

# **The Legacy of Nixon, Reagan, and Horton: How The Tough On Crime Movement Enabled A New Regime Of Race- Influenced Employment Discrimination**

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## ABSTRACT

*In this article, I explore the interaction between an alleged “backlash” against the Civil Rights Movement of the 1960s, the rise of “tough on crime” politics, the corresponding explosion in United States incarceration rates, and employment discrimination against individuals with criminal records. I begin by acknowledging scholars who charge that the growth of American prisons has been the direct result of a backlash against the Civil Rights Movement. After exploring the prevalence of “tough on crime” politics from roughly 1964-1986, I suggest that the racially-charged political rhetoric fueling rising African-American incarceration rates should cause us to question the desirability of unrestricted discrimination on the basis of criminal records. I proceed to examine the development of mandatory minimum sentencing laws, noting the racially disparate outcomes of the determinacy in sentencing movement and finding further reason to question the legitimacy of allowing employers to indiscriminately screen candidates on the basis of their criminal histories. I then demonstrate that, despite this suspect history, the current law surrounding criminal record-based employment discrimination is largely unconcerned with the labor market rights of ex-offenders. Finally, I examine the prospects of various reforms that might improve the situation of ex-offender job applicants, acknowledging the barriers to comprehensive change and arguing that any reform movement must find its genesis in the African-American community.*

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<sup>‡</sup> J.D. Columbia Law School. 2011. Thanks to the staff of the *Berkeley Journal of African-American Law & Policy* for their valuable editing assistance.

## INTRODUCTION

The United States incarcerates a greater percentage of its population than any other country in the world, with roughly 726 out of every 100,000 people in prisons or jails.<sup>1</sup> To reach this peak, governments at the local, state, and national levels have spent the past forty years arresting, convicting, and imposing stricter sentences on an ever increasing number of U.S. residents.<sup>2</sup> As a result, an unprecedented one in every four American adults today has some form of criminal record.<sup>3</sup>

Not only are U.S. residents more likely to be sent to jails and prisons than in years past, there is also a much greater probability that their criminal records will follow them throughout their lives. Although court records have historically been available to the general public, innovations of recent years have made investigating an individual's criminal history increasingly cheap and simple.<sup>4</sup> This is particularly true in the job screening context, where employers may frequently reject otherwise qualified applicants because of their criminal records.<sup>5</sup> This discrimination is often perpetrated arbitrarily, as employers refuse to hire ex-offenders regardless of the severity of their convictions or whether they were ever convicted at all.<sup>6</sup> Compounding the problem, federal and state courts and legislatures have been mostly unwilling or unable to prevent employment discrimination against ex-offenders.<sup>7</sup>

The burdens of these concurrent developments have fallen disproportionately on African-Americans. As the percentage of white males in United States prisons has dropped in recent decades,<sup>8</sup> African-American males

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1. *Defending Justice, Fact Sheet: The United States Versus the World* (Feb.16, 2010) <http://www.publiceye.org/defendingjustice/pdfs/factsheets/9-Fact%20Sheet%20-%20US%20vs%20World.pdf>.

2. *See Bureau of Justice Statistics Correctional Surveys* (February 16, 2010) <http://www.ojp.usdoj.gov/bjs/glance/corr2.htm>, (collection of statistics detailing the exponential increases in incarceration over the past 30-40 years).

3. *Criminal Records Impact Communities of Color*, NAT'L EMP'T LAW PROJECT, (Nov. 30, 2009) <http://www.nelp.org/page/-/SCLP/CriminalRecordsImpactCommunitiesofColor.pdf?nocdn=1> [hereinafter National Employment Law Project].

4. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 395 (2005-2006) [hereinafter Jacobs].

5. *See* Harry Holzer, Steven Raphael & Michael A. Stoll, *Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles*, at 20-23 (Mar. 2003), [http://www.urban.org/UploadedPDF/410779\\_ExOffenders.pdf](http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf) [hereinafter Holzer], (survey findings indicate that employers are largely unwilling to take chances by hiring ex-offenders).

6. *Id.*

7. Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 206 (2003-2004).

8. Bruce Western, *The Labor Market Consequences of Incarceration*, PRINCETON UNIV. (Jan. 2001), <http://www.irs.princeton.edu/pubs/pdfs/450.pdf>. [hereinafter Bruce Western].

have been incarcerated with increasing frequency.<sup>9</sup> Accordingly, African Americans are also the group most adversely affected by the use of criminal background checks in pre-employment screening.

Noting these disturbing trends, various scholars have claimed that the racially disparate outcomes of the modern criminal justice system can be traced to a “backlash” against the progressivism of the Civil Rights Movement of the 1960s.<sup>10</sup> This model is intriguing as a broad explanation of the aforementioned phenomena, and, if accurate, should lead us to question the desirability of policies that cause a disproportionately African-American population of ex-offenders to experience crushing disadvantages in the labor market. The following pages discuss this “backlash” model while examining the forces that have led to the current interaction between race, criminal justice, and employment. In section II, I expand on the explosion in incarceration rates in the United States and the racially disparate outcomes evident in this trend, and discuss different articulations of “backlash” models which attempt to explain these developments. Then, demonstrating the prevalence of “tough on crime” politics from roughly 1964-1986, I argue that the racially charged political rhetoric driving the incarceration explosion should lead courts and legislatures to question the permissiveness of unrestricted discrimination on the basis of criminal records. In section III, I proceed to examine the development of mandatory minimum sentencing laws, noting the racially disparate outcomes of sentencing reforms such as the Anti-Drug Abuse Act of 1986. I then demonstrate that, despite this suspect history, the current law surrounding criminal record-based employment discrimination is largely unconcerned with the labor market rights of ex-offenders. Finally, in section IV I examine the prospects of various reforms that might improve the situation of ex-offender job applicants, acknowledging the barriers to comprehensive change and arguing that any reform movement must find its genesis in the African-American community. I conclude that while a simple “backlash” model is not wholly accurate because it ascribes too much of a conscious character to institutional developments caused by a broad range of factors, it is instructive and helps to explain phenomena that cannot be adequately understood without a consciousness of recent racial and political history.

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9. *Criminal Offenders Statistics*, BUREAU OF JUSTICE STATISTICS ([Insert date]), <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (follow “Lifetime Likelihood” hyperlink) [hereinafter Bureau of Justice Statistics].

10. See Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, 13 *NEW LEFT REV.* 41, 41-42 (2002) [hereinafter Wacquant] (“[S]lavery and mass imprisonment are genealogically linked. . .one cannot understand the latter. . .without returning to the former as historic starting point and functional analogue.”); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 4 (2006) (arguing that the modern trend of disparate and expanded incarceration of African-Americans was a response to the racial unrest of the 1960s & 70s).

## I. INCARCERATION, EMPLOYMENT, RACE, AND THE BACKLASH MODEL

By the end of the seventies, then, as the racial and class backlash against the democratic advances won by the social movements of the preceding decade got into full swing, the prison abruptly returned to the forefront of American society. . .<sup>11</sup>

The number of individuals under some form of sanctions (incarceration, parole, or probation) imposed by the United States criminal justice system rose from roughly 1.8 million in 1980 to more than 7.3 million in 2007.<sup>12</sup> These figures include a more than 400% increase in the number of persons held in prisons or jails (from 503,586 to 2,294,157) and an almost equally exponential growth in the number supervised by probation programs.<sup>13</sup> Over the same period, the United States' population has grown by less than 50%.<sup>14</sup> These developments have been fittingly characterized as an "incarceration explosion."<sup>15</sup>

This modern explosion of incarceration rates has been frequently examined and lamented by the media, the academy, and civil society,<sup>16</sup> yet little meaningful systematic reform has taken place. Equally well known is the fact that the justice system intervenes in the lives of black Americans much more frequently than those of white Americans. According to current rates, African-American males have a 32% chance of spending time in prison during their lifetime, while the probability of incarceration for white males is only 5.9%.<sup>17</sup> This figure does not include criminal convictions leading to penalties short of incarceration, and it therefore appears that an African-American male today has a greater than one in three probability of acquiring a criminal record. Further, as the penal system has grown, the percentage of prisoners who are white has

11. Wacquant, *supra* note 10, at 52.

12. Bureau of Justice Statistics, *supra* note 9 (Click on chart to view data).

13. *Id.*

14. *Historical National Population Estimates*, U.S. CENSUS, ([1980-2007]) <http://www.census.gov/population/www/popclockus.html> (click on hyperlink: Historical National Population Estimates).

15. See, e.g., Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL'Y. REV. (Online), at 3 (Dec. 8, 2008), [http://www.hlpronline.com/Berman\\_HLPR\\_120808.pdf](http://www.hlpronline.com/Berman_HLPR_120808.pdf) ("Taking stock of America's modern incarceration explosion."). This article will use the term "incarceration explosion" to refer to the vast increases in incarceration rates over the past forty years, as well as other indicia of increased activity of the criminal justice system.

16. See, e.g., Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 28, 2008 (highlighting increases in rate of incarceration); Susan R. Klein & Jordan M. Steiker, *Symposium Punishment Law and Policy Foreword*, 84 TEX. L. REV. 1687 (2005-2006) (symposium on rise in incarceration rates); Human Rights Watch, *Incarcerated America*, <http://www.hrw.org/en/reports/2003/04/28/incarcerated-america> ("The country that holds itself out as the 'land of freedom' incarcerates a higher percentage of its people than any other country").

17. Bureau of Justice Statistics, *supra* note 9.

steadily decreased.<sup>18</sup> The imprisonment of African-American males with increasing frequency, then, has been the driving force behind the incarceration explosion.

Incarceration (and, indeed, any criminal record) erects significant barriers to an individual's ability to successfully function in society, regardless of his or her race. Most significantly for the purposes of this article, a criminal record can have dire implications for an ex-offender's employment prospects. It seems intuitive that a history of contact with the criminal justice system would negatively affect an applicant's employability, and employer practices affirm this intuition.<sup>19</sup> The stigma attached to a criminal conviction is substantial: there are real (though overemphasized) risks associated with hiring ex-offenders, and employers are largely unwilling to give jobs to applicants with criminal records.<sup>20</sup> The ability of ex-offenders to support themselves and their families by conventional means is thus severely limited when evidence of their past misconduct is made easily available. In recent years, this has been the case: employers today are much more likely to investigate applicants' backgrounds than in the past.<sup>21</sup>

Advances in information technology, mandated background checks in certain industries, and doctrinal developments penalizing employers who fail to investigate prospective employees have all helped to promote the increased use of criminal background checks in pre-employment screening.<sup>22</sup> Criminal records today are much more easily accessed and widely used by private employers than they were in the past.<sup>23</sup> Additionally, background checks are mandated for many jobs in the public sector or as a condition for job-related licensing.<sup>24</sup> Complementing the broader dissemination of records, legislatures and courts have been largely unwilling to extend significant protections to individuals facing labor market discrimination because of their criminal records.<sup>25</sup> According to estimates made by the National Employment Law Project, about 25% of adults in the United States have criminal records,<sup>26</sup> and these individuals are all vulnerable to employment discrimination in the absence of legal protections.

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18. Bruce Western, *supra* note 8, at 3.

19. See Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962-1963) (noting that a criminal record has always been a black mark on employment prospects).

20. See Holzer, *supra* note 5, at 20-23 (survey findings indicate that employers are largely unwilling to take chances by hiring ex-offenders).

21. Jacobs, *supra* note 4, at 395.

22. *Id.*

23. Jacobs, *supra* note 4, at 395.

24. *Id.*

25. *Id.*

26. National Employment Law Project, *supra* note 3, at 4.

The result of unprecedented incarceration growth combined with the increased use of criminal background checks in employment screening is a massive self-perpetuating mechanism of recidivism for marginalized populations; namely, African-Americans.<sup>27</sup> Although steady employment has been shown to be perhaps the most significant factor helping ex-offenders to avoid recidivism,<sup>28</sup> the use of background checks to disqualify these individuals increasingly pervades the labor market.<sup>29</sup> These burdens are being felt by an ever-growing (estimates suggest that about 600,000 people are released from prison each year)<sup>30</sup> number of ex-offenders, whose ability to stay out of jail is limited by the disadvantages they face in the labor market.

Further demonstrating the centrality of race to the intersection between crime and employment, black ex-offenders appear to have more difficulty in the labor market than white ex-offenders, and even African-Americans without a criminal record may suffer from assumptions of criminality. A study by Princeton sociologist Devah Pager found that whites with criminal records tend to do as well or better in receiving interview callbacks than blacks with no criminal record.<sup>31</sup> The study was controlled for a number of factors, and the participants had relatively the same educational and work backgrounds.<sup>32</sup> To control for the possibility of difficult-to-measure negative personality traits common to ex-offenders, none of the participants actually had a criminal record, merely representing that they did or did not have one to a prospective employer.<sup>33</sup> The results were illuminating. White males received callbacks at a rate of 34% when they denied having a criminal record and 17% when they admitted having a criminal record.<sup>34</sup> Black males, in contrast, were only contacted 14% of the time when they denied having a criminal record and a

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27. See Deborah N. Archer & Kele Williams, *Making America the "Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 531-532 (2005-2006) (discussing the cyclical and racialized nature of barriers to ex-offender reentry and recidivism).

28. See, e.g., Nicholas Freudenberg, Jessie Daniels, Martha Crum, Tiffany Perkins, & Beth Richie, *Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 95 AM. J. PUB.HEALTH 1725, 1729 (2005) (finding that although only one third of young men released from jail in New York City had found formal jobs within 15 months of release, the likelihood of rearrest was reduced by two-thirds for those who had found employment within one year of release).

29. See Jacobs, *supra* note 4, at 387 (improved information technology and acceptance of discrimination on the basis of criminal record has led to wider dissemination of records).

30. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences, Sentencing & Corrections: Issues for the 21st Century*, U.S. DEP'T OF JUSTICE (Nov. 2000), <http://www.ncjrs.gov/pdffiles1/nij/184253.pdf>.

31. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939-41 (2003).

32. *Id.* at 940.

33. *Id.*

34. *Id.*

mere 5% of the time when they acknowledged having a record.<sup>35</sup> The study's findings serve to illuminate just how greatly disadvantaged African-Americans are as job applicants today. They are the group perhaps most adversely affected by the current interaction between the criminal justice system and the labor market.

This interaction gives rise to many questions, some of which have been addressed. The framework of the present criminal record reporting regime has been thoroughly explained,<sup>36</sup> the legal protections available (or unavailable) to ex-offenders have been explored,<sup>37</sup> the relationship between race, incarceration, and criminal records has been frequently identified,<sup>38</sup> and different commentators have proposed varying policy solutions<sup>39</sup> to what is mostly viewed (at least by the academic community) as a significant social problem. Recent discourse, however, has largely neglected to examine the historical context<sup>40</sup> in which the incarceration explosion arose and the value that this historical record has on an understanding of the modern phenomena of increased use of criminal background checks in employment and legal developments motivating and sanctioning these practices. Luckily, there is a great deal of scholarship that delves into the origins of the incarceration explosion, and this work must inform our attitudes toward and understanding of the use of criminal records in employment today.

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35. *Id.*

36. See generally Jacobs, *supra* note 4, at 397-404; James Jacobs and Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U.J. LEGIS. & PUB. POL'Y 177, 179-210 (2008).

37. See Nancy B. Sasser, *Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U.RICH.L.REV. 1063 (2007); Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283 (2006).

38. See Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U.PA. J. L. & SOC. CHANGE 159 (2011); Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 1 U. CHI. LEGAL F. 381 (2009).

39. See Jacobs, *supra* note 4, at 416-417 (examining a range of policy options and concluding that the only feasible solution is to promote accuracy in criminal record reports); Archer, *supra* note 27, at 528 (advocating a "comprehensive litigation attack to . . . restore full citizenship for ex-offenders"); Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL L. REV. 1191, 1225-1242 (proposing that ex-offenders be treated as a suspect class); Ryan D. Watstein, *The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 602-610 (proposing that federal legislation modeled on the New York state law protecting ex-offenders be implemented).

40. One notable exception to this gap is a recent article by a professor at the University of Maryland School of Law, a section of which examines the interaction between race and collateral consequences to conviction in United States history. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity* 15-23 (2009) [web.bu.edu/law/central/jd/organizations/journals/bulr/. . ./PINARDv2.pdf](http://web.bu.edu/law/central/jd/organizations/journals/bulr/. . ./PINARDv2.pdf).

### A. *The Backlash Model*

Given the United States' legacy of institutionalized racism, policies with significantly adverse effects on minority groups must be critically and closely examined. In this tradition, many analyses of the present day criminal justice system<sup>41</sup> have identified its institutions as suspect. Loic Wacquant, a University of California sociologist, has argued that mass incarceration is the direct offspring of slavery and Jim Crow and cannot be understood without the context of this country's history of subjugating African-Americans.<sup>42</sup> A recent article by Dorothy Roberts, a professor at the Northwestern School of Law, similarly claims that the "U.S. criminal justice system has always functioned . . . to subordinate black people" and that the system consciously "refashions past regimes of racial control to continue to sustain white supremacy."<sup>43</sup> Other scholars, such as Bruce Western, a Princeton sociologist who has written extensively on incarceration, make less virulent claims about the history of today's criminal justice regime.<sup>44</sup> But even Western notes the effect that "anxieties and resentments of working class whites" during the 1960s had on the policies behind the incarceration explosion.<sup>45</sup>

Wacquant specifically posits that "hyperghetto and prison" have evolved, since the late 1960s, to replace past forms of control and subjugation of African-Americans.<sup>46</sup> Noting that "[on] the morrow of Emancipation, Southern prisons turned black overnight," Wacquant explicitly equates the more recent trend of racially disproportionate incarceration with a resistance to the provision of substantive rights to African-Americans, going on to claim that "slavery and mass imprisonment are genealogically linked" and that "one cannot understand the latter . . . without returning to the former as historic starting point and functional analogue."<sup>47</sup> This model of modern American history flies in the face of popular rhetoric suggesting increased inclusivity and racial blindness and is troubling when considered alongside policies sanctioning employment discrimination on the basis of an applicant's criminal history (which will be detailed later in this article). In the face of such claims, it would be an oversight to evaluate the interplay between rising incarceration

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41. In this note, the phrase "criminal justice system" is used to refer to the entire apparatus of imposing criminal sanctions: the police, the courts, the penal system, and policy-makers.

42. Wacquant, *supra* note 10, at 41-42.

43. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262-263.

44. BRUCE WESTERN, PUNISHMENT AND INEQUALITY 4 (2006). Western explains the development of current trends in criminal justice as more of an expression of "social inequality" and politics than as a racist backlash *per se*.

45. *Id.*

46. Wacquant, *supra* note 10, at 42.

47. *Id.* at 42-43.



rates and discrimination against ex-offenders in the workplace without, at the least, a consciousness of the history of these developments.

This article will therefore undertake a critical, history-based analysis of the rise of the incarceration explosion and criminal record reporting and the effects that these institutions have on African-Americans. The story *could* be told as follows: “After Title VII was enacted and race became an impermissible criteria on which to base employment decisions, racist legislatures, law enforcement agencies, and judiciaries created more subtle institutions (targeted sentencing reforms coupled with permissible discrimination on the basis of criminal records) to help perpetuate a long tradition of barring African-Americans from valuable employment opportunities.”<sup>48</sup> But can claims of a “backlash” manifested by subtle interactions between legislatures, law enforcement institutions, courts, and employers be substantiated in any real way? As the following pages will demonstrate, while the “backlash” model posited above is hyperbolic, the historical record reveals that racially-motivated policy developments have been largely responsible for the substitution of criminal-records for skin color in present-day employment outcomes.

## II. “TOUGH ON CRIME” POLITICS, MASS INCARCERATION, AND EMPLOYMENT DISCRIMINATION

The United States’ criminal justice system is measurably harder on African-Americans than it is on whites, and the racial disparities evidenced by the aforementioned rates of incarceration deserve critical analysis. It must be noted, however, that African-Americans are determined, by government measures, to commit crimes at substantially higher rates than whites.<sup>49</sup> By the early-1970s (which were the first years of prison expansionism), crime rates had been rising for years, and this period saw African-American males emerge as the face of a surge in violent offenses.<sup>50</sup> In 1974, victimization surveys (which generally provide more conservative measures of crime rates than FBI

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48. This hypothetical “backlash” model is not specifically posed by either Wacquant or Roberts, whose claims are grounded, respectively, in sociology and critical race theory. Rather, it is presented as a possible articulation of the use of criminal history as a proxy for race-based employment discrimination, grounded in the strongly-worded claims of the aforementioned scholars.

49. The claim that the crime rate among African-Americans is higher than that of whites is vulnerable to criticism on a number of bases. According to a vast body of scholarship, crime rate data may be distorted by racial profiling, selective prosecution, and other systemic biases. Without minimizing these critiques, this article highlights a narrative which proposes that the disproportionate incarceration of African-Americans is merely a function of higher crime rates within that community. See, e.g., Heather MacDonald, *High Incarceration Rate of Blacks is Function of Crime, Not Racism*, INVESTOR’S BUSINESS DAILY (April 28, 2008), <http://www.manhattan-institute.org/html/miarticle.htm?id=4582#.Uhb2ly7R5Dk>. (This narrative is then shown to ignore the complex history of the issue.)

50. THOMAS EDSALL AND MARY EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 112 (1992) [hereinafter EDSALL].

arrest data) conducted by the Department of Justice found that although African-Americans made up 11% of the population, 30% of victims of aggravated assault said their assailants were black, 62% of robbery victims said their attackers were black, and 39% of rape victims said the offenders were black.<sup>51</sup> If these estimates of crime rates were fully credited, an explanation of the racial character of the incarceration explosion and its accompanying effects on the labor market might end here.

But such an explanation would be incomplete. The rise in incarceration rates within the African-American community can only be understood by examining the historical context within which the trend began. The late 1960s and early 1970s were turbulent years, characterized by often violent demonstrations conducted by African-Americans and resistance to the prospect of racial equality on the part of many whites.<sup>52</sup> Capitalizing on overwhelming public opinion<sup>53</sup> in favor of more rigid crime control, conservative politicians at the national and state levels stoked their constituents' fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time. This exploitation of genuine public concerns on the electoral stage and the enactment of "tough on crime" policies such as mandatory minimum sentences drove the incarceration explosion to heights it would not otherwise have reached.<sup>54</sup>

Situating the genesis of the incarceration explosion within the framework of general conservative reaction against the Civil Rights Movement, subsections A and B will show how white voters' anxieties about racial issues were central to lawmakers' decisions to portray themselves as "law and order" crusaders and then enact policies which would provide the framework for the criminal justice system's increased interference into the lives of African-Americans. These developments validate, to some degree, the racial backlash framework interrogated by this article; at the least, they support the proposition that employment discrimination on the basis of a criminal record is more invidious than might otherwise be thought. The following examination of the interplay between race, politics, and policies in the evolution of criminal justice policy provides insight into the significance of criminal-record-based discrimination in employment and suggests the need for a reevaluation of that practice.

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51. *Id.* at 113.

52. Western, *supra* note 44 at 4.

53. See MICHAEL FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 9 (2005) [hereinafter FLAMM] (detailing the broad base of public support for the "law and order" movement).

54. See MARC MAUER, RACE TO INCARCERATE 56-57 (1999) [hereinafter MAUER] (noting that the "get tough" policies of the early to mid-1970s significantly contributed to the incarceration explosion).

A. *Crime, Race, and Politics: From Nixon to Reagan*

Every time you see a white man, think about the devil you're seeing! Think of how it was on *your* slave foreparents' bloody, sweaty backs that he built this empire that's today the richest of all nations – where his evil and his greed cause him to be hated around the world! – Malcolm X<sup>55</sup>

Martin Luther King's inspired passive resistance tactics are rightfully given the limelight in contemporary accounts of the Civil Rights Movement of the 1960s. In contrast, the kind of rhetoric used by the Black Nationalist movement may seem today like a relic of another era, during which tangible discrimination was pervasive in all walks of life and governments were complicit in efforts to stem the flow of legally enforceable rights to African-Americans. The evocative subtext of Malcolm X's message – that whites will be beholden into perpetuity to African-Americans for the transgressions of their ancestors – is a poor fit with popular contemporary understandings of race-relations and the legacy of racism.

But while the Black Nationalist movement did not enjoy widespread membership, it made the national news on a frequent basis and was viewed with concern by the public.<sup>56</sup> Racially-driven agitation and unrest, often degenerating into violence, was a central theme of the campaigns and coalition-building of two out of three major candidates in the 1968 presidential election.<sup>57</sup> To many whites, the revolutionary posturing of groups such as the Black Panthers and the Nation of Islam gave rise to fears “that the Mau Mau [were] coming to the suburbs at night.”<sup>58</sup> A deep unease with the virulence of some black activists and the extent of the changes taking place, coupled with an entrenched culture of outright racism in the lives of less progressive whites, led to a general reaction against the movement towards rapid racial equality.<sup>59</sup>

An appreciation of this backlash is central to an accurate understanding of the genesis of the incarceration explosion and an appreciation of the implications of criminal-record-based employment discrimination. The racially charged atmosphere of the late-1960s, when many African-Americans were not only engaging in activism but also increasingly committing violent crime, enabled politicians, in their campaigning and policymaking, to exploit fears common to many of their constituents.<sup>60</sup> This exploitation removed the focus from the unavoidably racial and class-based character of crime-control issues

55. MANNING MARABLE, *RACE, REFORM, AND REBELLION* 88 (2d ed.1991).

56. *Id.* at 110.

57. HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY* 110 (1981).

58. *Id.* Mau Mau was the name given to an uprising against British colonial rule in Kenya from about 1952-1960. Members of the rebel group were thought by the British to engage in cannibalism and bestiality. The uprising was brutally quelled over a period of years, but its efforts led to significant concessions by the British government.

59. *Id.*

60. Western, *supra* note 44, at 4.

and portrayed “tough on crime” policies as necessary to the safety and wellbeing of all citizens – especially African-Americans, who were disproportionately victims as well as offenders.<sup>61</sup> From the initial roots of Goldwater and Nixon’s “law and order” rhetoric to Reagan’s ability to ride his “tough on crime” reputation all the way to the presidency, the turmoil of the late-1960s was a key catalyst for the reorientation of national and state campaigning and policymaking toward criminal justice reform programs like mandatory minimum sentences that would be the driving forces behind the incarceration explosion.

1. *The Election of Richard Nixon and the Rise of Tough on Crime Politics*

The 1968 presidential election was a chance for Southern white voters to express their discontent with the cultural upheaval of the decade, and they did so resoundingly. Although Richard Nixon was elected by only the barest of margins, he and George Wallace together managed to carry almost 70% percent of votes in former Confederate states.<sup>62</sup> Even more significantly, around 40% of Nixon’s voters were people who had supported Johnson in the prior election.<sup>63</sup> “As volatile pictures of Watts. . . and other cities going up in smoke hit the television airways,”<sup>64</sup> white voters supported the candidates most likely to halt the process of radical change and restore stability to American society. The 1968 electoral realignment cannot be explained wholly by the climate of racial unrest at the time, but these forces surely factored into Nixon’s triumph. During a period when “violence was the background condition of American life,” one of Nixon’s major campaign victories was to successfully portray himself as a defender of law and order while appealing to moderates by distancing himself from the blatantly racist rhetoric of more conservative statesmen.<sup>65</sup>

Barry Goldwater’s failed 1964 campaign employed the infamous “Southern Strategy,” explicitly playing on themes of race and crime. In one speech, he claimed: “Our wives, all women, feel unsafe on our streets. And in encouragement of even more abuse of the law, we have the appalling spectacle of [Adlai Stevenson] actually telling an audience that ‘in the great struggle to advance human civil rights, even a jail sentence is no longer a dishonor but a proud achievement.’ Perhaps we are destined to see in this law-loving land

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61. See FLAMM, *supra* note 53, at 68-69 (discussing Barry Goldwater’s attempts to equate “law and order” politics with protecting African-Americans).

62. ROBERT MASON, *THE FORGOTTEN AMERICANS* 35 (2004).

63. *Id.*

64. Anna Everest, *The Civil Rights Movement and Television*, THE MUSEUM OF BROAD.COMMC’N (last visited Feb. 3, 2013) <http://www.museum.tv/eotvsection.php?Entrycode=civilrights>.

65. Mason, *supra* note 62, at 35. See also Flamm, *supra* note 53, at 2 (“By 1968 law and order was the most important domestic issue in the presidential election and arguably the decisive factor in Richard Nixon’s narrow triumph. . . .”)

people running for office not on their stainless records but on their prison record.”<sup>66</sup> George Wallace, who ran as an independent in the 1968 presidential race, similarly tied together opposition to the Civil Rights Movement, race, and crime control in coded messages to white Southern voters.<sup>67</sup>

Nixon’s message, in contrast, was subtler. In a 1967 article published in *Reader’s Digest* (then the most widely read American magazine) entitled “What’s Happened to America,” he reframed the tumult gripping the country less as a racial issue than as one of public safety and respect for the law. Discussing the rioting of recent months, he wrote:

Certainly racial animosities. . . were the most visible causes. But riots were also the most virulent symptoms to date of another, and in some ways graver, national disorder – the decline in respect for public authority and the rule of law in America. Far from being a great society, ours is becoming a lawless society.<sup>68</sup>

The future president then went on to attack jurisprudential trends toward increased respect for defendants’ rights and to recommend “a substantial upgrading in the number of police.”<sup>69</sup> This rhetoric worked to great effect on an electorate that was wary of the Civil Rights Movement and the prospect of more radical change. One 1969 opinion poll showed that Nixon’s message was adopted almost verbatim: 81% of Americans thought “law and order” had broken down, with a majority blaming “Negroes who start riots.”<sup>70</sup> The media helped propagate this theme, with *Time* magazine reporting that “law and order” was the number one issue of the 1968 election.<sup>71</sup>

Although Nixon’s language was divorced from the obvious racial agitation of contemporaries like Goldwater and Wallace, he was still able to portray himself as conservative on racial issues. In one speech, Nixon clearly signaled his opposition to aggressive social change and passive resistance tactics, rallying against “permissiveness . . . applied to those who defy the law in pursuit of civil rights” and claiming that in the “slums, the limits of responsible action are all but invisible . . .”<sup>72</sup> These themes must have been reassuring to those white voters uncomfortable with the thinly veiled hatred behind Wallace’s efforts to halt desegregation but frightened nonetheless by the prospect of something resembling a racial revolution. Nixon would later follow through on his rhetoric, presiding over reactionary policies that rolled back

66. JEROME G. MILLER, *SEARCH AND DESTROY* 153 (1996).

67. *See, e.g.*, Jody Carlson, *George C. Wallace and the Politics of Powerlessness* 129 (1981).

68. RICHARD NIXON, *SPEECHES, WRITINGS, DOCUMENTS* 122-123 (Rick Perelstein, ed., 2008) [hereinafter *NIXON*].

69. *Id.* at 126.

70. MAUER, *supra* note 54, at 53.

71. FLAMM, *supra* note 53, at 162.

72. NIXON, *supra* note 68, at 124.

many of the programs of the Civil Rights Era.<sup>73</sup> Thus, although racism in the traditional sense cannot be definitely proven to be responsible for Nixon's success, his conservative approach to civil rights attracted whites in a time characterized by racial tensions.

Hubert Humphrey's more nuanced approach to the issue of crime helped Nixon to win over "law and order" voters. Contending that there was a "causal relationship between poverty, deprivation . . . and crime," Humphrey vowed to build a new school for every new prison promised by Nixon.<sup>74</sup> However, as the vice-president's chief opinion strategist noted, Humphrey was seen as "soft in the area of law and order, and this softness is hurting him more than anything else."<sup>75</sup> Caught between trying to appeal to moderates while still maintaining support among liberal activists, Humphrey was deeply compromised by events such as the rioting following the assassination of Martin Luther King, Jr.<sup>76</sup>

Humphrey's inability to compete with Nixon as a "tough on crime" candidate foreshadowed the effect that an increased focus on criminal justice would continue to have on the Democratic Party. Michael Dukakis, smeared by the infamous Willie Horton ad campaign, would suffer the same fate at the hands of "law and order" voters for his perceived softness on crime.<sup>77</sup> Although Lyndon Johnson recognized the growing significance of criminal justice policy when declaring a "war on crime" and passing the "Safe Streets Act" late in his presidency, the 1968 election demonstrated voters' desire for bolder promises and tangible results.<sup>78</sup> Nixon's campaign gave them at least the former and, as a result, "law and order" voters favored him by a considerable margin.<sup>79</sup> Nixon's ostensibly colorblind but rigid approach to crime control, as evinced by his campaign rhetoric, came to form a central platform plank uniting the ascendant Republicans.

## 2. *Ronald Reagan: Bringing Race & Crime Back to Presidential Politics*

While the 1968 election is a convenient place to begin a narrative of "tough on crime" politics, conservatives had been portraying themselves as defenders of "law and order" throughout the 1960s. One scholar describes their success: "Conservatives took decisive control of the issue in 1966, incorporating street crime, urban riots and student protests into a comprehensive critique of liberalism's failure to contain the crisis of authority

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73. KEVIN L. YUILL, RICHARD NIXON AND THE RISE OF AFFIRMATIVE ACTION 1 (2006).

74. FLAMM, *supra* note 53, at 170.

75. *Id.* at 168.

76. *Id.* at 155-61.

77. See, e.g. Michael Blanding, *The Long Shadow of Willie Horton*, BOSTON GLOBE SUNDAY MAGAZINE, (Oct. 18, 2009), [http://www.boston.com/bostonglobe/magazine/articles/2009/10/18/the\\_long\\_shadow\\_of\\_willie\\_horton/](http://www.boston.com/bostonglobe/magazine/articles/2009/10/18/the_long_shadow_of_willie_horton/).

78. JONATHAN SIMON, GOVERNING THROUGH CRIME 94-95 (2007).

79. FLAMM, *supra* note 53, at 163.

that seemed pervasive in America.”<sup>80</sup> Ronald Reagan would be one of the most effective and successful engineers of this critique, using it as a central component of his 1966 gubernatorial campaign<sup>81</sup> and then again in his resounding triumph on the national stage in 1980.<sup>82</sup>

In 1966, the Reagan campaign in California seized on student agitation in Berkeley as its rallying cry against liberal ineffectiveness on “law and order.”<sup>83</sup> Mirroring the situation nationwide, violent crime was increasing in California, and Reagan was able to place the blame squarely on liberal tolerance of disorder and unrest.<sup>84</sup> He further distinguished himself during the campaign by vigorously supporting the death penalty and describing his opponent’s opposition to the punishment as identifying with killers rather than victims.<sup>85</sup> Additionally, while attacking his incumbent opponent’s failure to control “the drug problem,”<sup>86</sup> he used much of the same loaded language as Goldwater and Nixon. In one speech, he cautioned that every day “the jungle comes a little closer” and borrowed from Goldwater in claiming “[t]here isn’t a city street that’s safe for our women after dark.”<sup>87</sup> Reagan’s ability, like Nixon’s two years later, to implicitly link criminal justice policy with race set the stage for his subsequent victory in the 1980 presidential election, an office that he won in substantial part by successfully manipulating racial divides in voter preference.<sup>88</sup>

During the Ford and Carter administrations, the salience of crime in presidential politics seemed to diminish, as neither executive spent considerable time discussing or legislating on crime.<sup>89</sup> In 1980, Reagan bucked this trend, relying on, among other strategies, the proven platform of criminal justice policy reform to defeat the incumbent Jimmy Carter.<sup>90</sup> While Reagan prevailed in large part due to the support of those who believed “the government should not make any special effort to help [blacks] because they should help themselves,”<sup>91</sup> whites’ resistance to facially redistributive public policies wasn’t the only racially-charged wedge contributing to Reagan’s success. His famous speeches about “welfare queens” were supplemented by frequent

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80. FLAMM, *supra* note 53, at 67.

81. SIMON, *supra* note 75, at 55.

82. Katherine Beckett and Theodore Sasson, *The Rise of the Modern “Tough on Crime” Movement*, (last visited Feb. 3, 2013) [http://www.archive-publiceye.org/defendingjustice/con\\_agendas/toughcrime.html](http://www.archive-publiceye.org/defendingjustice/con_agendas/toughcrime.html).

83. SIMON, *supra* note 78, at 55.

84. *Id.*

85. *Id.* at 56.

86. *Id.*

87. *Id.* at 74-75.

88. EDSALL, *supra* note 50, at 153.

89. Beckett, *supra* note 82, at 56.

90. *Id.*

91. EDSALL, *supra* note 50, at 153.

campaign references to “crime on the streets” and promises to expand the federal role in criminal justice.<sup>92</sup>

After his election, Reagan claimed that Americans “utterly reject” philosophies placing blame for crime on society rather than individual offenders, and he did not hesitate to act on what he saw as a mandate for harsher criminal justice policies.<sup>93</sup> Interestingly, Reagan seems to have acknowledged, even embraced, a close correlation between criminal justice policy and the allocation of economic opportunity. Attributing the rise in crime rates to increased social welfare expenditures, he proposed to remove the government “from interfering in areas where it doesn’t belong, but at the same time strengthen its ability” to punish crimes, a power that Reagan implied was one of the federal government’s “constitutional and legitimate functions.”<sup>94</sup> Backing up his belief in an expanded federal role in crime control, Reagan presided over significant expansions of the federal role in criminal justice, especially in the area of drug policy and enforcement.<sup>95</sup>

Mirroring Nixon’s approach years earlier, the racial implications of Reagan’s “tough on crime” posturing were obscured by their inclusion in broader ideological flourishes seemingly disconnected from race. As one influential account of modern politics argues, Reagan conservatives were able to portray their opposition to civil rights enforcement as “putatively egalitarian” and “ideologically respectable.”<sup>96</sup> Crime, with the visceral reactions it provoked in voters of all races, was an even easier sell. The racially disproportionate effects of “tough on crime” policies were not a part of the presidential discourse, and those highlighting such collateral consequences could be successfully branded as opposed to “victims’ rights.”

### 3. *Shaping Perceptions of Crime and the Permanence of “Law and Order”*

The tumult of the 1960s and the increased incidence of heroin and cocaine use in the 1970s and ‘80s made white voters amenable to “tough on crime” rhetoric.<sup>97</sup> Republican presidential candidates were especially adept at framing an alarmist discourse to describe these developments to voters, even creating the demand for “law and order” in areas of limited initial salience.<sup>98</sup> The public’s outrage about the “drug problem,” for example, was decidedly muted in 1981, when only around 3% of the population felt that cutting the drug

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92. Beckett, *supra* note 82, at 52.

93. MAUER, *supra* note 54, at 60.

94. Ronald Reagan, *Remarks to Members of the National Governors Association*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=33893>.

95. MAUER, *supra* note 54, at 60-61.

96. EDSALL, *supra* note 50, at 144.

97. Beckett, *supra* note 82, at 54.

98. *Id.*



supply would be an important means of reducing crime.<sup>99</sup> By the late 1980s, these perceptions would change. With Reagan aggressively perpetrating his “War on Drugs,” drug-related stories had become a mainstay on major media outlets, due in large part to the Drug Enforcement Administration’s efforts to put the issue on the public’s radar.<sup>100</sup> These initiatives were wildly successful: in 1989, 27% of Americans believed that drug abuse was the most serious problem facing the country.<sup>101</sup>

Crime and blackness remain intertwined in the national consciousness, and conservative politicians have successfully created a paradigm allotting responsibility for crime to individual offenders rather than to fault-lines in the country’s socioeconomic structure. From the “tough on crime” movement’s roots in the carefully crafted conservative rhetoric of the tense 1960s, it has grown to form an intrinsic part of the United States’ ostensibly post-racial political discourse. Savvy politicians today must think twice before proposing any significant departures from the current regime of hard-line crime control. The Dukakis example caused Bill Clinton’s campaign to vow that Democrats should never permit Republican opponents to appear tougher on crime.<sup>102</sup> In early 1992, Clinton tried to bolster his record as a “law and order” statesman by travelling to Arkansas to view the execution of a severely mentally disabled inmate, afterwards noting, “[N]o one can say I’m soft on crime.”<sup>103</sup> Even Barack Obama’s campaign sought to portray him as a “tough on crime” candidate.<sup>104</sup> “Tough on crime” has become an indispensable platform in United States politics, with both parties acknowledging its critical rhetorical force.<sup>105</sup>

In proceeding to evaluate policies governing the interaction between crime, race, politics, and employment, it must be remembered that the “tough on crime” movement had its origins in a period of racial upheaval, and that politicians such as Nixon and Reagan succeeded in appealing to voters’ fears for political gain. Considered in this light, the “backlash” model is helpful to an understanding of the politics of the incarceration explosion, although this backlash cannot be thought of as a blatant collusion between individuals and institutions allied against racial equality. Instead, a consciousness of the “backlash” model demonstrates that race has played a central role in the politics of criminal justice, and that manipulators of “tough on crime” politics were

99. *Id.*

100. *Id.* at 55.

101. *Bureau of Justice Statistics, Public Opinion About Drugs*, (last visited Feb. 3, 2013) <http://bjs.ojp.usdoj.gov/content/DCF/poad.cfm>.

102. MAUER, *supra* note 54, at 68-69.

103. *Id.*

104. See, e.g. Raymond Hernandez & Christopher Drew, *It’s Not Just ‘Ayes’ and ‘Nays’: Obama’s Votes in Illinois Echo*, N.Y. TIMES, (Dec. 20, 2007), <http://www.nytimes.com/2007/12/20/us/politics/20obama.html?r=1&pagewanted=2>.

105. MAUER, *supra* note 54, at 181-183.

successful at framing their questionable rhetoric as being inherently related to public safety, not race.

*B. From Politics to Policies: Sentencing Reform and Race*

The preceding discussion of “tough on crime” politics at the national stage is a convenient summary of what became a rhetorical trend at all levels of politics. Criminal justice policy, though, is largely made at the state level, where governors have also exploited the salience of criminal justice issues for political advantage.<sup>106</sup> One author, arguing that prison expansionism can be largely explained as a political phenomenon, compared the incarceration rates of states with governors portraying themselves as “tough on crime” to those of states with governors less focused on crime.<sup>107</sup> He found that the existence of “tough on crime” rhetoric was a reliable predictor of significant jumps in incarceration rates, whereas those states presided over by governors with more liberal attitudes toward crime saw incarceration rates stay relatively constant.<sup>108</sup> While this correlation is not surprising, it is illustrative of an important nexus between a political rhetoric born in racial tension and the tangible policy decisions causing the incarceration explosion.

Indeed, those politicians elected with strong “law and order” reputations have been among the major architects of the incarceration explosion.<sup>109</sup> The demonstrated value of “tough on crime” politics has thus led to the creation of destructive public policy, including punitive innovations in sentencing laws. Accordingly, subsection B(1) will examine developments in criminal justice policy that have significantly contributed to the incarceration explosion, with a continued consciousness of these policies’ origins in subtly provocative “tough on crime” rhetoric. The focus will be on mandatory minimum sentencing laws, relatively recent innovations in the criminal justice system that have been driving forces behind the rapid rise in incarceration rates<sup>110</sup> and which are disproportionately imposed on African-Americans.<sup>111</sup> Sentencing laws are nominally race-blind and could be explained by developments in criminological theory or by lawmakers’ eagerness to bolster their “tough on crime” credentials. Certain sentencing laws, however, such as the federal

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106. See JOSEPH DAVEY, *THE POLITICS OF PRISON EXPANSION* (1998) (discussing the pervasive use of “tough on crime” rhetoric to win elections on the gubernatorial stage).

107. *Id.* at 51-73.

108. *Id.*

109. *Id.*

110. See MAUER, *supra* note 54, at 32 (noting that judges sentencing more offenders to prison, due in large part to mandatory sentencing policies, has been a driving force behind incarceration growth).

111. See *The Sentencing Project, Federal Crack Cocaine Sentencing* (May 2009), [http://www.sentencingproject.org/doc/publications/dp\\_crack\\_sentencing.pdf](http://www.sentencingproject.org/doc/publications/dp_crack_sentencing.pdf) (discussing the racially disparate impact of federal mandatory minimum drug laws).

government's differential treatment of cocaine and crack offenses,<sup>112</sup> are difficult to justify as being race-blind. As the following section will show, the centrality of race to the policies (as well as the politics) behind the incarceration explosion demonstrates that legislatures have made highly suspect policy decisions in refusing to restrict employment discrimination against a disproportionately African-American group of ex-offenders.

### 1. *Mandatory Minimum Sentencing*

Mandatory minimum sentencing laws have been frequently derided for their harsh results and effects on minority defendants,<sup>113</sup> but they remain on the books in many jurisdictions. These laws are among the primary mechanisms responsible both for rising incarceration rates and for the racial disparities that characterize today's penal system.<sup>114</sup> They originated in the "tough on crime" political rhetoric discussed in the preceding subsection, and their existence lends further weight to the "backlash" theory discussed by this article.

In the early 1970s, a consensus about the desirability of more determinacy in criminal sentencing laws began to emerge.<sup>115</sup> The Rockefeller Drug Law, passed by the New York State Legislature in 1973 in response to the "drug issue," served as the model for a nationwide trend in toward less discretion in sentencing laws.<sup>116</sup> In the subsequent years, other states followed New York's lead and adopted mandatory minimum sentencing laws, mostly imposing this rigidity on gun and drug offenders.<sup>117</sup> There was a rush to legislate, perhaps driven by state politicians' recognition of the political capital available in sentencing reform, and by 1983 twenty-nine states had passed mandatory minimum drug laws.<sup>118</sup> The result of these laws was to create "a greater likelihood of a prison term, and a longer one, for those who were convicted."<sup>119</sup> The Rockefeller Laws "created mandatory minimum sentences of fifteen years to life for possession of four ounces of narcotics—about the same as a sentence for second-degree murder."<sup>120</sup> Unchanged until recent reforms, the Rockefeller

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112. 21 U.S.C. § 841 (2010).

113. See, e.g., *Stop the Drug War, Judge Sentences Marijuana Seller to 55 Years, Then Attacks Mandatory Minimums*, (last visited Feb. 3, 2013) <http://stopthedrugwar.org/chronicle-old/363/angelos.shtml> (noting the case of a federal judge who called the result of mandatory minimum sentences "unjust, cruel, and even irrational."); Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War On Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 396-400 (2002); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997).

114. MAUER, *supra* note 54, at 32; The Sentencing Project, *supra* note 111, at 1.

115. MAUER, *supra* note 54, at 56.

116. *Id.* at 57.

117. *Id.*

118. DAVEY, *supra* note 106, at 90.

119. *Id.*

120. Madison Grey, *A Brief History of the Rockefeller Drug Laws*, TIME (April 2, 2009), <http://www.time.com/time/nation/article/0,8599,1888864,00.html>.

Drug Laws have been condemned as an example of “institutionalized racism” and a “human rights disgrace.”<sup>121</sup>

Despite a lack of any demonstrable effect on crime rates,<sup>122</sup> mandatory minimum sentences were vigorously endorsed by Congress in the 1986 Anti-Drug Abuse Act. The law, which remains in effect today, created the harshest penalties “ever adopted for low level drug offenses.”<sup>123</sup> While the maximum sentence for simple possession of all other drugs (including powder cocaine) is one year in prison, the Anti-Drug Abuse Act mandates that simple possession of 5 grams of crack cocaine carries a five-year prison term.<sup>124</sup> Based on the structure of the law, it is not surprising to find that a large majority of those subject to these harsh terms are “offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”<sup>125</sup>

The federal government’s decision to target crack cocaine vendors and users has essentially been a decision to send more African-Americans to jail and prison for longer periods of time. As the Sentencing Project notes, “people of color are disproportionately subject to the penalties” with African-Americans representing “81.8 percent of crack cocaine defendants in 2006. . .”<sup>126</sup> The disparity in the prosecution of these offenses has changed the composition of the federal penal population, as the average time African-American federal drug offenders spent in prison rose by 62% between 1994 and 2003 while white offenders’ time served only increased by 17%.<sup>127</sup> The most deeply troubling aspect of these developments is that they have occurred in spite of the widely reported fact that two-thirds of crack users are either white or Hispanic.<sup>128</sup>

The Rockefeller Drug Laws and the Anti-Drug Abuse Act are highlighted here as examples of sentencing trends that have occurred throughout the United States. Both laws have had striking racial impacts, as have similar policies enacted by many state legislatures.<sup>129</sup> Mandatory minimum sentencing laws and

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121. *Drug Policy Alliance, Background on New York’ draconian Rockefeller Drug Laws*, (last visited Feb. 3, 2013) [http://www.drugpolicy.org/docUploads/ndny\\_rdlbackground.pdf](http://www.drugpolicy.org/docUploads/ndny_rdlbackground.pdf).

122. See Susan Turner, *Impact of Truth-in-Sentencing and Three Strikes Legislation on Crime*, CRIM. AND JUST. ATLAS 2000, JUNE 200, AT 10 (“[T]hree strikes and truth-in-sentencing laws have had little significant impact on crime and arrest rates.”)

123. The Sentencing Project, *supra* note 111, at 1.

124. *Id.* at 2.

125. USSC, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 100 (2002).

126. The Sentencing Project, *supra* note 111, at 4.

127. *Id.*

128. Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health: Detailed Table J* (Washington, DC: Sept. 2006), Table 1.43a.

129. See, e.g. *Drug Policy Alliance, State by State*, ([insert date]), <http://www.drugpolicy.org/statebystate> (providing summaries on racial consequences of many states’ drug laws).

the so-called “War on Drugs” are among the most significant causes of the incarceration explosion; between 1981 and 1989, the percentage of new prisoners who were drug offenders rose from 7.7% to 29.5%.<sup>130</sup> These laws were enacted by “tough on crime” legislators, who backed their shrewd manipulation of voters’ fears of disorder and drug abuse with laws that have devastated the African-American community.

The argument here is not that mandatory minimum sentencing laws were enacted by racist legislatures and enforced by racist judges to retard the cause of racial equality. In fact, the legal community’s consciousness of these policies’ effects has been growing for years. (Lawmakers,<sup>131</sup> judges,<sup>132</sup> the American Bar Association,<sup>133</sup> and the American Law Institute<sup>134</sup> have all recognized the inequities inherent in mandatory minimum sentencing laws.) It appears that reforms to these laws may be forthcoming. Again, however, the “backlash” model helps to highlight the fact that these policies were made, in large part, by politicians responding to and catalyzing the fears of their white constituents. That laws such as the Anti-Drug Abuse Act have had such a disastrous impact on African-Americans may not have been by design, but their ugly results make the question of intent largely irrelevant. It remains true that their rhetorical origins are unsavory and their effects destructive. They have rendered today’s criminal justice system suspect.

### C. *From the Jail to the Job Market*

The preceding sections demonstrate that any explanation of racial disparities in United States incarceration rates is complicated. An explanation focusing solely on a conscious institutional targeting of African-Americans would be deficient, but it is untenable to claim that the legacies of “tough on crime” politics and mandatory minimum sentencing laws are benign. The origins and character of these developments should lead courts and legislatures

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130. DAVEY, *supra* note 106, at 86.

131. See Families Against Mandatory Minimums, 2000: Another Look at Mandatory Sentencing, <http://www.famm.org/UnderstandSentencing/HistoryofMandatoryMinimums/HistoryTimeline/2000AnotherLookatMandatorySentencing.aspx> (discussing a bill introduced in Congress to repeal mandatory drug sentences and Congressional hearings on the subject).

132. See *Harris v. United States*, 536 U.S. 545, 570 (2002) (“Mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.”) (Breyer, J., concurring).

133. See *American Bar Association, RE: Conferees Considering the Hate Crimes Mandatory Minimum Provision*, ([insert date]), [http://www.abanet.org/poladv/letters/crimlaw/2009oct01\\_mandatoryminimumh\\_1.pdf](http://www.abanet.org/poladv/letters/crimlaw/2009oct01_mandatoryminimumh_1.pdf) (“Mandatory minimums limit the ability of courts to properly do their jobs and needlessly tie the hands of judges by stripping them of their discretion to weigh the facts and evidence on a case-by-case basis.”).

134. See Kevin R. Reitz, *Model Penal Code: Sentencing, Plan for Revision*, 6 *BUF. CRIM. L. REV.* 525, 533 (2002) (Model Penal Code revisions contemplate “judicial authority to deviate from mandatory penalty statutes.”)

to reassess their tendency to comprehensively allow employers to delve into the criminal histories of job applicants.

At present, employment law provides few protections to ex-offenders, an omission that may cause a disproportionately African-American group of individuals to experience discrimination during the job application process.<sup>135</sup> Because of employers' demonstrated reluctance to hire those with criminal records,<sup>136</sup> the failure of courts and legislatures to create meaningful protections for ex-offenders is equivalent to tacking on a lifetime of labor market disadvantages to the actual criminal sanctions incident to a conviction. The widespread allowance of employment discrimination against ex-offenders is bad policy for a number of reasons, some of which will be detailed in subsection C(1). Most fundamentally, though, permitting employers to disqualify applicants because of their criminal histories paints courts and legislatures as ignorant of the history of the incarceration explosion and of the devastating effect this discrimination continues to have on the struggle for racial equality in the United States. As noted, African-Americans, who make up a grossly disproportionate share of the population of ex-offenders released from prisons each year,<sup>137</sup> suffer the bulk of criminal-record-related discrimination in the labor market. The crisis of race and crime in the United States will only deepen if these individuals continue to be arbitrarily barred from valuable employment opportunities regardless of the severity of their criminal records or the time elapsed since their release.

### 1. *Criminal Records and Discrimination*

There are certainly situations that warrant the disclosure of a person's criminal record for pre-employment screening and justify an adverse hiring decision to be made on that basis. Sex offenders, to use the most prominent example, should be identified and barred from working with vulnerable populations such as children and the developmentally disabled. Further, since they can be subject to negligent hiring liability if they fail to inquire into an applicant's criminal history and the same applicant goes on to commit a crime while on the job, employers may have strong incentives to conduct background checks.<sup>138</sup>

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135. See Peger, *supra* note 31, at 939-41 (detailing adverse effects of both presence of criminal record and perception of criminality on black applicants' employment outcomes).

136. See JEREMY TRAVIS, AMY SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 32 (2001) (citing research showing that two-thirds of employers would not knowingly hire a former offender).

137. See Corrine A. Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 598 ("Racial and ethnic minorities account for two-thirds of those returning each year from prisons and jails.").

138. Negligent hiring liability may be imposed on employers who fail to exercise due diligence in determining potential employees' histories of violent crime, and whose employees then engage in violence while on the job. The key to recovery in these claims is a showing that

But the existence of the negligent hiring doctrine and the availability of background checks can also cause low-level, nonviolent offenders to be irrationally barred from the labor market. Almost two-thirds of those released from jails and prisons today served time for non-violent offenses.<sup>139</sup> Drug offenders make up an especially high number of ex-offenders, representing over 35% of the total number released.<sup>140</sup> As noted in section III.B, a large percentage of these individuals were low-level couriers or drug users.<sup>141</sup> When these characteristics of the population of ex-offenders are understood, the desirability of permitting employers to discriminate on the basis of criminal records comes into further question. Considerable inequities would exist in a system that allowed minor drug offenders to be subject to the same burdens as rapists, or that allowed employers to take arrests without conviction into account.

Unfortunately, state and federal laws governing the dissemination and use of criminal records in pre-employment screening usually allow such unjustifiable practices. This is particularly true of legislatures' unwillingness to limit the types of criminal history which can form the basis for an adverse hiring decision, require employers to demonstrate a connection between an individual's conviction and the type of work sought, or allow ex-offenders to have their records expunged after years of good behavior.<sup>142</sup> These legal gaps have created a puzzlingly arbitrary and punitive way of governing the employment rights of the vast population of people with criminal records. The following sections will flesh out this governmental insensitivity by highlighting the voids in federal and state law that allow discrimination in hiring to take place and the developments that have created widespread dissemination of and demand for criminal records. These systemic flaws demand that a fundamental reassessment of policies governing the intersection between crime and employment be made.

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the employer knew or should have known of the risk of harm posed by the relevant employee. See generally Steven C. Bednar, *Employment Law Dilemmas: What to do When the Law Forbids Compliance*, 12 *BYU J. PUB. L.* 175 (A breach of this duty occurs if an employer either "knew or should have known" of an applicant's unfitness for the job but hired the applicant anyway.).

139. National Employment Law Project, *supra* note 3, at 9.

140. *Id.*

141. USSC, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 100 (MAY 2002).

142. See Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People With Criminal Records*, 30 *FORDHAM URB. L.J.* 1501, 1503 (2002) (discussing state legislatures' imposition of civil disabilities on and failure to prevent discrimination against ex-offenders).

## 2. *Title VII: Not Enough Protection*

Discrimination continues to exist in all parts of the country. . . The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them.<sup>143</sup>

The depth, the revolutionary meaning of this act, is almost beyond description. . . It is, in the most literal sense, revolutionary, destructive of the very essence of life as it has been lived in this country since the adoption of our Constitution.<sup>144</sup>

The above statements, made by two Congressmen supporting and opposing, respectively, the passage of Title VII, are indicative of the transformative effect the Civil Rights Act of 1964 was expected to have on American society. The latter statement ostensibly refers to the Act's delegation of "almost unlimited authority" to the executive branch of the federal government, but it could just as easily be read to lament the conferral of substantial legal protections of the rights of African-Americans.<sup>145</sup> Indeed, some would argue that the "very essence of life" in the United States, up until the Civil Rights Movement, was the legally sanctioned discrimination against and marginalization of African-Americans.

The Civil Rights Movement, however, yielded tangible and lasting victories. By the mid-1970s, the most reactionary voices in the political arena had been largely silenced, "Jim Crow signs had been removed from public restaurants [and] federally sponsored 'affirmative action' programs brought tens of thousands of blacks into middle-class jobs in both the public and private sectors. . . ."<sup>146</sup> Title VII and *Griggs v. Duke Power Co.*, the seminal 1971 Supreme Court case targeting systematic, implicit discrimination through the use of the disparate impact doctrine, further promoted the cause of equality in employment.<sup>147</sup> Unfortunately, these developments also coincided with the early years of the incarceration explosion, and while it is difficult today for an employer to blatantly discriminate on the basis of race, black applicants' criminal records have become widely utilized and legally permissible grounds for discrimination.

Foreshadowing *Griggs*, a California District Court held, in 1970, that "excluding from employment persons who have suffered a number of arrests without any convictions, is unlawful under Title VII . . . because it has the

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143. House Judiciary Committee Report (Additional Views on H.R. 7152) *in* Legislative History of Titles VII and XI of Civil Rights Act of 1964, 2150 (Equal Employment Opportunity Commission, 1968).

144. Minority Report Upon Proposed Civil Rights Act of 1963 *in* Legislative History of Titles VII and XI of Civil Rights Act of 1964, 2069 (Equal Employment Opportunity Commission, 1968).

145. *Id.*

146. MARABLE, *supra* note 55, at 149-150.

147. 401 U.S. 424 (1971)



foreseeable effect of denying black applicants an equal opportunity for employment.”<sup>148</sup> A case in the 8th Circuit later extended the applicability of Title VII to ex-offenders, finding that refusing employment to persons with convictions could also give rise to disparate impact liability.<sup>149</sup> Those holdings remain good law today, creating the illusion that minorities with criminal records enjoy substantial protections. In fact, the force of disparate impact doctrine in this arena is limited by the availability of the business necessity defense, which allows employers to avoid liability by showing a connection between the type of employment sought and an applicant’s criminal record.<sup>150</sup> There are a number of difficulties plaintiffs may encounter in attempting to overcome this hurdle, and the courts have generally only been willing to prohibit flat bans on hiring *anyone* with a criminal record.<sup>151</sup>

Further, and more importantly, few disparate impact claims on the basis of criminal record discrimination seem to have been brought.<sup>152</sup> This may be partly due to the expense of litigating in federal court<sup>153</sup> and the limited resources available to the few organizations dedicated to promoting the rights of ex-offenders. These limitations suggest that Title VII is not a viable mechanism for restricting criminal-record-related employment discrimination. Additionally, there are inherent problems of proof in trying to demonstrate that an adverse hiring decision occurred because of a criminal record. While an employer “may rely on a criminal conviction to refuse employment . . . the applicant may never learn that that was the basis upon which he or she was refused employment.”<sup>154</sup> Ex-offenders usually have poor educational backgrounds, gaps in their employment histories, and fractured social networks, and these factors can be easily cited by employers as legitimate reasons for an adverse hiring decision. Because of these barriers to bringing claims and to ultimate recovery, Title VII has not proven to be a viable prophylactic against criminal-record-based discrimination.<sup>155</sup> Given the striking number of African-Americans with criminal records today, the fact that Title VII’s protections

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148. *Gregory v. Litton Sys., Inc.* 316 F.Supp. 401, 403 (C.D. Cal. 1970).

149. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 631 (8th Cir. 1975).

150. See EEOC, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000E Et. Seq. (1990), available at 1990 WL 1104708.

151. See *Green*, *supra* note 149; *Gregory*, *supra* note 148; *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971)(holding that conviction record cannot be an absolute bar to employment).

152. Miriam Aukerman, *The Somewhat Suspect Class: Towards A Constitutional Framework For Evaluating Occupational Restrictions Affecting People With Criminal Records*, 7 J.L. SOC’Y 18, 26 (2005).

153. *Legal Action Center, From Hard Time to Full Time 18*, (June 2001) [http://lac.org/doc\\_library/lac/publications/from\\_hard\\_time.pdf](http://lac.org/doc_library/lac/publications/from_hard_time.pdf).

154. *Clark*, *supra* note 7, at 206.

155. See *Legal Action Center*, *supra* note 153, at 18 (noting that representation may be hard to find in Title VII actions and that claims are “time-consuming, expensive, and difficult.”).

rarely extend to African-American ex-offenders has significant implications for the vitality of the antidiscrimination principle in modern employment law.

### 3. *State Law: Barriers to Opportunity and Few Protections*

State legislatures have largely been loath to recognize the many negative externalities created by discrimination against ex-offenders in the labor market. With a few exceptions, state laws allow employers great flexibility to make adverse hiring decisions against applicants with criminal records.<sup>156</sup> A large majority of states lack any law restricting employers, public or private, from discriminating on the basis of arrests that did not result in conviction.<sup>157</sup> Convictions, it is implicitly provided, will be highly relevant to the hiring process in almost all states. Additionally, many states promote the use of criminal records in employment screening by requiring that criminal background checks be conducted on individuals seeking various occupational licenses or public sector jobs.<sup>158</sup> Finally, in a majority of states it is impossible for ex-offenders to obtain relief from the stigma of criminal convictions through certificates of relief or expunction provisions, which are only available to restrict access to or seal records of arrests not leading to conviction.<sup>159</sup> Accordingly, a vast group of ex-offenders is vulnerable to adverse hiring decisions made on the basis of their criminal records by employers unwilling to take chances when other candidates are available.

At least eleven states have enacted legislation designed to regulate employment discrimination on the basis of criminal records, with mixed approaches and effectiveness.<sup>160</sup> The legal frameworks differ among these states: some require a close relationship between an applicant's criminal record and the job sought,<sup>161</sup> while others prohibit the use of arrest data not leading to convictions.<sup>162</sup> New York has one of the most thorough statutory schemes, incorporating several protections designed to protect ex-offenders' rights as job applicants.<sup>163</sup> But although these states have taken important steps in recognizing the consequences of unfettered discrimination on the basis of criminal records, their laws suffer from the same limitations as Title VII. It is

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156. Mukamal & Samuels, *supra* note 142, at 1503.

157. *Id.*

158. Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N. DAK. L. REV. 187, 193 (1995) ("Countless federal, state, and municipal laws single out the ex-felon for possible exclusion from the majority of regulated occupations.").

159. *After Prison: Roadblocks to Reentry: Access to Criminal Records*, LEGAL ACTION CENTER, (last visited Feb. 3, 2013), <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=2>.

160. Jennifer Leavitt, *Walking a Tightrope*, 34 CT. L. REV. 1281, 1287 (2002).

161. WIS. STAT. ANN. §111.321 (West 2012); HAW. REV. STAT. §378-2 (2012).

162. MASS. GEN. LAWS ANN. CH. 151B, § 4(9)(i) (West 2012).

163. N.Y. CORRECT. LAW § 752; N.Y. EXEC. LAW § 296 (McKinney 2007).

not difficult for employers to justify their failure to hire individuals who have gaps in their employment histories and poor educational backgrounds without admitting to relying on an applicant's criminal record.<sup>164</sup> As a result, while state laws prohibiting discrimination are valuable in that they create substantive and enforceable rights for ex-offenders, they are not wholly effective and do not exist in a large majority of states.

By failing to recognize an exigency to limit the circumstances in which employers can disqualify applicants with criminal records, state legislatures have assured that high rates of recidivism will continue and ignored the impact that criminal record-based discrimination has on African-Americans. This is not particularly surprising - since state governments are also the institutions most responsible for the rapid growth of incarceration rate - but it is nonetheless extremely poor public policy. One upside of the recent recession may be that states will be forced to reconsider their vast criminal justice expenditures; California, for example, is currently attempting to shrink its expensive prisons amid considerable opposition.<sup>165</sup> But unfortunately, eliminating prison cells would only solve a small part of the problem regardless of its budgetary worth. Imposing lesser sanctions than incarceration on low-level offenders would not remove the stigma of their convictions, and their criminal records would remain easily accessible. This accessibility adds another brick to the wall of disadvantage facing ex-offenders today.

#### 4. *Criminal Records: Available, Inaccurate, and Lasting*

The right of the public to access court records has long been recognized by the Supreme Court as guaranteed under the First and Sixth Amendments and was originally derived from the English Common Law.<sup>166</sup> But the interests served by transparency in court proceedings (as consistently identified by the Supreme Court) are completely unrelated to those asserted today to justify the practice of conducting criminal background checks. These traditional justifications rightfully acknowledge the value of allowing citizens to “keep a watchful eye on the workings of public agencies” and permitting the media to “publish information concerning the operation of the government.”<sup>167</sup> In contrast, the Attorney General's Office has stated that employers need access to criminal records to “protect employees, customers, vulnerable persons, and

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164. Jacobs & Crepet, *supra* note 36, at 212.

165. See, e.g., Solomon Moore, *California Prisons Must Cut Inmate Population*, NY TIMES, (Aug. 4, 2009), [http://www.nytimes.com/2009/08/05/us/05scalif.html?\\_r=1&scp=7&sq=california%20prisons%20budget%20crisis&st=cse](http://www.nytimes.com/2009/08/05/us/05scalif.html?_r=1&scp=7&sq=california%20prisons%20budget%20crisis&st=cse).

166. See, e.g., *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“What transpires in the courtroom is public property.”); *Ex-Parte Capital U-Drive It, Inc.* 630 S.E.2d 464, 469 (2006) (noting American courts' recognition, since independence, of common law right to access court proceedings.)

167. *Nixon v. Warner Commc'n., Inc.*, 435 U.S. 589, 597-98 (1978).

business assets.”<sup>168</sup> The right of access has clearly been extended to situations not contemplated by the doctrine’s original rationale. Although the Attorney General’s reasons for extending the doctrine are facially reasonable, the ability of private entities to obtain criminal records for business purposes is not inexorably enshrined in United States jurisprudence.

Regardless of their doctrinal underpinning, criminal records are “expanding in scope” and “their dissemination is proliferating.”<sup>169</sup> According to the National Employment Law Project, the number of annual civil requests for criminal background information (as distinguished from requests for criminal justice purposes) submitted to the FBI has more than doubled in recent years, while “background checks conducted by private screening firms have increased at a record rate.”<sup>170</sup> Enabling this phenomenon are databases (created by state and federal governments) that collect and catalogue information including arrest data and disposition information.<sup>171</sup> The FBI collects state criminal records in a repository known as the Interstate Identification Index, which can be used by federally regulated agencies and industries but not by the public at large.<sup>172</sup> In contrast, many state databases allow any person, for a fee, to conduct name and (sometimes) fingerprint searches of their criminal record collections.<sup>173</sup> The number of individual criminal records accessible via these state databases was recently found to be over seventy-one million.<sup>174</sup> Criminal records in these databases are easily accessed and widely disseminated, and the labor market consequences of an arrest are therefore much more serious than in the past, when practical difficulties limited the availability of court records.

Most private employers seeking criminal background checks receive their information from private companies that purchase or freely obtain criminal records from state databases.<sup>175</sup> The Attorney General concedes that “[c]hecks of these databases are based not upon positive, biometric identification (such as fingerprints), but on personal modifiers such as names.”<sup>176</sup> Accordingly, the potential for incorrect matches under these systems is high, since the criminal history of an individual with the same name as an applicant may be provided to employers by private firms without any other information guaranteeing that the

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168. *The Attorney General’s Report on Criminal Background Checks*, OFFICE OF THE ATTORNEY GEN. 1 (June, 2006), [www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf).

169. Jacobs & Crepet, *supra* note 36, at 179.

170. *Testimony of Maurice Emsellem, National Employment Law Project, to Criminal Background Checks: The Need for Efficiency and Accuracy* U.S. CONGRESS, HEARING BEFORE THE SUBCOMM. ON CRIME, TERRORISM, AND HOMELAND SEC’Y 18-19 (April 26, 2007), <http://judiciary.house.gov/hearings/printers/110th/34928.pdf>.

171. *Id.* at 180.

172. OFFICE OF THE ATTORNEY GEN., *supra* note 168, at 3.

173. *Id.* at 4.

174. Jacobs & Crepet, *supra* note 36, at 180.

175. OFFICE OF THE ATTORNEY GEN., *supra* note 168, at 2.

176. *Id.*

information actually pertains to the applicant. Additionally, a Congressional Committee has cautioned that “many records fail to include information on dismissal of charges and expungements,”<sup>177</sup> based on data from the Attorney General noting that about half of all records in the FBI database are missing final disposition information.<sup>178</sup> The result is that employers, with limited understandings of the exact content and significance of the information they receive, take arrest records to be indicative of undesirable behavior absent any evidence to suggest that an applicant was ever convicted.<sup>179</sup>

Finally, since only a few states allow ex-offenders’ records to be cleared by years of good citizenship,<sup>180</sup> minor offenses remain barriers to opportunity for ex-offenders decades later. The FBI’s background check information also remains accessible into perpetuity.<sup>181</sup> Under recent federal laws requiring background checks for professional licensing in a variety of fields, “employers are authorized to receive information on any felony conviction in the FBI system, no matter the age or seriousness of the offense, in addition to most misdemeanors.”<sup>182</sup> Given the widespread association of any criminal record with unsuitability for employment (one study found that over 40% of employers would not even *consider* an applicant with any criminal record, while only 20% would probably consider such an applicant),<sup>183</sup> even individuals convicted of minor offenses in the distant past may have substantial difficulty finding jobs.

The lack of protections available to ex-offenders seeking work might not be so troubling if criminal background checks were only used to screen applicants for dangerous convictions relevant to the work sought, or if criminal background checks were not so widely available. Instead, private agencies frequently provide employers with evidence of relatively innocuous convictions or arrests not leading to conviction,<sup>184</sup> exaggerating the dangers of negligent hiring liability<sup>185</sup> with warnings like “PROTECT YOUR ORGANIZATION

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177. Robert C. Scott, *Employer Access to Criminal Background Checks: The Need for Efficiency and Accuracy*, U.S. CONGRESS, HEARING BEFORE THE SUBCOMM. ON CRIME, TERRORISM, AND HOMELAND SEC’Y 3 (April 26, 2007), <http://judiciary.house.gov/hearings/printers/110th/34928.pdf>.

178. OFFICE OF THE ATTORNEY GEN., *supra* note 168, at 4.

179. Scott, *supra* note 177, at 3.

180. Mukamal & Samuels, *supra* note 142, at 1505.

181. Emsellem, *supra* note 170, at 16.

182. *Id.*

183. Holzer, *supra* note 5, at 6-7.

184. In many states, this information can be freely used to disqualify ex-offender applicants. See Leavitt, *supra* note 160, at 1288-90.

185. Legal Action Center, one of the few organizations with considerable expertise in protecting ex-offenders’ employment rights, notes that “[m]ost employers who hire people with criminal records do not face a risk of negligent hiring liability.” Legal Action Center, *Employment Laws Affecting People With Criminal Convictions*, [http://lac.org/doc\\_library/lac/publications/employ\\_laws\\_and\\_convictions.pdf](http://lac.org/doc_library/lac/publications/employ_laws_and_convictions.pdf).

FROM TERRORISTS AND FUGITIVES.”<sup>186</sup> These criminal records are then used to disqualify applicants who, far from being terrorists or fugitives, pose little danger to workplace safety. Criminal records are all too often used against a population largely composed of individuals convicted of non-violent drug crimes,<sup>187</sup> whose missteps follow them throughout their lives. Further, the significance of criminal background information is difficult for laymen to understand,<sup>188</sup> and the information relayed to employers is often incomplete or inaccurate.<sup>189</sup> When this flawed regime is considered in conjunction with the suspect history of the incarceration explosion and the continuing racial disparities inherent in the criminal justice system, the need for reform is clear.

### III. POLICY RECOMMENDATIONS

The rhetorical force of “tough on crime” politics, discussed throughout this paper, is indicative of a parallel trend: the negligible salience of ex-offenders’ rights in political campaigns and legislative initiatives.<sup>190</sup> “Criminals” are hardly a sympathetic group to most electorates, and the ability of ex-offenders to advocate for their rights (already limited by their ineligibility to vote, poor educational backgrounds, and minimal resources) is further diminished by the relative strength of coalitions that advocate for the creation of jobs in the criminal justice industry<sup>191</sup> and the massive revenues earned by the criminal background check industry.<sup>192</sup> Additionally, while mandatory minimum sentencing laws have been frequently and publicly criticized,<sup>193</sup> knowledge of the collateral consequences of a criminal record is limited to actors in the criminal justice system, and these individuals often have only a fragmented understanding of the issue.<sup>194</sup> In recognition of these barriers and other challenges to reform, it has been said that “there may be no politically or

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186. National Background Data, [https://www.nationalbackgrounddata.com/marketing/app\\_alert.html](https://www.nationalbackgrounddata.com/marketing/app_alert.html).

187. See The Sentencing Project, *Facts About Prisons and Prisoners* (April, 2000) (noting that over 70% of state prisoners in 2000 were convicted of non-violent offenses).

188. Scott, *supra* note 177, at 3.

189. Office of the Attorney General, *supra* note 168, at 2.

190. See Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. Rev. 255, 269 (discussing how the political value of targeting offenders also leads to an unwillingness to extend rights or protections to them).

191. *Id.* at 287-288.

192. See, e.g., Dana Harris, *Reed Elsevier to Sell Part of FBI-US*, *Variety*, July 30, 2009, available at <http://www.variety.com/article/VR1118006676.html?categoryid=1043&cs=1> (discussing the acquisition of the large background check firm ChoicePoint for \$4.2 billion dollars).

193. See, e.g., Families Against Mandatory Minimums, *supra* note 125; American Bar Association, *supra* note 127.

194. See Thompson, *supra* note 190, at 272-276 (discussing the lack of knowledge about collateral consequences on the part of lawyers, judges, and defendants).

administratively practical strategy for ending or reducing de facto discrimination based on criminal records.”<sup>195</sup>

It is true that the most aggressive prospective remedial approaches that might protect the labor market rights of ex-offenders are simply not feasible. For example, although prohibiting private actors from accessing records of minor convictions or arrests without conviction would do much to mitigate the harshness and irrationality of the current regime, constitutional guarantees of the right of access to court records would likely bar legislation to this effect even if legislators were willing to pass it.<sup>196</sup> Similarly, laws prohibiting employers from inquiring about applicants’ criminal histories would come into direct conflict with negligent hiring liability doctrine, creating an incongruous apparatus. As a result, the prospects for sweeping and transformative reforms to protect ex-offenders from employment discrimination are poor.

Even the face of these political and legal limitations, however, there is some room for incremental change. One such reform would be the passage of statutes prohibiting or restricting employment discrimination against ex-offenders in the many states without such laws.<sup>197</sup> Although these laws are difficult to enforce<sup>198</sup> and would not be a comprehensive solution to the problem, they might deter employers from engaging in wholly arbitrary discrimination against ex-offender applicants and would serve an important expressive function, signifying an institutional recognition of the destructiveness of such discrimination. A necessary component of any new legislation (and a necessary addition to some existent anti-discrimination laws) is a flat ban on discrimination on the basis of arrests not leading to conviction. When legislatures continue to allow employers to rely on alleged illegal behavior that has not been proven beyond a reasonable doubt in making adverse hiring decisions, the presumption of innocence is undermined. Imperfect and perhaps easily evaded, anti-discrimination laws should nonetheless be passed in the thirty-nine states that have thus far failed to take any steps to protect the labor market rights of ex-offenders.

The effectiveness of laws restricting discrimination would be greatly enhanced by reforms providing for avenues through which ex-offenders can have their records expunged or obtain certificates of rehabilitation. As noted in Part 2(C)(III), the vast majority of states do not have any such provisions, an omission which is inexplicable. It is notoriously difficult for those released to stay out of prison,<sup>199</sup> and the individuals who are able to do so should be

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195. Jacobs, *supra* note 4, at 390-391.

196. *Id.* at 410.

197. See Part 2(C)(III) of this Note.

198. Jacobs & Crepet, *supra* note 36, at 212.

199. See, e.g. Bureau of Justice Statistics, Two-Thirds of Former State Prisoners Rearrested for Serious New Crimes (June 2, 2002), <http://bjs.ojp.usdoj.gov/content/>

rewarded, not stigmatized for the rest of their lives. The already extant provisions of this kind are usually only applicable to less serious offenses and require the passage of a significant period of time<sup>200</sup> before an ex-offender's records can be expunged or made inaccessible for employment screening purposes. Of course, under those laws, particularly serious offenses remain recorded and accessible, an exception that allows for an equitably moderate approach. These measures would add an element of rationality and fairness to a system that contains few, and would incentivize good behavior on the part of ex-offenders. If implemented along with laws restricting employment discrimination, expunction or relief provisions would eliminate some of the grossest inequities plaguing ex-offenders.

Unfortunately, the enactment of even the modest reform initiatives proposed in the preceding paragraphs would require the support of individuals, communities, coalitions, and policymakers, a broad base of support that will be difficult to build. Raising awareness of collateral consequences to criminal records and catalyzing concern for the plight of ex-offenders is no easy task while more facially sympathetic causes abound. Additionally, public opinion surveys have found that a large majority of people favor the use of criminal background screening for employment and government licensing purposes,<sup>201</sup> suggesting a general hostility to restrictions on the use of criminal records for these means. Thus, even marginal improvements to the current structure of dealing with ex-offenders' labor market rights may be difficult to realize.

If any reforms are to be implemented, the impetus for change must come from the African-American community. Neighborhoods and families that see one-third of their young men incarcerated, unable to find jobs upon release, and then sent back to prison need to advocate for the labor market rights of their neighbors, brothers, sisters, daughters and sons. Building this movement in communities that are disproportionately composed of victims of crime complicates, but need not defeat, the process. Organizations attempting to create coalitions to catalyze reform could educate potential supporters about the nexus between diminished economic opportunities and recidivism and disseminate the message that providing increased labor market rights to ex-offenders will actually benefit crime-ridden communities. These organizations would need to allocate more resources to educating communities about recidivism and lobbying local and state legislatures for uncontroversial reforms to irrational gaps in the law. These organizations would also need to attempt to

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pub/press/rpr94pr.cfm (citing a study finding that 67% of state ex-offenders had been arrested for a new crime within three years of release).

200. Jacobs, *supra* note 4, at 411.

201. See Bureau of Justice Statistics, Public Attitudes Toward Uses of Criminal History Information 22 (Department of Justice, July, 2001), [www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf) (87% of those surveyed who had been subjected to a criminal background check supported their use).



change the common framework for dealing with “criminals” from a paradigm focused on condemnation and individual fault to one based on promotion of the general social welfare. The road to reform is filled with obstacles, but perhaps a movement led by the African-American community could create new ways of thinking about and treating ex-offenders in the labor market.

#### CONCLUSION

It is difficult to explain the present characteristics of institutions and laws governing distinct types of conduct by reference to events that occurred in decades past. Causal connections will be incomplete, and the best that can be done is to show that relationships between past and present exist. With these limitations in mind, it is clear that the racially conservative genesis of the “tough on crime” movement and the inexplicable racial impact of mandatory minimum sentencing laws must be included in any account of incarceration growth in the United States. Without consideration of these phenomena, uninformed conclusions regarding the desirability of high incarceration rates might be made. A consciousness of these trends is also invaluable to an understanding of the use of criminal records in pre-employment screening today. An awareness of the historical origins and significance of employment practices that serve to disqualify large numbers of African-American applicants shows that these practices are inegalitarian and unsustainable.

A model claiming that developments in criminal justice policy and employment law have been caused by a racist backlash against the Civil Rights Movement is not necessary to demonstrate the need for reform. It is enough to say that developments like “tough on crime” politics and mandatory minimum sentencing laws were catalyzed by racial tensions and continue to have unjustifiable effects on the African-American community. The criminal justice system has been poorly crafted, and it has obstructed the cause of racial equality in the United States. Likewise, laws failing to regulate criminal record-based discrimination are destructive and unsavory on their own merits. When these two developments are considered in conjunction, the case for change is even clearer.

The criminal justice system has developed policies with questionable political origins that cause African-Americans to be incarcerated with greater frequency than whites. African-Americans are therefore considerably more likely than whites to experience labor market disadvantages based on their criminal records. Additionally, incomplete or inaccurate records and databases that maintain information about minor offenses for many years often exacerbate discrimination against ex-offenders. The resulting consequences for the economic well-being of African-Americans are dire. This is the model that best describes the interplay between race, the criminal justice system, and employment discrimination, an interplay that demands immediate attention. As

the group most harmed by this regime, the African-American community will have to lead any reform movements designed to remove some of the labor market disadvantages suffered by ex-offenders and promote rational and equitable treatment of these individuals.