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Regulating Harm: Tensions Between Data Privacy and Data Transparency

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ABSTRACT

In an era of massive digital data growth, data storage and dissemination has posed complex new problems for privacy regulations across agencies and institutions on a global scale. Laws about data privacy vary substantially by country, by state, and by industry. In formulating these policies, there exists a fundamental tension between a desire for data privacy and one for data transparency. This tension becomes particularly acute as new digital tools and access technologies have made these records more accessible and connectable than ever before. This tension is borne out in the enactment of law. Three states – California, Colorado, and Virginia – for example, have enacted comprehensive consumer data privacy acts, giving individuals the right to opt out of data collection and/or providing guidelines for what and how businesses can collect and disseminate consumer information. In some contexts and jurisdictions, such as these, data privacy seems to be an uncontroversial imperative. However, in others, the imperative swings the other direction, protecting public data access.

An especially salient site of analysis for this debate is criminal records. Criminal records are not just relevant in court, though the issue of data transparency vs. privacy is particularly acute for court derivative records; these records also follow individuals outside of court and create significant obstacles for entry into employment, education, housing, and other elements of social life. Public criminal records can substantially impact an individual's life well beyond the scope of the criminal proceeding, making a compelling normative case for keeping them private. While criminal records can be individually damaging, a closed system of court data also prevents transparent knowledge of policies and disparities. Private criminal records and court documents can substantially hinder evaluating systemic issues in the courts as a whole, making a compelling case for making criminal record data public. However, once records are public, they are more difficult to control and therefore consequences of public records are the

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ability of the public to use them for individual decision-making, use them for potentially discriminatory policy making, and to use them for commercial gain. The relationship between equity issues in the courts and data privacy is far from simple.

In this article we examine this tension between privacy and transparency and its consequences in several different contexts, taking criminal courts as a case study as an institution where the tension is not unique but heightened. We consider the use of criminal records as elements of a transparent court process; as tests for obtaining employment, education, or housing; and finally, the commercialization of criminal records themselves in a burgeoning terrain of digital companies providing mugshots and criminal records, connecting our criminal case study to other industries. We consider each of these three domains, laying out the universe of data privacy tensions and data transparency arguments to create a nuanced picture of how data privacy regulation interacts with public access. We conclude with recommendations, grounded in knowledge about innovative data techniques and data ethics, designed to help alleviate the tension between data privacy and data transparency.

I. INTRODUCTION

The world's capacity to store, communicate, and compute information have been increasing exponentially since the 1980s, ushering in not just a new digital age, but also a new digital data reality.² This new digital data reality consists of collecting, storing, and sharing huge swaths of data about everything from individual decisions to system outcomes. Data can be packaged covertly or overtly in both formal and informal spaces. That is, the consequences of a new digital data reality are not constrained to obvious online spaces, this new emphasis on data is everywhere.³ This new data connectedness, again spurred by the capacities of data digitization and increased data gathering capacity, brings with it new opportunities and new problems. Creators and archivers of data are then left to contend with new problems, often without sufficient systems to do so. In this article we analyze one such system, the United States criminal legal system, and consider the types of problems and potential harms that must be dealt with.

The court system in the United States creates a huge amount of data every year. This data has particular legal requirements for data

² Martin Hilbert & Priscila López, *The World's Technological Capacity to Store, Communicate, and Compute Information*, 332 SCIENCE 60, 60, 64 (2011).

³ Matthew J. Salganik, BIT BY BIT: SOCIAL RESEARCH IN THE DIGITAL AGE 3 (2019).

records themselves to be accessible to the general public and the courts prescribe potential consequences to the individuals described by them.⁴ To consider the magnitude of this problem we can think about how much legal data is being created each year. More than 100 million legal cases are filed each year in state trial courts alone, and all of those legal cases have potential to become substantial and complex data records.⁵ Each case has a multitude of attendant documents from charges and initial filings to motions and transcripts produced along the way. Furthermore, when jurisdictions collect socio-demographic information about parties or statistics about types of cases or time to disposition, these cases generate that data as well. The courts must not merely receive these cases and create data about them via legal processes, but they must also develop systems and processes for storing, disseminating, and protecting that data, considerations that can be difficult and expensive. Furthermore, the courts and legislators are tasked with developing formalized systems to address these needs, considering how this data can be stored and who can access it and when and how. This creates compounding problems as previously uncollectable, unconnectable, and non-monetizable information becomes a type of capital in the new data economy.

We therefore find ourselves in the midst of a substantial legal and social problem. The courts now have to regulate data, both their own and data from other sources, but they have never had to do so on this quickly compounding scale. Courts are creating regulations around not just ‘data’ in its purest form, but also are generating law that affects the subjects of those data. This adds a human dimension to the data regulation problem, where courts have to balance legal entitlement to data access with the well-being of individuals who may be unwilling or even unknowing subjects of a rich data record. Functionally, this creates many decisions for courts to make about data access versus data privacy. In this article we operationalize this as the tension between data privacy and data transparency.

We begin our analysis by more tangibly defining ‘data’ and data-related harms. We then turn our attention to the tensions between data protection and data transparency as defined and codified in U.S. law. In order to illustrate the nuances of what we argue is a seemingly unresolvable tension between data privacy and data transparency we

⁴ See generally *Associated Press v. United States Dist. Court*, 705 F. 2d 1143 (9th Cir. 1983) (holding that the First Amendment right of access required the court to provide pretrial records as an extension to the actual records themselves from previous cases that focused explicitly on the public right to view legal proceedings).

⁵ Quality Judges Initiative, *FAQs: Judges in the United States*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf.

use criminal records as a case study to analyze public criminal records as court transparency, public criminal records as continued punishment, and the commercialization of public criminal records. We then conclude with a broader discussion about how to regulate harm in the larger universe of data protection v. data transparency.

II. DATA HARM AND COMMODIFICATION

It is useful to begin with a discussion of how we are thinking about data harms as to more thoroughly conceptualize the scope of the argument to follow. Here we apply a broader definition of data harm, moving away from a commonly-held presumption that data is necessarily simply a two-dimensional categorization of numbers stored in flat files. This conceptualization of data is too static and presumes that the spreadsheet-style data produced by institutions represent an underlying truth. Instead, we embrace the relational and discursive nature of data, considering instead that data "...do not have truth-value in and of themselves, nor can they be seen as straightforward representations of given phenomena."⁶ Rather, they are fungible objects defined by their portability and prospective usefulness as evidence. As such, in the argument to follow we do two things. First, we consider what the data produced by the courts actually represents. Second, we center the experiences of individuals that are attached to data and data observations, with particular emphasis on what happens after the data record is created and shared.⁷

These considerations become more salient when considering the universe of data stakeholders who may rely on data produced by courts. Court data does not only exist for the utility of the courts, instead it is uniquely public and therefore has significant applications outside the courtroom. For example, when ex-offenders seek employment, their prospects are affected by whether or not employers have access to their criminal records.⁸ In this way, it is not simply the record itself that changes future outcomes, but also the relative accessibility of that record. In this way, data regulation becomes a key shaper of employment, education, and housing decisions. This universe of stakeholders expands further upon the revelation that much of court data is public, therefore any member of the public is theoretically able to use it for whatever they wish. This may seem hyperbolic, but it must be considered through the lens of the current digital data reality where

⁶ Sabina Leonelli, *What Counts as Scientific Data? A Relational Framework*, 82 *PHILOSOPHY OF SCIENCE* 810, 810 (2015).

⁷ Tanya Luhrmann, *What Counts as Data*, *EMOTIONS IN THE FIELD: THE PSYCHOLOGY AND ANTHROPOLOGY OF FIELDWORK EXPERIENCE* 212, 213-14 (2010).

⁸ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 349 (2009).

“a critical element of the transformative power of digital technologies is their rising capacity to datafy all aspects of life on this planet.”⁹

Who actually “owns” data is an open question. As lines between data volunteering and data surveillance have become societally blurred, data itself has also become a commodity.¹⁰ Scholars point to this commodification as a problem of social inequality, drawing parallels to colonial projects of dispossession where the individual is essentially resource mined for their data.¹¹ Importantly, this data colonization mirrors many systems of oppression and inequality, having implications for the general well-being of individuals and, in some cases, the preservation of their human rights.¹² Where this leaves us, then, is in a new data reality where data broadly construed have far reaching consequences and uses and where virtually everyone has the potential to become a data stakeholder, sometimes in ways that threaten the safety or autonomy of others.

III. TENSIONS BETWEEN DATA PROTECTION AND DATA TRANSPARENCY

Before we look specifically at our criminal records case study, we want to consider the theoretical problem at the heart of this paper first. As we will show, there are a number of harms that can plausibly spring from complete transparency of criminal records. This may seem as though there is an impetus toward data privacy undergirding this work. However, as we will discuss in this section, these records are, in fact, constitutionally public and what is ultimately at stake is how to do data transparency in a way that is productive, ethical, and fair.

⁹ F. Xavier Olleros and Majlinda Zhegu, *RESEARCH HANDBOOK ON DIGITAL TRANSFORMATIONS* (2016).

¹⁰ See Kat Albrecht & Brian Citro, *Data Control and Surveillance in the Global TB Response: A Human Rights Analysis*, 2 *LAW, TECH. & HUM.* 107, 110 (2020) (discussing how data becomes commodified through systems of data surveillance that are not truly voluntary, since agreeing to share data is often necessary to procure medical treatment or maintain liberty concerning tuberculosis treatment). See also Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 *HARV. L. REV.* 1880 (2012) (discussing the complex issues of data consent, voluntarily releasing data, data sales and surveillance and the current regulatory framework that exists to protect - or not - individuals in the era of digital data consumption and dissemination).

¹¹ Jim Thatcher, David O’Sullivan & Dillon Mahmoudi, *Data Colonialism through Accumulation by Dispossession: New Metaphors for Daily Data*, 34 *ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE* 990, 1000 (2016); Nick Couldry and Ulises A. Mejias, *Data Colonialism: Rethinking Big Data’s Relation to the Contemporary Subject*, 20 *TELEVISION & NEW MEDIA* 336, 336 (2019).

¹² See generally Albrecht & Citro, *supra* note 10 (arguing that data dispossession of medical health data surrounding tuberculosis via new digital surveillance technologies specifically endangers human rights to health, privacy, freedom from discrimination, and the right to liberty and security of person).

Others have written on a vast array of potential issues with mass publication of court records, particularly in civil courts.¹³ These considerations include, as benefits: reduction of corruption, enhanced legislative control over the courts, democratization of the law, prediction of litigation outcomes, enhancement of the information infrastructure, reduction of lawyer and litigant error, and automation of document service and file maintenance.¹⁴ Costs considered are financial cost, privacy, judicial independence, loss of protection of lawyers' work product, and flight to private adjudication.¹⁵ For our purposes, we focus on the benefits of transparency and potential costs of privacy in particular, in the criminal court setting, because, we argue, that is where the fundamental action is in terms of ultimately making regulatory decisions.

In order to understand the broad stakes of data regulation, we want to walk through the tension at the heart of this paper: the functionally dichotomous ideological positionings of data privacy and data transparency. In order to understand that tension, we will describe each position and their stakes. First, we take data privacy, looking at what it means, the legal protections and standards available, current open legal issues, and an analysis of jurisdictional variation. Second, we do the same for the concept of data transparency. Finally, we take up the idea of the tension between the positions, navigating the substantive and financial costs of creating real public access for theoretically public court documents.

A. Data Privacy

Court records contain personal information. Specifically, they contain highly personal and sensitive information. In the case of criminal records, this is information that can often be used to cause personal reputational harm.¹⁶ The stigma associated with criminal proceedings can be potentially harmful socially for defendants or victims. We know that data has been used to discriminate against certain groups of people in obtaining credit, employment, and

¹³ See generally Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009) (exploring the costs and benefits of mass data extraction from electronic court records, ultimately arguing that the cumulative potential benefits of widely public records outweigh the cumulative potential costs).

¹⁴ *Id.* at 494-513.

¹⁵ *Id.* at 513-537.

¹⁶ LoPucki, *supra* note 13, at 516. LoPucki discusses the privacy issue in civil courts as "reputational data" whereby the data that could be released with mass publication offers complex issues of personal reputation information. This issue is potentially compounded in criminal cases.

housing.¹⁷ We will explore this concern in more depth throughout this article.

Courts and legislators are increasingly protecting digital data privacy particularly against use and misuse by the government. The Supreme Court of the United States has, for example, limited the government's ability to track cell phone data in criminal cases.¹⁸ States such as California, Colorado, and Virginia have passed laws that regulate the types of digital data private companies are permitted to store and sell.¹⁹ The California Consumer Privacy Act, for example, grants California residents the right of notice with respect to what personal information – information that can be reasonably linked to the resident or their household – businesses are collecting and what they are doing with that collection.²⁰ Although the idea of data privacy generally is an ongoing issue in the United States legal system whereby the courts and the legislators are concerned with specifically regulating the use and distribution of data, these state consumer protection statutes do provide some insight into ways in which the law can be nimble with respect to data protection.

The specific issue of privacy in court data has been more narrow. The Federal Rules of Civil Procedure delineate what pieces of sensitive personally identifying info must be redacted from public federal court records in civil cases.²¹ Beyond this, the Courts offer a set of privacy policies for redaction.²² But the broad positioning of the Courts, for reasons we will discuss in the next section, is not to intentionally or specifically limit the publication of court documents. However, as these attempts at limitation illustrate, there exist reasonable normative concerns that suggest a desire to protect court data. Affiliation with court processes can be stigmatizing and court records can contain personal and financial information.

B. Data Transparency

¹⁷ Albrecht & Citro, *supra* note 10, at 108.

¹⁸ *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding that the Fourth Amendment privacy interests from *Katz v. United States* also applies to cell phone location records).

¹⁹ California Consumer Privacy Act, 2018 CAL. LEGIS. SERV. Ch. 55 (A.B. 375) (West 2018); Colorado Privacy Act, 2021 COLO. LEGIS. SERV. Ch. 483 (S.B. 21-190) (West 2021); Virginia Consumer Data Protection Act, 2021 VA. LEGIS. SERV. Ch. 36 (S.B. 1392).

²⁰ California Consumer Privacy Act (A.B. 375). The California Consumer Privacy Act also prohibits businesses from discriminating against consumers for exercising the rights delineated under the bill.

²¹ Fed. R. Civ. P. 5.2 (containing the redaction rules).

²² United States Courts, *Privacy Policy for Electronic Case Files*, U.S. Courts Rules & Policies (Mar. 2008), <https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files> (last visited Mar. 10, 2022).

Compared to the legal history of how the courts deal with data, particularly digital data, the legal history of the nature of public records goes deeper. The Supreme Court held very unambiguously in 1947 that, “A trial is a public event. What transpires in the court room [sic] is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”²³ Court records are unambiguously public records and unambiguously publishable. Further, the Supreme Court held here that defendants are equally able to obtain and publish court records.²⁴

The Supreme Court has frequently reaffirmed this stance with respect to the press. In 1980, the Court returned to the 1565 writings of Sir Thomas Smith to affirm that the definitive feature in criminal cases is and always has been that they are public – and, furthermore, put in writing publicly.²⁵ In 1982, the Court held that the testimony of a minor victim in a sex-offense trial was not a sufficiently compelling government interest to allow for closure of the courts to the press during a criminal trial because the sensitive data in question, the minor’s name in relation to the case, was already a matter of public record.²⁶ Although all of these cases pertain to the press, in each, the press’s right of access is because of their function as an arm of the public. That is, each of these cases affirms the public nature of criminal proceedings even as they begin to show some of the risks attendant to public records.

C. Fundamental Tension and Costs Between Protection and Transparency

As we lay out in this section, the law is an open terrain with respect to the regulation of court documents. Although the proceedings and records themselves are definitively public, we can see that there are certain risks to their publicity: interaction with the courts involves a great deal of sensitive and potentially stigmatizing information becoming public.

²³ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

²⁴ *Id.*

²⁵ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 566 (1980) (holding that the right of the press and the public to attend criminal trials was a guaranteed Constitutional right).

²⁶ *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 610-11 (1982).

Finally, we want to consider the important consideration of financial cost. Technically, court records are already public and accessible (at least to a certain date) at courthouses and are managed by the clerk.²⁷ We consider, however, potential costs to free, permanent digital public access. Costs to the courts from a full-scale move to public digital data could be potentially substantial if difficult to definitively establish.²⁸ However, the bulk of this cost would be a one-time upstart cost that pales in comparison to the current substantial, ongoing, repetitive costs to the public.²⁹ Currently, we argue, the courts pass that cost onto the public on an ongoing basis: either through direct charge through the clerk's office or indirect charge using third-party court document management services. One well-known direct court document management service is, of course, the Public Access to Court Electronic Records service (PACER). At the time of this writing, PACER charges \$0.10 per page for documents, search results, reports, and transcripts or \$2.40 per audio file.³⁰ Beyond PACER, the cost of and process for obtaining criminal court records is highly variable across the United States.

Furthermore, unlike the transition to public digital archiving, the current costs to the public for records are ongoing. The cost of a record can be expensive, particularly, as discussed, with transcripts which can be lengthy and entirely lacking in fee caps. It is worth mentioning that this fee is not a one-time fee that makes that record public to everyone, even though the work of digitizing the record may have been done: this fee is a cost per user whereby any time any individual or organization wishes to obtain that document, they too have to pay for access. Not only is the cost of records management being transferred to the public, it is being done on a potentially repetitive basis: record access could be an ongoing cost for individuals rather than institutions. As we discuss in the next section, this cost barrier works to implicitly define who is able to access this public data.

IV. CASE STUDY: CRIMINAL RECORDS

²⁷ Courts vary in their preservation of documents – many only keep them up to a certain date and preservation is not often a driving goal of the courts: documents get destroyed both incidentally and intentionally.

²⁸ Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 514-15 (2009); See Smithsonian Institution Archives, *Digital Preservation Challenges and Solutions*, <https://siarchives.si.edu/what-we-do/digital-curation/digital-preservation-challenges-and-solutions> (delineating challenges beyond cost).

²⁹ See *Id.* (arguing that much of the financial cost to the courts would be in “research design time”).

³⁰ Public Access to Court Electronic Records, *Pacer Pricing: How Fees Work*, <https://pacer.uscourts.gov/pacer-pricing-how-fees-work> (last visited Mar. 10, 2022). Documents (such as dockets, motions, orders, judgments, or briefs) have a maximum charge of \$3 per document. There is no such cap for search results, reports, or transcripts.

In order to demonstrate exactly how this seemingly unresolvable normative tension between data privacy and data transparency operates in society, we turn to a specific case study of the function of criminal records. Criminal records are a particularly appealing record source for this analysis because they are created and regulated by the courts but are also some of the most broadly accessible types of court records in large numbers. Though the exact number does vary from year to year, there are around 10 million arrests each year in the United States.³¹ Each arrest is an initial contact with the justice system that initiates a data record that will follow arrestees through courts, carceral institutions, and back into society.³² Research has also found that these particular records have significant impacts on ex-offenders. In particular, scholars find that there exists a “mark of violence” whereby the public erroneously believes that ex-offenders with violent criminal records are more likely to commit future crimes.³³ Not only is this perception inconsistent with existing data about recidivism, it also serves as a cultural rationale for excluding these individuals from pro-social opportunities that actually lessen recidivism.³⁴ Confronted with this reality, we consider the origins of criminal records before looking at three specific contextual examples that illuminates the transparency vs. privacy debate.

A. Purposes of Criminal Punishment and Applications to Criminal Records

Because our case study involves questions of punishment and the extent to which punishment pervades within the criminal legal data framework, we begin first by briefly examining theories of criminal punishment and the related use of criminal records. We use here the 5-part framework proposed by Cyndi Banks, which considers five theories of punishment.³⁵ We will consider them in the order proposed by Banks: deterrence, retribution, rehabilitation, incapacitation, and

³¹ See Office of Juvenile Justice and Delinquency Prevention, *U.S. Department of Justice Programs Statistical Briefing Book*, available at https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2 (last visited Mar. 10, 2022) (Explaining that the number of arrests has decreased from a peak of ~14 million arrests per year in 1990, but has remained between 11 and 10 million since 2015).

³² *Id.*

³³ Megan Denver, Justin T. Pickett, and Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 *CRIMINOLOGY* 664, 671 (2017).

³⁴ *Id.* at 664, 672.

³⁵ See generally Cyndi Banks, *CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE* (5th ed. 2018), 103-20 (describing these five rationales for punishment in detail).

restorative justice.³⁶ Finally, we consider how these theories of punishment translate to the criminal records they leave behind. As we move through these theories of punishment, it becomes clear that criminal records can be used to harm individual arrestees/defendants beyond any clear public interest. This will ultimately illustrate a problem with the way that court record transparency currently does operate.

1. Deterrence

Deterrence theories purport that future crime is deterred due to expectations of punishment for criminal conduct.³⁷ There are three fundamental assumptions in deterrence theory: 1) That future offenders will understand the consequences of a criminal action, 2) that future offenders will internalize those consequences as a threat, and 3) that future offenders will consciously choose to not commit crime because of those consequences.³⁸ Further, deterrence is thought to be most effective when three conditions are maximized. First, criminal sentences must be sufficiently severe so as to constitute a deterrent threat.³⁹ Second, there must be sufficient certainty of being caught so that severe punishment is more likely.⁴⁰ Third, there must be sufficient celerity or swiftness to receive consequences since future consequences are thought to be less effective at deterring crime.⁴¹ The cumulative weight of these assumptions renders deterrence theory practically untenable for most offense types. Theoretically, homicide-types crimes should be easier to deter given increased sentences and increased likelihood of punishment, but studies find no deterrent effects even under threat of the death penalty.⁴² While deterrence theory has been largely discredited by scholars, it continues to be rhetorically popular in American media and criminal justice.⁴³

³⁶ *Id.* We do not use this framework to argue for the exclusion of other rationales proposed by scholars in other venues. Rather, we use Banks' framework to organize some of the most popular rationales and make sense of this substantial terrain in criminal justice and legal studies.

³⁷ *Id.* at 109.

³⁸ Kelli Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33 (2016).

³⁹ Elizabeth Mertz, Lawrence M. Friedman & Stewart Macaulay, *LAW IN ACTION: A SOCIO-LEGAL READER* 397-398 (2007).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Richard Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88, 114 (1986); Ruth Peterson & William Bailey, *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*, 29 CRIMINOLOGY 367, 388 (1991).

⁴³ See generally Travis Pratt, Francis Cullen, Kristie Blevins, Leah Daigle & Tamara Madensen, *The Empirical Status of Deterrence Theory: A Meta-Analysis*,

Applied to public criminal records themselves, deterrence theories would postulate that the harm caused by having a criminal record might deter crime. On the surface, this is quite appealing because it suggests some future-thinking deterrent component in addition to time served in a penal institution that might magnify the deterrent effect. Practically speaking, though, it falls prey to the same unachievable assumptions and unlikely vectors of maximization (severity, certainty, and celerity) as deterrence theory in the classic sense. While criminal records have tangible social consequences, the extent of those consequences may not fully be known to individuals at the time of the criminal incident.⁴⁴ Further, there is no celerity in record-based consequences because they necessarily come after an extended judicial process that may include time served in penal institutions, whereas the rewards from successful criminal activity are more contemporaneous.⁴⁵

2. Retribution

Next, we can consider retribution as a rationale for punishment and its foundations in moral blameworthiness. Essentially, retribution argues that punishment is just because it is deserved.⁴⁶ We can trace theories of retribution back to the moral foundations of law and contemporary discussions of moral blameworthiness.⁴⁷ Criminal law encodes blameworthiness into law via considerations of intent and action (i.e., *mens rea* and *actus reus*). In doing so, they establish a precedent that “justifiable punishment is premised on and proportional

TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367 (2017), (conducting a meta-analysis of 40 scholarly studies of deterrence theory). *See also* Nicholas Goldberg, *We’re Swinging Back Toward ‘Tough-on-Crime’ Before Progressive Reforms Have Had a Chance*, L.A. TIMES (Mar. 3, 2022), <https://www.latimes.com/opinion/story/2022-03-03/progressive-prosecutors-george-gascon-recall> (discussing the cyclical nature of criminal justice policy and notes that despite a recent wave of progressive reforms, there seem to be signs that criminal justice policy are shifting back toward dominant ‘tough on crime’ paradigms that more closely follow the tenants of deterrence theory than their restorative/rehabilitative counterparts).

⁴⁴ *See* J.J. Choi, Jung Jin, Diane L. Green, and Michael J. Gilbert, *Putting a Human Face on Crimes: A Qualitative Study on Restorative Justice Processes for Youths*, 28 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL 335, 377 (2011), (discussing empirical findings demonstrating that youthful offenders did not fully understand the consequences of what seemed like small criminal actions until engaging in victim mediation, something certainly not under the purview of deterrence theory).

⁴⁵ Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. OF ECONOMIC PERSPECTIVES 25, 25 (1996).

⁴⁶ *See generally*, Banks, *supra* note 33 (examining ethical issues in practice and theory in the criminal justice system).

⁴⁷ *See generally*, Danielle Allen, THE WORLD OF PROMETHEUS (2000), (arguing that retribution formed a primary motivation and justification behind prosecution in ancient Athens).

to moral guilt.”⁴⁸ Thus, a substantial prison sentence is retribution for substantially immoral actions.

These ideas continue to feature in contemporary criminal justice. In a study of vehicular manslaughter, Albrecht and Nadler found that information cues of moral blameworthiness (via drunk driving) prompted substantial increase in suggested punishment without any changes in the level of resultant harm.⁴⁹ This link between morality and punishment serves as a sort of rationale for lengthy criminal sentences.

Using the same retributive orientation, the consequences of public criminal records may themselves be the just consequences of criminal action. However, the punishment born by criminal records is an indeterminate one, since in many cases these records are never expunged or removed. Indeed, this application of retribution varies slightly from the neatness of the penal solution, since individuals with criminal records exist in the same society as those who do not have criminal records. Furthermore, rather than find that the retributive capacity of criminal records serves to reduce future crime, research actually finds that record clearance may actually reduce crime by virtue of successful social integration.⁵⁰ There is then a potential tension between theories of punishment whereby it can be considered *earned* but not necessarily be effective or purposeful.

3. Incapacitation

A third theory of punishment, incapacitation, aims to remove offenders from society for extended periods of time to protect the public and reduce future crime.⁵¹ Theoretically, incapacitation aims to predict future dangerousness and incarcerates only those individuals for long periods. Scholars have expressed skepticism about the general utility of incapacitation, believing it would require huge amounts of

⁴⁸ M. R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 655 (1993).

⁴⁹ See generally, Kat Albrecht and Janice Nadler, *Assigning Punishment: Reader Responses to Crime News* 13 FRONTIERS IN PSYCHOLOGY (2022), <https://www.frontiersin.org/article/10.3389/fpsyg.2022.784428> (creating realistic news vignettes designed to test how the inclusion of additional information—that does not affect the extent of harm caused in the incident - changes amounts of recommended punishment. They find that including moral cues that suggest elevated blameworthiness corresponds with increases in suggested punishment).

⁵⁰ See also, Ericka B. Adams, Elsa Y. Chen, and Rosella Chapman, *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOCIETY 23, 45 (2017), (offering a study that analyzes data gathered from interviews with past offenders to examine record clearance efforts and expectations and the reintegration into society).

⁵¹ Banks, *supra* note 33.

increases to the incarcerated population with little pay-off due to the inherent impossibilities in predicting future dangerousness.⁵² Indeed, attempts to predict future dangerousness have often relied on racism and genetic predeterminism (genetics) to predict dangerousness, whether untaken manually or algorithmically.⁵³

Criminal records themselves can serve to incapacitate ex-offenders, even if they are ultimately released from prison. Americans with criminal records face significant barriers seeking employment, accessing housing, public assistance, education, family services, and establishing credit.⁵⁴ As such, criminal records themselves are drivers of poverty.⁵⁵ But unlike incapacitatory theory in its most ideal form, such incapacitation does not serve to protect the public. Rather it is thought to increase crime due a dearth of legitimate pro-social options for ex-offenders.⁵⁶ That is, as a form of punishment, criminal records do not serve to incapacitate and can, instead, serve the counter-intended purpose of increasing factors that contribute to crime.

4. Rehabilitation and Restorative Justice

Finally, we consider the 4th and 5th theories of punishment, rehabilitation and restorative justice. Rehabilitative theories of justice examine more than just the offense, also taking into account the individual who committed the crime, and their background and circumstances when assigning punishment.⁵⁷ Restorative justice takes these tenants even further by attempting to make society whole,

⁵² See Stevens Clarke, *Getting 'em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime*, 65 J. CRIM. L. AND CRIMINOLOGY 528, 535 (1975), (exploring whether and to what extent, incarceration prevents criminal acts which may have occurred but for the imprisonment of the offender).

⁵³ See generally, Renata M. O'Donnell, *Challenging Racist Predictive Policing Algorithms Under the Equal Protection Clause*, 94 N.Y.U. L. REV. 544 (2019), (discussing how predictive policing algorithms are a violation of the equal protections clause). See also Erica Beecher-Monas and Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW AND CONTEMPORARY PROBLEMS 301 (2006), (discussing in detail the history of eugenics and contemporaneous use of genetic pre-determinism to predict future dangerousness).

⁵⁴ The Sentencing Project, *Americans with Criminal Records*, POVERTY AND OPPORTUNITY PROFILE, 1 <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (last visited Mar. 10, 2022).

⁵⁵ *Id.*

⁵⁶ Megan Denver, Justin T. Pickett, & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 Criminology 664, 672-74 (2017).

⁵⁷ Cyndi Banks, *Criminal Justice Ethics: Theory and Practice* 116 (5th ed. 2018).

including a restoration of the victim, offender, and community.⁵⁸ Both of these theories of punishment share something not seen in the previous three, a desire to reintegrate the offender back into the community. Critics of these approaches express skepticism that the carceral state is interested in or capable of carrying out rehabilitative or restorative justice, a position supported by the historical and continuing functions of the U.S. criminal justice system.⁵⁹

It is difficult to ascertain any rehabilitative or restorative functions of criminal records as they currently stand. While criminal records could theoretically signal increased need and priority for certain social services, they instead serve the opposite function. Instead, criminal records function as a modern day “Scarlet Letter,” stigmatizing and excluding the 77 million Americans who have them from social services, employment, education, and opportunities.⁶⁰ Rather than being a gateway for social reintegration, they are instead a temporally indeterminate obstacle. Scholars find that record clearance directly improves societal reintegration. In their study of criminal records and employment, Adams, Chen, and Chapman find that, “[record clearance] gave them opportunities for employment and helped them once again be productive, “contributing” members of society.”⁶¹ However, even if individuals are able to expunge their criminal record, a number of obstacles remain including the practice of leaving unsealed records with only a notation of expungement, background checks still including the expunged records, failure by commercialized entities to report expungements, and the universe of digital data.⁶²

Importantly, restorative justice does not just seek to vindicate the victim, but also the offender and the community. In this way public criminal records have perhaps their greatest positive utility. Rather than solely being a way to describe the individual offender, they can also be a way of characterizing the criminal justice system itself. Aggregations of individual criminal records can reveal important information about

⁵⁸ *Id.* at 118.

⁵⁹ Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 *Crime and Just.* 299, 314–15 (2013).

⁶⁰ Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 *FORDHAM L. REV.* 2999, 3005 (2015); Chidi Umez & Rebecca Pirius, *Barriers to Work: People with Criminal Records*, National Conference of State Legislatures (Jul. 17, 2018) <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>.

⁶¹ Ericka B. Adams, Elsa Y. Chen, & Rosella Chapman, *Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance*, 19 *Punishment & Society* 32, 46 (2017).

⁶² See generally James B. Jacobs, *THE ETERNAL CRIMINAL RECORD* (2015) (discussing the collateral consequences of criminal records and ways to lessen discrimination toward rehabilitated ex-offenders).

system dysfunction, bias, and inequality that happen within the system that affects individuals and communities. A substantial amount of research has focused on revealing these inequalities, though they are often limited by the ability of research teams to obtain sufficiently nuanced and sizable data.⁶³ The public nature of criminal records makes

⁶³ See generally John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689 (2014) (presenting an overview of implicit bias in the courts and arguing that key decisions of the courts have generated and reified implicit bias and that courts should focus on limiting discretion and focus on disparate impact rather than intent); See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2016) (extending theories of overt racism in Cook County courts with an analysis of how systematic triage - and the consequence of scarce resource allocation - exacerbate and magnify implicit racism); See Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994) (criticizing legal doctrines that accept the inevitability of racism in the justice system and more broadly critiquing the tendency of protective measures to only consider bias directed individual defendants rather than to consider systems of racial bias that permeate all elements of US Criminal Justice); See David R. Johnson & Laurie K. Scheuble, *Gender Bias in the Disposition of Juvenile Court Referrals: The Effects of Time and Location*, 29 CRIMINOLOGY 677 (1991) (considering competing theories of punishment to test how gender discrimination operates in courts. They find support for the theory that female offenders are treated more leniently except for repeat offenders who committed serious offenses.), See Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L. J. 237 (1989) (defining gender bias and presenting a history of gender bias in the courts with the intention of showing how it came to be manifested in courts. The author advocates for gender bias being a permanent item of the judicial reform agenda and for the institutionalization of reforms that have previously been accomplished while still looking toward future decision making), See John M. MacDonald & Meda Chesney-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQUENCY 173 (2001) (presenting an updated analysis of gender bias in courts, focusing on juvenile courts in Hawaii. Their findings confirm previous literature that girls are shown more leniency via informal handling in the beginning of the process, but the authors find that this leniency declines in the dispositional stage), See Brian J. Ostrom & Roger A. Hanson, *Efficiency, Timeliness, and Quality: A New Perspective From Nine State Criminal Trial Courts*, U.S. DEP'T OF JUST. 1, 7 (1999), <https://www.ojp.gov/pdffiles1/nij/178403-1.pdf> (conducting a study of 9 trial court systems to analyze case processing delays and defendant characteristics. The authors illustrate the differences between these systems and argue that courts can be made more efficient via a three-step process of self-diagnosis, communication, and education); See generally Malcolm M. Feeley, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (arguing that the final sanctions handed down by lower criminal courts are a lesser punishment than the lost employment/wages, attorney's fees, time, and anguish experienced by defendants during the entirety of the time spent in the court process. Feeley argues that in this way the court process itself becomes the punishment); See Kat Albrecht, Maria Hawilo, Thomas Geraghty, and Meredith Rountree, *Justice Delayed: The Complex System of Delays in Criminal Court*, LOYOLA L. REV. (2022) (Demonstrating that felony case processing in Cook County functions in such a way that case processing delays become an essential supporting structure of the system itself, arguing that delays contribute to a lock-in system of case processing delay).

more sense in a restorative justice framework, then, because of their utility for understanding the injustices within the system itself.

B. Purposes of Criminal Records

Just as there are many purported justifications for criminal punishment, there are also various rationales or justifications for the production and the dissemination of criminal record data. While we do not claim to analyze all of them here, we turn our attention toward three such justifications that we believe are at the center of the data privacy vs. data transparency debate. Distilled from the theories of punishment discussed above, we name and consider the capacity of public criminal records to be protective tools, punitive tools, and system tools, ultimately rejecting some of these possibilities as not supported by the current uses of criminal record data but considering others as potential goals of data regulation.⁶⁴

In order to explore these possibilities, we also consider three contexts that demonstrate different sides of the transparency vs. protection debate. First, we consider the protective capacity of criminal records via an analysis of criminal record commercialization of mugshots. Second, we consider the capacity of criminal records to be punitive by analyzing their use as a catalyst for continued punishment and social disadvantage. Third, we consider the use of criminal records as a form of system tool to gauge court outcomes and increase justice system transparency. Here, again, we show how data privacy facially appears to be paramount; however, as we will argue, productive, true transparency is ultimately the goal.

1. Protective Tools

Both deterrence and incapacitation theory purport to offer some protective capacity to society. Applying this logic to criminal records, perhaps the existence of a public criminal record might have protective capacity as well. That is, if the public and relevant stakeholders are able to examine criminal records, they may be able to make choices that keep them safer. While perhaps valid on its face, we must consider who uses criminal records to make decisions and how data disclosures themselves relate to public safety.

⁶⁴ Importantly, not all criminal records are public. Notably, juvenile criminal records may be sealed, expunged or otherwise made confidential, but these procedures are not always easy to initiate, and the juvenile ex-offenders may not ever be notified that they have the ability to do so. Anne Teigen, *Automatically Sealing or Expunging Juvenile Records*, 24 NATIONAL CONFERENCE OF STATE LEGISLATORS (Jul. 2016), <https://www.ncsl.org/research/civil-and-criminal-justice/automatically-sealing-or-expunging-juvenile-records.aspx>.

Criminal records are public records, but that does not mean that they are used equally by all members of the general public. They are not equally accessible by all people. Criminal records checks are routinely conducted by social service providers, employers and lenders, but average individuals are substantially less likely to search for criminal records. Researchers using two large public opinion surveys found that 15% of Americans searched online for conviction records in 2018.⁶⁵ These record searches do not give the searchers universal information about crime and safety, rather it gives them information about one particular individual. The piecemeal nature of this search strategy makes it difficult to envision individual criminal records constituting a scalable strategy for public decision making, even if the data you're looking for is both available and accurate.

When data disclosures do exist that are accessible to all members of the community, the utility of that data may be quite limited. For example, in their analysis of The Clery Act, which mandates the disclosure of crime on college campuses, Fisher, Hartman, Cullen and Turner conclude that the act is largely symbolic reform because it is unknown whether or not the data disclosure has had any impact on the actual amount of crime.⁶⁶ In this way, the data disclosure is “doing something” about crime, but may not actually be having the desired effect of making college campuses safer.⁶⁷ What has also been left largely unstudied is the impact that data disclosures about campus crime might have on fear, relative to risk-reduction.⁶⁸ That is, when considering criminal records and criminal data as protective tools, we must also consider the risk and rewards calculus about possibly making people more afraid of something without providing any meaningful reduction to risk of victimization.

As digital criminal records have become more widely used, so has a slate of new entrepreneurial activities that commercialize criminal records. This criminal record industry has continued to grow with limited regulation, in large part due to new possibilities in the digital age.⁶⁹ Scholars find that each year, over 10 million arrests, 4.5 million

⁶⁵ Sarah E. Lageson, Megan Denver, & Justin T. Pickett, *Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views About Publicizing Arrest Records*, 21 PUNISHMENT & SOCIETY 315, 332 (2019).

⁶⁶ Bonnie S. Fisher, Jennifer L. Hartman, Francis T. Cullen, & Michael G. Turner, *Making Campuses Safer For Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 88.

⁶⁷ *Id.*

⁶⁸ Bonnie S. Fisher, *Crime and Fear on Campus*, 539 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 85, 101 (1995).

⁶⁹ Megan C. Kurlychek et al., *Enduring risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007).

mugshots, and 14.7 million court proceedings are released online.⁷⁰ By 2013, there were over 80 websites that used a combination of records requests and automated software to scrape mugshots from local law enforcement websites, hosting them indefinitely and collecting millions of images in these online repositories.⁷¹ While mugshot websites initially made money by charging photo removal fees, they have since transitioned to relying on advertising to turn a profit.⁷² Mugshot photos are available to post because criminal records are public, with many police departments actually posting them on their websites that can be easily scraped by private companies.⁷³ Having a mugshot taken does not mean you were ultimately convicted, meaning that even falsely accused individuals are susceptible to being included on mugshot websites.⁷⁴

Owners of mugshot websites claim to be providing a public service, but there is little evidence to support such an assertion.⁷⁵ Scholars critique the way these websites display information, writing, “It is difficult to imagine how the public is served by providing a conduit through which people may ridicule members of society who have been judged or are awaiting judgment by the criminal justice system.”⁷⁶ These websites offer little in terms of public utility, instead serving as a means of shaming and stigmatizing their subjects.⁷⁷ This is a poignant demonstration of how public criminal records can be co-opted under the guise of information dissemination while having no legitimate protective capacity.

Private company distribution of criminal records is overwhelmingly not supported by most Americans, with only 12% indicating that they support allowing private companies to distribute criminal records.⁷⁸ This high amount of societal consensus presents an

⁷⁰ Sarah E. Lageson et al., *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 L. AND SOCIAL INQUIRY 635, 637 (2021).

⁷¹ Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. R. 557, 566 (2018).

⁷² *Id.* at 567-68.

⁷³ A. Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1323 (2012).

⁷⁴ Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. R. 557, 574 (2018).

⁷⁵ Michael Polatsek, *Extortion through the Public Record: Has the Internet Made Florida's Sunshine Law too Bright*, 66 FLA. L. REV. 913, 918 (2014).

⁷⁶ *Id.* at 919.

⁷⁷ Olivia Solonin, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, THE GUARDIAN (Jun. 12, 2018).

⁷⁸ Sarah E. Lageson et al., *Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views About Publicizing Arrest Records*, 21 PUNISHMENT & SOCIETY 315, 327 (2019).

appealing in-road for regulatory limitations on the commercialization of criminal records. Indeed, scholars have argued directly for courts to consider differentiating between public news dissemination and willingness to remove data for a fee when crafting criminal record regulations.⁷⁹ Scholars have also suggested that a better balance needs to be struck between public access and data protection that more accurately represents legitimate public interest over commercial enterprise.⁸⁰ Clearly, as the current commercialization of criminal records shows, there is absolutely the potential for widespread dissemination of criminal records to cause harm to individuals who have been arrested. However, as we will show, the current nature and contours of the public-ness of this data means that it can *only* be used in this harmful way, negating any aims of productive transparency.

2. Punitive Tools

Taking inspiration from applications of retribution theory, criminal records can themselves act as a continued form of punishment. They do so principally by acting as obstacles that prevent ex-offenders from obtaining social services, employment, education, and housing via social stigma. As we will discuss in this section, numerous studies have found that criminal records pose often insurmountable barriers to finding employment, securing housing, financial security, and procurement of education among other obstacles.

Importantly, criminal records vary from other forms of institutional punishment because they are definitionally permanent unless expunged or cleared.⁸¹ Unlike time served in penal institutions,

⁷⁹ A. Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1334 (2012).

⁸⁰ Sarah E. Lageson et al., *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 L. AND SOCIAL INQUIRY 635, 661 (2021).

⁸¹ For an overview of different empirical studies on the effects of criminal records, see generally Brett Garland, Eric J. Wodahl, and Julie Mayfield, *Prisoner Reentry in a Small Metropolitan Community: Obstacles and Policy Recommendations*, 22 CRIMINAL JUSTICE POLICY REVIEW 90 (2011) (discussing specific consequences experienced by women entering a smaller metropolitan community including housing and employment difficulties); Amanda Agan, and Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AMERICAN ECONOMIC REV. 560 (2017) (conducting a field experiment where they sent out 15,000 online job applications with half of resumes randomly assigned criminal convictions and half not. They found that even minor criminal convictions significantly negative impacted employer callback rates, concluding that disclosure of felony convictions constitutes a barrier to employment); Devah Pager, Bruce Western, and Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 THE ANNALS OF THE AMERICAN ACADEMY

criminal records follow ex-offenders back into society and constitute a permanent obstacle, functionally preventing true rehabilitation and societal integration. Research finds that even old criminal records can substantially interfere with opportunities for ex-offenders. In their study on how old criminal records affect current employment prospects, Leasure and Stevens Andersen find that the “proportion of applicants with old felony records who received an interview invitation or job offer was approximately 33% lower than their equally qualified counterparts with no self-disclosed criminal records.”⁸² This further illustrates the punitive nature of widely disseminated criminal records, with no discrete end to that punishment in sight.

This leaves us with two possibilities: that this continued punishment is unintentional or that it is an intentional consequence of criminal activity. In the former case, revision to policies that re-cast criminal records as punitive are highly desirable in tandem with policies to expunge or seal criminal records. If, however, the continued punishment of criminal records is intentional, we might then reconsider whether the science of desistance from crime and public safety actually supports such a conclusion.⁸³

In short, it does not. Instead, these punitive collateral consequences have actually been found to increase crime, precisely because they prevent ex-offenders from securing the types of resources and opportunities that are required for successful reentry into society.⁸⁴

OF POLITICAL AND SOCIAL SCIENCE 195 (2009) (finding from experimental studies on the measurable effects of criminal records on employment applications that criminal records substantially affect odds of employment and further finding that these barriers were elevated for young black men compared to their white counterparts); Robert Stewart and Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 CRIMINOLOGY 156 (2020) (finding that nearly 72% of colleges require criminal record disclosure); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2004) (describing how criminal records exclude specifically needy populations from public housing); James Jacobs and Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2007) (discussing multiple uses of criminal records). This is by no means an exhaustive list of all such studies but provides significant context to consider the potential harms of criminal records.

⁸² Peter Leasure and Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 N.Y.U. REV. OF L. AND SOCIAL CHANGE, THE HARBINGER 271, 284 (2017).

⁸³ Desistance is the process of stopping crime by people with a previous offense or pattern of offense. See generally John H. Laub and Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1 (2001) (discussion the study of desistance from crime and further defining the theory of desistance).

⁸⁴ See also Megan Denver, Justin T. Pickett, and Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social*

The types of collateral consequences experienced by ex-offenders are also not proportionate with the harm of the criminal incident.⁸⁵ The digitization of even minor criminal records exacerbates these lasting harms.⁸⁶ Scholars, policy makers, and activists have urged regulatory changes to alleviate these stressors, including making it easier to expunge criminal records and banning the use of criminal records to make employment and housing decisions.⁸⁷

3. System Tools

So far, the rationales we have discussed for public criminal records seem to suggest that data privacy should unilaterally be prioritized over data transparency. Here we complicate that assumption by looking at the potential for court transparency about criminal records to improve the justice system in the United States and expose its shortcomings. Taking our cues from theories of restorative justice and rehabilitation, we suggest that criminal records are more than just representative of individual criminal incidents; rather they can be analyzed in the aggregate to understand and audit the justice system. This gives us valuable information on success outcomes, the cumulative impact of the carceral state on communities, and details about the specific functions of the justice system.

We argue that public criminal records have the potential to constitute a powerful check on the justice system, giving researchers, policymakers, and the invested public recourse to see how the justice system works and whether or not it is fair. Criminal record data is already public and has already been harnessed by third party profiteers and other types of decision-makers to the severe disadvantage of people who have been arrested and/or convicted. The current system of data storage, then, does not serve to keep data private, rather it only limits the ability of researchers, policy makers, and the general public to study

Construction and Use of Criminal Record Stigma, 55 CRIMINOLOGY 664, 664, 672 (2017) (discussing the effects and stigmatization of people with a past criminal record and the new policy initiatives attempting to curtail these effects on reintegration and further recidivism due to this labeling).

⁸⁵ See also Stephen Nathanson, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 74–75 (2001) (indicating that most crimes do not have an analogous behavior that would be obviously proportionate when it comes to punishment).

⁸⁶ See also Sarah Esther Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 127, 137 (2016) (exploring, through interviews and fieldwork with people attempting to expunge and legally seal their criminal records, how online access to criminal records affects family relationships).

⁸⁷ See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WISC. L. REV. 321, 322–23 (2015) (analyzing the different approaches to sealing or expunging criminal records through an analysis of states' new laws and policies).

patterns within the justice system at scale. This functionally shields the courts from liability without offering any meaningful increases in data protection. Specifically, we argue that data regulation around criminal records should recognize that the current fee structure of criminal record procurement, where individuals attempting to procure records must pay exorbitant fees to do so, is not a data protection solution, rather it is an access to justice problem.⁸⁸

That is, the current system works in an ambivalent space with respect to data privacy and transparency whereby harms are both hidden and displaced. The current criminal records landscape is, as we have shown, neither private nor public. It operates in this liminal space in such a way to ensure that only certain types of information – that which can harm people who have been arrested – are readily available and that those which allow for a full auditing of the system that allows for the perpetuation of those harms is largely invisible. This is the current landscape in light of an absence of explicit policy regulating the publication and distribution of these records.

Taken in sum, the examples we describe here articulate where we see potential to resolve the seemingly unresolvable tension between data privacy and data transparency concerning court records. We find that there are considerable problems with the assertion that criminal records are useful protective tools for the general public, since the general public does not have access to criminal records to make decisions and because data disclosure alone does not guarantee increases in public safety. We also find that criminal records are currently being substantially used as a punitive tool rather than a rehabilitative one. That is, having a known criminal record erects considerable barriers to societal re-entry and desistance from crime. We do however, see positive potential in the use of criminal records to operate as system tools to audit and understand the functioning of the justice system and make courts more transparent. Therefore, we recommend that data regulation be tailored to both system transparency and individually-protective goals.

C. Should Criminal Records be Public?

We offer here three potential solutions to the tensions between the harms and benefits of public criminal records that we believe have

⁸⁸ See also Stephen Gossett, *Legal Research — We Just Need the Data*, BUILT IN (Mar. 22, 2021), <https://builtin.com/machine-learning/scales-judicial-analytics> (last visited, Mar. 10, 2022) (providing an update on the research team at SCALES and their project to apply machine learning to court-record data that would provide researchers with access to the necessary data to assess the systemic patterns, inconsistencies and biases in the justice system, including the waiver of fees).

potential to balance the public interest in ensuring a transparent and unbiased justice system with personal protection from discrimination and stigma for individuals with criminal records. Individual harm due to public records could be lessened in three ways. First, processes for expunging criminal records can be elucidated and expanded, giving more individuals protections from individual harms and discrimination. Second, the use of criminal records to make certain types of decisions can be limited so as to prevent criminal records themselves from becoming a driver of recidivism and social disadvantage. Finally, criminal records can be redacted of identifiable information, but still remain public. This would make commercialization and monetization of criminal records less attractive, since they would not be uniquely identifiable.

All of these recommendations functionally shift the idea of what the actual data point is. Instead of considering an arrest, charge, or conviction as attached to a specific individual, we advocate for the consideration of these moments in the criminal legal process as a part of the system or process. We argue for data to be collected, maintained, and distributed in such a way as to protect the rights of individuals but to still allow for the consideration of the impact of the system on these individuals. That is, rather than thinking of criminal records as a file that attaches to an individual noting charge and outcome on the individual level, courts and legislatures should be thinking of them as vehicles for extracting key information: socio-demographic information, charge, outcome, attendant motions, and time to disposition of case so that the public is able to see trends and patterns. This treatment of data is not without precedent. Even in data forms, like the US Census, that seek specifically to quantify and provide detailed information about the US population, data swapping and differential privacy strategies have been applied to protect individual confidentiality without damaging the utility of the data.⁸⁹

We want to stress that data regulations can also serve to protect the public good by taking a systems approach to transparency and guarding against inequality. Criminal record data and court process data remains one of our best ways of understanding processes and outcomes in the criminal justice system. Protective motivations should not preclude the use of this data to audit the justice system. For the most

⁸⁹ The U.S. Census has managed and continued to update data swapping and blinding procedures (with no known compromises to confidentiality as of this writing). Notably, the Census has also provided quantifications of how their data protection procedures affect results so as to maximize the flexibility and utility of the data for researchers and policymakers. See National Conference of State Legislatures, *Differential Privacy for Census Data*, <https://www.ncsl.org/research/redistricting/differential-privacy-for-census-data-explained.aspx> (last accessed Mar. 10, 2022).

part, criminal record data is already public, it just is not accessible to researchers, policy makers, and the public who want to understand the workings of the justice system. Making data ethically available (including utilizing redactions or data blinding) serves the project of equalizing access to what is already entitled to the public. The U.S. government needs to support this project of record accessibility financially and logistically in order to ensure that these constitutional rights to access continue to be protected.

V. CONCLUSION: REGULATING THE LARGER UNIVERSE OF DATA PROTECTION VS. TRANSPARENCY

In this article, we have examined the current unregulated terrain of data privacy and transparency with respect to criminal records. We argue that there is a fundamental normative tension between data privacy and transparency in this arena: privacy and transparency are competing needs in the courts where data can both serve to cause harm and to shed light on systemic issues. Ultimately, we argue that these records are public and should be public, but courts and legislators must consider the use and distribution of those records with respect to the public interest. As we have shown, the publication of court data as a means of furthering retributive or deterrent interests is ineffective at meeting those ends. Instead, we should focus on ensuring that data is utilized in a way that allows for furthering interests of justice via court transparency.