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CAN THE ON-DEMAND ECONOMY OPEN DOORS FOR THE FORMERLY INCARCERATED?

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INTRODUCTION

Today, roughly one in three workers in the United States are employed in the “gig economy,” also known as the “shared,” “on-demand,” or “access” economy. Jobs within it include ride-hailing and delivery digital platforms. One in twenty-five people across the country uses digital platforms like Uber or Lyft as a means of employment, and these sectors are expected to see large gains in future years.¹ Although it began with just a few niche apps and digital marketplaces, the sector has grown tenfold in the past three years to nearly \$34 billion dollars of annual revenue.² And, with at least a quarter of the U.S. population now employed within it, this new and rapidly growing sector has

1. Andrew Soergel, “1 in 3 Workers Employed in Gig Economy, But Not All by Choice,” *U.S. News & World Report*, Oct. 11, 2016. <https://www.usnews.com/news/articles/2016-10-11/1-in-3-workers-employed-in-gig-economy-but-not-all-by-choice>.

2. Mitch Ratcliffe, “Sizing the Local On-Demand Economy: 2016 — 2017,” BIA/Kelsey, Feb. 1, 2017. <http://blog.biakelsey.com/index.php/2017/02/01/sizing-the-local-on-demand-economy-2016-2017>.

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the potential to recruit qualified applicants that are often excluded from traditional forms of employment—particularly those who have been incarcerated.

Studies show a strong correlation between unemployment and recidivism. In fact, unemployed offenders are more than twice as likely to end up back in prison compared to their employed counterparts.³ With over 640,000 individuals exiting prison gates annually, the post-release necessity to secure employment as quickly as possible can literally mean the difference between freedom and incarceration.⁴ Further, on a community level, without steady employment, rates of recidivism that stem from higher incidences of criminal activity increase, and thus taxpayers will continue to spend billions of dollars annually on corrections.

However, research shows that people are better served in their home communities with expanded access to opportunities for upward mobility.⁵ One intervention that can achieve lower recidivism, spend taxpayer money more efficaciously and improve businesses’ bottom lines is to end blanket policies that automatically disqualify applicants based only on

3. Mark T. Berg and Beth M. Huebner, “Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism,” *Justice Quarterly* 28:2 (2011), pp. 382-410. www.tandfonline.com/doi/abs/10.1080/07418825.2010.498383?journalCode=rjqy20#preview.

4. E. Ann Carson and Elizabeth Anderson, “Prisoners in 2015,” U.S. Bureau of Justice Statistics, December 2016. <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

5. Michelle Natividad Rodriguez, “Why Employers Are Hiring People With Records,” National Employment Law Project, June 2017. <http://www.nelp.org/blog/why-employers-are-hiring-people-with-records>.

biometric information like fingerprint-based criminal background checks. Accordingly, the present study presents the economic, social and moral arguments against the indiscriminate and inaccurate use of these government-mandated biometrics. Indeed, if employers and other invested stakeholders tailor the use of criminal background checks to an individual's circumstances, rather than merely to disqualify an applicant based on the existence of *any* conviction or offense, employers and consumers, as well as our local, state and national economies will reap public safety and budgetary benefits.

NAME-BASED VS. FINGERPRINT-BASED BACKGROUND CHECKS

The term “biometrics” refers to a variety of tools used to identify individuals by physical and behavioral traits. The two most common biometric techniques used today are name-based background checks and fingerprint-based background checks. The former are used by commercial background check companies that pull information from local courts, state records and “aggregators” of criminal history data.⁶ Traditional background checking companies typically use a person's name, Social Security number and date of birth to search a variety of data sources. These include online state and county criminal record databases, sex offender registries and most-wanted lists. Some companies analyze physical court records, but as digital recordkeeping improves this practice has declined.

On the other hand, fingerprint-based criminal background checks involve a company taking fingerprints of all applicants (usually through a technician employed by the state) and sending the prints to the FBI to be checked against the Next Generation Identification (NGI) system, which includes fingerprint and palm identification as well as iris recognition technology. This system serves as a repository of state, local and federal law enforcement agency biometric records, and depends on the various agencies reporting timely and accurate information. The NGI system also provides agencies and employers with a “rap back” service, which is designed to keep requesters up-to-date with new information on criminal activity after the original report is distributed.⁷ Identification systems are intended to protect public safety by providing information that is used to make a range of decisions in housing, education, licensure and employment. It is for this reason that a majority of employers use criminal background checks. However, they also use them to avoid lawsuits claiming negligence for their failure to do so.

6. Maurice Emsellem, “The Pros and Cons of Fingerprinting Uber Drivers,” National Law Employment Project, July 2016. <http://www.nelp.org/blog/the-pros-and-cons-of-fingerprinting-uber-drivers>.

7. Federal Bureau of Investigation, “Next Generation Identification (NGI) Flyer,” U.S. Dept. of Justice, May 21, 2015. <https://www.fbi.gov/file-repository/next-generation-identification-ngi-flyer.pdf/view>.

NAMED-BASED CHECKS IN THE GIG ECONOMY

Surveys conducted by the Society of Human Resource Management reveal that between 70% and 86% of employers today perform background checks, with the majority of those screening for criminal history as well.⁸ Although not all jobs in the transportation industry require them, taxi drivers and other classes of workers who have been disrupted by the on-demand economy traditionally have been subject to fingerprint-based background checks. Whereas some local jurisdictions have attempted to mandate fingerprint-based checks for on-demand economy companies, firms like Uber and Lyft have been committed to using name-based checks due to the additional cost and time associated with full fingerprint scans.⁹ On-demand firms frequently use third-party vendors like Checkr and Onfido, which automate the screening process and cater specifically to the background check needs of sharing economy firms. Uber, for example, contracts out to Checkr for all of their background checks, disqualifying applicants that screen positive for felonies, sex offenses or driving related offenses that have occurred over the previous seven years.¹⁰ AirBnB recently acquired Trooly, a startup that collects publicly available information on the internet—such as social media content and public registers of offenders—and then uses machine learning technology to produce an individualized risk assessment.¹¹ TaskRabbit uses a third-party company, SterlingBackCheck, to complete its background checks with Social Security number traces, a federal criminal background check and additional county check.¹² Commercial screening services vary widely in speed, accuracy and the types of personal information checked, which allows firms to tailor the features of a background check to their liability concerns and level of risk aversion. It also results in public scrutiny when controversies arise.

Several high-profile incidents have emerged in recent years in which a gig economy platform has come under fire for its background check processes, resulting in pressure from local government officials to use fingerprint checks. In 2016, for example, Uber and Lyft famously left Austin, Texas over a municipal rule that would force the companies to fingerprint its drivers. Uber threatened to pull out of Maryland

8. Michael Aamodt, “Conducting Criminal Background Checks for Employee Selection,” *SHRM-SIOP Science of HR Series*, 2016. <https://www.shrm.org/hr-today/trends-and-forecasting/special-reports-and-expert-views/documents/shrm-siop%20background%20checks.pdf>.

9. “Uber and Lyft: Fingerprint-Based Background Checks Essential to Assure Public Safety,” International Biometrics and Identity Association, June 14, 2016. <http://www.biometricupdate.com/201606/ibia-urges-ridesharing-firms-to-enforce-fingerprint-based-background-checks>.

10. Joe, “Details on Safety,” Uber Newsroom, July 16, 2015. <https://newsroom.uber.com/details-on-safety>.

11. Olivia Zaleski, “Airbnb to Buy Background-Check Startup Trooly to Root Out Scams,” *Bloomberg Technology*, June 16, 2017. <https://www.bloomberg.com/news/articles/2017-06-16/airbnb-to-buy-background-check-startup-trooly-to-root-out-scams>.

12. Kate Rogers, “TaskRabbit rolls out on-demand service,” *CNBC*, March 1, 2016. <https://www.cnbc.com/2016/03/01/taskrabbit-rolls-out-on-demand-service.html>.

and Massachusetts, as well as other states and large cities if required to use fingerprinting checks. Supporters of mandatory fingerprinting argue that checking against the FBI's fingerprint database would be more accurate and would increase public safety, as it is the "gold standard" of background checks. Some important facts, however, cast considerable doubt on such a claim.

THE CASE AGAINST MANDATORY FINGERPRINTING

Accuracy and case dispositions

A key benefit to using fingerprint screening is the accuracy of the underlying technology. However, proponents of fingerprinting regimes use metrics favorable to fingerprinting when making comparisons to commercial name-based checks. One report, for example, finds that: "Fingerprint background checks have a potential error rate of 1%; and name-based background checks can have a potential error rate of 43%."¹³ It thus concludes that "FBI fingerprint searches are highly preferable to name checks."¹⁴ However, these numbers are misleading in that the FBI's Advanced Fingerprint Identification Technology has a potential 99% success rate, but the information associated with the prints may be inaccurate or incomplete.

Indeed, FBI fingerprint background checks have considerable limitations and inaccuracies. The National Employment Law Project (NELP) estimates that up to 600,000 people per year face undue prejudice because of inaccurate information in the FBI database.¹⁵ As many as 50% of records do not include the final disposition of any charges.¹⁶ As a result, individuals who are arrested but never convicted, those who have a charge dropped from a felony to a misdemeanor or those who have their record expunged may be wrongfully prohibited from holding a job. Moreover, because the FBI database relies on other law enforcement entities to accurately report their records, and because those reporting agencies may relay incomplete or inaccurate information (and some states are not required to report at all), flaws are inevitable. A 2015 Government Accountability Office report highlighted missing disposition information in state records with ten

states reporting that their databases were 50 percent or less complete, 13 states less than 75 percent complete, only 20 reporting 75-100 percent complete, and seven states did not have any data available.¹⁷ Without comprehensive information that details the final dispositions, employers make hiring decisions based on incomplete information, which leads to millions of qualified people denied access to employment.

Importantly, not every criminal record is associated with a fingerprint, as not every person entering the criminal justice system is formally booked and printed. Because the FBI database only accepts records tied to a fingerprint, an FBI check will not return records that lack one. An Oregon-based study found that half of the state's "book and release" cases over a three-month span had no control numbers because no fingerprints were taken.¹⁸ And in Ohio, a May 2015 investigation conducted by *The Columbus Dispatch* found that "thousands of convictions, which police officers and public and private employers hope to detect during background checks, are missing from the state database."¹⁹ One report suggests that as many as 25% of felony convictions—a number that represents more than seven million convictions—are not available to the FBI's system.²⁰

Timeliness

Studies have shown that the faster ex-offenders can find a job, the more likely they are to avoid reoffending.²¹ Conversely, longer periods of unemployment following release are associated with higher recidivism rates. While there is considerable variation across name-based vendors, companies have the ability to select a background check that returns fast results without sacrificing accuracy. For an ex-offender with an old arrest or conviction, the sooner he can procure employment, the less likely he is to resort to criminal activity. The FBI's process does not have the same flexibility as these commercial checks, and may, in fact, damage public safety by increasing wait times.

13. Matthew W. Daus and Pasqualino Russo, "One Standard for All: Criminal Background Checks for Taxicabs, For-Hire, and Transportation Network Companies (TNC) Drivers," John Jay College of Criminal Justice, May 2015, p. 86. <http://www.utrc2.org/sites/default/files/pubs/Background%20Check%20Report.pdf>.

14. Ibid.

15. Madeline Neighly and Maurice Emsellem, "Accurate FBI Background Checks for Employment," National Employment Law Project, July 2013, p. 3. <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf>.

16. Michelle Natividad Rodriguez and Maurice Emsellem, "65 Million 'Need Not Apply: The Case for Reforming Criminal Background Checks for Employment," National Employment Law Project, March 2011, p. 7. http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

17. "Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used For Employment-Related Background Checks," U.S. Government Accountability Office, Feb. 12, 2015, p. 1. <https://www.gao.gov/products/GAO-15-162>.

18. Teresa Bennett, "Book and Release Cases: A Comparative Analysis of Complying with Fingerprint Orders," U.S. Bureau of Justice Statistics, Spring 2012, p. 2. [https://www.pdx.edu/cps/sites/www.pdx.edu/cps/files/Bennett_Teresa_EMPA_Capstone\[1\]%20approved%20final.pdf](https://www.pdx.edu/cps/sites/www.pdx.edu/cps/files/Bennett_Teresa_EMPA_Capstone[1]%20approved%20final.pdf).

19. Randy Ludlow, "Law enforcement stymied when clerks don't report convictions," *The Columbus Dispatch*, May 10, 2015. <http://www.dispatch.com/content/stories/local/2015/05/10/law-enforcement-stymied-when-clerks-dont-report-convictions.html>.

20. "Improving the National Instant Background Screening System for Firearm Purchases," The National Consortium for Justice Information and Statistics, February 2013, p. 19. <http://www.search.org/files/pdf/Improving%20NICS%20for%20Firearms%20Purchases.pdf>.

21. Aaron Yelowitz and Christopher Bollinger, "Prison-To-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates," Manhattan Institute, March 26, 2015. <https://www.manhattan-institute.org/html/prison-work-5876.html>.

Scope of inquiry

The fingerprint database may also retain old records. Certain offenses reported to the FBI may remain active on Identity History Summary reports for more than ten years.²² Particularly old convictions may not tell employers anything about an applicant's risk, however, as a large body of research suggests that an offender's likelihood to commit a new crime greatly diminishes after roughly four years. Depending on the age at the time of first offense, the type of crime and the number of prior offenses, a former offender can resemble the general population in terms of likelihood to reoffend as soon as 4.3 years after their return to society.²³ A 2015 National Institute of Justice study found that: "considerable evidence exists that, after an initial period, the probability of recidivism declines monotonically with time free and clear of further contact with the criminal justice system."²⁴ Similarly, Alfred Blumstein and Kiminori Nakamura found that the hazard rate among first-offense 18-year-olds (for robbery, burglary and aggravated assault) declined to the same arrest rate for the general population of same-aged individuals by age 25.7, or only 7.7 years after arrest.²⁵ After that point, the probability that individuals will commit another crime reduces to even less than the probability of other 26-year-olds in the general population.²⁶

Name-based checks, on the other hand, are legally considered consumer reports, and thus are regulated federally by the Fair Credit Reporting Act (FCRA). The FCRA prohibits the release of individual arrest records that, depending on whichever of these occurs first, are seven years past the date of original entry, or when the governing statute of limitations has expired.²⁷ The FBI fingerprint database contains no such protections, which means that hiring managers would likely receive records that suggest that a job prospect is risky, when most academic research would suggest the applicant poses no greater risk than the general population.

Regulations and guidelines

When making screening decisions, employers are bound by the Equal Employment Opportunity Act (EEOC), or Title VII

of the Civil Rights Act. This legislation prohibits employers from discriminating against workers on the basis of race, gender, religion or national origin. Under 2012 EEOC guidance, a number of considerations must be made when employers carry out criminal background checks on potential employees. Perhaps most significantly, an arrest record alone cannot be the sole determinant of a hiring decision, as Black and Latino-Americans are arrested at disproportionately high rates.²⁸ As noted previously, the FCRA also regulates the ability of a reporting entity to report outdated information, a metric under which the FBI database would be noncompliant. It makes little sense, then, to legally mandate that gig economy firms use a background check process that would not comply with federal laws.

THE CASE FOR HIRING FORMERLY INCARCERATED JOB CANDIDATES

Although the facts presented thus far indicate that mandating fingerprint screening would do little to improve public safety over name-based checks, a broader problem looms. Criminal background checks for employment purposes—whether name or fingerprint-based—have grown dramatically in recent years. From 1996 to 2006, background checks conducted both by private agencies and through requests to the FBI exploded. Civil requests for FBI checks doubled, such that by 2006 the agency conducted more fingerprint reviews for civil purposes than for criminal ones.²⁹ According to some reports, up to 87% of employers today conduct some type of background check, and the background check services industry has ballooned to \$2 billion.³⁰ However, even when a background check shows a criminal history, an employer should still strongly consider hiring the applicant.

Economic case

By limiting employment opportunities for people with criminal records, businesses dismiss talented applicants who could contribute millions in annual revenue and bring diverse experiences to the company. Further, these potential employees have strong motivations to perform at high levels. As a result of excluding formerly incarcerated job seekers

22. Jennifer Mora and Rod Fleigel, "Background Screening Companies May Now Report Convictions Older Than Seven Years in Nevada," *Littler*, June 24, 2015. <https://www.littler.com/publication-press/publication/background-screening-companies-may-now-report-convictions-older-seven>.

23. Alfred Blumstein and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 47:2 (2009), p. 339. http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf.

24. See, e.g., Megan C. Kurlychek et al., "Long-term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Convicted Felon Study," *Criminology* 50:1 (2012).

25. Blumstein and Nakamura, "p. 339. http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf.

26. *Ibid.*

27. Fair Credit Reporting Act, 15 U.S.C. § 1681.

28. "Background Checks: What Employers Need to Know," U.S. Equal Employment Opportunity Commission and the U.S. Federal Trade Commission, 2018. https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

29. Kai Wright, "Boxed In: How a Criminal Record Keeps You Unemployed For Life," *The Nation*, Nov. 6, 2013. <https://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life>.

30. Aaron Elstein, "Background-check industry under scrutiny as profits soar," *Crain's New York Business*, June 23, 2013. <http://www.crainnewyork.com/article/20130623/FINANCE/306239972/background-check-industry-under-scrutiny-as-profits-soar>.

from the workforce, economists argue that the gross national product is reduced between \$78 and \$87 billion.³¹

Although limited evidence exists about how well formerly incarcerated populations perform in the workplace as compared to those without criminal records, what does exist is promising. Following the passage of Proposition 47 in California, which reclassified certain felonies as misdemeanors, more than 3,300 new Uber drivers were able to gain a legal source of income. Significantly, the drivers who had criminal records had the exact same average rating as those without records on the app.³² More broadly, research by big data human resources startup Evolv found employees with criminal records were actually up to 1.5% more productive than other employees.³³

Moreover, a recent study found that employees with records had a 13 percent lower turnover rate, thereby saving companies \$1,000 per year for each of them hired. The study concludes: “this evidence taken together suggests that employees with a criminal background are, in fact, a better pool for employers.”³⁴ Higher retention rates saves businesses significant costs associated with the loss of productivity when employees leave, as well as slower rates of productivity while new employees acclimate to the work environment. Other costs of turnover include recruiting strategies, training new employees and the breadth of required human resources documentation. A 2012 analysis by the Center for American Progress revealed that businesses spend about one-fifth of an employee’s salary on the costs listed above. Depending on annual salary, employee turnover costs companies between sixteen and twenty-one percent of an employee’s salary.³⁵

Employers also stand to benefit from the Work Opportunity Tax Credit (WOTC), a federal incentive tax credit for employers to hire workers from “target populations,” which include “people with felony convictions who have faced consistently significant barriers to employment.”³⁶ The WOTC

promotes workforce and vocational training programs and maximum tax credits range from \$1,200 to \$9,600, depending on the employee hired.³⁷ The U.S. Department of Labor’s Federal Bonding Program (FBP) is another unique hiring tool that provides fidelity bonds to employers willing to hire “justice-involved citizens.”³⁸ For the first six months after an employee’s hire, the FBP pays bonds on behalf of employers starting at \$5,000.³⁹

Moral and social cases

Allowing former offenders the right to work, particularly in the gig economy, offers them crucial social benefits. Co-founder of on-demand staffing firm Wonolo, Yong Kim emphasizes that: “the on-demand economy is here to stay because of its core benefit – people feel empowered and liberated knowing that they can work when they want.”⁴⁰ Flexible working conditions and low-skilled, entry-level positions are therefore consistent with the needs of many people in reentry transitions. Alternative schedules allow people to work several hours at a time on preferential days, which gives them additional time to explore vocational, educational and alternative employment options. They also provide them with time to reunify with family, and engage in local community activities and events. Without strict employment schedules that limit such positive endeavors, reentered workers have options that many of them have lacked for substantial portions of their lives.

Although morality can be subjective, our values and beliefs as Americans conflict with the indiscriminate collection of biometrics to make employment decisions that exclude viable and talented applicants. Ethical concerns that illustrate this include: the right to earn a living, an opportunity for a second chance, the ability for people to “redeem” themselves, rights to privacy, the human right to worth and dignity, and the provision of tools and skills needed to thrive.

Put simply, when people in positions of authority, whether employers, landlords or admissions advisors allow people a second chance, the resulting impacts are positive and benefit more than just that person and his or her family. Civil society must respond to an overly punitive criminal justice system by expanding opportunities for rehabilitation. This starts with the right to earn a living—and to be a self-sufficient, productive and contributing member of society. Conversely, to continue to define people by their worst moments not only

31. Cherrie Bucknor and Alan Barber, “The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies,” Center for Economic and Policy Research, June 2016. <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

32. Travis Kalanick, “Record shouldn’t bar ex-offenders from work,” *San Francisco Chronicle*, Oct. 5, 2016. <http://www.sfchronicle.com/opinion/openforum/article/Record-shouldn-t-bar-ex-offenders-from-work-9799875.php>.

33. Eamon Javers, “Inside the wacky world of weird data: What’s getting crunched,” *CNBC*, Feb. 12, 2014. <https://www.cnbcm.com/2014/02/12/inside-the-wacky-world-of-weird-data-whats-getting-crunched.html>.

34. Dylan Minor et al., “Criminal Background and Job Performance,” Northwestern University, May 11, 2017, p. 11. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2851951.

35. Heather Boushey and Sarah Jane Glynn, “There Are Significant Business Costs to Replacing Employees,” Center for American Progress, Nov. 16, 2012, p. 2. <https://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>.

36. Employment and Training Administration, “Work Opportunity Tax Credit,” U.S. Dept. of Labor, April 8, 2010. <https://www.doleta.gov/business/incentives/opntax/eligible.cfm#Ex-felons>.

37. Employment and Training Administration “What is WOTC?”. U.S. Dept. of Labor, Feb. 15, 2017. <https://www.doleta.gov/business/incentives/opntax>.

38. “About the FBP,” The Federal Bonding Program, 2016. <http://bonds4jobs.com/about-us>.

39. *Ibid.*

40. Yong Kim, “The Great On-Demand Economy Debate: You’re Missing the Point,” Wonolo, Jan. 13, 2018. <https://www.wonolo.com/blog/the-great-on-demand-economy-debate-youre-missing-the-point>.

reinforces the idea that millions of people have no dignity or worth, but it also eliminates their potential for economic and social mobility, and further entrenches them and their families in cycles of poverty, unemployment, incarceration and stagnation.

Finally, mandatory collection of sensitive biometrics has implications for the right to privacy. Compulsory registration of fingerprints or any other biometric erodes the basic rights of American citizens. By utilizing software to match our fingerprints, palm impressions, iris recognition and facial composition to a range of alleged criminal acts, private firms and law enforcement alike invade private spheres, extending the government into our personal lives. Though criminal records are public information, the way the government and private agencies mandate, collect and disseminate personal information is not public, nor is it transparent.

Principle in action: Dave's Killer Bread

A useful case study on the benefits of hiring ex-offenders is Dave's Killer Bread Foundation, which organizes annual Second Chance Summits to educate companies about the benefits of hiring people who can successfully fulfill the responsibilities of the position. Dave's Killer Bread employs over 300 employees—one in three of whom have a criminal record. By setting aside stigma to recognize the value of a new talent pool, Dave's "vital members of the population power the national brand," and the company has witnessed firsthand how formerly incarcerated people are passionate, hard-working, dedicated and resolved to work hard for a second chance.⁴¹ The organization cites higher retention rates, greater company loyalty, increased job performance, and reduction of recruitment and training costs. Now, Dave's educates other employers on the benefits of following their lead. It also maintains a useful website that includes videos that answer questions and offer insight into various employment needs and hiring considerations.⁴²

Resources like these are an important step to help reduce the barriers associated with job-seeking for ex-offenders, and to help employers adopt a more inclusive approach to their background checking and hiring practices. In addition, the remaining sections recommend other best practices that can provide guidance for firms and governments to boost revenues, afford qualified individuals the opportunity to work and maintain customer safety.

RECOMMENDATIONS

Avoid onerous mandates

Public policy debates often involve tradeoffs, as solutions rarely, if ever, emerge free of costs. However, the research herein demonstrates that a legally enforced fingerprint-based background check system is often inaccurate and thus unnecessarily filters out an alarming number of otherwise-qualified candidates. Still, commercial-based name checks are also imperfect and can vary widely in quality. Indeed, there is no "gold standard" for criminal background checks for employment purposes. But the question is not whether firms ought to choose one method over the other, but whether governing bodies should mandate a particular method. Given that it is unclear if fingerprint-based checks represent a substantial improvement in accuracy compared to services offered by third-party, name-based background checks and that they have been shown to impose significant costs, the argument for compulsory biometric checks is dubious. Moreover, gig economy firms often face strong marketplace incentives to properly vet workers without government mandate. Platforms that involve intimate human interactions, such as AirBnB, TaskRabbit and Uber are only viable insofar as consumers trust them. If an obviously superior screening method were eventually to emerge or if firms show themselves to be flagrantly negligent, regulators might consider additional mandates. However, in the case of the gig economy, neither of these stipulations appear to be true and thus such mandates should not currently be required.

Make more nuanced hiring decisions

Until recently, employers had no empirical basis to guide decisions on the relative safety of hiring ex-offenders. In the past decade or so, however, several important studies have emerged that examine "redemption points" or the period of time a former offender must stay clean to be considered a safe hire.

The general consensus is that former offenders who have refrained from committing new crimes for a certain amount of time begin to resemble non-offenders in terms of their likelihood to reoffend, and this usually takes between four and ten years, depending on the type of crime committed.⁴³ Further, the younger an offender was at the time of the offense, the longer he needed to refrain from crime to reach the same arrest rate as people of the same age in the general population. However, older offenders require less time.⁴⁴ In fact, research confirms that for first-time offenders aged

41. "About Us," Dave's Killer Bread Foundation, 2017. <http://www.dkbfoundation.org/about>.

42. "Second Chance Playbook," Dave's Killer Bread Foundation, 2017. <https://www.dkbfoundation.org/second-chance-playbook>.

43. Blumstein and Nakamura, pp. 338-40. http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf.

44. *Ibid.*, p. 340.

42-46, the redemption period may be as little as two years.⁴⁵ In addition to time since original offense, employers should also consider the nature of the offense. For example, occupations that serve vulnerable populations like children and the elderly might be particularly sensitive to a prior record involving violence, while a bank would be sensitive to fraud or other “white collar” crimes. Conversely, a marijuana possession conviction may not matter much to a land surveying company. In at least four states, occupational licensing boards must evaluate the relationship of the conviction to the nature of the job before denying a license.⁴⁶ This represents a step in the right direction, and employers that do not belong to licensing boards should still make this consideration.

Indeed, when businesses consider hiring a formerly incarcerated individual, they should establish a two-pronged approach: First, they should account for the age of the individual at the time of the offense, the type of offense (property or violent crime), the number of prior convictions and the amount of time the individual has refrained from crime. Second, they should consider whether the original offense is even related to the job in question. In other words, they should evaluate whether there is an obvious public safety connection between the nature of the original offense and the requisite duties of the job for which the person has applied. If the individual is close to or past the point of redemption, or if there is not an obvious public safety connection between the offense and the job, an employer would likely benefit from the hire.

Seek out best practices

Many organizations currently exist that have a wealth of experience and knowledge that can be useful to others. Root & Rebound, for example, is a California-based reentry advocacy group that recently introduced its “**Fair Chance Hiring Toolkit**,” a comprehensive resource for California employers on “Fair Chance” hiring. Fair Chance Hiring is the practice of delaying disclosure of a criminal record until a conditional offer of employment has been extended. Fair Chance Hiring allows employers to first view applications without criminal history attached in order to provide opportunities for applicants to explain circumstances behind criminal activity and mitigate risks associated with the position. The organization

also offers in-person trainings and consultations based on the content covered in the toolkit. The National Employment Law Center also offers a variety of resources for employers and the business community more broadly, including a **fact-sheet** that lays out the case to hire former offenders, a list and specific examples of businesses that have successfully hired within this population, and various other resources for employers and policymakers.

Additionally, the ACLU’s report “**Back to Business: How Hiring Formerly Incarcerated Jobseekers Benefits Your Company**,” is an extensive resource that not only lays out the benefits of hiring ex-offenders, but also models how to avoid negligent hiring liability, conduct accurate background checks and garner support from the community.⁴⁷

Provide greater transparency

Several high-profile incidents have emerged in recent years in which Uber has threatened to leave a given jurisdiction over looming bills to require the company to use fingerprint-based background checks.⁴⁸

However, because the FBI’s database is often incomplete and lacks final disposition information, far too often, it may unnecessarily weed out individuals for no reason at all.⁴⁹ Even more concerning, the FBI’s system may have a racially discriminatory result, as African-Americans make up 14 percent of the U.S. population but account for 28 percent of arrests across the country. Because the database tracks arrests without disposition, it may be excluding an even more disproportionate number of black Americans.⁵⁰

Thus, if on-demand businesses want to avoid being forced to use the FBI’s database, they must prove that their screening methods are either equally or even more rigorous than the FBI’s biometric processes. They must also show that their screening methods do not contain the same kind of incomplete or erroneous information that causes potential employees to be rejected unnecessarily. Quantifying such data about their background check systems would go a long way to build trust with the community and avoid public controversy.

45. See, e.g., Shawn Bushway et al., “The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?”, *Criminology* 49:1 (2011), p. 28. https://www.albany.edu/bushway_research/publications/Bushway_et_al_2011.pdf; Keith Soothill and Brian Francis, “When do ex-offenders become like non-offenders?”, *Howard Journal of Criminal Justice* 48:4 (2009), pp. 373-87. <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2311.2009.00576.x/abstract>; and Megan Kurlychek et al., “Enduring risk: Old criminal records and prediction of future criminal involvement,” *Crime and Delinquency* 53:1 (2007), pp. 64-83. <http://journals.sagepub.com/doi/abs/10.1177/001128706294439>.

46. “Consideration of Criminal Records in Licensing and Employment,” Restoration of Rights Project, October 2017. <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment>.

47. “Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company,” American Civil Liberties Union, June 2017. https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf.

48. See, e.g., Heather Kelly, “Uber and Lyft to leave Austin after losing vote on fingerprinting,” *CNN*, May 8, 2016. <http://money.cnn.com/2016/05/08/technology/uber-lyft-austin-vote-fingerprinting/index.html>; Kevin Rector and Sarah Gantz, “Maryland regulators won’t force Uber, Lyft to conduct fingerprint-based background checks,” *The Baltimore Sun*, Dec. 22, 2016. <http://www.baltimoresun.com/business/bs-md-uber-fingerprint-decision-20161222-story.html>; and Dee-Ann Durbin and Tom Krisher, “Uber, Lyft battle governments over driver fingerprint checks,” Associated Press, June 22, 2016. <https://apnews.com/a2d907fc7ecb42e2a73e0afe8dc626ba>.

49. See, e.g., Neighly and Emsellem. <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf>.

50. *Ibid.*

Revisit “blanket” bans

In some states and jurisdictions, ex-offenders can be categorically turned away from the sharing economy. In the States of Colorado and Nebraska, for example, the legislatures enacted blanket bans on potential drivers who have committed a felony—even non-violent ones, such as fraud or property crimes.⁵¹ While this may seem reasonable at first glance, the present study has demonstrated that there is a statistical “redemption” point.⁵² In light of this, businesses and policymakers should avoid blanket bans because these categorical rejections ignore the nuance involved in crime desistance and the likelihood of re-offense. EEOC guidance explains that employers should make individualized assessments regarding ex-offender applicants and given that plenty of data exists that can better inform an individualized assessment, there is no good reason to use blanket bans. Having a criminal history does not define one’s ability to perform job responsibilities and is not a sufficient indicator of future job performance.

Accordingly, in order to attract quality applicants, hiring managers should instead take into account the following: the nature of the crime, the time elapsed since the crime occurred, whether the crime relates to a person’s ability to perform the job and any mitigating factors surrounding the crime. By using supplemental metrics, employers can gain a comprehensive picture of a person and to what extent he or she can contribute as a successful and productive employee. They can also reduce the disparate impacts of employment discrimination on communities of color, which are disproportionately represented in the criminal justice system.

Consult multiple check mechanisms

Through tools such as GoodHire, job candidates and employers receive full copies of background check results, along with real-time updates and source information. Prospective applicants can also search themselves using the True Me tool to see what an employer would see before an interview. The tool can be accessed through a smartphone and has a streamlined option to go through public databases and correct inaccuracies. Additionally, GoodHire never reports arrests that did not result in convictions and filters out records that are prohibited by applicable laws in each state.⁵³ Background Report is another service that allows job candidates to see results, provide feedback and dispute or explain them if necessary.⁵⁴ In order to ensure fairness, accuracy and to form

individualized assessments, employers should capitalize on more interactive and inclusive screening tools.

Ensure due accreditation

Private screening agencies that provide results of criminal background checks should be held accountable for misinformation that disqualifies applicants from jobs. Employers should aim to use background checks accredited by the National Association of Professional Background Screeners (NAPBS). The NAPBS established the Background Screening Agency Accreditation Program (BSAAP) to promote professionalism, legal compliance and promote consumer safety by providing verifiable information.⁵⁵ In 2012, the National Consumer Law Center published an extensive report about the collection and dissemination of criminal records, which revealed that: “less than one percent of background screening agencies are actually certified by NAPBS, meaning, less than one percent undergo voluntary audits by their own trade association and commit themselves to comply with Standards that contain many legally mandated elements.”⁵⁶

To ensure that these screening companies are duly accredited and thus responsible for the information they provide is an important step to rectifying many of the issues present within the current system.

CONCLUSION

Shortly after the rapid rise of the on-demand economy, some of the most popular firms came under public scrutiny. Sensational local news stories spotlighted violent interactions from workers on platforms like Uber and AirBnB, which elicited calls for stricter background screening methods. Mandating that gig economy companies use the FBI’s fingerprint-based background check instead of or in addition to their own name-based background check systems became a popular proposal. However, the FBI’s system is far from a “gold standard” of background checks, as it tracks arrests and not convictions, which unduly prohibits over a half million people per year from getting a job, and that burden may be racially disproportionate. The FBI system also misses individuals who were never fingerprinted, and is time consuming, difficult to appeal and may dig up old records that, due to their outdatedness, may not reflect an individual’s actual risk.

For these reasons, to unfairly exclude hundreds of thousands of otherwise qualified candidates from entire economic

51. Colorado SB 14-125. [http://www.leg.state.co.us/clics/clics2014a/csl.nsf/billcontainers/70364091166B28FC87257C4300636F6B/\\$FILE/125_eng.pdf](http://www.leg.state.co.us/clics/clics2014a/csl.nsf/billcontainers/70364091166B28FC87257C4300636F6B/$FILE/125_eng.pdf); Nebraska LB 629 2015. <https://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB629.pdf>.

52. See, e.g., Blumstein and Nakamura. http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf.

53. “True Me: Run Your Own Personal Background Check,” Goodhire, 2018. <https://www.goodhire.com/trueme>.

54. See, <http://www.backgroundreport.com>.

55. “About NAPBS,” National Association of Professional Background Screeners, 2018. <https://www.napbs.com/about-us/about-napbs>.

56. Peter Yu and Sharon M. Dietrich, “Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses,” National Consumer Law Center, April 2012. <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

sectors has economic, moral and social implications. Do we, as a society, believe in second chances, and how much do we value “due process” if we allow the consequences of criminal behavior to follow a person long after they have paid for their mistakes? With respect to fiscal and public safety consequences, employment is one of the surest safeguards against recidivism. Erecting barriers to employment merely increases the likelihood that an ex-offender will revert to a life of a crime, which makes communities less safe and burdens local governments with excessive correctional spending. Additionally, a growing body of research suggests that ex-offenders make loyal and productive employees, and that employers could save substantial sums of money by simply hiring more people from this demographic.

The gig economy experienced explosive initial growth and will likely remain a robust alternative to traditional employment. Because this sector offers flexible work schedules for a wide range of skill levels, it is particularly well-suited for individuals reentering society. Accordingly, in order to maximize its potential, policymakers should resist the urge to issue onerous hiring mandates that may actually hamper public safety and impose significant costs on taxpayers.

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