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## *Ex-Offenders Need Not Apply*

The Criminal Background Check in Hiring Decisions

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Many legal barriers exist that prevent ex-offenders from obtaining lawful employment, a principle means for reintegration. This article explores the scope and utility of these laws, which aim ostensibly to reduce the prospective employee's likelihood of engaging in workplace crime. Irrelevance of the provisions to the effective assessment of job applicants' risks of offending, shortcomings of criminal background checks, lack of empirical evidence linking ex-offenders to workplace crime, and the availability of viable alternatives underscore the need to scale back these significant obstacles to ex-offender reentry. The article concludes with recommendations for reasonable uses of risk assessment in employment screening laws.

**Keywords:** *criminal background check; employment laws; offenders; risk prediction*

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**A** longstanding concern among employers and lawmakers alike is the risk to coworkers and consumers posed by employees with criminal histories. Most states have enacted various laws that make it difficult, if not impossible, for ex-offenders to acquire employment, regardless of their work history or risk of reoffending (Legal Action Center, 2004). Although many of these laws have been in existence for years, obstacles to ex-offenders have recently proliferated as legislators have expanded the statutory authority of noncriminal justice agencies and groups to access criminal histories for purposes of employment screening, occupational licensing, and certifications (SEARCH Group, 2003). Employers' responses to enhanced access have been enthusiastic; more than half of the fingerprints sent to the FBI for processing in the year ending May 31, 2002, came from noncriminal justice agencies, up from just 9% in 1993 (SEARCH Group, 2003). These changes in the law, combined with a greater ease of access afforded by technological developments, have fed a growing reluctance by employers to hire ex-offend-

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ers (Albright & Denq, 1996; Atkinson, Fenster, & Blumberg, 1976; Holzer, 1996).

This article explores the nature, scope, and utility of laws designed to limit offenders' access to employment. In the next section, we describe state and federal provisions governing the use of criminal background checks for job applicants. We then examine the reliability and validity of these provisions as measures for the control of workplace crime. We conclude the article with recommendations for employment screening measures that balance the goals of workplace risk reduction with offenders' need for reintegration.

### **LEGAL BARRIERS TO EX-OFFENDER EMPLOYMENT**

Barriers to ex-offender employment may be direct or indirect. Direct barriers, found in various statutes and occupational code licensing requirements, require employers to exclude applicants with criminal convictions and, in some cases, arrest records. Indirect barriers originate in Title VII of the Civil Rights Act of 1964, which establishes parameters affecting the scope of a potential employer's inquiries about prior arrests, convictions, and other aspects of the applicant's criminal history. Under Title VII, employers may exclude applicants with arrest or conviction records if they can prove that the applicant's criminal history prevents the latter from satisfying certain job requirements.

#### *Direct Barriers to Ex-Offender Employment*

Employers in many industries are legally compelled to exclude ex-offenders. Some of these regulations exclude ex-offenders outright and do not require a nexus between the specific professions and the type of offense committed. These blanket restrictions permanently bar those with any conviction from entering any job in a specific industry. For example, a number of states prohibit an ex-offender from obtaining any public employment position. Ex-offenders are also limited by restrictions in professional licensing codes. Although some licensing provisions prohibit employment of ex-offenders convicted of specific offenses, other codes prohibit employment of individuals lacking "good moral character." It is significant that most codes do not define good moral character, leaving licensing boards and agencies much latitude in determining which criminal backgrounds do not meet this criterion (May, 1995).

Occupational licensing restrictions are daunting both in number and scope. A survey by Hunt, Bowers, and Miller (1973) conducted in the early 1970s

revealed as many as 1,948 separate statutory and licensing provisions barring or restricting applicants with arrest or conviction records. Thirty years later, occupational licensing restrictions have spread to such an extent that they defy enumeration (Clark, 2004; May, 1995).

Many states have also taken the position that employers should be given much discretion in making hiring or licensing decisions about applicants with any form of criminal record. Thirty-eight states permit employers and licensing agencies to rely on arrests that do not lead to convictions in determining whether to hire or license (Mukamal & Samuels, 2003).

Of much importance, enactment of a statutory employment or licensing requirement imputes a duty of care onto employers in the industry governed by the provision. In some states, an employer's failure to perform a state-mandated criminal background check is considered negligence per se in a negligent hiring case (*Mahan v. Am-Guard, Inc.*, 2003; *Mueller by Math v. Community Consolidated School District 54*, 1997). In other states, the failure is not negligence, per se, but is admissible as some evidence of negligence (*Connes v. Molalla Transport Sys., Inc.*, 1991).

Congress has followed the states' lead in placing barriers before ex-offenders seeking employment. Along with enacting statutes banning ex-offenders from certain positions, Congress has also enacted laws indirectly affecting an ex-offender's ability to seek and maintain employment. For example, the Department of Transportation and Related Agencies Appropriations Act of 1993 (P.L. 102-388) requires the revocation or suspension of drivers' licenses for at least 6 months of any person convicted of a federal drug felony and thus prevents a large number of ex-offenders from seeking employment where driving is necessary.

Not all states have joined the trend to construct barriers to ex-offender employment. For example, Connecticut, New Jersey, and New York have codified their statewide policies of eradicating discrimination based on criminal records (Scales, 2002). Section 46a-79 of Connecticut's state code (Connecticut Gen. Stat. Ann., 1973) stipulates that

the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community.

Wisconsin and Hawaii have gone one step further, enacting "fair employment laws" that expressly preclude, absent an applicable exception, employment discrimination based on an arrest or conviction record (Hruz, 2002; Lau, 2000).<sup>1</sup> Yet, it is important to note that the protections afforded by these

statutes govern only those employers not already bound by the exclusionary requirements of statutory and licensing code regulations.

#### *Indirect Barriers to Ex-Offender Employment*

When an employer is not compelled to exclude ex-offenders by statute or licensing code requirements, the decision to exclude an applicant with a criminal record is governed by Title VII of the Civil Rights Act of 1964 and further clarified by the Equal Employment Opportunity Commission's (EEOC, 1973) *Uniform Guidelines on Employee Selection Procedures*. Title VII and its guidelines prohibit employers from refusing to hire applicants based on their race, religion, sex, or national origin. It is significant that neither Title VII nor the EEOC guidelines expressly proscribe discrimination based on arrest or conviction records; yet, these provisions serve as the primary legal vehicles on which applicants challenge an employer's consideration of criminal backgrounds. In bringing a Title VII claim, applicants claim the employer used the arrest or conviction record to indirectly discriminate against them by making hiring decisions that "disparately impact" individuals falling into the protected classes of race, religion, sex, or national origin.

*Applicant's burden: proving a disparate impact.* The burden of demonstrating the disparate impact rests with the complaining applicant. To carry this burden, applicants generally rely on three types of statistics, showing (a) individuals (as a class or in a specific geographical area) are excluded by the employment condition at a substantially higher rate than other classes; (b) the employer excludes a greater percentage of individuals of one class than of other classes on the basis of the employment condition; or (c) a comparison between the percentage of individuals of one class working for the employer as compared to the percentage of class individuals in the relevant population (*Green v. Missouri*, 1975). The quality of the statistical data presented is pivotal to the survival of the case.<sup>2</sup> In addition, the defendant-employer will also submit statistical data controverting the evidence presented by the employee-plaintiff. As such, despite the collection of quality statistical data, most plaintiffs are unable to overcome the threshold issue of demonstrating a disparate impact.

*Employer's burden: proving a justification for the disparate impact.* If the applicant satisfies the threshold inquiry, the burden shifts to the employer to rebut the evidence. The employer may be justified in using a background check, despite the disparate impact, if the employer can prove that there is a need for the background check based on the specific duties required by the job sought. In *Griggs v. Duke Power Co.* (1971), the U.S. Supreme Court cre-

ated the "business necessity" defense to Title VII challenges. Thus, if the employer presents evidence that the arrest or conviction record review was necessary to ensure that the applicant was capable of performing the specific duties of the job, the employer's use of background checks does not violate Title VII.

Absent sufficient evidence to demonstrate a business necessity to conduct the background search, the trial court must rule in favor of the complaining applicant. Further, it is irrelevant whether the employment practice is motivated by nondiscriminatory intent. In other words, if the employment condition causes a disparate impact but is not a business necessity, it will be held invalid regardless of whether the employer intended to discriminate against the protected class. After *Griggs* established the business necessity defense, employers using arrest and conviction backgrounds as employment conditions were required to demonstrate that the inquiry was necessary to determining the applicant's capacity to successfully perform the job functions.

For example, in *Dozier v. Chupka* (1975), a district court in Ohio found that a city's use of arrest records when hiring fire department trainees was not a business necessity. Although the city claimed that it reviewed the criminal records to weed out candidates with a propensity for theft, the court found that the city's background checks were "tools too crude" for the claimed purpose of determination of the applicants' predilection for theft. In other words, the employer was unable to show that the background check was directly linked to specific duties of the job sought. Notably, the court stated that, under the current system, there was no procedural safeguard to ensure that applicants with nonlarcenous convictions were not disqualified.

However, courts have acknowledged that some employers, whose employees affect the overall safety of the general public, are in a unique situation and, as such, should be afforded more discretion in using criminal backgrounds to exclude candidates. Consequently, when law enforcement agencies implement narrowly tailored policies calling for the exclusion of specific candidates from specific positions, a resulting disparate impact is justified by the business necessity of ensuring the safety of the overall public. In *United States v. Chicago* (1976), a district court in Illinois enjoined the City of Chicago from conducting background investigations on police cadet candidates for the purpose of discovering evidence of "bad character, immoral conduct, and dissolute habits." The court noted, however, that if the investigation revealed a conviction for a serious felony, the conviction would serve as a valid ground for disqualification regardless of whether the condition represented a disproportionate racial impact.

Furthermore, when determining whether the employment condition serves as a business necessity, courts distinguish between employment conditions based on convictions and employment conditions based on arrests. Federal

courts distinguish arrest inquiries from conviction inquiries because arrest records per se are not proof of any criminal act and, therefore, bear no rational relation to the ability to perform adequately as an employee. The EEOC and some courts have stated that the use of arrest records alone in determining employability violates Title VII because it has the foreseeable effect of denying Black applicants equal opportunity for employment in that Blacks are arrested substantially more frequently than Whites. For example, in EEOC Decision No. 77-9 (1977) and EEOC Decision No. 72-0386 (1972), the EEOC rejected the business necessity defense for a refusal to hire an individual as a store clerk based solely on his prior arrest. In *Gregory v. Litton Systems, Inc.* (1970), the court held that basing hiring decisions on nonconviction arrests violated Title VII because it disproportionately affected Black applicants.

*Other federal challenges to the use of criminal background (or lack thereof) as a condition of employment.* Applicants also challenge pre-employment criminal record reviews on the ground that the inquiry serves as a “chilling effect” on classes of individuals. Specifically, applicants allege that Blacks, with disproportionately more arrests and convictions, are discouraged from ever applying for positions if they are aware the employer will inquire into their arrest and conviction record. For example, the Eighth Circuit Court of Appeals struck down a general inquiry policy in *Carter v. Gallagher* (1971). The court held that the felony conviction inquiry served to deter persons with felony records from applying for the position and, as such, disparately affected Blacks. Similar sentiments were expressed by the federal district court for the District of Columbia in *Reynolds v. Sheet Metal Workers* (1980).

### *Summary*

Although Congress, various states, and some courts have supported the principle that steps should be taken to integrate ex-offenders back into society, the vast majority of laws legalize employment discrimination based on conviction or arrest records. In general, absolute preclusion of ex-offenders has been held to violate Title VII and parallel state protections. However, either through case law, statutory enactments, or occupational licensing restrictions, many exceptions, generally based on the business necessity defense, have been created to permit employers to exclude applicants with criminal records. Consequently, exceptions to Title VII and similar state provisions have “swallowed” the rule of law prohibiting discrimination based on criminal history.

## VALIDITY OF RISK CRITERIA IN EX-OFFENDER EMPLOYMENT LAWS

### *Individual-Level Predictors of Crime Risk*

Risk factors as established in statutory and case law barriers to ex-offender employment (mainly, the existence or nature of convictions or arrests) depart markedly from criteria included in commonly accepted and validated assessments of offender risk. One important difference is the latter's reliance on a wider variety of measures of criminal history than are found in the laws discussed above. Age at first arrest, number of prior incarcerations, and performance on current or prior community supervision are not uncommon to risk assessment instruments known to produce better than chance predictions of future reoffending.<sup>3</sup> The widely adopted Level of Service Inventory—Revised (LSI-R) includes, in addition, history of escape attempts from institutions, punishments for institutional misconduct, and official record of assault/violence (Andrews & Bonta, 2001).

Offender risk assessment tools also make considerable use of dynamic or so-called criminogenic needs variables. In addition to employment and education history, about which employers are permitted to inquire, needs variables predictive of crime risk include financial status, living arrangement, family and marital situation, use of free time, quality of companions, emotional well-being, attitudes toward authority, and substance abuse (Gendreau, Little, & Goggin, 1996). Multiple measures for all of these indicators appear on the LSI-R (Andrews & Bonta, 2001). Dynamic risk variables are integral to the prediction of violence, the assessment of psychopathy, and the prediction of sexual offense recidivism.<sup>4</sup> This is not to advocate the modification of laws to include these factors but only to emphasize the latter's relevance to better than chance predictions of future offending.

Laws governing entry of persons with criminal histories into the work force also overlook the additivity of risk factors and, consequently, the fact that classifications of high risk can attach only to those individuals who exhibit multiple risk characteristics. No single factor could tip an assessment in favor of high risk, as is suggested by offender employment laws that permit exclusion of applicants from specific occupations based on just one conviction for one of an assortment of particular offenses. For example, using the LSI-R, male offenders who exhibit as many as 13 risk factors (out of the 54 included in the instrument) would fall within the lowest risk category, associated with a 13.9% chance of recidivism (Andrews & Bonta, 1999).

### *Crime Specialization*

Underlying the concept of business necessity is the assumption that the type of prior offenses present in an individual's background is a meaningful indicator of crimes to come. The notion that offenders specialize in particular crimes finds only weak research support. This is partly due to the manner in which specialization research is carried out; criminologists focus on the transition from one arrest to another (i.e., pairs of arrests) and thus do not summarize offenders' entire careers (see, e.g., Blumstein, Cohen, Das, & Moitra, 1988; Brennan, Mednick, & John, 1989; Britt, 1996; Kempf, 1987; Rojek & Erickson, 1982). (The reliance of researchers on arrests, not convictions, in carrying out these studies is an additional limitation, considering that some states limit employers' consideration to convictions only.) Inasmuch as findings of specialization are more likely observed in careers of longer versus shorter duration, criminologists may omit offenders with fewer than five arrests on their record at the time of analysis. Offenders with no or little criminal history other than the present offense, on the other hand, escape scrutiny in this research.

Researchers of crime specialization may group offenses into broad categories such as violence, property crimes, and other offenses in the search for specialization (see, e.g., Stander, Farrington, Hill, & Altham, 1989, where it is unclear how rape was classified). In multiple event arrests, researchers may choose to record only the most serious crime. Specialization, when it has been observed, refers simply to a higher likelihood of being arrested for the same crime than for a different crime—even if the actual probability of being arrested for that same crime is very small, overall.

Whatever the limitations of crime specialization research, the fact remains that most offenders appear to have very heterogeneous criminal careers. This is true even of sex offenders (Weinrott & Saylor, 1991), where both public and politicians alike presume the greatest stability of specialization (Sample & Bray, 2003). That is, although persons with a prior record of sex offending are at somewhat higher risk of future sex crime involvement than persons whose criminal histories do not include sex offenses, it is the latter who contribute the majority of sex offenses processed by the criminal justice system (see, e.g., Bureau of Justice Statistics, 1992; Langan & Levin, 2002). Persons whose records include sex offending, on the other hand, also engage in nonsex offenses. Consistent with research on specialization, commonly accepted offender risk assessment instruments typically do not distinguish among types of prior offenses.

### *Crime Hazards Versus Crime Risks*

Similar to provisions for sex offender notification, the laws governing employment of persons with criminal histories confound crime hazards with crime risks. According to the National Research Council (1996), a hazard is “an act or phenomenon that has the *potential* to produce harm or other undesirable consequences to humans or what they value,” whereas risk is “the *likelihood* of harm or loss from a hazard” (p. 215, italics added). At best, laws that limit the employment of ex-offenders establish loose criteria for the selection of hazardous individuals. They do not in any way facilitate assessment of the likelihood that hazardous individuals will reoffend. Confusion of hazards and risks in employment decisions means that employers and coworkers may understate actual risks of new crimes associated with individuals who survive the hiring criteria and overstate risks of those who are declined employment.

The concept of hazard begs an important question, namely, just how are ex-offenders hazardous in the workplace? A presumption underlying limits to employment of ex-offenders is that persons with criminal histories are hazardous because they will commit additional crimes. However, some such individuals may pose different and possibly more dangerous hazards than ordinary criminal activity. A growing body of research confirms that offenders harbor key cognitive deficits, which make them more impulsive, short-sighted, and less capable problem solvers compared with nonoffenders (Pratt & Cullen, 2000). In addition, offenders are more likely to be egocentric and lacking in social perspective taking compared with nonoffenders (Ross & Fabiano, 1985). For example, baggage handlers with criminal backgrounds may be more reckless and less attentive to their responsibilities or more willing to give in to pressure to breach procedures. Nurse aides with criminal backgrounds may be less likely than noncriminal counterparts to observe required standards of patient care, resulting in higher frequency of patient bedsores or other injuries unrelated to intentional assaults.

### *Summary*

As vehicles for facilitating assessment of applicants' risk of workplace crime, state and federal laws limit employers' focus to too few measures and thus overstate their relation to an individual's risk of future offending. They attribute greater credibility to the idea of crime specialization than is supported by research. Ultimately, they do not convey useful information concerning the likelihood that particular applicants will engage in repeat offending.

### RELIABILITY OF CRIMINAL BACKGROUND CHECKS

State laws govern how criminal records are handled and when they are made available to potential employers or the public. Most states impose restrictions on the release of nonconviction records for noncriminal justice purposes, including by employers (SEARCH Group, 2003). Some states single out arrest records, limiting employers' access to them as a whole, limiting access to those more than 1 year old, or prohibiting employers from inquiring about arrests not leading to convictions.<sup>5</sup>

In general, expunged and sealed records fall outside the scope of employers' access. As many as 32 states have provisions that permit individuals whose criminal histories have been expunged to deny the events reported in those records, up from 6 states in 1974 (SEARCH Group, 2003). Courts in Louisiana, New Jersey, Ohio, Pennsylvania, and Washington have held that the improper retention of an exonerated arrestee's criminal record infringes on the arrestee's right to privacy.<sup>6</sup> In Illinois, however, employers may consider the events involved in expunged histories if their source of information is other than the expunged record.<sup>7</sup>

The state criminal history record repository is the main resource to which employers turn for information on the criminal backgrounds of prospective employees. States vary greatly with respect to the choice of which data elements must be maintained in the repository. For example, jurisdictions differ with respect to the extent to which less serious misdemeanors should be included in the database, with the majority choosing to exclude them despite their relevance to assessments of chronicity of offending (SEARCH Group, 2001). There is also variation in the amount of time elapsed between an event and its submission to the state repository. According to a 1999 national survey, the average number of days between an arrest and receipt of arrest data by the state was 13, but as long as 93 days in Mississippi. The average number of days between a trial disposition and receipt of data by the state was 30, but as long as 110 days in Wisconsin (SEARCH Group, 2001).

With respect to mandatory data elements, many records in state systems remain incomplete. The passage of such laws as the Brady Handgun Violence Prevention Act (P.L. 103-159), the National Child Protection Act (P.L. 103-209), and the Victims of Trafficking and Violence Prevention Act of 2000 (P.L. 106-386) provided the impetus for the National Criminal History Improvement Program, administered by the Bureau of Justice Statistics (2003). In addition, all states have now enacted their own legislation for the improvement of state criminal history records, up from 14 in 1974 (SEARCH Group, 2003).

Although state systems are improving, record accuracy and completeness continue to be the most serious problems affecting criminal history databases. A 1999 survey of 32 states and the District of Columbia found that in 14 states, final dispositions were recorded in no greater than 50% of arrests. One half of the state-submitted arrests in the FBI database have no final dispositions attached (SEARCH Group, 2001). This presents a significant deficiency for employers, whose review of applicants' criminal histories must center on convictions. According to the SEARCH Group (2001), in-depth audits of state criminal history databases "have found unacceptable levels of inaccuracies" (p. 39). Moreover, records tend to be difficult for noncriminal justice agencies to decipher.

Even when histories are complete and accurate, noncriminal justice agencies may have trouble receiving responses to record requests in a timely manner. Policies and practices established by the repository may result in more restrictive access for employers than is provided by law (SEARCH Group, 2003). Noncriminal justice inquiries generally receive less priority than requests by criminal justice agencies. The typical method of access for noncriminal justice agencies is through the mail, although some states, under authority of state statute, provide online access to certain requestors (SEARCH Group, 2001). Lack of sufficient staff and facilities are additional reasons that lawful requests by noncriminal justice agencies may go unfulfilled (SEARCH Group, 2003).

Access to FBI records by noncriminal justice agencies for the purpose of conducting nationwide record searches is very cumbersome (SEARCH Group, 1993). This is not an insignificant fact, inasmuch as approximately 25% to 30% of the criminal subjects for whom records are kept by the FBI are multistate offenders (SEARCH Group, 1993). The recently enacted national Amber Alert law, formally titled Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (P.L. 108-21), underscores the rudimentary condition of national criminal history search capabilities. P.L. 108-21 established an 18-month pilot program for national criminal history checks, for use by volunteer groups such as the Boy Scouts of America.

Requests for criminal background checks to the FBI produce juvenile records from only those states that authorize release of such information. Juvenile criminal histories of persons whose records were accumulated in states that do not permit access to juvenile records cannot be released by the FBI (Bishop, 1997). Historically, however, neither state nor federal criminal history repositories collected juvenile records, except for those tried as adults and, since 1992, those adjudicated for serious crimes (SEARCH Group, 2001). Thus, even where access to juvenile records is permitted by law, employers may receive criminal history results that do not include them.

Some states have recognized the impracticality of requiring a background check before employment begins; thus, some mandatory provisions permit the hiring of applicants without checks in exigent circumstances. That is, employers may hire individuals while they await the results of the criminal background check (see, e.g., Texas Health and Safety Code, 2003). The “temporary employment period,” pending the background check, is often further elongated because the criminal history checks may be channeled through an intermediary agency (see, e.g., New York Education Law, 2004).

In summary, background checks do not consistently yield complete and accurate information on job applicants’ criminal histories. State laws curtail employers’ access to some types of criminal records to protect the privacy of the individuals to whom they pertain. State variations in record-keeping practices further limit the kinds of criminal history data available for employers’ review. The lower status of employers in relation to government agencies, coupled with outdated and underfunded criminal history repositories, renders timely receipt of accurate information about job applicants unlikely. Finally, loopholes in the law may permit employers to avoid background checks entirely, for various durations.<sup>8</sup>

### THE EFFECT OF EX-OFFENDERS IN THE WORKPLACE

Underlying case law and legislation facilitating screening or exclusion of job applicants with criminal histories is the assumption that offenders make substantial contributions to crime in the workplace. Yet, little research on workplace crime focuses on employees with criminal histories. Research on the nature of workplace victimization finds that particular occupations place employees at higher risk of victimization, not because of fellow employees but because the activities they are required to engage in increase frequency of contact with offender populations (Lynch, 1987). Research on workplace violence indicates that workers actually face higher risks of assault from strangers, clients, intimate partners, or other family members than from coworkers (Duhart, 2001; National Center for the Analysis of Violent Crime, 2004; Tjaden & Thoennes, 2001). It is not surprising that higher risk occupations include protective and mental health services and retail sales positions (Lord, 1998; National Institute for Occupational Safety and Health, 1996).

Persons with criminal backgrounds are believed to make substantial contributions to levels of crime in vocations serving vulnerable populations (see, e.g., *Crooks Caring for Seniors*, 1998). Yet, other than for a few small-scale accounts of employee crimes in health care settings (see, e.g., Pillemer & Bachman, 1991; Pillemer & Moore, 1989), there is no research that demonstrates that an organization, coworker, or client is any more likely to be vic-

timized by exposure to an employee with a criminal history than to one without. This is partly due to the lack of emphasis by researchers on the measurement of criminal histories of employee subjects and partly due to methodological problems where criminal histories are taken into account. For example, a study of 281 cases of nonfatal workplace violence found that perpetrators of internal threat incidents (which made up one third of total incidents) were more likely to have had a prior criminal record than perpetrators of external threat incidents; however, included as internal events were domestic struggles between employee and fellow employee, or nonemployee intimates (Scalora, Washington, Casady, & Newell, 2003). Problematic also is the tendency of researchers to stray from legally prohibited acts when constructing measures of workplace violence. Studies of workplace violence frequently mingle measures of traumatic events and uncivil conduct with that which is unlawful (Flannery, 1996; Greenberg & Barling, 1999; Lord, 1998).

Policy-relevant research concerning the contributions of persons with criminal histories to workplace crimes likely involves greater complexity of effort than determining merely that ex-offenders are represented, or even disproportionately represented, in work settings where criminal activity occurs. For example, consistent with routine activities theory (Felson, 2002), the risk that any offender with a criminal history will reoffend at work may be a function of the extent of a hazard's exposure to vulnerable targets. Two ex-offenders of apparently equivalent risks (judging solely from criminal histories and other criminogenic factors) who each obtain work in a health care setting may pose vastly different risks if one is assigned to patient care and the other to the laundry.

Too, aggregates of individuals with criminal histories in a single workplace would likely present greater risks of harm than one or few. Thus, the "collective risks" posed by the employment of numerous individuals in the same workplace whose criminal histories do not meet legal criteria for exclusion may exceed, perhaps substantially, the risks posed by any one offender who does. The phenomenon of sexual assaults, thefts, and other crimes that has followed the employment of high concentrations of minor offenders in nursing homes (General Accounting Office, 2002) illustrates this point. The aggregation of even low-risk offenders in a single location gives rise to the equivalent of criminal companions, an established correlate of reoffending (Gendreau et al., 1996).

There is also the question of how best to characterize risks presented by employees with criminal histories. According to the National Research Council (1996), risk characterization is a "synthesis and summary of information about a hazard that addresses the needs and interests of decision makers and of interested and affected parties" (p. 215). However, as public health

literature on risk characterization indicates, there is a variety of means for characterizing risk, and the selection of any one over the others can be controversial (Crouch & Wilson, 1982).

Precisely how workplace crime risks should be characterized to best inform law and policy would likely also engender debate. Taking into account the number of criminal incidents by employees with criminal histories as the numerator in the calculation of a risk, choices for the denominator include at least the following: number of clients or targets at affected businesses, number of clients or targets to which the employees in question were exposed, number of clients or targets in the affected industry as a whole, number of employees with criminal histories, number of employees with criminal histories by number of days worked, and number of businesses/facilities. The infrequency with which very serious crimes occur may discourage their use as measures for risk characterization. Crimes such as theft that occur with greater frequency may make more useful measures, however, like thefts or other property crimes outside the workplace context, it will not always be possible to know exactly what parties are responsible (and much less, whether those parties had criminal records). Some workplaces or industries may be more vulnerable to a dark figure of crime than others. For example, victims' lack of ability to report or capacity to recognize criminal behavior would likely depress estimates of assaultive behaviors in facilities for children and the infirm.

Skeptics may argue that the reason there is so little research to date linking persons with criminal histories to workplace crime is precisely because laws have been effective at eliminating or reducing the risks those individuals pose. However, this argument cannot justify the recent proliferation of provisions that aim to exclude ex-offenders from the workplace. Moreover, legislation that reduces the ex-offenders' likelihood of securing or retaining gainful employment carries with it risk tradeoffs. Inasmuch as unemployed offenders pose greater risks to the public at large than do employed offenders in the workplace (Ouimet, 2002; Wilson, Gallagher, & MacKenzie, 2000), efforts to reduce risks of workplace crime by barring persons with criminal histories may coincide with increased risks of the same persons engaging in crimes in other contexts.

In summary, although research demonstrates that some occupations present greater crime risks for employees than others, it has not produced strong evidence that employees with criminal histories are chiefly responsible. Efforts to research the contribution of persons with criminal histories, specifically, to workplace crime may be difficult undertakings. Policy makers should consider that risks averted by exclusion of offenders in the workplace might translate into increased risks of crimes to the public at large.

### **ALTERNATIVES TO EXCLUSION OF EX-OFFENDERS FROM THE WORKPLACE**

Considering the problem of workplace crime in the aggregate, an assumption that much employee-perpetrated illegal activity may be due to employees with no prior criminal justice involvement is probably not unreasonable. First, the availability of various provisions to employers for denying offenders employment along with the former's increasing reluctance to hire the latter suggests that persons with criminal histories are likely underrepresented among employed individuals. Second, in the case of workplace property crime, where perpetrators typically enjoy low risk of detection and prosecution, persons with criminal histories could not possibly be responsible to any substantive extent. For example, one study estimates the proportion of all employees responsible for workplace theft at more than 50% (Wimbush & Dalton, 1997). Employees are responsible for 48% of all thefts in retail settings, outstripping even the contributions of shoplifters, who are responsible for 32% (Hollinger & Davis, 2003). Twenty-three percent of the convictions for financial institution frauds obtained by the U.S. Department of Justice in 2002 involved bank "insiders" (Federal Bureau of Investigation, 2003).

Third, research finds that crime at work, such as theft, is accepted or rationalized by many employees (Dabney, 1995; Greenberg, 2002; Miller & Gaines, 1997). Fourth, long-term follow-ups of birth cohorts, long the backbone for tracking criminal careers, now find that more than half of adult offenders have no criminal histories whatsoever (Eggleston & Laub, 2002).

There is also reason to believe that characteristics of the physical environment as well as employee supervision practices may account for variation in levels of crime in the workplace. Studies exploring the etiology of aggression by coworkers fault management conflict style and ineffective disciplinary practices (Aquino, 2000; Braverman, 2002). Use of physical security measures, closed circuit TV, point-of-sale systems, and employee incentive and awareness programs are credited with reduction in crime where they have been introduced and evaluated (National Center for the Analysis of Violent Crime, 2004; Traub, 1996).

If the problem of crime in the workplace is larger than the likely contribution of employees with criminal histories, more reasonable solutions entail active management of crime risks at the workplace itself. Yet, in marked contrast with increasing frequency and scope of legislation to control offender access to employment, workplace crime risk management is mainly a voluntary enterprise.

Legislation calling for businesses to take steps to contain risks presented by offenders in the workplace has been imposed in only a few states (Barish, 2001; Injury Prevention Research Center, 2001). Washington, Florida, and

Virginia limit the hours of operation of late-night retail establishments; Washington and Florida also mandate employee training in crime risk prevention. Regulations to reduce incidents of aggression by patients have been enacted in California and Washington. It is notable that the laws of all of these states target sources of workplace violence from intruders or clients (as opposed to employees). Aside from these few exceptions, and whatever deterrence is imparted by the threat of negligent hiring litigation brought on by injured coworkers or clients, employers are free from mandates to reduce risks of crime in the workplace.

Occupational Safety and Health Administration (OSHA), which has maintained a longstanding interest in workplace violence and collects statistics on such events, has stopped short of imposing regulations to contain crime risks in places of employment. OSHA's favored approach is to issue guidelines for risk containment. For example, even though its own report (OSHA, 1998) on high rates of workplace violence in late-night retail establishments cautions employers that "many incidents can be anticipated and avoided" (p. 1) and cites a study of a crime prevention effort by the Southland Corporation that reduced robberies at experimental group stores over control group stores by 30%, OSHA provides only recommendations "that may be useful to employers designing a violence prevention program" (p. 2). Of additional interest is OSHA's advice to employers that failure to adopt recommendations would not be a violation of the General Duty Clause of the Occupational Safety and Health Act of 1970 (P.L. 91-596), which permits OSHA to cite employers who fail to prevent or abate recognized hazards of workplace violence in their establishments (29 U.S.C. 654 § 5[a][1]). A similarly passive approach to prevention of workplace victimization appears in OSHA's (1996) report on reducing risks of assaults to health care workers. The voluntary approach to reducing workplace crime risks also appears in the National Child Protection Act of 1993, which directs the Attorney General to "develop guidelines for the adoption of appropriate safeguards by care providers and by states for protecting children, the elderly, or individuals with disabilities from abuse."

In addition to situational crime prevention strategies, various other measures can be implemented to reduce employer reluctance to hire and retain ex-offenders. These include tax incentives, state insurance programs to reduce employers' concerns about liability linked to the hiring of offenders, caps on employers' liability for negligent hiring, and elimination of liability where background investigations are conducted according to statutory guidelines (Leavitt, 2002). Prison industries, currently available to only 7% of inmates, accrue benefits for offenders, the public, and employers alike (Atkinson & Rostad, 2003). According to Holzer, Raphael, and Stoll (2003), the success of welfare reform efforts, which target low-skilled and low-income populations of single mothers, can be viewed as an indicator of

achievements that can result from the right mix of employer incentives and program interventions.

In summary, persons with criminal histories probably do not account for the majority of crimes by employees. Various options to reduce risks of workplace crime and to enhance business interest in employment of ex-offenders are available, but there is as yet little interest by either the states or federal government to encourage employers to adopt these measures.

### CONCLUSION

At the center of this discussion are the competing interests of reintegration of ex-offenders and the prevention of workplace victimization. Congress and the states, by enacting laws regulating the use and consideration of background checks, have sought to strike a balance between these competing interests. However, for the most part, both parties have failed to implement either proper risk assessment or significant ex-offender reintegration within the balancing process. Effective reforms must address both of these interests.

This article provides various justifications for scaling back legal barriers to ex-offender employment. In their current form, laws limiting the employability of ex-offenders offer dubious benefits to public safety. Still, the various objectives attached to offender employment laws—reduction in workplace victimization, protection of vulnerable populations, and increased national security—are important to achieve. What changes are needed to bring about offender employment laws that are more likely to accomplish these goals while minimizing injustice to the ex-offender?

At a minimum, the decision to impose legal barriers to employment of ex-offenders should consider the nature of possible consequences attached to not imposing a barrier. For example, although breaches to homeland security may not be frequent, the failure to plan for them threatens negative outcomes of substantial magnitude. In the case of enterprises related to homeland security (airports, rail transportation, border security, chemical and biological laboratories, and so on), the stakes associated with other than cautious hiring suggest that all employees should be subjected to thorough screening.

Second, reforms should consider the voluntariness of exposure to offender coworkers and the capacity of potential victims to protect themselves. Children, the disabled, and infirm individuals ordinarily cannot protect themselves from violence. Absent rigorous employee screening standards in nursing and assisted-living situations, they may experience long and involuntary exposure to crime risks. In combination, these factors mitigate the injustices associated with greater scrutiny of applicants with criminal histories.

Third, the decision to impose barriers should consider evidence linking workplace crime problems to ex-offenders. As this article has demonstrated,

there is little known of the real crime risks posed by ex-offenders in the workplace. If individuals with criminal histories do not make substantial and disproportionate contributions to workplace crime in specific occupations or businesses, denying them employment can only be unjust.

Fourth, reforms should consider whether risks posed by ex-offenders can be effectively controlled by means other than exclusion from employment. Advances in crime prevention strategies outshine developments in risk assessment technologies, which at best are still fairly error prone. The regulation of crime risks should favor situational crime prevention measures over restriction of opportunities for individuals with criminal histories to reintegrate into their communities.

Fifth, wherever risk assessment is mandated, there needs to be an earnest risk assessment. This means application of the most respected, reliable, and valid instruments for the prediction of reoffending currently available.

Although repeal of various legal barriers to ex-offender employment is a necessary condition for facilitation of reentry and reintegration, it will not be sufficient for many ex-offenders. Successful efforts to assist individuals with criminal histories will require increased support for various interventions. These include increasing the number and scope of partnerships between criminal justice agencies and employers, to make opportunities for long-term employment available for inmates, probationers, and parolees prior to and following departure from criminal justice supervision; creation of more attractive employer incentives for hiring individuals with criminal histories; and issuance of certificates of rehabilitation by justice agency personnel who have been trained to assess offender treatment and risk.

Two major obstacles confronting efforts to bring about these reforms are civil litigation against employers and political fallout for legislators. When workplace violence erupts, the employer faces the likelihood that the injured third party will initiate litigation. Under the current set of laws, an employer who complies with federal or state regulations has an opportunity to proffer evidence of such compliance to negate negligence, to prove it acted reasonably. In the current era of tort reform, such laws are attractive to Congress, state legislatures, and employers. Were law reforms to occur, employers must be provided some form of guidance or reassurance that, upon following established steps, it will be afforded a potential defense to civil litigation arising from workplace crime.

To stave off loss of voter support in the wake of increased funding for programs to enhance ex-offender reentry, legislators must begin to reframe programs in a context that will be attractive to the public, to whom offenders have never been popular. Political discourse concerning the needs of ex-offenders must place greater emphasis on risk tradeoffs associated with failure to attend to the needs of individuals with criminal histories. These include

increased criminal activity by the unemployed, costly return of the repeat offenders to the criminal justice system, and need for considerable taxpayer support of the ex-offender's dependents. In the eyes of the public, consistent accentuation of issues such as better crime control and enhanced self-sufficiency of ex-offenders and their families may help to divert attention from the very principled yet enormously unpopular arguments for removing barriers to ex-offender employment. Ultimately, the end will justify the means.

### NOTES

1. The underlying purpose of these laws is to prevent employers from discriminating against ex-offenders. For example, Section 100C of Chapter 276 of Massachusetts's General Laws (1973) permits individuals to apply for jobs without revealing their criminal records. Some states go so far as to enact laws encouraging employers to hire ex-offenders, like Connecticut Gen. Stat. Ann. (1973) and New Mexico Stat. Ann. (1974a). Although some states enact laws aimed at eradicating such discrimination, the majority of challenges to state laws affecting ex-offenders are brought under federal provisions, such as the Equal Protection Clause of the United States Constitution or Title VII, discussed above.

2. However, the burden of proving a disparate impact is a heavy one, and most claimants fail to satisfy the legal requirement. In *Drayton v. St. Petersburg* (1979), an ex-felon and former heroin user sued the City of St. Petersburg, alleging the consideration of his criminal and drug history disparately impacted Black candidates seeking jobs as firefighters. The district court of Florida dismissed the case because the applicant failed to demonstrate any disparate impact on Black candidates. Further, the applicant did not show that a White applicant with a felony record and drug history had been hired.

3. Examples of risk prediction tools that use multiple measures of criminal history include the Violence Risk Appraisal Guide (Harris, Rice, & Quinsey, 1993), the Level of Service Inventory—Revised (Andrews & Bonta, 2001), the Salient Factor Score (Hoffman, 1994), and the Wisconsin Model (Baird, Heinz, & Bemus, 1979).

4. Instruments that rely heavily on dynamic risk variables include, for the prediction of violence, the HCR-20 (Webster, Douglas, Eaves, & Hart, 1997); for the assessment of psychopathy, the Hare Psychopathy Checklist—Revised (Hare, 2003); and for the prediction of sexual offense recidivism, the Sex Offender Risk Appraisal Guide (Quinsey, Harris, Rice, & Cormier, 1998).

5. See California Lab. Code Ann. (2004); Hawaii Rev. Stat. (1974); Illinois Comp. Stat. Ann. (2004); New Mexico Stat. Ann. (1974b); Virginia Code Ann. (2004).

6. *Itzkovitch v. Whitaker* (1905); *State v. R.E.C.* (1981); *City of Pepper Pike v. Doe* (1981); *In re Pflaum* (1982); *Eddy v. Moore* (1981).

7. Illinois Comp. Stat. Ann. (2004).

8. A recent development in this area is the growing use of private agency criminal history databases. Bushway (2004), noting that the integrity of these databases is as yet unexplored, speculates that they are probably of poorer quality than official

sources. This is because private databases are more likely to lack disposition data and cannot be linked to fingerprint files.

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