**Abstract:** Employers’ access to and use of criminal records as a selection mechanism in the labor market makes it far more difficult for ex-offenders to find jobs, especially regular, well-paid jobs, than those without criminal convictions. The paper asks whether there is anything morally problematic about this practice. The aims of the paper are twofold. First, arguments based on premises of wrongful discrimination against the current, commonest use of criminal records are critically discussed. It is argued that employers do not necessarily engage in morally wrongful discrimination against job applicants when they use criminal records in recruitment screening. But it is also argued that ex-offenders who apply for jobs are subject to what can be called “structural and morally wrongful discrimination” when laws allow employers to request (or directly access) a job applicant’s full criminal record. Second, preliminary proposals on how criminal records can be used by employers in a way that avoids wrongful structural discrimination of ex-offenders will be presented and critically assessed. I suggest that it should be lawful for an employer to access an applicant’s criminal records only where there is a relevant and special match or link between the crime on the records and the job being applied for and the crime is serious. This proposal is defended against two objections, one based on concerns about crime prevention and the other based on the employer’s interest in knowing whom not to hire.

**Keywords:** Criminal records; discrimination; ethics; ex-offenders; collateral sanctions; job-screening; labor market

**SOME ETHICAL CONSIDERATIONS ON THE USE OF CRIMINAL RECORDS IN THE LABOR MARKET: IN DEFENSE OF A NEW PRACTICE[[1]](#footnote-1)**

I would get out and for the first few weeks I would … try and get a job, but obviously with a criminal record, if you were honest and said, yes, I´ve got a criminal record, then, there’s the door basically.[[2]](#footnote-2)

1. **Introduction**

You may believe that a person who has served a criminal sentence will return to ordinary life with a clean slate because he has paid his debt to civil society. However, this is often not the case. A number of post-sentence collateral consequences (or ‘informal punishments’ or ‘collateral sanctions’) mean the ex-offender is not accorded the same rights as citizens who have never been given a criminal sentence. To mention just a few, in some US states ex-offenders are barred from holding public employment, and seven states permanently bar them from voting.[[3]](#footnote-3) In many parts of the world employers access criminal records and refer to them in their selection processes, and this makes it far more difficult for ex-offenders to find jobs, especially regular and well-paid jobs, than citizens with clean records.[[4]](#footnote-4) This paper examines ethical issues raised by this last practice. To date, relatively little attention has been given to these issues in the fields of criminal justice ethics and business ethics.[[5]](#footnote-5)

The aims of the paper are twofold. First, I shall discuss moral objections to the current, and commonest, use of criminal records in the labor market which allege that this use involves wrongful discrimination.[[6]](#footnote-6) I will argue that an employer does not necessarily engage in morally wrongful discrimination against a job applicant as a result of using criminal records in pre-employment screening.[[7]](#footnote-7) But I will also argue that, as things stand, ex-offenders who apply for jobs are subjected to what can be called “structural and morally wrongful discrimination” because laws allow employers to ask for (or directly access) their full criminal records. Second, I will describe and seek to evaluate proposals as to how employers can use criminal records in a way that allows for no such wrongful structural discrimination.

Before I turn to these tasks I will develop the background to the discussion in Section 2. I will describe and interpret the most common use of criminal records in pre-recruitment screening[[8]](#footnote-8) and set out some data on the prevalence of criminal records in the population. In Section 3, I will query the notion that current use of criminal records in pre-employment screening involves employers in direct wrongful discrimination against job-seeking ex-offenders.[[9]](#footnote-9) But in Section 4, I will argue that ex-offenders are subject to another kind of unfair differential treatment—one which is based on current laws about privacy and disclosure of criminal records and which can be called ‘wrongful structural discrimination’. The leading idea here is that it is morally wrong for employers to ask for, or otherwise acquire information about, applicants’ criminal records given that they are in general legally prohibited from asking about an applicant’s health, family planning, religious faith, and sexual orientation.[[10]](#footnote-10) I will try to show that attempts to identify a moral difference between these latter types of information and the disclosure of criminal records fail.

In Section 5, I will examine the conditions under which, from a legal and moral perspective, employers are entitled to access a job applicant’s criminal records.[[11]](#footnote-11) I shall propose that it should be lawful for an employer to access an applicant’s criminal records only if there is a *relevant* and *special* match or link between the crime on the records and the job being applied for and *the crime is serious*.[[12]](#footnote-12) Section 6 presents a critical discussion of arguments in favor of the present use of criminal records and against my own proposal. The proposal will be defended against two objections, one based on concerns about crime prevention and the other based on the employer’s interest in knowing whom not to hire. These arguments will build, respectively, on the claim that the current use of criminal records has a better crime-preventive effect than the proposal offered in this paper, and the claim that employers have a right to know who they are employing, including details of criminal records.

1. **Criminal records**

Historically, criminal records have been kept for many purposes.[[13]](#footnote-13) But in the last 50 years the primary purpose has been to support the criminal justice system: to assist the police in their investigations—’catching thieves on paper’—and to support sentencing decisions, where previous convictions are always considered aggravating factors. However, data from criminal records are increasingly used outside the criminal justice system.

In particular, the use of criminal records in pre-employment screening has increased dramatically in many countries over the last 20 years.[[14]](#footnote-14) Where it is common practice for employers to investigate the criminal records of applicants,[[15]](#footnote-15) ex-offenders have a harder time obtaining jobs; and when they do find employment the jobs are often not very well paid.[[16]](#footnote-16) The evidence from a number of western countries shows that on average about 20% of the population (especially its young, male members) have criminal records. This means that the ethical challenge of explaining when and how employers ought to have access to criminal records is paramount.[[17]](#footnote-17) This ethical challenge is even more important given that we also know, as many researchers have shown, that one of the best ways of staying away from crime is being employed. According to Christopher Uggen, “employment reduces the risk of re-offending by between one third and a half”.[[18]](#footnote-18) So, whether the common practice of screening job applicants using criminal records is morally acceptable as it stands, or whether instead it needs to be challenged and changed, will impact, not just on ex-offenders and employers, but also on future potential victims of crime.

It can be, and indeed has been, argued that the way criminal records are used as a pre-employment screening tool involves systematic and morally wrongful discrimination against ex-offenders.[[19]](#footnote-19) However, this charge of discrimination certainly does need to be argued. In Section 3, I will discuss whether employers discriminate against ex-offenders when they exclude them because of their criminal records. I will argue that applicants are not necessarily subjected to discrimination if they are excluded because of their criminal records, even if they are as skilled as other applicants. In Section 4, however, I will argue that there is a case for saying that ex-offenders are subjected to what I call ‘wrongful structural discrimination’.

1. **Is the use of criminal records in pre-employment screening necessarily discriminatory?**

Helen Lam and Mark Harcourt claim that ex-offenders are subjected to morally wrongful discrimination in the labor market and therefore need legal protection.[[20]](#footnote-20) They argue that employers discriminate against ex-offenders;[[21]](#footnote-21) and they argue that employers discriminate in this way because they frequently inquire about a job applicants’ criminal past, and on that basis systematically exclude them.[[22]](#footnote-22) They present empirical data showing that, as a result of employers’ selection practices, ex-offenders are disadvantaged, landing fewer jobs and obtaining lower earnings than people without criminal records.

However, as Lam and Harcourt recognize,[[23]](#footnote-23) it is far from obvious that ex-offenders are wrongfully discriminated against by employers just because employers inquire into their criminal backgrounds, and because this results in lower levels of success in obtaining work and lower earnings. To begin with, employers may not be engaged in what is technically known as ‘direct discrimination’, since the specific disadvantage ex-offenders suffer from as the result of employers’ selection practices need not be (and as we shall see, usually is not) what the employer *aims* at.[[24]](#footnote-24) There are many other reasons in play when employers do not hire ex-offenders. Owing to their limited or poor quality of education, many ex-offenders are, for example, less qualified than people without criminal records. Where the choice is between poorly qualified ex-offenders and more highly qualified non-offenders, we would not usually suspect ‘wrongful discrimination’ when an employer selects the latter—at least, not if this is a practice that employers routinely adopt in their job-selection processes.

Moreover, even if an ex-offender and a non-offender have the same *technical qualifications* (e.g. being skilled carpenters), it would not necessarily be morally wrong to select in favor of the non-offender, for at least two reasons. The first is that besides technical qualifications, there are also ‘reaction qualifications’, and here ex-offenders will often fare worse than non-offenders.[[25]](#footnote-25) Reactions qualifications, which often form part of a specified job qualification, are dependent on the reactions employees cause among their colleagues and customers. Even where the technical qualifications of an ex-offender may be just as good, or better, than those of a non-offender, the employer may reasonably decide that the poor reaction qualifications outweigh the technical skills. If poor reaction qualifications are based on sound data, and not just on stereotyped and inaccurate expectations about conduct, there would seem, at least in principle, to be no morally wrongful discrimination involved when the employer takes these data into account.[[26]](#footnote-26)

The second reason why it would not necessarily be morally wrong to select in favor of a non-offender when his or her technical qualifications are no better than an ex-offender also being considered for a job is this. Several studies have shown that ex-offenders are at high risk of offending: within three years of their convictions, it is estimated that between 20–80% (depending on age, sex, type of criminal act, and job situation) will re-offend.[[27]](#footnote-27) So, if we accept that workforce stability is an important factor in assessing job applicants, it is clear that ex-offenders will on average bring less stability to the workplace than applicants without criminal records.[[28]](#footnote-28) As an employer, it seems reasonable to protect one’s business from the damage that re-offending can cause in terms of lost earnings and lowered reputation.

Importantly, these observations are supported by empirical studies which show that employers who acquire information about job applicants’ criminal pasts usually do so for job-relevant reasons, like those mentioned above.[[29]](#footnote-29) It seems fair to say, then, that employers may not be directly discriminating when they use criminal records as a pre-employment screening tool. Shortly, I shall discuss whether employers who do not appear to be discriminating against ex-offenders may instead be accused of participating in what we might call wrongful *statistical* discrimination. Then, in Section 4, I will argue that the way many jurisdictions allow employers to gain access to information about ex-offenders’ crimes is morally problematic and can plausibly be described as a kind of wrongful *structural* discrimination. But first I want to make a brief comment on the use of statistical data.

It might be objected that, by using statistical data in the way mentioned above, employers subject ex-offenders to a morally problematic form of discrimination. One general worry that has been discussed in the literature is whether it is discriminatory to treat an individual on the basis of statistical information on the group to which he belongs (here, the group of ex-offenders).[[30]](#footnote-30) Instead, it is argued, we ought to treat and evaluate people only by taking into account their individual characteristics. It is obvious that where employers use statistical information about recidivism in combination with inquiries into applicants’ criminal records, this disadvantages the sub-group of ex-offenders who will *not* re-offend. For, if it is true that 20–80% of ex-offenders re-offend within three years, it follows, statistically, that between 20–80% of ex-offenders will not do so.[[31]](#footnote-31)

However, it is surely unreasonable to hold that pre-employment screening involves morally wrong discrimination simply because employers use statistical data about the group of which the applicant is a member.[[32]](#footnote-32) Few of us can do without generalizations about what we can reasonably expect from people. From adults, for example, we expect a different kind of behavior than we do from children, and from a sick person we usually expect less than we do from a healthy person, and so on. Thus, when an employer recruits a carpenter, he typically turns someone who has taken an apprenticeship, and the reason for doing this is ultimately statistical: it is that the apprentice is more likely to be better at carpentry than the non-apprentice. The latter may in fact be very good indeed. He may even be better. However, as a member of the group of non-apprentices, he is less likely to be so. Again, consider hospital or airline employers who do not rely on any generalizations or statistical data when hiring doctors or pilots. This would surely worry us, and we might even say it was immoral. So, if an ex-offender applies for a job and is turned down because the employer believes that other applicants without a criminal past are better candidates, this is not, as such, morally wrongful discrimination. In such cases, there may well be relevant and impartial reasons to deny the ex-offender employment.

At this point it could be argued that although ex-offenders are not subjected to direct discrimination, they are subjected to another kind of discrimination. In what follows, I shall support this position, alleging that the morally problematic discrimination involved is *structural*. The problem, in a nutshell, is one of consistency: employers have lawful (direct or indirect) access to information about applicants’ criminal records, while the law in many countries prohibits them from gathering information about applicants’ family plans, health, religious faith, sexual orientation, and so forth. Why this difference? And is it morally defensible? I will argue that the differential treatment here is, in fact, inconsistent and morally problematic. Before we proceed, note that if structural discrimination is the result of intentionally creating rules with the aim of disadvantaging the members of certain groups, we may be entitled to categorize this kind of discrimination as a form of direct discrimination. However, for present purposes I shall assume structural discrimination is not based on direct discrimination.[[33]](#footnote-33)

1. **Is structural discrimination of ex-offenders the result of unfair laws?**

The law in many countries, including Denmark, Sweden, Norway, the UK, and the US, permits employers to acquire information about applicants’ criminal records either directly or indirectly. At the same time, however, employers are typically prohibited from inquiring into, for example, an applicant’s health, religion, ethnical heritage, sexual orientation, or family plans. Access to the latter information is generally restricted to protect the sick, the religious, women, and those from ethnic and sexual minority groups from wrongful discrimination, and to ensure they do not have fewer job opportunities or experience other kinds of treatment that are considered immoral. These laws protect because the disclosure of the relevant kinds of information can be to the detriment of job applicants. However, ex-offenders are not protected in the same way. Can we point to a morally relevant difference that justifies this differential treatment and ensures it does not involve wrongful structural discrimination?

Two ways of doing so might be suggested. The first is a backward-looking and desert-based approach. It claims variously that people are *not responsible* for their ill health (or at any rate some aspects of it), or their religion (to some extent), or their ethnical heritage, or their becoming pregnant (woman are at least not responsible for the fact that only women can become pregnant). It adds that ex-offenders are responsible for committing crimes. And it applies a general principle to the affect that people should not be disadvantaged by things for which they are not responsible but do deserve any disadvantages arising from things for which they are responsible. The second approach, which is forward-looking and consequentialist in character, is to say that whereas it is a *socially important* *goal* that, say, women and ethnic minorities groups have the same opportunities as men and majority groups to join the workforce, it is not as socially important to ensure that ex-offenders have the same opportunities despite their misdeeds.

Neither approach is convincing. Against the first it can be pointed out that ex-offenders are not always fully responsible for their transgressions of the law. Some criminal acts are performed by people who are mentally ill or have personality disorders like kleptomania, ADHD[[34]](#footnote-34) and antisocial personality disorder.[[35]](#footnote-35) It seems wrong to say that ex-offender with these conditions are responsible for them.[[36]](#footnote-36) Arguably, they should be treated, not punished. Although the court’s knowledge of such disorders often mitigates punishment, not every offender is tested for mental illness or personality disorders before or during the sentencing phase of a trial.[[37]](#footnote-37) Second, there are many other mitigating factors or excuses that lessen or remove offenders’ responsibility. For instance, a person may have been coerced into committing a crime or have committed a crime out of strong jealousy. Third, it seems right to say that social circumstances (e.g. family relations) can contribute significantly to a person’s criminal career, and these are circumstances for which the offender often cannot be held responsible. And when the state makes it lawful and easy to inquire into ex-offenders’ prior criminal convictions, it denies ex-offenders access, at the same time, to one of the best crime-preventive strategies in the world, namely paid employment.

Just as offenders are not always responsible, or fully responsible, for their offences, it seems fair to say that people are sometimes at least partly responsible for their disorders or illnesses. This may be true in the case of so-called ‘lifestyle’ diseases like obesity, smoking-related lung diseases, and some types of diabetes. Again, at least sometimes, it seems clear that some pregnant women, especially those who are independent and live in affluent western countries, are responsible for being pregnant. But we would not claim that the obese and women *deserve* to be worse off in the labor market than those who are healthy or male. So it seems to be a mistake to base the current difference in access to information between ex-offenders and those in the other categories listed above on the notions of responsibility and desert. Of course, one could claim that employers should have the legal right to know not only about applicants’ criminal pasts but also about their health, religious and cultural belonging, sexual orientation, and family plans. But in what follows I will take it for granted that employers should not have a legal right to the latter sorts of information. The idea that ex-offenders are responsible for their offences and that many people with poor health are similarly responsible for their illnesses, suggests that we should help them both by making it easier for them to get jobs, or to avoid criminality, or to obtain treatment for their illnesses. Such help would of course benefit not only the individual in question but also others, including relatives and potential future victims of crime.

The second approach does not fare any better. It is true that important social goals are served by ensuring that women, religious/cultural minorities, and people with health problems are not disadvantaged in their applications for employment; and this is why employers are barred, at least in some countries, from inquiring into such matters as family plans. Likewise, however, better job opportunities for ex-offenders would help them, not only to lawfully support themselves, but also to support their relatives. As we know, it would also prevent further crimes from being committed and thus result in fewer victims of crime. Obviously these are also important social goals.

We can now draw the following interim conclusion. Information about a job applicant’s criminal pasts is always morally relevant for employers because of the high rate of recidivism. So, everything else being equal, in using criminal records as a pre-employment screening tool *individual employers* do not necessarily discriminate wrongfully and directly against ex-offenders. (In fact employers often do not discriminate objectionably in this way). On the other hand, there are morally problematic legal arrangements in many societies that currently make it possible systematically to gain information that excludes ex-offenders from the labor market in a way that seems to subject ex-offenders to what can be called ‘structural discrimination’. Personal or private information that employers are not permitted to collect includes information about health, religion, family planning, and so on. However, for a society, it is important that ex-offenders get a foothold into the labor market because lawfully supporting themselves reduces recidivism, thereby lowering the number of potential victims of further crime.

Equally, however, it is important for employers to have some access to information on the criminal pasts of those they hire. For instance, it is obviously important for the principal of a school to know about a job applicant’s conviction for pedophilia to shield the children from a significant risk of harm. So we need to strike a balance between these two different interests. The ideal would be to find a model that would both protect employers, their customers and their employees against significant threats of recidivism and at the same time avoid subjecting ex-offenders to structural discrimination, or at least mitigate that eventuality, thereby giving ex-offenders better opportunities to stay away from crime. I will present and critically discuss models designed to secure these aims in the next two sections.

1. **Alternative models: Matching crimes and employment**

Current practice in many countries is for employers to have direct or indirect access to an applicant’s criminal records regardless of the job being applied for. As we saw in Section 4, this means ex-offenders are systematically excluded from the labor market in ways that are morally problematic because they involve structural discrimination; rates of recidivism also rise and opportunities for crime prevention are lost. In what follows, I will argue that employer access to information about an applicant’s criminal past should be more limited. I begin with the following restriction on access to such information:

**Matching:** It should be lawful for an employer to access an applicant’s criminal records only if there is a *relevant* match or link between the crime on the records and the job being applied for.[[38]](#footnote-38)

The idea behind the Matching model is that employers should only be allowed to acquire information from applicants’ criminal records where this is necessary to protect the employer’s and others’ security, and relevant given the job in question. I call this restriction ‘Matching’ because the underlying idea is that access to an applicant’s criminal records requires a relevant match between the crime and the post being filled. However, if we define matching this way, it is difficult to differentiate between it and the way criminal records are currently used in pre-employment screening. As we have already noted, somewhere between 20% and 80% of ex-offenders re-offend within three years. From this it is arguable that there is *always* a relevant match permitting employers to enquire into applicants’ criminal backgrounds because generally recidivism leads to job instability and therefore poor performance at work. However, we saw in Section 2 that current practice does not only mean that ex-offenders are subject to structural discrimination; there is also reason to believe that it is counter-productive in terms of crime prevention.[[39]](#footnote-39) So, we have good reason to look for another restrictive model. One suggestion is:

**New Matching:** It should be lawful for an employer to access an applicant’s criminal records only if there is a *relevant* and *special* match or link between the crime on the records and the job being applied for.[[40]](#footnote-40)

The wording ‘relevant and special match’ indicates that the link in question is not one that *all* ex-offenders will satisfy regardless of the job being applied for simply in virtue of their (statistically evidenced) recidivist tendencies. An example will help to explain what makes a match ‘special’. Imagine a school board wants to hire a childcare worker. In such a case, the board should only have access to the *special* part of the applicant’s criminal record that concerns, for example, sexual offences, or violence towards children. It should not have access to information about convictions for shoplifting or embezzlement. Other cases can readily be imagined: embezzlement and work as an accountant, illegal drug procurement and work at a rehab center for drug addicts, for example. It is only in these kinds of case, where there is a special match between the crimes and the work, that employers should have direct or indirect access to an applicant’s criminal records.

This New Matching model is attractive for at least three reasons. First, it maintains the *morally plausible* part of the current practice. In this practice, pre-employment screening on the basis of access to information of prior crimes can be an important tool in, for example, minimizing the risk of children to exposure to violence and sex crimes in schools and sports clubs. The revised model might also be capable of generally minimizing the risk of subjecting workplaces to specific crimes, as employers will have access to relevant parts of job applicants’ criminal records. Second, New Matching avoids what I have argued is a *morally problematic* part of the current practice, namely that ex-offenders are systematically excluded from employment while other minorities such as pregnant women and those in poor health who on average also have lower job stability are legally protected from such exclusion. New Matching harmonizes better with existing laws governing access to information on job applicants. Finally, we have good reason to believe that, because New Matching increases the likelihood of ex-offenders finding employment, it will help to ensure that fewer ex-offenders re-offend and thereby reduce the number people who will in future be victims of crime.

Despite its attractiveness, however, New Matching faces several challenges. Roughly speaking, it seems to be a flaw that there is no *triviality limit* for the type or degree of crime that can be invoked in the match and explored by employers. Even the most minor crime, like shoplifting or the possession of a gram of marijuana, can still, within the framework of this model, deal a fatal blow to an ex-offender’s job prospects. Compatibly with New Matching, a person who has been sentenced for minor shoplifting could have great difficulty acquiring any paid position in which it is possible to steal something.[[41]](#footnote-41) And of course it is possible in most jobs to steal something of value while at work: in just about any line of work, there is arguably a special and relevant match between petty theft and job. Furthermore, in most countries the ex-offender would never have a chance to become a member of the police force or otherwise work in the public sector. And this is true no matter how minor their crime may have been.

New Matching would also be expensive to administer. Let me mention just some of the administrative burdens. First, it would be necessary to work out, in sufficient detail, which crimes match with which jobs in a special and relevant way, and which do not. In many cases, it would be fairly easy to identify the relevant match—for example, between being a child molester and working in a kindergarten, or between a history of embezzlement and working in accounting. In other jobs, however, it would be much harder.[[42]](#footnote-42) Take cleaners, decorators, and philosophy teachers, for example. It is not obvious that there are any crimes that would make applicants inappropriate for these jobs in the same way that child molesters are unfit to work at childcare centers. Second, when the police issue criminal records, they will need to prepare a specialized criminal record for the particular job in question. It is true that these burdens would probably be less time consuming once the model is in place; and more importantly, administrative costs of these sorts might well be outweighed by the benefits of New Matching, because such matching would be more inclusive of ex-offenders, decrease recidivism and thereby reduce the number of future crimes and victims of crime. A lot more, of course, needs to be said about the costs and benefits of this model, but I will leave this to others, who might inform this discussion with empirical investigations.

Instead, I want to propose and defend a model which retains the important parts of New Matching while avoiding its problematic elements. The following is a preliminary formulation of this improved model:

**New Matching+:** It should be lawful for an employer to access an applicant’s criminal records only if there is a *relevant* and *special* match or link between the crime on the records and the job being applied for and *the crime is serious*.

For simplicity’s sake, I suggest we read the words ‘the crime is serious’ to mean that the crime in question normally attracts a sentence of three months imprisonment or more. (The model could, of course, be interpreted more or less harshly in this respect.) With New Matching+ minor crimes will no longer have a severely negative effect on ex-offenders’ job opportunities, as we saw would follow from the previous two models. This ought to be welcomed by those who favor proportionality in sentencing. New Matching+ would also be less costly to administer, as any matching between minor crimes and potential jobs could be skipped. Finally, New Matching+ would have the same advantages as both Matching and New Matching.[[43]](#footnote-43)

This is not to deny that New Matching+ is in some ways controversial. For example, one might be inclined to infer from the fact that employers should have limited access to information about applicants’ prior crimes that everyone should have similar access, but many people would be uncomfortable with the latter. However, the model is compatible with the view that *judges* and *the police* should have access to information about all crimes no matter how serious they are. In many countries criminal records are divided into two parts. One part of the record is available to the public or at least to the ex-offender in question; the other part is available to the police and those working in relevant roles in the criminal court system. The latter part often contains more detail, and the period before erasure here is often longer than it is for the more publicly accessible part of the record. However, if one still considers New Matching+ to be too politically controversial, the model could be softened in several respects. For instance, instead of a straightforward New Matching+ model, where employers have no access to information about minor crimes, *the period before erasure* for minor crimes could be less that it is now. So, instead of being included in criminal records for five years, petty crimes could be included for only one year. Or one could be given a *warning* for one’s first minor crime, and the authorities could refrain from including it in criminal records, whereas the commission of minor crimes twice or more would lead to normal recording. Where job opportunities are concerned these last elaborations are probably better for ex-offenders than traditional Matching, but worse than New Matching+. However, as we shall see, the provision of job opportunities for ex-offenders is not the only relevant value at stake in this area.

1. **Crime prevention and the employer’s demand to know whom not to hire**

I will now comment briefly on two objections to New Matching and New Matching+. Recall that these models would give employers less access to information about ex-offenders’ criminal pasts than they currently have in most countries.

**The crime preventive objection**

An obvious objection to New Matching+ is that the law as it stands has a crime preventive effect which would be lost if New Matching+ were implemented. Under the present law each *individual* contemplating the commission of a crime is deterred from doing so not only by the formal punishment, but also by the negative effect the crime will have on his or her future job opportunities because criminal records are used in pre-employment screening. This means that the present arrangements for access to criminal records are crime preventive *generally* because they give everyone a reason to avoid crime. This second, more general, claim presupposes that the public is informed and understands the law on employers’ access to criminal records. It is not entirely clear this is correct, but if these claims about deterrence are true, we have a reason to stick with the present law and practice.

Several considerations appear to weaken this objection. First, it is difficult to find evidence for the assertion that the current practice of including *all* crimes in criminal records, together with current access to criminal records by employers, is indeed crime preventive (either in the case of a particular individual or generally). The former Danish Minister of Justice, Lene Espersen, once commented on the right to carry a knife: “I believe that the threat of being put to jail and having marks on your criminal record for five years will make young people think about whether it is such a cool idea to carry a knife.”[[44]](#footnote-44) But in truth this was a largely speculative opinion.

Second, even if we agree that the current rules permitting access prevent crimes that would be committed if those rules were withdrawn, this is an unconvincing objection to New Matching. For it may be the case that the preventive effect of New Matching+ (perhaps in one of its less controversial versions) would be *greater* than that of the current rules. The effect might be greater, as we have already seen, because New Matching+ makes it easier for ex-offenders to obtain employment and thereby reduces recidivism. If this is correct, then, by implementing a new model like New Matching+ we will ensure that we have fewer criminals, fewer crimes, and fewer victims than we would have if we stick with the present access arrangements.

The third consideration is about particular kinds of crime. I take sexual offences as an example. New Matching+ will mean that sexual offenders will not get jobs in daycare centers where there are vulnerable people. If it is true that sexual ex-offenders commit fewer crimes involving children if they do not work with children, then New Matching+ is indeed particularly crime preventive in the sense that it provides ex-offenders with less opportunity and therefore less temptation to repeat the offence for which they were previously convicted.

Fourth, perhaps, in any case, the general crime-preventive effect would be preserved under New Matching+. People would still be deterred from crime by the knowledge that they will have more difficulty acquiring jobs in certain public sectors (e.g. if they want to join the police force) if they become offenders because certain parts of the public sector have access to applicants’ criminal records. And even if not all information on applicants’ criminal records is available to employers, all the information could be available to the police, the judges, and other officials working in the criminal justice system. This may also ensure that some of the deterrence effect—if there is any—would be preserved.

Furthermore, when it comes to the less politically controversial versions of New Matching+, the crime preventive effect might be maintained if the period before criminal records are erased is shortened—for instance, from five years to one year. For many people, a change from five years to one year might not mean a great deal when it comes to the deterrence effect. It seems fair to say, at least, that many people do not know whether petty crimes are included in criminal records. If they do know this, they do not know for exactly how many years the record of a crime such as shoplifting would be kept.

I suggest, then, that instead of making decisions based on speculation about the deterrence effect of the current use of criminal records, we should make decisions on the basis of what we know. What we do know is that being employed is the best insurance against both first-time offending and re-offending. Since New Matching+ will almost certainly offer more job opportunities to ex-offenders than they have under current law, and since we know that more job opportunities will mean less crime and fewer victims, we have strong reason to implement New Matching+, either in its original form or in one of its less controversial versions.

**The demand to know whom not to employ**

A further objection to the idea that employers should not always be given information about applicants’ prior crimes focuses on what employers want. The employer’s demand to be able to confirm what job applicants have told them about their educational backgrounds and job skills seems fair. As we have seen, many employers also demand to know whether applicants have criminal pasts. Since some ex-offenders have injured people or damaged property, it is understandable that employers would want to know whom not to hire. So, one reason for accepting this latter demand would be to prevent crimes from being committed in workplaces. Another is the need for a stable workforce. But this requires us to give employers access to details of applicants’ criminal pasts. In the US and Canada, employers are increasingly being held liable for so-called ‘negligent hiring’ in order to reduce harm to co-workers and customers.[[45]](#footnote-45)

The key question here is whether employers are should be entitled always to know everything about applicants’ criminal pasts. Should ‘the demand to know’ always be respected? The law in many countries (e.g. in the US, the UK, Canada and Denmark) places certain restrictions on which types of offence are noted in criminal records and for how long. These restrictions mean that minor transgressions of, for example, traffic laws are not included in criminal records. They also ensure that petty crimes, such as minor shoplifting, are not included indefinitely. So, it is obvious that the demand to know whom to not hire is not a demand that should always be respected. This fits well with other legislation. Thus employers are not permitted access to *any* information about a candidate they might request: access to details of age, health history, marital status, religious belief, sexual orientation, political views and family plans is generally rigorously restricted.

It is obvious that there is a conflict of interest here between the employer and the ex-offender,[[46]](#footnote-46) and indeed the potential victims of future crime. As we have seen, employers can reasonably argue that, generally speaking, it is less than optimal to hire ex-offenders. But it is equally true that employers can be disadvantaged (e.g. in terms of profitability) by lack of access to information about an applicant’s health, family plans, and sexual or religious orientation. But if we accept that these laws are designed mainly to protect those in the categories they delineate from discrimination, and to give them equal opportunities, then it seems fair to claim that we should do the same for ex-offenders and the potential victims of crime. Doing this, we would not only protect ex-offenders by offering them better chances (or second chances) of acquiring jobs through New Matching+ (or one of its less ambitious versions). We would also reduce criminal activity in the future and therefore minimize the number of victims of that activity.

Finally, it is worth underlining that although employers would have less access to information about applicants’ criminal pasts than they currently do under the proposals discussed here, they will still be in a position, much of the time, to know quite a bit about the people they employ. Most jobs are filled because people know each other, through friends, family, and so on. And employers can discover more about applicants via psychological tests, job interviews and reference checks.

1. **Conclusion**

I hope to have shown that employers can turn down applicants who have criminal records without thereby subjecting them to direct discrimination. However, I have also explained that the legal structures we currently have, which permit women, those in poor health, and other minorities to withhold private information from employers, disadvantage ex-offenders because there are few restrictions on the disclosure of information about their criminal pasts. This difference, it has been argued, means that ex-offenders are subjected to structural discrimination.

Even if it is denied that ex-offenders are subjected to structural discrimination by current employment law, that law has some significant negative consequences, and these make it hard to defend the status quo against the alternative arrangements available involving New Matching+. The current practice does not help to lower the unemployment rate among ex-offenders (approximately 50%, compared to about 6­–10% for non-offenders, in many countries). As we also know that unemployment makes it more likely that an individual will commit crime, current practice seems to lead to more crimes. So, if we want less crime and fewer victims, it is important to give ex-offenders a foothold in the labor market. This is probably the best insurance against recidivism. I have examined a number of versions of New Matching, looking at them as alternatives to the current practice that might well lower unemployment rates among ex-offenders. I have shown that two objections that can be made to New Matching and New Matching+ are not well founded. I suggest, then, that if we favor less discriminatory practice and want to decrease recidivism, we should implement New Matching+. If we do not do so, political acceptance of the current strategy reminds one of the doctor who wishes his patients were healthier but refuses to prescribe medicines that would bring this about .

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1. Thanks to …. [↑](#footnote-ref-1)
2. Quoted from *Social Exclusion Unit* (SEU) (2002, 52). [↑](#footnote-ref-2)
3. E.g. see LaFollette (2005), Munn (2012), and von Hirsch & Wasik (1997) for critical discussion of these kinds of informal punishment. [↑](#footnote-ref-3)
4. E.g. see Lam & Harcourt (200, 241–242) and Pager (2003). See also studies by Holzer (1996) showing that 65% of employers will *not* knowingly hire an ex-offender. [↑](#footnote-ref-4)
5. Exemptions are Lafollette (2005) and Lam & Harcourt (2003). [↑](#footnote-ref-5)
6. The phrase ‘the current, and commonest, use of criminal records in the labor market’ covers, roughly speaking, both a *direct* and an *indirect* infrastructure. In some countries (e.g. the US) employers can obtain direct access to applicants’ criminal records by consulting the federal crime bureau without asking the applicant in question. All states in the US have made it possible to search for sex offenders by name or residence; information about sex offenders is available on-line and will usually include offenders’ names, addresses, photos and offences. For further detail on access to criminal records, see Jacobs and Crepet (2008, 203–208). In Denmark employers only have indirect access to this information, in the sense that they must ask applicants or get signed and informed consent from them, in order to obtain access to the records, which are held in custody by the police. [↑](#footnote-ref-6)
7. In what follows, I will refer to ‘discrimination’ rather than ‘morally wrongful discrimination’ for the sake of brevity. [↑](#footnote-ref-7)
8. Criminal records are not only used for pre-employment screening; they are also used to fire or promote people who are already employed. In this paper, the focus is on pre-employment screening, but the conclusions can be read across to the latter use of criminal records in the labor market. [↑](#footnote-ref-8)
9. Lam & Harcourt (2003, 237–252). [↑](#footnote-ref-9)
10. In several countries employers are legally prohibited from inquiring into personal information including *inter alia* health history, marital status, family plans, and religious or ethnic status. See, e.g. Lam & Harcourt, 241. [↑](#footnote-ref-10)
11. This critically assesses the current laws within which employers navigate. So, the important question is: are the current laws (or more precisely the common denominator of these laws), which make it legal for employers to inquire into applicants’ criminal records, morally problematic? The focus is not on what employers ought, morally speaking, to do irrespective of the existing law. [↑](#footnote-ref-11)
12. Clarification of phrases like ‘special and relevant match’ and ‘if the crime is serious’ is provided in Section 5. [↑](#footnote-ref-12)
13. See Thomas (2007, 62); among these were, e.g., the purpose of tracking and supervising offenders who were no longer transported abroad or executed. [↑](#footnote-ref-13)
14. See, e.g., Thomas (2007, Chs 7 and 8, especially 130–131 & 158) where numbers from the UK show an increase in criminal record disclosures to employers from 100,000 in 1985 to over 900,000 in 1993 and over 2,000,000 in 2002. This tendency mirrors what is happening in other countries: for the US see, Jacobs and Crepet (2008) and for Sweden, see Backman (2012). [↑](#footnote-ref-14)
15. In a study by Lam & Harcourt (2003, 241) 66% of the 229 organizations investigated asked applicants about prior convictions. [↑](#footnote-ref-15)
16. See, e.g., Lam & Harcourt (2003, 242). I take it for granted that the use of criminal records is usually to the disadvantage of ex-offenders. In a few situations it *can,* admittedly, be to a job applicant’s advantage: this might happen where the employer (e.g. the police, a security service, an insurance company) is seeking knowledge and competences that only certain ex-offenders might have (think of hackers, or forgers). [↑](#footnote-ref-16)
17. See e.g. Lam and Harcourt (2003, pp. 237–238). [↑](#footnote-ref-17)
18. Uggen (2000). Skardhamar and Telle (2009) reach almost the same conclusion as Uggen. [↑](#footnote-ref-18)
19. Lam & Harcourt (2003, 238). [↑](#footnote-ref-19)
20. They suggest, for example, that the law should “ … prohibit employers from inquiring into spent convictions; prohibit public agencies from disclosing spent conviction information of employers and others … the above amendments [should be] incorporated directly into human rights legislation …” Lam & Harcourt (2003, 50). [↑](#footnote-ref-20)
21. Lam & Harcourt (2003, 238 and 241). [↑](#footnote-ref-21)
22. E.g. consider: “Do ex-offenders even need legal protection from discrimination? The evidence suggests that they do. First, research does indicate that employers do make frequent inquires about job applicants’ criminal past. … Second … the effect of discrimination against ex-offenders … translates into fewer job opportunities and lower earnings.” Lam & Harcourt (2003, 241–242). [↑](#footnote-ref-22)
23. Ibid., 249. [↑](#footnote-ref-23)
24. Like, e.g., Altman (2001), I take direct discrimination here to describe an act or practice which is aimed at imposing (consciously or unconsciously) a disadvantage on persons because they are members of a certain group. [↑](#footnote-ref-24)
25. Wertheimer (1983) 99–100. For critical discussion of the use of reaction qualifications, see Mason (2006) and Lippert-Rasmussen (2013). [↑](#footnote-ref-25)
26. But an act’s not being an instance of morally wrongful discrimination does not mean that it might not be morally wrong all things considered. For example, the use of reaction qualifications that will result in very few ex-offenders getting jobs can be seen as morally problematic because such use will cause inequality in the labor market or be less crime-preventive than non-use. [↑](#footnote-ref-26)
27. See Lam & Harcourt (2003, 240) for several references on this subject. [↑](#footnote-ref-27)
28. Even if it is true that employment reduces recidivism by up to 50%, the recidivism rate would (all else being equal) still make the average ex-offender less stable than a non-offender. [↑](#footnote-ref-28)
29. Backman (2012, 75–76). [↑](#footnote-ref-29)
30. For detailed and thorough treatment of the ethical arguments for and against statistical discrimination, see Lippert-Rasmussen (2013) and Maitzen (2005). [↑](#footnote-ref-30)
31. However, studies have shown that if employers had no access to the criminal pasts of ex-offenders, it would be *more* difficult for some applicants to be hired. The case of *black non-offenders* in the US is given here. The reasoning is that employers who know there is on average a higher proportion of offenders among blacks will, if they have no information on actual criminal records, try to safeguard themselves from hiring ex-offenders by trying to avoid hiring black workers. It might be said in this case that where employers have no access to criminal records more non-black ex-offenders get jobs; but this has to be weighed against the reduced number of black non-offenders who are not hired. For data supporting this point, see Bushway (1996, 2004). [↑](#footnote-ref-31)
32. Treating people differently on the basis of statistical data *can* of course be morally problematic. This will be the case where: (i) the expectations on which the differential treatment is based are caused by immoral prejudice; (ii) those expectations are caused by inaccurate statistics; or (iii) the benefits of statistical discrimination are outweighed by the harm it may inflict on, for example, minorities. For clear discussion of these claims, see Lippert-Rasmussen (2013, 92). [↑](#footnote-ref-32)
33. It seems fair to claim that, at least sometimes, there is a difference between direct and structural discrimination in our context: for example, if governments enacted privacy laws in order to protect vulnerable groups like young women, religious believers, ethnic and sexual minorities, and not because they consciously (or even unconsciously) want to disadvantage ex-offenders. [↑](#footnote-ref-33)
34. Studies by Dalsgaard (2002) show that 47% of people who are diagnosed with ADHD will be (or have been) convicted for committing criminal acts. Such people usually lack impulse control. [↑](#footnote-ref-34)
35. Fazel & Danesh (2002). It is estimated that about 50% of male prisoners and 20% of female prisoners have antisocial personality disorder. Other studies, such as Cale & Lilienfeld (2002), appear to show that the number may be as high as 50–80% of male prisoners. [↑](#footnote-ref-35)
36. There seems to be a genetic component for most of these psychological disorders—e.g. see Nolen-Hoeksema, (2011, 274–275). [↑](#footnote-ref-36)
37. See Fazel & Danish (2002). [↑](#footnote-ref-37)
38. The basic idea of matching is not entirely new. Von Hirsch and Wasik (1997, p. 601) once suggested that conviction-based disqualifications “… should be used only when the occupation or activity is especially sensitive to abuse, and when the defendant’s criminal conduct is of a kind that is indicative of risk of that kind of abuse.” However, von Hirsch and Wasik focus on the moral evaluation of the court’s power to bar the offender from engaging in various professions or occupations. The theme of this paper is normative discussion of the degree to which employers should have access to the criminal records of job applicants. [↑](#footnote-ref-38)
39. Again, because one of the best ways to lessen recidivism is to be employed: see Uggen (2000) and Skardhamnar & Telle (2009). [↑](#footnote-ref-39)
40. This model has been proposed by several Danish political parties, including the Social Democrats and the Socialist Folk Party, but it was rejected by the parliament: see <http://www.ft.dk/samling/20061/beslutningsforslag/b25/bilag/3/397060/index.htm> (in Danish—accessed May 19, 2014). [↑](#footnote-ref-40)
41. Again, compare Holzer (1996) and see note 5 above. [↑](#footnote-ref-41)
42. Australia’s Human Rights Commission (2012) has tried to specify when a criminal record is relevant to the inherent requirement of the job. See <https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf> [↑](#footnote-ref-42)
43. It is important to see that New Matching+ differs from von Hirsch and Wasik’s idea of matching. While von Hirsch and Wasik concentrate on whether or not the occupation is sensitive to abuse (e.g. a daycare center or a kindergarden), the focus for New Matching+ focus is not on whether the occupation is sensitive to abuse, but whether there is a special and relevant match between the crime and the job and that the crime in question, is serious. [↑](#footnote-ref-43)
44. The quotation is taken from the Danish newspaper *24 Timer*, January 17, 2008. [↑](#footnote-ref-44)
45. E.g. see Duplessis, et al. (2001). [↑](#footnote-ref-45)
46. Concern for ex-offenders can also be cast in terms of their right to privacy: see Lippke (1993). [↑](#footnote-ref-46)