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# Criminal Employment Law

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# CRIMINAL EMPLOYMENT LAW

*Benjamin Levin*<sup>†</sup>

*This Article diagnoses a phenomenon, “criminal employment law,” which exists at the nexus of employment law and the criminal justice system. Courts and legislatures discourage employers from hiring workers with criminal records and encourage employers to discipline workers for non-work-related criminal misconduct. In analyzing this phenomenon, my goals are threefold: (1) to examine how criminal employment law works; (2) to hypothesize why criminal employment law has proliferated; and (3) to assess what is wrong with criminal employment law. This Article examines the ways in which the laws that govern the workplace create incentives for employers not to hire individuals with criminal records and to discharge employees based on non-workplace criminal misconduct. In this way, private employers effectively operate as a branch of the criminal legal system. But private employers act without constitutional or significant structural checks. Therefore, I argue that the criminal system has altered the nature of employment, while employment law doctrines have altered the nature of criminal punishment. Employment law scholars should be concerned about the role of criminal records in restricting entry into the formal labor market. And criminal law scholars should be concerned about how employment restrictions extend criminal punishment, shifting punitive authority and decision-making power to unaccountable private employers.*

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## INTRODUCTION

The shadow of criminal law looms large over the U.S. labor market. A criminal record sharply decreases a job applicant's likelihood of gaining employment, and employers' refusal to hire formerly incarcerated applicants has led to a growing population of unemployed and underemployed people with criminal records.<sup>1</sup> Every year, more than 600,000 people are released from prison, but, a year after release, over seventy-five percent of them remain jobless.<sup>2</sup> While parole boards treat employment as a powerful guard against recidivism,<sup>3</sup> the legal system imposes a range of structural obstacles that make it very hard for people with criminal records to find work.

The difficulty finding and keeping a job thus serves as a significant collateral consequence of the criminal justice system—a harm that accompanies criminal conviction, charge, and even arrest.<sup>4</sup> While

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<sup>1</sup> See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 275–300 (2015); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 28–41 (2007); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 151–85 (2005).

<sup>2</sup> See PAGER, *supra* note 1, at 5, 28.

<sup>3</sup> See *id.* at 26; JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* 192–93 (1993).

<sup>4</sup> See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010); *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS*

incarceration, probation, and other formal vehicles of punishment are explicitly designed to respond to law breaking, these formal sanctions are only one effect of conviction. As the carceral state has expanded, so too have civil consequences of conviction—consequences that have proliferated and grown more severe.<sup>5</sup> Loss of employment opportunities (along with loss of housing, disenfranchisement, ineligibility for public benefits, and deportation) may result in greater and longer-lasting harms than the traditional forms of statutorily or judicially mandated punishment.<sup>6</sup> These consequences have wreaked havoc in low-income communities, particularly low-income communities of color.<sup>7</sup> Scholars have grappled with ways to reduce these collateral costs or ways to make them more transparent, so that criminal defendants might weigh them when considering guilty pleas, judges might factor them into sentencing

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INCARCERATION IN THE AGE OF COLORBLINDNESS 143 (2010); A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004); Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 249 [hereinafter *Managing Collateral Consequences*]; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010) [hereinafter *Confronting Issues*]; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 299 (2011).

<sup>5</sup> See A.B.A., *supra* note 4, at 8; Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 14–15 (1996) (“[An] analysis of state legal codes reveals an increase between 1986 and 1996 in the extent to which states restrict the rights of convicted felons. . . . [T]here was an increase in the number of states restricting six rights; voting, holding office, parenting, divorce, firearm ownership, and criminal registration increased.”); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 673–74 (2008); *Project Description: National Inventory of Collateral Consequences of Conviction*, JUSTICE CTR. [hereinafter NICCC], <http://niccc.csgjusticecenter.org/description> (last visited Apr. 7, 2018) (“While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more pervasive and more problematic in the past 20 years for three reasons: they are more numerous and impactful [sic], they affect more people, and they are harder to avoid or mitigate. As a result, millions of Americans are consigned to a kind of a permanent legal limbo because of a crime they committed in the past.”).

<sup>6</sup> See generally 21 U.S.C. § 862a (2012) (denying benefits to individuals convicted of certain drug-related offenses); 42 U.S.C. § 13661 (2012) (restricting housing assistance for those with drug-related convictions); Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 205 (Mary Pattillo et al. eds., 2004) (discussing employment challenges for former offenders); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 18–25 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the ways in which non-criminal statutes bar individuals with criminal records from obtaining a range of public benefits); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004) (describing the process of felon disenfranchisement).

<sup>7</sup> See generally JACOBS, *supra* note 1, at 280–81; PAGER, *supra* note 1 (showing how criminal records harm black job applicants more than white applicants); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 6 (2006).

determinations, and legislators might act to mitigate their effects.<sup>8</sup> However, the role of private employers in this shadow criminal system remains underexplored.

This Article describes a phenomenon, “criminal employment law,” which exists at the nexus of employment law and the criminal system. For those with criminal records, the life-altering effects of their past run-in(s) with the law shape their legal rights and opportunities in the labor market. The laws of the workplace empower employers to discipline workers in response to non-workplace misconduct, and the tort doctrines of negligent hiring and retention expose employers to potential liability if they hire people with criminal records.<sup>9</sup> Therefore, private employers have become critical players in the contemporary criminal system.<sup>10</sup> But, at the same time, they remain critical sources of social services—health care, childcare, etc. This Article treats collateral consequences in the labor market as a window into a troubling and under-appreciated dynamic in the criminal system: the role of private actors and institutions in the delivery and design of punishment.<sup>11</sup>

My goals are threefold: (1) to examine how criminal employment

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<sup>8</sup> See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1825–32 (2012) [hereinafter Chin, *The New Civil Death*]; Love, *supra* note 4, at 249; Margaret Colgate Love & Gabriel J. Chin, *Old Wine in a New Skin: The ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 16 FED. SENT’G REP. 232, 232 (2004); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 686–90 (2006) [hereinafter Pinard, *An Integrated Perspective*].

<sup>9</sup> See, e.g., *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 76–85 (2015); Elizabeth A. Gerlach, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 988 (2006).

<sup>10</sup> By stressing the fluid boundaries of the criminal system, this Article contributes to a growing literature that questions whether the administration of criminal law constitutes a “system” at all. See, e.g., Bernard E. Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia Pub. Law Research, Paper No. 14-562, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3062900](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900) (tracing the use of “criminal justice system” as a concept in legal and social thought); Sara Mayeux, *The Idea of the “Criminal Justice System”*, AM. J. CRIM. L. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050263) (same); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013).

<sup>11</sup> While sociologists have studied empirically the problems of reentry into the labor market for those with criminal records, see, e.g., Holzer, *supra* note 6; PAGER, *supra* note 1, and while others have begun to address the legal framework for discrimination against ex-offenders in the labor market, see, e.g., Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 196–97 (2004), the relationship between employment consequences and employment law has gone largely unexplored and un-critiqued. Cf. NOAH ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR & EMP’T, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (Mar. 2016), <http://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail> (examining terms of release that are premised on the ability to retain employment).

law works; (2) to hypothesize why criminal employment law has proliferated; and (3) to assess what is wrong with criminal employment law. This Article examines the ways in which the laws that govern the workplace encourage employers to reject job applicants with criminal records and to discharge employees based on non-workplace misconduct. I argue that through these legal mechanisms private employers effectively operate as a branch of the criminal system without constitutional or significant structural checks. Therefore, this Article argues that the criminal system has altered the nature of employment, while employment law doctrines have altered the nature of criminal punishment.

Criminal law's collateral consequences in the employment sphere should be cause for concern for many of the reasons collateral consequences in general are cause for concern (including that they operate as "invisible" punishment).<sup>12</sup> But the collateral consequences in the employment sphere raise an additional set of concerns because they ostensibly arise *outside* of the criminal system and often depend on the decisions, preferences, and incentives of *private actors*. By focusing on private employers and their public function in extending the effects of punishment, I argue that criminal employment law illustrates structural flaws with both the criminal system and the legal status of employment. Employment and labor law scholars should be concerned about the shadow economy of those who are unwelcome in the formal labor market as a result of past criminal convictions (or even arrests).<sup>13</sup> By tying employer liability to criminal records, the legal system invites (and often requires) employers to monitor their employees' behavior away from work. At the same time, criminal law scholars should consider how employment restrictions might serve as extensions of criminal punishment and how the involvement of private employers might complicate discussions of criminal justice reform. If private employment provides the vehicle through which workers access critical benefits, then public functions of the welfare state are necessarily filtered through the actions, decisions, and preferences of private employers.

Employers' role as disciplining force is reflected not only in the tort law doctrines of negligent hiring and retention,<sup>14</sup> but also in the public

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<sup>12</sup> See Travis, *supra* note 6, at 15–16; see also Love & Chin, *supra* note 8, at 232 (“One goal of the new [ABA] Standards [on collateral consequences] is to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for the legal system to operate in ignorance of the effects of its actions.”).

<sup>13</sup> I distinguish between punishment and arrest here, but it is worth noting that many of the consequences of formal criminal punishment also attach at the arrest stage, substantially widening the pool of those drawn into the criminal system's ambit. See generally Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

<sup>14</sup> See RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (AM. LAW INST. 1965); Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1006

demand for and proliferation of employee conduct policies that put employers in a position to punish workers for non-work-related criminal misconduct.<sup>15</sup> Such doctrines and policies may be appealing—we as a society may want employers to assume this role as a cost of doing business and to be responsible for the conduct of their employees. But this Article will consider the effects of such a legal framework. My claim is not that employers should never be permitted to consider a job applicant's or employee's allegedly criminal conduct. Rather, my goal is to assess how those consequences operate and to confront the costs of employer decision-making as an extension of criminal punishment. To the extent that involvement with the criminal system is creating or preserving a racial and socioeconomic underclass,<sup>16</sup> it is important to ask how the classifications operate in practice. If employers effectively operate as an arm of the criminal system, do criminal procedure principles have a place in the employment law pantheon? And to the extent that such an application would be inappropriate, should we also be skeptical about delegating criminal justice-related tasks to employers in the first place?

In an effort to address these questions, this Article will proceed in four Parts. The Article will first ask *how* and *why* criminal employment law has proliferated, before turning to the costs of criminal employment law. Part I will describe how criminal employment law fits into the broader scholarly discussion of collateral consequences. Next, Part II will examine how criminal employment law operates and will provide an overview of its legal architecture and justifications. This Part will focus on two areas of law that shape employer incentives and regulate the employment relationship: (1) the tort doctrines of negligent hiring and negligent retention and (2) personnel or employee conduct policies

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(2011) (collecting cases).

<sup>15</sup> See, e.g., Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 575–79 (2009); Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 150 (2010); Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1049 (1996); David Post, *Justice, Ferguson MO, and the NFL*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/justice-ferguson-mo-and-the-nfl>.

<sup>16</sup> See generally ALEXANDER, *supra* note 4 (arguing that the criminal system has created a socially, politically, and legally marginalized class of black men); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1003 (2010) (arguing that aggressive policing of low-income communities of color “told students that no matter what they do, their race, poverty, and political powerlessness will always mark them as outlaws, available for degradation whenever the state chooses”); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 969 (2013) (“As a result, poor individuals of color disproportionately bear the mark of a criminal record. This is perhaps the heaviest possible burden to carry, as the effects of a criminal record are long-lasting and often permanent. For those who are convicted, these effects include the essentially countless legal disabilities—termed collateral consequences . . .”).

that provide for employee discharge or discipline based on non-work-related interactions with the criminal system. While these two legal areas are distinct and implicate the criminal system in different ways, they both allow for employers to advance or exacerbate the punitive effect of underlying state action (e.g., arrest, conviction, etc.).

Next, Part III will examine further the justifications for criminal employment law by (1) situating it within the literature on the collateral consequences of conviction and (2) considering the limitations of possible policy solutions. This Part will survey briefly a set of policy responses that courts or legislators might adopt to check the impact of tort liability and conduct policies on the work-lives of individuals with criminal records. I will look to policy proposals aimed at reducing employment consequences for the previously incarcerated: (1) modification of the negligent hiring/retention tort doctrines; (2) “ban the box” laws that restrict employers from considering criminal history in hiring decisions<sup>17</sup>; (3) traditional employment discrimination principles; (4) contractual solutions to employers’ private conduct policies; and (5) integration of employment considerations into sentencing determinations. I will describe the potential benefits of each solution, but by emphasizing the persistent problems associated with the role of private employers in the criminal punishment (and even rehabilitative) enterprise, I also will note the ways in which each might fall short.

Part IV will turn to the costs of criminal employment law by asking what is wrong with this legal regime. This Part will continue the focus on the status of criminal employment law as a public/private and civil/criminal hybrid. To the extent that relaxing the state action doctrine and extending procedural protections to private employers are unpalatable or problematic solutions, this Article will ask why. Or, perhaps more importantly, if constitutional criminal procedure principles do not have a role to play in the workplace, why should private employers be asked to, expected to, or allowed to operate as disciplinary institutions tasked with punishing worker malfeasance that does not affect the workplace? By exploring the answer to this question, I hope to examine the costs of the hybrid public/private approach to employment law and the significant social costs of encouraging private actors to further punitive ends.

Ultimately, I will argue that criminal employment law has a lot to tell us about both the structure of criminal punishment and the nature of employment. I highlight how employment law doctrines and employment consequences shape and are shaped by the criminal system

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<sup>17</sup> See generally Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 211–15 (2014) (describing the “ban the box” movement and its goals).



and how a comprehensive reform movement must engage with these ostensibly disparate legal areas and grapple with the pathologies and power dynamics of the employment relationship.

### I. THE CONTEXT OF CRIMINAL EMPLOYMENT LAW

In some sense, criminal employment law operates as a quintessential collateral consequence of criminal punishment.<sup>18</sup> An individual is convicted, arrested, charged, or subject to some state action, and, as a result, she faces a new set of challenges not specifically identified by the sentencing judge, arresting officer, or relevant law enforcement personnel.<sup>19</sup>

But my treatment of criminal employment law differs from most scholarly accounts of collateral consequences. The growing literature on collateral consequences (including employment consequences) generally treats these effects as a *public law* problem.<sup>20</sup> That is, scholars and advocates have trained their fire on *formal* collateral consequences—statutes that explicitly restrict the rights of individuals with criminal records.

For example, in its 2003 Model Standards on the “Collateral Sanctions and Discretionary Disqualification of Convicted Persons,” the American Bar Association (ABA) Task Force on Collateral Sanctions and Discretionary Disqualification of Convicted Persons laid out a comprehensive proposal to address the growing web of collateral consequences.<sup>21</sup> While the Standards distinguish between “collateral sanction[s]” (consequences that attach automatically) and “discretionary disqualification[s]” (consequences that the state is “authorized but not required to impose on a person convicted of an offense on grounds related to the conviction”), they only address state action.<sup>22</sup> That is, the Standards focus on how state actors make

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<sup>18</sup> See A.B.A., *supra* note 4, at 7–9; Chin, *The New Civil Death*, *supra* note 8, at 1791; Roberts, *supra* note 5, at 673.

<sup>19</sup> See *Gilchrist v. Bd. of Review*, 94 P.3d 72, 77 n.5 (Okla. 2004); Pinard, *An Integrated Perspective*, *supra* note 8, at 635–36.

<sup>20</sup> See, e.g., Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 26 (2010); Nora V. Demleitner, “Collateral Damage”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027 (2002); Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 295 (2014); David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 B.Y.U. L. REV. 1277, 1312–13 (“The most tangible of the non-legal consequences of conviction is the loss of employment prospects.”).

<sup>21</sup> See A.B.A., *supra* note 4, at 8–13. The Report does, however, use “collateral consequences” as a general descriptive term. For purposes of clarity and simplicity (and in keeping with most scholarly literature in the area), this Article will refer to “collateral consequences” rather than the two subcategories defined by the ABA.

<sup>22</sup> *Id.* § 19-1.1.

decisions, but they have little to say about consequences shaped by private actors and “private law.”<sup>23</sup>

Addressing these formal collateral consequences certainly is critical to understanding and reforming the realities of the criminal system. But these consequences are only part of a bigger picture. By focusing exclusively on statutes and state actors, the Standards—and much collateral consequences scholarship—understate the role of private actors and attendant common law and private social regimes.<sup>24</sup>

This Article departs from the Standards’ approach in order to address “informal” collateral consequences. “Unlike formal collateral consequences, such as loss of public housing eligibility, deportation, occupational disqualification, or electoral disenfranchisement,” Wayne Logan explains, “informal” consequences “do not attach by express operation of law.”<sup>25</sup> Informal collateral consequences “aris[e] independently of specific legal authority, and concern the gamut of negative social, economic, medical, and psychological consequences of conviction.”<sup>26</sup> In introducing this distinction, Logan has argued that legal scholars’ important work on collateral consequences has undervalued the significance of these informal consequences.<sup>27</sup>

This Article’s focus on the role of private employers in the criminal system is intended to respond to Logan. In examining criminal employment law, this Article takes up and continues the larger project of considering the informal collateral consequences and the legal and social conditions that shape them. The institutions of criminal employment law that I address depend on the conduct of private employers and a range of (at least ostensibly) private social orderings, rather than statutory diktats.<sup>28</sup> While the employment decisions and

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<sup>23</sup> See generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640–41 (2012) (opposing the legal realist position that all law is public, and defining “private law” as “includ[ing] the common law subjects that have long been central to U.S. legal education—contracts, property, and torts”). While this Article challenges the public/private distinction and therefore relies on a realist account of the way in which the law functions, I use “private law” and “public law” as descriptive phrases in much the same way as Goldberg does.

<sup>24</sup> Indeed, taking “criminal justice” and “criminal justice reform” seriously should require us to appreciate the ways in which the criminal system affects and is affected by legal doctrines and institutions that appear far removed from the traditional realms of substantive and procedural criminal law. See, e.g., Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, in *THE NEW CRIMINAL JUSTICE THINKING* 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Benjamin Levin, Book Review, *Rethinking the Boundaries of ‘Criminal Justice’*, 15 OHIO ST. J. CRIM. L. 619 (2018).

<sup>25</sup> See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> As noted in Part II, there certainly are employment-related collateral consequences that would fall into the “collateral sanctions” category, as they rest on statutory bans on licensing, employment, etc. See JACOBS, *supra* note 1, at 261–62 (collecting statutes).

legal regimes outlined in this Article may be responsive to statutory, common-law, or consumerist pressures, they hardly fall into the ABA Standards' framework. Instead they rest on an even more opaque set of decisions and decision-makers.<sup>29</sup>

I do not mean to undersell the important work that other collateral consequences scholarship and the ABA taskforce have done in bringing “invisible punishment” to the fore and deconstructing the direct/collateral distinction. This distinction has been critiqued rightly as “formalistic,” “outdated,” and “unprincipled.”<sup>30</sup> Indeed, dating at least to the 1950s, criminal law practitioners and scholars have attempted to catalog and curb collateral consequences.<sup>31</sup> Drafted in 1962, decades before the rise of scholarly attention to collateral consequences, section 306.6 of the Model Penal Code explicitly addressed the need to confront these harms by granting the sentencing court the authority to enter an order eliminating “any disqualification or disability imposed by law because of the conviction . . . .”<sup>32</sup> While this provision of the Model Penal Code has failed to gain acceptance, recent work is a big step in the right direction.

That being said, the exclusive focus on “formal” collateral consequences understates the scope of the problem faced by individuals with criminal records. Further, by failing to address informal collateral consequences, the current discourse invites policy solutions that fail to remedy much discrimination against those with criminal records.<sup>33</sup> Therefore, this Article argues that criminal employment law—a class of “informal” collateral consequences—requires the same attention as mandatory or “formal” collateral consequences.

My claim is that criminal employment law mirrors the same patterns as formal collateral consequences and risks producing similar effects. Certainly, as a descriptive matter there is a difference between a consequence that attaches automatically or via state action and one that does not—the latter necessarily implicates the discretion of private actors and, as a result, is less predictable.<sup>34</sup> That is, informal collateral

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<sup>29</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1241 (2016); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317 (2012) (“More broadly, misdemeanor processing reveals the deep structure of the criminal system: as a pyramid that functions relatively transparently and according to legal principle at the top, but in an opaque and unprincipled way for the vast majority of cases at the bottom.”).

<sup>30</sup> Roberts, *supra* note 5, at 672–73.

<sup>31</sup> See JACOBS, *supra* note 1, at 248; Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1709 (2003) [hereinafter Love, *Starting over*].

<sup>32</sup> Model Penal Code § 306.6(1) (AM. LAW INST. 1962). But the shift from a rehabilitative to a punitive approach to criminal justice in the following decades saw a move to eliminate “civil death” after a conviction largely forgotten. See Love, *Starting over*, *supra* note 31, at 1713–16.

<sup>33</sup> See generally *infra* Part III.

<sup>34</sup> It is worth noting that, given empirical research on employers' hiring preferences, it would not be unreasonable to conclude that difficulty in finding employment post-conviction is

consequences like criminal employment law are even collateral to the consequences treated as collateral consequences by legal scholars. But, if these private decisions have similar effects, why should this formal distinction matter? If discretion is routinely exercised in the same way, then we should be able to predict its consequence. Criminologists Devah Pager, Bruce Western, and others have shown that employers generally would prefer to hire job applicants without criminal records.<sup>35</sup> So, even if the employment consequences are contingent on the decisions or policies of private actors, it appears that the effects are at least somewhat predictable.<sup>36</sup>

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highly probable. See HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 59–60 (1996); JACOBS, *supra* note 1, at 279–82 (collecting data on employer hiring preferences); Ian B. Petersen, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEX. L. REV. 175, 176–77 (2015); Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences* 1, 3–4 (Sentencing & Corr. Issues for the 21st Century, No. 9, 2000). That being said, as I stress throughout the Article, private employers and their decisions operate as intervening acts and actors in the chain of causation from conviction to unemployment.

<sup>35</sup> See, e.g., PAGER, *supra* note 1, at 59–63; Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 22–23 (2005) (“For example, one study conducted in five major cities showed that two-thirds of employers would not knowingly hire a former offender.”); Petersen, *supra* note 34, at 176–78 (“Employers said they were less likely to hire ex-offenders than any other disadvantaged population included in the survey: welfare recipients (82% willing to hire), GED holders (82%), applicants who had been unemployed for at least one year (68%), and even applicants with only part- or short-time work experience (48%).”).

<sup>36</sup> Indeed, predicting the behavior of private employers is hardly unheard of in public law. By way of analogy, in the Social Security context, administrative law judges (ALJs) frequently rely on the testimony of “vocational experts.” See, e.g., *Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006); *Phillips v. Barnhart*, 357 F.3d 1232, 1240 (11th Cir. 2004); Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration’s Disability Programs*, 62 ADMIN. L. REV. 937, 964–65 (2010). These experts testify as to a disability claimant’s ability to perform various jobs and the presence of those jobs in the labor market. See, e.g., *Boone v. Barnhart*, 353 F.3d 203, 205–06 (3d Cir. 2003); *Tackett v. Apfel*, 180 F.3d 1094, 1100–01 (9th Cir. 1999). Whether a claimant receives benefits often depends upon the testimony of the vocational expert and her statements about the claimant’s likelihood of being hired by a private employer. See, e.g., *Smith v. Halter*, 307 F.3d 377, 378 (6th Cir. 2001); Dubin, *supra* at 964–65. There are many reasons to be suspicious about ALJs’ reliance on vocational expert testimony. See *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002) (“We asked the parties at oral argument what makes a vocational expert an ‘expert’ (and where the information in the Dictionary [of Occupational Titles] came from). They did not know.”); Dubin, *supra* at 966–68 (listing problems and noting the “‘emperor’s new clothing’ quality sometimes attendant to [vocational expert] qualifications and evidence”). But it is worth noting that this practice of examining the private labor market is a staple of the large body of litigation that comprises Social Security appeals. ALJs’ decisions and the allocation of benefits depend not on extensive social scientific research or legislative fact finding, but on the statements of marginally qualified experts. See generally Nathaniel O. Hubley, Note, *The Untouchables: Why a Vocational Expert’s Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 VAL. U. L. REV. 353 (2008) (critiquing the overreliance on testimony from vocational experts). That is, if such vague statements about the labor market provide a sufficient basis to grant or deny federal benefits,

If we know that a criminal conviction is likely to render an individual unemployable, and if we know that a range of economic benefits and social and civil rights are tied to employment, then we should be able to identify a set of collateral consequences that are highly likely to result from conviction. While the consequences may not be mandatory and while they might rest on private decision-makers, they are foreseeable. Thus, to the extent that scholars have argued that *formal* collateral consequences should be factored into decisions about punishment or sentencing, I argue that informal collateral consequences also should be. As the Standards indicate, scholars and attorneys have identified a set of tools and institutional reforms that might take collateral consequences seriously.<sup>37</sup> It is impossible to assess whether sentences are too harsh, too lenient, etc. if we do not know the parameters of each sentence.<sup>38</sup> Probable unemployment, coupled with the attendant social and economic problems, might appear disproportionate when coupled with lengthy prison sentences or other direct effects of conviction (or, in some cases, perhaps not). To the extent formal punishment plus informal collateral consequences appear disproportionate, they should trigger the sorts of policy proposals and inspection that the Standards put forth and scholars of collateral consequences have raised.

Even if criminal employment law were not troubling as excessively punitive, though, it still would raise predictability concerns. That is, the contingency of criminal employment law in and of itself should be an issue. An enormous amount of case law and scholarly literature has focused on the role of discretion in sentencing (whether it is properly exercised by the judge, the legislator, or the prosecutor; whether determinate sentencing schemes yield fairer outcomes; whether discretion helps or hurts defendants of color and other marginalized groups).<sup>39</sup> Regardless of our view on the proper function of discretion in

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then why could not engagement with data about private market actors have a role to play at sentencing or in the course of determining probation terms or terms of release?

<sup>37</sup> See generally A.B.A., *supra* note 4.

<sup>38</sup> Of course, properly calibrating sentences or punishments would also require a broader agreement on the purposes of punishment and what functions criminal law is meant to serve. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. (forthcoming 2018) (examining competing theories of criminal justice reform and the significance of first-principles disagreements). Cf. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 8 (2017) (noting that “no one has provided a metric for determining how many people in prison is ‘too many’”). Such a discussion of criminal punishment’s proper purpose falls outside the scope of this Article.

<sup>39</sup> See, e.g., Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 171 (2013); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1326–27 (1997); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial*

determining punishment, it is important to note that private employment consequences shift decisions about the treatment of individuals with criminal convictions outside of the scope of the criminal system altogether.<sup>40</sup> Given that the criminal code is a product of political decisions by political actors, someone will always be exercising some degree of discretion in shaping criminal punishment. Should that someone be a private employer?

Put simply, the conventional treatment of formal collateral consequences understates the role that private actors and informal consequences play in shaping the lives of individuals with criminal records. By focusing on private employers and non-statutory legal frameworks, I hope to shine a light on the private decisions and legal doctrines that shape the experience of punishment. To this end, the next Part lays out the legal framework of “criminal employment law.”

## II. THE FRAMEWORK OF CRIMINAL EMPLOYMENT LAW

A wide array of legal and extra-legal institutions shapes the interaction between the criminal system and the labor market. For individuals arrested, charged, or sentenced, a web of statutes will affect their attempts to obtain or retain employment.<sup>41</sup> Licensing laws in many states bar those convicted of crimes from a range of occupations,<sup>42</sup> and seven states go so far as to forbid those convicted of a felony from holding any public jobs.<sup>43</sup> According to the National Inventory of

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*Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>.

<sup>40</sup> See *infra* Section IV.B.

<sup>41</sup> See JACOBS, *supra* note 1, at 261; Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1503–05 (2003) (describing statutes that specifically address those with arrests rather than convictions).

<sup>42</sup> See Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 209–10 (1995). For example, in New York, a person convicted of any felony may not work in real estate sales, see N.Y. REAL PROP. LAW § 440-a (McKinney 2018), alcohol sales, see N.Y. ALCO. BEV. CONT. LAW § 110(d) (McKinney 2018), check cashing, see N.Y. BANKING LAW § 369(6) (McKinney 2018), as a firefighter, see N.Y.C., N.Y. ADMIN. CODE § 15-103 (2018), a notary, see N.Y. EXEC. LAW § 130 (McKinney 2018), a pier superintendent or hiring agent, see N.Y. UNCONSOL. LAW § 9814(b) (McKinney 2018), a private investigator, N.Y. GEN. BUS. LAW § 74 (McKinney 2018), an insurance adjuster, see N.Y. INS. LAW §§ 2108(d)(3)–(4) (McKinney 2018). See generally LEGAL ACTION CTR., NEW YORK STATE OCCUPATIONAL LICENSING SURVEY (2006), <http://lac.org/wp-content/uploads/2014/12/Occupational-Licensing-Survey-2006.pdf>.

<sup>43</sup> JACOBS, *supra* note 1, at 261. Other states forbid public employment for individuals with felony convictions, but allow for “restoration of eligibility.” *Id.* Even states that do not contain blanket prohibitions on public employment still restrict heavily the employment of those with criminal records. See *id.* Indeed, it is not uncommon for state law to include hundreds of statutes and regulations granting public employers the discretion to discharge individuals with

Collateral Consequences of Conviction (NICCC) maintained by the ABA, 599 federal statutes and regulations restrict employment for those with criminal records.<sup>44</sup> As of March 2016, eighty-five percent of all the statutes and regulations in the NICCC (state and federal) pertain to the employment rights of those with criminal records.<sup>45</sup> Indeed, looking to the employment-related statutes in the broader context of other denials of rights and benefits,<sup>46</sup> it would be hard to disagree with James Jacobs's characterization of those with criminal records as "second-class citizens by law."<sup>47</sup>

Statutory criminal employment law—the web of laws that governs public employment and public licensing—is ubiquitous.<sup>48</sup> But, in this Part, and in this Article generally, I do not want to focus on the statutory schemes. These statutes are certainly important. They shape the circumstances of reentry and the broad sweep of the criminal system. But, while they are hidden punishments, unmentioned at sentencing and not written into the criminal laws that define offenses or prescribe punishment, they are still more visible than another corner of criminal employment law: ostensibly, private "private law"<sup>49</sup> doctrines of employer liability for employee conduct and employer disciplinary systems. These non-statutory institutions play a critical role in the broader framework of criminal employment law.<sup>50</sup> The use of criminal background checks as a prerequisite to employment has expanded

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criminal records or banning outright individuals with criminal records from holding specific jobs. See *Search by Jurisdiction*, JUSTICE CTR., <https://niccc.csgjusticecenter.org/search/?jurisdiction> (select "Employment" from "Category") (last visited May. 23, 2018). The numbers range from greater than federal restrictions (California has 753) to more modest, but still large numbers (Rhode Island has 189). *Id.* (click "Advanced Search"; select "Employment" from "Categories"; select the state from "Jurisdiction")

<sup>44</sup> *Search by Jurisdiction*, *supra* note 43 (select "Employment" from Category and select "Federal" from "Jurisdiction"). Of these 599, 242 are "mandatory" or "automatic." *Id.* That is, a conviction immediately triggers discharge, failure to hire, or reporting to a superior, rather than granting a supervising or hiring official the discretion to make an employment decision.

<sup>45</sup> See *id.*

<sup>46</sup> See, e.g., John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1063–64 (2009); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 279–82 (2004) ("Although it is tempting to think in isolation about each of the problems reentering ex-offenders face, they tend to be linked.")

<sup>47</sup> JACOBS, *supra* note 1, at 249.

<sup>48</sup> See, e.g., JACOBS, *supra* note 1, at 261; Mukamal & Samuels, *supra* note 41; NICCC, *supra* note 5.

<sup>49</sup> See *supra* note 23 and accompanying text.

<sup>50</sup> See generally MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, THE NAT'L EMP. LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (Mar. 2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) (cataloging the effects of employment discrimination against those with criminal records).

substantially in the last twenty years,<sup>51</sup> and surveys have shown that over sixty percent of employers would not knowingly hire people with criminal records.<sup>52</sup> This means that much of the work of criminal employment law operates extra-statutorily.

There may be legitimate reasons why employers are hesitant to hire those with criminal records. But it does not follow that *any* conviction should bar *any* type of employment, or that the law, employers, or consumers are necessarily justified in imposing blanket bans. Further, this Article emphasizes that those decisions and those preferences have significant social and distributional costs. To the extent that they disadvantage certain groups, have criminogenic effects, or are undervalued in calibrating punishment, they require our attention.

As sociologist Bruce Western describes it, the treatment of individuals with criminal records, particularly black men, has resulted in a process of “social exclusion.”<sup>53</sup> This marginalized population “bears the stigma of official criminality in all subsequent spheres of social life, as citizens, workers, and spouses.”<sup>54</sup> According to Western and other scholars of reentry, the marginalization is inextricably linked to employment and to the labor market—mass incarceration removes many people from the labor market directly (via imprisonment) and indirectly (via the collateral consequences that follow release).<sup>55</sup> “[P]enal exclusion has been layered on top of economic and racial exclusion,” argues David Garland, “ensuring that social divisions are deepened, and that a criminalized underclass is brought into existence and systematically perpetuated.”<sup>56</sup> That is, the carceral state and the effects of

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<sup>51</sup> See Ian B. Petersen, Note, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEX. L. REV. 175, 177 (2015) (“In 1994, just 48% of surveyed Los Angeles employers always or sometimes checked criminal backgrounds; by 2001, this number had risen to 63%. A 2010 national survey showed over 90% of employers used criminal background checks in some capacity, and 73% used them for all candidates.” (footnote omitted)).

<sup>52</sup> See PAGER, *supra* note 1, at 34.

<sup>53</sup> WESTERN, *supra* note 7, at 6. See generally JACOBS, *supra* note 1, at 279–81 (reporting on studies that demonstrate that black job applicants with criminal records are less likely to find employment than similarly situated white applicants); PAGER, *supra* note 1 (same). But see Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (U. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 16-012, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795) (finding no relationship between race and felony convictions in hiring decisions).

<sup>54</sup> WESTERN, *supra* note 7, at 6.

<sup>55</sup> See *id.* (“So marginal have these men become, that the most disadvantaged among them are hidden from statistics on wages and employment. The economic situation of young black men—measured by wage and employment rates—appeared to improve through the economic expansion of the 1990s, but this appearance was wholly an artifact of rising incarceration rates.”).

<sup>56</sup> David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 2 (David Garland ed., 2001); see also Jonathan Simon & Richard Sparks, *Punishment and Society: The Emergence of an Academic Field*, in THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 1, 11 (Jonathan Simon &



mass incarceration are embedded in a broader set of economic conditions.

In this Part, and in this Article generally, I will focus on the decisions made by employers and the common law doctrines and private agreements that structure those decisions in an effort to examine the legal architecture of this social and economic exclusion. Specifically, this Part first will examine the tort law doctrines of negligent hiring and retention, which allow for liability when employers hire or retain individuals with criminal records. Next, this Part will discuss the rise of employee conduct policies that allow for employers to discipline or discharge employees based on criminal investigations, arrests, or charges.

#### A. *Negligent Hiring and Retention*

In order to understand the place of “private law” in the criminal system, it is important to recognize tort law’s role in bringing criminal records into the workplace. The doctrines of negligent hiring and retention create potentially broad avenues for direct employer liability based on the identity and history of employees.<sup>57</sup> “These theories of recovery impose liability for an employee’s intentional tort, an action almost invariably outside the scope of employment,”<sup>58</sup> but they do so because of an overarching attempt to “address risks created by exposing members of the public to a potentially dangerous individual.”<sup>59</sup>

Both doctrines rest on the premise that an employer may be responsible for the misconduct of her employee even when the employee acts outside the scope of her employment. An employer “is under a duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them” if the conduct satisfies four elements—the employee: (1) “is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee],” or (2) “is using a chattel of the master,” and the employer: (3) “knows or has reason to know that he has the ability to control his [employee],” and (4) “knows or should know of the necessity and opportunity for exercising such control.”<sup>60</sup> Specifically, in

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Richard Sparks eds., 2013) (describing this view of incarceration as social control).

<sup>57</sup> See, e.g., *Connes v. Molalla Transp. Sys.*, 831 P.2d 1316, 1320–21 (Colo. 1992); *Plains Res., Inc. v. Gable*, 682 P.2d 653, 662 (Kan. 1984); *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982).

<sup>58</sup> *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993).

<sup>59</sup> *Id.* (citing *Di Cosala*, 450 A.2d at 515).

<sup>60</sup> RESTATEMENT (SECOND) OF TORTS § 317 (AM. LAW INST. 1965); see also *Ehrens v.*

the context of negligent retention, an employer may be liable for “retaining in his employment [employees] who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as [employer].”<sup>61</sup>

In negligent hiring and retention cases, therefore, courts focus on the “propensities” of the employees.<sup>62</sup> For this reason, the doctrines remain distinct from general principles of respondeat superior.<sup>63</sup> As the Supreme Court of New Jersey has explained:

[T]he tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring.<sup>64</sup>

That is, an employer’s liability for her employee’s tortious conduct within the scope of employment is not predicated on the employer’s knowledge of the employee’s character, background, or predilections outside of work. Respondeat superior liability’s focus is on the workplace itself and the manner in which an employee does her job, or the way in which an employer trains and supervises her employee. Negligent hiring and retention, on the other hand, base liability on an employee’s identity and the sufficiency of her employer’s efforts to suss out past misdeeds or misconduct.<sup>65</sup>

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Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004) (articulating the elements under New York law); *Stalbosky v. Belew*, 205 F.3d 890, 894, 896 (6th Cir. 2000) (stating the elements under Kentucky law). For purposes of clarity and consistency, I have replaced the “master/servant” formulation with “employer/employee.” While these two different sets of legal classifications are not coterminous, the differences are not applicable to this discussion.

<sup>61</sup> RESTATEMENT (SECOND) OF TORTS § 317 cmt. c. The Restatement specifies that “[t]here may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant.” *Id.*

<sup>62</sup> See, e.g., *Mercado v. City of Orlando*, 407 F.3d 1152, 1162 (11th Cir. 2005) (“To state a claim of negligent retention of employees, Mercado must show that Orlando was put on notice of the harmful propensities of the employees.” (internal quotation marks omitted) (citation omitted)); *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012) (discussing a school counselor’s alleged “propensities” for predatory conduct that might put his employer on notice that he was a potential sex offender); *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 606 (Ga. 2004); *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983) (“Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation . . .”).

<sup>63</sup> See JACOBS, *supra* note 1, at 73.

<sup>64</sup> *Di Cosala*, 450 A.2d at 515.

<sup>65</sup> See, e.g., *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1224–25 (Kan. 1998) (collecting cases); *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988).

Criminal records naturally come into this analysis when courts examine knowledge and foreseeability<sup>66</sup>—i.e., whether an employer knew of the employee's propensity for bad behavior and whether the resulting harm to third parties was foreseeable.<sup>67</sup> Whether an employer knew or should have known of an employee's propensity for misfeasance might rest on whether a background check had been conducted (and how thorough that check was).<sup>68</sup> Similarly, whether the ultimate tortious conduct and injury were foreseeable might turn on the nature of any past arrests or convictions.<sup>69</sup> That is, a criminal history need not render future misconduct foreseeable if the past offense differs substantially from the ultimate tortious or criminal conduct.<sup>70</sup>

While courts consistently have held that failure to perform a criminal background check does not amount to negligence per se,<sup>71</sup> courts frequently treat an employer's decision to conduct a background check as evidence of due diligence.<sup>72</sup> And, an employer's failure to conduct a background check or failure to investigate suspicious conduct or gaps in a resume may weigh against an employer and create a triable issue of fact for the jury.<sup>73</sup> Indeed, as a practical matter, given the significant rise in employment-related background checks and technological advances in access to records that make retrieval less

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<sup>66</sup> While the existence of a duty to the plaintiff frequently is also at issue in negligent hiring and retention suits, see *Di Cosala*, 450 A.2d at 516, this inquiry is not relevant to this Article's focus on criminal records.

<sup>67</sup> See, e.g., *D.R.R. v. English Enters.*, Catv, 356 N.W.2d 580, 583 (Iowa Ct. App. 1984); *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 288 (Mich. 1971); *Se. Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999); Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 188 (2008); Hickox, *supra* note 14, at 1007–08 (collecting cases).

<sup>68</sup> See, e.g., *Keen v. Miller Envtl. Grp., Inc.*, 702 F.3d 239, 246 (5th Cir. 2012); *Blair v. Def. Servs., Inc.*, 386 F.3d 623, 629 (4th Cir. 2004); *Jackman*, 513 S.E.2d at 397; *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436, 442 (R.I. 1984).

<sup>69</sup> See, e.g., *Muegge v. Heritage Oaks Golf & Country Club, Inc.*, 209 F. App'x 936, 941 (11th Cir. 2006); *Van Horne v. Muller*, 705 N.E.2d 898, 905 (Ill. 1998) (collecting cases); *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 888 (Wash. Ct. App. 1994).

<sup>70</sup> See, e.g., *Van Osdol v. Vogt*, 908 P.2d 1122, 1132 n.17 (Colo. 1996); *McCann v. Varrick Grp. L.L.C.*, 84 A.D.3d 591, 591–92 (N.Y. App. Div. 2011).

<sup>71</sup> See *Keen*, 702 F.3d at 246 n.4 (collecting cases). *But see* *Vaughan v. Harrah's Las Vegas, Inc.*, No. 46821, 2008 WL 6124455, at \*5 (Nev. July 7, 2008) (“The tort of negligent hiring imposes a general duty on an employer to conduct a reasonable background check on a potential employee to ensure that he or she is suitable for the position.” (internal quotation marks omitted) (citation omitted)).

<sup>72</sup> See, e.g., *Blair*, 386 F.3d at 632–33 (Widener, J., dissenting); *Estevez-Yalcin v. Children's Vill.*, 331 F. Supp. 2d 170, 173 (S.D.N.Y. 2004); *Dewitt v. Home Depot U.S.A., Inc.*, No. 10-CV-3319 KAM, 2012 WL 4049805, at \*7 (E.D.N.Y. Sept. 12, 2012); *Pinkerton's, Inc.*, 474 A.2d at 442.

<sup>73</sup> See, e.g., *Peterson v. RTM Mid-Am., Inc.*, 434 S.E.2d 521, 523 (Ga. Ct. App. 1993); *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1311 (Mass. App. Ct. 1988); Megan Oswald, Comment & Casenote, *Private Employers or Private Investigators? A Comment on Negligently Hiring Applicants with Criminal Records in Ohio*, 72 U. CIN. L. REV. 1771, 1780–81 (2004) (collecting cases).

costly and time consuming,<sup>74</sup> it would not be unreasonable to conclude that a risk-averse employer would make a criminal background check a prerequisite for any range of jobs.<sup>75</sup>

That being said, while courts may focus on the presence or absence of a background check, it is unclear what criminal records actually tell us about the foreseeability of future harm (or, for that matter, an employee's propensity for tortious or criminal conduct). As an empirical matter, the probative value of criminal records in assessing future offending remains a point of some scholarly uncertainty.<sup>76</sup> For example, in a 2009 study, Alfred Blumstein and Kiminori Nakamura found that the predictive weight of a past conviction diminishes significantly over time.<sup>77</sup> Using data from New Yorkers arrested in 1980 for robbery, burglary, and aggravated assault,<sup>78</sup> Blumstein and Nakamura found that the "hazard rate" (i.e., the risk of re-arrest)<sup>79</sup> declined rapidly after the initial conviction.<sup>80</sup> For the bulk of the subjects of the study, within five years, the hazard rate had dropped to the normal rate for record-less New Yorkers of the same age.<sup>81</sup> Further, to the extent rehabilitation retains any purchase as a justification for criminal punishment, treating past misconduct as evidence of future wrongdoing is deeply troubling. In other words, the logic of

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<sup>74</sup> See, e.g., JACOBS, *supra* note 1, at 281; Love, *supra* note 4, at 251; Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1198–99 (2006).

<sup>75</sup> The practical ease of conducting background checks might be relevant to the liability calculus given some courts focus on other factors such as "the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm caused to the plaintiff, the practical consequences of placing such a burden on the defendant, and any additional elements disclosed by the particular circumstances of the case." *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992).

<sup>76</sup> Compare J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1356 (2011) ("The U.S. Sentencing Commission has suggested that the criminal history categories of the sentencing guidelines, which categorize offenders by frequency, seriousness, and recency of prior offenses, are highly predictive of future recidivism."), with Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1101 (2011) ("Unfortunately, criminal history is a significantly less accurate predictor of future criminality than would be a direct clinical assessment of a person's dangerousness.").

<sup>77</sup> See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 349–50 (2009); see also *Doe v. United States*, 110 F. Supp. 3d 448, 455 (E.D.N.Y. 2015) ("That [the party seeking expungement] has not engaged in any criminal activity since the conduct that brought her before me helps to prove that point; a long period of law-abiding conduct after a conviction lowers the risk of recidivism to the same level as someone who has never committed a crime.").

<sup>78</sup> Blumstein & Nakamura, *supra* note 77, at 335.

<sup>79</sup> It is worth noting that re-arrest may not be an accurate indication of recidivism and may be both over- and under-inclusive. Further, given what we know about the ways in which criminal enforcement tends to be targeted most heavily in marginalized communities, there is reason to be suspicious that re-arrest might track a defendant's identity as much as (if not more than) her criminal conduct.

<sup>80</sup> See Blumstein & Nakamura, *supra* note 77, at 338–46.

<sup>81</sup> See *id.* at 339.

rehabilitation fails if people who have served their sentence continue to be treated as dangerous or suspect.<sup>82</sup> Nevertheless, despite these flaws, courts continue to use criminal history as a proxy for risk.

Before moving on to address employee conduct policies, it is worth pausing to note the significance of negligent hiring and retention in the body of criminal employment law. While these tort doctrines initially might not seem as imposing as the statutory components of criminal employment law, it would be a mistake to understate their significance in shaping employer preferences and restricting the job market for people with convictions. A 2001 study found that employers had lost seventy-two percent of negligent hiring cases that went to trial.<sup>83</sup> Average pre-trial settlement amounts of the studied cases topped \$1.6 million.<sup>84</sup> Therefore, employers face significant financial incentives to avoid hiring those with criminal records, or at least to be very careful in assessing the criminal histories of any applicants.<sup>85</sup> Even for industries or occupations where no statutory or regulatory diktat bars employing people with criminal records, the specter of costly civil litigation might make discriminating against those with criminal records a “rational” decision for many employers.<sup>86</sup>

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<sup>82</sup> Indeed, this logical flaw permeates the broader realm of collateral consequences. If an individual has served her sentence or received her punishment, what justification is there for her to continue to suffer? If the answer is that her conviction indicates that she remains a danger to society, then either that means a rejection of the rehabilitative idea or a belief that the mode (or severity) of punishment has failed to advance rehabilitative ends. Alternatively, the answer might be that she has lost certain rights, privileges, or status as a result of her having violated community norms. But, that justification sounds a lot like an argument that collateral consequences are punishment.

<sup>83</sup> Holzer et al., *supra* note 6, at 207.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* (“The high probability of losing such a [negligent hiring or retention] suit coupled with the magnitude of settlement awards suggest that fear of litigation may substantially deter employers from hiring applicants with criminal history records.”).

<sup>86</sup> *See infra* text accompanying notes 184–85 (discussing and critiquing the role of “rational discrimination” as a driver of collateral consequences in the labor market). The presence of varying state tort doctrines coupled with the occupational licensing restrictions at the state and local level further increases the likelihood that employers will over-correct or adopt the most risk-averse approach to hiring and retentions. If a company does business in multiple jurisdictions (or employs workers to perform a range of functions), it is not out of the question that the company might employ ex-offenders in one jurisdiction (or for one function) with impunity, but that doing so elsewhere would expose them to liability. While such nuance and variation might be products of different community attitudes toward rehabilitation, employers might respond by taking the most risk-averse approach and adopting a general hiring policy that conforms to the most restrictive jurisdiction’s approach to tort liability or licensing. *Cf.* Monique C. Lillard, *Their Servants’ Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709, 745 (2007) (“Employers, like most potential defendants, are cautious and tend to overprotect themselves.”).

### B. *Employee Conduct Policies*

Where the tort doctrines provide employer liability, employee conduct policies or handbooks do not necessarily give rise to liability; instead, they shape the contractual relationship between employer and employee.<sup>87</sup> “Most state courts have found that an employee handbook or other policy statement can create an enforceable contract between employer and employee.”<sup>88</sup> In cases where employers (private or public) have contracted out of the traditional “at-will” employment, they occasionally take advantage of conduct policies to restrict or further define the behavior that they expect of their employees.<sup>89</sup> These policies operate as internal rules or constraints on employees, granting rights to employers to discipline workers based on misconduct.<sup>90</sup> In some cases, these policies operate as a version of “morals clauses”—contractual terms that allow for discharge or discipline if an employee acts in such a way as to compromise the image or moral standing of the employer.<sup>91</sup> Such contracts have a long history in the entertainment and education industries, where consumers and students, respectively, are assumed to be particularly responsive to the character and identity of the employee (i.e., the actor or teacher).<sup>92</sup>

Perhaps the most publicly visible form of the policies in the current labor market has been the proliferation of player conduct policies in the professional sports context.<sup>93</sup> In the wake of highly publicized off-field

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<sup>87</sup> See 2 HR SERIES POLICIES AND PRACTICES § 126:25 (rev. ed. May 2018) [hereinafter HR SERIES].

<sup>88</sup> *Id.*; see also *Wooley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985). *But see* *Elmore v. Cleary*, 399 F.3d 279, 280 n.1 (3d Cir. 2005) (noting that such an agreement need not serve as a contract).

<sup>89</sup> See HR SERIES, *supra* note 87, § 126:25. That said, employment conduct policies are not found exclusively in unionized shops.

<sup>90</sup> See, e.g., Dana H. Freyer, *Corporate Compliance Programs for FDA-Regulated Companies: Incentives for Their Development and the Impact of the Federal Sentencing Guidelines for Organizations*, 51 FOOD & DRUG L.J. 225, 236 n.71 (1996); *About: 665 Postal Service Standards of Conduct*, U.S. POSTAL SERV. [hereinafter USPS], [https://about.usps.com/manuals/elm/html/elmc6\\_024.htm](https://about.usps.com/manuals/elm/html/elmc6_024.htm).

<sup>91</sup> See, e.g., *RKO Radio Pictures, Inc. v. Jarrico*, 274 P.2d 928, 929 (Cal. Dist. Ct. App. 1954) (“[A]ppellant agreed that during the production and distribution of the motion picture he would conduct himself with due regard to public conventions and morals and would not do anything which would tend to degrade him or bring him into public disgrace, obloquy, ill will or ridicule.”); Marka B. Fleming et al., *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 B.Y.U. EDUC. & L.J. 67, 67–68 (2009) (“In general, morals clauses in employment contracts allow an employer to terminate employment when an employee’s conduct is potentially detrimental to the employer’s interest.”); Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235–36 (2005).

<sup>92</sup> See Fleming, et al., *supra* note 91, at 67–68; Kressler, *supra* note 91, at 235–36.

<sup>93</sup> See, e.g., Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011*

and off-court incidents, the National Football League (NFL) and National Basketball League (NBA) have implemented conduct policies that govern the behavior of their players at all times.<sup>94</sup> These policies allow the league commissioners to discipline players who are arrested for or convicted of crimes.<sup>95</sup> For purposes of this Article, it is critical to note that this misconduct need not take place at work or be directly tied to workplace safety.<sup>96</sup> Instead, in some cases, the employer may exercise authority to fire or discipline an employee based on actual or alleged misconduct that has occurred when a worker is “off the clock” and conducting personal business.<sup>97</sup> In one highly publicized incident, NFL

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*Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 63 (2012); Marc Edelman, *Speech: A Different Look at Compliance in Professional Sports: Why the NFL Personal Conduct Policy Might Be More Illegal Than the Very Conduct It Seeks to Regulate*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 89, 90 (2011); Michael A. Mahone, Jr., Note, *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League’s Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 183–84 (2008); Adam B. Marks, Note, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1583 (2008); J.J. Adande, *Can Silver Fix NBA’s Off-Court Issues?*, ESPN (Sept. 4, 2013), [http://espn.go.com/nba/story/\\_/id/9634662/nba-adam-silver-nba-court-conduct](http://espn.go.com/nba/story/_/id/9634662/nba-adam-silver-nba-court-conduct); William C. Rhoden, *Principal Goodell Sets a New Tone for the N.F.L.*, N.Y. TIMES (June 2, 2007), <https://www.nytimes.com/2007/06/02/sports/football/02rhoden.html?mtrref=www.google.com&gwh=C41C19332247371352D4642653B04331&gwt=pay> (describing NFL commissioner Roger Goodell as a “law and order commissioner” due to his focus on off-field issues).

<sup>94</sup> See generally Mahone, Jr., *supra* note 93; Adande, *supra* note 93.

<sup>95</sup> See generally Kim & Parlow, *supra* note 15.

<sup>96</sup> See NAT’L BASKETBALL ASS’N, CONSTITUTION AND BY-LAWS OF THE NATIONAL BASKETBALL ASSOCIATION 45 (May 29, 2012), <http://prawfsblawg.blogs.com/files/221035054-nba-constitution-and-by-laws.pdf> (granting the commissioner the power to fine or suspend a player who “shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association”); see also HR SERIES, *supra* note 87, § 126:25 (“If employers wish to hold employees accountable for their actions while they are away from work, that rule should be clearly set forth in the employee practices and procedures and communicated to employees. Conduct away from work should be subject to employer scrutiny only if the conduct has a clear nexus to the employer’s business. For example, a bank should probably discharge any employee convicted of theft. A children’s television host might be disciplined or discharged for a DUI.”); USPS, *supra* note 90 (“Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.”). *But see Conduct: Employee Conduct and Work Rules Policy*, SOC’Y HUMAN RES. MGMT. (June 30, 2014), [http://www.shrm.org/templatestools/samples/policies/pages/cms\\_006651.aspx](http://www.shrm.org/templatestools/samples/policies/pages/cms_006651.aspx) (providing a sample conduct policy that emphasizes behavior at the workplace and enumerates a list of unacceptable behavior, including possession and distribution of narcotics and weapons).

<sup>97</sup> See, e.g., Terry L. Leap, *When Can You Fire for Off-Duty Conduct?*, HARV. BUS. REV., Jan.

Commissioner Roger Goodell initially suspended Ray Rice of the Baltimore Ravens for two games for allegedly assaulting his fiancée, Janay Palmer.<sup>98</sup> After a video surfaced that showed Rice knocking Palmer unconscious, public outcry caused Goodell to attempt to increase the punishment for Rice indefinitely and declare that domestic violence incidents would receive harsher treatment going forward.<sup>99</sup> Put simply, the public demanded a response beyond what the criminal system offered,<sup>100</sup> and Goodell—as a voice of the NFL owners—was able to mete out that punishment.<sup>101</sup> There are numerous reasons why the world of professional sports is not representative of the U.S. labor market, but the Rice case nonetheless should serve as a useful illustration of a conduct policy's application.<sup>102</sup>

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1988, at 28.

<sup>98</sup> See Jill Martin & Steve Almsay, *Ray Rice Wins Suspension Appeal*, CNN (Nov. 30, 2014, 12:59 AM), <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated>.

<sup>99</sup> See *id.*

<sup>100</sup> See Withers, *supra* note 15 at 149–50; Post, *supra* note 15.

<sup>101</sup> While earlier player conduct policies and disciplinary actions focused on drugs, alcohol, and the specter of other criminal misconduct, recent disciplinary actions and public reactions often have focused on intimate partner violence and have taken on the language of gender justice. See, e.g., Dan Gunderman, *Former Pro Bowler Greg Hardy Vying for NFL Return, Says He's 'Not a Psychopath'*, N.Y. DAILY NEWS (May 2, 2017, 3:15 PM), <http://www.nydailynews.com/sports/football/pro-bowler-greg-hardy-vying-nfl-return-article-1.3130469> (cataloging cases of NFL discipline in domestic violence cases); Robert Salonga, *49ers Star Reuben Foster Charged with 3 Felonies in Domestic Violence Case*, MERCURY NEWS (Apr. 12, 2008, 4:42 AM), <https://www.mercurynews.com/2018/04/13/49ers-star-reuben-foster-charged-in-domestic-violence-and-weapon-case-2-2-2> (same). The past year has seen a dramatic rise in public attention to issues of gender justice in the workplace with the rise of the #MeToo movement. Unlike many of the cases addressed in this Article, much of the conduct addressed by #MeToo activists took place in workplaces or was more explicitly related to the workplace or employer/employee power dynamics. Nevertheless, as of the time of this Article's publication, the legal and policy responses to #MeToo still are unknown. It is conceivable that we might see some interaction between the #MeToo activism and criminal employment law, but, as of now, that remains an open question.

<sup>102</sup> Four elements of major league professional sports in the United States render them largely unrepresentative of the labor market at large: (1) the high salary and prestige associated with players' participation; (2) the degree of publicity that the players and their actions receive; (3) the degree of skill required to participate; and (4) the power of unions. Cf. Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil Rico Claim*, 75 ALB. L. REV. 559, 628 (2012) (examining the exceptional nature of labor and employment law in the sports and entertainment context). In their treatment of professional sports discipline, Janine Kim and Matthew Parlow highlight the publicity point as a key component of employee discipline in professional sports. See Kim & Parlow, *supra* note 15, at 575–79. While I will return to the publicity point, it is worth noting that the other factors (and, perhaps to a lesser extent, even the publicity factor) all speak to the bargaining power or relative market power of the employees. That is, one of the reasons that I think we should be concerned about criminal employment law is the power imbalance in the market and the ways in which those with criminal records, particularly low-income individuals, people of color, and others from marginalized communities face even greater challenges in the labor market due to their criminal status. See generally PAGER, *supra* note 1 (finding that black job applicants with criminal records faced greater discrimination than white applicants with criminal records). Therefore, while the professional sports context may serve as a useful way to understand and illustrate the public/private dimensions of criminal employment law, the Rice case and other



These personnel or employee conduct policies have received less scholarly attention than negligent hiring and retention. And, aside from the sports context, they have received limited public attention. Indeed, it is difficult to determine how ubiquitous they are.<sup>103</sup> But, I think it is fair to treat them as closely related to the tort doctrines discussed above and as a piece in the broader criminal employment law puzzle. Employee conduct policies function as part of a legal regime in which employers are often viewed as responsible for the actions and characters of their employees. The tort law doctrines discussed in the previous Section rest on this view of the employment relationship, so it should not be much of a reach to consider those doctrines as closely related to a set of private orderings that re-inscribe and delineate the terms of that employment relationship. Viewed in this light, the policies might serve one of several functions for employers.

First, they might operate as a means of shielding employers from liability under theories of negligent hiring and retention (or other analogous tort or statutory theories of liability). If an employer includes a specific term forbidding her employee from acting criminally (or perhaps even being arrested), and if the employer monitors her employee and disciplines based on breach of the policy's terms, then perhaps she might be able to defend against suits arising from the employee's misconduct.<sup>104</sup> In other words, an employer is "putting in writing" its commitment to preventing employee misconduct, preemptively going on record to disapprove of conduct by an employee

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cases that have been the focus of other articles about employee conduct policies may well distract from the underlying structural considerations that make criminal employment law so worrying. Nevertheless, it would be wrong to disregard these cases and this context altogether as: (1) professional sports *are* highly publicized, meaning that the rules, social institutions, and legal orders that shape them stand a greater chance of entering the public consciousness, *see generally* Levin, *supra* note at 568–72 (advocating a focus on the cultural awareness of legal rules and norms); and (2) if a market defined by such a powerful group of employees still displays such grants of power to employers, there is good reason to assume that such dynamics might be even more pronounced in other markets—such as those for low-wage, unskilled labor—where employee bargaining power is lacking.

<sup>103</sup> A number of obstacles stand in the way of determining how widespread these policies are and what conduct they reach. Primarily, unlike the licensing statutes discussed above, *see supra* text accompanying notes 41–48, private employment contracts, employee manuals, and personal conduct policies are not necessarily parts of the public record. While references to employee conduct policies and their terms appear in judicial opinions, *see, e.g.*, *Elmore v. Cleary*, 399 F.3d 279, 280 (3d Cir. 2005); *Morris v. Collis Foods, Inc.*, No. W2001-00918-COA-R3CV, 2002 WL 1349514, at \*4 (Tenn. Ct. App. June 19, 2002), these passing mentions or discussions of specific provisions provide only a fleeting glance at the legal landscape.

<sup>104</sup> *See* HR SERIES, *supra* note 87, § 126:25. Because respondeat superior liability rests on an employee acting within the scope of her employment when she acts tortiously, *see* *Lev v. Beverly Enterprises-Mass., Inc.*, 929 N.E.2d 303, 308 (Mass. 2010), closely circumscribing the scope of employment would aid an employer in defending against tort suits relying on such a theory. However, tort liability for negligent hiring does not always require a finding that an employee acted within the scope of her employment. *See* *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982).

that might otherwise expose the employer to liability.<sup>105</sup> Therefore, the policies might function as a natural outgrowth of negligent hiring/retention theories and, perhaps more broadly, respondeat superior liability.<sup>106</sup>

Second, and perhaps relatedly, the policies might serve as a sort of public relations or cultural framing strategy for employers.<sup>107</sup> Particularly in response to public perception of lawlessness or callousness on the part of an employer or an industry, such policies can signal awareness and engagement.<sup>108</sup> That is, the presence (and perhaps the publicizing) of such policies might signal to consumers or clients that the employer takes her social responsibility seriously. An employer does not want “criminals” on her payroll, and she cares about more than the bottom line—or, at least, so the policy signals.<sup>109</sup> Rather than waiting for the state to take criminal action or allowing the state to define the terms of punishment, the employer is signaling that she is willing to impose her own moral condemnation.<sup>110</sup>

This explanation finds particular purchase in the professional sports context, where public outcry about players’ actions off the court have prompted league commissioners to draft and aggressively enforce

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<sup>105</sup> *But see* RESTATEMENT (SECOND) OF TORTS § 317 cmt. c. (AM. LAW INST. 1965) (“[A] railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding such practices.” (emphasis added)).

<sup>106</sup> *But cf. Di Cosala*, 450 A.2d at 515 (clarifying the different legal standard for respondeat superior and negligent hiring claims).

<sup>107</sup> *See* Joel Bakan, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, 48 CORNELL INT’L L.J. 279, 291 (2015) (“Construction of that conscience has been underway in the form of corporate social responsibility (CSR) since the 1980s, when private regulation first emerged. Today, CSR is mainstream, a mantra for business leaders, a ubiquitous presence in marketing and public relations campaigns, and an organizing principle for earnest gatherings of NGOs, scholars, business leaders, and government officials.” (footnote omitted)).

<sup>108</sup> *See* Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL’Y REV. 367, 373–77 (2008); Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2521 (2013) (“A key dispute about corporate social responsibility is whether firms’ practices meaningfully increase social welfare or merely provide an illusion that firms are good citizens.”).

<sup>109</sup> *Cf.* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 985 (2011) (“Part of the problem [with the legal and social treatment of BP] lies in what some term ‘greenwashing’ and what we dub ‘faux [corporate social responsibility].’ By greenwashing, a corporation might increase its sales or boost its brand image through environmental rhetoric, but at the same time either pollute the environment or decline to spend money on the environment, employee welfare, or otherwise honor its commitments to other constituencies.”).

<sup>110</sup> This framing or justification for conduct policies jibes with public preferences for “tough on crime” policies and with public assumptions about the guilt of those arrested for or charged with crimes. *See generally* Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1777–79 (2013) (describing and critiquing this cultural perception of the criminal system).

“player conduct policies” that allow for fines, suspensions, and all-out bans based on convictions, arrests, and—in some cases—even investigations.<sup>111</sup> In these situations, sports fans or commentators would have had no basis to pursue legal action—by allowing Rice to continue playing in the NFL, Goodell would not have harmed viewers or NFL fans.<sup>112</sup> Therefore, it seems much more plausible that the policies reflect a strategy of public presentation, rather than an effort to avoid liability.<sup>113</sup> It is worth noting that the sports context is unusual in the degree of publicity that the policies receive—crafting an employee conduct policy for public relations purposes would not make much of an impact if consumers were unaware of the policy (or of the underlying misconduct).<sup>114</sup> Nevertheless, viewed through the broader lens of corporate social responsibility, any attempt to craft an employer-sanctioned moral, ethical, or behavioral code might reflect an attempt at crafting an image of a good corporate citizen. Such an image might render an employer’s business more profitable or might even help to shield the employer from external regulation or suit.<sup>115</sup>

Finally, and perhaps most straightforwardly, we might view these policies as an attempt to establish greater employer control over employees. After all, whether these policies are merely aspirational or whether they are enforced actively, they purport to set the parameters of employee conduct and set up employers to police those boundaries. As a general matter, employers presumably wish to control the behavior of their employees to the extent possible.<sup>116</sup> And, to the extent that the law

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<sup>111</sup> See *supra* text accompanying notes 93–94.

<sup>112</sup> See *supra* text accompanying notes 98–102. Any harm to the NFL would be of an intangible and not legally cognizable variety (i.e., something like “damage to the integrity of the game”). Perhaps rewarding individuals who behave badly with lucrative contracts, publicity, and highly desirable jobs might do some harm to society writ large. But, again, this harm sounds much more in the language of the public psyche, collective, consciousness, or some other, non-legally cognizable theory of harm.

<sup>113</sup> It is certainly true that the motivation need not be exclusively one or the other and that an intent to improve public relations might be complementary to or a part of a broader effort to avoid liability.

<sup>114</sup> See *supra* note 102; see also Kim & Parlow, *supra* note 15; Post, *supra* note 15 (“I understand that perhaps the NFL is a special case, because it is in the entertainment business, and has to be particularly sensitive to public opinion and to be sure that its product meets with the public’s approval, so it needs to take the law into its own hands for reasons not applicable to other private firms.”).

<sup>115</sup> See, e.g., Bakan, *supra* note 107, at 291; Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 LAW & SOC’Y REV. 313, 314 (2011) (“CSR was transformed from being associated mainly with displays of good ‘corporate citizenship’ to a scientifically validated form of corporate risk management and, more generally, into a perceived commercial asset.”).

<sup>116</sup> See Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other “Survivalists”*, 67 FORDHAM L. REV. 957, 984–85 (1998) (“Employers or managers often will seek to protect their managerial power by resisting employee ownership plans involving employee control. . . . Employers, and particularly managers, may, therefore, resist attempts to

allows for—and may even encourage—such control,<sup>117</sup> why wouldn't employers try to exert it? This rationale might be a close relative of the first two justifications: (1) the law assumes that employers “control” their employees, so it is in an employer's best interest to exercise this control fully if she might ultimately be liable for her employee's conduct<sup>118</sup> and (2) consumers and the public at large might view the conduct of employees as having the tacit approval of their employer.<sup>119</sup> If that is the case, then it seems only logical that an employer would try to shape this conduct in any way possible.

Ultimately, the three justifications for employee conduct policies appear to overlap significantly. Each finds some basis in an underlying assumption that it is the place of the employer to control the activities of her employee. Or, perhaps more broadly, each relies on a belief that an employer is the actor or institution (rather than, or in addition to, the state) that ought to discipline individuals who behave badly.<sup>120</sup> Whether the exercise of control is responsive to a descriptive recognition of the legal lay of the land or a normative response to public demands depends on which rationale we view as the primary driver of these policies.

Regardless of what is actually motivating each individual employer, it is important to recognize the potential significance of these policies if broadly applied—or, broadly written. Imagine two different types of conduct policies (or, two types of provisions), both of which proscribe conduct that is also criminal. First, consider an employee conduct policy

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decrease their control over firm policy . . .”).

<sup>117</sup> The presence of employer “control” over a worker remains the touchstone of the common law test for whether a worker is an employee or an independent contractor. *See, e.g.,* Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1496 (11th Cir. 1993) (identifying the key component in a determination of employment as the “hiring party's right to control the manner and means by which the work is accomplished” (quoting Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993))); Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 977–78 (Cal. 1970); J.M. v. Shell Oil Co., 922 S.W.2d 759, 764 (Mo. 1996) (en banc); Hageman v. Park W. Gardens, 480 N.W.2d 223, 226 (N.D. 1992); Averett v. Grange, 909 P.2d 246, 249 (Utah 1995) (“In workers' compensation cases, this court has consistently held that whether an employer-employee relationship exists depends upon the employer's right to control the employee.”); Mountain Lodge Ass'n v. Crum & Forster Indem. Co., 558 S.E.2d 336, 342 (W. Va. 2001).

<sup>118</sup> *See* John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1480 (1998) (“For employers . . . a legal regime that imposed liability for work accidents could have created incentives to increase the extent of their control over the workplace and over the day-to-day conduct of employees.”).

<sup>119</sup> *See* Gilbert v. Sycamore Mun. Hosp., 622 N.E.2d 788, 794 (Ill. 1993); Howard Levin, Note, *Hospital Vicarious Liability for Negligence By Independent Contractor Physicians: A New Rule for New Times*, 2005 U. ILL. L. REV. 1291, 1300–03.

<sup>120</sup> This view could be defined in economic terms as a belief that the employer is the “least-cost avoider” when it comes to preventing injury as a result of an employee's conduct. *See* Richard J. Butler & John D. Worrall, *Wage and Injury Response to Shifts in Workplace Liability*, 61 INDUS. & LAB. REL. REV. 181, 182 (2008). Alternatively, the view could stem from a morals-focused belief that if an employer benefits from the conduct of its employees, it would be wrong for society to have to bear the costs of employee misconduct.

that proscribes certain behavior at the workplace because that behavior causes unsafe working conditions or directly affects the quality of the product or service. (For example, if a mining company prohibits its miners from committing theft and using narcotics on company property.<sup>121</sup>) Second, consider a policy that bans criminal conduct that occurs away from the workplace and when an employee is not on duty. (For example, if the mining company prohibits its miners from “being convicted of [a] felony criminal offense.”)<sup>122</sup>

Conduct policies of the first variety certainly might be used by employers to restrict workers unduly or for pretextual purposes. But—at least facially—they are unremarkable: rules are a staple of any workplace or industry, and prohibiting conduct that might endanger other workers or interfere with the functioning of the workplace is not noteworthy.<sup>123</sup> Therefore, I want to focus on the second variety (blanket prohibitions on criminality or criminal conduct). Without a clear tether to the safe or efficient functioning of an employer’s business, these kinds of terms or policies may function as criminal employment law. The employer effectively acts to punish privately, either in addition to, or instead of, the state. Certainly, we might explain this kind of behavior using each of the three rationales traced above. But, just because we can rationalize a policy does not make it normatively desirable. Do we trust employers as much as, or even more than, the state to respond to criminal conduct?<sup>124</sup> If employers might have private concerns (e.g., avoiding liability, maximizing profits)<sup>125</sup> that ostensibly are foreign to the criminal system and traditional purposes of punishment, why should they have a role to play in furthering the criminal system’s ends? And, why should employers take *any* action before a formal determination of guilt? (I will return to these questions later.)<sup>126</sup>

Having set up the legal framework for criminal employment law, the next two Parts will take two different tacks to examine criminal employment law’s flaws. Part III asks how to address the expansive scope and effects of criminal employment law. Part IV will return to the broader question of employers’ role as private actors in the criminal system and the ways in which the dual public/private nature of criminal employment law highlights problems with the legal treatment of employment.

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<sup>121</sup> See *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 705 (Wyo. 1985).

<sup>122</sup> *Id.*

<sup>123</sup> For example, the employee handbook in *Mobil Coal Producing, Inc. v. Parks* also prohibits “refusing or willfully failing to carry out proper instructions,” “willfully damaging plant or personal property,” “violation of safety rules,” and “falsification of records.” *Id.*

<sup>124</sup> See Post, *supra* note 15.

<sup>125</sup> See *supra* text accompanying notes 104–19; cf. Jain, *supra* note 29, at 1232 (examining the incentives of individual prosecutors).

<sup>126</sup> See *infra* Part IV.

## III. THE RESPONSES TO CRIMINAL EMPLOYMENT LAW

How might the legal system lessen the unduly harsh impact of criminal law? By addressing a range of proposed legal reforms, this Part continues to examine how criminal employment law operates and why employers might discriminate against individuals with criminal records. I briefly examine a set of policy responses that scholars have identified as a means of mitigating collateral consequences, specifically as they apply to employment-related consequences. By pointing out the limitations of these solutions, I hope to highlight the particular problems posed by criminal employment law's merger of public and private legal regimes.

Whether employment consequences are best viewed as a form of punishment or as a costly side effect, they are an important part of the daily functioning of the criminal legal system. They present an area in which to consider the ways courts or law makers might exercise control over the spread and operation of the criminal system's societal impact. As U.S. District Court Judge Lynn Adelman notes in calling for systemic reform:

With respect to collateral consequences, despite the growing body of model laws and best practices created by entities interested in law reform, such as the American Bar Association, no state has yet comprehensively reformed the ways in which people with criminal convictions are prevented from participating in civic and business activities.<sup>127</sup>

Private employers and private organizations might pose a set of obstacles and considerations absent from the public sector. Yet, that does not lessen the need to study and amend the ways in which these private arrangements continue to extend the force of criminal punishment.

Therefore, this Part takes up the question of what such reforms might look like. I will describe several proposals, some of which have been raised by scholars, attorneys, and activists. A number of these proposals already have been adopted in certain jurisdictions, and a number more might prove beneficial if adopted. In my examination, though, I will note the potential limitations of each solution. These limitations ultimately lead to the discussion in Part IV. There, I will turn to the peculiarities of and problems with the public/private nature of employment and the role of private employers operating in the context of the criminal system. My goal is not to reject these proposals; for the reasons discussed below, I think that they might be positive, but, by

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<sup>127</sup> Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 189.

noting their limitations, I hope to emphasize the deeper structural problems posed by the relationship between private employers and the criminal system.<sup>128</sup>

A. *Ending or Restricting Tort Liability*

Perhaps the most simple and straightforward remedy to the problems caused by negligent hiring and retention doctrines would be to abolish these tort doctrines altogether.<sup>129</sup> This fix could come via judicial action (as these doctrines are judicially constructed) or legislative action.<sup>130</sup> Under such a hypothetical legal regime, employers would no longer be liable for having negligently hired or retained employees with criminal records. If the fear of tort liability currently keeps employers from hiring or retaining individuals with criminal records,<sup>131</sup> then removing the specter of tort liability should remove the bad incentives. Employers might still be liable for the conduct of their employees via respondeat superior, but that liability would turn on employees' conduct performed within the scope of employment.<sup>132</sup>

Notably, these proposed tort law regimes would not exclude all such liability for the hiring and retention of individuals with criminal records. A number of the proposals would allow for (or require) employers to consider certain types of criminal history when dealing with certain types of crimes. This exception or carve-out has certain intuitive appeal: if, for example, a job applicant has a history of violent offenses, wouldn't we worry if she were hired for a security guard position where she would be licensed to use force against civilians? Or, if an applicant had been charged with child abuse, wouldn't an employer be wise to consider these past offenses before hiring her as a daycare worker? If the touchstone of negligence liability is foreseeability, maybe we could imagine a regime in which tort liability was closely circumscribed in an effort to identify only the most foreseeable of injuries and to predict which employees would create the greatest risk.

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<sup>128</sup> The list of policy proposals in this Section is not exhaustive. Cf. Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1308 (2002) (describing state tax credit systems); Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. POVERTY L. & POL'Y 261, 269 (2006) (noting a possible system of financial incentives for employers to hire the formerly incarcerated). Nor are the discussions of the proposals themselves meant to be comprehensive. Rather, this Part gives a general overview of possible solutions as a way of highlighting the deeper problems that criminal employment law reveals.

<sup>129</sup> See JACOBS, *supra* note 1, at 278–79.

<sup>130</sup> See *id.*

<sup>131</sup> See *supra* Section II.A.

<sup>132</sup> See *supra* text accompanying notes 63–64.

This line of analysis quickly gets us back to a central problem: in order to determine if an employee or applicant poses such a risk, *someone* would need to inspect her criminal record. This approach could take two forms: (1) the state formally could certify that an ex-offender was not a future risk or was suitable to certain types of employment<sup>133</sup>; or (2) employers could be expected to survey criminal records and assess the future risk posed by a job applicant based on her record.<sup>134</sup> Either approach leads through (or at least into) the quagmire of criminal record keeping.<sup>135</sup> In an era of plea bargaining, it is difficult to conclude that a criminal conviction for offense X necessarily means that X was the only offense committed or that a jury ever determined there was proof beyond a reasonable doubt that a defendant committed X.<sup>136</sup> And, just because employers have access to more information via the internet does not mean that this information is always accurate or that employers are equipped to interpret the information they find.<sup>137</sup>

Even aside from accuracy, either approach, public or private, should raise concerns. Public certificates of rehabilitations—which six states will grant in some cases<sup>138</sup>—are both over- and under-inclusive. That is, are there not some cases where an applicant might be rehabilitated to enter certain lines of work, but not others? And, perhaps more importantly, such certificates imply that some people with

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<sup>133</sup> See, e.g., N.Y. CORRECT. LAW § 753(2) (McKinney 2018) (“[T]he public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”); Love, *supra* note 4, at 269–71; Mukamal & Samuels, *supra* note 41, at 1505.

<sup>134</sup> See, e.g., JACOBS, *supra* note 1, at 283–84; Katherine A. Peebles, Note, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1418 (2012).

<sup>135</sup> Given significant technological advances and variations among states, municipalities, and other record-keeping units, this is a rapidly changing area of law and practice shaped both by formal rules and informal practices. Nevertheless, James Jacobs’s recent work on criminal records in the United States provides a valuable overview of criminal records’ role in the U.S. criminal legal system. See generally JACOBS, *supra* note 1.

<sup>136</sup> See *id.* at 284–85.

<sup>137</sup> See, e.g., *Employer Access to Criminal Background Checks: The Need for Efficiency and Accuracy: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec.*, 110th Cong. 7 (2007) (statement of Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Legal Policy, United States Department of Justice), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg34928/html/CHRG-110hhrg34928.htm>; Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 3, 30–31 (2013); Sarah K. Starnes, Note, *Interviewing Stripes Instead of Suits: Addressing the Inadequacy of Indiana’s Current Legislation and How to Assist Employers in Effectively Hiring Convicted Felons*, 49 VAL. U. L. REV. 311, 321 (2014); Editorial, Opinion, *Accuracy in Criminal Background Checks*, N.Y. TIMES (Aug. 9, 2012), <http://www.nytimes.com/2012/08/10/opinion/accuracy-in-criminal-background-checks.html>.

<sup>138</sup> See Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 547 n.178 (2007) (collecting sources).



criminal records are not rehabilitated and that people with criminal records *must be rehabilitated*. Given that the criminal system does not embrace a single theory of punishment,<sup>139</sup> and that it is not clear that all punishment is designed with a rehabilitative goal,<sup>140</sup> it seems peculiar to use rehabilitation as the benchmark for reentry. Would the implication be that serving a sentence was not sufficient to atone for a crime? And do we really think that any and all law breaking is so anti-social as to require rehabilitation? Courts and scholars have struggled with the best way to predict future offending;<sup>141</sup> it is not clear how certificates could serve as sufficiently reliable predictors of future dangerousness.

Private analysis of criminal records also poses problems. Employee privacy is a casualty of background checks generally,<sup>142</sup> and determining how egregious past misfeasance was or how much of a risk the prospective employee might be could require further intrusions. Although state-issued certificates would be problematic, employers' judgments regarding future dangerousness or likelihood of recidivism seem even more troubling. What epistemic advantage do employers have in assessing these issues, and what reason do we have to think that employers have the same views or incentives as criminal justice actors when it comes time to determine how to react to past offenses?<sup>143</sup> By continuing to require employers to conduct background checks, this narrowed tort liability still would not get employers out of the business of analyzing criminal records.

Finally, it is worth noting that the prospect of tort liability might not be the only risk-focused legal regime pushing employers not to hire people with criminal records. Insurance policies might preclude coverage or raise premiums when employers did not use background

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<sup>139</sup> See, e.g., STANDARDS FOR CRIMINAL JUSTICE § 18-2.1 (AM. BAR ASS'N 1994) (stating multiple purposes for sentencing); MODEL PENAL CODE § 1.02 (AM. LAW INST. 1985) (same); Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1137 (2008).

<sup>140</sup> See, e.g., Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 841-45 (2001) (arguing that a predictive or incapacitation-based approach had replaced rehabilitation as a primary purpose of punishment); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on an Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449 (1992) (arguing that incapacitation had become the dominant ideology driving criminal law); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016).

<sup>141</sup> See, e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 241 (2007); *Smith v. Doe*, 538 U.S. 84, 104 (2003); Bernard E. Harcourt, *Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age 2-5* (U. Chi. Law Sch. Pub. Law & Legal Theory Working Papers, Paper No. 94, 2005); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 807 (2014).

<sup>142</sup> See, e.g., JACOBS, *supra* note 1, at 284-85; Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 511 (2013); Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363 (2008).

<sup>143</sup> I will return to these questions in Part IV.

checks or when they hired people with criminal records. Certainly, insurers might be less likely to adopt such restrictions absent the threat of tort liability under negligent hiring/retention. But—based on actuarial calculations and general risk averseness—insurers might retain these bars in a world without negligent hiring or negligent retention liability. Therefore, insurers might continue to re-inscribe the same troubling incentives, even if tort doctrine ostensibly fixed the problem.

### B. *Ban the Box*

Rather than relying exclusively on tort-based solutions, some scholars and activists have advocated statutory restrictions on employers' use of criminal records in hiring.<sup>144</sup> The ban-the-box movement, both domestically and internationally, has pushed for legislation to prohibit employers from considering criminal history in hiring decisions.<sup>145</sup> By preventing employers from initially inquiring into criminal history, ban-the-box laws (i.e., laws that “remove the check box or question from employment applications that asks whether the applicant has ever been convicted of a crime”<sup>146</sup>) attempt to level the playing field for those with criminal records.<sup>147</sup>

This strategy to curb collateral consequences in the labor market has achieved some political success. In 1998, Hawai'i passed the first legislation to remove criminal history questions from employment applications.<sup>148</sup> In the ensuing decades, the movement spread to other jurisdictions.<sup>149</sup> As of April 2018, one hundred and fifty cities and thirty-one states had passed some form of ban-the-box legislation.<sup>150</sup> Further, in November 2015, President Obama “called on Congress to follow a growing number of states, cities, and private companies that have

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<sup>144</sup> This Section expands on arguments introduced in Benjamin Levin, *Obama's Post-Prison Jobs Plan Is Not Enough*, TIME (May 12, 2016), <http://time.com/4326135/obama-ban-the-box>.

<sup>145</sup> See, e.g., Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 79 (2015); Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1455 (2014); Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 757 (2007); Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2804 (2015).

<sup>146</sup> Fishkin, *supra* note 145, at 1455.

<sup>147</sup> See Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—and Other Combinations*, 103 CALIF. L. REV. 919, 930 n.48 (2015).

<sup>148</sup> See HAW. REV. STAT. ANN. § 378-2.5 (West 2018). The “ban-the-box” name was later adopted by the activist group “All of Us or None.” See Eumi K. Lee, Commentary, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 255–56 (2010).

<sup>149</sup> See, e.g., O'Connell, *supra* note 145, at 2804–06; Smith, *supra* note 17, at 212.

<sup>150</sup> See Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Apr. 20, 2018), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>.

decided to ‘ban the box’ on job applications” and directed the Office of Personnel Management to delay background checks “until later in the hiring process.”<sup>151</sup> And, in 2016, President Obama went so far as to propose that all federal employers adopt ban-the-box rules.<sup>152</sup> In short, banning the box is an increasingly mainstream approach to the problems of reentry and re-employment for the previously incarcerated.

However, these statutes, ordinances, and policies have some significant limitations. Most only restrict the behavior of public employers;<sup>153</sup> they have frequent exceptions for types of employment and classes of employment;<sup>154</sup> and they often are silent as to when and to what extent employers *may* consider criminal history.<sup>155</sup> And, like a number of other policy proposals discussed here, ban-the-box has little to tell us about the rights of workers who have already been hired and *then* are arrested or charged with a crime. As Jonathan Smith, then-Assistant Counsel to the NAACP observed, ban-the-box provisions “do not, for the most part, preclude an employer’s consideration of criminal history information. They simply delay it to later stages in the screening process.”<sup>156</sup> That is, these provisions do not constitute a comprehensive anti-discrimination regime. Rather, they may offer a foothold for some job applicants to climb over the structural obstacles of life with a criminal record, but they do not necessarily remove the obstacles.<sup>157</sup>

Further, a recent study by Amanda Agan and Sonja Starr showed that ban-the-box policies might produce some troubling unintended consequences—specifically, ban-the-box might increase employer discrimination in job callbacks.<sup>158</sup> Based on a sample of New York and New Jersey employers, Agan and Starr found that after these laws went into effect, “white applicants went from being 7% more likely to receive a callback than similar black applicants to being 45% more likely.”<sup>159</sup> Agan and Starr offer two possible explanations: (1) “statistical discrimination against black men”—absent background checks,

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<sup>151</sup> Press Release, White House, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

<sup>152</sup> Press Release, White House, Fact Sheet: During National Reentry Week, Reducing Barriers to Reentry and Employment for Formerly Incarcerated Individuals (Apr. 29, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/29/fact-sheet-during-national-reentry-week-reducing-barriers-reentry-and>.

<sup>153</sup> See Smith, *supra* note 17, at 213.

<sup>154</sup> See *id.* at 217.

<sup>155</sup> See *id.* at 215.

<sup>156</sup> See *id.* at 211.

<sup>157</sup> Cf. JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1999) (arguing that “don’t ask, don’t tell” empowered state actors to discriminate based on status, while providing the illusion that they were reacting to conduct).

<sup>158</sup> See Agan & Starr, *supra* note 53, at 31.

<sup>159</sup> *Id.* at 33.

employers might be more likely to assume that black applicants, rather than white applicants, had criminal records; or (2) “benefits for white applicants”—without information about criminal records, employers simply might prefer white applicants, so that a white applicant with a record might be more likely to get a job than a black applicant without one.<sup>160</sup> While we do not know what actually accounts for Agan and Starr’s findings, the proffered explanations for this phenomenon both suggest that ban-the-box laws cannot be treated in a vacuum. The causes speak not only to possible shortcomings in the legislation itself but also to broader pathologies of race and class in the labor market and criminal system.<sup>161</sup>

None of these critiques is intended to diminish the positives of ban-the-box or the very real possibility that it is the most politically feasible option discussed in this Part. But, if we are concerned more broadly with the relationship between private employers and the criminal system, it is not clear that—as written—many of the ban-the-box policies provide a comprehensive, long-term solution to the problem.

### C. *An Employment Discrimination Model for Criminal Records*

To the extent that ban-the-box does not go far enough, perhaps the answer is a comprehensive anti-discrimination approach. Using Title VII of the Civil Rights Act of 1964<sup>162</sup> as a model, some scholars and commentators have argued that the best means of addressing discrimination against the formerly incarcerated is to treat it as discrimination.<sup>163</sup> Under this framework, individuals with criminal records might become a suspect class whose employment status would not rise and fall entirely on the whim of their employers.<sup>164</sup> Alternatively, some have argued that discrimination against those with criminal records violates Title VII because of the disparate impact of

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<sup>160</sup> See *id.* at 34.

<sup>161</sup> Indeed, some scholars and advocates have argued that the issues identified by Agan and Starr are not problems with ban-the-box policies; rather the issues are signs of underlying racial discrimination. See Maurice Emsellem & Beth Avery, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies*, NAT’L EMP. L. PROJECT (Aug. 11, 2016), <http://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies>; Noah Zatz, *Ban the Box and Perverse Consequences, Part I*, ONLABOR (Aug. 2, 2016), <https://onlabor.org/2016/08/02/ban-the-box-and-perverse-consequences-part-i>.

<sup>162</sup> 42 U.S.C. §§ 2000e–2000e-17 (2012).

<sup>163</sup> See, e.g., RODRIGUEZ & Emsellem, *supra* note 50, at 19–21; Mukamal & Samuels, *supra* note 41, at 1503; Mullings, *supra* note 20, at 264; Jocelyn Simonson, *Rethinking “Rational Discrimination” Against Ex-Offenders*, 13 GEO. J. POVERTY L. & POL’Y 283, 287–88 (2006).

<sup>164</sup> See, e.g., Aukerman, *supra* note 35, at 52–53; Geiger, *supra* note 74 (tracing this line of argument). *But see* Schanuel v. Anderson, 546 F. Supp. 519, 524 (S.D. Ill. 1982).

such discrimination on black and Latino job applicants.<sup>165</sup> The Supreme Court has never directly addressed criminal record discrimination,<sup>166</sup> but we do have some guidance on how such litigation would proceed.

First, some states have adopted a discrimination-based approach. New York, for example, prohibits employers from denying employment “by reason of the [applicant’s] having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses . . . .”<sup>167</sup>

Second, the federal government has weighed in on the potential issues posed by employment discrimination against those with criminal records. In 2012, the Equal Employment Opportunity Commission (EEOC) weighed in on the place of criminal background checks in the workplace, providing official guidance on the issue.<sup>168</sup> Addressing the interplay between Title VII and the criminal legal system, the EEOC noted the limitations of the current legal regime:

Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer’s reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin.<sup>169</sup>

That is, absent some other legal determination that individuals with a criminal history are a suspect class, a discrimination analysis would rest on the racial identity of those with criminal records. Nevertheless, relying on statistical evidence of criminal law’s disparate impact on people of color,<sup>170</sup> the EEOC has advised employers that blanket criminal records exclusions can have a disparate impact based on race or national origin, thus falling afoul of Title VII’s bar on

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<sup>165</sup> See, e.g., *EEOC v. Freeman*, 778 F.3d 463, 465 (4th Cir. 2015); *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1295–98 (8th Cir. 1975); Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831, 832–33 (2014).

<sup>166</sup> See *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 240 (3d Cir. 2007). *But see* *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (refusing to hire worker using methadone to recover from addiction to illegal narcotics); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (refusing to hire worker who previously had participated in illegal protest against employer).

<sup>167</sup> N.Y. CORRECT. LAW § 752 (McKinney 2018); see also Leavitt, *supra* note 128, at 1294–98.

<sup>168</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, 915.002, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012) [hereinafter EEOC ENFORCEMENT GUIDANCE], [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

<sup>169</sup> *Id.* at 6.

<sup>170</sup> See *id.* at 8–9; see also *United States v. Valdovinos*, 760 F.3d 322, 330–41 (4th Cir. 2014) (Davis, J., dissenting) (collecting statistics); *United States v. Blewett*, 719 F.3d 482 (6th Cir. 2013), *vacated en banc*, 746 F.3d 647 (6th Cir. 2013) (critiquing the racial impact of drug laws).

discrimination.<sup>171</sup>

However, the hiring practice's disparate impact alone is not sufficient to prove a Title VII violation.<sup>172</sup> Rather, a disparate impact finding simply shifts the burden of persuasion to the employer to demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity . . . ."<sup>173</sup> The exact contours of the business necessity defense continue to confound courts and commentators,<sup>174</sup> but the Third Circuit has addressed the exception's application to criminal-record-based discrimination.<sup>175</sup> In *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,<sup>176</sup> Douglas El brought a Title VII claim against SEPTA after he was fired from his job as a medical transportation worker because of his criminal history.<sup>177</sup> Forty years earlier, when he was fifteen, El had been convicted of second-degree murder.<sup>178</sup> SEPTA had hired El conditionally pending a background check, but fired him immediately upon learning of the conviction.<sup>179</sup> El, who was black, claimed that SEPTA's blanket prohibition on employing anyone with a "violent felony" conviction had a racially disparate impact.<sup>180</sup> The Third Circuit rejected this argument, concluding that SEPTA's policy fell within the business necessity exception because of the close contact between patients and employees

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<sup>171</sup> See EEOC ENFORCEMENT GUIDANCE, *supra* note 168, at 8–10.

<sup>172</sup> See *id.* at 10–11.

<sup>173</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); EEOC ENFORCEMENT GUIDANCE, *supra* note 168, at 10–11. *But see* *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 239 n.9 (3d Cir. 2007) ("[T]he successful assertion of the business necessity defense is not an ironclad shield; rather, the plaintiff can overcome it by showing that an alternative policy exists that would serve the employer's legitimate goals as well as the challenged policy with less of a discriminatory effect.").

<sup>174</sup> See, e.g., *SEPTA*, 479 F.3d at 241; Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 391–93 (1996); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1520 (1996).

<sup>175</sup> *SEPTA*, 479 F.3d at 241. In *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), the Eighth Circuit also addressed a criminal record-based Title VII claim. In *Green*, the employer refused to hire applicants with any criminal history beyond traffic infractions. *Id.* at 1292. While the court held that this policy was overbroad, the decision predated *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and subsequent congressional clarification that expanded the scope of the exception.

<sup>176</sup> 479 F.3d 232.

<sup>177</sup> *Id.* at 235.

<sup>178</sup> *Id.* at 235–36.

<sup>179</sup> See *id.*

<sup>180</sup> *Id.* at 235. Specifically, SEPTA would not hire anyone with a "record of driving under [the] influence . . . of alcohol or drugs, and [a] record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s)," or "any conviction within the last seven (7) years for any other felony or any other misdemeanor in any category referenced below (see section F.2.10.C) [listing specific offenses]," or who was "on probation or parole for any such crime, no matter how long ago the conviction for such crime may be." *Id.* at 235–236 (alterations in original).

and the predictive value of past convictions.<sup>181</sup> The court noted that “it is impossible to measure the risk perfectly,” but “Title VII does not ask the impossible. It does, however, as in the case of performance-related policies, require that the policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”<sup>182</sup>

Therefore, as with the other policy proposals, we are left with the question of risk management and risk prediction. As a result, aside from concerns about practicability due to judicial resistance to Title VII suits,<sup>183</sup> an employment discrimination model raises two primary issues—“rational discrimination”<sup>184</sup> and worker privacy. First, courts may well conclude that much discrimination against those with criminal records is rational. In other words, the business necessity exception (or analogous provisions under state law) might swallow the rule. Indeed, in critiquing the concept of rational discrimination against people with criminal records, Jocelyn Simonson has shown that this rationale largely de-fanged New York’s statutory protections for job applicants with criminal records.<sup>185</sup> This comes as no surprise, as the New York statute contains a sweeping “business necessity” exception of its own: employers can discriminate if

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.<sup>186</sup>

What is “unreasonable”? And, what constitutes a “direct relationship”? In short, it is not a stretch to see how employers might explain a great deal of discrimination in rational terms as calculated to protect their own interests and those of consumers and other employees.

Second, much like the strategy of curbing tort liability, this employment-discrimination approach quickly raises employee privacy concerns. It is unlikely that under a discrimination paradigm an employer *never* could discriminate against a worker based on her

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<sup>181</sup> See *id.* at 246–47.

<sup>182</sup> *Id.* at 244–45 (footnote omitted).

<sup>183</sup> See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1365 (2010) (“For as long as courts have recognized disparate impact claims under Title VII, disparate impact suits have been notoriously difficult for plaintiffs to win . . .”).

<sup>184</sup> See generally JACOBS, *supra* note 1, at 277–78, 304; Simonson, *supra* note 163 (describing and critiquing the ways in which rational discrimination applies to those with criminal records).

<sup>185</sup> See Simonson, *supra* note 163, at 286–87.

<sup>186</sup> N.Y. CORRECT. LAW § 752 (McKinney 2018).

criminal history. Judging from the statutory licensing schemes discussed above as well as the carve-outs to ban-the-box laws, there is strong public support for keeping *some* people with *some* criminal histories out of *some* jobs. And, as in the tort context, determining whose criminal history is sufficiently serious would require someone to assess criminal history. Put simply, the same issues raised in the tort context apply here<sup>187</sup>: either (1) employers would be responsible for this screening, putting them on notice of all an applicant's past misconduct and allowing them to determine what offense predicted future dangerousness/offending; or (2) the state would have to provide some prediction of future dangerousness.<sup>188</sup>

#### D. *Contractual Solutions to the Problem of Conduct Policies*

The background rules of tort law and employment discrimination certainly might drive employers' incentives to adopt employee conduct policies. Regardless of whether there is a change in these background rules, though, contract law might offer some assistance in reigning in the policies themselves. That is, as discussed in Part II, employee conduct policies are agreements between employers and (sometimes unionized) workers.<sup>189</sup> Therefore, if we look to contract law here, we might land on one of the contractual doctrines designed to restrict the content or form of an agreement.<sup>190</sup> But it is hard to imagine judges

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<sup>187</sup> See *supra* Section III.A.

<sup>188</sup> Finally, it is worth noting another problem with adopting an employment discrimination paradigm: to the extent that we are concerned about marginalized or "disadvantaged" job applicants, particularly people of color, focusing on people with criminal records seems like an under-inclusive and imperfect approach. See JACOBS, *supra* note 1, at 300. That is, creating a single carve-out to at-will employment would retain at-will employment for many others and might not address the structural barriers to labor market entry that affect many without criminal records. Or, as James Jacobs argues, such a system might ultimately benefit those with criminal records at the expense of other job applicants from disadvantaged backgrounds. See *id.* at 298–300. That being said, the criminal system already singles out those with criminal records for certain services. Halfway houses, job training, and certain supervisory aspects of probation are among the services that people with criminal records receive, while those without criminal histories might not. The exclusivity of these benefits and services (i.e., that they are not available to anyone, or at least anyone of limited means) is justified on the grounds of facilitating reentry. See, e.g., *Iacoboni v. United States*, 251 F. Supp. 2d 1015, 1022–23 (D. Mass. 2003); S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 239 (2011). That is, the state has marked individuals as criminals, and, without some assistance, that mark will stay with them, preventing them from re-socialization and increasing the likelihood of recidivism. See, e.g., Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 141 (2007). We might be skeptical about whether those services should be viewed as "benefits" rather than extensions of punishment or vehicles of social control. But, it is worth noting that they might be viewed or framed as benefits.

<sup>189</sup> See *supra* Section II.B.

<sup>190</sup> In unionized shops, we also might hope that unions would bargain around such



broadly applying a set of doctrines (e.g., unconscionability) that tend to be disfavored and that courts rarely embrace.<sup>191</sup>

Perhaps these agreements could be void as against public policy<sup>192</sup>—a court might hold that the provisions of a conduct policy that impose penalties on workers based on arrests, convictions, etc. fall afoul of some broader public interest or policy.<sup>193</sup> An agreement might be void for public policy agreements “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>194</sup> But what policy? The broader framework of criminal employment law and the statutory network of collateral consequences hardly speak to a preference for forgiveness.<sup>195</sup> Indeed, the broader web of collateral consequences that accompany conviction suggests that the legal regime we have is one in which ex-offenders generally cannot escape their records and criminal conviction is treated as a reliable predictor of future risk.<sup>196</sup>

Returning to the morals clause analogy or to what Stephen Sugarman calls “lifestyle discrimination,”<sup>197</sup> it might be that courts

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agreements or seek to modify their terms. That being said, given power dynamics in collective bargaining and the range of other benefits that unions seek to maximize, employee conduct agreements might remain a comparatively attractive concession (particularly when compared with wages, benefits, etc.). See Marks, *supra* note 93 (describing the National Football League Players Association’s treatment of the personnel conduct policy during collective bargaining).

<sup>191</sup> See generally Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2015) (examining the successes and failures of unconscionability litigation).

<sup>192</sup> Even under an expansive “safety net” conception of the unconscionability doctrine, see Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 74 (2006), it would be highly unlikely that a court would conclude that the sorts of provisions in the employee conduct policies discussed above would be unconscionable.

<sup>193</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981); cf. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 117 n.5 (1988) (discussing the policies identified by courts); Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 76, 85–86 (1928) (same).

<sup>194</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

<sup>195</sup> See JACOBS, *supra* note 1, at 226 (“[T]he strong link between pervasive employment discrimination and high recidivism rates is unsurprising, albeit extremely frustrating, in light of statutorily sanctioned policies that seem specially designed to facilitate private sector bias against convicted persons.”).

<sup>196</sup> See, e.g., *State v. Funk*, 349 P.3d 1230, 1234 (Kan. 2015); *Trantino v. N.J. State Parole Bd.*, 764 A.2d 940, 972 (N.J. 2001), *modified*, 772 A.2d 926 (N.J. 2001) (“[R]esearch in the area of risk assessment demonstrates that prior criminal history is probably the most important factor in predicting future risk.”); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 237 (2015) (discussing the relationship between race and criminal history as proxies for future dangerousness).

<sup>197</sup> See generally Stephen D. Sugarman, “Lifestyle” *Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377 (2003). Sugarman defines lifestyle discrimination as decisions made by employers to discipline or discharge workers for conduct away from work. See *id.* at 378–79.

would be suspicious of agreements that sweep in too much conduct with no apparent relationship to work or to the employer's business.<sup>198</sup> To the extent that courts view employment contracts as existing against a backdrop of public preference for employee privacy, these concerns might have some legal bite. Courts tend to grant employers great latitude in restricting employee conduct, but that needn't mean that employer control is unlimited.<sup>199</sup> However, as discussed in the previous Sections, employers might still provide compelling (or at least colorable) claims of why conduct away from work does spill over into the workplace or might have some nexus to employment.<sup>200</sup>

### E. *Employment Consequences at Sentencing*

A common goal of the literature on collateral consequences is the incorporation of collateral harms into the sentencing and plea process.<sup>201</sup> As noted in the discussion of the ABA Standards, sentencing plays a key role in proposed reforms.<sup>202</sup> There are two ways in which collateral consequences could be integrated into the sentencing process: (1) via notice by court or counsel; or (2) via integration into the sentence itself.

#### 1. Notice of Consequences

First, scholars have argued that notice of collateral consequences is essential and that defendants must know what fate awaits them after they plead guilty.<sup>203</sup> The Standards explicitly endorse this notice concern, recommending a requirement "that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged . . ."<sup>204</sup> This concern and the need for notice has taken on greater significance not simply because

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<sup>198</sup> See *supra* text accompanying notes 94–97.

<sup>199</sup> See *infra* Part III (discussing and critiquing the expansive scope of employer control of employee conduct outside of work).

<sup>200</sup> See Sugarman, *supra* note 197, at 379.

<sup>201</sup> See, e.g., Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1754 (2015).

<sup>202</sup> See A.B.A., *supra* note 4, at 2–3.

<sup>203</sup> See, e.g., Jain, *supra* note 29, at 1210; Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1141–42 (2015); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111 (2006); Pinard & Thompson, *supra* note 46, at 590–93; Roberts, *supra* note 5, at 677.

<sup>204</sup> A.B.A., *supra* note 4, at 1.

of the increasing number and severity of collateral consequences,<sup>205</sup> but also because of the rise of plea bargaining.<sup>206</sup> In a criminal system where a vanishingly small percentage of cases go to trial,<sup>207</sup> it is critical that defendants know exactly what punishment they are agreeing to. From a contractual perspective, how can a defendant knowingly agree to the terms of a plea bargain if she does not fully understand the terms—that the sentence she agrees to is not the end of her punishment and that her criminal status carries with it other costs and consequences?<sup>208</sup>

This concern has garnered significant attention in the context of immigration-related collateral consequences. In *Padilla v. Kentucky*,<sup>209</sup> the Supreme Court took an unprecedented step towards recognizing the importance of collateral consequences at sentencing and as a component of plea deals.<sup>210</sup> The Court held that defendants have a Sixth Amendment right to be informed of immigration consequences that flow from a guilty plea.<sup>211</sup> The petitioner, Jose Padilla, a U.S. permanent resident, had pleaded guilty to transporting marijuana and, as a result of his conviction, was subject to deportation.<sup>212</sup> Padilla claimed that his attorney's failure to warn him of these immigration consequences prior to the guilty plea amounted to ineffective assistance of counsel, and the Court agreed.<sup>213</sup> *Padilla* sparked even more scholarly work on collateral consequences, in hopes of expanding the Court's rationale further and requiring additional notice prior to a plea.<sup>214</sup>

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<sup>205</sup> See *supra* text accompanying note 5.

<sup>206</sup> See, e.g., Murray, *supra* note 203, at 1142; Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

<sup>207</sup> See, e.g., Padilla v. Kentucky, 559 U.S. 356, 372 (2010) ("Pleas account for nearly 95% of all criminal convictions."); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 9–10 (2003); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1986 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

<sup>208</sup> See generally Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (describing a potential judicial shift to regulating the terms of plea bargaining more carefully).

<sup>209</sup> 559 U.S. 356 (2010).

<sup>210</sup> See, e.g., Chin & Love, *supra* note 20, at 21 ("There are only a handful of Supreme Court decisions in the past 50 years that can be said to have transformed the operation of the criminal justice system. *Padilla v. Kentucky* may be such a case."); Logan, *supra* note 25, at 1104; Joanna Rosenberg, Note, *A Game Changer? The Impact of Padilla v. Kentucky on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 FORDHAM L. REV. 1407, 1409–10 (2013). *But cf.* Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395 (2011) (arguing that *Padilla* will have limited impact because it requires defense attorneys to stay apprised of a vast web of collateral consequences).

<sup>211</sup> *Padilla*, 559 U.S. at 360.

<sup>212</sup> *Id.* at 359.

<sup>213</sup> See *id.* at 374–75.

<sup>214</sup> See, e.g., JACOBS, *supra* note 1, at 248; Bibas, *supra* note 208, at 1146–51; Chin & Love, *supra* note 20, at 21; Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011); Steven Zeidman, *Padilla v. Kentucky: Sound and Fury, or Transformative*

Unfortunately, a *Padilla*-style notice requirement probably would be a bad fit for private employment consequences. That is not to say that the logic is not compelling—unemployment may pale in comparison to deportation, but both are dramatic, life altering circumstances that a defendant and her family may face as a result of a conviction. Regardless of whether they formally are “punishment,” they flow from conviction. Yet, it is difficult to imagine what notice of employment consequences would look like in practice—or how it would matter. Would a criminal defense attorney be required to produce statistical evidence of employer bias?<sup>215</sup> Would the sentencing court consider cost of living and compare it to salaries from employers likely to hire ex-offenders?

In a sense, this issue represents an extension of a general problem with *Padilla*'s implementation. Darryl Brown has argued that *Padilla* actually will be of limited use to defendants because it places the onus of learning and appreciating *all* collateral consequences on the defense attorney.<sup>216</sup> For a defendant to understand fully the consequences of her conviction, her attorney would need to grasp and be aware of a massive range of statutes and state and federal schemes that would affect her client post-conviction.<sup>217</sup> As noted above, the NICCC makes it easier to scour state and federal codes to identify collateral consequences.<sup>218</sup> But this remains a vast and shifting legal landscape.<sup>219</sup> And, given the crisis in indigent defense, where attorneys are often under-funded and overworked,<sup>220</sup> it is not at all clear that the defense attorney is the best actor to address these issues. Even if Brown were overly pessimistic in the context of statutory collateral sanctions, his point resonates strongly when we consider informal collateral consequences. Communities are home to different businesses with different hiring practices. Therefore, the employment consequences that a defendant will face are contingent upon the idiosyncratic and personal decisions of a range of private actors.<sup>221</sup> And, while it would not be unreasonable to expect an attorney (or the court) to offer general warnings about the challenges faced by

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*Impact*, 39 FORDHAM URB. L.J. 203 (2011).

<sup>215</sup> *But cf. supra* note 36 and accompanying text (discussing other legal areas that involve predictive evidence about private employers and the ability to find work).

<sup>216</sup> *See* Brown, *supra* note 210, at 1395.

<sup>217</sup> *See generally id.*; Jain, *supra* note 29, at 1213.

<sup>218</sup> *See supra* note 44 and accompanying text.

<sup>219</sup> *See* Brown, *supra* note 210, at 1395 (“The problem for defendants like Mr. Padilla who face grave collateral consequences after conviction is the substantive criminal law and sentencing law, the civil law regimes that create collateral consequences, and, at least in immigration law, the limited procedural possibilities for avoiding or mitigating those consequences.”).

<sup>220</sup> *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006) (describing the funding obstacles to effective representation of indigent defendants); Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 (2010) (same).

<sup>221</sup> *But see supra* Part II (examining the structural forces that shape these decisions).

individuals with criminal records, these warnings could not tell a defendant with certainty what the world would look like for her post-conviction.

Ultimately, regardless of how specific that advice were, it is not clear how meaningful such advice would be or how far it could go in addressing the core problems of criminal employment law. Assuming that most defendants are aware of some general stigma associated with criminal conviction, knowledge might not be the problem. Rather, the problem is the stigma.

## 2. Consequences as Punishment

Another means of approaching criminal employment law at sentencing is to treat private employment consequences as punishment. Many decisions about probation, parole, and conditions of release focus on the granular or quotidian details of criminal defendants' lives—where a former offender can and cannot live; where she can and cannot travel; with whom she can and cannot associate.<sup>222</sup> Employment consequences are implicated by many of these restrictions and decisions, but courts and probation departments generally do not address them explicitly or on the record. That is, restrictions on where, for whom, or in what industry a former offender may work, are a staple of the modern criminal system and the carceral state. But they are largely invisible.<sup>223</sup> Courts do not explicitly weigh these costs to determine if they are proportional to a given offense or if a given defendant is deserving of this added punishment.

A system that purports to value proportionality and individual tailoring of punishment should be required to consider and internalize collateral consequences.<sup>224</sup> As Jack Chin puts it, “[s]entencing is

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<sup>222</sup> See, e.g., *United States v. Floyd*, 491 F. App'x 331, 332 (3d Cir. 2012) (discussing travel restrictions); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (discussing housing and employment restrictions); Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 905–39 (2014) (cataloging restrictions imposed on parolees); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013) (describing restrictions on liberty imposed as a part of community supervision).

<sup>223</sup> See Travis, *supra* note 6, at 22.

<sup>224</sup> See Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 407 (2013). As a general matter, prior to sentencing, courts consider sentencing memoranda or pre-sentencing reports. See, e.g., Stanton Wheeler, *Adversarial Biography: Reflections on the Sentencing of Michael Milken*, 3 FED. SENT'G REP. 167, 169 (1990). These memoranda often include biographical information intended to provide context and influence the judge's decision. See, e.g., *United States v. Soto*, 660 F.3d 1264, 1266 (10th Cir. 2011); *United States v. Begay*, 117 F. App'x 682, 684 (10th Cir. 2004). Further, at sentencing it is not uncommon for judges to make statements about the defendant's character or personal background and explain how these characteristics affected the judge's decision and the ultimate sentence. See, e.g., *United States v. Zuniga-Lazaro*, 388 F.3d 308, 311 (7th Cir. 2004); *United*

designed to impose punishment that is proportionate to the offense and consistent with that imposed on similar offenders. These goals cannot be achieved without evaluating the total package of sentencing facing an individual.”<sup>225</sup> Again, the Standards identify this rationale and (at least generally) a potential fix.<sup>226</sup> The Standards recommend that courts (and perhaps legislators) “include collateral sanctions as a factor in determining the appropriate sentence . . . .”<sup>227</sup>

But, again, this solution appears to be a bad fit for private criminal employment law consequences. While the literature on collateral consequences tends to argue that the consequences constitute punishment,<sup>228</sup> “collateral consequences are not, strictly speaking, punishment,”<sup>229</sup> and courts have not embraced this expansive conception of punishment.<sup>230</sup> To the extent that courts are unwilling to treat a range of formal collateral consequences as punishment, it is highly unlikely that they would be willing to treat these informal collateral consequences as punishment.

Further, as discussed in the context of notice at sentencing, the contingency of the employment consequences remains a sticking point. While an attorney, judge, or probation department might predict the challenges involved in finding or retaining employment post sentence, these predictions will be probabilities, rather than certainties. Additionally, as Pager and others have shown, the likelihood of significant employment consequences may depend on a range of other variables including the defendant’s race and education level,<sup>231</sup> as well as the employment practices of businesses in the area.

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States v. Dominguez, 296 F.3d 192, 195 (3d Cir. 2002); United States v. Sloane, 308 F.R.D. 85, 86 (E.D.N.Y. 2015); United States v. Norton, 218 F. Supp. 2d 1014, 1017 (E.D. Wis. 2002); cf. Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1308 (2007) (examining “hidden (or ancillary) sentencing proceedings”).

<sup>225</sup> Chin, *The New Civil Death*, *supra* note 8, at 1830.

<sup>226</sup> See A.B.A., *supra* note 4, at 2.

<sup>227</sup> *Id.* at 1, 18.

<sup>228</sup> See, e.g., Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in *LAW AS PUNISHMENT / LAW AS REGULATION* 77, 93 (Austin Sarat et al. eds., 2011) (“[C]ommentators from a variety of perspectives have concluded that collateral sanctions are a legal burden constituting punishment.” (internal quotation marks omitted)); Mayson, *supra* note 201, at 314–17.

<sup>229</sup> Chin, *The New Civil Death*, *supra* note 8, at 1811.

<sup>230</sup> Generally speaking, scholars and courts have struggled to define criminal punishment and—at the margins—to distinguish between civil and criminal punishments. See, e.g., Austin v. United States, 509 U.S. 602, 621–22 (1993); United States v. Halper, 490 U.S. 435, 449 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997); United States v. Ward, 448 U.S. 242, 251 (1980); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 809–13 (1997).

<sup>231</sup> See generally JACOBS, *supra* note 1, at 279–81 (reporting on studies that demonstrate that black job applicants with criminal records are less likely to find employment than similarly situated white applicants); PAGER, *supra* note 1 (same); Agan & Starr, *supra* note 53.

In a sense, then, the reason that this proposal faces major implementation obstacles or has glaring flaws is the very reason that criminal employment law is so troubling: it is both certain and uncertain. As a descriptive matter, we know that individuals with criminal records face discrimination and adverse consequences in the workplace.<sup>232</sup> And we know the laws and legal arrangements that underpin this mistreatment. But we cannot be certain who ultimately will make these decisions or how they will make them. The collateral consequences themselves remain contingent. They are a critical component of the criminal system as an extension of punishment. At the same time, they remain external to the criminal system, shaped by private actors and civil legal rules and regulations. The criminal dimension is contingent on civil legal relations, and the public, punitive force is contingent on private decision-makers.

Taking this issue of contingency as a frame, then, the next Part will ask what criminal employment law can tell us about both the private aspects of the criminal system and the public aspects of the employment relationship.

#### IV. THE IMPLICATIONS OF CRIMINAL EMPLOYMENT LAW

What is wrong with criminal employment law? The policy proposals discussed in the Part III are important, but they are narrow solutions for narrow problems. They treat collateral consequences in the labor market as the product of narrow decisions and narrow doctrinal problems, each in need of a fix.<sup>233</sup> Yet they fail to address the broader set

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<sup>232</sup> See *supra* text accompanying note 35.

<sup>233</sup> It is worth noting that much of the legal (as opposed to sociological or criminological) literature on employment consequences of conviction comes in the form of short student pieces geared towards offering a proposed statute for a given state. See, e.g., Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 1000 (2006); Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 523 (1988); Katherine A. Peebles, Note, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1419 (2012); Nancy B. Sasser, Comment, *"Don't Ask, Don't Tell": Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. RICH. L. REV. 1063, 1090 (2007); James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 757 (2004). While these Notes and Comments offer a range of important proposals, they also demonstrate the need for broader more sustained treatment of criminal employment law and its place within the broader framework of both employment law and criminal law. Cf. Mayson, *supra* note 201, at 309 ("We may have reached a watershed moment for [collateral consequences] policy. On the other hand, none of the recent [collateral consequences] policy developments are comprehensive, and most are wholly aspirational.").

of legal relationships in which each decision or doctrine is imbedded. Perhaps the most obvious lesson to be learned from an examination of criminal employment law is the one reached by most scholars of collateral consequences: punishment can be invisible, and if we want to calibrate punishment properly or lessen its impact on individuals and communities, we need to unmask invisible punishment.<sup>234</sup> While that is an important lesson, it does not cut broadly enough. Certainly, revealing hidden aspects of punishment is critical to addressing the problems of mass incarceration, and I hope to contribute to the broader project embodied by the ABA Standards, the NICCC, and the growing body of legal and sociological literature on these costs. But, what the previous Part emphasized was the way that—in the employment context—something else is at work.

What is significant, troubling, and in need of reform in the employment context is not only that employment consequences do not appear at sentence. Criminal employment law is significant because it also shows the ways in which criminal law has become private, the ways in which private actors may become a part of the punitive apparatus, extending the effects of punishment without formal checks. And, at the same time, it shows us how employment is public,<sup>235</sup> how private employers serve quasi-governmental functions as wielders of disciplinary force and as gatekeepers to benefits, rights, and opportunities. This Part will address the public/private distinction as it applies to criminal employment law, focusing first on the private dimensions of criminal law, before shifting to examine the public dimensions of employment law (or, more precisely, the employment relationship).<sup>236</sup> My claim is not that there is a clear or coherent line

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<sup>234</sup> See, e.g., Chin, *The New Civil Death*, *supra* note 8, at 1830; Pinard & Thompson, *supra* note 46, at 590–93; Travis, *supra* note 6, at 15–17; Roberts, *supra* note 5, at 677.

<sup>235</sup> As Martha Minnow has observed,

[d]efining what is “public” and what is “private” turns out to be complicated in part due to the history of interconnections between governmental and private initiatives. . . . In the United States, “public” has potentially three meanings: (1) pertaining to the government, (2) pertaining to spaces and processes open to the general population or “the people,” or (3) pertaining to any sphere outside the most intimate, which usually means outside of the home and family.

Martha Minnow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 n.1 (2003).

<sup>236</sup> Because doctrinal employment law encompasses not only aspects of tort and contract, but also statutory provisions (e.g., Title VII, the Fair Labor Standards Act), it is uncontested that there are public components of employment law. See, e.g., Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 686 n.295 (1988); Lisa Rodgers, *Public Employment and Access to Justice in Employment Law*, 43 INDUS. L.J. 373, 373 (2014) (“In general terms, employment law sits uneasily on that public/private divide: although founded on a ‘private’ contract of employment the regulation of that contract is steeped in matters pertaining to the more general public interest.”); Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an*



between private and public. Rather, I hope to highlight the inconsistency in a regime where employers subjugate workers' rights to the "public" interest, but where workers have limited legal recourse against employers because they are "private" actors.<sup>237</sup> Criminal employment law therefore shows that the public/private distinction is not a line at all, but a semi-permeable membrane.

#### A. *Private Criminal Law*

Outside of the collateral consequences frame, privatization and the role of private actors in the criminal system increasingly have garnered academic attention over the last few decades. In their treatments of criminal law's private dimensions, scholars have focused primarily on private prisons,<sup>238</sup> with a lesser emphasis on private policing.<sup>239</sup> To many critics of these institutions, privatization of punitive functions represents a victory of neoliberal governance principles—the state purports to retain a monopoly on violence, but it does so by commodifying and marketizing state violence (in the form of private prison and policing contracts).<sup>240</sup> Law enforcement and incarceration, like other government functions, have become the province of market-based thinking and market-primacy. Viewed through this lens, the turn to private actors in the criminal legal system represents an embrace of an "economistic" view of state services that prioritizes cost and efficiency over values of rehabilitation, socialization, or even retribution.<sup>241</sup> Further, by allowing private market actors into the management of the criminal system, policy makers have created a

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"Information-Shifting" Model, 30 HARV. J.L. & GENDER 99, 150 (2007). My claim in this Article and in this Part, however, is that the employment relationship in and of itself may be public because of the public functions assigned to private employers. See *supra* Section IV.B.

<sup>237</sup> See James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435, 443 (1997); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1362 (1982).

<sup>238</sup> See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441 (2005); Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 265 (2001); Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 549 (2014); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 902 (2004).

<sup>239</sup> See, e.g., Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); Rosky, *supra* note 238, at 896–99; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1166–68, 1199 (1999).

<sup>240</sup> See, e.g., BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 233–39 (2011); Rosky, *supra* note 238, at 880.

<sup>241</sup> See Dolovich, *supra* note 238, at 544; cf. Richard Michael Fischl, "Running the Government Like a Business": *Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 39–41 (2011) (critiquing the move to focus on efficiency in government operations at the expense of other values).

pernicious dynamic: private prison contractors and other stakeholders lack incentives to reduce prison populations; instead, these private actors benefit from large prison populations and punitive criminal laws that ensure a continuing need for the “prison industrial complex.”<sup>242</sup>

Beyond the political economy critique, scholars have also emphasized the ways in which private actors complicate and even undermine the purposes of punishment.<sup>243</sup> For example, in addressing prison privatization through a retributive lens, Mary Sigler argues that “[p]unishment is . . . meaningful not primarily as a means to an end; rather, punishment instantiates justice. The delegation of punishment through prison privatization attenuates the meaning of punishment in a liberal state and undermines the institution of criminal justice.”<sup>244</sup> That is, to the extent that criminal law is meant to embody some sort of collective consciousness or shared moral opprobrium,<sup>245</sup> a system that employs private actors or that implicates private motives may fail to advance the public interest. Private actors have private incentives and concerns—concerns that they might share with other members of the society, but that need not be embodied formally in criminal law or in the official policies that shape the criminal system.<sup>246</sup> In short, what is troubling about private actors in the criminal system is not only their incentives and their status within a market economy; it is their legitimacy. We lack a clear justification for why they (rather than the state, or other private actors) are entitled to exercise force and discipline over other members of the polity. If criminal law is—at least in part—rooted in socialization (or social control), then how can actors without the imprimatur of the state or the stamp of democratic legitimacy perform the rituals of punishment and/or formal societal condemnation?

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<sup>242</sup> For discussions on the prison industrial complex, see Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 865 n.26 (2012); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1420 n.1 (2012); cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (describing the political and economic forces that drive support for harsh criminal policies).

<sup>243</sup> See, e.g., Dolovich, *supra* note 238, at 543–44; Levin, *supra* note 238, at 549; Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010).

<sup>244</sup> Sigler, *supra* note 243, at 151.

<sup>245</sup> See, e.g., ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 58 (George Simpson trans., 1964); DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 67–68 (1990).

<sup>246</sup> As noted above, employers could have a range of reasons to treat individuals with criminal records differently from other applicants or employees. See *supra* Part II. They certainly could be motivated by a desire to express moral condemnation, but they also could be focused on maximizing profits, attracting more costumers, or protecting consumers or other employees.

Given the general lack of engagement with private decision-makers in the collateral consequences literature, it is not surprising that this public/private debate has gone largely unexplored. In looking at criminal employment law as a species of “informal” collateral consequences, however, the problems of private actors become increasingly salient. Of course, a vast network of statutory criminal employment law exists that does not implicate private actors, or, at least, that does not implicate the discretion of private actors.<sup>247</sup> But, the corners of criminal employment law described in this Article—the tort doctrines and the employee conduct policies—rest on the decisions of private employers. That is, the statutory frameworks, coupled with the tort doctrines create a labor market in which private employers are tasked with and/or empowered to continue to discipline workers based on the past or on parallel proceedings of the criminal system.

Certainly, private employers in this narrative occupy a different position from private prison companies, private security firms, and the other actors critiqued by scholars of criminal law’s turn to privatization. Prison contractors have powerful incentives to support the carceral state,<sup>248</sup> but it is unclear that employers do. An employer’s decision not to employ an ex-offender may be rooted in a calculus of efficiency, trustworthiness, or risk aversion,<sup>249</sup> but there is no reason to assume that employers benefit directly from the legal regime that discourages hiring people with criminal records or that employers have some stake in preserving it.<sup>250</sup>

Yet, to the extent we find compelling the privatization critiques in other corners of the criminal legal system, I think that those critiques should be a source of concern here as well.<sup>251</sup> In one of the only articles to treat employer discipline through the lens of punishment theory, Janine Kim and Matthew Parlow argued that some types of employer discipline (specifically, in the sports context) resemble private policing.<sup>252</sup> Adopting an expressivist approach, Kim and Parlow suggest

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<sup>247</sup> See *supra* text accompanying notes 41–48.

<sup>248</sup> See, e.g., Dolovich, *supra* note 238, at 474–80; Sigler, *supra* note 243, at 151.

<sup>249</sup> See *supra* note 75 and accompanying text.

<sup>250</sup> Indeed, as discussed below in Section IV.B., there may be reason to think that the way in which the effective deputization of employers described in this Article may be more of a burden than a boon.

<sup>251</sup> It is worth noting that criminal law, despite its status as “public” law has long had “private” components or served private ends. See Benjamin Levin, *American Gangsters: Rico, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 118 (2013). Indeed, private prisons may not be that far removed from earlier moments of incarceration that relied on convict leasing and other public/private prison labor regimes. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 626 (2000); cf. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001, 1005 (1996) (arguing that ostensibly “public” areas historically have not represented the public or have had private dimensions).

<sup>252</sup> See Kim & Parlow, *supra* note 15, at 590; cf. Kent Greenawalt, *Punishment, in*

that the disciplining of workers by professional sports leagues, via employee conduct policies, may send the same sort of public signals that are traditionally associated with criminal punishment.<sup>253</sup> In their account, this “punishment” need not supplant state action or formal prosecution in order to implicate considerations of proportionality and public morality.<sup>254</sup> That is, the NFL personnel conduct policy—and similar provisions—significantly extend the logic and effects of criminal punishment.<sup>255</sup>

In some sense, then, criminal employment law, much like the other turns to private actors, fundamentally alters the institutions and operations of the criminal system. The monopoly on state violence that has been used historically to justify criminal law and criminal punishment is (or at least purportedly is) checked by constitutional rights and private causes of action.<sup>256</sup> The rules of criminal procedure, the Bill of Rights, and the causes of action under state and federal civil rights statutes create a framework under which state action remains bounded. On the one hand, punitive force is justified by the language of democratic theory and political legitimacy.<sup>257</sup> On the other, punitive force and the power of the state to discipline have their limitations, restrictions that nominally grant individuals some protection from official overreach or a criminal system run amok. Put simply, the state action both empowers (via the monopoly on violence) and constrains (via constitutional checks).

Unlike traditional criminal law, criminal employment law is neither fish nor fowl. It is not state action, at least not as most lawyers, scholars, and courts understand it.<sup>258</sup> While the Supreme Court has held

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FOUNDATIONS OF CRIMINAL LAW 48, 48 (Leo Katz et al. eds., 1999) (arguing that punishment occurs whenever “persons who possess authority impose designedly unpleasant consequences upon, and express their condemnation of, other persons who are capable of choice and who have breached established standards of behavior”); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 580 (2012) (defining punishment in terms of public morality).

<sup>253</sup> See Kim & Parlow, *supra* note 15, at 590. As discussed at length above, Kim and Parlow emphasize that special properties of professional sports (notably, the culture of publicity and media attention surrounding the industry) might make this insight particularly applicable in that context. See sources cited *supra* note 102.

<sup>254</sup> See Kim & Parlow, *supra* note 15, at 590–97.

<sup>255</sup> My claim here is not that such policies and employer discipline satisfy the formal definition of punishment; rather, my claim is that employer decision-making extends the effects of punishment, thus implicating employers in the criminal system’s punitive apparatus.

<sup>256</sup> See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 253 (E.D.N.Y. 2002), *modified*, 294 F. Supp. 2d 369 (E.D.N.Y. 2003) (“It is a long held maxim that the state holds a monopoly on violence . . .”); Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537, 552 (2015); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1134 (1995).

<sup>257</sup> See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 312–13 (2004).

<sup>258</sup> Cf. Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 577–604 (1989) (describing the challenges posed by attempting to apply the state action

that “[s]tate action . . . refers to exertions of state power in all forms,”<sup>259</sup> the state action doctrine remains dreadfully muddled, a constant source of irritation for both courts and scholars.<sup>260</sup> Therefore, in contexts like criminal employment law, where governmental involvement in the ultimate conduct by employers is attenuated at best, it is unlikely that constitutional criminal procedure principles would be applied to private employers. As a result, while private employers lack some of the powers and responsibilities of the state (to incarcerate, to use force, etc.), they also lack the institutional checks on state action. To the extent that the state retains the moral authority and political legitimacy to punish, it need not follow that private employers also do. And, more practically, when the state gets it wrong—i.e., punishes an innocent defendant, commits unjustified violence—*Bivens*,<sup>261</sup> 42 U.S.C. § 1983,<sup>262</sup> and other legal mechanisms exist to correct, or at least address, the error. When private actors err, it is much harder for the wronged party to seek recourse successfully.<sup>263</sup> In *George v. Pacific-CSC Work Furlough*, for example, the Ninth Circuit rejected a claim that a private prison contracting company was a state actor when it came to claims regarding how it treated prison employees.<sup>264</sup> Similarly, in *Holly v. Scott*, the Fourth Circuit reached the same result in rejecting a constitutional claim against correctional officers employed by a private prison company.<sup>265</sup>

From a practical standpoint, therefore, the “private” nature of criminal employment law makes it difficult to devise a legal solution. The policy proposals discussed above each hit a wall when we consider that the effects for ex-offenders rely on private decision-makers. That is, criminal employment law remains distinct from the “formal” collateral

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doctrine to private prison officials).

<sup>259</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

<sup>260</sup> See, e.g., Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1985) (“There still are no clear principles for determining whether state action exists.”); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 817 (2004); Sklansky, *supra* note 239, at 1229–80.

<sup>261</sup> See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (allowing for private rights of action based on deprivation of rights by federal actors).

<sup>262</sup> See 42 U.S.C. § 1983 (2012) (allowing for a private right of action based on deprivation of rights by state actors).

<sup>263</sup> See, e.g., Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 631 (2001). *But see* *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (treating private prison contractors as state actors for section 1983 purposes). For a discussion on the challenges of applying the state action doctrine to private actors in the criminal system, see Sklansky, *supra* note 239, at 1229–80.

<sup>264</sup> *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996).

<sup>265</sup> *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006); see also *King v. Hilgert*, No. 4:13CV3061, 2015 WL 1119451, at \*5 (D. Neb. Mar. 11, 2015) (finding that private prison employee was not a state actor); *Shapiro v. Cmty. First Servs., Inc.*, No. 11-CV-4061 (KAM)(LB), 2014 WL 1276479, at \*8 (E.D.N.Y. Mar. 27, 2014) (same).

consequences addressed in the Standards because it is contingent on the decisions of private actors who lack any official relationship to the criminal legal system.<sup>266</sup> Outside of the limited Title VII examples discussed above,<sup>267</sup> “public law” generally does not recognize criminal employment law or acknowledge these consequences as a part of the criminal law universe. In a sense, then, criminal employment law reproduces the problems of privatization in other areas of the criminal system and illustrates the ways in which private prisons and other targets of critique are not unique. The justice system is a massive apparatus, a network of institutions, laws, and legal actors that extends well beyond police, courts, and prisons. And that means that the problems with the criminal system—its social and economic costs, its racially disparate impact, etc.—implicate actors who are not formal state actors and who are not formal officers of the criminal system.

William Stuntz famously argued that the expansiveness and punitive nature of the criminal law were the products of a particular political economy.<sup>268</sup> Stuntz claimed that the electoral incentives of prosecutors, legislators, and judges combined to make criminal law a one-way ratchet, yielding a larger and harsher criminal system.<sup>269</sup> These “pathological politics” had driven an explosion in prison populations and a criminal system that had grown to an unprecedented size.<sup>270</sup> What is remarkable when we consider criminal employment law, though, are the ways in which criminal law’s pathological politics and troubled incentives bleed out of the elected branches, and even out of the formal confines of the criminal system. To appreciate the current state of the criminal system requires stepping outside of the scope of Stuntz’s frame and recognizing that the private market and private market actors continue to replicate and re-inscribe the harms of the criminal law. The issue is less that private actors are necessarily worse for criminal defendants, for justice, or for the operation of the criminal system. Rather, it’s that if these private actors play an important role in the functioning of the criminal system, they should be treated accordingly.

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<sup>266</sup> See *supra* note 36 and accompanying text.

<sup>267</sup> See *supra* Section III.C.

<sup>268</sup> See generally Stuntz, *supra* note 242.

<sup>269</sup> See *id.* at 528–65.

<sup>270</sup> See *id.* This is not to say that the criminal system of earlier moments was not beset by its own pathologies and deep-seated structural flaws. See Stephen J. Schulhofer, Book Review, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1086–87 (2013).

### B. *Public Employment Law*

Much as the criminal law has metastasized, so too has the role and function of employers as purveyors of social services and as the vehicle by which social and economic policy is implemented. In this respect, criminal employment law is also transforming the employment relationship and the limits of employee privacy. Writing in 1991, Vivian Berger, then-General Counsel to the American Civil Liberties Union, predicted a future in which the greatest threats to civil liberties might come not only from the state, but also from private actors:

Above all, business organizations have come to assume a hegemony over their workers' lives rivaling that of the national government at the time the Bill of Rights was adopted. Technology has greatly enhanced this power: many companies routinely monitor employee phone calls and other activities by means of electronic devices or require intrusive polygraph tests before or during the course of employment. Increasingly, too, in order to reduce . . . costs or for other self-interested reasons, employers are attempting to control the personal lives of workers.<sup>271</sup>

Criminal employment law is a powerful indicator that such a future already has arrived.<sup>272</sup>

Employment law and the employment relationship have long occupied a peculiar place at the boundaries of public and private.<sup>273</sup> And the contours of the distinction have long been manipulated to justify varying degrees of judicial intervention in employment contracting.<sup>274</sup> Prior to the New Deal moment, courts and legislators treated employment as the product of a private relationship between employer and employee.<sup>275</sup> This approach meant that courts and legislators viewed the enforcement of contracts as their province, but shied away from or

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<sup>271</sup> Vivian Berger, *Civil Liberties in the Next Century*, 63 N.Y. ST. B.J. 46, 48 (1991).

<sup>272</sup> Indeed, other scholars, writing long before Berger, had already warned that the power of private employers had become a danger for employees. See, e.g., David L. Bazelon, *Civil Liberties—Protecting Old Values in the New Century*, 51 N.Y.U. L. REV. 505, 512–13 (1976); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (“It is a widely accepted proposition that large corporations now pose a threat to individual freedom comparable to that which would be posed if governmental power were unchecked. The proposition need not, however, be limited to the mammoth business corporation, for the freedom of the individual is threatened whenever he becomes dependent upon a private entity possessing greater power than himself. Foremost among the relationships of which this generality is true is that of employer and employee.” (footnotes omitted)).

<sup>273</sup> See *supra* note 236.

<sup>274</sup> See Klare, *supra* note 237, at 1361–62.

<sup>275</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518–19 (Tenn. 1884), *overruled in part by Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915); Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 4–6 (1992).

outwardly disclaimed the public or social implications of private orderings.<sup>276</sup> Employment was regarded as a “dominant-servient relation rather than one of mutual rights and obligations.”<sup>277</sup> Under such a conception of employment, “[t]he employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. . . . The employer is sovereign over his or her employee subjects.”<sup>278</sup> There was no place for public considerations or for a treatment of the contract as embedded in or shaping the social, economic, and political conditions of the public sphere.<sup>279</sup>

The New Deal moment saw a reimagining of the employment relationship. To the new school of legal realist scholars, all law was public.<sup>280</sup> Contracting parties negotiated against a set of background rules—distributions of power and property created by political decisions, rather than a natural, “free” market.<sup>281</sup> Where courts had previously struck down employment regulations as impinging on the constitutional right to freedom of contract,<sup>282</sup> the Court began to adopt more of a realist approach and shifted away from the clean, formalist public/private distinction in regulating the workplace.<sup>283</sup> The New Deal era saw the passage of statutes that regulated the terms and conditions of employment, and ensuing decades have seen a range of such statutes erode further at-will employment and the *Lochner*-era conception of employment as private.<sup>284</sup> But, aspects of the earlier conception of employment remain: employers can generally fire employees without cause,<sup>285</sup> and, as the discussion in Part II highlighted, courts and

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<sup>276</sup> See generally DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1998) (describing the pre-New Deal legal ordering that relied on clear distinctions between public and private and that prioritized property rights).

<sup>277</sup> Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

<sup>278</sup> *Id.*; see also CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 390 (1993).

<sup>279</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 10–11 (1992).

<sup>280</sup> See Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 304–05 (1988).

<sup>281</sup> See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8–13 (1928); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–75 (1923).

<sup>282</sup> See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum wage law); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (same); *Coppage v. Kansas*, 236 U.S. 1 (1914).

<sup>283</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 30 (1937); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2172 (1999).

<sup>284</sup> See generally Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002) (chronicling the development of employment law).

<sup>285</sup> See Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 917–19 (1989).



legislatures still defer to the preferences and business interests of employers.<sup>286</sup> That is, if the categories retain any descriptive or theoretical value, employment law is at once private and public.

This is an oversimplified account of employment law's development and the shift away from a purely private conception of employment law. But this history is important to understanding the significance of criminal employment law's place in the current public/private model. Criminal employment law is both public and private in two ways: (1) it is subject to statutory regulation, but it is also the province of private agreements; and (2) it is premised on the belief that employers should (or, at least, can) serve the public interest, but it also depends on a view of employment where employers are allowed to prioritize their own private business interests. The first public/private point is simply a restatement of the realist claim about the public/private distinction and is true of most areas of the law.<sup>287</sup> Therefore, it does not require further discussion. But the second represents a new approach to employment regulation—an approach that criminal employment law exemplifies.

A central claim of this Article is that criminal employment law makes employers complicit in certain aspects of the criminal system. That is, the tort doctrines, combined with the statutory licensing schemes and public consumer support for employer discipline of workers, has led to a system in which employers effectively serve a public function. By situating this “private punishment” within a broader frame of privatization literature,<sup>288</sup> I hope to emphasize the ways in which the ends of criminal employment law map onto the aims of criminal punishment. In carrying out these ends, though, employers may well engage in a range of practices that vitiate worker privacy (e.g., email searches, GPS tracking, exhaustive background checking, and extensive limitations on conduct away from work).<sup>289</sup> And, while public-sector employees enjoy some Fourth and First Amendment protections,<sup>290</sup> private-sector employees do not and have limited recourse at common law.<sup>291</sup> To the extent that employee conduct policies reach conduct away from work, employers may exercise an almost unlimited jurisdiction to impose the moral force of criminal (or

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<sup>286</sup> See *supra* Section II.B; see also Atleson, *supra* note 237, at 443.

<sup>287</sup> See HORWITZ, *supra* note 279, at 1426–27.

<sup>288</sup> See generally *supra* Section III.A.

<sup>289</sup> See, e.g., JACOBS, *supra* note 1, at 306–08; S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 829 (1998); cf. Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 280 (2012) (noting similar trends in practices among government employers).

<sup>290</sup> See, e.g., *City of Ontario v. Quon*, 560 U.S. 746, 765 (2010); *O'Connor v. Ortega*, 480 U.S. 709 (1987). See generally Secunda, *supra* note 289.

<sup>291</sup> See Wilborn, *supra* note 289, at 829.

quasi-criminal) law.<sup>292</sup>

Therefore, employers take on public responsibility that justifies intrusions into worker privacy and exacerbates the imbalance of workplace power relations. At the same time, employers remain private, unchecked by the Constitution, and shielded from liability by judicial deference to the same private values of workplace efficiency and business-owner autonomy that justified the pre-realist freedom of contract cases.<sup>293</sup> To the extent that we are uncomfortable with the idea of private employers being treated as state actors, unshielded by their private status, it is worth asking why. And, if it wouldn't make sense to treat private employers as state actors for liability purposes, then why does it make sense to allow them to take on state functions?

Richard Epstein has argued in favor of employment at will as more protective of individual rights.<sup>294</sup> By this logic, the real concern for workers should be the state; a legal system that makes it easier to get in and out of contractual relationships is one that maximizes the power of private actors, and therefore maximizes liberty.<sup>295</sup> Without rehashing the realist/formalist debates of the 1930s,<sup>296</sup> I think it is important to emphasize the ways in which criminal employment law undermines Epstein's argument. If the concern is state power, then what happens when it becomes harder to distinguish between the private and the public, the employer and the state? That is, even if we were prepared to accept Epstein's dismissal of realist concerns for background rules, his argument appears to be premised on a belief that employers and employees are seeking to maximize profits or efficiency, not that they are seeking to enforce broader conceptions of morality. To the extent that employers are acting to advance quasi-public punitive goals, then why should we be less concerned by these private actors than by the state? Or, even if we accept that state punishment is more severe than private punishment so that we should be *more* concerned, why does it follow that we shouldn't still worry about the disciplining power of employers?

When considering employer power and employers' function within the system of criminal employment law, it is worth considering the costs

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<sup>292</sup> Cf. Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 929 (2016) ("These coercive labor practices are redolent of peonage, one component of the Jim Crow South's broader system of racial labor control, which leveraged a racist criminal justice system into an institution of labor subordination. That system, too, often flew the banner of disciplining the dissolute laborer and containing his threat to social order.").

<sup>293</sup> See *supra* text accompanying notes 276–79, 282.

<sup>294</sup> See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954–55 (1984).

<sup>295</sup> See, e.g., *Garcia v. Kankakee Cty. Hous. Auth.*, 279 F.3d 532, 536 (7th Cir. 2002); *R.S. & V. Co. v. Atlas Van Lines, Inc.*, 917 F.2d 348, 352 (7th Cir. 1990).

<sup>296</sup> See *supra* text accompanying notes 275–84.

to employers as well as employees that such a regime creates. Whether criminal employment law empowers employers or burdens them is not entirely clear. Certainly, as discussed in the context of conduct policies, some criminal employment law institutions (and some public calls to action) empower employers and grant them even more authority over workers. But, as discussed above, tort doctrines impose clear burdens on employers and expose them to liability if they fail to take account of criminal histories.<sup>297</sup> Similarly, the range of occupational licensing statutes and regulations restrict who an employer may hire.<sup>298</sup> And, as noted in the context of employee conduct policies, consumers and clients often hold employers responsible for the conduct of their employees, even conduct with little to no relationship to work or the workplace.<sup>299</sup> Combine these burdens with some of the reform proposals discussed earlier, and it is easy to see how employers are often left between a rock and a hard place. Hiring or retaining those with criminal records may, in some cases, trigger civil suits or state regulatory action, while, in other cases, refraining from doing so might prompt EEOC action. Put simply, the disparate and internally inconsistent web of criminal employment law may well whipsaw employers,<sup>300</sup> forcing them to choose a least-worst option when presented with possible sources of liability.<sup>301</sup>

Ultimately, though, intention need not be an essential component of our analysis. If we are concerned with effects (as most collateral consequences literature is),<sup>302</sup> then what matters most is the impact that the decisions have, not the motivations that drive the decisions. That is, employers might be acting wholly rationally or their motives and preferences might be sympathetic. But, if the problem with criminal employment law is that it has shifted decision-making to unaccountable actors and has extended the scope of punishment, then it should matter

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<sup>297</sup> See generally *supra* Section I.A.

<sup>298</sup> See *supra* text accompanying notes 41–45.

<sup>299</sup> See *supra* text accompanying notes 96–97.

<sup>300</sup> Thanks to Jack Chin for offering this phrasing and insight.

<sup>301</sup> See, e.g., Gerlach, *supra* note 9, at 982–83; Leavitt, *supra* note 128, at 1283; Mullings, *supra* note 20, at 274–75. That said, it is possible that criminal employment law harms or burdens employers in a less sympathetic way: it makes it more difficult to hire workers who have less bargaining power and might be less likely to assert their legal rights or challenge employers' authority. That is, aside from altruism or a belief in second chances, it is conceivable that an employer might believe that workers with criminal records will make more cooperative or compliant workers. They have more to lose or might be less likely to rock the boat by challenging employers' policies, complaining about supervisors, etc. because they might understand how difficult it would be to find another job. Cf. ZATZ ET AL., *supra* note 11 (discussing the significant power advantages employers have over workers on probation, parole, or supervised release).

<sup>302</sup> See, e.g., Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 *FORDHAM L. REV.* 2999, 3004–05 (2015); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 *TEX. L. REV.* 1383, 1396 (2002); Pinard & Thompson, *supra* note 46, at 593–604.

relatively little whether those unaccountable actors are right or wrong when they make decisions.

In this respect, employer *intent* might be a red herring that distracts from the risks posed and harms done by criminal employment law. Attempting to show animus (or lack thereof) removes focus from the effects of the doctrines and institutions described in this Article. As I noted at the outset, one goal of this Article is to begin to understand *why* criminal employment law exists—i.e., what incentives and ideologies shape employer decisions and legal rules. But focusing too much on individual employers as good or bad actors obscures the broader structural forces that shape their decisions. Indeed, one of the problems with a number of the narrow fixes discussed in Part III is that they are responsive to individual acts or individual actors, rather than the underlying structures of inequality that define both the criminal legal system and the labor market.<sup>303</sup>

In calling for broader structural solutions to the problems of workplace inequality, Samuel Bagenstos has argued that “[w]e have reached, or will soon reach, the limits of what our current conception of employment discrimination law can do to solve the persistent problems of workplace inequity.”<sup>304</sup> That is, “[m]any of today’s most significant problems are structural and are widely understood to lie beyond the responsibility of individual employers.”<sup>305</sup> Regardless of whether Bagenstos is right about the effectiveness of Title VII suits as a form of impact litigation,<sup>306</sup> his underlying insight resonates here. Each employer is only one component of a broader social, economic, and political system. The problems of criminal employment law are broader structural problems that implicate the inequality of bargaining power and the social and economic conditions of those with criminal records.<sup>307</sup>

Criminal employment law tells us about more than the lack of

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<sup>303</sup> Cf. Noah Zatz, *Ban the Box and Perverse Consequences, Part III*, ONLABOR (Aug. 4, 2016), <https://onlabor.org/2016/08/04/ban-the-box-and-perverse-consequences-part-iii/#more-16105> (emphasizing “the cumulative effects” of individual hiring decisions and individual instances of discrimination).

<sup>304</sup> Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 47 (2006).

<sup>305</sup> *Id.*

<sup>306</sup> Bagenstos is not alone in lamenting the limitations of employment law. See Jeffrey D. Jones, *The Public’s Interest in “Private” Employment Relations*, 16 LEWIS & CLARK L. REV. 657, 657–58 (2012) (“Few employment law scholars are satisfied with the current state of employment law. . . . Professor Bagenstos speaks for many of us . . .”).

<sup>307</sup> Cf. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1528 (1983) (critiquing family law reforms as taking too narrow a view of the problems of gender hierarchy in the market at large); Ahmed A. White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 BUFF. L. REV. 1061 (2015) (critiquing employment discrimination law as insufficient to address broader class and power dynamics in the workplace).

employee privacy and the lack of a clear line between public and private. It illustrates the power imbalance of the modern workplace. In examining the rise of employer email monitoring, Rosa Ehrenreich Brooks describes the problem as “a power issue that stems both from the deep structure of American employment law and from the economic and social framework of our society more broadly.”<sup>308</sup> Because a fired worker will suffer “some tangible and extremely unpleasant economic harms,”<sup>309</sup> any doctrine or legal institution that allows employers to monitor or discharge furthers the liminality of a vulnerable or marginal worker. In Brooks’s frame, each policy

is only a symptom. The *problem* is that despite the erosion of at-will employer traditional privileges, most American workers have very little power in relation to their employers. Most can be fired for an astonishingly large number of reasons and can have an awful lot of their rights infringed upon with impunity. The solution to this problem is not the creation of laws or policies forbidding e-mail monitoring by employers, although that would be helpful as a first step. The solution would involve a radical overhaul of employment law.<sup>310</sup>

This Article does not purport to offer a vision for what such an overhaul would entail. But Brooks’s insight is critical to understanding what is wrong with criminal employment law. Entrusting private employers with enforcing criminal law has costs for the criminal system, but it also has costs for individual workers who face a system of almost-unchecked employer discipline—a system in which unaccountable actors are tasked with weeding out the good from the bad and imposing their own brand of punishment.

#### CONCLUSION

This Article has argued that criminal employment law is transforming the nature of the employment relationship and the delivery of criminal punishment. This hybrid public/private and civil/criminal institution exacerbates both the punitive turn in criminal law and the marginalization of those with criminal records. Like many questions of criminal justice reform, the best policy solution is not immediately apparent. As I have shown, there are a range of possible solutions already on the table, but each of them has its weaknesses—weaknesses that show how and why criminal employment law is becoming an intractable problem in the U.S. labor market.

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<sup>308</sup> Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047, 2054 (2001).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* (footnote omitted).

“We have become a nation of employees,” observed sociologist Frank Tannenbaum in 1951.<sup>311</sup> Because of the reliance on wages and the relationship between employment and social and economic benefits, “*the substance of life is in another man’s hands.*”<sup>312</sup> Criminal employment law shows us the costs of a continued reliance on such a model not only for delivering benefits, but also for imposing punishment.

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<sup>311</sup> FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

<sup>312</sup> *Id.*