

# CRIMINALS ESCAPING AFFLICTION GERALD TURNER AND WISCONSIN'S FAIR EMPLOYMENT LAW

THOMAS HRUZ

Wisconsin is one of ten states making it illegal to discriminate in employment decisions based on an applicant's criminal record. Due to this law, last summer "Halloween Killer" Gerald Turner was able to receive a cash settlement from Waste Management Inc. of Madison, a business whose only offense was to not hire a known child killer. Some Wisconsin legislators are attempting

to amend this provision of the state's Fair Employment Act to permit employers the freedom to lawfully consider criminal records as a reason to deny employment. Yet once again, the defenders of those who preyed on the defenseless are diligently at work to protect a law that continues to privilege felons at the expense of the law-abiding public.

## Gerald Turner: A Monster Turned Parolee

By his own admission, Gerald Turner is a monster.<sup>1</sup> It is also evident that Turner remains a deeply troubled man, with tendencies that are at best questionable. But before discussing Turner's current disposition, it is essential to comprehend the crime he committed.

On the night of October 31, 1973, nine-year old Lisa Ann French dresses herself as a hobo



and playfully goes out trick-or-treating in Fond du Lac. When she arrives at Gerald Turner's neighboring residence she rings the doorbell, opens her candy bag, asks "trick or treat," and awaits some candy reward. Unfortunately that never happens. Turner's own words recount what happened next:

I can still see you standing in the doorway with that felt hat beaming at having recognized

me. . . . Then I see the delight in your eyes turn to fear as I close the door behind you...

Turner brutally raped and then murdered Lisa. Afterward, he dumped her body in a farm field. During the course of this crime, Turner wore socks on his hands in a deliberate attempt to not leave any fingerprints; he even went so far as to wipe down Lisa's shoes and the zipper on her coat. It is hardly necessary to go into the horrific details of Turner's crime. Suffice it say, as the state agent who handled the Turner case in 1974 stated plainly, "She met a very painful death."

Turner's crime shocked parents throughout the state. For many, Halloween would never be the same. Just now, twenty-six years

*Thomas Hruz is a Resident Fellow of the Wisconsin Policy Research Institute.*

## GERALD TURNER TIMELINE

- October 31, 1973:** Nine-year old Lisa Ann French, dressed as a hobo, is trick-or-treating in Fond du Lac when she arrives at Gerald Turner's residence. Turner brings Lisa inside and then brutally rapes and later murders her, thereafter depositing the body in a farm field.
- August 1974:** Turner confesses to the crime, but he later pleads innocent.
- February 1975:** Turner is convicted of second-degree murder, enticing a child for immoral purposes, indecent behavior with a child, and sexual perversion. The jury rejects a charge of first-degree murder. Turner is sentenced to prison for a term of 38 years and six months.
- October 1992:** Turner reaches his mandatory release date. He is awarded parole and is released to a Milwaukee halfway house, later moving to a Milwaukee east side apartment.
- November 1993:** Turner is ordered back to prison after state Appeals Judge Ralph Adam Fine rules that the state had miscalculated his release date under a faulty formula. The state Supreme Court reverses this decision in 1994.
- 1994:** Prompted by public outcry about Turner's release, the state enacts a sexual predator law, and Turner is held in custody under the terms of the statute. This law was found constitutional by the Wisconsin Supreme Court in 1995.
- January 1998:** Dane County jury rules that the state failed to prove beyond a reasonable doubt that there was a substantial risk that Turner would commit a similar offense. Therefore he was allowed release to the Foster halfway house on Madison's west side. Conditions of his parole require that he be placed on electronic monitoring and confined to the halfway house, except for limited, supervised trips outside the house, and is prohibited from having any contact with children.
- June 1998:** State prison officials attempt to revoke Turner's parole after he is alleged to have waved a butcher knife at a caseworker while working as a cook at a halfway house. A state Division of Hearings and Appeals administrator denies the request and Turner remains on parole.
- Summer 1999:** Turner files a complaint with the State Department of Workforce Development after Waste Management of Madison refuses to hire him based on his criminal record. An investigator finds probable cause for a hearing to determine if Turner has been discriminated against. Before the hearing occurs Waste Management settles out of court with Turner for an undisclosed amount of money.
- Presently:** Turner is unemployed and lives at a state-run halfway house in Madison. He is 50 years old.
- August 4, 2013:** Barring any future changes in Gerald Turner's health or legal status, the day that Turner will no longer be under direct state supervision.

later, some local communities are once again starting to hold night-time trick-or-treating.

From the beginning, the criminal justice system had difficulty dealing with Gerald Turner. A timeline of this history includes two occasions when juries involved in the Turner matter seemingly erred. The first instance was in 1975, when a jury gave Turner a second degree murder conviction, bypassing on a first-degree conviction. This decision not only prevented Turner from receiving a life sentence, but effectively ordered his release from prison after serving only a fraction of his actual 38 year prison term.

The second error occurred in 1998, when a Madison jury determined that Turner is not likely to commit another crime as a sexual predator, and therefore should be released on parole. The irony is that the enactment of Wisconsin's sexual predator law was prompted specifically by outrage over Turner's first scheduled parole release in 1992. The law allows the state to confine violent sex offenders beyond their prison term if there is substantial probability they will commit another, similar crime and they are shown to possess a mental disorder.<sup>2</sup> While sexual predator laws have been ruled valid under Wisconsin law and by the U.S. Supreme Court,<sup>3</sup> the state is required to meet a heavy burden.<sup>4</sup> Nevertheless, the jury's ruling came despite the fact that a psychiatrist testifying on Turner's *behalf* believed there was a 20 percent chance that Turner would commit another violent sexual crime sometime in the next seven years. Apparently, a one in five chance was good enough for this jury. In the end, Turner overcame the effect of a law that was created specifically due to his own existence.

Although Turner found his way out of prison, he also found it exceedingly difficult to land a job. Before applying at Waste Management, Turner reportedly had applied and been rejected for employment at more than 100 companies and government agencies in the Madison area. Finally, when Turner was denied a job at Waste Management involving the sorting of recyclables, he was advised by his caseworker to sue the company for discrimination.<sup>5</sup>

Waste Management argued, to no avail, that the job would have given Turner access to potentially dangerous materials and to elementary schoolchildren who frequently tour the facility. Unfortunately, state bureaucrats were compelled to side with Turner. State Equal Rights Officer Charles Phelan ruled that the job was not substantially related to Turner's crime and that there was probable cause to believe that the company discriminated against Turner under the state's Fair Employment Act.<sup>6</sup> This decision required a hearing before an administrative law judge with the state Department of Workforce Development.

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Faced with the prospect of confronting another state bureaucrat, Waste Management opted to settle with Turner out of court for an undisclosed amount of money.

Whether Gerald Turner is still a monster or instead is truly rehabilitated and repentant is perhaps an open question. But some things about him we do know for sure. Four women, including Turner's two former wives, a former girlfriend, and a 15 year-old baby sitter, testified at a recent hearing that Turner had beat and raped them prior to his attack of Lisa French. Based on records obtained from his parole file, we also know that Turner has pulled out three of his own teeth, rather than wait for a dentist; is accused of having tried to

unscramble the Playboy Channel on his halfway house television set; has tried on three occasions to rent movies about serial killers, including one about a young girl being slashed to death; and who must take medication to lower his sex drive, as a precaution against his propensity to be a sexual predator — the same characteristic found lacking by the Madison jury two years ago.

Perhaps most frightening of all, Turner also genuinely believes that he is getting *too much* attention and excessive supervision because of his crime, and that, in his own words, “if [the murder] had happened on some other day, like Valentine’s Day, nobody would give a damn.”<sup>7</sup> One wonders if he likewise believes that had he not brutally killed a nine-year-old girl who was participating in a celebrated childhood tradition, he would not be so vilified. Amazingly, instead of feeling fortunate to be out of prison relatively soon after committing such a crime, Turner instead paints himself as a victim.

Reasonable people could infer that Turner’s prior and current actions indicate that he is still a dangerous person. Seemingly, such rational concern (and fear of liability) would be recognized and supported by law, or at a minimum not be hampered by public policy. Instead, the State of Wisconsin currently forces businesses to either hire Turner or, alternatively, pay him compensation to simply keep him a safe distance away.

### **Murderers and Rapists as a Protected Class?**

The type of crime Gerald Turner committed is one that should not be stricken from public memory. Unfortunately, that is precisely what Wisconsin’s law mandates that Waste Management, and any other employer faced with the prospect of hiring Turner, must do.

Under Wisconsin’s Fair Employment Act, the state currently prohibits employers from considering felony convictions when making hiring decisions, unless the crime is “substantially related” to the job. Some professions, such as health care, fire-fighting, and law enforcement are exempt from these restrictions, but the vast majority are bound to its

terms. The law is based on the erroneous belief that private judgments of criminal actions are not appropriate if those judgments deny an otherwise qualified person a job. Yet the law’s practical effect is to shift the burden of proving one’s social worth away from criminals to the innocent and rightfully skeptical.

The Act explains quite clearly its purpose and rationale:

*The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of . . . conviction record . . . substantially and adversely affects the general welfare of the state.*<sup>8</sup>

*It is the intent of the legislature to:*

- *protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of . . . conviction record;*
- *encourage employers to evaluate an . . . applicant for employment based upon the . . . applicant’s individual qualifications rather than upon a particular class to which the individual may belong.*<sup>9</sup>

There you have it. The state legislature has made criminals of every type a protected class. These statements assume that “proper qualifications” are limited to the purely technical merits of job performance, that an individual’s character or personality within the workplace is irrelevant, and that a person’s criminal past must not be considered one of an “applicant’s individual qualifications.” These questionable assumptions engender a disturbing result: the state is officially adopting the Gerald Turner mentality that he, and others like him, are victims worthy of special legal protection.

The current law also suffers from some other deficiencies. First, the law equates immutable characteristics, such as race, age, and sex, with *choices* and *behavior* that are the result of one’s affirmative judgment, or more appropriately lack of judgment. It is illogical, silly, and arguably immoral to place racial or sex discrimination on the same plane with discrimination based on someone’s criminal status.

Consider: someone who avoids a person on the street because of that other person's race is bigoted and weak-minded; yet someone who avoids a known murderer on the street is viewed as cautious and prudent. Nevertheless, at the employment office these populations must be treated the same. And although one's religion or creed is based on voluntary choice, those classes do not, by definition, include people who have done acts proscribed by law.

It is one thing when employers discriminate against a person who is being slighted for a personal characteristic the applicant holds through no fault of their own, or which does not carry with it the correlative fact of having committed a criminal act. But certainly employers should be allowed, if not obligated, to choose their employees based on an applicant's character and history of treating other human beings.

Indeed, how can an employer *not* consider an applicant's conviction record when making hiring decisions? When employers look to hire people, they generally will look through a list of each candidate's qualifications and drawbacks, decide what combination of characteristics is most desirable to have in the person filling the position, and chose that person for employment. Some employers value experience, some education, while some value other, much less tangible qualities. But most employers generally frown upon a candidate being a convicted murderer, at least when compared to a pool of candidates who have not unlawfully and maliciously killed another person. Unless we are comfortable with disallowing any character judgments on the part of employers, it makes little sense to bar them from *considering* the evident flaws in a person who has committed a serious crime.

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The law may also have a negative impact on businesses forced to hire criminals like Turner. For example, imagine Turner had applied for employment as a bank teller (assuming for the time-being that he would be "qualified" for this job). Turner would not come into contact with many children in such a position, he would be under constant supervision, and his crime is not even remotely related to the job. So why would bank managers be worried? Perhaps their concern is over customers walking in and recoiling at the sight of a convicted murderer. It is not hard to imagine that once people become aware of Turner working at a businesses they might be

more apprehensive about patronizing that establishment. Even in manufacturing jobs where Turner would not come into contact with the general public, there is the matter of retaining or reassuring employees who might reasonably be uncomfortable with being forced to work with the likes of a Gerald Turner. In addition, there is the issue of potential civil liability for employers who knowingly hire an ex-felon who then goes on to harm a co-worker, customer, or other third party. Sad as it is, under the current law, it is criminals who are provided the power to decide which businesses will have to stand idly by as they introduce a murderer into their employee ranks.

A final problem with the current law is that the process of determining what jobs are "substantially related" to any particular crime is fraught with questions of what level of generality should apply to such a standard? In the Turner case, must his job be related to the threat of murder, or more narrowly to the threat of violence to children? Arguably, the requirement could be interpreted more broadly, such as the threat of violence in any form to

any person. Clearly there is a hierarchy of crimes recognized by the legal system, but crimes of a more serious nature are not always “substantially related” to crimes of a lesser degree. Oddly enough, had Turner been convicted of something such as unlawful destruction of property, a less serious crime, Waste Management may have had a more compelling case that his crime was substantially related to the job for which he applied.

Despite these problems with the current law, it is claimed that the proposed changes will be too harsh on those who commit so-called lesser felony crimes. According to State Representative Marlin Schneider, “We’re going to vote as if all felonies are created equal. How mean-spirited can you be.”<sup>10</sup>

This reasoning is flawed in two ways. First, in response to Representative Schneider, the current law *already* treats all felonies as equal. In fact, the current law overreacts in the opposite direction by failing to allow employers to consider murderers differently than, say, common thieves. Nor does the current law make any distinction between misdemeanor convictions and felonies, which the proposed Assembly version would distinguish by retaining discrimination protection for crimes lesser than felonies. If supporters of the current law view the proposed changes as too comprehensive, then they should at least draw a line, and defend that line, where they believe a crime becomes more than just a matter relevant to one’s employment task and becomes a matter relevant to who they are as a person.

Second, and more importantly, the problem would be largely self-correcting and would put the burden appropriately on the criminal, not on businesses. The proposed changes to the law would still *allow* an employer to hire any released felon, whether a murderer, thief, or embezzler. Employers are perceptive enough to distinguish the severity of a conviction record and its relation to the performance of a job. Waste Management itself is a case in point. The company has hired 30 ex-felons since May 1999 alone. But Waste Management decided to draw the line at a man

like Turner. If a particular felon has committed a crime that is less heinous or threatening, employers will, of their own accord, decide that that particular element of the person’s past is less important. But it is the employer who should be allowed to make this decision.

As State Representative Scott Walker notes, “Why do the rights of a convicted murderer take precedence over those a law-abiding business? The state should not force hiring decisions that belie the best interests of the employer.” Moreover, which duty of the state is more important? To protect the employment prospects of someone who has raped and murdered a child, or to safeguard the public and allow its citizens the freedom to not associate with known murderers?

The state may set a criminal free, but that should not mean everyone else must treat him with the same respect that they treat those who have not seriously violated another person’s life, liberty, or property. Whether or not Turner is still a monster, the more important issue is who can decide whether he is still a threat, and how that decision will be protected by the law. Under current law, businesses, including their owners, employees, and customers, do not have the freedom to make that judgment. An equally workable but much more just system would give those people the freedom to choose, and place on Mr. Turner and others like him the task of sufficiently proving their repentance.

Such principles should be self-evident, but apparently they are not.

### **The Apologists for a Rapist and Child Killer**

When members of Wisconsin’s legislature moved last fall to eliminate the protection ex-felons have from employment discrimination, various constituencies came forth to decry the danger of these changes.<sup>11</sup> As a result, although the bill passed in the Assembly by a wide margin, movement on the Senate version is virtually nonexistent.

Supporters of the current law argue that since a released felon has served his time in

prison, and has therefore paid for his crime, any subsequent form of social punishment (including being denied employment) is unjust and actionable. The trouble with this syllogism is in the second premise, because a large segment of society is thoroughly unconvinced that serious criminals, like Turner, actually “pay their debt to society.” Such an argument would possibly carry more weight had Turner experienced what most reasonable people deem was an appropriate punishment. Whatever that punishment may be exactly, it is something significantly more than the mere 22 years he did spend in prison.

Another argument supporting the current law is the concern that released felons who are not given opportunities for employment will be unable to earn an honest income and will be left with no other alternative but to revert back to criminal activity. Therefore, a law allowing conviction-based discrimination will make life even harder for those convicted criminals to adjust back into mainstream society, even if they want to get jobs and be productive citizens. While this possibility is genuine, we must remember that many applicants have characteristics that are less desirable for obtaining employment, but which are characteristics much less vile than criminal activity. Many personal and professional attributes, from the lack of a quality education to poor communication skills, adversely affect job performance and work against someone landing a job. Never before have employers been expected to ignore these types of traits when hiring, as they are required to do under the conviction record provision of the Fair Employment Act.

A more sophisticated variation of the preceding argument asserts that the proposed law

will have a disparate impact on minorities, given this population’s disproportionate numbers in the criminal justice system. Again, this result may very well be true and unfortunate. Nevertheless, if this negative impact results by judging people on the basis of their commission of serious crimes, such effect is not the direct product of racial discrimination. Crimes have always required adjudication that is blind to anything but the actual crime charged and who is responsible for its commission. Perhaps the day will come when societal influences will be recognized as a defense in a court of law, but we are not there yet. And if these factors are not a defense in one’s trial for a crime, they should not be a justification for wiping away the impact and memory of that crime.

Public policy should instead focus on enhancing the opportunities for people to develop strong qualifications for employment and, conversely, to not make life choices that are detrimental to themselves and unattractive to employers. In the present context, it means finding possible methods to quell the criminal tendencies found in the likes of a

Gerald Turner. Certainly, the appropriate route to rectifying the problem starts there, *before* the acquisition of the trait, and not by making competitive employers pretend that a damaging trait in a potential employee does not exist. Such a system is truly akin to mandating that employers hire less intelligent people over others of greater intellect, simply because the less intelligent person may be afforded less comfort in life, or will turn to crime, if he can not find a job. The logic is poor and the principle dangerous.

In addition, the state has other means to help facilitate a released felon’s chances for finding employment, besides simply requiring

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private employers to give released criminals the benefit of the doubt. This role could be in the form of offering incentives to employers who hire ex-felons, or by the state more rigorously assisting in job searches. The state could find temporary employment for newly released felons, either within state agencies or with private employers who volunteer to participate. If an ex-felon is successful at this gateway employment, then he will be able to either stay at that employer or use this experience to show other prospective employers that he has the ability and commitment to work well, and without causing trouble. These strategies would place the burden on the state to achieve its end, which it currently achieves by means of legislative fiat against all private employers.

This entire discussion is in no manner meant to preclude or criticize the private actions of forgiveness and support that people may extend to any individual who commits a crime, even one as odious as Turner's. Under the proposed revisions to Wisconsin's Fair Employment Act, each business is still allowed the ability to facilitate a person's ongoing rehabilitation by hiring ex-felons. A free society always allows people to act on an individual level to perform acts of absolution to criminals. In fact, even Lisa French's mother has already been willing to offer forgiveness to the same man who took her young daughter's life. Even so, this type of forgiveness is only dignified and suitable at the level of the individual, not within the realm of public policy and law. People must accede to this role, not be coerced into it through legal sanction.

### **Favoring the Judgment of the Innocent**

The question boils down to which segment of society should have its freedom limited and which segments will find their choices protected? The criminal who seeks a job? Or the employer or citizen who would rather not work with that criminal? Who's liberty, who's judgment, and who's benefit should win out? Answering on the side of the employer is not only the comfortable thing to do, it the just thing to do. After all, if violent criminals are to

be a protected class, what class of people should not be protected?

Having failed to adequately punish Turner for his heinous crime, Wisconsin has only compounded its error by creating a law that gives Turner, and any others like him in the future, a reward of employment protection. The ability to change the law rests with Wisconsin lawmakers. Perhaps they will soon realize that the law-abiding public deserves the right to decide how to associate with ex-felons, and that criminals should not be offered legal asylum from these private judgments.

### **Notes**

1. In an eerie letter written sometime after his conviction, Turner wrote to the young girl he killed, stating, "The rest of my life I will have to live with what I did to you. On that night I became a monster."
2. Wisconsin's Sexual Predator law is governed under Wisconsin Statutes, Chapter 980.
3. *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997). The court here explicitly upheld a Kansas law providing for the involuntary civil confinement, upon release from prison, of any person who had been previously convicted of a violent sexual offense and "who suffers from a mental abnormality or personality disorder which makes [him] likely to engage in predatory acts of sexual violence." The court also found that this law was not an *ex post facto* or that it violated the Constitutional protection against double jeopardy, because the basis for the confinement was not punitive but instead to prevent the convict's dangerous behavior.
4. The state must prove beyond a reasonable doubt that the alleged sexual predator has a mental disorder and that there is substantial probability he will commit the same or similar crime. Wisconsin Statutes Chapter 980.
5. A similar case occurred in Milwaukee when, in August of 1999, the state Labor and Industry Review Commission ruled that the Milwaukee Public School system had violated the Act by refusing to hire a felon who had been convicted for recklessly tossing hot grease on a child. The position for which he applied? A boiler attendant in a school. The State Assembly responded quickly after this incident to pass a common sense law to permit an educational agency to refuse to employ or to terminate from employment an unpardoned felon. Action in the Senate is still pending.
6. Phelan went so far as to say that if Turner were considered "unsuitable for the position of sorting recyclables, it would then appear that he could be lawfully excluded from every other job dealing with other

people and with most if not all objects." *Milwaukee Journal Sentinel*, September 21, 1999.

7. *Milwaukee Journal Sentinel*, November 14, 1999. Based on his parole file obtained by the newspaper under Wisconsin's open records law.
8. The other reasons for which discrimination is prohibited are age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state, or the use or nonuse of lawful products off the employer's premises during nonworking hours.
9. Wisconsin Statutes 111.31(1) and 111.31(2).
10. *Milwaukee Journal Sentinel*, October 26, 1999.
11. Assembly Bill 469 and 446 were passed last fall. AB 446 pertains explicitly to schools, and would allow an educational agency to refuse to employ or to terminate from employment an unpardoned felon. AB 469 is the companion bill, which relates to the general provision covering employment discrimination, and would allow an employer to refuse to employ or terminate from employment an individual who has been convicted of a felony and who has not been pardoned. Senate Bill 238 is similar to AB 469 with the exception that it removes protection from those convicted of a felony, and misdemeanor or other offense. The Senate version has of the time of this publication not been voted on.