

EMPLOYING EX-OFFENDERS:  
SHIFTING THE EVALUATION OF WORKPLACE RISKS  
AND OPPORTUNITIES FROM EMPLOYERS TO CORRECTIONS

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*Employers would just as soon not hire ex-offenders. They see the potential for workplace violence or theft, negligent hiring liability, and public relations nightmares. Because current law places the burden on employers to evaluate the risk that a particular ex-offender poses on the job, but gives them few tools with which to make that evaluation, employers would rather err on the side of caution and turn ex-offenders away.*

*This Comment shows that the current system of employer evaluations is based on exaggerated fears and leads to ex-offender unemployment, which is likely to make our communities less safe, rather than more. However, though tort reform and workplace antidiscrimination statutes are part of this Comment's proposal, the solution to this problem cannot be found in the employment context alone. Instead, making ex-offender employment safe and rehabilitative will require cooperation between employers and corrections departments.*

*Corrections departments currently evaluate ex-offender risk for communities and have access to information far superior to that provided to employers in background checks. Thus, as this Comment argues, employers should be encouraged to rely on assessments by corrections officers of any workplace risk an ex-offender applicant might pose. While this will be a positive step, this Comment goes further to suggest that corrections departments should have an even larger role to play in ex-offender employment: one based less on the sort of fear, discrimination, and avoidance of liability that drives our current system of risk evaluation by employers, and more on a commitment to reentry success through accurate information and community partnerships.*

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## INTRODUCTION

Roscoe Heaton is the type of guy who should be going places.<sup>1</sup> He put himself through Emory University and earned a bachelor's degree in political science. Yet, in February 2005, he stood at a freeway exit, begging for money and making dinner out of sugar packets. Fourteen years earlier, before college, Roscoe served time for aggravated assault. He has been turned away from job after job ever since.<sup>2</sup>

James Carter had been working for three weeks, doing landscaping jobs.<sup>3</sup> For good performance, he was moved inside to do townhouse maintenance.

1. See Christine Van Dusen, *Ex-Con. Emory Grad. Would You Hire Him?*, ATLANTA J.-CONST., Nov. 27, 2005, at A1.

2. *Id.* Roscoe was able to get one job after his release: work-study while he was at Emory with a temp agency that did not check criminal history. Other employers either refused outright to hire felons or rescinded their offers after performing conviction checks. Since the newspaper article in 2005, Roscoe pleaded his case in a letter sent to hundreds of business and community organizations, and was finally able to get a position in a cabinet shop through a Christian business leaders fellowship (though he still makes less money there than do workers without high school diplomas). *Id.*

3. See *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980).

One day in April 1978, James entered one of those townhouses with his passkey, forced the woman who lived there to the floor, and assaulted her. This was James's first job postrelease. Seven years earlier, he had been convicted of assault to commit murder, spending some time in a psychiatric hospital.

The stories of Roscoe and James exemplify the extremes of the prisoner reentry debate, which pits the rehabilitation of ex-offenders against fears of recidivism and threats to public safety. Between these two options, the preferred employee may seem clear. However, if you were an employer, you might only know that Roscoe has a prior violent conviction and spotty work references. You might know that James has a prior violent conviction, but that he appears to be doing well on another job. Which of them, then, would you hire? Our current system forces employers to make these decisions regarding all ex-offenders, even those under corrections supervision, with tort liability and public safety at stake if they choose the wrong applicant.

In assessing the wisdom behind the current system, Part I of this Comment examines prisoner reentry. The majority of prisoners released every year go into community supervision, through which corrections officers evaluate their recidivism risks and monitor their postrelease employment. Society has an interest in seeing that ex-offenders are able to reenter society, and employment is often the first step.

However, perceptions of an increase in workplace violence have made employers cautious.<sup>4</sup> Even though nearly all workplace violence is minor—resulting in few, if any, injuries<sup>5</sup>—employers still fear the exceptional case. Employers also fear that they are vulnerable to liability if they hire or retain dangerous employees under theories of negligent hiring,<sup>6</sup> negligent retention,<sup>7</sup> and respondeat superior.<sup>8</sup> This fear leads many to

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4. Articles in management and human resource reviews suggest to employers that workplace violence has been increasing. See, e.g., Daniel Weisberg, *Preparing for the Unthinkable*, MGMT. REV., Mar. 1994, at 58, 58. However, violent crime in the workplace has actually been decreasing over the past decade. See DETIS T. DUHART, BUREAU OF JUSTICE STATISTICS, VIOLENCE IN THE WORKPLACE, 1993–99, at 1 (2001), <http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf> (showing a decline of 44 percent between 1993 and 1999).

5. See *infra* notes 74–75 and accompanying text.

6. An employer is subject to liability for harm resulting from his negligence in employing improper persons for work involving risk of harm to others. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

7. Negligent retention occurs when an employer knew or should have known of problems indicating an employee's unfitness for a job and fails to take further action. See, e.g., *Garcia v. Duffy*, 492 So. 2d 435, 438–39 (Fla. Dist. Ct. App. 1986).

8. Employers may be liable for the actions of an employee when the employee was acting within the scope of his employment and his actions would give rise to a cause of action against the employee himself. See, e.g., CAL. GOV'T CODE § 815.2 (West 1995).

investigate applicants for any history of violence,<sup>9</sup> and to look in particular for past criminal convictions. Part II explores the way employers are forced to decide on their own which ex-offenders are safe to hire for which jobs. Such determinations are required by negligent hiring law, Title VII,<sup>10</sup> and some state antidiscrimination statutes, all of which generally ask that the employer evaluate the prior offense in relation to the job sought (the “job relatedness” of the crime).

Yet, employers’ evaluations may not provide the best way to assess risk, as seen in Part III. Thorough inquiries are time consuming and depend on extensive, reliable information; more general evaluations risk painting offenders with a broad brush that may leave many unemployed. Courts have offered little guidance as to what level of investigation is necessary.<sup>11</sup> Therefore, employers are more likely to err on the side of caution and not hire ex-offenders. Because unemployment is a key factor in recidivism,<sup>12</sup> by failing to hire ex-offenders, employers may be fueling the very statistics on which they rely when making their hiring decisions.

Using multifactor tests, some commentators have attempted to clarify for employers how job relatedness should be determined.<sup>13</sup> Yet, the more extensive the evaluation of job relatedness becomes, the more likely it is to depend on information to which employers have no reliable access. Realizing this, other commentators have suggested alternatives to employer evaluations.<sup>14</sup> However, their alternatives are always couched as exceptions to the general rule under which employers evaluate risk and require creating entirely new systems to evaluate risk in certain special cases. None of

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9. Stephen J. Beaver, *Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 103 (1997). A survey of scholarship directed at employers reveals that fears of liability are motivating background checks. See, e.g., DONALD H. WEISS, FAIR, SQUARE & LEGAL 91 (2004) (listing a request for conviction information as the first step “to protect yourself from the possibility of hiring someone who might get you into serious trouble”); Mary L. Connerley et al., *Criminal Background Checks for Prospective and Current Employees: Current Practice Among Municipal Agencies*, 30 PUB. PERSONNEL MGMT. 173, 173 (2001) (“Organizations that fail to recognize the risk of hiring into certain positions an individual who has a previous history of violent or inappropriate behavior, and to reduce that risk by checking the individual’s background, could find themselves liable for the actions of that individual.”).

It is worth noting, however, that courts have consistently held that there is generally no duty to inquire into an applicant’s criminal background at the time of hiring. See *Evans v. Morsell*, 395 A.2d 480, 484 (Md. 1978); see also *infra* notes 107–114 and accompanying text.

10. 42 U.S.C. §§ 2000e–2000e-17 (2000).

11. Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 360 (1996); see also discussion *infra* Part II.A.

12. See discussion *infra* Part I.B.

13. See discussion *infra* Part II.D.

14. See discussion *infra* Part III.C.

these commentators has taken into account that supervision and risk assessment already exist for the vast majority of those released from prison.

This Comment argues that forcing employers to evaluate ex-offenders already under corrections supervision is redundant, confusing for employers, unfair to ex-offenders, and ill-suited to address potential workplace violence. To remedy these problems, Part IV proposes limiting employers' liability when they hire supervised ex-offenders. In order to prevent continued discrimination against ex-offenders, states should also enact legislation that would prevent employers from discriminating against supervised ex-offenders except in certain exceptional circumstances. For ex-offenders not under supervision (either because their supervision has ended or because they were released without supervision), the current system, in which employers evaluate risk, should be kept in place because no better one exists to shoulder the burden.

This Comment's proposal shifts responsibility to corrections departments to evaluate conviction records and notify employers of any risks. Though the shift in responsibility is new, corrections departments already evaluate recidivism risks and monitor ex-offender employment. This proposal will likely require them to expand and tailor their supervision to assume a greater advisory role with employers. But, beyond additional supervision, it ideally will also spur a simultaneous expansion of offender job training programs and partnerships with businesses, which are crucial to successful reentry.

These changes should contribute to hiring decisions that more accurately reflect the risks posed by an ex-offender applicant. Because probation and parole officers have superior information about and access to ex-offenders, they can assess any danger posed and notify employers. This, especially when combined with existing incentives to hire ex-offenders,<sup>15</sup> will ease employers' fears about hiring supervised ex-offenders while permitting them to maintain their current cautious position regarding unsupervised ex-offenders. Curbing employer liability and providing employers with a clearer sense of their obligations may also cause them to hire more ex-offenders because employers will have less incentive to err on the side of caution. This, in turn, may lead to less recidivism.

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15. For example, the federal bonding system protects employers against theft of up to \$25,000. National H.I.R.E. Network, Federal Bonding Program, [http://hirenetwork.org/fed\\_bonding.html](http://hirenetwork.org/fed_bonding.html) (last visited Nov. 8, 2007); see *infra* note 62 and accompanying text. Employers who hire ex-offenders may also be eligible for tax breaks. See Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Reentry?* 7 (Urban Inst., Working Paper, 2002), available at [http://www.urban.org/UploadedPDF/410803\\_PositiveRole.pdf](http://www.urban.org/UploadedPDF/410803_PositiveRole.pdf); *infra* note 63 and accompanying text.

Undoubtedly, this proposal will face skepticism from those who pose horrific scenarios of child molesters employed as daycare workers, or career criminals working as police officers. However, many such situations are already prevented by licensing regulations promulgated by state legislatures. This proposal does not lessen these restrictions. Instead, this Comment addresses the more common case, in which the relationship between the past crime and the current job is harder to evaluate. In doing so, this Comment attempts to be sensitive to the needs of victims and to concerns about public safety by keeping intact the current system of liability in circumstances in which the threat seems clearest or employers hire unsupervised ex-offenders.

The current system creates exaggerated fears of ex-offender risk in ill-informed employers wary of liability. These fears can become a self-fulfilling prophecy, leaving ex-offenders like Roscoe Heaton out of work, one step from the desperation that feeds crime. The proposal in this Comment encourages policymakers to emphasize the role of corrections departments in prisoner reentry, which will ideally involve expanding reentry services and recidivism evaluations to provide the public not only with safer workplaces, but also with safer communities. Recognizing that corrections departments are better equipped to gauge the risks posed by those they supervise should help keep the James Carters out of our homes, while giving the Roscoe Heaton a second chance.

## I. THE PRISONER REENTRY DEBATE

### A. Prisoner Release and Corrections Supervision

Thirteen million Americans have been convicted of a felony,<sup>16</sup> and one out of every fifteen Americans will serve time during their lives.<sup>17</sup> The majority, of course, must reenter society after serving that time. In 2002, nearly 650,000 people were released from U.S. prisons,<sup>18</sup> mostly into state community supervision.<sup>19</sup> In 2005, over 4.1 million people were on

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16. JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 83 (2005) (citing Christopher Uggen et al., *Crime, Class and Reintegration: The Scope of Social Distribution of America's Criminal Class* (paper presented at the annual meeting of the American Society of Criminology, Nov. 18, 2000)).

17. BUREAU OF JUSTICE STATISTICS, *CRIMINAL OFFENDERS STATISTICS*, <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Nov. 8, 2007).

18. Office of Justice Programs (Reentry), <http://www.reentry.gov> (last visited Feb. 23, 2007).

19. See LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, *PROBATION AND PAROLE IN THE UNITED STATES, 2005*, at 8, 11 (2006), <http://www.ojp.usdoj.gov/bjs/pub/ppus05.pdf> (noting that in 2004, only 19 percent of inmates were released from state prison because their sentences had expired, whereas 61 percent were released to parole, 10 percent to probation, and 6 percent to other conditional release). The use of state numbers here

probation and nearly 785,000 were on parole.<sup>20</sup> The vast majority of these ex-offenders were under active supervision and were required to report regularly to their supervisors.<sup>21</sup>

Probation and parole officers provide some counseling and assistance with community resources, while simultaneously monitoring for risk. They enforce the conditions of supervision imposed on ex-offenders at release, which often include regular reporting, travel restrictions, submission to random searches, and seeking and maintaining employment.<sup>22</sup> Federal probation and parole officers also have a duty to “make sure that the jobs [persons under supervision] take do not present temptation or opportunity to commit crime and thus pose a threat to other people or the community.”<sup>23</sup> In doing so, the officers “verify the job-seeking efforts of these persons” and “keep[] in touch with their employers.”<sup>24</sup> While this duty is not explicitly outlined at the state level, it may be included implicitly in probation and parole officer job descriptions.<sup>25</sup>

In addition, corrections departments have developed risk assessment instruments designed to make “more rational and accurate”

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provides a more representative picture than federal numbers, because federal probation only represents 0.7 percent of the total probation population, *id.* at 4, and federal parole only represents 11.6 percent of the total parole population, *id.* at 7. Additionally, 77 percent of offenders (state and federal) are sentenced directly to probation. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1998 tbl.3.1, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9803.pdf> (last visited Nov. 9, 2007).

20. GLAZE & BONCZAR, *supra* note 19, at 1.

21. *Id.* at 6, 9 (70 percent of probationers and 83 percent of parolees).

22. JOAN PETERSILIA, *WHEN PRISONERS COME HOME* 82 (2003).

23. U.S. Courts, Employment for Persons Under Supervision, <http://www.uscourts.gov/fedprob/supervise/employment.html> (last visited Nov. 8, 2007).

24. *Id.*

25. See, e.g., Virginia Probation and Parole Services, <http://www.dhrm.state.va.us/compensation/careergroups/pubsafe/ProbationParoleSvcs69090.htm> (last visited Nov. 8, 2007) (describing probation officers' duties as including “[f]requent and sensitive external community contact to manage offenders”); State of Oregon, Department of Administration Services, Adult Parole and Probation Officer, <http://egov.oregon.gov/DAS/HR/Class/ccrt/spec/6787.pdf> (last visited Aug. 6, 2007) (including in the probation and parole officer job duties regular contact with community members in order to give or receive information). Notification is particularly prevalent with sex offenders; however, this is often just general notification of sex-offender status rather than particularized assessments of individual offender risk. See PETER FINN, NAT'L INST. OF JUSTICE, *SEX OFFENDER COMMUNITY NOTIFICATION 1* (1997), <http://www.ncjrs.gov/pdffiles/162364.pdf> (stating that thirty-two states have notification statutes, some of which “require probation and parole departments . . . to disseminate information about released offenders to the community at large”); see, e.g., Adam Bowles, *Sex Offender Rehabilitation Program Makes Sure Victims Are Heard*, AM. NEWS SERV., Aug. 24, 2000, available at <http://www.berkshirepublishing.com/ans/HTMLView.asp?parItem=S031000604A> (noting that in Connecticut, probation officers have discretion—though not a duty—to notify employers regarding sex offenders).

recidivism predictions.<sup>26</sup> Studies indicate that “criminogenic need, criminal history/history of anti-social behavior, social achievement, age/gender/race, and family factors” are all strong predictors of recidivism.<sup>27</sup> The U.S. Parole Commission’s salient factor score, which was developed over twenty years ago and which serves as the basis for many corrections assessments, looks to the number of prior convictions, prior commitments of more than thirty days, age at offense, any recent three-year incarceration-free period, any escape violations, heroin dependence, and the current age of the offender.<sup>28</sup> These factors have been found to be a fairly reliable means of differentiating between high- and low-risk offenders.<sup>29</sup> Newer assessments take into account more dynamic risk indicators like the offender’s employment status, financial situation, substance abuse history, and living situation.<sup>30</sup>

Research indicates that supervision, if done properly, can lead to lower recidivism rates. One prominent study by the RAND Corporation found that “[o]ffenders who had at least two contacts a week with their probation or parole officer and participated in such prosocial activities as education, work, or community service displayed recidivism rates 10 to 20 percent lower than other offenders in the study.”<sup>31</sup> Research also suggests that supervision that is both intensive and treatment oriented produces greater reductions in recidivism than does regular supervision.<sup>32</sup> It should be noted, however, that supervision that is merely intensive without also being treatment oriented may have negative effects, in that minor violations are more likely to be found and acted upon, sending more ex-offenders back to prison.<sup>33</sup> Thus, an approach that couples supervision with other supportive services is necessary for ex-offender success.

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26. PETERSILIA, *supra* note 22, at 71.

27. Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178, 190 (2006) (quoting P. Gendreau et al., *Predicting Adult Offender Recidivism: What Works! 2* (Ministry of the Solicitor General of Canada, Public Works and Government Services, 1996)).

28. PETERSILIA, *supra* note 22, at 71.

29. *Id.*

30. *Id.* at 72.

31. TRAVIS, *supra* note 16, at 109–10. See generally Susan Turner et al., *Evaluating Intensive Supervision Probation/Parole (ISP) for Drug Offenders*, 38 CRIME & DELINQ. 539 (1992). The group under intensive supervision also experienced higher employment rates than did the control group. Turner et al., *supra*, at 546.

32. See M. Douglas Anglin, *The Efficacy of Civil Commitment in Treating Narcotic Addiction*, in COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE (Carl G. Leukefeld & Frank M. Tims, eds., 1988); Paul Gendreau & Bob Ross, *Effective Correctional Treatment: Bibliotherapy for Cynics*, 25 CRIME & DELINQ. 463 (1979).

33. See TRAVIS, *supra* note 16, at 110–11.

As a part of their supervision, officers also keep detailed files on their charges. The Parole Commission, for example, includes information such as conduct records, social background, educational and mental health data, and statements of third parties in supervision files.<sup>34</sup> Not all of this information is available publicly, however.<sup>35</sup> The public portions (those subject to a Freedom of Information Act request) include only the more static pieces of information,<sup>36</sup> not the statements of third parties or evaluations of social factors, for example. Some corrections departments also maintain websites with information on their charges,<sup>37</sup> but these websites lack information about the context of the crime or any rehabilitation efforts.<sup>38</sup> Therefore, potential employers could not simply request an individual's probation or parole file and obtain the same range of information available to corrections officers.

Unfortunately, supervisory departments today are “seriously understaffed.”<sup>39</sup> Parole officers supervise an average of seventy cases—twice the number considered ideal—and probation officers supervise around two hundred.<sup>40</sup> Tight budgets have forced cutbacks in manpower and in services.<sup>41</sup> For example, Kentucky was forced to cut funding for educational programming, Alaska reduced state support for drug and alcohol treatment, and Colorado reduced funding for local community corrections agencies.<sup>42</sup> Additionally, though probation and parole officers historically provided job training and housing assistance, rehabilitation was deemphasized during

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34. U.S. Parole Commission, Freedom of Information Act Reference Guide, <http://www.usdoj.gov/uspc/makfoi.html> (last visited Nov. 8, 2007) (citing 53 Fed. Reg. 7813 (1988)).

35. *Id.*

36. *Id.* (including name, register number, past and current places of incarceration, age, race, offense, date and place of conviction(s), sentence length(s), date(s) of parole hearings, and parole decision(s)).

37. See *infra* note 89. Ohio, for example, provides a photo, name, date of birth, physical description, admission date, institution, current incarceration status, offense information (including county, sentence date, code section violated, degree of felony, and sex and adult or child status of victim), term of sentence, release date, and term of supervision. Ohio Department of Rehabilitation and Corrections, Offender Detail Information, <http://www.drc.state.oh.us/offendersearch> (last visited Sept. 10, 2007).

38. See Ohio Department of Rehabilitation and Corrections, *supra* note 37.

39. ISIAH BROWN, THE CHANGING ROLE OF PROBATION AND PAROLE: A VIEW TO THE FUTURE I, [http://www.fdle.state.fl.us/fcjei/slp\\_papers/brown\\_i.pdf](http://www.fdle.state.fl.us/fcjei/slp_papers/brown_i.pdf) (last visited Nov. 8, 2007) (quoting USA TODAY, Oct. 21, 1991, at 10A).

40. Re-Entry Policy Council, Re-Entry Statistics, [http://www.reentrypolicy.org/reentry/Document\\_Viewer.aspx?DocumentID=903](http://www.reentrypolicy.org/reentry/Document_Viewer.aspx?DocumentID=903) (last visited Nov. 12, 2006).

41. JON WOOL & DON STEMEN, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 2–3 (2004), [http://www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf).

42. *Id.* at 2, 4.

the 1970s in favor of retribution and punishment.<sup>43</sup> As a result, supervision became more surveillance oriented, and conditions of supervision were often strictly enforced, which resulted in a sharp increase in parole revocations for technical violations.<sup>44</sup> Nonetheless, there are some indications that, in the future, states might be willing to look again to community corrections for services and monitoring, even if primarily to take the burden off their overflowing prisons.<sup>45</sup>

Despite the large numbers of ex-offenders under community supervision, nearly 20 percent of those released from prison come out unsupervised.<sup>46</sup> Many of these are the “baddest of the bad actors” who, due to the severity of their crimes or their behavior while incarcerated, were ineligible for early release.<sup>47</sup> These individuals can go from twenty-three-hour solitary confinement to complete freedom in one day.<sup>48</sup> Thus, those who leave prison unsupervised may pose greater threats to the community and have a more difficult time reintegrating than the supervised ex-offenders on which this Comment focuses.

## B. Recidivism and Rehabilitation Through Work

While large numbers of inmates are released from prison every year, a high percentage of them return in a short time. In 1994, the most recent year for which data is available, approximately 67 percent of those released from prison were rearrested for a felony or serious misdemeanor within three years, with over 25 percent sentenced to prison for a new crime.<sup>49</sup> Recidivism rates differ according to the prior crime, with violent offenders returning to prison at lower rates than any other offenders—much lower than those previously convicted of property offenses.<sup>50</sup>

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43. Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839, 842 (1998).

44. See TRAVIS, *supra* note 16, at 49–50; JEREMY TRAVIS & SARAH LAWRENCE, *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 21, 24 (2002), [http://www.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf).

45. See WOOL & STEMEN, *supra* note 41, at 13–14 (describing states that expanded transition programs).

46. See *supra* note 19.

47. PETERSILIA, *supra* note 22, at 6.

48. TRAVIS, *supra* note 16, at 102; see *id.* at 101–02 (discussing inmates released without supervision generally).

49. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 1, 3 (2002) <http://www.ojp.usdoj.gov/bjs/pub/pdf/trpr94.pdf>.

50. *Id.* at 8 (finding that 20.4 percent of violent offenders returned to prison—that rate was 10.8 percent for those previously convicted of homicide—whereas 30.5 percent of property offenders returned).

Increasing rehabilitation efforts may help turn around these discouraging numbers. Throughout history, rehabilitation has often been linked to work, whether in chain gangs, prison industries, or postrelease programs.<sup>51</sup> From a psychological standpoint, work brings a sense of fulfillment, achievement, and belonging. From a practical standpoint, work brings wages to support one's self (or family), which creates less temptation to seek out illegal means of earning money. Research supports the theory that work status affects recidivism.<sup>52</sup> Job instability can lead to higher arrest rates, whereas "[i]f someone has a legitimate job, he or she is less likely to be involved in criminal activity."<sup>53</sup> Recent scholarship also suggests that employment programs can reduce recidivism<sup>54</sup>—by as much as 40 percent according to some studies<sup>55</sup>—even though their success is hampered by the educational and employment backgrounds of today's prisoners, as well as by labor

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51. See generally SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 117–30 (2001).

52. See, e.g., ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING* (1993) (associating job instability with higher arrest rates); Philip Cook, *The Effect of Legitimate Opportunities on the Probability of Parolee Recidivism* 20 (Ctr. for Justice Policy, Working Paper, 1973) (suggesting that the probability of property crimes may go up with unemployment, while crimes of violence like murder and assault may go down with unemployment); Karen E. Needels, *Go Directly to Jail and Do Not Collect? A Long-Term Study of Recidivism, Employment, and Earnings Patterns Among Prison Releasees*, 33 J. RES. CRIME & DELINQ. 471 (1996) (finding crime rates decreased as wages increased); Christopher Uggen & Melissa Thompson, *The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person Changes in Drug Use and Illegal Earnings*, 109 AM. J. SOC. 146 (2003) (finding that legitimate earnings tended to reduce illegal earnings).

53. See TRAVIS, *supra* note 16, at 168.

54. "[A]dult academic and vocational . . . programs may be associated with . . . reductions in recidivism" and increases in employment opportunities. CRIMINAL JUSTICE CTR., SAM HOUSTON STATE UNIV., PRISON EDUCATION RESEARCH PROJECT: FINAL REPORT 23 (1994), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/14/84/4b.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/84/4b.pdf); see also Gerald G. Gaes et al., *Adult Correctional Treatment* 26 CRIME AND JUST. 361 (1999). Note that this represents a shift from the thinking in the mid-1970s that "nothing works" in prisoner rehabilitation. See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

55. See, e.g., BI INC., OVERVIEW OF THE ILLINOIS DOC HIGH-RISK PAROLEE RE-ENTRY PROGRAM AND 3-YEAR RECIDIVISM OUTCOMES OF PROGRAM PARTICIPANTS (2002), [http://www.bi.com/pdfs/BI\\_ChicagoReport.PDF](http://www.bi.com/pdfs/BI_ChicagoReport.PDF) (finding a 40.6 percent reduction in recidivism rates in a high-risk group undergoing both supervision and rehabilitation activities compared to a matched parolee comparison group); TRAVIS, *supra* note 16, at 173 (finding that only 23 percent of the Project Reintegration of Offenders (RIO) job-preparation participants returned to prison, compared with 38 percent of the control group (citing RAMDAS MENON ET AL., PUB. POLICY RES. LAB., AN EVALUATION OF PROJECT RIO OUTCOMES: AN EVALUATIVE REPORT (1992)).

market pressures.<sup>56</sup> Surveys also show a near-universal public belief “that helping ex-offenders find stable work [is] the most important step in helping them reintegrate into their communities.”<sup>57</sup>

Recognizing that employment is central to rehabilitation, most prisons offer some sort of work programming.<sup>58</sup> In 1994, the federal government created the Office of Correctional Job Training and Placement.<sup>59</sup> Also, the Office of Correctional Education awards grants to correctional educational programs, which often include employment components.<sup>60</sup> The U.S. Courts website states that once offenders are released from prison into supervision, “[a] critical part of the supervision duties of officers is to build relationships with people in the community who can help persons under supervision find and keep jobs.”<sup>61</sup> Furthermore, to encourage employers to hire ex-offenders, the federal government has established a bonding program, under which employers can be reimbursed up to \$25,000 for thefts or embezzlement perpetrated by ex-offender employees.<sup>62</sup> Federal and some state tax credits are also available to employers who hire ex-offenders.<sup>63</sup>

In addition, states have created policies and programs designed to increase ex-offender employment and encourage ex-offender hiring.

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56. Ex-offenders often have low levels of education and spotty work experience. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf> (finding that over 41 percent of inmates had completed only some high school or less, and another 46 percent just had a high school diploma or GED); *id.* at 10 (only 56 percent of those with GEDs were employed full time at the time of arrest). Prison also imposes a “wage penalty” in that time incarcerated takes the potential worker out of the routine of regular employment. TRAVIS, *supra* note 16, at 166. Furthermore, even when the economy is booming, average wages for low-skilled workers tend to remain stable, and the sorts of jobs that ex-offenders are most likely to get—blue-collar and manufacturing jobs—are decreasing as a share of the workforce. *Id.* at 166–67.

57. TRAVIS, *supra* note 16, at 183.

58. JAMES J. STEPHAN & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, at 10 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/csf00.pdf> (reporting that 91 percent of federal and state facilities had some sort of work program, most often facility support).

59. MARIA L. BUCK, GETTING BACK TO WORK 7 (2000), [http://www.ppv.org/ppv/publications/assets/94\\_publication.pdf](http://www.ppv.org/ppv/publications/assets/94_publication.pdf).

60. *Id.*

61. U.S. Courts, Employment for Persons Under Supervision, <http://www.uscourts.gov/fedprob/supervise/employment.html> (last visited Sept. 15, 2006).

62. See National H.I.R.E. Network, *supra* note 15. Employers pay nothing for the bond insurance, which is available for all jobs, public or private, part time or full time. *Id.*

63. See Small Business Jobs Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755, 1768 (1996); National H.I.R.E. Network, H.I.R.E. Resources and Assistance, [http://www.hirenetwork.org/state\\_tax\\_credits.htm](http://www.hirenetwork.org/state_tax_credits.htm) (last visited Sept. 10, 2007) (listing state tax credits available in California, Illinois, Iowa, Louisiana, Maryland, and Texas).

Wisconsin, for example, declares it the “public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . conviction record.”<sup>64</sup> State parole boards always require those under supervision to seek employment.<sup>65</sup> Some states are trying to restore the corrections officer’s position as liaison with community businesses and employers. Georgia’s Operation TOPSTEP, for example, involves collaboration between the Departments of Parole and Labor in both pre- and postrelease periods.<sup>66</sup> Under the program, a parole officer’s performance is measured in relation to the program’s goal of ex-offender employment.<sup>67</sup> There are also a number of nonprofit ex-offender programs that receive funding and participants from state and local departments of corrections and treat relationships with parole officers as the “key to success.”<sup>68</sup> These sorts of programs must confront skepticism about ex-offenders as employees, and attempt to diffuse it by making connections between corrections departments, community organizations, and employers.<sup>69</sup>

### C. Public Safety Concerns

Although the recidivism statistics quoted above have prompted many to call for reducing barriers to prisoner reentry, they also raise real safety concerns. While we may recognize that the statistics do not tell the whole story,<sup>70</sup> the percentage of ex-offenders convicted for committing new crimes is still worrisome.<sup>71</sup> Furthermore, high-profile crimes

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64. WIS. STAT. ANN. § 111.31 (West 2002). The Wisconsin statute is discussed below in Part II.C.2. For another example of such a public policy, see N.Y. CORRECT. LAW § 753(1) (McKinney 2003).

65. See PETERSILIA, *supra* note 22, at 112.

66. BUCK, *supra* note 59, at 9.

67. *Id.*

68. See *id.* at 12–13 (describing nonprofit organizations such as Chicago’s Safer Foundation and New York City’s South Forty Corporation). Program staff usually communicate regularly with parole officers, both as leverage to keep participants in the program and to help deal with any problems. *Id.* at 14.

69. Ohio’s Offender Job Linkage program brings employers into prisons for job fairs as a way of putting employers’ concerns “into a realistic perspective.” *Id.* at 10.

70. For example, although 67.5 percent of ex-offenders were rearrested, those arrests only represented 4.7 percent of the total arrests during that same period. See LANGAN & LEVIN, *supra* note 49, at 6, 8. Fifty-two percent of those returning to prison do so on a technical violation of their release conditions. *Id.* at 1. Technical violations “pertain to behavior that is not criminal, such as the failure to refrain from alcohol use or remain employed.” PETERSILIA, *supra* note 22, at 87.

71. See LANGAN & LEVIN, *supra* note 49, at 1 (46.9 percent).

involving ex-offenders stir up public fear and create a perception that ex-offenders are responsible for most crimes.<sup>72</sup>

It is certainly true that violence has moved into the workplace, with nearly one out of every five violent crimes occurring there.<sup>73</sup> However, despite this alarming statistic, over 90 percent of those incidents involve simple or aggravated assaults,<sup>74</sup> and nearly all of them result in either no injury or only minor injuries.<sup>75</sup> Additionally, there appears to be no research suggesting that a high percentage of workplace violence is committed by employed ex-offenders. Rather, the majority of incidents are committed by nonemployee strangers;<sup>76</sup> co-workers are responsible for only 7 percent of workplace homicides.<sup>77</sup> Nonetheless, articles aimed at managers and human resources departments reveal how afraid employers are.<sup>78</sup> One warns that “[t]oo frequently . . . the evening news leads off with a report about a ‘disgruntled’ employee committing some horrifying act of violence.”<sup>79</sup> Employers are also concerned about workplace theft and nonviolent crime, which is more prevalent than violent crime,<sup>80</sup> though less sensational.

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72. See TRAVIS, *supra* note 16, at 88. For example, despite the successes of New York’s work-release program, “public support . . . hangs by a slender thread.” *Id.* at 89. The state was forced to severely limit its program after a public outcry following four prisoner escapes in the spring of 1977 during which “three [escapees] went on horrific crime sprees that made headlines in New York’s tabloids.” *Id.* at 89–91; see also NANCY G. LA VIGNE ET AL., PRISONER REENTRY AND COMMUNITY POLICING: STRATEGIES FOR ENHANCING PUBLIC SAFETY 12 (2006), [http://www.urban.org/UploadedPDF/411061\\_COPS\\_reentry\\_monograph.pdf](http://www.urban.org/UploadedPDF/411061_COPS_reentry_monograph.pdf) (“The prospect of new crimes committed by returning prisoners can elevate fear of victimization among residents and perceptions that the neighborhood is unsafe.”).

73. DUHART, *supra* note 4, at 1; see also Beaver, *supra* note 9, at 103.

74. DUHART, *supra* note 4, at 2 (noting that simple assaults represent 75.2 percent and aggravated assaults 18.6 percent of all violent crime in the workplace). Homicides represent less than 1 percent, rape and sexual assault just over 2 percent, and robbery 4 percent of all violent workplace crime. *Id.*

75. *Id.* at 6 tbl.11 (finding that in 88.2 percent of violent workplace victimizations, there was no injury and, of the 11.8 percent with injuries, 10.2 percent were minor).

76. *Id.* at 8, 10 (finding that 55.6 percent of all workplace victimizations and 84 percent of workplace homicides were committed by strangers).

77. *Id.* at 10.

78. See, e.g., Milton Zahl, *Negligent Hiring Rulings Can Impact Employers*, FLEET EQUIPMENT, Aug. 2000, at 43, 43 (“Every employer fears the discontented or unbalanced worker who commits a violent act.”).

79. Weisberg, *supra* note 4, at 58.

80. See RONE BACHMAN, BUREAU OF JUSTICE STATISTICS, VIOLENCE AND THEFT IN THE WORKPLACE 1 (1994), <http://www.ojp.usdoj.gov/bjs/pub/pdf/thefwork.pdf> (“[O]ver 2 million personal thefts and over 200,000 car thefts occur annually while persons are at work.”).

Employers want to protect their workers<sup>81</sup> and the public, while also protecting themselves from liability and negative publicity for any workplace violence. Under negligent hiring law, which most jurisdictions recognize,<sup>82</sup> an employer may be “subject to liability for harm resulting from his conduct if he is negligent . . . in the employment of improper persons . . . involving risk of harm to others.”<sup>83</sup> Similarly, negligent retention and negligent supervision claims can be brought against employers who retain or fail to supervise those they know or should know are dangerous.<sup>84</sup> In addition, if an employee commits a tort while in the scope of his employment, the employer may be liable under the theory of respondeat superior.<sup>85</sup> Thus, it is not surprising that employers are increasingly turning to background checks to screen out potentially dangerous employees.<sup>86</sup> About one-third of employers regularly check criminal records.<sup>87</sup> Because of a proliferation of private providers of background checks<sup>88</sup> and states that post conviction and parole information on the Internet,<sup>89</sup> such checks can now be done for broad areas<sup>90</sup> at low cost.<sup>91</sup>

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81. Note, however, that employers would not be subject to lawsuits brought by employees if those employees were harmed by an ex-offender co-worker. Worker's compensation laws preempt tort liability against the employer. See, e.g., ALASKA STAT. § 23.30.055 (2006); CAL. LAB. CODE § 3602 (West 2006).

82. For a list of jurisdictions, see 27 AM. JUR. 2D § 392 n.3.

83. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

84. See *supra* note 7.

85. See *supra* note 8.

86. See Connerley et al., *supra* note 9, at 175.

87. *Id.*; TRAVIS, *supra* note 16, at 165.

88. A Google search for “criminal record check” returns thousands of hits. Examples include IntegraScan, <http://www.integrascan.com>, Intelius, <http://find.intelius.com/criminal-check.html>, and Peoplefinders, <http://www.peoplefinders.com>.

89. On the Internet, nineteen states have records available for current and former prisoners and parolees, while six states have records available for current prisoners and parolees. PETERSILIA, *supra* note 22, at 111. Kansas, for example, has a free, searchable database providing information on convictions, previous known locations, and disciplinary actions. See Kansas Department of Corrections, [http://www.dc.state.ks.us/kasper/index\\_html](http://www.dc.state.ks.us/kasper/index_html) (last visited Aug. 29, 2007). Ohio also has a free, searchable database with similar information, as well as the victim's sex and general age (adult versus child), along with links to felony sentencing charts and the Ohio code. See Ohio Department of Rehabilitation and Corrections, Offender Search, <http://www.drc.state.oh.us/offendersearch> (last visited Nov. 10, 2006). For a complete list of states providing conviction information, the extent of the information provided, methods of retrieval, and any fees involved, see National CASA Association, Statewide Criminal Background Check Resources (2003), <http://www.casenet.org/program-management/volunteer-manage/criminal-bkg-check.htm>.

90. See Rob Thomson, *Caveat Emptor: The Myth of the “Permanent Record,”* GOV'T PROCUREMENT, Aug. 2004, at 28 (explaining that many online background check vendors promise statewide or nationwide coverage).

91. See Connerley et al., *supra* note 9, at 179 (“[D]ecision makers do not seem to realize that they can usually find out the information they need for under \$10 . . . The services available range from large investigation companies to upstart, Web-based companies . . . which leads to a range of costs for background checks between \$5 to \$200.”).

Employers often screen first for ex-offenders when trying to curb workplace crime for a number of reasons. Fear of liability leads many employers to check for a criminal background.<sup>92</sup> Much of the scholarship directed at employers advises them to avoid liability by checking conviction records,<sup>93</sup> despite the fact that negligent hiring case law has consistently failed to find a general duty to check applicants' criminal records.<sup>94</sup> Employers also use criminal records as a basis of character evaluation, finding ex-offenders untrustworthy.<sup>95</sup> Furthermore, ex-offenders have little political or social power to argue for change, and are often viewed as "the least eligible of all citizens for social benefits."<sup>96</sup> And finally, ex-offenders are easily identifiable through increasingly available criminal record histories.<sup>97</sup> Thus, though nonemployee strangers are responsible for more workplace crime, it is ex-offenders that employers target.

## II. EMPLOYER EVALUATIONS OF THE RELATIONSHIP BETWEEN PRIOR OFFENSE AND PROSPECTIVE JOB

Employers have been asked to evaluate job relatedness by negligent hiring law, state and federal antidiscrimination statutes, and legal commentators. While it is clear that those obligations are placed squarely on employers, the content of those obligations is less certain and less uniform.

### A. Negligent Hiring Law

Case law in the majority of states recognizes negligent hiring as a cause of action.<sup>98</sup> These courts find an employer liable for an injury caused by an employee if the employer knew or should have known of the employee's "propensity for the conduct which caused the injury."<sup>99</sup>

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92. See *supra* note 9.

93. See *supra* note 9.

94. See *Evans v. Morsell*, 395 A.2d 480, 484 (Md. 1978) ("[T]he majority of courts flatly reject . . . that where an employee is to regularly deal with the public, an inquiry into a possible criminal record is required. . . . We agree . . ."). Some courts have suggested that, in certain circumstances, a duty to check criminal records may arise. See *infra* notes 109–112 and accompanying text.

95. See *PETERSILIA*, *supra* note 22, at 116.

96. *Id.* at 5.

97. See *supra* notes 88–89 and accompanying text.

98. See *supra* note 82.

99. *Daniels v. Loizzo*, 174 F.R.D. 295, 299 (S.D.N.Y. 1997); see, e.g., *Williams v. Cloverland Farms Dairy, Inc.*, 78 F. Supp. 2d 479, 484 (D. Md. 1999) (Maryland law);

In *Ponticas v. K.M.S. Investments, Inc.*,<sup>100</sup> for example, the Minnesota Supreme Court upheld a jury verdict of negligent hiring, finding the jury could have reasonably concluded that the apartment owners should have known the manager they hired had dangerous propensities.<sup>101</sup> The employers made little effort to investigate the references, the information regarding discharge from the U.S. Army, or the lack of work history indicated on the application.<sup>102</sup> Had they checked, the court suggested that they likely would have discovered the manager's prior convictions for receiving stolen property, armed robbery, and burglary.<sup>103</sup> That past, the court held, made the risk of harm to tenants in the apartment complex where the employee worked foreseeable.<sup>104</sup>

While most courts agree that requiring employers to inquire into references and past employment is reasonable,<sup>105</sup> they often disagree about whether "reasonable investigation" includes inquiry into a criminal record. *Evans v. Morsell*<sup>106</sup> articulates the majority position that there is no duty to find out if the employee has a criminal record. Instead, an "adequate inquiry" or other "sufficient basis to rely on the employee" is enough to avoid negligence liability.<sup>107</sup> For example, in *Williams v. Feather Sound, Inc.*,<sup>108</sup> a Florida court found that entrusting an employee with access to people's homes generates a "responsibility of first making some inquiry with respect to whether it is safe to do so."<sup>109</sup> Even there, the court found that heightened inquiry did not require checking with law enforcement regarding any criminal record.<sup>110</sup> The *Evans* "adequate inquiry" standard is based on the fact that it might be difficult to obtain criminal records and that an employer "to some extent is entitled to rely upon the determination of the government's criminal

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D'Alessandro v. Westall, 972 F. Supp. 965, 976-77 (W.D.N.C. 1997) (North Carolina law); J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 393 (Va. 1988) (Virginia law).

100. 331 N.W.2d 907 (Minn. 1983).

101. *Id.* at 914.

102. *Id.*

103. *Id.* at 909, 914.

104. *Id.* at 912.

105. See *Abbot v. Payne*, 457 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1984) (citing *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980)).

106. 395 A.2d 480 (Md. 1978).

107. *Id.* at 484.

108. 386 So. 2d 1238.

109. *Id.* at 1240.

110. *Id.* at 1240 & n.8.

justice system that the individual is ready to again become an active member of society.”<sup>111</sup>

Several courts, however, have implied that, in certain circumstances, there may be a duty to inquire into criminal backgrounds. In *Cramer v. Housing Opportunities Commission*,<sup>112</sup> the court’s dicta suggested that “where the work involves a serious risk of harm if the employee is unfit, as in the hiring of a police officer . . . there may well exist a duty to conduct a criminal record investigation.”<sup>113</sup> Other courts have made similar statements in dicta, but have offered little general guidance about which situations might require a criminal background check.<sup>114</sup> The *Cramer* court would ask juries to determine “whether the failure to obtain a criminal history record constitutes a breach of duty in a given case.”<sup>115</sup>

For employers who do decide to check criminal backgrounds<sup>116</sup> and discover that an applicant is an ex-offender, the standard for evaluating whether the prior conviction poses an undue risk to others remains murky as well. In *Yeboah v. Snapple, Inc.*,<sup>117</sup> a New York court suggested that an employer is expected to evaluate the risk posed in a particular case using the circumstances of the crime and the applicant’s

111. *Evans*, 395 A.2d at 484. There is some suggestion that courts may be willing to revise this perception given that background checks are becoming easier to perform. See *Cramer v. Hous. Opportunities Comm’n*, 501 A.2d 35, 40 (Md. 1985) (finding that the availability of criminal background information and the cost, inconvenience, and delay in obtaining it should all be considered as evidence, along with whether other sources were sufficient to justify a finding of fitness).

112. 501 A.2d 35.

113. *Id.* at 40. The police officer situation is often viewed as a special case in hiring, one that is covered by state statute and subject to greater scrutiny regarding prior criminal activity. See *Leonard v. Corrs. Cabinet*, 828 S.W.2d 668 (Ky. Ct. App. 1992) (upholding as constitutional a Kentucky statute banning those who have been convicted of felonies involving moral turpitude from employment as peace officers); *Law Enforcement Standards Bd. v. Vill. of Lyndon Station*, 305 N.W.2d 89, 99 (Wis. 1981) (“If the state authorities through our court system have convicted someone of 26 felonies, it stands to reason that his effectiveness as a law enforcement officer will be greatly diminished.”).

114. See, e.g., *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1321–22 (Colo. 1992) (finding that the duty does not necessarily extend to checking criminal history unless there are “circumstances . . . giving the employer reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm”); *Butler v. Hurlbut*, 826 S.W.2d 90, 93 (Mo. Ct. App. 1992) (finding that “some situations”—though not the hiring of a cashier at issue in the case—would require inquiry). One court has suggested that if an employer does not comply with its own personnel procedures to check criminal records when there is an indication that such a history exists, the employer may be liable. See *Haddock v. City of New York*, 553 N.E.2d 987 (N.Y. 1990).

115. *Cramer*, 501 A.2d at 41.

116. See *infra* Part IV.

117. 729 N.Y.S.2d 32 (App. Div. 2001).

intervening activities.<sup>118</sup> A Florida court in *Island City Flying Service v. General Electric Credit Corp.*<sup>119</sup> suggested that there would need to be a close connection between the past criminal record and the conduct at issue for the employer to be found negligent.<sup>120</sup> Despite this uncertainty, cases finding liability when there is prior knowledge of conviction do not appear to be common. Where employers are found liable, there are often additional issues: The employer did not follow up on early indications that there might be a risk, for example.<sup>121</sup>

Unfortunately for employers who are trying to determine risk, courts offer few rules about when the connection between past crime and current conduct is sufficient—would the prior crime need to be the same or involving some of the same elements as the current conduct? Furthermore, employers do not know at hire what the potential subsequent conduct will be, and thus cannot evaluate the strength of the potential connection. Finally, case law allowing juries to determine whether knowledge of the prior crime constitutes knowledge of foreseeable risk<sup>122</sup> may introduce enough unpredictability to make employers wary of making decisions regarding ex-offenders. Thus, employers are more likely to err on the side of caution and simply not hire those with criminal records.

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118. The court speculated that, even if the employer had checked the applicant's criminal record, he would not have been negligent in hiring him as a truck driver due to the time lapsed since conviction and parole and the fact that his more recent offense was a misdemeanor not requiring corrective action. *Id.* at 33.

119. 585 So. 2d 274 (Fla. 1991).

120. *Id.* at 277 ("While Diezel had a military criminal record of imprisonment for a drug offense, there is no showing that there was any imprisonment for theft. . . . [B]ased on this record, Island City could not have foreseen Diezel's theft of this airplane."); see also *Argonne Apartment House Co. v. Garrison*, 42 F.2d 605, 608 (D.C. Cir. 1930) (suggesting that a prior conviction for intoxication would not put an employer on notice as to dishonesty); *Baughner v. A. Hattersley & Sons, Inc.*, 436 N.E.2d 126 (Ind. App. 1982) (finding that, even though employers knew of the employee's prior record for armed robbery at hire, that did not lead them to know of his intent to use a company vehicle and access to the company building in perpetrating a crime).

121. Liability was found where an applicant indicated on his application that he had been arrested but provided no information about the crime, and the employer did not investigate. *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Civ. App. 1979). Liability was also found where New York City did not follow its own personnel procedures in processing the applicant's fingerprints, which would have revealed a violent criminal past. *Haddock v. City of New York*, 553 N.E.2d 987 (N.Y. 1990).

122. *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 289 (Mich. 1971); see also *supra* note 115 and accompanying text.

## B. Title VII

Under Title VII of the Civil Rights Act of 1964,<sup>123</sup> employers can choose not to hire an applicant solely because of criminal record so long as they can show a business necessity for their policy. However, Title VII prohibits employers from failing to hire applicants on the basis of race.<sup>124</sup> In *Green v. Missouri Pacific Railroad Co.*,<sup>125</sup> the Eighth Circuit found that an employer's "absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense"<sup>126</sup> had the effect of "disqualif[ying] black applicants . . . at a substantially higher rate than whites"<sup>127</sup> because of higher conviction rates for blacks.<sup>128</sup> An employment practice "which operates to exclude a disproportionate percentage of blacks violates Title VII unless the employer can establish that the practice is justified as a business necessity."<sup>129</sup> The court went on to find that the particular employer had not demonstrated a business necessity for the policy.<sup>130</sup>

The Equal Employment Opportunity Commission (EEOC) has since offered employers more guidance in determining what constitutes a "business necessity."<sup>131</sup> Employers should be able to show that they considered (1) the nature and gravity of the offense(s); (2) the time passed since the conviction or completion of the sentence; and (3) the nature of the job held or sought.<sup>132</sup> A hiring decision that reasonably weighed these factors would show adequate business necessity. In *Board of Trustees of Southern Illinois University v. Knight*,<sup>133</sup> for example, the employer failed to prove it was justified in refusing to hire an applicant based on his prior conviction. The conviction for unlawful weapons possession was remote in time (five years earlier), and the applicant had since established

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123. 42 U.S.C. §§ 2000e-2000e-17 (2000).

124. *Id.* § 2000e-2(a)(1).

125. 523 F.2d 1290 (8th Cir. 1975).

126. *Id.* at 1292.

127. *Id.* at 1295.

128. *Id.* at 1294. Finding discrimination under a disparate impact analysis is appropriate under Title VII, even though a constitutional claim would require discriminatory intent. See *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

129. *Green*, 523 F.2d at 1293.

130. *Id.* at 1298.

131. This guidance is accorded "great deference" by courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

132. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NOTICE NO. N-915, POLICY STATEMENT ON ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987) [hereinafter EEOC NOTICE].

133. 516 N.E.2d 991 (Ill. App. Ct. 1987).

a “history of professional and responsible police and police-related work which involved the use of firearms.”<sup>134</sup>

Despite the requirement that employers give full consideration to the EEOC factors, courts have been fairly lenient in finding business necessity. Policies of refusing to hire convicts need not be “essential” or “indispensable” to business needs.<sup>135</sup> Some courts have even suggested that reliance on conviction records is “exceedingly reasonable.”<sup>136</sup> Employers’ desires to minimize losses from theft have also been considered sufficient business necessity, even when their losses are lower than the industry average.<sup>137</sup> Additionally, courts have been persuaded when employers plead connections between aggravated offenses and the protection of employees and the public,<sup>138</sup> as well as relationships between hazardous driving convictions and jobs that require driving.<sup>139</sup> Generally, courts have been inclined to defer to employers regarding risk.<sup>140</sup> Thus, although Title VII and the EEOC require employers to evaluate job relatedness, case law suggests that job relatedness is broadly read and often found.

### C. State Antidiscrimination Laws

Several states have antidiscrimination laws that prohibit discrimination based on conviction status unless the employer has found that status to be related to the job sought. Of these states, New York, Connecticut, and Minnesota ask employers to evaluate job relatedness using multifactor tests. These tests attempt to look not only at the crime with which the individual was charged, but also at the circumstances surrounding that crime. Because of the details these tests aim to consider, this Comment labels these tests “fact-specific inquiries.” Wisconsin’s antidiscrimination statute, by contrast, is an “element-of-the-crime inquiry,” which evaluates

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134. *Id.* at 997.

135. *Equal Employment Opportunity Comm’n (EEOC) v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 752 (S.D. Fla. 1989).

136. *Id.* at 753.

137. *Id.* at 754.

138. *See Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1972).

139. *See Davis v. City of Dallas*, 777 F.2d 205, 225 (5th Cir. 1985) (looking to the empirical evidence the employer relied on that showed a connection between prior driving convictions and future accident involvement).

140. *See Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (stating that Title VII was not intended to “diminish traditional management prerogatives”); *Freight Carriers*, 723 F. Supp. at 754.

job relatedness by looking more to the statutory elements of the prior conviction than the specifics of the crime.

### 1. Fact-Specific Inquiries

New York's antidiscrimination statute is the predominant model of a fact-specific inquiry. New York requires employers to evaluate whether there is a "direct relationship" between a prior criminal record and the employment position sought.<sup>141</sup> The statute provides eight factors for employers to use in making reasonable decisions: (1) New York's public policy of encouraging the employment of ex-offenders; (2) the specific duties of the job; (3) the time elapsed since the conviction; (4) any bearing the offense will have on the applicant's fitness to perform the duties of the job; (5) the age of the applicant at the time of the offense; (6) the seriousness of the offense; (7) any information regarding the applicant's rehabilitation and good conduct; and (8) the safety and welfare of specific individuals or the general public.<sup>142</sup> In one application of New York's statute, *Soto-Lopez v. New York City Civil Service Commission*,<sup>143</sup> the court found that the employer had not shown a direct relationship between the applicant's prior manslaughter conviction and a housing caretaker position.<sup>144</sup> In deciding that the employer "would be exceeding [its] discretion in concluding that such unreasonable risk existed" under the eight factors, the court looked to the facts that the applicant had completed probation, his conviction was nine years earlier, and the caretaker position "would not as such involve plaintiff in violent confrontations" or require that he carry arms.<sup>145</sup> However, the statute has also been used to support the denial of employment to ex-offenders, as in *Grafer v. New York City Civil Service Commission*,<sup>146</sup> in which the court found that a man with drunk driving convictions who applied for a position with the New York City Fire Department posed an "unreasonable risk to property, and to the safety and welfare of the general public."<sup>147</sup>

Minnesota and Connecticut have antidiscrimination laws which similarly allow evidence of rehabilitation and the time elapsed since

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141. N.Y. CORRECT. LAW § 752(1) (McKinney 2003); *see id.* §§ 750–53.

142. *Id.* § 753(1).

143. 713 F. Supp. 677 (S.D.N.Y. 1989).

144. *Id.* at 679.

145. *Id.*

146. 581 N.Y.S.2d 337 (App. Div. 1992).

147. *Id.* at 337. This reaction may be partly explained by the same sort of special case that exists for police department employment. *See supra* note 113.

conviction or release to be considered.<sup>148</sup> Minnesota goes even further, listing various ways through which an ex-offender applicant might provide evidence of rehabilitation,<sup>149</sup> and allowing the applicant to offer any mitigating circumstances surrounding the crime.<sup>150</sup>

State antidiscrimination laws seek to limit the employer prejudice encouraged by negligent hiring law. They do so by attempting to prevent bias, except in very limited circumstances (such as when there is a “direct relationship” between a prior offense and the job sought under New York law). However, despite the attempt to curb prejudice by forcing employers to engage in an individualized analysis using multiple, defined factors, such an analysis is difficult in practice because of the limited availability of reliable information.<sup>151</sup>

## 2. Element-of-the-Crime Inquiries

Unlike New York and those states following its model, Wisconsin has shied away from a fact-specific inquiry. Wisconsin’s antidiscrimination law allows employers to discriminate against applicants for any offense “the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.”<sup>152</sup> Wisconsin’s Labor and Industry Review Commission (LIRC) initially used a very fact-specific test, much like those of the states described above, which considered evidence of rehabilitation, mitigating circumstances, and the time elapsed since conviction, among other things.<sup>153</sup> However, in *Gibson v. Transportation Commission*,<sup>154</sup> the Wisconsin Supreme Court suggested that an employer could comply with Wisconsin law “by ascertaining the elements of the crime for which [the applicant] was convicted” and making a reasonable

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148. MINN. STAT. ANN. § 364.03, subdiv. 3 (West 2004); CONN. GEN. STAT. ANN. § 46a-80(b) (West 2004).

149. MINN. STAT. ANN. § 364.03, subdiv. 3. Evidence of rehabilitation may include a copy of the release order, evidence that a year has elapsed since release without subsequent conviction, evidence of compliance with the conditions of probation or parole, or a discharge order showing completion of probation or parole. *Id.*

150. *Id.* (considering any information presented that is “relative to the crime or crimes, including mitigating circumstances or social conditions surrounding the commission of the crime”).

151. See *infra* Part III.A.

152. WIS. STAT. § 111.335(c)(1) (2006).

153. For an overview of Wisconsin’s approach to job relatedness, see Thomas M. Hruz, Comment, *The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 789–92 (2002).

154. 315 N.W.2d 346 (Wis. 1982).

decision based thereon.<sup>155</sup> The “circumstances” of the offense, then, became those that the crime included by definition.<sup>156</sup> Despite the misgivings of some,<sup>157</sup> in *County of Milwaukee v. LIRC*,<sup>158</sup> the Wisconsin Supreme Court “reject[ed] an interpretation of [the substantial-relation test] which would require, in all cases, a detailed inquiry into the facts of the offense.”<sup>159</sup> In doing so, it followed the *Gibson* court’s lead and endorsed the elements-only approach as the most efficient way to ascertain the circumstances of the crime.<sup>160</sup>

#### D. Alternative Approaches

Several law review articles have also tackled the connection between ex-offenders and employment in general or ex-offenders and negligent hiring law in particular. Most of these endorse tests under which employers still determine the job relatedness of prior offenses, often approving of factually specific tests, which they see as leading to “[m]ore accurate hiring decisions.”<sup>161</sup> Many then add on various components in an attempt to

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155. *Id.* at 347. See generally Hruz, *supra* note 153 (discussing the rise and fall of the factor-specific test in Wisconsin).

156. See *Gibson*, 315 N.W.2d at 349 (“A conviction of armed robbery . . . requires that the person be found to have participated in the taking of another’s property by threatening to harm them with a dangerous weapon. It thus indicates a disregard for both the personal and property rights of other persons. It also indicates a propensity to use force or the threat of force to accomplish one’s purposes. The armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, level-headedness and avoidance of the use of force which Mr. Luick testified are essential in a school bus driver.”).

157. See *Law Enforcement Standards Bd. v. Vill. of Lyndon Station*, 305 N.W.2d 89, 107 (Wis. 1981) (Abrahamson, J., dissenting) (“The record does not contain the circumstances of . . . conviction.”). The dissent in *Village of Lyndon Station* suggested that the proper factors to consider were more factually specific, including evidence of rehabilitation and indications of “whether the circumstances leading to the offense still exist or are likely to recur.” *Id.* at 109.

158. 407 N.W.2d 908 (Wis. 1987).

159. *Id.* at 916.

160. *Id.* at 917.

161. Elizabeth A. Gerlach, *The Background Check Balancing Act: Protecting Applicants With Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 996 (2006). For advocates of employer determinations in general, see Dermot Sullivan, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York’s Need to Reevaluate Its Priorities to Promote Public Safety*, 72 ST. JOHN’S L. REV. 581, 601 (1998); Monica Scales, Note, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 434–35 (2002) (suggesting that whatever balancing test is to be used, employers need it to be defined for them to prevent overcautious hiring); James R. Todd, Comment, “It’s Not My Problem”: *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 759 (2004). For those advocating more factually specific inquiries, see Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment*

quell employers' fears of liability and encourage or force employers to hire more ex-offenders: requirements that employers perform criminal records checks for all or most applicants;<sup>162</sup> enactment of liability limits<sup>163</sup> and tax incentives for employers who hire ex-offenders;<sup>164</sup> the enactment<sup>165</sup> or repeal<sup>166</sup> of antidiscrimination laws based on conviction status; or the expungement of criminal records for minor offenses.<sup>167</sup> However, none of these articles considers whether the basis of their argument—that employers are the correct parties to evaluate job relatedness—best achieves the goals of improving workplace safety and encouraging ex-offender employment. Furthermore, none of these articles makes any distinction between employer evaluation of supervised and unsupervised ex-offenders.

There is also a considerable amount of scholarship on prisoner reentry in general, which often includes discussions of employment issues.<sup>168</sup> At times these discussions touch on negligent hiring liability as a reason for employers' reluctance to hire ex-offenders.<sup>169</sup> However, none explores employers' evaluations of ex-offenders in the context of community supervision or suggests that employers are poorly positioned to make evaluations when there are more informed parties better able to do so.

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of *Ex-Convicts*, 38 U.S.F. L. REV. 193, 208–09 (2004) (approving of New York's factor test as a more "contextual evaluation"); Gerlach, *supra*, at 995–96; Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1310 (2002) (approving of New York's factor test).

162. See Gerlach, *supra* note 161, at 995–96; Sullivan, *supra* note 161, at 600; Todd, *supra* note 161, at 758–59.

163. See Clark, *supra* note 161, at 209–10 (requiring employers to ask about conviction status and then offering immunity if the applicant fails to disclose it); Sullivan, *supra* note 161, at 602–03 (advocating a damages cap); Leavitt, *supra* note 161, at 1309 (advocating a damages cap and a legal presumption of no liability if a background check was performed and evaluated); Scales, *supra* note 161, at 437 (advocating a damages cap); Todd, *supra* note 161, at 759 (creating a presumption of reasonableness if the employer makes a "reasonable inquiry" into an applicant's background, including criminal records).

164. See Leavitt, *supra* note 161, at 1308.

165. *Id.* at 1312; Todd, *supra* note 161, at 757–58 (arguing that Arizona should include a prohibition against discrimination on the basis of criminal record in its civil rights statute).

166. See Hruz, *supra* note 153, at 783; Scales, *supra* note 161, at 439.

167. See Scales, *supra* note 161, at 438–39.

168. See, e.g., PETERSILIA, *supra* note 22; TRAVIS, *supra* note 16. There are also numerous articles relating to prisoner reentry on the U.S. Department of Justice's website. See U.S. Dep't of Justice, Reports and Publications, [http://www.usdoj.gov/05publications/05\\_3\\_a.html](http://www.usdoj.gov/05publications/05_3_a.html) (last visited Oct. 15, 2007); see, e.g., WALTER J. DICKEY & MICHAEL E. SMITH, U.S. DEP'T OF JUSTICE, RETHINKING PROBATION: COMMUNITY SUPERVISION, COMMUNITY SAFETY (1998), <http://www.ojp.usdoj.gov/probation/rethink.pdf>; Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENT'G & CORRECTIONS, May 2000, at 1, available at <http://www.ncjrs.gov/pdffiles1/nij/181413.pdf>.

169. See PETERSILIA, *supra* note 22, at 116–19.

### III. WHY FORCING EMPLOYERS TO EVALUATE RISK MAY NOT BE THE BEST APPROACH

Of the various means described in Part II by which employers are forced to evaluate job relatedness, the ways in which those evaluation schemes break down can be most clearly seen through a more in-depth look at limitations of both the fact-specific and the element-of-the-crime inquiries. Although the examples from the state antidiscrimination statutes described in the previous Part illustrated these limitations, it is reasonable to assume that job relatedness evaluations under negligent hiring law or Title VII, though currently ill-defined and loosely applied, would fit into one of these categories as well.<sup>170</sup>

#### A. Fact-Specific Inquiries

Despite the advantages of fact-specific inquiries,<sup>171</sup> an employer may have “little to base a ‘circumstances’ inquiry on”<sup>172</sup> and little time for a “full-blown factual hearing” that would, according to one court, be “unnecessary” and “impractical.”<sup>173</sup> The conventional background check—obtained through either the state or a private company—usually provides basic information about the crimes for which the individual has been convicted, the release date and location of that individual, and whether the individual is currently under supervision.<sup>174</sup> None provides any factual information about the circumstances surrounding the crime or any rehabilitative measures taken postrelease, though some states<sup>175</sup> and corrections officers<sup>176</sup> clearly view these pieces of information as relevant to recidivism.

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170. See, e.g., *Yeboah v. Snaple, Inc.*, 729 N.Y.S.2d 32, 33 (App. Div. 2001) (suggesting a more fact-specific inquiry into the circumstances of the crime and any intervening activities). Title VII could be seen to require either a fact-specific inquiry or an element-of-the-crime inquiry, depending on how the “nature and gravity of the offense” factor is read. See EEOC NOTICE, *supra* note 132. Compare *Bd. of Trs. of S. Ill. Univ. v. Knight*, 516 N.E.2d 991, 997 (Ill. App. Ct. 1987) (looking to facts such as the intervening activities), with *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1972) (looking more generally to the connection between aggravated offenses and the protection of employees and the public).

171. See *supra* Part II.C.1.

172. *County of Milwaukee v. Labor & Indus. Review Comm’n. (LIRC)*, 407 N.W.2d 908, 916 (Wis. 1987).

173. *Id.* at 917.

174. See *supra* notes 37, 89.

175. See *supra* Part II.C.1.

176. See *supra* notes 26–30 and accompanying text.

Indeed, these background checks fail to indicate many of the characteristics that studies have found to predict recidivism.<sup>177</sup>

Aside from background checks, it is unclear how employers could gain access to reliable information that would allow them to predict recidivism. Only six states issue official certificates of rehabilitation.<sup>178</sup> Interestingly, the one state that does suggest a way for employers to obtain additional information (Minnesota) envisions that parole, probation, or other correctional officers could provide letters attesting to the applicant's risk level, successfully completed supervision, or rehabilitation.<sup>179</sup> Thus, at least one state already appears to recognize the potential to shift workplace risk assessment to corrections officers.

#### B. Element-of-the-Crime Inquiries

Using the elements of the crime as a proxy for the circumstances of the offense may create a clearer rule that is easier for employers to apply, but it could lead to “an emphasis on describing the circumstances of the offense at a high level of generality.”<sup>180</sup> Applying the Wisconsin antidiscrimination statute, the *County of Milwaukee v. LIRC*<sup>181</sup> court said that an elements test was the proper way to get to “the circumstances which foster criminal activity . . . [for example,] the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.”<sup>182</sup> However, it is unclear whether the elements of a crime would truly capture such information. To illustrate, a woman who killed her abuser might be

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177. See Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *CRIMINOLOGY* 575 (1996). Paul Gendreau and others found that static factors, including juvenile antisocial behavior, family rearing practices, intellectual functioning, and socioeconomic status, as well as dynamic factors—including companions, antisocial personality, social achievement, and interpersonal conflict—all affect recidivism. *Id.* In summarizing those findings, Joan Petersilia noted that the dynamic factors were more predictive than the static ones. PETERSILIA, *supra* note 22, at 152.

178. Certificates are currently offered in Arizona, California, Illinois, Nevada, New Jersey, and New York. LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY 10* (2004), [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf). These certificates can lift statutory bars to jobs or licenses and are envisioned as “a way for qualified people with criminal records to demonstrate evidence of . . . or a commitment to rehabilitation.” Glenn E. Martin, *Certificates of Rehabilitation*, NAT'L H.I.R.E. NETWORK, Apr. 2006, [http://hirenetwork.org/pdfs/April06\\_Certificate\\_article.pdf](http://hirenetwork.org/pdfs/April06_Certificate_article.pdf).

179. See MINN. STAT. ANN. § 364.03, subdiv. 3 (West 2004).

180. *County of Milwaukee v. LIRC*, 407 N.W.2d 908, 919 (Wis. 1987) (Abrahamson, J., concurring).

181. 407 N.W.2d 908.

182. *Id.* at 916.

convicted of manslaughter, but the elements of that crime<sup>183</sup> would likely not capture the fact that she would be unlikely to reoffend outside of the abusive context. In *Gibson v. Transportation Commission*,<sup>184</sup> the Wisconsin Supreme Court found that an armed robbery conviction indicated “a propensity to use force or the threat of force to accomplish one’s purposes.”<sup>185</sup> There was no inquiry into whether the likely purpose behind armed robbery (desire to take another’s property) would exist in the context of employment as a school bus driver. Instead, the court seemed to focus more on the threat of violence posed, independent of the reason that the threat was employed.<sup>186</sup> Read broadly, any violent crime would indicate the same propensity to use force, which could lead to the exclusion of those convicted for violent offenses from any job.

Furthermore, an elements test leads to use of the past crime as a proxy for the applicant’s dangerous propensities. Courts have indicated that “the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public.”<sup>187</sup> However, because employers often have little access to reliable information about mitigating circumstances, they may be inclined to find a conviction to be synonymous with dangerous potential. To believe that prior crime evidences a permanent violent tendency ignores possibilities for rehabilitation—possibilities that are not captured by knowing only the elements of an applicant’s prior offense.

Using prior convictions as a proxy for current dangerous tendencies also creates a vicious cycle: Employers are more likely to err on the side of caution due to fears of negligent hiring liability, even though they may be exaggerating the risk of liability.<sup>188</sup> When ex-offenders are unable to find work, they become more likely to reoffend.<sup>189</sup> Higher recidivism statistics then fuel employers’ fears and lead them to be even less willing to hire ex-offenders in the future.

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183. In California, for example, such a crime might be considered voluntary manslaughter, which is defined as the “unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion.” CAL. PENAL CODE § 192 (West 1999).

184. 315 N.W.2d 346 (Wis. 1982).

185. *Id.* at 349.

186. *Id.*

187. *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 289 (Mich. 1971).

188. See PETERSILIA, *supra* note 22, at 117 (“Generally, an employer’s reasonable efforts to check and consider a prospective employee’s background will . . . eliminate the risk of liability.”).

189. See *supra* notes 52–53 and accompanying text.

Certainly, conviction records may have some probative value, “given that convictions are based on an actual finding of guilt accomplished through an evidentiary-laden, adversarial process.”<sup>190</sup> Indeed, they are considered relevant by corrections officers in evaluating recidivism risks.<sup>191</sup> However, while convictions may be relevant, that does not necessarily mean that employers should be the ones to evaluate that relevance for supervised ex-offenders, particularly because studies have shown that actuarial assessments, like those used by corrections departments, outperform human judgments relating to ex-offender risk.<sup>192</sup>

Finally, heavy reliance on the conviction information provided in a criminal record check assumes correct information despite the fact that “criminal history records are not as complete and accurate as they ought to be.”<sup>193</sup> Even records that employers can retrieve as part of a credit check “[are] often reported with erroneous information.”<sup>194</sup> This is not only a problem with criminal records; employers are likely faced with potential errors in other areas of an applicant’s background as well. Nonetheless, while mistakes regarding criminal history may be inevitable and acceptable for unsupervised ex-offenders, mistakes need not be made as to supervised ex-offenders, given that their corrections officers have access to a wider range of reliable information with which to evaluate risk.<sup>195</sup> As this Comment goes on to suggest, that greater access to reliable information argues for placing workplace risk assessment with correction officers, not employers.

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190. Hruz, *supra* note 153, at 849.

191. See *supra* notes 27–28 and accompanying text.

192. See T.R. Holland et al., *Comparison and Combination of Clinical and Statistical Predictions of Recidivism Among Adult Offenders*, 68 J. APPLIED PSYCHOL. 203 (1983).

Also, it should be noted that, while employers may regularly consider information such as grades or work history as indicators of work performance (even if imperfect), unlike conviction records for supervised ex-offenders, these types of information have no other system set up to evaluate them.

193. *Ernst v. Parkshore Club Apartments Ltd. P’ship*, 863 F. Supp. 651, 656 n.3 (N.D. Ill. 1994) (regarding the criminal records provided by the state under the Illinois Uniform Conviction Information Act).

194. National H.I.R.E. Network, *Employer Use of Consumer/Credit Reports to Obtain Criminal Record Information*, <http://www.hirenetwork.org/consumerreports.html> (last visited Oct. 4, 2006); see also PETERSILIA, *supra* note 22, at 108; Van Dusen, *supra* note 1, at A1 (noting that, on two different occasions, Roscoe Heaton’s background checks listed his crimes multiple times, “giving the impression that Roscoe had been convicted of aggravated assault several times and sentenced to more than four years in prison”).

195. Unlike employers, who must rely on background check providers, corrections officers have access to a greater quantity of records from more official sources. They also have ample opportunities to discuss any discrepancies with the ex-offender in the course of their supervision.

### C. Alternative Solutions

Recognizing the difficulties that employers may experience in making determinations about a prior offense, some commentators have suggested deferring to outside agencies that have more experience in the area. One has proposed submitting ambiguous cases to an administrative board;<sup>196</sup> another has suggested that outside agencies, such as those developed by some communities and staffed with volunteers, should monitor ex-offenders, undertaking “a portion of management responsibilities with regard to released prisoners.”<sup>197</sup> These two options have in common the assumption that employers may not be best equipped to determine or manage risk. But, because these alternatives still remain coupled to schemes in which employers determine risk in most cases, they do not really solve the underlying problem. The number of cases in which employers need assistance from others to evaluate risk is not small. Indeed, as one commentator has noted, assistance would be needed in nearly all cases in which there is a known prior conviction.<sup>198</sup>

## IV. A PROPOSAL FOR LIMITS ON LIABILITY AND DISCRIMINATION

As this Comment has made clear, employers can be required to evaluate the job relatedness of applicants’ prior convictions under both negligent hiring law and antidiscrimination statutes. Thus, the proposal presented here must incorporate changes to both sets of law to provide comprehensive reform. Because corrections departments also have a large role to play here, the necessary expansion of both their supervision and services is discussed below.

It is important to make clear from the outset that this proposal is aimed at those who know of their applicants’ ex-offender status. For those who do not check, this proposal will not affect their negligent hiring liability: Employers will still have no general duty to check criminal records, and must only conduct an adequate inquiry in order to avoid liability.<sup>199</sup> Given the increasing use of background checks,<sup>200</sup> this proposal will apply to an ever-growing number of employers. The increasing

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196. Clark, *supra* note 161, at 210.

197. Scales, *supra* note 161, at 438.

198. See Clark, *supra* note 161, at 210.

199. See *supra* notes 107–115 and accompanying text.

200. See *supra* notes 86–91 and accompanying text. The relative ease with which these records can be obtained suggests that even more employers will begin to check applicants’ criminal records.

interaction between corrections officers and employers envisioned by this proposal may also serve to notify some employers, and in turn improve the officer's ability to evaluate the risks posed by a particular job. It is true that forcing employers to check criminal records could help minority employment generally by dispelling the myth that all minorities are ex-offenders.<sup>201</sup> However, the general lack of uniformity and reliable information in criminal records currently available to the public, as discussed throughout this Comment, argues against establishing any of those records as an authoritative source on which we would have employers rely. Therefore, this proposal attempts to control the use of those records by targeting those employers who know their applicants are ex-offenders.

#### A. Changes to Negligent Hiring Law

When an employer hires a supervised ex-offender, courts should presume<sup>202</sup> that the employer is not liable for hiring the ex-offender under negligent hiring law unless that employer (1) knows or has reason to know of an incident of violence or threatened violence by the applicant unrelated to his or her prior conviction; or (2) is informed of a risk of harm to third persons by the ex-offender's supervising officer. If the employer does know of such an incident or has been warned of such a risk, that employer should then be subject to the traditional negligent hiring analysis—whether it acted reasonably in hiring the ex-offender, given that knowledge.

Under this proposal, employers should be held responsible for determining whether the ex-offender applicant is under supervision. Most commercial- and state-provided criminal histories reveal any community supervision.<sup>203</sup> If an employer knows about the conviction through some other means, it may request that the applicant provide the name and contact information of any supervising officer at the job interview. Applicants should be willing to provide this information because it will make them more likely to receive the job and will prove to their supervising

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201. Research suggests that employers who do not check criminal records tend to hire fewer black men than those who do because they avoid applicants whom they suspect of being ex-offenders. Holzer et al., *supra* note 15, at 5; Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* (Inst. for Research on Poverty Discussion Paper, No. 1243-02, Jan. 2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf>.

202. Because negligent hiring law has been developed in courts, not through statutes, asking courts to create presumptions regarding liability in certain circumstances is appropriate.

203. See *supra* note 37.

officers that they are following the conditions of their supervision. Employers should also be required to make contact with the supervising officer prior to hiring the applicant. This will serve to alert officers to the applicant's prospective job duties and environment (which the employer may be in a better position to describe),<sup>204</sup> improving the officer's evaluation of any on-the-job risk.<sup>205</sup>

If an ex-offender is found to be unsupervised at the time of application, employers may follow the current system and evaluate job relatedness themselves. Because the majority of those released from prison are released into community supervision, employers will be evaluating ex-offender risk in fewer cases. Furthermore, even though supervised ex-offenders will ultimately become unsupervised, the proposal here could still improve their job prospects: It may help them obtain employment while supervised so that, when they are up for hire as unsupervised ex-offenders, their work history and the remoteness of their crime may make them more attractive to employers.

#### B. Creation of Antidiscrimination Laws

Changing negligent hiring law alone may be insufficient to encourage the hiring of supervised ex-offenders.<sup>206</sup> To prevent continued discrimination against ex-offenders, states<sup>207</sup> should also enact legislation that would prevent employers from discriminating against supervised ex-offenders unless the employers (1) know or have reason to know of an incident of violence or threatened violence by the applicant unrelated to

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204. In particular, the level of supervision in a job has been seen as very important to the risk posed. See *Wal-Mart v. LIRC*, No. 97-2690, 1998 WL 286332, at \*3 (Wis. Ct. App. June 4, 1998) (finding that Wal-Mart's continual drug testing, daily security checks, and highly regimented and structured workday left the employee no substantial opportunity to distribute or use drugs in the workplace).

205. Some conditions of supervision also require that ex-offenders report to their supervising officers prior to any change in employment status. See Ohio Department of Rehabilitation and Corrections, Conditions of Supervision, <http://www.drc.state.oh.us/offendersearch/PDFs/Conditions%20of%20Supervision.pdf> (last visited Nov. 11, 2006) (Ohio conditions retrieved through a link from an offender details page).

206. After all, employers often refuse to hire ex-offenders for reasons broader than potential liability. Changing negligent hiring law alone also would not change the EEOC guidelines for Title VII compliance, so employers would still have to evaluate job relatedness.

207. Federal legislation, of course, would have the benefit of creating an equal playing field for ex-offenders across the nation. However, given that more ex-offenders are under state or local community supervision, see GLAZE & BONCZAR, *supra* note 19, at 11, and that some states have already taken the lead in antidiscrimination legislation, legislation at the state level seems most appropriate here.

his or her conviction; or (2) are informed of a risk of harm to third parties by the ex-offender's supervising officer.<sup>208</sup> Such legislation would then be consistent with state corrections policies of encouraging ex-offender employment and rehabilitation. Those states already possessing antidiscrimination statutes should abandon current requirements that employers determine job relatedness and modify them as described above.

Because this proposal prevents employers from discriminating against supervised ex-offenders except in certain cases, supervised ex-offenders should be able to find employment more easily.<sup>209</sup> Once employed, they will be less likely to reoffend, which leads not only to safer workplaces, but also to safer communities. Additionally, employers may feel more secure hiring those workers because they know that corrections officers are assessing the risks posed and have a duty to notify employers if they find third-party risk.

This proposal also leaves in place the federal bonding program, which insures employers against theft or embezzlement, as well as the federal tax breaks for employers who hire ex-offenders. These incentives no doubt encourage employers, but are currently insufficient on their own to change hiring practices.<sup>210</sup> Even if these programs were better funded or more widely available, they still would not address employers' concerns regarding safety and public relations. An employer who fears being in the headlines because a convicted murderer reoffends on the job would not be swayed by modest monetary payments, even if the programs insured against violent crimes, which they do not. Thus, these programs work best in concert with a proposal, such as the one made here, that addresses employers' concerns about violence in the workplace.

Furthermore, employers will still be able to refuse to hire unsupervised ex-offenders, who may be among the most dangerous offenders.<sup>211</sup> Employers will also be free to refuse to hire even supervised ex-offenders if they know that the applicant has been violent or has threatened violence

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208. Note that this antidiscrimination statute would then mirror the negligent hiring proposal made above. See *supra* Part IV.B. Having one standard will help employers know what is expected of them and bring consistency to a confused area of law.

209. It is important to note, however, that this proposal does not require employers to hire ex-offenders who are not qualified for the job. See discussion *infra* text accompanying note 213.

210. See Holzer et al., *supra* note 15, at 9 (suggesting that the funding for the bonding programs is too low and that most employers either do not know about the programs or are discouraged by the amount of paperwork involved); Van Dusen, *supra* note 1, at A1 (“[T]he bond had become a weak incentive—companies were increasingly held liable for workplace crimes, and most court settlements far exceeded the coverage offered by the Department of Labor.”).

211. See *supra* notes 46–47 and accompanying text.

unrelated to his or her conviction, or if they receive a warning from the applicant's supervising officer. An employer might be informed about violence or threats by the applicant's previous employer during a reference check,<sup>212</sup> or may even know of such behavior from their own experience with the applicant. The employer could then refuse to hire the applicant.

These results seem appropriate. Information received through job references or previous workplace experience can demonstrate a propensity for violence in the workplace setting. It may also be unrelated to the conviction and thus would not necessarily be considered by the applicant's supervising officer. Additionally, if an employer is informed by a corrections officer that the applicant poses a risk, the employer should be subject to negligent hiring liability if it ignores the warnings of a better-informed corrections department.

It is true that the proposed antidiscrimination law may force employers to employ those who, if given the choice, they would not hire. Managers might be required to hire those applicants previously convicted of rape or murder, to name two extreme examples. That requirement will, of course, be subject to each applicant's supervision status and to the corrections officer's determinations about the risks posed by that particular ex-offender. There are also other checks on these extreme cases: Some jobs are closed to ex-offenders because of licensing or bonding requirements.<sup>213</sup> Many of these requirements reflect the greatest fears

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212. Currently, employers have no "legal obligation . . . to disclose adverse information concerning a former employee," and if they choose to do so, it is only because of moral or social obligation. *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990). However, employers risk negligent misrepresentation liability if they give false or misleading information. See RESTATEMENT (SECOND) OF TORTS § 311 (1965); see e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997). The issue of requiring employers to give accurate references is beyond the scope of this Comment and has been discussed in depth elsewhere. See, e.g., Markita D. Cooper, *Beyond Name, Rank, and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287 (1998); John Ashby, Note, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117 (2004); Joshua D. Sayko, Note, *When Employers Get "Something for Nothing": The Need to Impose a Limited Obligation to Disclose in Employment Reference Situations*, 38 SUFFOLK U. L. REV. 123 (2004).

213. These restrictions do generalize based on crime, excluding ex-offenders from some jobs altogether, and these exclusions have been upheld. See *Henry v. Earhart*, 553 A.2d 124, 129–30 (R.I. 1989). However, employers are not asked to evaluate ex-offender risk in these situations—the risk instead has been evaluated by legislatures, presumably with input from corrections departments—and thus the barriers that licenses pose are beyond the scope of this Comment.

about ex-offenders and employment: felons as security officers<sup>214</sup> or police officers,<sup>215</sup> sex offenders caring for disabled adults<sup>216</sup> or working with children.<sup>217</sup> Furthermore, this antidiscrimination law only applies to hiring. While this Comment does not advocate that employers hire and then promptly fire employees,<sup>218</sup> employers do retain the ability to fire, which they might exercise if they become aware of any on-the-job behavior that signals a risk.<sup>219</sup> Nonetheless, there will undoubtedly still be situations that leave employers dissatisfied. This proposal aims to balance the concerns of employers with the public interest in providing ex-offenders with options for rehabilitation. The current imbalance has left us with an untenable situation, so compromises must be made.

Finally, victims of workplace violence at the hands of ex-offenders will still have recourse under this proposal. They may assert negligent hiring law claims if employers hire unsupervised ex-offenders (and in some cases, supervised ex-offenders). If victims believe that corrections officers were negligent in their supervision of the ex-offender, they may also assert negligent supervision claims against corrections officers.<sup>220</sup> Additionally, if the employer has hired an ex-offender employee and

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214. See, e.g., N.Y. GEN. BUS. § 81 (McKinney 2004); WIS. STAT. ANN. § 440.26 (West 2005).

215. See, e.g., FLA. STAT. ANN. § 943.13 (West 2006).

216. See, e.g., ARK. CODE ANN. § 20-48-804 (2001).

217. See, e.g., CAL. PENAL CODE § 290.95 (West 1999); IDAHO CODE ANN. § 18-8327 (2004).

218. Because this proposal aims to help employers feel more at ease about hiring ex-offenders, it seems unlikely that many employers would hire an ex-offender because the antidiscrimination laws required it and then fire the individual the next day. This would also be inefficient from a training and human resources perspective.

219. Arguments could be made that, if the employer knows the employee has a criminal record, there is a heightened duty to supervise the employee, particularly regarding behavior similar to that of the prior offense. That, however, is for a future discussion.

220. See PETERSILIA, *supra* note 22, at 85–87; see, e.g., *Payton v. United States*, 636 F.2d 132 (5th Cir. 1981); *Goergen v. New York*, 196 N.Y.S.2d 455 (N.Y. Ct. Cl. 1959). It is possible that a fear of negligent supervision claims could give probation and parole officers an incentive to be overly cautious about risks, causing them to overreport. PETERSILIA, *supra* note 22, at 85–87. That would leave ex-offenders in the same position they are now—excluded from employment because of a fear of liability—just with a different party responsible for the exclusion. However, corrections departments should be able to curb overcautious reporting by carefully describing procedures and scenarios in which risks should be reported, with corresponding immunity when the supervising officer has complied with these procedures. The recidivism indices that corrections departments currently use would be a natural basis for these procedures and would still provide a more factually specific inquiry regarding risk than can be undertaken by employers.

Negligent supervision claims have already been allowed in some instances. See, e.g., *Rieser v. District of Columbia*, 563 F.2d 462, 474–75 (D.C. Cir. 1977) (finding no immunity because the parole officer's actions were “ministerial” not “discretionary”). In others, the officers have been held immune. See, e.g., *J.A. Meyers & Co. v. L.A. County Probation Dep't*, 78 Cal. App. 3d 309, 314 (Ct. App. 1978) (finding the probation officer immune because his actions were “confined to the terms of probation as determined by the judge”).

retains that employee despite behavior during the course of employment that creates a foreseeable risk of harm, victims may bring negligent retention claims against the employer. With negligent retention claims, there is less concern that the employer is being forced to make an evaluation without all the necessary information; the employer has a first-hand view of any behavior evidencing a dangerous propensity.<sup>221</sup> Alternatively, if the victim's injury occurs when the employee commits a tort acting in the scope of his or her employment, the employer may be liable under the respondeat superior doctrine.

### C. Expansion of Corrections Departments

Because the proposal here shifts the responsibility for evaluating the workplace-related risks that supervised ex-offenders pose to corrections officers, corrections departments will likely need to expand. Given the current use of risk assessments, requirements that ex-offenders obtain and keep employment, and established policies and procedures regarding supervision and the provision of services, corrections departments will be asked to do little that is new to them. Nonetheless, some of these aspects of corrections are not currently being implemented with as much uniformity or thoroughness as they could be.<sup>222</sup> Departments will likely require additional staff and funding,<sup>223</sup> as well as clearer guidelines regarding the duty to report risk to employers.<sup>224</sup>

Increased partnerships with community businesses would help supervising officers understand employers' concerns while also facilitating the placement of ex-offenders in appropriate jobs. Stronger connections to prerelease prison job training and education programs may help supervising officers evaluate risks regarding a particular job type. These sorts of improvements will help strengthen corrections departments, protect employers, and minimize the widespread employment discrimination that many supervised ex-offenders face.

States are already beginning to expand their probation and parole departments as a way of curbing their overflowing prison populations

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221. See *supra* note 219.

222. See *supra* notes 39–44 and accompanying text. For an examination of the difficulties facing community supervision, see DICKEY & SMITH, *supra* note 168.

223. Intensive supervision, for example, costs roughly \$8000 per year per offender, versus regular supervision at \$5500 per year per offender. Turner et al., *supra* note 31, at 552.

224. While the federal duty to report risk seems clear, see *supra* notes 23–24 and accompanying text, it is not as clearly spelled out in state procedures.

and cutting costs.<sup>225</sup> Many have expanded transitional programs aimed at helping ex-offenders reenter society.<sup>226</sup> Scholarship is pushing for even more reforms: more community-centered parole models and a greater focus on treatment and work training.<sup>227</sup>

Finally, even though an expansion of corrections departments may require additional funding, research shows that effective reentry programs can actually save money. BI Incorporated, a private corrections company, found that an Illinois program that significantly reduced recidivism rates saved millions of dollars.<sup>228</sup> This is intuitive: Preventative methods often save money over the long run. Indeed, even under the same budget, reallocating funds according to greatest need (the first months, when recidivism rates are highest, for example<sup>229</sup>) could have a significant impact.<sup>230</sup> Even though costs will likely be incurred in expanding corrections departments under this proposal, the costs of not doing so—both monetarily, and in terms of safety—would likely be greater.

## CONCLUSION

Surveys show that nearly 40 percent of employers say they would definitely or probably hire an ex-offender.<sup>231</sup> Thus, the arguments here will already appeal to a significant number of employers who want to hire ex-offenders when they feel it is safe to do so and feel assured that their liability is limited in some way. The protections for employers and the more comprehensive risk assessment the proposal in this Comment provides will hopefully make more employers willing to hire ex-offenders.

Of course, some employers will remain unwilling. Supervised ex-offenders may still be turned away from many jobs because of their poor education, poor job skills, absence from the workplace, and geographical

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225. See PATRICK KELLY & DON STEMEN, VERA INST. OF JUSTICE, PROBATION REFORM: IS ZERO TOLERANCE A VIABLE OPTION? 2 (2005), [http://www.vera.org/publication\\_pdf/316\\_587.pdf](http://www.vera.org/publication_pdf/316_587.pdf) (describing the costs of providing one year's worth of supervision for an individual as less than 1 percent of incarceration costs over the same time).

226. See WOOL & STEMEN, *supra* note 41, at 13.

227. See PETERSILIA, *supra* note 22, at 192–220; TRAVIS, *supra* note 16, at 323–52.

228. See BI INC., *supra* note 55, at 5 (“[A] 40.6% reduction in new criminal convictions . . . translates into an estimated saving of \$3.6 million over 3 years to the Illinois taxpayers.”).

229. See LANGEN & LEVIN, *supra* note 49, at 3 (finding that the rearrest rate is nearly 30 percent in the first six months, and then only goes up another 15 percent for each of the three years following).

230. Jeremy Travis has made a similar suggestion. See TRAVIS, *supra* note 16, at 115.

231. Holzer et al., *supra* note 15, at 4.

limitations.<sup>232</sup> These problems cannot be addressed without improving job training and education programs in prisons and expanding postrelease services, which will require money, manpower, and the attention of policymakers.

At its most ambitious, this Comment argues for sweeping revisions in the way society thinks about employers' roles in ex-offender employment. Some of the changes posed require only modifications of current law (like the change in negligent hiring liability), while others will require a considerable amount of effort, money, and political will (like the expansion of supervision and postrelease services). At the very least, this Comment hopes to make clear that our current system is dysfunctional, and leads to the employment of fewer ex-offenders, more recidivism, and workplaces that are no less dangerous.

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232. See TRAVIS, *supra* note 16, at 159, 165–67.