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## **From the Legal Literature America's Paper Prisons: The Second Chance Gap**

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# From the Legal Literature

## America's Paper Prisons: The Second Chance Gap

Francesca Laguardia\*

### I. INTRODUCTION

Official punishments, such as fines and prison, are not the only ramifications of criminal justice involvement.<sup>1</sup> Instead, criminal conviction, or even criminal arrest, can lead to a stunning array of broader repercussions, including barriers to employment and occupational licensing; barriers to housing, both subsidized and wholly private; barriers to financial aid for higher education and other public benefits; disenfranchisement; barriers to owning firearms or obtaining a driver's license; exclusion from jury service; and deportation.<sup>2</sup> These burdens, which continue indefinitely, collectively are referred to as "collateral consequences" of criminal justice involvement.<sup>3</sup>

While the moral, philosophical, and practical implications of collateral consequences were largely ignored for the greater part of U.S. history, they have begun receiving attention over the past decade.<sup>4</sup> This attention is well deserved, as the overall effect of col-

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<sup>1</sup>Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 524 (2020).

<sup>2</sup>U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–2 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/QA8H-92CZ>].

<sup>3</sup>U.S. COMM'N ON C.R., *supra* note 2, at 1.

<sup>4</sup>Gabriel Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 234 (2018–19); *see also, e.g.*, Emily Ahdieh, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to A Trial by Jury*, 30 GEO. MASON U. C.R. L.J. 65 (2019); Jamie Connolly, *Prosecutorial Discretion and Collateral Consequences: Rethinking the Alabama Rules of Professional Conduct*, 43 J. LEGAL PROF. 269 (2019); Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625 (2018); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162 (2021); Francesca Laguardia, *From the Legal Literature: Disentangling Prison and Punishment*, 56 CRIM. L. BULL. 754 (2020); Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. 863, 916 (2020);

lateral consequences on American society is severe, rising to a level some scholars rank as equivalent to “civil death”—an almost complete removal from citizenship and the protection of law.<sup>5</sup> It is also exceptionally widespread.<sup>6</sup> One in three U.S. adults have criminal records, and 5.2 million U.S. citizens cannot vote due to felony disenfranchisement.<sup>7</sup> Like other consequences of interaction with the criminal justice system, these burdens are disproportionately carried by people of color, especially Blacks and Latinos.<sup>8</sup>

As collateral consequences have received more attention they have become a particular focus of criminal justice reform efforts.<sup>9</sup> These efforts have had apparent success, as every state in the country and the federal government have passed legislative reforms to address collateral consequences of conviction.<sup>10</sup> But while these reforms have attempted to fix the problem, they are inadequately implemented, leaving millions of people (“30–40 percent of those with criminal records”) to remain burdened even though they qualify for relief.<sup>11</sup>

In *America’s Paper Prisons: The Second Chance Gap*, Colleen Chien explores how these reforms have stumbled in their execution.<sup>12</sup> Due to insufficient education of potential applicants, inconsistent and unworkable standards, complex processes, structural problems such as high costs of application, and other problems, very few of those people who qualify for relief under these reforms have managed to

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Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031 (2020); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Rafi Reznik, *Retributive Abolitionism* 24 BERKELEY J. CRIM. L. 123 (2019); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670 (2008).

<sup>5</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>6</sup>Chien, *supra* note 1, at 529–30.

<sup>7</sup>Chien, *supra* note 1, at 529–530.

<sup>8</sup>Chien, *supra* note 1, at 530.

<sup>9</sup>See, e.g., Lynne Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181 (2015); Chin, *supra* note 4; Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010).

<sup>10</sup>Chien, *supra* note 1, at 532.

<sup>11</sup>Chien, *supra* note 1, at 519.

<sup>12</sup>Chien, *supra* note 1.

obtain it.<sup>13</sup> Chien explains the problems that have undermined these reforms, and suggests how they could be fixed.<sup>14</sup>

**II. COLLEEN CHIEN, *AMERICA'S PAPER PRISONS: THE SECOND CHANCE GAP*, 119 MICH. L. REV. 519 (2020).**

After reviewing the extent of the imposition created by collateral consequences, Chien offers an introduction to the state of second-chance reforms across the country.<sup>15</sup> These include increased opportunities to qualify for early release, reclassifying and downgrading nonviolent crimes, increasing opportunities to expunge and seal criminal records, expanded voter eligibility, and federal initiatives offering resentencing opportunities for federal inmates.<sup>16</sup> Overall, these reforms appear to have contributed to “an 11 percent decrease in state imprisonment rates without an increase in crime rates” generally across the country.<sup>17</sup>

Chien points out these reforms do not only benefit potentially incarcerated individuals, or even their families; they also reduce spending for states by cutting down on the cost of incarceration.<sup>18</sup> Costs of incarceration vary but recent estimations suggest federal incarceration costs close to \$40,000 per year, and state costs can range “from less than \$15,000 per Alabama prisoner, on average, to close to \$65,000 per California prisoner, yearly.”<sup>19</sup> These costs are even greater for elderly inmates, who require increased medical assistance.<sup>20</sup> This translates into savings of hundreds of thousands of dollars per inmate when inmates are released early, as reform initiatives can reduce sentences by five to ten years or more.<sup>21</sup>

While the cost savings are clear, other benefits and risks of the reforms are undetermined. Second chance reforms might enhance public safety, by increasing successful reentry and rehabilitation, or decrease public safety by undermining deterrence or reducing the incapacitative effect of incarceration.<sup>22</sup> Additionally, second chance reforms might offer economic and civic benefits to the broader community, by increasing employment post-incarceration and bringing

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<sup>13</sup>Chien, *supra* note 1, at 519.

<sup>14</sup>Chien, *supra* note 1, at 567–89.

<sup>15</sup>Chien, *supra* note 1, at 531–34.

<sup>16</sup>Chien, *supra* note 1, at 531–32.

<sup>17</sup>Chien, *supra* note 1, at 534.

<sup>18</sup>Chien, *supra* note 1, at 535.

<sup>19</sup>Chien, *supra* note 1, at 535.

<sup>20</sup>Chien, *supra* note 1, at 536.

<sup>21</sup>Chien, *supra* note 1, at 535–36.

<sup>22</sup>Chien, *supra* note 1, at 536–39.

voters back into civic participation.<sup>23</sup> Thus far, Chien summarizes, there is no clear sign of decreased public safety as a result of second chance opportunities.<sup>24</sup> There is some evidence of increased employment, although these data come from small studies.<sup>25</sup> Evidence of increased civic participation (such as voting) is limited; it is hypothesized that this is due to a lack of publicity or understanding about the opportunity to have voting rights restored.<sup>26</sup> In all, although the record regarding these benefits is uncertain, they lean towards suggesting that the reforms help rather than harm public interests.<sup>27</sup>

One reason that evidence of the overall effect of second chance reforms is limited is underutilization of these reforms, and it is to this issue that Chien turns next.<sup>28</sup> This underutilization of second chance reforms is what Chien refers to as “the second chance gap”—“the difference between the apparent eligibility and delivery of a particular second chance in accordance with the law.”<sup>29</sup> In other words, it is the number of people who are legally eligible for relief under second chance legislation, but for one reason or another do not get that relief.<sup>30</sup> There are many reasons that individuals may miss these opportunities, from a lack of education, to vague standards and reluctant judges, to structural barriers such as a lack of funds to pursue expensive administrative processes, or debt accumulated in connection with the criminal justice process (such as fines and court fees).<sup>31</sup> Overall, as Chien shows, second chance reforms are underutilized to a shocking degree.<sup>32</sup>

In order to estimate just how utilized or underutilized these reforms are, Chien looks to already existing expert data, as well as performing her own original research.<sup>33</sup> Many states and the federal government have already performed research in this area, estimating the number of individuals who should qualify for relief under second chance reforms and stating how many have actually obtained that

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<sup>23</sup>Chien, *supra* note 1, at 538.

<sup>24</sup>Chien, *supra* note 1, at 538.

<sup>25</sup>Chien, *supra* note 1, at 538–39.

<sup>26</sup>Chien, *supra* note 1, at 539.

<sup>27</sup>Chien, *supra* note 1, at 538–39.

<sup>28</sup>Chien, *supra* note 1, at 539.

<sup>29</sup>Chien, *supra* note 1, at 539.

<sup>30</sup>Chien, *supra* note 1, at 539, 541–42.

<sup>31</sup>Chien, *supra* note 1, at 539–40.

<sup>32</sup>Chien, *supra* note 1, at 545–61.

<sup>33</sup>Chien, *supra* note 1, at 544.

relief, and it is this expert data that Chien relies on for her analysis.<sup>34</sup> In the area of conviction expungement data and employability, Chien supplements this expert data with original research based on data provided by background check services (which are often used by potential employers).<sup>35</sup>

The numbers Chien presents are astounding. She begins with a summary of the analysis of the 2014 Clemency Initiative, performed by the U.S. Sentencing Commission, which shows that only fifty-four to ninety-two of 2,687 offenders eligible for relief, a total of only 3% to 5%, have actually received relief.<sup>36</sup> Worse, of the approximately 50,000 elderly inmates in the federal criminal justice system who might be entitled to “compassionate release” that year, only 296 applied, and only two were released.<sup>37</sup> In California, legislation passed recently to allow certain offenders to reclassify felony convictions for low level, nonviolent crimes such as shoplifting, as misdemeanors, and to have their sentences reduced.<sup>38</sup> This legislation potentially applies to two million Californians, according to data provided by the Los Angeles Public Defender’s Prop 47 Task Force.<sup>39</sup> Yet, across two separate reform statutes applying at least to hundreds of thousands if not millions of Californians, only 3% to 9% of eligible persons applied for relief.<sup>40</sup> Similarly, of the twelve states that require an application in order to restore voting rights to persons formerly incarcerated for felonies, only four have restored voting rights to more than 10% of eligible persons.<sup>41</sup> Of those four, only Iowa has restored voting rights to a majority of eligible persons (83%).<sup>42</sup> Among the other eight, three have not restored voting rights to any eligible persons, and the rest have restored voting rights to between one and six percent.<sup>43</sup>

From release and sentence reductions, Chien moves on to the question of mass criminalization, and the long term repercussions of conviction and even arrest records.<sup>44</sup> Chien points out that some of the most well-known collateral consequences associated with criminal convictions, the hurdles a record creates for obtaining

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<sup>34</sup>Chien, *supra* note 1, at 544.

<sup>35</sup>Chien, *supra* note 1, at 544.

<sup>36</sup>Chien, *supra* note 1, at 545–46.

<sup>37</sup>Chien, *supra* note 1, at 547.

<sup>38</sup>Chien, *supra* note 1, at 548.

<sup>39</sup>Chien, *supra* note 1, at 548.

<sup>40</sup>Chien, *supra* note 1, at 548–49.

<sup>41</sup>Chien, *supra* note 1, at 552.

<sup>42</sup>Chien, *supra* note 1, at 552.

<sup>43</sup>Chien, *supra* note 1, at 552.

<sup>44</sup>Chien, *supra* note 1, at 553.

employment, as well as immigration and housing hurdles, may all be implicated by records of very low level criminal activity, and even without conviction.<sup>45</sup> Because arrest records may be broadly available to background check companies, and because these companies are widely relied upon, arrest records alone may lead to these same consequences.<sup>46</sup>

While most states offer opportunities to expunge criminal records, once again the gaps in utilization of these opportunities are huge.<sup>47</sup> Most states appear to have successfully expunged fewer than 10% of eligible records, accounting for millions of people living in the expungement gap.<sup>48</sup> In fact, even in Rhode Island, Iowa, and Oregon, which have the smallest gaps, only 25 to 30% of records have been expunged, leaving over 300,000 eligible people in the gap in *each state*. The gaps in New York (99%) and Washington (97%) account for more than a million people in each state, and, as noted before, the gap in California (92–95%) encompasses over two million people.<sup>49</sup>

The above numbers refer to convictions, which create records, and Chien obtained them in reliance on court records.<sup>50</sup> However, arrest records in situations that did not lead to a conviction can be more difficult to research and more difficult to expunge.<sup>51</sup> In order to create an estimate of the number of individuals who could have their non-conviction criminal records expunged but have not, Chien worked with a background check company to create a dataset of 60,000 job seekers and their criminal histories.<sup>52</sup> She then analyzed these records in relation to the laws of the individuals' states in order to determine whether those records should be clearable.<sup>53</sup> The results varied widely, in part because states have widely varying statutes as to records clearance; a state might have a very small gap in records clearance either because it is very generous and active in clearing records or because its laws are extremely rigid so that very few individuals qualify to have their records cleared.<sup>54</sup> Nationwide, Chien found a total gap of 35%, or 28 million individuals

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<sup>45</sup>Chien, *supra* note 1, at 553.

<sup>46</sup>Chien, *supra* note 1, at 553.

<sup>47</sup>Chien, *supra* note 1, at 555–56.

<sup>48</sup>Chien, *supra* note 1, at 555–56.

<sup>49</sup>Chien, *supra* note 1, at 555–56.

<sup>50</sup>Chien, *supra* note 1, at 555.

<sup>51</sup>Chien, *supra* note 1, at 558.

<sup>52</sup>Chien, *supra* note 1, at 559.

<sup>53</sup>Chien, *supra* note 1, at 560.

<sup>54</sup>Chien, *supra* note 1, at 561.

who legally could have their non-conviction criminal records cleared, but had not done so.<sup>55</sup>

Why are so few qualified individuals successfully taking advantage of these legislative reforms? Chien offers several contributing factors. One factor is the vagueness of statutes and breadth of discretion offered to decisionmakers under some statutes.<sup>56</sup> Decentralized staff, such as in the case of the Clemency Initiative, or a lack of guidance and reliance on individual counties to institute their own policies can create not only an inconsistent application, but an inefficient one, as applicants are uncertain about the proper path to success.<sup>57</sup> Another factor is the difficulty of verifying eligibility.<sup>58</sup> Questions such as whether someone has reoffended in any way require a way to check that person's record across the state.<sup>59</sup> Only eighteen states are capable of this, as it requires using a state identification number consistently.<sup>60</sup> And of course, the cost of pursuing second-chance opportunities creates another barrier to full implementation.<sup>61</sup> Chien cites research suggesting that the cost of preparing an application can be thousands of dollars.<sup>62</sup> Applicants may also have accumulated debt over the course of their cases, including court fees, fines, and restitution, and many statutes foreclose second-chance opportunities to applicants until those debts are paid.<sup>63</sup> These costs can be insurmountable to many potential applicants, and can exacerbate disparities in the criminal justice system in direct contradiction of the purposes of second-chance legislation.<sup>64</sup>

Chien offers several solutions to these problems. The most obvious answer to the financial burdens of court costs and application costs is to waive those fees.<sup>65</sup> But to resolve the problem of the costs of the application itself, Chien recommends automation.<sup>66</sup> Automating the process of clearing records can lower costs through

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<sup>55</sup>Chien, *supra* note 1, at 562.

<sup>56</sup>Chien, *supra* note 1, at 572.

<sup>57</sup>Chien, *supra* note 1, at 572.

<sup>58</sup>Chien, *supra* note 1, at 567.

<sup>59</sup>Chien, *supra* note 1, at 567.

<sup>60</sup>Chien, *supra* note 1, at 567.

<sup>61</sup>Chien, *supra* note 1, at 574–75.

<sup>62</sup>Chien, *supra* note 1, at 574.

<sup>63</sup>Chien, *supra* note 1, at 576–77.

<sup>64</sup>Chien, *supra* note 1, at 576–77.

<sup>65</sup>Chien, *supra* note 1, at 577.

<sup>66</sup>Chien, *supra* note 1, at 575.



scaling, arguably from over \$3,000 to under \$3.<sup>67</sup> Moreover, total automation of the process (automatic expungement or automatic voting restoration) avoids relying on any action from courts, which should reduce the inconsistencies associated with discretion and court evaluations.<sup>68</sup>

To further reduce problems of vagueness and inconsistent application, Chien recommends a strategy of “ruthless iteration.”<sup>69</sup> It should be expected, she argues, that statutes will have to be written and rewritten, with the specific input of those individuals most likely to be involved in implementing the statutes.<sup>70</sup> Only repeated efforts to simplify and clarify the criteria to qualify for second-chance relief can offer a path to successful implementation of what often begins as highly complex legislation.<sup>71</sup>

But one of Chien’s most important insights may be the particular problems caused by the combination of the permanence of the internet, and the catch-22 of trying to expunge a record that did not end in a conviction.<sup>72</sup> It is a popular joke about modern everyday life that “the internet never forgets,”<sup>73</sup> but Chien shows that the results of this permanence can nullify the best efforts of legislators.<sup>74</sup> Background check and “people search” organizations seize crime-related data from early in the criminal process (such as mug shot photos, and arrest records), make that information available to the public, and are unlikely to erase that data if charges are dropped.<sup>75</sup> The use of non-conviction and non-acquittal resolutions to charges, such as no-contest pleas or dismissal for failure to pursue a conviction, may be recorded in legalese (or Latin) that most non-lawyer readers do not understand.<sup>76</sup> Employers and landlords who rely heavily on these services may not distinguish between an arrest that is never pursued and an arrest that ends in conviction.<sup>77</sup> While a conviction may be expunged, an arrest that shows no final resolution remains in background checks and continues to plague job and

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<sup>67</sup>Chien, *supra* note 1, at 575.

<sup>68</sup>Chien, *supra* note 1, at 574.

<sup>69</sup>Chien, *supra* note 1, at 567.

<sup>70</sup>Chien, *supra* note 1, at 567–69.

<sup>71</sup>Chien, *supra* note 1, at 569–70.

<sup>72</sup>Chien, *supra* note 1, at 580–83.

<sup>73</sup>*The Internet Never Forgets*, SCI. AM. (Aug. 18, 2008), <https://www.scientificamerican.com/article/the-internet-never-forgets/>; May Crockett, *The Internet (Never) Forgets*, 19 SMU SCI. & TECH. L. REV. 151 (2016).

<sup>74</sup>Chien, *supra* note 1, at 580–83.

<sup>75</sup>Chien, *supra* note 1, at 580–82.

<sup>76</sup>Chien, *supra* note 1, at 582.

<sup>77</sup>Chien, *supra* note 1, at 582.

housing applicants.<sup>78</sup> Chien refers to this problem as “punishing innocence,” and notes that “[a]mong the over half a million charges reviewed in [Chien’s] analysis of background checks . . . only about 40% included a definitive record of conviction.”<sup>79</sup> Moreover, these results are racially lopsided due to racial disparities in arrest rates.<sup>80</sup>

To rectify these problems, Chien looks in part to Europe’s “right to be forgotten” and argues that laws are needed to facilitate updating public databases and punish organizations that continue to publish outdated information.<sup>81</sup> She also recommends automatic expungement of arrests that do not result in conviction.<sup>82</sup>

### III. CONCLUSION

Chien offers an important reminder that the administrative details of legislation can make or break its success.<sup>83</sup> Her work is also an important reminder of the ways that criminal justice involvement, even without conviction, can permanently change an individual’s life, and that activists endeavoring to create exits from the collateral consequences of conviction must not forget the collateral consequences of arrests.<sup>84</sup> Her overview of the state of criminal justice reform efforts is a useful and eye-opening addition to the literature, and should be carefully considered by those seeking to change the system.

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<sup>78</sup>Chien, *supra* note 1, at 582.

<sup>79</sup>Chien, *supra* note 1, at 581–82.

<sup>80</sup>Chien, *supra* note 1, at 582.

<sup>81</sup>Chien, *supra* note 1, at 580.

<sup>82</sup>Chien, *supra* note 1, at 583.

<sup>83</sup>*E.g.*, Chien, *supra* note 1, at 573 (discussing the differences between Vermont’s gap and Alaska’s and relating it to small differences in drafting or implementation).

<sup>84</sup>Chien, *supra* note 1, at 580–83.