



TESTIMONY

in support of

**THE USE OF CRIMINAL-BACKGROUND
CHECKS IN EMPLOYMENT**

and in qualified support of

**H.R. 2703, THE PRIVATE SECURITY OFFICER
EMPLOYMENT AUTHORIZATION ACT OF 2007**

before the

**SUBCOMMITTEE ON HEALTH, EMPLOYMENT,
LABOR, AND PENSIONS**

of the

COMMITTEE ON EDUCATION AND LABOR

of the

UNITED STATES HOUSE OF REPRESENTATIVES

on behalf of

THE COUNCIL FOR EMPLOYMENT LAW EQUITY

by

**Mark A. de Bernardo
Executive Director and President**

February 26, 2008

I. STATEMENT OF INTEREST

Good morning, Chairman Andrews, Ranking Minority Member Kline, and members of the Subcommittee on Health, Employment, Labor, and Pensions of the House Education and Labor Committee.

My name is Mark A. de Bernardo, and I am the Executive Director and President of the Council for Employment Law Equity (“CELE”), as well as a senior Partner at the law firm of Jackson Lewis.

Thank you for this opportunity to testify *in strong support of* the use of criminal-background checks in employment. Such record-checks *before* the commencement of employment are highly effective and appropriate tools to help prevent criminal recidivism in the most harmful contexts, protect at-risk populations, and assist employers in making fully informed hiring decisions and in protecting their employees, their clients and customers, their assets, and the public at-large.

I also am testifying in qualified support of H.R. 2703, the Private Security Officer Employment Authorization Act of 2007. H.R. 2703 – in our opinion – is *not* perfect, but it is highly appropriate legislation that recognizes the necessity and usefulness of criminal-background checks in employment. H.R. 2703 is a positive step forward, and the CELE appreciates and endorses its fundamental pro-security and pro-safety thrust and intent.

It is my firm and unequivocal belief that the use of criminal-background checks in employment is in the *decisive* interests of employers, employees, and the American public overall, helps protect vulnerable populations within our society, and is an effective crime deterrent.

Moreover, as will be discussed later, *and* as empirical evidence supports – record-checks ultimately are in the strong interests of ex-offenders themselves in terms of positively influencing their opportunities for re-employment and re-integration into society. The plain truth is that employers who do criminal-background checks are *more* likely to hire ex-offenders than employers who do not (and who therefore often resort to assumptions which may lead to statistical discrimination).

The Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices. The CELE advocates such employment practices: (1) to the employer community; (2) before the judicial, legislative, and executive branches of government; and (3) to the public at-large.¹

¹ Among other activities, the Council for Employment Law Equity has filed *amicus curiae* briefs on numerous occasions to the U.S. Supreme Court, and to other federal and state courts and the National Labor Relations Board; has filed comments during rule-making to the U.S. Department of Labor, the U.S. Department of Health and Human Services, the Office of Management and Budget, and the Government Services Administration; and has been active on policy-making issues before the American Bar Association’s House of Delegates – *including* on issues regarding criminal-background checks.

The CELE regularly attempts to positively and constructively influence the consideration of national policy issues of importance to the employer community. The use of criminal-background checks in employment is one such issue.

Jackson Lewis is a national law firm of more than 450 lawyers in 34 offices, *all* of whom are dedicated exclusively to the representation of management on labor and employment issues.²

Clearly, the CELE in particular, and the employer community in general, have a *very* strong interest in any initiative – such as H.R. 2703 – which would embrace the use of criminal-background-check policies and programs in employment.

I am here today to *support* your legislative initiative, Chairman Andrews, to provide real-world context to the issues associated with criminal recidivism and its impact on the workplace, and to underscore the message that criminal-background checks in employment are fair, appropriate, effective, and even *necessary* in many, *many* contexts – including for private-security officers, one of the most compelling categories of employees for whom the need for criminal-background checks is – frankly – beyond question.

However, there are other employment categories in which the use of criminal-background checks is just as compelling – or even *more* compelling, and the *option* of conducting criminal-background checks on job applicants and employees is and should be available to *all* employers.³

I respectfully urge, on behalf of the CELE and the employer community at-large, the U.S. Congress to endorse: (1) the use of criminal-background checks in employment for a *much* broader range of employment situations; (2) enhanced and expanded federal recordkeeping on criminal records; (3) greater private-sector employer access to such criminal-conviction records; (4) more federal funding and staffing for such efforts; and (5) ultimately, the protection and promotion of the right of *all* employers to have access to *all* criminal-conviction records without a date limitation, provided the conviction records have not been expunged.

The protection and promotion of the use of criminal-background checks in employment stands significantly behind the principle that employers should have *more* – not less – information upon which to make fully informed hiring decisions.

On behalf of the CELE, I thank you for your endorsement of that principle in H.R. 2703.

² No law firm has had as extensive or prominent a labor practice as has Jackson Lewis over the past 50 years. In addition, Jackson Lewis has the highest concentration of employment lawyers in such major markets as the New York, Washington, and Los Angeles metropolitan areas.

³ E.g., any positions involving defense, national security, law enforcement, health care, access to pharmaceutical drugs, minors, transportation, public safety, access to large amounts of cash, securities, and/or other valuables, correctional institutions, and/or elder-care or care for the disabled.

II. SUMMARY OF POSITION ON CRIMINAL-BACKGROUND CHECKS IN EMPLOYMENT

The seminal question is: Should employers have access to federal and state criminal-conviction records, and be able to use those records as a factor in their consideration of job applicants?

The seminal answer is: Absolutely. Such access and consideration is not only appropriate, in many contexts it is absolutely necessary given the high rates of criminal recidivism and the legitimate employer, employee, and public expectations regarding safety and security.

Some advocates of ex-offenders' rights want to restrict the use of criminal-background checks of job applicants by employers, no matter how dire the possible consequences.⁴

One state – Connecticut⁵ – already has enacted a restrictive law in this regard, and proposals are pending in several other states.⁶ While these initiatives represent “only” indirect or partial restrictions on the use of criminal-background checks in employment, some criminal-rights' advocates are pushing for legislation that would only allow for criminal-background checks under limited exceptions – such as for job applicants for law enforcement positions, *or* for convictions for particularly egregious crimes, *or* for a period of a year or two or three after the conviction (provided the individual has not subsequently been convicted of the same or a related crime during that period).

These exceptions are *not* particularly meaningful. For example, an individual may have been arrested for an egregious crime (e.g., terrorism-related activities), but pleaded out to a lesser crime (e.g., conspiracy to commit a crime or a firearms-possession charge)... *or* the individual may have been acquitted because of a technicality or a tainted confession... *or* the individual may have been “clean” for the three-year period before the conviction record is sealed *because* he or she was in prison during that entire period... *or* because he or she was arrested but the criminal-justice process was winding its way laboriously through our court system⁷ with its significant procedural delays and backlogs.⁸

⁴ For example, there was some effort by the leaders of the American Bar Association's (“ABA”) Commission on Effective Criminal Sanctions, which is soon to expire, to promote sealing of criminal-conviction records as a proposed resolution before the ABA's House of Delegates, but this effort was soundly rejected.

⁵ An amendment was added to a non-germane bill in Connecticut during a late-night session last July that, because of the administrative burdens it would impose, would effectively deny criminal-background checks as an option to employers. The amendment was to become effective earlier this month, but its effective date was delayed until May 1, 2008, and negotiations to substantially – and favorably – revise the amendment are likely to be successful. Connecticut Public Act No. 07-243, July 11, 2007 (originally Connecticut SB 1700).

⁶ Principally in Massachusetts, although bills also have been introduced in Ohio, Minnesota, and New Jersey. *See Mass. H.B. 1358 and H.B. 1416.* (Available at <http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01358.pdf> and <http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01416.pdf>.)

⁷ Significant delays in our court system are well-documented. One study found that lawsuits lasted between two-and-a-half and eight years to resolve depending on the nature of the case and the jurisdiction involved. *Evaluating*

Should employers be able to conduct criminal-background investigations of job applicants? Should employers be able to take every reasonable and appropriate step to screen out convicted felons with an established history of criminal behavior, especially in such circumstances as:

- Day-care centers, juvenile sports leagues, and summer camps screening out convicted pedophiles;
- Pharmaceutical companies and drug stores screening out convicted drug dealers;
- Defense contractors manufacturing guided missiles or employing civilians on military bases screening out those convicted of espionage;
- Banks and credit-card companies screening out convicted embezzlers;
- Hospitals and medical clinics screening out convicted drug abusers;
- Retirement and assisted-living homes screening out convicted arsonists;
- Taxicab and messenger/delivery-service companies screening out those convicted of reckless endangerment or driving under-the-influence;
- School districts and youth recreational centers screening out those convicted of statutory rape;
- Power plants and petroleum refineries screening out convicted terrorists;
- Rehabilitation centers and counseling programs screening out those convicted of spouse or child abuse;
- Retailers and wholesalers screening out those convicted of theft; and
- Employers with diverse workforce populations and/or diverse clients or patients screening out those convicted of hate crimes?

and Using Employer Instituted Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts (ADLI-ABA Course of Study, April 28-30) 875, 894 (1994). While criminal cases are docketed and tried more expeditiously than civil cases, the delays in prosecution, discovery, motions, trials, and appeals can and do routinely take multiple years, especially in major metropolitan areas with greater backlogs.

⁸ The backlog in the federal courts is significant – 23,000 cases had been pending in U.S. District Courts for two-to-three years in 2006, and another 50,000 had been pending between one-to-two years, and this does not, of course, include appeals and remands. *U.S. District Courts: Civil Cases Pending by Length of Time Pending* tbl.4.11, available at <http://www.uscourts.gov/judicialfactsfigures/2006/Table411.pdf>.

Really, shouldn't *every* employer have every legitimate option, as appropriate and necessary, for ensuring the protection of its employees, customers, and assets, and the public at-large?

There *are* legitimate privacy interests at stake, and rehabilitation and re-entry into the workforce – under appropriate circumstances – of ex-offenders *is* a highly appropriate societal goal.

However, a blanket prohibition on all or most criminal-background checks – as some criminal-rights' advocates support – would promote the indiscriminate concealment of arrest and conviction information on even the most dangerous of convicted felons, and represents: (1) *bad* public policy; (2) a compromise of employee and public safety; (3) a major impediment to employers' ability to minimize their exposure to legal liability; and (4) a prescription for dramatically more crime and more *severe* crime.

While the re-integration into society of former convicts is a compelling and worthwhile goal, in American society we sometimes lose sight of the need to protect the rights of *victims* (and potential victims), by focusing too intently on protecting the rights of *criminals*.

In this regard, H.R. 2703 takes the appropriate course. H.R. 2703 is a crime-prevention bill.

III. CRIMINAL-CONVICTION CHECKS FOR SECURITY GUARDS

Power Corrupts; Absolute Power Corrupts Absolutely⁹

H.R. 2703 addresses the very appropriate need for criminal-background checks for security guards in the private sector.

Very little in American society is as morally repulsive as a crooked cop. We know they exist, but it is antithetical to our trust in authority, our sense of justice, and our basic feeling of well-being. If law enforcement is corrupt, then how can we feel safe? How can we *be* safe?

Security guards are an extension of law enforcement. They fit into this rubric of societal expectations. We *rely* on their integrity. We trust them. We need them to protect us, and to protect our property.

This is why employers should be able to make fully informed decisions about who they hire as security personnel. The jobs are too important to take undue risks. The potential harm of criminals "acting" as security guards – a Kafkaesque irony – is enormous. Given the high rates

⁹ Lord John Emerich Acton (1834-1902), English historian and moralist, in a letter to Bishop Mandell Creighton in 1887: "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men."

of criminal recidivism,¹⁰ hiring convicted felons as security guards “to serve and protect” is like lighting matches around gasoline.

There are, of course, exceptions. Should someone who was convicted of a driving-under-the-influence (“DUI”) charge 20 years ago be automatically eliminated from consideration for a security-guard position today? No. Should someone who was convicted of possession of marijuana ten years ago similarly be considered absolutely ineligible for hiring as a security guard today? Again, no.

But those are *my opinions* – without context. Employers – *each* employer – should be able to make his or her own determination as to whether these individuals are acceptable risks. To do so, they need to be fully informed. They need to have access to all available, relevant, and appropriate information. They need to be able to judge what is best for their particular working environment taking into account their specific situation and circumstances.

What if the DUI were a hit-and-run with a fatality? What if the “influence” in “under-the-influence” was a high concentration of an addictive narcotic drug? What if the job applicant cannot produce any evidence of having completed rehabilitation? What if the job the individual is being considered for involves operating a vehicle, as so many security positions do?

As for the marijuana-possession conviction, what if the amount of marijuana involved was large and suggested an intent-to-distribute? What if, at the time of apprehension, the individual was in the company of major known-and-convicted drug dealers? What if the individual had a gun, and/or large amounts of cash on his or her person? What if the job applicant is being considered for a position as a security guard at a pharmaceutical company’s distribution center?

Aren’t these factors relevant? Shouldn’t employers have access to this information in order to use their best judgment as to who – and who is not – an acceptable risk?

Certainly it is possible, indeed likely, that many times an employer *will* hire a job applicant regardless of a past conviction or convictions – for example, if the offense or offenses were minor or dated or highly irrelevant to the position. Some employers look leniently at the type of convictions that criminal-rights’ advocates often describe as “youthful indiscretions.”¹¹ In fact, many employers – especially in construction and other highly physically demanding industries – have programs which affirmatively recruit ex-offenders, and there are programs in several states which encourage such hiring practices with tax incentives.

¹⁰ As high as 80 percent according to Professor Alfred Blumstein of Carnegie-Mellon University who has researched and published in this area. See discussion on Page 16.

¹¹ If you or I were to lose a loved one because of an industrial accident caused by an employee impaired by substance abuse, *or* in a vehicular homicide, *or* in a violent assault or robbery-turned-assault, it is unlikely that we would take any solace in the fact that the perpetrator was young, or that we would consider it merely a “youthful indiscretion.” The use of the term by criminal-rights’ advocates trivializes the plight of the victims and their families.

However, how much risk an employer is willing to take should be up to the individual employer, *not* up to some pre-determined “one-size-fits-all” regulatory scheme administered by distant and uninvested bureaucrats for whom the potential legal and financial liability is irrelevant.

In the case of security guards – the focus of H.R. 2703 – the question may be: Am I willing to take a chance on a person convicted of burglary 15 years ago? Or am I willing to integrate into my workforce an individual who was convicted of assault and battery ten years ago? Or sold marijuana five years ago?

That is an individual determination. *That* is the prerogative of the employer – whose company and whose workforce and/or customers could be put in jeopardy.

This is particularly relevant given two factors: (1) the quantum leap in lawsuits filed against, and in the legal liability of, employers for workplace accidents, product defects, and – most directly relevant – negligent hiring and negligent retention;¹² and (2) the dangerous world in which we reside, especially as Americans, which has particularly come into focus as a result of on-going terrorist activities – personified by the horrific suicidal attacks of September 11, 2001.¹³

H.R. 2703 is a response to this heightened urgency on security issues – the higher stakes which we *all* face.

H.R. 2703 goes one step further – *mandating* criminal-background checks for private-sector security guards.¹⁴ While the CELE, and the employer community in general, normally dislike government mandates – a common libertarian-style employer view of don’t-tell-me-how-to-run-my workplace – H.R. 2703 represents an appropriate and acceptable exception.

First of all, it is extremely likely that most employers who hire security guards *already* do criminal-background checks. Those who do not, should.

Secondly, H.R. 2703 does not mandate what an employer should do with the information it receives from the record-check – that prerogative remains the employer’s, and rightfully so.

¹² See, Workplace Violence: Defending Against Negligent Hiring Litigation Requires Exercise of Due Care in Hiring. *Daily Labor Report*. Michael Bologna. No. 179, Page A-7. September 16, 2003; Negligent Retention of Employees: An Expanding Doctrine. Rosanne Lienhard. 63 Def. Counsel J. 389, 1996.

¹³ As an example – which is directly on point – of the response to this concern, H.R. 2703 would amend Section 6402 of the Private Security Officer Employment Act of 2004, 28 U.S.C. 534, which was first enacted as part of the intelligence anti-terrorism bill by Congress in the wake of terrorist activities in and against the United States.

¹⁴ The original legislation, *see id.*, permitted, but did *not* require employers to do criminal-background checks of private-sector security guards. H.R. 2703 goes one major step forward, mandating such record-checks in Section D (ii)(I).

What *is* at risk – especially given escalating employer liabilities in an increasingly litigious society,¹⁵ *and* the legitimate heightened concern about terrorism and exposure to the enemies of our country – is too great *not* to take every reasonable and responsible step to ensure the integrity of our workplace and protect our people and assets.

Security guards often carry firearms (or other weapons), are largely unfettered in their exercise of authority,¹⁶ and are positioned to commit crimes that would not necessarily be quickly or easily discovered.¹⁷

It is a Joseph Conrad *Heart of Darkness* scenario in which the security guard – charged with preventing crime – would in fact be unimpeded in committing crime. If the security guard is a convicted felon – with a history of crime and/or violence, a propensity for breaking the law, and – given the high and troubling criminal-recidivism rates¹⁸ (an individual convicted of crime in the past will *always* have a higher likelihood of committing a crime than an individual who has never had such a conviction)¹⁹ – the situation is *inviting* crime.

If the cops are criminals – like in Stanley Kubrick’s *A Clockwork Orange* – then who is there to stop crime? And isn’t the temptation to commit crime overwhelming? Who – among the known criminal element – would be likely to resist? If there is no one to enforce the law, as in *Heart of Darkness*, then what incentive is there to obey the law, given the financial and other incentives *not* to do so and the lack of accountability regarding same?

By putting “rehabilitating” criminals directly in positions of enhanced opportunity for criminal recidivism, we do a great disservice *to them*, while putting our own people and assets in greater jeopardy.

Criminal-background checks in employment are an appropriate, prudent, sensible, and reasonable employment practice for employers in evaluating their job applicants. In regard to security-guard positions, their appropriateness, prudence, sensibility, and reasonableness is heightened to the “nth power.”

¹⁵ For example, private employment lawsuits against employers *tripled* in one decade. In January of 1999, the Bureau of Justice Statistic published a study showing that from 1990 through 1998, employment-related civil cases nearly tripled. Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that flooded the U.S. District Courts in this period. Marika F.X. Litras, Civil Rights Complaints in U.S. District Court, 1990-98, (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

¹⁶ Particularly at remote locations, or on off-hour shifts, or in capital-intensive (vis-à-vis labor-intensive) work sites – such as oil refineries (which are sprawling, can cover many acres, and have relatively few employees).

¹⁷ E.g., theft from a warehouse, embezzlement, or covert drug “stealing-and-dealing.”

¹⁸ See, *supra*, note 10.

¹⁹ See *id.*

No responsible corporate loss-prevention manager, safety director, medical director, security manager, product-integrity specialist, or human resources manager should ever oppose the use of criminal-background checks.

Too much is at stake in both human and financial terms.

For one important subset of employment – private-sector security guards – H.R. 2703 recognizes and endorses this critically important concept.

IV. RECCOMENDATIONS FOR IMPROVEMENTS TO H.R. 2703

H.R. 2703, although overall a positive initiative which CELE supports, could be improved, and we look forward to working with you, Chairman Andrews, and with your staff, and with Mr. Kline and his staff, and to participating in the process by which this bill may be improved.

First, the time limitation for which criminal-conviction records may be provided, while generally acceptable, is inadequate for some crimes and some job positions. Is there *ever* a time when a convicted pedophile should be considered for a job at a youth camp or recreational facility? I would say “no.” Is there *ever* a time when a convicted terrorist should be considered for a position at a defense plant or military base? Again, I would say “no.”

H.R. 2703 applies only to criminal records applicable to convictions in the last ten years, *or* for which the individual completed his or her prison sentence within the last five years. This is *not* enough in some situations. Some crimes are so egregious, some workplace situations so sensitive or vulnerable, that no time limit on record-checks is appropriate.

Secondly, H.R. 2703 applies to convictions for “possession or distribution of any illegal narcotic drugs.” What about illicit distribution of *legal* drugs – an increasingly common and troubling trend in American society – such as painkillers, barbitruates, amphetamines, and steroids? What about illegal distribution of non-narcotic drugs? This provision should be expanded to *all* drugs scheduled under the federal Controlled Substances Act.

Finally, in general H.R. 2703 unnecessarily and inappropriately limits the range of offenses for which criminal records should be reported. The catch-all allows for the Attorney General to provide a list of covered convictions by regulation.

A preferable approach is to allow the individual employer to determine what offenses are relevant and acceptable (or unacceptable) to its particular workforce situation, and which would pose an undue risk to life and property. Give employers the opportunity to decide. As the empirical evidence clearly demonstrates, employers are more likely to hire ex-offenders if they perform criminal-background checks, but the decision should not only be theirs, it should be a fully informed decision.

V. EMPLOYERS' CONCERN ABOUT NEGLIGENT-HIRING CLAIMS

Negligent hiring is defined as an employer's failure to exercise reasonable caution when hiring an employee. Today, the plaintiffs' bar is increasingly pressing claims against employers, and the courts are increasingly holding employers legally and financially responsible for illegal or violent actions by employees who were not subjected to pre-employment screening – such as criminal-background checks. This is most often – and most aggressively – litigated in regard to employers' hiring of former criminals whom, claim the plaintiffs' attorneys, the employers knew, should have known, or should have reasonably anticipated would commit crimes again.²⁰

Employers' liability in such legal actions have been substantial – often resulting in multi-million-dollar verdicts or settlements.

Negligent hiring and negligent retention cases are on the rise.²¹ Courts in almost every jurisdiction now recognize the doctrines of negligent hiring and retention.²² If an employee causes harm to another employee or to a customer, or to a member of the public at-large, and the employer knew or should have known that the individual causing the harm was high-risk, the courts have found the companies liable. Employers in negligent-hiring cases lose more than 70 percent of such lawsuits, and the average jury plaintiff award is more than \$1.6 million.²³

The appropriateness and necessity of criminal-background checks comes further into focus given that, according to the U.S. Department of Commerce, 30 percent of business failures are due to poor hiring practices.²⁴ Annual losses generated by poor hires, absenteeism, drug abuse, and employee theft amount to \$75 billion per year.²⁵ Simply trusting job applicants to be truthful on their job applications is neither rational nor responsible. According to a recent study by the American Psychological Association, 67 percent of job applicants' résumés in the United States contain material misrepresentations.²⁶

²⁰ Or cause industrial or vehicular accidents – e.g., caused by their drug abuse or reckless/impaired driving for which they had a prior record which easily could have been discovered by a criminal-background check.

²¹ *Supra*, see note 12.

²² *Daily Labor Report*. No. 179, Page A-7, see *id.*

²³ Public Personnel Management, *USA Today*, Nov. 21, 2003.

²⁴ U.S. Department of Commerce: <http://jobcircle.com/career/articles/x/njtc/3026.xml>.

²⁵ Corporate Combat Inc., at <http://www.corporatecombat.com/statistics.html>.

²⁶ Sixty-seven percent of job applicants' résumés contain misrepresentations: Info Cubic, Employment Screening FAQ, at <http://www.infocubic.net/faq.htm>.

Approximately 66 percent of negligent-hiring trials overall result in awards averaging \$600,000 in damages.²⁷ The Workplace Violence Research Institute reports that the average jury award for civil suits on behalf of the injured is \$3 million.²⁸

The following are examples of lawsuits with adverse outcomes against employers for negligent-hiring claims:

- (1) In California, a store customer was injured in an altercation with a Kmart *security guard* after trying to return an item. The customer, while being restrained, was injured by the security guard. The customer was awarded \$3.8 million in damages in a lawsuit claiming negligent hiring against the store;²⁹
- (2) A car-rental company in Pennsylvania settled for \$2.5 million a lawsuit seeking to hold it liable for negligent hiring and entrustment of an intoxicated *security guard*. The guard had an on-duty traffic accident in a company car in which he and another motorist were killed;³⁰
- (3) A furniture company in Florida was found liable for \$2.5 million for negligent hiring and retention of a deliveryman who savagely attacked a female customer in her home;³¹
- (4) A Pennsylvania jury awarded \$1.5 million for the negligent hiring of a babysitter who abused a child;³²
- (5) A nursing home in Texas was found liable for \$235,000 for negligent hiring of an unlicensed nurse with 56 prior criminal convictions who assaulted an 80-year-old visitor;³³ and
- (6) A jury awarded \$2.76 million in West Virginia to the parents of a deceased child when a doctor negligently failed to diagnose and treat the mother, which resulted in the death of the newborn son. The hospital negligently hired the doctor without investigating an agreed order between the doctor and the medical licensing board that put his medical license on probationary status for

²⁷ Alliance Network, Chicago & Illinois Background Checking, at http://www.alliancehrnetwork.com/employers/background_checking.asp.

²⁸ Workplace Violence: An Employer's Guide, Steve Kaufer, CPP and Jurg W. Mattmann, CPB, at http://www.workviolence.com/articles/employers_guide.htm.

²⁹ Heiner v. Kmart Corp., 84 Cal. App. 4th 335 (Cal. Ct. App. 2000).

³⁰ Butler v. Hertz Corp., Pennsylvania County Court of Common Pleas.

³¹ Tallahassee Furniture Co., Inc. v. Harrison, 583 So.2d 744 (Fla. 1st DCA 1991).

³² Glomb v. Glomb, 366 Pa. Super. 206, 530 A.2d 1362 (1987).

³³ Deerings West Nursing Center v. Scott, 787 S.W.2d 494 (Tex. Ct. App. 1990).

writing a large volume of prescriptions for illegitimate non-medical purposes and not in the course of professional practice.³⁴

As the number of negligent-hiring claims, verdicts, and settlements grow – as does the *size* of the verdicts and settlements – employers recognize the necessity of minimizing their potential legal liability, but more importantly, of protecting their employees and their assets, and the public at-large.

First and foremost, this is a people issue. The examples above are incidents that *never* should have happened. Employers have an obligation – and recognize that obligation – *not* to aid and abet criminal behavior. The explosive growth in negligent-hiring and negligent-retention lawsuits simply underscores employers' commitment in this regard, and the necessity of criminal-background checks in employment.

VI. CRIMINAL-BACKGROUND CHECKS IN EMPLOYMENT FAVOR EX-OFFENDERS, FAVOR AFRICAN-AMERICANS, AND PREVENT DISCRIMINATION

In a nation of 303 million people,³⁵ 2.2 million people are currently incarcerated in federal or state prisons or jails.³⁶ The prison population *doubled* in a little over a decade,³⁷ and the trend continues. Of those in prison, approximately 650,000 will be released this year.³⁸

Of those who have been incarcerated in the United States, 39 percent are African-American,³⁹ of whom more than 90 percent are males.⁴⁰

Reintegration of the released convicts into mainstream society is a priority, especially given the growing population of ex-prison inmates being released each year.⁴¹

³⁴ Andrews v. Reynolds Memorial Hospital, 201 W. Va. 624 (W. Va. 1997).

³⁵ U.S. Census, Population Division, released November 1, 2007.

³⁶ In June 2006, the number of people held in Federal and State prisons or local jails was 2,245,189. Bureau of Justice Statistics, U.S. Department of Justice, Prison Statistics, at <http://ojp.usdoj.gov/bjs/prisons.htm>.

³⁷ “Between 1988 and 2000, the national incarceration rate doubled from about 250 to nearly 500 per 100,000 persons,” Bureau of Justice Statistics, as reported in The Effect of an Applicant’s Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles, Professors Harry J. Holzer, Steven Raphael, and Michael A. Stoll (December 2004).

³⁸ U.S. Department of Justice, Office of Justice Programs: Reentry, at <http://www/reentry.gov>. See also, One Solution to Staff Shortages: Hire Felons, Amy Doolittle, FederalTimes.com, November 5, 2007.

³⁹ Bonczar, Theodor P., Prevalence of Imprisonment in the U.S. Population, 1974-2001, Bureau of Justice Statistics, U.S. Department of Justice, August 2003, at pg. 5.

⁴⁰ Holzer, Harry J., Professor, Georgetown University, “Employer Attitudes Toward Ex-Offenders: What We Know and What It Means,” Conference on Fair Use of Criminal Records in Employment, American Bar Association Commission on Effective Criminal Sanctions, Washington, D.C., January 12, 2008.

⁴¹ See, *supra*, note 37.

“Reintegration failure” often results in additional crimes committed by ex-inmates, further incarceration for released inmates, and – given the racial composition of ex-offenders⁴² – “a greater degree of racial socioeconomic inequality.”⁴³

Some criminal-rights’ activists point to these numbers and offer a simplistic explanation: ex-inmates face racial discrimination by employers who use criminal-background checks to screen out ex-convicts, with an intentional and/or unintentional adverse impact on racial minorities, especially African-American males.

However, the empirical evidence does *not*, to any degree, support this unsupportable assumption – quite the contrary.

In fact, employers who do criminal-background checks on job applicants using private-sector companies are *both most* likely to hire ex-offenders *and most* likely to hire African-Americans. If employers use government sources for criminal-background checks, they are *less* likely to hire both ex-offenders and African-Americans, and if employers do *not* do any criminal-background checks at all, they are *least* likely to hire ex-offenders and African-Americans.⁴⁴

Two years later, in 2006, Professors Holzer, Raphael, and Stoll again addressed these issues in a *Journal of Law and Economics* article reporting on their research. They *opened* the article with the statement:

In this paper, we analyze the effect of employer-initiated background checks on the likelihood that employers hire African Americans. We find that employers who check criminal backgrounds are more likely to hire African American workers, especially men. This effect is stronger among those employers who report an aversion to hiring those with criminal records than among those who do not.⁴⁵

⁴² Beyond the 39 percent who have been prison inmates who are African-American, 18 percent are Hispanic, *see supra*, note 39.

⁴³ *See, supra*, note 37, at pg. 1.

⁴⁴ *See, supra*, note 37.

⁴⁵ Holzer, Harry J., Steven Raphael, and Michael A. Stoll, Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, The University of Chicago, *Journal of Law and Economics*, Vol. XLIX, October 2006, at pg. 451.

Explaining *why* it is that employers who do criminal-background checks are *less* likely to discriminate and *more* likely to hire both African-Americans and ex-offenders than the employers who do not do criminal-background checks, Holzer et al. go on to say:

[I]n the absence of criminal background checks, some employers discriminate statistically against black men and/or those with weak employment records. Such discrimination appears to contribute substantially to observed employment and earnings gaps between white and black young men.⁴⁶

What is clear from this research is that employers who do criminal-background checks are *more* aware of their legal rights and obligations, *more* deliberate and conscientious in the hiring process, *less* likely to discriminate, *less* likely to engage in statistical discrimination (based on assumptions on *classes* of job applicants such as young African-American males or young formerly incarcerated African-American males), and *more* likely to look beyond the presence of a criminal-conviction history to discern whether the individual with a prison record is an acceptable risk.

Professors Holzer, Raphael, and Stoll *conclude* that:

The results of this study suggest that curtailing access to criminal history records may actually harm more people than it helps and aggravate racial differences in labor market outcomes. Moreover, to the extent that statistical discrimination engenders an endogenous behavioral response on the part of young black men that serves to self-fulfill erroneous expectations, the long-term consequences of such discrimination may be particularly pernicious. Surely, calls to seal criminal history records fail to take into account this unintended consequence and the market failure associated with the inferior information that employers would have as a result.⁴⁷

This was underscored in earlier (2004) research by Professors Holzer, Raphael, and Stoll specific to the Los Angeles area and concentrating on race factors alone (and *not* necessarily the impact on ex-offenders' hiring overall).⁴⁸

California, and Los Angeles County in particular, are repositories for released convicted felons. In 2001, 23 percent of the 600,000 inmates released from prison that year resided in California (which, by contrast, had "only" 11 percent of the national population). Of this 23 percent, nearly one-third (approximately 47,000) resided in Los Angeles County.⁴⁹

⁴⁶ See *id.*

⁴⁷ See *id.*, at pg. 473.

⁴⁸ See, *supra*, note 37.

⁴⁹ See, *id.*, at pg. 1.

Thus, Los Angeles was a logical choice for the research, given the heavy concentration of ex-offenders.

Professors Holzer et al. found that when employers use criminal-background checks, “a sizeable number would consider mitigating factors, such as the type of offense committed and when it occurred.” Thus the “demand for their [ex-offenders] labor” is potentially raised by “providing accurate information to employers about offenders’ histories and recent activities.”⁵⁰

Once again, we find that those who use criminal-background checks, which H.R. 2703 would mandate (at least for a small subset of the workforce), *improve* the opportunities of ex-offenders to re-integrate into the workforce, and thus re-integrate into mainstream society.

The study found that nearly 82 percent of employers in Los Angeles County were willing to consider those with criminal records for a job, and 57.4 percent said they were willing to accept such an applicant, depending on the offense.⁵¹

Specific to the race issue, and more specific to African-American males, Professors Holzer et al. found that employers who did criminal-background checks using private-sector sources were three-and-a-half times more likely to hire African-American males than those who did not do criminal-background checks – 11.2 percent of jobs were filled by African-American males when employers did criminal-background checks using private-sector sources; only 3.3 percent of jobs were filled by African-American males when employers did *not* do criminal-background checks.⁵²

Professor Holzer and his colleagues, in the conclusion of their December 2004 study, “The Effect of an Applicant’s Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles,” found that:

- (1) “[W]e find that employers who use private sources of checking (which are quick and cheap and can act as a protection mechanism against such [negligent-hiring] lawsuits) are actually more likely to hire ex-offenders than employers who use criminal justice agencies to check methods or do not check at all”;⁵³ and
- (2) “These findings suggest a number of important implications for policy as well. For instance, some advocates seek to suppress the information to which employers have access regarding criminal

⁵⁰ See *id.*, Abstract.

⁵¹ See *id.*, Figure 1.

⁵² See *id.*, Figure 4.

⁵³ See *id.*, Conclusions, at pg. 25.

records. But it is possible that the provision of more information to these firms will *increase* their willingness to hire young black men, as we show here, and as we have previously found evidence that employers who do not have such information often engage in statistical discrimination against this demographic group.”⁵⁴

Thus, this research clearly supports two points: (1) those employers who use private companies as criminal-background-check sources are *most* likely to hire ex-offenders and, correspondingly, *least* likely to discriminate against ex-offenders; and (2) those employers who use private companies as criminal-background-check sources are *most* likely to hire young African-American men (and African-Americans of all ages and both genders) and, correspondingly, *least* likely to discriminate against African-Americans.

Thus, those who favor the hiring of ex-offenders should advocate *more* criminal-background checks, and those who oppose racial discrimination against African-American males (*and* African-American females) should likewise advocate *more* criminal-background checks – especially by private-sector providers.

Moreover, the favorable impact for African-Americans is even *greater* in those instances in which the employer is *unwilling* to hire job applicants with a criminal history.

For those employers willing to hire ex-offenders, doing criminal-background checks increased their chances of being hired 4.8 percentage points; for those employers unwilling to hire ex-offenders, doing criminal-background checks increased their chances of being hired 10.7 percentage points – a difference which the researchers termed “highly significant.”⁵⁵

Overall, “employers who conducted criminal background checks on applicants were more than 50% more likely to hire African Americans than employers who did not (24% versus 14.8%, respectively).”⁵⁶

Thus, while it is assumed by many that two compelling policy interests stand directly in conflict to one another in regard to the hiring of those with criminal convictions and the use by employers of criminal-background checks, they do not. One supports the other.

Criminal-rights’ advocates especially recognize the privacy interests of the individual with a criminal-conviction record, and therefore sometimes advocate the sealing of criminal records after a certain period, or suppression of them altogether.

⁵⁴ *See id.*

⁵⁵ *See, supra, note 45, at pg. 465.*

⁵⁶ Strahilevitz, Lior Jacob, Privacy Versus Antidiscrimination, John M. Olin Law & Economics Working Paper No. 349 (2d Series), Public Law and Legal Theory Working Paper No. 174, University of Chicago Law School, July 2007, at pg. 6, citing Holzer et al. (2006).

However, to do so would actually conflict with the ultimate policy interest they support – the need for ex-convicts to become gainfully employed upon their release from prison. The “problem” is that suppression of criminal-record reporting actually undermines the opportunity for ex-convicts to become employed, as discussed earlier,⁵⁷ and – as an added casualty, our compelling national policy of non-discrimination of racial minorities also falls victim.

This is persuasively discussed by Professor Lior Jacob Strahilevitz of the University of Chicago Law School in his research paper “Privacy Versus Antidiscrimination”:

By increasing the availability of information about individuals, we can reduce decisionmakers’ reliance on information about groups. Put another way, there is often an essential conflict between information privacy protections and antidiscrimination principles, such that reducing privacy protections will reduce the prevalence of distasteful statistical discrimination... in the absence of accurate information about individuals’ criminal histories, employers who are interested in weeding out those with criminal records will rely instead on racial and gender proxies.⁵⁸

Professor Strahilevitz’s conclusion is that “information privacy protections undermine antidiscrimination principles.”⁵⁹

Thus, the balancing test is no balancing test at all: the national policy is best served by wider dissemination of criminal-record information which reduces statistical discrimination against such high-rate-offender subgroups as young African-American males, and improves the hiring opportunities for ex-offenders regardless of their race, gender, or age.

The use of criminal-background checks in employment serves multiple appropriate national interests, and serves them well.

VII. CRIMINAL RECIDIVISM

While re-integration into society for ex-convicts is a worthwhile goal, and while acquiring gainful employment for ex-convicts is an important step in *preventing* criminal recidivism (without an income, what choice is left for an ex-offender but to return to crime?), the reality is that former criminals *are* highly likely to become current criminals.

In fact, at a recent conference conducted by the American Bar Association’s Commission on Effective Criminal Sanctions, Professor Alfred Blumstein of the Heinz School at Carnegie-

⁵⁷ See, *supra*, note 45.

⁵⁸ See, *supra*, note 50, at pg. 2.

⁵⁹ See, *id.*, at pg. 11.

Mellon University reported that, based on the preliminary findings of his research, as many as 80 percent of those released from prison after criminal convictions will be convicted of crimes again, with the percentages especially high for those convicted of burglary and robbery.⁶⁰

In 2002, the U.S. Department of Justice's Bureau of Justice Statistics ("BJS") released a study of criminal recidivism covering released inmates from 15 states (hereinafter "the study"). The study tracked 272,111 former inmates for three years after their respective releases from prison in 1994. In defining the term "recidivism," the study used four separate measures: rearrest, reconviction, resentence to prison, and return to prison with or without a new sentence.⁶¹

The study found that of the 272,111 prisoners released in 1994, 67.5 percent of the prisoners were rearrested for a new offense (almost exclusively a felony or a serious misdemeanor), 46.9 percent were reconvicted for a new crime, 25.4 percent were resented to prison for a new crime, and 51.8 percent were back in prison serving time for a new sentence or a technical violation of their release.⁶²

Thus, more than half were back in prison within three years. By contrast, the general population has a 6.6 percent chance that they will serve time in prison during their lifetime.⁶³ This means that criminal recidivists are nearly *eight times* more likely to be incarcerated again within three years than an average American is to be incarcerated for the first time.

(A) **First-Time Offenders and Recidivism**

While criminal recidivism is a major problem in the United States criminal-justice system, first-time offenders have accounted for a large increase in overall crime in the country. Between 1974 and 2001, the number of adults incarcerated increased by 3.8 million. Nearly two-thirds of the 3.8-million-person increase occurred as a result of an increase in first-time incarceration rates.⁶⁴

However, once an individual has entered the criminal-justice system, the person is more likely to be arrested again within three years of

⁶⁰ Blumstein, Alfred, Redemption in the Presence of Background Checking – Some Preliminary Results, Conference on Fair Use of Criminal Records in Employment, ABA Commission on Effective Criminal Sanctions, Washington, DC, January 12, 2008.

⁶¹ Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994, U.S. Department of Justice, NCJ 193427, Patrick A. Langan, Ph.D., David J. Levin, Ph.D., June 2002, at pg. 1.

⁶² *See id.* This, of course, does *not* include the substantial number of crimes committed for which the offenders are not apprehended. No one is charged in more than 80 percent of the crimes committed in America today.

⁶³ Bureau of Justice Statistics, U.S. Department of Justice, Criminal Offender Statistics, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

⁶⁴ *See id.*

release. Within three years of a convict's release, 40.6 percent of prisoners with just one prior arrest were rearrested.⁶⁵

Moreover, the *more* arrests an ex-convict has, the *more* likely he or she will be rearrested. Within three years, 47.5 percent of people with two prior arrests were rearrested, 55.2 percent of those with three prior arrests were rearrested, and 59.6 percent of those with four arrests were rearrested. Across-the-board, the number of prior arrests *directly* correlates to the chances that an individual will be rearrested within any given time period – the more prior arrests, the higher the percentage of rearrests. At the high end, individuals with 16 or more prior arrests had an 82.1 percent chance of being rearrested.⁶⁶

The annual proportion of federal offenders with “zero criminal history points” is substantial. However, it is substantially lower than the percentage of federal offenders who are recidivists.⁶⁷

In fact, overall, significantly more crime is being committed by recidivists than by first-time offenders – almost *50 percent* more. The U.S. Sentencing Commission report found that in 2004, 57.8 percent of federal offenses were committed by individuals with at least one prior conviction.⁶⁸ When compared to the adult population in the United States as a whole, first-time offenders are only a very small subset of the general population.

Therefore, the odds that a released prisoner will commit another crime are *much* higher than the odds that someone who has never committed a crime will start committing crime.

(B) Total Crime Compared to Recidivist Crime

BJS also attempted to measure the percentage of all crimes that were committed by released prisoners. While the study did not precisely measure what fraction of all crimes the released prisoners accounted for, it calculated the number of arrests for seven serious crimes – murder, rape,

⁶⁵ See, *supra*, note 61, at pg. 10.

⁶⁶ See *id.*

⁶⁷ Research Series on the Recidivism of Federal Guideline Offenders, Recidivism and the ‘First Offender,’ A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate, May 2004, (defining “zero criminal history points” as individuals with no prior contact in the criminal-justice system, those with prior arrests but no convictions, and those with minor convictions but only for limited offenses such as hitchhiking, juvenile status offenses, loitering, and minor traffic offenses).

⁶⁸ See *id.*

robbery, aggravated assault, burglary, larceny, and motor vehicle theft.⁶⁹ Released prisoners were arrested within three years of their release from prison for homicide at a rate 53 times higher than the homicide arrest rate for the adult population.⁷⁰ In 1994-to-1997, 8.4 percent of homicides overall were committed by prisoners released in 1994 – a figure which does *not* include released prisoners who had crossed state lines.⁷¹ The percentage of homicides attributable to released prisoners would be substantially greater if it included these additional individuals.

(C) **Specific Offense Recidivism – “Specialists”**

“Specialists” are prisoners who, after being released, commit the same crime that resulted in their imprisonment. Different offenses show varying degrees of specialization. The types of convictions that showed high degrees of specialization were robbery (13.4 percent), assault (22 percent), burglary (23.4 percent), and motor vehicle theft (11.5 percent).⁷²

Further analysis of released prisoners shows a striking statistic among categories of offenses previously thought to be non-specialists. The study analyzed the ratio of ex-convicts being rearrested for the same or similar offense compared to rearrest for a different offense. Someone who committed a rape was 4.2 times more likely to be rearrested for rape than if the initial conviction was for a crime other than rape. The ratios of other offenses were also high. Released prisoners with other sexual-assault records were 5.9 times more likely to be rearrested for sexual assault. Released prisoners with prior fraud convictions were 5.3 times more likely to be rearrested for fraud. Released prisoners with prior drug offenses were 2.1 times more likely to be rearrested for another drug offense. Thus, recidivism is not only prevalent, a pattern of *same*-offense recidivism is highly prevalent.⁷³

(D) **Recidivism and Violence**

The U.S. Sentencing Commission report found an especially troubling statistic linking violent crimes to recidivism. The report found that recidivists were much more likely to have a weapon present, use actual or threatened violence, and injure or threaten to injure a victim

⁶⁹ See, *supra*, at note 61, at pg. 5.

⁷⁰ See *id.*, at pg. 6.

⁷¹ See *id.*

⁷² See *id.*, at pg. 9. These percentages, again, refer to crimes committed in the three-year period 1994-to-1997 by prisoners released from prison in 1994 alone.

⁷³ See *id.*

during the commission of a crime.⁷⁴ The report also suggests that regardless of the number of convictions, the more arrests an individual has, the more likely the arrests involve weapons, injury, or violence.⁷⁵ The BJS study found that of the recidivists released from prison in 1994, 61.7 percent of the recidivists were rearrested for a violent offense regardless of what their original offense was.⁷⁶

(E) Recidivism and Employment

Some evidence suggests that access to employment reduces recidivism. Indeed, numerous articles have been written maintaining the close relationship between post-incarceration employment and reduced recidivism. This theory purports that employment provides for basic needs that criminal activity previously funded. Indeed, work-release reentry programs have made an impact on recidivism. Although many of the programs were not specifically intended to reduce recidivism, studies of some work programs report reduced recidivism rates, but qualify these findings by admitting biased data. These work-release programs are generally subject to the inmate's election. The self-selection process of program participants results in a group that is less likely to revert to criminal behavior with or without the program.⁷⁷ Simply put, ex-convicts clearly are unlikely to participate in such surveys if they are continuing to engage in criminal behavior, or to be honest about their resumption of criminal behavior if they do choose to participate in such surveys.

Some studies have argued that without income from employment, released prisoners are more likely to turn to crime for economic support. Employment, however, is important for many reasons beyond the basic need for income. Employment also provides a stabilizing routine, occupies time that might otherwise be used for illegal activity, keeps individuals responsive to employer's behavioral demands, and provides a non-stigmatized social role. Although work is important, not all types of employment have the same effect on recidivism. Higher wages are an important factor in reducing recidivism. Generally speaking, only jobs that are high quality in terms of pay or viable careers have been shown to reduce recidivism.⁷⁸

⁷⁴ See, *supra*, note 67, at pg. 9.

⁷⁵ See *id.*, at pg. 16.

⁷⁶ See, *supra*, note 61, at pg. 9, table 10.

⁷⁷ Bushway, Shawn, *Reentry and Prison Work Programs*, Urban Institute, May 2003, at www.urban.org/url.cfm?ID=410853.

⁷⁸ McKean, Lise, *Current Strategies for Reducing Recidivism*, Center for Impact Research, August 2004, at pg. 19.

While high-paying employment may reduce recidivism rates, studies of federal programs meant to provide employment assistance have demonstrated very limited reductions in recidivism. These programs generally focus only on the need for employment, not other serious issues that many released inmates face such as substance abuse, mental illness, stigma associated with their criminal past, and lack of education, skills, and/or work experience.⁷⁹ In addition, the post-incarceration positions that former inmates generally hold are not high-paying or career-oriented. Former inmates will not have the ability to obtain a satisfactory job or stay gainfully employed without programs that address these other issues.

Employment is therefore not the single answer in addressing criminal recidivism. Legislation and government programs must focus on the entire set of problems that former inmates face, rather than limiting employers' access to information in an attempt to artificially and inappropriately bolster employment rates regardless of the human and financial costs. To truly re-integrate former inmates into society, employment represents only one part of the equation.

Recidivism statistics are particularly troubling when viewed in light of the threat in a small number of states to prevent or restrict criminal-background checks in employment. Entrance into the U.S. criminal-justice system dramatically increases the likelihood that individuals will continue their criminal behavior. Employers would have no knowledge of whether they would be hiring an individual with a criminal background. As research statistics have clearly demonstrated, individuals with criminal backgrounds are *much* more likely to commit another crime than the general U.S. population (as much as 80 percent become criminal recidivists; only six percent of Americans are ever convicted of a crime).⁸⁰ That means employers would be putting themselves, their employees, and the public at-large at substantially higher risk by hiring an individual who has a high statistical probability of engaging in criminal activity. In addition, employment alone has not been proven to reduce recidivism. Only effective programs to increase skills and education (and therefore increase eligibility for higher-paying jobs), and to reduce substance abuse and treat mental illness will have a positive effect on reducing recidivism.

VIII. THE LINKS BETWEEN CRIME AND SUBSTANCE ABUSE, AND BETWEEN SUBSTANCE ABUSE AND RECIDIVISM

In considering crime in America, it is impossible to ignore the highly detrimental and incestuous impacts of drug dealing, drug-related crime, and substance abuse.

Two questions need to be answered: (1) What are the relationships between crime and substance abuse, *and* between crime and substance-abuse recidivism?; and (2) Are substance

⁷⁹ *See id.*

⁸⁰ *See, supra, notes 10 and 63.*

abusers more likely to be criminal recidivists than individuals who do not abuse, or have not abused, drugs or alcohol?

A direct correlation exists between substance abuse and crime. Nearly one-quarter of federal prison inmates, and one-third of state prison inmates, reported being under the influence of drugs or alcohol when they committed their respective offenses. While there is debate as to whether the correlation between substance abuse and crime consistently equates to causation, certain types of crime, such as violent crime and property crime, clearly demonstrate a direct causal link.

Drugs and alcohol are prevalent in crime. One U.S. Government study showed that more than 36 percent of the 5.3 million convicted adult offenders under the jurisdiction of probation authorities, jails, prisons, or parole agencies had been drinking at the time of the offenses for which they had been convicted.⁸¹ Nearly half of those convicted of assault and sentenced to probation had been drinking when the offense occurred.⁸²

Victims of violent crimes perceived drug use by the assailant 37 percent of the time.⁸³ Among victims of violence who were able to describe the offender's use of drugs, about two-thirds in an intimate relationship with the offender reported the offender's drinking at the time of the crime. These individuals were current or former spouses, boyfriends, or girlfriends. Based on victim reports, on average each year approximately 183,000 rapes and sexual assaults involve alcohol use by the offender, as do more than 197,000 robberies, 661,000 aggravated assaults, and nearly 1.7 million simple assaults. Combined abuse of drugs and alcohol accounted for 18 percent of the alcohol-involved rapes and sexual assaults, 36 percent of the alcohol-involved robberies, 24 percent of the aggravated assaults in which the offender was drinking, and 15 percent of the simple assaults involving a drinking offender.⁸⁴

(A) **Substance Abusers and Recidivists**

Substance abuse is a chronic relapsing illness.⁸⁵ In 2006, an estimated 20.4 million Americans aged 12 or older were current illicit drug users and had used an illicit drug during the previous month. This estimate represents 8.3 percent of the population age 12 and older. In 2006, an estimated 22.6 million persons age 12 and older were classified with substance dependence or abuse in the past year (9.2 percent of the

⁸¹ Greenfeld, Lawrence A., Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime, Bureau of Justice Statistics, U.S. Department of Justice, prepared for the Assistant Attorney General's National Symposium on Alcohol Abuse and Crime, April 5-7, 1998, at pg. 20.

⁸² *See id.*, at pg. 21.

⁸³ *See id.*, at pg. 3.

⁸⁴ *See id.*

⁸⁵ Haiyi Xie, Ph.D. et. al., Substance Abuse Relapse in a Ten-Year Prospective Follow-up of Clients With Mental and Substance Use Disorders, *Psychiatric Services*, Vol. 56, No. 10, October 2005, at pg. 1282.

population age 12 and older). Of these, 3.2 million were classified with dependence on, or abuse of, both alcohol and illicit drugs, 3.8 million were dependent on or abused illicit drugs but not alcohol, and 15.6 million were dependent on or abused alcohol but not illicit drugs.⁸⁶

In 2006, the number of persons age 12 and older needing treatment for an alcohol-use problem was 19.5 million (7.9 percent of the population age 12 and older). Of these, 1.6 million (0.6 percent of the total population and eight percent of the people who needed treatment for an alcohol-use problem) received alcohol-use treatment at a specialty facility. Thus, there were 18 million people who needed treatment but did not receive treatment at a specialty facility for an alcohol-use problem.⁸⁷

Addiction to a drug is a very powerful – and destructive – force. Recovery from substance abuse is notoriously difficult, even with exceptional treatment resources. The National Institute on Alcohol Abuse and Alcoholism at the National Institutes of Health cited evidence that 90 percent of alcohol-dependent users experience at least one relapse within the four years after treatment. Relapse rates for heroin and nicotine users are believed to be similar.⁸⁸

Thus, those who have formerly had a substance-abuse problem (addiction and/or alcoholism) have at least a 90-percent probability of a relapse in the short term, while non-substance-abusers have only about a ten-percent chance of *ever* developing a substance-abuse problem.

(B) Drug Users in the General Population Are More Likely Than Non-Users to Commit Crimes

Of inmates in local jails in 2002, 68.7 percent reported using drugs at least once a week for at least a month. In addition, 28.8 percent of inmates in local jails in 2002 reported using drugs at the time of the offense.⁸⁹ In 2006, adults aged 18 or older who were on parole or a supervised release from jail during the past year had higher rates of dependence on, or abuse of, a substance (36.9 percent) than their

⁸⁶ Department of Health and Human Services, Substance Abuse and Mental Health Service Administration: 2006 National Survey on Drug Use & Health, at pg. 16. (These statistics reflect use of marijuana, cocaine, heroin, hallucinogens, and inhalants; and the non-medical use of prescription-type pain relievers, tranquilizers, stimulants, and sedatives.)

⁸⁷ *See id.*

⁸⁸ Health A to Z: Substance Abuse and Dependence, at http://www.healthatoz.com/healthatoz/Atoz/common/standard/transform.jsp?requestURI=/healthatoz/Atoz/ency/substance_abuse_and_dependence.jsp.

⁸⁹ Bureau of Justice Statistics, U.S. Department of Justice, Substance Dependence, Abuse, and Treatment of Jail Inmates, NCJ 209588, July 2005.

counterparts who were not on parole or supervised release during the past year (9.1 percent).⁹⁰ The rate of substance dependence or abuse was 39.7 percent among adults who were on probation during 2006, which was four-and-a-half times higher than the rate of adults who were not on probation during the past year (8.7 percent).⁹¹

A U.S. Department of Health and Human Services (“HHS”) survey asked individuals about their drug and alcohol use and involvement in acts that could get them in trouble with the police. Data for 2005 showed that among adults, those who use cannabis (marijuana) or cocaine were much more likely to commit crimes of all types than those who did not use these substances. Of those arrested for a violent crime, 63.1 percent also reported using illicit drugs in the year prior to their arrest.⁹² Individuals who had been arrested two or more times for the most serious “Part I” crimes were more likely to have used an illicit drug in the past year than those who were only arrested once (69.8 percent versus 55.2 percent).⁹³

(C) **Factors Related to Drug Use and Crime – the Goldstein Framework**

In 1985, Paul Goldstein, the then-Deputy Director of Narcotics and Drug Research Inc., was commissioned by the National Institute on Drug Abuse to write a series of studies that described the connection between drugs and violence. Goldstein looked at drug-related violence and created three distinct categories of drug crime. Goldstein classified drug crimes as psychopharmacological, economic-compulsive, and systemic. The psychopharmacological category was for violence due to the direct acute effects of a psychoactive drug on the user. The economic-compulsive category encompassed violence committed instrumentally to generate money to purchase expensive drugs. Finally, the systemic category covered violence associated with the marketing of illicit drugs, such as turf battles, contract disputes, etc.⁹⁴

⁹⁰ See, *supra*, note 86, at pg. 74.

⁹¹ See *id.*

⁹² National Survey on Drug Use and Health. Office of Applied Studies, Substance Abuse and Mental Health Services Administration, NSDUH Report: Illicit Drug Use Among Persons Arrested for Serious Crimes, December 16, 2005.

⁹³ See *id.*, at pg. 3. Part I offenses include criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson.

⁹⁴ Goldstein, Paul, The Drug/Violence Nexus: A Tripartite Conceptual Framework, *Journal of Drug Issues*, 14, 1985, at pgs. 493-506.

When the Goldstein framework was applied to homicides in New York State in 1984 and New York City in 1988, it was found that drugs and alcohol were important causes for a large number of homicides in both samples. For the 1988 sample in New York City, near the height of the crack epidemic, Goldstein classified 53 percent of 414 homicides as drug- or alcohol-related.⁹⁵

1. **Psychopharmacological**

When other researchers applied the Goldstein framework, they found that purely psychopharmacological violence (as opposed to economic-compulsive or systemic) is rare and attributable mostly to alcohol rather than illicit drugs. If the psychopharmacological claim is that drugs directly promote violent behavior absent any situational provocation or stressors, then that claim is probably false. However, when taking into account the individual's psychological health and the situation leading to the violent crime, drugs – and even more so alcohol – can amplify the psychological and situational facilitators of aggression.⁹⁶

2. **Economic-compulsive**

Clear evidence exists to form a relationship between crime and drugs under Goldstein's economic-compulsive category. In 2004, 17 percent of state prisoners and 18 percent of federal inmates said they committed their current offense to obtain money for drugs.⁹⁷ About a quarter of convicted property and drug offenders in local jails in 2002 had committed their crimes to get money for drugs, compared to five percent of violent and public order offenders. State prisoners in 2004 with property (30 percent) and drug offenses (26 percent) were more likely to commit their crimes for drug money than violent (10 percent) and public-order (7 percent) offenders.⁹⁸ Inmates

⁹⁵ National Institute of Justice: The Research, Development, and Evaluation Agency of the U.S. Department of Justice. Robert MacCoun, Beau Kilmer, and Peter Reuter, Research on Drugs-Crime Linkages: The Next Generation, July 2003, at pg. 66.

⁹⁶ *See id.*

⁹⁷ Bureau of Justice Statistics, U.S. Department of Justice, Drug Use and Dependence, State and Federal Prisoners 2004, NCJ 213530, October 2006.

⁹⁸ Bureau of Justice Statistics, U.S. Department of Justice, Drug and Crime Facts, NCJ 165148, April 12, 2007. (26.9 percent of local jail inmates who committed property crimes did so for money for drugs. 24.8 percent of local jail inmates who committed drug crimes did so for money for drugs.)

in local jails convicted of burglary had the highest rate of substance dependence or abuse (85 percent).⁹⁹ Money-generating crimes quite clearly account for the majority of economic-compulsive drug crimes.

3. Systemic Violence

Some drug markets are more prone to market-related violence than others. While the market for marijuana is generally not violent, the crack market is particularly prone to market-related violence.¹⁰⁰

The National Institute of Justice (“NIJ”) suggested four factors that account for the increase in violence in the crack market: (1) the youth of the participants increase the rates for violent crime. NIJ believes that the young are particularly likely to lack foresight, judgment, and restraint, and thus engage in violence to settle disputes; (2) the high value of the drugs themselves lead to increased violence; (3) the intensity of law enforcement increases the likelihood that drug transactions are conducted under considerable uncertainty, and as a consequence, situational violence can be high; and (4) the indirect consequences of drug use render some drug users more violent and aggressive, causing dealers to be more likely to carry and use weapons, and similarly to make this more likely among their customers. This in turn promotes unreliable behavior among both users and dealers as well as subsequent retaliation by their suppliers.¹⁰¹

Under the Goldstein framework, drugs have a distinct impact on overall crime. Drug use increases the need for money, thus increasing property crime. Use of drugs may increase an individual’s general aggression when a predisposition for violence already exists. Finally, some drugs are accompanied by varying degrees of market-related crime.

⁹⁹ Bureau of Justice Statistics, U.S. Department of Justice, Drug and Crime Facts, May 20, 2007, at <http://www.ojp.usdoj.gov/bjs/DCF/duc.htm>

¹⁰⁰ Research on Drugs-Crime Linkages: The Next Generation, July 2003, at pg. 74.

¹⁰¹ *See id.*

(D) Drugs and Driving

DUI offenses are a major source of drug- and alcohol-related crime, injuries, and fatalities. In 2005, nearly 1.4 million drivers were arrested for driving under-the-influence of alcohol or narcotics.¹⁰² In 2006, an estimated 17,602 people died in alcohol-related traffic crashes – an average of one person every 30 minutes. These deaths constitute 41 percent of the 42,642 total traffic fatalities. Of these, an estimated 13,470 involved a driver with an illegal blood-alcohol content (.08 or greater).¹⁰³ In 2000, 1,400 fatalities occurred in crashes involving alcohol-impaired or -intoxicated drivers who had at least one prior driving-while-intoxicated (“DWI”) conviction. This represents 8.5 percent of all alcohol-related fatalities.¹⁰⁴ In addition, 34 percent of the offenders in jail and eight percent of the offenders on probation reported having been convicted of three or more DWI offenses in their lifetime.¹⁰⁵

(E) Drug Use and Criminal Recidivism

As discussed earlier, the U.S. Department of Justice’s Bureau of Justice Statistics issued a special report regarding recidivism of prisoners released in 1994. The report followed 272,111 former inmates for three years after their release from prison in 15 different states. Of the prisoners released whose most serious offense was a drug offense, 66.7 percent were rearrested within three years. Of all drug-crime recidivists, 49.2 percent returned to prison within three years of their release. Of those previous drug offenders rearrested, 41.2 percent were rearrested for a new drug offense.¹⁰⁶

As discussed above, DWI recidivism is a major problem. The National Highway Traffic Safety Administration found that the majority of DWI offenders:

- Are age 25-to-45, male, white, and unmarried; have blue-collar jobs; prefer beer and drink it frequently; tend to drink at bars; and

¹⁰² U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports, Washington, D.C., FBI, 2005 [cited 2006 Nov 3].

¹⁰³ National Highway Traffic Safety Administration, 2006 Traffic Safety Annual Assessment – A Preview, DOT 810 791, Washington, D.C., National Highway Traffic Safety Administration, July 2007, at <http://www-nrd.nhtsa.dot.gov/Pubs/810791.PDF>.

¹⁰⁴ Angel Outside My Window – Don’t Drink and Drive, at <http://aomw.org/>.

¹⁰⁵ National Highway Traffic Safety Administration, A Guide to Sentencing DWI Offenders, 2005 HS 810 555, Washington, D.C., National Highway Traffic Safety Administration, 2005, at <http://www.nhtsa.dot.gov/people/injury/alcohol/DWIOffenders/pages/intro.htm>.

¹⁰⁶ See, *supra*, note 61. Drug offenses include drug trafficking, drug possession, and other drug-related offenses.

tend to be “problem drinkers” (i.e., repeat DWI offenders, drink excessively [5 or more drinks in a session], and have problems associated with alcohol use); and

- Tend to have experienced alcohol-related problems in the past and tend to be extroverted, impulsive, aggressive, hostile, and anti-social.¹⁰⁷

DWI arrestees also are much more likely to have more arrests for non-traffic offenses including, but not limited to, assault and public drunkenness.¹⁰⁸

The statistics regarding overall rearrest rates for drug-related crimes are difficult to quantify. Due to different definitions of the phrase “drug-related,” studies differ on how to classify crimes. For example, the FBI conducted a study entitled “Crime in the United States: Uniform Crime Reports.” In the study, the FBI did *not* include as drug-related a burglary committed by someone under the influence of drugs, *or* a murder that occurs during a robbery committed to obtain money to buy drugs.¹⁰⁹ The Department of Justice’s Bureau of Justice Statistics classifies crimes in the same manner.

Regardless of the problems in defining drug-related crime, drugs clearly have a major impact on crime. In addition, under the Goldstein framework, drug users are likely to continue their criminal habits due to the psychopharmacological, economic-compulsive, and systemic pressures.

Drugs and alcohol clearly and substantially are directly related to the incidents and severity of crime in America today.

Whether the effects of drugs cause violent behavior and/or criminal activity (psychopharmacological effects), the need for money by chronic substance abusers or addicts to support their habits leads to crime (economic-compulsive), or the drug market creates criminal activity, such as stealing and dealing, and the violence associated with same (systemic), one plain fact stands out: drugs and crime are inextricably linked.

Many convicted criminals were under the influence of drugs and/or alcohol at the time they committed their crimes. Drugs are also prevalent in recidivist crimes. Many released prisoners are reconvicted for drug-related offenses, and many more abuse drugs and alcohol.

¹⁰⁷ See, *supra*, note 105.

¹⁰⁸ See *id.*

¹⁰⁹ Executive Office of the President, Office of National Drug Control Policy, Drug Policy Information Clearinghouse: Fact Sheet, March 2000, at pg. 5.

Moreover, a very high percentage of crime is caused by those who are chronic substance abusers who are drug- and/or alcohol-dependent. Recidivism rates by chronic substance abusers, addicts, and alcoholics are extremely high, and multiple relapses are the rule, not the exception. The recidivism of the substance abuser *after* “successful” rehabilitation often equates to *criminal* recidivism by the substance abuser.

“Former” substance abusers will *always* constitute a *much* higher at-risk population for future substance abuse than the public at-large, and – correspondingly – ex-criminal-offenders will *always* be a *much* higher at-risk population than the public at-large for future criminal offenses. You cannot separate one from the other. The former is a significant subset of the latter. The extensive and well-documented incidence of substance abuse addiction/alcoholism recidivism translates *directly* into criminal recidivism.

IX. CONCLUSION

*“Nothing we do is more important than hiring and developing people.
At the end of the day you bet on people, not on strategies.”*¹¹⁰

So said Larry Bossidy, former Chairman of the Board of Honeywell. Mr. Bossidy was right – nothing is more important to a company than who it hires, and we do “bet” on the people we hire.

But we don’t want to bet too much, we don’t want to risk too much, we don’t want to “bet the farm” on any one wager – or one person, especially if that person is a convicted felon with a documented history of crime and/or violence.

Let’s *not* bet. Let’s play it safe.

Playing it safe in regards to the hiring and employment of private-sector security guards is particularly necessary and appropriate, as H.R. 2703 and its sponsor, Chairman Andrews, recognize and appreciate. We cannot give guns and badges, keys and combinations, passcodes and trust, to those who are at a high risk of abusing it, to those who may have as high as an 80-percent chance of criminal recidivism, to those who *may* be wedded to terrorism and anarchy. We cannot gamble with people’s lives – the lives of *our* people who expect more and deserve our protection.

H.R. 2703 is highly appropriate legislation, an acceptable and appropriate mandate, and an endorsement of the place for, and priority of, criminal-background checks in employment in American society. With – or without – the revisions we recommend, the Council for Employment Law Equity endorses H.R. 2703, commends Chairman Andrews for its introduction, and respectfully urges its support in this Subcommittee and by the U.S. Congress.

¹¹⁰ Bossidy, Lawrence A., Execution: The Discipline of Getting Things Done, at <http://www.brainyquote.com/quotes/quotes/l/larrybossi307853.html>

On behalf of the Council for Employment Law Equity, and the employer community at-large, I thank you for this opportunity to testify and to express our views here this morning. I would welcome any questions you may have, and the opportunity to work together to help protect and promote the use of criminal-background checks in employment.