

# DO CRIMINAL BACKGROUND CHECKS IN HIRING PUNISH?

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## INTRODUCTION

Criminal background checks in the hiring process make it more difficult for former offenders to obtain employment at their market skill level. As a result, many former offenders end up underemployed or unemployed altogether. This obstacle to finding gainful employment is a harm, and this harm directly follows from a former offender's criminal conviction. The harm can therefore be thought of as part of the punishment imposed on criminal offenders. However, unlike the formal punishment that a criminal offender receives through his sentence, the harm that follows the offender as he seeks employment after he has completed his formal sentence has no basis in punishment theory.<sup>1</sup> Criminal background checks in hiring is a policy that aims at furthering employer interests, not punishing criminal offenders. For this reason, the punitive effect of criminal background checks often goes overlooked even though there are simple, straightforward ways to reform the process without abridging the purpose of protecting employers.

Part I of this note reviews the principal reason why society permits employers to conduct criminal background checks in hiring: to protect them from organizational risk. The risk that employers face when they hire a person with a criminal history is a valid concern, but if we acknowledge that employers have good reason to be worried about hiring a person with a criminal history, we should also acknowledge that a person with a criminal history therefore faces increased employment obstacles as a direct result of having committed a crime in the past. Focusing disproportionately, if not wholly, on employer interests in justifying criminal background checks in hiring means ignoring much, if not all, of the other side of the equation.

Part II of this note focuses on the other side of the equation: the effect that criminal background checks in hiring have on job applicants with criminal histories. It argues that the effect of running criminal background

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1. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

checks in hiring is punitive to former offenders because it diminishes their prospects for gainful employment even after they served their sentences. This punitive effect opens the door to incidental adverse social effects, including substantive harms imposed on the families of former offenders as well as macroeconomic loss to society due to former offenders being underemployed or unemployed.

Once we understand that criminal background checks in hiring carries a punitive effect for former offenders, the question becomes whether any punishment theory justifies continuing to report a former offender's criminal history to employers. Part III of this note reviews theories of punishment—retributivism, incapacitation, denunciation, rehabilitation, and utilitarianism—to see if the punitive effect of criminal background checks in hiring is consistent with any of them. The conclusion is that it is not. The analysis then proceeds to explore how the criminal background check system can be reformed to bring the punitive effect into accord with the theories of punishment while still allowing employers to run background checks.

Part IV finalizes the analysis of criminal background check reform by reviewing a relatively recent utilitarian proposal: redemption policy. Redemption policy holds that some former offenders can be predicted with high accuracy to have demonstrated that they actually pose no greater risk to employers than the average job applicant. The note considers some of the pros and cons of this approach.

## I. SOCIETY'S JUSTIFICATION FOR CRIMINAL BACKGROUND CHECKS IN HIRING

### *A. The Expressed Concern: Organizational Risk*

The employer practice of conducting criminal background checks on individuals applying for jobs is widespread and has been growing even more in recent years.<sup>2</sup> In a 2012 survey by the Society for Human Resource Management ("SHRM"), sixty-nine percent of all hiring organizations surveyed reported that they conduct background checks on all job applicants, and another eighteen percent reported that they conduct background checks on candidates for certain jobs—such as those involving a fiduciary duty, care for children, public safety, national

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2. U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1, 2, 21, 38 (JUNE 2006) [HEREINAFTER ATTORNEY GENERAL'S REPORT].

defense, or security services.<sup>3</sup> A mere fourteen percent of the surveyed hiring organizations responded that they do not conduct any sort of criminal background check when hiring.<sup>4</sup>

The interest that employers have in protecting their employees, customers, and assets—indeed, their very businesses—from harm is obvious. In fact, under the doctrine of negligent hiring, this interest rises to the level of a legal duty when it becomes foreseeable that hiring a particular person represents a risk of harm to others.<sup>5</sup> To insulate themselves from liability, employers perform a “reasonable investigation” into whom they hire, including by conducting criminal background checks.<sup>6</sup>

The SHRM survey also asked each of the surveyed organizations to indicate which of the survey’s six provided answer choices reflected the organization’s two “primary reasons” for running criminal background checks on job candidates.<sup>7</sup> The top response, selected by fifty-two percent of organizations participating in the survey, was “to reduce legal liability for negligent hiring.”<sup>8</sup> Forty-nine percent indicated that their primary reason was to “ensure a safe work environment for employees.”<sup>9</sup> Thirty-six percent said that avoiding “theft and embezzlement” or “other criminal activity” was one of their primary reasons.<sup>10</sup> Twenty-eight percent identified compliance “with applicable state law requiring a background check” as a primary reason.<sup>11</sup> Seventeen percent noted a primary reason of “assess[ing] the overall trustworthiness of the job candidate.”<sup>12</sup> The survey also provided an answer choice of “other,” which five percent of

3. Society for Human Resource Management, *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3, 11 (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>. See also ATTORNEY GENERAL’S REPORT, *supra* note 2, at 19–20.

4. Society for Human Resource Management, *supra* note 3, at 3, 11.

5. ATTORNEY GENERAL’S REPORT, *supra* note 2, at 38; Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 186–88 (2008) (citing *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983)); *Se. Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999) (quoting *Ponticas*, 331 N.W.2d at 911); *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982).

6. Creed, *supra* note 5, at 188, 190 (citing *Perkins v. Spivey*, 911 F.2d 22, 31 (8th Cir. 1990)).

7. Society for Human Resource Management, *supra* note 3, at 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. Society for Human Resource Management, *supra* note 3, at 6.

12. *Id.*

organizations listed as one of their two responses.<sup>13</sup> Put straightforwardly, employers are concerned about organizational risk.<sup>14</sup>

States and the federal government collect and store a vast array of data on offenders who pass through their criminal justice systems.<sup>15</sup> Modern information technology makes much of this data readily accessible to anyone legally authorized to obtain it.<sup>16</sup> Furthermore, while the cost of running a criminal background check on job applicants varies by jurisdiction, it is easily affordable (especially if the cost is passed on to the job candidate), costing only about twenty dollars for a state report<sup>17</sup> or a Federal Bureau of Investigations (“FBI”) fingerprint-based report.<sup>18</sup> Given this low cost, plus the incentive for employers to conduct a reasonable investigation into whom they hire,<sup>19</sup> the popularity of criminal background checks in hiring makes sense.<sup>20</sup>

### *B. The Limited Legal Oversight of Criminal Background Checks in Hiring*

Employers have great discretion in making hiring decisions. They are subject to some degree of legal oversight, but that oversight fails to protect all job applicants with criminal histories. In the context of criminal

13. *Id.*

14. See *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007) (“In a broad sense, hiring policies . . . ultimately concern the management of risk.”)

15. ATTORNEY GENERAL’S REPORT, *supra* note 2, at 13–18; Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 330 (2009).

16. Blumstein & Nakamura, *supra* note 15, at 328–29; see also ATTORNEY GENERAL’S REPORT, *supra* note 2, at 13–18 (“The [Federal Bureau of Investigation] maintains an automated database that integrates criminal history records, including arrest information and corresponding disposition information, submitted by state, local, and federal criminal justice agencies. Each state has a criminal records repository responsible for the collection and maintenance of criminal history records submitted by law enforcement agencies in its state.”); Cf. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HARV. L.J. 753, 772–73, n. 85 (2011) (noting that a simple “Google” search of a person’s name brings up unsolicited internet advertisements from private screening companies offering a criminal background check for a nominal fee).

17. ATTORNEY GENERAL’S REPORT, *supra* note 2, at 21 (reporting that, in 2006, fees for state fingerprint-based checks ranged from \$5 to \$75, with \$20 being the average).

18. Federal Bureau of Investigation, *Identity History Summary Checks: Frequently Asked Questions*, <http://www.fbi.gov/about-us/cjis/identity-history-summary-checks/faqs> (last visited Oct. 25, 2015); see also ATTORNEY GENERAL’S REPORT, *supra* note 2, at 21, 139–41 (reviewing the various FBI reports and their associated prices).

19. Creed, *supra* note 5, at 183, 186; ATTORNEY GENERAL’S REPORT at 38; Blumstein & Nakamura, *supra* note 15, at 329; Society for Human Resource Management, *supra* note 3.

20. Cf. Elizabeth A. Gerlach, Comment, *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 (2006).

background checks in hiring, Title VII protects job applicants who are members of a protected class (*i.e.*, race, color, religion, sex, or national origin)<sup>21</sup> and who are denied employment because they have criminal records by allowing them to make a discrimination claim based on a disparate impact theory.<sup>22</sup> The Supreme Court recognized in *Griggs v. Duke Power Co.* that Title VII permits disparate impact claims for employment practices.<sup>23</sup> That decision came down the year after *Gregory v. Litton Systems, Inc.*, in which the Central District of California was first to rule that discrimination on the basis of arrest records constituted disparate impact in violation of Title VII.<sup>24</sup> In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit held that a disparate impact Title VII violation occurs when an employer categorically disqualifies former offenders from employment simply because of their criminal histories. In the words of that court:

an employment test or 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. . . . Once a *prima facie* case of substantially disparate impact is made the burden shifts to the employer to justify the employment practice or test as a business necessity.<sup>25</sup>

Two years later, the Eighth Circuit identified three factors to consider when determining whether an employment practice meets the “business necessity” test: “the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the [candidate] has applied.”<sup>26</sup>

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21. 42 U.S.C. § 2000e-2(a)(1) (2012).

22. 42 U.S.C. § 2000e-2(k)(1)(a)(i) (2012).

23. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”); United States Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012) available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#I](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I) (last visited Nov. 19, 2015) [hereinafter *EEOC Guidelines*].

24. *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970); Creed, *supra* note 5, at 195.

25. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293 (8th Cir. 1975). In a world in which the demographics of the population of former offenders were aligned to the demographics of the United States, this holding would be null. Disparate impact would not exist. The practice of denying employment to former offenders solely on the basis of their criminal record would be permitted. This is just another way of understanding that the *Green* court was concerned with racial discrimination, not with discrimination against former criminal offenders.

26. *Id.*

Today, Title VII provides that unlawful disparate impact occurs when:

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .<sup>27</sup>

The Equal Employment Opportunity Commission (“EEOC”) publishes guidelines for navigating Title VII’s coverage of employment decisions when criminal background checks are involved.<sup>28</sup>

The EEOC itself also institutes enforcement actions, including through administrative proceedings and litigation, regarding the proper use of criminal background checks in the hiring process.<sup>29</sup> While Title VII does technically constrain employment decisions by offering *some* degree of protection to *some* former offenders who apply for jobs, its practical reach is limited for at least two reasons.

First, the disparate impact protection of Title VII is not available to all. Some former offenders have no legal entitlement to a claim.<sup>30</sup> Employers are not as restricted from categorically dismissing these former offenders for the sole reason that they have a criminal past.<sup>31</sup>

Second, discrimination is hard to conclusively prove when an employer declines to hire a former offender.<sup>32</sup> Even if a former offender who is part of a protected class could make a *prima facie* disparate impact claim, “the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”<sup>33</sup> An employer then may be able to persuade the factfinder that its hiring decision was justified by business necessity,<sup>34</sup> or that the decision had nothing to do with the former offender’s criminal history. Hiring an employee is a private decision involving an employer’s judgment about who would be a good fit, and that decision is not easy for outsiders—even courts—to

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27. *EEOC Guidelines*, *supra* note 23.

28. *Id.*

29. United States Equal Employment Opportunity Commission, *Administrative Enforcement and Litigation*, [http://www.eeoc.gov/eeoc/enforcement\\_litigation.cfm](http://www.eeoc.gov/eeoc/enforcement_litigation.cfm) (last visited Nov. 22, 2015).

30. Creed, *supra* note 5, at 195.

31. *Id.*

32. *Id.*

33. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

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

assess after the fact.<sup>35</sup> Employers often can, and do, choose whom to hire from among multiple job applicants. If another applicant who does not have a criminal history, then an employer might just hire that person over the individual with a criminal history and argue later that the decision was based on education, experience, compatibility with organizational culture, or some other seemingly innocuous factor that made the person a more desirable hire.

## II. THE HARMFUL EFFECTS OF CRIMINAL BACKGROUND CHECKS IN HIRING

### A. *The Punitive Effect*

Regardless of whether allowing pervasive criminal background checks in hiring carries a positive net result for society, ignoring the costs is unfair to those who shoulder them. Indeed, only by considering the costs is it even possible to determine whether criminal background checks in hiring truly produce a positive net social benefit.<sup>36</sup> Furthermore, limiting society's available alternatives to either (a), allowing employers to conduct criminal background checks in hiring, or (b), disallowing all criminal background checks in hiring, misses more nuanced alternatives that could result in greater social benefit than either of these binary extremes.

A crime is an act that is in violation of society's express moral prohibitions, as stated in its criminal law.<sup>37</sup> When an individual commits a crime, that individual may be indicted, prosecuted, convicted, and punished for his criminal conduct.<sup>38</sup> In the United States, when society prosecutes and convicts a defendant for violating the criminal law,<sup>39</sup> it makes its announcement of conviction through a verdict reached and delivered by a jury, and makes the announcement of the punishment through the court's declaration of the offender's sentence. These are

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35. Cf. Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Their Attempts to Earn a Living for Their Families*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 13, 18 (Amy E. Hirsch et al. eds., 2002).

36. ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 1 (3d ed. 2006).

37. See, e.g., Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575, 576 (1959–1960).

38. Note the multiple steps that must be taken for a person to actually be punished for violating society's moral standards. Not only must the legislature prohibit a certain behavior, there must also be enforcement.

39. It is, in fact, society that prosecutes and convicts. Case names denoting "People v. \_\_\_\_," "State v. \_\_\_\_," or "Commonwealth v. \_\_\_\_" are not mere legal formalities; they represent the actual parties to the action.

serious, formal procedures that carry with them the weight of society's condemnation of the convicted criminal's immoral behavior. Furthermore, by imposing the sentence in the same course of proceedings as when the verdict is delivered, an offender hears and is aware of the connection between his or her immoral behavior and the sanction received. If a punishment were to be imposed on an offender outside of this process, or long after the time of the offense, or without ever having been announced, the relation between the punishment and the underlying immoral behavior would diminish.<sup>40</sup>

Imagine that an offender receives a sentence of incarceration. A court of law pronounces the sentence to him, and the offender is transferred to the State's custody until he completes that sentence. After the offender completes the sentence, he is released from the State's custody and rejoins society, but with some limitations.<sup>41</sup> After returning to live with general society, the former offender may again apply for jobs. While he has fulfilled the entirety of his *formal* sentence, as declared by the courts, that is rarely the end of the tribulations society imposes on him as a direct consequence of his crime. Like his competing job applicants, he will be subject to criminal background checks in hiring. But unlike many of his competing job applicants, the employer will see that the former offender has a criminal history, which may foreclose to the former offender much economic opportunity even though he fulfilled his formal criminal sentence. Criminal background checks in hiring amount to punishment for former offenders because the criminal histories those background checks relate have the effect of imposing a major obstacle to obtaining gainful employment as a direct consequence of the former offender's past crime.<sup>42</sup>

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40. See, e.g., Barry F. Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 418–21 (1970); Yair Listokin, *Crime and (With a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. LAW. REV. 115, 17 (2007) (“Because of discounting, two otherwise equivalent sentences imposed at different lags after the crime will have differential severities.”).

41. For example, upon release from incarceration a former offender proceeds into the parole/probation system where his or her conduct and progress are monitored. Other limitations on the extent to which former offenders truly “rejoin” society include an array of what some scholars refer to as “collateral sentencing consequences,” such as restriction from eligibility for certain governmental benefits (e.g., housing, welfare), denial of voting rights, and others. See Demleitner, *supra* note 1, *passim*.

42. Demleitner, *supra* note 1, at 156 (citing BILL HEBENTON & TERRY THOMAS, CRIMINAL RECORDS: STATE, CITIZEN AND THE POLITICS OF PROTECTION 113 (1993)).



*B. The Punitive Effect as an Externality*

Jerome Hall argues that “the meaning of ‘liberty under law’” is that “the restraint of penal law makes freedom possible.”<sup>43</sup> Under this theory, when liberty is taken away as a stated consequence for criminal wrongdoing, there is liberty *under law*. This means that liberty is conditional; you get it only if you do not violate society’s moral code. However, when liberty is taken away arbitrarily, without punitive justification, there is no liberty under law—only liberty arbitrarily afforded. This holds true for criminal background checks in hiring. The punitive effect of criminal background checks is a type of deprivation of liberty because former offenders are not free to pursue employment without the obstacle of their criminal history being reported. But this is not liberty *under law* because the loss of job search liberty is not *per se* what the law provides for. Rather, as analyzed in Part I, the law provides for criminal background checks in hiring as a means of helping employers. Offenders are given no notice of losing this liberty.

The punitive effect is not purposely imposed as punishment for wrongdoing. It is a hidden punishment in the form of a sentence from the market.<sup>44</sup> It is hidden because it is not imposed until after the formal sentence is handed down, nor is it ever announced by society through the court as part of an offender’s formal sentence. Rather, the punitive effect simply results, extraneously, as employers conduct criminal background checks in hiring to reduce organizational risk. It is extraneous because employers do not seek to produce it, nor do they feel its negative effect. Furthermore, the punitive effect does not thwart or serve the purpose of reducing organizational risk. In theory, employers would be equally content—from their own organizational perspective, not from the perspective of their personal moral or political beliefs—to avoid the risk of hiring a former offender whether or not that same former offender is able to find gainful employment somewhere else.

In sum, the punitive effect of criminal background checks in hiring is not imposed as punishment despite the fact that it does punish. The punitive effect is imposed without any punishment theory justification. It simply results, externally from its designed purpose to protect employer interests. The only way to get rid of the punitive effect entirely is to get rid of criminal background checks in hiring. But, as will be argued, such a

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43. Jerome Hall, *The Purposes of a System for the Administration of Criminal Justice*, in *THEORIES OF PUNISHMENT*, 380 (Stanley E. Grupp ed., Indiana University Press 1971).

44. See Demleitner, *supra* note 1, at 156; Blumstein & Nakamura, *supra* note 15, at 330.

drastic step is not necessary to find punishment theory justifications for the punitive effect.

### *C. Incidental Social Effects*

The harms of the punitive effect extend further than only making it harder for former offenders to find employment. There are incidental social effects that flow from underemployment and unemployment of former offenders.<sup>45</sup> These range from consequences suffered by families to society-wide macroeconomic loss.<sup>46</sup> Former offenders who find themselves underemployed or unemployed despite their efforts to find work are prone to recidivate.<sup>47</sup> There is widespread agreement that gainful employment substantially reduces the likelihood that former offenders will reoffend.<sup>48</sup> There is also evidence that after an initial period of time, the longer former offenders remain free of the criminal justice system, the less likely they are to reoffend.<sup>49</sup>

Not only do diminished job opportunities negatively impact both a former offender's chances of avoiding recidivism and his ability to pay for basic living necessities, they can also produce cross-generational harms when former offenders are not able to provide for their families up to their potential.<sup>50</sup> For example, underemployment or unemployment could result in reduced savings or fewer resources that a parent who is a former

45. The concern should not be centered only on the binary question of job versus no job, employment versus unemployment. Some former offenders might be able to find employment just fine if they lower their reservation values. The variable for employment should not be binary at all; since job quality and worker satisfaction matter. A good job will do more to help a former offender avoid offending again than will a bad job, even though in both cases former offenders can check off the box on the form asking if they are "employed."

46. Cf. Richard B. Freeman, *Crime and Unemployment*, in CRIME AND PUBLIC POLICY, 90 (James Q. Wilson ed., ICS Press 1983) (summarizing research that shows a relationship between aggregate unemployment and the crime rate, but cautioning that the link may not be as substantial as one would suspect and that other variables are at play).

47. Creed, *supra* note 5, at 194.

48. ATTORNEY GENERAL'S REPORT, *supra* note 2, at 51; Creed, *supra* note 5, at 194 (citing Cindy M. Haerle, *Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1323–24 (1984)); Blumstein & Nakamura, *supra* note 15, at 329.

49. Blumstein & Nakamura, *supra* note 15, at 329. This does not necessarily suggest that unemployment causes crime. While there is some evidence that such a linkage between unemployment and crime exists, some researchers question both the direction of causality between the two and whether there exists a third variable that establishes the connection. See, e.g., Freeman, *supra* note 38 (reviewing different study methodologies and the general findings of each as to the connection between crime and unemployment, and noting that "the cause of both the unemployment and the criminal activity may be a third variable having to do with specific attributes of the individuals").

50. AUSTIN NICHOLS, JOSH MITCHELL & STEPHAN LINDNER, CONSEQUENCES OF LONG-TERM UNEMPLOYMENT 1, 11 (Urban Institute 2013).

offender can commit to educating his or her children.<sup>51</sup> If this results in any lack of educational opportunities, systemic obstacles such families already confront will grow.<sup>52</sup> A parent who has to work two jobs instead of one will have less time to assist their children with homework.<sup>53</sup>

As former offenders and their families struggle, some might develop a mistrust or contempt for society out of a belief that they were mistreated or had no real chance. The difficulties that these families face can harden into lifelong challenges. Exacerbating these issues is the fact that in addition to whatever reduced employment opportunities former offenders face, they are also disqualified from obtaining certain welfare benefits.<sup>54</sup> Not only does this limit the economic stability and flexibility of former offenders, it compounds former offenders' hindrance to obtaining quality employment.<sup>55</sup>

The deprivation of social and welfare rights has further marginalized some [former offenders]. Welfare programs, designed to assist those in need, may provide cash, in-kind, or indirect financial assistance. The welfare system provides a threshold beyond which no member of society should fall, while at the same time assisting recipients in getting back into the labor market.<sup>56</sup>

The punitive effect also produces macroeconomic harms. According to estimates from a 2010 Center for Economic and Policy Research ("CEPR") report, in 2008 there were twelve to fourteen million former offenders of working age in the United States.<sup>57</sup> Based on the large size of this population, the CEPR report further calculated that the punitive effect may have lowered the male employment rate in the United States by 1.5 to 1.7 percentage points, which is equivalent to approximately \$57–\$65 billion in lost gross domestic product (in 2008 dollars).<sup>58</sup> The report

51. *Id.*

52. For example, Ann Huff Stevens and Jessamyn Schaller found that children of a parent who loses a job are fifteen percent more likely to repeat a grade in school. Ann Huff Stevens & Jessamyn Schaller, *Short-Run Effects of Parental Job Loss on Children's Academic Achievement*, 30 ECON. EDUC. REV. 289, 289 (2011).

53. Cf. David S. Pedula & Katherine S. Newman, in UNDEREMPLOYMENT: PSYCHOLOGICAL, ECONOMIC, AND SOCIAL CHALLENGES 233, 237 (Douglas C. Maynard & Daniel C. Feldman eds., 2011).

54. Demleitner, *supra* note 1, at 158.

55. Demleitner, *supra* note 1, at 157.

56. *Id.* at 158.

57. John Schmitt and Kris Warner, *Ex-Offenders and the Labor Market*, CENTER FOR ECONOMIC AND POLICY RESEARCH (Nov. 2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

58. *Id.*

cautions: “[absent] some reform of the criminal justice system, the share of [former offenders] in the working-age population will rise substantially in coming decades, increasing the employment and output losses [estimated] here.”<sup>59</sup>

### III. PUNISHMENT THEORIES APPLIED TO CRIMINAL BACKGROUND CHECKS IN HIRING

#### A. Retributivism

Retribution is the oldest theory of punishment.<sup>60</sup> It is largely based on the concept of desert (that is, what the offender deserves) and that to which society is entitled. In a sense, the offender must “retribute,” or “pay back” the moral debt his criminal behavior imposed on society.<sup>61</sup> C. S. Lewis defended retribution, and criticized rehabilitation as an alternative theory of punishment, in his essay *The Humanitarian Theory of Punishment*.<sup>62</sup> Lewis argued that rehabilitation is problematic for at least two reasons.<sup>63</sup> First, to say that society offers a convicted defendant treatment, education, or some cure in the hopes of rehabilitating him is disingenuous because the treatment, education, or cure is compulsory—the offender has no choice but to accept the “rehabilitation.”<sup>64</sup> Second, for retributivists like Lewis, a person who engages in criminal misconduct naturally deserves punishment, and to deny him of it deprives him of his humanity.<sup>65</sup> For Lewis, it was not so much that society needed to justify punishment according to its retributive ends; no, the convicted defendant *needed* it, as a humanitarian matter, so that he could become good again.<sup>66</sup>

“[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>67</sup> In other words, the punishment a criminal offender receives should be of the same measure as his guilt for the crime. Under this premise, a retributivist should find punishment that is grossly disproportionate to the

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59. *Id.*

60. Wayne R. LaFare & Austin W. Scott, Jr., *HANDBOOK ON CRIMINAL LAW* 24 (1972).

61. John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238, 238 (1950).

62. C. S. Lewis, *The Humanitarian Theory of Punishment*, in *THEORIES OF PUNISHMENT* 301, 302 (Stanley E. Grupp ed., Indiana University Press 1971).

63. Lewis, *supra* note 62.

64. *Id.*

65. *Id.* at 303.

66. *Id.*

67. *Graham v. Florida*, 560 U.S. 48, 71 (2011) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

criminal act (*i.e.*, extreme in relation to the crime) unfavorable.<sup>68</sup> Another element of retributivism—and this is apparent from the proportionality requirement—is that an offender must be able to associate the punishment he receives with the behavior the punishment is meant to address. Else, for all the offender knows, he is suffering an arbitrary injustice. A simple fix would be to announce to the offender up front, in a formal proceeding, that as a consequence of his criminal behavior, employers will see his criminal history, perhaps until he reestablishes his trustworthiness.

The issue of proportionality remains, however. And whether there is proportionality between the punitive effect of criminal background checks and a former offender's past crimes depends on how the punitive effect of criminal background checks in hiring actually harms former offenders. There are three ways to interpret how the punitive effect works its harm upon former offenders. Under the first, the harm suffered by all former offenders is the same. The simple fact that an employer will see that a former offender job applicant has a criminal history means the offender is less likely to be employed. All former offenders endure the same process—submission to a criminal background check when applying for a job—and for the same reason—commission of at least one past criminal offense.

Consider the propositions that (1) punishment is the deprivation of a right or entitlement and (2) an individual has the right or entitlement of access to the labor market.<sup>69</sup> Since the punitive effect itself is undifferentiating in exposing former offenders to some greater degree of employment uncertainty than the rest of society, the *difference* in degree being immaterial, *all* former offenders feel the punishment of *diminished access* to the labor market. One scholar goes as far as to argue that “[t]he exclusion of former offenders from vast segments of the labor market . . . parallels the effect of restrictions on the [former offenders’] right to contract in the nineteenth and early twentieth centuries.”<sup>70</sup> Under this first interpretation, the punitive effect is the same for all former offenders. If the punitive effect punishes all former offenders equally, by the simple fact that all former offenders must submit to it when applying for a job, there is no proportionality. A former offender who spent fifteen years in prison for several violent crimes submits to criminal background checks

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68. See generally *Harmelin v. Michigan*, 501 U.S. 957 (1991).

69. Demleitner, *supra* note 1, at 155–56 (arguing that “the position of individuals in . . . society depends to a large extent on their participation in the labor force” and that this is “particularly true for the United States”)

70. Demleitner, *supra* note 1, at 156.

when applying to jobs just like a former offender who went on probation for selling a small amount of marijuana when he was seventeen. It seems reasonable, though, that employers would be much more likely to overlook the latter former offender's criminal history than the former's.

The second interpretation of how the punitive effect works is that the added difficulty former offenders experience in finding employment depends less on the fact that they have criminal histories and more on the specific information their criminal histories communicate. A former offender whose criminal history includes violent crime, several offenses, or a certain type of offense that makes them particularly risky for employment in a certain field will probably encounter greater difficulty finding a job than will someone with a less troublesome history. For example, a former offender with a conviction for theft might have a tougher time getting a job handling cash than will a former offender who is similar in every relevant way except whose conviction was for, say, vandalism. The SHRM survey corroborates this. Twenty-six percent of surveyed employers responded that they consider a nonviolent misdemeanor conviction "very influential" in their decision not to hire a job candidate.<sup>71</sup> But *sixty* percent responded that they consider a *violent* misdemeanor conviction very influential.<sup>72</sup> The figure for a nonviolent *felony* was seventy-four percent.<sup>73</sup> For a violent felony, it was ninety-six percent.<sup>74</sup>

This suggests there is some proportionality between a former offender's criminal history and his difficulty in obtaining employment, though labor market circumstances temper that suggestion somewhat. The proportionality between the punitive effect and a former offender's criminal history is distant and loose because it is not tied to a punitive framework with a basis in the law,<sup>75</sup> and depends instead on the subjective preferences and risk curves of individual employers. And not only do employers tend to be risk-averse when hiring for their organizations—especially if the fact that a person has a criminal history is weighty enough to tip the scales for juries in negligent hiring litigation—but, in addition, little legal oversight governs hiring practices. Consequently, even when a

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71. Society for Human Resource Management, *supra* note 3, at 7. The survey also reported findings of potential employers' perceptions with regard to severity of past criminal behavior, number of convictions, relevance of criminal history to the job applied for, the length of time since the past criminal history, and the age of the job candidate.

72. Society for Human Resource Management, *supra* note 3, at 7.

73. *Id.*

74. *Id.*

75. See Demleitner, *supra* note 1, at 160 (noting the lack of proportionality review).

job applicant's criminal history reflects that he poses little actual risk, employers would probably tend to be more dismissive of him. The market sentence of the punitive effect therefore inclines away from proportionality for all types of criminal histories. Given the choice between a job candidate with any criminal history and another job candidate without one, many employers would choose the latter.<sup>76</sup> This weakens the argument for the second interpretation of how the punitive effect works and strengthens the first.

The third interpretation of how the punitive effect works recognizes that both the first and second interpretations are valid. Because employers tend to see former offenders as inherently risky, regardless of their individual characteristics, all former offenders suffer a baseline-added difficulty in obtaining employment when their criminal histories are indiscriminately reported to employers. Those with more serious criminal histories encounter additional obstacles. However, employers may perceive different degrees of risk in the same former offender. In addition, two former offenders may have identical criminal histories and yet one of them might find work more easily. These possibilities reinforce the suspicion that the punitive effect tends toward disproportionality. They also highlight the desirability of defining a former offender's risk more precisely. Employer hiring decisions do not accurately measure the risk that former offenders pose.<sup>77</sup> The status quo permits the market sentence of the punitive effect to treat similarly situated former offenders differently. "To be justifiable, [criminal background checks in hiring] should be based on sound penological goals and be *narrowly circumscribed* to accomplish these goals."<sup>78</sup>

### B. Incapacitation

When one takes the principle of deterrence to its extreme, the resulting theory is incapacitation. Incapacitation aims to remove criminal offenders from society to prevent them from committing further crimes. The

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76. To reiterate, twenty-six percent employers in the SHRM survey said a nonviolent misdemeanor conviction was "very influential" in their decision not to hire a job candidate. Society for Human Resource Management, *supra* note 3, at 7.

77. Cf Colgate Love, *supra* note 16, at 773 (citing Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 174–200 (Shawn Bushway et al. eds., 2007)) (noting that the large number of private companies providing criminal background checks are largely unregulated).

78. Demleitner, *supra* note 1, at 160 (emphasis added).

theoretical basis is that a large portion of crimes are committed by repeat offenders, so if a person commits a crime and is convicted, society can imprison that person (or otherwise incapacitate him) for the simple purpose of ensuring that he will not reoffend.<sup>79</sup> The incapacitation theory is an offshoot of the utilitarian theory since its merits rely on a net cost-benefit analysis involving a comparison of the social benefit stemming from reduced crime to the social loss stemming from increased incarceration costs.<sup>80</sup> A downside to this theory is that it results in over-incapacitation, since not all who commit a criminal offense will inevitably go on to commit another. For this reason, some argue for a more cautious approach to incapacitation, where the focus is on offenders who are highly likely to commit more crimes.<sup>81</sup>

The only logical relationship by which the punitive effect of criminal background checks in hiring could serve incapacitation goals is if it disables would-be criminals from offending. But the logical relationship by which the punitive effect of criminal background checks *thwarts* the goals of incapacitation is actually clearer. The underlying theory of incapacitation is that repeat offenders substantially drive the crime rate, so they should be locked up to prevent them from engaging in criminal activity. But not all offenders can remain locked up indefinitely; eventually, people return to society where they have to support themselves. If it is difficult to support oneself, such as happens when a criminal record makes it hard to get a job, there is a risk that the individual will turn to illegal means of support. In other words, if criminal background checks make it harder for former offenders to obtain satisfying employment, and some former offenders in that position turn to criminal conduct as a response, criminal background checks actually have potential to stimulate criminal activity.

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79. Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L. J. 536, 554 (2005–2006); Kent Scheidegger & Michael Rushford, *The Social Benefits of Confining Habitual Criminals*, 11 STAN. L. & POL'Y REV. 59 (1999–2000).

80. Malcom M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458 (1992) (“Incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society.”).

81. Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 267–68 (2007); Leipold, *supra* note 79, at 555 (suggesting that factors such as education and prior employment could be used by a court deciding whether to impose an “incapacitative premium” on an offender’s sentence).



### C. Denunciation

“The denunciation theory holds that punishment is justified when the offender has violated the rules that society has used to define itself.”<sup>82</sup> “Society is the proper entity to inflict the punishment because it was the victim of the crime.”<sup>83</sup> The point is to publicly declare society’s disapproval of an offender’s immoral conduct in the context of responding to that conduct.

It is the expression of the community’s hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment. If this is what a ‘criminal’ penalty is, then we can say readily enough what a ‘crime’ is. . . . It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.<sup>84</sup>

Joel Feinberg argues that the “definition of legal punishment” must include both the expressive element of society’s disapproval, the ‘reprobative function,’ and the physical element of the sentence, what he calls “the hard treatment.”<sup>85</sup> For him, a crucial distinction between denunciation and retribution is the manner in which each requires that the punishment “fit the crime.” Under retribution, the *physical* punishment must fit the crime. Under denunciation, the “*condemnatory aspect* of the punishment” must fit the crime.<sup>86</sup> This “is precisely the element in punishment that makes possible the performance of such symbolic functions as disavowal, non-acquiescence, vindication, and absolution.”<sup>87</sup> The social stigma of criminality, brought about by a guilty verdict, is therefore legitimated. Similarly, so is the possibility of redemption. Denunciation does not mean exile. According to Nora Demleitner, “[d]enunciation does not aim at permanent exclusion but rather at reintegrating the offender into society after shaming her.”<sup>88</sup> This

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82. Ronald J. Rychlak, *Society’s Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 301 (1990–1991).

83. *Id.*

84. Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (quoting George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176, 193 (1953) (quotation marks omitted)).

85. Joel Feinberg, *The Expressive Function of Punishment*, in READINGS IN THE PHILOSOPHY OF LAW 467, 470 (Jules L. Coleman ed. 1999).

86. Feinberg, *supra* note 85, at 492–93.

87. *Id.* at 490.

88. Demleitner, *supra* note 1, at 160.

formulation of the theory suggests some overlap with other theories, particularly rehabilitation and utilitarianism.

Whether successful reintegration of an offender post-denunciation is an upfront goal of the denunciation theory, or whether it is a rehabilitative or utilitarian objective that follows only after denunciation is carried out, is of moderate importance. If reintegration is truly required for denunciation to work, then the punitive effect fails the denunciation theory terribly. First, the punitive effect is a punishment without an end.<sup>89</sup> It presents an indefinite obstacle to former offenders in their attempts to obtain gainful employment, an obstacle that the rest of society does not have to deal with. Real reintegration cannot exist where the obstacles are unjustifiably unequal.<sup>90</sup> As such, denunciation is no basis for the punitive effect.

Even if reintegration is not a necessary aspect of denunciation, the punitive effect is still problematic under this theory of punishment. Society denounces criminal conduct by convicting and formally sentencing convicted defendants through its public institution for imposing criminal punishment—the court.<sup>91</sup> However, society does not declare the punitive effect at conviction or sentencing. As an informal market sentence, the punitive effect is usually never declared to a convicted defendant.

In addition, the punitive effect makes it possible for the stigma of criminality to follow former offenders for the rest of their lives as they look for job opportunities, since it allows those running the checks to ascertain the former offenders' past convictions.<sup>92</sup> Since in this vein the stigma is primarily made known only to employers and not generally to the public, the ends of the denunciation theory are not served. Society cannot declare its moral disgust for a criminal's behavior if only select people know of it.<sup>93</sup> Furthermore, absolution becomes more difficult to come by when the stigma is continually reported to employers and the harm is continually felt by former offenders. The punitive effect does not align with the theory of denunciation at all.

To align the punitive effect with the denunciation theory of punishment, a court sentencing a convicted defendant should give notice to the defendant of the consequence of having to submit to future criminal

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89. Dietrich, *supra* note 35, at 14.

90. The operative word here is "unjustifiably." The barriers are unjustifiable in certain circumstances because they are imposed on too broad a population of former offenders without sufficiently distinguishing among them by actual risk. Reforming such over-inclusivity is not a tall order.

91. Hart, *supra* note 84.

92. See Demleitner, *supra* note 1, at 160.

93. See Demleitner, *supra* note 1, at 160.

background checks in hiring, whereby his record will be made known.<sup>94</sup> This notice need not rise to the level of a precise sentence prescribing how long a defendant's record will be available because the exact consequences of a defendant submitting to criminal background checks in the future would be hard to foresee, both for the defendant and the judge. What matters is that notice of the general consequence is given so that the defendant may contemplate future economic difficulties as a consequence of his criminal misconduct.

#### *D. Rehabilitation*

Rehabilitation is the idea that former offenders can reach the same social status that they had before they committed their crimes. The idea is that society should help them get there, not necessarily by inflicting punishment, but rather by recognizing that offenders can learn to fit in.<sup>95</sup> Some scholars argue that rehabilitation theory is not only compatible with punishment, but is actually furthered by it because punishment serves to provide a moral education, which is the basis of rehabilitation.<sup>96</sup> There is also a branch of rehabilitation that considers criminal behavior as a manifestation of illness deserving of some form of medical treatment.<sup>97</sup> More broadly, rehabilitation can be viewed as a philosophy advocating a

94. According to Margaret Colgate Love, this was an intended purpose of the American Bar Association Standards on Collateral Sanctions and Discretionary Disqualification. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1728 (2002). Love also explains that the 2003 revision of the Model Penal Code envisioned making collateral sanctions like criminal background checks for employment a part of a convicted offender's sentence. *Id.* at 1732. See also MODEL PENAL CODE § 306.6(1) (2003).

95. The rehabilitation ideal has little sway, having lost much of its following after Robert Martinson published his famous article *What Works?—Questions and Answers about Prison Reform*. See Andrew von Hirsch, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, 131 *U. PA. L. REV.* 819, 820–21 (1983) (book review). In that article, Martinson reviewed various treatment programs intended to help offenders avoid recidivating. His conclusion was candid:

I am bound to say that these data, involving over two hundred studies and hundreds of thousands of individuals as they do, are the best available and give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation.

Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 *THE PUBLIC INTEREST* 22, 49 (1974). Martinson's findings contributed to the forming of the "nothing works" thesis. See, e.g., Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?*, *Washington Post* (Mar. 1989), available at <https://www.prisonpolicy.org/scans/rehab.html>.

96. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 208 (1984) (claiming "good reason to believe" that Plato and Hegel adhered to this view, and noting Herbert Morris and Robert Nozick as modern adherents, having maintained that "the moral education which punishment effects is at least part of punishment's justification."); Hall, *supra* note 43, at 396 (noting Plato's belief that punishment was educational).

97. Michael Vitiello, *Reconsidering Rehabilitation*, 65 *TUL. L. REV.* 1011, 1016 (1990–1991).

holistic approach dedicated to reforming the intrinsic motivations and desires of criminals to make them law-abiding.<sup>98</sup>

The nexus between the punitive effect and the rehabilitation theory is thin. Society does not allow employers to perform criminal background checks as part of a moral education or treatment program for former offenders. And though experiencing the punitive effect may cause some former offenders to avoid further criminal behavior, those former offenders will probably tend to have lighter criminal histories than most. Even so, the punitive effect falls short of the rehabilitation ideal for all former offenders as long as they must submit to the punishment. A former offender may regret the moral wrong of his crime, never commit a crime again, and still have his criminal history reported to potential employers. It is actually impossible for a former offender who is subject to criminal background checks in hiring to attain the same status he had before having committing any crime. Finally, because gainful employment reduces the likelihood that former offenders will recidivate,<sup>99</sup> freeing them from the punitive effect would actually serve rehabilitative ends better. It is for these reasons that “[t]here is widespread agreement” that criminal background checks in hiring “do not serve a rehabilitative function.”<sup>100</sup>

To improve the punitive effect’s fit with rehabilitation theory, in addition to being given up-front notice that they will be subject to future criminal background checks, convicted defendants could be given behavioral standards to meet whereby they can eventually earn back their right to apply for jobs without their record being disclosed.<sup>101</sup> For example, after serving the entirety of his sentence, a parolee who abides by every term of his parole for a pre-established period of time may be granted relief.<sup>102</sup>

### *E. Utilitarianism*

Utilitarians may value punishment, but not in itself as retributivists do. “The utilitarian theory of punishment holds that punishment is a necessary

98. See Karl Menninger, *Love Against Hate*, in THEORIES OF PUNISHMENT, 246 (Stanley E. Grupp ed., Indiana University Press 1971) (effective treatment must “begin with motivating or stimulating or arousing in a cornered individual the wish and hope and intention to change his methods of dealing with the realities of life,” and noting his belief that this can be achieved “by education, medication, counseling, [and] training”).

99. See *supra* note 48 and accompanying text.

100. Demleitner, *supra* note 1, at 160.

101. Colgate Love points out that MODEL PENAL CODE § 306.6(1) has this objective. Colgate Love, *supra* note 94, at 1732.

102. Colgate Love, *supra* note 94, at 1732.

evil that is justified if and only if it benefits society.”<sup>103</sup> An alternate understanding of utilitarianism is that it does not value punishment at all, because punishment concerns the individual. Utilitarians, in contrast, focus on society. “Punishment,” then, is a mechanism that society leverages as it seeks to maximize net social benefit. Utilitarianism is a straightforward cost-benefit analysis; society should choose the alternative by which the sum of the benefits *most* outweighs the sum of the costs.<sup>104</sup> For utilitarians to support criminal background checks in hiring at all, the social benefits must outweigh the social costs. The benefits include employers having information to make better hiring decisions, plus whatever benefits that may accrue from the punitive effect, such as if it deters any criminal behavior. The costs include any excessive punishment imposed on former offenders, as well as the incidental social effects former unemployment and underemployment carry.

Utilitarians would object to similarities in punishment that the punitive effect inflicted on former offenders whose past crimes were of disparate severities (a likely outcome given the punitive effect’s tendency toward disproportionality). The social benefit resulting from this scheme would create greater market uncertainty, especially for job seekers with criminal records, and this uncertainty would reduce total social utility.<sup>105</sup> In addition, the utilitarian justifiability of criminal background checks in hiring diminishes, and may even reach the point where it produces social disutility and is unjustifiable, as the criminal records of former offenders seeking employment become less severe, making those former offenders less risky to employers. Some individual former offenders also become less risky to hire as they pass time without recidivating. However, criminal records do not go away, and under the current regime neither does an employer’s ability to obtain them. Employer risk aversion, *laissez-faire* hiring oversight, and continued disclosure of old or mild criminal histories

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103. Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1552 (2002).

104. Jeremy Bentham gave an early characterization of utilitarianism, saying that as a “fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong. A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT (THE COLLECTED WORKS OF JEREMY BENTHAM) 393 (J. H. Burns & H.L.A. Hart eds., Clarendon Press Reissue ed. 2009). This notion embraces the economics concept of opportunity cost.

105. Total social utility is a function of the expected value of benefits, minus the expected value of costs. Expected value is simply the value of the cost or benefit multiplied by its respective probability of occurring. Greater uncertainty can mean probability is lower, because it is less reliable, which reduces the expected value. BOARDMAN ET AL., *supra* note 36, at 168–71.

weaken the utilitarian case for the background check system as it is currently constructed.

There is wide room for utilitarian reform of criminal background checks in hiring. Not all individuals with criminal records are necessarily a risk to employ. Indeed, some probably pose less risk to employers than certain people who do not have a criminal history at all. Consider, for example, former offenders who committed few offenses, committed offenses long in the past, committed offenses that were not severe, or those who endured turbulent childhoods and have succeeded in putting themselves on a good track in life. Compare these former offenders to habitual drug users or alcoholics who, though they may not have a criminal history, could be particularly risky to hire. If some former offenders have completed their sentences, lived lawfully since, and do not show characteristics that are predictive of risk, it may be socially beneficial for society to consider them as having redeemed themselves.<sup>106</sup>

#### IV. THE REDEMPTION EXCEPTION

The concept of redemption is based on the idea that some former offenders actually do rehabilitate themselves.<sup>107</sup> They complete their formal sentences and demonstrate, after living lawfully for a time, that they are not true risks to employers. Unfortunately, the criminal records of even these individuals often remain available to employers that conduct background checks. When employers discover the criminal pasts of these redeemed former offenders, they may ascribe excessive risk to them. An employer who is hiring for a position for which there may be numerous job candidates and who is concerned with minimizing the risk of negligent hiring litigation may just go with an applicant with a clean record.

Redeemed former offenders have completed their sentences and, while enduring the punitive effect's additional market sentence, have stayed away from unlawful activity for a prolonged period of time. Their criminal histories remain an obstacle for them to obtain fully gainful employment and yet do not provide the contemplated benefit to employers since they communicate false risk. These redeemed former offenders should be considered to have reclaimed their right to apply for jobs without the

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106. Blumstein & Nakamura, *supra* note 15, at 328.

107. Regardless of how successful rehabilitation programs are in decreasing recidivism rates, some former offenders succeed in rehabilitating themselves. *See generally* Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89 (2003).

encumbrance of a criminal history being reported. They are redeemed, and, so, may as well not have a criminal history. The risk profile of a redeemed former offender would show that they may not be any riskier to hire than any average person, and their risk profile is knowable.

Government collection of vast data on offenders and modern information technology, the same factors that allow for inexpensive and easily obtainable background checks,<sup>108</sup> also allow for thorough analyses of the risk characteristics of former offenders. Time since a former offender's last offense is one of the more important variables,<sup>109</sup> and type of conviction, number of convictions, time incarcerated, age, age at first offense, family relationships, and other variables can factor in as well.<sup>110</sup> Experts can aggregate this data and develop sophisticated risk models that describe, with high levels of certainty, the types of offenders statistically unlikely to reoffend.<sup>111</sup> Using these models, lawmakers and criminal justice administrators can establish a certainty threshold that they consider appropriate for considering whether certain offenders have reached the point of redemption. For example, they might require a model with ninety-eight percent certainty, meaning that only about two percent of the offenders the model identified as redeemed would reoffend.<sup>112</sup>

Employers would continue to be able to run background checks on job applicants, providing much of the same social benefit that the system currently has. At the same time, redeemed former offenders would be exempt from having their criminal histories reported, reducing the social cost of what is currently an overinclusive punitive effect. The net result may be greater social benefit. However, regardless of the redemption standard and corresponding chosen error rate—an error rate is inevitable since no risk model is ever one hundred percent error-free—we must understand that some former offenders who meet the redemption measure will reoffend. Some employers will hire these former offenders after being unable to discover that they have criminal histories. This is a social cost of the redemption exemption, and the employers of these former offenders suffer it disproportionately. Every employer would face this risk, but few would actually experience it.<sup>113</sup>

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108. ATTORNEY GENERAL'S REPORT, *supra* note 2.

109. Blumstein & Nakamura, *supra* note 15, at 347 n. 30.

110. *Id.* at 335–41; Visher, *supra* note 107, at 94.

111. Blumstein & Nakamura, *supra* note 15.

112. The political process could play an important role in deciding on the appropriate certainty threshold. Different political preferences, social values, morals, punishment theories, etc., could argue for higher or lower certainty thresholds.

113. Blumstein & Nakamura, *supra* note 15, at 215.

Assuming society sets an error rate of two percent, about two percent of former offenders would meet the redemption standard and yet would reoffend. However, ninety-eight percent of former offenders predicted as redeemed would honor their redemption. The benefits that would accrue to them and to society as a result of their improved employment opportunities could produce a net social benefit that far outweighs the social loss caused by those in the two-percent error.<sup>114</sup> The distribution of the benefits is the only issue. In the abstract, society does not face any real risk under this policy because it benefits broadly. Ninety-eight percent of those predicted to be redeemed enjoy better job prospects, the benefits of which are not outweighed by being wrong two percent of the time. The calculus is different for employers. They face the low, but still real possibility of hiring someone in the two percent, and if they do, they do not have any gain to counteract it.

However, the point of a redemption policy based on risk analysis is to show that former offenders achieving redemption status are predicted to be no riskier than an average person. Even though it sounds like a social cost that a former offender who meets the redemption standard might reoffend, that social cost might not be any greater on average than what would have resulted had the employer hired an average person without a criminal history. Even so, if society really wants to move forward with a redemption policy, it can choose to compensate the few unlucky employers of the two percent since it will be reaping the benefits of the correctly redeemed ninety-eight percent.<sup>115</sup> “The burden of recidivism and victimization should not be inflicted imprudently on the employer who aids the assimilation process, but rather requires a more delicate balance of society's interests and responsibilities.”<sup>116</sup>

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114. See John Schmitt and Kris Warner, *supra* note 57.

115. Public policy approaches of this type are not unheard of. Consider, for example, the Affordable Care Act (ACA). Congress determined that expanding health insurance coverage to the majority of Americans would increase overall social welfare. To do so, it passed the ACA, which required that health insurers accept customers with preexisting conditions. However, this requirement alone would have been highly unprofitable for insurance companies. To make the result acceptable to the insurers, then, Congress required all Americans to purchase health insurance or else pay a penalty to the IRS, which in effect transferred some of the increased social benefit derived from expanding healthcare to the insurance companies. See *NFIB v. Sebelius*, 567 U.S. 519 (2012).

116. Cindy M. Haerle, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory*: *Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1326 (1983–1984).



### CONCLUSION

The criminal background check for employment is a critically important and valuable tool for employers to ascertain the risk involved in hiring a given individual. However, criminal background checks have a genuinely adverse effect on a former criminal offender's ability to get a job. This adverse effect is a direct consequence of a former offender's past criminal activity, and but for that criminal activity the consequence would not exist.

As a direct and adverse consequence of past criminal behavior, and because states provide employers with the ability to review the states' criminal justice system records, criminal background checks in hiring amount to additional punishment and should be considered part of the formal sentence imposed by a criminal court. The fact that it is not imposed this way is problematic because the punishment that results from a former offender having to submit to criminal background checks in hiring lacks any justification in punishment theory.

There are straightforward ways to rectify this shortcoming. Conveniently simple reforms would bolster punishment theory bases for the harms that the punitive effect actually imposes on former offenders. At sentencing, convicted defendants should be made aware that, from that moment forward, their criminal records will be disclosed to hiring employers who legally seek them. This notice will more effectively satisfy the goals of denunciation and retributivism. These individuals should be given standards that they can meet to earn back their unabridged right to access the job market. These standards will improve a former offender's prospects for rehabilitation. And as more offenders rehabilitate themselves, fewer will recidivate. In addition, the risk characteristics of individual former offenders could be analyzed so that when a determination can be made with some reasonable certainty that a former offender does not pose significant risk to hiring employers, the former offender can be freed from the burden of having to find jobs with their criminal record holding them back. These reforms need not hamper the ability of employers to perform reasonable investigations into whom they hire, including by running background checks on job applicants.

Going forward, while criminal record expungement options are available to former offenders in many jurisdictions, further research into how former offenders achieve redemption may allow for expanding expungement eligibility. Society benefits from employers being able to run criminal background checks on job applicants, but the social benefit might be greater if redeemed former offenders no longer had to submit to

them. Society might be better off if those individuals were free to pursue work without their old criminal histories holding them back.