

THE STANLEY JONES CLEAN SLATE PROJECT

CORI-BASED EMPLOYMENT DISCRIMINATION: ISSUES AND POSSIBLE SOLUTIONS FOR EMPLOYERS

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I. EXECUTIVE SUMMARY

A. INTRODUCTION

According to the Urban Institute Justice Policy Center, approximately 600,000 individuals will be released from federal and state prisons in the upcoming year, including more than 3,000 in Massachusetts alone. Travis, Jeremy, et al. "From Prison to Home: the Dimensions and Consequences of Prisoner Reentry." Urban Institute Justice Policy Center, June 2001. See Appendix C37. Re-entry can be difficult for ex-offenders on multiple levels, especially when seeking employment. Ex-offenders face many obstacles, including the stigma attached to incarceration, reluctance on the part of employers to hire ex-offenders, and lack of job skills and experience due to time spent away from the workforce. A survey of employers in five major cities found that two-thirds (3/4) of employers would not knowingly hire an ex-offender. Id. Moreover, at least one-third (1/3) of employers check the criminal histories of job applicants. Id.

B. GOALS

Although ex-offenders entering the job market may face obstacles in obtaining employment, there are many organizations such as the Stanley Jones Clean Slate Project ("SJCSPP") that can provide guidance, information, and assistance to both employers and employees in Massachusetts. In Northeastern University School of Law's second year working with SJCSPP, Law Office 13 focused primarily on compiling comprehensive information for SJCSPP to use in encouraging Massachusetts employers to hire ex-offenders. By

interviewing a cross-section of ex-offenders and employers in Massachusetts, we sought to create a realistic understanding of how ex-offenders and employers experience the employment seeking process. Our goal was to give SJCSPP a report and presentation that would examine the 1) the current status of CORI (Criminal Offender Record Information) laws in Massachusetts, 2) issues faced by both ex-offenders and employers in the employment seeking process, including employer liability 3) tax credits and other incentives available in Massachusetts for employers who hire ex-offenders, and 4) suggestions for new legislation based on successful incentives and programs in other states.

C. FINDINGS AND SUGGESTIONS

In compiling this report, Law Office 13 performed extensive legal research regarding the CORI Act, the CHSB (Criminal History Systems Board), CORI regulations and procedures, the extent of public access to CORI information, and relevant case law and statutes. Furthermore, Law Office 13 focused on employer liability, negligent hiring, federal and state incentive programs, and tax credits. The overall goal of the legal research was to determine 1) the existing state of CORI laws, 2) what, if any, liability existed on the part of an employer when hiring a job applicant with a prior criminal history and 3) what, if any, incentives were offered to employers in Massachusetts and/or throughout the country with respect to hiring ex-offenders.

This report outlines the existing state of CORI laws, and outlines procedures for the reading, correcting and sealing of

criminal history records. In addition, recent changes in CORI laws and the trend toward broader availability of criminal records are discussed.

Moreover, there is very limited liability for employers with respect to hiring employees with criminal histories. In fact, in Massachusetts, no statutes specifically set forth guidelines for employer liability. However, employers must exercise "reasonable" care when hiring employees. Employers are only required to perform criminal background checks when an employee will have substantial contact with the general public, especially vulnerable populations.

Although Massachusetts administers several federal incentive programs, it does not provide any additional state level incentive programs for hiring ex-offenders. For example, the Federal Bonding Program, administered in Massachusetts by the Department of Employment and Training, issues fidelity bonds to employers when an employee's criminal history causes a commercial insurance carrier to consider him or her as "at risk." The federal government also offers the Work Opportunity Tax Credit, the Welfare-to-Work Tax Credit and financial assistance through the Workforce Investment Act.

Finally, Massachusetts should look to other states that have made tremendous strides in providing programs and incentives for employers and ex-offenders. For example, several states give incentives to employers who hire targeted groups, such as ex-offenders, through the use of state tax credits for employment zones (economically distressed areas). Also, Wisconsin and Iowa both have

successful tax benefit programs for employers willing to hire ex-offenders and other targeted groups. Additionally, both the Safer Foundation in Chicago and Project RIO in Texas are models of successful programs which facilitate interaction between employers and ex-offenders. With so many models in place, Massachusetts ought to be able to provide more assistance to employers hiring ex-offenders.

II. CORI LAWS: HISTORY AND EVOLUTION

A. CORI STATUTES AND REGULATIONS

The Criminal Offender Record Information Act (the "CORI Act"), as set forth in Massachusetts General Laws Chapter 6 §§ 167-178 was enacted in 1972 to protect the privacy of ex-offenders. The CORI Act created a centralized database to which all of the Commonwealth's probation and parole offices are to make regular reports, as well as the Criminal History Systems Board (the "CHSB" or the "Board"), to control and regulate access to information contained in the database. Prior to the enactment of the CORI Act, criminal record information was considered public record, with each agency or court keeping criminal records for its own use. While attempting to protect the privacy of ex-offenders, the CORI Act centralized these records, thus enabling law enforcement agencies greater access to criminal records.

The Criminal Offender Record Information ("CORI") statutes and regulations govern the composition and function of the CHSB and dictate what information is to be reported to the CHSB, how long information is considered public, and who may gain access to records

once the statutorily mandated time frame permitting general public access has passed. Mass. Gen. Laws ch. 6, §§ 167-178 (2001); See Appendix A1; 120 Code Mass. Regs. § 500.00 (2002); See Appendix A2; 803 Code Mass. Regs. §§ 2.00-8.00 (2002); See Appendix A3. Criminal justice agencies and probation and parole offices must report to the CHSB detailed and complete records of all cases including, but not limited to, arraignments, convictions, and all other procedures, including dismissals and non-prosecutions. 803 Code Mass. Regs. § 2.03; Mass. Gen. Laws ch. 6, § 168A.

Under the CORI Act, criminal histories are not considered public records. Id. However, despite this formal classification, there are a number of exceptions which allow the general public to gain access to this information. The public may access the criminal history of an individual if that individual: 1) has an open warrant for arrest or any other pending matter; 2) is presently on probation, parole, or incarcerated; 3) ended his or her involvement with the criminal justice system (probation, parole, or incarceration) within one (1) year for a misdemeanor or two (2) years for a felony; 4) was sentenced to five (5) or more years in prison; or 5) is deceased. 803 Code Mass. Regs. § 2.04. Thus, the essential problem with CORI laws is the struggle to balance the privacy interests of ex-offenders with the need for public dissemination of information.

While the CORI Act was originally enacted to protect the privacy of ex-offenders, courts have entered the debate as to whether or not CORI reports and/or certain sections of information

contained therein should be considered public records. In the case of Globe Newspaper Company v. John J. Conte et al., the Globe Newspaper Company (the "Globe") sought to obtain docket numbers for municipal corruption cases from various district attorneys' offices, who refused to comply. 2001 WL 835150 (Mass. Super. July 19, 2001); See Appendix B26. They claimed that the information could not be released without violating CORI statutes. Id.

The court held that the various district attorneys' offices had to release the docket numbers of criminal cases prosecuted in public judicial proceedings. Id. As docket numbers are a matter of public record, they are subject to mandatory disclosure. Id. The ruling was based on the fact that the Globe requested only offense-specific information and not defendant-specific information, and therefore, releasing the docket numbers did not violate the privacy rights of individuals. Id.

In Bellin v. Kelley Consultants, Inc., the plaintiff alleged that his CORI information was disclosed in violation of Mass. Gen. Laws ch.6, § 172. 435 Mass. 261 (2001); See Appendix B27. The police suspected an inside job when a larceny had been committed at Kelly Consultants, Inc. ("KCI"). Id. After performing criminal background checks on all KCI employees, the police found Bellin to have a criminal record containing charges of larceny and fraud. Id. An officer threatened to reveal Bellin's CORI report to KCI if he refused to take a lie detector test. Id. Although Bellin agreed to submit to the test, the officer nonetheless disseminated his CORI information to KCI. Id. Despite the fact Bellin was never charged

with a crime, he was fired when the results of the lie detector test turned out to be "unfavorable." Id.

The Supreme Judicial Court (the "SJC") reversed the Appellate Court's holding that the regulation providing for broad dissemination of CORI information in ongoing investigations exceeded legislative authority and was therefore invalid. Id. The SJC felt that there was no evidence that CORI regulations are "illegal, arbitrary or capricious." Id. at 265. Since CORI regulations implicitly allow criminal justice agencies to use CORI in performing their duties, the SJC found that dissemination of Bellin's CORI report to KCI in the course of a criminal investigation was appropriate. Id.

These cases were yet another setback in the struggle to restrict access to CORI information so as to protect the rights of ex-offenders, which, after all, was the original intent of the CORI Act.

Although CORI information is widely disseminated in practice, technically, under Mass. Gen. Laws ch. 6, § 172, an individual's criminal history record may only be accessed on three grounds. First, the law extends virtually unlimited CORI access to criminal justice agencies, including access to records that contain conviction and non-conviction information.¹ Id. Second, agencies and individuals required to have access by law, such as the U.S. military, are granted access to the extent necessary to fulfill

their needs. Id. The third and most common form of access is granted to individuals by submitting an application to the CHSB. Any person, group or entity can request and receive certification to gain access to a CORI "where it has been determined [by the CHSB] that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy [of individuals]." Id.

Certification requires the petitioner to file a three-page application with the CHSB, formalizing its necessity for CORI access.² See Appendix E46. At a monthly public meeting, each application is reviewed by the CHSB and the applicant's need is balanced against an individual's privacy interests. Mass. Gen. Laws ch. 6, § 172. Applicants are invited to present their case to the Board in person. Id. Applications must be approved by a two-thirds (2/3) vote of the Board in order to be certified for CORI access. Id. The Board may grant access for a single identified individual, or individuals, on a single occasion, or for a specified period of time not to exceed two (2) years. Id.

Along with the statutorily defined allowances for disclosure, the general public may circumvent the CHSB and acquire access to criminal history information in a number of ways. For instance, a single search on the Internet provides over 100 links to companies that perform criminal background checks for a fee. This suggests

¹ Non-conviction information includes arraignments, dismissals, and non-prosecutions.

² This application for certification can now be accessed through the CHSB's website. www.mass.gov/chsb. Once an individual is certified, he or she may access CORI reports online. Id.

that the original goal of the CORI Act -- to protect the privacy of ex-offenders -- has not been achieved through either statutory or legislative means. However, according to Barry LaCroix, Director of the CHSB, these companies do not receive information from the CHSB, but instead use arrest records from courts, which are publicly available, to compile information on individuals then market them as criminal histories. Interview with Barry LaCroix, Director of the CHSB, March 12, 2002. Although this may often be true, the CHSB's list of pre-approved agencies includes private investigators from North Carolina, as well as other agencies that would not fall into one of the statutorily defined categories that are granted access. CHSB, General Grants www.state.ma.us/chsb/CORI/gen_grants1.pdf (accessed Mar. 13, 2002); See Appendix D41. This suggests that companies marketing criminal histories over the Internet are not necessarily precluded from gaining access to CORI reports. Furthermore, penalties for the misuse of a CORI are nominal; civil fines are limited to no more than \$500.00 per violation. 803 Code Mass. Regs. § 5.06.

While public access to CORI information is loosely restricted from the general public, an ex-offender may find that he or she faces formidable obstacles and delays when attempting to gain access to his or her own criminal history. Mass. Gen. Laws ch. 6, § 175 states that an individual has the right to inspect "criminal offender record information which refers to [that individual]." As the following case illustrates, however, it can be a lengthy process to access one's own criminal history.

In Richard Seaver v. Stanley Adelman et al., the plaintiff requested a copy of his own CORI report from the CHSB. 49 Mass. App. 1117 (2000); See Appendix B28. The plaintiff filed a complaint with the District Court when, six (6) months after filing the request, he still had not received a copy of his CORI report. Id. The case was dismissed since the CHSB had not denied his request, and therefore, he had not "exhausted his administrative remedies." Id. This case illustrates that with no allotted time frame, individuals may be forced to wait months before having the opportunity to obtain their CORI reports.

Employers also expressed frustration regarding the amount of time it sometimes takes to obtain a CORI report. One employer, an administrator who is required to perform CORI checks on each candidate for employment, explained, "It takes much too long to get back an applicant's CORI report. In some cases, it has taken as long as 4 or 5 weeks. This is much too long when you are trying to fill positions. If it turns out 4 or 5 weeks after conditionally hiring someone that they have a record and can't be hired, that is another 4 to 5 weeks that the position will have to go unfilled. A good candidate you could have hired during that time will probably have found another job and not be able to take the position." Interview with Employer, School Administrator, Feb. 12, 2002. However, Barry LaCroix of the CHSB attributes this delay to bureaucratic issues outside of his office's control. Interview with Barry LaCroix, Director of the CHSB, March 12, 2002. According to Mr. LaCroix, technology has been updated in the past few years, most

recently, the web page has been updated, now enabling his office to provide the required information within one (1) day to anyone previously certified. Id.

B. THE CRIMINAL HISTORY SYSTEMS BOARD

The Criminal History Systems Board (the "CHSB" or the "Board") was created to provide for and exercise control over the installation, operation and maintenance of the CORI system. Mass. Gen. Laws ch. 6, § 168. Barry LaCroix explained, "the CHSB is essentially a warehouse of all the criminal information for the state." Interview with Barry LaCroix, Director of CHSB, March 12, 2002. The CHSB was designed to organize the collection, exchange, dissemination, and distribution of criminal records. Mass. Gen. Laws ch. 6, § 168.

The CHSB essentially consists of the department heads of each major criminal justice agency in Massachusetts and several appointed Board members, including a victim of crime and persons with experience in privacy issues. Mass. Gen. Laws ch. 6, § 168. However, the applicable statute does not allow for the appointment of any ex-offenders to represent their privacy interests, although they are the people who are purportedly protected by the regulations. Id. Prior to 1990, each CORI request had to be approved by the CHSB, as well as the Security and Privacy Council. Interview with Barry LaCroix, Director of the CHSB, March 12, 2002. The Security and Privacy Council was abolished in 1990, leaving the CHSB as the sole gatekeeper of CORI information. Id.

C. READING, CORRECTING, AND SEALING A CORI

1. READING A CORI

To the uninitiated reader, CORI reports may seem incomprehensible. This often presents difficulties for employers when making hiring decisions regarding ex-offenders. CORI reports contain a vast body of information including abbreviations for crimes, the disposition and status of the charge, the court in which the charge was brought, and the correctional facility involved, if any. In fact, there are over 250 abbreviations for crimes alone. See Appendix D42. Multiple listings for the same crime further confuse the unfamiliar reader. For instance, information such as an arraignment, trial, imprisonment, parole, are all listed separately. Furthermore, there may be different convictions all associated with the same crime. For example, if an individual has committed a burglary, his CORI report may show one entry for breaking and entering and another one for possession of burglary tools. This could make a one time offender seem like a habitual offender. Difficulties in reading CORI reports may present an additional bar to employment for an ex-offender. One employer, a school administrator, explained, "It is impossible to get a sense of what happened from the little [information] contained in the report." Interview with Employer, School Administrator, Feb. 12, 2002.

2. CORRECTING A CORI

A CORI report containing erroneous information may be prohibitively difficult to correct. An individual who wants to correct his or her CORI report must petition the Department of

Probation of the court or agency from which the record originates. 803 Code Mass. Regs. § 6.07(1); CHSB, CORI FAQ, www.state.ma.us/chsb/CORIFAQ_own.html (accessed March 27, 2002). Therefore, if an individual has charges from multiple courts or agencies that require correction, each of these entities must be petitioned separately. The petition must detail the disputed information and the action needed to correct the record. Id. This initial step in the correction process is a barrier to those with open warrants for arrest, as one interviewee experienced. After losing his wallet, someone used his identification when arrested for larceny. Therefore, the person interviewed could not petition the probation office to delete the larceny charge without risking his own arrest. He eventually found a Legal Services lawyer to petition for the correction of the information on his behalf. Luckily, the physical description of the perpetrator did not match his physical description, and the probation office removed the information from his record. Interview with Ex-Offender, Feb. 27, 2002.

If an individual's petition is rejected by the court or agency, the individual may file a written complaint with the CHSB detailing the disputed information and corrective action requested, along with a copy of the rejection of the petition to the court or agency, and a description of all prior administrative steps taken to correct the information. 803 Code Mass. Regs. § 6.07(2). The CHSB determines whether or not the petitioner has a valid complaint which merits a hearing, similar to a trial. Id. at § 6.07(4).

A sub-committee of the CHSB holds a hearing at which the individual attempting to correct CORI information can produce evidence, testify, call witnesses such as police officers, and cross-examine witnesses produced by the court or agency disputing the correction. Id. at § 6.07(5). If an individual is able to afford counsel, he or she is allowed to have counsel present at the hearing. Id. However, it is not compulsory, and counsel is not provided for an indigent petitioner. At the completion of the hearing, the sub-committee presents its findings to the Board, along with recommendations regarding appropriate action. Id. at § 6.07(6).

The CHSB can order any correction or deletion necessary in an individual's record, but during the correction process, the CORI is presumed to be accurate. Id. at § 6.09. This may be detrimental to an individual's employment opportunities considering the amount of time the court considers "reasonable" to obtain a CORI, let alone the time necessary to complete the CORI correction process. See Seaver, 49 Mass. App. 1117.

If the CHSB denies an individual's request to change information on a CORI report, an individual may pursue a court order to correct the contested information. Mass Gen. Laws ch. 6 § 176. In rare cases, the court will grant the correction requested. (See Commonwealth v. S.M.F., 40 Mass. App. 42 (1996), Appendix B29, for a discussion of record sealing and expungement, as well as the overall process of CORI correction.) As with CHSB sub-committee hearings, the burden is on the individual making the complaint to show that

the record is inaccurate, not on the court or agency which reports the information.

The difficulties inherent in the CORI correction process are illustrated in the case of Commonwealth v. James Pappas, where the defendant attempted to correct his CORI report. He contested two defaults entered onto his CORI report when he failed to appear in court because he was incarcerated. 735 N.E.2d 1277 (Mass. App. 2000); See Appendix B30. The District Court denied the defendant's motions to remove the defaults in the court records and to expunge the references to the defaults in his CORI. Id. The Appellate Court reversed, holding that when an error in a defendant's CORI is attributable to an error in the court record, the District Court has the power to correct the inaccurate CORI record. Id. The court found that the defaults on the CORI suggested defendant's deliberate failure to respond to the criminal justice system, when in fact, it was his incarceration that prohibited him from responding. Id.

In a recent interview, Barry LaCroix, Director of the CHSB, commented on this case. Mr. LaCroix agreed with the original District Court ruling and opined that people like Mr. Pappas should be more diligent in communicating directly with the court or with their probation officers in order to prevent unnecessary defaults from being entered on their CORI record. Interview with Barry LaCroix, Director of the CHSB, March 12, 2002.

3. SEALING A CORI

An individual may petition the Department of Probation in order to seal his or her non-disputed criminal record. Mass. Gen. Laws ch. 276 § 100A (2001). See Appendix A4. A criminal record may be sealed once an individual has been released completely from the criminal justice system for a period of ten (10) years for a misdemeanor and fifteen (15) for a felony. Id. An individual is considered to be released from the criminal justice system when he or she is no longer incarcerated, on parole or probation. Id. While an individual who has his or her record sealed may legally claim "no record" when applying for a job, this does not mean that nothing will appear on that individual's CORI. Mass. Gen. Laws ch. 276, §100C (2001); See Appendix A5; CHSB, FAQ's <http://www.state.ma.us/chsb/FAQ_own.html> (accessed Mar. 13, 2002); See Appendix D43. If an employer performs a CORI check, the individual's CORI states, "there is at least one sealed record on file." The report will not divulge the nature of the offense or other identifying information. Id.

However, during a recent interview Barry LaCroix stated that only criminal justice agencies receiving CORI reports would see "there is at least one sealed record on file," but employers would receive a report reflecting "no record." Interview with Barry LaCroix, Director of the CHSB, March 12, 2002. Since the interview, the CHSB website has been changed and no longer provides any information regarding the sealing of criminal records. CHSB, FAQ's

http://www.state.ma.us/chsb/FAQ_own.html (accessed March 27, 2002); See Appendix D43.

D. CHANGES IN CORI LAWS

CORI regulations have changed rapidly over the past few years. In fact, from March 2001 to the present, no less than seventeen (17) changes have been made to CORI regulations, all of which have had the effect of further limiting employment options for ex-offenders. This figure stands in stark contrast to the trend in years past. Specifically, only two (2) CORI changes were adopted in the ten-year span from 1990-2000: one which established standardized procedures for CORI reviews of those seeking employment or regular volunteer or training positions in the Department of Public Health (the "DPH"), and a similar regulation update for the Office of Child Care Services (the "OCCS"). 105 Code Mass. Regs. § 950.000 (2001); See Appendix A6; 102 Code Mass. Regs. § 14.00 (2002); See Appendix A7. Recent CORI changes suggest a growing trend toward mandatory CORI checks and automatic employment disqualification in the public sector. Should such changes be adopted in the private sector as well, such a trend would likely have a severely limiting effect on the already minimal employment opportunities currently available to ex-offenders.

In 2001, the Massachusetts Executive Office of Health and Human Services (the "EOHHS" or "HHS") adopted new regulations requiring CORI reports for all candidates under consideration for employment or volunteer opportunities through HHS-funded or -operated programs, a category which spans a vast field of employment opportunities.

See Appendix E46. Included on the list are the Department of Social Services, the Department of Transitional Assistance, the Department of Mental Health, and the Office for Refugees and Immigrants. See Appendix E46.

The most recent CORI changes reflect a growing tendency towards restricted employment for applicants with criminal records. Prior to the recent EOHHS changes, a CORI report was required only for candidates who would have regular unsupervised contact with clients. In contrast, the new CORI regulations require that *all* applicants for employment or volunteer positions undergo a CORI check, and no applicant will be offered employment until he or she receives a finding of "no record," or the EEOHS determines that the violation does not automatically disqualify the applicant from employment. 112 Code Mass. Regs. §§ 6.09, 6.11 (2001); See Appendices A8 and A9.

Moreover, a hiring agency, such as the EEOHS, compares the applicant's verbal account of his or her criminal history with what is actually reflected on the CORI report, and any discrepancy may lead to the applicant's automatic disqualification. Code Mass. Regs. § 6.11. Unfortunately, this process presents an additional bar for prospective employees who attempt to make a good faith effort to inform potential employers of their criminal record. Essentially, if a potential employee has not thoroughly researched his or her CORI report, he or she may not be aware of multiple listings for each offense, including erroneous information.

The stated policy supporting the recent CORI regulations is to ensure that applicants are "appropriate for serving in their

positions...[as] convictions of certain crimes pose an unacceptable risk to the vulnerable populations" served by the HHS. 112 Code Mass. Regs. § 6.02 (2001); See Appendix A10. However, this policy undermines the potential benefit that can be derived from ex-offenders who can counsel and support others who are in situations similar to their own. Depending on the severity of the crime, an applicant with a prior criminal conviction may be subject to a five-year, ten-year, or lifetime disqualification from employment through HHS-funded or -operated agencies. 112 Code Mass. Regs. § 6.11. As one interviewee suggested, "Who can better help an addict than a recovered addict?" Interview with Ex-Offender, Feb. 8, 2002. Nonetheless, all ex-offenders interviewed support the idea that certain positions should be off-limits to certain ex-offenders. For example, convicted child molesters should be unquestionably barred from any position requiring them to be near children.

In 1997, the then-Chair of the CHSB, Secretary of Public Safety Kathleen M. O'Toole, proposed eliminating existing regulations, and the Board considered adopting an open-book policy for public access to CORI reports. Gilbert, James G. "Free Liberty to Search and View: A Look at Public Access to Criminal Offender Record Information in the Commonwealth." *Boston Bar Journal*, November-December, 1997; See Appendix C38. The premise behind this proposed change was that public interest for the dissemination of CORI should outweigh the ex-offender's interest in security and privacy in all cases. Id. Under the proposed regime, every applicant would be granted automatic access to the CORI data of every ex-offender in

the Commonwealth, thereby creating a *de facto* application process. Id. Although in 1997 the Board did not adopt the proposed changes, the trend over the past two decades has been steadily moving towards unrestricted access to CORI information. Id.

The clash of opinion regarding access to criminal records reflects not only a historic balance between the public's "right to know," but also the general societal interest in the rehabilitation of ex-offenders. The scales have now been tipped in favor of the public's "right to know," as is evidenced by the updated CHSB website which now provides web-based access to pre-certified individuals. CHSB, home <www.mass.gov/CHSB> (accessed March 27, 2002). See Appendix D43. In many respects, this is a reflection of life in an information and technology age. When the CORI Act was passed in 1972, society was twenty years away from instant access to information. Considering the technological advances in today's world, which allow virtually limitless access to certain information by computer, public access has taken on a whole new dimension.

III. HIRING PRACTICES

A. LIABILITY FOR NEGLIGENT HIRING

As public access to CORI information expands, employers are afforded the ability to obtain previously restricted CORI information. The trend towards general public access has led to increased employer demands for information. Employers, who often fear legal or financial liability, often argue that they are entitled to CORI reports when hiring ex-offenders. While employers may feel that they are entitled to complete disclosure of an

applicant's criminal history, an employer's inquiry into an applicant's criminal background is limited to a time period of five (5) years prior to the date of the completion of the job application. Mass. Gen. Laws ch. 151B, § 4(9) (1996); See Appendix A11.

Even so, many employers are often confused as to the real extent of their potential liability. One employer interviewed stated that he would never hire an ex-offender due to the high risk of liability. When asked to explain the source of this liability, however, the employer responded that there were laws preventing him from hiring ex-offenders, but he wasn't sure what they were. Interview with Employer, Hiring Coordinator, Feb. 22, 2002.

This confusion may be attributable, in part, to the fact that in Massachusetts, no statute exists outlining the extent of employer liability. Instead, the concept of employer liability arises from a common law doctrine that states that an employer must exercise "reasonable" care when hiring employees. "Reasonable" care does not constitute an obligation or duty to perform criminal background checks unless the ex-offender is being hired for a position in which he or she will have substantial contact with the public, especially vulnerable populations. Although many states have enacted statutes defining the extent of employer liability, Massachusetts has not.

Massachusetts instead depends on its common law doctrine to establish general employer responsibilities with regard to the

hiring and retention of employees.³ The pivotal case establishing the parameters of private employer liability for negligent hiring and retention is Foster v. The Loft, Inc. 26 Mass. App. 289 (1988); See Appendix B32. In that case, the Massachusetts Appellate Court held that "an employer whose employees are brought in contact with members of the public in the course of the employer's business has a duty to exercise reasonable care in the selection and retention of his employees." Id. at 290.

Negligent retention occurs when an employer becomes aware or should have become aware of an employee's criminal history, yet fails to take further action such as investigating, reassigning or discharging the employee. The Foster court held that an employer must use "due" care to avoid the selection or retention of "an employee whom he knows or should know is a person unworthy by habits, temperament, or nature to deal with the persons invited to the premises by the employer." Id. at 291. The central question regarding whether an employer will be liable is the meaning of "reasonable" or "due" care. The translation of these abstract terms into meaningful guides for employers requires a highly fact-based analysis, as is discussed below.

In Foster, a bar owner was held liable for the negligent hiring and retention of a bartender, who assaulted and battered a patron.

³ An employer's responsibility to exercise "ordinary" care was set forth in a 1902 case, in which an employer was held liable for an employee's theft. A pawn shop owner was held liable when an employee stole a patron's personal property. The court held that, had the employer exercised ordinary care, he would have discovered that the employee was unfit for the position due to the employee's criminal history. Carson v. Canning, 180 Mass. 461 (1902); See Appendix B31.

Id. at 294. Although the employer knew, prior to the assault, that the employee had a criminal record, he did not inquire about the nature or extent of the employee's prior criminal history. Id. Furthermore, the employer knew that the nightclub environment in which the employee worked was volatile with a high potential for violence. Id. at 293.

The court found that the nature of a bartender's duties, including the handling of customer complaints, presented situations that could deteriorate into heated confrontations, thereby making the bartender unfit to work in this environment due to his criminal history. Id. The employer was held liable because he failed to inquire about the relevance of the employee's criminal record to the particular bartending job and not because of the knowledge he had regarding the employee's criminal record. Id. at 291.

The Foster court made two important findings which limit employer liability:

- 1) "For us to hold that an employer can never hire a person with a criminal record or retain such a person as its employee 'at the risk of being held liable for [the employees] tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.'" Id. at 294, n. 6.
- 2) "We agree with the majority of jurisdictions that hold that there is no requirement, as matter of law, that the employer make an inquiry with law enforcement agencies about an employee's *possible* criminal record, even where an employee

is to deal regularly with the public. Id. at 295, n. 8.
(emphasis in original).

Thus, employers do not always have to inquire about an employee's criminal record and are not automatically liable for failure to make such inquiries.

Furthermore, even actual knowledge of "past acts of impropriety, violence, or disorder on the part of the employee," will not always result in employer liability. Id. at 291. Knowledge alone of the employee's criminal record is insufficient to make the employer liable for the employees' subsequent actions. Id. at 294. Rather, a determination of negligent hiring or retention depends not only on the nature of an employee's criminal record but also on whether there is a nexus between the nature of the employee's criminal record and all of the circumstances relating to the current job. Id. The Foster court emphasized that: "Our decision does not mean that an employer cannot hire or retain a person known to have a criminal record. Circumstances will differ from case to case, and what might be a perfectly acceptable hiring or retention under one set of circumstances might be highly unreasonable under another." Id. at 295.

Consequently, employers should know that courts, when assessing employer liability with regard to negligent hiring and retention consider the nature of the employee's criminal record and the relevance of the record to all of the job circumstances in order to determine the foreseeability of an actual crime being committed. For example, the Foster court noted that if an employer hires an

individual who has been convicted of check forgery, and such employee later rapes a customer, under the doctrine of negligent hiring or retention, the employer would not be held liable. Foster at 295, n.7.

While Foster has been widely cited, there are few cases that directly address employer liability, especially in the context of hiring ex-offenders. However, in Brimage v. City of Boston, the court held that there was sufficient evidence for a jury to find negligent hiring and remanded the case for trial. 2001 WL 69488 (Mass. Super. Jan. 24, 2001); See Appendix B33. Here, the City of Boston failed to conduct a CORI check before hiring the employee, Rosario, to supervise a summer youth program. Id. Had it done so, it would have discovered that Rosario had been arrested several times for rape, kidnapping, and assault and battery, and convicted of rape and assault. Id. In his capacity as supervisor, Rosario had contact with city youths, one of whom he allegedly raped.

Noting a gap in Rosario's resume (the time during which he was incarcerated for rape), as well as the fact that the job would require Rosario to supervise and have direct contact with adolescents, the Court held that the City of Boston was on notice of the need to make a reasonable inquiry as to his criminal background. Id. Failure to do so, in this case, established "a triable issue of material fact as to whether the employer knew or should have known that Rosario was unfit and posed a danger to others with whom he was likely to come into contact." Id.

Likewise, Cohen v. Health and Education Services, Inc. et al, established that negligent hiring was an issue for the jury, although the case did not involve an ex-offender. 1996 WL 1185035 (Mass. Super. July 26, 1996); See Appendix B34. The case arose when Sandra Cohen alleged that she was sexually assaulted by Michael Grampetro while she was a resident in a residential program for mentally ill persons run by Health and Education Services, Inc. Id. Grampetro was hired as a maintenance specialist and house counselor. Id. The court found that there was a disputed issue as to whether Grampetro's limited education and prior training were adequate for the performance of his duties. Id. Therefore, the case was sent to trial for a determination of whether or not due care in hiring Grampetro was exercised. Id.

In Armstrong v. Lamy, the Federal District Court discussed municipal liability for the negligent hiring of a high school teacher who had sexual contact with a student. 938 F. Supp. 1018 (D. MA 1996); See Appendix B35. Citing Foster, the court stated that, "A claim for negligent hiring requires evidence that the employer failed to exercise due care in the selection of an employee, evidence that the employer knew or should have known that the employee who was hired was unfit and posed a danger to others who would come into contact with the employee during the employment, and evidence that the employer's failure proximately caused the injury of which the plaintiff complains." Id. at 1046. However, summary judgment was granted to the defendant, because the plaintiff had presented "no evidence, whatsoever, that there was any criminal

record or past sexual misconduct with students of which the Municipal Defendants were, or should have been, aware." Id.

Thus, while employers may be concerned about the risk of liability, case law seems to suggest that liability will only be found in cases when an employer knew or should have known that an employee was unfit for his or her position due to his or her criminal background. The likelihood of employer liability is decreased exponentially by due diligence exercised on the employer's part. As one employee explained, "Any responsible employer will check up on an applicant's references and past work history. If a person with a prior record can demonstrate a solid work ethic and that they are not at risk to commit a crime in the future...they [should] get the job." Interview with Employer, Small Business Owner, Feb. 19, 2002.

B. CORI-BASED EMPLOYMENT DISCRIMINATION

Unfortunately, due to employers' lack of knowledge concerning their limited liability, ex-offenders often do not get the jobs for which they apply. The scarcity of case law on the failure of employers to hire ex-offenders is due to the difficulty in proving that an employer's reasoning not to hire an ex-offender was based on his or her criminal record. In a landmark case, Cronin v. O'Leary, ex-offenders sued the Executive Office of Health and Human Services ("HHS") on the grounds that they were denied jobs with the Department of Human Services solely due to their past convictions. 2001 WL 919969 (Mass. Super. Aug. 9, 2001); See Appendix B36. Although not all applicants with prior records were disqualified

from employment, if an applicant had the potential for unsupervised contact with the Department of Human Services' clients, HHS would not hire them. Id.

The court held that this practice was unacceptable and that ex-offenders need to be given a hearing to rebut the presumption that they pose an unacceptable risk. Id. The ruling in Cronin furthered the legal rights of ex-offenders with regard to job placement and unfair disqualification in the human services fields. Id. Prior to this case, HHS employers could refuse to hire an ex-offender simply because of his or her criminal history. To date, there is no record of an appeal on this case.

HHS employers have identified approximately seventy (70) different crimes that constitute grounds for immediate dismissal. Id. The assumption is that certain prior criminal activity puts their clients at an immediate risk of harm from the ex-offender. Id. After Cronin, however, ex-offenders are given the right to prove through a hearing that they are not a risk to clients. Id. Although this is an important case in the quest for fairer procedures with regard to unfair hiring practices of ex-offenders in Massachusetts, it is still only a small step in the need for closer scrutiny of CORI mandated regulations.

IV. INCENTIVES FOR MASSACHUSETTS EMPLOYER

A. THE FEDERAL BONDING PROGRAM

The Federal Bonding Program, sponsored by the U.S. Department of Labor (the "DOL"), and administered by the Massachusetts Department of Employment and Training Administration (the "DET"),

provides fidelity bonds for employers of "at risk" individuals, such as ex-offenders, who would not otherwise be bondable through commercial insurance carriers. 42 U.S.C.A. § 13725(d)(1) (West 2002); See Appendix A12; Federal Bonding Program, <<http://www.bonds4jobs.html>> (accessed Mar. 28, 2002); See Appendix D44. The DOL purchases fidelity bonds issued by the McLaughlin Group.⁴ Id. The McLaughlin Group determines the policies regarding who are "at risk" employees, and an authorized representative of each state's Employment Training Administration or Agency is assigned to decide which employers will be certified and how many fidelity bonds will be issued. Id. Judy Stokey, DET Bonding Coordinator, confirms that the employee is an ex-offender before issuing the fidelity bond on a first come, first serve basis. Interview with Judy Stokey, Bonding Coordinator, DET, March 18, 2002.

With fidelity bonds, the employer is able to harvest the employee's skills without taking any risk of employee dishonesty on the job. While fidelity bonds do not cover an employer's liability due to his employee's "poor workmanship, job injuries or work accidents, it does insure the employer against theft, forgery, larceny, or embezzlement." Mukamal, Debbie, "From Hard Time to Full Time, Strategies to Help Move Ex-Offenders from Welfare to Work" <<http://WtW.doleta.gov/documents/hard.htm>> (June 2001). See Appendix D45.

⁴ 29 U.S.C.A. § 2916 (West 2002) is the authorizing legislation for pilot programs such as the Federal Bonding Program. See Appendix A13.

Each policy, valued at approximately \$5,000, is issued to the employer free-of-charge for a period of six (6) months. See Appendix D44. The application process is a simple, one-page form to be filled out by a one-stop career center, or other qualified organization, and approved by the Massachusetts DET. 29 U.S.C.S. §§ 2801, 2842 (LEXIS L. Pubg. 2002); See Appendixes A14 and A15.

After the initial six (6) month period, the fidelity bond automatically expires. Id. McLaughlin then gives employers the option to purchase another fidelity bond. Id. If the employers choose to do so, they are provided with the fidelity bond at market rate, as the employee is considered "bondable." Id.

Unfortunately, Massachusetts does not purchase fidelity bonds. Accordingly to Ms. Stokey, the DET only utilizes the ten (10) "complimentary" fidelity bonds provided to Massachusetts by the federal government. Interview with Judy Stokey, Bonding Coordinator, DET, March 18, 2002. Funding for the "complimentary" fidelity bonds is provided through the Workforce Investment Act. Pub. L. No. 107-116, 115 Stat. 2177 (West 2002); See Appendix A16. Once the initial ten (10) complimentary fidelity bonds have been issued, employers may purchase fidelity bonds at \$84 per fidelity bond. Interview with Judy Stokey, Bonding Coordinator, DET, March 18, 2002.

As part of the movement to decentralize many of the federal government's programs, the Federal Bonding Program was restructured in 1998, so that states can sustain the program through a federal-state partnership before running the program independently. Federal Bonding Program, DOL/ETA Information Notice No. 5-98 (Aug. 3, 1998);

See Appendix E48. As a result, there are currently twenty-three (23) states which purchase additional fidelity bonds. Massachusetts does not do so. See Appendix D44. The Federal Bonding Program's success is illustrated by the fact that, out of 40,000 fidelity bonds issued to date, only 450 employees have caused their employers' bonds to default, thus giving the program a 99% success rate. Id. With such a success rate, most employers who may have had reservations in the beginning about employing ex-offenders should feel more confident about hiring ex-offenders. Given the program's obvious success, it is strongly encouraged that the Massachusetts General Assembly be persuaded to fund the Federal Bonding Program.

B. TAX CREDITS

Although Massachusetts does not offer any state tax credit to employers who hire ex-offenders, the federal government offers the Work Opportunity Tax Credit (the "WOTC")⁵. 26 U.S.C.S. § 51 (LEXIS L. Pubg. 2001); See Appendix A17. With respect to ex-offenders, only those who have been convicted of a felony ("ex-felons") are considered members of a targeted group under the WOTC.⁶ 26 U.S.C.S. § 51(d)(1)(c). Pursuant to 26 U.S.C.S. § 51(d)(4), the qualified ex-felon must be a member of a family whose annual income would be 70% or less than the Bureau of Labor Statistics lower living

⁵ The WOTC credit is valid for wages paid prior to December 31, 2003 and may be extended by Congress thereafter. Public Law No. 107-147; See Appendix A18.

⁶ There are eight (8) targeted groups of employees who qualify an employer to receive the WOTC. 26 U.S.C.S. § 51(d)(1).

standard.⁷ See Appendix E49. For example, if a qualified ex-felon with a family of four (4) was living in the greater Boston area and earning \$22,910.00 or less annually (prior to being hired), then his or her employer would be eligible to receive the WOTC. See Appendix E49.

Before an employee is considered to be a qualified ex-felon under the WOTC, the employer must receive DET certification that the ex-offender is a member of such group. 26 U.S.C.S. § 51(d)(11)-(12)(a). To request a certification, the employer and employee must file the DET's WOTC Request for Verification (Mass. Form 2099). See Appendix E50. Certification must be received on or before the employee begins work, unless the employer completes a pre-screening notice (IRS Form 8850).⁸ 26 U.S.C.S. § 51(d)(11)-(12)(a); See Appendix E51 for IRS Form 8850.

An employer may receive a credit of 40% on the first \$6,000.00 in wages from the first year of hire for an ex-felon working more than 400 hours or a 25% credit for an ex-felon working at least 120 hours but less than 400 hours.⁹ Id. at § 51(i)(3). For example, an employer would receive a credit ranging from \$1,500.00 to \$2,400.00 for the first \$6,000.00 in wages per qualified ex-felon employee, depending on the number of hours worked.

⁷ Determination of annual income is based on income in the six (6) months prior to the earlier of 1) the month of hire or 2) the month in which the determination is made. 26 U.S.C.S. § 51(d)(11)-(12)(a).

⁸ IRS Form 8850 must be completed on or before the day that employment is offered and must be submitted to the DET (signed by both employer and employee) no later than twenty-one (21) days after the employee's first day. Id.

⁹ 26 U.S.C.S. § 51(i) contains further restrictions, i.e., the employee cannot be related to the employer.

Many employers may be wary of spending the time filling out paper work and taking on the perceived risk of hiring an ex-felon who would have to work a minimum amount of hours before the tax credit would become available. Mr. Robert Direng of the DET believes that the WOTC is underutilized because many employers either do not know about it or do not take advantage of it. Interview with Robert Direng, DET, Feb. 12, 2002. According to Mr. Direng, most of the companies that seek WOTC certification for employees seem to do so through consultants who screen potential employees for qualifying individuals. Id.

Employers may also claim the Welfare-to-Work Tax Credit (the "WtW").¹⁰ 26 U.S.C.A. § 51A (West 2002); See Appendix A19. The WtW credit does not specifically target ex-offenders, but rather employees whom each state's Department of Labor designates as members of families who have been "long term family assistance recipients." 26 U.S.C.A. § 51A(c)(1). Ex-offenders would qualify as "long term family assistance recipients" if they are a member of a family receiving assistance for at least 18 months prior to the hiring date or if they are a member of a family receiving assistance that ceased being eligible for assistance under the program. Id.; See Appendix A9 for further qualifications. Employers may apply for the WtW by completing and submitting IRS Form 8850. See Appendix E51.

¹⁰ The WtW credit is valid for wages paid prior to December 31, 2003, and may be extended by Congress thereafter. Public Law No. 107-147; See Appendix A18.

An employer may receive a credit of 35% on the first \$10,000.00 in wages from the first year of hire and 50% on the first \$10,000.00 in wages from the second year of hire. 26 U.S.C.A. § 51A. Therefore, an employer may receive a \$3,500.00 credit the first year and a \$5,000.00 credit the second year, for a total credit of \$8,500 over two years. If an employer retains an employee who would allow the employer to receive both the WOTC and the WtW, the employer may only claim the WtW. 26 U.S.C.A. § 51A(d)(3). Given the large number of ex-offenders who have had to rely on public assistance, the WtW, which offers a higher credit than the WOTC, may offer the financial incentive employers need to hire ex-offenders.

C. THE WORKFORCE INVESTMENT ACT

Employers who are willing to train and provide work experience to ex-offenders may qualify for Workforce Investment Act (the "WIA") financial assistance. 29 U.S.C.S. § 2842; See Appendix A15. Congress passed the WIA in 1998 to assist low-income populations, such as ex-offenders, who are faced with difficulty transitioning into the workplace. Id. Part of this law included the implementation of one-stop career centers in every state to assist with coordination between the needs of employers and job seekers. 29 U.S.C.S. § 2841(b)(2) (LEXIS L. Pubg. 2001); See Appendix A20. Ex-offenders may utilize the career centers for job counseling and assessment, to obtain skills in resume and cover letter writing, job hunting, and to use computers, copiers, telephones and fax machines to obtain employment. See Appendix E52 for The Work Place, career center materials. Ex-offenders who are Temporary Assistance to

Needy Families ("TANF") recipients may be eligible for the employer-based training that will guarantee a job upon completion of the program. Id. Eligibility and funding for employers will depend upon changes made by the current proposals for reauthorization of the WIA. 42 U.S.C. § 603 (West 2002); H.R. Res. 3625 (LEXIS L. Pubg. 2002). See Appendix A21. Employers who provide job training to ex-offenders are financially compensated and the employee receives welfare-to-work wage subsidies through federal funds administered by the DET. Id.

V. SUGGESTIONS AND OPTIONS FOR THE FUTURE

A. EMPLOYMENT ZONES

Although Massachusetts promotes federal programs, it has not taken any initiative to offer additional tax incentives to employers hiring ex-offenders. In some states, employers in economically distressed areas are given incentives to hire employees in targeted groups, such as ex-offenders, through the use of state tax credits.

For example, the California State Enterprise Zone Hiring Tax Credit provides a state income tax credit to employers who hire ex-offenders in an effort to persuade employers to invest in or operate a trade or business located within an enterprise zone designated by the State Trade and Commerce Agency. Ca. Revenue & Tax. Code Ann. §17053.34 (West 2002); See Appendix A22. Using this tax credit, California employers can claim up to \$27,000.00 in tax credits over a five (5) year period when they hire qualified employees, such as ex-offenders. However, the qualified employees must perform at least 50% of their work within the boundaries of the enterprise zone

and 90% of their work must be directly related to a trade or business activity located in the enterprise zone. Id.

Similarly, Wisconsin has adopted The Community Development Zone Program, which makes tax benefits available to certain businesses that meet specified requirements and are located or willing to locate in one of the twenty-two (22) community development zones designated by the State's Department of Commerce. Wis. Stat. Ann. § 560.71 (West 2001); See Appendix A23. Specifically, a non-refundable employment credit of up to \$8,000.00 is available to businesses that create new full-time positions filled by members of targeted groups, including ex-offenders. Id.

Iowa made greater strides towards revitalizing distressed areas when it adopted the New Employment Opportunities Fund. Iowa Admin. Code r. 871-13 (2000); See Appendix A24. As a supplement to the pre-existing state tax credit that Iowa already gives employers who hire ex-offenders and other targeted groups, this fund provides additional flexibility and services in an effort to persuade employers to hire underutilized members of the state's population. Iowa Admin. Code r. 701-53 (2000); See Appendix A25. Such services supported by this fund include, but are not limited to, transportation, child-care, mentoring, assisting businesses with compliance, and generally reducing the perceived risks associated with the hiring of ex-offenders. Id.

In order to qualify as a project or a pilot project to receive an allocation of funds under this program, approval must first be obtained from the State's Workforce Development Center. Id. Upon

approval, the maximum grant for such a project is \$250,000.00 and cannot last for more than eighteen (18) months, but must have an end date no later than June 30th of the year following the award of funding. Iowa Admin. Code r. 701-53. The program operator distributes program funds on a voucher basis, with a maximum voucher value of \$5,000.00, in an attempt to address each barrier an ex-offender faces in obtaining employment. Id.

Given the benefits of persuading employers to hire ex-offenders by providing employers with state tax credits in addition to federal tax credits, Massachusetts should consider launching programs modeled on such forward-thinking states.

B. RE-ENTRY PROGRAMS

There are several successful programs across the country that address the diverse interest of ex-offenders and employers with respect to employment. Programs such as Chicago's Safer Foundation and Texas' Project RIO (Re-Integration of Offenders) have demonstrated the benefits associated with open communication and dialogue between ex-offenders, policy makers, government agencies and employers in the business sector. These programs consistently demonstrate that when employers and ex-offenders work together (sometimes with other agencies acting as moderators), ex-offenders are more readily able to acquire and maintain jobs, resulting in a lower recidivism rate.

The Safer Foundation, established in Chicago in 1972, works as a middleman between prisons and the private business community. "Chicago's Safer Foundation: A Road Back for Ex-Offenders." *Program*

Focus Report compiled by the National Institute of Justice, the National Institute of Corrections and the Office of Correctional Education (June 1998). See Appendix C39. Safer Foundation is now the largest community-based provider of employment services for ex-offenders in the United States, assisting ex-offenders in finding jobs and supplying services to ex-offenders to help them develop a mindset to ensure successful employment.

The goal of Safer Foundation is to reach offenders while they are still incarcerated in order to encourage them to seek employment upon release. Id. The Safer Foundation runs a private school, the PACE (Programmed Activities for Correctional Education) Institute, in the Cook Country Jail and operates a work release center with programs designed to promote educational and employment readiness. Id. In its programs, the Safer Foundation uses small-group, peer-based learning in order to help offenders prepare to overcome the barriers they will face when seeking permanent employment. Id.

In 1996, Safer Foundation helped over 1,100 clients find positions in fields such as light assembly, manufacturing, warehousing, customer services, sales and a variety of entry-level positions. Id. The clients, who are exclusively ex-offenders, have a low recidivism rate of 15%, as compared to the 42% rate in Cook County as a whole. Id. The Safer Foundation provides cost-free fidelity bonding to employers for the first six-months as both an incentive and as insurance. Id. Clients undergo a rigorous screening process to ensure that they are placed in appropriate fields of employment based on their skills. Id. As a testament to

its success, to date, every single employer that has had a placement through the Safer Foundation has returned for another.

Another successful program is Project RIO (Re-Integration of Offenders) in Texas. "Texas' Project RIO." *Program Focus Report* compiled by the National Institute of Justice, the National Institute of Corrections and the Office of Correctional Education (June 1998). See Appendix C40. Project RIO is a state program devoted to placing ex-offenders into the job market through the Texas Workforce Commission (the state's employment agency). Id. Project RIO provides job preparation services including résumé building and interview skills to inmates. Id.

In 1992, an independent evaluation documented that 69% of Project RIO participants found employment after release, as compared to 36% for non-participants. Id. During the year after release, only 23% of high-risk RIO participants returned to prison, compared with 38% of a comparable group of non-participants. Id. This evidence supports Project RIO's theory that if inmates can find a suitable job as soon as possible after release, they are less likely to return to crime and, subsequently, prison.

Project RIO employment specialists match ex-offenders with more than 12,000 employers, based on skills and temperament. Id. Employment specialists also have immediate access to the Texas Workforce Commission's database of job openings. Id. In addition, most prisons have Project RIO offices, including a research room equipped with computers that have job listings, telephone books, and telephones. Id. Burt Ellison, Project RIO's director, explains,

"The biggest incentive for companies to hire [Project] RIO clients is that employers know what they are getting through us. When John Q. Public walks in, they don't have a clue." Id. One employer emphasized Project RIO's dependability, adding, "[Project] RIO's referrals seem to stay longer than the people I hire off the street." Id. Considering the success of programs such as the Safer Foundation and Project RIO, Massachusetts would be better-equipped to employ its ex-offender population if it instituted similar reintegration programs.

VI. CONCLUSION

Though many studies have correlated stable employment with reduced recidivism rates, an overwhelming number of ex-offenders are unable to obtain jobs in the United States. Unfortunately, this often means that those in our society who have the greatest need for employment may be faced with meager options for the future when they are released from the criminal justice system.

One employer interviewed in connection with this project articulated the assumption so often made with regard to the criminal justice system. "I always believed that if you went to jail...you had paid your debt to society," she said. Interview with Employer, Hiring Coordinator, Feb. 11, 2002. As the findings of this report suggest, however, nothing could be further from the truth. While many ex-offenders may believe they have paid their debt to society, they are likely to find upon seeking employment that, although they may have served time within the walls of an institution, they have nonetheless been given a life sentence on the outside. With few or

no opportunities for employment, they may in fact find themselves once again trapped in the cycle of poverty, crime, and incarceration.

The bleakness and complexity of the situation facing ex-offenders is perhaps best summarized by one employer who himself hires ex-offenders and who claims he will continue to do so, despite the perceived risks. "How do you expect someone to make a life for himself if he can't support himself, pay for rent, take care of his kids," he said. "Post-release employment really makes all the difference for people who want to make a change." Interview with Employer, Small Business Owner, Feb. 19, 2002.

Indeed, providing ex-offenders the opportunity to secure post-release employment may be an effective method of affecting social change by breaking the cycle of poverty and desperation that so often leads to crime. Unfortunately, this is the very avenue most often blocked by employers who fear the risk of employee liability, who are confused by CORI laws and CORI reports, who have been discouraged by misinformation, who suffer from a lack of information, or who are reluctant to hire ex-offenders due solely to the stigma that is attached to image of the ex-offender in general. To effectively break the cycle of recidivism, the roadblocks to obtaining employment must be removed, and this can only be achieved by offering employers information, incentives, and options for the future.

Employers who are reluctant to hire ex-offenders often fear the risk of liability and will reject an applicant with a criminal

record solely based on the information contained in a CORI report. Faced with the knowledge that an ex-offender's criminal history may be an open book to any future employer, forward-thinking agencies and organizations such as the Stanley Jones Clean Slate Project, must arm themselves with knowledge to combat the obvious disadvantage faced by ex-offenders in employment settings. Informing employers that hiring an ex-offender may in fact pose no greater risk of liability than other employees may assuage an employer's fears, and the Federal Bonding Program may provide an added measure of security for employers to hire ex-offenders. Furthermore, employers and ex-offenders alike must be made aware of the fact that employers may potentially qualify for the Work Opportunity Tax Credit or Welfare-to-Work tax credit, which may provide financial incentives to employers reluctant to hire ex-offenders.

Finally, the Stanley Jones Clean Slate Project should cast an eye toward the future to push for progressive legislation to incorporate ideas such as employment zones and re-entry programs, which have enjoyed such success in other states. It is only by providing employers with information and incentives that they may be persuaded to afford ex-offenders the opportunity they deserve, even in the face of increasingly less restricted access to CORI reports. While the CORI laws themselves are not apt to change, with accurate, persuasive information and the proper incentives, employer attitudes toward ex-offenders can.

APPENDIX

A. STATUTES, CODES & REGULATIONS

1. Mass. Gen. Laws ch. 6, §§ 167-178 (2001).
2. 120 Code Mass. Regs. § 500.00 (2002).
3. 803 Code Mass. Regs. §§ 2.00-8.00 (2002).
4. Mass. Gen. Laws ch. 276, § 100A (2001).
5. Mass. Gen. Laws ch. 276, § 100C (2001).
6. 105 Code Mass. Regs. § 950.000 (2001).
7. 102 Code Mass. Regs. § 14.00 (2002).
8. 112 Code Mass. Regs. § 6.09 (2002).
9. 112 Code Mass. Regs. § 6.11 (2002).
10. 112 Code Mass. Regs. § 6.02 (2002).
11. Mass. Gen. Laws ch. 151B, § 4(9) (1996).
12. 42 U.S.C.A. § 13725(d)(1) (West 2002).
13. 29 U.S.C.A. § 2916 (West 2002).
14. 29 U.S.C.S. § 2801 (LEXIS L. Publg. 2002).
15. 29 U.S.C.S. § 2842 (LEXIS L. Publg. 2002).
16. Pub. L. No. 107-116, 115 Stat. 2177 (West 2002).
17. 26 U.S.C.S. § 51 (LEXIS L. Publg. 2002).
18. Pub. L. No. 107-147, 116 Stat. 21 (West 2002).
19. 26 U.S.C.A. § 51A (West 2002).
20. 29 U.S.C.S. § 2841(b)(2) (LEXIS L. Publg. 2002).
21. 42 U.S.C. § 603 (West 2002); H.R. Res. 3625 (LEXIS L. Publg. 2002).
22. Ca. Revenue & Tax Code Ann. §17053.34 (West 2002).
23. Wis. Stat. Ann. § 560.71 (West 2001).
24. Iowa Admin. Code r. 871-13 (2000).
25. Iowa Admin. Code r. 701-53 (2000).

B. CASE LAW

26. *Globe Newspaper Company v. Conte*, 2001 WL 835150 (Mass.Super. July 19, 2001).
27. *Bellin v. Kelley*, 435 Mass. 261 (2001).
28. *Seaver v. Adelman*, 49 Mass. App. 1117 (2000).
29. *Commonwealth v. S.M.F.*, 40 Mass. App. 42 (1996).
30. *Commonwealth v. Pappas*, 735 N.E.2d 1277, (Mass. App. Sept. 15, 2000).
31. *Carson v. Canning*, 180 Mass. 461 (1902).
32. *Foster v. The Loft, Inc. et al.*, 26 Mass. App. Ct. 289 (1988).
33. *Brimage v. City of Boston*, 2001 WL 69488 (Mass. Super. Jan. 24, 2001).
34. *Cohen v. Health and Education Services, Inc. et al*, 1996 WL 1185035 (Mass. Super. July 26, 1996).
35. *Armstrong v. Lamy et al.*, 938 F. Supp. 1018 (D. MA 1996).
36. *Cronin v. O'Leary*, 2001 WL 919969 (Mass.Super. Aug. 9, 2001).

C. ARTICLES

37. Jeremy Travis, *From Prison to Home: the Dimensions and Consequences of Prisoner Reentry*, Urban Institute Justice Policy Center, June 2001.
38. James G. Gilbert, *Free Liberty to Search and View: A Look at Public Access to Criminal Offender Record Information in the Commonwealth*, Boston Bar Journal, November – December, 1997.
39. “Chicago’s Safer Foundation: A Road Back for Ex-Offenders.” *Program Focus Report* compiled by the National Institute of Justice, the National Institute of Corrections and the Office of Correctional Education (June 1998).
40. “Texas’s Project RIO.” *Program Focus Report* compiled by the National Institute of Justice, the National Institute of Corrections and the Office of Correctional Education (June 1998).

C. WEBSITES

41. CHSB Home, General Grants of Access
<http://www.state.ma.us/chsb/CORI/gen_grants1.pdf> (accessed Mar. 13, 2002).
42. CHSB Home, *Offense Abbreviations*
<http://www.state.ma.us/chsb/CORI_codes.html> (accessed Mar. 13, 2002).
43. CHSB Home, *Questions About One’s Own Criminal Record*
<http://www.state.ma.us/chsb/FAQ_own.html> (accessed Mar. 13 and 27, 2002).
44. Federal Bonding Program, <<http://www.bonds4jobs.html>> (accessed March 28, 2002).
45. Debbie Mukamal, *From Hard Time to Full Time, Strategies to Help Move Ex-Offenders from Welfare to Work* <<http://wtw.doleta.gov/documents/hard.html>> (June 2001).

E. MISCELLANEOUS

46. Changes to CORI Laws.
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