

**WHEN THE PAST IS A PRISON: THE HARDENING PLIGHT OF THE
AMERICAN EX-CONVICT**

Roger Roots

University of Nevada, Las Vegas
Department of Sociology

ABSTRACT

Today's American criminal justice system is generating more ex-criminals than ever before, due to increasingly punitive sentencing, the increasing criminalization of formerly noncriminal acts, and the increasing federalization of criminal matters. At the same time, advances in record-keeping and computer technology have made life more difficult for ex-convicts. This article examines the hardships faced by American ex-convicts reentering the non-custodial community both at present and in the past. It concludes that modern ex-convicts face more difficulties than those of past generations, because 1) a greater number of laws that restrict their occupational and social lives, and 2) better data collection and transfer among criminal justice jurisdictions make evading or escaping from one's criminal past more difficult. The result of these coalescing trends is that American society is increasingly forming a hierarchical order of citizenship, with long-term negative economic and social consequences for both ex-offenders and the broader community.

INTRODUCTION

Criminal convictions have always carried collateral consequences in addition to their formal penalties. During much of American history—and, indeed, the history of the English legal system—convicted felons suffered a loss of social standing, disenfranchisement, and in some cases, “civil death,” a state in which they were denied all rights of citizenship including marriage, inheritance, and public office. In contrast, contemporary American ex-convicts retain their citizenship, their rights of property ownership, and their marriage and family rights, but are denied a host of other rights and privileges such as bearing arms and working in various occupations. This paper argues that the tradeoff has been less friendly to post-convicted inmates than might be immediately evident.

The number and percentage of Americans finding themselves processed through American correctional facilities has exploded since 1965 (Platt 2001, p. 145).¹ Some nine percent of all American men can now expect to be housed at least temporarily in a state or federal prison during their lifetimes (Bureau of Justice Statistics, 1997). When jails and probation are added, the percentage passing through custody rises to one-fourth of the male population (Donziger, 1996). Indeed, according to the Bureau of Justice Statistics, some six percent of all American males are *presently* in custody (USA Today, 2000), a figure unmatched in American history, and in the modern world.

With such large numbers currently in the system and even greater numbers exiting from the system, America is now facing something of a crisis of post-convicted felons. This immense nation of incarcerated and formerly-incarcerated individuals is generating

social problems of a type and scale that the United States has never dealt with before. In each recent year, about half a million former prison inmates—roughly the equivalent of the population of the state of Wyoming—has reentered American society (Van Slambrouck, 2000). Where they go and what they do is one of the most understudied aspects of contemporary criminal justice.

American society treats convicted criminals who have served their sentences with great ambivalence. It exploits them as cheap labor in times of prosperity but turns them away from many rewarding careers even in the best of times. It urges them to be productive citizens but spurns them from full-fledged membership in polite society regardless of their successes. Formerly-convicted individuals meet with a wide range of social and occupational disabilities, finding employment discrimination, banishment from many careers, occasional inability to obtain professional licenses, and general disenfranchisement from a political system that has little incentive to listen to their grievances.

There are many laws encumbering convicted felons after they serve their sentences of incarceration, probation, fines, or supervision. Federal laws dispossess ex-convicts of their right to serve as jurors in federal trials (28 U.S.C. § 1861), to possess or deal in firearms that travel in interstate commerce (18 U.S.C. § 922), or hold offices at banks (12 U.S.C. § 1730 (h)(1)). A conviction pertaining to an abuse of trust or an act of treason makes a person ineligible to work for the federal government in any capacity (18 U.S.C. §§ 593,1901,2071, 2381,2383,2385, and 2387). Depending on the crime they were convicted of, ex-convicts might also lose their Veterans' or federal retirement benefits (5 U.S.C. § 8312; 38 U.S.C. § 3505), their entitlements to educational assistance

(42 U.S.C. §§ 1862, 2459), or their right of residency at a veteran's retirement home (24 U.S.C. § 50).

Many state laws encumbering ex-convicts also exist. Nine states disenfranchise convicted felons from voting for life, while others have few or no restrictions. Most states prohibit felons from service on juries and from bearing arms (whether or not they have traveled in interstate commerce). The effect of these prohibitions is profound and has complicated racial and gender implications. In all, thirteen percent of all black men are barred from voting in their local elections due to such laws (*Providence Journal*, 2000).

But the principle loss for contemporary ex-convicts is mobility—the ability to resurface in new locations, partake of new occupational and educational opportunities, or remake themselves in different manners of living. The true onus of a criminal record often rests, not on those intent on continuing in criminal lifestyles, but on those trying hardest to succeed in rewarding careers.

To understand why the ex-convicts of today have less mobility than those similarly situated in previous generations, one must understand the great expansion of the criminal law and of criminal record-keeping that has occurred in the past century—indeed, in the past twenty years.

There is no doubt of two trends: (1) the numbers of persons finding themselves bearing the label “convicted felon” have exploded in the past two decades, and (2) the increased computerization, accessibility, and centralization of law enforcement records has drastically decreased the mobility of ex-convicts in a very brief period of time. These coalescing trends are creating a new, more stratified social landscape—a different type of

America than the one known by previous generations. Despite the cruelties and misfortunes faced by felons under earlier law, the plight of ex-convicts has gotten worse.

THE CHANGING DEFINITION OF “FELON”

Under Old English common law, a felony was any crime for which the penalty was death (Roots 2001a, 739). In general terms, felonies were roughly compatible with the FBI’s modern “index” crimes (e.g., murder, robbery, burglary, arson, and rape). In the early 1600s, there were only eight such crimes in most jurisdictions. By the late 1600s, this number had increased to twelve (Pound 1998, 102). It is not unusual to read old statutes that list “felonies” in addition to other serious crimes, suggesting that the law distinguished “felonies” as a very small subset of crime. An early Virginia statute, for example, barred admission to the bar of those convicted of “treason, *felonies*, forgery, or willful and corrupt perjury” (Rhode, 1985, p. 497 n.19, emphasis added). Thus the term felony designated a crime found on a very short list of serious crimes—a crime that justified lasting and permanent restraints on occupational and social privileges.

A felony also designated a serious danger to the community. A “fleeing felon” could be shot and killed on sight during the nineteenth century because he was considered an “outlaw at war with society,” and his apprehension without warrant was thought justified by absolute necessity (Roots 2001a, 739). Modern criminal codes, in contrast, are likely to classify more than a thousand acts as felonies, including various offenses committed by nonhuman entities such as corporations and businesses (DeLong 1997). A felony may include absence from the army for a year, helping someone avoid the draft, or stealing “wool, or mohair, or edible meat” of any value.² In California, the mere possession of “nunchakus”—an Oriental tool used in the ancient orient to used by

farmers as scythes and as a choking device to move oxen, and occasionally as a martial arts weapon—is a felony (Cal. Penal Code § 12020). There are also dozens of narcotics possession felonies that do not entail any showing of victimization or even misuse. Mere possession of various kinds of firearms under various conditions now constitutes a felony under the laws of many states, as well as the federal government. Indeed, new "felonies" are being created each year, in every American jurisdiction. Fewer and fewer of these new felonies involve serious harm to anyone.

American law has probably never been more punitive with regard to crime and criminality. This can be measured not only by the number and percentage of inmates, but by average sentence lengths, and by a glance at the types of offenses that are increasingly landing Americans in prison. Average sentences have increased by an average of seven months in only the past decade, and now stand at 2.4 years (Petersilia, 2003). American legislators at state and national levels enacted harsh penalties for nonviolent and victimless offenses (especially narcotics offenses), limited or abolished parole, established mandatory minimums instead of indeterminate or open-ended sentences, and made repeat offenders subject to 'three-strikes-you're-out' lifetime incarceration.

Most of the crimes that are described as felonies today were considered misdemeanors under the laws of the first decades of the United States. At that time, there were few prisons, few law enforcement officers, and sheriffs spent very little time dealing with criminal matters (Roots 2001). Moreover, punishments for even the most severe crimes were often suspended due to governors' pardons or the application of "benefit of clergy"—a procedure whereby first-time convicted felons could save themselves from

punishment by appealing to religious authorities and atoning for their sins through Bible study or submission to ministerial guidance.³

The reality of criminal justice in the early years of the United States is that punishment was often quite lax. Most sentences were simply fines and corporal punishment. American society relied primarily upon noninstitutional mechanisms to treat criminal deviants (Rothman 1971, 46). Eighteenth-century criminal codes fixed a wide range of punishments, including fines, whippings, stocks and pillories, and banishment. Capital punishment was used relatively rarely. “The two most widely used penalties in the eighteenth century were the fine and the whip”:

A sentence of imprisonment was uncommon, never used alone. Local jails held men caught up in the process of judgment, not those who had completed it: persons awaiting trial, those convicted but not yet punished debtors who had still to meet their obligations. The idea of serving time in a prison as a method of correction was the invention of a later generation (Rothman 1971, 46) (emphasis deleted).

It was possible for a criminal to be captured, tried, convicted, sentenced, and imprisoned within one community without the community next door knowing about it. Record-keeping was so lax that many early court dispositions took place essentially without record. Even when jail registers were kept by sheriffs or jailers, such records were regional in nature and unknown to officials in other localities.

After serving their sentences, most offenders were able to simply relocate to escape the burden of their social stigma. America was a mobile society, filled with wanderers and refugees from other lands and regions. The labor of strangers was often needed more than the security of knowing much about people’s backgrounds. Questions about how ex-convicts behave or how to behave toward them were no doubt in the minds of many, but rarely were such questions answered through legislation or court

administration. Criminal recordkeeping was so poor and scanty that few Americans bothered to research the backgrounds of employees or associates they encountered.

Research on the impacts of collateral consequences on the lives of ex-offenders is both scanty and inconclusive. Not much is known about whether post-conviction burdens are justified by empirical evidence, or whether such impositions help or harm society in general. For that matter, the long-term costs of such burdens on the lives of ex-inmates have never been adequately calculated.

AUSTRALIA AS A CASE STUDY

There is, however, some anecdotal evidence that suggests that post-conviction restrictions are misguided. Australia provides a unique case study of what happens when convicts are wrenched from their criminal environs and expatriated to new climates without long-term restrictions. At the beginning of the nineteenth century, some 160,000 English criminals were transplanted to the Australian penal colony. Upon their arrival, these convicts discovered that the Australian frontiers afforded them a second chance to make an honest life for themselves. The British marines and civilians who oversaw the Australian convict colony were amazed to find that “an individual convict’s usefulness and tractability were not closely related to the nature and frequency of his crimes” in England (Hirst, 1998, p. 237).

Convicts and ex-convicts composed three-quarters of the original population of New South Wales and consequently had rights that were denied to convicts in Britain (Hirst, 1998, p. 239). They formed the colony’s first police force and ultimately rose to exercise civil authority not only over their fellows but over the military officials who had originally overseen them (Hirst, 1998, pp. 238-39). “Within twenty years, the richest

people in the colony were ex-convict merchants and bankers” (Hirst, 1998, p. 240). Australia’s cultural legacy is so celebrated that even the twenty-dollar note bears the image of a “horse-thief-made-good” who became Australia’s first successful businesswoman, Mary Reibey (Neuman & Wiegand, 2000, p. 32).

The Australian experiment is doubly inspiring because the convicts sent to Australia represented the very worst of England’s criminal classes. Transportation of criminals to Australia was the ‘three-strikes’ effort of its age. Many of the inmates selected for transportation had led lives of crime in England since childhood, had served numerous previous jail terms, and had “been nursed and tutored in crime” throughout their lives (Crawford, 1834, p. 49). Their lives in England were “without character or friends” and typified by “habits of wandering and an aversion to restraint” (Crawford, 1834, p. 49). Sir William Crawford, a British emissary to the United States, remarked that the transported English convicts had been “repeatedly brought before the magistrates, committed for short periods, and on their liberation [were] soon again in prison.” “They continue to increase in guilt as they advance in years, until transportation [to Australia] closes their short but miserable career[s]” (Ibid.).

Female convicts that were selected for transportation to Australia were, if anything, even more wretched than their male counterparts. Shiploads of convicted women composed almost entirely of the lowest street-walking prostitutes, thieves, and runaways, many of whom had led lives of misery, exploitation and abuse in Britain, were transported to Australia during the period. As historian Sian Rees (2002) documents in a recent book, the ships that carried the women convicts to distant shores “both held them prisoner and offered them refuge from their oppressive existence in London.” But Rees’

study of life outcomes of one shipload of 237 women convicts that landed on the Australian penal colony in 1789 showed that the women adjusted to the Australian frontier with uncharacteristic heart: “From maidens in distress, teenage mothers or hardened street criminals, some would evolve into the mistresses of wealthy households and founders of dynasties, others would sink without a trace, and the majority would settle somewhere in between” (Rees, 2002, p. 202).

The success of the Australian penal colony has rarely been repeated. At least one other experiment at expatriating convicted criminals seems to have yielded very different results. Since the dawn of America’s “War on Drugs,” the United States has deported foreign-born criminals to their native countries, and many of these deported criminals have resorted to violent crime in their transplant nations (Rohter, 1997, p. A6). But while cross-comparisons of this phenomenon with the Australian story provide for fascinating studies in human behavior, they supply policymakers with little or no real means with which to predict the ultimate social outcomes of punished persons.

AMERICA AS A SAFE HARBOR FOR EX-CONVICTS

There is, of course, another case study that may shed some light on the question. The United States of America itself was founded, settled, pioneered and colonized disproportionately through the efforts of convicted criminals from Europe. The English Transportation Act of 1717 sent tens of thousands of convicted people to North American and the Caribbean prior to the Revolutionary War (Kerle, 1998, p. 6). One 1766 pamphlet published in Britain described American colonists as “the posterity of independents and Anabaptists, Presbyterians and Quakers, convicts and felons, savages and negro-worshippers” (Reid, 1981, p. 73). The extent of such transportation on the

colonies was such that Benjamin Franklin petitioned the British Parliament in 1767 to cease the practice of shipping convicted felons to the American colonies to solve the *British* crime problem (Silberman, 1978, p. 28). As an officer of the colony of Pennsylvania, Franklin complained that the endless tides of England's criminal classes being washed upon the shores of the colonies were corrupting the morals of the poor and terrorizing the population with numerous burglaries, robberies, and murders (Silberman, 1978).

While little empirical data supports this perception, much evidence to the contrary survives: convicted felons became hard-working contributors to the American struggle for survival and independence. Indeed, the Revolution itself could not have been waged by the American side without the aid of former criminal offenders. For example, John Hancock, the first signer of the Declaration of Independence and one of America's most prominent citizens *after* the Revolution, was one of America's most prominent smugglers of uncustomed goods *before* the Revolution (Lasson, 1937, p. 72). The military recruits who fought in the Revolution were overwhelmingly gathered from the ranks of "the scum of society," as one observer noted, "sold or shanghaied into the service, rootless, [and] lacking any class or national loyalties" (Kohn, 1975, p. 2). Yet they fought admirably and triumphed over the most powerful empire in the world.

This pattern of America being a safe harbor for the criminal classes from overseas continued through the nineteenth century, even though American lawmakers repeatedly attempted to stem the tide of immigrant felons. In *Mayor of New York v. Miln* (1837), the United States Supreme Court wrote that the State of New York was justified in enacting a statute excluding paupers arriving by ship, saying it was "necessary for a state to provide

precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence . . . from unsound and infectious articles” (p. 142). At the end of the nineteenth century, Americans regarded the constant influx of immigrants as a source of crime, expressing the opinion that large numbers of Italian ex-convicts had immigrated to start their criminal lives anew in America (Albanese, 1996, pp. 92-93). Yet as each phase of offenders assimilated into U.S. society, it became clear that the initial measures against them were unjustified.¹

The formal obstructions in the path of the convicted classes which existed in Victor Hugo’s France and other European countries during the 1800s led many Europeans to seek the more open harbors of North America in the nineteenth century. Yearning to breathe free, as the Statue of Liberty described them, Europe’s beleaguered coolie classes sought a new life in the free land that was America. Only in the 1900’s did the United States Congress begin to restrict the immigration of foreigners with criminal convictions. Congress set up a commission in 1907 to look at how the mass immigration of lower class Europeans affected America’s crime problem (Friedman, 1993, p.326). That this issue was a major national concern at the turn of the twentieth century says much about the immigration patterns of the nineteenth century, which according to the committee’s report brought the “vilest practices . . . from continental Europe” to corrupt America’s innocence.²

¹ There is some evidence that even the England that so desperately sought to purge itself of criminals was itself a dumping ground for criminals, heretics, and unwanted dissidents only a century earlier. Even prior to this period, large numbers of criminal vagabonds and gypsies *fled to England from* the European continent, adding to Britain’s roving populations of “escaped villeins, friars, peddlers, [and] tinkers” (Hill , 1996, p. 131).

² . *See id.* (speaking of the menace of immigrating prostitutes).

It is impossible to know precisely how many immigrants sought America's shelter because of criminal convictions received in their mother countries. There is little doubt, however, that when such immigrants arrived, they were treated by American law as being equal in status to every other similarly situated person in American society. Many convicted criminals contributed to the American economy in factories, farms, mines and on railroads. Language and cultural barriers, rather than the barriers of criminal convictions, were their foremost obstacles.

For the average criminal offender, escape to a new life and future was easily made. For American society as a whole, there were both positive and negative consequences. On one hand, the mobility of American culture allowed petty criminals to roam freely about, having their way with crime victims and confidence-game marks (*Harper's Magazine*, 1999, pp. 402-08). On the other hand, mobility provided a means for ex-convicts to conquer and overcome their pasts. Examples of convicted felons who traveled afar and remade themselves as valuable social contributors are too numerous to recount. But some cases are illustrative. The famed Texas jurist Judge Roy Bean began his adult life as a drifting brawler, a killer of at least two men, and a prison escapee. A failed lynching so injured the judge's neck that he never was able to turn his head (Flanagan, 1999, p. 290). Chief Justice Stephen J. Field, who captained the United Supreme Court from the 1870s to the early twentieth century, carried a pistol and bowie knife and was jailed, disbarred, and involved in several feuds during his earlier career in California's gold rush country (Schwartz, 1993, p. 308).

Perhaps exemplifying the mobility of America's criminals during the nineteenth century is the case of John Wesley Hardin. Hardin, an infamous Texas outlaw, killed

between thirty and forty men in a criminal career that began around the time of the Civil War (Roots, 2001b). Some one dozen law enforcement officials were killed in the line of duty while attempting to arrest or keep custody of the man who was considered “too mean to arrest” (Metz, 1996, p. 117). Yet only fifteen years into a twenty-five year sentence for killing a law enforcement officer, Hardin was pardoned by Texas Governor James Hogg and admitted to the practice of law as an attorney (Metz, 1996, pp. 185-252). All of this has changed in the past 100 years. Today, the State of Texas—like several other states—statutorily bars convicted felons from practicing law. If he were living today, John Wesley Hardin would have difficulty becoming licensed to sell insurance, real estate, or even operating a tavern (even if he were released from prison, which would be highly unlikely).

INCREASED SEVERITY OF CONTEMPORARY PUNISHMENT

Two trends agitate the conditions of post-conviction conditions: 1) the growth of the state, and 2) the growth of information technology and its increased use among and between criminal justice jurisdictions. These changes ensure that, compared to early American criminal penalties, modern penalties are more severe, more disabling, and more long-lasting. The growth of the state in relation to the private sector has meant an expansion of state facilities for incarceration and punishment. Public jails (“gaols”) and dungeons were rare in early America, but have grown to be a much larger domain of governmental affairs and social landscape. Just as the state has grown, the electorate has given up on resolving crime problems with reason, and has adopted the simplistic method of mass incarceration.

RECIDIVISM

Any discussion of post-conviction collateral consequences must address the closely related issue of recidivism. The tendency of ex-offenders to re-offend bears much on policies aimed at encumbering felons. Are there not some valid reasons for placing restrictions on the economic, civic, and social mobility of felons? Are not such individuals more prone to crime and thus more “dangerous”—warranting added measures against them? The question is made difficult by a host of factors.

Record-keeping was notoriously lax before the twentieth century, and many convicted criminals simply left their area of initial conviction to start lives of crime anew in other places. Recidivism has been a recurring problem for decades if not centuries. In an effort to stave off recidivism, the Massachusetts assembly passed an early “three strikes” law in the early 1800s. A thief, on first conviction, was to be whipped or fined. The second offense required payment of treble damages, placement on the gallows platform with a noose around the neck for an hour, followed by whipping with thirty stripes. The third offense brought hanging (Rothman, 1998, pp.100-102).

A number of authorities have pointed out the difficulty of determining reliable measures of “recidivism” and “recidivism rates” (Gehring & Eggleston, 1999, pp. 9-15) Every source, however, agrees that those charged, convicted, sentenced, and imprisoned for crimes are substantially more likely than other persons to be charged, convicted, sentenced, and imprisoned for additional crimes in the future. Indeed, of every two arrestees, one of them has already been arrested and convicted of an earlier crime (Burt, 2000, p. 4).³

³ According to Burt (2000, 3-4) approximately 47 percent of all American state offenders are convicted for new offenses within three years of release.

Bennett et al. have pointed out that America's crime problem is largely attributable to a small population of habitual offenders. They noted that 88.5 percent of nonviolent felony offenders admitted to California prisons in 1992, for example, had one or more prior convictions. More than thirty percent had three or more adult incarcerations. The *average* number of prior convictions for such individuals was 4.7—meaning that a sizeable number of inmates had been arrested and convicted many more than five times. Over forty percent of the 1991 prison population consisted of felons whose latest conviction was for a crime committed while on probation or parole (Bennett, et al., 1996, pp. 88-96).

But while all authorities recognize the existence of a relationship between past and present criminality, few agree on an appropriate conclusion to be drawn from the relationship. On one hand, the tendency of offenders to repeat (and to be repeat offenders) lends itself to a suggestion that there is something intrinsically criminal in the makeup of offenders in general. On the other hand, the same relationship can be interpreted as completely spurious in light of the many common factors shared by both first-offenders and repeat offenders. First-time offenders as well as repeat offenders are disproportionately drawn from subgroups of the American population that differ markedly from the American majority.

Those who find themselves cast into the streets after a stay in prison should be seen not only as “ex-convicts” but for what they generally are: undereducated inarticulate males of the lowest classes with weak or nonexistent social support networks. Add to

this the onus of a criminal record, and the greatest oddity is that so many manage to avoid rearrest.⁴

While some 91 percent of Americans admit to having violated laws that could have subjected them to imprisonment, the poorest and most uneducated Americans are disproportionately likely to bear a criminal record while wealthier Americans overwhelmingly escape criminal censure (Reiman, 1998, p. 106).

CRIMINOLOGY IS NO SCIENCE

Moreover, no well-articulated explanation has ever been realistically asserted by criminologists as a real answer to the question of how to predict criminality. “Criminology” is largely a mere science of data collection and statistical analysis. Criminological “theory”—that part of criminology that purports to posit and test theories of criminality—remains a domain of utterly unproven ideas. In the words of Michael J. Lynch and W. Byron Groves, general, or ‘grand’ theories of criminality tend to “serve ideological and legitimation purposes” in order to “reinforce and legitimize values and interests” that “cannot be empirically grounded.”

Despite generations of study and research dating to the ages of Bentham and Baccaria, the “science” of criminology has never found a way to predict the rehabilitation of convicted offenders. In a noteworthy 1974 article, Dr. Robert Martinson surveyed over two hundred criminological studies involving hundreds of thousands of convicted persons and concluded that a solution to the eternal crime problem remained elusive. “I

⁴ Reiman identifies poverty as the most important factor in determining who is arrested for crime or repeat crimes. “*For the same criminal behavior*, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes” (Reiman, 1998, p. 102).

am bound to say that these data . . . are the best available and give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation” (Robinson, 1995, p. 10). Professors Ross and Fabiano expressed this same disillusionment in an influential and often-repeated quote: “There is very little evidence that crime prevention programs prevent crime; that rehabilitation programs rehabilitate; that deterrence deters; that correction corrects” (Ross & Fabiano, 1985, p. 1).

ECONOMIC CONSEQUENCES

Research establishes that those released from prison often suffer economic consequences for a decade or more after their release. Deficits earned from a prison term early in a working career reverberate throughout the life cycle. One California study found that just 21 percent of California’s parolees were working full time in the early 1990s (Street, 2001, p. 50). A study of 1,176 men released from Georgia’s correctional system in 1976 found that less than forty percent of them had any officially recorded earnings in each year from 1983 to 1991 (Street, 2001, p. 50). Even among those who were able to obtain and retain employment, average annual wages were only \$7,880 per year for white ex-cons and \$4,762 for black ex-cons (Ibid.). Harvard economist Richard Freeman calculated that men who were in jail or on probation in 1980 were 19 percent more likely than the general public to be unemployed eight years later in 1988 (Street, 2001, pp. 50-51). Prison records made employment haphazard, reducing the amount of time employed by 25 to 30 percent (Ibid.). Princeton sociologist Bruce Western found that time spent in juvenile incarceration reduced paid employment by five to ten weeks annually for as long as a decade or more afterward. Even when paroled inmates are able

to find jobs, they earn only half as much as people of the same social and economic background who have not been incarcerated (Street, 2001, p. 51)

Street notes that “prison lives on within the ex-offender, limiting his or her freedom on the outside” (Street, 2001, p. 51). Mass incarceration also impacts the economic health of entire neighborhoods:

Incarceration deepens a job-skill deficit that is a leading factor explaining “criminal” behavior among disadvantaged people in the first place. “Crime rates are inversely related...to expected legal wages, particularly among young males with limited job skills or prospects.” . . . Combined with ex-offenders’ shortage of marketable skills in the legal economy, it creates irresistible incentives for the sort of income-generating conduct that leads back to prison. The lost potential earnings, savings, consumer demand, and the human and social capital that result from mass incarceration cost black communities untold millions of dollars in potential economic development, worsening an inner-city political economy already crippled by decades of capital flight and de-industrialization. The dazed and embittered graduates of the prison-industrial complex are released back into a small number of predominantly black and high-poverty ZIP codes and census tracts, deepening the concentration of poverty, crime, and despair (Street, 2001, 51).

The lifelong burden of a criminal record can be even more severe when it attaches during adolescence. A comprehensive study by Tanner, Daivies, and Grady (1999) revealed that the life-chance deficit is even starker than any authority might predict. Delinquency does not merely reduce students’ educational skills and aspirations; it exerts a penalty over and above the delinquent’s academic characteristics (Tanner, et al., 1999,

pp. 260-61). “[F]or males, high school delinquency has effects that are felt twelve years later in both educational and occupational realms” (p. 261). The fact that most adolescents grow out of delinquency does not negate the serious negative impacts that a juvenile record brings to their career outcomes. The total cost to the U.S. economy of locking felons out of constructive careers may be incalculable.

Convicted felons may make great dishwashers, janitors, and short-order cooks but are rarely invited out of the secondary labor market.⁵ Employers that offer stable careers, good wages, and a high level of benefits tend to be the most likely to screen out prospective employees with problematic pasts. The result, in many cases, is a perpetuation of the very disengagement and lack of social investment that causes individuals to deviate from social norms through criminal lifestyles.

The economic boom of the 1990s saw employers hurt by standards that prevented them from recruiting employees with criminal records. Detroit police recruiters conducted a recruitment drive in 1999 that yielded only 287 viable candidates out of 1,200 applicants. The top disqualification was prior convictions (Newsweek, 1999). The U.S. Army and Navy were forced to double their numbers of waivers of felons between 1998 and 2000, when military recruitment numbers declined (Moniz, 2000). More than four hundred recruits with felony arrest records were waived into the U.S. military in 2000, a greater figure than ever in U.S. history (p. 7A).

⁵ The secondary labor market, typified by high-turnover, low-wage, and low-benefits jobs, has been described in a number of studies. See, for example, Doeringer & Piore (1971). Secondary-labor positions are essentially those that are filled without stringent background or reference checks and which employees rarely sue to acquire or keep. Mills (1994) describes secondary employers as those which pay low wages and “rarely seek to train employees, to provide for their participation in their jobs in a constructive fashion, or to provide competent supervision” (p. 158). Mills adds that secondary-labor

Despite some indications that public and private employers are accommodating growing numbers of ex-convicts, some lawmakers have crusaded to limit the opportunities of ex-convicts to obtain certain types of employment—or even to limit the rights of employers to hire such workers. In October 2000, the United States Congress enacted legislation barring convicted felons from gaining security clearances in the Defense Department or working in fields with access to classified documents (Pound, 2000). Like many disabilities placed upon convicted felons by lawmakers, the measure was a reaction to a recently publicized scandal—this time involving national security at the Los Alamos nuclear facility in New Mexico (Pound, 2000). Similarly, California legislators passed a law preventing school districts from hiring felons convicted of serious crimes after a parolee employed as a school janitor for only three days raped and murdered a high school student (Bailey, 2000).

PREDICTING FUTURE MISCONDUCT IMPOSSIBLE

The central premise of laws disabling convicted persons as they pursue their careers and lives is that policymakers can predict future misconduct from prior offenses. Despite this confidence in the predictive capacities of the law, social science research has failed to substantiate the existence of consistent moral traits (Rhode 1985, 557). Moral integrity is more a function of habit and circumstance than any general attribute (Rhode 1985, 557).

A 2000 Secret Service study of violence-prone students indicated that no single profile could predict that a juvenile school shooter (Henry 2000). Most people are neither consistently law-abiding nor criminal (Jacoby 1994, 78). Students who cheat in one class will not cheat in another class under similar circumstances (Rhode 1985, 557 n. 299

employers “employ extremely authoritarian management techniques and use discharge as a device to discipline the work force” (p. 158).

(citing studies by Hartshorn and May). Law-abiding graduate students with unblemished records will administer apparently dangerous electric shocks to co-participants despite their cries of pain when ordered to do so by authority figures (Rhode 1985, 558, citing Stanley Milgram's experiments), and will throw acid in the face of assistants when under stress. Even the best clinical research among institutionalized mental patients will err in two out of three predictions of violent conduct among patients ((Rhode 1985, pp. 558-559).

PUNISHMENT CAN CAUSE CRIME

This is not to say that a criminal record cannot in some ways predict one's chances of straying once again from compliance with the criminal code. Indeed, a number of thought-provoking studies suggest a link between the two is not only significant but *causational*. Individuals identified as deviant and exposed to the prison system at any age are highly likely to develop antisocial character traits and to suffer from a prolonged inability to adjust to productive living thereafter. Yale criminologist Elliott Currie describes the phenomenon in this way:

[T]he dwindling availability of serious vocational training or education in many prison systems means that most ex-inmates leave prison today even less able to fit into an ever more demanding labor market than they were when they went in; they've acquired the stigma of prison without increasing their capacity to function on the outside. (As the British criminologist David Garland notes, this is a deeper meaning of the idea that prison "incapacitates" offenders) To the extent that incarceration aggravates the already severe labor-market problems of their mostly low-income, poorly educated inmates, it will increase the costs to the public sector of dealing with them on the outside—through public assistance, drug treatment, and emergency health care, as well as in lost taxes and economic productivity (Currie 1998, 73-74).

Currie adds, “the tendency for incarceration to make some criminals worse is one of the best-established findings in criminology.” Currie cites a recent Massachusetts study of delinquent youth showing that going to prison often increases the chances of ex-convicts committing further crimes as adults, mainly because it reduces the youths’ chances of getting a stable job” (Currie 1998, 74).

CONCLUSION

In contrast to the ease with which Americans of the past were able to shake their criminal pasts by aging or relocating, modern American offenders are kept under the all-seeing eye of the criminal justice system throughout their lives. Under the law of previous generations, an offender once convicted might easily travel afar and live a new life, unhindered by his prior bad name. Today, however, the same convicted felon is tracked throughout his life by a network of government databases. Any officer of the law can bring up a person’s national criminal file in a matter of minutes.

The criminal justice system of the United States has grown to encompass an increasing number and percentage of the American population. This sizeable sector of the citizenry is disabled by a wide array of state and federal laws, private discrimination, and decreased career opportunities. While empirical evidence suggests the existence of a relationship between past and future criminality among the ranks of convicted persons, the precise **dimensions of the relationship remains difficult to discern**. Predicting future criminality remains an inherently dubious pursuit, and policy makers might do well to dismantle barriers against ex-convicts in order to maximize their productive potentials in the coming century.

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Notes

¹ According to Platt, the American rate of imprisonment per 100,000 citizens stood at just over 100 during the 1970s and increased to 690 in 1998.

² A felony/misdemeanor in Texas. Kerper and Kerper, 77.

³ In sixteenth-century England, all felonies brought (in addition to the possibility of execution) the collateral punishment of forfeiture of one's possessions, making it impossible for the felon's heirs to inherit property (Pound 1998, 103). In practice, however, those convicted of felonies had a good chance to evade the full consequences of their status. Pardons and other acts of clemency were also given much more freely in previous American generations. Nearly two-fifths of those sentenced to die were pardoned or had their sentences commuted to a prison sentence (Hindus 1980, 103). The practice in some American colonies was to automatically pardon first-time felons (Hindus 1980, 110). Pardons for past criminal offenses were easily obtained (Hindus 1980, 111), and one governor twice ran out of pardon forms (111). Governor Oscar Lieber of South Carolina noted that he "pardoned every single one" of the convicts convicted of capital offenses in South Carolina in the 1850s (Hindus 1980, 112 (quoting 1859 letter to Matilda Lieber)). In place of execution, first-time felons in South Carolina were often branded or simply banished (110).

In effect, many convicted felons received little or no punishment for their first offense (111). In general, the punishment for most noncapital offenses were also insubstantial (126). The fine continued to be the most common criminal penalty in early South Carolina (105). By the standards of early American colonists, most modern felonies would be considered misdemeanors or not crimes at all.