

# American Criminal Record Exceptionalism

Kevin Lapp\*

JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (Harvard University Press, 2015)

## I. INTRODUCTION

Early in *The Eternal Criminal Record*, prolific crime scholar James B. Jacobs' new book, Jacobs explains that he seeks to "shine[] a bright light on criminal records policies and practices in order to render them problematic rather than inevitable." (P. 4). Mission accomplished. The book is an exhaustively researched, wide-ranging discussion of American criminal record policies, published as criminal records have proliferated and come to be more consequential than ever. It documents the broad scope of American criminal record keeping. It shows how widely available those records are, finding their way to employers, schools, landlords, licensing agencies, the media, and the internet. And it details the long, devastating shadow that criminal records cast, including isolating stigma, formal disabilities such as disenfranchisement, statutory ineligibility for certain jobs, deportation for noncitizens, restrictions in housing options and welfare benefits, and untold informal discrimination.

By the end, the reader confronts a public policy conundrum for American criminal justice. The more information that law enforcement collects and shares about suspected criminals and actual offenders, the easier it is to identify and discriminate against those marked individuals and socially isolate them. This, it turns out, increases recidivism, therefore undermining the public safety goal that drives accessible criminal records. Jacobs proposes a handful of reforms throughout the book that would reduce the frequency of this perverse outcome. They include greater resources to ensure that criminal records are accurate, limits on the availability of arrest records outside of law enforcement, more stringent regulations of commercial information vendors that peddle in criminal background checks, and less discrimination against those with criminal records.

While these reforms would reduce the burden of criminal records, they are mostly trimming along the edges. Proposals for sweeping change that would significantly restrict public access and prohibit discrimination based on criminal records are largely absent from the book. That is explained, in part, by Jacobs' conception of the book as a conversation-starter rather than a unified proscription for reform. But it is also because of the many political, cultural, and technological

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obstacles that stand in the way of change. Most notably, computer technology and the internet, together with enduring commitments to governmental transparency and free speech, make less data collection and greater privacy protections doubtful. All told, it is classic work from Jacobs, explaining and predominantly supporting current practices while speaking frankly about the necessity of unlikely change.<sup>1</sup>

In this Review, I aim to accomplish two things. First, I organize the tremendous amount of material in the book into three different claims about American criminal record exceptionalism: that in the United States, criminal records are exceptionally public, exceptionally punitive, and exceptionally permanent. As I do, I marshal evidence and optimism for reforms that Jacobs considers either unattainable or unwarranted. Second, I shed more light on what Jacobs calls the juvenile exception, by which he means the traditional restraint and confidentiality that has attended the creation and dissemination of criminal records about youth. My research has shown that juvenile records have lost much of that exceptionality, and have come to resemble (in their breadth, impact, and availability) adult records.<sup>2</sup> Yet, there is evidence that the pendulum may be swinging back toward special protections for youth. Limits to the amount of information that law enforcement collects, stores, and shares about youth have been proposed and passed by legislatures, and imposed by courts. With this in mind, I consider whether juvenile justice policy can serve as a potential blueprint for a more redemptive criminal record policy for all.

The review closes by explaining how American criminal record exceptionalism functions as an inexpensive way to sort and inflict punishment by devolving a great portion of the work to private actors and the general public. Because of race and class distortions in the criminal justice system, this further problematizes a public, punitive, and permanent criminal record regime. Yet, especially in tight fiscal times, this simultaneously diminishes the prospects for reform in this area.

## II. AMERICAN CRIMINAL RECORD EXCEPTIONALISM

In recent law review articles, Professor Jacobs has documented the proliferation of police, prosecution, court and corrections records and databases, and identified the stigmatizing criminal record as the most serious consequence of

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<sup>1</sup> See, e.g., JAMES B. JACOBS, *CAN GUN CONTROL WORK?* (2004) (concluding that constitutional, political, and practical obstacles will frustrate attempts to effectively regulate guns); JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998) (arguing that hate crime legislation is not an appropriate response to the problem of bias-motivated violence).

<sup>2</sup> See Kevin Lapp, *Databasing Delinquency*, 67 *HASTINGS L.J.* 195 (2015).

being convicted.<sup>3</sup> He has also published a series of articles with foreign scholars and lawyers contrasting American criminal record practices to those in the European Union.<sup>4</sup>

*The Eternal Criminal Record* brings that prior work, and more, together in one place. The first part of the book defines its subject matter, emphasizing that a criminal record cannot be understood as a single document. (P. 2). Criminal justice actors and institutions maintain numerous and overlapping files, records, and databases. Law enforcement creates records for every arrest (11–12 million a year),<sup>5</sup> whether the arrest was followed by a charge or conviction or nothing at all. It also maintains a host of databases that store all sorts of information about people, some of whom may have never been arrested or even suspected of committing a crime. (P. 13). These include sex offender registries, gang databases, and DNA and other biometric databases, among others. Court records document charges and convictions. Court and police records also contain information about people beyond supposed unlawful or suspicious behavior, such as medical records, mental health evaluations, family and relationship history, friends and associations and more. (P. 64).

While the data collection capabilities of the criminal justice system are greater today than ever, none of this is all that exceptional. Law enforcement and court systems worldwide have, and always will, crave and collect information. The bulk of *The Eternal Criminal Record* examines when criminal records should be created, edited, and destroyed, who can and should have access to those records, and the impact of those records on individual lives within and without the criminal justice system. This section organizes that material into three claims: American criminal records are exceptionally public, exceptionally punitive, and exceptionally permanent.

#### A. Exceptionally Public

With the steadiness of a drumbeat, Jacobs shows that criminal records in the United States are more widely accessible than anywhere else in the world. Within law enforcement, a nationally integrated computerized rap sheet system allows any

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<sup>3</sup> James B. Jacobs, *Gang Databases: Context and Questions*, 8 CRIMINOLOGY & PUB. POL'Y 705 (2009); James B. Jacobs & Tamara Crepet, *The Expanding Scope, Use and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178–79 (2008).

<sup>4</sup> See, e.g., James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 PUNISHMENT & SOC'Y 3 (2012); James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, The European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125 (2008).

<sup>5</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013: DATA DECLARATION TABLE 29 (2014), [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table\\_29\\_estimated\\_number\\_of\\_arrests\\_united\\_states\\_2013.xls/@@template-layout-view?override-view=data-declaration](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls/@@template-layout-view?override-view=data-declaration).

officer in the United States to learn almost instantaneously whether an individual is wanted or has been arrested or convicted at any time anywhere in the United States. (P. 10). Access is not limited to law enforcement. Congress has granted various industries, organizations and businesses access to the criminal histories of job applicants, employees, and volunteers. (Pp. 43–46). Moreover, inmate locators allow members of the public to find the location, crime of conviction, custody status and sentencing terms of detainees.<sup>6</sup> Anyone can also look up in online registries the name, address, photograph and offense history of sex offenders and, in some states, those convicted of violent crimes. (Pp. 49–51). The public and media have daily access to things like arrest blotters, docket sheets and court case indexes. (Pp. 60, 195). A few states even make publicly available documents within court records, like pre-sentence reports, that can contain mental and physical health information, and intimate personal and family history. (P. 64).

All this accessibility enables entrepreneurial secondary aggregation and distribution of criminal history information. Private information vendors<sup>7</sup> market and sell lucrative criminal background check services, populating their databases with information downloaded from publicly-accessible sources and purchased from state and local governments. (P. 58). Organizations like the National Domestic Violence Registry use the same access to create specialized databases of people convicted of domestic violence offenses. (P. 168). Particularly troubling are those companies that collect publicly available information about arrestees and offenders, including names and photographs, post them to their website, and then offer to remove the embarrassing information for a fee. (Pp. 81–88). These aggregation services represent an unplanned, and in cases like the blackmailing mug shot companies, deplorable consequence of publicly-available criminal records.

The American way is not the only way. Jacobs explains that in Europe, individual criminal history records created and held by police are not available to non-police agencies, much less the media and general public. (P. 159). Nor may European employers, landlords, and voluntary associations obtain criminal history information from the courts or national conviction registers. (P. 160). Jacobs illustrates the difference with a fascinating case study of Spain. Spanish criminal verdicts are not announced in open court, but instead in writing to the defendant, and published cases anonymize the defendant's name and other identifying information. (P. 164). Court files on criminal cases are not available to the media or public. (P. 165). Indeed, the Spanish Supreme Court held that the country's National Conviction Register violated an individual's right to privacy by

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<sup>6</sup> See, e.g., N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, *Inmate Population Information Search*, <http://nysdoccslookup.doccs.ny.gov/>.

<sup>7</sup> There is a wonderful double-meaning to talking about private information vendors. It reflects that they are private companies that sell information, and that they are sellers of information that many believe ought to be private.

disclosing his criminal record to the Election Commission. Another case prevented the posting on a website of the names of civil servants who had previously been found guilty of torture. (P. 166).

Why the profound difference? According to Jacobs, Europeans conceptualize a criminal conviction as personal information entitled to privacy protection, whereas Americans consider it public information infused with public interest. (P. 188). In protecting criminal record information from disclosure to the Election Commission, for example, the Spanish Supreme Court reasoned that a criminal conviction is “personal information” and “the constitutional right to privacy guarantees anonymity, a right not to be known, so that the community is not aware of who we are or what we do.” (P. 165). For Americans steeped in felon disenfranchisement and public court records, concealing criminal records from election officials (much less torture convictions of government employees) seems unfathomable.

Jacobs’s discussion on the “whats” and “whys” is rich and varied, and I highly commend it. I want to focus attention briefly on the public interest of governmental transparency that Jacobs identifies as undergirding current criminal record policy and standing in the way of reforms. He writes that Americans have a long and deep commitment to governmental transparency, and that transparency contributes to confidence in the fairness, integrity, and competence of judges and courts. (P. 191). This is undoubtedly true. From James Madison to the Freedom of Information Act to Barack Obama’s campaign promise of unmatched transparency, Americans have valued and demanded access to the workings of government.<sup>8</sup> Along these well-worn lines, Jacobs asserts that without publicly available records showing how criminal cases have been handled, there could be no confidence that justice was being done in our courts. (P. 191).

The importance of transparency should not be ignored. No one would trust a court system that operated behind closed doors.<sup>9</sup> Still, Jacobs seems to overstate the role of publicly accessible criminal records in keeping courts in check. First, criminal courts are not black boxes, but are open to the public and media to attend. Second, there is mandated counsel for defendants, so lawyers are present, and a robust procedural law governs American court proceedings. Finally, defendants have a right to transcripts of the proceedings and to have their cases reviewed by an appellate court. None of these many ways to monitor courts requires disseminating criminal court records to the general public.

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<sup>8</sup> 3 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 276 (Philadelphia, J.B. Lippincott & Co. 1867) (“A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy.”); Freedom of Information Act (FOIA), S. 1160, 89th Cong. (1966).

<sup>9</sup> This was one of the primary complaints against juvenile courts resolved by the Supreme Court’s landmark *In re Gault* decision. *In re Gault*, 387 U.S. 1, 61 (1967) (describing “a more or less secret, informal hearing” that was closed to public, that produced no transcript of the proceedings, and where no counsel for respondent was present).

Moreover, to identify values served by publicly accessible criminal records is not the same as identifying why the American public wants access to criminal records. Marshaling as much empirical data about why Americans want public criminal records as Jacobs does (which is none), I doubt that most Americans, if asked, would defend liberal public access to criminal court records in terms of government transparency. Instead, I would expect exhortations about protecting the public to top the list, followed by declarations about just deserts. In fact, such justifications litter *The Eternal Criminal Record*. For example, in defending the broad availability of criminal records, Jacobs remarks that “[e]x-offenders . . . are responsible for their tainted biography,” (P. 299) and “law-abiding citizens have a right to know when individuals in their community or workplace represent a potential threat.”<sup>10</sup> This language of accountability and public safety echoes the conversation of the late twentieth century, when retribution and incapacitation dominated criminal justice policymaking.<sup>11</sup> But the failure and crushing expense of a criminal justice system driven by retribution and incapacitation led to a widespread movement toward decriminalization, reduced sentencing schemes, increased rehabilitative services and decarceration.<sup>12</sup> Widely accessible criminal records do not suit a less vengeful, more redemptive approach to offending, and would, therefore, seem to be ripe for reconsideration.

I agree with Jacobs that “criminal justice agencies and courts do a better and fairer job of preventing and solving crime when they have more information at their disposal.” (P. 302). But it is easy to conflate the value of information to the criminal justice system with absolute value to any and all. I remain unconvinced that public access to criminal records (“the modern equivalent of branding”) does much to prevent or solve crime. (P. 209). The book certainly does not persuade on this point, and there is little empirical evidence that it deters offenders.<sup>13</sup> In fact, evidence indicates that the labeling that accompanies publicly-available criminal records is more likely to increase recidivism than reduce it.<sup>14</sup>

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<sup>10</sup> *The Eternal Criminal Record*, HARVARD UNIV. PRESS, <http://www.hup.harvard.edu/catalog.php?isbn=9780674368262> (last visited Oct. 16, 2016). See also The Brian Lehrer Show, *It Really is a Permanent Record*, WNYC (Jan. 29, 2015), <http://www.wnyc.org/story/it-really-permanent-record/>.

<sup>11</sup> See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>12</sup> See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (linking decriminalization to efforts to limit mass incarceration, and identifying decriminalization as a budget-saving measure that eases the punitive impact of the criminal justice system on defendants).

<sup>13</sup> Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2189 (2003) (“[T]he deterrence debate has largely centered around theoretical accounts supported by selected anecdotal evidence.”); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1884 (1991) (arguing that shaming penalties are ineffective).

<sup>14</sup> See *infra* note 27.

That criminal records are riddled with errors gives even greater reason to worry about exceptionally public criminal records. As Jacobs laments, criminal records are frequently wrong or out-of-date. (Pp. 133–57). One recent study found that fifty percent of FBI rap sheets are incomplete or inaccurate.<sup>15</sup> Some records contain multiple entries for the same arrest or conviction, giving an exaggerated impression of criminality. Others attribute criminal history information to the wrong people. Many do not include updated arrest and court dispositions, and records that were supposed to be sealed or expunged remain fully accessible. Each kind of error produces outcomes at odds with the goals of public criminal records, such as wrongly denied jobs and education, and unwarranted arrests.<sup>16</sup>

Jacobs discusses several potential reforms to limit criminal record accessibility. Some, like prohibiting the dissemination of arrest records when the arrest was not followed by a charge or conviction, make good sense. (P. 207). Others, like new or expanded databases to cure the ills of current record keeping, illustrate a pathology of “dataveillance”<sup>17</sup>—it nearly always sees the solution as more data collection and greater dissemination. For example, to counter the negative impact of public criminal records, Jacobs proposes a new, “easily accessible” database of those who have been rehabilitated. (P. 132). While such a database promises to provide better information to employers and the like who discover that applicants have some kind of criminal record,<sup>18</sup> there is reason to believe that additional data systems would replicate existing problems with respect to accuracy and completeness. Nor is it clear that such additional information would sufficiently temper the negative reaction that employers have to learning of an arrest or conviction to change outcomes. The difference between a job applicant with a felony conviction and an applicant with a felony conviction who is certified as rehabilitated may be no difference at all in the job market. Negative information tends to drown out the good, even if the good is more recent.

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<sup>15</sup> Madeline Neighly & Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment*, NAT'L EMP. LAW PROJECT (July 2013), <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf>.

<sup>16</sup> See, e.g., *Herring v. United States*, 555 U.S. 135 (2009) (upholding admission of evidence recovered pursuant to search based on erroneous entry about an outstanding arrest warrant in law enforcement database). While criticizing error-prone records, Jacobs asserts that *Herring* was rightly decided.

<sup>17</sup> Roger A. Clarke, *Information Technology and Dataveillance*, 31 COMM. ACM 498, 499, 502–04 (1988) (offering the term to describe the new forms of surveillance facilitated by the widespread use of computer-based technology).

<sup>18</sup> See Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012) (explaining that successful implementation of a certificate of rehabilitation scheme requires committed administrative leadership and an effective means for making certificates accessible).

It would be a lot easier to control the dissemination of information by restricting data collection in the first place. But that ship has likely sailed.<sup>19</sup> In its stead, limiting the accessibility of criminal records to non-criminal justice actors should be pursued, at least until the high error rate is demonstrably reduced. Models for such restrictions exist. The state of New York recently prohibited the N.Y.P.D. from maintaining databases of those stopped by police but not summoned or arrested.<sup>20</sup> Washington state recently passed a law allowing for most juvenile records to be automatically sealed when the youth turns 18.<sup>21</sup> Senators Rand Paul and Cory Booker proposed a bill, the REDEEM Act, that would automatically seal criminal records for non-violent offenses and juvenile offenses, and eliminate some collateral consequences of drug offenses.<sup>22</sup>

These, and similar, restrictions would protect individuals from having old, erroneous, or unfairly prejudicial criminal records shared with the public without threatening public safety or undermining checks on the integrity of the criminal justice system.

### B. *Exceptionally Punitive*

Malcolm Feeley famously wrote three decades ago that the criminal process is the punishment.<sup>23</sup> In today's increasingly efficient, assembly-line criminal justice system, the process may not extract such a damaging toll.<sup>24</sup> Rather, Jacobs makes a compelling case that, today, the criminal record is the punishment.

Criminal records punish in a variety of ways. Within the criminal justice system, criminal records drive decision-making at every step of the process. (P. 227). They influence the treatment of suspects, arrestees, defendants and convicted persons, always for the worse. Those with criminal records get more attention from law enforcement, are more likely to be arrested, searched and charged, are less likely to get good offers from prosecutors, and more likely to be

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<sup>19</sup> See Stephen I. Vladeck, *Big Data Before and After Snowden*, 7 J. NAT'L SEC. L. & POL'Y 333, 335 (2014).

<sup>20</sup> Al Baker & Colin Moynihan, *Paterson Signs Bill Limiting Stop-and-Frisk Data*, N.Y. TIMES (July 16, 2010), [http://cityroom.blogs.nytimes.com/2010/07/16/paterson-signs-bill-limiting-street-stop-data/?\\_r=0](http://cityroom.blogs.nytimes.com/2010/07/16/paterson-signs-bill-limiting-street-stop-data/?_r=0).

<sup>21</sup> COLUMBIA LEGAL SERV., *FAQ on the Youth Opportunities Act (HB 1651)* 1 (Apr. 8, 2014), [http://columbialegal.org/sites/default/files/FAQ%20on%20the%20Youth%20Opportunities%20Act%204-9-14\\_0.pdf](http://columbialegal.org/sites/default/files/FAQ%20on%20the%20Youth%20Opportunities%20Act%204-9-14_0.pdf).

<sup>22</sup> Record Expungement Designed to Enhance Employment Act (REDEEM Act), S. 2567, 113th Cong. (2014).

<sup>23</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

<sup>24</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (describing a system of high-volume arrests and high plea rates).

detained and end up with harsher sentences. (P. 227). Outside the criminal justice system, statutes mandate thousands of disabilities and discrimination against persons with criminal records. (P. 246). A criminal record can result in the loss of voting and firearms rights, ineligibility for jury service and occupational licenses, and restrictions in housing options, welfare benefits, and much, much more. (Pp. 246–74). Indeed, there are so many statutorily-imposed disabilities for those with criminal records that it takes a 1,000 page treatise to cover the topic.<sup>25</sup>

Not all so-called “collateral consequences” are formal or statutory. Public criminal records also enable discretionary discrimination. Employers, landlords, and colleges conduct background checks and make unfavorable decisions based on criminal records.<sup>26</sup> Jacobs illustrates this with a discussion of classic and recent studies on the impact of criminal records on employment discrimination. (Pp. 279–81). In one such study, a single drug conviction caused employers to significantly reduce their interest in prospective applicants who otherwise looked identical. However rational it may be to err on the side of caution (and research discussed below identifies limits to that rationality), it is a debilitating harm for those who carry criminal records.

Public criminal records also punish by inflicting debilitating stigma. As Jacobs recognizes, “a criminal record has become the most important marker of public identity.” (P. xiii). The “criminal” label that attends a criminal record impacts life chances and choices. According to labeling theory, stigmatic labels lead to social isolation, as community members avoid the stigmatized by choosing not to work or live alongside them. Compounding the harm, individuals internalize the negative label and withdraw socially, leading to further marginalization and continued offending. (P. 302). Sex offender registration and community notification requirements, for example, impose devastating stigma harms that cause sex offenders to isolate themselves, away from support systems that help prevent recidivism.<sup>27</sup>

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<sup>25</sup> MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013); *see also* NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME* 9 (2014).

<sup>26</sup> Over 90 percent of employers conduct background checks on prospective employees. SOC’Y FOR HUMAN RES. MGMT., *BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS* 3 (2010), [http://www.slideshare.net/shrm/background-check-criminal?from=shair\\_email](http://www.slideshare.net/shrm/background-check-criminal?from=shair_email); David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 *LAW & SOC. INQUIRY* 5 (2008); CTR. FOR CMTY. ALTS., *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED* (2011), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> (noting that some colleges use criminal background screening in addition to self-reporting from applicants).

<sup>27</sup> Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 *HARV. L. REV.* 2186 (2003); *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting) (identifying the “profound humiliation and community-wide ostracism” that attends sex offender community notification); Michael F. Caldwell et al., *An Examination of the Sex Offender*

A major problem with affixing such punitive consequences to criminal records (beyond their inaccuracies) is that criminal records are unavoidably underinclusive as a marker. While a record of a conviction typically means the person committed the alleged offense,<sup>28</sup> actual crime far exceeds reported crime, and reported crime far exceeds convictions. For example, the FBI estimates that there were some 2 million burglaries in the United States in 2012, but just under 13 percent of them were cleared by an arrest.<sup>29</sup> Even fewer resulted in burglary convictions. Simply put, many more people commit criminal offenses than have criminal records.

This underinclusiveness means that a criminal record provides a distorted mark of criminality. This is so even if there were rationality to the inevitably selective enforcement and prosecution of the criminal law, but there is no such rationality. In a world of limited resources, prosecutors often pick the easiest cases to prove, not necessarily the worst or most serious offenses.<sup>30</sup> Due to invidious stereotypes and the deployment of law enforcement resources, criminal records are unevenly distributed by race and class amongst the general and offending population.<sup>31</sup> Expanded criminalization has made the distortion of a criminal record even worse. Today, there are more convictions annually than ever before, for offenses much less severe, such that “the status of convicted felon no longer means what it once did.”<sup>32</sup>

Despite these distortions, the punitive consequences of a criminal record have never been worse. This all leads Jacobs to conclude that “the basic punishment meted out in criminal cases is a conviction record that exposes the record-subject to discrimination, disabilities, and disqualifications.” (P. 93). This is a potentially game-changing conclusion that no one who has studied and written about criminal

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*Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL’Y & L. 89, 106 (2008) (juvenile sex offender registration may actually create a greater risk to community safety by increasing recidivism).

<sup>28</sup> *But see* Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) (“Plea bargaining has an innocence problem.”); *see also* Cases, INNOCENCE PROJECT (Mar. 17, 2016), <http://www.innocenceproject.org/all-cases/#exonerated-by-dna> (identifying hundreds of post-conviction DNA exonerations).

<sup>29</sup> FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2012: OFFENSES CLEARED 3 (2013), <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearancetopic.pdf>.

<sup>30</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 54 (2011) (explaining the rise of drug arrests and convictions because they are cheap and easy).

<sup>31</sup> Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”); Robin S. Engel, *Introduction to RACE, ETHNICITY, AND POLICING* 3 (Stephen K. Rice & Michael D. White eds., 2010) (examining “the role of race/ethnicity on multiple coercive outcomes, including police stops, searches, arrests, and use of force”).

<sup>32</sup> STUNTZ, *supra* note 30, at 264 (“[O]ffenders acquire that status having committed offenses much less severe than the ones that traditionally led to felony convictions and prison terms.”).

law for as long as Jacobs has would make glibly. The Eighth Amendment protects against cruel and unusual punishment, and has long been interpreted to include a proportionality component.<sup>33</sup> If a criminal record itself, or the many collateral consequences of a criminal record, are considered punishment, then they quickly become constitutionally problematic because the quantity of punishment that a conviction imposes increases dramatically.

Courts, however, have consistently held that collateral consequences are not punishment,<sup>34</sup> and therefore not governed by the Eighth Amendment's proportionality clause. Jacobs does not indicate whether he thinks that doctrine should be challenged. He does remark that "[i]n some cases, naming and shaming provides too much punishment, therefore violating retributive justice's proportionality principle." (P. 223). But Jacobs makes no mention of the Eighth Amendment and gives no hint that the *constitutional* proportionality principle is threatened. Instead, he follows that immediately by observing that naming and shaming could be justified as just deserts.

Were Jacobs to push the claim about punishment, he would not be alone. Gabriel Chin and others have made the case that mass collateral consequences should be considered punishment, and therefore be subject to constitutional limitation.<sup>35</sup> Chin found that in foundational Eighth Amendment proportionality cases like *Weems* and *Trop v. Dulles*, the Supreme Court considered punishments to be cruel and unusual in part because of burdensome and systematic collateral consequences. For Chin, "[w]hether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment."<sup>36</sup> And that susceptibility is magnified by comprehensive, accessible criminal records.

While he does not recommend a constitutional attack on punitive criminal records, Jacobs does urge reducing disqualifications based on a criminal record. (P. 270). But rather than proscribing a path to reform, he succumbs to the challenge of getting specific. For example, he leaves the reader with the "daunting task" of identifying which convictions should not disqualify a person for certain jobs. (P. 271). It is hard not to read the lack of specific reform proposals as an acceptance of the current system. That Jacobs defends criminal record discrimination as rational and legitimate underscores that impression: "Employers should not be required to show the relevance of a particular past conviction for a particular job" to make a decision based on it. (P. 299).

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<sup>33</sup> *Weems v. United States*, 217 U.S. 349, 359 (1910) (Punishment was cruel and unusual because it was disproportionate to the offense for which Weems was convicted).

<sup>34</sup> *Smith v. Doe*, *supra* note 27.

<sup>35</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

<sup>36</sup> *Id.* at 1826.

The best Jacobs can do is to encourage the government to lead by example and voluntarily ignore criminal convictions for many public sector jobs. (P. 274). At the risk of raining on a parade I would actually enjoy, I do not see much promise here. The notion of the government as a signaler and leader in this arena strikes me as terribly unlikely. The National Security Agency revelations show that the government is the biggest, most ravenous information collector there is,<sup>37</sup> and voluntary blindness to criminal convictions runs counter to every impulse that has created the current policy landscape.

Simply put, encouraging actors not to discriminate is unlikely to effect any change. We can limit the punitiveness of American criminal records only by legislating. A critical study of the potential to legislate forgiveness is beyond the scope of this review, but would be a welcome addition to the literature.

### C. *Exceptionally Permanent*

The last component of American criminal record exceptionalism that emerges from *The Eternal Criminal Record* comes straight from the title: their enduring permanence. As Jacobs bluntly puts it, “[a] criminal record is for life; there is no statute of limitations.” (P. 4).

American criminal records are permanent by policy, practice, and by virtue of modern technology. The policy default is that everything that appears on a criminal record remains on that record. Law enforcement records are maintained indefinitely and court records are not destroyed. (P. 125). Entries about arrests and charges rarely come off of rap sheets. In part, that is because law enforcement has little motivation, and fewer resources, to continually monitor and update records. (P. 133). But it is also because individuals seek correction or deletion of erroneous information when they learn about the error, which is usually too late to matter. For example, an individual might learn about an erroneous criminal record only when a prospective employer explains a negative decision as based on criminal record information revealed by a background check. Where sealing or expunging are available (which is not often), individuals typically must initiate the process, which can be needlessly difficult and costly, leading many to forsake the procedure. (P. 119). Even when records are sealed or individuals pardoned, records remain, leaving individuals susceptible to harm.<sup>38</sup>

Jacobs explains that we make criminal records permanent to deter offending (people will choose not to offend because the record will follow them forever) and avoid victimization. I have already expressed doubt about the deterrent value of public criminal records. The public safety justification depends in part on whether

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<sup>37</sup> See Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

<sup>38</sup> See, e.g., Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355 (2012).

criminal records are a valuable predictor of future dangerous conduct. (P. 155). Most, including Jacobs, believe they are. As Jacobs put it, “[c]haracter and personality are not chimeras. While some people’s attitudes, values, characters, and personalities do change over time, past behavior is usually a good predictor of future behavior.” (P. 304).

Empirical research suggests otherwise. It has consistently been found that “in the aggregate, everywhere and at all times, the prevalence of offending tends to increase in early adolescence, rise to a peak in late adolescence, and diminish in early adulthood.”<sup>39</sup> In other words, a lot of people commit crimes in their teens and early twenties, and most of them stop doing so as they age. Indeed, over eighty percent of people stop committing crimes by the age of twenty-eight.<sup>40</sup> Recidivism typically occurs within three years of offense or release, or not at all.<sup>41</sup> Researchers have consistently found that individuals with a prior criminal justice contact who stay arrest-free for seven years or more pose very little risk of future crime.<sup>42</sup> Moreover, that low risk converges with the offending risk of a same-aged individual from the general population at around seven years after contact, and approaches (though never quite equals) that of same-aged individuals with a clean criminal record.<sup>43</sup> That is, those who remain free of further contact with the criminal justice system have, after a few years, no measurably greater risk of rearrest than anyone else.

This evidence of rapid desistance (at relatively early ages) rebuts the notion that past criminality is a good predictor of future criminality. Whatever predictive value a criminal record has diminishes with time. Recognizing this, provisions

<sup>39</sup> Jessica M. Craig & Alex R. Piquero, *Crime and Punishment in Emerging Adulthood*, in OXFORD HANDBOOK OF EMERGING ADULTHOOD 543 (Jeffrey Jensen Arnett ed. 2016).

<sup>40</sup> TONY WARD & SHADD MARUNA, REHABILITATION 13 (2007).

<sup>41</sup> JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003); Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 CRIMINOLOGY & PUB. POL’Y 697, 699–70 (2007).

<sup>42</sup> See, e.g., Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Bushway & Sweeten, *supra* note 41, at 697; Megan Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007); Megan Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006).

<sup>43</sup> See Blumstein & Nakamura, *supra* note 42, at 338–44 (finding that after 4–9 years, a person with a single prior record who subsequently stayed clean has the same risk of reoffending as members of the general population of the same age); Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 HOW. J. CRIME & JUSTICE 373, 380–81 (2009) (finding that after a ten-year conviction-free period, prior contact is no longer informative for future criminality and the risk of reconviction of those with a finding of guilt as a juvenile or before age 21 converges with non-offenders between the ages of 30 and 35, or approximately 10–15 years after the initial conviction); Kurlychek et al., *Enduring Risk?*, *supra* note 42, at 80 (“[I]f a person with a criminal record remains crime free for a period of about 7 years, his or her risk of a new offense is similar to that of a person without any criminal record.”).

that keep information about prior crime from decision-makers where there is a risk that they will use it improperly abound in the law. Federal Rule of Evidence 404 (and similar rules in every state) prohibits the admission at trial of past acts to prove a person's character to show that they likely acted in conformity with that character, on the theory that past acts have little probative value as to future conduct. Federal Rule of Evidence 609(b) similarly restricts the admissibility of a conviction more than 10 years old to impeach an individual. The Senate Report on the rule notes that "convictions over ten years old generally do not have much probative value."<sup>44</sup> Along these same lines, negative entries in credit reports come off an individual's report after the passage of time because they cease to be meaningful predictors of future risk.<sup>45</sup>

Character and personality may not be chimeras, but of the many people who violate the law, only a few people are persistent offenders. In recognition of this desistance evidence, many support reforms that would increase the availability of sealing or expungement procedures for old criminal records, especially where the individual has not re-offended for a set number of years. Jacobs resists such reforms, which he characterizes as "record concealment" in a section entitled "The Right to Lie?" (Pp. 123–24). But limiting the life-span of criminal records makes good sense.

Outside of political will, the biggest challenge to limiting the permanence of criminal records is the internet. Arrests and charges are publicly available, so even if a trial results in the dismissal of charges, or deferred prosecution, and even if police and courts expunge or seal the arrest and charges, "the information is likely to have been copied by commercial information vendors" and be publicly available indefinitely. (P. 110). This leads Jacobs to doubt "that criminal record information can be effectively suppressed in this day and age" (P. 131), and call the move toward ever more public criminal records "inexorable." (P. 307).

It is all too easy to raise up our hands in the face of technology. But Jacobs insists that he set out to make criminal record policy "problematic rather than inevitable." (P. 4). And I have been convinced by Jacobs that current policy and practice is not inevitable. As a result, I do not share his pessimism. Technology, for one, can address part of the problem. Linking judicial information systems with rap sheet databases would, as he states, ensure that rap sheets contain updated disposition information. (P. 155). A more robust solution to the permanence problem is emerging in Europe, known as the right to be forgotten. In 2014, the Court of Justice of the European Union issued a ruling that, under certain

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<sup>44</sup> S. Rep. No. 1277, 93d Cong. 2d Sess. 4, *reprinted in* 1974 U.S. CODE. CONG. & ADMIN. NEWS p. 7051. *See also* United States v. Cathey, 591 F.2d 268, 275 (5th Cir. 1979) (The rule is "founded on a legislative perception that the passage of time dissipates the probative value of a prior conviction.").

<sup>45</sup> *See* 15 U.S.C. § 1681c(a) (2006) (prohibiting credit reports from including adverse information, including arrests, that antedate the report by more than seven years).

conditions, provides individuals with a right to have search engines like Google remove links with personal information about them.<sup>46</sup> I am no privacy scholar, but I recognize that the right to be forgotten faces a steeply uphill road in the United States for a number of reasons. Still, an uphill road is one that can take you to the mountaintop.

The landscape is certainly overwhelming for those who would seek to limit the accessibility, punitiveness, and permanence of American criminal records. The next section considers whether juvenile justice policy offers a blueprint for change.

### III. THE JUVENILE EXCEPTION

While *The Eternal Criminal Record*, like most criminal law scholarship, focuses on adults, it includes occasional discussion of the special case of juveniles. And rightly so, as over one million juveniles each year are arrested or face criminal or delinquency charges.<sup>47</sup> Further, the American thirst for and sense of entitlement to criminal records extends to juvenile records. Consider the frantic public and media search for biographical material about Michael Brown in the wake of his tragic shooting in Ferguson, Missouri in August, 2014.<sup>48</sup> Most desired were criminal history records. When neither the police nor juvenile court would release records about Brown (if they had any),<sup>49</sup> a conservative blogger filed a lawsuit seeking their release. The lawsuit asserted that “the Missouri, American, and International Public deserve to have answers to basic questions about personal

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<sup>46</sup> C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ECLI:EU:C:2014:317, ¶ 66–88 (May 13, 2014).

<sup>47</sup> NAT’L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 2* (Melissa Sickmund & Charles Puzzanchera eds., 2014); Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2012*, NATIONAL REPORT SERIES, December 2014, at 3 (law enforcement agencies made more than 1.3 million arrests of person under 18 in 2012).

<sup>48</sup> See, e.g., Laura Collins, *Who was the Real Michael Brown?*, DAILY MAIL (Aug. 22, 2014), <http://www.dailymail.co.uk/news/article-2730153/A-kid-broken-home-beat-odds-to-college-A-rapper-sang-smoking-weed-feds-A-violent-robbery-suspect-caught-shocking-video-just-real-Michael-Brown.html>.

<sup>49</sup> The Ferguson Police Department refused to disclose any records (if it had any) related to Michael Brown. The St. Louis Prosecuting Attorney’s Office announced that Brown had no adult arrest record. The St. Louis County Family Court would neither confirm nor deny that Brown had a juvenile record, other than to say that he had no record of serious felony charges in juvenile court. Manny Fernandez, *Michael Brown Never Faced Serious Felony Charge, St. Louis Official’s Lawyer Says*, N.Y. TIMES (Sept. 3, 2014), <http://www.nytimes.com/2014/09/04/us/michael-brown-never-faced-serious-felony-charge-st-louis-officials-lawyer-says.html>.

histories” of Michael Brown.<sup>50</sup> The St. Louis Post-Dispatch filed a similar lawsuit seeking records about Brown a week later.<sup>51</sup>

Yet, as Jacobs recognizes, legislatures and officials have long restricted the information that law enforcement gathered about juveniles, limited the length of time it was stored, and protected the information gathered from disclosure. (P. 99). For example, most states prohibited police from taking fingerprints or photographs of juvenile suspects, unless taking them was necessary to an investigation or was otherwise approved by a court.<sup>52</sup> As recently as 1988, only a quarter of law enforcement agencies fingerprinted juveniles.<sup>53</sup> Those juvenile records kept by police were held in decentralized, local systems, apart from adult criminal histories, with limited access from outside the justice system.<sup>54</sup> This confined knowledge about a juvenile’s prior contact with the police to the juvenile’s locality. To ensure against any lasting effect, juvenile records were frequently sealed or expunged.<sup>55</sup>

Juvenile courts—invented in the United States over one hundred years ago to divert youth from the harms of the criminal justice system—likewise aim to prevent creating and distributing stigmatizing records. This was accomplished by, among other things, defining the court as civil instead of criminal, anonymizing case names, making juvenile court records confidential by statute, and expunging juvenile records. (Pp. 180–85). Together, these protective policies gave adolescents the opportunity to enter adulthood unburdened by the mistakes of their youth. Consistent with this protective impulse, the St. Louis Court denied the lawsuits seeking Michael Brown’s juvenile records.

But the amount of information law enforcement collects about juveniles has markedly increased in the last two decades.<sup>56</sup> And while criminal information about juveniles has long been recognized to leak beyond law enforcement,<sup>57</sup> its

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<sup>50</sup> Charles C. Johnson, *Lawsuit: Why We Sued St. Louis County Court to Get Michael Brown’s Juvenile Arrest Records*, GOTNEWS (Aug. 22, 2014), <http://gotnews.com/sued-st-louis-county-court-get-michael-browns-juvenile-arrest-records/>.

<sup>51</sup> Adam Goodman, *Post-Dispatch Seeks Juvenile Court Records*, ST. LOUIS POST-DISPATCH (Aug. 29, 2014), [http://www.stltoday.com/news/local/columns/editors-desk/post-dispatch-seeks-juvenile-court-records/article\\_ca156c3c-37b2-5b1d-b4ad-a79b196c433a.html](http://www.stltoday.com/news/local/columns/editors-desk/post-dispatch-seeks-juvenile-court-records/article_ca156c3c-37b2-5b1d-b4ad-a79b196c433a.html).

<sup>52</sup> *Vovos v. Grant*, 555 P.2d 1343, 1347 (Wash. 1976) (Lawmakers and courts sought to “safeguard[] the child from unwarranted indicia of misconduct becoming a part of police and court records.”).

<sup>53</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *JUVENILE RECORDS AND RECORDKEEPING SYSTEMS* 9 (1988).

<sup>54</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT* (1997).

<sup>55</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *JUVENILE RECORDS AND RECORDKEEPING SYSTEMS* 12 (1988).

<sup>56</sup> See Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015).

<sup>57</sup> *In re Gault*, 387 U.S. 1, 25 (1967).

availability has correspondingly expanded. As Jacobs recently observed elsewhere, the United States now “is exceptional for the amount of juvenile offender information that is disclosed to diverse government agencies and the public.”<sup>58</sup> *The Eternal Criminal Record*, however, gives no hint at the unprecedented extent of juvenile record collection and dissemination, and I want to take the opportunity here to fill in the picture.

The movement began in the 1980s when rising juvenile crime eroded the public’s faith in the rehabilitative ideal and created growing pressure to lift traditional protections governing juvenile records.<sup>59</sup> By 1990, open and complete use of juvenile records in adult criminal proceedings was the norm.<sup>60</sup> By 1997, private employers, educational institutions, insurers and others had regular access to juvenile justice records.<sup>61</sup>

Today, police and courts collect, store, and share more information about juveniles than ever. State and federal laws compel thousands of young people convicted or adjudicated delinquent of sex offenses to register as sex offenders and provide personal information that is posted online, sometimes for life. Thousands more must provide DNA samples as a result of delinquency adjudications and mere arrests.<sup>62</sup> Children as young as 10 years old are entered into databases of known and suspected gang members (often in the absence of an arrest or even a suspicion of wrongdoing). Schools across the nation are required to notify law enforcement when students commit certain behaviors at school, and law enforcement agencies return the favor, providing schools with criminal or delinquency information.

At the same time, juvenile court records and juvenile court proceedings have lost some of their hallmark confidentiality. No longer does any state declare, as did Arizona in the famous *Gault* litigation, that the aim of the court is “to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.”<sup>63</sup> Instead, policymakers jabber in the register of public safety and accountability, and most state legislatures have riddled juvenile confidentiality

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<sup>58</sup> James B. Jacobs, *Juvenile Criminal Record Confidentiality*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 149, 163 (Franklin E. Zimring & David Tanenhaus eds., 2014).

<sup>59</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JUVENILE RECORDS AND RECORDKEEPING SYSTEMS (1988); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JUVENILE AND ADULT RECORDS: ONE SYSTEM, ONE RECORD?: PROCEEDINGS OF A BJS/SEARCH CONFERENCE (1990).

<sup>60</sup> *Id.*

<sup>61</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT vii (1997).

<sup>62</sup> While Jacobs is right that some states allow collection of DNA samples from juvenile arrestees, his number of states that do so (four) is low. My 2014 survey of state legislation found that 19 states permit DNA collection from some juvenile arrestees. See Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 TUL. L. REV. 435, 458 (2014).

<sup>63</sup> *In re Gault*, 387 U.S. 1, 24 (1967).

statutes with holes and multiple exceptions.<sup>64</sup> Today, juvenile court records are increasingly accessible to the media, employers, government agencies, victims, and others. Some states require that schools be notified when students are adjudicated delinquent.<sup>65</sup> As with the records of adults, public and private services aggregate and make available this information to law enforcement nationwide, private employers, public housing authorities, the media, colleges, and the general public, often at no cost.<sup>66</sup>

These changes have profound implications, and not just for young people. Public records “can erect lifelong barriers to success for . . . [those] who have outgrown their behaviors or have been rehabilitated and are working to better themselves.”<sup>67</sup> They frustrate the ability of young people (and adults with a youthful criminal record) to earn a living, find a place to live, educate themselves, join the military, and receive public benefits. This increases recidivism without any demonstrable contribution to public safety. Further, it reshapes the very meaning of childhood, breaching its protected space and contradicting the special understandings that otherwise, and resurgently, dominate the regulation of youth.<sup>68</sup>

There are several reasons to renew the commitment to protective juvenile exceptionalism. First, it has become a legislative fact that juveniles are less culpable for their wrongs.<sup>69</sup> Consequently, the appropriate level of accountability and retribution is lower for juveniles.<sup>70</sup> An eternal, and widely-available criminal record is too much accountability. Second, research shows that juveniles are less deterrable than adults.<sup>71</sup> This reduces the public safety justification to publicly disseminate their wrongs. Third, “adolescence is a heightened period of vulnerability.”<sup>72</sup> Young people suffer specific, and often greater, harms as

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<sup>64</sup> Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 533–38 (2004) (describing the erosion of the presumption of confidentiality in juvenile proceedings).

<sup>65</sup> Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2015).

<sup>66</sup> JUVENILE LAW CTR., *FAILED POLICIES, FORFEITED FUTURES: A NATIONWIDE SCORECARD ON JUVENILE RECORDS* 6 (2014).

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) (“[I]t is the odd legal rule that does *not* have some form of exception for children.”).

<sup>69</sup> *Id.* at 2465.

<sup>70</sup> ANITA ALLEN, *WHY PRIVACY ISN’T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY* 29 (2003) (Young people are “typically excused from the high level of accountability imposed on adults.”).

<sup>71</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”).

<sup>72</sup> Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCIENCES 69 (2005).

juveniles and they are more likely to suffer them because of their youth.<sup>73</sup> Limiting accessibility facilitates the critical transition to independence in early adulthood and prevents permanent stigmatization. Finally, juveniles are more rehabilitatable because their characters are not yet fully formed.<sup>74</sup> In fact, most juveniles do not persist in offending, but instead mature into law-abiding individuals. As a result, “juveniles have a greater claim than adults to be forgiven.”<sup>75</sup>

For all these reasons, laws should limit what information law enforcement should gather about youth, how long that information should be stored, and who the information may be shared with. But we need not limit such policies to youth. Adults, too, are susceptible to harm, and exhibit the capacity to change. Drawing conclusive character judgments and imposing devastating, permanent consequences based on criminal records that are riddled with errors, unavoidably underinclusive, and become predictively stale is hard to justify whoever the subject. This is especially so when the consequences of a criminal record risk promoting the very behavior that public criminal records are thought to deter. It is time, therefore, to begin exploring whether and how the traditional and resurgent protective principles governing juvenile justice could appropriately inform criminal justice policy for all. Rather than identifying or making the case for a juvenile exception, scholars should consider how juvenile justice scholarship’s rich critique of the criminal justice system offers a blueprint for a better system as a whole.

#### IV. CONCLUSION

Americans are obsessed with criminal records. Not only do they drive decisions at every stage of the criminal justice process, they have come to play a profound role outside the criminal justice system. Employers check the criminal records of job seekers. Colleges ask applicants to disclose their criminal records. Landlords, volunteer organizations, and licensing agencies all demand access to criminal records. Aided by the internet and the proliferation of private information vendors, the American obsession is more readily satisfied than ever before. And as the lawsuits seeking Michael Brown’s records show, the sense of entitlement to criminal records extends even to juvenile records.

In *The Eternal Criminal Record*, Professor Jacobs exhaustively surveys the current criminal record policy landscape, simultaneously demanding change and predicting stasis. I have attempted to temper the sense of inevitability that lurks in

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<sup>73</sup> DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 61 (2015).

<sup>74</sup> *Roper*, 543 U.S. at 570 (“[T]he character of a juvenile is not as well formed as that of an adult. The[ir] personality traits . . . are more transitory, less fixed.”);

<sup>75</sup> *Id.*

the book and identify further areas for research that might open new avenues to reform.

One important aspect of current policy debates that received little attention in the book deserves mention in closing. Since the financial collapse of 2008, government budgets have been under tremendous strain. In the criminal justice arena, this has led to calls to replace expensive “tough on crime” policies with more cost-effective “smart on crime” approaches.<sup>76</sup> Such efforts include reducing incarceration rates, decriminalizing certain behaviors, and changing the way that law enforcement deploys police resources.

For all these reasons, laws should limit what information law enforcement gathers about youth, how long it stores that information, and with whom the information may be shared. Looking at criminal record policy through this lens suggests that reforms in this area may be even more difficult. A public, punitive, and permanent criminal record regime is a cheap way to sort and inflict punishment. Technology effortlessly maintains, sorts, and distributes the information, enabling the public to impose punishment for criminality. The public imposes stigmatic harm, and private actors, like employers, landlords and neighbors, tack on additional punishment via discrimination for long after any sentence has been served. This frees governments from devoting resources to sentencing, jails, and post-conviction supervision. Instead, the profound disabilities and obstacles that the criminal record itself creates do much of the work.

This sorting and punishing function appears to be a goal of the current scheme. As Jacobs observes, “[t]he FBI and, no doubt, state and local law enforcement agencies see it as part of their missions to assist employers in sorting people on the basis of criminal biographies.” (P. 101). When, as now, governments face budget restraints, such cost-effective policies become increasingly attractive.

The devolution of punishment to the public is deeply problematic for several reasons. First and foremost, it is undeniable punishment that is presently ignored by proportionality analysis. Second, the race and class distortions in the criminal justice system discussed above mean the burden of this punitive scheme is disproportionately distributed. Moreover, the inevitable underinclusiveness of criminal records gives a distorted message about those who end up saddled with one. All together, it further shuts the doors of opportunity to those with a criminal past when and where they most need them open. Rather than deterring offenders and promoting public safety, permanent and public criminal records ironically lead to increased offending.

As I observed in the Introduction, this is a conundrum. Thanks to Jacobs’ notable book, an informed public discussion dedicated to resolving it can, and must, begin.

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<sup>76</sup> See Kamala D. Harris, *Foreword*, 8 HARV. L. & POL’Y REV. 255 (2014).