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James B. Jacobs

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ARTICLE

MASS INCARCERATION AND THE PROLIFERATION OF CRIMINAL RECORDS

JAMES B. JACOBS*

The criminal justice system feeds on itself. The more people who are arrested, prosecuted, convicted, and especially incarcerated, the larger is the criminally stigmatized underclass screened out of legitimate opportunities,[1] steered toward criminal careers and further incarceration.[2] Wider dissemination of criminal history records through modern information technology and greater acceptance of de jure and de facto discrimination against individuals with criminal records reinforce the cycle. Despite the increasing and impressive efforts by a "prisoner re-entry movement" dedicated to promoting "ex-offenders"[3] pro-social integration into the community, especially

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* Warren E. Burger Professor of Law & Director, Center For Research in Crime & Justice, NYU School of Law. I am grateful for comments, criticisms, and suggestions to Rachel Barkow, David Garland, Jessica Henry, and Martin Marcus, and to the D'Agostino Research Fund for supporting this work.

1. A criminal record is a stigma, the management of which becomes a major challenge and preoccupation for its holder. *See* Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster 1963); *see also Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., Black, Douglas & Brennan, JJ., dissenting) ("Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.").

2. There is a criminological debate over this assertion. John Hagan, among others, argues that as a group, criminal offenders suffer from so many personal and social deficits that these deficits alone account for failure in the job market. John Hagan, *The Social Embeddedness of Crime and Unemployment*, 31 Criminology 465, 468–69 (1993). To the contrary, Robert Sampson and John Laub have argued in a very influential book that formal labeling by the criminal justice system in adulthood will directly cause employers to exclude adult ex-offenders from employment opportunities, thereby leading to job instability and increased offending. Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points through Life*, 165 (Harvard U. Press 1993); *see also* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Sociology 937 (Mar. 2003). The prisoners' re-entry movement assumes that Sampson and Laub are basically correct and looks for ways to undo or neutralize the negative impact of a criminal record.

3. The terms "ex-offender" and "ex-convict" are offensive to some prisoner re-entry activists. They point out that the terms defines a previously-convicted person according to what might have been a single or uncharacteristic incident, i.e. the terms themselves are stigmatizing. This is a good and important point, but I have chosen to use the terms from time to time in this article because they are so widely used and because the alternative—"previously-convicted person"—is awkward.

those seeking to make the transition from prison to free society,[4] it is difficult to interrupt this dysfunctional cycle.

Criminal justice personnel are strongly motivated to collect criminal history information, understandably, aiming to classify defendants into categories like "dangerous," "recidivist," "persistent offender," and "sexual predator." Information technology has increased the capacity and reduced the cost of collecting, storing, and searching criminal records.[5] More agencies, organizations, and individuals utilize criminal records, believing them relevant, even necessary, to their operations and decisions. Private-sector entrepreneurs have stepped forward to meet the growing demand for background checks, and, for business reasons, have purposefully sought to increase that demand.[6] Therefore, the circulation and use of criminal records is steadily increasing.

The longer and more serious the defendant's criminal record, the more severely the defendant will be treated at every stage of the criminal justice process.[7] Criminal justice system decision-makers treat a record of past criminality as predictive of future criminality, and may regard individuals with serious criminal records as not *deserving* leniency or the benefit of the doubt. When investigating a serious crime, police will look for individuals living in the vicinity who have a record of similar past crimes. With respect to minor crimes, police are more likely to arrest, rather than release with a warning, individuals with criminal records. Prosecutors also scrutinize an arrestee's criminal record in deciding whether to charge, what to charge,

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4. *See* Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (The Urb. Inst. Press 2005); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. Rev. 255 (2004).

5. *See generally* Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (N.Y.U. Press 2004); SEARCH: The Natl. Consortium for Just. Info. and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, http://www.search.org/files/pdf/RNTFCSCJRI.pdf (2005) ("Today, background checking—for employment purposes, for eligibility to serve as a volunteer, for tenant screening, and for so many other purposes—has become a necessary, even if not always a welcome, rite of passage for almost every adult American.").

6. Even a cursory Internet search reveals numerous information vendors offering, for a modest fee, to investigate anybody's criminal record. *E.g.* CriminalWatchdog.com, *CriminalWatchdog.com Homepage*, http://www.criminalwatchdog.com/homepage.php (accessed Sept. 21, 2006); Info Link Screening Services, Inc., *Pre-Employment Screening Services*, http://www.infolinkscreening.com/InfoLink/Background/Searches.aspx (accessed Sept. 21, 2006) (offering comprehensive pre-employment background checks); NetDetective, *Official NetDetective Site*, http://www.netdetective.com (accessed Sept. 21, 2006) (boasts that its software will permit the user to "investigate anything about anyone online."); NetDetective, Advertisement, *NetDetective Advertisement*, http://theboost.net/criminal_records (accessed Sept. 18, 2006) ("Keep in mind you or your company could be held liable if someone you employ commits a crime on the job and it is found they had a criminal past which you failed to research."); *see also* SEARCH: The Natl. Consortium for Just. Info. and Statistics, *supra* n. 5.

7. *See* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 Crime & Just. 303 (1997).

and whether to seek pretrial detention.[8] They may regard any non-trivial criminal record as disqualifying the individual from pre-trial diversion. Some prosecutors' offices target arrestees with a serious criminal record for intensive prosecution, exercising their charging and plea bargaining discretion as aggressively as possible.[9] If convicted, the defendant with a criminal record faces a more severe sentence,[10] even life without the possibility of parole under a recidivist "three strikes" statute.[11] If sentenced to prison, a substantial criminal record will likely mean assignment to a higher security prison, more time to be served before release, and release with more restrictions.

Criminal conviction also results in collateral consequences, including denial of certain government licenses, benefits, and employment opportunities.[12] In the last two decades, the desire to control "criminals" more effectively and punish them more harshly[13] has generated a plethora of laws and administrative rules denying government benefits, such as student loans[14] and public housing,[15] to individuals convicted of crimes.[16] Organizations and individuals outside the criminal justice system increasingly use criminal records to make individuals ineligible for admission to educational programs (especially in teaching and health services),[17] welfare-type programs, and public and private employment.[18]

Just as a good education and strong employment record have always been a great advantages in obtaining employment, a criminal record has

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8. *E.g.* The "Diversionary Program Rules" of the Office of the District Attorney, Orleans Parish, Louisiana state that "The program is offered to persons who are first time arrestees of state misdemeanor or felony statutes (no prior convictions and no significant arrest history including any acts of violence.)" *See* Marc Miller & Ronald F. Wright, *Criminal Procedures: Prosecution and Adjudication* 146 (2d ed., Aspen 2005).

9. *See e.g.* Cal. Code Ann. §§ 999b–999h (West 2006) (mandating and funding a state-level program to encourage county prosecutors to set up special career criminal offender units).

10. *See e.g.* Fed. Sentencing Guidelines § 4A1.1 (2006); Roberts, *supra* n. 7.

11. Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford U. Press 2001).

12. *See e.g. Civil Penalties, Social Consequences* (Christopher Mele & Teresa A. Miller eds., Routledge 2005).

13. *See generally* David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (U. Chi. Press 2001).

14. Doug Lederman, *Drug Law Denies Aid to Thousands*, http://insidehighered.com/news/2005/09/28/drug (Sept. 28, 2005).

15. 42 U.S.C. § 13663 (2000); *see* Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, http://hrw.org/reports/2004/usa1104/index.html (Nov. 2004).

16. *See* Travis, *supra* n. 4, at 67–68.

17. *See e.g.* Hillsborough Community College, *Admission Requirements*, http://www.hccfl.edu/student/admissions/ (2006) (community colleges are more likely to ask applicants about their criminal record and disqualify persons with certain records).

18. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (Mar. 2002).

always been a disadvantage in obtaining employment.[19] Employers often associate a criminal record with unreliability, untrustworthiness, and dangerousness. Moreover, employers now fear potential tort liability for harms committed by an employee whose criminal background the employer knew or should have known (certainly that is the warning given by information brokers in the business of selling their criminal background checking services).[20]

Offender reentry proponents argue that discrimination based on criminal record, in effect, adds to the punishment experienced by those convicted of crime.[21] On the one hand, discrimination based upon criminal record (at least convictions) is widely seen as acceptable, even desirable: employers, government agencies, and credit bureaus should be able to consider a record of criminality as probative of character, reliability, and trustworthiness.[22] However, on the other hand, such discrimination has a devastating effect on ex-offenders and negative externalities for the larger society.

Recently, the reentry movement has highlighted the negative collateral consequences of conviction. Some collateral consequences, like de jure discrimination in voting, public housing, and student loans are essentially additional punishments imposed for retributivist reasons. But other collateral consequences, like occupations license restrictions and public and private employers' discrimination are based on utilitarian reasons, the desire to protect the employers' clients and employees from victimization and to ensure a reliable workforce. While the first type of collateral consequences can be eliminated by a stroke of the pen, there may be no politically or administratively practical strategy for ending or reducing de facto discrimination

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19. Pager, *supra* n. 2, at 937; *see also* Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 Soc. Problems 133 (1962); Goffman, *supra* n. 1.

20. Companies that provide nannies and home helpers, for example, are very likely to screen out applicants with criminal records. *See e.g.* Companion Care Inc., *Frequently Asked Questions*, http://www.companioncareofwa.com/faq.html (last updated Apr. 21, 2006); *see also* 4HomeHelp, *Ordering a Background Check*, http://www.4homehelp.com/background/BackOrder.cfm (accessed Sept. 21, 2006).

21. A few major U.S. cities, including Boston, Chicago, and San Francisco, have passed ordinances prohibiting city agencies from rejecting job applicants on account of, and in some cases even asking about, previous criminal convictions. Even these policies, however, make exceptions for criminal justice agencies and agencies serving vulnerable populations. Natl. Empl. Law Project, *Major U.S. Cities Adopt New Hiring Policies Removing Unfair Barriers to Employment of People with Criminal Records*, http://www.nelp.org/nwp/second_chance_ labor_project/citypolicies.cfm (last updated July 25, 2006).

22. *See* U.S. Dept. of Just., *Privacy, Technology, and Criminal Justice Information: Public Attitudes toward Uses of Criminal History Information* 5, http://www.obblaw.com/privacytf-survey.pdf (July 2001) (Regarding conviction records, "47% [of Americans] prefer what was labeled as a 'partially open system,' where only conviction records are freely available to everyone"; for arrest records, "[a]pproximately 3 out of 10 adults would bar any access to arrest—only records to any employer or governmental licensing agency. About one-half would allow limited access based on the sensitivity of the position, while only 15% would grant all employers or government licensing agencies access to arrest-only record.").

based on criminal records.[23] This article illuminates the proliferation of criminal records and the challenges that would need to be surmounted to limit access to and discrimination based on criminal records.

Section I identifies the range of criminal records. Section II analyzes the potential and limits of various strategies to reduce these negative consequences. Section III briefly argues that, because it is likely that criminal records will continue to play an important role in our society, it is essential that the accuracy of those records be assured.

I. Consumer's Guide to Criminal Records

Criminal justice agencies are both consumers and producers of criminal records. In addition to creating its own criminal records, each agency utilizes criminal records generated by other criminal justice agencies to solve cases; to keep track of arrestees; to identify and apprehend absconders; to assess risk of flight and future criminality for purposes of pretrial and post-trial detention;[24] to make prosecutorial decisions on diversion, charging, and plea bargaining;[25] to determine appropriate sentences;[26] and to administer probation, jails, prisons, and parole. According to the Bureau of Justice Statistics, the federal agency (in the U.S. Department of Justice) that plays the lead role in developing criminal records technology and policy:

> Complete, accurate, and immediately accessible records enable States to: immediately identify individuals with prior criminal records in any State; more effectively identify felons and others prohibited from firearm purchases; check backgrounds of persons responsible for child, elder and disabled care; identify individuals who have a history of domestic violence or stalking; make informed decisions relating to pretrial release and detention of offenders, prosecutions of career criminals and appropriate

23. *See generally Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Mark Mauer & Meda Chesney-Lind, eds., The New Press 2002).

24. Twenty-four states either require or permit criminal records to be considered in bail decisions, and thirty-two states have statutes authorizing consideration of criminal histories in corrections classifications and supervision. Blake Harrison, *State Criminal Records*, 27 Natl. Conf. of St. Legis.: State Legis. Rpt. 1, 2 (Sept. 2002) (available at http://www.nacdl.org/sl_docs.nsf/Issues/Expungement/$FILE/2002blake.pdf#search=%22Blake%20Harrison%20%22State%20Criminal%20Records%22%22); *see Russell v. U.S.*, 402 F.2d 185 (D.C. Cir. 1968) (judge may use arrest record to decide whether to grant release pending appeal).

25. PROMIS (Prosecutor's Management Information System) has been refined since the 1970s. Only a minority of offices has adopted it, probably on account of cost. According to one description, "PROMIS permits a prosecutor's office to accumulate a wealth of information on each of its burgeoning cases and maximize what manpower is available by assuring that office operations are conducted in the context of modern managerial and administrative methods. As a prosecutor finds he can devote more time to priority areas, he can more efficiently exert positive and productive control over his workload." Susan Hastings, *Prosecutor Management Information System*, http://www.atariarchives.org/bcc1/showpage.php?page=86 (accessed Sept. 14, 2006).

26. *E.g. U.S. v. Cifarelli*, 401 F.2d 512 (2d Cir. 1966) (for sentencing purposes, trial judge may consider arrests that did not lead to conviction).

correctional confinement; and conduct background checks to protect public safety and national security.[27]

Most people, including criminal justice scholars and reformers, probably equate criminal record with "rap sheet." However, the numerous criminal justice agencies actually create many different records and associated databases.[28] Taken together, these records and databases constitute the informational infrastructure of the criminal justice system.[29] They inform decision-making by police, prosecutors, judges, and other criminal justice system personnel, and increasingly, by public and private non-criminal justice agencies, organizations, firms, and individuals. It is essential to recognize the full range of criminal records in order to appreciate the depth and complexity of the challenge facing those who would seek to improve opportunities for ex-cons by restricting access to or use of individual criminal history information.

Rap Sheets

The most widely used criminal record is the "rap sheet," a chronology of the criminal justice system's actions, including arrests, indictments and information, judgments, and sentencing dispositions, with respect to a particular individual.[30] The rap sheet is created when the arrestee is "booked."[31] In addition to photographing and fingerprinting, booking involves filling out forms and inputting arrestee information (name, date of birth, physical description, fingerprints, etc.) into a computer database. This information is then submitted to the state-level criminal records repository or entered di-

27. Bureau of Just. Statistics, *Criminal Records Systems Statistics*, http://www.ojp.usdoj.gov/bjs/crs.htm (last updated July 21, 2006). Congress has delegated to the U.S. Department of Justice's Bureau of Justice Statistics (BJS) authority and responsibility for making federal and state criminal records more accurate, accessible, and useful. The Interstate Compact for Juveniles establishes a system of uniform data collection pertaining to juvenile offenders. It also provides criteria for access to these records.

28. Of course, all databases are constructed from individual criminal record, but all individual records are not aggregated into databases.

29. This article does not deal with every type of police or other agency records or file system. However, for the sake of completeness, it is worth pointing out that the so-called police blotter, a chronological record of arrests maintained at the stationhouse or precinct, contains information about all arrests, arrestees, and arresting officers. These blotters have traditionally been treated as publicly available and are frequently consulted by crime beat reporters. To take another example, California law requires that state and local law enforcement agencies shall make public the name and address of every arrested person if requested for scholarly, journalistic, or governmental purpose. *See Los Angeles Police Dept. v. United Reporting Publg. Corp.*, 528 U.S. 32 (1999).

30. *See e.g.* Florida Criminal Records, *Example Florida Criminal Record*, http://www.floridacriminalrecords.com/criminal_records_rap_sheet_help/example_rap.html (accessed Sept. 15, 2006); Pennsylvania Access to Criminal History, *Rap Sheet Explanation*, http://www.psp.state.pa.us/patch/cwp/view.asp?a=3&q=151791 (accessed Sept. 15, 2006).

31. For a good description of both conventional booking procedures and modern-day automated booking, see Pennsylvania Commission on Crime & Delinquency, *Final Report: Comparative Assessment of Three Police Booking Center Projects* (Apr. 2000) (available at: http://www.pccd.state.pa.us/pccd/lib/pccd/stats/central%20booking%20eval%20report%20apr2000.pdf).

rectly into that agency's computer database. Officials can quickly determine whether the arrestee already has a rap sheet in that state or (by means of the FBI's Interstate Identification Index) any other state. If he already has a rap sheet, the current arrest and charge information is added. If there is no rap sheet for this individual, the system will create one. Future arrests and charges, if any, will be added to the rap sheet. In most cases, the rap sheet will last in perpetuity, although some states require arrest information to be deleted if, within a certain time period (usually more than one year) there is no further action. States also have various rules on expunging or sealing certain rap sheet entries.[32]

Every U.S. state has a state-level agency charged with maintaining databases of rap sheets and fingerprints. In New York, for example, that agency is called the Division of Criminal Justice Services.[33] The corresponding California agency is the California Department of Justice, California Justice Information Services Division.[34] As of December 31, 2001, the databases of all states' repositories held over 64 million rap sheets.[35]

The Criminal Justice Information Services Division, the FBI's largest unit,[36] operates the National Crime Information Center ("NCIC"), which,

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32. *See e.g.* James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 St. John's L. Rev. 73, 82 (1992).

33. The DCJS website explains:

> The New York State Division of Criminal Justice Services (DCJS) is a multi-function criminal justice support agency. DCJS is among the nation's leaders in developing criminal justice technologies, communication and information systems. Housed in the Division are the state's criminal history fingerprint files which are used to provide police departments and other authorized agencies throughout the state with the criminal records of arrested persons, and where authorized by statute, applicants for employment or licensure. Among its other responsibilities are advising the Governor and the Director of Criminal Justice on programs to improve the effectiveness of New York's justice system. DCJS is also charged with collecting and analyzing statewide crime data; administering federal and state funds earmarked for criminal justice purposes; conducting research on critical criminal justice issues and providing training and legal guidance to the State's law enforcement and prosecution communities. In 1996, the Office of Forensic Services was established in the Division to oversee the accreditation of public forensic laboratories in the state and, with the Division of State Police, to establish and operate the state's DNA databank. DCJS is comprised of six program bureaus: The Office of Justice Information Services; The Office of Identification and Special Services; The Office of Public Safety; The Office of Strategic Planning; The Office of Administration, [and] The Office of Legal Services.

NYS Div. of Crim. Just. Services, *Division of Criminal Justice Services, About DCJS*, http://www.criminaljustice.state.ny.us/crimnet/about.htm (accessed Sept. 12, 2006). The NYS budget for 2005–2006 recommended 720 positions for the DCJS. Its operations for that year were supported by $47 million from the state and $90 million from the federal government. It also distributed $180 million to localities. Pub. Employees Fedn., *Budgets: Division of Criminal Justice Services*, http://www.pef.org/budgets/budgets2005/bud_dcjs.htm (accessed Oct. 6, 2006).

34. Cal. Office of the Attorney General, *California Justice Information Services*, http://caag.state.ca.us/careers/descriptions/dcjis.html (accessed Sept. 12, 2006).

35. Bureau of Just. Statistics, *Reporting by Prosecutors' Offices to Repositories of Criminal History Records*, http://www.ojp.usdoj.gov/bjs/pub/pdf/rporchr.pdf#search=%22bjs%20and%2064%20million%20and%20criminal%20records%20%22 (Apr. 2005).

36. Fed. Bureau of Investigation, *Criminal Justice Information Services Division*, http://www.fbi.gov/hq/cjisd/about.htm (accessed Sept. 12, 2006).

until recently, maintained in its own database copies of all states' rap sheets so that a law enforcement agency in one state could find out whether an arrestee or other person of interest (like a criminal suspect) had a criminal record in another state.[37] The NCIC responds to approximately 4.8 million requests a day.[38] It provides information to over 94 thousand law enforcement agencies on wanted persons, missing persons, gang members, stolen cars, boats, and other property.[39] A large percentage of criminal background checks is carried out on behalf of public and private employers, landlords, and other agencies, organizations, and associations.

The 1998 National Crime Prevention and Privacy Compact mandated that the FBI's information system be transformed into a slimmed down and more efficient Interstate Identification Index ("Triple I" or "III").[40] In conjunction with the FBI's National Fingerprint File ("NFF"),[41] the III func-

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37. The early development of this program was outlined by the United States Supreme Court in *U.S. Dept. of Justice v. Reporter's Committee for Freedom of Press*:

> In 1924, Congress appropriated funds to enable the Department of Justice (Department) to establish a program to collect and preserve fingerprints and other criminal identification records. 43 Stat. 217. That statute authorized the Department to exchange such information with "officials of States, cities and other institutions." *Ibid.* Six years later Congress created the FBI's identification division, and gave it responsibility for "acquiring, collecting, classifying, and preserving criminal identification and other crime records and the exchanging of said criminal identification records with the duly authorized officials of governmental agencies, of States, cities, and penal institutions." Ch. 455, 46 Stat. 554 (codified at 5 U.S.C. 340 (1934 ed.)); *see* 28 U.S.C. § 534(a)(4) (providing for exchange of rap-sheet information among "authorized officials of the Federal Government, the States, cities, and penal and other institutions"). Rap sheets compiled pursuant to such authority contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject.

489 U.S. 749, 751–52 (1989). The Privacy Act of 1974 arguably required the FBI to make reasonable efforts to ensure the accuracy and completeness of the records in the NCIC system. Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. 552a (2004)). Recently, however, the DOJ relieved the FBI of this responsibility on the ground that since the FBI is merely the recipient of records created by local and state agencies, it has no way to determine the accuracy of those records or to correct mistakes. On this development, see Electronic Privacy Information Center, *Joint Letter and Online Petition: Require Accuracy for Nation's Largest Criminal Justice Database*, http://www.epic.org/privacy/ncic/ (accessed Sept. 12, 2006).

38. Fed. Bureau of Investigation, *FBI.gov, Crime Index Sets Record*, http://www.fbi.gov/page2/feb06/ncic021506.htm (Feb. 15, 2006).

39. *Id.*

40. Pub. L. No. 105-251, 112 Stat. 1870 (1998) (codified at 42 U.S.C. § 14616 (2000)). This legislation establishes uniform standards and processes for the interstate and federal-state exchange of criminal history records for non-criminal justice purposes. The compact is "privacy-neutral"—compact parties are required to provide criminal history records to other compact parties for non-criminal justice uses that are authorized by the requesting jurisdiction even though the law of the responding jurisdiction does not authorize such uses within its borders.

41. The FBI's Integrated Automated Fingerprint Identification System (IAFIS) provides automated fingerprint search capabilities, latent searching capability, electronic image storage, and electronic exchange of fingerprints and responses, 24 hours a day, 365 days a year. Agencies that submit ten-print fingerprints electronically receive electronic responses to criminal submissions within two hours and within 24 hours for civil fingerprint submissions. Mark Huguley, *theBoost.network, Criminal Records, Wanted and Arrested Person Records*, http://theboost.net/criminal_records/6.htm (accessed Sept. 12, 2006). According to the FBI, the IAFIS maintains the

tions as a "pointer system" that informs a requesting state agency whether another state's criminal justice records repository possesses criminal history information about an individual of interest to the requesting agency.[42] Once all states are in compliance, the FBI will discontinue its database of state offenders' records.[43] All users of criminal history records, for both criminal justice and non-criminal justice purposes, will have to obtain those records from one or more states' databases or, in the case of federal criminal records, from the FBI's database of individuals arrested and prosecuted for federal crimes.[44]

States vary considerably with respect to regulating access to and dissemination of rap sheet information. Every state makes rap sheets routinely available to police, prosecutors, pre-trial services personnel, judges, probation officers, and parole officials. In addition, there are laws in every state mandating or authorizing the release of individual criminal history records to certain non-criminal justice government agencies—agencies charged with granting licenses to individuals and firms in diverse businesses, ranging from liquor stores and bars to banks and private security firms as well as to agencies that provide programs and services to vulnerable populations including children, the elderly, and the handicapped.

The trend is clearly in the direction of making individual criminal history records more accessible. Today, many landlords want confirmation that they are not renting to a dangerous or disreputable person. Some private individuals want access to criminal history information so they can screen prospective friends, romantic interests, business partners, and neighbors.[45] At least ten (open-records) states treat criminal conviction records as public documents; at least three states provide that any member of the public may, for a fee, obtain any person's rap sheet.[46] Federal laws make individual

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largest biometric database in the world, containing the fingerprints and corresponding criminal history information for more than 47 million subjects in the Criminal Master File. Fed. Bureau of Investigation, *Criminal Justice Information Services Division, Integrated Automated Fingerprint Identification System of IAFIS*, http://www.fbi.gov/hq/cjisd/iafis.htm (last updated Aug. 2, 2005).

42. SEARCH: The Natl. Consortium for Just. Info. & Statistics, *Interstate Identification Index (III)*, http://www.search.org/programs/policy/iii.asp (2005).

43. *Id.* As of March 2006, forty-eight states met the requirements for participation in the Triple I system.

44. The federal offender crime records database is the Nation Crime Information Center (NCIC). Fed. Bureau of Investigation, *National Crime Information Center (NCIC)*, http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last updated Jan. 18, 2006).

45. SEARCH: The Natl. Consortium for Just. Info. and Statistics, *supra* n. 5, at 21 ("In an increasingly 'risk-averse' world, some individuals even order criminal background checks on dating partners or prospective spouses.").

46. Fla. Stat. § 943.053(3) (1987); Okla. Stat. tit. 51, § 24A.8 (Supp. 1988); Wis. Stat. § 19.35 (1987–1988). Oklahoma puts practically everything online, including newly filed changes. *See* The Oklahoma State Courts Network, *The Oklahoma State Courts Network home page*, http://www.oscn.net/applications/oscn/start.asp (last updated Sept. 12, 2006).

criminal history records available to state licensing officials, banks, securities firms, private security companies, and the nuclear-power industry.[47]

The September 11th attacks led to legislation mandating criminal background checks for persons with access to controlled areas in maritime facilities (Port and Marine Security Act of 2002), for persons seeking access to biological agents (the Bioterrorism Preparedness Act of 2002), for persons who work as airport security personnel, airport and airline employees, and for air marshal and other transportation personnel (the Aviation and Transportation Security Act of 2001), and for certain individuals seeking entry to the U.S. and for persons applying for hazardous materials licenses (U.S. Patriot Act). Private information providers procure publicly available information, most often obtained from court records, to compile their own databases. National Online Data claims that it draws on statewide criminal history databases from thirty-eight states, encompassing more than 75 percent of the U.S. population, to maintain its National Background Directory.[48]

The movement to make criminal records publicly available is reinforced by the growing interest in "shaming sanctions."[49] Some police departments may see the aggressive dissemination of conviction or even arrest information as serving a deterrent or other purpose;[50] they may desire that newspapers publish the names of "johns" (prostitutes' customers) in order that such men be embarrassed and censured by their families and friends, thereby deterring the john's repeat offending and future offending by others who fear similar embarrassment. Some judges reportedly require convicted drunk drivers to paste shameful stickers on their vehicles.[51] One federal judge required, as a condition of supervised release, that a defendant stand outside a post office holding a poster announcing "I stole mail."[52]

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47. *See* Natl. Employment Law Project, *Employment Screening for Criminal Records: Attorney General's Recommendations to Congress: Comments of the National Employment Law Project to the U.S. Attorney General, Office of Legal Policy* 9, http://www.nelp.org/docUploads/AGCommentsNELP.pdf (Aug. 5, 2005).

48. Robert W. Holloran et al., *The Role of Criminal History Databases in Conducting Background Checks* (Natl. Background Data, LLC 2002) (available at http://www.courtaccess.org/legalwritings/nbd-roleofdata2002.pdf).

49. *See* John Braithwaite, *Crime, Shame and Reintegration* (Cambridge U. Press 1989); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. Pa. L. Rev. 1811 (2001). Recently, at a train station in England, I came across a poster that stated: "The persons below have been convicted of riding the trains in this area without paying the fare. Their fines are posted beside their names." Below this announcement two dozen names were listed along with each convicted person's age, hometown, and fine amount. Apparently, this is thought to be an effective strategy of social control operating through deterrence and education.

50. *See Paul v. Davis*, 424 U.S. 693, 721 (1976) (the Sheriff prepared and distributed to local businesses a flyer with names of known shoplifters).

51. *See* Associated Press, *Bumper Stickers Ordered for Drunk Drivers*, http://www.dui.com/drunk_driving_research/dui_bumper_stickers.html (Sept. 24, 2003); Associated Press, *Bumper Stickers Will Identify Drunken Drivers*, http://www.pub.umich.edu/daily/1998/dec/12-04-98/news/news15.html (Dec. 4, 1998).

52. *U.S. v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004).

The Aggressive Dissemination of Criminal Records: Megan's Law

Washington State's 1990 Community Protection Act was America's first law authorizing public notification when certain sex offenders are released into the community.[53] After seven-year-old Megan Kanka, who lived in Hamilton Township, New Jersey, was raped and murdered in July 1994 by a twice-previously-convicted sex offender who, unbeknownst to Megan's parents, lived across the street from the Kankas,[54] Megan's parents and victims' rights advocates lobbied for a law that would require public officials to provide public notification of the identity and residence of convicted sex offenders and child molesters. Because public officials cannot provide notification unless they themselves know who is a qualifying sex offender, such a law could not work without a comprehensive registry of New Jersey sex offenders and child molesters, including both those previously convicted and now living in the community and those about to be released from prison.

The New Jersey legislature swiftly produced a mandatory registration and community notification law.[55] It required individuals who had been charged and convicted, or had been acquitted by reason of insanity, of certain sexual and child molesting offenses,[56] or had been adjudicated delinquent, to register with local law enforcement authorities. Registration involves providing name, personal description, photograph, address, place of employment or schooling, vehicle license plate number, and a vehicle description. A local police agency must forward this information to the county prosecutor's office, which assigns each sex offender to one of three

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53. Wash. Rev. Code § 4.24.550 (2006).

54. *See* Norbert Elliot, *New Jersey Institute of Technology server, An Elegy for Megan Kanka* http://web.njit.edu/~newrev/v2s3/elli/toc.htm (accessed Sept. 12, 2006).

55. N.J. Stat. Ann. §§ 2C:7-1–17 (2006). The U.S. Court of Appeals upheld the law in *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). The decision contains a good history of the law.

56. What constitutes a "sex offense" or "child molesting" offense varies among the states. *See* Karen J. Terry & John S. Furlong, *Sex Offender Registration and Community Notification: A "Megan's Law" Sourcebook* (2d ed., Civ. Research Inst. 2004). The New Jersey law requires registration from anyone convicted or found not guilty by reason of insanity of the following crimes:

> 1. Aggravated Sexual Assault; 2. Sexual Assault; 3. Aggravated Criminal Sexual Contact; 4. Criminal Sexual Contact if the victim was less than 18 years of age; 5. Endangering the Welfare of a Child involving sexual conduct; 6. Endangering the Welfare of a Child involving photographing or filming a child engaging in sexual conduct; 7. Child Luring; 8. Kidnapping, if the victim is less than 18 years of age and the offender is not the parent or guardian; 9. Criminal Restraint, if the victim is less than 18 years of age and the offender is not a parent or guardian; 10. False Imprisonment, if the victim is less than 18 years of age and the offender is not a parent or guardian; 11. An attempt to commit any of the above listed crimes. For the purposes of Megan's Law, a "school or community group" has been defined as anyone that owns or operates an establishment where children gather under their care or where women are cared for.

N.J. Office of the Attorney General, *Howell Township Police Dept., Megan's Law: A Message from the Attorney General*, http://www.howellpolice.org/Megan_s_Law/body_megan_s_law.html (accessed Sept. 12, 2006).

"tiers" based upon an assessment of risk of future offending.[57] If the risk is low ("tier 1"), the prosecutor must inform local law enforcement agencies as to the registrant's identity and residence.[58] If the risk is moderate ("tier 2"), the prosecutor must notify police and some local community organizations, including schools, religious institutions, and youth groups.[59] If the risk is high ("tier 3"), the prosecutor must inform the public by a means designed to reach those persons likely to encounter the registrant.[60]

While Megan's Laws were percolating in New Jersey and other states, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was moving through Congress. Precipitated by the abduction in rural Minnesota of eleven-year-old Jacob Wetterling,[61] the Act requires states to register persons convicted of violent sexual offenses and certain sex offenses against minors. It requires sex offenders to comply with registration requirements for ten years and *authorizes* states to release "relevant information that is necessary to protect the public concerning a specific person required to register."[62] Failure to register must be made criminal. States were "encouraged" to comply by a threatened ten-percent reduction in federal criminal justice funds if they did not pass the necessary laws. All states have complied.[63]

In 1996, concerned that some local criminal justice officials were not sufficiently aggressive in notifying the community of the identity and whereabouts of sex offenders in their midst, Congress amended the Act by adding a mandatory community notification requirement. Later that year, Congress passed the Pam Lychner Sexual Offender Tracking and Identification Act, imposing a lifetime-registration requirement on repeat sex offenders and on those individuals convicted of certain aggravated sex offenses.[64] Next, a 1998 amendment established a National Sex Offender Registry ("NSOR") and mandated the registration of several additional categories of offenders, including convicted federal and military sex offenders. In 2000, Congress added the Campus Sex Crimes Prevention Act to this web of re-

57. The Attorney General's Office issued guidelines by which county prosecutors must determine whether a sex offender poses a low, medium, or high risk of re-offending. Christine Todd Whitman & John J. Farmer, Jr., *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws* (N.J. Office of the Attorney General 2000) (the current guidelines, revised in January 2005, are available at http://www.nj.gov/oag/dcj/megan/meganguidelines1-05.pdf).

58. *Id.* at 18.

59. *Id.* at 18–19.

60. *Id.* at 19.

61. *Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Program*, 42 U.S.C. § 14071 (2000). Jacob Wetterling has never been found and no one has ever been charged with his abduction.

62. *Id.* at § 14071(e)(2).

63. *See* Terry & Furlong, *supra* n. 56.

64. For the text of the Act, see *Pam Lychner Sexual Offender Tracking and Identification Act of 1996*, Pub. L. 104-236, 110 Stat. 3093 (1996) (available at http://thomas.loc.gov/cgi-bin/query/z?c104:S.1675.ENR:).

gistration and reporting laws: it encourages states to require sex offenders to report to a law enforcement agency their enrollment or employment at an institution of higher education.[65] Lack of state compliance triggers a ten-percent reduction in federal criminal justice funds. All states are in compliance.[66]

As of March 2002, thirty-five states and the District of Columbia provided Internet access to sex offender registries.[67] In those states, it is simple to find the names, addresses, and even photos of previously convicted sex offenders. In 2005, after the occurrence of yet another brutal sex crime committed by a previously-convicted sex offender, two U.S. Senators and several members of the House of Representatives proposed "Dru's Law" (the National Sex Offender Public Data Base Act) to create a national on-line sex offender database.[68] In July 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006. In addition to establishing the Dru Sjodin National Sex Offender Public Website, the Act requires: each state to establish a sex offender registry; sex offenders to keep their registrations current; sex offenders to appear in person periodically to verify information; the U.S. attorney general to establish and maintain a system for informing jurisdictions about persons entering the U.S. who are required to register as sex offenders; the FBI to maintain a national sex offender registry; states to provide internet access to all sex offender information; severe federal penalties on sex offenders for failing to register; creation of an office of Sexual Violence and Crimes Against Children to administer standards for sex offender registration; and a federal funding penalty on jurisdictions that fail to implement the law's requirements.[69]

Megan's Law and its progeny arguably establish precedent and generate momentum for making more criminal records easily available to the public on the worldwide web. Several states have already moved in this direction.[70] Colorado, for example, posts all conviction records to the web and, for a small fee, allows anyone to conduct a criminal records search via the Internet. Connecticut makes conviction information generally available to the public; any person can access such information by contacting the police department that conducted the investigation or the court that heard

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65. *See Campus Sex Crimes Prevention Act*, Pub. L. No. 106-386, § 1601(b) & (c), 114 Stat. 1537, 1538 (codified at 20 U.S.C. § 1092(f)(1) and 42 U.S.C. § 14071(j)).

66. *See* Terry & Furlong, *supra* n. 56.

67. *See* Julia Sommerfeld, *Megan's Law Expands to the Internet*, http://www.msnbc.com/news/297969.asp (Aug. 17, 1999).

68. H.R. 95, 109th Cong. (Jan. 4, 2005) (as introduced); Sen. 792, 109th Cong. (Apr. 14, 2005) (as introduced).

69. Pub. L. No. 109-248, §§ 113, 116, 118–22, 125, 128, 120 Stat. 587, 588 (2006) (codified as 18 U.S.C. § 2257 (2006)).

70. *See* Lynn Peterson, *Navigating the Maze of Criminal Records Retrieval–Updated*, http://www.llrx.com/features/criminal2.htm (last updated June 1, 2001); Bureau of Just. Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, http://www.ojp.usdoj.gov/bjs/abstract/rntfptcj.htm (Aug. 2001).

the matter. The public can also contact the state police and pay $25 for a person's criminal history record using either the person's name, date of birth, or fingerprints.[71] Kansas, Montana, and Oklahoma already require certain violent offenders to register with the Department of Corrections or a local law enforcement agency.[72] A recent Illinois law directs the office of the state fire marshal to post on its website information about arsonists.[73] Tennessee, for a fee, provides a customer with a copy of any criminal record in its state repository.[74] The Maryland attorney general proposed creation of an online registry of hate crime offenders.[75] Many states, including Florida, provide online access to a directory of current and past state prisoners.[76]

Court Records and E-Government

A great deal of individual criminal history information is publicly available in court dockets and in court records. After a suspect is arrested, she must be arraigned before a judicial magistrate within twenty-four hours. At this brief hearing the magistrate will determine whether there is probable cause to require the defendant to answer criminal charges. The arrest and the charges arising from the arrest will be noted on the court's docket. Even if the case proceeds no further, the fact of the arrest will forever be in the public record.

Indictments, informations, trial transcripts, and other court documents are also criminal records. A grand jury indictment or prosecutorial information contains formal charges against a defendant. In some jurisdictions, these documents closely track the criminal statute, providing few details about the charged crime or the defendant. However, in other jurisdictions, they provide a wealth of specific factual allegations about the defendant's alleged crime. At a minimum, of course, these instruments confirm that a particular individual has faced or is facing particular criminal charges, which may be all the information that the requester wants to know and all that is necessary to negatively impact the individual's current and future opportunities. Because trial transcripts are very expensive to produce, only a few copies are printed; however, they can be copied in whole or in part.

71. Colo. Bureau of Investigation, *Records Check*, https://www.cbirecordscheck.com/Index.asp (accessed Sept. 14, 2006).

72. Christopher Reinhart, *OLR Research Report: Violent Offender Registries*, http://www.cga.ct.gov/2006/rpt/2006-R-0071.htm (Jan. 18, 2006).

73. *See* Fire Files, *Software for Today's Investigator*, http://www.arsonsoftware.com/news/docdetails.asp?.did=16 (accessed Sept. 10, 2006).

74. Tenn. Bureau of Investigation, *TBI Background Checks*, http://www.tbi.state.tn.us/tbibackgrounds/background_checks.htm (accessed Sept. 14, 2006).

75. Andrea Siegel, *Officials Target Hate Crimes: Sentencing Renews Attention to Issue of Race Relations*, Balt. Sun 1G (Feb. 15, 2006).

76. Fla. Dept. of Corrections, *Corrections Offender Network*, http://www.dc.state.fl.us/inmateinfo/inmateinfomenu.asp (accessed Oct. 6, 2006).

The originals are physically stored at the courthouse and then, after a time, in an archive or document repository.

All these documents may contain information that is embarrassing to a defendant and to witnesses. Some allegations and information may be untrue.[77] Nevertheless, these records have always been available to any person who had time and resources to locate them at the courthouse.[78] Just as court proceedings themselves are open to the public and the media, most court documents are public.[79] The U.S. Constitution and federal and state statutory law have a strong preference for open government. The Sixth Amendment guarantees that American courts will be open to the public, including the media.[80] Some cases are extensively reported in newspapers, magazines, on television and radio, and on the Internet.[81] Some courts even permit live television coverage.[82]

Until fairly recently, it could take considerable effort, at least for the ordinary citizen, to locate particular court records. Increasingly, however, they are being computerized and made more accessible, sometimes by remote electronic access and sometimes by means of an on-site courthouse computer terminal. In addition, private companies specializing in background checks have the expertise and motivation to copy this information to their own databases.[83] Some private information brokers obtain court records *en masse*. Credit bureaus have always obtained information on individual criminal history from court records. The Fair Credit Reporting Act permits consumer reporting agencies to provide potential and actual employers and other businesses information about an individual's criminal convictions and even arrests.[84]

The 2002 federal E-Government Act sought to make criminal court records more available via computer search.[85] The Act requires federal agencies and federal courts to make their records available electronically.

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77. *See e.g.* Fed. R. Crim. P. 7.

78. *See generally* Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet*, 79 Wash. L. Rev. 175 (2004).

79. *Press Enter. Co. v. Superior Ct.*, 478 U.S. 1, 6–8 (1986); *Richmond Newsps. Inc. v. Va.*, 448 U.S. 555, 572–73 (1980); *Smith v. Daily Mail Publg. Co.*, 443 U.S. 97, 103 (1979); *Nixon v. Warner Commun., Inc.*, 435 U.S. 589, 597 (1978); *Okla. Publg. Co. v. Okla. County Dist. Ct.*, 430 U.S. 308, 309–10 (1977).

80. *Press Enter.*, 478 U.S. at 6–8; *Richmond Newsps.*, 448 U.S. at 572–73.

81. *E.g.* Amy Benfer, *Legal Affairs: Http in Cincinnati*, http://www.legalaffairs.org/issues/March-April-2003/story_marapr03_benfer.msp (Mar./Apr. 2003).

82. *Chandler v. Fla.*, 449 U.S. 560, 560–61 (1981).

83. Solove, *supra* n. 5, at 131. There are also dozens of firms advertising background checking expertise on the internet. *See e.g.* Cora's Daily Planet, *Background Checks*, http://dailyplanet.corragroup.com/index.php/archives/category/background-checks/ (last updated Sept. 5, 2006); *see also* SEARCH: The Natl. Consortium for Just. Info. and Statistics, *supra* n. 5.

84. 15 U.S.C. § 1681c (2000).

85. Pub. L. No. 107-347, 116 Stat. 2889 (2002).

either by remote access and, or in the alternative, by on-site computer terminals.[86] Several states have passed analogous e-government statutes.[87]

The Criminal Rules Committee of the Administrative Office of the Courts will promulgate Rule 49.1 to specify which federal court filings and other documents will be posted to a government website. The March 23, 2005 draft of Rule 49.1 states that a "charging document and an affidavit filed in support of the charging document will be posted without redaction."[88] If passed, anyone with access to the Internet will instantly be able to access federal indictments and informations.

Before the advent of the Internet, an indictment or information that was later quashed, dismissed, or resulted in an acquittal could be sealed in the interest of protecting the defendant's reputation. Today, however, sealing is less likely to be effective. Once criminal charges are posted to a website for any length of time, the information, having circulated in public, can no longer effectively be made secret or confidential.

Pre-sentence Reports

In the event that a defendant is convicted, federal and state criminal procedure codes provide for a pre-sentence investigation and report, usually researched and written by a probation officer ("PO"), to inform the judge's sentencing decision.[89] The PO will normally interview the defendant's family members, friends, employers, teachers, and others who can provide biographical information relevant to the defendant, his crime, and the likelihood he will commit future crimes. Such reports often contain unverified information, opinion, and gossip,[90] and sometimes include psychiatric evaluations. In order to encourage cooperation, criminal procedure codes

86. *Id.* at §§ 204–05.

87. Center for Democracy and Technology, *A Quiet Revolution in the Courts; Electronic Access to State Court Records, A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability*, http://www.cdt.org/publications/020821courtrecords.shtml (Aug. 2002); James Chadwick, *Access to Electronic Court Records: An Outline of Issues and Legal Analysis*, http://www.courtaccess.org/legalwritings/chadwick2001.pdf (June 2001); Search Systems Premium, *Get Access to Over 100 Million Criminal Records*, http://premium.search systems.net/criminal.php (accessed Sept. 10, 2006).

88. U.S. Courts, *Federal Rulemaking, Criminal Rule 49.1*, http://www.uscourts.gov/rules/newrules6.html#egov0805 (Feb. 2006).

89. *E.g.* Fed. R. Crim. P. 32; *see also* Neb. Rev. Stat. § 29-2261(1) (2005) ("Unless it is impractical to do so, when an offender has been convicted of a felony other than murder in the first degree, the court shall not impose sentence without first ordering a pre-sentence investigation of the offender and according due consideration to a written report of such investigation."); *id.* at § 29-2261(3) (a pre-sentence investigation and report should include "an analysis of the circumstances attending the commission of the crime; the offender's criminal history; the offender's physical and mental condition; the offender's family situation and background; the offender's economic status, education, occupation and personal habits; victim statements, given either in writing or orally; and other matters deemed pertinent by the probation officer preparing the report or ordered by the court.").

90. *E.g. U.S. v. Tocco*, 200 F.3d 401, 428 (6th Cir. 2000).

typically make pre-sentence reports confidential and only available to the judge, prosecutor, defense lawyer, defendant,[91] probation department, and correctional authorities.[92] However, judges usually have discretion to make them available to other agencies and individuals. In California, such reports are available to the public.[93]

A pre-sentence report in a juvenile delinquency case contains even more information than what is commonly found in an adult pre-sentence report. In addition to the information included in an adult pre-sentence report, a juvenile pre-dispositional report typically includes: the respondent's behavior at school; parents' description of the respondent's conduct at home; use of alcohol or drugs; the probation officer's assessment of the respondent's remorse about committing the crime; and, in some jurisdictions (like New York), whether the juvenile is sexually active and, if so, whether she uses birth control. In juvenile cases, the judge often orders a psychological report prepared by the court's department of mental health services (called a "Mental Health Study" or "MHS"). Those reports will appear in the Probation Department's file on the respondent (sometimes called the "social file") and will probably also appear in the court file. In cases in which the defense submits a psychiatrist's or psychologist's report to the sentencing judge, copies will end up in the social file and court file.

Even when pre-sentence reports are defined as confidential, there is always the danger of deliberate or inadvertent leaks.[94] Personnel who han-

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91. Fed. R. Crim. P. 32(c)(3). The defendant shall have access to the PSI, except when the disclosure will disrupt the rehabilitation process, the information was obtained on a promise of confidentiality, or when disclosure could cause potential harm to the defendant or other individuals. However, when information is withheld, the court must provide a written summary and give the defendant the opportunity to respond.

92. *See e.g.* Pa. R. Crim. P. 703. This rule permits disclosure of the pre-sentence report to: (1) correctional institutions housing the defendant; (2) departments of probation or parole supervising the defendant; and (3) departments of probation or parole preparing a pre-sentence investigation report regarding the defendant. The rule states that "the reports shall continue to be confidential and not of public record." In *U.S. Dept. of Justice v. Julian*, 486 U.S. 1 (1988), the U.S. Supreme Court held that the Freedom of Information Act provides an individual the right to obtain a copy of his or her own pre-sentence report. Concerned that federal prisoners were being coerced into requesting their pre-sentence report by other inmates who would use the information against requesters, the Federal Beareau of Prisons adopted a blanket rule denying all such requests. *Privacy Act*, 5 U.S.C. § 552a (1974), provides that individuals may obtain certain records pertaining to themselves unless the records are protected from disclosure by the Act's ten exemptions. Investigative files prepared by criminal justice agencies are generally exempted. States do not necessarily interpret their own freedom of information acts in the same way. *See also* N.Y. Crim. P. § 390.50(1).

93. Cal. Penal Code § 1203.05. During the first 60 days after judgment, probation reports in California cases are open to the general public. After 60 days, if a non-specified person files a petition seeking a probation report, the subject of the report is entitled to a hearing concerning any personal information he does not want released. *People v. Connor*, 115 Cal. App. 4th 669 (Feb. 6, 2004).

94. *E.g.* Administrative Office of the U.S. Courts, *Electronic Access Available to Criminal Case Files*, 36 The Third Branch (newsletter of the Federal Courts) (Oct. 2004) (available at http://www.uscourts.gov/ttb/oct04ttb/access/index.html).

dle criminal records may not be highly committed to protecting the privacy interests of criminal defendants who are the subjects of the records. Some might be susceptible to bribes. It is widely understood that an "old boy" system, prevailing in most jurisdictions, allows former law enforcement personnel working in the private sector to obtain criminal records from their former colleagues.[95]

Probation and Corrections Department Records

A convicted defendant sentenced to probation will generate a *probation file* that typically consists of more than one-hundred pages, and not infrequently of several hundred pages. These files will include diverse psychological and social evaluations and risk assessments as well as drug test results and notes or summaries of the PO's interviews with the probationer, his employer, therapists, teachers, friends, and family members. Increasingly these files are automated for the agency's and the PO's use. These files are not public, but they are available within the agency.[96] How susceptible they are to leaks is unknown to this author, but their security ought not be assumed.

Prison records are yet another type of criminal record. Prison officials maintain various types of files on inmates—such as medical, work, educational, and disciplinary files.[97] Disciplinary records record an inmate's violation of prison rules and the ensuing administrative punishment (punitive segregation, loss of good time, etc.). Other files contain intelligence information, for example, whether the inmate is suspected of being a gang member or leader, a sexual predator, mentally unstable, HIV positive, and so forth. These records are not public, but they are widely available to prison personnel and law enforcement agencies.[98] Keeping them secure from inmates' prying eyes has not always been successful.

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95. One example of an inadvertent leak of confidential (medical) information, albeit not from a pre-sentence report, occurred in the Kobe Bryant rape case. The Colorado office of State Court Administrator inadvertently posted the complaining witness's name and address. Later her medical records were also inadvertently released. *E.g.* Associated Press, *Colorado Supreme Court Bars Media from Disclosing Bryant Transcripts Accidentally Sent to Reporters*, http://www.billingsgazette.com/newdex.php?display=rednews/2004/07/19/build/nation/80-kobe.inc (July 19, 2004).

96. *E.g.* S.D. Ga. Loc. R. Administration Crim. Cases 32.2.

97. The Federal Bureau of Prisons's comprehensive inmate record system is called "SENTRY." "The system collects, maintains, and tracks information, including inmate location, medical history, behavioral history, and release data. SENTRY processes over one million transactions each day and tracks more than 165,000 inmates." U.S. Dept. of Just., Off. of the Inspector Gen. Audit Div., *Select Application Controls Review of the Federal Bureau of Prisons's SENTRY Database System*, http://www.usdoj.gov/oig/reports/BOP/a0325/final.pdf#search=%22Review%20of%20the%20Federal%20Bureau%20of%20Prisons%20Sentry%20Database%20System%2C%E2%80%9D%22 (July 2003). SENTRY is not available to the public, but many Bureau of Prisons personnel access these files regularly. Once again, there is a risk of inadvertent or purposeful disclosure to interested parties, including inmates.

98. Under North Carolina's Open Records Law, for example,

II. Strategies to Combat the Negative Consequences of a Criminal Record

The unprecedented level of incarceration has sparked a great deal of interest in the negative consequences of "mass imprisonment." A burgeoning "re-entry/reintegration movement" aims to remove, or at least ameliorate, the negative collateral consequences of conviction in order to promote ex-convicts' successful integration into society.[99] Re-entry activists, echoing the long-time view of proponents of rehabilitation and restorative justice, argue that, in addition to being irrational and mean-spirited, it is counterproductive for public policy to contribute to the creation of an alienated class of ex-offenders who are excluded from the social, political, and economic mainstream.[100] They believe that members of such a subclass are likely to become further committed to deviant values and practices, thereby confirming the negative character-stamping implications of their criminal records. Therefore, in addition to campaigning for the elimination of de jure collateral consequences, such as disenfranchisement and ineligibility for public housing, student loans, and occupation licenses, they favor: 1) restricting access to criminal records, and 2) prohibiting, or at least establishing a presumption against, private discrimination based on criminal record.[101]

There are four general strategies for attacking the negative consequences of a criminal record. First, public policy could aim to restrict the government's collection and storage of individual criminal history records. If there were no criminal records, or no access to criminal records, there would be no discrimination based on criminal records. Second, private entities and individuals, including employers, could be restricted from obtaining individual criminal background information from the government, information brokers, or job applicants themselves. Third, policymakers could make it criminal or civilly actionable to discriminate on the basis of

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> [i]t is important to note that the confidentiality of prison records is limited to *internal* matters, such as prisoner behavior, discipline, consideration for work release, and the like. Matters such as the length of a prisoner's sentence, the beginning and ending date of the sentence, and the like are matters of public record.

Reporters Comm. for Freedom of the Press, *Open Government Guide NC Item*, http://www.rcfp.org/ogg/item.php?t=short&state=NC&level=R4L (2006); *see also* N.C. Gen. Stat. § 148--59 (2006).

99. *E.g.* Travis, *supra* n. 4; *see also* Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford U. Press 2003). The re-entry discourse focuses on policies and practices that inhibit or facilitate the transition from prison to freedom, but the problem of smoothing the transition to a law-abiding lifestyle occurs after any conviction, regardless of incarceration.

100. *See generally Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind eds., New Press 2002); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (U. Chi. Press 2001); *see also* The White House, *Statement on the Second Chance Act 2004*, http://www.whitehouse.gov/news/releases/2004/06/20040623-13.html (June 23, 2004).

101. *See* NuLeadership Policy Group, *An Open Letter to Our Friends*, http://rccatl.org/tiki-download_file.php?fileId=37 (accessed on Sept. 18, 2006).

criminal record. Fourth, reformers could take a completely different tack, attempting to remove the stigma from a criminal record by persuading employers and others that ex-cons are actually reliable and trustworthy and that having a criminal record is no more relevant to character and conduct than characteristics such as race or religion.

Restricting Production of Criminal Records

Indeed, criminal records are proliferating and being used more extensively. The criminal justice system depends upon such records. Information technology has permitted criminal justice agencies to collect and store more data and retrieve it more easily. The existence of more retrievable information on arrestees, defendants, probationers, prisoners, and parolees allows for better informed and more nuanced decisionmaking.

Of course, it is true that individuals could be spared the stigma of any criminal record if certain conduct was decriminalized (e.g. drugs, prostitution, minor assaults). Such decriminalization is beyond the scope of this article, but it is important to bear in mind the costs of a sprawling and ever-increasing criminal law.

It would be possible to expand use of pre-trial and even pre-indictment diversion programs. Individuals who successfully complete the diversion program would have their charges dismissed. They would therefore avoid the stigma of a conviction, and the record of arrest could be sealed.

Reform in this direction might prove salutary from the standpoint of promoting successful reintegration, although it might prove to be the case that the minor offenders who get diverted currently encounter the least reintegration difficulties. Diversion program records might also carry a stigma.

Sealing records of arrests, even when not followed by conviction, also is more difficult to implement than might first appear. Arrests are made public on police blotters and on court arraignment records. Arrest information also needs to be available at least during the pendency of the case, including any period of deferred prosecution. The fact of a prior arrest is relevant if the individual is subsequently arrested on another charge; prosecutors and judges will appropriately want to consider whether the individual had been previously arrested and perhaps diverted.

An arrest may not be followed by conviction for many reasons other than police, prosecutorial, and judicial belief that the arrestee is innocent. The victim may refuse to testify. A witness may die or disappear. The prosecutor may be satisfied with the arrestee's treatment plan. Relevant evidence may be suppressed on account of a Fourth Amendment violation. In all these situations, the police and prosecutors will want the individual's arrest record to remain accessible in the event he or she is arrested for a new offense. It is unlikely that criminal justice agencies will decrease their production of criminal records.

Restricting Dissemination to Criminal Records

A generation or two ago, the possibility of treating criminal records as private,[102] and thus restricting their dissemination, did not seem so far-fetched.[103] In 1950, Congress passed the Federal Youth Corrections Act, which made federal offenders between ages eighteen and twenty-six eligible to have their convictions "set aside" if the court released them early from probation. "[Congress's] primary concern was that rehabilitated youth offenders be spared the far more common and pervasive social stigma and loss of economic opportunity that in this society accompany the 'ex-con' label."[104] Congress repealed the Act in the mid-1980s.

Although the Freedom of Information Act, which was passed in 1966 and amended in 1974, created a strong presumption in favor of public access to government files, it made an exception for records or information compiled for law enforcement purposes "to the extent that the production of such [materials] would . . . constitute an unwarranted invasion of personal privacy."[105] In *Reporters Committee v. U.S. Department of Justice*, the plaintiff-journalists sought to use the Freedom of Information Act to compel the FBI to release the rap sheets of some individuals allegedly connected to organized crime. The D.C. Court of Appeals agreed with the journalists but the Supreme Court held in favor of the FBI's refusal to release the information, noting that even though criminal justice information may be available somewhere in the public domain, this is far different than it being compiled and indexed in government files:

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102. The U.S. Supreme Court addressed the question of whether an individual's right to privacy is violated by dissemination of information about a wrongful arrest in 1976 in *Paul v. Davis*, 424 U.S. 693 (1976). After the plaintiff was arrested for shoplifting, the Louisville police chief included the plaintiff's name and photo in a flyer titled "Active Shoplifters" that he circulated to 800 merchants. *Id.* at 694–96. After the shoplifting charge was dismissed, the plaintiff sued the police chief on the ground the flyer had injured his reputation in violation of his constitutional right to substantive due process of law and his constitutional right to privacy. *Id.* at 696. The Court rejected the due process argument, holding that while the police official's action might have constituted defamation under state law, the U.S. Constitution does not protect an individual's interest in his good name and reputation. *Id.* at 713–14. The Court then summarily disposed of the privacy argument as follows:

> [The plaintiff] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713; *see also Paul P. v. Veniero*, 170 F.3d 396 (3d Cir. 1999) (holding the Megan's Law sex offender registry does not violate a constitutional privacy interest because criminal justice events are public, not private).

103. Pub. L. No. 107-347, 116 Stat. 2899 (2002).

104. *Doe v. Webster*, 606 F.2d 1226, 1234–35 (D.C. Cir. 1979); *see generally* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside under the Federal Youth Corrections Act*, 1981 Duke L.J. 477 (1981).

105. *Freedom of Information Act*, 5 U.S.C. § 552b(c)(7) (2000).

> In addition to the common-law and dictionary understandings, the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.[106]

Moreover, the Court stressed that, in passing the FOIA, Congress intended to provide the public information about the operations of its government and government officials, not to make personal information widely available:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.[107]

The Court also found support in the Privacy Act of 1974:[108]

> The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. . . . Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided. Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."[109]

The public/private status of a criminal record was significantly complicated by the Fair Credit Reporting Act ("FCRA") of 1970,[110] which sought

106. U.S. Dept. of Just. v. Repts. Comm. for Freedom of the Press, 489 U.S. 749, 767 (1989).
107. *Id.* at 773.
108. 5 U.S.C. § 552a (2000).
109. Rptrs. Comm. for Freedom of the Press, 489 U.S. at 780.
110. 15 U.S.C. § 1681 et seq. (2000).

to balance the individuals' privacy interest with the interests of banks, creditors, and employers in making well-informed decisions.[111] The plain text of the FCRA unambiguously allows an employer to obtain a consumer credit report from a credit reporting agency ("CRA") if done for "employment purposes,"[112] broadly defined as "evaluating a consumer for employment, promotion, reassignment or retention as an employee."[113] Credit bureaus can report arrests for up to seven years; convictions can be reported forever.[114] No special rule exists for other types of criminal records, including criminal complaints, indictments, warrants, and probation and parole reports. While the FCRA does not entitle credit bureaus to obtain government-held criminal records,[115] it does constitute a basic and generation-long judgment that an individual's criminal record, even a bare arrest, is relevant information for institutions and organizations seeking to assess an individual's character for purposes of predicting future conduct.

Any thought that the Supreme Court might have been flirting with the idea that the Constitution contains a right of privacy protecting the individual from dissemination of his criminal record was dispelled in 1976 by *Paul v. Davis*.[116] Davis had been arrested and arraigned on shoplifting charges, but the case had not been resolved. Police Chief Paul included Davis' name and photo on a brochure of "active shoplifters" circulated to Louisville businessmen. Davis claimed that Paul's actions violated his constitutional privacy right. The Court disagreed:

> [Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to employ them in this manner.[117]

Regulating Discrimination of Criminal Records

Despite the historical privacy of criminal records, it would be difficult to reverse the recent trend of their proliferating use and dissemination. Congress has passed a number of laws providing, even mandating, that certain public agencies and private employers conduct criminal background checks. Following the 9/11 terrorist attacks on the World Trade Center and the Pen-

111. Taja-Nia Y. Henderson, Student Author, *New Frontiers in Fair Lending: Confronting Lending Discrimination against Ex-Offenders*, 80 N.Y.U. L. Rev. 1237, 1240–45 (2005).

112. 15 U.S.C. § 1681b(a)(3)(B) (2000).

113. *Id.* at § 1681a(h).

114. *Id.* at § 1681c(a)(2).

115. Credit bureaus usually obtain criminal background information from court records.

116. 424 U.S. at 693.

117. *Id.* at 713.

tagon, Congress passed several laws requiring criminal background checks for perhaps a million workers, including airport baggage screeners, port and chemical plant workers, workers in the transportation industry, private security personnel, and individuals handling certain biological agents.[118] Because a history of criminal conduct is so firmly believed to be a valid predictor of future unreliable and even dangerous conduct, it is unimaginable that Congress or state legislatures would reverse current policy and deny private security firms, airports, schools, hospitals, and banks the opportunity to use criminal history information to inform hiring and personnel decisions.[119] Indeed, the likelihood is that the criminal justice system will continue to operate openly.

Even if they wanted to, it is very unlikely that legislators could successfully restrict access to criminal history records.[120] The U.S. Supreme Court has recognized that the Sixth Amendment right to public trials embodies a strong societal interest in public, including media, access to court proceedings. The Court has also found that the media and the public have a strong First Amendment right to print and broadcast news about crime and criminal justice events, including arrests, indictments, and trials.[121] In our information age, there is little likelihood that an individual's conviction, arrest, or indictment could effectively be kept secret or accessible to just a small number of government officials. Anyone can find the information in newspaper files, court records, and on Internet websites and blogs.

Moreover, private information brokers have the capacity and economic incentive to provide individual criminal history information ("any information about anybody") to prospective employers and others.[122] These companies send their employees ("runners") to police stations and courts to gather information, which they then store in their own databases. Furthermore, as long as the demand for criminal history information is strong, we should anticipate that prohibitory or restrictive regulation would likely be undermined by a black market in criminal history information.[123] Hundreds, probably thousands, of criminal justice system employees in every state have access to criminal records. If these records were made unavailable

118. SEARCH, The Natl. Consortium for Just. Info. and Statistics, *supra* n. 5, at 1; *see* Pub. L. No. 107-56, 115 Stat. 272 (2001); Pub. L. No. 107-71, 115 Stat. 597 (2001).

119. *See* Legal Action Center, *After Prison: Roadblocks to Re-entry*, http://www.lac.org/lac/ (2004).

120. *See* Diehm, *supra* n. 32.

121. *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501 (1984) (holding that order sealing transcript of voir dire—the questioning of potential jurors—in trial involving rape and murder of teenage girl violated First Amendment); *Richmond Newsps.*, 448 U.S. at 572–73; *see also* Susanna Barber, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS–FAIR TRIAL DEBATE (ABLEX PUBLG. CORP. 1987).

122. *See supra* n. 6 (listing several private internet information brokers); *see also* SEARCH: The Natl. Consortium for Just. Info. and Statistics, *supra* n. 5.

123. On the current black market in criminal history information, see Peterson, *supra* n. 70; *see also* Bureau of Just. Statistics, *supra* n. 70.

while demand remained strong, the incentive to offer, and the opportunity to solicit, bribes would be great. Whatever the cause, unauthorized disclosure of criminal records is hardly a rare occurrence.[124]

The most plausible means of limiting criminal record dissemination is expungement. Every U.S. jurisdiction provides some form, even if limited, of "expungement" or "sealing" of criminal history records *in certain circumstances*.[125] But expungement is a highly problematic policy. In effect, it seeks to rewrite history, establishing that something did not happen although it really did. The problem is compounded if the expungement policy allows or requires lying to support the false history. Should the previously convicted defendant be told to lie if he is asked whether he had ever been convicted of a crime? Even if he is asked by a federal agent or under oath? Should police and prosecutors be ordered to lie if they are ever asked whether the previous (now purged) conviction happened? Even under oath? Perhaps for these reasons, expungement has traditionally been a narrow remedy, limited to less serious convictions and the passage of a certain period of time. Typically, the person seeking expungement has to apply to the appropriate agency and provide documentation in support of the desired action. In some states, the individual seeking expungement has to demonstrate factual innocence.[126]

In addition to expungement's limited nature, it is difficult to enforce. Because of the proliferation of private information brokers with criminal record databases, it is difficult to ensure the expunged record has been deleted from *all* databases. Even then, some licensing boards, employers, landlords, and others may request disclosure of expunged convictions. It is telling that the New York State judicial committee that oversees bar admissions requires applicants to divulge arrests as well as convictions (adult and juvenile) *even if expunged*. Indeed, every arrest must be disclosed.[127] If the bar committee feels no compunction about requiring would-be lawyers to reveal expunged convictions, it is likely that other regulators and employers

124. *See e.g. Paul P. v. Farmer*, 80 F. Supp. 2d 320 (D.N.J. 2000).

125. Cal. Penal Code Ann. § 1203.4 (West 2005); *see also* Darren T. Kavinoky, *Expungement 101*, http://www.1800duilaws.com/article/expungement101.asp (accessed Oct. 6, 2006).

126. Diehm, *supra* n. 32, at 74.

127. New York Supreme Court Appellate Division, *Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York*, http://www.nybarexam.org/admform.pdf (Revised, Oct. 2002). Question 12 on The New York Supreme Court, Appellate Division, First Department's Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York states: "Have you ever, either as an adult or a juvenile, been cited, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, except minor parking violations, or been the subject of any juvenile delinquency or youthful offender proceeding? . . . Although a conviction may have been expunged from the records by an order of a court, it nevertheless should be disclosed in the answer to this question."

would ask.[128] Alternatively, they might ask an ex-con to explain the gap in his employment history: "What were you doing the last couple of years?" It's hard to believe that the law of expungement would permit or encourage the job-seeker to tell a lie or fabricate a curriculum vitae. Sealing the record so that it can later be opened, perhaps pursuant to court order, is more practical, but still subject to the substantial risk of purposeful or inadvertent disclosure. The state repository is bound to encounter difficulties in managing its sealing or unsealing responsibilities. And there remains the question whether employers can ask about sealed convictions and if they do, whether the law tells ex-cons they need not answer truthfully.

Prohibiting Discrimination Based on Criminal Record

An obvious strategy for ameliorating the negative effect of criminal records is to prohibit employment, housing, and other discrimination based on criminal records. This would require reversing a great deal of current law that affirmatively authorizes and even mandates such discrimination. Today, most states bar some or all ex-cons from various occupations and professions—teachers and teachers' aides, massage therapists, union officers, securities dealers, and even barbers.[129] In addition, ex-cons are increasingly barred from working for voluntary organizations working with children and other vulnerable populations. To categorically prohibit discrimination based on criminal record would mean that daycare centers would be unable to exclude individuals previously convicted of child abuse, banks would not be able to exclude individuals previously convicted of embezzlement, a chemical plant would be unable to deny employment to an otherwise qualified person previously convicted of arson, and the CIA would not be able to reject an employee on the basis of a previous conviction for selling proprietary or classified information.

Admittedly, it is possible to prohibit employment discrimination based on criminal record generally, subject to a list of exceptions. There will be a tendency, however, to keep expanding the number of exceptions as all kinds of agencies, groups, and organizations lobby for the perceived greater protection provided by access to more background information.

It is highly unlikely that Congress or many state legislatures will, in the foreseeable future, prohibit public or private de jure and de facto discrimination based on criminal record. Out of fear of being blamed by political opponents and constituents for crimes committed by ex-cons, the vast majority of politicians would certainly oppose such a law.[130] Offenders

128. *See As Criminal Records Become Open Books, More People Are Trapped By Rap Sheets*, Picayune Item (Picayune, M.S.) (Aug. 13, 2005), http://www.picayuneitem.com/articles/2005/08/13/news/28rapsheet.txt.

129. Legal Action Center, *supra* n. 119.

130. *But see* H.R. 4676, 108th Cong. (June 23, 2004) (as introduced); Sen. 2789, 108th Cong. (Sept. 10, 2004) (as introduced). The Second Chance Act of 2004, a bill introduced into both the

have little, if any, political influence. Indeed, convicted felons are disenfranchised in many states, sometimes for life—even where they can vote, their actual participation rate is very low.

Legislation to prohibit discrimination based on criminal record is also unlikely to gain public support. Such a law, which suppresses relevant parts of an ex-con's curriculum vitae while permitting employers to consider all information, even disreputable information, about applicants without a criminal record, would appear to prefer ex-cons to other applicants. Likewise, employers would understandably object to politicians interfering with their desire to hire whomever they think would do the best job as long as they do not base their decisions on invidious racial and other such stereotypes. They will argue with much force that discrimination based on criminal conduct is not like racial discrimination. A criminal record is not an ascribed characteristic over which the individual has no control. While there is no morally acceptable reason to discriminate against a person because of race, there is a plausible and moral reason to discriminate against people based on their disreputable and perhaps dangerous conduct.[131] The criminal law itself punishes people for their bad (anti-social) choices. Why shouldn't a landlord or employer favor a tenant or job applicant with a solid record of reliability and trustworthiness over an applicant with a spotted record?

The few states that have anti-criminal-record-discrimination laws—rather than prohibiting discrimination outright—utilize presumptions: an employer must not discriminate against a person with a criminal record unless the criminal record bears a (significant) relationship to the job for which the applicant is applying.[132] But an employer could plausibly argue that any criminal record demonstrates untrustworthiness and regardless, low police clearance rates plus plea bargaining means that an ex-convict's conviction of record probably does not fully reveal his actual criminal conduct.

It would probably not be difficult for an employer to come up with an explanation for why a particular criminal propensity would pose a specified job risk. Moreover, an employer could easily avoid the exercise altogether by simply hiring a different applicant on the ground that, "everything considered, I think he will do the job better and make a greater contribution to the firm."

Senate (S 2789) and the House of Representatives (HR 4676) that would provide funds to provide services to assist ex-convicts with re-entry problems. The bill would also re-establish the eligibility of some ex-convicts for student loans but it would not seek to prohibit employment discrimination against ex-convicts.

131. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You*, 52 Stan. L. Rev. 1049, 1091–92 (2000); T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 Tenn. L. Rev. 287, 304 (1998).

132. N.Y. Correction L. §§ 752–54 (McKinney 1987); N.Y. Crim. Proc. L. § 160.60 (McKinney 1992); N.Y. Exec. L. §§ 296(15)–(16) (McKinney 2001).

Even if strong anti-discrimination laws against persons with criminal records could be passed, they would be difficult to enforce.[133] We should not underestimate many private employers' motivation to secure the most reliable workforce possible and to protect themselves from thefts and aggression against employees and patrons.[134] Moreover, disappointed job applicants will have little incentive to sue and a strong financial disincentive (attorney fees) to sue for a job she never had.

Some employers would likely equate their right to make informed hiring and other personnel decisions with the right of organizational self-defense. Employers' motivation will be reinforced by fear of being held liable for the ex-offender employee's intentional injuries inflicted upon other employees, clients, or customers under the traditional tort doctrine of respondeat superior or the more recent tort of negligent hiring.[135] Some state legislatures or courts have imposed special negligent hiring liability on certain businesses (such as employers of home helpers).[136] For example, it is legally irresponsible for a board of education to ignore (or be indifferent to) a new teacher's previous arrests or convictions for child molestation.[137] Courts may, in the future, find it irresponsible, even actionably negligent, for a college to ignore (or be indifferent to) an admission applicant's criminal record.[138]

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133. *See* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 517–18 (1987). One can imagine other strategies as well. For example, efforts could be made to persuade organizations and individuals not to discriminate against those with criminal records on at least two grounds: 1) that such discrimination is irrational; and 2) that such discrimination is mean-spirited and immoral. This strategy is beyond the scope of the present article.

134. A survey by the Society for Human Resource Management found that 51% of corporations used employment criminal record background checks in 1996. By 2003 the percentage had increased to 80%. Kris Frieswick, *CFO Magazine: Background Checks*, http://www.cfo.com/article.cfm/4220232/c_4221579?f=insidecfo (Aug. 1, 2005). Even if lawmakers decided that the public interest demanded ending or softening discrimination against ex-cons, employers might use pretexts for continuing to discriminate.

135. *See* Jennifer Leavitt, Student Author, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1302–03 (2002); Dermot Sullivan, Student Author, *Employee Violence, Negligent Hiring, and Criminal Record Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety*, 72 St. John's L. Rev. 581, 585 (Spring 1998); Gregory Davis, *The History of Negligent Hiring*, http://www.nationalbackgroundscreening.com/ResourceFiles/Negligent%20Hiring_White%20Paper.pdf (accessed Sept. 17, 2006).

136. Scott Brazil, *Liability for Negligent Hiring: Does It Affect You?*, http://www.riddleandbrazil.com/content/view/38/59/ (accessed Sept. 17, 2006).

137. *See* Robert D. Bickel & Peter F. Lake, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* ch. IV (Carolina Academic Press 1999).

138. Moises Mendoza, *Colleges Consider Criminal Checks*, The Hoya (D.C.) A1 (Apr. 19, 2005) (available at http://www.thehoya.com/news/041905/news2.cfm); Ellen C. Fullerton, *Screening College Applicants for a History of Violence*, http://jscms.jrn.columbia.edu/cns/2005-12-13/fullerton-collegesafety/fullText (Dec. 13, 2005). For a United Kingdom university's policy on an applicant's criminal record, see University College Worcester, *Policy Statement on the Admission of Students Who Are Ex-Offenders*, http://www2.worc.ac.uk/registry/pdf/policy_on_recruitment_of_exoffenders.pdf (2006).

Neutralizing the Stigma of a Criminal Conviction

The most ambitious strategy for neutralizing the consequences of a criminal record would involve persuading politicians, employers, landlords, voluntary organizations, and the general public that a criminal conviction (much more, an arrest) is not probative of the individual's character nor predictive of his future conduct. [139] There would be no debate over dissemination of criminal records, or over discrimination based upon criminal records if employers and others did not believe such information to be relevant to future conduct. Consider, by comparison, the unimportance most people assign to an individual's accumulation of a modest number of traffic tickets. This change could be achieved if people perceived that the experience of arrest, conviction, and punishment so chastened defendants that they rarely offended a second time. It would also be achieved if people perceived the criminal justice system experience as generally positive—i.e., that, upon conviction, defendants were consistently rehabilitated.

Space does not allow, nor is this the occasion for a lengthy discussion on the criminal justice system's potential to rehabilitate offenders. I will simply assert that there are many reasons to be skeptical. First, the vast majority of convicted offenders have huge vocational, educational, psychological, and social deficits. It is a tremendous uphill battle for criminal justice agencies to succeed where other institutions have previously failed. Second, the criminal justice system is not well-financed nor well-positioned to deliver rehabilitative services. Notwithstanding a small number of truly intensive probation programs, the criminal justice system has only limited contact opportunity to rehabilitate offenders who are not incarcerated after conviction. For those who are incarcerated briefly, there is probably inadequate time (not to mention resources) to address the deficits mentioned above. For the most serious offenders—those incarcerated for years—there is enough time, but prisons have proved to be a very bad venue for delivering social and treatment services.[140] It is also very difficult to recruit and retain high quality treatment, vocational, and educational staff to work in prisons; burnout is high.[141]

The recidivism rates of convicted offenders are shockingly high. In June 2002, the Bureau of Justice Statistics released data from the largest recidivism study ever conducted in the United States. [142] The study, which

139. *See* Margaret C. Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705 (2003).

140. *See Responding to the Threat of Gangs: Leadership and Management Strategies*, 5 Correction Management Quarterly (Special Issue) (2001) (the prison environment is conflictual and hostile, and may be dominated by warring gangs).

141. For extensive comments on this point, see James B. Jacobs, *Prison Labour: A Tale of Two Penologies*, in *Prison Labour: Salvation or Slavery?* 269 (Dirk van Zyl Smit & Frieder Dünkel eds., Dartmouth Publg. Co. Ltd. 1999).

142. Bureau of Just. Statistics, *Recidivism of Prisoners Released in 1994*, www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf (June 2002).

tracked prisoners discharged in fifteen states, representing two-thirds of all state prisoners released in 1994, found:

1) 67 percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years. This re-arrest rate was 55 percent higher than that among prisoners released during 1983.
2) Most former convicts were rearrested shortly after getting out of prison: 30 percent within six months, 44 percent within one year, 59 percent within two years, and 67 percent by the end of three years.
3) Within three years, 52 percent of the state released prisoners were back in prison because of a new crime or because they had violated their parole conditions (for example, failed a drug test or missed a parole office appointment).
4) The 272,111 released prisoners had accumulated more than 4.1 million arrest charges prior to their current imprisonment and acquired an additional 744,000 arrest charges in the three years following their discharge in 1994.
5) Post-prison recidivism was strongly related to arrest history. Among prisoners with one arrest prior to their release, 41 percent were rearrested. Of those with two prior arrests, 47 percent were rearrested. Of those with three earlier arrests, 55 percent were rearrested. Among those with more than 15 prior arrests, that is about 18 percent of all released prisoners, 82 percent were rearrested within the three-year period.

Admittedly, there is an unresolved question of causality here. Maybe high recidivism is caused by discrimination against ex-offenders, but the popular perception is the opposite. Given the grim recidivism statistics, one could hardly blame an employer, landlord, or university for considering a prior criminal record, especially a serious or recent record, highly relevant to future conduct.

Ensuring that Criminal Records Are Accurate

If the dissemination of criminal history information is inevitable, it is crucially important that such information at least be accurate. This goal is consistent with the goal of FCRA, which provides consumers the right to see their credit reports and to challenge inaccurate information, including criminal history.[143] It is also consistent with congressional and U.S. Department of Justice policy since 1968.[144] However, rap sheets are still often

143. 15 U.S.C. §§ 1681, 1681g (2000).

144. In 1973, Congress amended the Omnibus Crime Control and Safe Streets Act of 1968 to require that all criminal history information collected or maintained with federal funds be available for review and challenge by record subjects. For the current statutory requirements, see *Justice Assistance Act of 1984*, Pub. L. No. 98-473, § 812(b), 98 Stat. 1837 (1984); *see also* 28 C.F.R. § 20.2 (1999).

incomplete, especially on account of missing dispositional data.[145] Thus, Mr. X's rap sheet may show that he was arrested for robbery, but may not indicate that the charges were dropped or that X was ultimately acquitted. Likewise, a rap sheet might indicate that an arrest warrant was issued while, in fact, the arrest warrant had been quashed or otherwise withdrawn.[146]

A rap sheet may contain blatant errors. An arrest or conviction may have been attributed to the wrong person (perhaps the result of "identity

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145. Interestingly, it took a gun control measure, the 1993 Brady Law (Brady Handgun Violence Prevention Act), to trigger a massive national effort to improve the accuracy of state criminal records. The controversial Brady Law was meant to prevent "felons" (anyone ever convicted of a felony, and later amended to include certain domestic violence misdemeanors and domestic violence restraining orders) from purchasing a firearm from a retail dealer. 18 U.S.C. § 922 (2000). It required that retail gun sellers alert the chief law enforcement officer (CLEO) in their jurisdiction to a proposed firearms sale. *Id.* at § 922(s)(1)(A)(i)(III). The CLEO would then be required (or encouraged) to run a criminal records check on the would-be purchaser. *Id.* at § 922(s)(2). If the would-be purchaser had a criminal record, the CLEO would inform the retailer not to complete the sale. *Id.* at § 922(s)(1)(c)(ii). If, however, the CLEO did not communicate such a stop order to the retailer within five business days, the sale could be completed. *Id.* at § 922 (s)(1)(A)(ii)(I). *See also Printz v. U.S.*, 521 U.S. 898 (1997).

The Brady Law also provided that the de facto five business day waiting period would have to be replaced within five years by an instant background check system (NICS) that would permit a firearms retailer to obtain from an FBI database an immediate approval/disapproval of the would-be purchase depending on the instant background check. 18 U.S.C. § 922(t)(1)(A). Note that the Brady Law required the would-be firearms purchaser to show the firearms dealer an identification document, but no fingerprinting was required. Thus, the background check is based upon "soft" identity information.

As part of the Brady Act, Congress authorized the U.S. Department of Justice (DOJ) to allocate $200 million to state and local law enforcement agencies to computerize criminal records in a state-level database in order to make them accessible electronically. H.R. 1025, 103d Cong. § 106 (Jan. 5, 1993). In addition, the National Criminal History Information Program (NCHIP) provided money to state courts to improve their records and upgrade rap sheets to include dispositions. Bureau of Just. Statistics, *Program Report, Improving Criminal History Records for Background Checks, 2005* (July 2006) (available at http://www.ojp.usdoj.gov/bjs/pub/pdf/lchrbc05.pdf). The revamped NICS includes the Interstate Identification Index, the National Crime Information Center (which includes protection orders and active felony or misdemeanor warrants), and the NICS Index (a database containing information provided by local, state, and federal agencies pertaining to persons prohibited under federal law from receiving or possessing a firearm). Bureau of Just. Statistics, *National Criminal History Improvement Program*, http://www.ojp.usdoj.gov/bjs/nchip.htm#components (last updated May 5, 2006). From the inception of the Brady Act on February 29, 1994, to December 31, 2004, background checks have been performed on more than 61 million firearms purchasers. Bureau of Just. Statistics, *supra* n. 35. About 1,228,000 applications were rejected. *Id.* After the September 11th attacks, ATF regulations mandated a search of Immigration and Customs Enforcement's database on all non-United States citizens seeking to purchase a firearm. Natl. Instant Crim. Background Check Sys., *2001/2002 Operational Report*, pt. 5 (May 2003) (available at http://www.fbi.gov/hq/cjisd/nics/oper-rpt/oper-rpt2001-2.htm#page_33).

146. *See Ariz. v. Evans*, 514 U.S. 1 (1995). A routine police stop revealed that the defendant had an outstanding warrant for his arrest. Consequently, he was arrested. A search produced a bag of marijuana. The defendant argued that the marijuana should have been suppressed because the arrest was carried out pursuant to an error in the criminal records system. In actuality, there was no outstanding arrest warrant and therefore no basis for the search. The Supreme Court held that the purpose of the exclusionary rule did not require suppression of evidence in the case of a clerical or administrative error like this.

theft"),[147] or the rap sheet may indicate the wrong offense of conviction (a felony rather than a misdemeanor).[148] It is therefore imperative that states provide fair and effective procedures for obtaining one's own criminal record, challenging its accuracy, and having it corrected. Unfortunately, this is often not the case. It typically takes a lot of work by a lawyer or NGO to get errors corrected in all government databases. If licensing boards, employers, and others are able to obtain criminal records, they should be required to notify job applicants that a criminal records check is part of the licensing or hiring process; that would give a license or job applicant an incentive to obtain a copy of her criminal record and protest any inaccuracies.

CONCLUSION

One of the criminal justice system's core functions is to create and maintain individual criminal history records[149] and other records that document contacts between an individual and the police, courts, prosecutors, jails, probation, and prisons. This information drives decision-making at every stage of criminal procedure. Personnel use this information to categorize offenders. Leniency is often shown to arrestees and defendants with no sig-

147. *See* Beth Givens, *Identity Theft: The Growing Problem of Wrongful Criminal Records*, http://www.privacyrights.org/ar/wcr.html (last updated Mar. 2006). For a story about an individual who was fired from her job on account of a criminal record compiled by a person who had stolen her identity, see *Stolen Identity Victim Loses Job over Rapsheet*, Guelph Mercury (Ontario, Canada) C3 (Aug. 13, 2005).

148. *See* Legal Action Center, *Setting the Record Straight: What Defense Attorneys Need to Know about the Civil Consequences of Client Criminal Records*, http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf#search=%22%22What%20Defense%20Attorneys%20Need%20to%20Know%22%20%22 (2001). New York State provides a way for individuals to request a "records review" from the Division of Criminal Justice. Once a request is made, the state agency sends the requesting individual a copy of her rap sheet. If the individual believes there are errors, she has to take the initiative in assembling the appropriate documents that prove the inaccuracy. Even then, she cannot be positive that the error will be corrected in all government-maintained databases. Of course, it might not occur to the individual to ask for such a review in the first place. Even if the agency makes the requested correction, there is no way to obtain similar corrections in databases held by private information broker companies from whom private employers purchase background information on prospective employees. While every state has procedures for purging criminal records, in practice even purged records are often available to police, prosecutors, courts, and private employers.

149. It is likely that, by age 30, approximately half of U.S. males have been arrested at least once. Data are surprisingly hard to come by. According to Marvin Wolfgang's famous cohort study, by age 18, about 33% of males born in Philadelphia in 1947 had been arrested at least once. By age 30, the percentage had increased to 47%. A subsequent study found almost identical percentages for males born in 1957. The percentage for females is much lower. *See* Marvin E. Wolfgang et al., *Delinquency in a Birth Cohort* (U. of Chi. Press 1972). A 1979 unpublished study by Neal Miller for the U.S. Department of Labor concluded that approximately 25%–35% of the adult population has a record of arrest or conviction. Neil Miller, *A Study of the Number of Persons with Records of Arrest or Conviction in the Labor Force*, U.S. Dept. of Labor Technical Analysis Paper #63 (1979); *see also* Henderson, *supra* n. 111, at 1239 (citing a statistic claiming that 47 million Americans have either an arrest or conviction record).

nificant criminal record, while a lengthy or serious criminal record results in more severe treatment.

The criminal justice system thrives on criminal history information. The forces driving the collection and storage of criminal records are very strong. Criminal justice agencies collect more criminal history information, and store it in ever more efficient and easily accessible databases. While academic commentators and the American Bar Association have been lobbying to cut back the de jure consequences of conviction,[150] like voting disenfranchisement and ineligibility for student loans and public housing,[151] public policy seems to be moving inexorably toward making criminal records more widely available so that agencies, organizations, and individuals can, if they desire, take criminal history information into account in making business and other decisions.[152]

Non-criminal justice governmental agencies, private landlords, and employers believe that an individual's criminal record is relevant for predicting future job performance.[153] Just as a good curriculum vitae counts heavily in the job applicant's favor, a bad curriculum vitae counts against the job applicant. The more serious the record, the greater the disinclination to enter into a contractual or social relationship.[154] The rational employer will want to minimize the risk of an unreliable, predatory, and dangerous employee.[155] Moreover, most job applicants with a significant criminal record are also deficient in other job-relevant variables—educational achievement, work history, and interviewing skills. Even without the stigma of a criminal record, such individuals have difficulty finding work.[156]

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150. ABA, *Justice Kennedy Commission, Report to the House of Delegates* (2003) (available at http://www.abanet.org/media/kencomm/rep121a.pdf); *see also* Bureau of Just. Statistics, *supra* n. 70; Margaret C. Love, *Deconstructing the New Infamy*, 16 Crim. Just. 30 (2001).

151. ABA, *supra* n. 144; *see also* ABA *Commission on Effective Criminal Sanctions* 6 (May 5, 2006) (available at http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Entirereport8706(2).pdf).

For a Department of Justice compiled list of federal collateral consequences of conviction, *see* U.S. Dept. of Just., *Federal Statutes Imposing Collateral Consequences upon Conviction* (available at http://www.usdoj.gov/pardon/collateral_consequences.pdf).

152. There are two ways public records are accessible electronically. Some jurisdictions post them on their government websites, thereby providing free or low-cost access to records. Government agencies and courts also sell their public files to commercial data compilers and information brokers. These firms in turn sell the information. *See* Bureau of Just. Statistics, *supra* n. 70.

153. Frieswick, *supra* n. 134.

154. *See* Shawn D. Bushway & Peter Reuter, *Labor Markets and Crime Risk Factors*, in *Evidence-Based Crime Prevention* 198, 224 (Lawrence W. Sherman, David P. Farrington, Brandon C. Welso & Doris Layton MacKenzie eds., Routledge 2002).

155. *See* Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (Harvard U. Press 1993); Derek Hinton, *The Criminal Records Manual: The Complete National Reference for the Legal Access and Use of Criminal Records* (2d ed., Facts on Demand Press 2004).

156. Shawn D. Bushway, *The Stigma of a Criminal History Record in the Labor Market*, in *Building Violence: How America's Rush to Incarcerate Creates More Violence* ch. 24 (John May & Khalid R. Pitts eds., Sage Publications 2000); Shawn D. Bushway, *Labor Market Effects of*

There is no easy criminal records policy antidote to the growth of an ex-offender and ex-prison-inmate underclass. The potential to assist ex-convict re-entry through restricting the dissemination and use of criminal records seems very limited. Therefore, policymakers and policy analysts should look for ways to prevent the creation of criminal records in the first place, and to eliminate such governmentally-imposed punitive collateral consequences as denial of welfare benefits, drivers' licenses, student loans, and public housing. Beyond that, to make significant progress in reducing recidivism, governments will probably have to come up with wholly new initiatives, for example, providing some kind of government work for individuals in the transitional period after a sentence is served. A credible government-run work program could certify that a particular ex-offender had performed successfully for a period, say a year. Supervisors and foremen could provide positive references in the future. In other words, public policy could aim to assist an ex-convict in compiling a positive curriculum vitae. The government might also provide tax or other incentives, including insurance against tort liability, to employers willing to take a chance on hiring an ex-offender.[157] The government, assisted by NGOs and publicly-spirited private sector individuals and firms will need to take the lead in developing creative and effective reentry programs that have credibility with the public. Ex-cons will not be able to escape the negative consequences of having a criminal history by suppressing or denying that history. They will have to overcome a negative curriculum vitae by constructing a credible positive record of achievement.

Permitting Employer Access to Criminal History Information, 20 J. of Contemporary Crim. Just. 276, 276 (2004).

157. Perhaps the government could persuade employers to ignore some job applicants' criminal records with grants or tax credits for hiring ex-cons. This, of course, would require that employers know which job applicants have criminal records. Indeed, the Targeted Jobs Tax Credit Act did launch such an experiment in the 1970s. Evaluations apparently concluded that the tax credit did not induce employers to hire ex-offenders whom they would not have hired anyway, and the program was phased out. *See* James B. Jacobs et al., *Ex-offender Employment, Recidivism, and Manpower Policy: CETA, TJTC, and Future Initiatives*, 30 Crime and Delinquency 486, 490–500 (1984).