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When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders

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WHEN ANY SENTENCE IS A LIFE SENTENCE: EMPLOYMENT DISCRIMINATION AGAINST EX-OFFENDERS

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ABSTRACT

For the sixty-five million Americans with a criminal record, it is cruelly ironic that perhaps the most important resource for turning their lives around—employment—is also often the most elusive. Shut out from legitimate job opportunities, many ex-offenders resort to illegal means of survival that hasten their return to prison. Recidivism has devastating consequences not only for the individual offender, but also the family, the community, and society at large. This article proposes three amendments to Title VII of the Civil Rights Act of 1964 that seek to balance ex-offenders' need for employment with employers' safety concerns. First, employers should be prohibited from discriminating against an ex-offender whose criminal record is not directly related to the job in question or who does not pose an unreasonable threat to property or to the safety of others. Second, employer inquiries about an applicant's criminal record should be delayed until after at least one job interview. Third, a negligent hiring provision should be added to Title VII that creates a rebuttable presumption against negligence and that caps damages in certain cases. These measures represent a sensible, middle-of-the-road approach that promotes the employment of ex-offenders in appropriate cases, while ensuring that neither employers nor the public are unduly burdened as a result.

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TABLE OF CONTENTS

INTRODUCTION 46
I. AMERICA'S CRIMINAL PROBLEM 52
A. Mass Incarceration in the United States 52
B. Barriers to Ex-Offender Employment 55
1. Individual Characteristics 55
2. Employer Biases 56
3. Statutory and Regulatory Limitations 58
C. Ex-Offender Employment 59
D. Unemployment and Recidivism 62
E. Consequences of Recidivism 64
II. LEGAL LIMITS ON THE EMPLOYMENT OF EX-OFFENDERS 67
A. Constitutional Cases 68
B. Title VII Cases 72
1. Disparate Treatment Claims 73
2. Disparate Impact Claims 74
3. EEOC Guidance 78
C. Negligent Hiring Cases 81
III. AMENDING TITLE VII 84
A. The Inclusion of "Nondisqualifying Criminal Records" as Protected Status 85
B. Banning the Box 92
C. Negligent Hiring 95
D. Potential Impact 98
CONCLUSION 101

INTRODUCTION

"Been clean, can't get a job, I guess because of my background. My past predicts my future."[1] After spending eleven years in prison for street crimes, Maurice Ruffin knows his employment prospects are bleak. This is especially true in a tight job market, where one nonprofit official who trains ex-convicts in job-hunting skills lamented, "They're always at the back of the line, and the line just got a lot longer."[2] For Maurice and the

1. Kelly Avellino, *Henrico Tattoo Removal Clinic Helps Offenders Job Hunt with 'Fresh Face'*, NBC12 (Apr. 25, 2014, 6:18 PM), http://www.nbc12.com/story/25256658/henrico-tattoo-removal-clinic-helps-offenders-job-hunt-with-fresh-face.

2. Aaron Smith, *Out of Prison, Out of a Job, Out of Luck*, CNNMONEY (Nov. 11, 2009, 6:46 AM), http://money.cnn.com/2009/11/11/news/economy/convict_employment/; *see also* Kimani Paul-

sixty-five million other Americans with a criminal record,[3] it is cruelly ironic that perhaps the most important resource for turning their lives around—employment—is also often the most elusive.[4] Due to persistent stigmas and stereotypes about people with criminal records, ex-offenders know that so long as employers can deny them employment because of their criminal history, any sentence is effectively a life sentence they must continue serving long after their debt to society has been paid.

Despite broad consensus that ex-offenders need to be working, there is considerable disagreement over how best to accomplish this feat.[5] Employers often resist efforts to limit their ability to consider an individual's criminal history out of fear that such restrictions could jeopardize workplace safety and expose them to negligent hiring claims.[6] Lawmakers, too, are often reluctant to push for legislation facilitating the employment of ex-offenders because they do not want to appear soft on crime.[7] In fact, the vast majority of laws and regulations concerning ex-offender employment are *exclusionary* in nature, banning individuals with criminal records from entire industries, restricting licensing boards from granting occupational licenses to ex-offenders, and mandating that

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Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 894 (2014) (noting it is "particularly difficult" for ex-offenders to find work in the wake of the 2008 recession).

3. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), *available at* http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1 [hereinafter 65 MILLION].

4. *See* Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 755 (2007) ("It is close to a criminological truism that the lack of a legitimate job fosters criminality and, conversely, that holding a legitimate job diminishes criminal conduct."); Mark W. Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, *in* WHAT WORKS: REDUCING REOFFENDING 63–78 (James McGuire ed., 1995) (meta-analysis of nearly 400 studies from 1950 to 1990 found employment to be the single most effective factor in reducing recidivism); *see also infra* Part I.D.

5. Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 261–62 (2014) (explaining that society feels ambivalence about ex-offenders, on the one hand wanting them to have rehabilitation opportunities, but also fearing such opportunities could endanger others).

6. *See* Joe LaRocca, *Erase the Box, Endanger Customers*, NAT'L RETAIL FED'N (July 27, 2011), https://nrf.com/news/loss-prevention/erase-the-box-endanger-customers; *NFIB Helps Defeat 'Ban-the-Box' Legislation in Louisiana*, NAT'L FED'N OF INDEP. BUS. (May 13, 2014), http://www.nfib.com/article/nfib-helps-defeat-ban-the-box-legislation-in-louisiana-65622/; Rhonda Smith, *Employer Concerns About Liability Loom as Push for Ban-the-Box Policies Spreads*, BLOOMBERG BNA (Aug. 18, 2014), http://www.bna.com/employer-concerns-liability-n17179893943/.

7. *See* Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 607 (2005); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 23–32 (2013).

employers perform criminal background checks on applicants for certain types of jobs.[8] In reality, just one federal law limits an employer's ability to discriminate against ex-offenders. Under Title VII of the Civil Rights Act of 1964, an employer can be held liable for treating people with similar criminal records differently, or for maintaining a policy that screens individuals based on criminal history—but only if such differential treatment is otherwise tied to race, color, religion, sex, or national origin.[9]

Although negative stereotypes about ex-offenders abound, growing recognition that people with criminal records need to be working has generated a number of positive changes at the state and local levels. Fourteen states now limit discrimination against ex-offenders in public employment,[10] and five of those states have extended such prohibitions to the private sector.[11] Dozens of cities, including Boston[12] and San Francisco,[13] have enacted similar ordinances. Perhaps the most promising development is the growing "Ban the Box" movement, which seeks to remove criminal background questions from job applications and to delay background check inquiries until further in the hiring process to give ex-offenders an opportunity to interview and explain why they are qualified for employment instead of being automatically disqualified because of

8. Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 24 (2005) (noting that in recent years "there has been a major expansion of state and federal laws denying employment in key entry-level jobs, with many of the new laws imposing lifetime felony disqualifications even for nonviolent offenses"); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1611–14 (2004) (surveying various laws restricting the employment of ex-offenders in public and private employment).

9. 42 U.S.C. § 2000e-2(a)(1) (2013); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 §§ IV–V (2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [hereinafter EEOC ENFORCEMENT GUIDANCE] (disparate treatment and disparate impact claims relating to criminal history must be tied to a Title VII-protected trait).

10. *See* ARIZ. REV. STAT. ANN. § 13-904.E (2015); COLO. REV. STAT. § 24-5-101 (2014); CONN. GEN. STAT. § 46a-80 (2015); FLA. STAT. § 112.011 (2015); HAW. REV. STAT. § 378-2.5 (2014); KAN. STAT. ANN. § 22-4710 (2014); KY. REV. STAT. ANN. § 335b.020 (West 2015); LA. REV. STAT. ANN. § 37:2950 (2014); MINN. STAT. § 364.03 (2014); N.M. STAT. ANN. §§ 28-2-3 to -6 (2015); N.Y. CORRECT. LAW §§ 750–753 (McKinney Supp. 2013); N.Y. EXEC. LAW § 296.15 (McKinney Supp. 2013); 18 PA. CONS. STAT. ANN. §§ 9124–9125 (West 2012); WASH. REV. CODE §§ 9.96A.020, .030, .060 (2015); WIS. STAT. § 111.335 (2015).

11. HAW. REV. STAT. § 378-2.5; KAN. STAT. ANN. § 22-4710; N.Y. EXEC. LAW § 296.15; N.Y. CORRECT. LAW §§ 750–753; 18 PA. CONST. STAT. §§ 9124–9125; WIS. STAT. § 111.335.

12. BOS., MASS., MUN. CODE § 4-7 (2014).

13. S.F., CAL., POLICE CODE art. 49 (2014).

their criminal record.[14] By 2015, eighteen states, Washington, D.C., and over one hundred cities and counties had passed laws banning the box.[15] New York City's recently-enacted Fair Chance Act, for example, prohibits employers from inquiring about a person's criminal background in most cases until after a conditional offer of employment is made.[16] The EEOC has likewise endorsed removing criminal history questions from applications as a best practice.[17]

In addition to legal changes, ex-offenders are benefitting from a variety of other measures designed to facilitate their employment. In 2011, US Attorney General Eric Holder established a cabinet-level federal interagency Reentry Council to "coordinat[e] re-entry efforts and advanc[e] effective re-entry policies."[18] The federal government has also launched several initiatives to encourage the employment of ex-offenders. For example, under the Work Opportunity Tax Credit program, employers claim approximately $1 billion in federal tax credits each year for hiring individuals from certain target groups, including ex-offenders.[19] The Second Chance Act allows the federal government to provide substantial resources to state and local governments and community organizations to help ex-offender reintegration.[20] And the Federal Bonding Program provides employers with free-of-charge bond insurance against theft, forgery, larceny, and embezzlement to further incentivize employers to hire ex-offenders.[21]

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14. Johnathan 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, 211 (2014).

15. MICHELLE NATIVIDAD RODRIGUEZ & NAYANTARA MEHTA, NAT'L EMP'T LAW PROJECT, RESOURCE GUIDE, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE BARRIERS TO EMPLOYMENT OF PEOPLE WITH CONVICTION RECORDS 1 (2015), *available at* http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf [hereinafter BAN THE BOX].

16. N.Y.C., N.Y., ADMIN CODE § 8-107(10)(a) (2015); *see also Mayor de Blasio Signs "Fair Chance Act,"* NYC.GOV (June 29, 2015), http://www1.nyc.gov/office-of-the-mayor/news/456-15/mayor-de-blasio-signs-fair-chance-act-#/0.

17. EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.3.

18. Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT'L INST. JUST. J., June 2012, at 42, 46.

19. *Work Opportunity Tax Credit*, U.S. DEP'T OF LABOR, http://www.doleta.gov/business/incentives/opptax/wotcEmployers.cfm (last updated Jan. 14, 2015).

20. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.).

21. NAT'L H.I.R.E. NETWORK, NATIONAL BLUEPRINT FOR REENTRY: MODEL POLICIES TO PROMOTE THE SUCCESSFUL REENTRY OF INDIVIDUALS WITH CRIMINAL RECORDS THROUGH EMPLOYMENT AND EDUCATION 15–16 (2008), *available at* http://www.hirenetwork.org/sites/default/files/National_Blueprint_For_Reentry_08.pdf.

Advocacy groups are also playing a greater role in assisting ex-offenders in employment. Organizations like The National HIRE Network and The Next Step maintain successful networks of ex-offenders looking for employment, agencies and facilities that manage their post-release experience, and employers willing to hire ex-offenders.[22] In Chicago, ex-offenders can receive vocational training, employment placement assistance, life-skills training, and mentoring.[23]

Lastly, a growing number of employers are voluntarily changing their hiring practices to facilitate the employment of ex-offenders. High-profile retailers Walmart and Target Corporation recently announced plans to remove the criminal history box from their applications nationwide.[24] In Columbia, South Carolina, a furniture moving company appropriately named "Felons R Us" proudly hires employees with nonviolent felony records.[25] Other businesses have created specialized training programs involving the recruitment of ex-offenders and team up with community-based organizations to match ex-offenders with stable employment.[26]

Although certainly steps in the right direction, these efforts are inadequate given the reality that each year approximately seven hundred thousand prisoners are released back into their communities,[27] often without any prospects for employment.[28] Within five years of release,

22. *See, e.g.*, NAT'L H.I.R.E. NETWORK, http://www.hirenetwork.org/ (last visited July 5, 2015); NEXT STEP, https://www.thenextstep99.com/ (last visited July 5, 2015).

23. *See Chicagoland Youth and Adult Training Center*, CHICAGOJOBTALK.ORG, http://www.chicagojobs.org/node/1599 (last visited Jan. 29, 2015).

24. *See, e.g.*, *Companies Rethink Hiring Policies for Former Criminals*, INDIANAPOLIS BUS. J. (Feb. 7, 2014), http://www.ibj.com/articles/46052-companies-rethink-hiring-policies-for-former-criminals; Janet Moore, *No More Box for Crimes on Target Job Applications*, STAR TRIBUNE (Minneapolis), Oct. 26, 2013, at 1D, *available at* http://www.startribune.com/business/229310141.html; NAT'L EMP'T LAW PROJECT, COMMUNITY LEADERS SUPPORT FAIR CHANCE POLICIES 1, *available at* http://nelp.3cdn.net/0e4548d1901d375c45_2tm6b3qa4.pdf; *Target Corp. Bans the Box on Employment Applications*, JAILS TO JOBS (Nov. 1, 2013), http://jailstojobs.org/wordpress/target-corp-bans-the-box-on-employment-applications/.

25. Roddie Burris, *SC Company Gives Convicted Felons a Second Chance*, THE STATE (Columbia, S.C.) (May 25, 2013, 8:52 PM), http://www.thestate.com/2013/05/25/2785716/sc-company-gives-convicted-felons.html.

26. *See, e.g.*, Zoey Thill et al., *Thinking Outside the Box: Hospitals Promoting Employment for Formerly Incarcerated Persons*, 161 ANNALS INTERNAL MED. 524, 524–25 (2014).

27. *See* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011 1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

28. *See* Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89, 95 (2003) (citation omitted) ("Although slightly more than half of inmates report being employed full-time prior to incarceration, the poor employment histories and job skills of returning prisoners create diminished prospects for stable employment and decent wages upon release.").

more than three fourths of ex-prisoners are rearrested,[29] and between 40 and 50% of ex-prisoners return to prison.[30] Because employment is one of the strongest predictors of recidivism,[31] any hope of lowering the United States' recidivism rate will require major changes to federal employment discrimination laws to give ex-offenders greater employment opportunities. Although restrictions on ex-offender employment make sense in some settings,[32] in many situations a person's criminal record has little or no bearing on job performance. In those cases, legislative protections for ex-offenders are warranted.

This article advocates for three amendments to Title VII that would facilitate the employment of ex-offenders without unduly burdening employers or the public. First, Title VII should be amended to prohibit employment discrimination if an ex-offender's criminal record is not directly related to the job at issue or if the ex-offender does not pose an unreasonable threat of harm to property or to the safety of others. Second, Title VII should prohibit employers from inquiring about an applicant's criminal history until after at least one interview. Third, a provision should be added to Title VII that creates a rebuttable presumption against admitting evidence of an offending employee's criminal record in negligent hiring cases, if the employer made a good-faith, individualized determination that the employee would not pose an unreasonable risk. In such cases, damages should be limited to Title VII's existing caps. These proposals represent a sensible, middle-of-the-road approach that would place more ex-offenders in the workplace instead of back in prison.

This Article proceeds in three Parts. Part I examines the magnitude of the United States' mass incarceration problem and the barriers ex-offenders face in finding employment. It also reviews studies linking unemployment to recidivism and explains why recidivism has long-lasting

29. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (2014), *available at* www.bjs.gov/content/pub/pdf/rprts05p0510.pdf. According to this study of 404,638 prisoners, approximately two thirds were rearrested within three years of release, and more than three fourths were rearrested within five years. *Id.* Of those prisoners who were rearrested, 56.7% were rearrested by the end of the first year. *Id.* Rearrest was most common among released property offenders (82.1%), compared with 76.9% of drug offenders, 73.6% of public order offenders, and 71.3% of violent offenders. *Id.*

30. PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2 (2011), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/StateRecidivismRevolvingDoorAmericaPrisons20pdf.pdf.

31. *See infra* Part I.D.

32. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 28.723, 28.733–.734 (West 2011) (prohibiting registered sex offenders from working within one thousand feet of a school).

and devastating consequences for individual offenders, their families and communities, and society at large. Part II examines employers' legal duties toward ex-offenders under the Constitution, Title VII, and state negligent hiring laws, and discusses how the extant case law can help shape future legislative efforts to protect ex-offenders from employment discrimination. Finally, Part III proposes three amendments to Title VII that could increase ex-offender employment without exposing employers or the public to undue risk, and explores the potential impact of the proposed measures.

I. AMERICA'S CRIMINAL PROBLEM

A. Mass Incarceration in the United States

The number of Americans with a criminal record is staggering. According to conservative estimates, sixty-five million Americans—over one in every four adults—have a criminal history.[33] With twelve to fourteen million arrests annually, this population continues to grow rapidly.[34] The United States' crime problem is best illustrated by its incarceration rate. After five decades of relative stability, the rate of incarceration has more than quadrupled in the past forty years, from 161 prisoners per 100,000 people in 1972 to a stunning 707 per 100,000 in 2012.[35] This rate is easily the highest in the world, far outpacing second-place Rwanda (492) and third-place Russia (474).[36] By comparison, Canada's rate is just 118, and Mexico's is 210.[37] Although the United States is home to less than 5 percent of the world's population, it locks up nearly one quarter of the world's prisoners, with over 2.2 million offenders behind bars.[38] The rates of alternative forms of correctional supervision,

33. 65 MILLION, *supra* note 3, at 3.

34. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2009 1 (2009), *available at* http://www2.fbi.gov/ucr/cius2009/arrests/index.html; *see also* Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012) (roughly one in every three Americans has been arrested by age twenty-three).

35. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 13 (2014), *available at* johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf [hereinafter NAT'L RESEARCH COUNCIL].

36. *Id.* at 36–37.

37. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (10th ed. 2013), *available at* http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf.

38. CAROLYN W. DEADY, PELL CTR. FOR INT'L RELATIONS & PUB. POL'Y, INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD 1 (2014), *available at* http://www.salve.edu/sites/default/files/

including probation and parole, have experienced even sharper increases. In 2012, 3.94 million Americans were on probation, up from 923,000 in 1976.[39] An additional 851,000 Americans were on parole in 2012, compared to just 143,000 in 1975.[40] At present, nearly seven million Americans—one in every thirty-five adults—are part of the overall correctional system population.[41]

Rising incarceration rates have disproportionately impacted racial minorities, the poor, and the less educated—populations already at considerable disadvantages in employment.[42] Racial minorities are far more likely to be arrested and convicted and face harsher sentences than whites.[43] Nearly 60% of the United States' prisoners are black or Latino, although these groups comprise less than 30% of the country's overall population.[44] If current trends continue, one out of every three black males born today will go to prison, as will one out of every six Latino males, compared to just one out of every seventeen white males.[45] Socioeconomically disadvantaged individuals are also far more likely to come into contact with the criminal justice system. A recent study of California arrest records concluded that "[f]or all races, every age group,

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filesfield/documents/Incarceration_and_Recidivism.pdf; NAT'L RESEARCH COUNCIL, *supra* note 35, at 33.

39. NAT'L RESEARCH COUNCIL, *supra* note 35, at 40–41.

40. *Id.*

41. *Id.* at 42.

42. Joseph A. Ritter & Lowell J. Taylor, *Racial Disparity in Unemployment*, 93 REV. ECON. & STAT. 30, 35–40 (2011) (finding blacks "experience substantially higher lifetime unemployment" than whites, even after controlling for premarket skills); *Employment Projections: Earnings and Unemployment Rates by Educational Attainment*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/emp/ep_table_001.htm (last modified Apr. 2, 2015) (unemployment rate in 2014 for a US adult age twenty-five or older with less than a high school diploma was 9.0%, compared to 6.0% for adults with a high school diploma, 3.5% for adults with a bachelor's degree, and 2.1% for adults with a doctoral degree); *Gap in U.S. Unemployment Rates Between Rich and Poor Continues to Widen*, NJ.COM (Sept. 16, 2013), www.nj.com/business/index.ssf/2013/09/gaps_in_us_ unemployment_ rates.html (noting that in 2013, the unemployment rate for US families earning less than $20,000 was over 21%, whereas the unemployment rate for families with income of more than $150,000 was just 3.2%).

43. SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), *available at* http://sentencingproject.org/doc/publications/rd_ICCPR% 20Race%20and%20Justice%20Shadow%20Report.pdf.

44. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), http://www.prison policy.org/reports/rates.html.

45. Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011).

and age groups within races, arrest rates escalate as poverty levels rise."[46] Additionally, educational inequalities in incarceration have skyrocketed over the past four decades, with nearly all of the growth in incarceration rates concentrated among those with no college education.[47] The disparity is most pronounced among high school dropouts. On any given day, about one in every ten young male high school dropouts is in jail or juvenile detention, compared with just one in every thirty-five young male high school graduates.[48]

The explosion in the United States' correctional population is attributable to several factors. The rate of crime itself cannot fully explain this trend, given that incarceration rates have steadily risen over the past fifty years, even as the violent crime rate rose, then fell, rose again, then declined sharply.[49] Instead, growth in the incarceration rate has stemmed primarily from lawmakers' policy choice to increase the use and severity of prison sentences to control crime following the tumultuous social and political changes of the 1960s and 1970s.[50] Consequently, incarceration for lesser offenses has become more prevalent, sentences for violent crimes and repeat offenders are now longer, and drug crimes are more harshly policed and punished.[51] Incarceration is no longer reserved for the most severe crimes, but extends to a much broader range of offenses and a much larger segment of the population.[52] This move toward greater incarceration reflects a widespread belief, particularly among law

46. Mike A. Males & Elizabeth A. Brown, *Teenagers' High Arrest Rates: Features of Young Age or Youth Poverty?*, 29 J. ADOLESCENT RES. 3, 17 (2014).

47. NAT'L RESEARCH COUNCIL, *supra* note 35, at 66.

48. Andrew Sum et al., *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers* (Oct. 2009) (unpublished working paper), *available at* http://www.northeastern.edu/clms/wp-content/uploads/The_Consequences_of_Dropping_Out_of_High_School.pdf; *see also* PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 31 (2010), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf (noting that in 1980, 2.4% of white male dropouts were incarcerated, compared with 10.6% of black male dropouts and 3.2% of Hispanic male dropouts; by 2008, the percentages increased to 12% of white male dropouts, 37.1% of black male dropouts, and 7% of Hispanic male dropouts).

49. NAT'L RESEARCH COUNCIL, *supra* note 35, at 3.

50. *Id.* at 2–3, 70; Stephen J. Tripodi et al., *Is Employment Associated with Reduced Recidivism? The Complex Relationship Between Employment and Crime*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 706, 707 (2010) (observing that growth in incarceration rates even as crime has decreased suggests "get tough on crime" policies are fueling the increase in prisoners).

51. NAT'L RESEARCH COUNCIL, *supra* note 35, at 3.

52. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 938 (2003) (stating that since the 1970s, "incarceration has changed from a punishment reserved primarily for the most heinous offenders to one extended to a much greater range of crimes and a much larger segment of the population").

enforcement officials, that criminals must be dealt with harshly.[53] This tough-on-crime mentality has ushered in an era of unprecedented legal changes, including "three strikes and you're out" laws requiring minimum sentences of twenty-five years or longer for certain repeat offenders and "truth-in-sentencing" laws that mandate prisoners serve at least 85 percent of their sentences.[54]

B. Barriers to Ex-Offender Employment

A variety of barriers, both formal and informal, hinder many ex-offenders' ability to find steady employment. Some of these barriers, such as low education and deficient job skills, can perhaps best be overcome through nonlegal mechanisms, such as vocational training programs. Other barriers, including employer biases and overbroad exclusionary statutes and regulations, call for legal intervention. Because these barriers can drastically reduce an ex-offender's odds of finding and maintaining employment, both legal and nonlegal responses are necessary.

1. Individual Characteristics

A major impediment to employment for many ex-offenders is their lack of much-needed work skills, educational qualifications, and a stable job history.[55] For instance, one study found that just one third of males ages twenty-five to thirty-four in state prisons held a high school diploma, compared to 90% of males of the same age in the general population.[56] The study also found that nearly 80% of non-imprisoned males ages twenty-five to thirty-four were employed full time, compared to just 55% of inmates in the same demographic group.[57] Another study found that approximately 40% of adult state prisoners are functionally illiterate,

53. NAT'L RESEARCH COUNCIL, *supra* note 35, at 70 ("[C]hanges in prevailing attitudes toward crime and criminals . . . led prosecutors, judges, and parole and other correctional officials to deal more harshly with individuals convicted of crimes.").

54. *Id.* at 3.

55. Susan Lockwood et al., *The Effect of Correctional Education on Postrelease Employment and Recidivism: A 5-Year Follow-Up Study in the State of Indiana*, 58 CRIME & DELINQUENCY 380, 382 (2012) ("The profile of the prison population has been consistently characterized as economically poor, educationally illiterate, and socially inadequate to societal norms."); *see also* James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORR. EDUC. 297, 297–304 (2004) (discussing how a disproportionate number of ex-offenders are unemployed because they are illiterate and lack vocational skills).

56. Christopher Uggen et al., *Work and Family Perspectives on Reentry*, *in* PRISONER REENTRY AND CRIME IN AMERICA 209, 211–12 (Jeremy Travis & Christy Visher eds., 2005).

57. *Id.*

compared to 21% of non-incarcerated adults.[58] Moreover, some scholars have suggested "spending time in prison may further erode existing job skills and embed offenders into criminal networks."[59] Aside from possessing fewer skills and less education, ex-offenders may exhibit criminogenic attitudes and behaviors that further hinder their prospects for employment.[60] For instance, those "who admit a willingness to continue criminal behavior or drug use . . . are unlikely to be committed to a conventional lifestyle" that includes "legitimate employment."[61] Likewise, ex-offenders who believe the legal system is unfair are more likely to resume criminal behavior after release and may be less likely to hold a steady job.[62] Gottfredson and Hirschi argue that criminal history may also be an indicator of poor self-control and a tendency to reject the types of pro-social behaviors typically necessary to maintain a job.[63]

2. Employer Biases

The unlikelihood that ex-offenders will be hired because of their personal characteristics is compounded by employer biases toward people with criminal records.[64] In Holzer and colleagues' study of over 3,000 employers in four metropolitan areas, nearly 20% of employers reported they would "definitely not" hire an applicant with a criminal record, and

58. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 32 (2003).

59. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 388 (2011); *see also* Uggen et al., *supra* note 56, at 211–15 (citing various studies explaining how employment can increase an ex-offender's social capital by replacing criminally involved friends with coworkers and other law-abiding peers).

60. Christy A. Visher et al., *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698, 702 (2011) ("Former prisoners are likely to have other risk factors that may hinder their prospects for employment after release, including criminogenic attitudes and behaviors.").

61. *Id.*

62. *Id*.

63. *See* MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 85–120 (1990).

64. Daniel S. Murphy et al., *The Electronic "Scarlet Letter": Criminal Backgrounding and a Perpetual Spoiled Identity*, 50 J. OFFENDER REHABILITATION 101, 102 (2011) ("[A] criminal record is both a chronic and debilitating badge of shame that plagues exconvicts [sic] and exoffenders [sic] for the rest of their lives."); Stuart J. Ishimaru, Comm'r, U.S. Equal Emp't Opportunity Comm'n, Remarks on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), *available at* http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm ("Fears, myths and such stereotypes and biases against those with criminal records continue to be part of the . . . decision making for many employers.").

42% indicated they would "probably not" do so.[65] These percentages were significantly higher than the percentages of employers who would either definitely or probably not hire a welfare recipient (8%), a person with a GED (3%), a person with a spotty work history (41%), or a person unemployed for more than a year (16%).[66] More recent data from over 600 Los Angeles employers found that more than 40% of employers either definitely or probably would not hire an ex-offender, whereas only one fifth indicated they either definitely or probably would consider an applicant with a criminal history.[67]

Employer biases against ex-offenders are further evident from audit studies conducted in Milwaukee and New York that determined an ex-offender is about half as likely to receive a callback as a non-offender with comparable credentials.[68] Significantly, both studies found that the negative effect of having a criminal history is stronger for black applicants than for white applicants. In the Milwaukee study, whites with a criminal background were half as likely as whites without a criminal background to receive a callback (17 to 34%), whereas blacks with a criminal background were about one third as likely as blacks without a criminal background to receive a callback (5 to 14%).[69] Notably, whites with a criminal record were still more likely to receive a callback than blacks without a criminal record (17 to 14%).[70] In the New York study, 22% of whites with a criminal record received callbacks, compared to 31% of white non-offenders.[71] By contrast, just 10% of black ex-offenders received callbacks, compared to 25% of black non-offenders.[72]

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65. Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* 8 (Inst. for Research on Poverty, Discussion Paper No. 1243–02, 2002), *available at* http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf.

66. *Id.* at 9–10; *see also* Joseph Graffam et al., *The Perceived Employability of Ex-Prisoners and Offenders*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 673, 678–80 (2008) (demonstrating that individuals with a criminal background were rated as being less likely than other disadvantaged groups to obtain and maintain employment, rating only higher than those with intellectual or psychiatric disabilities).

67. Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles* 7 (Nat'l Poverty Ctr., Working Paper No. 04-15, 2004), *available at* http://www.npc.umich.edu/publications/workingpaper04/paper15/04-15.pdf.

68. *See* Pager, *supra* note 52, at 955; Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

69. *See* Pager, *supra* note 52, at 955–61.

70. *Id.* at 958.

71. Pager et al., *supra* note 68, at 200.

72. *Id.*

When asked about their reluctance or unwillingness to hire ex-offenders, employers often express concern that ex-offenders will revert to criminal behaviors, thus opening the door to potential negligent hiring claims.[73] Many employers also believe ex-offenders possess character flaws, such as unreliability and untrustworthiness, which prevent them from being productive employees.[74] Some employers assume hiring ex-offenders will create more work for their companies by having to complete work-release-related forms or deal with probation and parole officers.[75] Some employers continue to harbor strong negative impressions about ex-offenders even though they report positive experiences with employing ex-offenders in the past.[76] Given the stigmas that persist about individuals with criminal records, it is hardly surprising that the National Employment Law Project's analysis of Craigslist job postings found blanket no-hire policies for ex-offenders to be commonplace, even among major corporations and employment staffing firms.[77]

3. Statutory and Regulatory Limitations

A third barrier to the employment of ex-offenders is the vast network of federal, state, and local laws and regulations, estimated to be in the tens of thousands, that disqualify or substantially impede ex-offenders from various jobs and occupational licenses.[78] In Florida alone, there are over seventy occupations affected by criminal history, ranging from speech pathologist to pest-control technician.[79] Pennsylvania recently enacted legislation that not only expands the list of crimes that disqualify a person from working for a school, but also lengthens the ban from five years to

73. Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 20–29 (U.S. Dep't of Justice, Document No. 228584, 2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf.

74. *Id.* at 23–26.

75. *Id.* at 24–25.

76. *Id.* at 31–35.

77. 65 MILLION, *supra* note 3, at 13–18.

78. Mullings, *supra* note 5, at 263 (stating that "tens of thousands of statutes nationwide" have created a "complex set of barriers that will make reentry into the community and becoming a productive citizen difficult, if not impossible"); Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, ABA J. (June 1, 2013, 10:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_ restrictions.

79. Darren Wheelock et al., *Employment Restrictions for Individuals with Felon Status and Racial Inequality in the Labor Market*, *in* GLOBAL PERSPECTIVES ON RE-ENTRY 278, 284 (Ikponwosa O. Ekunwe & Richard S. Jones eds., 2011) (listing Florida statutes that limit the employment of ex-offenders).

life for most of those crimes.[80] Even statutes that do not specifically disqualify ex-offenders from employment can still impose significant limitations. For instance, a federal statute requires states to suspend the driver's license of any ex-offender convicted of a drug offense for at least six months (or risk losing transportation funds), thus foreclosing a number of jobs that either require a person to drive or that cannot be reached via public transportation.[81] Some of these laws, such as banning a person convicted of money laundering from working in a bank,[82] are entirely reasonable. However, many statutory and licensing bars tend to be highly overinclusive,[83] often disqualifying ex-offenders from jobs and occupational licenses unrelated to their convictions.[84]

C. Ex-Offender Employment

The foregoing barriers significantly impede ex-offenders' ability to find and maintain employment. Longitudinal studies have consistently found that incarceration reduces how much ex-offenders work by anywhere from five to eight weeks per year.[85] A study of recently-released ex-prisoners found that approximately three fourths had spent time searching for a job in the eight months following their release.[86] Two months after release, 43% had been employed at some point since leaving prison, but only 31% were currently employed.[87] Eight months after release, 65% had found work since their release, but only 45% were employed at the time of the interview.[88] In addition to reducing weeks worked, incarceration generally decreases hourly wages by 15%.[89] The negative effects of incarceration on employment and hourly wages

80. *See* Act 24 of 2011, 24 PS § 1-111.

81. 23 U.S.C. § 159 (2013).

82. *See, e.g.*, 12 U.S.C. § 1829 (2013).

83. Saxonhouse, *supra* note 8, at 1612 (noting that statutory and licensing bars often do not allow for "individualized consideration" and tend to be "highly overinclusive").

84. Wheelock et al., *supra* note 79, at 285 ("Many states and municipalities disqualify ex-felons from professional licenses that are unrelated to the offense for which an ex-felon was originally convicted.").

85. *See, e.g.*, BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2006) (incarceration cuts employment by about five weeks per year for white men, and by nearly eight weeks per year for black and Latino men); PEW CHARITABLE TRUSTS, *supra* note 48, at 11 (showing that incarceration reduces the average number of weeks worked by a forty-five-year-old male by nine weeks).

86. Visher et al., *supra* note 60, at 708.

87. *Id.*

88. *Id.* at 709.

89. *See* WESTERN, *supra* note 85, at 119.

combine to substantially reduce annual earnings, as men with prison records are estimated to earn between 30 and 40% less each year than non-offenders.[90] A Pew study calculated that incarceration results in an expected earnings loss of almost $179,000 through age forty-eight for ex-offenders.[91]

Ex-offenders' struggle to secure jobs has been made worse in recent years by the growing prominence of criminal background checks. Since the September 11th terrorist attacks, "the criminal background check industry has grown exponentially."[92] This growth is due, in part, to greater concern among employers about negligent hiring claims, as well as technological advances that have made criminal background searches easier, faster, and less expensive than ever before.[93] A Society for Human Resource Management ("SHRM") survey found that 92% of employers perform criminal background checks on job applicants.[94] By contrast, a study of data gathered in the 1990s found that just one third of employers always checked criminal records, and about half reported they sometimes ran background checks.[95] When the SHRM study asked about what motivated employers to conduct criminal background checks, the three most popular answers were "[t]o ensure a safe work environment for employees," "[t]o reduce legal liability for negligent hiring," and "[t]o reduce/prevent theft and embezzlement, [and] other criminal activity."[96]

To what extent are policies, laws, and licensing regulations justified in excluding ex-offenders from employment? Do employees with a criminal record actually pose more of a threat to the workplace than non-offenders? While it is true that "one of the most robust findings in criminology is the strong positive relationship between past and future criminal offending," an "equally robust finding" is that recidivism generally occurs quickly,

90. *Id.* at 120.

91. PEW CHARITABLE TRUSTS, *supra* note 48, at 11–12.

92. 65 MILLION, *supra* note 3, at 1; *see also* Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 201 (2013) ("Employers are relying on criminal record information to screen job applicants at increasing rates.").

93. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328–29 (2009); Paul-Emile, *supra* note 2, at 902.

94. SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), *available at* http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx.

95. Harry J. Holzer et al., Can Employers Play a More Positive Role in Prisoner Reentry? 4 (Mar. 20, 2002) (unpublished manuscript), *available at* http://www.urban.org/uploadedPDF/410803_PositiveRole.pdf.

96. SOC'Y FOR HUMAN RES. MGMT., *supra* note 94, at 7.

and that the risk of recidivism declines the longer an ex-offender remains free from further contact with the criminal justice system.[97] In fact, several studies have found there to be a "redemption point" for ex-offenders, meaning there comes a point in time when the recidivism risk converges to the risk of non-offenders, such that the ex-offender is about as unlikely as a non-offender to commit a crime.[98] For example, Blumstein and Nakamura found in their study of 80,000 rap sheets that the redemption point varied by offense type and age at first arrest.[99] For robbery, redemption took about nine years for a sixteen-year-old, eight years for an eighteen-year-old, and four years for a twenty-year-old, whereas for burglary, redemption took approximately five years, four years, and three years, respectively.[100] Redemption studies provide evidence that "the value of criminal records in predicting future crime diminishes over time,"[101] such that blanket proscriptions on the employment of ex-offenders, at least in most occupations, are empirically unjustified.

Employer concerns about ex-offenders are not always limited to the possibility they will commit additional crimes in the workplace, but may also extend to the ex-offenders' job performance. Surprisingly, the link between criminal history and employee performance has received almost no research attention.[102] The most promising research on this front is a twenty-three-year longitudinal study testing the relationship between criminal convictions and counterproductive employment behavior in

97. Kiminori Nakamura & Kristofer Bret Bucklen, *Recidivism, Redemption, and Desistance: Understanding Continuity and Change in Criminal Offending and Implications for Interventions*, 8 SOC. COMPASS 384, 386 (2014).

98. *See, e.g.*, Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 41–52 (2011) (finding that the redemption point for novice offenders is ten years, whereas for older offenders it is considerably shorter); Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 72–78 (2007) (finding a redemption period of approximately seven years across all age groups); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 493–98 (2006) (finding that after six or seven years of remaining crime free, the risk of recidivism begins to approximate, but not match, the risk of new offenses among non-offenders); Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 HOW. J. CRIM. JUST. 373, 380–83 (2009) (finding that individuals who are convicted between age seventeen and twenty generally reach redemption around age thirty).

99. Blumstein & Nakamura, *supra* note 93, at 338–39.

100. *Id.*

101. Nakamura & Bucklen, *supra* note 97, at 387.

102. Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL'Y 231, 245 (2012).

young adults.[103] The study not only found that adolescent criminal convictions did not predict counterproductive work behaviors, but in fact, "criminal conviction actually had small *negative* relationships with fighting or stealing at work."[104] The researchers suggested this could be due to a number of reasons, including that a past conviction could serve as a "preventative buffer" against misconduct at work because the ex-offender learned her lesson, an ex-offender may be more careful at work because the fear of getting fired is greater among people with criminal records, or perhaps individuals with lengthy criminal records simply spend less time employed and therefore have fewer opportunities to engage in inappropriate work behaviors.[105] Thus, as with redemption studies, preliminary research indicates employers may not be eliminating potential problem-employees by screening them for past criminal behavior.

D. Unemployment and Recidivism

Scholars have long contended that employment serves as an important mechanism to prevent ex-offenders from reverting to criminal activity.[106] President George W. Bush called attention to this relationship in his 2004 State of the Union Address by declaring: "We know from long experience that if [released inmates] can't find work or a home or help, they are much more likely to commit crime and return to prison."[107] Theoretical assumptions about the causal relationship between work and recidivism tend to emphasize the financial benefits of employment. Having a job enables ex-offenders to pay their bills and secure housing, thereby

103. Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427 (2007).

104. *Id.* at 1434 (emphasis added).

105. *Id.*

106. *See, e.g.*, Peter Finn, *Job Placement for Offenders in Relation to Recidivism*, 28 J. OFFENDER REHABILITATION 89, 89–90 (1998) (citing studies in support of assertion that "unemployment and low-paid and temporary jobs among ex-offenders may be associated with recidivism"); Byron Harrison & Robert Carl Schehr, *Offenders and Post-Release Jobs: Variables Influencing Success and Failure*, 39 J. OFFENDER REHABILITATION 35, 40–41 (2004) (analyzing studies showing how employment contributes to a stable prison rate); Henry & Jacobs, *supra* note 4, at 755 ("[M]any criminologists and social reformers have long advocated programs to expand employment opportunities for ex-offenders. . . ."); Paul-Emile, *supra* note 2, at 899 (citing studies in support of argument that "stable work is among the most effective ways to protect against a return to criminal activity"); Tim Wadsworth, *The Meaning of Work: Conceptualizing the Deterrent Effect of Employment on Crime Among Young Adults*, 49 SOC. PERSP. 343, 346 (2006) (noting that studies consistently support a "deterrent influence of wages" on crime and recidivism).

107. George W. Bush, U.S. President, State of the Union Address (Jan. 20, 2004), *available at* http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html.

"reduc[ing] the economic incentive to engage in income-generating crimes."[108] Theories also stress how work can generate greater personal support, stronger positive relationships, enhanced self-esteem, better mental health, and the ability to refocus one's time and efforts on pro-social activities, all of which reduce the likelihood of engaging in risky behaviors or associating with people who do so.[109]

Although the relationship between employment and recidivism is complex, studies have consistently found that ex-offenders are less likely to recidivate if they are employed. Nally and colleagues' study of over 6,500 ex-prisoners five years after release found education and employment status to be the strongest predictors of recidivism, with employment lowering the odds of recidivism by 37.4%.[110] Similarly, Berg and Huebner's study of 401 parolees over forty-six months found employment to have a "significant, negative influence on recidivism."[111] Six hundred days after release, 42% of employed parolees had survived without an arrest, compared to just 24% of unemployed parolees.[112] Sampson and Laub's longitudinal analysis of juvenile delinquents likewise found job stability to be a significant deterrent to adult crime and deviance.[113] Subjects with low job stability during young adulthood were at least five times more likely to engage in deviant behavior than those with high job stability.[114] By contrast, Uggen found that employment did not affect the likelihood of recidivism in ex-offenders under age twenty-seven; however, for ex-offenders age twenty-seven or older, employment

108. Berg & Huebner, *supra* note 59, at 387.

109. LE'ANN DURAN ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS 2 (2013), *available at* https://www.bja.gov/Publications/CSG-Reentry-and-Employment.pdf; Robert J. Sampson & John H. Laub, *Crime and Deviance Over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609, 611 (1990) (arguing that employment by itself does not reduce crime, but the stability and commitment associated with work do); *see also* NANCY LA VIGNE ET AL., URBAN INST., RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS, AND COMMUNITY GROUPS 15–16 (2008), *available at* http://www.urban.org/UploadedPDF/411767_successful_reentry.pdf (noting that ex-offender employment promotes "self-efficacy and self-sufficiency, building confidence in released prisoners that they can support themselves without needing to resort to criminal activities or reliance on family members or 'hand outs,' and providing a new social network that supports positive behaviors and serves as a protective factor against future criminal activity").

110. John M. Nally et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States*, 9 INT'L J. CRIM. JUST. SCI. 16, 26–27 (2014).

111. Berg & Huebner, *supra* note 59, at 397.

112. *Id.* at 397–98.

113. Sampson & Laub, *supra* note 109, at 617.

114. *Id.*

reduced the likelihood of recidivism by 24%.[115] Tripodi and colleagues found that employment did not reduce the likelihood of recidivism, but did prolong the length of time until reincarceration.[116] Ex-offenders who obtained employment upon release from prison averaged 31.4 months before being reincarcerated, compared to 17.3 months for ex-offenders who did not obtain employment.[117]

E. Consequences of Recidivism

In the United States, approximately 45% of ex-prisoners are reincarcerated within three years.[118] The consequences of recidivism are devastating not only to individual offenders, but also to their families, communities, and society at large. At the individual level, a prison sentence inflicts pain and suffering on the offender while behind bars, as he is "denied liberty, deprived of the company of loved ones, and exposed to the dangers and degradations of prison life."[119] But as unpleasant as prison can be, life after release can be just as difficult, if not more so. Studies have found that ex-offenders suffer long-term negative mental and physical health consequences as a result of incarceration,[120] and that their life expectancy is diminished by two years for each year spent behind bars.[121] Ex-offenders may also be especially prone to substance abuse.[122] As previously discussed, they also have substantial difficulty finding and

115. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 535–37 (2000).

116. Tripodi et al., *supra* note 50, at 713–14.

117. *Id.*

118. *See* PEW CTR. ON THE STATES, *supra* note 30, at 2.

119. Michael Tonry, *Crime*, *in* CONTEMPORARY READINGS IN SOCIAL PROBLEMS 244, 252 (Anna Leon-Guerrero & Kristine Zentgraf eds., 2009).

120. *See, e.g.*, Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56, 64–65 (2008) (finding that individuals with a history of incarceration are consistently more likely to be afflicted with infectious diseases and other stress-related illnesses); Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 121–24 (2007) (finding that a history of incarceration strongly increases the likelihood of severe health limitations following release from prison).

121. Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 525–26 (2013).

122. Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 49–50 (Jeremy Travis & Michelle Waul eds., 2003) ("The strains of postprison adjustment and the lack of available community-based treatment programs and social services . . . increase the likelihood that recently released prisoners will turn to drugs or alcohol as a form of self-medication and, as a result, severely compromise their successful reintegration into society.").

maintaining steady employment,[123] and their lifetime earnings are often significantly diminished.[124]

The families of incarcerated individuals likewise experience reduced standards of living and lesser life chances both during the period of incarceration and following release.[125] When a parent goes to prison, the family he supported often must apply for food stamps and other financial assistance.[126] Incarceration increases the likelihood of household food insecurity by 4 to 15%.[127] For married men, incarceration during marriage significantly increases the risk of divorce or separation.[128] Imprisonment likewise impedes family formation, thus increasing the number of children raised in single-parent families.[129] Children are particularly vulnerable to parental imprisonment. About half of US prisoners are parents of children under age eighteen, and the number of children with a parent in prison has nearly doubled, from roughly 950,000 children in 1991 to 1.7 million in 2007, which represents 2.3% of the country's children.[130] Researchers and practitioners have identified a variety of negative long-term effects on children stemming from parental incarceration. For instance, a meta-analysis of forty studies found that parental incarceration is associated with a higher risk of antisocial behavior in children.[131] It may also disrupt the attachment bond between parents and children, which "will likely

123. *See supra* Part I.C.

124. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 541 (2002) (concluding "[t]here is strong evidence that incarceration reduces the wages of ex-inmates by 10 to 20 percent").

125. Tonry, *supra* note 119, at 252 ("Insofar as ex-prisoners support partners and children, they too experience reduced standards of living and often lesser life chances than they would otherwise have had.").

126. *Id.*

127. Sally Wallace & Robynn Cox, *The Impact of Incarceration on Food Insecurity Among Households with Children* 29 (Univ. of Ky. Ctr. for Poverty Research, Discussion Paper No. 2012-14, 2012), *available at* http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1024&context=ukcpr_papers.

128. Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 J. MARRIAGE & FAM. 721, 731 (2005) (finding that men in prison are 3.6 times more likely to divorce or separate).

129. Melinda Tasca et al., *Family and Residential Instability in the Context of Paternal and Maternal Incarceration*, 38 CRIM. JUST. & BEHAV. 231, 244 (2011) (finding that "fathers with a history of incarceration [are] rarely involved in their children's lives and that . . . in the majority of cases the mother [has] custody of the child and [is] raising the youth as a single parent").

130. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2008), *available at* http://www.bjs.gov/content/pub/pdf/pptmc.pdf.

131. Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCH. BULL. 175, 189–91 (2012).

adversely affect the quality of the child's attachment to the parent," and can also result in "poorer peer relationships and diminished cognitive abilities."[132] School-age children of incarcerated parents are at increased risk of poor academic performance, classroom behavior problems, transient school phobias, teasing, and ostracization.[133] Children who witness a parent's arrest also are more prone to suffer nightmares and flashbacks to the arrest incident.[134]

Because most prisoners come from and return to a small set of inner-city neighborhoods, incarceration and reentry affect entire communities in terms of health, housing, employment, and social networks.[135] Incarceration shapes the quality of life in such communities, as each resident experiences certain unintended consequences of incarceration, such as "elevated stigma, financial stress, fractured identities, and low self-esteem."[136] This can cause residents to withdraw from community life, which can ultimately diminish the well-being of local businesses, churches, and other elements of the community.[137] Incarceration can also disrupt community networks that are essential for building and maintaining social capital, thus compromising the community's ability to secure goods and services for its residents.[138] This can be particularly devastating for children, whose chances in life are often tied to their level of social capital.[139] Moreover, incarceration may also increase crime rates in some neighborhoods by fundamentally undermining community cohesion. Clear and colleagues found that above some critical number, men with criminal records become role models for youth, such that prison is no longer stigmatizing and stops serving as a deterrent to crime.[140]

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132. Ross D. Parke & K. Alison Clarke-Stewart, *The Effects of Parental Incarceration on Children: Perspectives, Promises, and Policies*, *in* PRISONERS ONCE REMOVED, *supra* note 122, at 189, 202–03.

133. *Id.* at 189, 203–04.

134. *See* Christina Jose Kampfner, *Post-Traumatic Stress Reactions in Children of Imprisoned Mothers*, *in* CHILDREN OF INCARCERATED PARENTS 89, 94–97 (Katherine Gabel & Denise Johnston eds., 1995).

135. Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, *in* PRISONERS ONCE REMOVED, *supra* note 122, at 285.

136. Dina R. Rose & Todd R. Clear, *Incarceration, Reentry, and Social Capital: Social Networks in the Balance*, *in* PRISONERS ONCE REMOVED, *supra* note 122, at 313, 314.

137. *Id.*

138. *Id.* at 313, 319.

139. *Id.* at 313, 321.

140. *See* Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 57–58 (2003); *see also* Tonry, *supra* note 119, at 252–53.

Furthermore, cycles of incarceration can also promote pervasive cynicism about the law and law enforcement, particularly among disproportionately impacted racial groups.[141]

Incarceration and reincarceration also impact society at large. The cost of imprisonment itself is immense. In the past three decades, state corrections expenditures have more than tripled, from $15 billion in 1982 to $48.5 billion in 2010.[142] A substantial portion of these expenses is tied to repeat offenders. Indeed, Pew's study of recidivism in forty-one states found that just a 10% decrease in recidivism could save more than $635 million annually.[143] Incarceration not only burdens the taxpayer, it strains the economy as a whole. Schmitt and Warner estimate that ex-offenders decrease overall employment rates by as much as 0.8 to 0.9%, resulting in a loss to the economy of between $57 and $65 billion per year.[144]

II. LEGAL LIMITS ON THE EMPLOYMENT OF EX-OFFENDERS

Although no federal law prohibits employment discrimination against ex-offenders, courts have long recognized the injustices of overbroad exclusions of ex-offenders in employment.[145] Courts utilize both the US Constitution and Title VII to occasionally strike down overbroad or unfair treatment of ex-offenders in employment. At the same time, courts have little sympathy for employers that employ ex-offenders who pose an unreasonable risk to others.[146] In such cases, courts have not hesitated to hold employers liable under state negligent hiring, retention, and supervision laws. Although the Constitution, Title VII, and state tort laws differ in terms of their legal standards, each requires a certain measure of

141. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262–63 (2008).

142. TRACY KYCKELHAHN, U.S. DEP'T OF JUSTICE, NCJ 239672, STATE CORRECTIONS EXPENDITURES, FY 1982–2010 1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/scefy8210.pdf.

143. PEW CTR. ON THE STATES, *supra* note 30, at 26.

144. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. AND POL'Y RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 14 (2010), *available at* www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.

145. *See, e.g.*, Soto-Lopez v. N.Y.C. Civil Serv. Comm'n, 713 F. Supp. 677, 679 (S.D.N.Y. 1989) (finding that there is a public policy in favor of hiring ex-offenders); Haddock v. City of New York, 553 N.E.2d 987, 992 (N.Y. 1990) ("[T]he opportunity for gainful employment may spell the difference between recidivism and rehabilitation.").

146. *See, e.g.*, Blair v. Defender Servs., Inc., 386 F.3d 623, 628–30 (4th Cir. 2004) (holding that employer's failure to run a background check on a janitorial employee who assaulted a student precluded the employer from summary judgment on a negligent hiring claim).

reasonableness that can inform future legislative efforts to balance ex-offenders' need for employment with employers' safety concerns.

A. Constitutional Cases

Despite occupying one of the most marginalized positions in American society, ex-offenders are not considered a suspect class for equal protection purposes and therefore do not receive heightened scrutiny when subject to state-sanctioned discrimination.[147] Consequently, state action barring ex-offenders from employment only needs to rationally relate to a legitimate government purpose to survive an equal protection attack.[148] Despite this low bar, courts do occasionally strike down as irrational laws that exclude ex-offenders from employment, if such laws are not sufficiently tailored to reflect the "probable and realistic circumstances in a felon's life."[149]

The Supreme Court first considered this issue in *Hawker v. New York*, which involved a challenge to a New York law that criminalized the practice of medicine after a felony conviction.[150] In upholding the law, the Court reasoned that "[i]t is not open to doubt that the commission of crime . . . has some relation to the question of character."[151] The Court acknowledged the possibility that "one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character," but ruled that New York was nonetheless entitled to "prescribe a rule of general application based upon a state of things."[152] In *Schware v. Board of Bar Examiners of New Mexico*, the Supreme Court was far less deferential to a Board of Bar Examiners' determination that the plaintiff's past disqualified him from practicing law.[153] The Court cautioned that, although a state can require standards such as good moral character before it admits an applicant to the bar, "any qualification must have a rational

147. Parker v. Lyons, 757 F.3d 701, 707 (7th Cir. 2014) (holding that felons are not a suspect class); Stauffer v. Gearhart, 741 F.3d 574, 587 (5th Cir. 2014) (holding that sex offenders are not a suspect class).

148. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988).

149. *See, e.g.*, Smith v. Fussenich, 440 F. Supp. 1077, 1080 (D. Conn. 1977) (striking down as unconstitutional a statute that prohibited ex-felons from obtaining a license to work as a private detective or security guard because its "across-the-board disqualification fail[ed] to consider probable and realistic circumstances in a felon's life").

150. 170 U.S. 189 (1898).

151. *Id.* at 196.

152. *Id.* at 197.

153. 353 U.S. 232 (1957).

connection with the applicant's fitness or capacity to practice law."[154] The Court then engaged in a highly individualized assessment of the plaintiff's past and ultimately concluded there was no evidence to rationally justify a finding that the plaintiff was unfit to practice law.[155] Just three years later, in *De Veau v. Braisted*, the Supreme Court upheld a New York statute that prohibited ex-felons from collecting dues on behalf of a waterfront union.[156] This time the Court focused on the broader "context of the structure and history of the legislation of which it [was] a part"[157]—namely, the corruption and dishonesty that had infested the waterfront, in part because of the "presence on the waterfront of convicted felons in many influential positions."[158] The Court noted that in enacting this exclusion, "New York was not guessing or indulging in airy assumptions . . . . It was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation."[159]

Lower courts generally follow the Supreme Court's lead in validating laws and policies that bar ex-offenders from employment, so long as they are somewhat narrowly tailored to specific types of offenders or governmental interests. *Hill v. City of Chester* illustrates just how deferential courts can be to state action excluding ex-offenders from employment.[160] In that case, Robert Hill served two prison sentences when he was younger: one for homicide charges when he was fourteen years old and the other for engaging in intercourse with a minor.[161] While incarcerated, he earned his GED and acquired office skills; following his release, he pursued a career as a legal secretary, earned respect in the legal community, married and had three children, and even became a minister.[162] After the mayor appointed Hill as her administrative assistant, various constituents protested the appointment and pressured the city council to terminate Hill's employment.[163] Although the city council did not have the authority to discharge Hill, it voted to set his salary at zero,

154. *Id.* at 239.
155. *Id.* at 239–47.
156. 363 U.S. 144 (1960).
157. *Id.* at 147.
158. *Id.*
159. *Id.* at 159–60.
160. No. CIV. A. 92-4357, 1994 WL 463405 (E.D. Pa. Aug. 26, 1994), *aff'd*, 60 F.3d 815 (3d Cir. 1995), *cert. denied*, 516 U.S. 914 (1995).
161. *Id.* at *1.
162. *Id.*
163. *Id.*

effectively ending his employment.[164] In the lawsuit that followed, the court granted the City summary judgment based on its determination that the City's actions were justified by its "legitimate purpose of promoting high standards of professional conduct in the position of Administrative Assistant to the Mayor because of the sensitivity and importance of the position."[165] It further noted that the City had the right to be concerned that protests about Hill's employment could jeopardize the functioning of the City government.[166] The court seemed to adopt the "once a felon, always a felon" rationale, stating as fact that "persons who have committed serious crimes in the past have demonstrated a 'greater potential for abuse' of rights and privileges.'"[167]

Other examples of state actions that have passed constitutional muster include a prohibition against issuing certain types of insurance licenses to ex-felons,[168] school district bans on hiring ex-felons into some teaching positions,[169] an ordinance allowing the revocation of taxi licenses for certain crimes,[170] the denial of a license to operate a child-care facility to a person convicted of a violent crime,[171] a ban on employing parole officers with prior felony convictions,[172] the discharge of a city firefighter for a prior arson conviction,[173] a prohibition on private detective agencies

164. *Id.*

165. *Id.* at *5.

166. *Id.*

167. *Id.*

168. Heller v. Ross, 682 F. Supp. 2d 797, 803 (E.D. Mich. 2010) (internal quotation marks omitted) (holding that the state had a legitimate interest in denying insurance licenses to ex-felons because "it is rational to conclude that applicants who have been convicted of felonies are more likely to violate their legal, and fiduciary, obligations to their clients").

169. Crook v. El Paso Indep. Sch. Dist., 277 F. App'x 477, 481 (5th Cir. 2008) (holding that a school board's policy barring ex-felons from permanent teaching positions reflected "the legitimate interest of protecting children from both physical harm and corrupt influences"); Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994) (same).

170. M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941, 951 (N.D. Ill. 1998) (holding that the city had a "legitimate interest in protecting the public from those with criminal propensities").

171. Lopez v. McMahon, 253 Cal. Rptr. 321, 325 (Ct. App. 1988) (holding that a statute disqualifying individuals with certain types of felony convictions from operating a day-care facility was "rationally related to the legislative purpose to protect day care children against risk of harm").

172. Dallara v. Sinnott, No. 1:98-CV-3472-ENVCLP, 2006 WL 1582159, at *3 (E.D.N.Y. June 5, 2006) (finding that "parole officers have a unique ability to exercise awesome authority on their own split second judgment," and that New York had "a legitimate interest in hiring qualified individuals of high moral character who have a background likely to inspire public confidence and respect").

173. Carlyle v. Sitterson, 438 F. Supp. 956, 963 (E.D.N.C. 1975) (holding that a fire department did not act capriciously in discharging the plaintiff because his arson conviction was "directly antithetical to the duties of a fireman").

employing convicted felons for ten years,[174] and the denial of a license to operate a dance hall to an ex-felon.[175]

By contrast, courts tend to strike down blanket or otherwise overbroad employment exclusions. For example, in *Barletta v. Rilling*, the district court invalidated Connecticut's statutory ban on issuing precious metals licenses to ex-felons.[176] The court acknowledged the state had a reasonable interest in eliminating fraud in the precious metals trade,[177] but determined there was no rational nexus between "any and every felony offense and the fitness to act as a precious metals dealer."[178] The court pointed out that many felonies, such as mishandling environmental pollutants and draft dodging, were not related to precious metals dealing, whereas many misdemeanors—which were not included under the ban—"reflect conduct that seems to be more relevant to the state's legitimate goals."[179] The court further noted that the statute also failed to "distinguish among felons in terms of when they were convicted and how severely they were sentenced," and "prohibit[ed] consideration of the nature and severity of the crime, the nature and circumstances of an applicant's involvement in the crime, the time elapsed since conviction, and the degree of the applicant's rehabilitation."[180]

Similarly, in *Smith v. Fussenich*, the district court struck down a Connecticut statute banning ex-felons from employment as private detectives or security guards.[181] The court reasoned that the statute "fail[ed] to recognize the obvious differences in the fitness and character of those persons with felony records," and that crimes such as bigamy and tax evasion "have virtually no relevance to an individual's performance as a private detective or security guard."[182] The court further noted that the statute's blanket prohibition failed to take into account the "probable and realistic circumstances in a felon's life, including the likelihood of

174. Schanuel v. Anderson, 708 F.2d 316, 320 (7th Cir. 1983) (holding that the statutory ban was constitutional because it was "more closely tailored to the state's legitimate interest in a competent and reliable workforce in the sensitive area of detective work").

175. Darks v. City of Cincinnati, 745 F.2d 1040, 1043 (6th Cir. 1984) (holding that the ordinance furthered the city's interests in "insuring that dance halls are operated by persons of integrity" and that dance hall owners "will abide by and enforce liquor and tax collection laws").

176. 973 F. Supp. 2d 132 (D. Conn. 2013).

177. *Id.* at 136.

178. *Id.* at 138.

179. *Id.* at 138–39.

180. *Id.* at 139.

181. 440 F. Supp. 1077, 1082 (D. Conn. 1977).

182. *Id.* at 1080.

rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation."[183]

Other examples of state actions that have been deemed unconstitutional include bans on contracting with towing companies whose owners have a criminal record,[184] the denial of a teaching credential to a community college instructor because of a misdemeanor conviction,[185] general exclusions from state and municipal employment,[186] the denial of a license to sell vehicles,[187] and a lifetime ban from working for the Massachusetts Health and Human Services Agency.[188]

B. Title VII Cases

Title VII provides some relief to ex-offenders who are discriminated against in employment, but only in very limited cases. The statute prohibits disparate treatment and disparate impact in the employment of ex-offenders, but only if it is somehow tied to race, color, sex, national

183. *Id.*

184. Lewis v. Ala. Dep't of Pub. Safety, 831 F. Supp. 824, 827 (M.D. Ala. 1993) (holding that a prohibition on contracting with tow owners with misdemeanor convictions involving moral turpitude was "totally irrational and inconsistent" with the Equal Protection Clause); Gregg v. Lawson, 732 F. Supp. 849, 856 (E.D. Tenn. 1989) ("The Court is simply not convinced at this point that a legitimate State interest is served by such a broad rule that provides no procedure to determine whether in a particular case its application to a person who has previously been utilized by the State for providing wrecker services is justified, fair, and rational.").

185. Newland v. Bd. of Governors, 566 P.2d 254, 258 (Cal. 1977) ("The Legislature could not possibly or sensibly have concluded that misdemeanants, as opposed to felons, constitute a class of particularly incorrigible offenders who are beyond hope of rehabilitation.").

186. Furst v. N.Y.C. Transit Auth., 631 F. Supp. 1331, 1338 (E.D.N.Y. 1986) (holding that the employer's policy dismissing all employees with a felony conviction was "simply too broad to accomplish any legitimate governmental purpose"); Kindem v. City of Alameda, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980) ("[I]t has not been demonstrated that the sole fact of a single prior felony conviction renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought."); Butts v. Nichols, 381 F. Supp. 573, 580 (S.D. Iowa 1974) (stating that although Iowa "could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job," the state's blanket prohibition against the employment of ex-felons in civil service positions was not sufficiently tailored to "conform to what might be legitimate state interests").

187. Brewer v. Dep't of Motor Vehicles, 155 Cal. Rptr. 643, 649 (Ct. App. 1979) (holding that the plaintiff's conviction for inappropriate relations with a child was not rationally related to his fitness for selling vehicles).

188. Cronin v. O'Leary, No. 00-1713-F, 2001 WL 919969, at *3-7 (Mass. Super. Ct. Aug. 9, 2001) (holding that a lifetime ban on employment for certain convictions was a violation of due process).

origin, or religion.[189] As with constitutional challenges, the relevant inquiry under Title VII is whether the policy or practice bears some reasonable relation to a particular job. In disparate treatment cases an employer must proffer a legitimate nondiscriminatory reason for the adverse action,[190] whereas in disparate impact cases the employer must prove its exclusionary practice is "job related for the position in question and consistent with business necessity."[191]

1. Disparate Treatment Claims

To prove disparate treatment, a plaintiff generally must first establish a prima facie case of discrimination by showing: "(1) he is a member of a protected class, (2) he met his employer's legitimate expectations, (3) he suffered an adverse employment action, and (4) the circumstances give rise to an inference of discrimination."[192] The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for the adverse action, after which the burden then shifts back to the plaintiff to prove the employer's proffered reason was a pretext for discrimination.[193] For an ex-offender to prevail on a disparate treatment claim, he must prove the employer treated criminal history information differently for different persons based on a Title VII-protected characteristic. In its Enforcement Guidance, the EEOC gives the example of two similarly qualified applicants, one white and one black, who both have convictions for distributing marijuana as high school students.[194] If the employer denies the black candidate an interview based on his criminal record but interviews the white candidate, the employer has treated the ex-offenders differently based on race in violation of Title VII.[195]

189. 42 U.S.C. § 2000e-2(a)(1) (2013); EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § III.C; *see also* Mullings, *supra* note 5, at 281 (arguing that tying criminality to race under Title VII "reinforce[s] stereotypes of criminality and deepen[s] antipathy toward providing protection to ex-offenders, and African American and Hispanic ex-offenders in particular").

190. *See, e.g.*, Johnson v. Pub. Servs. Enter. Grp., 529 F. App'x 188, 192 (3d Cir. 2013) (affirming summary judgment for employer where employer's inability to verify the applicant's criminal history constituted a legitimate nondiscriminatory reason for revoking a conditional offer of employment).

191. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2013).

192. Young v. Builders Steel Co., 754 F.3d 573, 577 (8th Cir. 2014). This burden-shifting framework does not apply to cases in which a plaintiff has direct evidence of discrimination. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121–22 (1985).

193. *Young*, 754 F.3d at 577–78.

194. EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § IV.

195. *Id.*

Disparate treatment cases involving ex-offenders are most notable for their extreme deference to employers. For example, in *Strong v. Orkand Corporation*, the Sixth Circuit held that the plaintiff could not even make out a prima facie case of discrimination because his criminal record rendered him unqualified for the position at issue as a matter of law.[196] The court made no mention of what crimes the plaintiff had committed, when he had committed them, or how they related to the job, but instead appeared simply to take the employer's word for it.[197] Even where an ex-offender does establish a prima facie case of discrimination, the courts have held—often with little or no discussion—that taking an adverse action against an applicant or employee because of the individual's criminal record constitutes a legitimate nondiscriminatory reason for the employment decision.[198] At the pretext stage, courts rarely scrutinize whether the exclusion was justified in light of safety or performance concerns or the ex-offender's individual circumstances; instead, they tend to focus on factors unrelated to the ex-offender herself, such as how strictly the employer followed its policies[199] or whether the employer was consistent in its treatment of comparators.[200]

2. Disparate Impact Claims

Unlike disparate treatment cases, where a court's primary focus is on whether the employer's criminal record policy was consistently applied, in disparate impact cases courts carefully scrutinize whether the policy itself is justifiable. To prevail on a disparate impact claim, an ex-offender must show that an employer's facially neutral criminal record policy

196. 83 F. App'x 751, 753 (6th Cir. 2003).

197. *Id.*

198. Hickox & Roehling, *supra* note 92, at 240 (citations omitted) ("The courts have consistently held that not hiring an applicant or terminating an employee because of the individual's criminal record is a legitimate nondiscriminatory reason. Courts typically reach this conclusion with little or no discussion."); *see also, e.g.*, Crawford v. U.S. Dep't of Homeland Sec., 245 F. App'x 369, 378–79 (5th Cir. 2007) (holding, with almost no analysis, that the plaintiff's prior workplace misconduct and criminal record constituted legitimate nondiscriminatory reasons for the government's refusal to hire her as an immigration inspector).

199. *See, e.g.*, Barrow v. Terminix Int'l Co., No. 3:07-cv-324, 2009 WL 243093, at *12 (S.D. Ohio Jan. 29, 2009) (denying summary judgment to employer because there was no evidence that it followed its own policy in considering "the nature and seriousness of the crimes, the date of conviction and the relation to the position sought").

200. *See, e.g.*, Noble v. Career Educ. Corp., No. 07-CV-5832, 2009 WL 2391864, at *8-9 (S.D.N.Y. Aug. 4, 2009) (granting employer summary judgment where the plaintiff and proposed comparator were not similarly situated, in part because the plaintiff's conviction was very recent, and the comparator's conviction was nine years old).

disproportionately impacts some individuals protected under Title VII.[201] An employer can defeat a disparate impact claim by showing the exclusionary policy is job related and consistent with business necessity.[202]

The foundational disparate impact case involving ex-offenders is *Green v. Missouri Pacific Railroad Company*.[203] Buck Green, a black man who served twenty-one months in prison for refusing military induction, brought a disparate impact claim against the Railroad for denying his application for a clerk position pursuant to its policy of refusing to employ any person convicted of a crime other than a minor traffic offense.[204] Having determined the Railroad's policy disproportionately disqualified blacks, the court considered whether the policy was job related and consistent with business necessity.[205] The Railroad identified several reasons its policy was necessary: fear of cargo theft, handling company funds, bonding qualifications, the possible impeachment of an employee as a witness, negligent hiring liability, employment disruption due to recidivism, and an alleged lack of moral character of persons with convictions.[206] The court noted that although these reasons could "serve as relevant considerations in making individual hiring decisions, they in no way justif[ied] an absolute policy which sweeps so broadly."[207] In a post-remand appeal, the Eighth Circuit affirmed an injunction permitting the Railroad's use of criminal convictions as a factor in its employment decisions, so long as the Railroad considered three factors: the nature and gravity of the offense, how much time had elapsed since the offense or the completion of the sentence, and the nature of the job held or sought.[208]

For decades, courts have incorporated *Green*'s three factors into their analysis of whether criminal record exclusions are job related and consistent with business necessity.[209] The EEOC likewise has integrated

201. Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 576 n.1 (D.C. Cir. 2013) (citing Gen. Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375, 387–88 (1982)).

202. Ricci v. DeStefano, 557 U.S. 557, 578–79 (2009).

203. 523 F.2d 1290 (8th Cir. 1975).

204. *Id.* at 1292–93.

205. *Id.* at 1294–95.

206. *Id.* at 1298.

207. *Id.*

208. Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).

209. *See, e.g.*, Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 889–90 (S.D. Ohio 2013) (denying school district's motion to dismiss based on determination that policy banning individuals with certain convictions from employment did not constitute a business necessity as a matter of law because the offenses at issue were remote in time, one of the offenses was "insubstantial," and both plaintiffs had demonstrated "decades of good performance"); Hill v. U.S. Postal Serv., 522 F. Supp.

the *Green* factors into its various policies and guidance on criminal convictions.[210] However, in 2007, the Third Circuit sent shockwaves through the business world by imposing a more rigorous assessment of business necessity in *El v. Southeastern Pennsylvania Transportation Authority* ("SEPTA").[211] The case involved a disparate impact challenge to SEPTA's criminal conviction policy, which prohibited drivers of its paratransit busses from having certain convictions.[212] Douglas El brought suit against SEPTA after he was denied a paratransit driver position because of a forty-year-old, second-degree homicide conviction for his role in a gang-related fight when he was fifteen years old.[213] He served three-and-a-half years in prison.[214] Although the court affirmed summary judgment for SEPTA, it made clear it had serious "reservations" about SEPTA's policy.[215]

The court centered its analysis on the issue of risk, noting that hiring policies "ultimately concern the management of risk," and that although Title VII "does not ask the impossible" of employers in measuring risk perfectly, "[i]t does . . . require that the policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[216] Crucially, the court interpreted various Supreme Court disparate impact cases as "refus[ing] to accept bare or 'common-sense'-based assertions of business necessity and instead requir[ing] some level of empirical proof that challenged hiring criteria accurately predicted job performance."[217] The court concluded from these cases that "employers cannot rely on rough-cut measures of employment-related qualities; rather, they must tailor their criteria to measure those qualities

1283, 1301 (S.D.N.Y. 1981) (finding that evidence showed the employer did not consider an applicant's conviction in isolation "but in the context of the [individual's] overall qualifications and employment record"). *But see* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752 (S.D. Fla. 1989) (observing that *Green* was "ill founded" because it could be "broadly read to bar all employment conviction policies").

210. *See, e.g.*, EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.1 (identifying the *Green* factors as relevant to the question of job relatedness and business necessity); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), *available at* http://www.eeoc.gov/policy/docs/convict1.html (replacing prior analytical framework with *Green* factors).

211. 479 F.3d 232 (3d Cir. 2007).

212. *Id.* at 236.

213. *Id.* at 235–36.

214. *Id.* at 236.

215. *Id.* at 235.

216. *Id.* at 244–45.

217. *Id.* at 240.

accurately and directly for each applicant."[218] The court likewise interpreted Supreme Court precedent as rejecting "more is better-style reasoning," whereby an employer may try to justify its exclusionary policy based on "some abstract notion that more of a given quality is better."[219] In so doing, the court implicitly rejected *Green*'s three-factor test and the EEOC's formulation of the business necessity defense and instead demanded empirically-backed evidence to justify exclusionary employment policies.[220]

The case ultimately turned on the fact that SEPTA produced empirical evidence to justify its policy, which El did not refute.[221] A renowned expert on recidivism testified that although an individual's likelihood of recidivating decreases the longer he stays free from criminal activity, the individual cannot "be judged to be *less or equally likely* to commit a future violent act than comparable individuals who have no prior violent history."[222] The expert testified that although the risk differential might be small, making predictions about comparable low-probability events would be "extremely difficult."[223] Based on this testimony, the court concluded that even though the probability El would recidivate after forty years of living crime free was small, it was sufficient to justify SEPTA's policy, "given the marked sensitivity of the paratransit position at issue."[224] A second expert witness testified that "disabled people are proportionately more likely than others to be the victims of violent or sexual crimes," and that "employees of transportation providers commit a disproportionate share of those crimes against disabled people."[225] He further testified that the predictive power of past violent criminal activity "moderates over time but remains regardless of how much time passes."[226] From this, the court determined that SEPTA's decision to screen out applicants with violent convictions, no matter how remote, was appropriate in light of the extraordinarily sensitive nature of the paratransit driver position.[227]

218. *Id.*
219. *Id.* (internal quotation marks omitted).
220. *Id.* at 243–45.
221. *Id.* at 247–48.
222. *Id.* at 246.
223. *Id.*
224. *Id.* at 247.
225. *Id.*
226. *Id.*
227. *Id.*

Although the court expressed skepticism about the validity of the expert testimony,[228] the absence of any counterevidence left it "little choice" but to uphold SEPTA's policy.[229] In the court's view, had El "hired an expert who testified that there is [a] time at which a former criminal is no longer any more likely to recidivate than the average person"—a redemption point[230]—it would have been "a different case."[231] *El* marks a serious departure from past judicial treatment of criminal exclusion policies. Although the Third Circuit ultimately upheld SEPTA's policy, the decision warns that employers can no longer rely on stereotypical assumptions about ex-offenders, but must analyze the risk both quantitatively and qualitatively to prove business necessity.

3. EEOC Guidance

The *El* decision prompted the EEOC to reevaluate its policy statements on employers' consideration of criminal records[232] and issue new guidance that updated, consolidated, and superseded all of its previous policy statements on the issue.[233] The Enforcement Guidance is noteworthy in several regards. First, the EEOC distinguishes between arrest and conviction records, cautioning that unlike a criminal conviction, which "will usually serve as sufficient evidence that a person engaged in particular conduct,"[234] "an arrest record standing alone may not be used to deny an employment opportunity" because an arrest is not proof of criminal conduct.[235] Although the EEOC does not consider an exclusion based on an arrest record alone to be job related and consistent with business necessity, the Commission acknowledges an arrest may "trigger

228. *Id.* ("This is not to say that we are convinced that SEPTA's expert reports are ironclad in the abstract.").

229. *Id.*

230. *See supra* Part I.C.

231. *El*, 479 F.3d at 247.

232. *See Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm?renderforprint=1 (last visited Aug. 28, 2015) (stating that the EEOC decided to reevaluate existing policies, in part because of the Third Circuit's suggestion in *El* that "the Commission should provide in-depth legal analysis and updated research on this issue"); *see also El*, 479 F.3d at 244 (concluding the EEOC's guidelines were not "entitled to great deference," and that although "the EEOC's policy was rewritten to bring it in line with the *Green* case . . . the policy document itself d[id] not substantively analyze the statute").

233. EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § II.

234. *Id.* § V.B.3.

235. *Id.* § V.B.2.

an inquiry into whether the conduct underlying the arrest justifies an adverse employment action."[236] If such conduct renders a person unfit for the position, the employer may make an employment decision on that basis.[237]

The Enforcement Guidance also details the EEOC's position on how an employer can prove a criminal record exclusion is job related and consistent with business necessity. If data about criminal conduct and subsequent work performance is available, an employer can prove the defense by validating the criminal conduct screen in accordance with the Uniform Guidelines on Employee Selection Procedures.[238] Because such data are relatively scarce, a more feasible option for most employers is to develop "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job" (the *Green* factors), and then provide "an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."[239] The individualized assessment should allow the person an opportunity to explain why the exclusion should not apply in her case.[240] Mitigating individualized evidence may include proof that the ex-offender was not correctly identified in the criminal record, the facts and circumstances surrounding the offense, the number of offenses on the person's record, age at the time of conviction or release from prison, evidence that the person performed similar work post-conviction without any issues, the length and consistency of the person's employment history before and after the offense, rehabilitation efforts, employment and character references, and whether the individual is bonded.[241]

A final point of emphasis in the Enforcement Guidance is the EEOC's endorsement of banning criminal history questions from employment applications as a best practice.[242] The EEOC urges employers to "not ask about convictions on job applications," and recommends that any subsequent inquiries into the person's criminal record "be limited to

236. *Id.*
237. *Id.*
238. *Id.* § V.B.4; *see also* 29 C.F.R. § 1607.5 (2015) (describing the general standards for validity studies).
239. EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.4.
240. *Id.* § V.B.9.
241. *Id.*
242. *Id.* § V.B.3.

convictions for which exclusion would be job related for the position in question and consistent with business necessity."[243]

The EEOC has made criminal records policies that disparately impact Title VII-protected groups a litigation priority in recent years.[244] Although the EEOC has yet to prevail in court,[245] it successfully pressured Pepsi into a widely publicized $3.1 million settlement to resolve the agency's claim that the beverage giant's criminal policy unfairly weeded out black applicants.[246] More recently, BMW Manufacturing Company agreed to pay $1.6 million to settle a lawsuit in which the EEOC claimed the company's criminal background policy was unlawful because it excluded from employment any individual with a conviction for certain categories of crimes, regardless of the length of time since the conviction or whether the conviction was for a misdemeanor or felony.[247] The EEOC's aggressive actions of late prompted attorneys general from nine states to pen a scathing letter to the EEOC Commissioners in which they referred to the agency's litigation tactics as "quintessential example[s] of gross federal overreach."[248] In 2013, Texas took more drastic action by seeking a declaratory judgment in federal court that the Enforcement Guidance is

243. *Id.*

244. *See* EEOC v. Freeman, 961 F. Supp. 2d 783, 786 (D. Md. 2013) (noting that in addition to this case, the EEOC had recently filed similar lawsuits against Dollar General Corp. and BMW); *see also* Scott Thurm, *Employment Checks Fuel Race Complaints*, WALL ST. J., June 11, 2013, at A1, *available at* www.wsj.com/articles/SB10001424127887323495604578539283518855020 (stating that EEOC lawsuits against Dollar General and BMW "underscore increasing government scrutiny of criminal and credit checks").

245. *See, e.g.*, EEOC v. Freeman, No. RWT 09cv2573, 2015 U.S. Dist. LEXIS 118307, at *1-2, *54 (D. Md. Sept. 3, 2015) (ordering EEOC to pay attorneys' fees of nearly one million dollars based on faulty claim that the defendant's criminal background check policy disparately impacted minorities); EEOC v. Peoplemark, Inc., 732 F.3d 584, 591–92 (6th Cir. 2013) (affirming district court's order that the EEOC pay over $750,000 in attorney and expert fees and costs after agency's disparate impact claim failed); EEOC v. FAPS, Inc., Civil No. 10-3095 (JAP)(DEA), 2014 WL 4798802, at *16–22 (D.N.J. Sept. 26, 2014) (granting summary judgment to employer on disparate impact claim, but allowing pattern or practice claim to go forward).

246. Press Release, U.S. Equal Emp't Opportunity Comm'n, 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), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

247. Press Release, U.S. Equal Emp't Opportunity Comm'n, BMW to Pay $1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit (Sept. 8, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/9-8-15.cfm.

248. Letter from State Attorneys Gen. to U.S. Equal Emp't Opportunity Comm'rs (July 24, 2013), *available at* http://www.esrcheck.com/file/Atty-General-Criticism-of-EEOC_2013-7-24.pdf; *see also* Letter from Jacqueline A. Berrien, Chair, U.S. Equal Emp't Opportunity Comm'n, to State Attorneys Gen. (Aug. 29, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/wysk/upload/EEOC-Response-to-AG-Letter.pdf (responding to Attorneys General).

unlawful and unenforceable.[249] The case was ultimately dismissed based on the district court's determination that the Enforcement Guidance is merely a guideline, not a final agency action.[250] Texas has appealed the judgment to the Fifth Circuit.[251]

C. Negligent Hiring Cases

Unlike constitutional and Title VII challenges, negligent hiring claims tend to hinder, rather than promote, ex-offender employment. In recent years, companies have been slapped with multimillion-dollar verdicts—and a spate of bad publicity—for unwittingly hiring employees with questionable backgrounds who subsequently harm others.[252] The prospect of a negligent hiring lawsuit understandably makes some employers uneasy about employing anyone they believe may have a propensity for violence or dishonesty. Consequently, ex-offenders often stand little chance of being hired—especially over non-offenders—because employers rely on past criminal conduct as a predictor of future misconduct. Despite their negative effect on ex-offender employment, negligent hiring cases are useful in considering how accountable an employer should be for hiring a person with a criminal record.

The tort of negligent hiring is designed to motivate employers to hire competent and safe employees by holding employers liable for the tortious conduct of an employee against third parties, including coworkers, customers, and other members of the public.[253] Although the tort varies

249. *See generally* Compl. for Declaratory and Injunctive Relief, Texas v. EEOC, No. 5:13-cv-00255-C (N.D. Tex. Nov. 4, 2013).

250. *See* Order at 7-8, Texas v. EEOC, No. 5:13-cv-00255-C (N.D. Tex. Aug. 20, 2014).

251. *See generally* Notice of Appeal, Texas v. EEOC, No. 14-10949 (5th Cir. Aug. 25, 2014).

252. Mary L. Connerley et al., *Criminal Background Checks for Prospective and Current Employees: Current Practices Among Municipal Agencies*, 30 PUB. PERSONNEL MGMT. 173, 174 (2001) (employers lose approximately 72% of negligent hiring cases, with the average settlement over $1.6 million); *see also, e.g.*, *Oregon Jury Renders $5.2M Verdict Against Trucking Broker and Driver in Negligent Hiring Case*, PRWEB (Mar. 6, 2012), http://www.prweb.com/releases/2012/3/prweb9258166.htm (discussing a $5.2 million judgment against a transportation broker after its driver fell asleep while under the influence of methamphetamine and caused an accident that killed a man); Press Release, Langdon & Emison, Langdon & Emison Obtains $7 Million Verdict in Trial over Trucking Accident (Nov. 11, 2011), *available at* http://www.langdonemison.com/newsroom/langdon--emison-obtains-7-million-verdict-in-trial-over-trucking-accident (discussing a $7 million judgment against a trucking company that employed a driver who caused a fatal accident based on the company's failure to perform a background check that would have shown the driver had received two license revocations).

253. Shawn D. Vance, *How Reforming the Tort of Negligent Hiring Can Enhance the Economic Activity of a State, Be Good for Business and Protect the Victims of Certain Crimes*, 6 LEGIS. & POL'Y BRIEF 171, 176 (2014).

from state to state,[254] in general it allows a victim of an employee's tortious conduct to seek remedies from the employer if the employer knew or should have known of the employee's potential risk to cause harm or if the risk could have been discovered through reasonable investigation.[255] Unlike the doctrine of respondeat superior, the tort of negligent hiring generally does not require that the tortious conduct occurred within the scope and course of the employee's employment.[256]

Negligent hiring cases often turn on whether the employer knew or should have known that the employee posed an unreasonable risk. Courts do not apply a bright-line test in assessing this factor; instead, "[t]he scope of [an employer's] investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee."[257] Thus, it may be unreasonable for an employer not to conduct a criminal background search for certain positions but not others. In *Stacy v. HRB Tax Group, Inc.*, the Sixth Circuit reversed summary judgment for H&R Block on a negligent hiring claim brought by former clients whose identities were stolen by one of the company's tax preparers.[258] The court could not comprehend why the company did not perform a background check on someone who would have unfettered access to clients' financial information, noting that had the employer conducted even a "minimal investigation," it would have discovered the employee's multiple convictions for identity theft and using computers to commit a crime.[259] By contrast, in *Keen v. Miller Environmental Group, Inc.*, the Fifth Circuit affirmed summary judgment for an employer that did not conduct a background check on an employee who later raped a coworker after giving her a ride home from work.[260] The court emphasized that the employee

254. *Id.* at 181–99 (providing a state-by-state review of negligent hiring laws).

255. Kelly M. Feeley, *Hiring Sexters to Teach Children: Creating Predictable and Flexible Standards for Negligent Hiring in Schools*, 42 N.M. L. REV. 83, 89 (2012); *see also* RESTATEMENT (SECOND) OF AGENCY § 213 (1958) ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others . . . ."); *id.* § 213 cmt. d (stating that the basis for such liability is that "the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment," and thus, "under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand").

256. Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 792 (1993).

257. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 913 (Minn. 1983).

258. 516 F. App'x 588, 592 (6th Cir. 2013).

259. *Id.* at 589.

260. 702 F.3d 239, 249–50 (5th Cir. 2012).

was hired as a laborer to remove tar balls from the Gulf Coast, and that there was "[n]othing about the nature of that work [that] could have suggested . . . [the employee] was likely to subject [a coworker] to the risk of assault."[261] "If a criminal background check were necessary to screen for indicia that a manual laborer might assault a co-worker," the court reasoned, "it is difficult to envision a fact pattern in which a background check would not be necessary."[262]

Courts consider a variety of factors in assessing the foreseeability of an employee's tortious conduct. In most states, foreseeability depends on the extent and nature of an employee's criminal history and "the nexus . . . between the prior acts and the ultimate harm caused."[263] But courts are inconsistent at best in their analyses. Sometimes courts hold employers liable based on fairly unrelated past criminal behavior,[264] and other times they discount prior criminal acts for not being almost identical to the conduct underlying the negligent hiring claim.[265] In other states, courts tend to focus on the totality of the circumstances that would indicate an unreasonable risk of harm.[266] Such circumstances can be wide ranging and include anything from an offending employee's past positive experiences working under similar conditions[267] to professional opinions about an

261. *Id.* at 246.

262. *Id.*

263. Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1007–08 (2011) (quoting Doe v. ATC, Inc., 624 S.E.2d 447, 450 (S.C. Ct. App. 2005)).

264. *See, e.g.*, Hines v. Aandahl Constr. Co., No. A05-1634, 2006 WL 2598031, at *1-3 (Minn. Ct. App. Sept. 12, 2006) (upholding jury verdict against contractor whose employee robbed and assaulted homeowners, where employee had no history of violence but did have a record of chemical dependence and theft); Spencer v. Health Force, Inc., 107 P.3d 504, 512 (N.M. 2005) (finding that the employer could be held liable for employee's fatal injection of a patient with heroin based on employee's criminal record, which included aggravated assault and armed robbery convictions).

265. *See, e.g.*, Stalbosky v. Belew, 205 F.3d 890, 892–97 (6th Cir. 2000) (affirming summary judgment for trucking company because it was not reasonably foreseeable that driver with prior convictions for arson and aggravated assault would later rape and murder motorist); Prewitt v. Alexson Servs., Inc., No. 2007-09-218, 2008 WL 3893575, at *6 (Ohio Ct. App. Aug. 25, 2008) (holding that the employer could not be held liable for sexual assault of coworker by employee with record of indecent exposure, where exposure was not a physical assault and assailant received treatment for mental illness and was cleared by his doctor to return to work); Kirlin v. Halverson, 758 N.W.2d 436, 453 (S.D. 2008) (refusing to hold employer liable for assault committed by employee with prior conviction for resisting arrest in connection with a domestic violence situation, as well as arrests for assault, grand theft, and traffic violations).

266. Hickox, *supra* note 263, at 1008.

267. *See, e.g.*, Estevez-Yalcin v. Children's Village, No. 01-CV-8784 (KMK), 2006 WL 1643274, at *7 (S.D.N.Y. June 13, 2006) (finding the children's home not liable for mentor's molestation of resident because mentor had no prior record of inappropriate behavior, had worked well with children in the past, and was certified by two agencies to board a child).

offender's suitability for employment.[268] Because juries rather than courts typically decide issues of foreseeability, the case law provides limited guidance to employers seeking to avoid a negligent hiring lawsuit.[269]

III. AMENDING TITLE VII

Given the size of the United States' ex-offender population and its dismal recidivism rate, it is no longer tenable to allow employers unfettered discretion to discriminate against ex-offenders. Although the number of states enacting laws to protect ex-offenders in the workplace is growing, those states remain a small minority in comparison to states where discrimination against ex-offenders is permitted. Moreover, even among states that have adopted laws to protect ex-offenders, the types and levels of protection vary widely, as do the legal tests and standards interpreting those protections.[270] Workplace discrimination against ex-offenders is a nationwide problem, and therefore demands a national solution.[271] Federal legislation would not only bring much-needed consistency to this issue, but would also signal a national commitment to facilitating ex-offender reentry. This part advocates for three amendments to Title VII that would increase the employment of ex-offenders without unduly burdening employers or the public. Calls to amend Title VII in this regard have been scarce.[272] Yet Title VII exists primarily to protect vulnerable populations whose opportunities in the labor market historically have been limited by discrimination,[273] and thus, it is well suited to protect ex-offenders from unwarranted discrimination. Moreover, amending Title VII would likely require less time and fewer resources than writing a new law, and would also offer the added benefit of existing

268. *See, e.g.*, Coughlin v. Titus & Bean Graphics, Inc., 767 N.E.2d 106, 112 (Mass. App. Ct. 2002) (finding that employer was entitled to rely on doctors' professional evaluations in employing ex-offender who subsequently committed murder).

269. Hickox, *supra* note 263, at 1004.

270. *See infra* note 281.

271. Mullings, *supra* note 5, at 286 (arguing that a federal statute is arguably the best solution because the barriers to the employment of ex-offenders affect the national economy).

272. *See, e.g.*, Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1312–13 (2002).

273. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority citizens."); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 62 (1999) ("Title VII was enacted primarily to remedy discrimination against members of groups that had historically been excluded from equal access to social, political, and economic power.").

judicial analysis and EEOC guidance on the treatment of criminal records under the statute.

Amending Title VII is not without its challenges. Aside from opposition from employers and some members of the public, perhaps the biggest issue is how the amendments would affect existing state and federal laws and regulations pertaining to the employment and licensing of ex-offenders. The amendments to Title VII would preempt inconsistent state employment discrimination and negligent hiring laws,[274] but would not affect state statutes and regulations governing the licensure of ex-offenders in certain occupations.[275] The amendments likewise would not affect federal statutes that limit the employment or licensure of ex-offenders. Although amending Title VII would be a major step forward for ex-offenders, both state and federal barriers to the employment of ex-offenders must likewise be reassessed.

A. The Inclusion of "Nondisqualifying Criminal Records" as Protected Status

The single most important change necessary to protect ex-offenders from unwarranted discrimination is to amend Title VII to include "nondisqualifying criminal records" as a protected characteristic. In the five decades since its enactment, Title VII has proven remarkably immune to change, even as the American workplace has transformed dramatically. But the fact that Title VII remains limited to its original five protected categories hardly suggests other statuses are unworthy of federal protection. Indeed, characteristics such as age,[276] disability,[277] veteran status,[278] and, more recently, genetic information,[279] have received comparable protection through other statutory mechanisms. In this case, an alternative statutory scheme for protecting nondisqualifying criminal history seems unnecessary. Several states have incorporated similar

274. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § VII (alteration in original) (quoting 42 U.S.C. § 2000e-7) ("[S]tate and local laws or regulations are preempted by Title VII if they 'purport[] to require or permit the doing of any act which would be an unlawful employment practice' under Title VII.").

275. Camacho v. Puerto Rico Ports Auth., 369 F.3d 570, 577–78 (1st Cir. 2004) (holding that Title VII does not apply to licensing agencies).

276. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2013).

277. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2013).

278. Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 (2013).

279. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff (2013).

protections into their general employment discrimination statutes without difficulty.[280]

The amendment to Title VII would be the first to specify upfront that only "nondisqualifying criminal records" are protected. No state statute includes an explicit modifier in its statutory text, even though each law allows employers to consider certain types of criminal records, but not others.[281] The modifier "nondisqualifying" would make clear that only certain ex-offenders are entitled to Title VII protection. This is important because without this modifier, one could argue that including "criminal records" alongside traits such as race and sex, which have been deemed to have no bearing on one's fitness for employment, would render criminal records implicitly unrelated to job qualifications, which may not always be the case.[282] Sometimes criminal history is related to job qualifications, but in many cases there is no relation or the connection is so attenuated that it lacks probative value. In the latter case, a person's criminal history is no more relevant to her job performance than her race or sex. Consequently, "nondisqualifying criminal records" should be afforded the same protection as other Title VII traits.

Discerning the relevancy of a person's criminal record is a struggle for courts and criminologists alike—to say nothing of employers, many of whom lack the sophistication to make such a determination. The amendment must therefore provide employers with specific guidance on what constitutes a "criminal record," and when that record is

280. *See, e.g.*, HAW. REV. STAT. § 378-2 (2014) (including "arrest and court record" among twelve prohibited bases of employment discrimination); WIS. STAT. § 111.321 (2015) (including "arrest record" and "conviction record" among fourteen prohibited bases of employment discrimination).

281. Hawaii prohibits discrimination based on an individual's criminal record, but allows an employer to consider a conviction less than ten years old that bears "a rational relationship to the duties and responsibilities of the position." HAW. REV. STAT. §§ 378-2, 378-2.5(a), (c) (2014). Kansas prohibits discrimination based on "criminal history record information," unless such information "reasonably bears upon [the individual's] trustworthiness, or the safety or well-being of the employer's employees or customers." KAN. STAT. ANN. § 22-4710(f) (2015). New York prohibits discrimination based on "convict[ion] of one or more criminal offenses," unless the conviction is job related or the individual would pose an unreasonable risk to property or the safety of others. N.Y. CORRECT. LAW § 752 (McKinney Supp. 2013). Pennsylvania prohibits discrimination based on "[f]elony and misdemeanor convictions," but only if they do not "relate to the applicant's suitability for employment in the position for which he has applied." 18 PA. CONS. STAT. ANN. § 9125(b) (West 2012). Wisconsin prohibits discrimination based on "arrest record" or "conviction record," unless "the circumstances of the [offense] substantially relate to the circumstances of the particular job or licensed activity." WIS. STAT. § 111.335 (2015).

282. 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, 781 (2002); Paul-Emile, *supra* note 2, at 925.

"nondisqualifying." "Criminal record" should be broadly defined to include any information about an individual having been questioned, apprehended, taken into custody, detained, held for investigation, charged with an offense, served a summons, arrested (with or without a warrant), tried, or convicted of an offense.[283]

Defining "nondisqualifying" is more challenging, but is nevertheless a crucial component of the amendment. Each state that prohibits discrimination against ex-offenders has included statutory guidance to help employers discern when they can and cannot consider a person's criminal record.[284] However, most of these provisions tend to be extremely general and therefore fail to provide employers with any meaningful assistance.[285] New York is the lone exception to this trend. Like other states' laws, the New York statute broadly asserts that an employer cannot deny an ex-offender employment based on a previous conviction unless it is job related or the person would impose an unreasonable risk to property or to the safety of others.[286] But New York goes further by specifying eight factors employers must consider in determining the relevancy of an individual's criminal background: (1) the state's public policy to encourage the licensure and employment of ex-offenders; (2) the specific duties and responsibilities of the license or employment; (3) how the individual's criminal record would affect his ability to perform those specific duties and responsibilities; (4) the amount of time that has passed since the crime was committed; (5) how old the person was at the time of the crime; (6) the seriousness of the offense; (7) evidence of rehabilitation or good conduct; and (8) the employer's legitimate interest in protecting both property and the safety and welfare of specific individuals or the general public.[287]

The New York statute represents a helpful starting point for defining "nondisqualifying criminal records" under Title VII. Like the New York law, the amendment should limit the relevancy of criminal records to job relatedness and safety risks. But whereas New York authorizes employers to consider conviction records that are either job related or that create "an unreasonable risk" to property or the safety of others,[288] Title VII should require both job-relatedness *and* an unreasonable risk. Accordingly, the

283. Hawaii has adopted a similar definition. *See* HAW. REV. STAT. § 378-1 (2014).
284. *See supra* note 281.
285. *See id.*
286. N.Y. CORRECT. LAW § 752 (McKinney Supp. 2013).
287. *Id.* § 753.1.
288. *Id.* § 752.1-.2.

amendment should specify that an individual's criminal history is nondisqualifying unless there is a direct relationship between a previous criminal offense and the job in question, such that employing the individual would impose an unreasonable risk to property or to the safety of specific individuals or the general public.

This approach makes sense because even if an individual's criminal history is job related, that relationship only matters to the extent it creates an unreasonable risk to property or safety. For example, a theft conviction might be directly related to a hotel front desk clerk position, but if the hotel has security cameras that monitor the front desk area and a policy that two clerks must be present at the desk at all times, the security measures would minimize the risk of an ex-offender stealing from the cash register, thereby negating the importance of job-relatedness. Moreover, requiring both job-relatedness and unreasonable risk is consistent with disparate impact jurisprudence, which obliges an employer to show that its exclusionary policy is both job related and consistent with business necessity.[289] Equating property and safety concerns with business necessity is hardly a stretch; courts have consistently made this same connection.[290]

Like the New York statute, the amendment to Title VII should provide additional guidance on when a criminal record is nondisqualifying. However, rather than mandating that employers consider certain factors like the New York statute does,[291] the amendment should follow the EEOC's approach by providing a list of factors employers would be wise to consider in deciding whether an individual's criminal record should disqualify him from employment.[292] Framing the factors as

289. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2013) (providing that a plaintiff can prevail on a disparate impact claim where the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); *see also, e.g.*, Arizona v. City of Cottonwood, No. CV-11-1576-PHX-GMS, 2012 WL 2976162, at *5–17 (D. Ariz. July 20, 2012) (granting summary judgment to plaintiffs on disparate impact claim where defendant proved fitness test was job related but failed to establish business necessity).

290. *See, e.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232, 247 (3d Cir. 2007) (finding that a policy against employing paratransit drivers with certain convictions constituted business necessity because of the safety risks of having an ex-offender work with vulnerable disabled passengers); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753–54 (S.D. Fla. 1989) (finding that an employer's policy banning the employment of any truck driver with a theft conviction involving an active prison sentence was justified by the business need to minimize losses from employee theft).

291. *See* N.Y. CORRECT. LAW § 753.1 (McKinney Supp. 2013).

292. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.9. Unlike the New York statute, the EEOC stops short of requiring employers to perform an individualized assessment, noting that although "Title VII . . . does not necessarily require individualized assessment in all circumstances . . . [it] can help employers avoid Title VII liability by allowing them to consider more complete

recommendations rather than requirements will steer employers toward considerations that are likely to bear most directly on an ex-offender's suitability for employment, while preserving employers' autonomy to consider other factors that may be unique to the work environment or the individual. This approach likewise allows employers to maintain bright-line exclusionary policies in clear-cut cases, such as prohibiting an individual with a burglary conviction from working as a security system installer, or a sex offender from providing daycare services.[293] To incentivize employers to consider such factors, the amendment should further provide that an employer that evaluates these factors and thereafter makes a reasonable, good-faith determination that such factors militate against employing the ex-offender is entitled to a rebuttable presumption that its denial of employment to an ex-offender was not a pretext for discrimination, in the case of a disparate treatment claim, or that its decision was job related and consistent with business necessity, in the case of a disparate impact claim.

Both the New York statute and the EEOC Enforcement Guidance are helpful in formulating a list of recommendations to be included in Title VII to help employers determine whether a criminal record is nondisqualifying. Those factors can be condensed into the following recommendations.

(1) Public Policy Encouraging the Employment of Ex-Offenders. Employers should assess an individual's criminal record against a public policy backdrop that favors the employment of ex-offenders.[294] This policy is reflected in existing offender rehabilitation legislation such as the Second Chance Act of 2007, which acknowledges a strong public interest in providing ex-offenders with legitimate employment opportunities and other resources "to break the cycle of criminal recidivism, increase public

information on individual applicants or employees." *Id.* § V.B.8. The EEOC's list of potentially relevant factors overlaps with New York's eight-factor test, but also includes factors such as whether the individual was "correctly identified in the criminal record," the number of offenses committed, the individual's "employment history before and after the offense," and "[w]hether the individual is bonded." *Id.* § V.B.9.

293. In *El*, the Third Circuit rejected the argument that Title VII prohibits any bright-line policy with regard to criminal convictions, reasoning 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." 479 F.3d at 245. The EEOC likewise has acknowledged this possibility. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.4 ("Depending on the facts and circumstances, an employer may be able to justify a targeted criminal records screen solely under the *Green* factors.").

294. *See* N.Y. CORRECT. LAW § 753.1(a) (requiring employers to consider the "public policy of this state . . . to encourage the licensure and employment of [ex-offenders]").

safety, and help . . . better address the growing population of criminal offenders who return to their communities and commit new crimes."[295] Including this recommendation in the amendment would call employers' attention to the fact that employing an ex-offender can produce societal benefits spanning more than just the immediate employment relationship.[296] With this mindset, employers may be more open to employing ex-offenders.

(2) The Nature of the Criminal Record. Employers should scrutinize an ex-offender's criminal record, not to assess guilt or innocence,[297] but rather to determine if the offenses are a valid concern in light of the job in question. Not all criminal records are equal, and it would be irresponsible for an employer to treat them as such. Instead, an employer should consider pertinent factors relating to the record. For example, it may be appropriate for an employer to treat an ex-offender who committed a criminal act as a teenager more leniently than if the act was committed as an adult.[298] The amount of time that has elapsed since the applicant last committed an offense is also a valid consideration.[299] Although it is unrealistic to expect employers to discern when an ex-offender has reached redemption, certainly an offense committed twenty-five years earlier would be less probative than a more recent offense. Other factors employers should consider in evaluating a criminal record include the seriousness of the offense,[300] the number of offenses,[301] and any available facts surrounding the crime.[302]

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295. 42 U.S.C. § 17501(a)(1) (2013).

296. *See* Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 307–09 (2006) (arguing that protecting ex-offenders requires a shift from viewing the rationality of individual employment decisions to the rationality of the effect those decisions have on broader society).

297. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.3 (providing that it is reasonable in most cases for an employer to assume an individual engaged in a particular conduct based on a conviction record, "given the procedural safeguards associated with trials and guilty pleas").

298. *See* N.Y. CORRECT. LAW § 753.1(e) (requiring employers to consider the "age of the person at the time of occurrence of the criminal offense or offenses"); EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.9 (encouraging employers to consider "[o]lder age at the time of conviction, or release from prison").

299. *See* N.Y. CORRECT. LAW § 753.1(d) (requiring employers to consider the "time which has elapsed since the occurrence of the criminal offense or offenses").

300. *See id.* § 753.1(f) (requiring employers to consider the "seriousness of the offense or offenses").

301. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.9 (encouraging employers to consider the "number of offenses for which the individual was convicted").

302. *See id.* (encouraging employers to consider the "facts or circumstances surrounding the offense or conduct").

(3) The Nature of the Job. In addition to evaluating the nature of the criminal record, an employer should also determine if and how the record relates to the specific job in question.[303] This requires the employer to scrutinize various aspects of the employment position beyond just the job title. The EEOC Enforcement Guidance is instructive in this regard:

> While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home).[304]

This guidance seems well reasoned. For example, a hotel may be justified in refusing to hire a room attendant with a theft-related conviction because room attendants have access to guests' rooms and often work unsupervised. However, it may be harder for a hotel to refuse to hire a shuttle driver with a theft conviction, since a driver would rarely be alone with guests' property. Moreover, even a position-specific policy may be overbroad, depending on the individual circumstances under which employees perform their jobs. For example, a housekeeper's conviction for theft may have less relevance if he were only assigned to clean the lobby, hallways, and other public areas than if he were given access to guests' rooms.

(4) Legitimate Risk of Harm to Property or Safety. Assessing whether there is a legitimate risk of harm to property or safety requires an employer to consider the type of property an ex-offender would have access to and the people with whom he would interact. A garbage collector or farmhand would typically have less access to valuable property than would a jeweler, such that the potential harm to property would rightly be of greater concern to the jewelry store. Moreover, if an ex-offender is likely to interact with children, the elderly, the disabled, or other vulnerable populations, the safety risk could understandably weigh more heavily in an employer's assessment. In evaluating risk, employers must

303. *See* N.Y. CORRECT. LAW § 753.1(b)-(c) (requiring employers to consider the "specific duties and responsibilities necessarily related to the license or employment sought or held," as well as what bearing the criminal record would have on the person's "fitness or ability to perform . . . such duties or responsibilities").

304. EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.6.c.

resist the tendency to rely on what the Third Circuit referred to as "rough-cut measures of employment-related qualities" or "more is better-style reasoning."[305] Absent proof an ex-offender has crossed the redemption point, hiring a person with a criminal background can almost always be said to increase the risk of harm to property or safety.[306] However, an employer should not be able to rely on a generally elevated risk of harm alone; instead, it must carefully consider the types and amount of risk an ex-offender poses in light of his criminal record and the specific job duties in question.

(5) Evidence of Good Character. In recognition that many people with criminal records can and do change, an employer should consider an individual's criminal record together with any evidence of rehabilitation and good conduct produced by the ex-offender or on her behalf.[307] Such evidence may include character references, employment history, references from former employers, completion of job training or educational programs, and civic involvement. For example, a trucking company may consider hiring a driver with a DUI conviction if the driver can show she successfully completed an Alcoholics Anonymous recovery program, speaks to community organizations about the dangers of drunk driving, joined Mothers Against Drunk Driving, and has worked as a delivery driver for the past two years without any problems.

B. Banning the Box

Title VII should also be amended to prohibit employers in most instances from inquiring about an applicant's criminal history or running a criminal background check until after the applicant has completed at least one interview with the employer. Commonly referred to as "banning the box," similar legislation has been enacted by, or is pending in, numerous states and municipalities.[308] The purpose of this amendment is not to limit

305. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007) (internal quotation marks omitted).

306. *See id.* at 246.

307. *See* N.Y. CORRECT. LAW § 753.1(g) (requiring employers to consider "[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct"); EEOC ENFORCEMENT GUIDANCE, *supra* note 9, § V.B.9 (encouraging employers to consider "[e]vidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct"; the individual's employment history both pre- and post-offense; rehabilitation efforts such as education and training; character references; and "[w]hether the individual is bonded").

308. *See* BAN THE BOX, *supra* note 15, at 6–7 (featuring a regularly updated list of states and municipalities that have passed or are considering ban-the-box laws).

the scope of an employer's inquiry, but rather to control the timing of the investigation. Aside from making a "significant statement about public policy regarding the employment of ex-offenders,"[309] controlling the timing of an employer's inquiry into an applicant's criminal history has the added benefit of providing ex-offenders greater control over what sociologist Erving Goffman referred to as "impression management."[310] By delaying an employer's knowledge of an ex-offender's criminal history until after he has had the opportunity to convince the employer of his job qualifications, an employer may be more willing to overlook a criminal record in light of the applicant's qualifications, whereas if the employer were to become aware of the criminal record prior to interviewing the applicant, the employer may automatically dismiss the candidate without ever having met him.[311] Studies have shown that people ask stereotyped targets fewer questions, "selectively notice and retain information consistent with the stereotypes while ignoring information that is inconsistent with initial expectations," and are "less likely to seek out or retain individuating information when confronted with members of stigmatized social groups."[312] This is particularly true of ex-offenders. Pager and colleagues' audit study of 250 employers found that ex-offenders' ability to have personal contact with a potential employer "reduce[d] the effect of a criminal record" by approximately 15%, and that "testers who interact[ed] with employers [were] between four and six times more likely to receive a callback or job offer."[313]

Banning the box also benefits ex-offenders by providing greater incentive to apply for jobs. Most ex-offenders are under no illusion that finding employment after prison will be easy.[314] Jessica Henry argues that "the mere presence of a question about criminal history may deter otherwise qualified [ex-offenders] from applying" for a job, which can "trigger[] a downward spiral in which ex-offenders fail to seek work because they believe they will not be hired, which in turn leaves them mired in chronic unemployment and often results in a return to criminal

309. Mullings, *supra* note 5, at 282.

310. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 208–37 (1959).

311. *See* Pager et al., *supra* note 68, at 197 ("[A] wealth of social psychological evidence indicates that negative stereotypes compromise interactions and undermine the ability of interaction partners to demonstrate traits that are inconsistent with stereotypical expectations.").

312. *Id.* (citing studies).

313. *Id.* at 198–200.

314. *See* VERA KACHNOWSKI, URBAN INST., RETURNING HOME ILLINOIS POLICY BRIEF: EMPLOYMENT AND PRISONER REENTRY 2 (2005), *available at* http://www.urban.org/UploadedPDF/311215_employment.pdf.

behavior."[315] While it is true that banning the box may only delay the inevitable in some cases, the fact that an employer would not be able to dismiss an ex-offender's job application out of hand may provide ex-offenders with sufficient encouragement to more aggressively pursue employment.

Amending Title VII would resolve many of the issues left open by existing ban-the-box laws. Some commentators argue that existing laws are ineffective because they merely postpone discrimination.[316] However, delaying discrimination would not be an issue under the proposed amendments because Title VII would prohibit discrimination based on nondisqualifying criminal records. Concerns that some ban-the-box laws only regulate the timing of an employer's inquiry without imposing any limits on what an employer does with the information[317] are likewise inapplicable, since the amendments to Title VII would also include specific guidance on how to determine whether a criminal record is nondisqualifying. Lastly, employers may be critical of ban-the-box laws that require them to wait to conduct a background check until after they extend a conditional offer of employment[318] or deem the candidate otherwise qualified for employment[319] as unduly burdensome to the hiring process itself by requiring employers to spend valuable time and resources courting candidates they are otherwise entitled to exclude based on their criminal histories. This concern can be alleviated, at least in part, by allowing employers to inquire about an applicant's criminal history after just one interview rather than waiting until further in the interview process. Additionally, the amendment should include an exception for employers in industries where state or federal laws require background checks or otherwise restrict ex-offender employment.

One potential concern that the amendment would not directly address is the possibility that without criminal history information, employers might "statistically discriminate" against minority candidates by excluding them from consideration based on their assumption that minorities are likely to

315. Jessica S. Henry, *Criminal History on a "Need to Know" Basis: Employment Policies that Eliminate the Criminal History Box on Employment Applications*, JUST. POL'Y J., Fall 2008, at 1, 6, *available at* http://www.cjcj.org/uploads/cjcj/documents/criminal_history.pdf.

316. *See, e.g.*, Smith, *supra* note 14, at 211 (stating that ban-the-box laws generally do not preclude an employer's consideration of criminal records, but "simply delay it to later stages in the screening process").

317. *Id.* at 211, 215 (criticizing a Texas ban-the-box law as "say[ing] nothing about the factors employers should consider when evaluating applicants with criminal histories").

318. *See, e.g.*, HAW. REV. STAT. § 378-2.5(b) (2014).

319. *See, e.g.*, CONN. GEN. STAT. § 46a-80(b) (2015).

have criminal records.[320] This would place minority candidates without criminal records in a worse position than if they were allowed to reveal on the job application that their criminal history is clean.[321] At this juncture, it is unclear how often employers actually engage in statistical discrimination or if a federal ban-the-box law would impact this practice. At any rate, even though the amendments to Title VII would not directly address this concern, the fact remains that an employer's denial of employment based on stereotypical assumptions about a Title VII-protected trait such as race or national origin is prohibited.[322]

C. Negligent Hiring

The amendments to Title VII proposed in this article stand little chance of enactment unless employers are adequately protected from negligent hiring claims that may arise with more ex-offenders in the workplace. The threat of negligent hiring liability is a significant deterrent to employing ex-offenders for many businesses.[323] While the possibility of negligent hiring liability cannot and should not be eliminated, the tort should be made more employer friendly. To this end, Title VII should be amended to establish a federal cause of action for negligent hiring.[324] The amendment should create a rebuttable presumption that an offending employee's criminal history should be excluded from evidence in a negligent hiring case if the employer hired the individual after engaging in the five-factor analysis proposed in Part III.A. In cases where the employer engaged in

320. *See* Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 2009 U. CHI. LEGAL F. 381, 400–07 (noting that some evidence suggests that in the absence of criminal information employers will assume black males have a criminal history and exclude them from consideration).

321. Mullings, *supra* note 5, at 283 (citing Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006) ("'[S]tatistical discrimination' raises the possibility of putting some individuals, particularly African American males without criminal records, in a worse position than they would be if information about criminal records were available at the outset of the hiring process.")).

322. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, FACTS ABOUT RACE/COLOR DISCRIMINATION (2008), *available at* http://www.eeoc.gov/facts/fs-race.html ("Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.").

323. JENNIFER FAHEY ET AL., CRIME & JUSTICE INST., EMPLOYMENT OF EX-OFFENDERS: EMPLOYER PERSPECTIVES ii (2006), *available at* http://208.109.185.81/files/ex_offenders_employers_12-15-06.pdf (noting that over half of surveyed employers feared liability for hiring ex-offenders).

324. The amendment should likewise apply to negligent retention and negligent supervision claims.

the five-factor analysis, damages should be limited to Title VII's existing caps.

Although nearly every state recognizes the tort of negligent hiring, there are significant differences in state laws.[325] This variance not only leads to the inconsistent treatment of employers in negligent hiring cases, but can cause employers to treat ex-offender applicants differently depending on a particular state's law. Reforming negligent hiring laws through an amendment to Title VII rather than at the state level would help ensure employers are held to the same standards in every state. If employers are going to be subject to federal law when it comes to discriminating against ex-offenders, it only makes sense that a federal standard would also apply in holding employers liable for the hiring decisions they make as a result of those antidiscrimination standards.[326]

Unlike Title VII's other provisions, which only cover businesses with fifteen or more employees,[327] the negligent hiring amendment should apply to employers of any size. The amendment should set forth the precise elements of a negligent hiring claim, namely that: (1) an employment relationship existed between the employer and the offending employee; (2) the offending employee was unfit for employment under the circumstances of the position; (3) the employer failed to conduct a reasonable and appropriate investigation or knew or should have known the employee was unfit for employment; (4) the offending employee's actions caused the plaintiff to suffer harm; (5) the negligent hiring of the offending employee proximately caused the plaintiff's harm; and (6) the plaintiff actually suffered harm as a result of the offending employee's actions.[328] Additionally, the negligent hiring amendment should follow New York's lead[329] by creating a rebuttable presumption that the offending employee's criminal history should be excluded from evidence if the employer hired the employee based on its good-faith assessment of the five factors set forth in Part III.A. This presumption offers employers a

325. *See* Vance, *supra* note 253, at 199 (arguing that a more uniform negligent hiring law is required in light of key differences in how state laws have been developed, the level of foreseeability required by employers, and the guidance given to employers on how to avoid liability).

326. *See* Dermot Sullivan, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety*, 72 ST. JOHN'S L. REV. 581, 604 (1998) ("[E]mployers should not be exposed to unlimited liability when judicial constructions appear to restrict their power to fully evaluate the compatibility of an ex-offender's record with the responsibilities of the available position.").

327. 42 U.S.C. §§ 2000e(b), 2000e-2(b) (2013).

328. Feeley, *supra* note 255, at 94.

329. *See* N.Y. EXEC. LAW § 296.15 (McKinney Supp. 2013).

substantial advantage in defending against negligent hiring claims and thus would further incentivize employers to perform the five-factor assessment rather than dismiss—or hire—ex-offenders without appropriate scrutiny.

The negligent hiring amendment should also subject damages to Title VII's existing caps if the employer hired the offending employee after engaging in the five-factor analysis. Because the negligent hiring provision would apply to employers of any size, the amendment should make clear that the existing cap for employers with fifteen to one hundred employees would likewise apply to employers with fewer than fifteen employees. Although sure to be unpopular with the plaintiffs' bar,[330] damages caps have become commonplace in a variety of industries.[331] Capping damages would provide yet another incentive for employers to thoroughly evaluate an ex-offender's criminal record. The cap would also protect businesses' financial stability by giving employers a more realistic idea of what their potential exposure would be if they lost such a suit, so they could plan their insurance and bonding needs accordingly.[332]

Limiting an employer's liability for hiring an ex-offender is surely a controversial prospect. Yet several states have successfully done so. Texas recently passed a law that prohibits most negligent hiring or supervision claims based on an employee's criminal record.[333] In Florida, an employer that conducts a criminal background check that does not reveal information demonstrating unsuitability for employment is entitled to a rebuttable presumption against negligent hiring liability.[334] And North Carolina altogether bars negligent hiring claims if the ex-offender obtained a certificate of relief from a court.[335] These limitations reflect a

330. Although a damages cap would limit the amount of recovery in some cases, Sullivan argues that a cap might actually *benefit* plaintiffs, as courts may be more willing to "allow negligent hiring cases to proceed to trial" because there would be less "fear of juries setting extremely high precedents for future awards." Sullivan, *supra* note 326, at 602.

331. Sullivan, *supra* note 326, at 602–03 (noting that states limit negligence liability in a variety of areas, such as environmental pollution, aircraft disasters, medical malpractice, and negligent bailment).

332. Monica Scales, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 437 (2002).

333. TEX. CIV. PRAC. & REM. CODE ANN. §§ 142.001–.002 (West 2013) (providing that negligent hiring claims are allowed if the employee was convicted of an offense that was committed while performing duties similar to those reasonably expected to be performed, or if the conviction was for a sexually violent offense, murder, child-related offenses, aggravated robbery, or certain other offenses); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2013).

334. FLA. STAT. § 768.096(1) (2015).

335. N.C. GEN. STAT. § 15A-173.5 (2014). A certificate of relief is only available for certain types of offenses, and likewise requires proof of rehabilitation and a determination that "[g]ranting the

recognition that it would be unfair for employers to have to shoulder the entire burden of employing ex-offenders. Because society as a whole stands to benefit from the employment of ex-offenders, it is important that both employers and the public share in this responsibility.

D. Potential Impact

The amendments to Title VII proposed in this article would benefit society in several important ways. At the outset, it is important to recognize the potential significance of this legislation from a public policy perspective. For years, the federal government has acknowledged the need to help ex-offenders find employment and has even apportioned substantial funding to this endeavor.[336] But its unwillingness to pass legislation that directly improves an ex-offender's chances of employment has rendered many of its reentry initiatives somewhat hollow. Federal legislation that prohibits employment discrimination based on nondisqualifying criminal records, "bans the box" on job applications, and limits negligent hiring liability would signal to the public that the government is unequivocally committed to helping ex-offenders turn their lives around. With the federal government's backing, it is reasonable to expect other social institutions to follow suit in helping to remove unnecessary and unfair barriers to reentry.

The single most important goal of the proposed amendments is to reduce the United States' exorbitant recidivism rate. It is well settled that employment is one of the most—if not the most—important factors in determining whether an ex-offender successfully reintegrates into society.[337] Therefore, placing more ex-offenders in the workforce may be more effective in reducing recidivism than any other policy change. Lowering recidivism not only improves the health and life prospects of ex-offenders, but also promotes stronger families and more integrated communities.[338] At a societal level, successfully reintegrating ex-offenders can help lower corrections expenses, reduce crime rates, and create a stronger labor force.[339]

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petition would not pose an unreasonable risk to the safety or welfare of the public or any individual." *Id.* § 15A-173.2(b)(1)-(6).

336. *See supra* notes 18–21 and accompanying text.

337. *See supra* Part I.D.

338. *See supra* Part I.E.

339. *See supra* Part I.E.

In addition to reducing recidivism, the proposed amendments would help break down rigid stereotypes about people with criminal records. As more ex-offenders enter the workforce and are able to prove their value, the disdain and discomfort that supervisors and coworkers may initially feel eventually could be replaced with tolerance, if not admiration, for ex-offenders who are striving to overcome their pasts. By proving themselves in the workplace, ex-offenders may likewise help remove barriers to reentry in other areas, such as housing and education. Of course, there are risks that come with eliminating stereotypes about ex-offenders and removing reentry barriers. An argument could certainly be made that stereotypes and barriers serve important social functions like deterring criminal activity and reinforcing the bounds of socially acceptable behavior. But while these proposals could conceivably normalize criminal behavior on some level, the threat of imprisonment likely remains a much more powerful deterrent and boundary setter than post-release stigmas and reentry barriers ever could. A potentially more serious possibility is that in the absence of stereotypes and reentry barriers, people may let their guard down, thereby making themselves vulnerable to theft, assault, or other criminal acts by ex-offenders. Whether it is possible for society to embrace ex-offenders while exercising appropriate caution remains to be seen.

While these proposals would clearly benefit many ex-offenders, their potential impact on employers is less certain. On the one hand, employers may benefit from larger and more diverse applicant pools that include highly qualified ex-offenders who might otherwise be overlooked. Indeed, initial research suggests ex-offenders perform no worse, and in fact may perform better in some regards, than non-offender employees.[340] On the other hand, the amendments present new avenues for liability—hardly welcome news for employers struggling to stay afloat in this era of mass litigation. This places employers between a rock and a hard place by exposing them to liability if they fail to hire an ex-offender with a nondisqualifying criminal record, but also if they hire an ex-offender who later harms a third party. The amendments seek to alleviate this conundrum as much as possible by giving employers practical guidance regarding when a criminal record is nondisqualifying, creating rebuttable presumptions against discrimination and negligent hiring, and capping negligent hiring damages in certain cases.

The potential impact of the amendments on the public is similarly mixed. As previously discussed, reducing recidivism is not only beneficial

340. *See generally* Roberts et al., *supra* note 103.

to the individual and his family, but also to communities and society at large.[341] The public certainly stands to benefit generally from ex-offender employment, whether through lower taxes or a stronger labor force.[342] Moreover, as stereotypes about ex-offenders subside, members of the public can individually benefit by developing social connections with a segment of society that might otherwise be inaccessible. Yet these public benefits are of little worth if ex-offender employment jeopardizes safety. Because employment lowers recidivism, it is conceivable that employing more ex-offenders may actually increase public safety. However, this is unlikely to placate a customer or employee who comes into direct, unsupervised contact with an ex-offender employee.

With regard to safety, it is important to note that under the proposed amendments, an employer's duty to protect third parties from unreasonably dangerous employees remains unchanged. Thus, at least in theory, the amendments should not make workplaces any less safe since they only promote the employment of ex-offenders with nondisqualifying criminal records. Employers would still have every right—and indeed every obligation—to exclude from employment any ex-offender who poses an unreasonable risk. Certainly there will be times when employers erroneously deem an ex-offender suitable for employment and the ex-offender subsequently harms a third party. Ideally, such instances would become less common as employers more carefully scrutinize an applicant's criminal background. However, the threat of a discrimination claim may cause some employers to err on the side of hiring ex-offenders who present "close calls" simply to avoid a lawsuit. Regardless, an employer's duty to exercise reasonable care in hiring an ex-offender remains unchanged by the amendments. If an employer acts unreasonably, third-party tort victims would have all the same rights to recovery that currently exist.

Lastly, it is important to acknowledge that as crucial as these proposed amendments are, they represent just one part of the solution. As previously discussed, state and federal barriers to the employment and occupational licensing of ex-offenders must also be overhauled. Furthermore, while the proposed amendments would be a boon to ex-offenders with relatively minor or outdated offenses—particularly if they possess marketable skills and are free from mental or physical health or dependency issues—a sizeable portion of the ex-offender population unfortunately does not fit

341. *See supra* Part I.E.
342. *See supra* Part I.E.

this description. For many ex-offenders, if their criminal records do not disqualify them from employment, other factors such as low education, poor skills and training, and drug and alcohol addiction will. Therefore, prisoner rehabilitation programs that focus on education, vocational skills, and physical and mental well-being must be enhanced in order to elevate these ex-offenders to the point where the proposed amendments would be of true benefit.

CONCLUSION

The Civil Rights Act of 1964 is one of the most important laws ever enacted, in part because it has fundamentally altered how we treat groups of people who were long considered deserving of discrimination. Perhaps more so than other industrialized nations, the United States has proven particularly inhospitable to ex-offenders, imposing a vast network of both formal and informal sanctions to ensure people with criminal records continue serving a life sentence long after their prison terms are complete.[343] While some collateral consequences can be legally justified, most cannot. Accordingly, it is appropriate to draw upon the Civil Rights Act to change the way we think about—and treat—our growing ex-offender population.

Advocating for the employment of ex-offenders is a delicate task. No matter the proposal, there are bound to be risks and rewards, winners and losers. But with more than sixty-five million Americans with criminal records,[344] the time has come for comprehensive federal reform that empowers ex-offenders to turn their lives around through greater employment opportunities. To be sure, these efforts must carefully and responsibly balance the employment needs of ex-offenders with valid concerns about safety. The amendments proposed in this article attempt to strike such a balance. They encourage ex-offender employment by prohibiting discrimination based on nondisqualifying criminal records, banning employers from inquiring about an applicant's criminal history until after the first interview, and limiting an employer's liability for negligent hiring. But the amendments also protect employers' and the

343. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459, 465, 501 (2010) (arguing that in addition to locking up more of its citizens than any other country, "the United States imposes collateral consequences that are harsher and more pervasive than those in [other developed countries]," and that "both criminal convictions and their long-reaching effects are more *permanent* in the United States").

344. 65 MILLION, *supra* note 3, at 3.

public's interests by providing meaningful guidance on when an ex-offender's criminal record is nondisqualifying. Employers who follow this guidance are entitled to a rebuttable presumption against liability in discrimination cases, and in negligent hiring cases both a rebuttable presumption in favor of excluding evidence of an offending employee's criminal record and a damages cap. These are reasonable proposals designed to promote the employment of ex-offenders in appropriate cases, while safeguarding employers from excessive liability and the public from unreasonable risk. For many ex-offenders, these measures could mean the difference between recidivism and redemption.