

# **BALANCING THE RIGHTS OF EMPLOYER, GENERAL PUBLIC, AND THE EX-OFFENDER: TO WHAT EXTENT SHOULD CRIMINAL RECORDS BE CONSIDERED IN EMPLOYMENT DECISIONS AND WHAT ARE THE IMPLICATIONS FOR POLICY**

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“We know from experience that if former prisoners can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.... America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.”

President George W. Bush 2004

The Fifth Amendment of the U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. When applying these basic rights of privacy, security, and property to employers, employees, the general public, and ex-offenders, the balancing of these rights can become quite problematic and raises several important questions in regards to policy. One method that employers use to protect their property rights is to rely on background checks through criminal records to exclude potential bad candidates from the selection process. Given that research has shown that most ex-offenders stop committing crimes in their late thirties, relying on criminal record checks has the potential to create a society of unemployable people. This paper examines the use of criminal records in the selection process by employers as well as analyzing the barriers that ex-offenders confront and discuss to what extent those barriers are based on their own characteristics and attitude, as opposed to those of the employer and the results of being incarcerated. Finally, a review of current policy and recommended legislative changes are discussed that could potentially reduce some of the barriers opposing ex-offenders in the labor market.

In the mid nineties, a demand from the American people for tougher laws on drugs and crime was heard and responded to by political leaders. In 1996, former President Clinton signed into legislation policy that would have inadvertent effects on the Criminal Justice System (CJS). Policy such as the “War on Drugs” and “Three Strikes and You’re Out” legislation focused less on rehabilitation and more on the resolution of particular crimes and the treatment of certain offenders. Incarceration was changed from a punishment reserved predominantly for the most heinous offenders to one extended to a much greater range of crimes and a much larger portion of the population. As a result of these initiatives, the CJS in America has undergone tremendous reform and transformation.

The result of this shift in philosophy was an unparalleled escalation of men, women, and young adults being influenced by the CJS. The latest report from the Bureau of Justice Statistics

(BJS) released November 2005 announced that the number of adults in prison, jail, or on probation or parole reached almost 7 million during 2004 (Department of Justice 2005). The number has grown by more than 1.6 million adults under correctional authority control since 1995. The nation’s total correction population was 6,996,500 in 2004, of which 4 million were living in the community on probation; 1.4 million were in a state or federal prison; 765,000 were living in the community on parole; and 713,990 were in jail according to the BJS report on probation and parole. Astoundingly, at year-end one in every 31 adults were under correctional supervision, which was 3.2 percent of the U.S. adult population.

There is little doubt that the “tough on crime” policies were effective in getting criminals off the streets, however, little provisions were made for when they got back out (Pager 2003) and with such huge numbers of the prison population on parole, the general

public is now concerned with how to successfully reintegrate parolees back into the community. A 1994 recidivism study estimated that within 3 years, 51.8 percent of prisoners released during the year were back in prison either because of a new crime for which they received another prison sentence, or because of a technical violation of their parole (Department of Justice 2005). Ironically, to address the issue of reducing the recidivism rate and successfully reintegrating ex-offenders back into the community, the general public petitioned for new initiatives through political legislation that would help ex-offenders participate in the labor market. Most experts, academics, and practitioners, as well as people with criminal records themselves, believe that obtaining employment is absolutely crucial to successful reintegration of offenders and to the promotion of public safety through a reduction in crime (Anderson 2002).

Employing ex-offenders, however, is easier said than done, especially, when there are so many barriers that restrict their access to the labor market. Ex-offenders are not only hindered by their own characteristics and attitudes (supply side) but they are also challenged by the obstacles put in front of them by employers (demand side) and the public. Events such as the September 11, 2001 terrorist attacks coupled with stringent employment laws, welfare legislation, and the stigma of being incarcerated has made the decision to hire ex-offenders a cautious one. More than ever, employers are conducting background checks on prospective employees. Depending on the source, anywhere from 80 percent to 95 percent of U.S. corporations employ some form of background checks; specifically, of companies that conduct pre-employment screenings, 81 percent verify education, 79 percent check previous employment, 59 percent check references, 50 percent conduct drug testing, 37 percent examine criminal records, and 21 percent inspect motor vehicle records (Connerley et al., 2001).

## ISSUE

The right to be treated equally and not be subjected to discrimination is often seen as a “negative” right unlike “positive” rights, which involve a claim or entitlement to something, “negative” rights call for the prohibition of some action or the right not to be interfered with (Hirchl, 2000). Considerable portions of the general public are receptive to the necessity for protection against discrimination for underprivileged groups such as the disabled. What makes the protection of ex-offenders’ rights different from other negative rights is the perceived conflict with another right, the right of the public at large to feel safe and secure (Lam & Harcourt, 2003). Also, promoting the right of ex-offenders to employment may also infringe upon the employer’s right to use his or her property at will (Lam & Harcourt, 2003). The dilemma surfaces when an offender is released from incarceration and seeks employment, but because of the criminal background check, the individual is denied employment and seeks monetary income elsewhere, usually through criminal activity. The general public is then affected by the criminal activity through social and financial cost. The question of how to break this cycle is a convoluted one: “How do we balance the rights of the employer, the general public, and the ex-offender in regards to employment selection?”

## RESEARCH QUESTION

Protecting public safety and security while promoting the rehabilitative significance of work and the basic employment rights of all workers, especially those with criminal records, is of the up most importance in balancing the above issue. Given that such a large number of employers conduct criminal background checks while ex-offenders stop offending in their late thirties, is criminal record checks a valid selection strategy? This paper examines to what extent should criminal records be considered in employment selection and what are the implications for policy. This paper will review federal and state policies, private employment and the private entities in the business of providing criminal history information for

employment purposes. From this assessment, recommendation for policy changes will be made.

### **PAPER OUTLINE**

In order to exam how criminal record checks affect the selection of ex-offenders for employment, this paper will first began by examining what kind of barriers ex-offenders endure on both the demand and supply side of the labor market. A review of current literature on background checks will be presented as well as several studies that were conducted on the extent to which employers actually hire ex-offenders. From the results of this evaluation, a close look at existing policy will be considered followed by a recommendation for changes to policy.

### **BARRIERS TO THE LABOR MARKET- SUPPLY SIDE**

Most researchers agree that there are barriers in place that make job opportunities for ex-offenders more restricted. Disagreement occurs when considering which barriers affect the job opportunities more. One important question is “Are the labor market experiences of ex-offenders due to the effects of conviction or incarceration or are they due to characteristics of offenders that simultaneously place them at risk of arrest and low earnings or unemployment?” (Western et al., 2001).

Ex-offenders have a multiplicity of characteristics that significantly limit their employability and earnings capabilities. Some of the more relevant researched characteristics are ex-offender’s limited education and cognitive skills, limited work experience, substance abuse, and other physical and mental health problems. For instance, about 70 percent of offenders and ex-offenders are high school dropouts (Travis et al., 2001). According to at least one study, about half are “functionally illiterate” (Hirsch et al., 2002). Viscusi (1986) states that prior to incarceration, the employment rates of those involved in criminal activities are not trivial but they generally lag well behind those of other young men—even those who had similarly limited skills and also lived in poor inner city neighborhoods. As a consequence, the

work experience that they had accumulated prior to incarceration was generally well below what it might have been in the absence of their participation in crime. It can also be argued that when an individual is incarcerated there is a depreciation of their human capital that occurs because particular skills deteriorate when they are not used. Thus, the incarceration period impedes the individual from gaining any additional private sector experience, and impacts job skills, positive work habits or connections to employers they might have had beforehand (Holzer et al., 2003).

Further, a large proportion of the men and women who have been influenced by the CJS suffer from drug abuse and mental health problems. For example, about three-fourths have had substance abuse problems; 2 to 3 percent have AIDS or are HIV-positive; 18 percent have hepatitis C; and 15 to 20 percent report emotional disorders (Travis et al., Hirsch et al). According to the BJS, among the small fraction of ex-offenders who are women, larger numbers suffer from depression or past sexual abuse. As Holzer (2003) purports, these factors limit employability because they limit the basic “job-readiness” that employers almost universally seek as a pre-condition for employment.

Additionally, when most ex-offenders are released from prison, they return to the same low income and minority neighborhoods from which they came. These neighborhoods contain comparatively few unskilled jobs as well as the ex-offender’s peer group, which provides relatively few contacts to the world of legitimate work. A large proportion of jobs are found through personal connections that match workers to employers (Granovetter, 1995) thus societal contacts that provide information about job opportunities may be weakened as a result of incarceration. Hagan (1993) argues that juvenile delinquency embeds young offenders in social contexts with weak connections to stable employment opportunities. He also asserts that inmates build social connections to those promoting opportunities for further criminal activity after release further reducing employment opportunities. These difficulties are reinforced by parole restrictions that often

require these individuals to live in the same communities from which they came, and by laws that prohibit ex-offenders in some states from obtaining driver's licenses (Holzer et al., 2003).

Besides the barriers that ex-offenders deal with, they also limit their opportunities for employment by their own poor choices and attitudes about work. It is unimaginable that there are no jobs available for these individuals in the labor market. Likely, the jobs that are available are low wage, low skilled jobs with no benefits or upward mobility. These individuals are likely to decline the low skilled low wage jobs for something more easy and lucrative, usually through some form of illegal opportunity. In other words, they would rather do something easy and get paid more money like selling drugs instead of doing something legal and harder receiving an honest pay check but with less money...like washing dishes.

#### **BARRIERS TO THE LABOR MARKET- DEMAND SIDE**

The barriers faced by ex-offenders because of their very limited skills, poor health, and race or area of residence often reflect a “mismatch” between these characteristics and those sought by employers on the demand side of the labor market (Hlozer et al., 2003). From these mismatches of characteristics, it is relatively easy to understand why employers conduct background checks to protect their private property, especially when one of the main goals of a firm is to turn a profit. However, besides the ex-offenders own inadequacies, there are additional barriers that they face on the demand side of the labor market.

Firms are hesitant to employ ex-offenders for an assortment of reasons. The things an employer wants to know about a potential employee vary with the kind of jobs the individuals are seeking. The following are several reasons why a firm may not select an ex-offender for employment. Negligent hiring claims have had a profound effect on employer's decisions to hire ex-offenders. The doctrine of negligent hiring subjects employers to liability for the risk created by exposing the public and

their employees to potentially dangerous individuals often referred as the “deep-pocket theory” (Extejt 1991). Negligence is a theory of liability premised on one's breach of a duty of care to others in the organization and to the public (Connerly et al., 2001). There has been an increase in negligent hiring cases in recent years. There are several explanations for this increase. First, negligent hiring theory does not limit the employer's liability to actions taken specifically during the course of employment; thus, employers are held liable for actions taken by employees who are off the job (Connerly et al., 2001). Second, the amount of money that an individual can receive in these cases is astronomically higher than in other cases. Third, the statute of limitations for negligent hiring claims is longer than other claims, such as workers' compensation (Connerly et al., 2001). Lastly, the rules of evidence are different where prior negligent acts of the employee, including the persons' character, may be introduced in negligent hiring cases.

According to the consulting firm Secure Systems Group, current events have also caused an increase in employment screening. For example, child abuse and child abductions in the news in recent years have resulted in new laws in almost every state that require criminal background checks for anyone who works with children. The move to protect children through criminal background checks now includes volunteers who serve as coaches for youth sports activities and scout troop leaders. The terrorist acts of September 11, 2001, have resulted in heightened security and identity verification strategies by employers. Also, corporate executives, officers, and directors now face a degree of scrutiny in both professional and private life unknown before the Enron catastrophe and other corporate scandals.

Further, some state and federal laws also require criminal history checks where employees may be working with vulnerable groups (for example, children or hospital patients), where employees work with highly sensitive or confidential information, or where employees are in public trust positions such as police officers, correctional officers, and firefighters

(Howie & Shapero, 2002). Welfare laws also affect ex-offenders. The 1996 federal welfare law, Personal Responsibility Work and Reconciliation Act (PRWORA), contains a specific provision that restricts access to public benefits for individuals with drug-related convictions (Anderson 2002). With 37% of parolees released having a drug related conviction, the welfare law is a considerable barrier. An ex-offender’s eligibility to receive public assistance can be critical since many people with criminal records are not “job-ready” immediately and require services such as substance abuse treatment, job training, or education before they can enter the job market (Anderson 2002).

The last barrier that this paper will discuss is the stigma of incarceration, specifically the biases that the employers form about the ex-offender’s incarceration. Schwartz and Skolnick (1962) conducted early research on criminal convictions and determined that criminal convictions signaled convicts’ untrustworthiness. Given the fact that employers cannot monitor every aspect of their employees’ behavior in the work environment, trustworthiness is of the utmost importance. Employers, whose business is concerned with customer contact or the management of cash or

expensive merchandise, want to hire reliable, law-abiding employees. Also, people lie, especially on job applications. Secure Systems Group estimates that 30 to 40 percent of all job applications and resumes include some false or inflated facts.

Given the potential for employers to suffer tremendous losses from law suits as a result of not conducting a criminal record background check, it is hard to criticize employers who utilize the strategy.

**LABOR MARKET DISPARITIES FOR EX-OFFENDERS  
PAGER’S STUDY**

There is significant disagreement among academics, legislators, and field professionals over the extent to which contact with the CJS leads to detrimental consequences in employment selection for ex-offenders. This incongruity stems from two schools of thought that focus on the causation aspect of the non-selection of ex-offenders. Specifically, is there a direct link between incarceration and employment outcomes or are employers basing their decision of non-selection on the preexisting traits of the ex-offender rather than incarceration as represented by figures 1 and 2 (Pager 2003).

Figure 1- Model of Direct

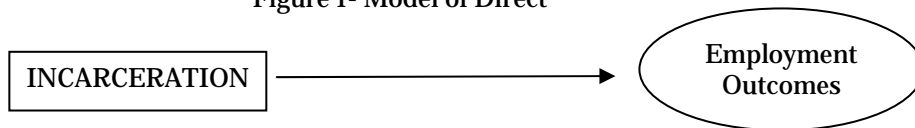
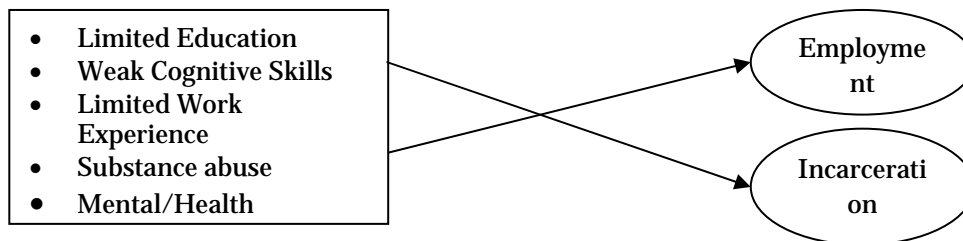


Figure 2- Model of Indirect



In an attempt to resolve the debate, this paper conducted a cursory review of several studies and found that survey researchers have

offered numerous hypotheses regarding the mechanisms that produce the observed relationship between incarceration and

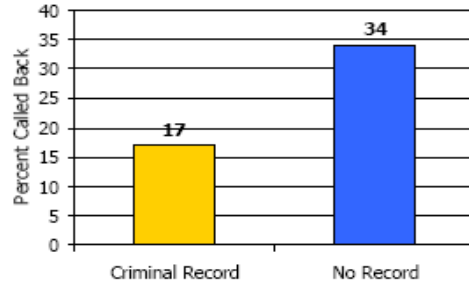
employment to included the labeling effects of criminal stigma (Schwartz and Skolnick 1962), the disruption of social and familial ties (Sampson and Laub 1993), the influence on social networks (Hagan 1993), the loss of human capital (Becker 1975), institutional trauma (Parenti 1999), legal barriers to employment (Dale 1976), and , of course, the possibility that incarceration effects may be entirely spurious (Kling 1999; Grogger 1995; Neddles 1996) according to Pager (2003). Pager, however, stresses that without direct measures of these variables, it is difficult, using survey data, to discern which, if any, of these causal explanations may be at work and stray from conventional thought by conducting an audit survey using criminal records.

For this reason, this paper relies on Pager’s work to determine if employers do indeed avoid hiring ex-offenders. The study conducted by Pager is a more comprehensive assessment of the hiring process of ex-offenders across a full range of entry-level employment. He uses an experimental audit design to isolate the effects of a criminal record while observing employer behavior in real-life employment settings. The basic design of an employment audit involves sending matched pairs of individuals (called testers) to apply for real job openings in order to see whether employers respond differently to applicants on the basis of selected characteristics (Pager 2003).

Figure 3 shows the percentage of applications submitted by white testers that elicited callbacks from employers, by criminal status. As illustrated below, there is a large and significant effect of a criminal record, with 34% of whites without criminal records receiving callbacks, relative to only 17% of whites with criminal records; a criminal record thereby reduces the likelihood of a callback by 50%.

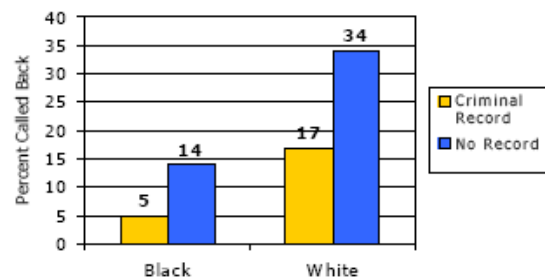
Although it is not the objective of this paper to concentrate on race and the impact that the Criminal Justice System has on it, this paper would be incomplete if the effects of race was not considered in regards to employment selections, especially when African-Americans make up such a large majority of the penal system. The following is the results of Pager’s

Fig. 3. The effect of a criminal record on employment opportunities for whites. The effect of a criminal record is statistically significant ( $P < .01$ ) (Pager 2003)



study in regards to race. Figure 4 presents the percentage of callbacks received for both categories of black testers relative to those for whites. The effect of race in these finding is strikingly large. Among blacks without criminal records, only 14% received callbacks, relative to 34% of white non-criminals. Even whites with criminal records received more favorable treatment (17%) than blacks without criminal records (14%). Plager points out that the rank ordering of groups in this graph is painfully revealing of employer preferences: race continues to play a dominant role in shaping employment opportunities, equal to or greater than the impact of a criminal record.

Fig. 4. The effect of a criminal record for black and white job applicants. The main effects of race and criminal record are statically significant ( $P < .01$ ) (Pager 2003).



Pager’s study takes a strong stand on the current debate by offering direct evidence of the causal relationship between a criminal record and employment outcomes. While there is still disagreement among professionals on the issue,

Pager's survey offers a direct measure of a criminal record as a mechanism producing employment disparities. The main finding of Pagers study has extraordinary ramifications for the labor market and ex-offenders. The finding that ex-offenders are only one-half to one-third as likely as non-offenders to be considered by employers suggests that a criminal record indeed presents a major barrier to employment. With over 2 million people currently behind bars and over 12 million people with prior felony convictions, the consequences for labor market inequalities are potentially profound (Pager 2003).

### **TO WHAT EXTENT DO EMPLOYERS CONSIDER CRIMINAL RECORDS IN EMPLOYMENT?**

As evidence from Pager's study suggest, there are inequalities in the labor market for ex-offenders. However, it is necessary to take the analysis further by evaluating the extent that employers actually hire ex-offenders in order to make pertinent policy modification recommendations. This paper assesses a study that was conducted by the Urban Institute on prison reentry to establish the extent to which employers hire ex-offenders. The Multi-City Study of Urban Inequality (MSCUI) includes slightly over 3,000 establishments and was conducted between June 1992 and May 1994 in the Atlanta, Boston, Detroit, and Los Angeles metropolitan areas. The study examines employer-hiring behaviors in a low wage and low skill labor market as well as the degree to which employers conduct criminal background checks.

The following generalizations can be made about employer hiring behavior in low-wage and low-skill labor markets (Holzer, 1996; Moss and Tilly, 2001):

- Virtually all employers seek basic "work-readiness" in prospective employees, while many seek additional "hard" and "soft" skills, even in low-wage markets;
- Since most skills are not directly observable at the time of hiring, employers generally seek applicants

with certain credentials that signal employability and skill, and tend to avoid those with certain stigmas;

- Employers vary in the amounts of resources they can apply to hiring and compensation decisions, as well as in their information and expertise on these matters;
- Recruiting and screening choices (as well as compensation, promotion and retention decisions) are often made informally, and can reflect employer prejudices, perceptions and experiences;
- Employer access to a reliable and steady pool of applicants is also affected by their physical proximity to various neighborhoods and groups, their employee networks, as well as the tightness of the labor market locally and /or nationally.

The following are the results of the (MSCUI) study conducted by the Urban Institute on employer preferences towards the hiring of ex-offenders and their tendencies to check for a criminal background:

- Employers are much more adverse to hiring ex-offenders than they are towards any other disadvantage group, such as welfare recipients;
- Employers vary in their stated willingness to hire ex-offenders according to the characteristics of their establishments and the jobs they are seeking to fill;
- They also vary according to the offense committed by the offender and whether any meaningful work experience has been obtained since release; and
- Employer tendency to check backgrounds is far from universal, but has risen over the previous decade.

For instance, over 90% of employers surveyed are willing to consider filling their most recent job vacancy with a welfare recipient, while only about 40% are willing to consider doing so with an ex-offender (Holzer et al., 2003). Employer reluctance is greatest when the offense in question was a violent one and

least when it was a non-violent drug offense (Holzer et al., 2003).

### **WHAT ARE THE RESTRICTIONS ON EMPLOYERS CONDUCTING BACKGROUND CHECKS**

Employers are challenged with the quandary, both ethically and legally, in deciding what type of information to substantiate during a background investigation. A comprehensive background check is much cheaper than the cost of first hiring, then terminating the wrong employee, and then having to hire and train the right employee as a replacement. On the contrary, the issue of privacy and discrimination against ex-offender need to be considered to avoid extensive litigation since it can be argued that background checks are subject to the same requirements as any employee selection procedure: record keeping, adverse impact analysis and validation (Connerly et al., 2001). Given that employers conduct criminal background checks for a variety of reasons creating disparities in the labor market for ex-offenders, it is necessary to discuss what limitations are placed on employers that attempt to balance the rights of ex-offenders seeking employment. This paper will now draw attention to the Fair Credit Reporting Act (FCRA), the federal law that protects consumer rights with regard to information that is released for background checks, followed by an analysis of the Equal Employment Opportunity Commission (EEOC) regulations, and the different state laws that are relevant to employers' access to and use of arrest and conviction information for the purposes of conducting background checks.

Although federal law does not specifically address the use of arrest and conviction information, it defines what is considered to be public information and, therefore, accessible for background checks (Martucci & Coverdale, 2004). In 1970 Congress passed the FCRA to protect individuals from the misuse of information on their credit report. Although the stated focus of the FCRA relates primarily to an individual's ability to obtain loans and credit, the scope of

the FCRA, like many federal statutes, has proven to be substantially larger than was first apparent. For employers, the key language is contained in the FCRA's definition of "consumer report," which is defined as any report containing information regarding a person's "credit, character, reputation, personal characteristics, or mode of living" (15 U.S.C. §1681a(d)). Martucci and Coverdale imply that this definition clearly includes an employer's pre-employment criminal background check. The FCRA recognizes that employers have job-related reasons for gathering data such as criminal records, but also acknowledges countervailing concerns for employee privacy and for the potential misuse of personal information and created amendments to the FCRA to impose certain limitations on an employer's access to and use of consumer information (15 U.S.C. §1681b, 1681e).

The amendment necessitates that before an employer may request a consumer report for employment purposes, it must now obtain written authorization from the current or prospective employee. Also, the employer must provide the current or prospective employee with a clear, conspicuous written disclosure that such a report may be obtained for employer purposes. The disclosure and consent may be in the same document, but that document must be separated from any other consent forms or employment application signed by current or prospective employee.

Before taking any adverse employment action, including the decision not to hire a prospective employee -- that is based in whole or in part on information contained in a consumer report-- an employer must provide the current or prospective employee with a copy of the report and a written description of the actual or prospective employee's rights under the FCRA (Howie & Shaper, 2002). This report is design to allow a potential employee the right to contest any erroneous information on their credit report. If after a short period of time, the employer receives no contestation of the report and then proceeds to take an adverse action, the employer must make available to the prospective employee the name, address, and telephone

number of the consumer reporting agency that provided the report, and a notice of the individual's right to dispute the accuracy of the report and obtain a copy of the report (Howie & Shaper 2002). This new amendment has the potential to create a huge load of paper work for employers as well as wasted time thus making employers think twice about how they proceed when investigating a potential employees' background.

In addition to the safeguards offered by the FCRA, the EOCC broadcasted parameters to prevent the subjective use of background information in the workplace. According to the EOCC Guide to Pre-Employment Inquires, Fair Employment Practices Manual, in 1981, the EOCC issued guidance on pre-employment inquiries that included advice on the use of arrest and conviction records. The agency takes the position that because "members of some minority groups are arrested substantially more often than whites in proportion to their numbers in the population, making personnel decisions on the basis of arrest records involving no subsequent convictions has a disproportionate effect on the employment opportunities of members of these groups (EOCC Guide to Pre-Employment Inquires, Fair Employment Practices Manual 1981). Howie and Shapero (2002) asserts that a blanket rejection of applicants on the basis of prior arrests could qualify as disparate impact discrimination under Title VII of the Civil Rights Act of 1964, and is unwise. The EOCC's manual acknowledges that the use of a prior conviction to bar an applicant from employment may not be illegal, but recommends that employers give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job. The EOCC states that criminal convictions should be cause for adverse hiring decisions only if their number, nature and recentness would cause the applicant to be unsuitable for the position.

States also place restrictions on employers' access to criminal records. These limitations can fall into one or more categories depending on the state. The most common restriction prohibits employers from making any inquiries regarding any arrest of the prospective employee

where that arrest did not lead to a criminal conviction (Howie & Shapero, 2002). The California provision states that "no employer...shall ask an applicant for employment to disclose through any written form or verbally, information concerning an arrest or detention that did not result in conviction...nor shall any employer seek from any source whatsoever...any record of arrest or detention that did not result in conviction" (Cal. Labor Code §432.7(a)). Certain state laws also limit an employer's ability to ask questions about the existence of certain types of convictions or regarding convictions that occurred some number of years before the query. Washington permits employers to obtain information about the criminal convictions of an employee or perspective employee only if that person, "in the course of employment, may have access to information affecting national security, trade secrets, confidential or proprietary business information, money, or items of value" (Wash. Rev. Code §43.43.815(1)). Other states prohibit inquiries regarding convictions more than ten years old, and most states prohibit employers from asking about convictions that have been sealed or expunged by the state. Another limitation is the manner in which criminal background information is obtained. For example, in Kansas, it is unlawful for any employer or prospective employer "to require a person to inspect or challenge any criminal history record information relating to that person for the purpose of obtaining a copy of the person's record in order to qualify for employment (Kan. Crim. Proc. Code §22-4710(a)).

### **HOW VALID ARE CRIMINAL RECORD CHECKS?**

Although there are restrictions that limit employers ability to rely on criminal record checks in the selection of ex-offenders, there are existing loopholes that they can rely on to get around the previously stated obstacles. Thus, an employer can rely on and in most cases do the criminal history of a potential employee in regards to employment decisions and get away with it. Opponents of this standpoint argue that relying on criminal record checks to predict

future behavior is not valid. Arguments have been made that criminal databases are inconsistent due to erroneous and incomplete information. More argue that the rise of identity theft cases reduces the reliability of criminal record checks and that the FCRA restrictions are not restrictive enough.

Although the FCRA establishes national standards employers must follow in screening applicants while providing potential employees certain legal protections, compliance, however, is only triggered when the employer seeks a report from an outside consumer reporting agency (CRA), such as a credit bureau, a background screening company, or an organization that gathers and resells public information. There are two major loopholes that exist in the law. First, background checks done on an in-house basis are exempt from the FCRA's various notice and consent provisions...only CRA conducted checks trigger the federal requirement. Second, employers subject to the rule can avoid compliance with the notice provisions simply by creating an alternative rationale for rejecting the applicant. Simply put, the employer can tell an applicant that he or she was rejected for a reason other than a problem found in the background check. In both of these situations, the applicant would not have the ability to obtain a copy of the background check to find out what negative information it contained.

It is generally accepted that fingerprint-based searches are the most accurate, however, currently there are a number of legal, efficiency, financial, and public acceptance barriers that prevent most businesses from using fingerprint-based searches for their due-diligence and investigative purposes (Hollaran et al., 2002). Employers conducting criminal record checks are reduced to using name-based searches, which have considerable limitations. Name-based searches are limited by currency lag, inaccurate personal identifying information, insufficient personal identifying information, and gaps in database coverage.

First, criminal history databases are periodically updated by jurisdictions at intervals that range from semi-monthly to annually, thus,

there will always be some lag in currency of any secondary public or private database and the jurisdiction's master criminal history records (Hollaran et al., 2002). Second, the offender may have been using a different name or provided false or misleading information when he or she entered the CJS, or the offender's information may not have been correctly entered in the jurisdiction's criminal history database (Hollaran et al., 2002). Third, in some cases sufficient personal identifying information is not present in the offender's record in the database to ensure that a record returned from a name-only search applies to the consumer being reported on (Hollaran et al., 2002). Lastly, statewide criminal history databases are not available from states for about one quarter of the US population. In many of the other states, statewide database of criminal court records are not available, limiting the availability of information about misdemeanor convictions and arrests that did not result in a conviction (Hollaran et al., 2002).

A shocking example of a databases providing erroneous and incomplete information is a study conducted by Craig N. Winston, an assistant professor of criminal justice at Sonoma State University. The National Association of Professional Background Screeners (NAPBS) commissioned the study to determine the accuracy and completeness of the FBI criminal search database. The study found that the FBI data lacks proper identifiers to credibly link a criminal hit with the subject of the investigation (Linderman 2005). The study revealed a large number of missed records and false positives generated. For example, when analyzing a sampling of 93,274 background checks in the state of Florida, Winston's search revealed that the database missed 11.7 percent of the criminal records it should have identified (Linderman 2005). Even worse, of the more than 10,000 criminal records found, 5.5 percent of them were falsely attributed to those who were not convicted of a crime.

The last issue that attacks the credibility of using criminal record checks for employment selection is the recent concern of identity theft that leads to criminal identity theft. Based on

credit bureau statistics and surveys, there are currently 7 to 10 million victims per year of identity theft. This paper focuses on criminal identity theft, which takes place when the imposter commits a crime using the identity of someone else and gives that person a criminal record. Unlike identity theft, the victim does not find out about the criminal history until that person either applies for a job or is stopped for a traffic violation. Also, unlike identity theft, criminal identity theft is almost impossible to remove from one's record and have traumatic affects.

For example, NBC's Date Line conducted an interview with Scott Lewis who applied for a job as a medical products salesman. He was promised the job contingent upon the completion of a background check. After hearing nothing from the employer, Lewis called the HR department and was warned that law enforcement would be contacted if he ever tried to call the company again. After similar experiences with other employers, Lewis hired a private investigator to review the situation. The investigation disclosed that Lewis's Social Security number showed a criminal record featuring several felony convictions, including murder. The confusion occurred because a police officer keying in arrest data about a different man mistakenly enter Lewis's number. Although this is only one extreme case, there is potential for the exclusion of many candidates who are right for the job but is turned away because of invalid information.

## **POLICY**

This paper argues that policy was the catalyst that put the Criminal Justice System in the predicament that it is in today. The unintentional affects of the "war on drugs" and "three strikes and you're out" policy have caused a cyclic affect for public safety with respects to the ex-offender towards the community. The ex-offender is released from prison back into the same community with little hopes of finding a decent job. The ex-offender reverts back to criminal activity, which in turn, affects the community in a negative way. Employers contribute to this cycle by relying on criminal records to determine the selectability of

a potential employee. Often refusing to even consider the possibility of hiring an ex-offender, they send the ex-offender back into the community without employment. It is argued by this paper that more needs to be done to reduce recidivism, which would increase public safety, by creating job opportunities for the record number of people leaving prison. New policy should be considered that targets the employment screening process, targets the barriers that ex-offenders face, and target more complete criminal records and privacy rights.

## **Justification for Change**

The extraordinary degree of criminal records checks elates the possibility of inaccuracies and exploitation of the employment screening process thus requiring more privacy and employee protections. In 2002, the FBI performed more fingerprint-based checks for civil purposes than for criminal investigations (Wall Street Journal 2005). In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 9 million in 2004 (Wall Street Journal 2005). In addition, criminal background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996) (Press Release 2004). These screening practices affects approximately one in five adults in the U.S. who have a criminal record according to the BJS. The EEOC also concluded that excessive reliance on criminal records can also produce adverse employment decisions that have a discriminatory impact on African Americans and Latinos who are more likely to have had contact with the CJS (EEOC Guidance 1990). Criminal record checks also places a hardship on those individuals who have never committed a crime but has been the victim of identity theft, which triggers false positives on name-based criminal record checks.

## **Recommendations for Policy Change- Attacking Barriers**

Federal laws require FBI criminal background checks covering millions of workers employed in the public as well as the private

sectors. These laws also prohibit people with certain criminal records from being employed in an assortment of occupations and industries. Maurice Emsellem, Policy Director for the National Employment Law Project, stated in his comments to the U.S. Attorney General that these federal and state laws are developed by diverse legislative committees and government agencies without the benefit of any uniform federal standards or guidelines. He stated that policies prohibiting employment based on a criminal record tend to evolve piecemeal without federal benchmarks to evaluate the comparative risks and benefits of subsection new categories or workers to background checks. In addition, Emsellem states that there are often no specific safeguards that, for example, take into account the relevancy of disqualifying offenses and protections for current workers who may have an isolated record but a history of loyal service to their employer. Given the huge number of criminal record checks that are being conducted, there is a need for standardization to control the expansion of criminal background checks. These standards need to take into account their impact on employment opportunities for current workers who may have a criminal record, potential employees, and people of color. Agreeing with Emsellem, the standard should “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.” The first recommendation proposed by this paper is to establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights. (Emsellem 2005).

An additional disturbing facet of employment screening laws is the nonexistence of realistic restrictions on the period of the offenses that bar a potential employee from employment. The goal of rehabilitation through work significantly destabilizes the public safety when time limits are not imposed on disqualifying offenses. Given that most offenders stop offending when they become

older and stay clear of criminal activity, lifetime disqualifications become invalid. In *Earl Nixon v. The Commonwealth of Pennsylvania*, the court determined through expert testimony that the greater number of years have passed since criminal activity, the lower the likelihood of subsequent activity. In this case, the Pennsylvania Supreme Court invalidated a state law imposing lifetime disqualifications on nursing home workers. The 2004 law regulating private security officers is an example where federal policy failed to impose reasonable age limits on criminal history information (Emsellem 2005). According to National Employment Law Project’s analysis, 24 states preclude anyone with a felony from being employed as a private security guard no matter the age of the disqualifying offense. This paper recommends that disqualifying offenses should have a time limit of 7 years from release or parole and lifetime disqualification should be eliminated except in special circumstances such as child molestation.

For those individuals who do have disqualifying offenses, there is a need for a system to be put in place that would give them an opportunity to prove their worthiness. Ex-offenders need an avenue for voice. They should be afforded the opportunity to make a case for their rehabilitation and that they do not pose a further threat to society. This is especially true for those individuals who were convicted of isolated disqualifying crimes that have stayed clear of the criminal justice system for an extended period of time. Also, this would apply to those individual who had drug related crimes and have successfully completed alcohol or drug abuse programs. Waiver protections already exist in several state employment and licensing laws providing an opportunity for individuals to challenge a disqualifying offense; for example, in California, most “community care” programs serving seniors, adults and children are subject to a criminal background check that identifies all misdemeanor and felony offenses. Individual “exemptions” are granted by Community Care Licensing Divisions taking into account non-violent offenses, the age of the crime and other mitigating factors (Emsellem

2005). A good paradigm to follow would be the maritime security law, which established a waiver standard for port workers being screened as a terrorism security risk. This paper recommends that a waiver process be established to give ex-offenders a voice to prove that they are no longer a threat to public safety.

According to the BJS, three out of four individuals leaving prison committed non-violent offenses. The majority of those crimes are property and drug offenses of which most are drug possession. Of the non-violent offenders being released from prison 48% are African-American and 25% are of Hispanic origin (Bureau of Justice 2004). As a recent state study found, "Among those arrested on drug charges, African-Americans are five times more likely to be sentenced to prison terms of a year or more than Whites arrested on drug charges (Eichler 2005). From the aforementioned stats, it is crucial that a close look be conducted regarding disqualifying drug offenses. In certain situations, such as industries where the ex-offender would be exposed to controlled substances, time-limited drug offenses are appropriate. However, other industries, such as transportation and security related jobs, the disqualification should be aligned with the job sought. Also, in light of the stats just mentioned, blanket felony disqualifications should be examined to prevent an individual who has a felony on his or her record of a non-violent offense from being penalized for all jobs sought. For example, the new federal law regulating private security guards authorizes the states to provide employers with the entire felony record generated by the FBI, which will inevitably produce adverse employment decisions based on crimes like welfare fraud, marijuana possession, and other lesser felonies (Emsellem 2005). This paper recommends that drug disqualifying offenses and blanket felony offenses should directly relate to the tasks of the employment.

### **Recommendations for Policy Change- Complete Records**

As stated earlier, the increase dependence on the FBI's national system for employment and licensing functions creates a serious problem for

ex-offenders seeking employment. The main issue with their system is that the FBI system is dependent on the considerable limits of state records. For example, in more than half of the states, 40% of the arrests in the past five years have no final disposition recorded, which means that the FBI's system is similarly incomplete (Bureau of Justice Statistics 2001). Further, the federal records for each state are often more incomplete than the state criminal records database due to the inability of the FBI to access all available state records and the delays inherent in reporting dropped charges and other dispositions to the FBI (Emsellem 2005). This paper argues that there is a need for stronger standards to be put in place to protect individuals from incomplete criminal records especially those involving arrest without a disposition. These are challenging because the individual accused has the burden of negotiating with the courts to get the records corrected. This includes both dismissals as well as acquittals. For those individuals with the resources and abilities to do so, it can often take more than a year to collect the information necessary to document that a charge was dismissed or resulted in acquittal (Emsellem 2005). It is the recommendation of this paper that arrests that did not result in conviction should not be allowed to be viewed by employers who are seeking information on an applicant and should be immediately expunged. Also, it is recommended that before an adverse employment decision is made based on an incomplete record the individual is allowed time to correct the misinformation.

The last recommendation proposed concerns the amount of access that private organizations have to federal criminal record information. Private employers should not be authorized to request FBI criminal history information, and their role should be limited to receiving the standard results of a fitness determination from the appropriate agency that reviews the FBI criminal records. Expanding the authority of private employers ability to request and review FBI criminal records would create significant potential for error and abuse by employers.

The following are more broad policy changes that this paper would recommend to

make the transition from prison to employment more effective. First, make it easier for employers to hire ex-offenders while they are still incarcerated. One study conducted by Saylor and Gaes 1996 indicated that work experience while in prison seems to reduce recidivism after release. Also, there is a need for the greater funding for the efforts of public and private agencies to link ex-offenders with the labor market, and especially for transitional employment for those who cannot find work on their own upon release. There is also a need for expanding funding for bonding programs to insure employers against the costs and legal liabilities that they might incur. The idea is to make the ex-offender labor as attractive as possible.

### CHANGING BEHAVIOR

The goal of the policy recommended changes suggested is to get more ex-offenders employed, reduce recidivism, and protect the public. This paper argues that by implementing these recommendations the outcome would be a change in behavior for the ex-offender and to a certain degree the employer as well. The best model to use to realize this change in behavior would be the Transtheoretical Model of Behavior Change by Dr. James Prochaska. Because the ex-offenders path from incarceration to employment can be seen as one of phases, it lines up quite well with the Transtheoretical Model, which recognizes that behavior change unfolds through a series of stages. The ex-offenders need for behavioral change would start with the recognition for a need to change, contemplating the change, making the change, and then sustaining the new behavior. Further aligning the model to this paper's policy recommendations is the fact that the Transtheoretical Model of Change emphasizes time as an important issue within the process of change. It is well established that ex-offenders have had lots of time to contemplate making a change.

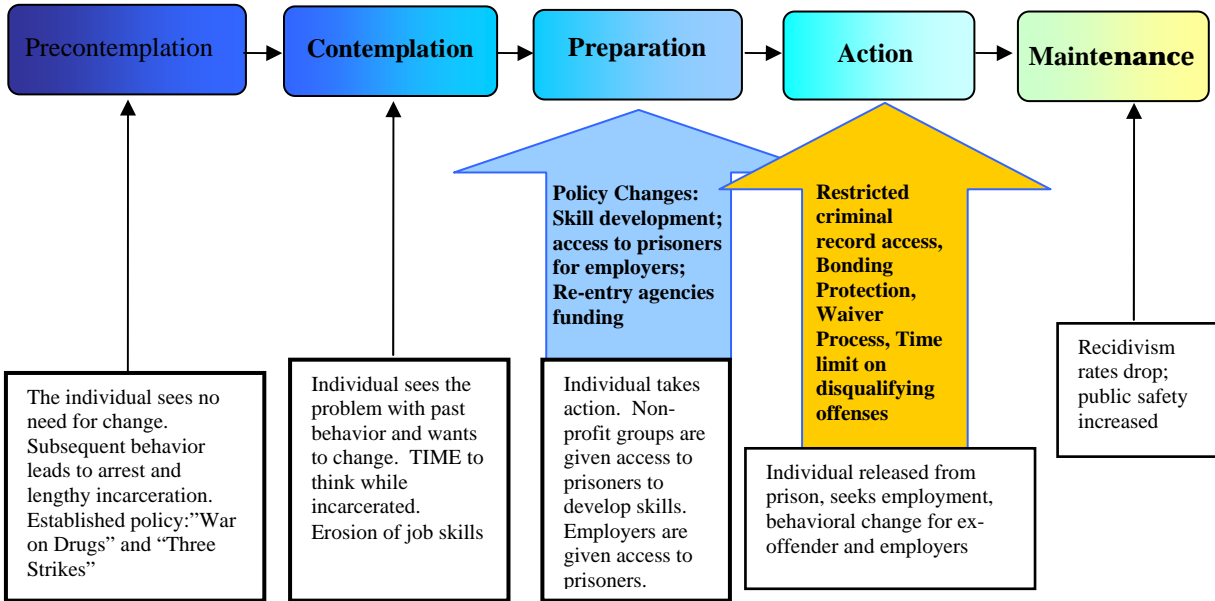
Presented are the five stages of this model along with an illustration of how the ex-offenders change would be realized through policy changes (Scholl, 2002):

- Pre-contemplation: This is the stage in which people are not intending to take action in the foreseeable future. People may be in this stage because they are uninformed or under-informed about the consequences of their behavior. For the ex-offender, this is the behavior that results in arrest or conviction.
- Contemplation is the stage in which people are intending to change in the next six months. They are more aware of the pros of changing but are also acutely aware of the cons. This balance between the costs and benefits of changing can produce profound ambivalence that can keep people stuck in this stage for long periods of time. We often characterize this phenomenon as chronic contemplation or behavioral procrastination. The ex-offender is incarcerated at this stage.
- Preparation is the stage in which people are intending to take action in the immediate future. They have typically taken some significant action in the past year. These individuals have a plan of action, such as joining a health education class, consulting a counselor, talking to their physician, buying a self-help book or relying on a self-change approach. For the ex-offender, the preparation comes from organizations that work within the prison system to help rehabilitate individuals. Also, building job skills would fall under this action.
- Action is the stage in which people have made specific overt modifications in their life-styles. The ex-offender is paroled, attempting to re-assert themselves back into the community by obtaining a job from the skills learned in the preparation stage. The employer connection is established in this stage. The behavioral change for the employer comes from policy changes in access to records or the reception of bond protection from the government.

- Maintenance is the stage in which people are working to prevent relapse but they do not apply change processes as frequently as do people in action. They are less tempted to relapse and

increasingly more confident that they can continue their change. The ex-offender becomes a productive member of society.

**Figure 5**  
The Transtheoretical Model of Change/Policy Recommendations

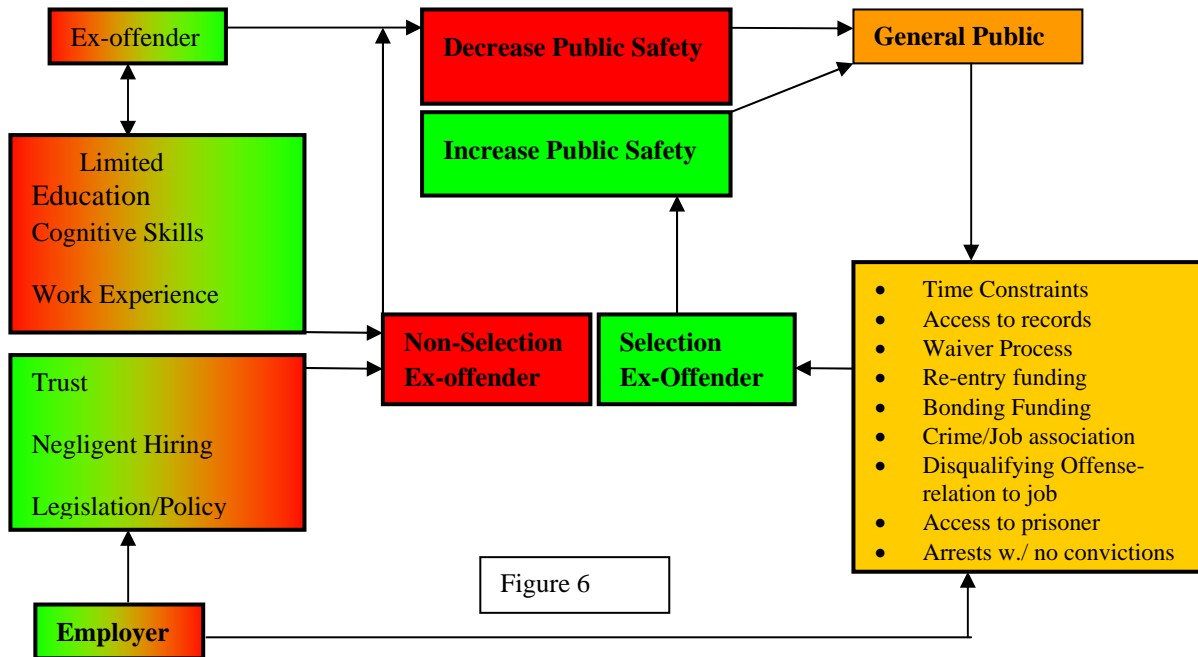


### CONCLUSION

The ex-offender is undoubtedly faced with a difficult road ahead. The rules and norms of our society dictate that if an individual breaks the law, he or she is punished accordingly. If that punishment entails incarceration, after the debt has been repaid to society then that individual is entitled to a second chance. As straight-laced as this sound, it is simply not the truth as this paper has shown. The stigmatizing effect of incarceration along with the ex-offenders own dispositional barriers severely restricts their access to successful employment. This leaves the individuals with few choices.

This paper is not arguing that an individual should not be punished for his or her crime; however, after that time of incarceration has been served, a real second chance should be afforded. How else will the offender stop offending? This paper does suggest that it was

knee jerk legislative policy that has gotten the CJS and the general public in the mess that it is in today and it will take policy changes to get us out. It is realized that those people who are making policy decisions are far removed from the influence of the CJS or the communities that are affected the most by ex-offenders returning to a community with no jobs. But it has to be realized by those individuals in Congress that a man without income or means to support his family becomes desperate and desperate people do desperate things. The policy recommendations that were suggested by this paper were made with the overall goal of reducing recidivism which would make the public safer through a change in policy as illustrated in figure 6 below. Policy changes would reduce the barriers on both the demand and supply side of the labor market increasing the job opportunities for the ex-offender. Given the research presented, ex-offenders would stop offending, resulting in increased public safety.



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