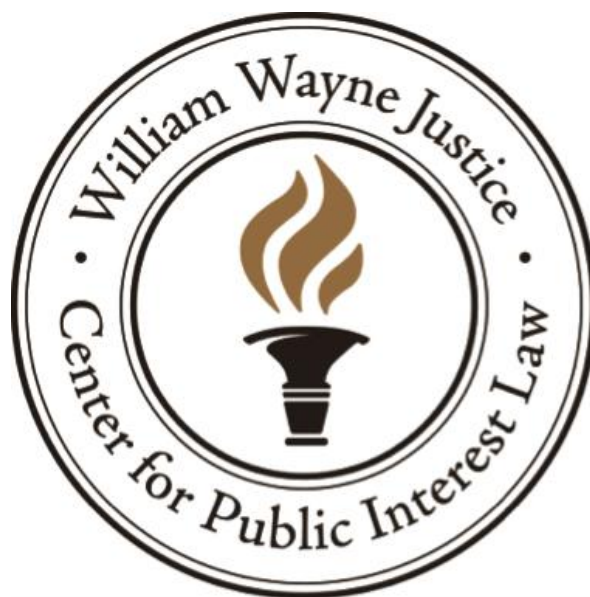


**Criminal Records in the Digital Age:
A Review of Current Practices
and Recommendations for Reform in Texas**



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Executive Summary

“Smart on Crime” reentry reforms have tended to focus on problems arising after criminal records are already publicly available. This is too late. Once criminal records have been released and incorporated into online databases it is difficult, if not impossible, to put the genie back in the bottle. It is time to broaden the reentry discussion and take a comprehensive look at how criminal records are accessed, disseminated, and utilized in this digital age and to find ways to make the criminal justice system more effective at providing meaningful opportunities for successful and lasting reintegration into our communities.

Across the United States criminal records are increasingly available to the public through government repositories and commercial vendors alike. The opportunities and benefits lost as a result of a criminal record create lifelong barriers for anyone attempting to overcome a criminal past.

- Easy access to records means that most employers and landlords routinely request criminal history information when screening applicants.
- A criminal record severely restricts most employment opportunities and can entirely eliminate the opportunity to work in hundreds of licensed professions.
- A criminal record makes it significantly harder to find housing, whether with private landlords or in publicly subsidized housing, with some offenses requiring lifetime bans.
- Government benefits, including, cash assistance, food stamps, and student loans, may be denied or restricted because of a criminal history.

More than 65 million adults nationwide have a criminal history; the numbers in Texas are equally alarming, with an estimated 4.7 million adults possessing a criminal record. These numbers continue to increase as more people are arrested and drawn into the criminal justice system. In Texas alone, law enforcement makes more than 1 million new arrests annually. All of these individuals are at risk for the long term negative collateral consequences that flow from a criminal record.

With the rise of the Internet and the emergence of electronic databases, more than 40 million criminal background checks are performed annually for non-criminal justice purposes. But despite the technological advances that make criminal records so easy and cheap to access, little oversight exists to ensure that the information being reported is accurate and legally compliant. Equally problematic is that efforts to minimize collateral consequences by limiting access to the criminal records are undermined by the absence of uniform statewide release procedures.

Widespread access to criminal records has serious long-term societal implications:

- Employment and housing are determinant factors in assessing recidivism risks, with the first year following release being the most critical time for reentry.
- Collateral consequences affect everyone in contact with the individual, including families and children. Many communities most affected already contend with high rates of unemployment, homelessness, and crime.
- The overrepresentation of African Americans and Latinos at every level of the criminal justice system puts these individuals at greater risk of harm.

The risk of recidivism and danger to public safety are the most common concerns voiced by those advocating for increased access to criminal records, but such fears are overstated. Few, if any, contend

that criminal history information is never a relevant factor to be considered. Problems arise, however, when policies and practices allow searches to include any past criminal involvement or law enforcement contact, regardless of offense, circumstance, and time passed. Restricting all opportunity for those living with a criminal record does not enhance public safety.

A review of legislative efforts from across the US illustrates the complex nature of these problems. Lawmakers must combine many small solutions to create comprehensive system-wide reform to better control access to and use of criminal records and to minimize downstream reentry barriers. It is time for Texas to engage in this same process.

The following ten recommendations deserve priority attention in Texas:

1. Apply uniform release procedures statewide to all criminal record holders. At a minimum, prohibit public access to all non-conviction records and to deferred adjudication records after discharge and dismissal of the underlying case.
2. Amend Texas Government Code 411.081 to further limit which entities can access non-conviction and deferred adjudication records.
3. Prohibit the release of deferred adjudication and conviction-related records after 5 to 10 years to all but criminal justice agencies, depending on the offense and disposition, and following successful completion of any supervision.
4. Prohibit the bulk release or bulk sale of criminal history information. Alternatively, permit bulk sales and bulk release of information only by DPS and only under specified terms.
5. Adopt a First Offender Statute for low-level nonviolent offenses, automatically expunging all related records following successful completion of any supervision.
6. Provide automatic “waiting period” expunctions, rather than requiring defendants to file a petition. Defendants could still file for a full expunction when eligible.
7. Provide automatic nondisclosure of deferred adjudications when eligible.
8. Allow full expunction of deferred adjudications and convictions after some waiting period.
9. Enact procedural reforms to ease the burden of seeking expunction or nondisclosure relief.
10. Convene a statewide task force to collect data and undertake research to better understand and attempt to quantify the actual (versus perceived) risks that accompany a criminal history, focusing in particular on questions of public safety, employment, and recidivism.

I. INTRODUCTION

In recent years, Texas has emerged as a national leader in criminal justice reform. “Smart on Crime” efforts appear to be paying off in terms of reducing prison populations and increasing sentencing options. Already, the numbers indicate that the first wave of reforms are improving thousands of Texas families’ lives and have saved the public more than \$2 billion dollars.¹

As positive as these reforms have been, the “Smart on Crime” movement has yet to address the broken and byzantine system by which Texas’ criminal records are accessed and disseminated. While reducing prison populations allows for significant cost savings, it does little to address the ongoing “invisible punishment” that those with a criminal record confront long after sentences have been served.² Statewide reentry programs (i.e., programs to support ex-offenders and their families) have likewise been largely silent on this issue.³

Millions of people are at risk of the severe and ongoing punishment that comes with a recorded criminal history. More than an estimated 65 million US adults have a criminal history.⁴ Roughly one-third of the records are for felony convictions; the remaining two-thirds cover misdemeanors and less serious offenses, including arrests not leading to conviction.⁵ Texas’ numbers are equally alarming. An estimated 4.7 million adults possess some kind of recorded criminal history;⁶ 1.7 million of these adults are living with a felony conviction record.⁷ These numbers will continue to increase as Texas law enforcement officers make more than 1 million new arrests annually.⁸

A criminal record can make it almost impossible to access the resources needed to reintegrate into one’s community, including: housing, employment, educational opportunities, and public benefits. The stigma from a misdemeanor arrest can trigger the same detrimental consequences as a felony conviction.⁹ Indeed, the personal and financial costs from these collateral consequences can be enormous and far reaching, harming not only the individual with the criminal record, but also their children, families, and the wider community. Individuals lose hope of ever overcoming the stigma of a criminal record; children’s basic needs are unmet when parents are unable to access housing and employment; employers lose out on the expertise, skill, and drive that many of these individuals could offer; and the wider community pays the ultimate price through increased recidivism attributed to unemployment, homelessness, and other destabilizing factors.¹⁰

State lawmakers from around the U.S., mindful of these tremendous costs, are enacting comprehensive system-wide reforms to better control criminal record access and use and minimize the downstream barriers associated with having a criminal history.¹¹ With multiple complex systems at play, advocates and policymakers have come to realize that isolated incremental “fixes” are not enough.

Sections II, III, and IV discuss the problems associated with cheap and virtually instant access to criminal records, as well as the justifications for relying on them.¹² Section V examines how Texas maintains criminal history information and what limits, if any, exist on their dissemination and use. Section VI offers examples of reforms from around the US designed to limit criminal record dissemination and use. Finally, Section VII provides recommendations for how Texas can be even “smarter” on crime –

enhancing public safety while ensuring people with criminal histories have a truly meaningful second chance.

II. THE PROBLEM: CRIMINAL RECORDS AND COLLATERAL CONSEQUENCES

In today's system of widespread and open access to criminal history records – through commercial vendors and government repositories – it is almost impossible for an individual to overcome a criminal history. Extending far beyond any judicially imposed punishment, many additional consequences flow “collaterally” from a person's criminal history, creating lifelong barriers to housing, employment, and other critical resources. These negative consequences can persist regardless of the offense's severity or whether an arrest is ever prosecuted. A review of Texas' largest urban counties illustrates the wide reach of collateral consequences and the harm inflicted.

Collateral consequences reach across generations and can impact families and children and disproportionately affect communities of color. The communities hardest hit are often the same communities already contending with unemployment, homelessness, crime, and other societal issues.

Collateral Consequences Overview

The American Bar Association and the National Institute of Justice have launched a searchable national inventory of collateral consequences.¹³ As noted in the inventory's preface:

“While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more important and more problematic in the past 20 years for three reasons: they are more numerous and more severe, they affect more people, and they are harder to avoid or mitigate. As a result, millions of Americans are consigned to a kind of legal limbo because at one point in their past they committed a crime.”¹⁴

Collateral consequences affect people in different and often unexpected ways; the two most prevalent and problematic areas are housing and employment. The following overview focuses on four of the most serious consequences affecting people with a criminal history.¹⁵

EMPLOYMENT: A criminal record severely restricts most employment opportunities and can entirely eliminate the opportunity to work in hundreds of licensed professions.¹⁶ The ongoing impact of these consequences is enormous, creating lifelong barriers to employment and lowering lifetime earning potential.¹⁷

Both public and private employers impose employment barriers. A majority of private sector employers in one study reported they would “definitely” or “probably” not hire an applicant who had a criminal history.¹⁸ In the public sector, the US Census Bureau required job applicants for the 2010 census to provide “official court documentation” for all arrests. Documentation was required regardless of arrest outcome or the nature of the offense or even its connection to the job being sought. This one requirement eliminated about 700,000 applicants (93%) from consideration.¹⁹

Professional licensing requirements create many of the barriers. As of 2008, Texas had more than 150 licensed occupations accounting for nearly one-third of the Texas workforce.²⁰ To illustrate, the Texas Private Security Board denied nearly 10,000 applicants work in one of its 16 regulated professions based on “unacceptable criminal histor[ies].”²¹ Nationwide, licensing restrictions are estimated to cost nearly \$35-40 billion in lost employment growth.²²

The kind of jobs available to those with a criminal history also is important. The Urban Institute reports that ex-offenders earning less than \$7 per hour are twice as likely to re-offend as those earning \$10 hour.²³ Thus, while it is an important first step for an individual to have any job, it may be just as important for the job to pay a living wage and offer some job satisfaction. Typically jobs most available to persons with a criminal history are low-level positions paying well below the federal poverty level. Such wage barriers present heightened recidivism risk and lower lifetime earning potential – making it almost impossible to get ahead and eliminate the significant debt associated with criminal justice involvement (i.e., fees, fines, restitution, etc.).

Travis County and the City of Austin have enacted “ban the box” laws that prohibit asking an applicant for criminal history information until after the initial interview.²⁴ The idea is to give all applicants the opportunity to display their qualifications and avoid relying on criminal history information as a basis for rejecting applicants. Bexar County has voluntarily instituted similar practices for some county positions.

HOUSING: A criminal record makes it significantly harder for an individual to find housing, whether with private landlords or in publicly subsidized housing. Yet we know that finding stable housing is a critical factor in reducing recidivism and parole violations.²⁵

A majority of ex-offenders will stay in homeless shelters at some point following their release.²⁶ Individuals who end up in temporary shelters are significantly more likely to reoffend, as they have a harder time resisting drugs and finding work. In fact, an ex-offender’s chance of re-arrest goes up approximately 25% with each move post-release.²⁷ This link between housing and criminal conduct runs in both directions. A Bureau of Justice report (2006) found almost 50% of homeless adults had spent five or more nights locked up in a city or county jail.²⁸

In the private market, affordability and perceived risks associated with ex-offenders close many doors. Of the landlords and property managers who participated in one survey, 66% reported they would not accept an applicant with a criminal history.²⁹ Landlords are hesitant to rent to persons with a criminal history out of worry of increased liability from lawsuits. According to John Mitchell, Apartment Association of Tarrant County’s executive director, “if risks could be limited . . . landlords and property owners would open up their portfolios to some nonviolent ex-offenders.”³⁰ As for affordability, persons with a criminal history are hard pressed to earn enough to afford even basic shelter. Today’s tight rental market only makes things harder.

Equally problematic are the barriers confronting persons with criminal records who are seeking public housing. Already facing a chronic shortage of available units, public housing authorities (PHAs) are

charged with implementing the US Department of Housing and Urban Development's eligibility guidelines. These guidelines mandate exclusion for just two categories of criminal conduct: (1) tenants (or any member of the household) who have ever been convicted of drug-related criminal activity involving the production or manufacture of methamphetamine on the premises of federally subsidized public housing, and (2) tenants (or any member of the household) who are subject to lifetime sex offender registration.³¹ Beyond these two categories, it is left to each PHA's discretion to decide how to utilize criminal records for tenant selection.

With few exceptions, PHAs have tended to go beyond HUD's guidelines, excluding applicants with criminal histories who fall outside the two mandated categories.³² The practice is so widespread that in 2011 HUD Secretary Shaun Donovan issued an open letter to PHAs urging them to "balance" competing interests and revisit policies that unnecessarily exclude individuals solely on criminal history.³³ The following year, a similar letter was sent to private HUD-assisted rental property owners.³⁴ Of particular concern to HUD are individuals denied housing even though they have had no further involvement with the criminal justice system and/or show evidence of rehabilitation.

EDUCATIONAL BENEFITS: Barriers arise through admissions policies and the automatic loss of financial aid (both federal and Texas) for students convicted of a felony drug offense while receiving aid.³⁵

Many colleges' application processes require individuals to report their criminal history. This practice will have a discriminatory impact on students of color, given their disproportionate representation in the criminal justice system. It also affects students who have a history of low-level offenses that have little, if any, bearing on educational success or campus safety.³⁶ Unchecked discretion in the admissions process with respect to evaluating criminal records means a school's risk assessment of different offense categories, for example alcohol versus drug offenses, can lead to unfair and racially skewed outcomes.

The federal law banning students from federal financial aid for a period of one or more years after being convicted of a felony drug offense while enrolled and receiving Title IV financial aid presents another barrier.³⁷ Texas imposes similar sanctions on receiving state financial aid.³⁸ These laws have a greater impact on low-income students and students who cannot pursue higher education without assistance.³⁹ Moreover, the disproportionate drug arrest and conviction rates for persons of color means banning educational benefits based on these offenses will have a discriminatory impact.

FEDERAL BENEFITS: The federal government permanently bans individuals with felony drug convictions from obtaining food stamps and cash benefits.

The 1996 Welfare Ban imposes a lifetime ban on anyone with a felony drug conviction (after August 22, 1996) from receiving cash/public assistance (TANF) or food stamps (now SNAP). States may opt out or modify the Welfare Ban, and most have done so for both SNAP and TANF benefits, either opting out entirely or requiring some additional steps to regain eligibility. Only seven states, including Texas, still fully implement the ban.⁴⁰

Who's Affected? A Look at the Numbers in Texas

The good news is both Texas' major crime and recidivism rates are declining. The Texas Department of Public Safety reports that for 2011, Texas' violent crime rate decreased 9.3% and the property crime rate decreased 8.3%, when compared to 2010 rates.⁴¹ Arrests fell as well, declining 6.1% from the previous year. In terms of overall numbers, this equates to approximately 8,000 fewer violent crimes (-7.4%), 60,000 fewer property crimes (-6.4%), and 80,000 fewer arrests from the previous year. According to a Council of State Governments (2012) report comparing recidivism rates, recidivism is down 11% for offenders released from Texas facilities in 2008 versus those released in 2005 (tracking three years from release).⁴²

Despite these declines, over the last twenty years Texas' incarcerated population has grown faster than in other states and, as of 2011, accounted for the largest prison population in the US.⁴³ An estimated 70,000 individuals are released from Texas prisons annually, with another million individuals circulating through local Texas jails.⁴⁴ Over the coming years, more and more prisoners will become release eligible. Eventually 95% of the current population will be released and will require state-based assistance to successfully reintegrate. Texas is unprepared for this reality.

As discussed, criminal records subject ex-offenders to a wide range of collateral consequences and barriers to successful reentry and reintegration. Ex-offenders know this fact all too well. According to an Austin/Travis County Reentry Roundtable survey (2011) more than 75% of respondents identified a criminal record (misdemeanor or felony) as their biggest reentry barrier.⁴⁵ Likewise, Silva (2010) in a Tarrant County homelessness study reported more than 75% of those surveyed identified criminal records as the main reason they were unemployed.⁴⁶

"They don't have a job. They can't afford first and last month's rent, which is huge. So they drift, from the homeless shelter to the couch of a friend to a low-rent hotel. And that's the lack of stability, the chaos in which small – and sometimes large – crimes flourish."

– Vincent Schiraldi, President of the Justice Policy Institute.⁴⁷

Texas' six largest metropolitan counties, where the majority of people being released tend to cluster, illustrate the degree to which criminal records exclude and marginalize ex-offenders.⁴⁸

Harris County: Texas' most populous county has the most arrests every year. Harris County also is home to the state's largest number of ex-offenders, with nearly 15,000 individuals released into the Houston area each year. In 2011, DPS reported Harris County had 3,890 violent crime and 19,192 property crime arrests. City of Houston arrests made up 77% (2,984) of the violent crime arrests and 64% (12,201) of property crime arrests for the county. The rates of arrest per 100,000 residents were 708.4 (Houston) and 382.9 (Harris County), respectively. In 2010, Harris County had an overall unemployment rate of 8.5%, but parolees' unemployment rate was 46%. More than 25% of respondents to Harris County's 2012 Point-in-Time Homeless Survey (PIT Survey) reported spending at least one night in jail or prison during the preceding twelve months, a significant increase from a year earlier.⁴⁹

Dallas County: In 2011, DPS reported Dallas County had 3,662 violent crime and 12,891 property crime arrests. The City of Dallas accounted for approximately 50% (1,835) of the violent crime arrests and 41% (5,296) of the property crime arrests. The rates of arrest per 100,000 residents were 583 (City of Dallas) and 652.7 (Dallas County), respectively. In 2010, Dallas County had an overall unemployment rate of 8.8%, but parolees' unemployment rate was 52%. Half of the respondents to Dallas County's 2012 PIT Survey reported job loss or unemployment as the cause of their homelessness, with 76% of respondents reporting being either underemployed (10%) or unemployed (66%). Twenty percent of respondents to the PIT survey reported having a prior criminal history.⁵⁰

Tarrant County: In 2011, DPS reported Tarrant County had 2,533 violent crime and 12,043 property crime arrests. The City of Fort Worth accounted for 48% (1,221) of the violent crime arrests and 43% (5,237) of the property crime arrests. The rates of arrest per 100,000 residents were 853.3 (Fort Worth) and 780.7 (Tarrant County), respectively. In 2010, Tarrant County had an overall unemployment rate of 8.2%, but parolees' unemployment rate was 49%. Three-quarters of respondents to a recent county survey on homelessness reported criminal records to be the "main reason" they were unemployed.⁵¹ That same year, a reported 10% of offenders released into Tarrant County were homeless at the time of their release.⁵²

Bexar County: In 2011, DPS reported Bexar County had 2,183 violent crime and 11,567 property crime arrests. The City of San Antonio accounted for the majority of both violent crime (89%) and property crime arrests (88%). The rates of arrest per 100,000 residents were 895.3 (San Antonio) and 406.4 (Bexar County), respectively. In 2010, Bexar County had an overall unemployment rate of 7.5%, but parolees' unemployment rate was 43%. Data on homelessness and criminal records in Bexar County and San Antonio was scarce, but roughly 10% of respondents to the 2012 PIT Survey reported "prison, hospital, rehab" as the reason for their being homeless.⁵³

Travis County: In 2011, DPS reported Travis County had 1,173 violent crime and 6,360 property crime arrests. As in Bexar County, arrests were not broadly distributed, with the City of Austin accounting for the majority of violent crime arrests (84%) and property crime arrests (87%). The rates of arrest per 100,000 residents were 805.8 (Austin) and 378.58 (Travis County), respectively. In 2010, Travis County had an overall unemployment rate of 6.9%, but parolee's unemployment rate was 51%. In terms of housing, 60% of Travis County's homeless population reported jail or prison stays.⁵⁴ One recent review reported individuals with felony convictions have access to only 3% of Austin apartment complexes.⁵⁵

El Paso County: In 2011, DPS reported El Paso County had 1,177 violent crime and 4,155 property crime arrests. The City of El Paso accounted for nearly all crime arrests, including 89% (1,052) of the violent crime and 95% (3,966) of the property crime arrests. The rates of arrest per 100,000 residents were 757.2 (City of El Paso) and 202.9 (El Paso County), respectively. In 2010, El Paso County had an overall unemployment rate of 9.8%, which was the highest of

Texas' six largest counties, but parolees' unemployment rate was 56%. Data on homelessness and criminal records was not available.

Driven in part by a growing appreciation for collateral consequences' social and individual costs, Texas has experienced an increased focus on reentry services and support. Together with the legislatively-created Statewide Reentry Taskforce, Texas' urban counties and cities have been working to reduce collateral consequences' negative outcomes.⁵⁶ However, these efforts have focused primarily on the problems occurring after criminal records have already been made publicly available. This is too late. Once criminal records have been publicly released and incorporated into online databases, it is difficult, if not impossible, to remove them from circulation or control their use.

Disproportionality and the Criminal Justice System

Throughout Texas and the US, people of color have disproportionate criminal justice system contact. The overrepresentation of African Americans and Latinos at every level of our nation's criminal justice system renders concerns about collateral consequences all the more pressing.⁵⁷ The National Council on Crime and Delinquency notes that at each stage, including arrest, court processing, sentencing, incarceration, supervision, and recidivism, "persons of color, particularly African Americans, are more likely to receive less favorable results than their White counterparts."⁵⁸ The disparities are not static; they "accumulate" and "widen" as one proceeds deeper into the system.⁵⁹ National statistics illustrate this disparity:

- African Americans are arrested at more than twice the rate of Whites, representing 28.3% of all US arrests, but only 12.9% of the population.⁶⁰
- Latinos are twice as likely and African Americans 87% more likely than Whites to experience pretrial incarceration as a result of the inability to make bail, due in large part to fewer "economic resources and networks."⁶¹
- African Americans are up to 15 times more likely than Whites to be arrested for low-level offenses.⁶²
- Latinos are 2 times more likely than Whites to be admitted to state prison for drug related offenses.⁶³ According to one study, the majority of Hispanics incarcerated in New York, for example, were for drug offenses even though their rate of illicit drug use (38.9%) is less than for Whites (54%).⁶⁴
- With respect to incarceration, 1 of every 194 Whites experience some form of incarceration versus 1 of every 64 Latinos and 1 of every 29 African Americans.⁶⁵ Looking at younger men only, 1 out of 9 African American men aged 20-34 is incarcerated at any given time.⁶⁶

Texas' numbers paint a similar picture, especially for African Americans.⁶⁷ For example, African Americans constitute 11% of Texas' adult population, but account for 27% of drug arrests and 36% of the prison/state jail population.⁶⁸ Further, African Americans represent a disproportionate amount of low-level offenses and minor drug offenses. By contrast, Texas' Latino adults fare slightly better with an incarceration rate nearly equal to their share of the state's adult population (32% versus 34%).⁶⁹ However, Texas' Latino adults may face greater disparity during sentencing, as they are more likely than Whites or African Americans to serve their sentences in prison rather than state jail facilities,⁷⁰ and less

likely to be diverted to drug courts, which typically offer additional treatment options and reduced sentences.⁷¹

With persons of color overrepresented at every stage of the criminal justice system, the collateral consequences triggered by criminal records created in this same system disproportionately impact this same population. The Equal Employment Opportunity Commission, attempting to address these issues, identifies how and when employers may utilize criminal records without raising discriminatory impact concerns.⁷² As discussed below, the EEOC prohibits hiring bans based on criminal records, calling instead for individualized assessments and the relevance of a criminal history, if any, to the job being sought. Non-compliance with EEOC guidelines subjects employers to prosecution for violating Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, gender, national origin, and other protected categories.⁷³

Reaching Across Generations and Communities

The long-lasting harm from criminal records is severe and affects every societal sector, from families and children to communities and schools. The intergenerational effects of criminal involvement -- and by extension the collateral consequences -- are well documented. Among incarcerated individuals, almost half have family members who have also been incarcerated. Incarcerated individuals leave behind their children, so that today 1 out of every 28 children in the US has at least one parent incarcerated.⁷⁴ For African American children the numbers are even more concerning, with 1 out of 9 children growing up with an incarcerated parent.⁷⁵

Children with parents involved in the criminal justice system have higher rates of delinquency, increased behavioral troubles, and are at higher risk of dropping out. When a parent is incarcerated children are 6-8 times more likely than other children to end up incarcerated.⁷⁶

Diminished access to employment, housing, education, and government benefits can be devastating. Restricted employment opportunities mean individuals with criminal histories are less able to pay child support, make restitution, or cover other outstanding financial obligations (including supervision costs and court fees). Without regular income, individuals are unable to find and retain stable housing and secure medical benefits, leaving them without access to critical medical and behavioral health care or treatment programs.⁷⁷ For many, the consequences have no end in sight with ex-offenders facing a “decreased lifetime earning potential” of 10-20%.⁷⁸ Gainful employment, stable housing, and drug and alcohol treatment are all closely correlated with reduced recidivism.

In the end, the collateral consequences associated with having a criminal history “tear families apart, create unemployment and homelessness, and guarantee failure, thereby harming parents and children, families, and communities.”⁷⁹ Widespread access to criminal history records on the Internet, through commercial vendors, and from the individual record holders magnifies these already significant problems, increasing the long-term costs to the individuals and the general public.

III. AN OUTDATED SYSTEM: OPEN ACCESS TO CRIMINAL RECORDS

Criminal histories come to light either through direct questioning or as the result of a criminal background check. While aggressive questioning about an individual's criminal history can be a problem, contemporary background checking practices are of greater concern. This section reviews some of the common criticisms of criminal background checks, ultimately concluding that increased limits on the background checking industry's access to and use of criminal records are necessary.

The Background Checking Industry

Almost all US employers request criminal history information as part of the hiring process.⁸⁰ Many of the largest US employers, for example Wal-Mart, Walgreens, Target, and CVS, demand background checks on all or virtually all applicants.⁸¹ Smaller businesses have also jumped on the criminal history bandwagon. Housing, educational, and governmental civil searches reinforce this practice. Consider the following:

- The FBI performs more background checks for civil purposes than for criminal investigations,⁸² with more than 12 million civil requests for criminal records in 2006 and almost 6 million checks conducted for employment and licensing alone in 2009.⁸³
- California performs about 1.5 million searches annually pursuant to state licensing procedures.⁸⁴ Across the United States, 40 state criminal history repositories performed 172% more name-based background checks for non-criminal justice agencies in 2008 than in 2006 (42 million versus 15.5 million).⁸⁵
- ChoicePoint, one of the largest background checking companies, alone conducts 10 million searches annually.⁸⁶
- Entry-level and unskilled positions typically require criminal history information. Craigslist job postings routinely require a "clean" background or advertise that no one with a criminal history – felony or misdemeanor – will be considered.⁸⁷ A review of job postings in some of Texas' largest cities shows a similar pattern, especially for low wage or unskilled positions (e.g., general laborer, warehouse worker, and customer service call center operator).

Increased reliance on criminal background checks has translated into unprecedented financial growth for the background checking industry. Background checking companies have reported 40% or higher year-to-year revenue growth, denoting revenues in the hundreds of millions.⁸⁸ One company nearly tripled its revenues from 1997 to 2008 (\$400 million to \$1.1 billion), eventually selling for \$4.1 billion.⁸⁹ This enormous financial growth has been accompanied by a similar rise in the number of companies offering background checking services. Without a national registry, it is impossible to track the number of companies currently operating. However, a simple Google search for "criminal background check" returns more than three million hits, including commercial companies advertising, among other things, "anonymous and accurate" services to help people/organizations "find the truth" and "uncover all that you can about someone's past."

Amidst the economic windfall, concerns about accuracy, fairness, and how records are to be used have been lost. In other words, the more commoditized the product, the more frequent the mistakes.⁹⁰ Given

these trends and the lack of meaningful oversight, it should come as no surprise the industry has been described as a modern “Wild, Wild West.”⁹¹

Common Practices and Pitfalls

Concerns with the background checking industry’s current practices fall mainly into two categories: record-related and process-related.

Criminal background reports are only as reliable as the underlying records from which they draw.

A handful of large data aggregators compile records from many sources, including state repositories, local government offices, and other criminal history record holders. Bulk purchases from individual record holders is how records are typically obtained, but they can also be acquired via screen-scraping technology (when remote online access is available), open records requests, or by sending runners to individual offices to manually download information from on-site terminals.⁹² These aggregators later sell their information to other background checking companies. Some companies advertise databases containing in excess of 450 million records, which include criminal records, as well as driving, credit, and other records frequently utilized in background checks.

“Many companies in the background screening industry, including most of the largest firms, play fast and loose with court record information, selling information to employers although they know that the data is bad and will lead to faulty hiring decisions. They ignore the federal Fair Credit Reporting Act’s requirement that they follow ‘reasonable procedures to ensure maximum possible accuracy’ of the reports they deliver and then quickly settle any lawsuits that come along, sometimes for millions of dollars. Hear that: they make so much money selling the bad data to employers that it is worthwhile to settle the cases for millions so that their practices are not scrutinized by the court.”

– Mike Coffey, President and Founder, Imperative Information Group.⁹³

Troubles begin when background checking companies that purchase records from large aggregators fail to update the information. And the aggregators themselves may not update information as frequently as needed given the fluid nature of criminal justice proceedings. Thus, Checkmate.com’s website advertises it can help “find the truth” but then cautions that its information “may not be 100% accurate, complete, or up to date, so do not use it as a substitute for your own due diligence, especially if you have concerns about a person’s criminal history.”

Further, states frequently do not have adequate procedures to ensure their records’ accuracy. In Texas, for example, until last year, the completeness rate for DPS’ state criminal records repository routinely fell below acceptable levels, with some counties reporting less than 30% of arrest dispositions.⁹⁴ Many states face the same problem.⁹⁵ This is also true at the federal level, as the FBI has previously reported almost 50% incompleteness based on a random record audit.⁹⁶ At the local level, few county or other local government agencies audit their criminal records for accuracy and completeness.⁹⁷

Inaccurate or incomplete records, and their subsequent damage, should not be underestimated. News accounts are filled with stories of employers and landlords receiving erroneous and misleading reports of criminal offenses and mistaken final dispositions, almost always at an innocent person's peril. It is worth noting that the problems run both directions, as databases may omit records and other relevant information about someone's criminal history.⁹⁸ The complaints of frequent and substantial inaccuracies are "true" for "much of the industry," making relying on criminal background checks when rendering any significant determinations questionable at best.⁹⁹

Even if criminal history records are accurate and updated, they can be confusing and hard to interpret without specialized knowledge or training. Different jurisdictions use different names or offense categories to describe similar conduct. Someone not familiar with a particular state's criminal code or legal requirements may misinterpret an arrest for "kidnapping" or "robbery" as being much worse than the underlying facts warrant. Reporting agencies also frequently neglect to combine allegations, thus producing lengthy multipage reports to a single arrest. In each of these examples, it would be easy for a background report user to confuse what might have been a minor incident with conduct that could be of much greater concern.

Many procedural issues relating to criminal background checks are no less troubling, including faulty search techniques and inadequate complaint procedures.

Sloppy search techniques cause many reporting inaccuracies. A mismatched record, where a search assigns records to the wrong person, is an "unbelievably common occurrence."¹⁰⁰ These mistakes are easy to make when companies rely on the barest minimum of search criteria, typically just name and date of birth, rather than utilizing more robust search methods. Thus, notwithstanding the Fair Credit Reporting Act requiring credit reporting agencies to ensure "maximum possible accuracy,"¹⁰¹ a Department of Justice report found that 1 in 20 (5.5%) name-based checks produced a "false positive" reporting a record where none existed.¹⁰² With millions of searches conducted every year, a 5.5% error rate quickly leads to hundreds of thousands of individuals suffering irreparable harm through inadequate search methods.

Equally problematic is the process for correcting errors when inaccurate records are identified. Even if the error is corrected in one set of records, it is almost impossible to follow the dissemination chain from one company to another and make sure that all databases contain the correct information. The consequences are all the more serious when dealing with expunged or sealed information. A person may be accused of failing to disclose a criminal history because a criminal background report contains an expunged or sealed record. A job applicant – who, in accordance with the law, did not disclose the expunged offense – will be denied employment for "lying," even though the offense should never have been reported. This is truly a losing scenario for anyone who has expunged or sealed a criminal record, and one reason why some attorneys advise clients not to bother with an expunction or nondisclosure petition.

Despite this wide range of problems, few meaningful enforcement mechanisms exist to rein in even the most egregious practices. A recent uptick in activity suggests that the Consumer Financial Protection

Bureau and the Federal Trade Commission, which together oversee the Fair Credit Reporting Act, may be increasing their oversight.¹⁰³ Nevertheless, the brunt of enforcement is left to the individuals who are harmed by the reports and who often have the fewest resources or capacity to fight these companies.

“To tell someone their record is gone is essentially to lie to them. . . . In an electronic age, people should understand that once they have been convicted or arrested that will never go away.”

– Lida Rodriguez-Taseff, Attorney.¹⁰⁴

Past Calls for Reform

The background screening industry has been slow to adopt even modest “best practices” to improve accuracy and minimize reporting erroneous or misleading information. Advocates and policy makers have proposed numerous reforms. Among the most common: (1) require companies to utilize additional search criteria beyond name and birth date, (2) require records to be updated on a frequent and regular schedule, (3) require companies to disclose information sources so that individuals can locate and correct erroneous information, (4) require companies to verify records lacking final dispositions, and (5) require streamlined and uniform reporting methods to minimize user confusion and avoid duplicate reporting. Efforts to impose external regulatory control over industry practices have met with limited success.

Internal industry efforts to create professional certification processes or establish industry best practices have also proven illusory. The National Association of Professional Background Screeners (NAPBS) initiated a licensing scheme where member companies voluntarily sign a form agreeing to implement certain safeguards. The problem is that, as of 2012, less than 1% of NAPBS’ 2,137 online members had signed the pledge.¹⁰⁵ Moreover, since the pledge is entirely voluntary, it provides no mechanism to audit practices or track compliance. A second professional organization, ConcernedCRAs, may prove to be a better vehicle for initiating change.¹⁰⁶ As a way to increase accuracy, the group’s members pledge to verify any criminal record before reporting, but as with NAPBS’s accreditation scheme, compliance is entirely voluntary, with no enforcement mechanisms or threat of sanctions.

Responsible industry players recognize why standards and best practices are needed, but significant changes require altering day-to-day practices, including record retrieval and search methodologies. With companies displaying little motivation to improve practices, policymakers must strengthen external oversight and create meaningful enforcement mechanisms. Limiting the companies’ access to and use of criminal history records are two of the surest ways to protect public safety, while ensuring the fair and responsible use of this information.

IV. WHY PEOPLE CARE: PUBLIC SAFETY AND LIABILITY RECONSIDERED

Background screening companies, human resources professionals, landlords, and law firms interested in eliminating any risk of liability for their clients, no matter how unlikely, all promote widespread access to and use of criminal records.¹⁰⁷

The “Public Safety” Argument

A frequent claim of those advocating for open access to criminal records is that screening employees and tenants, among others, for past criminal involvement, keeps the public safer by limiting contact with these individuals. These advocates rarely present specific data linking ex-offenders with increased incidences of workplace violence, theft, or premises liability, and a review of the available literature, including academic studies, policy reports, and industry materials, fails to produce anything to support such broad claims.¹⁰⁸

Recidivism fears are an integral part of the debate over criminal background checks.¹⁰⁹ Recidivism is a serious issue and many individuals who have been involved with the criminal justice system in the past have not just one, but a string of arrests or convictions that must be explained. Employer concerns about workplace liability – whether through negligent hiring lawsuits or even the threat of a lawsuit – require attention. Likewise, landlord concerns about premises liability and maintaining habitability and safety standards for the protection of other tenants merit serious consideration. In short, few, if any, would argue that criminal history information is never relevant. Problems arise, however, when policies and practices allow searches to include any past criminal involvement or law enforcement contact, regardless of offense, circumstance, and time passed.

In contrast with the current practice of widespread and open access to criminal history information, the available evidence supports limiting access to and use of criminal history information for the following reasons:

“Recidivism declines steadily with time clean.”¹¹⁰ So-called “point of redemption” studies indicate ex-offenders’ recidivism risks diminish over time. Once a person has reached the redemption point without reoffending, the risk the person will commit another crime is not meaningfully greater than for individuals in the general population. The length of time required for an individual to reach this point varies based on a number of factors, such as the offender’s age at the time of the original offense and offense type, but the typical time frame is estimated to be approximately seven years.¹¹¹ Many states have used this time frame as a guide in deciding when to permit expunction or sealing of criminal records, including conviction records.¹¹²

Successful and speedy reintegration of offender populations into the local community promotes public safety and reduces risks of re-offending. Unemployment and lack of housing and other critical resources positively correlate with increased recidivism rates, while expanded opportunity and successful reintegration reduce recidivism.¹¹³ Employment and housing are determinant factors in assessing recidivism risks, with the first year following release being the

most critical.¹¹⁴ Indeed, the first year alone may “account for nearly two-thirds of all re-offending.”¹¹⁵

Restricting ex-offenders’ employment, housing, and other legitimate opportunities does not enhance overall public safety. The individual unable to access a job or housing because of a criminal history continues to live in the community, walking its streets, utilizing its public facilities, and visiting its stores.

“It’s crazy. . . . My parole conditions allow me to go to a restaurant, buy food and sit there and fraternize with the customers all day long. But I can’t go up on their roof and fix their air conditioning.”

–Stephen White, ex-offender.¹¹⁶

The “Negligent Hiring” Argument

Employers often claim that they will be subject to negligent hiring lawsuits if they hire persons with criminal histories.¹¹⁷ However, such arguments typically lack evidence indicating that employees with criminal histories are more likely to commit illegal acts at the work place or to injure colleagues and others in the course of their employment.¹¹⁸

Negligent hiring is a legal doctrine where employers can be held liable for their employees’ harmful actions. The theory claims employers are in the best position to determine if a prospective employee poses heightened risks of danger to others. Texas’ general standard states “[a]n employer owes a duty to its other employees and to the general public to ascertain the qualifications and competence of the employees it hires, especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others.”¹¹⁹ The duty is “not avoiding a general propensity for bad acts, but to protect the public and fellow employees from workers who are unsafe or dangerous on the job.”¹²⁰

Courts hold that even where a particular position may trigger a heightened duty, such as working with children or vulnerable adults, the employer still need only assess competence and qualifications as “directly related to the duties of the job at hand.”¹²¹ A criminal record is just one of many possible grounds for finding liability, other grounds might include inadequate skill or training and other factors relating to an employee’s incompetence. Accordingly, courts have avoided imposing a general duty to perform criminal background checks on all employees,¹²² instead questioning whether an employer knew or should have known that an individual was “particularly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.”¹²³ In other words, courts question whether an employee’s history made the specific harm “foreseeable.”¹²⁴

Fear of negligent hiring liability is greatly exaggerated. In fact, few negligent hiring cases are ever filed. Further, the ones that are filed generally raise issues involving neither criminal records nor a failure to perform a criminal background check.

- A Council for Court Excellence study found only five examples involving Washington DC employers over the last several decades. Despite this low risk, the study concluded the

“impact [of potential lawsuits] on a private employer’s risk management calculus [was] likely significant.”¹²⁵

- A recent national case review estimates the risk an employer will be successfully sued for negligent hiring in any given year to be no more than a fraction of 1%.¹²⁶ Further, almost half of the negligent hiring claims reviewed involved issues other than past criminal histories or background check failure. The case review concludes: “the risk is much less than employers believe and is confined to a relatively small number of jobs.”¹²⁷
- Texas case law suggests similarly low rates, with 14 reported negligent hiring decisions over the past five years and only 1 decision finding against the employer. Notably, only 2 of the 14 cases involved criminal records issues.¹²⁸ A Westlaw search for Texas “negligent hiring” decisions (state and federal) revealed only 78 cases with reported decisions in the past three decades – an average of 2.6 cases per year.

Employers who are on record hiring persons with criminal histories report no observable increase in workplace conflict. A Texas Public Policy Foundation (2007) review reported the Texas Plumbing Board, which approves licenses for more than three-quarters of its applicants who hold criminal records, had not observed licensed ex-offenders to be any more likely to commit a criminal offense.¹²⁹ Travis and Bexar Counties and the City of Austin, all of which have some policy in place controlling when certain applicants may be asked about criminal histories, also report no observed increase in workplace safety concerns or employee-related criminal activity.¹³⁰

“You cannot figure out from demographic characteristics who is going to be violent. . . . It has nothing to do with figuring out in advance who the ‘bad people’ are.”

–Mark Braverman, Ph.D., Clinical Psychologist.¹³¹

According to workplace security experts relying on criminal histories to predict who may pose a criminal threat, as an attempt to prevent workplace violence and negligent hiring liability, is both wrong *and* dangerous.¹³² The practice is wrong because of the harm inflicted without regard for individual circumstances; dangerous because of the frequent inaccuracy, incompleteness, and lack of relevance of the underlying records. The Workplace Violence Research Center (2012) identified the following workplace violence offender commonalities: White male (35-45 years of age), migratory job history, loner, chronically disgruntled, externalizes blame, takes criticism poorly, identifies with violence, more than a casual user of drugs and/or alcohol, and possesses a keen interest in firearms and other dangerous weapons.¹³³ Notably, having a criminal history is not included.¹³⁴

To the extent employers’ liability fears negatively affect hiring opportunities, the issue can and should be addressed with negligent hiring liability limitations. No fewer than six states already have such provisions in place; another seven states have similar proposals pending.¹³⁵ Texas advocates have urged similar legislative action, and these efforts, taken in conjunction with other system-wide reforms, merit renewed consideration.¹³⁶

The “Employability” Argument

A third reason for relying on criminal background checks can be summed up as a belief in past performance predicting future behavior.¹³⁷ Searching for ways to assess an applicant’s employability, employers have looked to criminal background checks as a cheap and easy proxy to evaluate “fit” and trustworthiness. However, these checks can be misleading and contain information about alleged conduct that has never been factually established.

Nearly one-third of all arrests end up being dismissed.¹³⁸ Arrests are dismissed for many reasons, including basic factual errors (e.g., such as mistaken identity and false reporting). The fact that an individual has been arrested, without other information, offers neither proof of past conduct nor a sound basis for predicting future behavior. For this very reason, when evaluating “business necessity” for employment purposes, federal courts “distinguish arrest inquiries from conviction inquiries because arrest records are not per se proof of any criminal act and, therefore, bear no rational relation to the ability to perform adequately as an employee.”¹³⁹

Criminal record reports do not include information about an arrest’s factual circumstances or the role the arrestee may (or may not) have played in the alleged incident. These reports only contain easily collected, raw information. Those who use criminal background checks may insist they do not automatically equate evidence of an arrest record with an assessment that a person is untrustworthy, but if relying on background checks alone, they will not receive the mitigating information needed to question the inference.

Pleading to a reduced charge for time served or agreeing to community supervision in exchange for deferred adjudication may leave an innocent individual with a false criminal record. Individuals who are otherwise innocent may plead guilty for a variety of reasons including: avoiding the expense and delay of going to trial, not having resources to make bail, pleading guilty to gain release from jail rather than await trial to assert their innocence and contest the charges, or prevailing on appeal and then accepting a plea bargain in exchange for immediate release.¹⁴⁰ For Texas defendants, pleading guilty to any crime means a conviction record that is not expungeable (or sealable if anything other than deferred adjudication).

Most defendants first learn of their guilty plea’s collateral consequences when they seek to expunge or seal their record. During the plea agreement, defendants receive limited information regarding the serious and permanent consequences associated with conviction records. Lack of knowledge about this “permanent punishment” casts a shadow over the voluntariness of their plea.¹⁴¹

The number of individuals falling into one of these categories is a serious concern. In Harris County, 27,635 (46%) misdemeanor defendants in 2011 could not post bail and remained in jail until they pleaded guilty or waited for a resolution to their case. For felony defendants this number was closer to 69%.¹⁴² The risks to defendants caught in this system will only increase as job applicants, who previously might have been asked only about convictions, are now being asked to disclose incidents ending in pretrial diversion or deferred adjudication.¹⁴³

Not only are criminal records over-inclusive by including misinformation on factually innocent individuals, but they are also under-inclusive, reporting only formally processed information (i.e., criminal justice system information). Background record users do not receive the same information about each applicant, as some applicants under consideration may have engaged in the same behavior but escaped the criminal labeling. The records' incompleteness raises additional questions about their ultimate value in employment decisions, and, once again, highlights the inequity of relying on records disproportionately containing information about persons of color.

“Until there is a great deal more study, the science of predicting which individuals may or may not re-offend in the future is not the basis from which employers can make hiring decisions.”

– Lester Rosen, Founder and CEO, Employment Screening Resources.¹⁴⁴

To address hiring and employment issues, the EEOC has issued guidelines for how and when criminal history records should be utilized.¹⁴⁵ Employers are directed to perform individualized conduct assessments regarding the nature and seriousness of the offense, the length of time since the offense occurred, and how the offense relates to the specific job in question. With respect to arrest records, the EEOC guidelines maintain “[t]he fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.”¹⁴⁶ Businesses are cautioned to “think long and hard about why they think they need to do a criminal background check” at all.¹⁴⁷ Indeed, one background checking company, in an effort to protect employer consumers from possible discrimination claims, removed arrest records from its instant search database.¹⁴⁸

Given criminal background records' many shortcomings, security experts still consider personal reference checks to be the “most effective” method for obtaining accurate and meaningful information and assessing an individual's trustworthiness.¹⁴⁹ The increasing reliance on criminal background checks as a screening tool diverts attention and resources away from personalized character assessments. This should be of concern not only to advocates and state lawmakers, but to anyone interested in promoting public safety and identifying the best suited and most qualified individuals for any particular position.

V. HOW ARE CRIMINAL RECORDS ACCESSED AND USED IN TEXAS?

Texas Criminal Records Overview

Texas' criminal records are maintained at both the state and local levels. DPS manages the state's official criminal record repository, which includes criminal history data arising out of contact with the Texas criminal justice system.¹⁵⁰ The records are created by numerous government entities and maintained at the local level throughout the state. Police departments, sheriff departments, district and county clerks, and probation departments, among others, create and hold the different data needed to create a complete criminal history record. All entities creating criminal records are statutorily obligated to provide DPS regular updates.

The state's criminal record repository, called the Computerized Criminal History System (CCH), was created to provide law enforcement officers and federal agencies with accurate criminal history records and support operational decision-making and performance evaluation.¹⁵¹ In the mid-1990s the CCH became available for public use and DPS instituted a multi-tiered dissemination system.¹⁵²

The requesting entity's security level determines their criminal history record access. Utilizing a four-tier system, Level 1 records have the most limited dissemination while Level 4 records are open to the general public.

Level 1: Applies to criminal justice agencies, such as a local police department, and includes arrest and disposition records, as well as non-disclosed (i.e., sealed) and juvenile records (including restricted juvenile records).

Level 2: Applies to non-criminal justice agencies typically working with children or vulnerable adults or providing healthcare-related services, such as a school district or the Department of Child and Family Protective Services. Texas Government Code Section 411.081(i) identifies 29 specific agencies with Level 2 access. Level 2 access includes arrests and dispositions records as well as records subject to an order of non-disclosure. It does not include the juvenile records available to Level 1 users.

Level 3: Applies to non-criminal justice entities often working in tandem with Level 2 agencies. A level 3 agency can view the same information as the Level 2 agency with which it is working, with the exception of records subject to an order of non-disclosure.

Level 4: Applies to the general public and includes only adult conviction records and adult deferred adjudication records for Class B misdemeanors and higher. DPS does not make arrest records or below Class B misdemeanor records generally available. For a small fee individuals can search DPS' online Level 4 Conviction Database. This database is searchable by name and date of birth.

A CCH report includes a range of data, including offender information such as date of birth and a physical description, arrest-related information such as the arresting agency, date of arrest, the charge and its classification, and information regarding prosecution, disposition, and sentencing.¹⁵³ DPS has created a clearinghouse, available to users who receive criminal data under the non-disclosure statute (i.e., level 1 and 2 users), providing notice within thirty days of any updates or new activity.¹⁵⁴

Local practices regarding criminal record management and access vary greatly. Of the six counties surveyed, all but the Tarrant County Clerk's Office provide at least some free access to online criminal history data. However the data available and the means to obtain access differ. Both Harris and Dallas Counties, for example, provide criminal history data along with scanned documents filed in a case, including information on arrests not leading to conviction.¹⁵⁵ Bexar County, El Paso County, and Travis County Clerks' Offices make arrest and pending prosecution records available online, but documents filed with the clerk are not available electronically.¹⁵⁶ Both Travis County and Tarrant County District

Clerks' Offices require a fee to access online criminal history data. Only the Tarrant County Clerk's Office does not offer online data access.

"How the hell do I expunge anything . . . if I sell tapes and disks all over the country?"

– Thomas A. Wilder, Tarrant County District Clerk.¹⁵⁷

The decision to make criminal records widely accessible is based on each jurisdiction's interpretation of applicable statutes. Local Government Code Section 191.006, for example, provides: "All records belonging to the office of the county clerk to which access is not otherwise restricted by law or by court order shall be open to the public at all reasonable times. A member of the public may make a copy of any of the records." County and district clerk offices often go beyond the statute's plain language, reading the requirement not only as a duty to permit access, but also as a mandate to promote public access.

The overlapping state and local control raises at least two significant concerns regarding how criminal records are maintained and disseminated in Texas:

No statewide audit requirements to verify the accuracy of county-level records. To address this concern, some counties have voluntarily implemented local audit procedures. The Dallas County District Clerk's Office, for example, runs a periodic random sample to check for consistency in its records. The county currently reports a 98% accuracy rate.¹⁵⁸ The Travis County Clerk's Office has a quality control program that provides daily, weekly, and monthly reports validating the entry of information.¹⁵⁹ The Collin County District Clerk's Office randomly audits each employee on a monthly basis to check file integrity and scan quality.¹⁶⁰ Ensuring accurate county-level records is critical insofar as it determines the quality and accuracy of DPS' repository.

The absence of uniform statewide procedures governing criminal record access, dissemination, and sale. Not only have county and local entities not adopted DPS' tiered dissemination system, but these record holders also rarely differentiate between pending versus closed records and conviction versus non-conviction records (except for expunged or sealed records). For example, of the six surveyed counties, only the Travis County District Clerk's Office reported making distinctions in what data to sell in bulk to third parties, refusing to sell records subject to future expunction. In practice, the lack of uniform procedures undermines DPS' four-tier model, since public and commercial vendors are able to circumvent state level record request denials through accessing local level records.

Once curtailed by the "practical obscurity" that results from the inherent limits to accessing paper records, today's rapidly expanding technical capabilities have brought little added oversight as counties race each other to have the most comprehensive online databases.¹⁶¹ As time goes on, limiting dissemination will prove increasingly difficult, especially as the public, employers, and property owners grow accustomed to widespread, easy, and fast access to the full range of criminal records.

Across the US, regulation of commercial access to and use of criminal records is notoriously weak. Texas is no exception. Civil penalties for improper criminal history information dissemination apply under Texas law only if a vendor disseminates records in violation of an expunction or nondisclosure order. The first violation results in a warning; a second violation carries a penalty not to exceed \$1000.¹⁶² After three or more violations, DPS may not release any criminal history information to the commercial entity for a year.¹⁶³ None of the six county offices contacted for this report identified additional sanctions or release limits. Notably, the statutory penalties only address the small pool of cases where an individual has received an expunction or nondisclosure order.

Efforts to deter inaccurate reporting by commercial vendors – by far the more common problem with criminal background reports – are equally limited and ineffectual. Texas law forbids private entities that “compile and disseminate criminal records for compensation” from disseminating information obtained more than 90 days prior to release, but the statute does not impose any penalty for noncompliance.¹⁶⁴ This 90-day provision applies to all information, whether from DPS or a local entity. A company may be held civilly liable for any resulting damages to the subject of the information.¹⁶⁵

DPS maintains a non-disclosure database to promote compliance by all third-party purchasers of their duty to update records within 30 days of receiving a non-disclosure notice. However, DPS performs no auditing to verify compliance.¹⁶⁶ It is a criminal offense to knowingly or intentionally obtain criminal history records in an unauthorized manner, disclose information to an unentitled person, or violate any of the rules stated in Government Code subchapter 411,¹⁶⁷ but there exists no means by which DPS or other Texas criminal record providers can verify the accuracy of information disseminated downstream by the entities that first obtained the records.

“[A felony conviction] costs taxpayers in the form of expenditures supporting various penal departments. It costs the ex-offender socioeconomic and political opportunity. It also costs American society in the form of human capital and progression, individual talent, and community strength.”

– Lahny Silva, *Clean Slate: Expanding Expungements and Pardons for non-Violent Federal Offenders*.¹⁶⁸

Texas’ current regulatory and oversight scheme for the handling of its criminal records falls far short in preventing serious and ongoing harm to individuals possessing criminal histories or innocent victims of inaccurate search methods.

Limiting Access to and Use of Texas’ Criminal Records

Texas has tried at both the state and local levels to address some of the concerns regarding the open access to and dissemination of criminal records. Two efforts stand out: (1) amending the law governing criminal record expunction and (2) select counties adopting “ban the box” laws and other fair hiring practices. Whether these efforts have been too limited, too confusing, or simply unknown to the general public, it is clear these reforms have done little to improve the situation for many Texans.

1. Expunction Reform:

Prior to 2011, an arrest could only be expunged if (1) a defendant's charge was dismissed, (2) the defendant was acquitted, (3) the defendant was pardoned, or (4) the state never filed a charging instrument.¹⁶⁹ In cases of dismissal or when no charging instrument was filed, the defendant would be ineligible for an expunction if convicted of a felony in the five years preceding the arrest date.¹⁷⁰ Unless the arrest was due to mistake, false arrest, or absence of probable cause, defendants had to wait for the statute of limitations to run before petitioning the court for an expunction.¹⁷¹ The waiting requirement was burdensome for any defendant. It was especially problematic, however, for defendants charged with offenses having no statute of limitations, such as manslaughter or sexual assault. For these charges, even if the charge was dismissed or the state did not proceed with prosecution, the record could never be expunged.

In 2011, the 82nd Texas Legislature amended the expunction law to expand eligibility for individuals barred under the old law and to shorten the wait period.¹⁷² Among other things, the revised statute:

- Offers an early "waiting period expunction" available at 180 days (Class C Misdemeanor), 1 year (Class A and B Misdemeanors), or 3 years (felony) if no information or indictment has been presented after a designated period. A "waiting period expunction" is similar to a nondisclosure in that the records remain available for law enforcement purposes.
- Allows for discretionary expunctions, where a prosecutor may recommend expunction regardless of whether a charging instrument has been filed.
- Allows for expunction after a finding of actual innocence.
- Removes the expunction restriction for individuals with prior felony convictions.

At the time of the amendments, proponents maintained relief would be available sooner, thus limiting the time criminal records could be accessed and shortening the time a person must wait before applying for a job or seeking other benefits without the stain of a criminal record. Proponents applauded discretionary expunctions as a new opportunity to ensure justice in extraordinary circumstances.

Since the amendments went into effect in September 2011, they have received significant criticism including:

- The new framework is confusing and piecemeal, leaving the statute practically unworkable even for those familiar with the expunction law.¹⁷³
- Prosecutors and judges have too much discretion leading to inconsistent and possibly unfair application across the state.
- Discretionary expunctions will become subject to prosecutorial abuse or create a flood of baseless requests for discretionary expunctions that will increase the strain on an already overburdened criminal justice system.
- "Waiting period expunctions" impose additional burdens on defendants who must go back to court to seek a full expunction after statutes of limitation have expired. The two-step

framework exacerbates an already costly and difficult process and places an even greater strain on judicial and prosecutorial resources.

- Not all of the statutory changes expanded eligibility. The changes added a new bar for those who abscond from the jurisdiction following release.

In contrast with some other states, only a small fraction of potentially eligible defendants in Texas ever seek an expunction or nondisclosure.¹⁷⁴ This trend has continued since the new statute went into effect, suggesting barriers still exist making it difficult for defendants to avail themselves of this relief. The petitions filed versus the total number of arrests made (counting only arrests not leading to conviction) indicate fewer than 5% of eligible defendants are filing expunction or nondisclosure petitions.¹⁷⁵ Advocates differ on the reasons for the continuing low numbers, but insufficient free or fee-reduced legal resources, lack of awareness and education about the availability of the procedure, statutory requirements narrowly limiting eligibility, and an overly complicated and intimidating process all contribute.¹⁷⁶

Moreover, the reforms do nothing to address other related concerns, such as the failure to provide meaningful notice to defendants, prior to plea agreements, of the limited nature of expunction and nondisclosure, the complicated legal procedures causing most people to hire an attorney to assist in filing the petition, or the many downstream problems related to obtaining relief, even with an order of expunction or nondisclosure, after criminal records have been incorporated into internet-based databases. Further reform is needed to make Texas' expunction statute meet its intended goals.

2. Ban the Box:

In 2008 Travis County passed a ban the box ordinance, which prohibits the county from asking job applicants about past criminal convictions or performing a criminal background check until the hiring process' interview phase.¹⁷⁷ A few months later, the City of Austin passed a ban the box resolution effectively removing criminal background questions from city job applications.¹⁷⁸ Bexar County has implemented similar practices with respect to certain county positions, but has not officially banned the box.¹⁷⁹

To date, Texas' ban the box reforms have been limited to these three jurisdictions and only for public sector hiring. Reduced public sector hiring, however, means few positions have opened up to those with criminal records and current budget constraints do not indicate an increase any time soon. Further, the state's heavy reliance on licensing and certification requirements means many public sector jobs remain out of reach. Despite these limits, banning the box sends a clear signal to all employers – public and private -- of current practices' negative role in restricting meaningful "second chance" opportunities.

Banning the box is one way to provide additional support to those seeking reentry opportunities at little, if any, risk to the employers who would simply defer receiving the information until later in the hiring process. Postponing criminal history inquiries promotes a more comprehensive review of a candidate's skills and experience, and ban the box provisions may actually help employers avoid EEOC liability while also increasing their qualified applicant pool. Indeed, some industry analysts, such as Lester Rosen of Employment Screening Resources, are beginning to reach this same conclusion:

“An employer is better served using good hiring techniques based upon neutral factors to whittle down the applicant pool. . . . Asking [about criminal history] early does not accomplish that much and unnecessarily exposes an employer to potential allegations of discrimination. An employer may find that a candidate that would have otherwise been eliminated early due to a criminal record is, in fact, a good candidate for the position.”¹⁸⁰

The above reforms suggest a nascent but growing willingness to consider and incorporate promising alternatives to current criminal record practices. Additional reforms, such as limiting employer negligent hiring liability and reforming professional licensing practices will continue to improve reentry conditions. However, the growing reentry conversation has yet to fully embrace the threshold concerns surrounding criminal records. A review of other states’ efforts to limit access to and use of criminal records may help to initiate a more comprehensive conversation.

VI. Examples of Other States’ Efforts to Limit Access to and Use of Criminal Records

Other states’ reforms illustrate the complex problems associated with criminal record creation, dissemination, and use. There is no one answer. Many states have adopted a mix of reforms to have a wider and more meaningful impact. It is more a matter of combining many small solutions than searching for the perfect solution.

Limit Access to Existing Criminal Records:

Numerous states have statutory frameworks restricting the release of certain records, making them only available to law enforcement agencies and a limited number of other government agencies.¹⁸¹ Each model’s details vary, but some common features include:

- Prohibit releasing information about arrests not leading to conviction.
- Prohibit releasing conviction information after some period of time, typically 5 to 10 years.
- Only permit criminal justice agencies to access sealed records.
- Prohibit selling bulk data to third party vendors (i.e., background screening companies).

Prohibit releasing information about arrests not leading to conviction. A number of states limit releasing information about arrests not leading to conviction, including, in some states, information about deferred prosecutions.¹⁸² Texas DPS limits the release of non-conviction information, restricting the general public’s access to only conviction and deferred adjudication records. A continuing problem, however, is that seekers of non-conviction data can go to most any local court or law enforcement agency and receive the same information DPS or the state repository refused to release.¹⁸³ Accordingly, uniform statewide release policies are essential if the goal is truly to limit access to – and ultimately the use of – arrest information.

In Texas, creating a uniform system requires amending the Government Code (which governs DPS record management and public records) and the Local Government Code (which governs local government record management) to expressly limit local discretion and enact uniform release protocols.

Several additional changes would be needed to close the remaining loopholes and eliminate arrest information from national databases. For example, rules prohibiting the loading of non-conviction records onto online (remote access) databases might be needed to prevent the use of screen-scraping technologies. Bulk data sales to third party vendors, discussed below, would also need to be limited to comport with DPS' release protocols.

Applying DPS' four-tier model across the state would be a first step in mitigating the risks associated with allowing public access to arrest information. As recognized in Backgroundcheck.com's decision to remove arrest records from its instant access database, making arrest information inaccessible to all but law enforcement (and possibly a few other select agencies involved with vulnerable populations) spares employers the EEOC mandated in-depth fact assessment when using arrest information in hiring. Thus, it could bring greater certainty while simplifying an otherwise complex process. Providing employers with some form of negligent hiring safe harbor would further diminish any remaining concerns regarding liability risks.

While not a perfect system, DPS' tiered release represents the state's public safety agency's interpretation of statutory authority relating to the handling and release of state criminal records, indicating that making criminal records widely available is not in the general public's best interests. It appears contradictory to permit other criminal record holders (i.e., city and county level jurisdictions) to arrive at their own interpretations. These alternative interpretations circumvent DPS' system, and undermine its management and authority.

Prohibit releasing conviction information after some period of time. Massachusetts, with its reworked Criminal Offender Record Information (CORI) system, is one of many states to prohibit releasing most conviction records after some period of time (10 years for felonies; 5 years for misdemeanors).¹⁸⁴ Each state's time frame varies, but typically falls in the 5-10 year range depending on the offense's severity.¹⁸⁵ After that, law enforcement might continue to have access, but the records are no longer available for general public viewing and for all other purposes are treated as sealed.

In contrast, Texas has no time limit on how long criminal records can be released. The recidivism and rehabilitation research indicates this policy is misguided. Releasing decades old criminal histories does little to inform an employer or a landlord about current issues. Limiting release timeframes can be done in conjunction with other reforms, such as Certificates of Rehabilitation, hiring liability safe harbors, or enhanced bonding programs, designed to provide assurances regarding long term risks. Notably, the practice of time limiting criminal records is not new to Texas. The Texas Business Code already imposes a seven-year limit on reporting conviction records by credit reporting agencies for employment purposes.¹⁸⁶ Time limiting the release of conviction information is also consistent with the EEOC's recommendation directing employers to consider the time since an offense occurred.

Further limit access to sealed records. Many states with sealing statutes allow only a small number of law enforcement or other criminal justice agencies to access sealed records.¹⁸⁷ In contrast, Texas' non-disclosure statute currently includes 29 different agencies and organizations. Thus – particularly for individuals who want to work in education, medicine, law, or obtain an occupational

license, which in Texas is required for more than 30% of available jobs – non-disclosure offers little relief from the stigma of a criminal record.

Texas’ nondisclosure law would prove much more effective if the state rolled back the number of agencies with access to sealed criminal records. Vulnerable populations may justify heightened protection, but many of the entities provided access to DPS’ Tier 2 criminal records do not necessarily work with vulnerable populations. The number of organizations given access to sealed records should be as limited as possible, and reserved for positions directly involved with vulnerable populations.

Ban or limit selling bulk data to third party vendors. Massachusetts limits third party vendors buying records in bulk from the state repository to the same access level as the general public, meaning the vendors cannot obtain records from the state repository for charges not leading to a conviction or even for most conviction records after the relevant waiting period is passed. However the problem, once again, is the lack of statewide uniform release procedures and the fact that local entities, at their discretion, can provide bulk records to these very same vendors.

A few models implemented in Texas show a willingness to limit bulk sales under certain circumstances. The Travis County District Clerk, for example, has a two-tiered system whereby third party vendors are only sold records that are not and never will be expunction eligible. The Tarrant County Clerk’s system offers a second model, requiring purchasers of bulk records to acquire a subscription so that updates, errors, and other record-related changes can be tracked if needed. A third and preferred option would be to ban all bulk sales, instantly limiting the amount of information that can be vacuumed into the commercial databases.

Limiting or banning bulk sales would mark an important return to “practical obscurity” (i.e., the limits of accessing and processing paper records) protections, which would effectively limit criminal record release and dissemination. It does not preclude individuals from obtaining specific records from court clerks or other offices, but does prevent the current widespread and unregulated aggregation of criminal records.

Limit the Lifespan of Criminal Records

Allow limited expunction of convictions and deferred adjudications after some period of time. As already discussed, a number of states allow convictions to be sealed, barring subsequent violations, after a period of time has passed. States have adopted various waiting periods – typically 2 to 5 years for misdemeanors and 5 to 15 years for felonies. A limited expunction could operate like a “waiting period expunction” and represents a fair compromise between limiting the collateral consequences from a criminal record and the state’s need to track and identify repeat offenders. Under a limited expunction, only criminal justice agencies would continue to have access to conviction records. Violent crimes, sex offenses, and crimes against children could be exempted.

In Texas, deferred adjudications are eligible for non-disclosure. However, as noted above, currently in Texas a non-disclosure order allows 29 statutorily authorized entities continued access to these records. Such widespread access to what are considered to be restricted records significantly weakens the anticipated benefits of non-disclosure. For this reason, extending a limited expunction to deferred

adjudications would be a significant improvement. This is especially important in light of the many individuals who accept deferred adjudication without an accurate or complete understanding of its long-term ramifications.

Provide for automatic expunction and non-disclosure. Automatic record sealing or expunction has the potential to solve a number of problems within the typical administrative and judicial procedure.¹⁸⁸ An automatic process would ensure those eligible for expunction would benefit. It also would simplify the judicial process and streamline expunctions, avoiding the delays that confront many who seek an expunction or order of non-disclosure. It also would eliminate the expensive and often daunting task of retaining an attorney to draft and file the petition. Finally, automatic expunction and non-disclosure would result in a fair and straightforward outcome – simply put, if a person is entitled to an expunction, then justice requires it be granted without undue delay and expense. As evidenced by the low rate of expunctions in Texas, the current system is not set up to meet the needs of most eligible individuals.

A handful of states have enacted automatic expunction or sealing measures. Connecticut, for example, allows for automatic record erasure if the state elects not to prosecute and thirteen months have elapsed since the arrest.¹⁸⁹ If a defendant is acquitted at trial or a charge is dismissed, all records are automatically erased after the 30-day period for appeal has expired. There is no erasure fee. The prosecutor, police, and clerk's office can continue to access the records if other related charges are pending; however, the public cannot access such records. In New York, a court can move to seal on its own when notified of a favorable disposition.¹⁹⁰ If a court does not automatically move to seal, the defendant need only to send an explanatory letter and a certified copy of the disposition order to the Division of Criminal Justice Services. Prosecutors and judges retain the right to object for good cause.

In Texas automatic expunction could be set up to work within the current “waiting period expunction” framework.¹⁹¹ As previously discussed, these expunctions are not “final” as law enforcement agencies may still review the records. Nevertheless, waiting period expunctions provide defendants, who may need immediate work or housing, important protection. If waiting period expunctions were automatic, eligible defendants would receive a base level of protection regardless of whether they have the time or resources to obtain a full expunction after the statute of limitations expires.

Enact procedural reforms to ease the burden of seeking expunction or nondisclosure relief. Many states have recognized the burden on individuals who must navigate the expunction or non-disclosure process. This process often requires determining eligibility, hiring an attorney, finding old court records, paying high filing fees, attending a court hearing, and following up after an order is granted to ensure correct implementation. The clerks' offices' and courts' burdens must also be considered. Clerks must field questions by the public that they are not allowed to answer, and handle incorrectly filed or incorrectly drafted petitions submitted by both pro se and represented petitioners. As currently written, Texas law requires courts to hold hearings even when there is no objection to the expunction petition.¹⁹²

As noted above, New York, by having the court move to seal on its own motion, as long as it has been notified a charge was disposed of in favor of the defendant, greatly simplified its sealing procedures. This significantly reduces each party's burdens. A defendant does not need to draft a complicated petition and take multiple trips to the courthouse. Confused petitioners will no longer burden clerks' offices. In most cases, the court will initiate the process, but the statute also authorizes the defendant to act if mistakes occur or a case evades the automatic process.

Other state reforms helping ease procedural barriers to seeking relief include creating a solicitor's office to assist with completing and filing expunctions,¹⁹³ requiring a state agency to provide uniform petition and order forms,¹⁹⁴ waiving hearings in cases where no party objects,¹⁹⁵ and waiving filing fees for defendants who are acquitted, wrongfully arrested, or found "actually innocent."¹⁹⁶ The overarching goal of these reforms is to simplify the expunction and nondisclosure process, expand access to their benefits, and decrease the workload for the government agencies involved in the process.

Adopt a first offender statute. At least 17 states have created first offender statutes to provide a "second chance" to individuals with no previous criminal record.¹⁹⁷ The statutes' hallmark is allowing "first" offenses to be expunged. First offender statutes often focus on young offenders or certain so-called "youthful" offenses, such as alcohol-related or minor drug offenses. Most of the statutes require a defendant to draft and file the petition upon becoming eligible, but some statutes require the court to automatically enter the expunction order.¹⁹⁸ Automatic processes are the fastest and fairest method to bring benefits to the greatest number of eligible defendants.

Texas' deferred adjudication statute functions similarly to many first offender statutes, setting aside a conviction typically after completing some form of court-ordered community service. A significant difference, however, is that the only remedy following deferred adjudication is non-disclosure. Under Texas' current statutory scheme, expunction is a much surer method for controlling dissemination and use of criminal records, and the method most states have adopted. Moreover, as discussed, without automatic or, at the very least, greatly streamlined processes, the ability to avail oneself of non-disclosure relief requires knowledge of the law and access to legal representation to navigate filing requirements.

Limit the Use of Criminal Records

Ban the Box. According to the National Employment Law Project, at least 49 jurisdictions have implemented some form of ban the box into local and state hiring practices, with some statewide statutes applying to both public and private employers. California, Colorado, Connecticut, Hawaii, Minnesota, Massachusetts, and New Mexico all have statewide ban the box statutes. California's Code of Regulations § 7287.4(d) goes furthest, banning employers from asking at any time during the hiring process about any arrest not leading to a conviction, any sealed or expunged conviction, or any misdemeanor conviction for which probation was successfully completed and the case was judicially dismissed pursuant to Penal Code 1203.4.

As discussed above, several Texas jurisdictions have already implemented ban the box policies. Nationwide, the scope of the ban varies among jurisdictions, ranging from public employers only to all

employers, both public and private, operating in a state. Texas may want to consider taking the next step and adopt a statewide ban the box law. A ban could be phased in gradually, beginning with public employers and their vendors and broadening in scope over time as the impacts are evaluated.

Preclude the use of arrest information in hiring determinations. A number of states expressly limit the use of arrest information in connection with hiring decisions. California, New York, and Massachusetts, for example, all make it unlawful to inquire into arrests not leading to conviction or disposed of in the individual's favor.¹⁹⁹ Arkansas takes a slightly narrower view, limiting inquiries into arrests not leading to convictions only in connection with applications for registration, licensure, or certificates.²⁰⁰

VII. RECOMMENDATIONS

With each new legislative session, Texas has the opportunity to address problems associated with the dissemination and sale of the state's criminal history records. A number of bills relating to the release and sale of criminal records have been introduced in the 83rd Legislative Session.²⁰¹ This is a good first step but more is needed. It is time to consider the full range of reforms – including reforms limiting public access to certain criminal records – to bring long-term meaningful relief to Texans seeking to overcome the many barriers confronting individuals with a criminal history.

Among the many potential reforms, the following identifies ten deserving priority attention:

1. Apply uniform release procedures statewide to all criminal record holders. At a minimum, prohibit public access to all non-conviction records and to deferred adjudication records after discharge and dismissal of the underlying case.
2. Amend Texas Government Code 411.081 to further limit which entities can access non-conviction and deferred adjudication records. The list should be as limited as possible, including, for example, only entities hiring for positions involving sustained, unsupervised contact with children or other vulnerable populations or law enforcement positions.
3. Prohibit the release of deferred adjudication and conviction-related records after 5 to 10 years to all but criminal justice agencies, depending on the offense and disposition, and following successful completion of any supervision. Certain offenses might be excluded, e.g., violent or sexual offenses involving children or vulnerable adults.
4. Prohibit the bulk release or bulk sale of criminal history information. Alternatively, permit the bulk release or bulk sale only by DPS and only under certain terms and conditions, including, for example, requiring commercial vendors to possess industry certification, allowing periodic audits of bulk record purchases to ensure proper updating, and providing DPS with the names of subsequent purchasers. Subscription fees can include enforcement costs.

5. Adopt a First Offender Statute for certain low-level nonviolent offenses, automatically expunging all related records following successful completion of any supervision. As with a “waiting period” expunction, records could remain accessible to criminal justice agencies until eligible for a full expunction.
6. Provide automatic “waiting period” expunctions, rather than requiring defendants to file a petition. Defendants could still file for a full expunction when eligible.
7. Provide automatic nondisclosure of deferred adjudications when eligible.
8. Allow full expunction of deferred adjudications and convictions after some waiting period.
9. Enact procedural reforms to ease the burden of seeking expunction or nondisclosure relief. Reforms could include the creation of a statewide office to assist the public with filing petitions and creating streamlined uniform statewide pleadings and procedures. Fees from petitions or other court filings could be used to fund any new services.
10. Convene a statewide task force to collect data and undertake research to better understand and attempt to quantify the actual (versus perceived) risks that accompany a criminal history, focusing in particular on questions of public safety, employment, and recidivism.

VIII. CONCLUSION

Notwithstanding Texas’ “Smart on Crime” efforts, millions of the state’s residents continue to live under ever-increasing burdens from criminal history records. The permanent stigma associated with a criminal history brings long-term collateral consequences and limits an individual’s ability to successfully reintegrate. As Texas moves forward with its criminal justice reforms, it must broaden the effort and convene a statewide conversation to consider how best to balance public safety needs with providing individuals a meaningful second chance. The personal and financial costs from collateral consequences are enormous. With multiple complex systems at play, isolated incremental “fixes” are no longer enough. It is time to take a comprehensive look at how Texas’ criminal records are accessed, disseminated, and utilized, and find ways to make the system more effective for all involved.

ENDNOTES

¹ Michael Barajas, *What Texas criminal justice reformers could teach the booming immigrant detention system*, San Antonio Current, Sept. 20, 2012, <http://sacurrent.com/news/what-texas-criminal-justice-reformers-could-teach-the-booming-immigrant-detention-system-1.1374441>.

See also *State prison population lowest in 5 years*, Austin American-Statesman, Aug. 12, 2012, <http://www.chron.com/news/houston-texas/article/State-s-prison-population-lowest-in-5-years-3783056.php>; Cindy Horswell, *Texas says rise in paroles gives state bragging rights, Officials say reforms are 'smart on crime' and save money*, Houston Chronicle, Aug. 15, 2012, <http://www.chron.com/news/houston-texas/article/Texas-parole-system-cited-as-a-national-model-3788468.php>.

² Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer and Meda Chesney-Lind, Eds. (2002) at 19 (discussing the “permanent diminution in social status” that results from criminal sanctions).

³ The State Reentry Task Force, for example, is working to support ex-offenders and their families in reentry, but the Task Force’s current recommendations are silent with respect to the problem of wide spread and unregulated access to criminal records that trigger many later reentry concerns. Among the interim charges to the 83rd Legislative Session only one charge, regarding occupational licensing, touches on adult criminal record-related issues. See *Interim Charges*, House Committee on Licensing & Administrative Procedures, 83rd Legislative Session, <http://www.house.state.tx.us/media/pdf/interim-charges-82nd.pdf>, (“Study the feasibility of streamlining the process to obtain an occupational license. Consider consolidating all occupational licenses under one state agency and whether such a move would increase efficiency and effectiveness. Analyze the process being used in other states.”).

⁴ *65 Million “Need Not Apply” The Case for Reforming Criminal Background Checks for Employment*, Michelle Natividad Rodriguez and Maurice Emsellem, The National Employment Law Project (Mar. 2011) at 3, http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1. This estimate is based on a 2008 survey of states indicating upwards of 92.3 million people with criminal records on file with states. The larger number was reduced to account for individuals with records in multiple states and other factors, with 65 million considered to be a conservative estimate. This number will be even higher today, given the millions of new arrests made over the past five years.

⁵ *State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up*, a collaboration of the ACLU, Crossroad Bible Institute, The Sentencing Project, the National Employment Law Project, and the National H.I.R.E. Network (Sept. 2012) at 1, <http://www.nelp.org/page/-/SCLP/2012/StateCollateralConsequencesLegislativeRoundupSept2012.pdf?nocdn=1>. Even among felony arrests, a full one-third of those arrested are never convicted. *65 Million “Need Not Apply,” supra note 4 (citing, Felony Defendants in Large Urban Counties, 2004, U.S. Bureau of Justice Statistics (Apr. 2008))*.

⁶ *Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas*, Texas Public Policy Foundation, Policy Perspective (Nov. 2007) at 1, <http://www.texaspolicy.com/center/effective-justice/reports/working-conviction>.

⁷ This represents a rough estimate based on 2000 data available through the Texas Department of Criminal Justice. Criminal Justice Policy brief, Texas LULAC State Executive Office (Aug. 2004) at n. 57, <http://realcostofprisons.org/materials/LULAC.pdf>. The 2011 Texas adult population (18 years and older) was approximately 18.7 million. U.S. Census, <http://quickfacts.census.gov/qfd/states/48000.html>.

⁸ During 2010, Texas law enforcement officers made 1,144,178 arrests. Of those arrested, 10% were 16 years of age and under. Texas Crime Analysis, *Crime in Texas (2010)* at 13, <http://www.txdps.state.tx.us/crimereports/10/citCh2.pdf>. Nationally, an estimated 14 million new arrests are made each year. See generally Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/DCF/enforce.cfm>.

⁹ Richard D. Schwartz and Jerome H. Skolnick, *Two Studies of Legal Stigma*, *Social Problems*, Vol. 10, No. 2 (Autumn, 1962), pp. 133-142, at 136 (“[T]he individual accused but acquitted of assault has almost as much trouble finding even an unskilled job as the one who was not only accused of the same offense, but also convicted.”). See also Megan C. Kurlycheck, Robert Brame, Shawn D. Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, *Criminology & Public Policy* 5 (3) (Sept. 2006) (discussing the “life-long stigma” that comes with a criminal record).

¹⁰ Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. Cin. L. Rev. 155, 165 (Fall 2010) (noting that the inverse correlation between employment and recidivism is so strong that “employment is considered a ‘rehabilitative necessity’”) (quoting Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. Tol. L. Rev. 525, 532 (2005)).

¹¹ *State Reforms Legislative Round-Up, supra note 5*.

¹² This Report is limited only to issues surrounding the dissemination and use of adult criminal records. It does not consider laws or practices relating to access to and use of juvenile records.

¹³ One barrier to identifying collateral consequences is the fact that the consequences are “scattered throughout the codebooks . . . frequently unknown even to those responsible for their administration and enforcement.” National Inventory of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/CollateralConsequences/docs/ProjectDescription_gp.ml.pdf. Some states have begun to inventory all of the collateral consequences that are part of their regulatory frameworks. In 2006, for example, Florida undertook a statewide inventory of consequences relating to employment and licensure, to give policy makers a clearer picture of the existing landscape. See Fl. Exec. Order No. 06-89 (Apr. 25, 2006), <http://edocs.dlis.state.fl.us/fldocs/governor/orders/2006/06-89-exoftf.pdf>. Texas is just now beginning this process, with an interim charge to review agency practices and consider ways to coordinate and streamline agency decision-making as relates to professional licensing. See *supra* note 3.

¹⁴ National Inventory of Collateral Consequences of Conviction, *supra* note 13. The National Inventory Project focuses explicitly on collateral consequences of conviction, but, as noted below, collateral consequences also result from arrests not leading to conviction.

¹⁵ A criminal history can trigger many other negative consequences, such as deportation and other immigration issues, problems obtaining loans and commercial credit, and losing custody of one’s children. For an in-depth review of the many collateral consequences facing individuals with criminal records, see *Every Door Closed: Barriers Facing Parents with Criminal Records*, a collaboration of the Center for Law and Social Policy and Community Legal Services, Inc. (2002), http://www.clasp.org/admin/site/publications/files/every_door_closed_sum.pdf.

¹⁶ According to one study, a criminal record results in a 50% reduction in employment opportunities for Whites and a 64% reduction in employment opportunities for African Americans. See Devah Pager, *The Mark of a Criminal Record*, doctoral dissertation, Department of Sociology, University of Wisconsin-Madison (Sept. 2002), <http://www.docstoc.com/docs/35936829/Mark-of-a-Criminal-Record>.

¹⁷ One study calculates that returning ex-offenders, estimated nationwide to be 600,000-700,000 persons each year, account for roughly 30% of the annual growth in the nation's labor force. Written Testimony of Juan Cartagena, President and General Counsel of Latino Justice, July 26, 2011, Meeting of the EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, at 3, <http://www1.eeoc.gov/eeoc/meetings/7-26-11/cartagena.cfm?renderforprint=1>. These numbers do not include the additional 9 million people estimated released each year from jails. *Public Housing Authorities (PHAs) and Prisoner Re-Entry*, Re-Entry Policy Council, Council of State Governments (citing 2004 data provided by Allen J. Beck, June 27, 2006), http://www.reentrypolicy.org/documents/0000/0568/PHAs_one-pager_9.14.06.pdf.

¹⁸ Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, *NIJ Journal* / Issue No. 270 (June 2012), (citing Harry J. Holzer, Steven Raphael, and Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J.L. & Econ.* 451, pp. 453-454), <http://www.nij.gov/journals/270/criminal-records.htm>.

¹⁹ Written Testimony of Adam Klein, Outten & Golden LLP, July 26, 2011, Meeting of the EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, at 5, <http://www1.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm?renderforprint=1>.

²⁰ Interim Charge on Occupational Licensing & Overcriminalization, Testimony of Marc Levin, Director Center for Effective Justice, Texas Public Policy Foundation, before the Texas House Government Reform Committee Justice (July 16, 2008), <http://www.texaspolicy.com/center/effective-justice/reports/testimony-senate-business-commerce-committee>. Current licensing restrictions often leave the licensing agency broad discretion to determine whether to grant or deny licenses when criminal records are involved, which can lead to grossly disparate treatment depending on the agency and the particular criminal history. According to one review, many agencies in Texas "define[] nearly all crimes as 'directly related' under Chapter 53 of the Texas Code." *Id.*

²¹ *Id.* (quoting *Locked Out of Their Livelihoods*, *Austin American-Statesman* (Feb. 18, 2007)).

²² *Id.* Notably, the 83rd Legislature Session has several bills pending to remove certain occupational licensing provisions that currently prevent many individuals with criminal records from ever working in their chosen professions. See, e.g., HB 321 (Dutton) (Relating to the consequences of successfully completing a period of deferred adjudication community supervision); HB 798 (Thompson) (Relating to certain actions taken by certain licensing authorities regarding a licensee holder or applicant who has been convicted of a Class C misdemeanor). Texas Legislative Online has the complete text and filing history for every bill introduced. See <http://www.capitol.state.tx.us>. See also Mike Ward, *Prison reform outlook improves with business group's involvement*, *Austin American-Statesman*, Jan. 23, 2013, <http://www.statesman.com/news/news/prison-reform-outlook-improves-with-business-group/nT4YL/>.

²³ Eric Dexheimer, *Finding jobs a challenge for ex-inmates in Texas*, *Austin American-Statesman*, Apr. 10, 2011, (citing 2008 Urban Institute Study, <http://www.statesman.com/news/news/special-reports/finding-jobs-a-challenge-for-ex-inmates-in-texas/nRY48/>).

²⁴ See also *infra* pp. 25-26, 30-31.

²⁵ *Housing Needs & Barriers For Formerly Incarcerated Persons*, *Austin/Travis County Reentry Roundtable Report* (Aug. 5, 2008) at 11 (citing studies), <http://reentryroundtable.net/wp-content/uploads/2011/12/HousingNeedsBarriers.pdf>.

²⁶ *Building Successful Strategies for Offender Reentry*, *Austin/Travis County Reentry Roundtable Issue Paper* (undated) at 2, http://reentryroundtable.net/wp-content/uploads/2012/01/ATCRRT_Housing-Issue-Paper_2011.pdf.

²⁷ *Id.* (citing Jamie Watson, et al., *A Portrait of Prisoner Reentry in Texas*, *The Urban Institute*, 2004).

²⁸ *Strategies for Addressing Housing Needs and Risks in Prisoner Re-Entry: Homelessness and Prisoner Re-Entry*, Council of State Governments (undated) (citing 1996 HUD Study and related work), http://www.reentrypolicy.org/jc_publications/homelessness_prisoner_reentry/file.

²⁹ *Clean Slate: Expanding Expungements*, *supra* note 10, at 170.

³⁰ Mitch Mitchell, *Ex-offenders say housing, jobs are tough to find*, *Ft. Worth Star-Telegram*, May 28, 2012, <http://www.mcclatchydc.com/2012/05/29/150348/ex-offenders-says-housing-jobs.html>.

³¹ 24 CFR 960.204 and 24 CFR 982.553 (lifetime bans for methamphetamine production and sex offender registry offenses).

³² One review identifies four areas where HUD's guidelines tend to be interpreted overly broadly with respect to criminal records: "1. the number of years the housing provider will look back for criminal activity; 2. the use of arrests without convictions as proof of past criminal activity; 3. the use of categories of criminal activity so vague that neither applicants nor administrators can fully understand how to apply them fairly; and 4. the absence of mitigating circumstances as a means for overcoming criminal records barriers in written admissions policies." *When Discretion Means Denial: The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois*, Shriver Center (Aug. 2011) at 3-4, <http://www.theshriverbrief.org/2011/09/articles/community-justice/when-discretion-means-denial-for-people-with-criminal-records-in-federally-subsidized-housing/>.

³³ Letter from Secretary Shaun Donovan and Assistant Secretary for Public and Indian Housing, Sandra B. Henriquez, to PHA Executive Directors, U.S. Department of Housing and Urban Development, June 17, 2011, http://consensusproject.org/documents/0000/1130/HUD_letter.pdf.

³⁴ Letter from Secretary Shaun Donovan and Acting Assistant Secretary for Housing/Federal Housing Commissioner, Carol J. Galante, to Owners and Agents, U.S. Department of Housing and Urban Development, Mar. 14, 2012, http://www.nationalreentryresourcecenter.org/documents/0000/1344/3.30.12_MFamily_properties_Reentry_memo_6_2_.pdf.

³⁵ The move to erect additional educational barriers continues as evidenced by recent legislation introduced by Texas State Senator Williams allowing for the use of criminal records in determining eligibility for on-campus housing at public institutions of higher learning. Such use, combined with the overall shortage of safe and affordable housing stock available to all tenants with a criminal history, would leave many students in Texas' higher education system without access to housing, thereby further foreclosing educational opportunities. See *Tex. S.B. 146*, 83rd Leg., R.S. (2012).

³⁶ See generally *The Use of Criminal History Records in College Admissions: Reconsidered*, Center for Community Alternatives (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>. The Report identifies numerous concerns raised by the use of criminal history information in connection with college admissions, noting that in today's world "having a criminal record is no longer an unusual characteristic. Given the sheer numbers involved, it is inevitable that otherwise qualified and deserving applicants are either being rejected or are being discouraged from applying in the first place." *Id.* at 24.

³⁷ Students are ineligible for federal financial aid, including grants, loans, and work-study assistance, for one or two years, depending on whether the conviction is for possession or sale. Multiple offenses can lead to a lifetime ban on federal financial aid. Convictions that are reversed, set aside, or removed from a student's record do not count, nor do convictions received while a juvenile, unless tried as an adult. 20 U.S.C. 1091(r) (2010).

³⁸ Tex. Educ. Code Ann. § 56.304-5 [TEXAS Grant], § 56.404(b) and § 56.405(b) [TEOG Grant], § 56.455(4) [B-On-Time Loan requiring eligibility for federal financial aid] (West 2012).

³⁹ *The Use of Criminal History Records in College Admissions*, *supra* note 36, at 23-28.

⁴⁰ *State Reforms Reducing Collateral Consequences for People with Criminal Records*, National H.I.R.E. webinar (Sept. 25, 2012), <http://www.nelp.org/page/-/SCLP/Webinar/92512StateCollateralConsequencesWebinar.pdf?nocdn=1>. The Texas ban on receiving TANF benefits applies to felony drug convictions on or after April 1, 2002. 1 Tex. Admin. Code § 372.501 (2012).

⁴¹ *Annual Report of 2011 UCR Data Collection: Crime in Texas Overview*, Texas Department of Public Safety (2011), http://www.dps.texas.gov/director_staff/public_information/2011CIT.pdf. For Uniform Crime Reporting purposes, "violent crime" includes murder, rape, robbery, and aggravated assault and "property crime" includes burglary, larceny-theft, and motor vehicle theft. Roughly 90% of UCR crimes reported by DPS in 2011 involved property offenses, not crimes of violence (892,419 versus 104,961).

⁴² *States Report Reductions in Recidivism*, The Council of State Governments Justice Center (Sept. 25, 2012) at 5, <http://www.nationalreentryresourcecenter.org/publications/states-report-reductions-in-recidivism>.

⁴³ Prisoners in 2011, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2012) at 3, <http://bjs.ojp.usdoj.gov/>.

⁴⁴ Texas Criminal Justice Coalition website, <http://texascjc.org/solutions-confinement-reentry>.

⁴⁵ *Housing Needs & Barriers*, *supra* note 25, at 17.

⁴⁶ *Ex-offenders say housing, jobs are tough to find*, *supra* note 30.

⁴⁷ *Quoted in Housing Needs & Barriers*, *supra* note 25, at 8.

⁴⁸ Unless noted, all statistics come from the following sources: Email from Executive Services Department, Texas Dep. of Criminal Justice, Oct. 4, 2012; Texas Counties: Unemployment Rate, The County Unemployment Project, Texas Association of Counties (Texas Workforce Commission, Labor Force Statistics for Texas Counties 2000-Present (2011)), <http://www.txcip.org/tac/census/morecountyinfo.php?MORE=1042>; Texas Department of Public Safety Crime Reports (2011), http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm. The crime reports gather numbers, by jurisdiction, for Uniform Crime Report offenses only. In calculating county numbers, the report combines the county sheriff's office together with all other law enforcement jurisdictions reporting in that county, including municipal police departments as well as school, transit, and county facilities. Arrests, rather than total numbers of offenses, are included here to highlight where criminal records tend to originate within these counties. The distribution of offenses and arrests within a county may be attributable to many factors not discussed here, such as a county's population distribution or the percentage of county land lying outside the major metropolitan center's boundaries. The higher rates of arrests falling within the urban centers is some indication, however, both of the heightened risk for urban populations to be drawn into the criminal justice system as well as the clustering of individuals with criminal justice involvement within these urban centers.

⁴⁹ *Perceived Needs of Homeless Persons in Houston/Harris County 2012*, Coalition for the Homeless Houston/Harris County, at 16, <http://www.homelesshouston.org/wp-content/uploads/2012/12/2012NeedsAssessmentReport-Aug23.pdf>.

⁵⁰ *2012 Point-in-Time Homeless Count and Census, Dallas County*, Metro Dallas Homeless Alliance, at 22 and 28, <http://www.mdhadallas.org/downloads/2012DallasHomelessCountCensusReportFINAL.pdf>.

⁵¹ *Ex-offenders say housing, jobs are tough to find*, *supra* note 30 (quoting Cindy Crain, executive director of the Tarrant County Homeless Coalition).

⁵² Texas Interagency Council for the Homeless Meeting Minutes, June 9, 2010, <http://www.tdhca.state.tx.us/tich/docs/minutes-20100609.pdf>.

⁵³ 2012 Point-in-Time Survey, prepared by Dr. Amy Stone and students at Trinity University for the City of San Antonio and the South Alamo Regional Alliance for the Homeless (SARAH), at 13. Insofar as this number identifies prison (and hospitals and rehab) releases only, it will significantly undercount the number of individuals who have criminal records but may not have served time in prison. Almost half of those surveyed reported unemployment or loss of income as the reason for their being homeless. It is likely that at least some of the financial losses are also due to criminal records, though that number cannot be calculated based on the available information.

⁵⁴ *Frequently Asked Questions About Reentry From Incarceration*, Community Action Network (Mar. 2009), <http://www.caction.org/faqs/Reentry2009.pdf>.

⁵⁵ Jess Mitchell, *Past Offenders Struggling to Find Housing*, YNN, Sept. 26, 2012, (citing review by leasing agent Adam Seigel: "a felony in [Austin] is kind of like a death wish"), http://austin.ynn.com/content/top_stories/288531/past-offenders-struggling-to-find-austin-housing.

⁵⁶ Bexar and Travis counties have active Reentry Councils that focus on issues specific to reentry, such as housing and employment, and engage in evidence based research to identify effective solutions and document best practices. Harris County recently launched its inaugural Reentry Council and Tarrant County is busy rebuilding its Reentry Council following the departure of its past director. Criminal Justice Coordinating Councils are also working at the regional level and the Statewide Reentry Council Coalition held its third annual convening in November 2012.

⁵⁷ National data on Latinos is less available because many states do not track ethnicities as a separate category. The data that is available typically draws from the dozen or so states, including Texas, that do maintain some separate statistics on Latino criminal justice involvement.

⁵⁸ *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System*, C. Hartney & L. Vuong, National Council on Crime and Delinquency (Mar. 2009) at 2, http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

⁵⁹ *Id.* at 5.

⁶⁰ Written Testimony of Adam Klein, *supra* note 19, at 2 (based on 2009 data). See also *65 Million Need Not Apply*, *supra* note 4, at 5 (showing that while the arrest rate for African Americans is 2.2 times their share of the population, the arrest rate for Whites is actually less than their share of the population (.09 times less) (emphasis added)).

⁶¹ *Created Equal*, *supra* note 58, at 6 (quoting Schlesinger 2005).

⁶² Written Testimony of Adam Klein, *supra* note 19, at 2.

⁶³ Written Testimony of Juan Cartagena, *supra* note 17, at 2.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 2.

⁶⁶ *In Search of a Job*, *supra* note 18, at 44. Looking at all men, regardless of age, the incarceration rate is 1 out of every 106 Whites, 1 out of every 36 Latinos and 1 out of every 15 African Americans. *Id.*

⁶⁷ A recent Texas Criminal Justice Coalition report focuses, in part, on the disproportionate enforcement of drug policies in the black community and the resulting community harm from this disparate treatment. Harris County Communities: A Call for True Collaboration (Jan. 2013), <http://www.texascjc.org/sites/default/files/uploads/Harris%20County%20Communities%20A%20Call%20for%20True%20Collaboration.pdf>.

⁶⁸ Statistics provided by the Texas Health and Human Services Commission, Center for Elimination of Disproportionality and Disparities (relying on 2010 and 2011 TDCJ data), http://www.hhsc.state.tx.us/hhsc_projects/cedd/about/index.shtml.

⁶⁹ *Id.* But see Sentencing Project Interactive Map, <http://www.sentencingproject.org/map/map.cfm>, which indicates a 1.2 to 1 ratio of Latino to White incarceration in Texas. The national incarceration rate is higher yet with a 1.8 to 1 Latino to White ratio. *Id.* See also *Created Equal*, *supra* at note 58. Although this report focuses solely on adult populations, it is worth noting that Latino youth in Texas tend to experience greater disproportionality in terms of arrest and incarceration rates than the adult Latino population. *Latinos and the Texas Criminal Justice System*, Michael J. Coyle, National Council of La Raza Statistical Brief No. 2 (Aug. 1, 2003), at 9-10, http://www.nclr.org/index.php/site/pub_types/statistical_brief.

⁷⁰ *Latinos and the Texas Criminal Justice System*, *supra* note 69, at 3.

⁷¹ *Id.*

⁷² 42 U.S.C. Sec. 2000e et seq., <http://www.eeoc.gov/laws/statutes/titlevii.cfm>. The EEOC's guidelines, originally issued in 1987, were revised in April 2012 to provide employers with more detailed guidance.

⁷³ Notably, HUD has proposed a framework similar to the EEOC's for assessing public housing eligibility and some states have enacted similar statutory guidance, limiting the use of criminal records and calling for individualized assessments in lieu of broad prohibitions.

⁷⁴ Written Testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, July 26, 2011, Meeting of the EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, at 8 (citing studies), <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm>.

⁷⁵ *Id.*

⁷⁶ *Criminal Justice Policy Brief*, *supra* note 7, at 5.

⁷⁷ It is possible that the new health care reform laws, when fully implemented, will offer some relief for this population of individuals, breaking the "cycle of un-insurance, poor health, and high costs." *Frequently Asked Questions: Implications of the Federal Health Legislation on Justice-Involved Populations*, Council of State Governments Justice Center (2011) at 2, http://reentrypolicy.org/jc_publications/faqs-implications-of-the-federal-legislation-on-justice-involved-populations.

⁷⁹ *Every Door Closed*, *supra* note 15, at 1.

⁸⁰ There is some indication that usage may have declined somewhat following the issuance of new EEOC guidelines in April 2012 governing the use of background checks. The Society For Human Resources reports that the percent of businesses performing background checks dropped from 92% in 2010 to 86% in 2012. Ellen Hirst, *Business risks rise in criminal history discrimination*, Chicago Tribune, Oct. 21, 2012, http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-eeoc-felony-20121021_1_criminal-records-eeoc-s-chicago-district-office-court-case.

⁸¹ Written Testimony of Adam Klein, *supra* note 19, at 2. See also *Employer Credit-History Checks and Criminal Record Checks of Job Applicants for Hiring Decisions: The Illegality under Title VII Disparate Impact Doctrine*, Adam T. Klein, ReNika Moore, and Scott A. Moss (2007) at 9, (citing Wal-Mart), http://www.outtengolden.com/sites/default/files/klein_eeoc_testimony_final.pdf.

⁸² *Employer Credit-History Checks*, *supra* note 81, at 9.

⁸³ Testimony of Maurice Emsellem, National Employment Law Project, Before the U.S. Congress, House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism & Homeland Security (Apr. 26, 2007), http://nelp.3cdn.net/09844c01251e45bbf4_6am6ii9ld.pdf; Testimony of Maurice Emsellem, National Employment Law Project, Before the U.S. Congress, House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism & Homeland Security, Hearing on Collateral Consequences of Criminal Convictions: Barriers to Reentry for Formerly Incarcerated (June 9, 2010), <http://www.nelp.org/page/-/SCLP/2010/TestimonyofMauriceEmsellem.pdf?nocdn=1>.

⁸⁴ Testimony of Maurice Emsellem (Apr. 26, 2007), *supra* note 83, at 2.

⁸⁵ Shawn D. Bushway, Paul Nieuwebeerta, Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, *Criminology* Vol. 49, issue 1, at 27 (2011) (citing U.S. Department of Justice, 2008, 2009).

⁸⁶ See Chad Terhune, *The Trouble with Background Checks*, *Business Week*, May 29, 2008, <http://www.businessweek.com/stories/2008-05-28/the-trouble-with-background-checks>.

⁸⁷ *65 Million "Need Not Apply," supra* note 4, at 13.

⁸⁸ *Broken Records: How Errors By Criminal Background Checking Companies Harm Workers And Businesses*, Persis S. Yu and Sharon M. Dietrich, National Consumer Law Center (Apr. 2012) at 8 (quoting *The Trouble With Background Checks*, *supra* note 86), <http://www.nclc.org/issues/broken-records.html>.

⁸⁹ *Id.*

⁹⁰ Telephone Interview with Michael Coffey, President and Founder, Imperative Information Group (Sept. 14, 2012). See also Imperative Information Group, *The Danger of Selling Cheap Background Checks*, Mar. 14, 2007, <http://www.imperativeinfo.com/the-danger-of-selling-cheap-background-checks/> ("weaknesses in database products are well known" in the industry).

⁹¹ *The Trouble with Background Checks*, *supra* note 86 (quoting Lester Rosen, President of Employment Screening Resources).

⁹² Screen scraping is a means for collecting information remotely by having one computer read and download data from another computer. Screen scraping (or data scraping, which is similar) may be unwanted for various reasons and leads to a loss of control over records downstream. See also *Employment Screening Resources, Use of National Criminal Databases No Substitution for County Courthouse Searches*

during *Real Background Checks*, Dec. 14, 2012, <http://www.esrcheck.com/Top-Ten-Background-Check-Trends-for-2013.php> (discussing the “practical pitfalls” to screen scraping technology).

⁹³ *With Friends Like These, Who Needs Enemies?*, blog post from Dec. 18, 2011, <http://www.imperativeinfo.com/with-friends-like-these-who-needs-enemies/>.

⁹⁴ *An Audit Report on The Criminal Justice Information System at the Department of Public Safety and the Texas Department of Criminal Justice*, State Auditor’s Office, Report No. 12-002 (Sept. 2011), <http://www.sao.state.tx.us/reports/main/12-002.pdf>. All but 12 Texas counties, including all major metropolitan areas, were at or above 90% compliance for adult record reporting by September 2012.

⁹⁵ Testimony of Maurice Emsellem (Apr. 26, 2007), *supra* note 83, at 8 (citing Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2002 (Aug. 2003) at 2).

⁹⁶ *Id.*

⁹⁷ *See infra* p. 22.

⁹⁸ One industry estimate is that employers who rely primarily on large national databases may miss 30-60% of the available records. Imperative Information Group, *Conference Survival Guide Quiz*, at 5 (question no. 11), <http://www.imperativeinfo.com/answers/>.

⁹⁹ Imperative Information Group, *The Expungement Clearinghouse: A bad idea whose time has come?*, Apr. 12, 2012, <http://www.imperativeinfo.com/the-expungement-clearinghouse-a-bad-idea-whose-time-has-come/>. Some screening companies, recognizing this basic shortcoming, send runners to verify original records before reporting negative findings. These additional efforts increase the accuracy of the issued reports, but at an increase in cost that could prove prohibitive for many users. By one estimate, the cost for a “standard” search could increase from a typical \$20-40 online search fee to something closer to \$120-150 for a fully verified search. Telephone Interview with Michael Coffey, *supra* note 90.

¹⁰⁰ *Broken Records*, *supra* note 88, at 19.

¹⁰¹ 15 U.S.C.A. § 1681e (West 2012). Texas’ version of the FCRA is codified in the Business & Commerce Code, Title II, Chapter 20 (Regulation of Consumer Credit Reporting Agencies), Sec. 20.01 *et seq.*

¹⁰² *Report of the National Task Force to the U.S. Attorney General, Interstate Identification Index Name Check Efficacy* (July 1999) at 48, http://permanent.access.gpo.gov/ps65765/III_Name_Check.pdf.

¹⁰³ Employment Screening Resources, “ESR Top Ten Background Check Trends for 2013,” <http://www.esrcheck.com/Top-Ten-Background-Check-Trends-for-2013.php> (discussing increase in class action lawsuits and government actions to enforce the FCRA as well as greater EEOC oversight to prevent employment discrimination during background checks as major industry trends for 2013).

¹⁰⁴ Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. Times, Oct. 17, 2006, http://www.nytimes.com/2006/10/17/us/17expunge.html?_r=0.

¹⁰⁵ *Broken Records*, *supra* note 88, at 32. *See also With Friends Like These, Who Needs Enemies?*, *supra* at note 93 (decrying the NAPBS for “continu[ing] to avoid confronting this issue [i.e., selling bad data] for fear of alienating their largest members and possibly entering into antitrust or restriction of trade issues. . . . [] NAPBS’ accreditation program does not prohibit the sloppy database practices outlined in the story”).

¹⁰⁶ *See* Imperative Information Group, *Consumer Protection Collaboration Grows to Sixty Members*, June 10, 2009, <http://www.imperativeinfo.com/consumer-protection-collaboration-grows-to-sixty-members/> (discussing weaknesses in the background search industry and the need for reforms to protect consumers, employers, and the public).

¹⁰⁷ *See* Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. Rev. 521, 523 at n.4 (2007) (citing sources).

¹⁰⁸ *Id.* at 534 (“[T]here appears to be no research suggesting that a high percentage of workplace violence is committed by ex-offenders”). *See also The Use of Criminal History Records in College Admissions*, *supra* note 36, at ii (discussing the absence of any identifiable link between having a criminal record and campus safety).

¹⁰⁹ *See, e.g., Mandate for More Employee Background Checks Impeded By State Prohibitions Against Inquiries Into Criminal Records*, LPA Policy Brief (Feb. 6, 2003), http://www.hrpolicy.org/memoranda/2003/03-16_FCRA_State_Law_PB.pdf (recidivism rates “overwhelmingly” support need for criminal background checks).

¹¹⁰ Alfred Blumstein and Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice website, <http://www.nij.gov/journals/263/redemption.htm> (discussing their study, including research methods and findings, as published in *Criminology* 47 (2) (May 2009)).

¹¹¹ *Id.* at note 5 (citing additional research showing this diminishing risk of offending over time). *See also Working with Conviction*, *supra* note 6, at 7 (citing research from the University of South Carolina and University of Maryland confirming 7-year time frame at which point “there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record”); *Scarlet Letters and Recidivism*, *supra* note 9, at 6 (studies indicate that “the majority of people with a criminal justice contact at some point early in life pose little or no risk of active, long-term criminal careers” and citing desistance studies dating back over the past 30 years).

¹¹² The concept of a ‘point of redemption’ is relevant only for individuals with criminal records who have actually engaged in criminal behavior. An individual whose only criminal record is the result of a false arrest, mistaken identity, or some other reason not based on actual criminal behavior would not present any heightened risk of future criminal conduct, regardless of the amount of time since the arrest.

¹¹³ *See generally* 65 Million “Need Not Apply,” *supra* note 4; *Working with Conviction*, *supra* note 6; ‘Redemption’ in an Era of Widespread Criminal Background Checks, *supra* note 110.

¹¹⁴ *Cost-Saving Strategies For Texas’ Criminal And Juvenile Justice Systems/Providing Tools For Returning Individuals To Live Responsibly And Remain Law-Abiding*, Texas Criminal Justice Coalition, A Policy Guide, Part 2 of 4 (2011) at 2, [http://www.texascjc.org/sites/default/files/uploads/Cost-Saving%20Strategies%20-%20Part%201%20\(Feb%202011\).pdf](http://www.texascjc.org/sites/default/files/uploads/Cost-Saving%20Strategies%20-%20Part%201%20(Feb%202011).pdf) (citing a fifteen state study that included Texas). *See also Working with Conviction*, *supra* note 6, at 1 (citing an FBI finding that “ex-offenders who are employed are 3 to 5 times less likely to re-offend” and citing related studies). This same correlation is evident in Texas where, 13% of employed ex-offenders were shown to return to prison within a year of release, compared with 28% of their jobless counterparts. Nancy La Vigne, *Aid reintegration of ex-prisoners*, Austin American-Statesman, Apr. 26, 2008, http://www.urban.org/UploadedPDF/901161_aid_reintegration.pdf.

¹¹⁵ *Cost-Saving Strategies for Texas' Criminal And Juvenile Justice Systems*, *supra* note 114, at 2.

¹¹⁶ Eric Dexheimer, *Texas ex-offenders are denied job licenses*, Austin American-Statesman, Apr. 11, 2011, <http://www.statesman.com/news/news/special-reports/texas-ex-offenders-are-denied-job-licenses/nRY5B/>.

¹¹⁷ *The Exaggerated Threat of Negligent Hiring*, National WorkRights Institute White Paper (2012), <http://workrights.us/?p=594>; Interview with Michael Coffey, *supra* note 90 (suggesting attorneys have tended to exaggerate liability risks to scare employers into using background checks). Much the same set of concerns plays out in the housing industry, with landlords and property owners principally worried about increased liability risks from renting to ex-offenders. *Ex-offenders say housing, jobs are tough to find*, *supra* note 30 (comment by John Mitchell, executive director, Apartment Association of Tarrant County).

¹¹⁸ *Employer Credit-History Checks and Criminal Record Checks*, *supra* note 81 (highlighting industry practices promoting the use of background screenings as a way for employers to limit legal risks, but finding “no supporting statistics” for linking criminal records and legal liability).

¹¹⁹ *Wise v. Complete Staffing Services, Inc.*, 56 S.W.3d 900, 902 (Tex. App. – Texarkana 2001) (quoting *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. App. – Tyler 1979, writ ref'd n.r.e.)(citing additional cases)).

¹²⁰ *Id.* at 903 (citing *Estate of Arrington v. Fields*).

¹²¹ *Id.* When deciding whether to impose a legal duty, “courts weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the actor.” *Id.* at 902 (quoting *Allen v. Albright*, 43 S.W.3d 643, 646 (Tex. App.—Texarkana 2001, no pet.) (citing cases)). It is noteworthy that the social utility of the actor’s conduct is included in this determination, arguably introducing into the court’s calculus the public safety and reintegration benefits that come with gainful employment.

¹²² See, e.g., *Wise*, 56 S.W.3d at 903 (but where an employer voluntarily assumes the duty by choosing to perform a criminal background check, then the investigation must be adequately performed). See also *Guidry v. National Freight, Inc.*, 944 S.W.2d 807, 810 (Tex. App. – Austin 1997) (declining to extend a duty to perform criminal background checks beyond those employees who hold “a special relationship of trust with vulnerable groups”).

¹²³ *Guidry*, 944 S.W.2d at 810.

¹²⁴ It is also worth noting that when an employer voluntarily assumes a duty to protect by choosing to perform background checks on job applicants, courts may hold that employer liable for failing to ensure the check is adequate and non-negligent. Employers who rely on low cost internet background checks may place themselves in greater jeopardy due to the incomplete and often inaccurate results returned from these checks. See also *Inside Criminal Background Checks: Sources, Availability and Quality*, ADP of North America Pre-Employment Services (2007) at 4 (challenge to prove due diligence if employer “knowingly rel[ies] on searches from static criminal databases”), <http://www.consumerdatareporting.com/pdfs/adp%20inside%20background%20checks%2008.pdf>.

¹²⁵ *Unlocking Employment Opportunity for Previously Incarcerated Persons in the District of Columbia*, Council for Court Excellence (2011) at 13, <http://legaltimes.typepad.com/files/report-final.pdf>.

¹²⁶ *The Exaggerated Threat of Negligent Hiring*, *supra* note 117.

¹²⁷ *Id.* This figure relies, in part, on an assumption that approximately 1 of every 100 civil cases filed results in an appeal. The report’s findings are supported by interviews with management attorneys who report that they “rarely see negligent hiring cases,” indicating “at most one negligent hiring case per year.” *Id.* None of the employers interviewed by National Workrights Institute in connection with the report indicated ever having been sued for negligent hiring.

¹²⁸ The court in *THI of Texas at Lubbock I, LLC v. Perea* held a skilled nursing home liable for negligent hiring when it hired a nurse who had been disciplined in another state for prescribing the same drug without physician permission as prescribed in this case and leading to patient’s death. *THI of Texas at Lubbock I, LLC v. Perea*, 329 S.W.3d 548, 582 (Tex. App. – Amarillo 2010, pet. ref’d). In the second case, *TXI Transp. Co. v. Hughes*, the court declined to hold the employer liable noting that the failure to conduct a background check “furnished the condition that made the accident possible” (i.e., the employee’s illegal immigration status) but did not “create a foreseeable risk that [the employee] would negligently drive the gravel truck.” *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240-241 (Tex. 2010).

¹²⁹ *Working with Conviction*, *supra* note 6, at 8.

¹³⁰ Based on conversations with government officials in Bexar and Travis Counties and the City of Austin. See also *infra* at pp. 25-26, 30-31.

¹³¹ “Preventing Violence in the Work Place” conference presentation, Ninth National Labor-Management Conference, April 7-9, 1998, Chicago, Illinois, <http://www.wps.org/publications.html>.

¹³² *Id.*

¹³³ Workplace Violence Research Institute, http://www.noworkviolence.com/articles/preventing_violence.htm.

¹³⁴ In fact, studies indicate non-employees cause the overwhelming majority of workplace violence. Fatalities occurring as a result of workplace violence, for example, are “most often” the result of domestic violence carrying over to the workplace. Katherine Cabaniss, *Living Safe: Employers, employees have role in preventing workplace violence*, Sugar Land Sun News, Aug. 30, 2012, http://www.yourhoustonnews.com/sugar_land/news/living-safe-employers-employees-have-role-in-preventing-workplace-violence/article_00473273-6a98-5e38-8b6e-f5ba1d860a39.html. This is equally true in the educational setting where a 2010 study found “[n]o link . . . between having a criminal record and posing a risk to campus safety,” noting that “[c]ollege students who are victims of [violent] crimes are mostly victimized off-campus by strangers.” *The Use of Criminal History Records in College Admissions*, *supra* note 36, at 5.

¹³⁵ *State Reforms Reducing Collateral Consequences for People with Criminal Records*, NELP Webinar slide presentation (Tue., Sept. 25, 2012), <http://www.nelp.org/site/publications/> (states with current legislation include: Colorado, Florida, Massachusetts, New York, North Carolina, and Ohio; states with pending proposals include: Connecticut, Minnesota, New Jersey, New York, Vermont, West Virginia, and Wisconsin).

¹³⁶ See, e.g., *Cost-Saving Strategies for Texas' Criminal and Juvenile Justice Systems*, *supra* note 114, at 25; *Working with Conviction*, *supra* note 6, at 12. At least two bills have been filed in the 83rd Legislative Session urging similar action: HB 1188 (relating to limiting the liability of persons who employ persons with criminal convictions) and HB 3079 (relating to limiting the liability of landlords who rent or lease dwellings to persons with criminal records).

¹³⁷ Michael Coffey, *What Employers Need to Know When Selecting A Background Investigations Partner*, Imperative Information Group Report (2004) at 3, <http://imperativeinfo.com/wp-content/uploads/2011/09/EmploymentBackgrounds.pdf>.

¹³⁸ 65 Million “Need Not Apply” Report, *supra* note 4.

¹³⁹ Patricia M. Harris and Kimberly S. Keller, *Ex-Offenders Need Not Apply / The Criminal Background Check in Hiring Decisions*, Journal of Contemporary Criminal Justice, Vol. 21, No. 1 (Feb. 2005), pp. 6-30, at 11 (providing examples of supporting cases and EEOC decisions).

¹⁴⁰ *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, Grits For Breakfast Blog, Sept. 18, 2012, <http://gritsforbreakfast.blogspot.com/2012/09/the-unexonerated-factually-innocent.html>.

¹⁴¹ Following the U.S. Supreme Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), some commentators have raised the possibility of incorporating a new “Padilla Warning,” providing notice of the range of collateral consequences that come with a criminal conviction, into court proceedings. For a different interpretation, see *Collateral damage: guilty pleas, deportation, and Padilla v. Kentucky*, by David Newell, Assistant District Attorney in Harris County, The Prosecutor, May-June 2010, Vol. 40, No. 3, <http://www.tdcaa.com/node/6610>.

¹⁴² Mark Hochglaube, trial chief for Harris County’s Public Defender Office, confirms “bond practices . . . force some innocent defendants to plead guilty.” *Harris County jail population reductions may be short-lived if judges, new DA don’t act responsibly*, Grits For Breakfast blog, Sept. 14, 2012, <http://gritsforbreakfast.blogspot.com/2012/09/harris-county-jail-populations-may-be.html>.

¹⁴³ *Texas ex-offenders are denied job licenses*, *supra* at note 116.

¹⁴⁴ *Practical Steps Employers Can Take to Comply with New EEOC Criminal Record Guidance*, Sept. 2012, http://www.esrcheck.com/file/ESRWhitepaper_LesRosen_EEOCCriminalRecordGuidance_September2012.pdf.

¹⁴⁵ Some studies have found that a background check could, in some instances, actually reduce discriminatory impacts. In one study, for example, employers who might otherwise deny African American men employment based on personally held assumptions about who commits crimes, appeared to be more willing to hire these applicants if a background check showed a clean criminal history. *In Search of a Job: Criminal Records as Barriers to Employment*, *supra* note 18, at 48. The fact that such prejudicial stereotypes persist today, however, does not justify discounting the EEOC’s basic premise that hiring processes relying exclusively on criminal record checks perpetuate the inequities of our criminal justice system.

¹⁴⁶ *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC Enforcement Guidance No. 915.002 (Apr., 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹⁴⁷ *Business risks rise in criminal history discrimination*, *supra* note 80.

¹⁴⁸ Backgroundchecks.com website (search “Arrest Records”), <http://www.backgroundchecks.com/learning.mvc/criminal-records>.

¹⁴⁹ Telephone Interview with Steven Jones, Co-founder and Executive Director of Workplace Violence Research Institute (Sept. 27, 2012).

¹⁵⁰ The CCH includes information on arrests, prosecutions and the disposition of the case for persons arrested for Class B misdemeanor or greater. Tex. Crim. Proc. Code § 60.05 (West 2012).

¹⁵¹ The CCH is only one component of the state’s criminal justice information system (CJIS). The other component is the Corrections Tracking System (CTS) managed by the Department of Criminal Justice (DCJ). *About CCH*, Tex. Dept. of Public Safety, <https://records.txdps.state.tx.us/DpsWebsite/CriminalHistory/AboutCch.aspx>.

¹⁵² Telephone Interview with Angie Kendall, Deputy Administrator, Crime Records Service, Texas Department of Public Safety (Oct. 4, 2012).

¹⁵³ Tex. Crim. Proc. Code Ann. §§ 60.05 – 60.051 d\ (West 2012).

¹⁵⁴ For example, if a the YMCA (a Level 3 agency) wants to hire an individual who also works as a teacher for a school district (a Level 2 agency), the records that the school district viewed when hiring that teacher can also be made available to the YMCA. The clearinghouse is updated in real time so that if the teacher is arrested and this information is reported to the school district, it will also be reported to the YMCA.

¹⁵⁵ Some exceptions do apply, for example, documents with private information such as medical records, or court records that identify a minor victim of a sex crime.

¹⁵⁶ El Paso County advised that it is planning to move to scanned images within the next few years; the software that will make it possible will be implemented in early 2013, although it may take some time to include scanned images. Telephone Interview with Richard Rocha, Computer Systems Specialist, El Paso District Clerk’s Office (Sept. 2012).

¹⁵⁷ *Expunged Criminal Records Live to Tell Tales*, *supra* note 104.

¹⁵⁸ Telephone Interview with Stan Tungate, Managing Supervisor, Dallas County District Clerk’s Office (Aug. 2012).

¹⁵⁹ Telephone Interview with Neomia Bailey, Clerk Supervisor, Travis County Clerk’s Office (Sept. 2012).

¹⁶⁰ Telephone Interview with Suzanne Davis, Clerk Supervisor, Collin County District Clerk’s Office (Aug. 2012).

¹⁶¹ *Public Records on the Internet: The Privacy Dilemma*, Privacy Rights Clearinghouse, at 2 (Apr. 19, 2002) (revised Mar. 2006), <http://www.privacyrights.org> (discussing the past role of “practical obscurity” in protecting personal privacy). The author cautions against the increasing trend toward a “dossier society,” recommending close examination of the public policy objectives underlying expanded online access to records. *Id.* at 7. Many of the author’s final recommendations on how to achieve balance between privacy rights and public access to information mirror those in this report.

¹⁶² Tex. Gov’t Code Ann. § 552.1425 (West 2012).

¹⁶³ Tex. Gov’t Code Ann. § 411.0835 (West 2012).

¹⁶⁴ Tex. Gov’t Code Ann. § 411.0851(b) (West 2012). The statute only applies to commercial vendors not regulated by the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.) or the Gramm-Leach-Bliley Act (15 U.S.C. Sections 6801 to 6809).

¹⁶⁵ *Id.* The statute authorizes the Office of the Attorney General to file an action against a company for violations, but no such cases have been identified.

¹⁶⁶ Telephone Interview with Angie Kendall, *supra* note 152.

¹⁶⁷ Tex. Gov’t Code Ann. § 411.085 (West 2012) (a Class B misdemeanor unless the information is obtained and disclosed in exchange for remuneration, in which case it is a second degree felony).

¹⁶⁸ *Clean Slate: Expanding Expungements*, *supra* note 10.

¹⁶⁹ Terminology between states varies, but in Texas an “expunction” erases all records of arrest, booking and court proceedings from the local, state, and federal databases. Release, dissemination, or use of expunged records and files is prohibited; a person can legally deny ever having been arrested for or charged with the criminal offense on job applications and for most other purposes. In contrast, “nondisclosure” means that the record has been sealed and is no longer available for viewing except by specifically designated categories of individuals or agencies.

The underlying records, however, remain extant. As with an expunction, a defendant is not required to disclose sealed records to employers or other entities asking about criminal records. Tex. Gov't Code Ann. § 411.081(g-2) (West 2012) (“[a] person whose criminal history record information has been sealed under this section is not required in any application for employment, information, or licensing to state that the person has been the subject of any criminal proceeding related to the information that is the subject of an order issued under this section”); Tex. Crim. Proc. Code Ann. § 55.03(2) (West 2012) (“except [when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged] the person arrested may deny the occurrence of the arrest and the existence of the expunction order”).

¹⁷⁰ Tex. Crim. Proc. Code Ann. § 55.01(2)(C) (West 2010).

¹⁷¹ Tex. Crim. Proc. Code Ann. § 55.01 (West 2010).

¹⁷² For a comprehensive discussion of the 2011 statutory revisions, see Andrea Westerfeld and Katharine Decker, *Expunctions and Non-Disclosure 2011*, Texas District & County Attorneys Association, <http://www.tdcaa.com/publications/expunctions-nondisclosure-2011>.

¹⁷³ Andrea Westerfeld, *Changes in expunction law*, Texas District & County Attorneys Association, The Prosecutor, September-October 2011, Volume 41, No. 5, <http://www.tdcaa.com/journal/changes-expunction-law> (discussing weaknesses in new law).

¹⁷⁴ See Douglas Belkin, *More Job Seekers Scramble To Erase Their Criminal Past*, Wall Street Journal, Nov. 11, 2009, <http://online.wsj.com/article/SB125789494126242343.html> (noting a 30-40% increase in the number of expunction petitions being filed in some jurisdictions).

¹⁷⁵ Since 2008 the number of petitions being filed in Texas has increased slightly, likely in part a result of the 2008 economic downturn when many previously employed individuals suddenly were looking for work burdened by an old criminal record. But overall the number of petitions remains extremely low relative to the number of people who could be eligible and given what we know about the barriers facing individuals with criminal records, which suggests something more than a simple lack of interest is at work. (Calculation based on data provided by email from Angie Kendall, Administrator, Crime Records Service, Texas Department of Public Safety, Oct. 4, 2012).

¹⁷⁶ An informal survey of legal aid organizations, volunteer legal services, and other similar legal service providers in Texas’ six largest counties suggests that current resources are available to serve only a fraction of the requests for free or reduced-fee legal assistance with expunction and non-disclosure petitions. For people seeking information only, not direct representation, TexasLawHelp reported approximately 2,500 searches in a one year period of its online expunction webpage, and county law libraries for the six counties reported another approximately 2000 requests per year for expunction and non-disclosure related information. (Based on telephone interviews and email correspondence with the following organizations: Legal Aid of Northwest Texas, Lone Star Legal Aid, Texas Rio Grande Legal Aid, Bexar County Bar – Pro Bono, Dallas Volunteer Legal Services, Houston Lawyer Referral Service, Houston Volunteer Lawyers Program, Tarrant County Lawyer Referral Service, Travis County Volunteer Legal Services, TexasLawHelp, Attorney Referral for Central Texas, and the county law libraries for Bexar, Dallas, El Paso, Harris, Tarrant and Travis Counties (Sept. to Nov. 2012).)

¹⁷⁷ Guidelines for Hiring Ex Offenders, https://www.traviscountytx.gov/human_resources/jobs/guidelines.asp.

¹⁷⁸ For non-safety/law enforcement jobs, criminal background investigations are required only for positions that have financial responsibility or work with children, the disabled or elderly. When the job falls in one of these categories, the background investigation is undertaken only after an applicant has been selected as the top candidate for the position. For public safety/law enforcement positions, the Austin Police Department conducts the criminal background investigation. City of Austin, Tex., Res. 20081016-012 (Oct. 16, 2008), <http://www.ci.austin.tx.us/edims/document.cfm?id=122137>.

¹⁷⁹ Press Release, Commissioner Tommy Adkisson, Precinct 4, *Bexar County Re-Entry Council reports on its “Smart Justice” accomplishments* (Aug. 27, 2010), <http://www.bexar.org/cmacts/CM/P/Rel%20-%20ReEntry%20Council%20082710.pdf>.

¹⁸⁰ Les Rosen, *Ban the Box Movement Removing Question about Criminal Records from Job Applications Spreads Across United States*, ESR News: Background Check New From Employment Screening Resources (Trend #3 for 2013), Dec. 28, 2012, <http://www.esrcheck.com/wordpress/2012/12/28/ban-the-box-movement-removing-question-about-criminal-records-from-job-applications-spreads-across-united-states/>. See also Les Rosen, *EEOC Updates Guidance on Criminal Records to Prevent Employment Discrimination during Background Checks*, ESR News: Background Check New From Employment Screening Resources (Trend #2 for 2013), Jan. 2, 2013, <http://www.esrcheck.com/wordpress/2013/01/02/eec-updates-guidance-on-criminal-records-to-prevent-employment-discrimination-during-background-checks/> (discussing movement toward banning the box and the use of individualized assessments in hiring decisions and advising that both suggestions are “easily implemented, and may have little or no negative impact on employer and could potentially have a very positive impact on the problems of [sic] associated with finding appropriate work for ex-offenders.”).

¹⁸¹ For an overview of state statutes (circa 2008) governing criminal record access and use, see *Commercial Data Mining of Criminal Justice System Records*, Delivery Team Report to the Minnesota Criminal and Juvenile Justice Information Task Force (Aug. 2008), <http://archive.leg.state.mn.us/docs/2009/mandated/090200.pdf>. See also *State Reforms Legislative Round-Up*, supra note 5.

¹⁸² See, e.g., **Alaska** (Alaska Stat. Ann. § 12.62.160(b)(8) (West 2012)) (non-conviction information or correctional treatment information cannot be released to the public); **Indiana** (Ind. Code § 24-4-18-6 (West 2012)) (criminal history provider may provide only criminal history information that relates to a conviction); **Hawaii** (Haw. Rev. Stat. § 846-9 (West 2012)) (limits dissemination of non-conviction data, whether directly or through an intermediary, to criminal justice agencies and other individuals authorized by statute or order); **Kentucky** (39 Ky. Admin. Reg. 5 (Nov. 2012)) (limits dissemination of non-conviction data, whether directly or through an intermediary, to criminal justice agencies and individuals and agencies for any purpose authorized by statute, ordinance, or court order); **Minnesota** (Minn. Stat. Ann. § 13.87 (West 2012)) (criminal history data maintained by agencies, political subdivisions and statewide systems is classified as private except that convictions are public for 15 years following the discharge of the sentence imposed for the offense).

¹⁸³ In Massachusetts, in an attempt to stop this end run around central limits on dissemination of records, a coalition of organizations proposed barring screening companies from using the state’s repository at all if they sought to gather additional records locally. Katie Johnston, *Access, limits on criminal records*, The Boston Globe, May 7, 2012, http://www.boston.com/business/articles/2012/05/07/access_limits_on_criminal_records/. Other attempts to address this issue include incentives, such as extending negligent hiring safe harbors, to those who rely on the state’s central repository, rather than seeking records from local entities. It is not known whether any of these efforts have been successful, but nothing in the available literature indicates that the concerns leading to these proposals have been resolved or that practices within the background screening industry have shifted.

¹⁸⁴ Mass. Gen. Laws Ann. Ch. 6, § 172(a)(4) (West 2012). Permanent access is provided to conviction records for murder, manslaughter, and sex offenses.

¹⁸⁵ As with Massachusetts, most states that limit the release of conviction records after some period of time allow the records to be sealed, but not fully expunged. See, e.g., **Arkansas** (Ark. Code Ann. § 16-90-904 (West 2012)) (allows some convictions to be sealed after 5 years); **Illinois** (20 Ill. Comp. Stat. Ann. 2630/5.2(c) (West 2012)) (allows sealing of a conviction after 2 years but exempts DUIs and sexual offenses against a minor); **Indiana** (Ind. Code Ann. § 35-38-5-5 (West 2012)) (allows conviction records to be sealed for non-violent misdemeanor and Class D felonies 8 years following completion of any sentence served); **Minnesota** (Minn. Stat. Ann. § 13.87 (West 2012)) (makes conviction records public and available for release, but only for 15 years); **Nevada** (Nev. Rev. Stat. Ann. § 179.245 (West 2012)) (makes all convictions other than sexual offenses and crimes against children eligible for sealing after 2-15 years, depending on the crime); **New Hampshire** (N.H. Rev. Stat. Ann. § 651:5 (West 2012)) (allows “annulment” of convictions after 5-10 years for felonies and 3 years for misdemeanors, with the exception of violent crimes and crimes where there was an extended prison sentence); **Ohio** (Ohio Rev. Code Ann. § 35-3-37 (West 2012)) (allows sealing of misdemeanor conviction records after 4 years). In contrast, at least three states permit for full expunction of certain criminal convictions, including **North Carolina** (N.C. Gen. Stat. Ann. § 15A-145.5 (West 2012)) (allows expunging first-time nonviolent misdemeanors and low-level felonies 15 years after completion of an individual’s sentence); **Tennessee** (Tenn. Code Ann. § 40-32-101(g) (West 2012)) (allows expunging certain non-violent criminal convictions 5 years after completion of any sentence served); and **Utah** (Utah Code Ann. § 77-40-105 (West 2012)) (allows expunging certain low felonies and misdemeanors after a period ranging from 3-10 years).

¹⁸⁶ Tex. Bus. & Com. Code Ann. § 20.05(4) (West 2012). Note the 7-year limit on reporting applies only if the position is likely to pay \$75,000 or less per year.

¹⁸⁷ See, e.g., **Arkansas** (Ark. Code Ann. § 16-90-903 (West 2012)) (sealed data available to the individual, a criminal justice agency, a court upon showing of subsequent adjudication of guilt, a prosecution attorney, and the state crime information center); **Delaware** (Del. Code Ann. Tit. XI § 4376 (West 2012)) (“expunged” records are released only to law enforcement agencies acting in the lawful performance of their duties; employment applications with a law enforcement agency; criminal justice agencies can keep records regarding probations and past participation in the First Offenders Controlled Substance Diversion Program for purpose of determining later eligibility); **Hawaii** (Haw. Rev. Stat. § 831-3.2(d) (West 2012)) (“expunged” records are placed in a confidential file and can only be accessed by a court preparing a Pre-sentence investigation, a federal or state government considering the person for employment, or a law enforcement agency); **Illinois** (20 Ill. Comp. Stat. Ann. 2630/13 (West 2012)) (sealed records are accessible to courts, law enforcement agencies, and prosecutors); **Indiana** (Ind. Code Ann. § 35-38-5-5 (West 2012)) (“limited access” records are only available to criminal justice agencies); **Minnesota** (Minn. Stat. Ann. § 609A.03 (West 2012)) (“expunged” records can be accessed for purposes of criminal investigation or prosecution, for evaluating potential employment with a criminal justice agency, and for a background check through human services); **New York** (N.Y. Crim. Proc. Law § 160.58 (McKinney 2012)) (sealed records are available to prosecutors and law enforcement agencies in some circumstances, to agencies responsible for issuing gun licenses, to the state department of corrections and community supervision and probation if applicable, and applications for employment as a police officer or peace officer).

¹⁸⁸ The Texas Criminal Justice Coalition has advocated for similar reforms in the past. See *Cost-Saving Strategies*, *supra* note 114, at 32-33.

¹⁸⁹ Conn. Gen. Stat. § 54-142a (West 2012) (stipulating that records of arrest not leading to conviction are automatically ‘erased’ and the individual with the erased record may assert that he or she has not been arrested).

¹⁹⁰ N.Y. Crim. Proc. Law § 160.50 (McKinney 2012).

¹⁹¹ Such a system might work similarly to the “automatic restriction” that applies to juvenile records in Texas. When a juvenile turns 21 years old and has committed no additional criminal offenses since age 17, the juvenile records are automatically restricted and unavailable to all but criminal justice agencies. Tex. Fam. Code Ann. § 58.203 (West 2012). The juvenile can file a petition to fully seal the records, but the records are restricted even if no petition is ever filed. Restricted records may be used against an individual if charged with a crime as an adult. Records can be taken off restricted access if an individual is later convicted of, or placed on deferred adjudication for, a crime that is a Class B Misdemeanor or higher after turning 17. Tex. Fam. Code Ann. § 58.211 (West 2012).

¹⁹² Tex. Crim. Proc. Code Ann. § 55.02(Sec. 2)(c) (West 2012). At least one bill filed in the 83rd Legislative Session, SB 977 (West) (Relating to the procedure used to petition for an order of nondisclosure of criminal history records information), would relieve some of the current procedural burden of seeking an order of nondisclosure. Tex. S.B. 977, 83rd Leg., R.S. (2012).

¹⁹³ S.C. Code Ann. §§ 17-22-920 – 950 (2012) (relating to duties of the Solicitor’s Office).

¹⁹⁴ Ark. Code Ann. §16-90-905 (West 2012) (regarding uniform petition and order to seal records).

¹⁹⁵ Md. Code Ann., Crim. Proc. § 10-105(e) (West 2012).

¹⁹⁶ See, e.g., **Connecticut** (Conn. Gen. Stat. Ann § 54-142a(e)(2) (West 2012)) (no fee required); **Louisiana** (La. Rev. Stat. Ann. § 44:9(K) (2012)) (no fee if a person is acquitted, prosecution is declined, the statute of limitation runs, or the charge is dismissed with prosecutor’s consent); **South Carolina** (S.C. Code Ann. §17-1-40 (2012)) (no fee when charge results in acquittal or dismissal).

¹⁹⁷ Margaret Colgate Love, *Relief From The Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide*, tbl.5 (2009) (the 17 states include Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, and Utah). A federal first offender statute for drug possessors also exists, allowing for a dismissal and expunction of a charge after a defendant successfully completes a probation period. 18 U.S.C.A. § 3607 (West 2012).

¹⁹⁸ The North Carolina first offender statute, for example, requires the court to automatically enter an order of expunction for a youthful offender who is not charged with any subsequent violations during a two-year period. N.C. Gen. Stat. § 15A-145 (West 2012).

¹⁹⁹ See, e.g., **California** (Cal. Code Regs. tit. 2, § 7287.4(d) (2012)) (employers may not ask about or use any information about any arrest that did not lead to a conviction, any conviction which has been sealed or expunged, or any misdemeanor conviction for which probation was successfully completed and the case was judicially dismissed pursuant to Penal Code 1203.4); **Massachusetts** (Mass. Gen. Laws Ann. ch. 151B, § 4(9) (West 2012)) (employers are barred from asking about, recording, or using an application to gather information about any arrest, detention, or disposition for any offense not leading to a conviction); **New York** (N.Y. Exec. Law § 296(16) (McKinney 2012)) (employer barred from asking about an arrest that did not lead to a conviction or a sealed conviction); **Utah** (Utah Admin. Code r. 606-2-2(U)-(V) (2012)) (employer may not ask about arrest records and are advised to limit conviction inquiries to those that are job-related). See also *Prohibit*

Inquiries About Arrest That Never Led To Conviction, Legal Action Center, http://www.lac.org/toolkits/arrests/arrest_inquiries.htm (identifying 12 states that prohibit or otherwise limit inquiries about arrests not leading to conviction).

²⁰⁰ Ark. Code Ann. § 17-1-103 (West 2012).

²⁰¹ See, e.g., Tex. S.B. 1621, 83rd Leg., R.S. (2012) (Whitmire) (prohibiting bulk sales of criminal history records); Tex. S.B. 107, 83rd Leg., R.S. (2012) (West) (prohibiting public disclosure of information contained in court records and subject to an order of nondisclosure; criminal justice agencies and limited other entities excepted). Additionally, legislation has been introduced that would allow for expunction of deferred adjudications and certain low-level convictions, as well as certain procedural reforms that would ease the filing processes. Texas Legislative Online has the complete text and filing history for every bill introduced. See <http://www.capitol.state.tx.us>.