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COMMENT

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GET OUT OF JAIL FREE? PREVENTING EMPLOYMENT  
DISCRIMINATION AGAINST PEOPLE WITH CRIMINAL  
RECORDS USING BAN THE BOX LAWS

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## INTRODUCTION

Have you ever been arrested or convicted of a crime? Although this question may seem innocuous to job applicants who do not have to answer in the affirmative, it presents a major stumbling block for people with criminal records seeking employment.<sup>1</sup> Employers across the country are increasingly performing criminal background checks on job applicants and screening out

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<sup>1</sup> To avoid stigmatizing language while maintaining clarity and consistency throughout, this Comment will use the term “people with criminal records” to refer to anyone who has been arrested, charged with, or convicted of a crime. Many scholars and advocates have used the term “ex-offender” to refer to people with criminal records. *See, e.g.*, DEVAH PAGER & BRUCE WESTERN, NAT’L INST. OF JUSTICE, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 1 (2009), <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=250603> [<https://perma.cc/8CA3-TZD3>] (using the term ex-offender in a study investigating the barriers of race and criminal background to employment); Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261 *passim* (2014) (employing the term ex-offender in her article arguing for the adoption of a true antidiscrimination statute to address employer discrimination against people with criminal records). However, the use of this terminology has been called into question and currently “[a]n ongoing debate surrounds the appropriateness of terms including ‘convict,’ ‘ex-con,’ ‘ex-offender,’ and ‘returning citizen.’” Katrina Liu, *Reentering the City of Brotherly Love: Expanding Equal Employment Protection for Ex-Offenders in Philadelphia*, 22 TEMP. POL. & C.R. L. REV. 175, 175 n.\* (2012). In its guide to best practices, the National Employment Law Project advises advocates to “[a]void stigmatizing language such as ‘ex-offender’ [in favor of] terms that lead with ‘people,’ such as ‘people with records.’” NAT’L EMP’T LAW PROJECT, BEST PRACTICES AND MODEL POLICIES: CREATING A FAIR CHANCE POLICY 1 (2015), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Best-Practices-Models.pdf> [<https://perma.cc/JZV2-M7RK>]. In 2013, Philadelphia Mayor Michael Nutter proposed legislation to amend the Philadelphia City Code to replace the term “ex-offender” with the term “returning citizen” and signed an Executive Order declaring that all City of Philadelphia offices and employees must use the term “returning citizen.” Victor Fiorillo, *Philadelphia to Ban Term “Ex-Offenders” in Favor of “Returning Citizens,”* PHILA. MAG. (Oct. 24, 2013), <http://www.phillymag.com/news/2013/10/24/mayor-nutter-lets-call-returning-citizens-ins-tead-ex-offenders> [<https://perma.cc/ER4Q-87NZ>]. The term “returning citizen” is not appropriate for this comment because it concerns not only people who have been convicted but also those who have merely been arrested or charged.

those applicants with criminal records.<sup>2</sup> This form of hiring discrimination has an impact on an increasingly large segment of the workforce. As of August 2014, an estimated seventy million adults in the United States had arrest or conviction records that make it difficult to find work.<sup>3</sup> Pervasive employment discrimination on the basis of criminal history is troubling because it both increases rates of recidivism<sup>4</sup> and has a disparate impact on African American and Hispanic men.<sup>5</sup> Unless it is legally limited, this practice will continue to grow as personal information—including criminal history—becomes easier and cheaper to access online.<sup>6</sup>

Legal scholars have advocated for a number of different approaches to combat this form of discrimination, including Equal Employment Opportunity Commission (EEOC) enforcement under Title VII of the Civil Rights Act of 1964,<sup>7</sup> an antidiscrimination statute making criminal history a protected

<sup>2</sup> See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELEEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 & 27 n.1 (2011) (citing SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010)) (reporting that 92% of employers surveyed used criminal background checks on job candidates).

<sup>3</sup> NAT'L EMP'T LAW PROJECT, SEIZING THE BAN THE BOX MOMENTUM TO ADVANCE A NEW GENERATION OF FAIR CHANCE HIRING REFORMS 2 (2014), <http://www.nelp.org/content/uploads/2015/03/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf> [<https://perma.cc/76E6-V5D4>].

<sup>4</sup> See Michael L. Foreman, Professor, Pa. State Univ. Dickinson Sch. of Law, Statement at the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), <http://www.eeoc.gov/eeoc/meetings/11-20-08/foreman.cfm> [<https://perma.cc/45NQ-RQHZ>] ("Placement programs that specialize in rehabilitating ex-offenders frequently note the inverse correlation between recidivism rates and employment opportunities.").

<sup>5</sup> These blanket bans on hiring applicants with criminal records have a greater impact on minorities because minority men are incarcerated at higher rates than White men. See EEOC, EEOC ENFORCEMENT GUIDANCE 915.002, at 3 (Apr. 25, 2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [<https://perma.cc/LMJ3-LQL6>] (finding that one in seventeen White men will serve time in prison in their lifetimes compared with one in six Hispanic men and one in three Black men); see also Devah Pager, Professor, Princeton Univ., Statement at the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), <http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm> [<https://perma.cc/J6PS-KNFY>] (reporting the results of a study which show "a strong reluctance among employers to hire applicants with criminal records, especially when considering black ex-offenders").

<sup>6</sup> See Laura Moskowitz, Staff Attorney, Nat'l Emp't Law Project, Statement at the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), <http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm> [<https://perma.cc/4842-3YJ9>] (citing EVREN ESEN, SOC'Y FOR HUMAN RES. MGMT., WORKPLACE VIOL[ENCE] SURVEY (2004)) (reporting a dramatic increase in the percentage of companies performing criminal background checks from 51% in 1996 to 80% in 2003).

<sup>7</sup> See generally Jonathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197 (2014) (advocating for further EEOC enforcement under Title VII as the most effective means of preventing discrimination based on criminal records).

characteristic,<sup>8</sup> a redemptive-focused approach such as expungement or sealing of criminal records,<sup>9</sup> and Ban the Box laws.<sup>10</sup> Although EEOC enforcement under Title VII has had some success in protecting people with criminal records from employment discrimination, it is inherently limited by the nature of the EEOC and the legal doctrine of disparate impact.<sup>11</sup> The EEOC has also taken action to discourage employment discrimination against ex-offenders by issuing new enforcement guidelines for Title VII; however, these guidelines do not have the force of law.<sup>12</sup> Increased enforcement under the existing statutory scheme of Title VII is an inherently limited means of addressing the problem of hiring discrimination practiced against people with criminal records.

The existing legal framework for preventing employment discrimination on the basis of criminal history leaves gaps in protection. The Ban the Box movement, which emerged from the grassroots community of formerly incarcerated people, is a means of bridging these gaps in legal protection.<sup>13</sup> Although the specific provisions of Ban the Box laws vary across jurisdictions, they are all premised on the belief that questions about criminal history should be banned from initial job applications.<sup>14</sup> Over the last ten years, the Ban the Box movement has become increasingly widespread; as of December 2015, approximately ninety cities and municipalities across the country and twenty-one states have enacted some form of Ban the Box legislation.<sup>15</sup> A comparison of

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<sup>8</sup> See Mullings, *supra* note 1, at 284-88 (arguing that advocates should push for the passage of an entirely new federal statute to protect people with criminal records).

<sup>9</sup> See generally Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963 (2013) (advocating for a redemptive-focused means of preventing employment discrimination against people with criminal records through expungement or sealing of criminal records).

<sup>10</sup> See Adriel Garcia, Comment, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current Ban the Box Legislation*, 85 TEMP. L. REV. 921, 931 (2013) (arguing that a Ban the Box law would provide the best means of balancing the interests of people with criminal records with employers' concerns about liability for negligent hiring).

<sup>11</sup> Because criminal history is not a protected characteristic, actions brought by the EEOC under Title VII must show that the employer's refusal to hire people with criminal records has a disparate impact on racial minorities or another protected class. See *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975) (finding that a company policy disqualifying job applicants who had been convicted of crimes had a disparate impact on black job applicants and was thus in violation of Title VII). Furthermore, the EEOC may only take enforcement action against employers with fifteen or more employees. See *Overview*, EEOC, <http://www.eeoc.gov/eeoc/index.cfm> [https://perma.cc/H5U5-YQHL] (last visited Apr. 15, 2016).

<sup>12</sup> See EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 3.

<sup>13</sup> The Ban the Box movement was founded in 2004 by a national civil rights group of formerly incarcerated people called "All of Us or None." See *About: The Ban the Box Campaign*, BAN BOX CAMPAIGN, <http://bantheboxcampaign.org/?p=20> [https://perma.cc/A2KZ-U6V9] (last visited Apr. 15, 2016).

<sup>14</sup> See *id.* ("The campaign challenges the stereotypes of people with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, *not* past convictions.").

<sup>15</sup> See MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2016), <http://www.nelp>.

the country's many Ban the Box laws reveals several key differences, including which employers are restricted, at what point in the application process employers may inquire into an applicant's criminal history, whether employers may consider criminal history, and the means by which the laws are enforced.

Some legal scholars have argued that Ban the Box laws are inherently ineffective in preventing employment discrimination against people with criminal records.<sup>16</sup> It is true that certain provisions in many of the existing Ban the Box laws limit their efficacy. For example, many states' policies (including those of California) apply only to public employers.<sup>17</sup> However, a model Ban the Box law can be crafted by synthesizing the most effective elements of existing laws. When adopted at the city or state level, this model Ban the Box law would be a highly effective means of providing legal protection for job applicants with criminal records.

Part I of this Comment describes the problem of employment discrimination against people with criminal records, exploring the prevalence of this practice, some of the reasons and motivations underlying it, and its consequences for job applicants with criminal records, especially the troubling disparate impact on African American and Hispanic men. Part II examines the limitations in the existing legal framework for preventing employment discrimination against people with criminal records under Title VII and the disparate impact doctrine. Part III details the Ban the Box movement, and compares the provisions of various versions of Ban the Box laws that have been enacted. Part IV synthesizes the most effective elements of enacted Ban the Box laws to propose a model Ban the Box law. Finally, the Comment concludes with an argument that this model Ban the Box law would provide a highly effective means of protecting job applicants with criminal records from employment discrimination.

## I. THE PROBLEM OF DISCRIMINATION AGAINST PEOPLE WITH CRIMINAL RECORDS IN HIRING

### A. *The Prevalence and Negative Impacts of Employment Discrimination Against People with Criminal Records*

Hiring discrimination on the basis of criminal history is a pervasive problem that continues to grow at an alarming rate, due to the simultaneous increases in incarceration in the United States and the amount of personal information available online. The United States incarcerates its citizens at a

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org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf [https://perma.cc/9WU  
E-HEFM] (summarizing the Ban the Box measures that have been enacted).

<sup>16</sup> See, e.g., Smith, *supra* note 7, at 218 (advocating further EEOC enforcement under Title VII to prevent this kind of discrimination and dismissing the effectiveness of Ban the Box laws in that capacity).

<sup>17</sup> See RODRIGUEZ & AVERY, *supra* note 15, at 6.

greater rate than any other nation in the world.<sup>18</sup> In this climate, “[a]rrest, conviction, and incarceration are becoming increasingly common life events.”<sup>19</sup> Approximately sixteen million adults in the United States are considered either felons or ex-felons.<sup>20</sup> Due to these increasing rates of arrest and incarceration, an estimated seventy million American adults have criminal records that make it difficult for them to find employment.<sup>21</sup>

People with criminal records find it particularly difficult to secure employment because employers increasingly use criminal background checks to screen out job applicants. The percentage of employers performing criminal background checks has increased dramatically as these checks have become easier and cheaper to perform.<sup>22</sup> In one recent study, more than 90% of employers reported using criminal background checks in making their hiring decisions.<sup>23</sup> Because the information is so readily available, job applicants with criminal records are placed at a serious disadvantage. Some employers completely screen out applicants with criminal records while others are simply less likely to hire people with criminal records because they hold negative stereotypes about people who have committed or have been accused of committing crimes.<sup>24</sup> The cumulative effect of high incarceration rates and widespread criminal background checks on job applicants is pervasive employment discrimination against a large and growing segment of the general population.

Employment discrimination against people with criminal records injures vulnerable populations by increasing recidivism. When a person with a criminal record is denied equal opportunities for employment, it becomes more difficult for him or her to stay out of trouble with the law. Meaningful employment is vital to people reentering society from prison because people with criminal records who establish a stable working environment are much less likely to reoffend.<sup>25</sup>

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18 See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3-6 (10th ed. 2013) (ranking the United States as the country with highest prison population at 2,239,751).

19 Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 285 (2006).

20 See *id.* at 283, 285 (revealing that 7.5% of American adults are felons or ex-felons and that by 2004 “more incarcerated and nonincarcerated felons [were] serving sentences . . . than at any other time in U.S. history”).

21 See NAT’L EMP’T LAW PROJECT, *supra* note 3, at 2 (discussing the difficulties that approximately seventy million adults with arrests or convictions experience in finding employment given the proliferation of criminal background checks on applications).

22 See Moskowitz, *supra* note 6 and accompanying text.

23 See *supra* note 2 and accompanying text.

24 See Pager, *supra* note 5 (theorizing that criminal convictions are disqualifying for job applicants because they are commonly associated with negative behaviors such as dishonesty or violence); see also Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006) (finding that over 60% of employers indicate an aversion to hiring ex-offenders).

25 See Foreman, *supra* note 4 and accompanying text.

However, pervasive employment discrimination on the basis of criminal records means that many people with criminal records “remain marginalized from the work force and at greater risk of returning to crime.”<sup>26</sup> Employers who discriminate in hiring on the basis of criminal records deny employment opportunities to people who are most sorely in need of stable employment.

Employment discrimination against people with criminal records further injures vulnerable populations because it disparately impacts African American and Hispanic men. Minority men are incarcerated at higher rates than White men. The EEOC found that one in three Black men will serve time in prison in their lifetimes as compared to one in six Hispanic men and only one in seventeen White men.<sup>27</sup> Further, minority men are incarcerated at higher rates than White men for the same crimes.<sup>28</sup> For instance, “a Black person is 3.73 times more likely to be arrested for marijuana possession than a White person,” even though Black and White people “use marijuana at similar rates.”<sup>29</sup> Increased incarceration rates of minority men mean that facially neutral hiring policies that screen out all applicants with criminal records are likely to screen out more minority men than any other group.

This disparate impact is heightened when criminal-record bias is compounded by racism. A criminal record does not have the same effect on the success of a White man’s job application as it does on the success of a Black or Hispanic man’s. For Black people with criminal records, the stigma of incarceration “is compounded by the effects of racial stigmatization and stereotyping.”<sup>30</sup> Indeed, employers are especially reluctant to hire job applicants with criminal records if the applicant is Black.<sup>31</sup> In fact, one study found that “even when a white employer knows that a white applicant she is interviewing is a convict and the black applicant has never been in trouble with the law, she is as likely to hire

<sup>26</sup> Timothy Williams & Tanzina Vega, *A Plan to Cut Costs and Crime: End Hurdle to Job After Prison*, N.Y. TIMES (Oct. 23, 2014), <http://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html> [<https://perma.cc/9G6Z-PZR9>].

<sup>27</sup> See EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 3; see also CHRISTOPHER HARTNEY & LINH VUONG, NAT’L COUNCIL ON CRIME AND DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM* 3 (2009) (finding that “[n]ationwide, African Americans were incarcerated in state prison at 6 times the rate for Whites” and “Hispanics were incarcerated at over 1.5 times the rate for Whites”).

<sup>28</sup> See, e.g., Brad Heath, *Racial Gap in U.S. Arrest Rates: “Staggering Disparity,”* USA TODAY (Nov. 19, 2014, 2:24 PM), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207> [<https://perma.cc/8ZKM-HEUL>] (“Black[ people] are more likely than others to be arrested in almost every city for almost every type of crime.”).

<sup>29</sup> ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 4 (2013), <https://www.aclu.org/files/assets/aclu-thewarona-marijuana-rel2.pdf> [<https://perma.cc/6LRH-GZLP>].

<sup>30</sup> Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269 (2009).

<sup>31</sup> See Pager, *supra* note 5 and accompanying text.

the white applicant as the black applicant.”<sup>32</sup> Thus, the stigma of having a criminal conviction does not have the same disqualifying effect for White job applicants as it does for Black job applicants.<sup>33</sup> Bias against people with criminal records combines with racism in hiring to have an extremely detrimental impact on employment opportunities for Black and Hispanic men with criminal records. Concomitant with having fewer employment opportunities, minority men have higher rates of recidivism than White men.<sup>34</sup> Employment discrimination against people with criminal records is a self-fulfilling prophecy because employers who refuse to give people with criminal records a second chance by hiring them increase the likelihood that they will reoffend.

B. *Employers’ Motivations for Refusing to Hire  
Job Applicants with Criminal Records*

Hiring discrimination can be attributed partially to negative stereotypes about people with criminal records. Some legal scholars argue that employers should always be able to consider the criminal history of job applicants because “past criminal conduct necessarily reflects upon someone’s character and . . . character traits are usually permissible and even anticipated factors to consider in most employment decisions.”<sup>35</sup>

However, when employers consider applicants’ criminal history, they rely on unfounded stereotypes of people with criminal records rather than making individual assessments of character. The stigmatizing effect of having a criminal record is such that “offenders are assumed to be dangerous, aggressive, and unworthy of trust, and . . . are met with suspicion and hostility.”<sup>36</sup> Further, some researchers have theorized that employers are averse to hiring applicants

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<sup>32</sup> Ezekiel Edwards, *White Convicts as Likely to Be Hired as Blacks Without Criminal Records*, DMI BLOG (Sept. 25, 2007, 9:09 AM), [http://dmiblog.com/archives/2007/09/white\\_convicts\\_as\\_likely\\_to\\_be.html](http://dmiblog.com/archives/2007/09/white_convicts_as_likely_to_be.html) [<https://perma.cc/P7MZ-2RX4>].

<sup>33</sup> See *id.* (arguing that the results of a Princeton study show that “blacks who have never stepped foot inside a prison face not only unequal competition from whites without rap sheets and comparable competition from similarly situated blacks, but they can also be squeezed out of the job market by whites exiting penitentiaries” and concluding that it is not “[a] level playing field” for Black job applicants with criminal records).

<sup>34</sup> HARTNEY & VUONG, *supra* note 27, at 3.

<sup>35</sup> Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 827-28 (2002); see also *id.* at 853 (arguing further that laws which preclude consideration of job applicants’ criminal records are undesirable); Lauren Timmons, Comment, *Whose Role Is It Anyway? Applying Title VII to Employers’ Criminal Conviction Record Policies*, 49 WAKE FOREST L. REV. 609, 621 (2014) (arguing that employers should be able to consider job applicants’ criminal records because they “have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable” and that criminal records are evidence of these tendencies to commit crimes and be untrustworthy).

<sup>36</sup> Lyles-Chockley, *supra* note 30, at 269.



with criminal records because they think that a criminal record correlates with poor work performance.<sup>37</sup> This stereotype, however, is unfair to these applicants because a correlation between poor work behavior and past criminal behavior has not been substantiated.<sup>38</sup> Although employers may contend that their concern with hiring people with criminal records derives from their interest in maintaining a safe workplace environment, no study has ever shown that employees with criminal records commit a higher proportion of workplace crimes than employees without criminal records.<sup>39</sup>

Admittedly, employers' workplace safety concerns become more salient when considered in the context of employer liability for negligent hiring. Performing criminal background checks on applicants is a way for employers to limit liability. In most jurisdictions, "negligent hiring is a cause of action in which liability is predicated on the employer's hiring of a person who the employer knew or should have known would create a foreseeable risk of injury to others."<sup>40</sup> Claims alleging negligent hiring typically arise when an employee harms a third party and the third party brings a claim against the employer alleging that the employer failed to screen applicants scrupulously.<sup>41</sup> In such actions, an employer breaches its duty of care if it fails to make a reasonable inquiry into an applicants' background at the time of hiring; however, "there is no requirement, as a matter of law, that an employer make an inquiry with law-enforcement agencies about an employee's possible criminal record, even where the employee is to deal regularly with the public."<sup>42</sup> Although the current formulation of negligent hiring lacks "a uniform legal standard regarding an employer's duty to perform background checks,"<sup>43</sup> it is clear that the law of negligent hiring liability does not require employers to disqualify all job applicants who have criminal records.<sup>44</sup>

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37 See Pager, *supra* note 5 (theorizing that criminal convictions are disqualifying for job applicants because they are associated with "negative behaviors—like dishonesty, violence, or unreliability—that suggest poor performance on the job"); see also Holzer et al., *supra* note 24, at 453 (explaining that employers may screen criminal records of potential employees because they "place a premium on trustworthiness and may have little confidence in ex-offenders").

38 See RODRIGUEZ & EMSELLEM, *supra* note 2, at 3 ("[E]ven the assumption that the existence of a criminal record accurately predicts negative work behavior is subject to some debate . . .").

39 See Liu, *supra* note 1, at 179-80 (highlighting the lack of research demonstrating a correlation between employment of people with criminal records and workplace crime).

40 Garcia, *supra* note 10, at 931.

41 *Id.* at 931-32.

42 Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 990 (2006).

43 Garcia, *supra* note 10, at 939.

44 See Gerlach, *supra* note 42, at 991-92 (arguing that "an employer whose primary concern is avoiding liability has every reason to keep itself from being fully informed" and that such an employer may actually choose to remain ignorant about the applicants' criminal history to protect itself from liability).

## II. THE LIMITATIONS OF THE CURRENT LEGAL FRAMEWORK UNDER TITLE VII FOR PREVENTING EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH CRIMINAL RECORDS

There is currently no federal statute that explicitly protects people with criminal records from employment discrimination.<sup>45</sup> Although some advocates have called for the passage of federal civil rights legislation to protect people with criminal records,<sup>46</sup> the enactment of such a law is not likely to occur in the current political climate.<sup>47</sup> Title VII does not explicitly protect people with criminal records from employment discrimination;<sup>48</sup> however, the EEOC has successfully brought actions under Title VII showing that an employer's refusal to hire people with criminal records has a disparate impact on racial minorities or another protected class and is thus impermissible.<sup>49</sup> There is disagreement as to whether EEOC enforcement under Title VII is permissible, let alone the best means of protecting people with criminal records from employment

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<sup>45</sup> See Garcia, *supra* note 10, at 941 (discussing “the lack of protection at the federal level” for job applicants with criminal records). However, the Fair Credit Reporting Act (FCRA) places some restrictions on how employers may use criminal record information obtained through background checks to make employment decisions. 15 U.S.C. § 1681b (2012). The FCRA governs employers' use of consumer reports, which include background checks and criminal records. Before an employer takes an adverse employment action based on information found in a background check, the employer must provide the employee with notice, a copy of the report, and a description of the employee's rights under the FCRA to dispute the accuracy of the information in the report with the reporting agency. *Id.* § 1681b(b)(3). Some legal scholars have proposed amending the FCRA as a way of combating employment discrimination against people with criminal records. See, e.g., Ryan D. Watstein, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 608 (2009) (proposing an amendment to the FCRA requiring employers who use information obtained through criminal background checks in making employment decisions do so in ways that are relevant to employment).

<sup>46</sup> See Mullings, *supra* note 1, at 285 (“Confronting the issue of employer discrimination [against people with criminal records] requires a statute—a legislative statement—that unconsidered discrimination is not acceptable.”).

<sup>47</sup> See Christopher Doty, Comment, “*Because of Such Individual's Race: Employers' Use of Criminal Records as Unlawful Employment Discrimination*,” 44 CUMB. L. REV. 79, 113 (2013) (explaining that many lawmakers oppose such legislation because they believe that it would “create ‘protected classes’ for ex-offenders, who perhaps deserve no such protection”).

<sup>48</sup> Title VII protects members of specific classes from employment discrimination, but criminal history is not included. See 42 U.S.C. § 2000e-2(a)(1) (2012) (making it illegal for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin”). Although adding criminal history as a protected characteristic under Title VII is a possible means of combating employment discrimination against people with criminal records, this idea has been met with very strong opposition. See Doty, *supra* note 47, at 113 (“Some argue that ex-offenders lack the immutable characteristics shared by other protected classes; after all, does one not *choose* to participate in crime?”).

<sup>49</sup> See, e.g., *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1290 (8th Cir. 1975) (finding that a company policy disqualifying job applicants who had been convicted of crimes had a disparate impact on black job applicants).

discrimination.<sup>50</sup> Although the EEOC can certainly be a “powerful and effective ally” in combatting employment discrimination on the basis of criminal records, its ability to prevent this kind of discrimination is limited both by the doctrine of disparate impact and by the nature of the EEOC’s authority.<sup>51</sup>

A. *Equal Employment Opportunity Commission (EEOC) Enforcement  
of Title VII to Protect People with Criminal Records  
Under the Disparate Impact Doctrine*

Enforcement actions brought under Title VII are a primary way in which the EEOC combats employment discrimination against people with criminal records. Title VII protects employees from discrimination on the basis of protected characteristics, including race, and the EEOC is the federal government agency designated to enforce Title VII.<sup>52</sup> Because criminal history is not a protected characteristic, actions brought by the EEOC against employers who discriminate against people with criminal records are rooted in the doctrine of disparate impact. Under this doctrine, a hiring policy violates Title VII when a plaintiff shows that a facially neutral policy has the effect of disproportionately screening out members of a protected group (e.g., African Americans or women) and the employer fails to show a business necessity.<sup>53</sup>

The doctrine of disparate impact was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*<sup>54</sup> In *Griggs*, Black employees brought a class action alleging that their employer’s facially neutral policy of requiring a high school education or passing a general intelligence test as a condition of employment violated Title VII when the policy was shown to disqualify Black applicants at a substantially higher rate than White applicants and was not related to job performance.<sup>55</sup> The Court recognized that “Congress directed

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<sup>50</sup> Compare Smith, *supra* note 7, at 218 (“[T]he EEOC has shown through recent actions that it is not only a venue where people with criminal records can find legal remedies, but also where meaningful systematic changes can be made to the ways in which employers use criminal records . . .”), with Timmons, *supra* note 35, at 625, 627 (calling the EEOC’s enforcement actions and new enforcement guidelines an administrative overreach, and arguing that the EEOC is “actually attempting to create a new Title VII protected class for individuals with criminal conviction records. Such an extension, however, is ‘a legislative responsibility’” and should not be entrusted to the EEOC).

<sup>51</sup> See Smith, *supra* note 7, at 227-28 (arguing that efforts to prevent hiring discrimination against people with criminal records should include the EEOC).

<sup>52</sup> See *Overview*, *supra* note 11 (stating the agency’s mission to enforce federal laws dealing with employment discrimination).

<sup>53</sup> Candice S. Thomas, Comment, “*Felony*” Is the New N-Word: Statistical Evidence to Measure a Disparate Impact Claim for the Use of Criminal Records Checks in Employment Decisions, 82 U. CIN. L. REV. 1295, 1298 (2014).

<sup>54</sup> 401 U.S. 424, 430-31 (1971) (recognizing that a facially race-neutral policy can still constitute impermissible race discrimination if it has a disproportionate impact on racial minorities and is not justified by a business necessity).

<sup>55</sup> *Id.* at 425-26.

the thrust of the Act to the *consequences* of employment practices, not simply the motivation” and held that, absent a showing that the requirement was sufficiently related to the job in question as to be a “business necessity,” the policy violated Title VII.<sup>56</sup> This decision is frequently cited as “the single most important Title VII decision, both for the development of the law and in its impact on the daily lives of the American workers” because of its articulation of the doctrine of disparate impact.<sup>57</sup>

When challenging a hiring policy disfavoring applicants with criminal records, plaintiffs must show that an employer’s refusal to hire ex-offenders has a disparate impact on racial minorities or another protected class.<sup>58</sup> In 1975, the Eighth Circuit became the first court to apply the doctrine of disparate impact in the context of criminal background checks. In *Green v. Missouri Pacific Railroad*, plaintiffs challenged a hiring policy that disqualified all applicants who had been convicted of any crime other than a minor traffic offense on the basis that such a policy had a disparate impact on Black applicants.<sup>59</sup> The Eighth Circuit found that the policy disproportionately excluded Black applicants without being justified by business necessity.<sup>60</sup> In so holding, the court articulated three factors that must be considered by the employer in order to support a business necessity defense: (1) the nature of the underlying crime, (2) the time elapsed since conviction, and (3) the nature of the position being sought.<sup>61</sup> *Green* established the applicability of Title VII through disparate impact to employment policies that discriminate against people with criminal records. Indeed, following *Green*, the EEOC adopted in 1987 a categorical rule “that it is unlawful, without

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<sup>56</sup> *Id.* at 424, 432. The Court’s decision in *Griggs* thus laid the groundwork for the business necessity defense. This defense requires that employers demonstrate that a particular test or selection process “bear[s] a demonstrable relationship to successful performance” in the job position for which it is used. Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 247-48 (2013).

<sup>57</sup> Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1181 (1994) (quoting H.R. REP. NO. 101-644, pt. 1, at 19 (1990)).

<sup>58</sup> See Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 6 (2012) (discussing the first phase of Title VII suits for discrimination on the basis of criminal records in which “the plaintiff can make a prima facie case of disparate impact by showing that an employment practice has an adverse impact on members of a protected group, usually through the use of statistical evidence”).

<sup>59</sup> 523 F.2d 1290, 1293 (8th Cir. 1975).

<sup>60</sup> *Id.* at 1290.

<sup>61</sup> *Id.* at 1297. These factors have since become known as the *Green* factors. See Doty, *supra* note 47, at 107. Versions of these factors have been incorporated into a number of the statutes aimed at preventing employment discrimination against people with criminal records. See, e.g., COLO. REV. STAT. § 24-5-101 (2014) (requiring certain public employers to consider (1) the nature of the conviction, (2) the relationship between the conviction and the position, (3) rehabilitation, and (4) the time elapsed “when deciding whether the conviction disqualifies the applicant from the position”).

business necessity, to disqualify job candidates based on criminal records.”<sup>62</sup> However, the clause “without business necessity” has loomed increasingly large.

The business necessity defense presents a huge obstacle for disparate impact claims based on hiring policies that disqualify applicants with criminal records. Since the 1980s, Title VII–based disparate impact suits have proven largely unsuccessful.<sup>63</sup> Many courts have “embraced a more employer-deferential interpretation of the business necessity defense” in cases involving hiring policies that broadly disqualify applicants based on their criminal histories.<sup>64</sup> For example, the Third Circuit’s decision in *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)* broadened the scope of the business necessity defense in the context of criminal records.<sup>65</sup> The court held that even though a SEPTA hiring policy that screened out applicants with criminal records had a disparate impact on African American applicants, it was lawful because it was supported by a business necessity.<sup>66</sup> The Third Circuit rejected the plaintiff’s argument that Title VII requires hiring policies to consider the individual circumstances of each applicant and held that “[i]f a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.”<sup>67</sup> In light of these developments, there is a possibility that employers may use the business necessity defense in conjunction with negligent hiring law to claim that criminal background policies that have a racially disparate impact are necessary to avoid liability.<sup>68</sup>

The efficacy of EEOC enforcement as a means of protecting people with criminal records from employment discrimination is limited both by the structure of the agency and the legal doctrine. Because Title VII enforcement actions must proceed using the disparate impact doctrine, job applicants in these suits must be from a protected group, such as racial minorities.<sup>69</sup> The plaintiffs

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<sup>62</sup> Harwin, *supra* note 58, at 10.

<sup>63</sup> See Thomas, *supra* note 53, at 1301 (“Since the 1980s, plaintiffs have lost the vast majority of disparate impact cases, usually not even surviving summary judgment. The plaintiff success rate in disparate impact claims in federal district courts dropped from forty-eight percent in the early 1980s to just thirteen percent by 2002.”).

<sup>64</sup> Smith, *supra* note 7, at 208.

<sup>65</sup> See 479 F.3d 232 (3d Cir. 2007) (examining a Title VII claim that alleged that the employer transportation agency’s hiring policy had a disparate impact on Black applicants); see also Aaron F. Nadich, Comment, *Ban the Box: An Employer’s Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 786 (2014) (asserting that the “disparate impact theory has been largely under attack and eroding since the late 1980s” and citing an example of this trend).

<sup>66</sup> *El*, 479 F.3d at 247.

<sup>67</sup> *Id.* at 245.

<sup>68</sup> See Jordan Segall, Comment, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J.L. & SOC. CHANGE 159, 176 (2011) (“[I]n the future, contemporary employers could use the emergence of the law of negligent hiring to make the case that ex-felon discrimination is a business necessity.”).

<sup>69</sup> See Mullings, *supra* note 1, at 281 (“Ultimately, the real failure of the use of Title VII in this area may be that claims based on ex-offender status must necessarily tie criminality to race (African

in *Green* and *El* were both African American.<sup>70</sup> Although it is true that discrimination against ex-offenders has a disproportionate impact on African American and Hispanic men,<sup>71</sup> it also has an adverse impact on White men.<sup>72</sup> Although it may be an agency priority to combat hiring discrimination against disproportionately impacted minority offenders, Title VII does not offer a remedy to all job applicants with criminal records.

Additionally, some people with criminal records are without a remedy due to the size of their employer. The EEOC has statutory authority to bring enforcement actions only against employers with fifteen or more employees.<sup>73</sup> Enforcement of Title VII is also limited by the administrative structure of the EEOC. Title VII mandates that complainants file a charge of discrimination with the EEOC before commencing a private lawsuit and that the EEOC investigate that claim before any action can proceed.<sup>74</sup> Even advocates of EEOC enforcement acknowledge that this is an arduous process in which complainants can wait months or even years for the EEOC to address their claims.<sup>75</sup>

Despite these limitations, the EEOC has enjoyed some success in enforcing Title VII in the context of hiring policies that discriminate against people with criminal records. In 2012, the EEOC entered into a \$3.13 million settlement with Pepsi Beverages after the agency's investigation demonstrated that Pepsi's criminal background policy had a disproportionate effect on African American applicants.<sup>76</sup> The EEOC also entered into a settlement with J.B. Hunt Transport, Inc. (J.B. Hunt), when it concluded that the company did not have a valid business necessity defense for refusing to hire a truck driver with a criminal conviction.<sup>77</sup> In addition to monetary damages, both J.B. Hunt and Pepsi

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American), national origin (Hispanic), or other protected characteristics."); see also Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1030 (2011) ("Title VII only protects ex-offenders who are part of a protected class, which leaves many ex-offenders without a remedy.").

<sup>70</sup> See *El*, 479 F.3d at 237; *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1292 (8th Cir. 1975).

<sup>71</sup> See *supra* pp. 7–8.

<sup>72</sup> The EEOC has found that one in seventeen White men will serve time in prison during their lifetimes. EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 3.

<sup>73</sup> *Overview*, *supra* note 11.

<sup>74</sup> Emily J. Carson, *Off the Record: Why the EEOC Should Change Its Guidelines Regarding Employers' Consideration of Employees' Criminal Records During the Hiring Process*, 36 J. CORP. L. 221, 225–26 (2010) (describing the administrative procedures and requirements for filing a complaint with the EEOC under Title VII in great detail).

<sup>75</sup> See, e.g., Smith, *supra* note 7, at 225 ("This is not to say that the EEOC's administrative enforcement process provides a perfect remedy.").

<sup>76</sup> Press Release, EEOC, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), <http://www1.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm> [<https://perma.cc/Z7WS-2352>].

<sup>77</sup> Smith, *supra* note 7, at 223–24.

agreed to revise their criminal record hiring policies.<sup>78</sup> The EEOC also filed suit in 2013 against BMW and Dollar General Corp. for their use of criminal records in hiring; however, these suits were met with strong opposition.<sup>79</sup> While the EEOC entered into a \$1.6 million settlement with BMW,<sup>80</sup> the Dollar General case remains ongoing.<sup>81</sup>

### B. *The EEOC's 2012 Enforcement Guidelines for Title VII*

In 2012, the EEOC released new enforcement guidelines for Title VII, in which the agency strongly discouraged employment discrimination on the basis of criminal records.<sup>82</sup> This guidance was issued after *El v. Southeastern Pennsylvania Transportation Authority*, in which the Third Circuit disparaged the EEOC's previous guidance as insufficiently researched and unpersuasive.<sup>83</sup> The new guidelines were also issued in response to calls by legal scholars and advocates for action on the part of the EEOC.<sup>84</sup> For example, the ACLU encouraged the EEOC to adopt much more robust guidance.<sup>85</sup> In 2008, the EEOC convened a meeting during which agency officials heard testimony from scholars and researchers on the effect of employment discrimination on

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<sup>78</sup> *Id.* (explaining that both Pepsi and J.B. Hunt agreed to review and revise their criminal records policies, while J.B. Hunt also agreed to provide training to its hiring personnel).

<sup>79</sup> See Timmons, *supra* note 35, at 619 (explaining that in response to the EEOC's lawsuits, "[i]n July 2013, nine state Attorneys General (the 'AGs') sent a letter to the EEOC criticizing its position on criminal background checks. The AGs argued that the EEOC's recent lawsuits and application of the law set forth in the Guidance were 'misguided and a quintessential example of gross federal overreach.' The AGs also expressed concern that the EEOC's 'true purpose may not be the correct enforcement of the law, but rather the illegitimate expansion of Title VII protection to former criminals.'" (citing Letter from Nine State Attorneys Gen., to the EEOC 1-2 (July 24, 2013), [http://www.ago.wv.gov/publicresources/Documents/2013-7-24,%20EEOC%20\(bw\).pdf](http://www.ago.wv.gov/publicresources/Documents/2013-7-24,%20EEOC%20(bw).pdf) [<https://perma.cc/F9RX-NEXG>])).

<sup>80</sup> See Press Release, EEOC, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit (Sept. 8, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm> [<https://perma.cc/SP83-8XJC>].

<sup>81</sup> See *EEOC v. Dolgencorp, LLC*, No. 13-4307, 2015 WL 3856403 (N.D. Ill. June 19, 2015).

<sup>82</sup> See generally EEOC ENFORCEMENT GUIDANCE, *supra* note 5 (announcing the EEOC's interpretation of when the use of criminal records in employment decisions violates Title VII).

<sup>83</sup> Thomas, *supra* note 53, at 1303; see also *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 237 (3d Cir. 2007).

<sup>84</sup> See, e.g., Carson, *supra* note 74, at 227 ("The EEOC's guidelines lack clarity and deference. Due to this lack of clarity and deference, courts do not enforce the EEOC's guidelines, and because of this lack of enforcement, employers do not feel the need to adhere to the guidelines." (footnote omitted)).

<sup>85</sup> Email from Laura W. Murphy, Dir., Wash. Legislative Office, ACLU et al., to the EEOC (July 25, 2011), [https://www.aclu.org/files/assets/aclu\\_statement\\_to\\_eeoc\\_on\\_criminal\\_records\\_discrimination\\_7\\_25\\_11\\_corrected.pdf](https://www.aclu.org/files/assets/aclu_statement_to_eeoc_on_criminal_records_discrimination_7_25_11_corrected.pdf) [<https://perma.cc/VQA7-DY5C>] (recommending that the EEOC curtail employers' wide discretion on the use of criminal records).

people with criminal records.<sup>86</sup> In 2012, after soliciting comments from the public, the Commission voted to enact new guidelines.<sup>87</sup>

The EEOC's 2012 Guidance stands strongly against employment discrimination on the basis of criminal records. The Guidance provides, among other things, that an arrest does not establish that criminal conduct has occurred and consequently cautions employers against considering arrests that did not lead to convictions.<sup>88</sup> However, the EEOC clarifies that criminal history is not a protected characteristic under Title VII and that employers should not be completely barred from considering criminal records in employment decisions.<sup>89</sup> Further, the EEOC guidelines provide that the business necessity defense is met when the employer has developed targeted screening practices that consider at least the factors identified by the Eighth Circuit in *Green v. Missouri Pacific Railroad*: the nature of the crime, the time elapsed, and the nature of the job.<sup>90</sup> To satisfy the business necessity defense according to the new guidance, the employer's policy must also include an individualized assessment.<sup>91</sup>

Although the 2012 EEOC guidelines provide explicit and helpful guidance regarding the use of criminal records in hiring under Title VII, there is disagreement over their binding effect. The EEOC is an enforcement agency, not a lawmaking body. Therefore, it has no authority to issue rules regarding Title VII's substantive provisions.<sup>92</sup> While courts may accord some deference to agency guidance, it is generally regarded as a policy statement rather than a binding rule.<sup>93</sup> However, some critics of the Guidance argue that, though not legally binding, the Guidance nonetheless sets a binding norm for employees

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<sup>86</sup> See Foreman, *supra* note 4, at 3 (encouraging employers to "move away from the socially flawed idea that criminal conviction histories serve as an accurate proxy for important job qualifications"); Moskowitz, *supra* note 6, at 2 (asserting that the increased number of Americans with criminal records, racial disparities in the criminal justice system, and employer practices screening out applicants with criminal records disproportionately exclude minority applicants from employment); Pager, *supra* note 5, at 3 (presenting research demonstrating that the relationship between race and criminal record is "large and statistically significant indicating that the penalty of a criminal record is more disabling for black job seekers than whites").

<sup>87</sup> See EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 3; see also Tiffany R. Nichols, Comment, *Where There's Smoke There's Fire?: The Cloud of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance on Criminal Records Under Title VII*, 30 GA. ST. U. L. REV. 591, 606-07 (2014) (detailing the EEOC's process for issuing the guidance).

<sup>88</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 12.

<sup>89</sup> See Thomas, *supra* note 53, at 1304 (summarizing the EEOC's guidelines).

<sup>90</sup> EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 2.

<sup>91</sup> *Id.*

<sup>92</sup> See Smith, *supra* note 7, at 219 ("Congress . . . narrowly prescribed the [EEOC's] rulemaking authority. Specifically, the only delegation of such authority that Title VII grants the EEOC relates to the issuance of suitable procedural regulations.")

<sup>93</sup> See *id.* at 219-20.



because it becomes a de facto substitute for regulation.<sup>94</sup> Consequently, according to one author, the new Guidance constitutes administrative overreach because “the EEOC seemingly promulgated [it] in an effort to extend Title VII protections to ex-offenders—a class that Title VII does not protect—without any legislative action.”<sup>95</sup> Ultimately, it is up to federal courts to determine the degree of deference to afford to the EEOC Guidance, and thus far, courts have been critical of it.<sup>96</sup> It is not yet clear what impact the Guidance will have on hiring policies.

### III. THE WIDE VARIETY OF BAN THE BOX ORDINANCES IN JURISDICTIONS ACROSS THE UNITED STATES

#### A. *The Emergence of the Ban the Box Movement and the Growing Popularity of Ban the Box Laws*

Existing approaches for preventing employment discrimination against people with criminal records leave serious gaps in needed protection.<sup>97</sup> The Ban the Box movement seeks to fill these gaps.<sup>98</sup> Unlike the EEOC’s Title VII enforcement framework, the Ban the Box movement originated in the very community that it seeks to protect. The movement was founded by All of Us or None, a civil rights group made of formerly incarcerated people.<sup>99</sup> A diverse range of advocates in different communities, from legal aid organizations to reentry service providers and elected officials, has since adopted the campaign.<sup>100</sup>

The Ban the Box movement<sup>101</sup> is premised on the theory that making initial merit-based decisions without knowledge of a person’s criminal background will break down stereotypes and result in the hiring of more people with criminal

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<sup>94</sup> See Timmons, *supra* note 35, at 620 (calling attention to EEOC investigations that would follow from the guidance).

<sup>95</sup> *Id.* at 627.

<sup>96</sup> See, e.g., EEOC v. Freeman, 961 F. Supp. 2d 783, 785-87 (D. Md. 2013) (remarking that employer consideration of applicants’ criminal history is necessary and criticizing the EEOC for limiting this practice).

<sup>97</sup> See *supra* Part II (demonstrating that employees of small firms and White job applicants are unprotected, and protection for minority applicants is weakened by the broad business-necessity defense).

<sup>98</sup> See *About*, BAN BOX CAMPAIGN, <http://bantheboxcampaign.org/?p=20#.VreP8ZMrKgQ> [https://perma.cc/6QSR-8MSJ] (last visited Apr. 15, 2016) (explaining that the movement was founded after a series of Peace and Justice Summits where employment discrimination was identified as a barrier to formerly incarcerated people “successfully returning to [their] communities after jail or prison”).

<sup>99</sup> See *id.* (describing the Ban the Box Movement as originating from the ex-offender community in Oakland, California).

<sup>100</sup> See *id.* (cataloging the growth of Ban the Box efforts).

<sup>101</sup> Although this Comment addresses the premise of the Ban the Box movement in the context of employment discrimination, the movement also calls for the elimination of questions about criminal records in other contexts, including housing and college applications. See *id.* (explaining that the Ban the Box movement has begun advocating fair access to housing, and celebrating Newark’s adoption of a Ban the Box ordinance that extends its antidiscrimination policy to housing and college applications).

records.<sup>102</sup> Although Ban the Box laws prohibit questions about criminal history on initial job applications, they do allow employers to learn about applicants' criminal histories later in the hiring process, usually after the first interview.<sup>103</sup> By prohibiting questions about criminal history on initial job applications, Ban the Box laws ensure that people with criminal records who are otherwise qualified for jobs can interview with employers.<sup>104</sup> Theoretically, "[p]ersonal contact with an applicant . . . can help [an] employer to develop a 'gut feeling' about whether or not this individual is likely to diverge from the stereotype of the ex-con."<sup>105</sup> Although some scholars argue that this paradigm is flawed because employers may still refuse to hire applicants based on their criminal records,<sup>106</sup> many studies have found that applicants with criminal records who are able to interact personally with employers are significantly more likely to receive job offers than applicants with criminal records who do not have that opportunity.<sup>107</sup>

In the last ten years, the Ban the Box movement has been highly effective in obtaining legislative and social change. Since being founded by All of Us or None, the Ban the Box movement has spread across the country, in part due to the efforts of the National Employment Law Project (NELP).<sup>108</sup> In the past seven years, approximately ninety cities and municipalities across the country, as well as twenty-one states, have enacted some form of a Ban the

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102 See Mullings, *supra* note 1, at 282 (listing several of the objectives of Ban the Box laws, including the hope that "[a]n applicant with a criminal record can have a fair shot at being considered on the merits of his qualifications rather than being automatically excluded because of that criminal record. A corollary of that effect is that covered employers may begin to learn that ex-offenders might be qualified workers despite their records. Perhaps most importantly, ban the box provisions make a significant statement about public policy regarding the employment of ex-offenders.").

103 See *infra* pp. 20–21.

104 See *id.*

105 PAGER & WESTERN, *supra* note 1, at 16; see also Garcia, *supra* note 10, at 931 ("Ban the Box legislation can force employers to, at least initially, consider the applicant on his merits and not on the basis of his past. Ban the Box statutes aim to put ex-offenders 'on equal footing with other candidates,' so that ex-offenders may have the chance to explain their criminal histories in-person during an interview.").

106 See Smith, *supra* note 7, at 217 ("[A]n employer who has decided to reject an applicant because of her criminal history may use information uncovered during the interview as a pretextual justification for the decision to deny the applicant the position.").

107 See PAGER & WESTERN, *supra* note 1, at 16 ("Employment prospects [for applicants with criminal records] improve significantly for applicants who have a chance to interact with the hiring manager."); see also *Recent Developments in Criminal Background Screens; Ban the Box Takes Hold*, ABA SEC. LAB. & EMP. L. (Sept. 2014), [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_flash/2014/sept2014/feature.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/2014/sept2014/feature.html) [<https://perma.cc/P6QW-WFFR>] (disclosing the results of an experiment in which "those testers [who purported to have a criminal record and] who interacted with employers (typically in a job interview) were almost six times more likely to receive a job offer or callback compared to those testers who did not interact with employers").

108 See *Campaigns, Ensuring People with Convictions Have a Fair Chance to Work*, NAT'L EMP. L. PROJECT, <http://www.nelp.org/campaign/ensuring-fair-chance-to-work> [<https://perma.cc/LH2T-DNJR>] (last visited Apr. 15, 2016).

Box law.<sup>109</sup> In addition to legislative change, the Ban the Box movement has been successful in influencing social attitudes and business practices.<sup>110</sup> As momentum behind the Ban the Box movement continues to grow across the country, major employers, such as Target and Sunoco, have begun to change their hiring policies by removing questions about criminal history from initial job applications.<sup>111</sup> Ban the Box measures are growing popular even among conservatives. For instance, in 2014, Jim Scheer, a Republican state senator from Nebraska expressed his support for the state's Ban the Box law.<sup>112</sup>

### B. Differing Elements of Various Ban the Box Laws

A comparison of the nation's various Ban the Box laws reveals salient differences among them. One way the laws differ is in what types of employers are covered. Many initial laws that city and state legislators enacted applied only to public or state employers.<sup>113</sup> Many policies still apply only to public employers. Out of the nineteen states that have implemented Ban the Box laws, only seven of those laws apply to private employers.<sup>114</sup> Some city ordinances apply to city

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<sup>109</sup> See, e.g., CAL. LAB. CODE § 432.9 (West 2014); COLO. REV. STAT. § 24-5-101 (2014); CONN. GEN. STAT. § 46a-80 (2014); 79 DEL. LAWS 227 § 3 (2014); HAW. REV. STAT. § 378-2.5 (1998); 30 ILL. COMP. STAT. 105/5.855 (2015); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); N.M. STAT. ANN. § 28-2-3 (2010); 28 R.I. GEN. LAWS § 28-5-6 (2013); S.B. 2583, 2010 Leg. (Mass. 2010); S.B. 523, 88th Leg. (Minn. 2013); Legis. B. 932, 103d Leg., 2d Sess. (Neb. 2014); Assemb. B. 1999, 216th Leg. (N.J. 2014); S.B. 1484, 216th Leg. (N.J. 2014); see also, e.g., PHILA., PA., CODE § 9-3501 (2015); Richmond, Cal., Ordinance I-26 (July 30, 2013); Rochester, N.Y., Ordinance 2014-155 (May 22, 2014); Seattle, Wash., Ordinance 124201 (June 20, 2013); N.Y.C. Exec. Order No. 151 (Aug. 4, 2011). See generally NAT'L EMP'T LAW PROJECT, *supra* note 3, at 3 (summarizing the major developments in Ban the Box legislation).

<sup>110</sup> See Williams & Vega, *supra* note 26 (discussing changing attitudes toward criminal records in hiring); see also Chad Brooks, *Growing 'Ban the Box' Movement Impacts Hiring Practices*, BUS. NEWS DAILY (Aug. 13, 2014, 1:32 PM), <http://www.businessnewsdaily.com/6969-criminal-history-job-applications.html> [<https://perma.cc/SAU5-EYA4>] (explaining that it is "clear that Ban the Box . . . will soon affect all types and sizes of employers").

<sup>111</sup> See Janet Moore, *Target to Ban Criminal History Box on Job Applications*, STAR TRIB. (Minneapolis) (Oct. 26, 2013, 9:37 AM), <http://www.startribune.com/target-to-ban-criminal-history-box-on-job-applications/229310141> [<https://perma.cc/ZS53-MJJSK>]; Interview with Benjamin Geffen, Staff Attorney, Pub. Interest Law Ctr. Phila., in Phila., Pa. (Nov. 18, 2014).

<sup>112</sup> See Williams & Vega, *supra* note 26 (quoting Jim Scheer's statement in support of Nebraska's Ban the Box law: "If we are going to block their path and not give them options to reintegrate—if they can't get a job and the opportunity to earn a livelihood—what alternative do they have?").

<sup>113</sup> See, e.g., BOARD OF SUPERVISORS OF THE CITY AND CTY. OF S.F., RES. NO. 764-05 (2005) (banning the box for city employers as a municipal hiring policy). Compare H.B. 1301, 86th Leg. (Minn. 2009) (banning the box only for public employment), with S.B. 523, 88th Leg. (Minn. 2013) (banning the box for private employers as well).

<sup>114</sup> See RODRIGUEZ & AVERY, *supra* note 15, at 14-15 (revealing that only Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island have passed Ban the Box measures that apply equally to private and public employers).

employers as well as vendors contracting with the city.<sup>115</sup> In 2011, Philadelphia became the first city in the country to take the major step of banning the box for both public and private employers.<sup>116</sup> Although measures that apply only to public employers are certainly a step in the right direction, measures that apply also to private employers are highly desirable because they are able to protect many more people with criminal records from employment discrimination.

The basic premise of all Ban the Box ordinances is that employers are prohibited from asking about criminal history on initial job applications.<sup>117</sup> However, there is variation among these laws as to when in the application process employers are permitted to make inquiries about criminal history. The most far-reaching of these laws prohibit employers from inquiring into an applicant's criminal history until the applicant is a finalist for the job or has received a conditional offer of employment.<sup>118</sup> Interestingly, this approach is similar to the federal Americans with Disabilities Act (ADA) requirement that employers not inquire about disability until the applicant has received a conditional offer of employment.<sup>119</sup> Alternatively, many Ban the Box laws require that employers not inquire into criminal history until after the applicant's first interview.<sup>120</sup> Finally, some laws prohibit employers from inquiring into criminal history until after they have determined that an applicant meets the requirements for the job.<sup>121</sup> These laws are somewhat troubling because employers may make hiring decisions before interviewing the applicant. Allowing people with criminal records to proceed to the interview stage is a key aspect of the Ban the Box paradigm.<sup>122</sup>

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<sup>115</sup> See Cambridge, Mass., Ordinance 1312 (Jan. 28, 2008) (requiring that vendors comply with the Ban the Box ordinance).

<sup>116</sup> RODRIGUEZ & AVERY, *supra* note 15, at 30.

<sup>117</sup> See *supra* notes 101–103 and accompanying text; see also Nadich, *supra* note 65, at 771–72.

<sup>118</sup> See, e.g., COLO. REV. STAT. § 24-5-101 (2014) (prohibiting employers from performing background checks until the applicant is a finalist of the applicant receives a conditional offer of employment); S.B. 1484, 216th Leg. (N.J. 2014) (prohibiting inquiry during pre-application and application process which ends when a conditional offer is given); BOARD OF SUPERVISORS OF THE CITY AND CTY. OF S.F., *supra* note 113 (expressing support for legislation eliminating criminal background checks during “preliminary application”).

<sup>119</sup> See Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 936–42 (2014) (discussing the value of importing elements of the ADA into measures to prevent employment discrimination against ex-offenders).

<sup>120</sup> See, e.g., 79 DEL. LAWS 227 § 3 (2014) (prohibiting inquiry during initial application process, including first interview), MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013), (prohibiting inquiry until the applicant has been provided an opportunity for an interview); N.Y.C. Exec. Order No. 151 (Aug. 4, 2011) (prohibiting inquiry before or during the first interview).

<sup>121</sup> See, e.g., Legis. B. 907, 103d Leg., 2d Sess. (Neb. 2014) (requiring that an applicant must be determined to meet minimum job requirements before the employer may inquire into criminal history); Minneapolis, Minn., City Council Resolution (2006) (requiring that an applicant be found otherwise qualified before an employer conducts a criminal background check).

<sup>122</sup> See Garcia, *supra* note 10, at 942 (“Ban the Box [laws] give[] ex-offenders the chance to explain their criminal histories in person, so that [they] can be judged on their merits, and not by their histories.”).

In addition to banning questions about criminal history on an initial application, many Ban the Box laws mandate the ways in which employers may review criminal history. These measures are very important because, although Ban the Box laws do remove a major hurdle to employment, bias against people with criminal records may remain after the interview.<sup>123</sup> Some laws do not provide much more guidance than simply delaying the inquiry into criminal history until later in the process.<sup>124</sup> Other laws require that employers exclude from consideration any information about arrests or accusations that did not lead to convictions.<sup>125</sup> There are laws mandating that background checks be performed only for applicants to certain predetermined positions.<sup>126</sup> A few laws require that employers can perform criminal background checks only if it is a business necessity; however, it is not clear whether the definitions of business necessity in these states mirror the one articulated by the EEOC in its 2012 guidance or the common law definition.<sup>127</sup> Some laws incorporate factors that the employer should consider in reviewing criminal history, including the type of crime, its relation to the position for which the applicant is applying, and the length of time since it was committed.<sup>128</sup> These factors are often based on the *Green* factors as articulated in the 2012 EEOC guidelines.<sup>129</sup> Finally, many of these Ban the Box laws make an exception for positions in law enforcement or other employment areas that require a criminal background check by law.<sup>130</sup>

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<sup>123</sup> See *supra* note 106 and accompanying text.

<sup>124</sup> See *supra* notes 117–122 and accompanying text.

<sup>125</sup> See, e.g., COLO. REV. STAT. § 24-5-101 (2014) (requiring employers to disregard arrests that did not lead to conviction as well as expunged, sealed, or pardoned convictions); CONN. GEN. STAT. § 46a-80 (2010) (requiring employers to exclude “records of arrest, which are not followed by a conviction, or records of convictions, which have been erased”); N.M. STAT. ANN. § 28-2-3 (2010) (requiring employers to exclude records of arrest not leading to conviction and misdemeanor convictions not involving “moral turpitude”).

<sup>126</sup> See, e.g., Balt., Md., City Council Bill 13-0301 (2014) (mandating that only applicants for “facilities servicing minors or vulnerable adults” shall be required to undergo criminal background checks); Minneapolis, Minn., City Council Resolution (2006) (resolving that the city will make “a good faith determination as to which specific positions of employment are of such sensitivity and responsibility that a background check is warranted”).

<sup>127</sup> See, e.g., Seattle, Wash., Ordinance 124201 (June 10, 2013) (allowing employers to conduct criminal background check if there is a “legitimate business reason”).

<sup>128</sup> See, e.g., COLO. REV. STAT. ANN. § 24-5-101 (West 2014) (requiring employers to consider (1) the nature of the conviction (2) the relationship between the conviction and the specific position (3) rehabilitation and (4) the time elapsed); CONN. GEN. STAT. § 46a-80 (2010) (employing all four considerations as the Colorado House Bill but in a three-factor test); HAW. REV. STAT. § 378-2.5 (1998) (providing that only convictions from the past ten years that bear a “rational relationship” to the position may be considered); S.B. 523, 88th Leg. (Minn. 2013) (requiring that a conviction be directly related to the position sought in order to disqualify an applicant).

<sup>129</sup> See *supra* note 61 and accompanying text.

<sup>130</sup> See, e.g., CAL. LAB. CODE § 432.9 (West 2014) (exempting law enforcement employers); 79 DEL. LAWS 227 § 3 (2014) (same); Legis. B. 907, 103d Leg., 2d Sess. (Neb. 2014) (exempting law enforcement and school district employers).

The enforcement mechanism of these laws is also an important point of distinction.<sup>131</sup> Some provide for very limited enforcement, such as sole reliance on agency enforcement,<sup>132</sup> while others allow applicants to appeal adverse employment decisions by disputing either the relevance or accuracy of the applicant's criminal history.<sup>133</sup> When employers engage in criminal background checks, there is a substantial risk that faulty decisions will be made based on inaccurate criminal history reports.<sup>134</sup> Yet, only a few of the laws address the problem of faulty criminal background checks.<sup>135</sup> Some of these laws provide that noncompliant businesses shall be fined by an enforcement agency.<sup>136</sup> Although imposing fines is certainly one means of enforcement, private rights of action would place more pressure on employers to comply with legal requirements and increase public participation in the process.<sup>137</sup> The most protective laws are those that include rights of private action for applicants who are discriminated against based on their ex-offender status; these private rights of action are especially effective when they are combined with provisions for attorneys' fees.<sup>138</sup>

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131 Enforcement by a government agency comes with its attendant problems of administrative procedures and delays. *See* discussion *supra* notes 69–75 and accompanying text.

132 *See, e.g.*, Richmond, Cal., Ordinance I-26 (July 30, 2013) (providing that the City Manager shall enforce the Ban the Box ordinance and fine employers up to \$1000 per violation).

133 *See, e.g.*, Hartford, Conn., City Council Resolution 2-381 to 2-389 (Apr. 13, 2009) (providing that an applicant has 7 days after an adverse decision to appeal to the Human Resources Appeals Board by presenting information “rebutting the accuracy and/or relevance of the criminal record report”); Atl. City, N.J., Ordinance 83 (Dec. 7, 2011) (providing an applicant who has been subject to an adverse employment decision ten days to respond and provide evidence rebutting the accuracy or relevance of his or her criminal history).

134 *See* RODRIGUEZ & Emsellem, *supra* note 2, at 7 (discussing the rampant problem of inaccurate commercial background checks and the types of errors commonly found in these checks, such as uncorrected identity theft).

135 *See, e.g.*, S.B. 2583, 2010 Leg. (Mass. 2010) (requiring employers that conduct five or more criminal background investigations annually to “maintain a written criminal offender record information policy” that “provide[s] information concerning the process for correcting a criminal record” to the applicant). It is possible that state and city legislators crafting Ban the Box legislation rely on the FCRA to protect job applicants against faulty background checks. For more information on the FCRA, *see supra* note 45.

136 *See, e.g.*, Richmond, Cal., Ordinance I-26 (July 30, 2013) (imposing fines of no more than \$1000 for each instance of noncompliance by an employer).

137 Under the “maximum enforcement” regulatory model, agency enforcement is combined with a private right of action to maximize private participation in the enforcement process. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1216 (1982).

138 *See, e.g.*, Rochester, N.Y., Ordinance 2014-155 (May 22, 2014) (providing that “[a]ny person aggrieved by a violation of this Article may commence a civil action or proceeding for injunctive relief, damages, or other appropriate relief . . . . [T]he court may allow the party commencing such action or proceeding, if such party prevails, costs and reasonable attorney’s fees as part of the relief granted” as well as empowering the enforcement agency to levy fines).

Not only do Ban the Box laws benefit job applicants with criminal records, they also benefit employers.<sup>139</sup> Advocates of Ban the Box laws have recognized that collaboration with employers is essential to success, because these laws must recognize the interests of both job applicants and employers.<sup>140</sup> As one public interest attorney remarked, “[T]he solution has to come from employers and convincing employers that it is in their interests to hire people with records.”<sup>141</sup> Compliance with successful Ban the Box measures should actually allow employers to hire qualified candidates.<sup>142</sup> Because most Ban the Box laws were enacted only recently, there is little information on their effectiveness in reducing employment discrimination. Nonetheless, “[s]urveys conducted in Minneapolis and Durham, N.C., after those cities passed [Ban the Box] laws[,] showed that fewer job applicants had been rejected for public sector work because of a criminal conviction.”<sup>143</sup> Of course, existing Ban the Box laws are not the panacea for the pervasive problem of employment discrimination against people with criminal records. However, a model Ban the Box law incorporating effective elements from existing Ban the Box laws may prove the most effective means of combating this discrimination in the future.

#### IV. A MODEL BAN THE BOX LAW

##### A. *Elements of a Model Law*

Existing Ban the Box laws vary widely across a number of elements.<sup>144</sup> Among the most salient of these elements are the scope of employer coverage, the point in the application process in which criminal history information may be considered, the type of guidance employers are given to consider criminal history information, and the enforcement mechanism of these laws. A model Ban the Box law would appropriately address each of these elements.

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<sup>139</sup> See Nadich, *supra* note 65, at 801 (“[B]y considering only relevant criminal history, the employer ‘will have access to a better applicant pool . . . with diverse, qualified and motivated employees.’ By asking questions targeted at an interviewee’s relevant criminal history, the employer will reduce the chance of falling back on a meaningless consideration and depriving itself of a potentially better employee.” (omission in original) (footnote omitted) (quoting Mark Haase, *Ban the Box: A Major Milepost on a Long Road*, MINNPOST (July 12, 2013), <https://www.minnpost.com/community-voices/2013/07/ban-box-major-milepost-long-road> [<https://perma.cc/J5EA-CTMS>])).

<sup>140</sup> See Garcia, *supra* note 10, at 942 (arguing that advocates “could garner more support for Ban the Box statutes that, in addition to protecting ex-offenders from employment discrimination, could protect employers from negligent hiring liability by setting out clearer guidelines for proper criminal history investigation”).

<sup>141</sup> Interview with Benjamin Geffen, *supra* note 111.

<sup>142</sup> See Brooks, *supra* note 110 (citing an attorney expert in workplace issues as saying that “by not banning the box, employers are opening themselves up to legal risks,” and that “a complete ban on hiring anyone who has ever had a criminal conviction isn’t good business sense for employers”).

<sup>143</sup> Williams & Vega, *supra* note 26.

<sup>144</sup> See *supra* Section III.B.

### 1. Scope of Employees Covered

First, a model law would follow the example of the Philadelphia Fair Criminal Record Screening Standards Ordinance in its application to both private and public employers.<sup>145</sup> This far reach is essential to protecting the greatest number of job applicants.<sup>146</sup> However, there are some employers to which the law should not apply if it is to be successful. Because the potential costs of negligent hiring and antidiscrimination litigation are so high, small businesses of ten or fewer employees should be exempted.<sup>147</sup> In addition, there are existing laws mandating criminal background checks for certain positions such as those in law enforcement, or others that have contact with especially vulnerable populations, such as workers in hospitals or schools.<sup>148</sup> In crafting a workable Ban the Box law, city and state legislators should exempt these types of employers. Except in these narrow exceptions, a Ban the Box law should otherwise apply to all employers within its jurisdiction.

### 2. Earliest Permitted Consideration

Ban the Box laws should borrow from the ADA framework for determining when an employer is permitted to look at an applicant's criminal history. Many scholars advocate for Ban the Box laws that forbid an employer from considering criminal history until after the first interview.<sup>149</sup> Although these laws do allow people with criminal records to proceed to the interview stage and explain their criminal records in person,<sup>150</sup> it is possible that some discrimination may remain.<sup>151</sup> Under the health law framework, an employer may not ask any question about disability until he or she has given the job applicant a conditional offer of employment.<sup>152</sup> Under this approach, a job applicant whose offer is

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<sup>145</sup> PHILA., PA., CODE §§ 9-3500 to 9-3507 (2015).

<sup>146</sup> See Smith, *supra* note 7, at 216 (pointing out that a limitation of the Ban the Box movement is that “even in locations where ban the box policies are in effect, for the most part they cover only a subset of employers”).

<sup>147</sup> See Garcia, *supra* note 10, at 944 (arguing that small business should be exempt from the “potentially crushing expense” of this litigation). For example, Philadelphia law exempts employers with fewer than ten employees. PHILA., PA., CODE § 9-3502 (2015).

<sup>148</sup> See generally Gerlach, *supra* note 42 (discussing in detail the use of criminal background checks in hiring). Although there is no evidence that people with criminal records commit more crimes in the workplace, this exception for positions working with vulnerable populations is likely key for generating enough public support to see the law enacted.

<sup>149</sup> See, e.g., Garcia, *supra* note 10, at 945 (“The ideal Ban the Box statute would . . . prevent[] employers from conducting background checks until after the first or second interview . . .”).

<sup>150</sup> See Nadich, *supra* note 65, at 795-98 (discussing the importance of giving job applicants a chance to explain their criminal histories in person).

<sup>151</sup> See Smith, *supra* note 7, at 217 (“[A]n employer who has decided to reject an applicant because of her criminal history may use information uncovered during the interview as a pretextual justification for the decision to deny the applicant the position.”).

<sup>152</sup> Paul-Emile, *supra* note 119, at 936-37.



rescinded will know the rejection was based on his or her criminal record and can “compel employers to [explicitly] articulate the ways in which the exclusion was job-related or consistent with business necessity.”<sup>153</sup> The model Ban the Box law should adopt this framework and require employers to make conditional offers of employment before considering an applicant’s criminal history.

### 3. Factors that Must Be Considered by Employers

A model Ban the Box law would articulate factors employers must consider in examining an applicant’s criminal history. One of the concerns with Ban the Box laws is that “[e]ven in ban the box jurisdictions, employers retain substantial discretion in determining the weight they attach to an applicant’s criminal record.”<sup>154</sup> The best way to resolve this issue is by mandating the ways in which employers may consider a job applicant’s criminal record so that they comply with Title VII. A model Ban the Box law should adopt the *Green* factors as articulated in the 2012 EEOC Enforcement Guidance: (1) the nature of the underlying crime, (2) the time elapsed since conviction, and (3) the nature of the position sought.<sup>155</sup>

### 4. Enforcement

The model Ban the Box law should adopt the maximum enforcement regulatory model.<sup>156</sup> Including a private right of action would ensure that enforcement is not bogged down by administrative delays, and would allow public interest and civil rights lawyers to get involved. Although a private right of action might be unpopular among employers, individual damages would likely be low enough that many attorneys would be discouraged from bringing suit and small businesses would not be subject to crushing expenses.<sup>157</sup> Therefore, a private right of action would have a deterrent effect without being excessive.

This model Ban the Box law is best suited for enactment by city and state legislatures, for the time being. Although some advocates have called for a federal antidiscrimination law protecting people with criminal records,<sup>158</sup> others who believe that people with criminal records should not be a protected class

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<sup>153</sup> *Id.* at 942.

<sup>154</sup> Smith, *supra* note 7, at 216.

<sup>155</sup> See EEOC ENFORCEMENT GUIDANCE, *supra* note 5, at 11.

<sup>156</sup> See *supra* note 137 and accompanying text.

<sup>157</sup> Existing Ban the Box laws that provide for private right of action typically impose low fines and damages. For example, Philadelphia law provides a maximum fine of \$2000 per violation. PHILA., PA., CODE §§ 9-3506, 1-109(3) (2015).

<sup>158</sup> See, e.g., Mullings, *supra* note 1, at 283-95 (arguing that rather than amending Title VII, advocates should push for the passage of an entirely new federal statute to protect people with criminal records).

strongly oppose such a measure because it was their decision to commit crimes.<sup>159</sup> City and state legislators are uniquely positioned to enact Ban the Box measures. Under our federal system, states—and even cities and other municipalities—are zones of experimentation where “more democratic self-government . . . is located at a level closer to the people.”<sup>160</sup> In the past ten years, the Ban the Box movement has been very successful in getting measures passed on the state and local levels, which instills hope that other state and local governments might consider adapting and implementing the Ban the Box statute proposed below.

#### B. Proposed Model Ban the Box Law

1. We find that employment discrimination against people with criminal records is a pervasive problem that leads to increased recidivism and has a disparate impact on African American and Hispanic men.
2. The provisions of this law shall apply to all public and private employers within our jurisdiction that employ ten or more employees. Positions for which criminal background checks are statutorily mandated are exempt from the provisions of this law.
3. An employer shall not place questions directly concerning or related to criminal history on an initial job application.
4. An employer shall not make inquiries into an applicant’s criminal record, unless and until that employer has issued a conditional offer of employment to that employee.
5. When an employer considers an employee’s criminal history, the employer must consider at least the following three factors:
  - a. The nature of the underlying crime;
  - b. The time elapsed since conviction; and
  - c. The nature of the position sought
6. The [local employment discrimination enforcement agency] shall be responsible for enforcement of this ordinance. In the event of a finding of noncompliance, a court shall impose a monetary fine upon the offending employer in an amount not exceeding \$2000 per violation. Any applicant rejected due to a violation of this ordinance may commence a civil action or proceeding for injunctive relief, damages, compensation, attorneys’ fees, and other appropriate relief.

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<sup>159</sup> See Timmons, *supra* note 35, at 624 (“[W]hile race and sex are inherent traits that have no impact on an individual’s ability to perform a job or on the risk of harm that they pose to the public, a criminal conviction record typically stems from an individual’s volitional act. The two are not synonymous and should be recognized as distinct. An ex-offender is distinguishable from an individual with an immutable characteristic that has never been convicted of a crime.”).

<sup>160</sup> Liu, *supra* note 1, at 193-94.

## CONCLUSION

Employment discrimination on the basis of criminal history is a pervasive problem in the United States. It is insidious in that it disadvantages already vulnerable populations by increasing recidivism and having a disparate impact on the employment prospects of African American and Hispanic men with criminal records. Although EEOC enforcement under Title VII has had some success in protecting people with criminal records from employment discrimination, it is inherently limited by the nature of the agency and by the doctrine of disparate impact upon which it relies. The EEOC is a strong ally in the fight against employment discrimination on the basis of criminal records, but new legislation must be enacted. The proliferation of Ban the Box laws in the last ten years shows that people are no longer willing to tolerate this kind of discrimination. The substance, and consequently, the effectiveness of current Ban the Box laws vary widely. However, a model Ban the Box law can be created by synthesizing the most effective elements of existing statutes. This model Ban the Box law, when adopted at the city or state level, would be highly effective in providing the legal protection job applicants with criminal records vitally need today.

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