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Andrew Galle

George Mason University School of Law

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SQUARE WITH THE HOUSE: THE CASE FOR ENDING EX-OFFENDER EMPLOYMENT DISCRIMINATION

I. Introduction

From time to time and for a variety of reasons, people commit crimes. This is, of course, unavoidable in any system of justice. Once the offender is caught, convicted, and repays the harm he caused, he should be free to re-enter society and pursue a happy and productive life. However, for many of the nearly 600,000 incarcerated ex-offenders released each year in the United States, the path to reentry is permanently blocked because they are excluded from many of the best employment opportunities based on nothing more than their criminal history.¹ Without a chance at meaningful employment, these ex-offenders will never fully reintegrate into society and will instead be transformed into an underclass of citizen. Some may even perceive they have no option but to return to the criminal path that led them to their conviction in the first place to support themselves.

This paper will examine the reasons for and against allowing employment discrimination against ex-offenders. In Part II, it will introduce the problem and the typical players who are affected by the practice. In Part III, it will lay out the analytical framework describing how offenders should be punished, and will explore why employment discrimination is both a common practice and a bad idea. In Part IV, the paper will compare employment discrimination against

¹ Steven Greenhouse, *From Jail Cell to the Job Market: Conservatives Back Work Programs for Ex-Inmates*, N.Y. TIMES, Dec. 13, 2002, at B1.

ex-offenders to the practice of debarment. Part V will explore past solutions that address ex-offender discrimination and attempts to reduce recidivism with employment, and why they have failed. Part VI will then recommend new solutions, including outlawing employment discrimination, relying on employers to supervise ex-offender workers rather than the government, and creating an insurance program to reduce the risks that employers face in hiring ex-offenders. Finally, Part VII will conclude by stating that ex-offender discrimination must be outlawed if ex-offenders are ever to truly reintegrate and become functioning members of society.

II. An Illustrative Example

Larry Schanuel's criminal history appears to tell the story of a man who has had brushes with the law but has paid for his crimes. In April 1963, he pled guilty to Second Degree Robbery and in July 1967, he pled guilty to a charge of Transferring Government Obligations.² His parole period for those offenses expired in 1972.³ Apparently having repaid his debt to society, Schanuel applied to the Allied National Detective Agency of Belleville, Illinois, seeking employment as a private detective.⁴ He was denied this opportunity because state law prohibited private detective agencies from employing "individuals who have been convicted of a felony or crime of moral turpitude unless ten years have passed from the discharge from any sentence imposed therefore."⁵ This

² Schanuel v. Anderson, 708 F.2d 316, 318, n1 (7th Cir. Ill. 1983).

³ *Id.* at 318.

⁴ *Id.* at 318-19.

⁵ *Id.* (quoting 11 ILL. REV. STAT. § 2622(1)).

meant that Schanuel, regardless of how good a candidate he was, could not enjoy the benefits of such employment until at least 1982, ten years after he had served the entirety of his sentence.

Unsatisfied with being relegated to a class of unemployable workers, Schanuel filed suit on behalf of himself and other similarly situated individuals, alleging (among other things) that the prohibition against hiring ex-offenders bore no rational relationship to a legitimate societal interest as required under the Due Process Clause of the 14th Amendment and a line of cases within the circuit holding that “[licensing or employment] qualification standards must bear a rational relationship to the skills necessary for the job.”⁶ Ultimately, the Court of Appeals for the 7th Circuit ruled against the defendant and rejected the idea that a prior criminal history bore no rational relationship to the work performed by detectives. The court supported its decision with the simple statement that it was “not unreasonable to suppose that the public trust might be undermined by assigning [tasks relating to the guarding of persons and property] to ex-offenders.”⁷

Rules that allow discrimination against ex-offenders in employment are not uncommon throughout the nation.⁸ Not only are would-be private detectives discriminated against, but so too are dancehall owners convicted of felonies,

⁶ *Id.* at 319 (quoting *Thompson v. Schmidt*, 601 F.2d 305 (7th Cir. 1979)).

⁷ *Id.*

⁸ See, e.g., Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People With Criminal Records*, 7 J.L. SOC’Y 18 (2005) (tracing an extensive list of cases and rationales that courts have used to justify rules excluding ex-offenders from employment in various fields).

firefighters with a history of arson, and taxicab drivers who have a criminal history that suggests bad moral character, just to name a few examples.⁹ As the practice of ex-offender discrimination is so widespread, it should follow that the reasons underpinning it are not just based in “reason” and “common sense,” but are well rooted in actual fact and research that shows such discriminatory practices are effective at protecting the public and outweigh the harm inflicted against the ex-offenders. In order to understand if they are effective or not we must first understand how optimal punishments are determined.

III. The Costs and Benefits of the Rule

a. A Starting Place: $D = L / p$

On its simplest level, the punishment of crimes is a fairly straightforward idea. A criminal seeks to do an act because it will benefit him, but such an act is deemed by society to be unacceptable and is therefore forbidden by law. Take the simple example of a purse snatching: A criminal seeks the value of the contents of the purse, but society has an interest in keeping its citizens free from robbery and violence. Society will pass laws criminalizing the act of purse snatching and will assign a punishment sufficient to discourage individuals from becoming purse snatchers. As Judge Richard Posner explains, society must take into consideration various factors in order to determine the optimum value of the punishment (D), including the harm caused by the criminal (L) and the

⁹ *Id.* at 44-45.

probability of his being caught and made to pay (p).¹⁰ He expresses this formula as:

$$D = L / p$$

Other scholars have expanded on this simple formula to include other variables in an attempt to make it more comprehensive and useful, but for our purposes, it is sufficient in its current form.¹¹ From time to time, society can amend D , depending on changes in L and p (e.g., to represent the increasing losses from this sort of behavior or from advancements in law enforcement technology that make detection more likely, respectively). Even retributivists can insert an amount to be paid before the offender has satisfied his debt by adding it to the right side of the equation. However, the one constant is that after D has been satisfied by the criminal (a fine paid or sentence served in the event financial compensation is not possible or appropriate), then no further action should follow because the socially optimal level of punishment has been achieved. Any additional punishment will have negative effects, like over-detering behavior that is socially beneficial because it is too close to punishable behavior, resulting in inefficiency.¹² Posner illustrates this inefficiency with the example of a motorist who gives up driving because the penalty for speeding is death.¹³ The inefficiency occurs because drivers will not drive at all in an attempt to avoid the penalty and society will lose the

¹⁰ Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 279 (8th Ed. 2011).

¹¹ *See, e.g.*, Gary S. Becker, *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 5-7 (1974) (in which he splits D into the harm caused to society from the criminal act, reduced by the benefit received by the criminal).

¹² *Id.* at 280.

¹³ *Id.*

benefits of travel by car.¹⁴ In an employment case like Schanuel's, one can imagine that he would not confess to crimes, reveal them in employment applications or enter into plea agreements in the first place because the risk of punishment is so extreme that it would preclude him from obtaining a reputable job for the next decade on top of his other punishment. Thus, society would lose some of the benefits of plea bargaining (and a less expensive and more quickly resolved docket that comes with them) and honesty.

Why, then, impose a ten year prohibition on becoming a detective on ex-offenders like Schanuel if he has already satisfied D by serving his sentence and parole?

b. The Case for Discrimination

Posner suggests that the stigmatizing effect of a criminal history may have some benefit to society and employers as it represents a signal to those who would transact business with the criminal in the future.¹⁵ Courts like the one in *Carlyle v. Sitterson* appear to have embraced this idea.¹⁶ In *Carlyle*, the court supported the discharge of a firefighter upon learning of his convictions for arson.¹⁷ The court rooted its decision in "common sense," stating:

Common sense dictates that in many instances, the government must have authority to separate employees because of conduct occurring prior to the employment...This Court finds that any argument that

¹⁴ *Id.*

¹⁵ *Id.* at 281.

¹⁶ *Carlyle v. Sitterson*, 438 F. Supp. 956, 963 (D.N.C. 1975).

¹⁷ *Id.*

the defendants acted capriciously or arbitrarily in discharging the plaintiff from the fire department because he was a convicted arsonist to be totally devoid of merit. ... Not only must they consider the past record and character of their employees, they must also seek to insure continued public confidence in government and the services it provides.¹⁸

The “common sense” rationale advanced by this court and Posner appears to be that since this person has committed a crime in the past, he has communicated his possible intent to commit crimes in the future if given the opportunity, and therefore, employers should be allowed to avoid employing him. Presumably, this will save the expense of future similar crimes (L), and the related costs of prosecuting and punishing them.

There is some weight to this argument as most ex-offenders will commit crimes in the future. For evidence we need only look as far as any of the numerous studies on recidivism. One such study conducted by the Bureau of Justice Statistics tracked the release of nearly 300,000 prisoners in 1994 (which accounted for nearly two-thirds of the total number of prisoners released that year).¹⁹ Of those 300,000, approximately 67.5% were re-arrested within three years.²⁰ Similarly, there are no shortage of studies on the state level that come to the same conclusion that the majority of offenders recidivate in the first two or

¹⁸ *Id.*

¹⁹ Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUSTICE STATISTICS (2002), available online at: <http://www.bjs.gov/content/pub/pdf/rpr94.pdf> (Last Accessed December 5, 2011).

²⁰ *Id.*

three years after release.²¹ Therefore, we can safely conclude that an employer does, in fact have a legitimate interest in protecting himself from ex-offenders as they are more likely than not to engage in criminal acts in the future.

Another consideration for the potential employer is the threat of being sued for negligent hiring, which can occur if the employer knew or should have known that his employee had propensities towards violence due to his criminal history and such violence resulted after the hiring.²² Such liability has attached where an employer's background check failed to uncover an ex-offender's past history of assault and burglary and a workplace sexual assault occurred after hiring.²³ Though the court stressed that such liability can be avoided without banning all ex-offender employment, the common solution to avoiding this liability has simply been for employers to identify all ex-offenders and disqualify them for employment at the application stage just to be on the safe side (as long as and to the extent that law permits such discrimination).²⁴

c. The Costs of Discrimination

i. Purposeless Over-Internalization of Consequences

²¹ See, e.g., *Recidivism*, CONNECTICUT DEPARTMENT OF CORRECTIONS (2011), available online at <http://www.ct.gov/doc/cwp/view.asp?a=1492&Q=305970> (Last accessed December 5, 2011) (stating that approximately 56% of offenders released in 2008 from Connecticut institutions were re-arrested within two years); *Offender Recidivism Figures*, UNIVERSITY OF ALASKA (2007), available online at http://justice.uaa.alaska.edu/forum/23/4winter2007/c_recidivism.html (Last accessed December 4, 2011) (stating that approximately 60% of Alaskan ex-convicts recidivate within three years).

²² Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1302-1304 (2002).

²³ *Id.*, see also *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 908-913 (1983).

²⁴ Leavitt, *supra* note 16, at 1302-04.

The mere fact that an ex-offender is a riskier choice for his employer does not necessarily mean that barring him from employment makes economic sense. Take for example the arsonist-turned-firefighter who would have been retained but for his past arson. Why should his prior act of arson matter to his future employment with a fire department? He already paid his debt to society for his arsons (D), and so, he has not only reimbursed society for the cost of his bad acts (L), but has paid an additional cost taking into account the unlikelihood he would be caught (*p*). Being a rational actor, he should be one of the least likely individuals to attempt the same act again as he should have an exaggerated expectation of being caught based on his past experience. It is of course tempting to argue that criminals are irrational actors (and that is why they commit crimes in the first place), but as Posner points out, the available empirical evidence shows that even criminals are rational actors, taking into account opportunity costs, the probability of being caught, and the severity of any potential punishment.²⁵ Therefore, we can only conclude that society is engaging in over-deterrence and is forfeiting socially beneficial activities as Posner predicted because ex-offenders are being compelled to suffer a loss greater than D.

ii. The Fear of Recidivism is Exaggerated

The fear of recidivism is not a convincing argument for supporting a bar against these employees as far as safety to society is concerned.

²⁵ Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 279 (8th Ed. 2011).

While it is admittedly true that an ex-offender is more likely than not to commit a crime in the future, there is no reason to believe that denying the ex-offender employment opportunities will reduce the risk of recidivism. For example, the arsonists was not a firefighter before his conviction and still managed to commit the arson that led to his removal. The same holds true for Larry Schanuel, whose crimes of fraud and robbery were committed without the aid of a detective's license.

In fact, many commentators believe that discriminating against ex-offenders in employment actually increases the risk of recidivism.²⁶ Some of these commentators observe that employment is good for ex-offenders, not only because it provides for their survival by giving them a paycheck, but also because work promotes regular social interaction, community involvement, increased self-esteem, and social control on the ex-offenders that will reduce recidivism.²⁷ Some researchers believe that such opportunities for meaningful employment actually reduce recidivism, becoming increasingly effective as the ex-offenders age.²⁸

At the very least, by providing the ex-offender with attractive employment opportunities, the opportunity costs of forgoing them and instead choosing a life of crime increases, thereby making recidivism less likely. Conversely, denying employment opportunities would mean the

²⁶ See, e.g. Christy A. Visher, Laura Winterfield & Mark B. Coggeshall, *Ex-offender employment Programs and Recidivism: A Meta-Analysis*, J. OF EXPERIMENTAL CRIMINALOLOGY, 295-315 (2005).

²⁷ *Id.* at 295-96.

²⁸ Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, AM. SOC. REV., Vol. 65, No. 4 (2000), pp. 529-46.

opportunity cost for choosing a life of crime becomes less, and recidivism should go up.

However, none of this means that an individual employer who hires an ex-offender is not taking a risk by doing so. The news is replete with examples of how ex-offenders have harmed their employers and coworkers.²⁹ Thus, even though denying employment opportunities to ex-offenders harms society as a whole (by increasing the total likelihood of recidivism), it is rational for the employer to engage in this practice because he does not fully internalize risks society faces in general, but only those that he himself has to absorb. Put another way, the employer would rather have the ex-offender recidivate against his neighbor frequently than against his own interests even once.

iii. Discriminatory Tastes Are Always Expensive

Employers who discriminate have tastes for or against certain types of employees. For example, an employer who refuses to hire ex-offenders has a taste favoring non-offenders. Economists like Gary S. Becker have found that employers who discriminate based on taste are increasing their own cost, either because they are willing to endure reduced incomes or

²⁹ See, e.g., Stephen P. Shepard, *Negligent Hiring Liability: A look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-offenders*, 10 APPALACHIAN J. L. 145, 148-49 (2011) (describing how a convicted sex offender raped other employees after being hired).

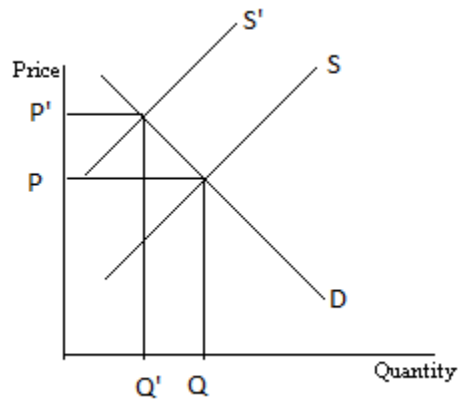
pay more for the same quantity and quality of labor.³⁰ To illustrate Becker's theories, suppose that the entire workforce consists of two groups, E (ex-Offenders) and N (non-offenders), who are perfect substitutes (in this scenario, this means that an employer has no merit based reason to prefer one group over the other).³¹ In the equilibrium marketplace, with no discrimination, the wages paid to these workers would be equal. However, if some employers have a taste for N (such taste represented by d), the wages (W) they are willing to pay to N increase. This increase represents the amount that the discriminating employers are willing to pay to avoid transacting with their disfavored group.³² The inefficient wage is represented by the equation $W_N = W(1 + d)$. Similarly, if the market as a whole contains many employers with a similar or greater taste preference, then the prevailing wages paid to non-offenders can be expected to increase further. Since the wages are higher, the quantity of the products the employer produces is reduced because the employer's costs of production are increased. This harms the employer as his net revenues are reduced. This harms the society as the total level of production is less than the non-discriminatory equilibrium, resulting in fewer products and higher prices. To see why, consider the following graph representing a labor market in which discrimination has increased costs:

³⁰ See Gary S. Becker, *THE ECONOMICS OF DISCRIMINATION* 14 (2nd ed., 1971).

³¹ This analysis parallels Becker's analysis of the effects of racial discrimination. *Id.* at 13-44. However, as Becker points out, his analytical framework can be applied to any discriminatory practice, including race, gender, bloodline, or even to people with "unpleasant" personalities. *Id.* at 11.

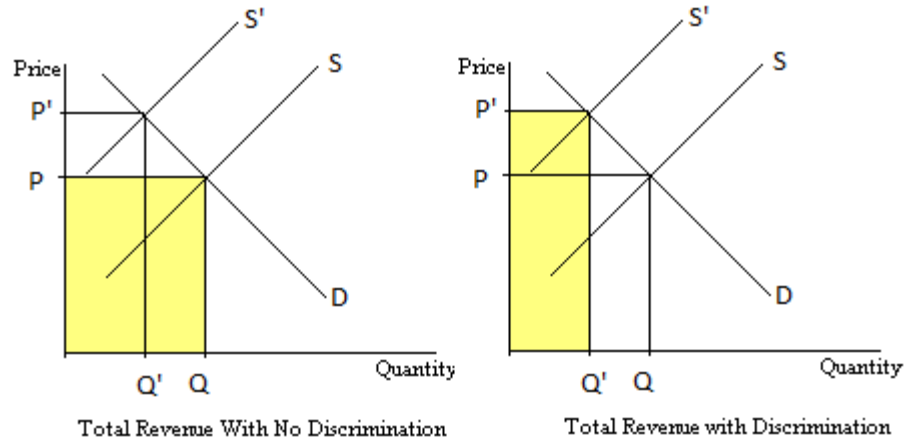
³² *Id.* at 14.

Figure 1



Here we see employers have absorbed an additional cost of production, in this case, the inflated wage caused by discrimination. This increase in costs shifted the supply of whatever product the employer produced from S to S' , which resulted in both higher prices (P') and lower quantity supplied (Q') than would otherwise be available had the market operated in equilibrium (where $P=Q$). Hence, we see that society has suffered as a whole because it has to make do with less and pay more as a result of discrimination. However, the employers do not just suffer because society in general suffers but because their total revenues are reduced as illustrated in Figure 2:

Figure 2



Here, we see that even though employers are able to charge a higher price (now at point P') for the products or services supplied, they still lose out overall as their total revenue (the shaded rectangle on the right diagram) is now smaller than if they did not discriminate at all, sold at a lower price, and sold more units. Therefore, both employers and society suffer as a direct result of discriminatory hiring practices.

Such discriminatory practices also harm the discriminated against party because, obviously, they are not hired or are hired only at reduced wages compared to their counterparts. Surprisingly, even the preferred group may be harmed because the employers are less able to hire workers because the marginal cost of hiring them is higher, and employers will only hire workers until marginal cost equals their marginal product. Thus, discrimination ultimately leads the employer to pay increased marginal costs for labor, produce less, and sell at higher prices, leaving everyone involved in a worse place than had discrimination not occurred.

In many markets, discrimination is at least partially controlled by the fact that an employer who engages in discrimination puts himself at a comparative disadvantage to those employers who do not have as high a *d*-value. This is because the groups that do not discriminate as much face lower marginal costs, and can expand more quickly compared to their more discriminatory counterparts.³³ However, in the labor market, this counteractive force on ex-offenders is minimized if not eliminated entirely because there is often an expectation or requirement imposed on employers that forces them to engage in discriminatory practices. This can be in the form of a law that requires discrimination as was the case with Schanuel’s detective licensing. Alternatively, social norms and expectations can create this discriminatory requirement, as when the *Carlyle* court observed that the government “must” ensure public confidence and “must” take into account a firefighter’s past involvement in an arson. Even if an employer would not have a comparatively low *d*-value, he would be required to increase his to the market’s *d* as it is expected or required of him. Therefore, employers are particularly likely to engage in discrimination against ex-offenders as there is no advantage in not doing so.

IV. Searching for an Analogy: Debarment

³³ *Id.* at 44.

Since there was no period in which the labor market was entirely free from the ancient tradition of ex-offender discrimination,³⁴ it is not possible to find conclusive evidence that its absence will be beneficial or not, even if economic theory suggests that it should be. However, evidence is available that suggests a similar practice, debarment, does have the negative discriminatory effects that economic analysis would suggest.

Debarment refers to when certain individuals or organizations are made ineligible to receive government contracts after engaging in prohibited conduct like fraud, waste, or abuse.³⁵ Such a scheme closely parallels employment discrimination in general because after conviction of a crime, employers will not hire ex-offenders, in effect “debarment” them from future employment opportunities. Therefore, lessons learned from studying the effects of debarment should be instructive as to the effects we can expect from ex-offender discrimination.³⁶

Researchers have found that debarment is a preferable method to incarceration because it is less expensive than administering fines and imprisonment.³⁷ This is because debarment does not require the state to

³⁴ See *infra* Part V for a discussion of the incomplete efforts that have been attempted to reduce ex-offender discrimination.

³⁵ See, e.g., Exec. Order No. 12,549, 51 Fed. Reg. 6370 (Feb. 18, 1986); see also *FAQ, EXCLUDED PARTY LIST SYSTEM*, <https://www.epls.gov/epls/jsp/FAQ.jsp#1> (last accessed November 30, 2011).

³⁶ See John R. Lott, Jr., *The Effect of Conviction on the Legitimate Income of Criminals*, 34 *ECON. LETTERS* 381 (1990).

³⁷ Douglas H. Ginsburg and Joshua D. Wright, *Antitrust Sanctions* (November 8, 2010). *Competition Policy International*, Vol. 6, No. 2, pp. 3-39, Autumn 2010; George Mason Law & Economics Research Paper No. 10-60. Available at: <http://ssrn.com/abstract=1705701> (Last accessed Dec. 17, 2011).

pay for the holding and care of a prisoner or provide for the collection of fines, but instead diminishes the offender's future earnings (by denying them access to contracts they otherwise may have been awarded), which itself acts like a deterrent. The additional debarment deterrent eliminates or at least reduces the total fine and incarceration period necessary to achieve any given level of deterrence.³⁸ Debarment itself can even act as a type of shaming, discrediting the target in the community, and therefore is a form of free punishment which costs the state virtually nothing yet still acts to deter offenders. Finally, the Supreme Court has held that debarment is a constitutionally permissible practice.³⁹

However, any system utilizing debarment has drawbacks. First, the effect of debarment is progressive, so it will punish some offenders more than others even though they committed the same crime. Research has shown that the higher the income the offender had prior to the debarment, the more painful the penalty because the amount of lost future earnings increases dramatically.⁴⁰ For offenders with more limited income potential, the deterrent effect of debarment is far diminished and is unlikely to effectively prevent future bad conduct.⁴¹ Such a "punish the

³⁸ *Id.* at 19.

³⁹ *See* *De Veau v. Braisted*, 363 U.S. 144, 157–60 (1960); *Hudson v. United States*, 522 U.S. 93, 105 (1997); *see also* Ginsburg, *supra* note 37, at 74.

⁴⁰ Joel Waldfogel, *The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen,"* 29 J. HUMAN RESOURCES 62, 75-76 (1994); *see also* Ginsburg, *supra* note 37, at 57.

⁴¹ Waldfogel, *supra* note 40, at 76.

wealthy” effect is a perversion of justice because offenders committing the same offense “pay” different penalties.⁴²

Also, by allowing the community to take into account the offender’s reputation, the offender may be permanently disadvantaged and suffer a lifelong loss of income potential. Research has shown that the loss of income is more than what can be accounted for by the loss of experience caused by the offender’s period of exclusion from the marketplace, which strongly suggests an enduring stigmatizing effect, depressing the ex-offender’s future earnings.⁴³ This effect can continue until the end of the offender’s life, and therefore, would greatly exceed the optimal penalty (a higher fine or additional incarceration) the offender would have otherwise been required to serve.

Thus, we see that allowing a stigma attach to an offender is both unjust and economically unwise because it allows enhanced penalties for well-to-do offenders and because its potential harm to the offender can far exceed the optimal level of damages the offender is expected to pay. Any system that allows discrimination based on reputation, including ex-offender employment discrimination, should not be utilized in a society that favors equal treatment of offenders and punishment that is proportional to the injury inflicted.

V. Past Attempts to Correct the Problem

⁴² *Id.* at 82.

⁴³ *Id.* at 67; *see also* Ginsburg, *supra* note 37, at 3 note 57.

The problem of ex-offender employment discrimination is by no means a new one, and legislation has frequently been passed to address it. Just a few of the prior examples of ex-offender employment programs include the Baltimore Living Insurance for Ex-Prisoners (LIFE) program, the Transitional Aid Research Project (TARP), Job Training Partnership Act (JTPA), and the Job Corp.⁴⁴ These programs attempted to reduce recidivism through gainful employment using a wide range of strategies and evaluation methodologies. Some, like Job Corp, consisted of residential programs that emphasized vocational training of some 60,000 ex-offenders aged 16-24 drawn from throughout the country.⁴⁵ Others, like TARP, focused on just 4,000 ex-offenders in two states where employment enrollment assistance was provided.⁴⁶ Still others, like LIFE, merely provided financial support to ex-offenders to see what would happen.⁴⁷ Despite their different strategies and methods, all of these programs boiled down to the same conclusion in the end - not one of them demonstrated any statistically appreciable effect on the reduction of recidivism.⁴⁸

The most obvious reason as to why these employment-based initiatives failed to reduce recidivism is that they failed to address the underlying cause of unemployment caused recidivism - i.e.,

⁴⁴ For a detailed description of each program, Visher, *supra* note 26, at 304

⁴⁵ *Id.* at 304.

⁴⁶ *Id.* at 301.

⁴⁷ *Id.* at 300.

⁴⁸ *Id.* at 309-310.

discrimination. None of the studies listed above prohibited employer discrimination, nor addressed the risks employers face when hiring ex-offenders. Without addressing these underlying causes of the problem, there is little reason to believe that any amount of aid given to ex-offenders in the form of training, financial support, or job placement assistance will reduce recidivism.

VI. Suggested Solutions

a. The Two-Pronged Approach

In order for any employment-based anti-recidivism program to be effective it must both prohibit employer discrimination against ex-offenders and mitigate the risk employers face from hiring ex-offenders. A two-prong statutory scheme that first prohibits employment discrimination based on ex-offender status, including the mere inquiry into such status, and second insures the employer to help offset the harm that employers face when an employed ex-offender recidivates and causes harm to him would be effective in addressing this problem.

The most obvious means of prohibiting ex-offender employment discrimination is simply to make it illegal. This can be accomplished by simply adding the term “ex-offender status” to the list of enumerated protected classes in existing anti-discrimination statutes such as those that already protect against discrimination based on race, sex, color religion, and national origin, like the federal Civil Rights Act of 1964 or similar

state legislation.⁴⁹ Some states have already moved in this direction, the most notable being Wisconsin which is currently considered to offer both the simplest and strongest protections for ex-offenders.⁵⁰ The statutory scheme in Wisconsin, at least on its face, prohibits all use of criminal histories or arrest records, and even the act of inquiring about the existence of such records, by both private and public employers making employment or licensing decisions just as it prohibits discrimination based on age, race, creed, color, disability, marital status, sex, national origin, ancestry, and a number of other protected classes.⁵¹ However, it specifically exempts all ex-offender discrimination in which the employer can show the ex-offender's previous offenses are of a type that "substantially relate to the circumstances of the particular job or licensed activity," or if it is a job that requires fidelity bonding that cannot be obtained without a criminal history check.⁵² Furthermore, the legislature also allows discrimination on a long list of enumerated crimes, from failing to register for selected service to the unlawful manufacture of controlled substances.⁵³ Thus, while founded on the right idea of

⁴⁹ Specifically, the Civil Rights Act prohibits, among other things, employers from failing or refusing to hire, discharging or "otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, as amended, codified at 42 U.S.C. § 2000-e2.

⁵⁰ See also Jennifer Leavitt, Note, *Walking a tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1288 (2002).

⁵¹ WIS. STAT. ANN. § 111.321 – 322, 335; See also Jennifer Leavitt, Note, *Walking a tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1288-1294 (2002) (Describing the Wisconsin statutory scheme as well as a number of other states attempts to protect ex-offenders from employment discrimination).

⁵² Wis. Stat. 111.335(1)(c)

⁵³ *Id.*

protecting ex-offenders from employment discrimination, the exceptions eviscerate the law's potential.

Suppose, however, that such a scheme were enacted without any of the exceptions. In such a situation, employers would hire ex-offenders as often as they would hire identically qualified non-offenders because they would have no reason not to (and would be prohibited from seeking such a reason). As a result, recidivism would be expected to drop because, as mentioned earlier, ex-offenders can obtain legal means for their survival by receiving paychecks instead of needing to turn to crime for support and because work promotes regular social interaction, community involvement, increased self-esteem, and social control over the ex-offenders.⁵⁴ As recidivism decreases, society saves as it pays for fewer trials and detentions, as well as the corresponding salaries of judges, police officers, and other employees who are no longer needed as the total amount of crime declines - a significant consideration in a \$228 billion per year industry.⁵⁵ Furthermore, even in the unlikely event that recidivism rates did not fall, society would still benefit as a whole because with more workers in the labor market, the wage demanded for each worker falls and employers, faced with reduced costs, will be able to produce more goods

⁵⁴ Visher, *supra* note 26, at 295-296 (2005).

⁵⁵ *Employment and Expenditure*, BUREAU OF JUSTICE STATISTICS, available online at <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=5>, (Last accessed November 22, 2011) (reporting that state, local and federal spend approximately \$228 billion for police protection, corrections, and judicial and legal services in 2007).

and services, resulting in Figure 1 operating in reverse as it approaches equilibrium.

Employers fearing negligent hiring suits should also benefit under the proposed legislation. As discussed earlier, an element of negligent hiring is having known or should have known of an individual's propensity for criminal acts, and failing to search a criminal history can give rise to a negligent hiring suit.⁵⁶ Under the proposed statutory scheme, however, this fear should be eliminated because an employer is prohibited by law from knowing or even inquiring about ex-offender status. Thus, an employer cannot be held liable for hiring an ex-offender.

Despite all the potential benefits of the proposed statutory scheme, it is certain that recidivism will still be a problem. Even if it diminishes, there is no authority that suggests that it will be eliminated entirely. Further, it stands to reason that an ex-offender who recidivates will do so locally, or to those around him, and his employment means he will often have a close proximity to his employer and coworkers. Therefore, employers have a legitimate fear of an ex-offender committing crimes against him, or at least that affect him or his other worker's productivity, and therefore will still not want to hire the ex-offender. However, this risk exists whether the employer hires the offender or not and whether or

⁵⁶ See, e.g., *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 908-913 (1983) (holding that an employer fails to exercise reasonable care, and thus exposes itself to negligence liability, by hiring an ex-offender whose criminal history would have demonstrated his propensity to commit acts of violence, as long as the employer knew or should have known of such propensity.)

not there is a law prohibiting ex-offender discrimination. An arsonist, for example, who is likely to repeat his offense due to some internal propensity to destroy may choose to destroy a building belonging to his employer. However, even if he is unemployed, he will destroy *someone's* building if he recidivates, and the chances of the target being one of those of interest to the employer are significantly diluted as there is less reason to expect the ex-offender will be spending much of his time near the employer. However, the loss to society is the same – a building is lost. The only difference between the proposed scheme and the current pro-discrimination schemes currently in force are that the employers are permitted to try to protect themselves by reducing the chance that the building in question will be of value to them.

If the employer were required to hire ex-offenders, it stands to reason that such destroyed buildings would be far fewer. For one thing, as mentioned before, the employed ex-offender has less free time in which to plot and carry out his criminal agenda as more of his time is consumed by the employer. Similarly, he will be less likely to recidivate for the other reasons mentioned above, such as his reconnection with the community and an increased imposition of societal control on his behavior, again resulting in fewer burned buildings. Finally, if the ex-offender were employed, he would be supervised and monitored by an interested party – the employer – who does not want the ex-offender to destroy his property. Furthermore, the employer should watch all his employees

anyway to ensure productivity and to provide them instructions, so the incremental cost of this additional monitoring should be negligible. The currently available alternative would be for a disinterested parole officer to conduct similar monitoring. The parole officer is disinterested in the sense that he neither owns the resources that the ex-offender would destroy or steal should he recidivate, nor does he spend prolonged periods of time around the ex-offender (certainly not a traditional 40 hour week of supervision the ex-offender would receive in a typical work week with his employer).

Since society has saved through reduced recidivism (including the costs of the corresponding litigation, imprisonment, and disruption to society from criminal activity) and the diminished need to maintain parole and supervising functions over released ex-offenders as this cost is shifted to employers, society would be able to redirect a portion of their savings into an insurance program for employers who suffer harm by recidivating ex-offenders. Such a program would reduce or eliminate the risk that employers faced from hiring ex-offenders, and would diminish their taste for discrimination against this riskier class of workers as they become a safer choice. Even with these insurance payments, society would be better off financially because the total amount of payment would be less than the losses society would have suffered had employers remained able to discriminate.

b. Likely Criticism

There are two likely arguments that would be made in opposition to the proposed two-prong solution. First, the “common sense” notion that ex-offenders should not be given the means to commit their crimes again and second, the idea that ex-offenders are “unworthy” to receive the same protections as other, legitimately disadvantaged groups.

Proponents of the “common sense” approach would argue that preventing ex-offender employment discrimination only multiplies the harm ex-offenders do by giving them access to the means to commit the crimes they have already shown themselves willing to commit. Continuing with our familiar example, this would mean that we would expect to see ex-arsonist firefighters allowing fires to burn or even feeding them if we did not allow employers to prevent such ex-offenders from serving as firefighters. I have been able to locate no evidence to show that this theory is rooted in any studies. Instead, the notion appears to be premised on “common sense” wisdom of the sort that taught us that heavier objects fall faster than lighter ones. Admittedly, there is a certain distasteful reaction to giving ex-murderers guns when they become police officers, or allowing ex-child molesters from serving as kindergarten teachers, but should there be such a reaction?

In many cases, the answer is no. The ex-murderer, if he is unfit to reenter society or otherwise has not repaid the optimal level of damages (D), would not have been released from his incarceration to serve as a police officer, and therefore, employment discrimination would not be

necessary. If he has repaid the optimal level of damages, then we should treat the ex-offender as if he has fully internalized the consequences of his actions as we presume people are rational in making our social policies.⁵⁷ In the event his actions were so vile that no single person could fully internalize the action, such a person would never be released from incarceration as his D value would be too high to repay. As for those who are not rational actors (that is, even if they pay D, they will still commit the same offensive conduct), it is arguable that it is better to place them with an employer than to leave them at large, where they have already demonstrated an ability to commit their offensive acts. For example, research suggests that for some offenders, a biological predisposition compels them to commit certain crimes, and therefore, they are unable to internalize D and change their behavior.⁵⁸ For this relatively small group of individuals, it would be better to have them reenter society under the watchful eye of an employer, who already has an interest in monitoring his employees' behavior, than to simply release him into the population at large, monitored only by a disinterested parole officer in an overworked office, or in many cases, by no one at all.

Finally, there are any number of reasons that an ex-offender committed his original crime which would no longer apply should he find employment, but would apply if he continued to lack lawful employment.

⁵⁷ Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 279 (8th Ed. 2011).

⁵⁸ Adrian Raine, *The Biological Basis of Crime*, reprinted in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL* 43- 74, (J.Q. Wilson & J.Petersilia, Eds., 2002).

An ex-robber, for example, who stole to support himself or his family would have less reason to commit the act again if he was lawfully employed. However, if he is released and cannot find employment due to his criminal history, he would be placed back in the same, and perhaps worse, position he occupied when he made his choice to rob in the past.

The other possible argument against a prohibition on ex-offender employment discrimination is that ex-offenders are unworthy of employment discrimination protection. Such an argument has been raised against the already limited protections provided under state laws like the Wisconsin prohibitions detailed above.⁵⁹ Arguing that the existing limitations on Wisconsin's protections are not enough, at least one commentator advocated abolishing all ex-offender's employment discrimination protection since as a prior criminal, such individuals are "unworthy" of protection.⁶⁰ The ex-offender is unlike other protected classes because the other classes are discriminated against based on factors outside their control, such as race or gender.⁶¹ I would argue that such a criticism is improper because as a society, we should not punish an individual who has paid his debt to society, nor should we endorse the suggestion that some people are simply less deserving of gainful employment because they have made mistakes in their past. It would be fundamentally unfair to hold a past crime, for which the ex-offender has

⁵⁹ See *supra* Part VI.a.

⁶⁰ Thomas M. Hruz, *Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQUETTE L. REV. 779, 820-21 (2002).

⁶¹ *Id.*

already paid, against an ex-offender in important aspects of his life, like employment, forever. Allowing such treatment would convert all ex-offenders into a permanent underclass of citizens, unworthy of employment, deprived of opportunities that would reduce their chances of escaping their life of crime.

VII. Conclusion

Without adopting serious reforms that prohibit discrimination against ex-offenders in employment, ex-offenders will continue to recidivate, society will continue to pay an economically inefficient premium to avoid hiring them, and the problem of recidivism will continue. Even though employing ex-offenders represents a risk to the employer, it is clear that the offender will be likely to recidivate in any event against someone, and society will be better off with the additional control it will have over an employed ex-offender rather than one at large. At the very least, if the employer hires the ex-offender, recidivism would be less likely due to the imposition of social control, the closer eye the employer would use than the government, and the lawful alternatives to crime the ex-offender would have available. Therefore, it is in society's, the ex-offender's, and the employer's long-term interests that the ex-offender be free to seek meaningful employment unimpeded by discrimination so that he can make valuable contributions to society again.