NOTE

LET'S KEEP IT CIVIL: AN EVALUATION OF CIVIL DISABILITIES, A CALL FOR REFORM, AND RECOMMENDATIONS TO REDUCE RECIDIVISM

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INTRODUCTION

Imagine the following scenario: You have just been released from prison after serving a two-year sentence for sale of a controlled substance. Upon release, you search for housing in your community but learn that your conviction disqualifies you from public housing.[1] You look for a job, but given the restrictions and required disclosures, your search constantly leads to dead ends.[2] You decide to pursue a college education, but learn that you only qualify for a limited amount of federal aid and cannot receive Federal Pell Grants—loans that do not require repayment.[3] Fed up with your situation, you turn to the ballot box but learn that you have lost your right to vote.[4] Facing these bleak circumstances, you turn back to selling drugs and are re-arrested. This cycle is one that far too many in this country face each year.

For ex-offenders, the odds are stacked against them to recidivate and return to prison.[5] A recent Department of Justice study revealed that among 404,638 released state prison-

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1 24 C.F.R. § 960.204 (2015).

2 *See, e.g.*, KY. REV. STAT. ANN. § 17.160 (West 2010) (permitting employers to request conviction records for any felony offense and for certain misdemeanors); MONT. ADMIN. R. 24.9.1406(2)(h) (2016) (permitting employers to inquire about criminal convictions).

3 34 C.F.R. § 668.40 (2015) (denying federal aid to individuals with certain drug convictions); 34 C.F.R. § 690.2 (2015) (defining student eligibility for the federal Pell Grant Program).

4 *See, e.g.*, FLA. STAT. § 97.041(2)(b) (2002) (explaining that those with felony convictions must have their rights restored by the state after their release from prison).

5 *See* MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014); Stephanie Slifer, *Once a Criminal, Always a Criminal?*, CBS NEWS (Apr. 23, 2014, 7:35 AM), http://www.cbsnews.com/news/once-a-criminal-always-a-criminal/ [https://perma.cc/M22Y-ND2W] (breaking down the Bureau of Justice Statistics' report into different types of offenses and their respective recidivism rates).

ers in 2005, 67.8% were re-arrested within three years.[6] These trends have not gone unnoticed, with many state governments focusing on improved reentry procedures and reduced recidivism rates as a "cornerstone[ ]" of their crime policy.[7] Even the federal government has taken initiatives to curtail these high rates.[8] Indeed, such a concern makes sense. During a time where mass-incarceration has markedly increased, re-incarceration accounts for a significant percentage of all incarcerations.[9] Moreover, these recidivism rates reflect poorly on the state's correctional system.[10] Among the multitude of challenges that prisoners face upon reentry, one is particularly crippling—civil disabilities.

Civil disabilities, also known as collateral consequences, are consequences that both federal and state governments impose on ex-offenders upon their release from prison.[11] For example, a re-entering prisoner in New York can lose the right to vote,[12] and a convicted drug felon in the United States can lose access to both Medicare and state healthcare programs.[13] In addition, an ex-offender may lose access to welfare benefits, public housing, and employment opportunities.[14] Understandably, such outcomes can make punishment seem never ending to the ex-offender.[15] To further complicate matters,

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6 DUROSE ET AL., *supra* note 5 (analyzing data from thirty states).

7 COUNCIL OF STATE GOV'TS JUSTICE CTR., REDUCING RECIDIVISM: STATES DELIVER RESULTS 1 (2014) (providing percent changes in recidivism rates in release cohorts of eight states).

8 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-483, PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS 3, 27 (2001) [hereinafter GAO REPORT] (noting a sevenfold increase in the number of offenders reincarcerated for violating parole or release conditions and evaluating a federal grant program intended to promote successful reentry among young offenders).

9 *See* REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU'RE OUT 4 (2014) (noting that the number of Americans currently incarcerated—1.5 million—has "quintupled" since 1980); GAO REPORT, *supra* note 8, at 7–8 ("After being released, many individuals—about 40 percent historically—later are sent back to prison for committing new offenses or violating conditions of release.").

10 *See* PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 6 (2011) [hereinafter PEW CENTER] ("[M]any states are taking a hard look at their recidivism rate as a key indicator of the return they receive from their correctional investments.").

11 *See* Zachary Hoskins, *Collateral Restrictions*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 249 (Chad Flanders & Zachary Hoskins eds., 2016).

12 OFFICE OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 99 (1996).

13 42 U.S.C. § 1320a-7 (2012).

14 Hoskins, *supra* note 11, at 249.

15 The lasting nature of criminal convictions makes it extremely difficult for ex-offenders to distance themselves from their past; this in turn compounds the effects of civil disabilities. *See generally* Stephanie Clifford, *From the Bench, a*

civil disabilities are not just limited to felonies—they also apply to misdemeanors.[16] The impact of civil disabilities is so tremendous that some states have begun reducing the total number they impose on ex-offenders.[17]

Given the harsh burdens that these civil disabilities create, as well as their potential links to recidivism, one must ask the following questions: Are civil disabilities best understood as mere preventative consequences or as a form of punishment? Moreover, can civil disabilities be justified? By answering these questions, this Note will explore the historical background, optimal conceptualizations, and current justifications for civil disabilities. Ultimately, my goal is to set forth a renewed foundational conceptualization for lawmakers and to demonstrate the need to adopt narrowly tailored civil disabilities similar to the standards set forth by the American Bar Association's (ABA) Criminal Justice Standards.[18] Using this framework, I will set forth a solution that both state and federal governments can implement to improve reentry initiatives and reduce recidivism. Moreover, I will apply this narrow tailoring framework in the context of criminal records usage, which I conclude functions as a de facto civil disability.

The Note will proceed in four parts. Part I of this Note will provide a background on the history of civil disabilities. This background will further survey the different definitions of punishment, ultimately setting forth a more complete and inclusive definition. Part II will explore the competing conceptualiza-

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New Look at Punishment, N.Y. TIMES (Aug. 26, 2015), http://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html [https://perma.cc/ZH65-KVXR] ("Federal district courts review dozens of similar requests a month . . . . Most judges have a standard response: Courts can expunge convictions only in exceptional circumstances.").

16 Alex Tway & Jonathan Gitlen, *An End to the Mystery, A New Beginning for the Debate: National Inventory of Collateral Consequences of Conviction (NICCC) Provides Complete List of Every Collateral Consequence in Country*, CRIM. L. PRAC., Summer 2015, at 15, 19 (noting that any misdemeanor will expose felons to 8,743 collateral consequences).

17 *See, e.g.*, Ari Berman, *Kentucky Restores Voting Rights for Thousands of Ex-Felons*, NATION (Nov. 24, 2015), http://www.thenation.com/article/kentucky-restores-voting-rights-for-thousands-of-ex-felons [https://perma.cc/X2LU-6GSG] (describing Kentucky's decision to restore voting rights to ex-offenders); Lauren-Brooke Eisen, *Ohio Takes Step to Roll Back Collateral Consequences*, VERA INST. JUST.: CURRENT THINKING BLOG (Aug. 20, 2012), https://www.vera.org/blog/ohio-takes-step-to-roll-back-collateral-consequences [https://perma.cc/EVJ7-TNMD] (describing civil disability reduction initiatives that Ohio has undertaken to reduce recidivism rates in the state).

18 AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) [hereinafter ABA].

tions of civil disabilities and will argue that civil disabilities, despite their historical treatment as a nonpunitive regulation, are best conceptualized as punishments. Part III will then set forth a normative analysis by examining civil disabilities under several theories of punishment to justify their use as punishment. Part III will further argue through constitutional and cost-benefit analyses that, notwithstanding any general justification, these civil disabilities must nevertheless be narrowly tailored. Based on this conclusion, Part IV will argue for the removal of insufficiently tailored civil disabilities to reduce recidivism rates throughout the country. Part IV will also explore this narrow tailoring framework in the context of the Ban the Box movement and propose a novel policy recommendation in response.

I
BACKGROUND

A. From Civil Death to Civil Disabilities

Civil disabilities find their roots in the concept of civil death, with early English colonists bringing the remnants of civil death to the colonies and imposing these consequences on lawbreakers in the community.[19] Originating from medieval justice systems, scholars have defined civil death as a "condition in which a convicted offender loses all political, civil, and legal rights."[20] The underlying effect of such a stringent deprivation of rights was that the offender's "membership in society, as conceived at the time, was over."[21]

Under a scheme of civil death, lawbreakers lost the right to vote, enter contracts, and inherit or bequeath property.[22] Though not nearly as crippling as civil death, civil disabilities in the United States retained several of the incapacitating qualities of civil death. Until the 1960s, civil disabilities in the United States included, among other restrictions, the loss of rights to contract, litigate, and hold various licenses.[23]

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19 Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010).

20 Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n.13 (2002).

21 Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) (noting that "[t]he ex-offender was treated as if already dead").

22 *Id.*

23 *Id.* at 155. Although civil death, in its pure form, does not exist in the United States today, several critics have noted that there are "theoretical similari-

The strict regime of civil death-like statues in the United States, however, fell out of favor midway through the twentieth century.[24] During this time, the harsh, condemnation-driven basis of civil death statutes ultimately gave way to a new goal of punishment: rehabilitation.[25] The basis of this new regime was to reform offenders and to allow them to lead productive, law-abiding lives.[26] Scholars during this time were aware of the detrimental effects of civil disabilities and in turn were vocal in their support for reducing the number of state-imposed civil disabilities.[27] Some scholars even went so far as to proclaim that civil disabilities were the "causative factor in the social degradation of the ex-convict."[28]

The impetus for civil-death reformation emerged in 1956 during the National Conference on Parole (NCP).[29] Here, the NCP recommended abolishing civil disabilities because of the significant legal burdens that they imposed on ex-offenders.[30] Several years later, in 1962, the American Law Institute's Model Penal Code (MPC) proposed a "nuanced way" of restoring rights and status to ex-offenders.[31] This proposed MPC provision, § 306.6, would allow sentencing courts to enter orders relieving "any disqualification or disability imposed by law because of the [ex-offender's] conviction."[32] Moreover, after a period of good behavior by the ex-offender after release, the court could issue an order vacating the judgment of conviction.[33] With the release of the ex-offender, the new goal was to assist

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ties between medieval punishments and the collateral consequences of conviction in the United States . . . ." Ewald, *supra* note 20, at 1060–61.

24 *See, e.g.*, Legislation, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 977 (1937) (noting that the "continued existence of civil death, outworn as a mode of punishment and ineffective as a deterrent to crime, leads to increasing confusion and uncertainty in its effect on the personal and property relationships of life convicts" and that "it would be wiser to repeal the civil death statutes"); Pinard, *supra* note 19, at 1216–17.

25 *See* Pinard, *supra* note 19, at 1216–17.

26 *Id.* at 1216.

27 *See, e.g.*, Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROB. 19, 25 (1971) ("To the extent that civil disabilities impede this progress, they must be reassessed and revamped to conform to modern theories and methods.").

28 *Id.*

29 Pinard, *supra* note 19, at 1217.

30 *See id.* In their place, the Conference recommended laws that would expunge the record of conviction so that "the individual shall be deemed not to have been convicted." 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, 1708 (2003) (internal quotations omitted).

31 Love, *supra* note 30, at 1711.

32 MODEL PENAL CODE § 306.6(1) (2003).

33 Love, *supra* note 30, at 1711.

the ex-offender's reintegration into society.[34] This commitment to rehabilitation was effective and influential, ultimately leading to a decline in the number of civil disability statutes throughout the states.[35]

The reform movement culminated with the ABA's *Standards on the Legal Status of Prisoners*, which advocated for an expungement procedure that would either lessen or remove the burdens of civil disabilities.[36] The ABA even went as far as to predict that the prevalence of civil disabilities would be dissipating.[37] This movement led the House Committee on the Judiciary to propose a sentencing reform bill that would restrict civil disabilities triggered by federal convictions.[38] All in all, the bill would have worked to "restore the convicted person to the same position as before conviction."[39]

Unfortunately, the civil disabilities reform movement would be short lived—the House's bill never passed.[40] Instead of focusing on rehabilitative efforts, both federal and state governments adopted "tough-on-crime" approaches that focused on incarceration and increased prison sentence durations.[41] The effects of this new focus were significant. Record numbers of people were either serving a prison sentence or being released from prison.[42]

This underlying focus led to a significant expansion of civil disabilities. Diverging from the anti-civil-disability sentiments that permeated the rehabilitative era, this new focus led federal and local governments to adopt more civil disability statutes that denied services such as public benefits, student loans, and public housing.[43] In their functional capacity, the modern day civil disability statutes had effects that were similar to their

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34 *See* Demleitner, *supra* note 21, at 155.

35 *See id.*

36 Love, *supra* note 30, at 1714.

37 Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1798 (2012).

38 Love, *supra* note 30, at 1715.

39 *Id.* at 1716.

40 *See id.* (noting that a rival Senate bill passed instead).

41 *See, e.g.*, Pinard, *supra* note 19, at 1214, 1217–18 ("Between 1980 and 2005, the number of individuals incarcerated in U.S. prisons and jails for drug possession offenses increased more than 1,000%."); Chin, *supra* note 37, at 1804 ("In 1980, more than 500,000 Americans were confined to prisons and jails . . . .").

42 Pinard, *supra* note 19, at 1218.

43 As an example of this expansion, eight out of fifty-one jurisdictions surveyed in 1986 required offenders to register with a law enforcement agency, whereas that number skyrocketed to forty-six by 1996. Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 13 (1996).

civil death counterparts.[44] Moreover, because many categorize disabilities as nonpunitive, their full effect went largely unnoticed.[45]

In 2004, however, the ABA published the third edition of the *Standards for Criminal Justice*.[46] Here, the ABA set forth recommended standards for legislatures to adopt that would limit the burdensome effects of civil disabilities and notify offenders of their existence.[47] Under this new set of Standards, the ABA sought to address the increase in the number of civil disabilities statutes across the country.[48] Moreover, the Standards focused on spreading greater publication and awareness of these regulations that the ABA deemed to be "neither fair nor efficient."[49] With an eye towards the criminal justice system's goal of reducing recidivism and promoting rehabilitation, the ABA's Standards stood as a renewed attempt to concentrate the public's eye on both the civil disabilities' detrimental impact on reentry and the ex-offenders' goals of reintegrating with their communities.[50]

B. What Is Punishment? Establishing the Framework

1. *General Definitions of Punishment*

A dictionary provides the following definition of punishment: "suffering, pain, or loss that serves as retribution."[51] In criminal law, however, the definition takes on a more sophisticated and elemental form. In 1967, H.L.A. Hart provided a five-element definition of punishment that is consistent with its standard conceptualization in criminal law. The punishment must involve pain or consequences that one would normally consider unpleasant.[52] The punishment must be for a breach of legal rules.[53] One must impose the punishment on an actual

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44 *See* Chin, *supra* note 37 at 1801–03. One scholar has gone so far as to call modern day civil disability statutes "the new civil death." *Id.*

45 *See* Pinard, *supra* note 19, at 1219–20 ("[I]t is difficult—essentially impossible—to fully grasp the scope of these consequences in a given jurisdiction, because they are dispersed throughout various federal and state statutes, federal and state regulations, and local policies.").

46 ABA, *supra* note 18.

47 *Id.* at 2–3.

48 *Id.* at 8, 12-13.

49 *Id.* at 11, 13.

50 *See id.* at 13.

51 *Punishment*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1009 (11th ed. 2003).

52 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4 (2d ed. 2008).

53 *Id.* at 5.

or supposed offender for their offense. Someone other than the offender must intentionally administer the punishment. Finally, the person administering the punishment must have legal authority within the offender's legal system. Central to this definition is the concept of intentionality[54] and criminal responsibility.[55]

On a broader level, societal norms also play a critical role in defining punishment: We seek to inhibit certain undesirable behaviors while encouraging socially desirable behaviors.[56] This societal view creates an institutional conceptualization of punishment.[57] Viewing punishment in a more simplistic fashion, society determines that an offender's act is wrong and therefore deserves punishment.[58] Under this view, punishment "assert[s] a right and accept[s] an obligation to punish anyone similarly circumstanced and behaved," while the institution assumes an authoritative position.[59] As a result, when the institution or the state deprives the rights of offenders in order to protect its citizens, that action is punishment.[60] However, one suffers punishment only when the state or state's agent inflicts pain or suffering that the criminal would consider "unpleasant."[61] Some scholars would even go so far as to require that the state design the punishment to "censure and to stigmatize" the offender.[62]

Nevertheless, not all scholars subscribe to these traditional conceptualizations of punishment. One scholar, Leo Zaibert, recommends conceptualizing punishment from the perspective of the punisher.[63] Under this view, an additional component exists when defining a punishment: The punisher must feel indignation towards the offender's actions and inflict harm that the punisher believes will be painful.[64] The punisher's beliefs and feelings—the actor's indignation as Zaibert explains—are

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54 *See* Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 5 (2012).

55 *See* Julian P. Alexander, *The Philosophy of Punishment*, 13 J. CRIM. L. & CRIMINOLOGY 235, 236 (1922).

56 *See* HART, *supra* note 52, at 6.

57 *See* LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 21 (2006).

58 *See* Alexander, *supra* note 55, at 238.

59 ZAIBERT, *supra* note 57, at 21 (quoting Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321 (2002)).

60 *See* Alexander, *supra* note 55, at 239.

61 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 12 (7th ed. 2015).

62 Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1182 (2011).

63 *See* ZAIBERT, *supra* note 57, at 29.

64 *See id.* at 31–33 (explaining the beliefs that are central to the author's theory of punishment).

most important when determining whether the punisher is inflicting punishment.[65] This is true whether the offender believes the punisher is *actually* inflicting punishment upon them or whether the punisher has actual or perceived authority over the offender.[66] As a consequence of this indignation and desire to burden, even unintended but foreseeable inflictions of harm stemming from intentionally inflicted actions may—and arguably should—come within the purview of this definition of punishment.[67] Indeed, as Professor Adam Kolber has noted in his literature, "Even if we can distinguish intentional and merely foreseen harms, it is not clear why the distinction has any intrinsic moral salience."[68]

2. *How We Will Define Punishment*

Finding a definition of punishment is understandably difficult, and as the above demonstrates, rather imprecise. Even so, establishing the boundaries of the definition is critical to expounding proper justifications. There are certain forms of punishment that society deems to be "foolish" for the law to pursue and better left to non-state actors."[69] On the other hand, there are certain behaviors which society deems necessary for the law to regulate.[70] In pursuit of this necessary regulation, H.L.A. Hart's definition provides the traditional baseline account of the critical elements of punishment, due in part to its requirement of intentionality—both in the punishment's infliction and its consequences.[71] This account is best coupled with the institutional conceptualization of punishment so as to communicate society's values, in turn legitimizing the state and its infliction of punishment.[72]

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65 *See id.* at 48.

66 *See id.* at 59–60 (explaining that there may be cases that are not punishment where a penalty is inflicted but the punisher does not feel the felon deserves it).

67 *See id.* at 51.

68 Kolber, *supra* note 54, at 7. Professor Kolber criticizes these justifications of punishment that address only the "intentional aspects" of punishment, calling them "seriously incomplete." *Id.* at 3. This is a position that this Note adopts as well. *See infra* section I.B.2.

69 HART, *supra* note 52, at 7.

70 *See id.*

71 *See id.* at 5.

72 *Cf.* ZAIBERT, *supra* note 57, at 65 ("An institution exists at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed." (quoting JOHN RAWLS, A THEORY OF JUSTICE 48 (rev. ed. 1999)); Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 33–34 (2001) (describing John Rawls view of political legitimacy and how it stems from the basic issues of justice).

This definition alone, however, is too narrow. It would exclude legitimate—and sometimes significant—state (i.e., government) actions from the purview of punishment, in turn shielding these actions from the same scrutiny we often exact upon traditional forms of punishment.[73] This exclusion occurs because the state action—such as the imposition of civil disabilities—lacks the requisite intentionality we often see entrenched in the traditional punishment analysis.[74] Such a major shortcoming creates a woefully underinclusive system of punishment. That said, these shortcomings can easily be rectified. To do so, we must incorporate additional factors into the definition. Accordingly, a more complete definition should add Zaibert and Kolber's inclusion of the unintentional but foreseeable harms that result from the intentional inflictions of impairment.[75]

This integrated definition is better suited to account for state-imposed, but facially neutral, regulations. Because a primary facet of punishment is to subject the offender to suffering, pain, and overall burden, this definition would include state actions that would otherwise be overlooked in an analysis of punishments. The definition puts the onus on the state to readily account for and justify the different penalties and deprivation of rights that it imposes on the violators of state-established social order.[76]

II
CIVIL DISABILITIES: PUNISHMENT OR CONSEQUENCE?

The Supreme Court's opinion in *Trop v. Dulles* showcases how framing is critical to the conceptual standing of civil disa-

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73 *Cf.* Kolber, *supra* note 54, at 14 (describing how, in the context of incarceration, "[w]e need to justify such harsh treatment because it would be wrong to cause distress or restrict people's freedoms in these ways without good reason").

74 *See id.* at 2–3, 5 (noting that punishment theorists agree that conduct must be intentional to constitute punishment and explaining that "[s]ome scholars . . . claim that we need not address unintentional aspects of punishment . . . because these side effects are not imposed intentionally and are therefore not punishment").

75 *See* ZAIBERT, *supra* note 57, at 49–50 ("It is true that in most cases the punisher indeed intends to inflict the punishment, but there are cases in which she might not intend to inflict the unpleasant consequences and which . . . ought to be recognized as instances of punishment."); *see also* Kolber, *supra* note 54, at 6 (arguing that "when we consider the severity of punishment, we consider more than just those aspects of punishment that are intentionally administered").

76 *See* ZAIBERT, *supra* note 57, at 51 ("The actor can be taken to intend . . . other consequences known to be inseparable from the consequence he desires, even though they are not themselves desired." (quoting GLANVILLE L. WILLIAMS, THE MENTAL ELEMENT IN CRIME 11 (1965))).

bilities in the criminal law landscape.[77] In the *Trop* opinion, the Court compared two statutes, one authorizing denaturalization and the other deportation.[78] The Court first explained that "the statute authorizing *deportation* of an alien . . . was viewed, not as designed to punish [the offender] for the crime . . . but as an implementation of the sovereign power to exclude."[79] Yet the Court ultimately held that *denaturalization* resulting from a wartime desertion conviction was cruel and unusual under the Eighth Amendment due to the statute's punitive nature.[80] This distinction highlights the importance of properly conceptualizing civil disabilities.[81] How the statutes are framed—either as punitive or nonpunitive—will ultimately dictate the necessary legal analysis that courts and scholars will apply when analyzing civil disabilities. As the following section will reveal, the burdensome effects and underlying rationales of civil disability statutes demonstrate that civil disabilities function as a form of punishment. Therefore, government lawmakers must justify their broad imposition on ex-offenders.

A. Civil Disabilities as Nonpunitive Consequences

The traditional framework conceptualizes civil disabilities as nonpunitive civil sanctions.[82] One general rationale underlying this nonpunitive scheme is that civil disabilities are merely consequences that stem from conviction; as such, this framework positions civil disabilities as risk-prevention measures instead of as punitive devices.[83] The underlying rationale is that the state is not imposing the consequences because of any wrong that the offender has committed; instead, the

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77 356 U.S. 86 (1958).

78 *Id.* at 98, 101.

79 *Id.* at 98 (emphasis added) (footnote omitted).

80 *Id.* at 101.

81 *See, e.g.*, Smith v. Doe, 538 U.S. 84, 105–06 (2003) (holding that the Alaska Sex Offender Act was nonpunitive and therefore did not violate the Ex Post Facto Clause); De Veau v. Braisted, 363 U.S. 144, 157–60 (1960) (holding that Section 8 of the New York Waterfront Commission Act of 1953, which disqualified individuals with a prior felony conviction from employment, was not in violation of the Due Process Clause).

82 *See* Hoskins, *supra* note 11, at 250 ("On this view, punishment is handed down by a sentencing judge for a particular defendant, whereas these other measures are created by legislative or regulatory bodies and imposed on entire classes of individuals.").

83 *See* Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 606 (1997) ("If disqualifications thus serve as civil risk-prevention measures, their use and limitations applying to them should be governed by concerns about risk.").

state is attempting to broadly prevent future misconducts and foster public safety.[84] Under this reasoning, the imposition of civil disabilities does not carry the intent[85] or social condemnation[86] needed for punishment. Those in support of the nonpunitive scheme are quick to note the conceptual difference between the logic underlying civil disabilities and punitive statutes.[87]

This difference is twofold. First, the state inflicts punishments because of the offender's particular offense, whereas the state categorically imposes civil disabilities as a regulation across a population rather than *because of* any particular offense.[88] Second, the nonpunitive scheme does not treat civil disabilities as intentionally burdensome, a necessary condition for punishment under the traditional scheme.[89] Instead, under this rationale, any burden that an ex-offender faces is unintentional and non-essential to the state's criminal policy.[90]

Yet this view suffers from a particular shortcoming. Even if the restrictions are not intentionally burdensome, such burdens are nevertheless foreseeable. Given that state legislators intentionally promulgate civil disability statutes, it is not a far stretch to conclude that the ex-offender's burden is foreseeable, even if unintentional, and in turn that foreseeability underlies the statutes' promulgation. In fact, this reasoning is consistent with Zaibert's punitive scheme.[91]

As a second rationale, supporters of the nonpunitive scheme contend that even if intentional burdens can be gleaned from the passage of civil disability statutes, these statutes do not reflect any legislative condemnation.[92] This view, however, is also not entirely accurate. As Zachary Hoskins notes, civil disabilities may not need to reflect any condemnation from the legislators but instead reflect condemnation from

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84 *See id.*

85 *See* HART, *supra* note 52, at 5.

86 *See* Alexander, *supra* note 55, at 238.

87 *See* von Hirsch & Wasik, *supra* note 83, at 612.

88 Hoskins, *supra* note 11, at 255.

89 *Id.* at 258–60 ("To count as punishment, the measure must be a condemnatory, intentionally burdensome response to the offense.").

90 *See id.* at 258–59.

91 *See* ZAIBERT, *supra* note 57, at 49–51. *But see* Hoskins, *supra* note 11, at 258–59 (noting the possibility of foreseeable but unintentional burdens that are non-essential to the state's policy).

92 *See* Hoskins, *supra* note 11, at 258 (questioning how the condemnatory aspect of punishment fits in with the general scheme of civil disabilities).

the community whom the legislators represent.[93] This point is consistent with an institutional view of punishment, which in turn lends further support to the punitive conceptualization of civil disabilities.[94]

B. Civil Disabilities as Punishment

Notwithstanding the traditional views, there is increasing support to conceptualize civil disabilities as punishment.[95] This support stems from the negative consequences and severe burdens that flow from these civil disabilities.[96] As a direct criticism of those who claim that civil disabilities are purely regulatory and lack a punitive nature, some scholars have noted that dichotomous (i.e., punitive and regulatory) results emerge when applying them in practice.[97] An example will shed light on this dichotomy.

Suppose a state passes the following civil disability: If the state convicts a driver of a dangerous speeding offense—for example driving one hundred miles per hour in a thirty mile per hour zone—the state will, in addition to sentencing the offender to jail time, suspend the offender's license, bar the offender from driving, and publicly post this information online and at the offender's local DMV.[98] One who subscribes to the nonpunitive view will note that the purpose here is merely to regulate the offender's civil status and ensure public safety from an individual who has shown a prior propensity to

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93 *Id.* at 260–61.

94 Hoskins notes that this is particularly true if the restrictions are tied to the ex-offender's blameworthiness. *Id.* at 260.

95 *See, e.g.*, Hugh LaFollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241, 244 (2005) (noting that some literature has described civil disabilities as a punishment and agreeing with that characterization).

96 Cohen & Rivkin, *supra* note 27, at 25 ("The debilitating influence of civil disabilities on the offender is vastly magnified upon his release.").

97 Hoskins, *supra* note 11, at 261 (highlighting objections to a "principled distinction between punishment and civil measures"). This dichotomy between prevention and punishment is prevalent in the concept of preventative punishment, a controversial theory of punishment that seeks to pre-emptively punish individuals based on a perceived risk to society. *See generally* Husak, *supra* note 62, at 1174–80 (providing a definition and example of preventive detention).

98 For the purposes of this Note, I have created an extreme situation. A mere license suspension may cause hardships but not necessarily, if at all, reflect the necessary degree of societal condemnation and intention that a punishment requires. The scenario set forth tends to be more consistent with the nature of civil disabilities.

speed.[99] It follows then that the state is not imposing the license suspension *because of* the conviction or with any intention to burden or condemn the offender.[100] The state is only restricting certain rights as a consequence of the offender's new societal "status"—in this case, a reckless driver.

But the imposition of this disability triggers more than a mere suspension. The state has effectively hampered and suspended the actor's ability to travel around town, make a living, and engage with the community. Certainly, there are other ways for the offender to adapt to the situation; however, one could realistically and justifiably view these as unwanted burdens or unpleasant experiences. Applying Hart's elemental approach demonstrates how this seemingly regulatory disability is punitive: (1) the burdens are triggered after a conviction for violating the law, here speeding seventy miles per hour over the speed limit; (2) consistent with Zaibert's punishment definition extension, the statute imposes a burden that the offender will find unpleasant and unwelcomed, regardless of the state's intentions; (3) the state's imposition of the statute was intentional; (4) the legal authority administering the punishment, here the state legislature, is imposing this suspension as a result of the offender's breach of duty within that authority's legal system; and (5) although the statute may initially appear to be creating a consequential scheme that lacks any punitive intent and is unrelated to any one offender's particular conviction, the statute's burdens only trigger because the state has found the offender guilty of a qualifying infraction.[101] In other words, there *is* a direct link between the offense and the restriction.

This example highlights how civil disabilities can function as punishments even when the facial purpose is regulatory. Because the state has occasioned a sanction that is contingent on the offender's offense and conduct, here a reckless speeding conviction, it follows that the particular conduct has triggered the disability's imposition. The offense really is a causal factor

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99 *Cf.* Hoskins, *supra* note 11, at 255 ("We sentence a man to prison *for* murdering his brother, or to a term of probation *for* shoplifting. The punishment is a response to the offense.").

100 *Id.*

101 *See* HART, *supra* note 52, at 4–5; ZAIBERT, *supra* note 57, at 49. In a recent article, Margaret Colgate Love noted that "[w]hether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment." Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 259–60 (2015) (alteration in original) (quoting Chin, *supra* note 37, at 1826).

of the state acting with such purposeful force.[102] Another key component is the underlying harm that the offender faces. In both this case and the run of cases, the unintended harms are a reasonably foreseeable result of the state's intentional ostracization and regulation. Even if these disabilities are promulgated with a regulatory purpose and an eye to the offenders' demonstrated proclivity to offend, they nevertheless are still intentionally imposed on offenders and reflect the state's underlying reproach of the offenders' actions. These factors blend together to paint civil disabilities in a punitive light and catapult them squarely into the realm of punishment.[103]

C. Why the Punitive Conceptualization Works

In *Smith v. Doe*, the Supreme Court rejected a convicted sex offender's Ex Post Facto Clause challenge on grounds that Alaska's "Megan's Law" statute was not punitive in nature and therefore did not qualify for any Ex Post Facto Clause analysis.[104] Although attempting to enter into the minds of Justices in the majority would be an impossible task, it is telling that the case was decided as a 6-3 decision with several of the Justices noting the punitive nature of the statute. A punitive conceptualization of civil disabilities may have moved this decision in a different direction by forcing the Court to confront the Ex Post Facto Clause ramifications of the statute.[105] Further supporting this hypothesis is the fact that courts have grown more uncomfortable with categorically characterizing civil disabilities as nonpunitive.[106]

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102 *See* Vincent Chiao, *Punishment and Permissibility in the Criminal Law*, 32 LAW & PHIL. 729, 734 (2013) (setting forth "Principle R" which states that "*A* does not punish *B* unless *A* treats *B*'s actual or supposed prior wrongdoing as a reason for responding as she does"). *But see* Husak, *supra* note 62, at 1182 (arguing that "a state response to conduct does not qualify as punitive unless it is designed to censure and to stigmatize").

103 *See* Kolber, *supra* note 54, at 5 ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . . . But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment . . . ." (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985))).

104 538 U.S. 84, 89, 105–06 (2003).

105 *See, e.g.*, *id.* at 107 (Souter, J., concurring) ("[F]or me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence [supporting a punitive basis].").

106 *See* Love, *supra* note 101, at 259 (noting that "there are signs that courts may be growing uncomfortable with the mechanical distinction between direct and collateral consequences").

Ultimately, the punitive conceptualization of civil disabilities is a more compelling approach, particularly because the existence of civil disabilities is burdensome and constricting on both an economic and social scale.[107] Given the prevalence of these statutes across both state and federal jurisdictions,[108] a punitive characterization of civil disabilities would provide greater clarity to legislatures when drafting these statutes. Moreover, a punitive conceptualization will help to make the derivative effects and consequences of the statutes resonate more profoundly with state actors.

D. Implications

Courts have not historically used civil disabilities in calculating criminal sentences.[109] As such, adopting the above analysis presents an important future ramification, as sentencing procedures may likely need to undergo an adjustment. Because civil disabilities have been classified as a form of punishment, it follows that states should alter overall sentencing to take this conceptualization into account.[110] This modification rests on retributive proportionality grounds.[111] For example, in the case of the drug offenders, the prison sentence could be shortened to take into account the additional civil burdens that offender will face upon release from prison. Although a court would still need to consider many other factors when determining the felon's final sentence, the inclusion of civil disabilities into the sentencing calculus will help create an appropriate sentence. This in turn makes the total punishment more proportional to the offense.

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107 *See id.* at 255–56.

108 Tway & Gitlen, *supra* note 16, at 16 (noting that there are at least 39,548 collateral consequences in the United States).

109 Ruth A. Moyer, *Avoiding "Magic Mirrors"—A Post-*Padilla *Congressional Solution to the 28 U.S.C. § 2254 "Custody" and "Collateral" Sanctions Dilemma*, 67 N.Y.U. ANN. SURV. AM. L. 753, 761 (2012) (noting that collateral consequences are not considered "explicit punishment[s] handed down by the court") (quoting Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006)).

110 *See, e.g.*, United States v. Chong, No. 13-CR-570, 2014 U.S. Dist. LEXIS 135664, at *14–16 (E.D.N.Y. Sept. 24, 2014) (explaining that courts should take civil disabilities into account to impose a "just punishment").

111 DRESSLER, *supra* note 61, at 16–17.

III
THE JUSTIFICATION AND NARROWING OF CIVIL DISABILITIES

A. Can Civil Disabilities Be Justified?

Having conceptualized civil disabilities as punishment, it follows that they require justification. So the question remains: Can civil disabilities be justified? I posit that the initial answer to this question is yes when looking at them from a broad perspective and using utilitarian and retributivist theories of punishment.

The utilitarian principles will justify punishment when the punishment serves to promote either general or individual deterrence.[112] Whether one views civil disabilities as punitive or nonpunitive, the underlying goal of these statutes is deterrence and prevention.[113] As such, by applying the utilitarian rationale, civil disabilities are justified at a broad level as a form of punishment. This is true whether framing the statutes through general or individual deterrence.

At the general deterrence level, the state promulgates the civil disabilities with an eye towards community protection; in turn, the goal is to prevent potential future misconduct by communicating the consequences of a particular criminal offense through the stigma stemming from civil disabilities.[114] Some scholars argue that the general deterrence rationale is insufficient to justify civil disabilities, especially since many in the community are unaware of the existence of civil disabilities.[115] Nevertheless, the state designs these civil disabilities to prevent ex-offenders from engaging in certain activities and to withhold certain rights that ex-offenders would otherwise possess. Under this scheme, civil disabilities maintain social order and deter crime by preventing the individual offender from acting.[116]

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112 *Id.* at 15.

113 *See* Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 529 (2005) (explaining that collateral consequences have preventive justifications).

114 *Cf.* VALLAS & DIETRICH, *supra* note 9, at 2 (noting that criminal records present life-long consequences for ex-offenders and create a stigma against the ex-offender).

115 *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 508–09 (2010) (arguing that general deterrence is not a satisfactory rationale in legitimizing the imposition of civil disabilities because individuals are generally unaware of their existence).

116 *See* DRESSLER, *supra* note 61, at 14–15.

This is the reasoning underlying both individual deterrence and the utilitarian goal of incapacitation.[117] Instead of a broad, community-focused scope, the aim of civil disabilities is at preventing an individual from engaging in future misconduct.[118] Although the standard example of incapacitation is imprisonment of the offender to prevent societal harm,[119] this concept is equally applicable to civil disabilities due to their incapacitating qualities.

Civil disabilities, at least on a general level, also find justification from a retributive standpoint. In particular, the state's imposition of civil disabilities is akin to serving the ex-offenders with their just desert, i.e. punishment in proportion to the seriousness of the harm.[120] More specifically, civil disabilities fall under the realm of protective retribution, where the ex-offender violates a set of societal rules and the state imposes civil disabilities both as a means of having ex-offenders pay their societal debt and protecting the "moral balance in [ ] society."[121] The goals underlying civil disabilities work to achieve retributive justice by communicating to the ex-offenders that they have engaged in conduct that "conveys disrespect for important [societal] values," and as such they deserve the burden they now face.[122]

The critical rationale driving both the utilitarian and retributive justifications is that the state is imposing this punishment to achieve certain goals derived from societal expectations. On one hand, the state aims to protect citizens and prevent criminal conduct, thus making the community safer as a whole;[123] on the other hand, the state wants to ensure that ex-offenders pay their societal debts stemming from their breach of societal values and rules.[124] These goals carry legitimate benefits for the state to pursue for the community—general community protection, denied access to recidivist

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117 *Id.* at 15 (explaining how incapacitation "[q]uite simply" prevents offenders from committing crimes in society through a "period of segregation").

118 *See* Pinard, *supra* note 115, at 508.

119 Dressler, *supra* note 61, at 15.

120 *See* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 186–87 (explaining the general concept of just desert and its role in sentencing policy).

121 *See* DRESSLER, *supra* note 61, at 17.

122 *Id.* at 19. Under retributive justice, the offender has engaged in some "wrongdoing" and for that reason they should take responsibility as a "moral agent" in society while the state punishes their actions. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 258–60 (2009).

123 *See* DRESSLER, *supra* note 61, at 15.

124 *See id.* at 17–19.

opportunities, and communicated societal expectations, to name a few. The benefits are certainly a noble cause for the state to pursue, and as such they justify the use of civil disabilities from a general standpoint. However, relying on the foregoing analysis alone would ignore the full scope of civil disabilities' impact.

B. The Narrowly Tailored Standard: A Cost-Benefit and Constitutional Justification

Despite the broad justifications, civil disabilities are not imposed in a vacuum. When viewed in the grand punitive scheme, they carry demonstrable costs. As such, an overarching application of these forms of punishment is ultimately untenable and unwarranted.[125] The ABA has recognized this dilemma and through the ABA Standards for Criminal Justice, they call for states to limit civil disabilities to those that are "closely related" to the offense.[126] When analyzing this framework under both a constitutional and cost-benefit analysis, one can see not only the merits of adopting such a framework but also how states should tailor statutes even more narrowly than the ABA recommends, moving from closely related to *directly* related.

1. *A Constitutional Framing*

The Supreme Court has recognized that there are several constitutionally protected individual and fundamental liberty interests under the Fifth and Fourteenth Amendment.[127] In particular, there is a "liberty from confinement" which includes "freedom from bodily restraint."[128] To deprive a citizen of these liberty interests, the state must have a compelling interest.[129] One such compelling interest is public safety.[130] Notwithstanding these legitimate interests, the Court in *Shelton v. Tucker* explained that "even though the governmental purpose

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125 *See* Demleitner, *supra* note 21, at 160 ("The current lack of a coherent framework for collateral consequences leads to disproportionate, irrational, and unjust results by painting with too broad a brush.").

126 ABA, *supra* note 18, at 23–24.

127 U.S. CONST. amends. V, XIV; Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 785 (1994).

128 Colb, *supra* note 127, at 787–88.

129 *Id.* at 785–87.

130 *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (noting that the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest").

be legitimate . . . that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[131]

Concededly, the rights that civil disabilities implicate are not necessarily included among the fundamental personal liberties embedded in due process jurisprudence. Still, functional and productive community membership is preconditioned on the availability of many of the rights and benefits that civil disabilities ultimately restrict. In their most fundamental conceptualization, civil disabilities function as a constraint on the ex-offender's ability to engage in normal day-to-day living. This includes restrictions on housing, income, employment, and education—all essentials to proper integration within the community.[132] As such, the compelling interest rationale underlying liberty-interest protection finds legitimate support in the context of civil disabilities. This in turn supports the need for the narrow tailoring of civil disability statutes. Such burdens may not fit within the traditional meaning of confinement or bodily restraint, but their effects create a de facto restriction of the offender's bodily freedoms—in this case, the ability to engage in the essentials of day-to-day livelihood.

To see this framework in action, take for example the case of a convicted sex offender. The state restricts the offender from inhabiting property near parks and schools.[133] Such regulations function as a constraint by restricting the offender's mobility within the community. These restrictions, however, are narrowly tailored and highlight why a direct relationship between the civil disability and the offense is necessary.[134] In the hypothetical above, the sex offender has shown a clear predisposition for sexual offenses. Although the imposition of this civil disability is inhibiting and constraining the offender's choices of where to live and work, this limitation of the offender's opportunity to harm is a legitimate and justified government action that advances public safety. Note the one-to-one relation between the criminal conduct and civil disability: there is a direct link between the conviction and the disability.[135] This direct link is critical to ensure proper narrow tailoring. By establishing a clear link, the state has properly tailored the disability to achieve a legitimate governmental goal.

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131 364 U.S. 479, 488 (1960).

132 *See* Demleitner, *supra* note 21, at 155–58 (outlining the various restrictions that civil disabilities impose on ex-offenders).

133 Hoskins, *supra* note 11, at 249.

134 ABA, *supra* note 18, at 23–24.

135 *See id.* at 24.

This principle should guide states when passing civil disabilities statutes. If the disability bears a functional and direct relationship to the conviction, then the disability is justified; conversely, if the disability bears a mere secondary or tertiary connection (or no connection at all), then the civil disability is overly broad and the state should do away with—or at the very least modify—the restriction.[136] To give another example under this framework, a civil disability statute that grants public housing operators the power to deny public housing to an ex-offender with a drug-possession conviction would not pass muster—the offense bears no direct relation to the civil disability.[137] There may be legitimate public safety concerns that state is addressing, but the civil disability creates costly burdens and does not achieve that goal in the narrowest manner possible. In lacking any particularized and direct connection between the offender's drug-related conduct and the use of public housing, such a dramatic constriction of the offender's choice and mobility finds no justification for its continued existence.

2. *Cost-Benefit Analysis*

Applying a cost-benefit analysis helps to support this narrow tailoring proposition. As previously noted, there is a legitimate interest in public safety. Civil disabilities help promote that interest by withholding particular rights that the state has deemed as too risky for an ex-offender to possess. Even so, the costs associated with civil disabilities are significant. Ex-offenders struggle to find employment, in turn leading to bleak economic situations.[138] They may become temporarily ineligible for benefits like social security, limiting their total incomes at a time when they are attempting to get back on their feet.[139] And they lose access to student loans, which hinders their ability to get an education, earn a higher expected income, and

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136 The ABA notes that "denial of licensure where the offense involves the licensed activity" would be a justifiable civil disability. *Id.* I would argue that, although there may be a close relation, the state legislatures must do more—the actual offense is what needs to be analyzed when determining if the license gets suspended, not merely that the offense during the course of a licensed activity.

137 The argument that courts have set forth for denying public benefits is that it would "save taxpayer money"; even so, saving taxpayer money bears no direct (or arguably even indirect) relation to a drug-possession conviction. *See* Chin, *supra* note 37, at 1809.

138 *See* Genevieve J. Miller, Comment, *Collateral Consequences of Criminal Convictions: A Cost-Benefit Analysis*, 9 J.L. ECON. & POL'Y 119, 131–32 (2012).

139 *See id.* at 121.

properly integrate in society.[140] Due to these compounding consequences, many ex-offenders return to crime.[141] This vicious cycle in turn leads to higher recidivism rates and effectively negates the benefits that these punishments may have provided, an outcome quite contrary to the public safety goals imbedded in civil disabilities legislation.[142]

As scholar Nora Demleitner has noted, "a well-planned system of [civil disabilities] may lead to the greater inclusion of ex-offenders within society."[143] Of course, narrowly tailored civil disabilities will not negate all the potential costs and burdens. Nonetheless, narrow tailoring creates more precision and promotes greater effectiveness within the realm of criminal law. Moreover, narrow tailoring properly balances the oft-clashing goals of deterrence, prevention, and rehabilitation. The state continues to pursue the desirable goals of community safety while minimizing the costs associated with pursuing these legitimate goals. By narrowly tailoring civil disabilities, the state prevents social fragmentation and encourages the successful rehabilitation and reentry of the offender, while the ex-offenders receive their just desert.[144]

IV
SHAPING OUR POLICIES AND REDUCING RECIDIVISM

Taken as a whole, the narrow tailoring framework for civil disabilities can be used to combat high recidivism rates. This Note will focus on three particularly problematic areas of civil disability restrictions that are linked to ex-offender recidivism: public housing, education funding, and employment.[145] By ensuring that a directly related crime is what triggers the civil disability, lawmakers can take steps to ensure that ex-offenders are not unnecessarily deprived of opportunities to succeed upon their release from prison. Furthermore, these reforms will provide significant monetary savings to the states and their

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140 *See id.* at 133–34.

141 *Id.* at 136.

142 *See* Slifer, *supra* note 5 (noting that 58% of released prisoners were re-arrested within five years of their initial release).

143 Demleitner, *supra* note 21, at 161.

144 *See id.* (noting that the current preventative rationale underlying civil disabilities creates "societal fragmentation and thwarts possible rehabilitation").

145 *See* Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, ABA JOURNAL (June 1, 2013, 10:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions [https://perma.cc/26CP-ECYB]; Miller, *supra* note 138, at 133.

criminal justice systems.[146] These reforms should help to reduce the probability of an ex-offender recommitting crimes and in turn reduce recidivism rates across the board.[147]

What the following will offer in terms of recommendations is not an absolute solution nor is it the only area of the law that must undergo robust reformations. Yet the implementation of these reforms, along with an increased focus on developing the public's awareness of the challenges that ex-offenders face, can help to lower recidivism rates across the country.[148]

A. Fostering Reintegration

1. *Remove Public Housing Bans*

Public housing provides affordable housing to low-income families and households.[149] A criminal conviction, however, may trigger mandatory or discretionary restrictions and disqualify ex-offenders from receiving these benefits.[150] These restrictions can lead to increases in both homelessness rates and incarceration rates amongst ex-offenders.[151] For state officials attempting to reduce recidivism, these outcomes are clearly counterproductive.

Studies have shown a link between housing and recidivism rates.[152] A narrowly tailored civil disability scheme should help to combat these crippling challenges by removing public

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146 State leaders in North Carolina and Ohio have projected savings of $560 million and $78 million, respectively, in averted costs and cumulative savings. COUNCIL OF STATE GOV'TS JUSTICE CTR., LESSONS FROM THE STATES: REDUCING RECIDIVISM AND CURBING CORRECTIONS COSTS THROUGH JUSTICE REINVESTMENT 4 (2013).

147 *Cf.* Pinard, *supra* note 109, at 681–82 (discussing how the Second Chance Act of 2005 reflects Congress' recognition of the connection between collateral consequences and reentry).

148 While this Note has the benefit of approaching these legal challenges in isolation, these issues are nevertheless quite complex from a practical standpoint. My goal is to provide a new way of thinking about these issues and to generate conversation in the criminal justice community. That said, I acknowledge that a solution is not a simple endeavor. See JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 269–74 (2015) for an extended discussion of the lack of a ready solution that can be drawn from collateral consequence critiques.

149 Marah A. Curtis et al., *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE 37, 38 (2013). Federal public housing benefits include the public housing program, Housing Choice Voucher Program, and Section 8 rental assistance. *Id.*

150 *See* NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUSTICE, PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 3 (2003).

151 *See id.*

152 *See* NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 15 (2015) (noting studies that show reduced recidivism rates among ex-offenders participating in halfway house programs).

housing restrictions that contribute to homelessness rates[153] and in turn, higher recidivism.[154] In cases where the felony pertains to a direct abuse of public housing, these restrictions are justified.[155] Conversely, if the particular offense does not pertain to the use of public housing, the benefits of providing public housing to ex-offenders outweigh the potential costs.[156] Critics may argue that this policy would create an unacceptable risk on public housing; however, as scholar James Jacobs notes, this solution is workable in practice.[157] For example, public housing officials could implement aggressive eviction policies if dealing with problematic tenants with prior conviction histories.[158] Reducing recidivism means improving barriers to reentry. Implementing narrowly tailored prohibitions on public housing brings us one step closer to this goal.

2. *Remove Bans on Education Funding*

Today, having a college degree has become something of a prerequisite for gainful employment and life stability.[159] Consequently, ex-offenders face numerous obstacles to obtaining the necessary funding for their college education. For example,

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153 *See* Mireya Navarro, *Ban on Former Inmates in Public Housing Is Eased*, N.Y. TIMES (Nov. 14, 2013), http://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html [https://perma.cc/6D6S-2AEE] (explaining that the New York City Housing Authority is easing its ban on recently released prisoners in order to reduce homelessness).

154 *See* Kathleen F. Donovan, Note, *No Hope for Redemption: The False Choice Between Safety and Justice in Hope VI Ex-Offender Admissions Policies*, 3 DEPAUL J. FOR SOC. JUST. 173, 189 (2010) (discussing the link between exclusionary public housing policies and increased recidivism).

155 For example, federal public housing guidelines mandate a complete ban of public housing to those ex-offenders with previous conviction for methamphetamine production on public-housing premises. 24 C.F.R. § 960.204(a)(3) (2015).

156 *See* JACOBS, *supra* note 148, at 258 (noting that those public-housing exclusions based on drug use are overinclusive); Gigi Starr, *Pros & Cons of Public Housing*, SFGATE, http://homeguides.sfgate.com/pros-cons-public-housing-8497.html [https://perma.cc/6PHE-MF55] (discussing the pros and cons of public housing for residents and communities). *But see* Raymond V. Mariano, *Public Housing Solves the Symptom – Homelessness – But Should Focus on the Problem*, HUFFINGTON POST (Jan. 12, 2016, 2:18 PM) http://www.huffingtonpost.com/raymond-v-mariano/public-housing-solves-the_b_8929814.html [https://perma.cc/3QWV-VR2W] (noting that although public housing solves homelessness, public housing does not address the underlying issue of lack of work experience).

157 *See* JACOBS, *supra* note 148, at 259.

158 *Id.*

159 *See* Robert Farrington, *A College Degree Is the New High School Diploma*, FORBES (Sept. 29, 2014), http://www.forbes.com/sites/robertfarrington/2014/09/29/a-college-degree-is-the-new-high-school-diploma/#2715e4857a0b5b11c9214cbe [https://perma.cc/M7M8-RLQS] (noting that the struggle of high school graduates to obtain employment highlights how college has essentially become a mandatory endeavor).

Congress has prohibited convicted drug offenders from receiving various forms of federal student loans and grants.[160] Moreover, a prior conviction will disqualify an aspiring college student from receiving Pell Grants—loans that do not require repayment.[161] These restrictions pose a legitimate threat to the ex-offender's goal of successful reentry and lawmakers' goal of recidivism reduction.[162]

Those in support of this restricted access to financial aid use deterrence principles to justify their positions. For example, restricting a drug offender's access to financial aid would in turn discourage drug use.[163] Yet scholars have noted that such a policy does not actually bear a connection to public safety.[164] Moreover, it is clear that education, or lack thereof, is correlated to criminal propensity.[165] As part of the process of implementing narrowly tailored civil disabilities to reduce recidivism, lawmakers should reduce or remove the financial barriers that ex-offenders face when seeking to obtain a college education.

Although colleges have legitimate student body safety concerns, schools could address these concerns in other ways. For example, schools could implement stricter screening and vetting processes of applicants and careful, individualized risk-assessments prior to admission. Restricting access to loans and educational financing, however, bears no relationship to an ex-offender's criminal history. Instead of encouraging ex-offenders to obtain an education that can help establish gainful employment and meaningful life stability, we create significant financial restrictions during a time when college tuition is ballooning.[166] We do so even when no functional or direct rela-

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160 *See* JACOBS, *supra* note 148, at 259.

161 *See* 34 C.F.R. § 668.40 (2015) (disqualifying certain ex-drug offenders from federal education funds authorized under Title IV of the Higher Education Act); 34 C.F.R. § 690.2 (2015) (noting that the federal Pell Grant Program is authorized under Title IV of the Higher Education Act).

162 *See* JAMES, *supra* note 152, at 14–15 (explaining that research shows that post-secondary education has a strong effect on reducing recidivism).

163 JACOBS, *supra* note 148, at 259–60.

164 *Id.* at 260.

165 Enrico Moretti, Does Education Reduce Participation in Criminal Activities? 4–7 (Oct. 25, 2005) (unpublished Symposium Paper Presentation) (on file with the Columbia University Teachers College).

166 One observer projects the cost of college tuition to reach $262,000 for four-year private schools and $133,000 for four-year public schools, reflecting a yearly increase of 2.14% and 2.80%, respectively. Libby Kane, *This Chart of Projected Tuition Costs Will Give Anyone Saving for College the Chills*, BUS. INSIDER (Apr. 30, 2015, 11:15 AM), http://www.businessinsider.com/projected-tuition-costs-are-terrifying-2015-4 [https://perma.cc/8MUU-P3FS].

tionship exists between the criminal conduct and the access to student loans. These current financial-aid policies may have a deterrence goal, but their effects produce the opposite result.[167] Reforming the current civil disability scheme would increase access to higher education, reduce recidivism, and decrease social costs.[168] As is the case with public housing civil disabilities, a narrowly tailored—or overall removal of—student loan civil disabilities would help reduce reentry barriers and promote a favorable environment to reduce recidivism.

B. Criminal Records and Narrow Tailoring

1. *Criminal Records as De Facto Civil Disabilities and Their Usage in Employment Contexts*

Although not necessarily civil disabilities per se, criminal records create many consequences and burdens for the ex-offender. As a result, one should view the usage of criminal records as a de facto civil disability. To reach this conclusion, one should consider both the direct and indirect utilizations of the criminal record. First, criminal records have a direct utilization against the ex-offender: the criminal justice system uses criminal history to aid current criminal investigations,[169] set bail amounts upon arrest,[170] prosecute offenders,[171] and affect the offender's sentencing duration.[172] These consequences are legitimate and justified—one who criminally offends should bear the consequences of their prior actions if they have chosen to commit a new crime against the public. Second, criminal records affect ex-offenders outside the criminal justice system,

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167 *See* Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 183 (2004) (noting an inverse correlation between the number of years of education and the probability of imprisonment); *see also* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1052 (2008) ("Imprisonment rates are also negatively correlated with income and education levels, meaning that those who are already economically disadvantaged are more likely to suffer the additional economic handicaps that come with imprisonment.").

168 *See, e.g.*, JUSTICE POLICY INST., EDUCATION AND PUBLIC SAFETY 1–2 (2007) (noting the various public benefits and effects on crime rates stemming from increased access to education).

169 JACOBS, *supra* note 148, at 228.

170 *Id.* at 228–29.

171 *See, e.g.*, FED. R. EVID. 413–15, 609 (allowing for use of prior sexual-assault and child molestation convictions as evidence of defendant's character and permitting use of past criminal convictions to impeach character for veracity, respectively).

172 U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING CMM'N 2010).

often in an indirect manner.[173] The United States, in particular, is unique in its usage of criminal records. Where other countries limit the disclosure of conviction information to members of the criminal justice system, the United States maintains public access to criminal records, and thus fosters a system of maximum transparency.[174] Such transparency subjects the ex-offender to significant social stigmas, some justified and others less so.[175] For this reason, the utilization of criminal records outside of the criminal justice system, particularly in the employment context, is open to certain narrow tailoring reforms.

In practice, access to ex-offenders' criminal records creates significant employment challenges and, in some cases, outright employment prohibitions against ex-offenders.[176] These challenges significantly impact the recidivism rates of ex-offenders: the recidivism rate of those obtaining post-release employment is nearly half the rate of those who do not.[177] Part of the reason why is that a criminal record effectively diminishes the employer's perception of the ex-offender's employability;[178] in turn, this significantly stunts any legitimate reentry or reintegration attempts. It is clear then that this area of the law is ripe for reform, especially given the correlation between unemployment and crime rates.[179] By limiting the unnecessary or unre-

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173 In some cases the impact is direct. For example, a conviction could lead to formalized bans from particular areas of employment. These restrictions would fall within the realm of formal civil disabilities. *See, e.g.*, FLA. STAT. § 112.011 (2014) (allowing public employers to deny employment to ex-offenders if the ex-offender has a felony conviction or a first-degree misdemeanor conviction and the conviction is directly related to the job).

174 JACOBS, *supra* note 148, at 159–61, 194–99.

175 *See id.* at 96–98 (noting the stigmatic effects that a criminal record can create).

176 *See id.* at 261–64, 275–77.

177 *See* Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 162 (2010) (noting that those ex-offenders with post-release employment had a recidivism rate of 27.6% while those who did not had a recidivism rate of 53.9%).

178 *See, e.g.*, Marnie Eisenstadt, *Car Dealer Fires Former Gang Member After Syracuse.com Story About His Success*, SYRACUSE.COM (June 17, 2015, 5:20 PM), http://www.syracuse.com/news/index.ssf/2015/06/car_dealer_fires_former_gang_member_after_syracusecom_story_about_his_success.html [https://perma.cc/H8LQ-KZER] (explaining how Quante Wright, an ex-gang member with a prior federal RICO law conviction, was terminated from his employment at a Syracuse car dealership after his employer learned the details of his criminal history). The Ban the Box movement seeks to prevent these types of situations. *See infra* section IV.B.2.

179 *See* Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. L. & ECON. 259, 280–81 (concluding that improving employment prospects can serve as an effective tool to combat crime). Moreover,

lated barriers to employment that ex-offenders face upon reentry, state lawmakers can create an environment that supports the necessary "prerequisite for successful rehabilitation."[180]

Lawmakers, however, must use great care when regulating this area of the law. Employers, both public and private, have legitimate public-safety concerns. These concerns are particularly heightened when dealing with the hiring of an ex–offender.[181] Accordingly, employment reforms must take into account the realities of the ex-offender's criminal history. For example, an ex-offender with a robust criminal history is not at the same level as a one-and-done, first time offender. With careful research and observation of the effects of implementing the current initiatives—in particular the Ban the Box movement—a narrowly tailored scheme for criminal records in employment contexts could present a long-term solution to curb recidivism rates.

2. *A Direct Application: Ban the Box and Selective Background Checks*

With over 70 million Americans possessing an arrest record or criminal conviction, many ex-offenders have found it difficult to obtain employment.[182] Unsurprisingly, these employment difficulties can negatively impact the economy.[183] As a result of these employment challenges and related policy issues, the San Francisco-based activist group All of Us or None

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gainful employment can serve as an additional way to combat the negative effects of incarceration—specifically, an effect dubbed the "criminogenic effect" of prison. *See* Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, ATLANTIC (Feb. 11, 2015), http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/ [https://perma.cc/FP3K-R6E8] (explaining how the criminogenic effect increases probability of crime after release).

180 JACOBS, *supra* note 148, at 297.

181 *See id.* at 264 (noting the complexities inherent in ex-offender employment).

182 Aaron Morrison, *Prison Reform 2015: Ban the Box Activists Demand Action from Congress, White House to Stop Employment Discrimination*, IB TIMES (Oct. 8, 2015, 12:06 PM), http://www.ibtimes.com/prison-reform-2015-ban-box-activists-demand-action-congress-white-house-stop-2131532 [https://perma.cc/E7D9-3UH5].

183 For example, economists estimated that the employment challenges stemming from criminal records cost the United States between $57 and $65 billion of lost economic output in 2008. *See* JOHN SCHMITT & KRIS WARNER, CTR. FOR ECONOMIC & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 1 (2010) (explaining that the drop in total male employment rate of "1.5 to 1.7 percentage points" in 2008 contributed to a reduction of "between $57 and $65 billion in lost output" in the United States).

(AUN) began the Ban the Box campaign to combat employment discrimination against ex-offenders.[184] The Ban the Box campaign urges state lawmakers to prohibit employers from inquiring into the applicant's criminal history during the interview process, except in cases where the ex-offender is expressly barred from a particular job.[185] AUN argues that consideration of criminal history promotes employment discrimination and deters ex-offenders from applying for jobs. By preventing employers from considering criminal history during the application process, AUN hopes to promote a cost-effective removal of a critical barrier to the ex-offender's rehabilitation and reintegration.[186] As of 2014, twelve states have adopted the Ban the Box policy in the public sector.[187] Additionally, seven of those states have adopted Ban the Box in the private sector.[188]

An important aspect of the Ban the Box movement is that employers may conduct a background check *after* the ex-offender receives a tentative offer of employment.[189] If at this time the applicant's criminal record is rationally related to the responsibilities of the position, then the employer could rescind the applicant's offer.[190] Of course, this is how it should work in theory. Criminal records, however, often trigger de facto employment discrimination by employers, an understandable reaction given the risks of potential tort liability.[191] This makes the inevitable background check problematic for ex-offenders because in most states employment is at-will, i.e., an employer

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184 JACOBS, *supra* note 148, at 271. AUN founded the campaign in 2004 with a focus on restrictions to public employment and educating public officials about the challenges that ex-offenders face and the needs of their communities. The movement eventually diversified across different states in the form of statewide coalitions formed by ex-offenders, elected officials, reentry service providers, civil rights partners, and legal aid organizations. See *About: The Ban the Box Campaign*, BANTHEBOXCAMPAIGN.ORG, http://bantheboxcampaign.org/?p=20#.VqAAPhgrKuU [https://perma.cc/CD8U-CUFA], for more information about the Ban the Box Campaign, its history, and the group, All of Us or None.

185 JACOBS, *supra* note 148, at 271.

186 *Id.* at 272.

187 Hawaii was the first state to implement this policy in 1998; the other states are California, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, and Rhode Island. *Id.*

188 Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2016), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ [https://perma.cc/8UDG-P7LE]. Additionally, a total of twenty-five cities and counties—including San Francisco, Baltimore, Buffalo, Chicago, New York City, and the District of Columbia—have adopted these Ban the Box policies. *Id.*

189 JACOBS, *supra* note 148, at 271–72.

190 *See id.*

191 *Id.* at 277.

may discharge an employee at any time and for any reason.[192] To complicate matters further, applicants often receive less protection than employees from the actions of an employer.[193] Hence, ex-offender job applicants with a contingent offer may still find themselves in a difficult situation upon reentry, even with the added layer of protection from Ban the Box.[194]

Cue the narrowly tailored civil disabilities framework. In an attempt to further solidify Ban the Box's underlying policies, state lawmakers should implement what would be a selective background check process in both the public and private sector. If the applicant's criminal history is relevant to the job's responsibilities, the criminal history will come up in the background check; conversely, if the criminal history bears no functional or direct relationship to the job's responsibilities, then that criminal history information would be suppressed. For example, if an applicant has a drug possession conviction and is applying to be an accountant, the criminal history is not functionally or directly related to the job's responsibilities. Therefore, that criminal history would not show up in the background check. On the other hand, if the applicant has a sexual offense conviction and is applying to be a teacher or work with children, then the criminal history is directly, functionally, and rationally relevant to the job's responsibilities. In turn, that criminal history would appear in the background check.

These are of course the easy cases. It therefore is critical to consider the many other challenging and unclear cases that

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192 *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/6TJU-C3DC]. Certain Ban the Box statutes call for the use of the Equal Employment Opportunity Commission's (EEOC) individualized assessment standards, which discourage sweeping exclusions of applicants solely based on criminal convictions. Although this does serve as one way to combat the challenges that a background check may present, the EEOC's guidelines are merely policy recommendations and are not necessarily heeded by courts in cases of challenges to adverse employment decisions. *See* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 220–21 (2014); Roy Maurer, *SHRM Seeks Clarification on EEOC's Criminal Background Check Guidance*, SOC'Y HUM. RESOURCE MGMT. (Dec. 13, 2012), https://www.shrm.org/hr-today/news/hr-news/pages/shrm-eeoc-criminal-background-check.aspx [https://perma.cc/8JL8-ANCX].

193 *See, e.g.*, Loder v. City of Glendale, 927 P.2d 1200, 1222 (Cal. 1997) (concluding that job applicants receive fewer protections from suspicionless drug tests than current employees).

194 Some states do expressly restrict how employers may use information obtained in a background check. For example, New York utilizes a narrowly tailored civil disability law to deal with discrimination of ex-offenders by employers. *See* N.Y. CORRECT. LAW § 752 (McKinney 2014).

can emerge when applying this framework.[195] Selective background checks have the potential to advance key rehabilitative goals, but state lawmakers should nonetheless proceed with deliberate caution. I would recommend the following approach: First, lawmakers should assess the effectiveness of the Ban the Box movement—it may be the case that a selective background check is an unnecessary endeavor if in practice the prior but unrelated conviction is not improperly biasing the employment decision. Second, lawmakers should at first only apply the selective background check to non-violent offenses. If the criminal history includes, for example, convictions like murder, rape, or aggravated assault with a deadly weapon, then those convictions would always appear in a background check. Third, lawmakers should carefully research the effects of these policies: Do they work in practice and are they accomplishing the intended goals of Ban the Box? Fourth, state lawmakers should apply additional considerations prior to implementation. These include the extent of the ex-offender's criminal history, the number of years since conviction, any noted mental history conditions, and critical public policy considerations.[196]

Despite this need for great care, the potential benefits are great. If this framework works in practice, lawmakers will have an opportunity to further expand the rehabilitative goals of Ban the Box, reduce the rates of recidivism amongst these ex-offenders, and demonstrate that ex-offenders can be successfully reintegrated without endangering their communities.[197] Hopefully this Note will start the conversation.

CONCLUSION

The hurdles of reentry and reintegration that ex-offenders face are profound and crippling. Given the current structure of the criminal justice system, ex-offenders forever carry onerous social stigmas, experience heavy financial burdens, and struggle to adapt in a society that refuses to truly welcome them back. The historical conceptualization of civil disabilities has entrenched them in a place of obscurity without much regard to the overarching effects that these disabilities have on ex-offenders.[198] Yet throughout history, there has been mounting

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195 *See* JACOBS, *supra* note 148, at 273–74.

196 Of course, many other considerations exist that need to be explored. These merely scratch the surface.

197 *See* JACOBS, *supra* note 148, at 272–73.

198 *See* Pinard, *supra* note 19, at 1219–20.

displeasure regarding a sweeping imposition of civil disabilities.[199] When viewing the current statistics on both incarceration and recidivism rates, as well as the lingering social ostracization that ex-offenders face, it is clear that now is the time for that long-desired change.

To facilitate such a change, narrow tailoring is the answer. Narrow tailoring will help to properly combat the adverse effects of civil disabilities and establish a more stringent regulation of a historically overlooked area in criminal sentencing and procedure. Further, it will provide clear standards for legislators to follow when promulgating statutes. With fewer barriers impeding successful reentry, the state has an opportunity to play an active role in the ex-offender's reentry process. By implementing the proposed policy recommendations, states can move one step closer to realizing this goal.

Given the staggering rates of recidivism in this country, this solution seems necessary to achieve both the state and federal governments' goals of lower crime and recidivism rates. By limiting civil disabilities to their most necessary applications, governments will witness tremendous reductions in recidivism rates. Moreover, such initiatives will drastically impact the world of the ex-offender. With the prospects of increased access to employment, education, and public housing, the formerly stigmatized offenders will have an opportunity to successfully rehabilitate and re-enter. Finally, they can have a fair opportunity to thrive as members of their community.

199 *See* Love, *supra* note 30, at 1713–14.