

A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record.

“A Spanish Window on European Law/Policy on Employment Discrimination Based on Criminal Record,” **Essays on European Penology**, Tom Deams, Dirk van Zyl Smit et al eds. (Hart Publishers , forthcoming 2012)

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I. Introduction

It is a consistent conclusion of European and US empirical criminology that if ex-offenders cannot obtain legitimate employment, their risk of recidivating is higher (Sampson and Laub 1993; Uggen 2000; Farrall 2004; Richards and Jones 2004; Leverentz 2011). Employed ex-offenders will be less likely to reoffend because employment provides 1) income support; 2) a stake in staying out of trouble; 3) a structured routine; 4) pro-social work colleagues and associates, and; 5) self-esteem. Thus, policy makers should presumptively support any policy that promotes ex-offender employment opportunities and presumptively oppose any policy that impedes ex-offender employment opportunities.

Given the critical importance of legitimate employment for successful post-conviction and especially post-prison reintegration into mainstream society, it is surprising that conviction-based employment discrimination (CBED) is not a more

¹ The Spanish research has been done under Research Project (DER 2009-08344 JURI: Género y Marginación: Victimización y Delincuencia) of the Ministry of Science and Innovation and the support of the Department of Universities of the Generalitat de Catalunya to the Research Group in Criminology (AGAUR 2009 SGR 1117). Thanks to Matti Joutsen and Dimitra Blitsa for helpful comments. We are extremely grateful to the senior National Conviction Register (NCR) official who patiently explained how the Spanish NCR works and provided relevant data on Criminal Conviction Certificates (CRC) requests. Thanks also to Kristel Beyens Tom Daems, Frieder Dünkel Krzysztof Krajewski, Sonja Snacken, and Dirk van Zyl Smit for their helpful comments.

salient penological topic in Europe.² Indeed, with the exception of a study by Louks, Lyner and Sullivan (1998),³ there is no Europe-wide study of either de jure or de facto conviction-based employment discrimination. We are not aware of any European research that has sought to determine, as Pager (2003)⁴ has in the US, the extent to which, if at all, ex-offenders face de facto employment discrimination from public and private employers.⁵ Indeed, there is also inadequate research on national laws in Europe barring ex-offenders (de jure discrimination) from various occupations.

Perhaps European employers do not discriminate against job applicants or employees with criminal convictions? If so, is that because European countries prevent employers from obtaining individual criminal history information, and/or provide powerful anti-discrimination remedies to ex-offenders who are discriminated against? Perhaps Europeans, including employers, believe that CBED is wrong or irrational, because a criminal conviction does not predict future misconduct on the job? However even if Europeans believe that prior convictions are predictive of future dishonesty, dangerousness and unreliability, perhaps they also support prohibiting CBED in order to further goals perceived to be more important like rehabilitation and social harmony? Finally, perhaps employers in Europe do discriminate on the basis of criminal record but such discrimination is not well recognized?

² The UK is a striking exception (Thomas 2007).

³ These authors tried to find out the EU policies that could affect the employment of people with a criminal record. Their main conclusions were: a) ex-offenders are not recognized as a stigmatized group in the EU; b) 'common to most countries (nine out of twelve) is a blanket ban on work for ex-offenders in the public sector or civil service'; c) most EU countries (with the exception of Ireland) have some means of purging criminal records; d) employer direct access to the national criminal register is not common, but providing individuals a right to obtain from the NCR their own criminal record, although discouraged by the European Council (Directive 11099/94), is common; e) in general, there is a total lack of information (and much 'misinformation').

⁴ Pager (2003) found that a criminal record reduces the chances of obtaining employment by almost 50%.

⁵ To be sure, European ex-offenders have difficulty finding legitimate employment. Admittedly, however, in addition to employer discrimination, this can be explained by poor education, poor social skills and lack of work experience.

This chapter seeks to address the relevance of a criminal record (CR) to employment opportunity in Europe. While we focus on Spain, the European country we know best, we believe the Spanish law and policy are similar in most, if not all, continental European countries.

In Spain, as in Europe generally, there is almost no academic work by criminal law or labor law scholars on CBED.⁶ To the extent that academic lawyers attend to the topic, they seem to assume that: 1) a conviction, especially if it involves a prison sentence, is an obstacle to employment and reintegration (Grosso 1983; Harremanak 2001; Quintanilla 2001; Bueno Arus 2006; Conde 2006); 2) de jure CBED is limited to positions in the Public Administration, and; 3) de facto CBED is extremely rare, even non-existent, because employers cannot obtain individual criminal history information from their National Criminal Registers (NCR).⁷

Although European employers have no direct access to conviction records, in fact, it is not true that European employers are unable to obtain job applicants' criminal histories. Every country permits at least some employers to ask job applicants to submit an official document attesting to a clean record or showing past convictions. For example, Spanish employers can ask job applicants to obtain a copy of their Criminal Record Certificate (CRC) (*Certificado de Antecedentes Penales*)⁸ from the NCR and submit it with their employment application. Although it is widely believed that

⁶ Spanish criminal law scholars have produced only two academic works on criminal records. One is a doctoral dissertation on the regulation of criminal conviction records (Grosso 1983); the other is a book focusing on expungement policies (Bueno Arus 2006). Neither publication discusses CBED. For the most part, labor law scholars have also not dealt with this subject. However, a few scholars have touched on it (Goñi 1986; del Valle 1991; del Rey 1993; Fernandez 1996; Harremanak 2001; Quintanilla 2001; Goñi 2004; Tascón 2005; Alameda 2010) in the course of explaining an employee's right to privacy. In general, the labor law academics just assume that the right to privacy protects job applicants from employers obtaining and considering past convictions except for convictions directly related to the job's requirements (See Section IV).

⁷ Unlike in the U.S., there are no private information vendors who collect and sell such information.

⁸ A CRC is an official document issued by the NCR which maintains a complete record of every individual's convictions.

employers rarely make such requests,⁹ there are no empirical studies to confirm that impression.

II. When Conviction-Based Employment Discrimination (CBED) is *Required*¹⁰: De Jure Discrimination

All European countries disqualify at least some categories of ex-offenders from some types of employment for some period of time after conviction.¹¹ The great comparative law scholar, Mirjan Damaska (1968), pointed out in a classic article published more than 40 years ago that countries vary significantly with respect to which professions and occupations they place off-limits to ex-offenders and for how long.

Ex-offenders are universally ineligible, at least for a certain period, to serve as judges, military officers, high-level executive branch officials and police officers of all ranks. This must reflect a European consensus that persons who hold positions of highest trust and power should have and be seen to have impeccable honesty and integrity, and that ex-offenders, based solely on their prior criminal conduct, presumably lack those qualities of good character. By law, certain private sector positions are also often closed to ex-offenders. As Damaska (1968) noted, which private sector jobs or occupational licenses are off-limits to all/some convicted persons is

⁹ We interviewed three senior officials responsible for assisting incarcerated offenders, those in open prisons and parolees to find jobs. All three believe that a criminal conviction record is not a significant employment barrier, although they advise ex-offenders not to apply for positions in public administration and private police because a CRC is legally required.

¹⁰ In English, ‘discriminate’ can be used neutrally, as in ‘We discriminate in favor of NYU graduates’. In Spanish and other European languages, ‘discriminate’ carries the connotation of morally wrong. Thus, in the US the law requires that certain employers not hire (i.e. ‘discriminate against’) persons with certain criminal records. Obviously, the law does not regard such discrimination as morally wrong; to the contrary, it makes it morally required. In the text, we use ‘discriminate’ as it is used in the US.

¹¹ But there are differences, for example, regarding whether 1) ‘administrative offences’ (e.g. traffic violations) are recorded; 2) all, or just serious, criminal offences are recorded; 3) all convictions, or just those that resulted in incarceration, are covered; 4) when a conviction is removed from the NCR by expunction and/or when it is sealed. In Spain, 1) only criminal convictions are recorded; 2) a recent law (LO 2/2010) makes minor offences recordable after December 2011; 3) all penalties are recorded and 4) criminal records are ‘expunged’ five years after the sentence has been fully served.

usually explained by an egregious crime or scandal rather than by focused consideration, logic or empirical data.¹²

Spain, like many European countries, requires a conviction-free record in order to work in the Public Administration as a teacher, university professor, medical doctor and civil servant. Additionally, there are laws requiring some government occupational licensing agencies to make a clean criminal record a prerequisite for obtaining a license. For example, only individuals who have never been convicted of a crime (technically – not having an unexpunged conviction) can be licensed as a commercial driver, a taxi driver (in some cities), operate a gambling enterprise, or manage a private school. Moreover, some professional organisations with authority to license and discipline members (for example, lawyers and notaries) make a clean criminal record a requirement for providing professional services. Spanish law also explicitly prohibits convicted persons, until their record is expunged, from working in a small number of private sector industries, businesses and jobs, for example, working for a private security firm or in a bingo parlor. Some laws and licenses only render job applicants and employees ineligible if their criminal sentence included an employment disqualification; other positions are closed to individuals who have been convicted of any crime, or of an intentional crime, or of one of a list of specified crimes. A few occupations are only open to persons with no previous administrative offences.¹³

All these examples belie the widely held belief in Spain that criminal records are not an occupational requirement, except to work in the Public Administration. However, the apparent misconception can be somewhat reconciled by certain qualifications: first, for some positions (eg prison and police officers, firemen, Central

¹² Grosso (1983) and Bueno Arus (2006) point out that there is no consistency as to which occupations require a criminal record certificate and which do not.

¹³ E.g. commercial drivers: Art 44 Ley 16/1987, de 30 de Julio, de ordenación de los transportes terrestres; private security: Art. 8.2. b Ley 23/1992, de 30 de Julio, de Seguridad Privada.

Bank of Spain officials), administrative laws bar ex-offenders from holding positions if they have any non-expunged convictions, but for other occupations (eg civil servant, university professor, judge) a previously convicted individual is disqualified only if the sentencing court explicitly imposed the occupational disqualification (*inhabilitación*) as part of the sentence.¹⁴ Thus, a previously convicted Spanish citizen is not automatically disqualified from all public sector positions because many such disqualifications specifically apply only to persons who ‘have not been *sentenced* to employment disqualification’.¹⁵

Second, the impression that criminal records are not an occupational requirement, may stem from the fact that these disqualifications are not effectively enforced, in large part because of restrictions on access to information about prior convictions. In Spain, as in most European countries, the NCR’s conviction records are available only to courts and certain law enforcement agencies (Jacobs and Larrauri 2012).¹⁶ Some government agencies (eg police) are explicitly authorized to obtain criminal record information directly from the NCR; that makes criminal background checking quite easy. For other positions (eg judges and lawyers), the government agency requires the job applicant herself to obtain and submit the CRC.¹⁷ However, for many positions closed to ex-offenders (eg teachers and most civil servants), the agency merely asks the job applicant to sign a statement attesting that she never has been sentenced to an occupational disqualification.

¹⁴ The recent and controversial conviction of Judge Baltasar Garzón provides a salient example of sentencing to occupational disqualification for 11 years. See the Spanish Supreme Court decision STS 79/2012, February 9th.

¹⁵ The sentence is a discretionary judicial sanction; the administrative law is a general, automatic consequence of the sentence. For a discussion of criminal sentences’ collateral consequences, see Demleitner (1999).

¹⁶ Real Decreto 95/2009 de 6 de febrero. For the history of this legislation, see Larrauri (2011).

¹⁷ Spain, like most European countries, gives individuals the right to obtain a CRC from the NCR (see Real Decreto 95/2009 de 6 de febrero).

Perhaps a third reason why Spanish criminal law scholars believe that ex-offenders seeking employment are not much hampered by CBED is a widely-held belief that de jure employment disqualifications only apply to public administration positions. (Admittedly, this explanation, based upon unfamiliarity with de jure employment disqualifications for prior criminal convictions, may also apply to labor law scholars who probably do not focus on restrictions that are embodied in administrative laws rather than labor laws). Additionally they believe that ex-offenders rarely look to Public Administration for employment on account of limited educational credentials.¹⁸ Since the vast majority of ex-offenders seek employment in occupations that do not disqualify ex-offenders (eg construction, and hotels), the labor law scholars tend to discount the significance of de jure CBED altogether.

To determine the extent of de jure CBED, we obtained data about government agencies' CRC requests to the NCR. Because these data are not broken down according to reason for the agency's request,¹⁹ we cannot reach definitive conclusions. However, and perhaps surprisingly given prevailing impressions, 2010 data show 1.3 million CRC requests by government agencies and 176.000 requests by individuals. (See Figure 1.)

Figure 1: Requests to the NCR (2010)

Requests to the NCR (2010)			
Requests from private citizens	176 332		11.7%
Requests from government agencies in order to obtain:	1335 834		88.3%
	Police Job	139 487	9.2%
	Enter the Army	44 056	2.9%
	Firearms permit	66 792	4.4%
	Nationality	119 250	7.90%

¹⁸ In Spain 19,9%% of the working population work in the public sector. Source: Personal elaboration based on Encuesta de Población activa (Labour Force Population Survey) IV term 2011. Available at: <http://www.ine.es/jaxi/tabla.do?per=03&type=db&divi=EPA&idtab=87&L=0> (visited February 13, 2012)

¹⁹ These data are not public. They were provided to us by a senior NCR official.

	Residence/Work Permit	966 249	63.9%
Total	1 512 166		100%

The government agencies' requests are the consequence of laws making a clean criminal record an employment or license prerequisite. Most public agency requests for CRC's came from the police, army, and private security companies which are legally prohibited from hiring persons with an unexpunged criminal conviction. 63,9% of these government agency requests are submitted on behalf of (non-EU) immigrants who need to demonstrate a clean record in order to obtain a work permit.²⁰ Figure 1 shows that a prior criminal record has the biggest impact on non-EU- immigrants. They are ineligible for work and residence permits²¹, and are at a great disadvantage in seeking Spanish citizenship.²² This policy reflects the view that immigrants who have committed criminal offences in Spain should not be permitted to remain in the country because they have demonstrated disrespect for Spanish law and pose a risk of future criminality.²³

In summary, criminal background checks in Spain, as in Europe generally, are legally required and most often pertain to a job applicant's eligibility for a position in public administration. In addition, Spain and other European countries have laws barring some convicted offenders from a small number of private sector occupations and professions. In recent years, some European countries have passed laws requiring criminal background checks for persons applying for jobs working with children or elderly persons (Thomas 2007; Boone 2011; Morgenstern 2011). Furthermore, a recent

²⁰ Art 260 RD 557/2011. Oficinas de Extranjería (Delegación o Subdelegación del Gobierno) dependent from Secretaría de Estado de Inmigración y Emigración, Ministerio de Trabajo e Inmigración, y del Ministerio del Interior.

²¹ Art 31 LO 4/2000, de 11 de enero y RD 2393/2004, de 30 de diciembre. An initial work and residence permit will not be issued to an individual with a criminal conviction. A conviction that occurs after the permit is granted is taken into account when the immigrant applies for a permit renewal.

²² See for example STS 381/2010, sala de lo contencioso administrativo secc 5ª, 12 febrero, 2010.

²³ The law requires deportation of an individual who cannot renew his work and residence permit, but this is rarely enforced.

EU Framework Decision²⁴ requires member states to make it possible for sentencing judges in sex offence cases to include an order that the defendant not to hold any position requiring close contact with children (Jacobs and Blitsa 2011).

III. When Conviction-Based Employment Discrimination (CBED) is *Permissible*: De Facto Discrimination

In Spain, as in other EU member states, the vast majority of private sector employers are neither required to nor prohibited from discriminating against job applicants (or current workers) on account of previous criminal convictions. It is therefore worth asking why employers would choose to discriminate against job applicants who have previously been convicted of crimes.

One possibility is that employers do not see their preference for employees with no criminal convictions as discrimination against those with prior convictions. These employers would likely argue that it is reasonable business practice to discriminate in favor of job applicants with good education, good grades, good prior experience, good personality and good indicia of personal integrity and reliability. Accordingly, selecting employees who excel in all those qualities does not constitute wrongful discrimination against job seekers who have poor education, poor grades, no experience, an unpleasant personality and poor indicia of integrity and reliability. According to this logic, preferring employees with a clean criminal record is no different than universities selecting faculty who have a PhD degree from a prestigious university and strong recommendations from their supervisors; does that preference discriminate against applicants who do not have prestigious PhD's and positive recommendations?

²⁴ FD 2004/68/JHA on combating the sexual exploitation of children and child pornography, [2004] OJ L13/44

A rational employer might also prefer to hire individuals without previous convictions because it wishes to minimize the risk of liability for injuries that an employee might inflict upon customers, clients, fellow employees and the business entity itself. Since, in Spain and Europe generally, employers are held strictly liable for harms caused by their employees²⁵, they have a financial incentive to screen out job applicants whom they believe pose higher than average risk of acting violently or dishonestly.

Whether or not employers have good reason to discriminate against persons with prior criminal records, in Spain employers rarely seek to obtain job applicants' conviction history. Obviously, if employers do not obtain criminal background information (or confirmation of the absence of prior criminal convictions), they cannot discriminate on the basis of past convictions. In an attempt to find empirical verification, we surveyed employers, workers and probationers and examined data from the NCR office.

In 2010, the NCR received 176.332 CRC requests from private individuals and a substantial (but unknown) number of these requests were presumably submitted in order to complete applications for jobs, for licenses to operate certain businesses and for firearms and residence permits.

While we were not able to conduct the kind of full-scale employer survey that has been done in the US and elsewhere,²⁶ we did administer to 16 trade union workers a written questionnaire²⁷ asking if an employer had ever requested them to submit their CRC. Eight of these respondents answered negatively. Four of those who answered

²⁵ Art 120.4 Spanish Criminal Code.

²⁶ In the UK two thirds of surveyed employers stated that they considered a job applicant's criminal record. In Us half of employers check before hiring an applicant Holzer, Raphael and Stoll (2007). In Australia, employers initiated 2.3 million criminal background checks in 2006-07 (Naylor, Patterson and Pittard 2008).

²⁷ We are grateful to Luis Antonio Salvadores, a lawyer for the Comisiones Obreras trade union.

affirmatively had been asked to provide a CRC for jobs with state and local police, private security and a fire department. This is no surprise since the law disqualifies certain ex-offenders from serving in those positions. However, the four other affirmative responders said that a criminal certificate had been requested for employment in office cleaning, domestic service, gardening and social services which provide care. (One respondent said that the employer made the criminal record request ‘orally’). Obviously, much more empirical research is needed, but the fact that 50% of our respondents or somebody they knew had been asked for criminal records, and half of those (25%) by private employers, casts some doubt on the widely-held belief that private employers rarely consider job applicants’ past convictions in Spain.

In another empirical foray, we surveyed 49 male probationers in Barcelona. Of this sample, 10,7% had ever been asked by employers to submit a CRC.²⁸ Most of those requests involved applications for jobs (especially private security and commercial drivers) from which, by law, ex-offenders are barred. (Curiously, a TV reality show asked one of these probationer respondents to submit a CRC in order to be considered for an appearance on the show.)

NCR data (176.000 CRC requests by private individuals) and our own research cast doubt on the widely held belief that private employers rarely consider job applicants’ past convictions. Still, it is puzzling why Spanish employers do not more frequently ask job applicants to submit a CRC. At this point we can only speculate. One possible explanation is that employers fill a large number of jobs with individuals whom they know personally or who have been recommended to them by family members or

²⁸ We interviewed personnel at four agencies that work on promoting offender reintegration and have also surveyed students in Masters courses who apply for temporary jobs. All believe that employers only rarely ask job seekers about past criminal convictions.

close friends.²⁹ Another possible explanation is that employers think, based upon an apparent consensus of scholarly opinion (see Section IV), that, in the absence of a specific law requiring it, it is illegal to ask job applicants to submit a CRC. This belief is probably based on the fact that (1) employers cannot communicate directly with the NCR, (2) the NCR keeps criminal records confidential, and (3) the Spanish constitution explicitly includes a commitment to rehabilitation (art.25.2 Spanish Constitution).³⁰

IV. When Conviction-Based Employment Discrimination (CBED) is *Prohibited*

If a country desired to increase employment opportunities of ex-offenders, it could prohibit CBED and make violators liable civilly and/or criminally. Such a policy would equate CBED with racial, gender and religious employment discrimination. The enacting country would certainly not allow employers direct or indirect access to criminal record information; it would prohibit them from asking job applicants to reveal prior convictions. However, neither Spain nor any other European country has adopted such a policy. European anti-discrimination laws do not prohibit CBED nor recognize offenders as a disadvantaged group entitled to special employment protection (Louks, Lyner and Sullivan 1998).³¹

²⁹ There is no data for the whole population of people who got a job through friends and relatives. The Labour Force Population Survey 2009 refers a 47,92% of young people (16-34) who found their job through families or friends. Source: Personal elaboration based on: Encuesta de Población activa (Labour Force population survey) module 2009. Available at: http://www.ine.es/jaxi/tabla.do?path=/t22/e308/meto_05/modulo/2009/10/&file=01012.px&type=pcaxis&L=0 (13/02/2012)

³⁰ The Spanish Constitution (art. 25) provides that “criminal punishments involving deprivation of freedom should aim towards rehabilitation and social integration”.

³¹ See for example Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. Art 1: Purpose. The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of *religion or belief, disability, age or sexual orientation* as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Spanish labor law prohibits employment discrimination based upon age, sex, national origin, marital status, and political ideas;³² criminal record is not mentioned. Arguably, this reflects a conscious decision not to treat CBED as immoral, irrational and unjustifiable. While the Penitentiary Law does state that CBED is unlawful,³³ it provides no remedy for an ex-offender who believes that she has been the victim of such discrimination and it has never been cited in labor courts.³⁴ In the absence of a specific labor law prohibition, Spanish private employers would seem free to engage in CBED.³⁵ This conclusion is strengthened by the fact that Spanish employers can lawfully require job applicants to submit their CRC with their job application.

Despite the fact that Spain's employment discrimination law does not protect ex-offenders, the majority of labor law scholars believe that it is illegal for private employers to even ask job applicants to present a CRC.³⁶ They base this belief on a well-known Constitutional Court judgment³⁷ that declared that a criminal record subject's privacy right was infringed by a government agency which, without lawful authorization, requested and received criminal record information from the NCR. From this judgment they infer that an official conviction record is 'private information' and

³² Estatuto de los Trabajadores. Art 4.2.

³³ Art 73.2 Ley Orgánica 1/1979 26 September, General Penitenciaria, states 'Conviction records can never be a basis for social or juridical discrimination.'

³⁴ There is no labor court judgment dealing with a challenge to an employer's requirement that a job applicant present a CRC. A few courts have referred to the Penitentiary Law provision. For example, in STSJ Andalucía (sala contencioso administrativo, sección 4, n. 349, 5 de marzo, 2010) the court said that a CR should not automatically foreclose renewal of a residence permit

³⁵ However, the País Vasco '*ombudsman*' considered CBED to violate the Spanish Constitutional provision (art 25.2) that states that rehabilitation is one goal of punishment (see Ararteko 1996). The ombudsman's recommendations has no normative force.

³⁶ A job applicant in Spain is not obliged to admit that she has a conviction record. Some labor law scholars believe that, if asked, a job applicant has the right to lie (Goñi 1986; Tascón 2005). It is not clear what 'right to lie' means, presumably that she cannot be fired if the employer later discovers the lie. We have found only one judgment dealing with a worker who did not tell the employer about a previous sentence. The Court concluded that the primary reason why the plaintiff was fired was failing to be at his free-world job because he was in prison, not because he lied (Tribunal Superior Justicia Comunidad Valenciana, 4 de Julio 1991 (AS 1991\4736)).

³⁷ STC 22 July 1999, n ° 144

thus that it is illegal for employers to ask prospective employees about prior convictions (for a discussion see Jacobs and Larrauri, 2012).

The labor law scholars draw further support for their belief that CBED is illegal from the Personal Data Protection Law that prohibits private individuals and entities from creating a register of criminal offenders or convictions. From this provision, they conclude that criminal records constitute protected personal data like information about an individual's politics, trade unions affiliation, religion, health and sex life (eg Goñi 1986; del Valle 1991; del Rey 1993; Fernandez 1996; Harremanak 2001; Goñi 2004; Tascón 2005; Alameda 2010). We do not think that a law prohibiting private parties from creating a database of convicted persons ought to be interpreted as prohibiting an employer from asking a job applicant 'have you ever been convicted of a crime?'.³⁸

The labor law scholars also argue that employers cannot ask for information about a job applicant's criminal convictions because information about 'moral character' is only rarely relevant to the job applicant's ability to perform the job for which she is applying. They reason that convictions should only be a job qualification when the offence is necessarily inconsistent with successfully performing a job's duties and responsibilities.³⁹ As a matter of policy, this opinion is also dubious. Many employers consider character relevant to every job that demands the employee to come to work when expected, stay until the end of the day and carry out duties conscientiously - in other words, every job. It is also important that employees abide

³⁸ We agree with Del Rey (1993) that it is one thing to maintain a database of criminal offenders and a different thing to ask job applicants to submit proof that they have never been convicted. Beneyto, Herrero and Prados (2007) are the only Spanish authors who argue that asking *all* job applicants about prior convictions is not discriminatory.

³⁹ For example a person convicted of fraud could be denied a job as a cashier, but not a job as a gardener (Goñi 1986). However it is not clear how employers can assess the relevancy of convictions to particular jobs if they cannot ask the applicant or otherwise find out about those prior convictions.

by rules and comply with authority. These qualities of character are often as important, even more important, than particular ‘skills’.⁴⁰

To conclude, Spain and the other European countries do not prohibit CBED as they prohibit race and gender discrimination. Moreover, their laws explicitly gives individuals the right to obtain their CRC from the NCR.⁴¹ If law makers wanted to protect job seekers from having to produce their CRC’s, they could have forbidden it.⁴² They could also provide ex-offenders who are discriminated against in employment a civil remedy that would provide compensation and/or a hiring order. Moreover, with respect to any such CBED lawsuit, law makers could make employers bear the burden of proving that the requested criminal record information is ‘justified by business necessity’. However, no European parliament has provided any specific legal recourse for a job applicant to sue an employer for CBED⁴³ and no such cases has been reported by Spanish courts.

Of course, just because CBED is not prohibited, does not mean that it is standard practice. The extent of criminal background checks and CBED in Spain is not known. We also lack research on employers’ attitudes towards hiring ex-offenders.⁴⁴ While CBED in Spain and other European countries, is widely and uncritically accepted as appropriate for serving in the public administration, private sector employers are mostly not regulated with respect to discriminating on the basis of criminal record. The

⁴⁰ Admittedly, not all criminal records equally impeach good character (Henry and Jacobs 2007).

⁴¹ Real Decreto 95/2009, de 6 de febrero.

⁴² In Finland, only certain employees may request information on criminal records from the NCR. An individual must show ‘need’ to obtain his CRC from the NCR. With respect to employment, need exists only when the applicant is applying for certain occupations, such as those involving contact with children. Matti Joutsen (email communications, 28 June 2011).

⁴³ However, an employer cannot fire a worker just because she has a CR or because she has been sentenced. It is possible to fire a convicted person only if she does not attend work (see art 54.2.a) Estatuto Trabajadores).

⁴⁴ In Spain, Gutierrez and Sintas (1994) carried out the only research of which we are aware. They found that 25% of employers probably would not hire an ex-offender; this rises to 85% if the ex-offender is already a recidivist. In the US, Holzer, Raphael and Stoll (2006) report that 60% of the employers are unwilling to hire ex-offenders.

belief that criminal records are private information (Jacobs and Larrauri 2012) may well explain the general belief that CBED is unlawful unless it is affirmatively authorized by legislation or a criminal sentence. However there is no specific legislation (or court judgments) to protect ex-offenders against employment discrimination.

V. Reflections

CBED has not been much studied in Europe despite its likely (albeit not proven) importance for ex-offender reentry. It is widely assumed that because European countries do not make individual criminal history information available to private and most public employers, employers do not obtain or consider prospective employees' prior convictions. That assumption may or may not be true. Certainly, employers can request that job applicants obtain and present their criminal records (or lack thereof) with their employment application. How often employers make such requests is unknown and deserves empirical research. Our preliminary research in Spain found that in 2010 there were 1.5 million requests to NCR.

CBED is a tough policy issue. First, it raises civil liberties concerns. Convicted criminals should not be punished, penalized or disadvantaged disproportionately to their just deserts. Lengthy or even lifetime exclusion from all legitimate employment would be a much more severe penalty than most defendants deserve. It would also be counterproductive from a societal point of view, because without opportunities for legitimate employment ex-offenders will gravitate back toward criminal activity.

The nub of the issue is whether an employment disqualification should be considered punishment. Arguably, a good character requirement for employment imposed by the discretionary licensing decisions of employers, governmental agencies and professional associations is not punishment any more than a PhD requirement for a

faculty position punishes those without a PhD. An employment disqualification imposed by a general employment law is a closer question. Certainly, a law providing that the judge must include employment disqualification as part of the sentence should count as part of the punishment for the criminal offence.⁴⁵ Is it any different if the legislature imposes the same employment disqualification automatically?⁴⁶ Perhaps it could be argued that the automatic disqualification imposed by a general employment law is not intended to convey condemnation or impose a stigma, but to safeguard consumers or the general public from injuries that could be caused by unqualified/irresponsible persons working in sensitive occupations. However, that seems like a formalistic distinction, albeit one that many national courts accept to justify collateral consequences of a criminal sentence.

Employment discrimination against persons with prior convictions raises important social policy concerns. There is a strong societal interest in convicted persons successfully reintegrating into the societal mainstream. If convicted offenders are relegated to a criminal subculture and a future of repeated offending and punishment, society is harmed financially and physically. However, it is also true that employers have a legitimate interest in preferring reliable, honest and self-disciplined employees to employees who are unreliable, dishonest and dangerous. The dilemma cannot be made to disappear simply by insisting that a criminal conviction does not reflect character nor predict future misconduct. Reality does not confirm such wishful thinking. Empirical studies find different reoffending rates depending upon the offenders who are sampled and, of course, on the efficiency of the police. Admittedly, recidivism itself is in part a consequence of employment discrimination. There is certainly no reason to believe that recidivism rates are constant over time and place or

⁴⁵ As suggested by von Hirsh and Wasik (1997).

⁴⁶ In the US literature, 'automatic disqualifications' are referred to as 'collateral consequences' of conviction. See Demleitner (1999) and Pinard (2010).

for all categories of ex-offenders. However, we are not aware of any recidivism study that finds that ex-offenders present no elevated risk of future offending.⁴⁷

We think that a fully developed analysis of the justifiability of CBED should also consider the interests of job applicants who have never been convicted of a crime. When an ex-offender is not hired for a job, that position is filled by another person in need of work, perhaps severely in need. That never-convicted job seeker might well feel, and with some justification, that his or her spotless criminal record should count as a plus on his or her curriculum vitae in the same way that good educational credentials and good prior job experience should count favorably. If a spotless criminal record does not give her an advantage over a person with one or more criminal convictions, her resolve to avoid the temptations of crime might weaken.⁴⁸

Policymaking in this area is more complex than is often assumed. It touches on constitutional law, sentencing and criminal law, labor law and administrative law. Strong interests point in different directions and the most affected population are normally the most powerless (ex-offenders and immigrants). Perhaps that is why in Spain and the other European countries policy remains, to a large degree, under-researched and under-developed. This is unfortunate because it leads to many assumptions, e.g. that the vast majority of employers do not discriminate on the basis of

⁴⁷ But see Kurlychek, Brame and Bushway (2007) who have found that after seven years of crime-free (as measured by arrest-free) conduct, an ex-offender's risk of recidivating is similar to that of a person without any criminal record. Maruna (2009) argues that CBED itself affects 'time to redemption'. Blumstein and Nakamura (2010) found that the hazard rate (probability to be rearrested) differs according to age and offence. But according to Blumstein only 30% of his sample actually reached the redemption point without another arrest (Blumstein, email communication January 21st, 2012). More recently, Bushway, Nieuwebeerta and Blokland (2011) point out that the number of previous arrests affects 'time to redemption'.

⁴⁸ There is lively debate about the effects of expungement policies (Funk and Polsby, 1998) and policies forbidding public access to CR (Busway 2004; Holzer, Raphael and Stoll 2006; Freeman 2008; Stoll and Bushway 2008). The authors cited in the previous sentence believe that if US employers were denied access to job applicants' criminal records, they would be more likely to discriminate against minority applicants, especially blacks. Therefore blacks who have no criminal record would obtain fewer jobs.

criminal record. Acceptance of such assumptions obviates the need to explore policy options⁴⁹ for regulating CBED more clearly and transparently.

⁴⁹ See for example Love and Chin (2010) on the need to inform the defendant about collateral consequences of conviction.

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