecurity for family members who wish to live with their formerly incarcerated loved ones. One in five families report “being evicted or denied housing when their formerly incarcerated family member returned.”<sup>126</sup>

Indeed, the regime of carceral citizenship mobilizes, severs, and imperils family ties all at once. Family members experience the consequences of carceral citizenship alongside the person convicted or suspected of a crime. As one 61-year-old woman told researchers in a 2015 study:

[My son] and I want to live together but he has felony charges so when we go and get a place even if we put all our money together, it’s still a struggle. Nobody wants to take somebody that has a felony. So I’m faced with being homeless, seriously homeless. At 61! I can’t believe it. I can’t find a place to live in my own hometown.<sup>127</sup>

For the families of carceral citizens, their own housing, safety, public benefits, child support payments, childcare options, income, mental health, and general well-being may be bound up in whether their family member returns to prison.

In the age of mass supervision, regimes of post-incarceration surveillance and ostensible social welfare provision serve to cement the legal exclusions of carceral citizenship. The relationship between a returning citizen and his or her parole officer, landlord, group counselor, or social worker is not structured by rights or recourse. These precarious, low stakes interactions operate alongside the state’s mobilization of kinship networks to produce a tangled web of welfare provision, surveillance, and punishment. In place of a public social welfare apparatus with clearly defined entitlements and avenues for redress, carceral expansion has produced a web of private actors with varied stakes and minimal liabilities.

## VI. ON RIGHTS AND RESPONSIBILITY

Once accused of a crime and deprived of liberty, the accused are routed into a set of perverse benefits and services unique to their class. For example, in order to not run afoul of constitutional protections against cruel and unusual punishment, the state is expected to ensure prisoners

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124. *Id.* at 27; see also Rebecca L. Naser & Christy A. Visher, *Family Members’ Experiences with Incarceration and Reentry*, 7 *W. CRIMINOLOGY REV.* 20, 20 (2006) (citing studies showing that more than three-quarters of formerly incarcerated people reside, at least initially, with family members after release).

125. DEVUONO-POWELL ET AL., *supra* note 123, at 27.

126. *Id.*

127. *Id.* at 26.

have access to food, water, shelter, and the most basic healthcare.<sup>128</sup> While one may debate the adequacy of such measures, the largest decarceration of prisons in U.S. history hinged on the claim that California prisons are overcrowded and provide inadequate health services.<sup>129</sup> Justice Kennedy's opinion in *Brown v. Plata* listed violations that included fifty-four prisoners sharing a toilet, 200 prisoners living in a gymnasium, suicidal prisoners being locked away for nearly twenty-four hours in cages the size of telephone booths, and a preventable death occurring every six to seven days in California prisons.<sup>130</sup>

We have shown that penological interests govern the restriction of rights. Thus, we are not suggesting that the rights of carceral citizenship are actually fulfilled in prisons but rather that the *avenue for recourse* (though limited and rarely successful) is noteworthy and provides some evidence that such rights exist. What is perhaps most striking is that the carceral citizen is the only citizenship class in the United States that can claim a right to what many may consider basic human needs—food, clothing, and shelter.

Such entitlements can be found in carceral systems beyond the prison, and carceral citizenship may operate in both criminal and civil proceedings. For example, the accusation of child abuse or neglect activates the universe of child welfare officers, police, and court officials to monitor and manage a parent accused of being abusive or neglectful of their children.<sup>131</sup> Whether or not the parent eventually loses her child permanently, the accusation that she abused or neglected her child routes her into an alternative citizenship track where she is at once surveilled, monitored, and managed, and at the same time provided access to goods and services to which other poor people simply do not have access. For example, when children are taken from their parents—or, as is disproportionately the case, when children are taken from poor, Black single mothers<sup>132</sup>—these parents have a right to access services that may include housing assistance, treatment of drug and alcohol addiction, bus vouchers, therapy, respite

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128. See *Brown v. Plata*, 131 S. Ct. 1910 (2011).

129. *Id.*

130. *Id.* at 1924, 1927.

131. See Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 885 (2007).

132. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477 (2012); see also U.S. DEP'T OF HEALTH & HUM. SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 3 (2011), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf#page=1&view=Introduction](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf#page=1&view=Introduction) (The Department's "figures for 1998 through 2008 show a drop in the percentage of African-American children in foster care, although a large disparity remains when compared with figures for White children.").

care, and parenting classes.<sup>133</sup> That is, after their right to parent their children is infringed based on an allegation of abuse or neglect, they are able to access the benefits of carceral citizenship and do not just bear its constraints. Legal scholar Dorothy Roberts identified this trade-off in her interviews with Black women in an area of Chicago exposed to high levels of Department of Children and Family Services involvement. As Roberts concluded, “The child welfare system exacts an onerous price: it requires poor mothers to relinquish custody of their children in exchange for state support needed to care for them.”<sup>134</sup>

While carceral citizens have an avenue for recourse if the state violates certain basic rights (an avenue unavailable to other citizens), in practice wardens, social workers, court officials, and social service providers deny basic needs at their discretion. The carceral citizen must therefore interact with the universe of third-party actors who manage their access to freedom, their interactions with their children, and the essential goods and services they need to make ends meet, in ways that will be interpreted as nonthreatening and compliant. This is in part due to the uneven stakes between third parties and the criminalized poor in their freedom and ability to navigate the social world. It is also due to the power differential third parties have under the regime of carceral citizenship. Carceral citizens are therefore made responsible for acting in ways that manage the perceptions of others, at the threat of losing access to their freedom, their housing, their employment, and their families.

## CONCLUSION

The practices of legal exclusion outlined in this Article have rendered the criminalized poor dependent on the goodwill of others, heightening the stakes of their everyday interactions in ways that are distinct from other social groups. Because former prisoners have no legal standing to make claims for protections against the most common forms of discrimination they face in everyday life, their interactions with the police, the courts, social service workers, group counselors, landlords, employers, their family members, and even other former prisoners have life and death consequences. Carceral citizens are excluded from most meaningful forms of employment.<sup>135</sup> They must therefore learn to navigate their social world in ways that are nonthreatening and allow them access to the scarce resources available to them. An argument with a family member means the carceral citizen may have no couch to sleep on. Scarce, intermittent, often under-

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133. CHILDREN’S BUREAU, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1-2 (2012), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>

134. Roberts, *supra* note 132, at 893.

135. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T L. PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1-2 (2011); *see also* Pager et al., *supra* note 76, at 199.

the-table employment leaves them little money to cover a security deposit for an apartment, insurance for a car, or a deductible in case of an auto accident. The geographic restrictions on their mobility, and the expectation that they will check in frequently with a probation or parole officer means that it is almost impossible for them to hold down a job and heightens the risk of parole revocation should they take one, especially one outside their receiving community where work is scarce to begin with.

The concentration of police presence in the spaces where carceral citizens live, work, and have leisure increases the chances that they will be stopped, frisked, and arrested, and extends police surveillance to members of their communities. Since having an arrest record justifies legal exclusion, the very presence of returning prisoners to poor urban and rural neighborhoods acts as justification for further police involvement, extending the reach of the penal state and its associated disadvantages to their partners, children, and neighbors.

We have presented the uniqueness of treatment for the criminalized poor, at the hands of social actors, and the mechanisms through which they are excluded from full social participation as evidence of an alternate citizenship track—what we have called carceral citizenship. We have argued that carceral citizens experience social life in ways that are unique from other marginalized groups. They are uniquely branded by the mark of a criminal record and are subject to forms of legal exclusion that would be unlawful if directed toward other social groups.<sup>136</sup> That they have little legal recourse further substantiates our claim that this is indeed a unique category of citizenship, based not on presumed ancestry (race), or a presumed gender classification, but on the presumption of legal guilt. This is not to say that carceral citizenship does not articulate with race, class, and gender-based forms of exclusion and domination. Members of this class are overwhelmingly poor, disproportionately comprised of racial and ethnic minorities, and disproportionately male. Difference of almost any kind is marginalized, over-policed and over-incarcerated in the United States—the egregious incarceration rates of Black women and the over-representation and treatment of LGBTQ youth in the juvenile justice system attests to this.<sup>137</sup> However, our central thesis is that the exclusion of carceral citizens from civil society is based on their status as *presumed* lawbreakers. As a result, they have tenuous standing to request protections from the state to prevent harm or to provide reparations for the harms associated with their treatment. For example, while half of employers surveyed through

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136. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (rev. ed. 2012).

137. See JILL McCORKEL, *BREAKING WOMEN: GENDER, RACE, AND THE NEW POLITICS OF IMPRISONMENT* (2013); JEROME HUNT & AISHA MOODIE-MILLS, CENTER FOR AMERICAN PROGRESS, *THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCES OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM* (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile\\_justice.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf).

Devah Pager's now famous audit study suggested they would not consider hiring an ex-offender, it is within an employer's right to discriminate based on an applicant's criminal record in most states.<sup>138</sup> In fact, there is a tacit expectation that a conscientious employer or landlord will deny applications from ex-offenders.<sup>139</sup> Furthermore, licensing bodies may disqualify candidates for licensure based solely on their arrest record without fear of reprisal. While empirical research is needed to validate this claim, we would argue that this is largely due to such ambiguously defined rules that bar offenders from licensure, as the "good character" mandates of many professional associations and the rise of actuarial strategies to contain risk by excluding high-risk groups.<sup>140</sup>

It is important to note that the activation of this distinct citizenship track does not rely on the actual commitment of a criminal act but on its presumption. The circulation of racialized, impoverished, and criminalized bodies between some form of confinement and poor urban communities activates police presence and signals the presumption of guilt in these spaces. Subsequently, the over policing of the inner city results in the over-arrest and eventual incarceration of disparate numbers of Black and Brown people, while extending the cycle of policing, arrest, and exclusion to former prisoners' families and community members.

This series of events is all the more problematic given that arrest and incarceration rates are not neatly linked with crime.<sup>141</sup> Furthermore, while most arrests do not result in conviction,<sup>142</sup> and despite limited evidence of verifiable legal guilt, third parties view arrest records as legal justification for exclusion from essential goods and services, thereby funneling the

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138. See Devah Pager, *Two Strikes and You're Out: The Intensification of Racial and Criminal Stigma*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIALIZED AMERICA 151-73 (Shawn D. Bushway, Michael A. Stoll & David Weiman eds., 2007).

139. Thacher, *supra* note 82, at 13.

140. Empirical research has shown that licensing bans and federal and state restrictions exclude people from participating in a range of occupations including driving a taxicab, street vending, and anything involving the care of children or vulnerable populations. See Amy Meek, *Street Vendors, Taxicabs and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OH. ST. L. J. 1 (2014); Darren Wheelock, Christopher Uggen & Heather Hlavka, *Employment Restrictions for Individuals with Felon Status and Racial Inequality in the Labor Market*, in GLOBAL PERSPECTIVES ON RE-ENTRY 283 (Ikponwosa O. Ekunwe & Richard Statler Jones eds., 2011).

141. Examining the relationship between the increased arrests associated with broken windows policing and crime, legal theorist Bernard Harcourt and economist Jens Ludwig find that one could not conclude this strategy had a causal impact on crime in New York City. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 277 (2006). They go on to write that "from a public policy perspective, the faith that many policymakers place in the efficacy of broken windows policing is in the end just faith, rather than the result of convincing empirical evidence." *Id.* at 300.

142. Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 119 AM. J. SOC. 351, 363 (2013).



raced and criminalized poor into what we describe as carceral citizenship. This alone raises important questions about the extent to which such practices of legal exclusion are actually triggered by the due process called for in the Fourteenth Amendment.

Current efforts to reduce the prison population will not address the conditions associated with carceral citizenship. Due in part to its (lack of) legal (and ethical) justification, and the multiple domains in which the processes we have outlined are carried out, its consequences extend across generations, drawing entire communities into the penal dragnet. Carceral citizenship therefore has important implications for scholarship on legal reform, how we understand what those reforms produce, and the role, force, and consequence of the state in the lives of the poor, and especially poor people of color in the United States.