

In February 2007 the Senate Committee on Faculty and the Academic Mission (SCOF) was asked to consider development of a policy of mandatory self-disclosure of prior criminal records for prospective faculty. After undergoing an extensive review in spring 2007, SCOF produced the following “Report on Disclosure of Prior Criminal Records in Faculty Hiring” listing arguments that could be made for or against faculty self-disclosure. The Faculty Senate Executive Committee (SEC) publishes this document as a definitive exposition of these arguments for the University of Pennsylvania faculty.

The Senate Committee on Faculty and the Academic Mission and the Senate Committee on Academic Freedom and Responsibility (SCAFR) considered the question of whether or not to develop a policy again in the fall of 2007. Their findings were sent to the Faculty Senate Executive Committee. In addition, several faculty senates within individual schools discussed the issue and the results of their votes were relayed to SEC.

On March 5, 2008 the Faculty Senate Executive Committee voted and unanimously approved a statement on the question of whether or not the University should go forward with developing a policy of mandatory self-disclosure for prospective faculty (see the SEC Actions of the SEC meeting in this issue of *Almanac*).

Report on Disclosure of Prior Criminal Records in Faculty Hiring

May 16, 2007

On February 9, 2007, the Provost asked the Faculty Senate to offer its views on the case for disclosure of a prior criminal record for all prospective faculty members. The Senate Committee on the Faculty and the Academic Mission (SCOF), the appropriate body for consideration of such issues, met seven times over the next three months to consider the matter. Included in its deliberations were helpful meetings on the subject with both the Provost and University General Counsel.

Having wrestled at length with a variety of difficult issues, the Committee has arrived at two general conclusions.

First, while a number of circumstances may ultimately compel the University to adopt a policy of mandatory self-disclosure of a criminal record prior to employment on the faculty, *the value of such a policy is presently quite unclear.*

Arguments can be made both for and against mandatory self-disclosure, and these are enumerated and reviewed below. At this point, the Committee judges the policy as having more symbolic than likely substantive effect vis-à-vis campus safety. In view of the many important complications that could arise in tandem with such a policy, and given that Penn would be alone among its Ivy League peers in taking this action, the Committee advises caution.

Second, given ambiguity as to the value of self-disclosure and deep uncertainty about how data about criminal records, once disclosed, are to be handled by the University, the Committee recommends that *no action be taken until further study is undertaken of the precise means by which the University will gather, and more importantly use, data bearing on criminal records.*

Our discussions produced a number of ideas about possible administrative protocols for the gathering and handling of disclosed information, some of which are described below. However, all of these seemed premature and to some extent uncomfortably ad hoc. A more thorough analysis is required, drawing in detail on the practices and experience of public universities that already gather data of this kind. We propose that such an analysis be carried out in collaboration with some of our Ivy peers.

In its advisory role to the Provost, SCOF is not able to provide a definite set of proposals at this time. However, its deliberations have produced a set of considerations that should guide policy development in this area, along with a few recommendations on matters where the Committee achieved broad consensus.

Background

Discussions surrounding investigations of criminal records and their role in faculty hiring have taken place on campuses throughout the country for several years, but a variety of recent events has brought this matter to the foreground at Penn. These include several high-profile cases involving criminal behavior of faculty at the University; a heightened awareness of criminal behavior, particularly sex-related crimes; revelations that some students and staff members at the University appeared on Megan’s Law lists; a decision by the Philadelphia School District to request nationwide background checks of prospective employees; and demands for similar action at universities by at least one member of the Pennsylvania legislature.

In soliciting the views of the Committee, the Provost noted three general principles that should guide the Committee’s considerations:

- The need to protect the safety and security of the University community
- The need to consider the relevancy of the past record, the qualifications, the expected responsibilities and campus access of past offenders
- The need to avoid unwarranted stigmatization (i.e. unfairness) to any member of the University community, including prospective members

The Committee’s counsel was sought on a number of issues. The most basic questions posed concerned a) whether or not the University should require self-disclosure of a criminal record prior to employment as a faculty member; and b) under what circumstances (and for what reasons) the University should require a criminal background check for a new faculty member.

The Committee was also asked to consider, in the event that self-disclosure were to be adopted, a) at what point in the recruitment process a question should be posed to the candidate; b) how the University might best protect the prospective faculty member’s privacy when a criminal record is disclosed; c) how the University should evaluate such information in judging the suitability of a faculty member for employment; and d) what safeguards or restrictions the University should adopt, if any, when permitting a faculty member with a prior record the opportunity to work in our community.

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Senate: From the Committee on Faculty and the Academic Mission

A Minimum Requirement of Self-Disclosure

The Committee discussed the possibility of mandatory background checks only briefly. University General Counsel Wendy White indicated that such checks, which are supplied by various commercial enterprises and based on a canvass of computerized databases, are of suspect accuracy and limited utility. Both University General Counsel and the Provost indicated that a program of mandatory checks was not presently under serious consideration. The Committee concurs with this judgment, and recommends that a criminal background check of this kind should be done only when required by law, for instance in situations specified by the Public Health Security Bioterrorism and Preparedness and Response Act of 2002. The Committee did note, however, that if a policy of mandatory self-disclosure were pursued, the pressure to follow up a self-disclosure with some sort of check is likely to be great.

The Committee focused primarily, then, on the advisability of a requirement that, prior to being hired, faculty members are asked to disclose a prior criminal record. In its many lively discussions on this question, the Committee focused on the three general principles suggested by the Provost, namely the need to protect the community, the need to consider the relevancy of a past record, and the need to avoid discrimination. Though not stated in his letter, the Provost also underlined to the committee a fourth general principle: equity among students, staff and faculty. This now looms as an issue owing to the fact that plans are underway to institute a policy of mandatory disclosure of previous criminal records for both prospective students and staff, with some programs already in place.

A number of arguments can be made in support of a policy requiring self-disclosure. Among those given careful consideration by the Committee were the following:

- It could prevent the University from hiring onto the faculty a person who might endanger the safety of others in our community.
- It might reduce the risk of damages, both legal and in terms of public standing, which the University could suffer should it come to light that a faculty member with a prior criminal record was hired and subsequently committed a serious crime.
- In cases where a faculty member has committed an egregious action and it is discovered that this person submitted false or incomplete information upon application, immediate action could be taken to remove him or her from the faculty.
- Enacting a policy now might forestall possible action by the Pennsylvania legislature to demand even more stringent policies.
- It might provide some reassurance to the families of Penn students and prospective students that the University is taking proactive steps to increase safety of the campus community. This is especially important in light of recent negative news stories concerning criminal behavior of Penn faculty over the last two years.
- It might reduce the contrast with other educational institutions, such as the School District of Philadelphia, which are now requesting background checks of prospective employees.
- Given that the University is moving to require self-disclosure of criminal records by all prospective students and staff members, a failure to enact a similar policy for faculty members may raise questions of perceived inequity. An exception for the faculty may cast it in a negative light.
- Having information on a faculty member's prior criminal convictions may allow the option of requiring special accommodations or restrictions.

The Committee is of the opinion that the first and most fundamental argument—that such a policy would contribute to the safety of the campus—is relatively weak. We noted for instance that none of the Penn faculty members involved in recent high-profile criminal cases had criminal records at the time of hiring. Concerns about ex-convicts committing new crimes may well be reasonable,¹ though it is unclear whether background checks or self-disclosure, particularly in faculty hiring, would have much if any preventative impact. An American Association of University Professors (AAUP) report examining background investigations of candidates for faculty positions noted that the increasing interest in such checks

1 Just how reasonable concerns about recidivism among faculty ex-convicts might be is quite difficult to gauge. On the one hand, the U.S. Department of Justice Bureau of Justice Statistics estimates that, of the 272,111 persons released from prisons in 15 States in 1994, 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% were resentenced for a new crime (www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism). On the other hand, since potential faculty members are very unlikely to be in the financial or social environments typical of most convicted felons, are probably older, and probably already out of prison a good number of years, we might well expect their recidivism rates to be considerably lower.

“has arisen despite the absence of any systematic study of the need for the information such checks might produce.”² Furthermore, in a system involving self-disclosure rather than institutional background checks, prospective candidates can easily lie and might indeed be tempted to do so if they had such a record. In short, while there may be some marginal value of such a policy in protecting the safety of the community, this value is unsubstantiated.

Arguments that such a policy would have a significant defensive value in protecting the University in the event of criminal activity by faculty may appear more persuasive, but these also strike the Committee as seriously limited. The likelihood of a case whereby a faculty member commits a heinous crime and was hired with a prior record of such criminality would appear, by any estimation, vanishingly small. And in its efforts to reduce the risk of that particular scenario through mandatory self-disclosure, it is conceivable that the University opens itself up to different sorts of risk. What if the University *did* know in advance of some degree of criminality in a faculty member's past, and such a faculty member subsequently commits a serious crime? If it came to light that a person with a serious criminal record simply lied upon being hired, would not the University be subject to criticism that it enacted a predictably futile policy?

More compelling are various arguments that the University stands to gain positive public relations from enacting such a policy, or by doing so avoid negative public relations (e.g., “most businesses and many schools do this, why not you?”). It may well prove reassuring to many parents, students, faculty and staff, and to other key external constituencies including some that are politically organized, that the University is taking some action to prevent the hiring of faculty with criminal records. On its face, such a policy seems an easy and sensible thing to do. And yet, a variety of perceptions may develop among differently interested constituencies, including our academic peers. There could be a danger that such a course of action would be interpreted, correctly or incorrectly, as indicative of an environment where actions of faculty members are more carefully scrutinized than at other highly regarded institutions—none of the Ivies currently have such a policy—or that the University is compromising its core values by enacting a likely-to-be-ineffective policy simply to placate critics or avoid suffering potentially negative public relations. The fact that a number of public institutions have undertaken similar policies under the command or threat of state legislatures does not clearly testify to the appropriateness of such action, and in any event Penn is not similarly under the direct control of a legislature. Our adoption of the self-disclosure requirement might conceivably reduce the likelihood of drastic measures by the state legislature; but there is, so far as the Committee can determine, no clear threat of drastic legislation on the horizon. Moreover, there is a possibility, difficult to estimate but of non-zero probability, that such an action could actually embolden rather than mollify critics: It may be construed as a logical first step toward implementing mandatory criminal background checks.

The Committee felt that the strongest argument for a policy of self-disclosure was the establishment of equity between faculty, students and staff, assuming that all prospective members of the latter two categories are asked to follow such a policy. It is true of course that the three categories are treated very differently in many ways and for perfectly justifiable reasons, but if it can be established that an inequity in this matter is a source of rancor, it might be appropriate to have a common policy. (The likelihood of such internal rancor seems to the Committee somewhat doubtful. However, a more likely possibility is that some external entity, such as a news organization, draws an explicit comparison between our policies for the three constituencies, with an eye toward painting the faculty as an out-of-touch and overly privileged body—stereotypes that we of course consider inaccurate and unfair, but which are unfortunately all too accessible to the public.)

To summarize, while the Committee was able to generate a large number of arguments for adoption of mandatory self-disclosure, many appeared upon reflection either unpersuasive or double-edged. At the same time, a number of countervailing arguments can be made against a policy requiring self-disclosure. Again, the Committee gave careful consideration to many such arguments, some of which have already been touched on above:

- It stands to have little real impact on the safety of the University community.

2 Finkin, M., Post, R. C., & Thompson, J.J. (2002). Verification and trust: Background investigations preceding faculty appointment. *Academe*, 90(6), 79-81.

• In the absence of background checks, which both SCOF and the administration dismiss for good reasons, there is little protection against the provision of false information.

• It may be construed as a logical first step toward implementing mandatory criminal background checks.

• In the case where a faculty member does disclose a prior record and is accused of a subsequent crime, it may subject the University to increased criticism.

A reasonably strong case can be made, in the absence of evidence to the contrary, that compulsory self-disclosure will do no good. Applicants with a very serious criminal record will in most cases fail to disclose it, especially if they are applying for the exceptional kind of job that can lawfully, and will probably, be denied them if they tell the truth. Those who do tell the truth will in most cases be hired anyway, but subjected to stress and anxiety. A policy that stands to do little good, puts pressure on job-seeking ex-convicts to lie about their past, and subjects even truth-telling job seekers to stress and anxiety seems unjust. And, while the policy may intend to shield the University from criticism or thwart attempts to force more draconian measures, as noted earlier the effects might conceivably be the opposite.

The Committee also considered a variety of arguments, each having to do with complications that will attend the possession of information about individuals' criminal records, which can also be marshaled against a policy of required self-disclosure. Prominent among them are the following:

• Even the most serious crimes rarely have direct relevance to the qualification of a faculty member to do the job for which she or he is hired.

• Those who are considering a hire may, despite the best of intentions, attach undue negative weight to a self-disclosed criminal record and reject an otherwise qualified candidate.

• Keeping a revealed criminal background secret while simultaneously making the information available for use in protecting the safety and security of the community would prove very difficult.

• Limits or restrictions on a faculty member owing to a disclosed criminal record, by impeding his or her ability to carry out basic teaching, research, or service duties, would likely lead to stigmatization. It could in effect produce a "second class" member of the faculty.

• Were Penn alone among Ivy League schools in adopting such a policy, it could make us look bad in the eyes of peer institutions, the liberal public, and perhaps most important, the potential faculty members we are trying, in a competitive environment, to recruit.

The Committee understands from University General Counsel that Pennsylvania law prohibits employers from taking a criminal record into account in hiring except in cases where the offense is directly relevant to the job duties in question. Only in the rarest of instances would such be the case with scholar-teachers. Yet few would feel comfortable hiring someone after disclosure, say of conviction and sentence served for a serious, particularly a violent, crime committed as a youth, even if such a past crime would be dispassionately judged to have little bearing on present abilities to work at the highest levels of the scholarly profession.³

On the other hand, there may be particular categories of crime of special concern to the campus community, even if the vast majority of criminal records would be deemed irrelevant. Thus, we might imagine some system that eschews a blanket policy of disclosure of any criminal record, in favor of targeted questions seeking disclosure of narrower categories of past behavior with direct relevance to ensuring the safety and security

3 Again, it is difficult to estimate the degree to which knowledge of a criminal record is likely to influence a faculty hiring committee. However, evidence from experimental studies indeed suggests that other types of employers are highly sensitive to such information. For example, Pager (2003) audited 350 employers in the metropolitan Milwaukee area who had advertised openings for entry-level jobs, experimentally manipulating the presence or absence of a prior felony drug conviction among otherwise identical teams of white and black job applicants. Those with fictional criminal records were only half as likely to be called back as equally qualified applicants with no criminal record. The unwillingness to call back drug offenders was just as common among employers who, when called later for a seemingly unrelated survey, claimed that they would very likely hire such a drug offender (Pager & Quillian, 2005). Pager (2003) concludes (p. 962) that the criminal justice system "has become a dominant presence in the lives of young disadvantaged men, playing a key role in the sorting and stratifying of labor market opportunities." Pager, D. (2003). "The Mark of a Criminal Record." *American Journal of Sociology*, 108, (5) 937-75. Pagers, D., & Quillian, L. (2005). "Walking the talk? What employers say versus what they do." *American Sociological Review*, 70 (June): 355-380.

of the campus community. Such a system would require careful research and development prior to implementation. Another option, discussed at length by the Committee, is to seek a self-disclosure and render a determination of relevance at the end of the hiring process, perhaps at the stage of Provost's Office approval, to avoid any circumstance in which the revelation of a criminal record might be used to inappropriately by a hiring committee to deny an appointment and to sequester sensitive personal information from faculty colleagues.

Complications owing to the difficulties in judging whether a particular crime should render a job candidate unworthy of hire are thus formidable; but in the view of the Committee they pale in comparison to the complications arising from the use of disclosed information to place limits on a faculty member who is ultimately hired. There appears to us no workable way, without inviting stigmatization, to restrict a faculty member from carrying out particular duties common to those on his or her faculty, other than perhaps in the rare cases when the prohibitions are specified by law.

Finally, while it has been reported recently in the *Chronicle of Higher Education* that 26 percent of surveyed colleges required faculty at the time of appointment to disclose a prior criminal record, the practice has not taken root among Penn's peer institutions. University General Counsel Wendy White's very helpful canvass of eight peers (Chicago, Columbia, Cornell, Duke, Harvard, Princeton, Stanford and Yale) reveals that none have a disclosure policy. The general feeling of the Committee was that there could be a danger that being out in front of our peers on this matter, though it may well be viewed as socially responsible, might also be interpreted as indicative of an environment where actions of faculty members are more carefully scrutinized than at other peer institutions. Such a perception could prove detrimental to faculty morale and recruitment. It should be noted, however, that several large, prestigious public universities do indeed have policies of criminal background checks, apparently without incurring any severe disadvantages in faculty recruitment.

Altogether, the Committee's deliberations uncovered far more uncertainty than confidence with respect to the contemplated policy of mandatory self-disclosure. Deep ambiguities surround its functional utility as it relates to public safety, the probability of serious legislative pressure on Penn to act along these lines, and the probable consequences for Penn should it do so. Although the University may ultimately feel compelled to adopt a policy of mandatory self-disclosure, the Committee finds that the value of such a policy is presently unclear. Without particularly persuasive reasons for adoption (aside from the potential inequities not doing so might highlight vis-à-vis students and staff) and in view of the many important complications that could arise in tandem with such a policy, the Committee advises caution. We recommend that no action be taken until further, careful study is undertaken of the precise means by which the University will gather, and more importantly use, data bearing on criminal records. We suggest a detailed analysis of the practices and experience of public universities that already gather data of this kind. It would be particularly helpful, if action is indeed taken, to do so in collaboration with some of our Ivy peers.

Questions of Implementation

While questions dealing with particulars of implementation seem premature in light of the above, the Committee discussed each of the Provost's questions bearing on procedures that should be followed if a policy of self-disclosure were to be adopted.

Timing in the recruitment and hiring process. One question concerned the point at which, during the recruitment process, a question about a prior criminal record should be posed to the candidate. The general conclusions were two-fold: first, that the information ought to be completely sequestered from hiring committees so that an independent judgment can be made about a candidate's suitability for employment unencumbered by this information; and second, that an individual's privacy should be protected as much as possible in order to avoid stigmatization. Thus, the Committee felt that the fewest number of people possible should be informed of a candidate's prior criminal record, and that the question should be posed to a prospective faculty member as late as possible, perhaps at the time of Provost's Staff Conference review (or even later). This would in all likelihood require the formation of a special panel that would review the information.

The advantages of such a system are several. It would place the Uni-

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versity and the candidate alike in the position of understanding clearly that the criminal record is of such a nature that it precludes employment, thus minimizing the chances that disclosed information might inappropriately influence a hiring decision. Another advantage is that it would limit the University's collection of sensitive (and potentially irrelevant) personal data to just a handful of cases, and only at the point when it matters. The Committee considered alternative systems involving up-front disclosure at the time of application, but feels this is a poor idea. It seems unnecessarily invasive, requiring hundreds of individuals to reveal embarrassing and irrelevant information to the University, and unnecessarily laborious from a bureaucratic perspective, requiring a review of many such records, most of which will be innocuous from the University's perspective.⁴ A predictable result of such a system is a heightened danger of false negatives, that is, missing the "needle in a haystack" because of the volume of routine reviews conducted. Most important, it puts the University in possession of large quantities of sensitive, private information it does not want and does not need.

The disadvantages of a system involving gathering this information at the final point of hire were also considered. One is that, in the rare case where a decision to hire was overturned at this high level, it would draw an enormous amount of attention to this fact, and thus arouse suspicions (of the candidate, or indeed of the University administration) owing to the secrecy surrounding the review. It also appeared likely to us that candidates should be somehow informed at the time of applying for positions that this question will be posed to them eventually if employment is contemplated. This should be done in order to avoid the embarrassing situation of a candidate clearing all earlier hurdles, only to balk at having to meet this final requirement of self-disclosure. Letting a candidate know, for instance at the point of initial application, that a question will be asked late in the recruitment process might in some ways be awkward, but is likely not an insurmountable problem.

Privacy protections when a record is disclosed. Should the University move forward with a policy of mandatory self-disclosure, great care will be necessary to ensure that any personal information obtained is used solely for the purposes of protecting the public safety. The Committee felt that one of the significant drawbacks of such a policy, particularly if it involves collection of data at the point of application, is that it would result in its possession of possibly damaging or embarrassing information about numerous individuals, information that has little functional utility even while it creates hazards of accidental, or worse, intentional exposure. The idea that some University administrator, say a dean or department chair, might know something about a faculty colleague's prior arrest and conviction for drug possession or some long-ago unlawful sexual conduct would seem to offer little by way of useful input to decision making; but it could certainly become the source of mischief in times of intense professional conflict or of great personal distress if accidentally exposed. As noted above, the Committee thus found that any workable system would need to minimize the degree of data collection to the greatest extent possible and create fool-proof provisions for sequestering that information permanently among a very small number of individuals.

One possibility discussed was a system involving a one-time disclosure and careful administrative evaluation, after which only the fact of the review having taken place is recorded, without retention of the actual information disclosed. Such a process would leave the University with a record of having completed a check and judged the matter to be unproblematic, without holding onto sensitive information in its personnel files. The

⁴ In 2001, the U.S. Department of Justice Bureau of Justice Statistics estimated that, if incarceration rates remain unchanged, 6.6% of U.S. residents born in 2001 will go to prison at some time during their lifetime, with rates being much higher for men (11%) than for women (around 2%; www.ojp.usdoj.gov/bjs/abstract/piusp01.htm). Drug offenders represented the largest source of jail population growth between 1996 and 2002 (www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism).

fact that no permanent record of the information will be maintained could be made clear to prospective employees, which might encourage honesty in self-reporting. It might be possible to designate University General Counsel or some other legal officer to act as attorney for the candidate in this procedure, allowing for the disclosure of sensitive information to that officer under conditions protected by attorney-client privilege.

Use of disclosed information. The Committee discussed possible scenarios involving the use of disclosed information to institute safeguards or restrictions on faculty members with a criminal record. Though we can envision situations in which members of our community might wish to be apprised of a fellow community member's earlier criminal conviction, we found it enormously difficult to envision just how, when and under what circumstances this information might result in "safeguards." Upon reflection, each of the scenarios considered appeared complicated to the point of being unworkable. What would it mean, for example, to have a member of the faculty prevented from teaching undergraduates of a certain age? Or handling grant funding? How would such restrictions be explained to faculty colleagues, or to administrators charged with making course assignments, without revealing the past criminality upon which they are based?

The academic freedoms and responsibilities that attend appointment to the faculty are to a substantial degree antithetical to the idea of such imposed restrictions and special monitoring. The Committee is of the opinion that, to restrict a faculty member from carrying out particular duties common to those on his or her faculty, other than perhaps in the rare cases when the prohibitions are specified by law, would inevitably invite stigmatization. Were the University to mandate self-disclosure, we would thus prefer that the information be used to render a basic judgment about suitability for membership in the faculty community, rather than to arrange hires with less than unfettered access to the customary rights and privileges of that community.

Proposed Next Steps

Our discussions produced a number of ideas, then, about possible administrative protocols for the gathering and handling of disclosed information about past criminal behavior. Fleshing out these procedures in more detail, however, seems to us premature at this juncture. They do not in the Committee's view resolve the basic uncertainties and ambiguities surrounding a mandatory disclosure policy, as outlined above, and for that reason should be given consideration only after a more thorough analysis of the central questions is completed. If and when the University is certain of the policy's value, and of exactly how any obtained information will be used, it should proceed with developing detailed procedures.

Toward this end, we propose that the Provost consider enlisting a joint committee of faculty and administrative leaders, both here at Penn and among one or more of our peer institutions, to give careful consideration to the various issues discussed here, and to help determine the best way forward. Such a joint, multi-campus venture could prove very enlightening as we share, despite our institutional differences, a common commitment to the highest professional standards and academic values. If collaborative action could be agreed upon, it would certainly strengthen our confidence in whatever position or policies we ultimately adopt.

2006-07 SCOF Committee Members

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