**James B. Jacobs, Blog posts from Volokh Conspiracy, February 2-6** <http://www.washingtonpost.com/news/volokh-conspiracy/>.

## February 2 - [Is employment discrimination against ex-offenders immoral?](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/02/is-employment-discrimination-against-ex-offenders-immoral/)

[The Eternal Criminal Record](http://www.amazon.com/Eternal-Criminal-Record-James-Jacobs/dp/0674368266) is a wide-ranging examination of jurisprudential, policy and empirical issues surrounding the construction, dissemination and use of criminal records, including intelligence information, arrests, convictions and court records. While there is much in the book about the use of criminal records in criminal justice system decision making, in my blogs for The Volokh Conspiracy I will concentrate on the morality, legality and remedial proposals regarding criminal record based employment discrimination (CBED).

Today, I will talk generally about CBED. Tomorrow I will deal with Title VII’s disparate impact doctrine as it applies to CBED. On Wednesday I will deal with the EEOC’s Enforcement Guidance on the Use of Arrests and Convictions in Employment. On Thursday my topic will be state laws and proposals for restricting CBED. On Friday, I will turn to the Ban the Box Movement.

A rational employer wants the best qualified and motivated workforce at a particular price, not a minimally qualified workforce. While an employer may be hiring for a particular job, it cannot be faulted for aiming to hire individuals who can move into other positions if and as needed and to be promotable in due course. Therefore, the job applicant’s honesty, reliability and self discipline will practically always be relevant, indeed extremely important. Likewise, the relevance of a particular conviction to a particular position will often be beside the point.

It is not immoral for businesses, not-for-profits, volunteer organizations and individuals to commission criminal background checks on those they are considering employing, admitting to membership or dating. More information is almost always preferable to less information. Failure to search out, or inattention to, such information might later be the basis for civil liability.

Dishonest, unreliable and un-self-disciplined employees impose costs on a business. Employers must internalize the costs of accidents, thefts, sabotage, absenteeism and workplace violence. Employers are liable for damages caused by employees who harm customers, clients and colleagues. In some states, employers also face liability if the person injured by an employee with a criminal record can prove that the employer’s hiring decision was negligent.

Given the modest cost of criminal background checking to hire, the cautious employer will require checks on all new hires. In one survey, 92 percent of responding employers stated that they required criminal background checks for some or all jobs. Their reasons included preventing theft, and workplace violence and avoiding liability for injuries and damages. Ex-offenders do not always reoffend, but they often do. Character is not a chimera.

Public policy strongly opposes criminal conduct. Punishing and deterring criminal conduct is necessary for public order and smoothly-functioning community. Government has a legitimate interest in protecting the public from criminal threats. Criminals should be condemned and crime deterred. It is telling that government itself not only condemns and punishes criminal conduct, pervasively discriminates against persons with criminal records in hiring and occupational licensing (collateral consequences of conviction). It would be inconsistent and hypocritical to compel businesses, volunteer organizations, colleges and universities to ignore individual criminal history.

Government and society generally have a strong interest in promoting ex-offender employment. Legitimate employment doesn’t assure desistance from crime, but it is a crucial factor if not a necessary precondition. However, it is one thing to recognize this interest and another thing to say that private employers must subordinate their own organizational and financial interests by adopting a pro-ex-offender employment policy.

It is well to remember that, while ex-offenders need jobs, so too do people who have never been convicted. When an ex-offender is passed over for a job, that job does not disappear. It is filled by someone who may be equally or more needy.

There is also a clear public interest in supporting employment of non-ex-offenders who need jobs. Job seekers with a spotless criminal record would have a valid complaint against a public policy that compelled private employers to treat a job applicant’s criminal; record as irrelevant. Such a policy might undermine a person’s commitment to obeying the law. Indeed, it could be persuasively argued that public policy should favor treating a clean criminal record as a plus factor for public and private hiring, a kind of benefit to reward and encourage good citizenship.

## February 3 - [When, if ever, does employment discrimination against ex-offenders violate Title VII?](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/03/when-if-ever-does-employment-discrimination-against-ex-offenders-violate-title-vii/)

Title VII of the 1964 Civil Rights Act prohibits public and private employers from discriminating against job seekers on the base of race, ethnicity, religion or gender, unless the employer can demonstrate a business necessity. These discriminations are widely condemned as immoral and irrational. By contrast, criminal record-based-employment-discrimination (CBED) is not generally considered immoral or irrational,and is not mentioned in Title VII. (Likewise, in Europe, where an individual’s criminal history is regarded as entitled to privacy protection, employment discrimination against ex-offenders is not unlawful.)

While CBED is neither immoral nor illegal, discrimination on the basis of race or ethnicity is both. Using CBED as a pretense for racial discrimination is unlawful. But suppose criminal record screening is applied uniformly to ex-offender job applicants of all races and ethnicities, but disproportionately excludes Blacks and Hispanics who are more likely than Whites and Asians to have been convicted? In *Griggs v. Duke Power Co.* (1971), the Supreme Court held that Title VII prohibits hiring tests and screening devices which, though neutral on their face, have a *disproportionate impact* on protected groups, e.g. Blacks and Hispanics.

Proof of disparate impact establishes a presumption of racial discrimination, which the employer can rebut by proving that business necessity justifies using the challenged screening criterion. However, some courts have held that plaintiffs can overcome even a justifiable business necessity by showing the availability of an equally effective policy that produces less disparate impact. (An employer could, of course, use criminal record to screen out Whites and Asians without raising any Title VII concern.)

In 1989, the Supreme Court’s decision in *Wards Cove Packing Co. v. Antonio* made it harder for plaintiffs to win disparate impact cases. The Court held that a hiring standard or test is permissible if it serves, in a significant way, the employer’s legitimate employment goals. Congress reacted by amending Title VII to restore the pre-*Wards Cove* understanding of disparate impact and business necessity. To this day, the Supreme Court has never rendered a decision in a case challenging an employer’s policy of screening out (or weighing negatively) prior criminal convictions. To say the least, the legality of CBED under Title VII remains confusing and unsettled.

In *Scott v. Genuine Parts Co.* (2002 U.S. Dist. Lexis 1698), a federal court in Indiana upheld the employer’s refusal to hire a job applicant who had several drug trafficking convictions and who had failed a drug test while employed at a different company. Likewise in *EEOC v. Carolina Freight Carriers* (723 F. Supp. 734), a federal district court in Florida upheld the company’s lifetime employment bar on individuals who had ever been incarcerated for felony theft. And in a thoughtful opinion in *El v. Southeastern Pennsylvania Transportation Co. (SEPTA)* (479 F.3d 232), the 3rd Circuit affirmed summary judgment in favor of a policy of permanently disqualifying from transporting a para-transit vehicle any persons who had ever been convicted of a violent felony; the plaintiff had been convicted of murder more than forty years previously.

Other courts have been more hospitable to challenges of criminal record screening. For example, in *Green v. Missouri Pacific Railroad Company* (523 F.2d 1290), the Eighth Circuit criticized the railroad’s policy of refusing to hire persons with prior convictions. In support of its business necessity claim, the railroad argued that persons with prior theft convictions posed unacceptable risk of absence from work in the event of new criminal charges, theft of cargo and company funds, ineligibility for bonding, ability to be impeached if called as a witness in a lawsuit against the company and negligent hiring liability in the event of tortious conduct.

The Eighth Circuit rejected these reasons because the company had not empirically validated them, observing that if all employers adhered to the same policy, ex-offenders would be permanently and completely excluded from the legitimate employment. It did concede that a narrower policy might not violate Title VII and remanded to the district court. On remand, the company stated that it would consider a prior felony theft conviction “as a factor,” but not automatically exclude all persons with felony theft convictions from the hiring pool.

The district court approved this policy and the Eighth Circuit affirmed with the understanding that the railroad would consider the nature and gravity of prior convictions, the time elapsed since completion of sentence and the nature of the job for which the ex-offender has applied. But that crucial questions unanswered. Importantly, the Eighth Circuit did not opine on what “consider” requires, i.e., how much negative weight can an employer give to criminal record?

Could the railroad treat a felony sentence less than five years old as presumptively disqualifying in the absence of evidence of extraordinary post-sentence rehabilitation? Could the railroad consider the offense for which a job applicant had been charged, rather than the conviction offense that resulted from the plea bargain? Could an employer justify its employment decision by explaining “although we gave just slight weight to a 10-year-old felony theft conviction, we preferred an equally qualified job applicant (perhaps of the same race) who had no prior felony theft conviction?

With respect to considering the nature of the job for which the ex-offender has applied, may the employer treat honesty, reliability and self-discipline as a requirement for all positions? Can its hiring policy seek to hire individuals whose criminal, educational and past-employment records would make them eligible (a good bet) for future promotion to positions of greater responsibility? Can business necessity be established by general reference to high recidivism rates or must companies come forward with specific statistics on how individual criminal histories predict job-related problems and misconduct?

## February 4 - [Employment discrimination based on previous arrests](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/04/employment-discrimination-based-on-previous-arrests/)

The Fair Credit Reporting Act permits private information vendors to report to the client employers information about a job applicant’s arrests for the previous seven years, even if those arrests did not result in conviction. [Indeed, if the record-subject is applying for a job that carries an annual salary in excess of $75,000 per year, even the seven-year limitation does not apply.] At first blush, it seems preposterous that a police officer has the de facto power to saddle an individual with a lifelong employment disability. On reflection, however, the issue is complicated.

If an employer can base its hiring decision on a previous employer’s suggestion or hint that the job applicant had been dismissed for dishonesty, why not on an arrest that was dismissed or even resolved by an acquittal?

Suppose an investigator tells a client employer that a job applicant’s neighbors believe that she is a member of a gang or associates with members of organized crime? Must the employer ignore that information because it is not admitted and has not been proved beyond a reasonable doubt? An employer is not required to consider a job applicant innocent until proven guilty. Isn’t it widely believed that the Catholic Church leaders should have defrocked, or at least isolated, priests against whom there were credible accusations of sexual misconduct?

Is it wrong (unlawful) for an employer to assume that arrests are based on probable cause? If not, can the employer treat assume probable cause once the prosecutor files charges? Once a judge finds probable cause? After a grand jury indicts?

It would be a mistake to infer that an arrest that did not lead to a conviction was improper. The most likely reason for dismissal of charges is the victim’s unwillingness to testify. The (alleged) victim may have found the process too time-consuming or embarrassing. Perhaps the victim or key witness fears the defendant’s retaliation or desires reconciliation. Prosecution may have been stymied because key evidence was suppressed due to a Fourth Amendment violation, improper interrogation or a speedy trial act violation. Such dismissals should not be interpreted as indicating the defendant’s innocence.

In some states, a significant percentage of criminal cases are resolved by a deferred prosecution agreement, whereby the suspect is placed on “prosecutorial probation” for six months or a year. If there are no new charges during that period, the original charges are dismissed.

According to the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction records in Employment Decisions, “since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment.” However, the guidance advises that employers can reject a minority job applicant on the basis of “conduct which indicates unsuitability for a particular position . . . where it appears that the applicant or employee engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent.”

The guidance provides a number of explanatory hypothetical examples. Here is Example #1 (slightly edited):

Wilma, a black female, applies to Bus Inc. for a position as bus driver. In response to a pre-employment inquiry, she states that she was arrested two years earlier for DWI, but acquitted at trial. Bus Inc. hires someone else. When Wilma asks for an explanation, Bus Inc.’s HR officer explains that the acquittal was based on suppression of the BAC test, which was not administered according to proper police procedures. At trial, witnesses testified that Wilma staggered when she got out of the car and had alcohol on her breath. Wilma’s rejection is justified because the conduct underlying the arrest is clearly related to the safe performance of a bus driver’s duties; it occurred fairly recently, and there was no indication of subsequent rehabilitation.

In this example, the EEOC would permit the employer to reject Wilma, even though she was acquitted because of trial testimony suggesting a likelihood of factual guilt. Suppose there had not been a trial with witness testimony, but simply a dismissal? Must the employer investigate the facts of the case? Perhaps the employer must find out where Wilma was arrested and contact the relevant police department or prosecutor’s office for information about her case?

Suppose the harried prosecutor’s office does not take the call? Suppose the relevant prosecutor has left the office? Suppose the prosecutor doesn’t remember the case and insists that she is too busy to dig out, especially if she is inundated with similar inquiries? If the prosecutor does give the employer her view of why Wilma was guilty of the charged offense, is that sufficient to support a negative hiring decision or must the employer give Wilma a chance to contradict the prosecutor’s account? For all job applicants who are not hired, must the employer maintain a case file documenting its investigative findings and its rationale for preferring another candidate?

## February 5 - [State prohibition of criminal-record-based-employment-discrimination](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/05/state-prohibition-of-criminal-record-based-employment-discrimination/)

Hawaii, New York, and Wisconsin make employment discrimination against ex-offenders (CBED) unlawful, unless an employer can show that successful performance of the job would be jeopardized by a person with a propensity for the kind of crime for which the job seeker had previously been convicted.

New York law states:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character,” when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses unless:

1) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

2) the issuance or continuation of the license or the granting or continuance of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

The New York statute and similar anti-CBED laws and proposals are simplistic. It is a mistake to assume that an employer always or usually hires someone only to fill a narrowly prescribed job. Employers routinely want to hire individuals who can fill various positions as needed and who have a chance of advancing through the firm. In addition, an employer wants employees who are honest, rule-compliant, reliable, and self-disciplined, employees who come to work every day and on time, get along well with fellow employees and clients, and contribute to a harmonious working environment.

The New York statute says that an employer cannot base a conclusion that a job applicant lacks good moral character on the basis of previous criminal convictions. Is it wrong to make a moral judgment about a person who tortured animals or brutalized a child or old man? In reality, we regularly reach conclusions about the character of those with whom we interact on incidents and evidence far less reliable than a criminal conviction. Is it okay for an employer to find that a job applicant lacks good moral character based upon a negative or lukewarm reference from a prior employer? A disturbing job interview?

The New York statute assumes that offenders are criminal specialists who present specific types of risk, i.e. a sex offense conviction indicates only a sexual threat and drunk driving convictions indicate only a vehicular threat? Research shows that many criminal offenders are generalists and opportunists. Today’s burglar was yesterday’s drug dealer. The person who today was charged with assaulting his girlfriend yesterday used a stolen credit card.

The New York statute imagines an offender with a single aberrant conviction. Of course, there are individuals who meet that profile, but there are also many offenders with multiple convictions, not to mention multiple, arrests, charges and pre-trial diversions. The statute also ignores context. Should an employer be forbidden to consider the fact that the previous (single) conviction arose out of gang or organized crime activity?

Ironically, perhaps, white collar offenders are most likely to have only a single conviction, but their criminal schemes are often complex and have extended over months or years. Can we draw no negative conclusion about Bernard Madoff’s moral character based on his decades-long Ponzi scheme? What about the moral character of a doctor convicted of long-term Medicare or insurance fraud? A lawyer convicted of embezzling a client’s money, but just once?

Focusing on the fit between the conviction offense and a job’s requirements ignores plea bargaining. The conviction offense often does not accurately reflect the defendant’s underlying criminal conduct. Perhaps a person with an assault conviction was originally charged with attempted rape. Perhaps a defendant who pled guilty to drug possession was originally charged with drug sale and possession of a weapon. Perhaps a convicted burglar was originally charged with a string of burglaries and settled the cases with a plea to a single count.

New York’s effort to regulate the way that private employers can consider criminal record information in their hiring decisions should not be emulated in other states. As I will argue tomorrow, it would be far better for government to clean its own house, reform its own hiring and licensing laws and thereby lead by example. As this now stand, federal, state, county and local governments have all sorts of law disqualifying ex-offenders from various professions, occupations and employments. If the government is successful in selecting certain ex-offenders for certain positions it will encourage private employers to follow suit.

I have spoken strongly against public policy that coerces private employers to ignore job applicants’ criminal records, while leaving them to cover the costs imposed by ex-offender employees.

Government, and thus the society generally, should pay for rehabilitating offenders just as it pays for punishing them. Integrating persons with criminal records into legitimate society should be a governmental responsibility. Government entities should start by reforming their own hiring policies and occupational licensing restrictions. (There are hundreds of occupations which state laws place off limits to persons with prior convictions.) Federal, state, county and local employment disqualifications and exclusions reinforce the public perception that individuals with prior criminal records are likely to commit future crimes.

## February 6 - [Promoting ex-offender employment with carrots](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/06/promoting-ex-offender-employment-with-carrots/)

Over the last decade, the [Ban the Box movement](http://www.nelp.org/page/content/banthebox/) has achieved some significance success in persuading cities, counties, and a few states to expand ex-offenders’ job opportunities by removing “the prior convictions box” from their employment applications. The job application is initially reviewed without knowledge of criminal record information. If, on the basis of the written application and subsequent interviews, the applicant is recommended for employment, a criminal background check is authorized. At that point, any prior convictions will be assessed in light of the already-compiled favorable information.

We do not know how successful Ban the Box has been in achieving employment for ex-offenders who would not otherwise been hired by government agencies. Obviously, Ban the Box reaches only ex-offenders who are job-ready. It will be of most help to those ex-offenders with the most education, skills, job experience and competent presentation of self, in other word to white collar offenders.

Ban the Box will be of little or no help to ex-offenders who are mentally ill, educationally deficient, lacking work history and social and occupational skills. It will be of little if any help to ex-offenders with extensive records of recidivism and to those who have been incarcerated for many years on account of horrific crimes. [In 2008, 36 percent of ex-prisoners lacked a high school education or GED. Sixty percent reported using illegal drugs in the month before their current conviction offense; 16 percent reported being diagnosed as mentally ill.]

Success in integrating ex-offenders into the public sector work force would establish a strong case for repealing occupational licensing restrictions on ex-offender and provide a persuasive example for private sector employers. (Target Stores, the nation’s second largest retailer, announced in late 2013 that it would voluntarily ban the box.)

Government should also support programs aimed at promoting ex-offender employment. This includes better job preparation programs in jails and prisons and transition-to-work programs in the community. The not-for-profit Chicago-based Safer Foundation provides a model for getting ex-offenders job-ready and finding them placements with willing employers. The preparation, involving coaching, counseling and training can take many months. Because the Safer Foundation seeks to establish long-term relationships with employers, its recommendations need to be credible. When Safer vouches for an ex-offender, it puts its credibility and reputation on the line. The employer is made aware of the ex-offenders full criminal record and the basis of Safer’s conclusion that the person is job ready, able and willing.

After an ex-offender is placed with an employer, Safer maintains contact with employer and employee. If problems arise, Safer works with employer and employee to resolve them. The availability of these post-employment services has persuaded scores of employers to take a chance and has enabled ex-offenders to make the transition into legitimate employment.

For ex-offenders who are not job-ready, government could provide transitional employment. A credible government-run work program could work to bring ex-offenders to job-readiness and eventually certify that the client had worked regularly and successfully for a significant period of time. Supervisors could provide references. However, for recommendations to be credible, they would need to be earned, not handed out automatically.

It is not fair to force private employers to internalize the costs of risky ex-offender employees. Rather than forcing private employers to ignore criminal records, government should, by example, seek to demonstrate that ex-offenders can be safely and successfully employed.