

Is America Becoming a Nation of Ex-Cons?

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Criminal law has consequences, both intended and otherwise, and no code of criminal law can serve its society well unless it is drafted with attention to the consequences it will have. The phenomenon of mass incarceration and convictions is, one hopes, an unexpected and unintended consequence of modern American criminal justice. But it is an important consequence nonetheless, and a bitter social reality for tens of millions of Americans and their families who have been swept up in decades of “tougher” laws—enactments whose proponents, however well motivated, have been content to “let the chips fall where they may.”

I. MASS CONVICTIONS AND SOCIAL DIVISION

The problem of mass convictions and incarceration is a pressing criminal justice problem. Its impacts are not just limited to the familiar statistic of 2.3 million people now held in our nation’s prisons and jails, nor even to the upwards of seven million who, as inmates, parolees or probationers, constitute our nation’s current “correctional population.”¹ The impacts reach much further, creating permanent social divisions that threaten to change the very structure of American society.

Already, under existing criminal justice policies, an estimated 25% of United States adults have a criminal record (over sixty-five million people).² Nearly one-

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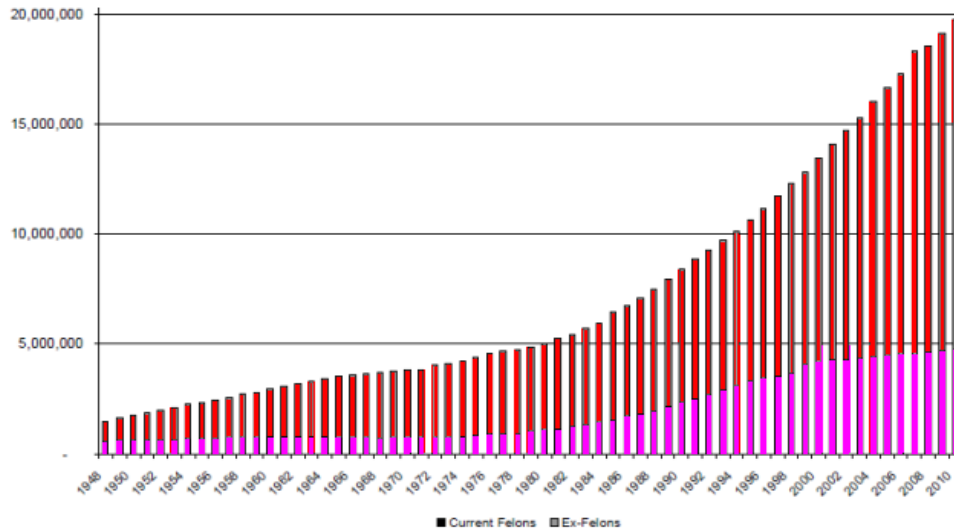
¹ Sarah Shannon, et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, 5 (unpublished manuscript), available at <http://paa2011.princeton.edu/papers/111687> (last visited Mar. 23, 2015).

² See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, THE NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, 3 n.2 (2011), available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1 and BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008, 16 (2009), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf> for many more statistics.

Despite the size and growing social significance of the nation’s ex-offender demographic, exact statistics concerning even the most basic facts about it seem to be unavailable. According to the U.S. Department of Justice, approximately 100.5 million persons had “criminal history files” in 2012 (i.e., records of “arrests and subsequent dispositions”). BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, 2 (2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. From fundamental raw numbers such as this, the cited article arrives at its own (lower) estimate of ex-offenders by statistical processes to remove over-counting due to individuals having criminal records in multiple states, recidivism and deaths. The results are said to be consistent with those reached by other researchers. See also JOHN

third of the people in our country have been arrested by age twenty-three.³ Nearly 6 million American adults cannot legally vote.⁴ For sex crimes alone, the United States imprisons nearly three times as many people as France imprisons for *all* crimes—in *total*.⁵ And, with the help of more than a million felony convictions per year—one every thirty seconds—America's ex-offender class is growing exponentially:⁶

Growth of Felons and Ex-Felons, 1948–2010⁷



SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET, 5 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

³ Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, Dec. 19, 2011, at A16, available at <http://www.nytimes.com/2011/12/19/us/nearly-a-third-of-americans-are-arrested-by-23-study-says.html> (citing Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21 (2012)). For purposes of this statistic, minor traffic violations were not counted. Brame et al., *supra*, at 21.

⁴ *Felony Disenfranchisement*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Mar. 23, 2015)

⁵ There are about 70,000 total prisoners in France. See Dan MacGuill, *Guards Rebel Over Record French Prisoner Numbers*, THE LOCAL (June 18, 2013), <http://www.thelocal.fr/20130618/record-prisoner-numbers-spark-call-for-guards-strike>. In contrast, there are at least 178,862 in *prisons* for rape and other sexual offenses in the U.S. See PAUL GUERINO, ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 28 (2012), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>, and *Statistics*, FEDERAL BUREAU OF PRISONS (2015), http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (67,500 for rape and 98,300 for other sexual assault in state prisons as of 2008, plus about 13,562 in federal prisons as of January 2015. These latter numbers do not count an unknown additional number held for sexual crimes in U.S. jails).

⁶ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 (2009), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

⁷ Shannon, et al., *supra* note 1, at 7.

As these numbers continue to mount, the status of being a “criminal” in the eyes of the law—once considered deviational—is now becoming just a variation on the American-citizenship norm.

The effects of being a “criminal” do not, moreover, end with release from prison. Newly released inmates are immediately met by a growing assortment of law-prescribed “collateral consequences” that now number in the tens of thousands.⁸ In their cumulative impact, these collateral consequences greatly reduce the ability of ex-offenders to find housing, make a living, get an education, obtain bank loans, support their children or, generally, to enjoy the usual rights and amenities of citizenship that are essential for a reasonable quality of life.⁹ And this is not to mention the severe impact of *informal* collateral consequences, such as the inability to obtain a decent job, that law-endorsed stigmatization brings with it. Being a “criminal” devastates economic opportunity, reduces lifetime productivity and virtually assures a place at the lower end of income inequality.

Thus, even though the laws defining crimes are supposed to trigger impacts that fall only on the offenders themselves, the combined ramifications of modern American mass conviction are not so confined. On the contrary, as cumulative effects of law-defined collateral consequences continue to grow, we are seeing the emergence of a new social underclass of ex-offenders, a growing segment of the American population that has been set apart and designated by law to be permanently excluded from the usual rights of ordinary citizenship. Already, tens of millions of past offenders and their families find themselves in this gloomy new social category, frustrated and oppressed by a deliberately established array of permanent legal obstacles that constantly impede their efforts to enjoy normal, fulfilling lives. As the definitions of what constitutes crime expand, this social underclass expands as well, forming a new and distinct demographic, a new social stratum in American society.

It is, to be sure, a matter for debate whether there is anything unfair or “unjust” about the effects of collateral consequences on ex-offenders and their

⁸ At the direction of Congress and under the aegis of the National Institute of Justice, a database of collateral consequences of conviction was assembled by the American Bar Association Section on Criminal Justice, and it lists over 45,000 collateral consequences “that may affect people because of their criminal records.” See Rhonda McMillion, *ABA Voices Concerns About the Impact of Over-Criminalization of US Laws*, ABA JOURNAL (Dec. 1, 2014), http://www.abajournal.com/mobile/mag_article/aba_voices_concerns_about_the_impact_of_over_criminalization_of_us_laws (referencing NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, available at <http://www.abacollateralconsequences.org> (last visited Mar. 23, 2015)). Collateral consequences, both legally prescribed and informal, apply to ex-felons and misdemeanants alike. See generally Jenny Roberts, *Why Misdemeanors Matter*, 45 U. C. DAVIS L. REV. 277 (2011).

⁹ See generally Roberts, *supra* note 8. See also Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 770–74 (2011) (“Collateral Consequences Come Roaring Back”). This article provides a good précis of the operation of collateral consequences.

families. After all, if people who break the law do so by *choice*,¹⁰ then the hardship of collateral consequences can be seen as essentially self-imposed. But the justness of collateral consequences in individual cases is not the only question. There is also the question of whether we want, as a byproduct of criminal-justice policy, to re-make America into a legally divided multi-stratum society with an entrenched system of law-sanctioned discrimination against a large and growing underclass. For that is precisely what is happening as our present mass-conviction practices and policies are allowed to continue.

The mechanism by which the criminal justice system is creating a new American underclass is not hard to see. By subjecting former offenders to the legal disabilities and burdens that conviction entails, especially those that last far beyond release from prison, the law is essentially assigning an ever-widening segment of the population to a modified civic status, separating them out by law for a lifetime of systematic discrimination and exclusion. In addition to these direct debilitating effects, the enduring consequences of conviction provide official ratification for the idea “once a criminal, always a criminal,” and private prejudice against past offenders is legitimized and reinforced as people take cues from the law. Already, literally “millions of Americans . . . are trapped permanently in semi-outlaw status”¹¹ from which there is no hope of escape. Denied normal membership in civil society, these millions are not merely objects of official and private disdain. The broadening pool of past offenders has become a new inferior civic category, a discrete, legally-defined second level of citizenship. It is the new American discrimination.

When the effect on job prospects is added into consideration, the picture becomes particularly grim. When it comes to setting people up for economic life, the credentialing effect of the modern criminal justice system is like an education system in reverse, systematically reducing the economic opportunity and potential of those who pass through it. The job-market demand for past offenders is extremely modest, at best. For example, in the case of job applicants who are white, a past offender’s chances of getting called back after an interview are about half that of applicants without a record.¹² For African-American past offenders, the chances of getting a callback are a miniscule 5%.¹³ As historic race disparities are magnified by the effects of the new discrimination prescribed and condoned by

¹⁰ Which may be true, at least, in the case of crimes that have an element of mens rea—though a growing number of crimes do not. See BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUNDATION, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 12 (2010), available at <http://www.heritage.org/research/reports/2010/05/without-intent>.

¹¹ See Love, *supra* note 9, at 753.

¹² The figure is 17% vs. 34% for persons with a clean record. Kai Wright, *Boxed in: How a Criminal Record Keeps Americans Jobless for Life*, THE NATION (Nov. 25, 2013), <http://www.thenation.com/article/177017/boxed-how-criminal-record-keeps-you-unemployed-life#>.

¹³ *Id.*

law, “the criminal justice system [is] an increasingly important mechanism for generating racial inequality in the labor market.”¹⁴

With hundreds of job categories and occupations closed off by law and thousands of others barred due to employer preference, people in the ever-larger underclass of past offenders work less steadily, earn far less money, and participate in the work force at sharply lower rates than others, mostly subsisting at the lower-end margins of the formal economy.¹⁵ The damage and suffering to the families of these economically crippled millions, not to mention to the economy as a whole, cannot be underestimated.¹⁶ The cumulative devastation of economic opportunity and combined national waste of social productivity is a serious burden, not just for those persons directly affected, but for the country as a whole. The criminal justice system is an engine of economic inequality.

This trend toward laws that assign an ever-increasing percentage of Americans to this new kind of inferior civic status is surely not a good one, but worse may be yet to come. Until now, most of the 25% of people comprising the new American underclass have not begun to self-identify, organize or otherwise reflect on their own potential as a social or political force (in the way that, more happily, our nation’s undocumented “illegal” immigrants recently have).

However, it may only be a matter of time before we start to see such a self-awareness and search for political muscle. A large social group of second-class citizens who feel a shared oppression and perceive common interests and needs is

¹⁴ *Id.* (quoting sociologist Devah Pager).

¹⁵ Schmitt & Warner, *supra* note 2, at 12–13; Shannon, et al., *supra* note 1; Steven Raphael, *The Employment Prospects of Ex-Offenders*, 25 FOCUS 21, (2007), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc252d.pdf>; Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (2002), available at http://scholar.harvard.edu/files/brucewestern/files/western_asr.pdf.

¹⁶ With the criminal justice system continuously churning out new annual waves of economically crippled Americans, serious damage to the nation’s economic vitality is eventually inevitable. For example, the current official rate of 5.9% unemployed (*i.e.*, unproductive) adults, Dionne Searcey & Jonathan Weisman, *Jobless Rate in U.S. Falls Below 6% as Hiring Picks Up*, N.Y. TIMES, Oct. 3, 2014, at A1, available at http://www.nytimes.com/2014/10/04/business/economy/monthly-jobs-report-september.html?_r=0 (rate as of October, 2014) is an artificially low number and, to make a more realistic comparison with our global competitors, we must also add in the 3 million or more people who are either held in prison or serving at the correction offices, jail guards and bailiffs who guard them, JAMES STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005 4 (2008), available at <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf> (showing 445,000 employees in correctional facilities in 2005, to which must be added those in private facilities plus 2.5 million inmates). And this is not to mention the legions of lawyers, legal support staff, court personnel, parole officers and workers, employees of prison supply firms and others whose contribution to American economic strength and global competitiveness is essentially nil, if not negative. Then, on top of that, there is the fast-growing class of past offenders whose ability to participate productively in the economy is, under present social and legal conditions, substantially impaired. A nation of deliberately weakened people cannot long remain strong. Whatever else the American criminal justice policy may be doing, it is almost certainly eating away at the nation’s economic vitality and its competitiveness on the global stage.

not likely to remain forever quiescent. Obviously, a major division in the body politic along lines explicitly labeled “criminal” and “not criminal” hardly seems a healthy development. But the laws that are populating the new inferior class of American citizenship are reaching more people every day and have the potential for exactly that. These laws *are* the new American discrimination and, like the previous ones, they will demand a response.

It should be stressed that no single law or macro policy (such as the “war on drugs”) is responsible for the growing numbers of persons subjected to the new, legally lesser citizenship.¹⁷ Rather, *every* new provision of law that has been enforced to expand the definition of crime or enhanced punishment, accumulating for decades across the fifty states, has been responsible, in some small part, for the change. It is the definitions of crimes that are the fundamental criteria of who goes into the new American underclass and who stays out. Every provision of the substantive criminal law forms part of the foundation on which overall rates of conviction and imprisonment are grounded. Indeed, they are grounded on nothing else.

As well-meaning people continue to identify new kinds of mischief to add to the list of punishable behavior, and new crimes are defined over time, further effects are bound to be produced. While each new criminal prohibition may seem like a good idea in itself, it is simply not possible to continually expand the range of punishable conduct and not expect the rates of incarcerations and convictions to be affected. If there is ever to be a recalibration or dialing back of the extraordinary rates of conviction and incarceration, the process has to start with the ordinary criminal laws out of which they emerge.

Yet, proposals for changes in the criminal law, especially those that aim to “crack down” on this or that area of social mischief, are rarely advanced or adopted with much attention to the second-order or cumulative effects that they will almost inevitably and predictably have. This inattention has undoubtedly contributed to the lamentable fact that the United States has the world’s highest rate of human confinement and ex-offender population. Accordingly, even when proposals for change in the law have sound reasons behind them (as they usually do), the job of law reform cannot properly be done as an insular exercise that focuses solely on particular, narrow social goals while ignoring the incremental impacts on society as a whole. As the criminal law becomes a major (if inadvertent) force to re-form society into legally ranked classes of human beings, it must be recognized that the substance of the criminal law is the gatekeeper to the growing dystopia of the American legal underclass.

¹⁷ There are apparently only about 330,000 incarcerated drug offenders (out of a total of around 2.3 million). See E. ANN CARSON & WILLIAM J. SABOL BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2011 9 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (showing 237,000 drug offenders held by states) and Matt Sledge, *The Drug War and Mass Incarceration By The Numbers*, HUFF. POST (Apr. 8, 2013 1:24 PM), http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html (showing 97,472 federal drug-crime prisoners).

II. MASS INCARCERATION IMPACT ASSESSMENT

Until now, the second-order social impacts of the criminal law have been largely overlooked in the lawmaking process. But the national levels of incarceration and conviction and their socially divisive sequelae have reached the stage where we can no longer afford to let changes in the criminal law be made as they have been in the past, simply letting the “chips fall where they may.” Instead, changes in the criminal law, especially ones that seek to close loopholes or get “tough,” should take into consideration the negative social side effects they will entail. There needs to be, in short, something on the order of “mass incarceration impact assessments” for every legal change that may significantly impact incarceration rates.

A requirement of mass incarceration impact assessments would help assure that there is a deliberate consideration of the predictable effects that each proposed change in the law will have—not just on the social problems it is meant to address, but also on the ones to which it might collaterally add. The content of such assessments should include, for example, considerations of (1) the net effects that the proposed revisions will have on the numbers of incarcerations and convictions, (2) alternative ways to achieve the revision’s goals with less adverse incarceration and conviction impact, (3) how any predicted unavoidable increases in convictions and imprisonment are justified, and (4) whether and how the impacts of justifiable increases can be mitigated. The value of such assessments is that they would make it possible to identify, as a part of the crime-definition process, the now largely unappreciated piecemeal accretion of pressures to convict and incarcerate by assessing and evaluating the predictable captivity effects of each proposal for change. They would also provide a place for evidence-based justification of predicted exacerbations of social stratification, for the exploration of alternative approaches having less incarceration effect, and for suggestions of measures to mitigate the effects that are unavoidable.

True, it will not be possible to solve the entire problem of mass convictions and incarceration solely by calibrating the details of individual provisions of the substantive criminal law. That is not, however, a reason to continue consciously disregarding the problem in the law revision projects. Just as small changes in the law can make the problem worse, every new revision of the criminal law presents an opportunity to make the situation better.

III. CONCLUSION

Our country did not arrive at today’s extraordinary rates of imprisonment and systematic social exclusion by any single large decision or choice of policy. It occurred as a result of countless little decisions that added, bit by bit, to the ever-widening range of conduct designated for imprisonment and to the severity of the consequences prescribed for that conduct. Without addressing those many

decision points in revisions of the law, there is no likely way out of the present situation.

The importance of mass convictions and the nation's growing post-prison demographic cannot be overstated. America will simply not be the same if it continues to expand and systematically oppress an enormous, permanent ex-offender class. Look again at the chart, *supra*. What it displays is not just statistics, but a harsh social reality. Our future approach to the problem of crimes and criminalization can have the effect of alleviating that reality or making it worse, depending on the choices that are made. One thing, however, seems clear. If action is not taken soon—if the present trend is allowed to continue—it will be only a matter of time until America is, literally, a nation of ex-cons.