

**Massachusetts CORI-Based Employment
Discrimination:
Effects and Strategies for Change**

EXECUTIVE SUMMARY

This paper examines the history and consequences of Massachusetts' laws governing employer access to and use of prospective employee's Criminal Offender Record Information (CORI) and offers possible strategies for challenging the laws.

The first section offers an analysis of the impact of CORI-based employment discrimination. It begins by presenting preliminary data indicating that current CORI regulations have an adverse economic impact on ex-offenders and the state more generally. It then examines the detrimental effect on Boston communities and the disproportionate impact on racial minorities. Finally, it presents ex-offender's perspectives on how CORI-based discrimination has affected their efforts to find employment.

The second section traces the history of CORI laws in Massachusetts, looking particularly at the shifting motivations and goals driving changes in the laws. It then describes the current CORI laws and how they regulate access to and use of CORIs.

The third section suggests several possible strategies for change. First, it presents the perspectives of ex-offenders and other community members on how the laws should change. Second, it surveys several other states' laws, paying most attention to the example offered by Wisconsin. Third, it examines the possibility of bringing Title VII claims based on the disparate racial impact of CORI-based employment discrimination. Finally, it discusses the possibility of limiting employer liability.

The CORI laws are codified as MGL ch. 6 §§ 167-178P. These sections and subsections are listed down the left side of the graph and the years are located across the top of the graph.

D- This is when the section was originally drafted, look to the top of the graph for the corresponding year

A- This shows an amendment to the section

X- This shows that the section was repealed

Underlined years indicate a year in which either CORI based regulations were promulgated under the authority of MGL ch. 6 § 167-178, and/or another of the Massachusetts General Laws was amended to include CORI language.

I. Introduction

Imagine if one youthful mistake could forever change your life. There are no second chances, there is no redemption, and there is no opportunity for you to ever prove to the world that you learned from your mistake. This scenario might sound plausible if the mistake is so egregious that society would deem you beyond rehabilitation. But are all past criminal convictions such mistakes? In Massachusetts, there are no limitations on how your past Criminal Offender Record Information (CORI) can be used, and few limitations on who can obtain such records. This combination allows for unfettered CORI-based employment discrimination. This combination also allows for every mistake you ever made, no matter how small or how long ago, to follow you for the rest of your life and forever impair your ability to find employment.

The effects of CORI-based employment discrimination are felt throughout Massachusetts. The economic effects felt by ex-offenders who are unable to maintain employment, are felt in not only the ex-offenders' communities and families, but by all Massachusetts citizens who pay higher taxes to finance the prison system and increased public assistance.

CORI laws, originally enacted to protect the privacy of ex-offenders, now offer little protection to ex-offenders. CORI reports are being requested by large numbers of employers, and Massachusetts offers no state protections for how this information is used. We offer three possible strategies to limit CORI-based employment discrimination: amending Massachusetts law, initiating a Title VII claim based on the disparate impact CORI-based discrimination has on minority communities, and limit employer liability for crimes committed by ex-offenders on the job.

II. The Impact of CORI Based Employment Discrimination

The problem is simple: ex-offenders are unable to find permanent employment because their individual CORIs are too easily accessible to almost any and all employers. Ex-offenders in minority and low-income communities cannot find or maintain a paying job, affecting their ability to support themselves and their family. Moreover, this often prevents ex-offenders from serving as positive role models and contributing to their communities. In addition to burdening minority and low-income community, all Massachusetts taxpayers feel the effects of this discrimination through the increased cost public assistance. Further, when an ex-offender is reincarcerated after they turn to illegal jobs, taxpayers once again bear the burden by paying for new prisons and housing inmates.

A. Economic Impact

Discrimination in hiring and promotion based on ex-offenders' CORIs impacts the ex-offender, Boston communities, and the state economy. This paper will show that because ex-offenders cannot find adequate paying jobs or jobs at all, the effect on them and their families is devastating. Each year thousands of inmates are released in Massachusetts hoping to reintegrate into society. For instance, 3,593 inmates were released in 1998, according to a Massachusetts Department of Correction report. Of these inmates, 26 percent of the males were either married, divorced, or separated, showing they had at least a spouse and possibly children to support.

Statistics on the economic impact of access to ex-offenders' CORIs are scarce. Few social scientists or state agencies have surveyed ex-offenders, during or after incarceration, on the impact CORI has on their lives, families, communities and the increased probability of becoming a repeat offender. Because of this lack of statistical research, our group developed a survey to measure the economic impact. Survey results confirmed that CORI regulations have a negative impact on the ability of ex-offenders to procure and maintain employment.

Approximately 54 percent of those surveyed were between the ages of 33 and 40. Responses came from 69 percent African-Americans and 31 percent European-American. The length of incarceration and type of crime committed varied significantly. The surveyed group had been convicted of crimes ranging from robbery to homicide, with the majority of participants reporting a conviction for possession of a controlled substance. Sixty-one percent of those surveyed reported being incarcerated up to five years. While only 15 percent reported being incarcerated for more than 10 years.

An overwhelming majority, 85 percent of ex-offenders, were denied employment because of CORI regulations. CORI based discrimination was not only reported by those surveyed in the areas of retail and human services, but financial, realty, and government positions also were withheld based merely on their ex-offender status as evidenced by their CORI. Sixty-nine percent of the people surveyed reported a major effect not only on their lives, but on the lives of their family members. Of those surveyed, 38 percent received benefits from the state to supplement their income, emphasizing the staggering amount of money the state of Massachusetts spends to supports ex-offenders because of their inability to gain employment. This inability can clearly be tied to Massachusetts' CORI regulations.

While these results are by no means conclusive, they can serve as a starting point for a more extensive survey. A small non-representative segment of the Boston community was surveyed, which is not representative of the statewide population affected by these regulations. Further research is required to uncover the true impact of CORI regulations on individuals and the community-at-large.

A more comprehensive study should be conducted using economic indicators to show a connection between CORI discrimination and the impact on ex-offenders, said Professor Barry Phillips, an economist, who has been working on CORI in conjunction with prisoner's rights since the mid-1970's. All homeless shelters should be visited to find the numbers and percentages of ex-offenders at these shelters. This could show that CORI based discrimination has even affected their ability to find housing.

The Massachusetts Department of Correction statistics showing the huge numbers of inmates being released each year demonstrate that CORI based discrimination affects many Massachusetts citizens. Further, the costs of incarceration, transitional assistance, and funding for employment resource agencies are borne by the Massachusetts taxpayers. This money could otherwise could be invested in education, elderly housing, or improving highways. Other economic factors draining taxpayers and the Massachusetts state government are the cost of crimes, new trials, incarceration, and prison cells. Overall, CORI based employment discrimination is forcing ex-offenders into low-wage, dead end jobs, or back into the illegal job sector, stated Phillips.

1. Communities

The effect of CORI based discrimination on the Boston community was vividly on display at the Massachusetts Department of Public Health public hearing on January 19, 2001. Ex-offenders, city councilors, homeless shelter representatives, and state legislators all spoke in outrage over the emergency CORI regulations that establish standardized procedures for the department's funded programs regarding the review of criminal records of candidates for employment, volunteer or training positions.

The newly proposed CORI regulations would impose a mandatory lifetime bar on employment with publicly funded health agencies for crimes such as perjury, extortion or trafficking cocaine. Further, the regulations would disqualify ex-offenders for five- and 10-years from substance abuse counseling jobs or working at homeless shelters when their CORIs show they have committed such offenses as forgery, possession of drug paraphernalia and delivering articles to an inmate. To overcome disqualifications, applicants with CORIs must submit to an assessment from a designated forensic psychologist or psychiatrist at the employer's expense. Most homeless shelters and human service organizations cannot afford the expense of \$500-\$2,000 for each test. Therefore, another area of the employment market is closed to job applicants with CORIs.

The community was staunchly opposed to the extension of CORI access because of its negative effect on members of the community trying to start over. The Department of Health decision to restrict the hiring of large segments of these communities because of a CORI is a policy with questionable overtones that will further divide our society, testified Boston City Councilor of District 8, Michael Ross. Community members who work with young people in areas such as Roxbury and Dorchester testified they would be unable to do so under these regulations, being disqualified for five or 10 years. For example, the current director of City Year Boston is an ex-drug user with a criminal record who turned his life around to lead the youth of Boston. Another six and a half year veteran in the human services field noted that he would be disqualified because he served an 11 year prison sentence before going on to graduate from Boston University.

Community organizations such as the Massachusetts Family Planning Association vehemently oppose the regulations because they deprive them of their best workers. For the past 10 years, the association has conducted outreach in Boston and other community neighborhoods to provide education to those at greatest risk of HIV/AIDS. Ex-offenders from these impacted communities who serve as peer counselors are highly effective in reducing the risks faced by their peers.

Leading members of Boston's African-American community summed up the significant impact of the proposed CORI regulations on ex-offenders attempts to right themselves. Boston City Councilor Chuck Turner stated, "If these regulations were passed by the legislature, they would be unconstitutional." Since the Reverend Martin Luther King went to jail, he would not be able to apply for a job under these CORI regulations, noted Reverend Don Muhammad.

B. Racial Impact

The effect of CORI-based discrimination is inextricably linked to racism because a disproportionate number of men and women of color are going to jail, according to Chuck Turner. The CORI law has a racial component that targets people of color. "Today, the

information is used by many companies to screen out particular individuals," he said. "Forty years after the affirmative action movement began, there are still many companies who are dismissing people with criminal records who are of color." Many companies will reject workers without concern as to whether their criminal activity is in any way connected to the particular job they are applying for, he concluded. Nevertheless, Turner's assertions are admittedly difficult to prove because CORI allows companies to summarily reject prospective employees because of their record.

However, while society is able to institute new laws through the legislature, laws do not necessarily change the thoughts and desires of the community. "We cannot dismiss the fact that now forty years after the affirmative action movement began, there is now a process of sending more people of color to jail, specifically because of the drug laws," stated Turner. Ex-offenders have a very difficult time finding employment, in both the public and private sectors. They also are confronted with problems when applying for public housing and grants for public education stemming from CORI laws grounded in racism. Massachusetts should not dismiss this move against affirmative action which has been caused by the intensification of CORI laws, he said.

C. Ex-offender Perspectives on Impact

The most realistic impression of the effects of CORI-based employment discrimination comes from the stories and experiences of ex-offenders we interviewed in focus groups. Beyond the statistics and statutes, there are real stories of real people, who are still suffering, after paying their debt to society by completing their prison sentences. Through these interviews we learned that the effects of CORI-based employment discrimination are deep and widespread, ranging from economic difficulties to psychological harms suffered by both ex-offenders and their families.

The most common effect CORIs have on ex-offender job searches is that they serve as gatekeepers, preventing ex-offenders from having a chance to compete for many jobs. The bottom line for many employers, it seems, is that having a criminal history results in automatic disqualification for employment. As a result, many ex-offenders turn to informal networks of friends, acquaintances, and family members for jobs, or they try to avoid CORI checks by lying on applications.

However, both of these strategies impose significant costs. Seeking employment through informal networks, rather than through the traditional application process, often cuts ex-offenders off from higher-paying and more stable employment. As one ex-offender pointed out, it often leads to employers' "taking advantage of [ex]-convicts because they know that you can't get a job. So once you get a job, they treat you like trash. As soon as they know your background, it's like I'm giving you a break - you owe me." Lying on applications also can have costs. One ex-offender reported that he had once gained employment by lying on the application, but then, after obtaining his CORI, the employer approached him while working and told him to "leave the building immediately. Just put down what you're doing and just leave the building." Another participant said that he does not lie on his applications, but tries to tone down descriptions of his offenses. Unfortunately, this has not helped him find any jobs.

"So once you get a job, they treat you like trash. As soon as they [employers] know your background, it's like I'm giving you a break - you owe me."

Despite occasional opportunities given to ex-offenders regardless of their criminal histories such as in the previous case, they are systematically and continuously faced with a dilemma. They can avoid the application process entirely by pursuing employment through informal networks and miss opportunities for better paying, more stable jobs, or they can lie on applications and face constant anxiety about being found out.

CORI-based employment discrimination also has a more subtle psychological effect on ex-offenders and their families. Many ex-offenders feel that this discrimination is an on-going punishment, which continues long after they have completed their prison sentences and often makes adjustment from prison to being a contributing member of society difficult. One ex-offender reported: "You're having a hard enough time going from living behind the wall with one mentality, trying to change while you're in there, which is hard enough. Now I'm going to a halfway house, and you're telling me I got to do a million miles of footwork for a \$7-an-hour job."

Furthermore, there is also a detrimental effect on the children of ex-offenders. The most obvious effect on children is the difficulty ex-offender parent have earning money to provide for the children's financial needs. Since CORI-based employment discrimination makes it difficult for parents to gain steady employment and reintegrate into society, it also makes it more difficult for formerly imprisoned parents to be part of their children's lives. One ex-prisoner said, "It hurts them mentally, physically, and spiritually because they don't have a parent who can help them, talk to them, and direct them, and tell them which way to go."

One focus group participant was a Northeastern University student when he began using drugs; he was still attending the university with a B average when he was convicted of a drug crime. This was his only conviction and he spent some time in jail for it. While it has been six years since his release and he has changed his life, but still cannot find a steady job.

Most participants stressed that they try very hard to change their ways after being released from prison. However, they also need jobs that will support them, and often their families as well. As a focus group participant noted, "any one of us can get a minimum wage job, but that won't put food on the table." For decent-paying jobs, employers perform a CORI check and will not hire convicted felons. As a result, most of the participants we talked to lie on their applications. Often, they will work for a few weeks before the CORI comes back, before their record comes to light. At this point, they are usually fired. Participants stressed that they take this time to make a positive impression. In one case, a participant was successful, and his employer did not fire him; instead, he was kept on a probationary basis. Since then, he has been able to keep the same job for nearly a year, and has been successful in changing his life. He did stress, however, that if it were to fall through, he would be willing to sell drugs again in order to feed his children. The company began checking CORIs after he had been employed for six months and found that he had failed to accurately report his criminal history on the application. But because he "never

missed work[,] ... was a good worker[,] and .. worked hard," he was allowed to stay on the job on probation.

All of the participants agreed that the prison system did not do much to prepare prisoners for re-entering society. When asked about a reintegration program, the participants responded that it did not really help any of them. They often viewed it as a lot of footwork to get a \$7 an hour job. Furthermore, they viewed the program as preparation for unattainable goals.

Unfortunately, ex-offenders with attainable goals often are impeded from successfully reintegrating into society. Until state and local legislators decide that CORI-based discrimination is a problem for all residents of Boston, the current trend of de facto exclusion of ex-offenders from securing employment will continue.

III. CORI Laws: What We Have and How We Got Them?

A once powerful tool to protect the right of privacy, the Massachusetts legislature has slowly changed the CORI Act into a tool that all but eliminates that right for ex-offenders. Many years ago Massachusetts decided to value the public's right to know over the ex-offender's right to privacy. However, changes made to the law over the years, mainly since 1996, tip the scales so far in the direction of the "right to know" that many if not most blue collar jobs and public assistance are unavailable to ex-offenders, convicted or not.

A. History of CORI

Massachusetts has implemented many changes to the laws that affect the privacy of individuals who have been in the criminal justice system and access to all associated records. The legislature has continued to claim that the goal of these changes is to reach a balance between privacy rights and the public's "right to know". The changes that we have seen in Massachusetts, especially over the past few years go far beyond this reasonable goal. The result of the legislature's efforts to "protect" the "innocent" public and "treat criminals like criminals" is that a large segment of our society are left without homes, jobs, and public assistance. We will start by exploring the law itself, where it began, and how it all went wrong.

1. Criminal History Systems Board

The Massachusetts Criminal History Systems Board (CHSB) has the authority to promulgate regulations regarding the collection, storage, access, dissemination, content, organization, and use of criminal offender record information. It consists of the following members: the Secretary of Public Safety, who serves as chairman, the Attorney General, the chairperson of the Massachusetts Sentencing Commission, the Chief Counsel for the Committee for Public Counsel services, the chairman of the Parole Board, the commissioner of the Department of Correction, the commissioner of probation, the commissioner of Department of Youth Services, and the colonel of the State Police, or their designees.

The governor appoints nine additional members to three year terms. Of these nine, there is one representative from the Massachusetts District Attorneys Association, the Massachusetts Sheriffs Association, and the Massachusetts Chiefs of Police Association. Also, the board includes a representative of private CORI users, a victim of crime, and four members who have experience in issues relating to personal privacy. Ex-offenders are not represented on the board.

CORI began in 1972. Originally, access to CORI reports was limited. Today, however, a staggering number of groups have access to criminal records. These groups include public and private employers, universities, landlords, record check companies, and the Housing Authority. An estimated 70,000 CORIs are disseminated per month.

2. 28 Years of CORI Legislative Change

In 1972, Massachusetts passed the Criminal Offender Record Information Act. This law was drafted to protect the privacy rights of individuals who were or had been in the criminal justice system. The CORI laws came at a time when privacy was considered to outweigh the public's right to know, and the Nixon Administration posed a threat to that privacy. The CORI laws also allowed Massachusetts to modernize the system of information exchange between different law enforcement agencies and between law enforcement agencies and the judiciary.

At the time of its drafting, the bill raised many concerns and went through a number of amended forms before finally being approved in both the state Senate and House, and signed by then-Governor Francis W. Sargent on July 19, 1972. One of the original concerns about the CORI laws was that their language was too ambiguous to actually protect the privacy of ex-offenders. Another was that the CHSB, which was created by the CORI laws to regulate dissemination of CORI reports, was essentially stacked with high level officials, all with an interest in allowing access to those reports. Additionally, it was felt that the CHSB had too much power, and that the regulatory power ought to rest with the more diverse Security and Privacy Council which was created along with the CHSB as a sort of consulting group. Also, some reservation was expressed at the lack of checks and balances for dissemination of CORI reports. The point was also made that although an individual was given a right to access their information, the law was (and is) silent about informing the individual that they have a CORI file. Additionally, it was felt that the rights of an individual if his/her CORI report was inaccurate or misused were vague and weak, as were the corresponding sanctions. This is typified by the use of language such as "'willful' violations". Finally, concern was expressed that the authority over CORI reports resides with a small group of individuals who were more interested in sharing the information than protecting individual privacy.

Now, almost 30 years after the CORI Act was signed into law, ex-offenders are finding that through a series of amendments, CORI laws are used as a tool against them. A gradual process has turned the tables on ex-offenders, fueled by intermittent bursts of public outcry and lawsuits filed by the media. The change began in 1978, just six years after the original drafting of the Act, when the law was amended to allow the CHSB the power to determine if the public interest in disclosure outweighed privacy rights.

The next catalyst for change in CORI law was the furlough controversy of 1986.

In 1986, Willie Horton, a convicted murderer, was granted furlough and failed to return to prison. Horton made his way to Maryland where he attacked a couple in their home. When the media tried to get information about Horton's record and previous furloughs, they were told that CORI laws prohibited the release of such information. This is where the battle between the public's right to know and an ex-offender's right to privacy began to heat up. The media wasted no time in printing blistering editorials against CORI laws and the Boston Globe soon filed a string of lawsuits designed to undermine the very foundation of CORI law.

In the 1988 presidential campaign, Vice President George Bush used the Horton incident to portray Massachusetts Governor Michael Dukakis as soft on crime. In response, a bill was filed in the Massachusetts legislature that allowed victims, the news media, the Housing Authority and the general public access to CORI reports for conviction, corrections placement, and parole status. After a two year struggle with opposition from the Civil Liberties Union of Massachusetts and the Commonwealth's Public Counsel Services, the bill passed and was signed into law in 1990. The bill was sponsored by Representative Salvatore DiMasi, chairperson of the Massachusetts House Judiciary Committee. The CORI laws were further amended in 1990 to eliminate the Secrecy and Privacy Council and make the CHSB the sole entity for CORI requests. vIn 1991, under the authority of the CORI laws, a set of regulations was adopted which outlined the functions of the CHSB, 803 Code of Massachusetts Regulations 2.00-9.00. The CHSB now clearly had autonomy with regard to all CORI issues. Now able to operate without the hindrance of a second committee, the new streamlined CHSB could more efficiently cope with changes to the law.

This momentum was carried into the next legislative session in 1992 where the CORI law was once again amended. The 1992 amendments were triggered by reports of possible child abuse in foster home situations. As the Department of Social Services was proving incapable of adequately protecting all of the children in its control, the legislature stepped in and amended the CORI laws to make it mandatory that a CORI check be done on each member of a foster home 18 years of age or older.

Under CORI law as it existed in 1992, the media and the rest of the public were denied access to an alphabetical index kept by court clerks that can be used in conjunction with a court docket number to locate the records of court activity. This information is essential to determining what occurred in a courtroom if one was unable to actually be there. After unsuccessful attempts to access this information the Boston Globe filed a lawsuit in federal court. U.S. District Court Judge Douglas P. Woodlock declared the portion of the CORI laws that restricted access to the indices to be unconstitutional under the First Amendment. The Commonwealth did not appeal the decision.

The next three years would bring general expansion of CORI access, most notably in 1995. In this year, the CORI laws were expanded to allow access to any entity receiving any type of government funding "that employed, hired, volunteered, or refers for employment to a client any individual who will have any interaction with an elderly or disabled person." This included such benign activities as calling a Bingo game at a senior center or teaching a class of disabled persons a new craft.

Although the changes to the CORI laws in 1995 may seem somewhat extreme, they pale in comparison to those made in the years that follow. In 1996, the enactment of the Massachusetts Sex Offender Registry Act foreshadowed a radical transformation in CORI law. In April of 1996, a Boston Globe article reported that the state was allowing ex-offenders to serve as foster parents. The Weld Administration reacted quickly. On May 20, 1996, the Executive Office of Health and Human Services (EOHHS) issued its Policy Manual Procedure #001. This procedure identified a nearly exhaustive list of crimes, both misdemeanors and felonies, and banned those convicted of these crimes from state employment. Some of the crimes, require a lifetime ban while others require either a five or ten year ban. A smaller group of crimes are deemed

"discretionary," meaning an ex-offender may be hired, but the employer must state why they chose to do so.

In the government's zeal to respond to public outcry and in light of the tough new sex offender laws, the state legislature added 17 new sections to the existing 15, more than doubling the size of the CORI laws. EOHHS procedure #001 now effected all entities receiving federal, state, or local government funding, and all entities contracting or subcontracting with the government. The CORI laws became so restrictive that a rehabilitated drug abuser is legally banned for life from working with those currently struggling with addiction.

Undoubtedly the Weld administration's implementation of EOHHS procedure #001 gutted the substantial privacy protections of the CORI laws. As public gained access and perceived safety, ex-offenders lost rights and employment opportunities. The problem was compounded in 1998 when the CHSB was granted the authority to make hearings optional when someone claims misuse of their CORI report. In 1999, the sex offender portions of the CORI law were amended to place more restrictions on ex-offenders employment opportunities, as school officials were given access to CORI reports for a wide range of personnel, including subcontractors and laborers who may have brief and remote contact with the school.

Protecting the public and the public's right to know is legitimate. However, it is difficult to believe that society today supports the idea that someone who was arrested for possession of marijuana should be banned from delivering meals to the elderly. How long must one pay for a single mistake made in his/her youth? Even today there are 49 proposed amendments to the CORI laws pending in the Massachusetts legislature. All but three expand access to CORI records or impose further restrictions on ex-offenders. If some of these amendments pass, the restrictions on ex-offenders could be expanded to virtually every blue-collar job in the commonwealth.

B. Actual Implementation of CORI

Under the procedures implemented by the CHSB, employers and agencies receive CORIs containing the amount of information they are cleared to see after approval by the board. The board has two types of record checks: public access record check and certified agency/employer checks.

1. Public Access Record Checks

In a public access record check, the company or individual receives the minimal amount of information such as conviction, nonconviction, and any felonies within two years, by giving the board a name and date of birth. Filling out a few simple forms and sending in \$25 gives a person or company complete access to an ex-offender's CORI.

2. Certified Agency/Employer Record Checks

Secondly, any state agency or employer can receive special certification from the board, which gives them almost unlimited access to records of any person. Most employers need to apply to the board with a special reason for certification, or have certification granted to them by the legislature, or made mandatory by state law such as all camps must be certified and all nursing homes must be certified. To date, 72 types of agencies have automatic certification and 7,000 to

7,500 have been certified by the board, of which in recent years, a high number of charter schools and private records check agencies have requested certification.

3. General Grant CORI Privileges

The Board adopts general grants when a number of applicants fit squarely into a specific category that is appropriate to receive a CORI. When an employer or agency has a general grant, the Board does not have to meet and review individual applications for these agencies. However, even if an agency or employer does not fall into one of these seven categories, the board can still approve an employer for general grant status. If an employer is certified, then all it has to do is request a CORI and they automatically receive it. No approval is needed by the board.

Some general grant privileges created by the Massachusetts Legislature and the board such as those concerning children and the elderly give the appearance of protecting the general public against ex-offenders working in these fields. However, general grants are also given for municipal, state, and federal governmental functions. Legislative committees authorized to oversee agencies possessing a CORI may inspect and copy it to fulfill legislative duties, according to the Board. Massage Licensing Authorities, Pawnshop Licensing Authorities, Fortuneteller Licensing Authorities, and Antique and Junk Dealer Licensing Authorities may receive CORIs pertaining to conviction and pending criminal case data for the purpose of screening pawnshop licensing authorities.

Further, the board allows grants to security organizations, including employers such as private detective agencies licensed in North Carolina. Background check companies may access and receive CORI from this agency for the purpose of screening otherwise qualified prospective employees or volunteers of client agencies or companies to the same extent as the client agency or company is authorized to receive CORI by the Board.

Many background check companies with Web sites offer employers access to prospective employees criminal data for inflated prices compared to the \$25 fee charged by the board. For example, www.criminal-records.com/massachusetts provides a records search on any individual from 1996 to today for \$75 per search.

4. Behind the Scenes: the Board and Employers

Each certified employer has a different level of clearance, meaning they see more or less of an ex-offender's record. The usual amount of information is all convictions and those pending. A person's CORI could contain convictions dating back to the turn of the century, which are kept on microfilm. All convictions from 1980 and on are in the state computer system.

Record checks must be approved by the board with at least 9 out of 20 members present for a quorum. They meet once a month. Anyone can request certification and they defend themselves in front of the board, while the board defends the public's interest of why the employer should not receive certification.

A CORI can be kept forever as long it is securely locked in a secure cabinet, or the board must be told if the CORI is shredded. Complaints have been filed with board because too much information was given out, but the ex-offender must bring that charge himself or the employer which received the CORI.

Often employers cannot read CORIs. They must refer to a sheet listing all the crimes and statute numbers. But most crimes are listed as "Possession of Class C." Most employers just want to know if the crime is a felony or misdemeanor because they have a felon/misdemeanor cutoff rule about not hiring felons.

In the past year, hundreds of employers have been approved for CORI access (see the Appendix for a complete list of employers in the past year approved for CORI access). Numerous North Carolina companies appeared on the list and many out-of-state requests also were endorsed by the board. The Boston Globe was the only employer denied a CORI request.

The process moves pretty quickly because the board meets every month, about how long it takes for a CORI application to be processed, stated Frank Carney, a former Criminal History Board member.

Virtually all types of employers apply for CORIs, Carney indicated. The board and its members take the "balancing test" required by the statute extremely seriously, Carney stated. He indicated that he tends to vote in favor of the person's privacy rather than the public's need to know. In his experience as a board member, the recidivism rate is high within the two-year period after a person is released from prison, but that it drops after those years. "People should have a chance to put their lives back together and move on." Although Carney recognizes this fact, he is still one of the few on the board that votes to deny CORI requests in the majority of cases. Most of the information on CORIs is accurate, but the board does receive complaints about improper disclosure for which a hearing procedure is held. In a perfect world, CORI information should be considered along with the person's other qualities and the employer should be allowed to decide if the employer is qualified for the position, Carney concluded.

VI. Strategies for Change

The ex-offenders interviewed in focus groups offered many ideas on the ways to limit the effects of CORI-based employment discrimination. We present three possible approaches for attacking this problem. The first would be to change the way in which Massachusetts allows CORI records to be used in employment decisions. The second approach would be to initiate a Title VII claim based on the disparate impact CORI-based discrimination has on minority community. Finally, our third strategy would be to limit employer liability for crimes committed by ex-offenders on the job.

A. Community Proposals for the Future

Towards the end of focus group interviews, we asked ex-offenders how they would change CORI laws or the ways in which employers are permitted to use this information. We asked the participants to adopt the role of a lawmaker and suggest ideas for change. Many participants responded positively to this suggestion, looking at the issue not only from their points of view, but also from those of potential employers.

Every ex-offender whom we interviewed had concrete ideas for improving CORI regulations. The overwhelming feeling is that an ex-offender needs the opportunity to demonstrate to a potential employer that he has reformed since incarceration; however, the interviewees agreed that this is not possible due to the way employers use CORI in Massachusetts. Ex-offenders believe CORI is used by employers for the sole purpose of denying employment without

providing the ex-offender with an opportunity to explain his situation or to make a positive contribution to the workplace.

"My hope is that they do something. Make some change in the CORI situation."

Few suggested the elimination or entire removal of CORI from the employment process. Instead, most recognized that CORI serves a legitimate purpose and that there should be a time in which employers look at an applicant's background before hiring. Many participants thought that CORI could be used in positive ways, instead of simply using the information to deny employment. Several people suggested using CORI in conjunction with a process of reintegration, working with employers and newly released individuals to promote networking and job skills. One participant described his ideas: I just feel that this CORI thing should be used in a positive way . . . it should be used to help people. This system being as powerful, or as strong as this country really seems to be, you know, the technology that we have This CORI thing really doesn't help people who are really capable of doing, of getting a better shot . . . If it's going to be used, the government can take folks and actually work with them in the private sector and go through a process to where they can actually get off. Because nobody should have nothing on them, because you have enough on you the minute you're born anyway.

One possible way to limit the pool of people who can access CORIs is to implement a two-tiered test that identifies those parties with legitimate reasons for accessing an ex-offender's CORI. Accordingly, we must first ask if senior citizens or children are impacted by the ex-offender's crime. Then, we must ask if there is a substantial relationship between the crime committed and that for which the ex-offender is applying (i.e. housing, employment, etc.). If we can answer "no" to both of these questions, then a CORI request should be denied.

Every ex-offender recognized that CORI serves a legitimate purpose.

Looking at the situation from an employer's point of view, some participants recognized that employers have a legitimate interest in knowing about the criminal backgrounds of their employees. As one participant said, "If I had a business, I'd like to know who's working for me, too." Yet, understanding the importance of this information to employers, these ex-offenders also feel that CORI should not be used for the sole purpose of denying opportunities. They see the need for protections for both employers and ex-offender applicants. One participant described his thoughts:

I think it's fair in some respects for an employer to have some type of measurement or some type of insight on who they're hiring. . . . I think, at the same time, people applying for jobs should have some type of protection, too. If they really deserve to be able to be hired for certain positions, if they're capable, and qualified, and something in their far past . . . there should be some type of fairness on both sides. Some type of scale or guidelines Not just if you have a record - oh, that's it. Cut and dry, like that.

Many participants were very interested in sharing their ideas for change and presenting their opinions on how to solve the problem of CORI-based discrimination. One ex-offender passionately discussed the need to focus attention on attainable goals, even though he is not part of the group he identified as benefiting from change in CORI. "Help the people who they can help first . . . I'd rather see one person helped than 1,000. One person is better than none."

"People applying for jobs should have some type of protection, too."

One focus group of six ex-offenders discussed changing the CORI laws by adopting a scale, by which first- or second-time offenders would be treated differently from repeat offenders. They articulated the same theme: "You can't judge someone who's been incarcerated his whole life to someone who's been incarcerated once while going to college." The discussion of different categories of ex-offenders arose in this focus group because one participant was a young man who served a short drug-related sentence in college, while other participants were repeat offenders. The repeat offenders saw themselves in a different category than the one-time offender, and they were particularly disturbed by his experiences of CORI-based employment discrimination.

The idea of a scale was articulated by a participant who had spent approximately the last 10 years incarcerated. He felt that a first- or second-time offender should not have his life and employment possibilities so disrupted by one or two mistakes. Discussing the need for a scale, he said:

Even though I would probably be at the top of that level because of the numerous incarcerations and felonies, at the same time, the person that's only been incarcerated once or twice, I don't think they should be put through what I have to go through, even though I should have to prove myself harder, which I'm doing.

Another recurring idea is to adopt a probation period after incarceration, during which CORI would be available, and then made unavailable a certain period of time after incarceration. Participants discussed making CORI unavailable five, seven, or 10 years after a person's last incarceration. There is an overwhelming feeling of "how long should this be held against me?" One participant said, "It was a double standard type thing for me. Once you pay your debt to society, I don't feel as though they should keep having that over your head, and keep punishing you for something you figured you paid your debt to society and should go on with your life."

Unless the laws are changed, ex-offenders will continue to be punished far beyond the sentence they served.

The idea of a probation period and a cut-off time for CORI availability also was expressed in an interview with the director of a male residential transition program in Boston. The program houses ex-offenders - after staying at halfway houses and before beginning independent living - and assists in obtaining employment and housing. With regard to housing, a person who has not been incarcerated for the past five years can, in most instances, receive public housing. The

director of this program sees the need to change the CORI laws in order to allow a time period during which CORI is applicable in employment. He said that, unless the laws are changed, ex-offenders will continue to be punished far beyond the sentence they served.

In my opinion, I think once folks have served their time, and they're back out, and it's supposed to be about rehabilitation and not punishment. So once they get out, then you make it almost impossible for them to start anew, by not giving them the basic necessities, not allowing them to have the basic necessities, like a job. So because of that, the laws need to be changed, where even if there's a CORI, there could be something put in place. I don't know, they have probationary periods for everybody that comes into work. Why not have some sort of probationary period for them as well? I mean, why not use that as well, as opposed to simply denying them employment. I'm thinking that for certain jobs, people would definitely want to know your past, just to do that work. And I think that's reasonable, but I'm thinking that there should be some sort of adjustment so that folks are at least given the opportunity to show that they have been rehabilitated. In other words, that's what the system is supposed to be about, not punishment. So if you're still denying folks access to what they need in order to live, then that's punishment, in my opinion.

These ideas for using CORI in positive ways, for adopting a scale of offenses or a probationary period after incarceration, arose in different ways in all of the focus groups. Ex-offenders' perspectives are particularly important because their lives and their families' lives are directly affected by CORI regulations. All of the ex-offenders interviewed recognized the need for change, and the need to strike a balance between the interests of ex-offenders and those of potential employers.

B. State Laws Concerning CORI

States have taken three main approaches in addressing the potential for abuse of CORI records in employment decisions. Some states such as Massachusetts attempt to regulate access to CORI information, while other states combat CORI discrimination by limiting the information contained in CORIs or by limiting the use of CORIs in employment decisions. The Wisconsin Legislative Council has prepared a comprehensive overview of state law approaches to limiting discrimination based on arrest or conviction records. The following survey the three approaches, and offers a detailed examination of the Wisconsin model. For a more comprehensive overview of state laws concerning arrest and conviction records and employment, see the Wisconsin Legislative Council Legal Memorandum, State Laws Prohibiting Employment Discrimination Based on Arrest or Conviction Record in the appendix.

The state of Washington, like Massachusetts, limits the availability of conviction records without specifying the manner in which the records can be used in hiring decisions. Washington limits the release of conviction records to instances where the potential employee will require bonding, or will have access to "information concerning national security, trade secrets, confidential or proprietary business information, money or items of value." The release of records is also allowed for investigations concerning employee misconduct if the misconduct may also constitute a penal offense. The state allows employees to obtain records of potential employees who will work with children or "vulnerable" adults, however, disclosed convictions are limited to crimes against children and other people.

Other states, including California, limit the information contained on records released to potential employers. California limits employers from inquiring about arrests unless the arrest is still pending. Records released by the state do not include sealed records, expunged records, or information on misdemeanors for which probation has been completed.

Four states, Hawaii, New York, Pennsylvania, and Wisconsin, specifically prohibit the use of conviction records for employment discrimination. Hawaii, which also limits what records are released, requires a "rational relationship" between a conviction and the duties and responsibilities of potential employment. New York requires either a "direct relationship" between a prior conviction and employment, or an "unreasonable risk to property, safety, or welfare of the public" for employment to be denied based on a prior conviction. Pennsylvania limits employer use of conviction records to instances where the "convictions relate to the applicant's suitability for employment."

C. Wisconsin as a Model for CORI Reform

Wisconsin's Fair Employment Act (WEA) is the most comprehensive state law protecting ex-offenders from employment discrimination based on conviction records. With the proliferation of private businesses offering criminal history checks, Wisconsin's method of limiting the use, rather than the content of criminal history records could be a useful model for Massachusetts to address and limit CORI-based discrimination. While Wisconsin allows public access to criminal records, the state has substantial limitations on the use of CORIs in employment decisions.

The limitations Wisconsin places on the use of criminal records in employment decisions addresses many of the concerns expressed in the focus groups, including the use of CORI as the sole basis for the denial of employment, the problem of all ex-offenders receiving the same treatment regardless of the offense, and the need to balance the interests of ex-offenders and the interests of potential employees.

Wisconsin's Fair Employment Act includes the presence of a conviction record as a prohibited basis of employment discrimination. However, an employer can refuse employment if the conviction "substantially relates" to the prospective employment position. Wisconsin also restricts employment in specific fields based on conviction records. Anyone with a past conviction record is specifically barred from employment as a private detective, or as an installer of burglar alarms. Anyone with a past conviction of manufacture or delivery of a controlled substance is barred from working in establishments that are licensed to sell alcoholic beverages. Most statutes regarding the licensure of specific fields are subject to Wis. Stat. § 111.335, and licensure can be denied if past convictions are substantially related to the licensure field.

The Wisconsin Supreme Court has determined that the "substantially related" test does not require a detailed inquiry into the factual context of an offense. The circumstances to be analyzed are "the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." The potential employer's inquiry into the circumstances of the conviction is limited to the general facts of the conviction.

The Wisconsin Department of Workforce Development (WDWD), Equal Rights Division offers information for employers on the implementation of the FEA. According to the WDWD, an employer can only ask for information regarding past convictions if the employer makes it clear

that such information will be considered if the offense is "substantially related" to the position being sought. Employers in fields where bonding is required may ask for information in relation to securing bonds and may deny employment if the prospective employee is not bondable. An employer may ask questions regarding the circumstances surrounding a conviction only to determine if the conviction is substantially related. Although the "substantially related" test is not defined by statute, the test looks at the circumstances surrounding the conviction compared to the circumstances of the job. The more similar the circumstances, the more likely a substantial relationship will be found.

Employers may not use a lengthy conviction record as the sole basis for denying employment. Past convictions can only be considered if they are substantially related. Unrelated past convictions may not be considered as part of the denial of employment. If an employee feels that he has been discriminated based on a conviction record or if the employee feels that his conviction is not substantially related to the job, he can file a complaint with the WDWD Equal Rights Division.

Wisconsin began prohibiting the arbitrary use of arrest and conviction records as a basis for employment decisions in 1977. The Wisconsin Legislative Council Staff's Information Memorandum on FEA cites three primary reasons for the limitations placed on the use of conviction records. First, employment discrimination based on conviction record limits an individual's employment opportunities and creates a life-long sentence of un- or under-employment. Second, recidivism rates are lower for ex-offenders who are able to find employment. Third, it was felt that without such protections ex-offenders were encouraged to lie on applications for employment. Under Wisconsin law, falsification of employee applications could be immediate grounds for dismissal and dismissals are grounds for denial of unemployment compensation.

The Wisconsin laws concerning conviction records and employment were revised four times since enactment. Twice, proposals have been made to limit the protections of the bill, however, both proposals failed. In 1991, the statute was amended to exclude convicted felons from obtaining work installing burglar alarms. In 1993 and 1995 licenses and permits for alcoholic beverages were prohibited for individuals convicted of certain drug-related offenses. In 1995 another exception was created to prohibit individuals with felony convictions from obtaining employment as private investigators and security personnel.

D. Remedies for Ex-offenders Through Title VII

Title VII of the Civil Rights Act of 1964 (42 USC §§ 2000e et seq.) was enacted to ensure equality in employment opportunities for racial minorities. Because conviction rates are disproportionately high for minorities, employment policies that exclude ex-offenders have a detrimental impact on persons of color, thus presenting Title VII as a potential legal strategy for relief.

Because Title VII has gone through dramatic changes since its enactment, the legal community is unsure about its current standards, particularly with respect to cases where intentional discrimination cannot be proven. While the U.S. Supreme Court expanded the reach of the Act in 1971 to include a disparate impact cause of action, the Court seriously limited the scope of Title VII relief under the Civil Right Act of 1964 in several 1989 cases. Congress responded to the

judiciary with sweeping amendments to the Act in 1991, which unfortunately did not succeed in its expressed goal of codifying the standards set out in 1971 thus leaving the interpretation of the Act back in the hands of the courts.

Title VII claims can be brought under either disparate treatment or disparate impact causes of action, which differ by the requirement of intentional discrimination for disparate treatment cases. Discrimination is inferred under disparate impact cases by a demonstrated disparate effect on a protected class resulting from employment practices not justified as business necessity. Because CORI-based employment discrimination is racially neutral on its face, this analysis will focus on the requirements for disparate impact causes of action and will evaluate the strengths and weaknesses of a challenge brought forward by ex-offenders challenging CORI-based discrimination.

1. Judicial Interpretation of Title VII Before 1991

The Congressional objective in enacting Title VII of the Civil Rights Act of 1964 was to achieve equality in employment opportunities and remove barriers operating in the past to favor identifiable groups regardless of their qualifications. In 1971, the Supreme Court in *Griggs* introduced the theory of disparate impact in Title VII claims to address grievances by black employees who were denied access to higher paying jobs because of low scores on mandatory aptitude tests. While the requirement was neutral on its face since all employees had to pass the tests, it effectively disqualified most black employees since they generally received lower scores on these tests. Despite no finding of discriminatory intent, the Court ruled in favor of the plaintiffs, because the tests were not found to have a demonstrable relationship to successful job performance. Evidence showed that employees hired or promoted prior to the implementation of this requirement continued to perform satisfactorily. The Court explained that Title VII was enacted to direct the consequences of employment practices, and, thus, discriminatory intent was not required under the disparate impact cause of action.

For the next 18 years, the Court applied the *Griggs* standard without major changes. Under this standard, once the plaintiff succeeded in demonstrating disparate impact on a protected class and the burden shifted to the employer to show that the challenged employment practices were job related and constituted a business necessity. In *Albermarle Paper Co. v. Moody*, the Court furthered the opportunity for plaintiffs to prevail by establishing that even if the employer met its burden of establishing business necessity, the plaintiff could show that its justification was a pretext by demonstrating that a less discriminatory method for meeting the stated business objective existed.

The Court dramatically shifted its doctrine in 1989 when it ruled in favor for a salmon cannery that hired predominantly Filipino and native Alaskan applicants of unskilled cannery positions, and white applicants for both skilled and unskilled non-cannery positions. The Court rejected the statistical evidence of disparity in the racial composition of the two departments and asserted that the plaintiff must identify challenged employment practices with particularity and prove that each practice caused "substantial" disparity. Further, the defendant was no longer charged with the burden of proving business necessity and needed only to provide a less stringent "business justification" which required that the challenged practice serve "the legitimate employment goals of the employer." The burden of persuasion shifted to remain with the plaintiff throughout, thus requiring the complainant to prove that the business justification presented by the employer was

not a valid justification. The Court upheld the pretext option for plaintiffs to prevail but asserted required consideration of costs and administrative burdens on the employer.

2. Legislative Response: Civil Rights Act of 1991

The original draft of amendments to the Civil Rights Act, introduced in 1990, explicitly addressed the areas targeted in Wards Cove. Specifically, the proposed draft permitted the plaintiff to challenge a group of employment practices, rather than identifying a specific one as causing disparate impact, restored the burden of persuasion with respect to business necessity to the defendant, and restored the original stringency of the "business necessity" doctrine. Although the 1990 draft passed through Congress, it did not generate enough support to override the presidential veto. Significant concessions were made to allow for its passage in 1991, leaving both Democrats and Republicans claiming victory, but producing a vaguely worded document. While the 1991 Civil Rights Act (hereinafter "1991 CRA") explicitly states the purpose of codifying the standards set in Griggs and addressing the judicial interpretations made by Wards Cove, the final product effectively hands the problem back to the courts.

The only targeted area agreed upon, and explicitly addressed in the 1991 amendments, is the issue of restoring the original distribution of burdens of persuasion. The issue of specificity in identifying discriminatory employment practices was scaled down to require that a particular practice be challenged unless separation of employment practices is impossible. The Act does not provide any guidelines as to when such a separation can be legally deemed impossible. The most contentious issue left open by the Act, however, is the definition of "business necessity". The relevant part of the Act states that an unlawful employment practice is established when a plaintiff makes out a prima facie case of discrimination and the respondent fails to show "business necessity". The only clue as to what Congress meant by this terminology is found in the Purposes section of the 1991 CRA stating that one of the purposes of the Act was to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs". Congress did not actually codify a specific formulation, as promised. The ambiguity within the text of the 1991 CRA has led to ongoing legislative disputes as to whether the Act rejects Wards Cove or upholds it.

3. How Will the Courts Respond?

The ambiguity in the 1991 CRA leaves open areas for judicial interpretation. One can expect the Supreme Court to follow the same doctrinal path demonstrated prior to 1991 in Wards Cove, except where specific guidelines have been set. As Justice Stevens articulated in his dissent, Wards Cove shows a convergence between disparate impact and disparate treatment causes of action and it is highly suggestive that disparate impact claims will only prevail when a "smoking gun" is found. Nonetheless, the 1991 CRA imposes some constraints on the judiciary and there are strong arguments to be made in favor of upholding the Griggs standard. The burden of persuasion distribution has been firmly restored in §105, thus ruling out the Wards Cove approach. Further, although the Act does not actually define the "business necessity" standard, it clearly evokes the Griggs terminology rather than the Wards Cove "business justification" and "legitimate employment goals" standards. Also, the Purposes section of the Act explicitly states the intent to codify Griggs.

4. Judicial Response: 1991-2001 Title VII Claims

There have not been any relevant Supreme Court disparate impact Title VII rulings since the enactment of 1991 CRA to shed light on how the Court will respond to the Act, particularly with respect to whether to adopt the Griggs standard or the Wards Cove standard on the issues of business necessity and causation. Federal Appeals Court rulings since 1991 show that judges do not have clear guidance on which standard to adopt.

Cases dealing with business necessity have shown a deference to the Griggs standard. In *Bradley v. Pizzaco of Nebraska, Inc.*, an African-American man suffering from a skin condition suffered by 50% of black men which makes shaving impossible for many of its victims, sued a Domino's pizza franchisee after he was discharged for failing to comply with the employer's no-beard policy. The Eighth Circuit applied the Griggs standard by requiring the employer to show that the alleged discriminatory policy was manifestly related to the employment, that it has a compelling need to continue the policy and that no alternative existed. The court found that Domino's failed to meet this burden with its proffered justification, that customers prefer clean-shaven delivery personnel nor did Domino's show that there were no alternatives to the policy. The Eleventh Circuit also applied the Griggs "business necessity" standard when ruling in favor of the defendant city in a disparate impact employment discrimination case brought by African American firefighters unable to shave because of PFB. The Court accepted the city's claim that beards would endanger the safety of firefighters using respirator equipment as a "business necessity". In *Lanning v. SEPTA*, female candidates for transit police officers claimed the Authority's use of a cutoff aerobic capacity requirement constituted sex-based disparate impact employment discrimination. The Third Circuit ruled for the Plaintiffs asserting that the 1991 CRA required that business necessity be interpreted using Griggs and related pre-Wards Cove cases which require that the cutoff score be shown to measure the minimum qualifications necessary to successfully perform the job.

In contrast, when addressing the issue of causation, the Second Circuit applied the Wards Cove standard in *Brown v. Coach Stores, Inc.*, where the Plaintiff alleged race-based disparate impact employment discrimination relying on statistical evidence of a significant drop in minority employees over a five year period to well below the local industry standard. The Court dismissed the action for failure to state a claim because plaintiff failed to adequately allege a causal connection between a facially neutral policy and the low proportion of minority employees. The Court cited Wards Cove for the proposition that a showing of a bottom line racial imbalance in the workforce is insufficient evidence for a Title VII claim since a particular employment practice was not identified.

5. CORI-based Discrimination Claims

For an ex-offender to make a claim under Title VII, s/he must address a facially neutral employment practice denying or severely restricting employment opportunities to persons with conviction records. The plaintiff(s) must demonstrate through evidence of higher conviction rates among people of color that the policy of denying employment to ex-offenders has a disparate impact on otherwise qualified racial minority applicants. The employer then will have the burden of proving a business necessity, and, if met, the plaintiff(s) will be required to demonstrate pretext through an alternative employment practice.

The lack of clarity in the 1991 CRA leaves many open questions as to how the courts will respond to such claims. A court preferring the Wards Cove mode of analysis used in the Second

Circuit may reject a bottom line showing of disparate impact on racial minorities as meeting the initial requirement of proving discrimination. Next, the "business necessity" standard has been applied as a heavy burden by some courts, but Fitzpatrick suggests that this standard can be met when safety concerns arise. While Fitzpatrick addressed the ability of a firefighter to perform his duties safely if unable to shave, the argument could extend to the safety of the public and other employees should an ex-offenders be permitted into the workplace. This argument could only be admitted with evidence that ex-offenders are more likely to commit a crime at work, a common assumption that has never been proven. Last, a court adopting a stringent causal connection requirement between the employment policy and the disparate impact will require a high number of rejected qualified applicants based solely on their CORI records. It will be easier to attack absolute bans on hiring individuals with conviction records, such as the one introduced recently by Massachusetts' Department of Public Health, since subjective hiring practices must be considered in other cases.

Success in challenging the disparate racial impact involved in policies denying employment to individuals with criminal records is not unprecedented. In the often cited case of *Green v. Missouri Pacific Railroad*, the Eighth Circuit held that the railroad's blanket rejection of all ex-offenders was not job related because it was not necessary to foster safety and efficiency. The Court concluded that a person's propensity to commit a crime should be determined by examining each ex-offender's background individually. In the case of an employer use of criminal records, the personal characteristic that the employer should seek to measure is the likelihood of the applicant committing a particular crime. The employer should consider the nature of the conviction but also what the applicant has done since being arrested. A background investigation will assist the employer in making this determination.

E. Limitation of Employer Liability

A main liability concern for employers is hiring an ex-offender and having him/her harm a third party at work. The two legal doctrines addressing this concern are negligence in hiring and negligence in retention. Under the doctrine of negligent hiring, employers have a duty to exercise reasonable care in the hiring of employees if those employees have public contact. The doctrine of negligent retention holds that if during employment the employer becomes aware of problems with an employee's "unfitness," then the employer is required to take further action such as investigation, discharge or reassignment.

Employers who discharge employees or fail to hire a prospective employee because the individual has a conviction or other offense on their CORI report without qualifying that decision are placing themselves at great risk. If a hiring or firing does take place, then there must be an element of foreseeability involved in that decision. For example, a convicted bank robber will be denied a job as a bank teller if that information is made available to the bank. Denying a fully qualified individual a job on an assembly line because he was convicted of soliciting a prostitute two years ago would be difficult to prove foreseeability. The CORI laws do, however, place requirements on all entities that receive government funding, as well as those that contract with or are licensed by the government. These requirements include mandatory CORI reports for all employees and employment bans for certain offenses.

Employers should also be cautious in Massachusetts in only using conviction information, as it is illegal to take action based on arrest records or pending charges. Employers may find that the use

of CORI reports to deny employment where such action is not required by law, may also lead to racial discrimination lawsuits.

There are benefits of using CORI reports in the final stage of the application process. However, employers should understand the number of legal pitfalls that exist in misusing this information, and how easy it is to do so. In the future, prospective employees may be given more options to protect themselves against lawsuits and provided tighter regulations on the employers use of CORI reports. Proactive employers should choose to take the correct steps now to eliminate the problems associated with the potential misuse of CORI reports and to save themselves expensive lawsuits in the years to come.

V. Conclusion

CORI-based employment discrimination has significant costs for ex-offenders, local communities and society. It deprives ex-offenders of the opportunity to find meaningful, rewarding work as they try to reintegrate into society and it deprives communities of productive, self-supporting members. Society bears the cost of children whose ex-offender parents cannot support them properly and the cost of re-incarcerating people who re-offend because they cannot find legal work. While access to conviction records can serve legitimate safety purposes, blanket restrictions on hiring ex-offenders serve no other purpose than enabling politicians to appear tough on crime and assuaging the fear of liability felt by employers. The original purpose of CORI law to protect the privacy of ex-offenders has been completely lost.

Other states have created systems in which the privacy rights of the ex-offender are thoughtfully balanced with the security concerns of the public to accommodate both. In the interests of justice Massachusetts must join them. This can be accomplished through lobbying the Legislature to change the laws, through court challenges to the disparate impact of CORI-based employment discrimination on minority communities or both. At the same time, issues of employer liability must be addressed. Ex-offenders only want the opportunity to prove that they can become productive members of society. They deserve that chance.

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MA Reg. Tracking Statenet, 1991 Lexis 3257-63
MA H. 5615, 180th Gen. Court, Reg. Sess., (Dec. 20, 1996)
MA H. 5949, 180th Gen. Court, Reg. Sess., (Aug. 5, 1996)
MA Reg. Tracking Statenet, 1998 Lexis 6590, 6619, 6797
MA H. 4387, 181st Gen. Court, Reg. Sess., (Sept. 10, 1999)
MA H. 4809, 181st Gen. Court, Reg. Sess., (Sept. 28, 1999)
MA H. 1, 8, 46, 136, 138, 148, 149, 150, 163, 168, 176, 206, 501, 588, 614, 639, 1087, 1171, 1276, 1347, 1452, 1684, 1974, 1978, 2297, 2313, 2579, 2956, 3062, 3366, 3495, 3679, 3856,
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