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Background Checks and Employment Discrimination: Distant Parallels between U.S. and EU Privacy Regimes

BY EUGENE FRID*

In 2012, Halstead Management Company offered Kevin A. Jones a job as a doorman in New York City. After the company requested a criminal background check on Mr. Jones, his offer was rescinded. Although Mr. Jones had no criminal record, Sterling Infosystems, the large company tasked with doing the background check, mixed up his information with the information of Kevin M. Jones, a different man with at least three criminal convictions.¹

In California, a fifty-two-year-old man worked a series of odd jobs until he was finally hired full-time at a dairy farm. Days before starting his job, the man was arrested for failure to pay child support. After hiring a background check company to investigate the man's criminal history, the farm revoked its offer. The job that would have helped this employee meet his child support obligations was yanked from his grasp because his employer saw an arrest on his record. This arrest had no bearing on his competency as a farmer.

Similarly, in Illinois, an African-American man was finally getting his life back on track when he found employment at the retail chain Dollar General. At the eleventh hour, the offer was revoked because of a criminal background check that disclosed a six-year-old conviction for possession of a controlled substance.² In that case, the Equal Employment Opportunity Commission ("EEOC") filed charges alleging Dollar General conditioned its job offers on criminal background checks, which results in a disparate impact against African Americans.³ Unfortunately, no guiding case law stems from

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1. Dan Fleshler, *You should fear background checks even if you've done nothing wrong*, QUARTZ (May 23, 2014), <http://qz.com/211178/you-should-fear-background-checks-even-if-youve-done-nothing-wrong/>.

2. U.S. Equal Employment Opportunity Commission v. DolgenCorp, L.L.C., EEOC, 2014 WL 3734361 (No. 13-CV-04307), (N.D. Ill. 2014).

3. Ben James, *Dollar General Rips Rulings In EEOC Background Check Suit*, LAW

this matter because Dollar General settled the case in 2015.

These stories demonstrate the severe detriment that preemployment criminal background checks have on individuals. Background checks are error prone and subject applicants to denials for reasons not related to job function. In other words, even if there is no error, many employers still reject applicants with a criminal record without having a sufficiently justified business reason for doing so.

While it is legitimate for banks not to hire convicted embezzlers, or for trucking companies not to hire drunk drivers, in the case of the dairy farmer, his failure to pay child support had no foreseeable impact on his ability to milk cows. Consequently, in the absence of legitimate business or safety concerns, employers that deny qualified people a job only perpetuate a vicious cycle of unemployment and increase poverty levels in the United States.

Conversely, an employer has a right to know information about the person he is going to hire and entrust to perform the functions of his business. More information helps an employer make a more informed hiring decision. One reason an employer would want to hire an individual with no criminal record over another with a record is due to efficiency. If a person has a prior arrest, he may be more likely to get rearrested and not show up for work, thereby leaving the employer short staffed with no prior notice.

Several conflicting interest have arisen as a result of overzealous background checks. On the surface, you have the frustrated employer who is concerned about employee reliability and vicarious liability lawsuits for tortious actions caused by their employees while on the job. Consequently, employers use background checks as a means to weed out unreliable or violent workers. Underneath this layer, you have the greater concern for society. The market is distorted when able Americans are unable to work due to reasons not related to their skills. They are restricted from contributing to the market, both because they are unable to provide labor and because of their lowered spending power. Lastly, and most importantly, the individual suffers. Not only is the person financially constrained, but their core American privilege “. . . to engage in any common occupations of life”⁴ is forever restricted based on their prior bad acts. To enjoy such a privilege has long been recognized at common law as essential to the orderly pursuit of happiness by free men.⁵

360 (May 21, 2015), <http://www.law360.com/articles/658872/dollar-general-rips-rulings-in-eoc-background-check-suit>.

4. Meyer v. Nebraska, 262 U.S. 390 (1923).

5. *Id.*

I. Exploring the Numbers

Recent surveys found that nearly 80% of U.S. employers perform background checks on current and potential employees.⁶ In addition, almost nine in ten large companies conduct criminal background checks.⁷ While some companies focus solely on felony convictions, others also look at misdemeanors and arrests without an indictment. A 2010 study found that nearly one in three U.S. adults - over seventy million people - had a serious misdemeanor, felony arrest, or conviction that could show up on a routine employment background check.⁸ In contrast, nine years earlier in 2001, only about 20% of adults - approximately forty-two million people - had a criminal record that was listed on a criminal history record system.⁹

Post-September 11, 2001, safety concerns, coupled with fear of employer liability and negligent hiring claims, contributed significantly to the rise in the availability of criminal records. Additionally, there is no shortage of work for the screening companies who run dragnet information mills because approximately one quarter of the U.S. population has some type of criminal record, and 9% of the population has been convicted of a felony.¹⁰ These vendors who use information processing technologies have exceptional power in their hands. They can dramatically influence the lives of people on the cusp of a job at the click of a button.¹¹

6. *U.S. Strengthens Regulations on Background Checks in Light of Financial Crisis*, AMERICAN BAR ASSOCIATION (Mar. 11, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/u_s_strengthens_reg.html.

7. Maurice Emsellem and Jason Ziedenberg, *Strategies for Full Employment Through Reform of the Criminal Justice System*, CENTER ON BUDGET & POLICY PRIORITIES (Mar. 19, 2016), <http://www.cbpp.org/research/full-employment/strategies-for-full-employment-through-reform-of-the-criminal-justice>.

8. *Id.*

9. *Id.*

10. Ruth Graham, *How criminal records hold Americans back*, THE BOSTON GLOBE (Mar. 08, 2015), <https://www.bostonglobe.com/ideas/2015/03/08/how-criminal-records-hold-americans-back/bFnOmPhZKeimlafcPU5mmI/story.html>.

11. Chad Terhune, *The Trouble with Background Checks*, BLOOMBERG BUSINESS WEEK (May 28, 2008), <http://www.bloomberg.com/news/articles/2008-05-28/the-trouble-with-background-checks>.

II. Consequences

Nowadays, a fresh start can seem impossible for people who have any type of criminal history,¹² but even then, some people face more severe consequences than others. While over seventy million U.S. adults have a criminal record that can show up in a routine background check, it is people of color in communities already hit hard by unemployment that are disproportionately disadvantaged.¹³ The Center on Budget and Policy Priorities announced that “while the official unemployment rate for those actively looking for work in early 2015 stands at 5.5%, the African-American unemployment rate is 10.4%, and the rate for African-American teens (ages 16-19) is 30%, about double the rate of white teens.”¹⁴ Studies have also shown that having a job with decent wages is associated with lower rates of reoffending, while reductions in wages lead to increases in illegal earning and criminal activity.¹⁵

Furthermore, the less likely an employer is to hire an individual with a criminal history, the more likely that person will abstain from contributing lawfully to society,¹⁶ thereby increasing the risk of recidivism.¹⁷ Even an old criminal offense can significantly disadvantage a qualified individual’s job prospects¹⁸ because some employers automatically stick their resumes in the “maybe” pile, which may never be seriously considered. To other employers, the stigma of an arrest can be so off-putting that they do not even consider applicants with a criminal record.¹⁹

In reality, applicants with a felony record are about half as likely to be called back for an interview as similar candidates without a felony record.²⁰

12. Graham, *supra* note 10.

13. Emsellem & Ziedenberg, *supra* note 7.

14. *Id.*

15. Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home, The Dimension and Consequences of Prisoner Reentry*, URBAN INSTITUTE JUSTICE POLICY CENTER, 31 (Apr. 4, 2016), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf.

16. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0.

17. Travis, Solomon & Waul, *supra* note 15 at 31; *see also* Bryan Knedler & William Welkowitz, *2014 Laws Limit Private Sector Employers' Use of Criminal History Information*, BLOOMBERG BNA DAILY LABOR REPORT (Jan. 20, 2015), <http://www.bna.com/2014-laws-limit-n17179922256/>, (“Some practitioners believe that in states with background-screening laws, significantly more individuals with criminal records are hired and there’s a substantial reduction in criminal recidivism rates.”).

18. Emsellem & Ziedenberg, *supra* note 7 at 4.

19. Travis, Solomon & Waul, *supra* note 15 at 31.

20. Emsellem & Ziedenberg, *supra* note 7 at 4.

The problem is exacerbated when lower paying employers, such as fast-food chains, perform background checks.²¹ When these checks turn up a record, the candidates are often denied an entry-level position that could help them make a living. Those employers that are unwilling to consider candidates with a criminal record for subsistence wage jobs are putting a strain on the broader U.S. economy. The failure to hire a large population of people with felony convictions recently cost the United States approximately 0.4 to 0.6 percentage points of the gross domestic product, or roughly \$57 billion to \$65 billion.²²

It is not just unemployed people with criminal records who feel the damage, but also members of society who do not possess a criminal record are affected. The cost of unemployment gets passed onto taxpayers because “the harder it is for an ex-offender to earn a living . . . the higher the costs to taxpayers for the social services he must rely on instead.”²³

Furthermore, it is bad policy for the economy to have an entire class of people for whom the mainstream labor market is out of reach.²⁴ Instead, if employers rely less on background checks, or those background checks are more tailored to the job functions, then ex-offenders would have a better chance at getting jobs. If that happens, recidivism rates would likely decrease, because people would be busily and gainfully employed, rather than out on the streets. Ex-offenders would have a structured routine, a steady income stream, and most importantly, gain greater self-esteem.²⁵ Therefore, employing ex-offenders would ameliorate at least some aspects of the perpetual poverty cycle plaguing their lives and the U.S. economy. It is in our nation’s best interest to enact stricter employment screening policies, just like a number of other developed democracies have already done. A closer look at the European Union’s (“EU”) privacy laws is a good place to start.

III. History in the European Union

Although the U.S. and the EU are two of the world’s leading economic powers, they differ greatly in their approach to regulating preemployment background checks. The two governing bodies “have different approaches in their attempts to regulate the use of personal

21. Appelbaum, *supra* note 16.

22. Emsellem & Ziedenberg, *supra* note 7 at 5.

23. Graham, *supra* note 10.

24. *Id.*

25. See Elena Larrauri & James B. Jacobs, *European Criminal Records & Ex-Offender Employment*, New York University Public Law and Legal Theory Working Papers, NELLO LEGAL SCHOLARSHIP REPOSITORY (Mar. 19, 2016), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1532&context=nyu_plltwp.

information in the information society.”²⁶ Specifically, in the EU, and increasingly across the developing world, a job applicant’s right to privacy trumps an employer’s right to collect information about a potential employee.²⁷ A historical analysis is key to understanding the formation of the different privacy doctrines adopted by the United States and EU.

Countries within the EU once faced severe oppression in the face of authoritarian governments. Distrust of government stemmed from, among other reasons, the thousands of secret informers working on behalf of the Ministry of State Security (STASI) of East Germany to listen and transcribe the phone calls of private citizens.²⁸ As a result, “in Europe, where people have had dictatorships, data protection is declared as a human right and regulated by comprehensive data protection legislation.”²⁹ Much like privacy, “data protection finds its roots in the idea that democratic societies should not be turned into societies resting on control, surveillance, actual or predictive profiling, classification, sorting, and discrimination.”³⁰ Moreover, “it is not only a matter of individual liberty, intimacy, integrity, and dignity of individuals but a wider personality right aimed at developing people’s social identity as citizens.”³¹ For these reasons, the EU adheres to strict privacy laws that govern and restrict the free flow of individuals’ private information.

IV. American Jurisprudence

U.S. jurisprudence, on the other hand, is not grounded in the concept of employee privacy, but is skewed to favor employer discretion.³² Unlike the EU, where data protection and privacy laws are considered human rights and are drafted into member states’ legislation,³³ there is no data privacy rights

26. Daniel Dimov, *Differences Between the Privacy Laws in the EU and the US*, INFOSEC INSTITUTE (Mar. 19, 2016), <http://resources.infosecinstitute.com/differences-privacy-laws-in-eu-and-us/>.

27. Fleshler, *supra* note 1.

28. Dimov, *supra* note 26.

29. *Id.*

30. FEDERICO FERETTI, *EU COMPETITION LAW, THE CONSUMER INTEREST AND DATA PROTECTION: THE EXCHANGE OF CONSUMER INFORMATION IN THE RETAIL FINANCIAL SECTOR*, 105, (Springer 2014).

31. *Id.*

32. U.S. Strengthens Regulations on Background Checks in Light of Financial Crisis, *supra* note 6.

33. *Id.*

33. Edith L. Curry, *To Snoop or Not to Snoop: Privacy Rights of Applicants and Potential Employees*, AMERICAN BAR ASSOCIATION (Mar. 27, 2016), http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/to_s

expressly outlined in the U.S. Constitution. “Americans do not have an express constitutional right to privacy, unlike free speech, the right to a speedy trial, and the right to bear arms expressly granted in the U.S. Constitution.”³⁴ Instead, privacy rights in the United States “derive from a disjointed collection of constitutional interpretations, statutes, and common law.”³⁵

Since the tragic events of September 11, 2001,³⁶ and the subsequent adoption of the Patriot Act, the United States has reduced its restrictions on personal data collection by law enforcement agencies.³⁷ The Patriot Act addresses surveillance of electronic communications and empowers the National Security Agency (NSA), the U.S. Department of Justice, and other federal agencies to detect and prevent possible acts of terrorism.³⁸ The Act also removes legal barriers that had blocked law enforcement agencies from sharing information about potential terrorist threats and coordinating efforts to respond to them.³⁹ However, with such intrusive data monitoring tactics come legitimate outcries from civil liberties groups about data privacy rights of U.S. citizens. Most notably in 2013, concerns over privacy were raised when Edward Snowden leaked information showing that the NSA was using the Patriot Act as a facade to justify its bulk collection of data about millions of American phone calls.⁴⁰

The Patriot Act gave the U.S. government more power and access to acquire private information about domestic individuals. Consequently, once law enforcement agencies collect data, including arrest records that ultimately become public record, an individual’s information is likely to end up in the hands of commercial background-screening agencies and ultimately, in the hands of potential employers.

noop_or_not_privacy_rights_applicants_potential_employees.html, discussing that the EU views privacy as a human right as outlined in the Convention for the Protection of Human Rights and Fundamental Freedoms; The Privacy Directive has been ultimately adopted into law within each member state).

34. *Id.*

35. *Id.*

36. *See, e.g.,* Terhune, *supra* note 11 (“Some employers have grown more vigilant about hiring since the September 11, 2001 terrorist attacks.”).

37. Dimov, *supra* note 26.

38. Margaret Rouse, *USA Patriot Act*, TECH TARGET (May 27, 2016), <http://searchdata.management.techtargget.com/definition/Patriot-Act>.

39. *Id.*

40. *Id.*

V. Accessing Criminal Records

Unlike in most European countries, where court files are considered confidential,⁴¹ access to court and arrest records in the United States are easily accessible by the public. Many people lose out on a chance at legitimate employment when either the employer, or screening firms they hire investigate their candidates' personal background through the use of public records.⁴² Without employment options, thousands of young men and women become trapped in a cycle of poverty and incarceration,⁴³ which is why one of the biggest impediments to employment in the United States is a criminal record.⁴⁴ There is a clear connection between lost job opportunities due to background checks and the increasing poverty and economic strife experienced by those that are unemployed. Despite the correlation, employers are nevertheless incentivized to use third party screening services to spare their human resource departments' time and money. "The proliferation of background checks by employers is driven largely by the cheap and ready access to criminal history information provided by both the commercial background check industry and the public sources that collect unprecedented amounts of criminal history information."⁴⁵ These investigative services are highly profitable because there is so much raw information available and a large network of vendors ready to deliver it to curious employers.⁴⁶ It is no surprise that the \$4-billion business of background screening is booming in the United States.⁴⁷

VI. Money in the Screening Industry

When employers look to hire a screening company, they often turn to ChoicePoint, the largest screening firm for corporate employers in the United States.⁴⁸ This company alone conducts approximately ten million background checks per year and controls roughly 20% of the U.S. screening market.⁴⁹ First Advantage, a competitor based in California, recently reported a revenue growth

41. Graham, *supra* note 10.

42. *Id.*

43. *Id.*

44. *Id.*

45. Emsellem & Ziedenberg, *supra* note 7 at 10.

46. Graham, *supra* note 10.

47. Terhune, *supra* note 11.

48. *Id.*

49. *Id.*

up 20% to \$233 million.⁵⁰ Profit potentials were too great for Dutch information provider Reed Elsevier Group (RUK) to sit back and not grab a piece of the growing market, which is why it acquired ChoicePoint for \$4.1 billion.⁵¹ Chad Terhune from Bloomberg BusinessWeek explains that this market is the Wild, Wild West because it is an unregulated industry with easy money and lacks a huge emphasis on compliance or on hiring quality people to perform the screening.⁵²

VII. Screening Flaws

While employers are saving time and money, and screening companies are swimming in profits, the people directly affected by the background checks are suffering from the lack of regulation. This is especially true for qualified job applicants who are mistakenly flagged for having a criminal record. The problem with employment background checks is exacerbated by error-filled and untrustworthy information within the reports, such as the reporting of expunged records or dropped charges.⁵³ The information obtained by vendors sometimes contains errors, innuendos, or outright falsehoods.⁵⁴ Another problem is when databases include arrest records without any indication of whether the person was convicted.⁵⁵ Often, screening companies rely on bulk databases that have not been properly updated.⁵⁶ In those cases, outdated or incomplete information is likely to be conveyed to the employer whenever a screener does not bother to check a person's original court record to verify the status or disposition of a case. Needless to say, this happens quite often.

Poor reporting and misinformation causes irreparable harm to many qualified workers.⁵⁷ A noteworthy example of such grave misreporting occurred after September 11, 2001, when the U.S. government began checking the backgrounds of 1.2 million workers at the nation's ports.⁵⁸ A law, which mandated the exclusion of anyone with a conviction in the last seven years before September 11, 2001, resulted in the exclusion of 59,000

50. *Id.*

51. *Id.*

52. *Id.*

53. Graham, *supra* note 10.

54. Terhune, *supra* note 11.

55. Appelbaum, *supra* note 16.

56. Fleshler, *supra* note 1.

57. Emsellem & Ziedenberg, *supra* note 7.

58. Appelbaum, *supra* note 16.

workers.⁵⁹ However, 30,000 of those workers filed appeals arguing that their records were inaccurate. In 25,000 of those cases, a more careful investigation found no evidence of a conviction.⁶⁰ To reiterate, when the background check system identified a felon, it was wrong at least 42% of the time.⁶¹

VIII. Why Do Employers Continue to Use Background Checks if They are Error Filled or Not Relevant to the Job?

Why do employers continue to use error-prone or irrelevant background checks? The answer, in part, is employer liability and safety. In California, for example, an employer can be liable to a third person for negligently hiring an unfit employee.⁶² Additionally,

negligence liability will be imposed on an employer if it “knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.”⁶³

Thus, while employers are becoming more dependent on mass-produced background reports that “rely heavily on anonymous, and sometimes inaccurate or unfair sources,”⁶⁴ they do so “to protect their customers, their employees and themselves from criminal behavior.”⁶⁵ Specifically, the Society for Human Resources Management conducted a survey and determined that approximately two-thirds (69%) of organizations reported they conduct criminal background checks on all of their job candidates. In addition, roughly half of the organizations conduct criminal background checks to reduce legal liability for negligent hiring (52%) and to ensure a safe work environment for employees (49%).⁶⁶ Should an employee ever harm a co-worker or customer, the employers’ failure to perform an adequate background check could lead to costly “negligent hiring” litigation, especially if evidence of

59. *Id.*

60. *Id.*

61. *Id.*

62. *Getting Greater Global Results-Ebook*, FIRST ADVANTAGE, 7 (Mar. 27, 2016), https://www.fadv.com/Portals/0/Downloads/ebooks/FirstAdvantage-Getting_Greater_Global_Results-ebook.pdf.

63. *Phillips v. TLC Plumbing, Inc.*, 172 Cal.App.4th 1133, 1139 (2009); *See, generally*, California Civil Jury Instructions (CACI), 426. *Negligent Hiring, Supervision, or Retention of Employee* (2009).

64. Terhune, *supra* note 11.

65. Appelbaum, *supra* note 16.

66. *Background Checking: The Use of Criminal Background Checks in Hiring Decisions*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, (Mar. 19, 2016), available at <https://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

such behavior could have been discovered prior to the hiring.⁶⁷ For this reason, there is an industry perception that it is irresponsible for employers to ignore readily available employee information.⁶⁸

Alternatively, in the EU, the extent to which employers may be held liable for their employees' activities is often statutorily limited. Therefore, employee monitoring is not as necessary to reduce liability as it is in the United States.⁶⁹

IX. Moving In The Right Direction

While there are no guarantees that the unpleasantness of unemployment will fully cease, "increasing the employment rates of people with criminal records, which increases the labor supply, will likely increase economic growth; and the economy's potential growth rate is partly a function of the growth of labor supply."⁷⁰ The ongoing link between unemployment and the financial crisis that the United States has faced in the last decade has called for more regulation on employee background checks.⁷¹ Fortunately, the recent increased attention to the regulation of background checks has begun to move the United States closer to laws in the EU, where employment screening on the basis of a criminal record is rare and exceptional.⁷²

As noted above, EU's legislature contains data privacy laws designed to explicitly protect citizens' rights to privacy. The right to privacy law is based on the notion that "employers have no right to snoop around in employees' lives."⁷³ The idea is that employers should only perform background checks on their employees or potential candidates if it is necessary for the job. Also, in order for the background check to be performed, "there is an obligation to retrieve the data directly by asking the candidate and not doing the background checks in the first place."⁷⁴

67. Curry, *supra* note 33.

68. Appelbaum, *supra* note 16.

69. Miriam Wugmeister, *Comparing the U.S. and EU Approach to Employee Privacy*, MORRISON FOERSTER (Apr. 02, 2016), <https://www.mofo.com/resources/publications/comparing-the-us-and-eu-approach-to-employee-privacy.html>.

70. Emsellem & Ziedenisberg, *supra* note 7.

71. U.S. Strengthens Regulations on Background Checks in Light of Financial Crisis, *supra* note 6.

72. Elena L. Pijoan, *Legal Protections Against Criminal Background Checks in Europe*, 16 (1) PUNISHMENT & SOCIETY 50, 50-73 (2014).

73. U.S. Strengthens Regulations on Background Checks in Light of Financial Crisis, *supra* note 6.

74. *Id.*

While data privacy laws in the EU vary across the different member states, each participant follows general guiding principles that stem from the Data Protection Directive and the E-Privacy Directive.⁷⁵ These are the two main legal instruments in the EU that regulate data protection in the information society.⁷⁶ The Data Protection Directive regulates the collection and use of personal data because employees' expectation of privacy in the workplace is generally high, and employees are viewed as being in need of protection from their employer's interference with their privacy.⁷⁷ The EU Directive on Data Protection of 1995 required member states to pass a national privacy law and create a Data Protection Authority to protect citizens' privacy.⁷⁸ The Directive prohibited personal information from being collected without the consumers' permission and also gave consumers the right to review data about them in order to correct inaccuracies.⁷⁹ In addition, personal information is prohibited from being shared by companies or across borders, without the express permission from the subject of the data, and companies that process the data are required to register their activities with the government.⁸⁰

X. Other Countries

France generally prohibits an employer from reviewing an applicant's financial position or past convictions.⁸¹ An employer may only seek personal data from job applicants if there is a direct and necessary connection between the background check and the contemplated employment relationship. Industries with a direct relationship between the job and a candidate's criminal history include sectors such as banking, auditing, and defense.⁸² In other European countries, ex-offenders are ineligible, at least for some period of time, from serving in positions of trust and power such as judges, military and police officers, and high-level executive branch officials.⁸³

75. Dimov, *supra* note 26.

76. *Id.*

77. Wugmeister, *supra* note 69.

78. Bob Sullivan, 'La difference' is stark in EU, U.S. privacy laws: Privacy Lost: EU, U.S. laws differ greatly, NBC NEWS, Oct. 19, 2006, http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws/#.VwMitceFDzI.

79. *Id.*

80. *Id.*

81. Eric Krell, *Pre-Employment Screening Agenda, Forecast for Global Background Checks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Mar. 19, 2016), <https://www.shrm.org/hr-today/news/hr-magazine/Pages/0413-international-background-screening.aspx>.

82. Wugmeister, *supra* note 69.

83. Larrauri & Jacobs, *supra* note 25.

Barring ex-offenders from these positions, which require honesty and integrity, is based on a presumption that ex-offenders lack those qualities.⁸⁴

In Spain, broader restrictions apply to prevent ex-offenders from working in the public sector as teachers, doctors, university professors, or civil servants, because there is a “widely held belief . . . that criminal records are not an occupational requirement, except to work in the Public Administration.”⁸⁵ Many European countries have also adopted laws mandating a criminal background investigation for individuals applying for jobs that include working with children or elderly persons.⁸⁶

If a job candidate is not barred from a position, and an employer decides to pursue the candidate’s criminal background information, the process which the employer would follow is not as simple as hiring a third party vendor, like it is in the United States. First, the process to gather criminal information in Europe typically takes longer than it does in the United States. In the United States, a domestic background check usually takes less than forty-eight hours to accomplish, but in the EU it can sometimes take two weeks.⁸⁷ Second, in France for example, an employer would have to file a registration with, and obtain approval from, the Commission Nationale de l’Informatique et des Libertés (CNIL)⁸⁸ in order to obtain the data sought from a background check. CNIL is a French administrative regulatory agency whose task is to ensure that data privacy law is “applied to the collection, storage, and use of personal data.”⁸⁹

In Spain, employers can bypass the government background check agency and are allowed to ask job candidates to individually obtain a copy of their Criminal Record Certificate (Certificado de Antecedentes Penales) from the National Criminal Register (NCR) and submit it with their job application.⁹⁰ However, some labor law scholars argue that employers cannot ask for candidates’ criminal information because “information about moral character is only rarely relevant to the job applicant’s ability to perform the job for which that person is applying.”⁹¹ Aside from Spain, the majority of EU employers only consider a background check if it is relevant to the position for which the candidate is applying.

84. *Id.*

85. *Id.*

86. *Id.*

87. Krell, *supra* note 81.

88. Wugmeister, *supra* note 69.

89. *Commission Nationale de l’Informatique et des Libertés –CNIL*, To protect personal data, support innovation, preserve individual liberties, <https://www.cnil.fr/en/home>.

90. Larrauri & Jacobs, *supra* note 25.

91. *Id.* at 14.

Consequently, if the United States mirrors the EU's approach in tailoring background checks to specific jobs, or even to select industries, this will allow employers to give Americans with criminal records a second chance at becoming productive members of society. After all, there is a "strong interest in convicted persons successfully reintegrating into the societal mainstream."⁹²

XI. U.S. Regulations

Before suggesting certain reforms, two existing laws that attempt to regulate preemployment screening practices need to be addressed. Those laws are the Fair Credit Reporting Act of 1970 (FCRA)⁹³ and Title VII of the Civil Rights Act of 1964.⁹⁴ FCRA has two primary goals: first, to ensure that applicants are aware of and give consent to any background check by an employer that involves credit, education, military service, or medical records;⁹⁵ and second, to permit job applicants an opportunity to correct any misinformation contained in the report, prior to any decisions made by the employer.⁹⁶ To accomplish these goals, the FCRA protects employees from employers using poor credit history as a hiring criterion, but also regulates consumer credit agencies (CRA) that provide criminal background checks to employers. FCRA mandates that employers obtain the applicant's permission before requesting a criminal history report from a CRA, and obligates employers to provide a copy of that report to the applicant before taking any negative action based on the information contained in the report.⁹⁷

Despite the FCRA's intentions, there are loopholes for employers to bypass these requirements. If an employer conducts the background check itself without using a CRA, the employer is not subject to the consent and notice provisions of the Act.⁹⁸ Also, an employer may refuse to hire a candidate after seeing the background information, if it purports to base its decision on other criteria, such as a large candidate pool with more

92. Larrauri & Jacobs, *supra* note 25 at 17.

93. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).

94. *See, generally*, Employers, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Apr. 7, 2016), <http://www.eeoc.gov/employers/index.cfm> (discussing laws that protect employees and job applicants against employment discrimination); *See also* Pre-Employment Inquiries and Arrest & Conviction, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Apr. 8, 2016), http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm.

95. Curry, *supra* note 33.

96. *Id.*

97. Wugmeister, *supra* note 69.

98. Curry, *supra* note 33.

qualified individuals than the applicant.

The Equal Employment Opportunity Commission (EEOC) supplemented the FCRA's clamp down on criminal background check discrimination with its April 2012 issuance of the *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*.⁹⁹ The EEOC issued the guidance because criminal background checks have a significant "disparate impact"¹⁰⁰ on protected classes of people including Latinos and African Americans. As further outlined in the EEOC's *Pre-Employment Inquiries and Arrest & Conviction* guide, Title VII's objective is to prohibit employers from treating people differently because of their race, national origin, color, sex, or religion. Title VII also prohibits employers from using policies or practices that screen individuals based on criminal history, if the screening does not help the employer accurately decide if the individual is likely to be a responsible, reliable, or safe employee.¹⁰¹

The issue took center stage in the case of *Equal Employment Opportunity Commission v. BMW*. In that case, the EEOC alleged that BMW had a blanket exclusion policy that denied facility access to some of its employees and contractors, who had certain criminal convictions, while other similarly situated employees with no convictions were allowed.¹⁰² The EEOC also alleged that BMW did not indicate a time limit with regard to the convictions, and it did not consider the nature or gravity of the crime, the age of the conviction, or whether the conviction was job-relevant.¹⁰³ BMW settled the case for \$1.6 million.¹⁰⁴

In a separate Title VII matter, *Equal Employment Opportunity Commission v. Freeman*,¹⁰⁵ the EEOC challenged the employer's use of criminal background checks in the hiring process, alleging that background checks had a disparate impact on African-American and Hispanic job applicants.¹⁰⁶ In this case, finding that the EEOC failed to show a disparate impact, the Fourth Circuit affirmed summary judgment in favor of the

99. Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. (2012); Emsellem & Ziedenberg, *supra* note 7.

100. *Id.*

101. Pre-Employment Inquiries and Arrest & Conviction, *supra* note 94.

102. Equal Employment Opportunity Commission v. BMW Mfg. Co., L.L.C., 2015 WL 5431118, 1, No. 7:13-1583-HMH, (D.S.C. July 30, 2015).

103. *Id.*

104. *Id.*

105. Equal Employment Opportunity Commission v. Freeman, 126 F. Supp. 3d 560 (D. Md. 2015).

106. *Id.*

employer.¹⁰⁷ The opinion emphasized that by bringing actions of this nature, the EEOC has “placed many employers in the ‘Hobson’s choice’ of ignoring criminal history and credit background information, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.”¹⁰⁸

The EEOC stated that preemployment screening should be limited to convictions for which the exclusion is “job [or position] related” and is consistent with a “business necessity.”¹⁰⁹ However, the current conundrum is that nobody knows exactly what “job-related and consistent with business necessity” means in practical terms, because it is not clear from any U.S. court decisions.¹¹⁰ The closest our courts have come to solving the confusion was in the *Dollar General*, *BMW*, and *Freeman* cases. However, we are left with no guiding case law since *Dollar General* and *BMW* both settled, and the EEOC lost on summary judgment without ever having the substantive discriminatory claims adjudicated in the *Freeman* case. At present, regulation of employers who seek background checks, and of the companies who serve them, is sorely lacking.

XII. An Effort to Rectify the Problem

Hope lies in the state and local agencies that are passing “fair chance” legislation to combat employers’ discriminatory hiring practices. Fair chance refers to an employer evaluating potential candidates based on the merits of their qualifications, not just past criminal history.¹¹¹ Many cities including Seattle and San Francisco have begun enforcing fair chance laws by placing “Ban the Box” restrictions on job applications.¹¹² In many jurisdictions that have banned the box, an employer may not ask candidates if they have ever been arrested or convicted of a crime. This does not mean that an employer is forbidden from ever requesting a criminal background

107. Barry A. Hartstein, et al., *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment*, A LITTLER MENDELSON REPORT, 1 (Feb. 23, 2015), available at http://www.littler.com/file_s/press/pdf/2015_2_Insight_Update_Criminal_Background_Checks_Impact_EEOC_v_Freeman.pdf.

108. *Id.*

109. Curry, *supra* note 33 (noting that the EEOC has indicated conviction records could only be used if the employer can show a business justification for the use).

110. Hartstein, *supra* note 107.

111. Emsellem & Ziedenberg, *supra* note 7.

112. Nathaniel M. Glasser, *Background Checks—EEOC Seeks to Eliminate Barriers to Recruitment and Hiring*, (June 23, 2015), <http://www.natlawreview.com/article/background-checks-eeoc-seeks-to-eliminate-barriers-to-recruitment-and-hiring>.

check on the candidate. Instead, ban the box laws delay the criminal inquiry until the candidate has had a chance to present his or her credentials for the job, without the stigma of past criminal history biasing the employer's first impression. Once the employer decides that the candidate is qualified and moves him or her to the next stage of the hiring process, criminal history information becomes fair game.

While public sentiment and political forces are finally shifting in favor of criminal justice reform,¹¹³ and although ban the box is a good first response to the problem, it is merely a short-term solution since it only prevents the employer from using background checks as a preliminary screening tool. Despite this measure, employers still have access to a job applicant's criminal information down the road, after the applicant has first been evaluated on the merits.

Fair chance legislation does not solve the larger policy issue of whether criminal history should be available to an employer at all times or only if there is a business justification (i.e., a candidate should be screened for criminal history if he or she works with children or in a specific industry, like the military). While the aforementioned regulatory efforts make it more difficult for U.S. employers to conduct background checks, the law still has a long way to go before it provides as much protection as EU employees enjoy.¹¹⁴ This begs the underlying question of what principle does the United States value more: to guard the country's safety by permanently tracking those accused of crimes, or to preserve its identity as a country of second chances.¹¹⁵

XIII. Conclusion

In the United States, common screening practices makes it difficult for ex-offenders to be evaluated based on their suitability for specific jobs.¹¹⁶ The courts provide some protection, requiring that the evaluation of an employee's criminal record must be tailored to a business justification, but the courts do not explain what qualifies as sufficient justification for denying employment. This oversight has created a regulatory gap.

The burden of proving whether employment exclusion is justified should rest on the employer. This approach will ensure that "business

113. Emsellem & Ziedenberg, *supra* note 7.

114. U.S. Strengthens Regulations on Background Checks in Light of Financial Crisis, *supra* note 6.

115. Graham, *supra* note 10.

116. Fleshler, *supra* note 1.

justification” is interpreted narrowly, to justify exclusion only to prevent a serious and immediate threat to public safety. A strong business justification rule will prevent blanket employment exclusion of candidates with criminal records from certain industries, as currently occurs in Spain. The rule will also prevent employers from rejecting qualified applicants from positions that are not relevant to the candidates’ criminal history. Consequently, in the earlier example of the dairy farmer, his employer would have no legal or business justification to exclude him solely based on an arrest for failure to pay child support.

Lastly, to mitigate the harms caused by flawed background checks, there needs to be more regulation on the background screening companies. The screening industry is worth billions of dollars and the companies performing the checks are profiting. Meanwhile, individuals who are bogged down by poverty and unemployment are suffering from the errors contained in their reports. The FCRA must enforce a policy that mandates those companies to advance additional due diligence processes in order to double check the disposition of an applicant’s criminal history prior to divulging information to employers. Had Sterling Infosystems performed this due diligence, Kevin A. Jones would not have been mixed up with Kevin M. Jones, and his job as a doorman would not have been rescinded.