ABOLISH LIFETIME BANS FOR EX-FELONS

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Approximately 16 million United States citizens have been convicted of felony offenses. At least 14 million of these ex-felons are unconfined, and at least 9 million have completed the sanctions ordered by the criminal justice system and are under no official supervision (Uggen et al., 2006). Upon conviction for a felony offense and continuing past release from prison and parole, sometimes for life, ex-felons are subject to a wide array of limitations on work, education, family, and civic activities. These bans are sometimes used as explicit forms of additional punishment (i.e., voting bans) and sometimes invoked to protect vulnerable populations. Serious ethical concerns exist about these types of officially-sanctioned collateral consequences because they go beyond punishment within the criminal justice system. These ethical concerns are balanced against the fact that ex-offenders are undeniably at a higher risk for crime than nonoffenders. The exact calculus of this balance is outside the realm of social science. But social science research can calibrate the risk associated with a criminal history record, and we feel safe in concluding that explicit lifetime bans cannot be justified on the basis of safety or concerns about crime risk. Age and time since last offense can help predict current offending risk. Older offenders and individuals who stay arrest-free for 7 years or more simply have very little risk for future crime, and this risk is similar to that of nonoffenders.

We are not suggesting that all risk-based collateral consequences for ex-offenders should be abolished. In our opinion, social science research has not proven that all collateral consequences are necessarily bad public policy. Ex-offenders with recent criminal histories are plainly at increased levels of risk, so short-term risk-based consequences may serve a useful purpose. For public safety reasons, and for purposes of encouraging desistance from crime, individuals with a substantial increased risk of reoffending may be identified and treated differently. Furthermore, a real possibility exists that employers and others who believe criminal history records are relevant will statistically discriminate on the basis of factors correlated with criminal history records (i.e., race) if denied the opportunity to use the information in criminal history records (Bushway, 2004). Such a policy would be especially harmful to the members of the group who did not have criminal records.

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We also see the real possibility that the existence of lifetime bans might create a hopeless environment that can trap an ex-offender and provide little incentive to adopt a prosocial attitude. Some evidence exists that as the prevalence of lifetime bans has increased (Travis, 2002) so have recidivism rates, particularly among drug offenders who have been specifically targeted by legislative bans. The 3-year reconviction rate of drug offenders increased by 33% from 1983 to 1994 (Hughes and Wilson, 2004). Although we know of no research on the causal impact of lifetime bans, some research suggests that the abolishment of parole release reduces incentives for good behavior, reduces program participation in prison, and increases recidivism (e.g., Kuziemko, 2006). We develop these arguments below after a brief description of some of the lifetime bans that currently exist.

EX-FELONS AND LIFETIME BANS

A mixture of state and federal legislation subjects ex-felons to numerous lifetime bans in a variety of domains, including, most importantly, employment, education, and family. These domains are particularly important for ex-felons because of the key role they play in the process of desistance. Despite the importance of employment in this process, lifetime bans on employment have continued to gain popularity since the early 1990s (Travis, 2002). Through laws against hiring or licensing, ex-felons are barred from up to 800 different occupations across the United States (Cromwell et al., 2005). Such bans may be warranted for occupations directly tied to offending history. Child sex offenders, for example, should not be employed working with children. Often, however, employment bans are blind to offense type. Ex-felons are barred from being barbershop owners, commercial feed distributors, and emergency medical technicians in New York, as well as speech–language pathologists and cosmetologists in Florida (Uggen et al., 2006). In 37 states, employers are allowed to consider arrests without conviction, which potentially negatively affects employment prospects of a much broader group (Samuels and Mukamal, 2004).

Educational opportunities are limited for one type of ex-offender. At the federal level, the 1998 amendment to the Higher Education Act of 1965 bans loans, grants, and work-study assistance to all people with drug convictions. Bans last for 1 year up to an indefinite term depending on number and type of convictions with provisions for lifting the ban upon documented rehabilitative drug treatment (Higher Education Act, 1998:Sec. 483).

Lifetime bans extend into home life as well. The federal Adoption and Safe Families Act of 1997 requires that states conduct criminal background

checks on prospective adoptive and foster parents and recommends lifetime bans on those with records involving crimes against children, domestic violence, and serious violent crimes. In addition, the legislation suggests a 5-year ban on those convicted of assault, battery, or drug-related felonies (Adoption and Safe Families Act, 1997:Sec. 106). State policies with regard to adoption and foster parenting for ex-felons vary. Fifteen states have outright bans against anyone with a criminal record becoming an adoptive or foster parent. A few states, such as California, allow adoptive or foster parents to retain custody of children even if barred by recommendation of federal legislation if it can be shown that the parent no longer poses a risk to the child because of rehabilitation (Samuels and Mukamal, 2004).

These bans are the tip of the iceberg of lifetime bans. Additional legislative bans affect voting rights, public assistance, public housing, and marital dissolution (Uggen et al., 2006). These bans originate from federal and state legislation and are often added as riders to other legislation, often receiving little notice or debate (Travis, 2002). Because of the bewildering array of sources of these bans, primarily outside the province of the criminal justice system, "defense lawyers cannot easily advise their clients of all of the penalties that will flow from a plea of guilty" (Travis, 2002:17). They simply do not know. We think criminological research speaks to the potential effect of several of these lifetime bans, but clearly more research is needed to understand the total effect.

DESISTANCE RESEARCH

Life-course criminology has nurtured a growing body of research on desistance from crime. Early research on criminal careers recognized that the end of the criminal career was an important parameter of interest to assess the effectiveness of criminal justice policy (Blumstein et al., 1986). Later research came to characterize the end of a criminal career not as an event but as a process of gradually decreasing offending and eventually reaching a rate indistinguishable from zero (Bushway et al., 2001, 2003; Laub et al., 1998). In their study that followed 500 delinquent boys from age 10 to 70 years, Laub and Sampson concluded that desistance processes were at work for the entire sample and that eventually most offenders either die or desist from crime by age 70 (Laub and Sampson, 2003; Sampson and Laub, 2003). Following three release samples from the California Youth Authority, Ezell and Cohen came to the same conclusion. Among all latent classes of the release samples, desistance was the norm by the time ex-offenders reached their late 20s (Ezell and Cohen, 2005). Blokland and Nieuwbeerta (2005) also found that most active offenders experience declines in criminal offending after age 40 and most desist by age 60. This

consistent finding that most active offenders desist from crime during their lifetime suggests that lifetime bans are simply unnecessary.

We are not arguing that no one offends into old age. Some evidence exists, both theoretical and empirical, that a small number of "life-course persisters" (Moffitt, 1993), "career criminals" (Blumstein et al., 1986), or low self-control individuals (Gottfredson and Hirschi, 1990) do not desist from crime. We can observe by definition this nondesistance and therefore can assess risk. Repeated long-term studies of recidivism confirm that reoffending risk tends to peak within 1 or 2 years after release and to decline thereafter (Greenberg, 1978; Harris and Moitre, 1978; Harris et al., 1981; Lattimore and Baker, 1992; Maltz, 1984 (2001); Schmidt and Witte, 1988; Visher et al., 1991). Notably, Schmidt and Witte (1988) found that the percentage of North Carolina prison releasees who returned to prison peaked at the 10-month mark with a halving of the hazard rate every 10 months thereafter. Similarly, using the 1942 Racine birth cohort and the 1958 Philadelphia birth cohort, Kurleychek et al. (2006, 2007) found that an arrest-free spell of 7 years yielded a future arrest risk that was indistinguishable from that of a nonoffender. In each study the longitudinal pattern of differences in arrest risk between offenders arrested at age 18 years and nonoffenders at age 18 years was one of continual decrease to nonsignificance (substantively in both cases, statistically in one) by the time the individuals reached their late 20s to early 30s. It is striking how quickly arrest-free ex-felons resemble nonoffenders in offending risk. All the more striking, given this finding, is the push for *lifetime* bans for ex-felons. We are very skeptical that longer follow-ups would reveal any substantive difference between arrest-free ex-felons and nonoffenders. We believe the evidence is clear: Policy makers do not need to wait a lifetime of nonoffending before they can be confident that the offending risk has been reduced to the level of the general population.

EFFECT OF LIFETIME BANS ON CRIMINAL BEHAVIOR

Social scientists are concerned that collateral consequences will lead to subsequent offending, if, for example, ex-offenders cannot get good jobs (Western, 2006). And certainly some compelling evidence exists that collateral consequences can lead to increased offending (Holzer et al., 2005). But we are aware of no research that distinguishes between lifetime bans and more short-term collateral consequences. Some work has been performed on graduated sanctions, for example, in drug courts (Gottfredson et al., 2003) and parole (Kuziemko, 2006) that suggest that ex-offenders respond to structured incentives. Future work could look at the relative

impact of lifetime bans versus bans that are more tightly linked to post-release behavior.

If collateral consequences can increase recidivism, why not entitle this essay "Abolish All Bans for Ex-felons?" The problem is the tension between protecting the public against the threat of ex-felons and preserving the rights (and possible rehabilitation) of ex-felons. Ex-felons are at a high risk of crime, and although change can and does happen, the reality is that the social science evidence in support of the role of work, for example, as a change agent for ex-offenders is relatively weak (Bushway and Reuter, 2002; Fagan and Freeman, 1999; Raphael and Weiman, 2007). The last time SEARCH, the consortium of state criminal history records, reviewed its standards for conduct by the repositories, it did not choose to restrict employer access to even arrest records because social science research "suggest[s] that even where employers do use arrest information as a bar to or a restriction on employment opportunities, this may not be significant from a rehabilitation standpoint because recidivism statistics suggest that rehabilitation is seldom achieved regardless of offenders' employment prospects" (SEARCH, 1988:29). Although this position may be a bit extreme, it is clear that we do not have a strong grasp on the types of positive things that we can do to encourage desistance. But even if we knew for a fact that employment has a large causal impact on recidivism for ex-offenders, good public policy might allow some discrimination against ex-offenders.

The problem is that employers and other policy agents clearly believe, and are supported by good research, that information on criminal history records is valuable for making informed decisions about future risk. It is undeniable that criminal history records are a very good predictor of recidivism (Andrews, 1989, 1996). Barring employers from using this information does not change this fact. The widespread proliferation of private criminal history record checks in the last 15 years is a testimony to the demand for this information and to the steps that agents will take to circumvent restrictions on access to official repository data (Bushway et al., 2007). Agents who believe that this information might be relevant also could resort to statistical discrimination on the basis of race, which is highly correlated to criminal history records (Bushway, 2004; Holzer et al., 2005). This type of discrimination not only hurts minority ex-offenders but also hurts minority nonoffenders. For example, the audit study in Milwaukee by Pager (2003) revealed that race is as salient as criminal history record among employers that do not check for a criminal history record. All things equal, we would rather work to develop rational guidelines for the use of criminal history records than advocate a policy that could well lead to much wider employment problems for nonfelons. Because the evidence simply does not support the need for lifetime bans on the basis of

risk, we think good policy should include sunset clauses for individuals who meet certain standards of conduct like staying "straight" for more than 7 to 10 years. It is possible that this sunset clause could be conditioned on age or other factors correlated with recidivism. For example, perhaps older offenders need not stay straight for so long before we can certify their desistance. Recent policy statements by a national task force studying the use of background checks have advocated for the creation of standards that could better guide the use of criminal history record information (SEARCH Group, 2006).

Raphael (2006) has suggested that even a policy that advocated sunset clauses based on time since last offense would be subject to problems with statistical discrimination. He is at least partially correct, to the extent to which negligent hiring lawsuits can be raised on the basis of very old criminal history records. But, social science research should be relevant in these cases. No compelling evidence exists that old criminal history records are predictive of anything once time since last offense or release from prison is taken into account. If employers are rational, which is a fundamental assumption of the statistical discrimination dictum, they should simply not consider very old criminal history records to be relevant.[1]

CONCLUSION

Lifetime bans for ex-felons affect an estimated 1 in 19 adults and 1 in 3 black male adults in the United States (Uggen et al., 2006). These bans may have some short-term benefit in the time period during which ex-felons are at a higher risk of reoffending. But, after a relatively short time span, offending risk differences disappear. Life-course research on desistance shows that virtually all ex-felons eventually desist and that the risk of reoffense drops precipitously as the period of nonoffending increases. Lifetime bans bar entry into many types of employment, impede formation of stable family units, and block access to education assistance, low-income housing, and public assistance. These bans block the very domains thought to be central to the desistance process (Giordano et al., 2002; Irwin, 1970; Laub and Sampson, 2003; Laub et al., 1998; Shover, 1996). Short-term bans of ex-felons may be justified because of short-term increased offending risk. In addition, long-term bans may be justified in certain politically sensitive cases, such as barring child sex offenders from

1. In this discussion, we focus on time since release for prisoners or disposition for probationers. Many current statutes seek to limit penalties according to time since conviction. The evidence suggests that prisoners are at very high risk for offending immediately after release. After the first year, they look like probationers and time served is largely irrelevant once we control for age.

working with children. Blanket lifetime bans of ex-felons, however, are not supported by criminological research and should be abolished.

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