

B. Collateral Consequences Come Roaring Back

For twenty years after the passage of the Sentencing Reform Act of 1984, the official position of the federal government was that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.⁷¹ States were encouraged to follow suit.⁷² Along with increased reliance on prison to carry out militant anti-crime policies, during the 1980s and 1990s new collateral sanctions and disqualifications were introduced into state and federal codes to augment and reinforce what remained of the old.⁷³ Concerns about security after the terrorist attacks of 9/11 made background checks routine, and conviction became a common sorting and risk-management device.⁷⁴ The immutability of criminal offenders' degraded legal status gave social sanction to their exclusion from many benefits and opportunities, ranging from employment and licensing to housing and public benefits.⁷⁵ Disqualifications once reserved for those convicted of felonies were extended to misdemeanants.⁷⁶ De-

70. See *id.* § 218(a)(8), 98 Stat. at 2027. Act of Sept. 30, 1950, ch. 1115, §§ 2, 3, 64 Stat. 1085 (repealed 1976).

71. See, e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003) ("Since 1980, the United States has passed dozens of laws restricting the kinds of jobs for which ex-prisoners can be hired, easing the requirements for their parental rights to be terminated, restricting their access to public welfare and housing subsidies, and limiting their right to vote.").

72. The interplay of crime and politics in the late 1970s and 1980s, and the leverage exerted by the federal government on states to toughen their stance on criminal justice issues, is described in MARC MAUER, RACE TO INCARCERATE 56-80 (2006). In addition to the employment directly regulated by the federal government, as in banks and financial institutions, Congress has granted certain employers, including those serving vulnerable populations like children and the elderly, special access to FBI data bases, with the predictable result that states have passed laws barring people with a record from working in schools and nursing homes, no matter how dated and minor the conviction. See generally Jacobs & Crepet, *supra* note 19.

73. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 11-15 (1996) (documenting an increase in state disabilities over a ten year period between 1986 and 1996).

74. See Chin & Love, *Status as Punishment*, *supra* note 12, at 26.

75. Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in CMTY. LEGAL SERVS., INC. & CTR. FOR LAW & POLICY, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 13, 14 (2002) [hereinafter EVERY DOOR CLOSED].

76. For example, in Pennsylvania after 9/11, school boards across the state began refusing to hire people who had any sort of record at all, even sub-misdemeanor "summary offenses," unless they had been pardoned by the governor. The Pennsylvania Board of Pardons was deluged with applications from people convicted of such low-level offenses as shoplifting and dog-off-leash,

ferred adjudication laws enacted in the 1970s, whose purpose was to enable certain defendants to avoid a conviction record, were overridden by laws penalizing guilty pleas even if charges were later dismissed.⁷⁷

At the federal level, Congress took collateral consequences to a new level of irrationality by making a single felony drug conviction grounds for automatic exclusion from financial and other assistance under the federal social safety net.⁷⁸ Discretionary decision-makers at all levels of government were permitted and even encouraged by federal laws and policies to bar people with a record from a variety of benefits and opportunities, including public housing and even access to government buildings, without regard to the actual risk posed.⁷⁹ Federal laws and rules encouraged states to apply exclusionary policies in their own hiring practices and in those of their private contractors and grantees, even with new evidence that recidivism sharply declines after a period of law-abiding conduct.⁸⁰ Many of the legal barriers to employment in major areas of the economy (health care, education, transportation, child- and elder-care) were categorical and permitted no exceptions.⁸¹ Only the military, ever pragmatic, found it

sometimes decades before, sometimes when they were teenagers, finally prompting the governor to support enactment of an expungement authority applicable only to summary offenses. *See* 18 PA. CONS. STAT. § 9122(b)(3)(i); Author's Interview with John Heaton, Exec. Sec'y, Pa. Pardons Bd. (December 2010).

77. *See, e.g.*, Amany Ragab Hacking, *Plea at Your Peril: When Is a Vacated Plea Still a Plea for Immigration Purposes?*, 29 ST. LOUIS U. PUB. L. REV. 459, 461-62 (2010); NEW YORK CITY BAR, *THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY* 3-4 (2007) (explaining the negative deportation consequences that result from guilty pleas offered in deferred adjudication programs), available at www.nycbar.org/pdf/report/Immigration.pdf.

78. *See, e.g.*, Gwen Rubenstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); Amy E. Hirsch, *Parents with Criminal Records and Public Benefits: "Welfare Helps Us Stay in Touch with Society,"* in *EVERY DOOR CLOSED*, *supra* note 83, at 27, 29.

79. *See generally* KELLY SALZMANN & MARGARET LOVE, *INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS* (2009) [hereinafter *INTERNAL EXILE*], available at http://www.americanbar.org/content/dam/aba/migrated/cccs/internal_exile.authcheckdam.pdf.

80. *See* Blumstein & Nakamura, *supra* note 18; *see also* Megan Kurlychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Recidivism?*, 5 *CRIMINOLOGY & PUB. POL'Y* 483 (2006) (establishing that eighteen-year-olds with conviction records had a substantively similar probability of being arrested as those without a record after having no contact with the criminal justice system for six to seven years).

81. *See generally* *INTERNAL EXILE*, *supra* note 79 (cataloguing federal collateral consequences).

expedient to relax its restrictions against hiring and contracting with convicted persons.⁸²

Discrimination based on criminal record also pervaded the private sector. By the first decade of the 21st century, most private employers were running routine background checks on current and prospective employees,⁸³ under advice from their lawyers or insurers not to take a risk on hiring someone with a criminal record, no matter how dated or minor the conviction.⁸⁴ Many businesses hoping for a government contract or grant feared having to report that one of their key employees had a criminal record. Many volunteer opportunities were closed to someone with a record, no matter how minor or dated. Parents convicted years before of minor fraud or drug possession could be barred from volunteering at their children's school or coaching their sports. Political candidates were reluctant to accept campaign contributions from a person with a record.

At the same time, new technologies made it almost impossible to hide a criminal record.⁸⁵ After the terrorist attacks of 9/11, an entirely new industry devoted to background screening sprang up almost over-

82. See 10 U.S.C.A. § 2408(a) (1996). Persons convicted of fraud or any felony arising out of a contract with the Department of Defense are prohibited for a period of "not less than five years after the date of conviction" from working in a management or supervisory capacity with a defense contractor, or from serving on the board of directors or acting as a consultant for any company that is a defense contractor; waiver prior to five years available from Secretary of Defense "in the interests of national security." See *id.* Persons convicted of a felony and actually incarcerated for a period of not less than one year are ineligible for a Department of Defense security clearance; waiver may be available "if there are mitigating factors." 10 U.S.C. §§ 986 (c)(1), (d).

83. According to a survey published in 2010 by the Society of Human Resources Management, ninety-two percent of their members perform criminal background checks on some or all job candidates, while seventy-three percent perform checks on all job candidates. See SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010); see generally Jacobs, *supra* note 1 (arguing that criminal records must be accurate).

84. A recent study of online job ads posted on Craigslist in five major cities noted widespread use of blanket policies refusing to hire anyone with any type of conviction in entry-level jobs such as warehouse workers, delivery drivers, and sales clerks. See RODRIGUEZ & Emsellem, *supra* note 6; MAURICE Emsellem, NEW MODEL STATE POLICIES IMPROVE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH A CRIMINAL RECORD 4 (2010), available at <http://www.nelp.org/page/-/SCLP/2010/ModelStateHiringProtections.pdf?nocdn=1> (announcement of job opening in data entry and clerical positions by Bank of America warned that applicants will not be considered if a background check reveals either a felony or misdemeanor conviction).

85. Dietrich, *supra* note 75, at 19; Jacobs & Crepet, *supra* note 19. It is now surprisingly easy to delve anonymously into other people's past: a "Google" name search may bring up an uninvited offer from a private screening company to do a criminal background check on the person for a nominal fee.

night, and even now remains essentially unregulated.⁸⁶ Quality control of public records systems is notoriously poor, and mistakes are common.⁸⁷ While the Federal Trade Commission has taken the position that the Fair Credit Reporting Act (“FCRA”) covers the activities of private background screeners, in practice FCRA gives individuals little protection from mistakes or unwarranted invasions of privacy.⁸⁸ Few jurisdictions have generally applicable laws prohibiting discrimination based on a criminal record, and those laws that do exist are costly to enforce and easy to avoid.⁸⁹ Tentative efforts to extend the federal civil rights laws to discrimination based on criminal record appear to have stalled in the Equal Employment Opportunity Commission (“EEOC”),⁹⁰ and in any event employers and staffing firms

86. See Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 174-200 (Shawn Bushway et al. eds., 2007).

87. *Id.*; see also U.S. DEP’T OF JUSTICE OFFICE OF THE ATT’Y GEN., THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (2006) available at http://www.justice.gov/olp/ag_bgchecks_report.pdf. (FBI is “missing final disposition information for approximately fifty percent of its records”).

88. The recent filing of numerous national FCRA class actions against both criminal background screeners and employers underscores the breadth of noncompliance with the law. See, e.g., *Williams v. Staffing Solutions Southeast*, No. 1:10-CV-00956 (N.D. Ill. filed Feb. 2, 2011) (no pre-adverse action notice or opportunity to dispute accuracy); *Henderson v. HireRight Solutions, Inc.*, 4:10-CV-00443 (N.D. Okla. filed Feb. 1, 2010) (reporting expunged convictions); *Ryals v. HireRight Solutions*, No. 3:09-CV-00625 (E.D. Va. filed Oct. 5, 2009) (failure to comply with notice requirements); *Hunter v. First Transit, Inc.*, No. 1:09-CV-06178 (N.D. Ill. filed Oct. 5, 2009) (no pre-adverse action notice or opportunity to dispute accuracy); *Joshaway v. First Student Inc.*, No. 2:09-CV-02244 (C.D. Ill. Oct. 5, 2009) (no pre-adverse action notice or opportunity to dispute accuracy).

89. In the 1970s, a number of states enacted statutes prohibiting disqualification from public employment and/or licensing based on conviction unless the offense conduct was somehow (usually “directly” or “substantially”) related to the job or license in question. These laws remain on the books, but most make no provisions for enforcement. See *RELIEF*, *supra* note 49, at 62-84. See also Sheri-Ann S.L. Lau, *Employment Discrimination Because of One’s Arrest and Court Record in Hawai’i*, 22 U. HAW. L. REV. 709, 722-35 (2000) (discussing different jurisdictional approaches to employment discrimination based on criminal records). Only three states (Hawaii, New York, and Wisconsin) prohibit discrimination based on conviction in public and private employment as part of their fair employment law; further and it is not clear that employment and licensing practices in those jurisdictions are a great deal more favorable to people with a criminal record than elsewhere. See, e.g., Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 781-99 (2002) (arguing that the “substantial relationship” test has been easy for employers to evade). See also Lau, *supra*, at 711 (concluding that Hawaii’s nondiscrimination law restricts the efficient conduct of business).

90. The most recent guidance from the EEOC is now twenty years old. See *Policy Statement on the Issue of Criminal Records Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e *et seq.* (1982) (Feb. 4, 1987), in II EEOC Compliance Manual § 604 (explaining that because a policy denying employment based on criminal records has a disparate impact on African-Americans and Hispanics, such a policy would violate Title VII); *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987), in II EEOC Compliance Manual App. § 604-B (ex-

appear to be either “unaware of civil rights and consumer protections for people with criminal records or indifferent to them.”⁹¹ There have been few recent court decisions invalidating employment barriers on constitutional grounds.⁹²

plaining how statistics should be used to prove disparate impact in cases involve record-based restrictions); *see also* *El v. SEPTA*, 479 F.3d 232, 243-44 (3d Cir. 2006) (criticizing EEOC policy as failing to provide useful guidance on hiring someone with a conviction). As of this writing, long-awaited revisions to EEOC’s policy on consideration of conviction in employment have not been issued.

91. *See* RODRIGUEZ & EMSELLEM, *supra* note 6, at 18. The Attorney General of New York has been unusually aggressive in enforcing state law protections regulating criminal background checks, and has reached settlements with three major employers (RadioShack, ABA Industries, and Aramark) and a private background screening firm (Choicepoint). *Id.* at 10-11 (including case citations).

92. *See generally* Aukerman, *supra* note 60 (noting the paucity of current case law providing constitutional protections for the employment rights of people with criminal records).

93. *See, e.g.*, N.M. STAT. ANN. §§ 28-2-3(B)(2010); MINN. STAT. § 364.021 (2009); 2010 Mass. Acts, Ch. 256; CONN. GEN. STAT. § 10-142 (2010); HAW. REV. STAT. § 378-2 (2010); AM. BAR ASS’N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 29 (2007) [hereinafter SECOND CHANCES], available at [http://www.pardonlaw.com/materials/rev_2ndchance\(3\).pdf](http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf).

94. *See* EMSELLEM, *supra* note 84, at 19.

95. *See, e.g.*, MINN. STAT. § 181.986 (2010); 730 ILL. COMP. STAT. 5/5-5.5-15(f) (2010).