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To Actually Give a Fair Chance: "Ban the Box" Law and the "Rationale Relationship" Standard

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TO ACTUALLY GIVE A FAIR CHANCE: “BAN THE BOX” LAWS AND THE “RATIONAL RELATIONSHIP” STANDARD

STEPHANIE LEACOCK*

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I. INTRODUCTION

In 2012, Zindora Crawford was arrested and charged with multiple counts

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of theft.¹ Instead of convicting her, the court allowed her to participate in an Accelerated Rehabilitative Disposition (“ARD”) program, which prevented the disposition of her crime from being considered a conviction under the law.² Four years later, she was denied a job at a T-Mobile retail store because of this very arrest.³

It is becoming more frequent that employers encounter job applicants with some form of criminal record.⁴ These employers ask these applicants about that criminal record and use it as a way to eliminate a “bad hire” from the hiring pool.⁵ This has created a group of job applicants who find obtaining employment after an arrest, charge, or conviction increasingly difficult.⁶ This phenomenon provided the inspiration for the “ban the box” movement, its goal being to make reintegration into communities easier for ex-offenders by making gainful employment easier for ex-offenders to obtain.⁷

The “box” in the movement’s name refers to a question or set of questions on employment applications that businesses create that asks an applicant about his or her criminal background.⁸ This question applies to an increasingly larger portion of the US population as incarceration rates increase through focuses on “law and order” and “tough on crime” policies, and the “war on drugs.”⁹ This eliminates greater numbers of people from the

1. Complaint ¶ 13, *Zindora Crawford v. T-Mobile US, Inc.*, (E.D. Pa. Oct. 26, 2017) (No. 2:17-cv-04826) [hereinafter *Crawford Complaint*].

2. *Id.* ¶¶ 14-17.

3. *Id.* ¶¶ 39-41.

4. See Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> (stating that nearly one-third of American adults have a criminal record).

5. See Michael Gaul, *Considering Employee Criminal Background Checks? Ask Yourself This Question*, PROFORMA SCREENING SOLUTIONS (May 4, 2010), <http://www.proformascreening.com/blog/2010/05/04/employee-criminal-background-checks/> (describing reasons companies use criminal background checks including to see past criminal behavior and use that information to predict employee behavior).

6. See Eric Dexheimer, *After 30 Years in Business, Locksmith Loses his License – For 1980 Crime*, MY STATESMAN (Dec. 29, 2017, 10:58 AM), <https://www.mystatesman.com/news/after-years-business-locksmith-loses-his-license-for-1980-crime/DuJ6O3WxF7CkjTMMMySTaxK/> (driving a get-away car at 19); Jesse Kelley, Opinion, *Welcome Ex-Offenders into Legal Marijuana Jobs*, SUNSENTINEL (Feb. 8, 2018, 11:30 AM), <http://www.sun-sentinel.com/opinion/fl-op-offenders-legal-marijuana-jobs-20180207-story.html> (smoking marijuana while it was illegal).

7. See *About: The Ban the Box Campaign*, BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/about/#.WvcsMyOZOt8> (last visited May 12, 2018).

8. See Taylor McAvoy, *‘Ban the Box’ Bill Advances*, THE GOLDENDALE SENTINEL (Feb. 21, 2018), <http://www.goldendalesentinel.com/story/2018/02/21/news/ban-the-box-bill-advances/10017.html>.

9. Christine Neylon O’Brien & Jonathan J. Darrow, *Adverse Employment*

hiring pool, and increases the necessity of laws protecting employment opportunities and other methods of providing aid to ex-offenders upon their release.¹⁰ “Ban the box” laws are among the methods being implemented in states across the country to remedy this problem.¹¹

“Ban the box” laws are a series of laws that in some way limit employers’ access to an individual’s criminal background during the hiring process.¹² At times they are also called “Fair Chance” laws because they are meant to provide a fair chance to ex-offenders upon reintegration into society by affording them a chance at obtaining gainful employment without employers automatically eliminating them from the pool of applicants.¹³

States across the nation continue to adopt “ban the box” legislation to counter the ever-growing use of criminal background checks in the hiring process.¹⁴ In November 2017, Arizona’s governor issued an executive order to eliminate questions about criminal records on the state government’s initial job applications or prior to an initial interview, and in March 2018, Washington state’s governor signed a “ban the box” statute into law.¹⁵ These

Consequences Triggered By Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination, 42 WAKE FOREST L. REV. 991, 994-95 (2007) (stating that “as many as one in five Americans [has] a criminal record”); see also ROY WALMSLEY, WORLD PRISON POPULATION LIST 5 (11th ed. 2016), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf (showing the increase in incarceration in the United States since 2000).

10. O’Brien & Darrow, *supra* note 9, at 994-95; see, e.g., Elizabeth Redden, *Criminals and Colleges in the Capital*, INSIDE HIGHER ED (Feb. 14, 2007), <https://www.insidehighered.com/news/2007/02/14/dc> (showing an increase in the use of criminal background checks in higher education). But see Ben Casselman, *As Labor Pool Shrinks, Prison Time is Less of a Hiring Hurdle*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/business/economy/labor-market-inmates.html> (explaining that hiring prospects are improving for ex-offenders).

11. Adriell Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP L. REV. 921, 921, 924 (2013).

12. See HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); see also Garcia, *supra* note 11, at 921, 924 (defining “ban the box” laws and their purpose).

13. Garcia, *supra* note 11, at 921 (explaining that the laws do this by limiting what an employer may ask about an individual’s criminal record, when an employer may ask about the criminal record, and how far into the past an employer may ask about); see also McAvoy, *supra* note 7.

14. Howard Fischer, *State Government Joins Flagstaff, Other Cities in Giving Convicted Job Applicants a Break*, ARIZ. DAILY SUN (Nov. 6, 2017), http://azdaily.com/news/local/state-government-joins-flagstaff-other-cities-in-giving-convicted-job/article_9af003bb-c245-5881-b42b-3b51ad65ba7a.html.

15. See Ariz. Exec. Order No. 2017-07 (Nov. 6, 2017), <https://azgovernor.gov/sites/default/files/related-docs/boxeo.pdf>; Fischer, *supra* note 14; Staff, *Gov. Inslee Signs Legislation to ‘Ban the Box,’* KREM (Mar. 13, 2018), <https://www.krem.com/article/news/local/northwest/gov-inslee-signs-legislation-to-ban-the-box/293->

two states joined twenty-nine other states that have similar guidelines from executive orders or legislation.¹⁶ Following Arizona's executive order, Virginia legislators are considering "ban the box" legislation for their own states.¹⁷ Additionally, in November 2017, Spokane, Washington joined the ranks of the more than 150 cities that have banned the box on employment applications for both public and private employers.¹⁸

This Comment delves into the history, structure, and application of "ban the box" laws in the United States. Part II will provide the historical and legal context for the emergence of "ban the box" legislation, discuss the anemic protections for ex-offenders at the federal level, and review arguments for and against these laws. It will also examine various "ban the box" laws and the case law attendant to the laws. In this Comment, "criminal record" will refer to any arrest, charge, or conviction an individual has received. Part III will compare and contrast these laws and assess how they interact with case law and a case that embodies the motivations for the "ban the box" movement. Finally, Part IV will recommend that courts across the country mimic the Hawaii Supreme Court's application of the rational relationship standard to achieve the actual purpose of the "ban the box" laws, in addition to recommending that states that do not have a "rational relationship" standard in the text of the laws add that standard to their current or emerging "ban the box" laws.

II. THE LEGAL CONTEXT FOR "BAN THE BOX" LAWS

Both the state and the federal government have attempted to address the use of background checks to eliminate ex-offenders from the hiring pool.¹⁹

528367808.

16. See Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Practices*, NAT'L EMP. L. PROJECT (Apr. 20, 2018), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (listing states with ban the box laws as Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin).

17. McAvoy, *supra* note 8; see Max Smith, *Va. Senate Passes 'Ban the Box' Bill for State Government*, WTOP (Jan. 19, 2018, 7:09 PM), <https://wtop.com/virginia/2018/01/va-senate-passes-ban-box-bill-state-government/> (stating that the bill will go to the house of delegates next to be considered).

18. Kip Hill, *Spokane City Council Votes to 'Ban the Box' for Private Employers, Fines Delayed One Year*, THE SPOKESMAN REV. (Nov. 27, 2017, 11:02 PM), <http://www.spokesman.com/stories/2017/nov/27/spokane-city-council-votes-to-ban-the-box-for-priv/>.

19. See generally Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395 (2016) (outlining

At the federal level, advocates have attempted to use Title VII and the Equal Employment Opportunity Commission (“EEOC”) to address discrimination based on ex-offender status.²⁰ However, these approaches have not adequately addressed the issue, and have left a gap in protection for “ban the box” laws to fill.²¹

A. Federal Treatment of Ex-Offender Protection Status

Title VII of the Civil Rights Act of 1964²² protects people based on their “race, color, religion, sex, or national origin” from discrimination in the hiring process and from discriminatory termination from their place of employment.²³ When applying Title VII in *Griggs v. Duke Power Co.*,²⁴ the United States Supreme Court established the disparate impact doctrine, providing that practices “fair in form, but discriminatory in operation” are subject to the Civil Rights Act.²⁵ Congress later codified the disparate impact doctrine, stating that a business practice that has a disparate impact on applicants from a protected class cannot be used unless the employer can show that the decision, policy, or practice relates to the job in question and is “consistent with business necessity.”²⁶

The EEOC also addresses this issue.²⁷ The EEOC is a federal agency that enforces federal laws such as Title VII that ban employment discrimination based on race, color, religion, sex, disability, or genetic information, and provides guidelines for employers to follow to abide by employment laws.²⁸

attempts to regulate the use of criminal records to protect job applicants).

20. See Garcia, *supra* note 11, at 926-27.

21. See *id.* at 924.

22. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

23. *Id.*; see Paul-Emile, *supra* note 19, at 403-04 (explaining that individuals suing under Title VII must demonstrate that the employment practice disproportionately burdens a protected group, excluding many ex-offenders).

24. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

25. *Id.* at 431.

26. 42 U.S.C. § 2000e-2(k)(1)(A)(i); see *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 308 (1972) (“[The] doctrine of business necessity . . . connotes an irresistible demand . . . must not only foster safety and efficiency, but must be essential to that goal.”).

27. Ingrid Cepero, *Banning the Box: Restricting the Use of Criminal Background Checks in Employment Decisions in Spite of Employers’ Prerogatives*, 10 FLA. INT’L U. L. REV. 729, 735-36 (2015).

28. See *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Apr. 25, 2018); see also *What You Should Know About the EEOC and Arrest and Conviction Records*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm (last visited Apr. 25, 2018) (stating that the EEOC issued this updated guideline after at least four years of research, meetings, and feedback from organizations

In 2012, the EEOC issued its updated policy guidance on the “Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” to set forth its procedure for determining whether and when criminal records should be considered when hiring employees.²⁹ These guidelines do not prohibit employers from using the information, but rather lay out ways for employers to limit using criminal background checks in a discriminatory way.³⁰

B. The Introduction of “Ban the Box” Laws

State law has filled the gaps in the shortfalls of federal regulations and efforts to alleviate employment discrimination of ex-offenders.³¹ Hawaii passed the first “ban the box” law in 1998.³² At the time, Hawaii had a law that prohibited employers from considering criminal records in the hiring process.³³ The legislature created the new statute — section 378-2.5 of the Hawaii Revised Statutes — in an effort to eliminate this prohibition.³⁴ Instead of eliminating the prohibition, Hawaii tailored the new law to provide ex-offenders with protections while giving employers the legal means to conduct background checks.³⁵

Six years later, a group of ex-offenders and their advocates called All of Us or None (“AOUON”) adopted the “ban the box” movement as an initiative in Oakland, California.³⁶ AOUON lobbied in the Oakland, San

interested in the subject of criminal background checks in the hiring process).

29. Cepero, *supra* note 27; see U.S. EQUAL EMP. OPPORTUNITY COMM’N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 8-9 (2012) https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [hereinafter CONSIDERATION OF ARREST AND CONVICTION RECORDS].

30. See generally CONSIDERATION OF ARREST AND CONVICTION RECORDS, *supra* note 29, at 15-16 (showing that companies can limit and narrow criminal background check use through considering “[t]he nature and gravity of the offense or conduct; [t]he time that has passed since the offense, conduct and/or completion of the sentence; and [t]he nature of the job held or sought.”).

31. See Garcia, *supra* note 11, at 927.

32. *Hawaii’s Fair Chance Law*, VERIFYPROTECT, <https://www.verifyprotect.com/ban-the-box/hawaii/> (last visited Apr. 25, 2018).

33. HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2017); Wright v. Home Depot U.S.A., 111 Haw. 401, 407-08 (2006).

34. See Sheri-Ann S. L. Lau, *RECENT DEVELOPMENT: Employment Discrimination Because of One’s Arrest and Court Record in Hawai’i*, 22 HAW. L. REV. 709, 715 (2000).

35. *Id.* at 715-16.

36. All of Us or None, *Ban the Box Timeline*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, 1 [hereinafter *Ban the Box Timeline*] <http://www.prisonerswithchildren.org/wp-content/uploads/2015/08/BTB-timeline-final.pdf> (last visited Apr. 25, 2018); see

Francisco, and East Palo Alto area for legislation addressing the question about criminal backgrounds on public employment applications and an end to discrimination against ex-offenders.³⁷ After effective lobbying, San Francisco passed a “ban the box” resolution in January 2006.³⁸ Since then, the “ban the box” movement has slowly picked up pace, with Massachusetts passing its own law in 2010.³⁹ Many states followed suit, and as of January 2018, thirty-one states and over 150 cities have some form of “ban the box” regulation.⁴⁰ As these states and cities have passed regulations, there has been plenty of opportunity for people to debate the merits of the “ban the box” statutes.⁴¹

C. *The Pros and Cons of “Ban the Box” Laws*

As “ban the box” laws gained visibility, advocates and opponents developed arguments for the laws’ passage or rejection. One argument in favor of the laws is that they protect individuals with criminal records who do not fall under Title VII protected classes.⁴² Because ex-offenders are not a Title VII protected class, state laws provide an alternative forum from federal law for employment protections.⁴³

Additionally, many argue that “ban the box” laws will reduce the recidivism of ex-offenders.⁴⁴ Studies have shown that gainful employment decreases the likelihood of recidivism for ex-offenders.⁴⁵ Limiting the use

also, *All of Us or None*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/> (last visited Apr. 25, 2018) (describing AOUON, a civil and human rights organization fighting for current- and ex-offenders’ rights).

37. *Ban the Box Timeline*, *supra* note 36, at 1.

38. *Id.* (stating that this ordinance banned the box on public employment applications).

39. See Dan Ring, *Massachusetts Gov. Deval Patrick Signs Law Changing CORI System*, MASSLIVE (last updated Aug. 6, 2010, 10:22 PM), http://www.masslive.com/news/index.ssf/2010/08/massachusetts_gov_deval_patric_24.html (stating that the law prohibits applications from including questions about criminal records but allows questioning in interviews).

40. See Avery & Hernandez, *supra* note 16.

41. See, e.g., McAvoy, *supra* note 8 (discussing the Washington legislature’s debates on the merits of “ban the box” laws).

42. See O’Brien, *supra* note 9, at 1020, 1023 (explaining how not all individuals fall under the Title VII protected classes of race, color, religion, sex, or national origin).

43. See *id.* at 1020.

44. Cepero, *supra* note 27, at 741-42 (explaining that gainful employment is one contributing factor to reducing recidivism).

45. See Christy A. Visher et al., *Ex-offender Employment Programs and Recidivism: A Meta-analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 295, 295-96 (2005) (explaining that “a good job . . . provides . . . means for . . . survival, . . . self-esteem, . . . a conventional

of background checks will likely lead to consideration of ex-offenders' qualifications rather than their criminal records and, thus, to hiring ex-offenders.⁴⁶

One challenge to implementing "ban the box" laws is their conflict with state negligent hiring standards.⁴⁷ The tort of negligent hiring occurs when an employee commits a crime while at work that the employer "knew or should have known would [be] a foreseeable risk" of employing that employee.⁴⁸ This standard encourages employers to conduct background checks and eliminate potentially risky applicants as early as possible, while "ban the box" laws limit this practice.⁴⁹ The result is a so-called "minefield of liability concerns," where too little or too much investigation into an applicant's background results in legal liability.⁵⁰ This difficult legal quagmire is murkier for employers operating in multiple states because of the existence of different versions of "ban the box" laws.⁵¹

D. Different "Ban the Box" Laws

Each "ban the box" law takes a unique approach to addressing employers' use of criminal background checks.⁵² Delaware's "ban the box" law regulates only public employers inquiring into criminal records, while Hawaii's law covers both public and private employers.⁵³

As of June 2018, eleven states and the District of Columbia cover both private employers and public organizations in their "ban the box" laws.⁵⁴

lifestyle, and a sense of belonging"); *see also* 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, 16 (2014).

46. *See* Garcia, *supra* note 11, at 942 (explaining that many of these offenses do not relate to the position applied for and are less relevant than the applicant's qualifications).

47. Garcia, *supra* note 11, at 940-41.

48. *Id.* at 924.

49. *Id.* at 939-40 (explaining that negligent hiring suits are costly for businesses, with employers losing approximately 72% of cases and the average settlement being \$1.6 million).

50. Garcia, *supra* note 11, at 940-41; *see also* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 913 (Minn. 1983) ("[T]o hold that an employer can never hire a person with a criminal record . . . would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can assimilate into the community.").

51. *See, e.g.*, OR. REV. STAT. § 659A.360 (2018); *see also* MD. CODE ANN. STATE PERS. & PENS. § 2-203 (LexisNexis 2018).

52. *See, e.g.*, DEL. CODE ANN. tit. 19, § 711(g)(1) (2017); OR. REV. STAT. § 659A.360.

53. DEL. CODE ANN. tit. 19, § 711(g)(1); HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017).

54. CAL. LAB. CODE § 432.7 (Deering 2018); CONN. GEN. STAT. § 31-51i (2017);

Nineteen states with "ban the box" laws or regulations only cover public employers.⁵⁵ For example, Delaware's "ban the box" statute explicitly states that "[i]t shall be an unlawful employment practice for any *public employer* to inquire" into an employee's criminal background.⁵⁶ In some states, the governors passed the regulations via executive order, and therefore had no ability to implement regulations on private employers.⁵⁷ In others, the legislature decided to write the law in this manner for a variety of reasons.⁵⁸

Under Hawaii's law, employers may inquire into criminal conviction records as long as the conviction "bears a rational relationship to the duties and responsibilities of the position."⁵⁹ Additionally, section (b) of this statute states that these checks may be conducted only after the applicant receives a conditional offer from the employer.⁶⁰ The statute defines conviction as "an adjudication by a court of competent jurisdiction that the defendant committed a crime"⁶¹ Only those convictions that fall within ten years of the date of the check can be considered.⁶²

The most discussed aspect of Hawaii's law is its "rational relationship" standard.⁶³ In December 2002, the Hawaii Criminal Justice Data Center of the Department of the Attorney General issued a report arguing that a rational relationship was a relatively easy standard to meet.⁶⁴ However, subsequent

D.C. CODE § 24-1351 (2018); HAW. REV. STAT. ANN. § 378-2.5; 820 ILL. COMP. STAT. ANN. 75/15 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); MINN. STAT. §§ 364.021, 364.03 (2018); N.J. REV. STAT. §§ 34:6B-14 (2018); OR. REV. STAT. § 659A.360; 28 R.I. GEN. LAWS § 28-5-7 (2018); VT. STAT. ANN. tit. 21, §495j (2018); News Release, Nat'l Emp't Law Project, Washington Gov. Inslee Signs Fair Chance Act, Extending 'Ban the Box' to Private Emp'rs (Mar. 13, 2018), <https://www.nelp.org/news-releases/washington-gov-inslee-signs-fair-chance-act-extending-ban-box-private-employers/>.

55. See, e.g., DEL. CODE ANN. tit. 19, § 711(g)(1).

56. *Id.* (emphasis added).

57. See, e.g., Ariz. Exec. Order No. 2017-07 (Nov. 6, 2017), <https://azgovernor.gov/sites/default/files/related-docs/boxeo.pdf>.

58. See, e.g., Daily Report Staff, 'Ban the Box' Bill Advances to Full Louisiana House of Representatives, GREATER BATON ROUGE BUS. REP. (Apr. 20, 2016), <https://www.businessreport.com/article/ban-box-bill-advances-full-louisiana-house-representatives>.

59. HAW. REV. STAT. ANN. § 378-2.5(a) (stating that employers may do this for "hiring, termination, or the terms, conditions, or privileges of employment").

60. *Id.* § 378-2.5(b) (reiterating the rational relationship standard stated section (a)).

61. *Id.* § 378-2.5(c) ("[N]ot including final judgments required to be confidential pursuant to section 571-84.").

62. *Id.* § 378-2.5(a) (excluding from that ten year period of time considered any periods of incarceration served).

63. *Id.*

64. HAW. CRIMINAL JUSTICE DATA CTR., CRIMINAL HISTORY RECORDS CHECKS REPORT TO THE 2003 LEGISLATURE 9 (2002), <http://ag.hawaii.gov/wp-content/uploads/>

court application of the law determined that a “rational relationship” is not “coextensive with the ultra-deferential rational basis test,” but still not incredibly difficult to attain.⁶⁵

Oregon’s “ban the box” law prevents employers from excluding an applicant from an initial interview solely because of a past criminal conviction.⁶⁶ Oregon defines “excludes an applicant from an initial interview” in section (2)(a)-(c) as requiring an applicant to disclose a criminal conviction on an application, before the initial interview, or before a conditional offer of employment if no interview is conducted.⁶⁷

Massachusetts’s law expressly prohibits employers from conducting any criminal background checks on an initial application for employment.⁶⁸ Additionally, employers are not allowed to conduct background checks to discover anything that did not result in a conviction or “a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace” for many portions of the hiring process.⁶⁹

Massachusetts’s “ban the box” statute also restricts what employers can search.⁷⁰ The law prevents employers from searching for misdemeanors committed five years before the search or, alternatively, for which the offender was released five years or more before the search; however, it provides an exception and allows employers to conduct a search when the applicant has committed another offense within five years of the application date.⁷¹ This provision limits criminal background checks for those ex-

2013/01/2003_rept to legis act 263.pdf (“[T]he rational relationship standard is not a difficult one to satisfy, requiring only a showing of an understandable or rational connection between the offense and how it may affect an individual’s ability to perform the job duties and functions. Almost any conceivable relationship between the offense and the job will likely satisfy the rational relationship standard.”).

65. See *Romer v. Evans*, 517 U.S. 620, 631-33 (1964) (finding that a rational basis may be found if a law advances a legitimate government interest); *Shimose v. Hawai’i Health Sys. Corp.*, 134 Haw. 479, 484 (2015).

66. OR. REV. STAT. § 659A.360(1) (2018).

67. OR. REV. STAT. § 659A.360(2) (“(a) Requires an applicant to disclose on an employment application a criminal conviction; (b) Requires an applicant to disclose, prior to an initial interview, a criminal conviction; or (c) If no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.”).

68. MASS. ANN. LAWS ch. 151B, § 4(9 1/2) (LexisNexis 2018).

69. *Id.* § 4(9) (“[A]n application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person . . .”).

70. See *id.*

71. *Id.* § 4(9)(iii) (“[A]ny conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom,

offenders who may have one or two old, minor convictions on their record, while still allowing employers to conduct a thorough search of any applicant who has more recent convictions.⁷²

None of these three laws completely bans background checks.⁷³ All three contain provisions stating that positions for which state or federal law requires an employer to conduct background checks are exempt from the states' "ban the box" provisions.⁷⁴

E. The Hawaiian Case Law

Since the passage of Hawaii's law in 1998, the legal field has been open to legal challenges of employer's use of criminal background checks in the hiring process.⁷⁵ Two major cases exist in Hawaiian jurisprudence for its "ban the box" law: *Wright v. Home Depot U.S.A.*⁷⁶ and *Shimose v. Hawaii Health Systems Corp.*⁷⁷

Wright was one of the first cases appealed to the Hawaii Supreme Court regarding the "ban the box" law.⁷⁸ The plaintiff's application for a promotion within the company triggered the employer to uncover a 1996 conviction for using a controlled substance in a background check.⁷⁹ Although the plaintiff passed all other requirements for the position, the employer fired the plaintiff for his conviction record.⁸⁰

The Hawaii Supreme Court remanded the case to provide the plaintiff an opportunity to prove that the conviction had no rational relationship to the

whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.”).

72. *See id.* (providing an exception to the ban on searches for applicants with more recent convictions).

73. *See* HAW. REV. STAT. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. § 659A.360 (2017).

74. HAW. REV. STAT. ANN. § 378-2; MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

75. *See, e.g., Wright v. Home Depot U.S.A.*, 111 Haw. 401 (2006) (interpreting the "rational relationship" clause of Hawaii's "ban the box" statute).

76. *Id.*

77. *Shimose v. Hawai'i Health Sys. Corp.*, 134 Haw. 479 (2015).

78. *See Kahumoku v. United Air Lines, Inc.*, No. 11-00661 ACK-BMK, 2013 U.S. Dist. LEXIS 184752, *16 (D. Haw. Feb. 26, 2013) (stating that the only appellate decision regarding the Hawaii "ban the box" law was *Wright v. Home Depot U.S.A.*); *Wright*, 111 Haw. at 401.

79. *Wright*, 111 Haw. at 403-04 (stating that this conviction occurred before the "ban the box" law's passage).

80. *Id.*

duties and responsibilities of a department supervisor.⁸¹ The court held that, despite having no explicit statutory definition, the plain and obvious meaning of the phrase “rational relationship” existed in the words in the statute.⁸² Thus, the relationship between the conviction and the duties and responsibilities of the position must be rational.⁸³

In *Shimose*, the plaintiff had a conviction on his record for possession with intent to distribute crystal methamphetamine.⁸⁴ While in prison, the plaintiff obtained an associate’s degree at Kapiolani Community College and a degree in the college’s radiological technician (“radtech”) program.⁸⁵ After his release, the plaintiff applied for a radtech position at a hospital.⁸⁶ The hospital turned the plaintiff down because of the criminal background.⁸⁷

The Hawaii Supreme Court held that the hospital did not establish a rational relationship between the plaintiff’s conviction and the duties and responsibilities of a radtech sufficient to warrant summary judgment.⁸⁸ Factual issues still existed that bore on whether the conviction had a rational relationship to the radtech position.⁸⁹

F. Crawford v. T-Mobile

In *Crawford v. T-Mobile US, Inc.*,⁹⁰ applicant Zindora Crawford alleged that her employer, T-Mobile U.S., Inc. (“T-Mobile”), violated Philadelphia’s “ban the box” ordinance by rejecting her application.⁹¹ In August 2012, Crawford was arrested and charged with multiple counts of theft.⁹²

81. *Id.* at 406, 412 (reversing the trial court’s decision to grant a motion to dismiss).

82. *Id.* at 411-12; *see* HAW. REV. STAT. ANN. § 378-2.5(b) (LexisNexis 2017) (stating that background checks take place “only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.”).

83. *Wright*, 111 Haw. at 411-12 (“[T]he plain and obvious meaning of the phrase is found in the words themselves.”).

84. *Shimose v. Hawai’i Health Sys. Corp.*, 134 Haw. 479, 481 (2015).

85. *Id.* (stating that plaintiff graduated from the program upon release from prison).

86. *Id.* (stating that the plaintiff was qualified for this position except for the criminal record).

87. *Id.* at 481-82 (finding that, upon his first rejection from the hospital for the clinical rotation, Shimose completed his rotation in a separate hospital).

88. *Id.* at 484 (reversing the trial court’s decision).

89. *Id.* at 486.

90. Complaint, *Zindora Crawford v. T-Mobile US, Inc.*, (No. 2:17-cv-04826) (E.D. Pa. Oct. 26, 2017).

91. *See id.* ¶¶ 1, 7-9, 145-57.

92. *Id.* ¶ 13 (mentioning that these charges included multiple counts of theft of services, theft by unlawful taking, receiving stolen property, unlawful use of a computer, computer theft, computer trespass, criminal use of communication facility, and

Crawford's charges were resolved two years later without a conviction through the state's Accelerated Rehabilitative Disposition ("ARD") program.⁹³ This program is meant to rehabilitate those charged with minor offenses, and is not intended to be counted as a conviction for most purposes.⁹⁴

In 2016, Crawford applied for a Retail Associate Manager position with T-Mobile.⁹⁵ After a successful first round interview, Crawford received a second interview for the position.⁹⁶ In between interviews, Crawford received a background check request from T-Mobile and completed it.⁹⁷ Crawford attended the second interview with no issue.⁹⁸

Days later, Crawford called the store to follow up on the background check process.⁹⁹ Her calls were not returned, and a week later Crawford received a letter containing a copy of her background check and stating that T-Mobile rejected her application, at least in part, because of the background check.¹⁰⁰ Crawford then filed suit under Philadelphia's "ban the box" law.¹⁰¹

III. "BAN THE BOX" AND THE "RATIONAL RELATIONSHIP" STANDARD IN *CRAWFORD V. T-MOBILE*

"Ban the box" laws are young, with all but one law having been passed since 2009, and vary from state to state in their construction and application.¹⁰² These differing standards result in a complicated legal

conspiracy).

93. *Id.* ¶¶ 13-17.

94. *Id.* ¶¶ 15-16; *see* PA. R. CRIM. P. 312 cmt. (2017) ("[I]t may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions.").

95. Crawford Complaint, *supra* note 1, ¶¶ 24-29, 29 (explaining that was Crawford's second attempt at employment with T-Mobile, and she was denied employment for the same reasons on both attempts).

96. *Id.* ¶¶ 34, 37.

97. *Id.* ¶ 36 (informing Crawford that the background check should be in by April 1, 2016).

98. *Id.* ¶¶ 38-39 (advising Crawford that there would be a third interview after the background check was received and reviewed if she met T-Mobile's background check requirements).

99. *Id.* ¶ 40.

100. *Id.* ¶¶ 41-42 (stating that Crawford never received a conditional offer of employment from T-Mobile).

101. Crawford Complaint, *supra* note 1, ¶ 1.

102. *See, e.g.*, MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018) (passed in 2010); VT. STAT. ANN. tit. 21, § 495j (2018) (passed in 2015); *see also* Dom Apollon, *Got a Record? You Can Still Get A Job In Massachusetts*, COLORLINES (Sept. 3, 2010, 12:04 PM), <https://www.colorlines.com/articles/got-record-you-can-still-get-job-massachusetts> (stating that Massachusetts, the second state to pass a "ban the box" law, passed it in

landscape, with more than one “ban the box” statute applying to employers that serve multiple states.¹⁰³ Additionally, few courts outside of Hawaii have addressed the standards for the application of “ban the box” laws.¹⁰⁴

A. The Diversity of the “Ban the Box” Laws

“Ban the box” laws across the country come in a variety of forms and use various methods and language to achieve the same goal.¹⁰⁵ However, the main differences between these laws are (1) whether the statute applies only to public employers or to both public and private employers; (2) what aspects of a criminal record employers can consider; (3) when during the hiring process the employers can consider criminal records; and (4) whether the statute incorporates a standard for considering the applicable criminal record.¹⁰⁶

“Ban the box” statutes range from incredibly broad to narrowly tailored when covering what aspects of an employee or applicant’s criminal records employers may consider during the hiring process.¹⁰⁷ Hawaii’s statute falls on the broader end of this spectrum, with Oregon’s law being broader than Hawaii’s, and Massachusetts’s more narrowly tailored.¹⁰⁸ Hawaii’s law allows the state to consider convictions, defined as “an adjudication by a court of competent jurisdiction that the defendant committed a crime,”¹⁰⁹ within ten years of the date of the search or convictions where the release came within ten years of the search.¹¹⁰ On the extreme end of broadness, Oregon’s law expressly states that employers may consider ex-offenders’

2010). See generally Rachel Santitoro, *Banning the Box in New Jersey: A Small Step Toward Ending Discrimination Against Ex Offenders*, 13 RUTGERS J.L. & PUB. POL’Y 215 (2015) (providing a survey of New Jersey’s “ban the box” law).

103. Garcia, *supra* note 11, at 940-41.

104. See *Shimose v. Hawai’i Health Sys. Corp.*, 134 Haw. 479 (2015); *Wright v. Home Depot U.S.A.*, 111 Haw. 401 (2006).

105. See, e.g., CAL. LAB. CODE § 432.7 (Deering 2018); LA. STAT. ANN. § 42:1701 (2018); see also Garcia, *supra* note 11, at 927-28 (stating that while the goals of the “ban the box” laws are generally the same, they approach the task differently).

106. See, e.g., HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); OR. REV. STAT. § 659A.360 (2018); Garcia, *supra* note 11, at 927-28.

107. See, e.g., 820 ILL. COMP. STAT. ANN. 75/15 (LexisNexis 2017) (incredibly broad and vague); MASS. ANN. LAWS ch. 151B, § 4(9) (incredibly specific about what an employer cannot consider).

108. HAW. REV. STAT. ANN. § 378-2.5(a), (c) (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. § 659A.360(1), (3) (2018).

109. HAW. REV. STAT. ANN. § 378-2.5(c).

110. *Id.* § 378-2.5(a), (c).

conviction histories when hiring employees.¹¹¹ Additionally, Oregon's law does not define "conviction," nor does it expressly state what is includable in the background checks as both Hawaii and Massachusetts do.¹¹² Nothing in the section of the Oregon statute addresses whether arrest records or pending case records may be included in the background check.¹¹³

Comparatively, Massachusetts's "ban the box" statute is much more specific than Hawaii's in covering the specific crimes that can be considered.¹¹⁴ While Massachusetts's law is similar to Hawaii's in restricting employers to considering only convictions,¹¹⁵ it expands this restriction to cover employers' consideration of first convictions for the misdemeanors "drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace."¹¹⁶

Additionally, Massachusetts limits its timeframe for searches to a much narrower window than Hawaii's ten-year timeframe.¹¹⁷ Specifically, the Massachusetts statute prevents employers from searching for misdemeanors that occurred within five years of the search or convictions for misdemeanors where the applicant was released within five years.¹¹⁸ Unlike Hawaii's law, however, Massachusetts's limit is not an absolute bar on searches before a certain time period.¹¹⁹ Massachusetts allows these misdemeanors to be exempt from the ban if the applicant has committed another misdemeanor in the five years since the initial misdemeanor was committed.¹²⁰ Oregon's law differs even further by not containing a timeframe at all.¹²¹ While the Massachusetts law appears to have an immediate negative effect on ex-offender employment in the two years following its passage, not enough data exists to determine which state's approach is the best.¹²²

111. OR. REV. STAT. § 659A.360(3) (2018).

112. See HAW. REV. STAT. ANN. § 378-2.5; MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. §§ 659A.001, 659A.360.

113. OR. REV. STAT. § 659A.360.

114. See HAW. REV. STAT. ANN. § 378-2.5(a), (c) (lacking discussion of any specific crimes in the text of the law); MASS. ANN. LAWS ch. 151B, § 4(9).

115. See HAW. REV. STAT. ANN. § 378-2.5(c); MASS. ANN. LAWS ch. 151B, § 4(9).

116. MASS. ANN. LAWS ch. 151B, § 4(9).

117. See HAW. REV. STAT. ANN. § 378-2.5(c); MASS. ANN. LAWS ch. 151B, § 4(9).

118. MASS. ANN. LAWS ch. 151B, § 4(9) (applying this limitation on searches only applies to misdemeanors and allowing employers to search for felonies committed by the applicant).

119. See HAW. REV. STAT. ANN. § 378-2.5; MASS. ANN. LAWS ch. 151B, § 4(9).

120. MASS. ANN. LAWS ch. 151B, § 4(9).

121. OR. REV. STAT. §§ 659A.001, 659A.360 (2018).

122. See generally Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts CORI Reform* (Fed. Reserve Bank of Bos., Working Paper

The “ban the box” laws vary as to when in the hiring process the employers can conduct criminal background checks.¹²³ Hawaii’s “ban the box” law is considered to be more strict because it expressly limits the window of time that employers may conduct a search.¹²⁴ This limitation prevents employers from conducting a criminal background check prior to extending a conditional offer of employment to the applicant.¹²⁵

In the same vein, Massachusetts is highly explicit about when the employer can conduct a background check on certain segments of the statute.¹²⁶ Massachusetts law directly states that employers may not request permission to conduct a background check on the applicant in the initial written application.¹²⁷ However, the statute does not explicitly state that an employer can never conduct a background check.¹²⁸

Similar to Hawaii, Massachusetts also mandates that an employer cannot request a background check regarding specific misdemeanors at any point in the process.¹²⁹ However, unlike other state statutes, the Massachusetts “ban the box” law says nothing about allowing employers to conduct background checks for other crimes after the initial written application.¹³⁰ This creates confusion as to whether an employer could conduct a background check once an applicant has been selected for an interview, or if the employer must wait until after the interview has been conducted.¹³¹

Unlike Hawaii’s law, Oregon’s “ban the box” law does not prevent employers from conducting background checks prior to a conditional job

No. 16-30, 2017) (discussing the effects of Massachusetts’s new law, the factors considered in analyzing the negative results, and possible alternative explanations for the results).

123. *See, e.g.*, CONN. GEN. STAT. § 31-51i (2018) (not prior to an initial employment application); MINN. STAT. § 364.021(a) (2018) (not prior to selection for an interview or, if there is no interview process, not prior to extending a conditional offer).

124. HAW. REV. STAT. ANN. § 378-2.5(b).

125. *Id.*

126. *See* HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, §§ 4(9) (LexisNexis 2018).

127. *See* MASS. ANN. LAWS ch. 151B, § 4(9 1/2).

128. *See id.* §§ 4(9), (9 1/2).

129. *See* MASS. ANN. LAWS ch. 151B, § 4(9) (“[I]n connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person.”); *see also* HAW. REV. STAT. ANN. § 378-2.5(c).

130. *See* MASS. ANN. LAWS ch. 151B, §§ 4(9), (9 1/2). *Contra* HAW. REV. STAT. ANN. § 378-2.5(b).

131. *See* MASS. ANN. LAWS ch. 151B, §§ 4(9), (9 1/2) (indicating that it is unlawful only “[f]or an employer to request on its initial written application form criminal offender record information.”).

offer.¹³² Additionally, Oregon's law likely is just as vague as Massachusetts's in specifying when in the hiring process an employer may conduct a background check because, like Massachusetts's law, it does not specify a time during which employers may conduct checks.¹³³ However, the context implies that employers cannot conduct background checks before they conduct the initial interview.¹³⁴

Additionally, some "ban the box" statutes contain standards that employers must apply to a criminal record to determine whether the employer may use it to exclude a person from the hiring pool.¹³⁵ In Hawaii, an employer may not consider a conviction when hiring an individual, even if it appears on the background check, unless it bears a "rational relationship" to the position for which the applicant is applying.¹³⁶ Additionally, the Hawaii Supreme Court has applied the "rational relationship" portion of the statute to several cases.¹³⁷

Neither Massachusetts's law nor Oregon's law includes a "rational relationship" provision or any other applicable standard.¹³⁸ In fact, neither law has a standard for which a court could determine how employers may use the criminal record in the hiring process written into it.¹³⁹ While employers in Hawaii may only use convictions if they bear a rational relationship to the position's duties and responsibilities, employers in Massachusetts and Oregon may be able to use any accessible conviction to make their determination.¹⁴⁰ In fact, Massachusetts and Oregon likely meant to allow access to all information on applicants not expressly restricted by

132. See HAW. REV. STAT. ANN. § 378-2.5(b); OR. REV. STAT. § 659A.360 (2018); see also Ian K. Kullgren, *Oregon Senate Approves Amended 'Ban the Box' Bill, Aimed at Helping Ex-Convicts Get Jobs*, THE OREGONIAN (June 11, 2015), http://www.oregonlive.com/politics/index.ssf/2015/06/oregon_senate_approves_amended.html (stating that the Oregon Senate removed a clause from the original bill that required a conditional offer before an employer conducts a criminal background check).

133. See MASS. ANN. LAWS ch. 151B, § 4(9 1/2); OR. REV. STAT. § 659A.360.

134. See OR. REV. STAT. § 659A.360.

135. See HAW. REV. STAT. ANN. § 378-2.5(b) ("rational relationship"); see also PHILA., PA., CODE tit. 9, § 9-3504(2) (providing an example of a city ordinance that contains a rational relationship standard).

136. HAW. REV. STAT. ANN. § 378-2.5(b).

137. See *Shimose v. Hawai'i Health Sys. Corp.*, 134 Haw. 479 (2015); *Wright v. Home Depot U.S.A.*, 111 Haw. 401 (2006).

138. See HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

139. See MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360. *Contra* PHILA., PA., CODE tit. 9, § 9-3504(2) (2018).

140. See HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

the statute.¹⁴¹ For example, the Oregon legislature removed the section from the proposed bill that would have required a conviction be “job-related.”¹⁴² Subsequently, Hawaii’s statute is the only statute with case law that applies its standards.¹⁴³

B. The Lessons of Wright and Shimose for Crawford v. T-Mobile US, Inc.

Outside of Hawaii’s Supreme Court decisions in *Wright* and *Shimose*, little case law exists that applies “ban the box” laws.¹⁴⁴

Crawford is similar to *Wright* and *Shimose* as each scrutinized the standards under which employers consider applicants’ criminal background checks.¹⁴⁵ Under the Hawaii rational relationship standard, if the conviction and the position have no similarities, then there is no “rational relationship” and the background check cannot be used to discriminate against a potential employee.¹⁴⁶ In *Wright*, the position of department supervisor at a Home Depot had no similarities with possession of an illegal drug.¹⁴⁷ However, as established in *Shimose*, the conviction and the position can have similarities and even then a rational relationship may not be established.¹⁴⁸

Philadelphia’s rational relationship standard aligns with Hawaii’s, while also being much more explicitly defined.¹⁴⁹ As with Hawaii’s law, the conviction must bear some relationship to the position.¹⁵⁰ However,

141. See MASS. ANN. LAWS ch. 151B, § 4 (lacking a standard with which to determine whether information may or may not be considered); OR. REV. STAT. § 659A.360 (lacking a standard with which to determine whether information may or may not be considered).

142. See H.B. 3025, 78th Leg. Assemb., Reg. Sess. (Or. 2015) (“[U]nless the conviction is job-related or is a conviction that legally bars the employment of the individual.”).

143. See *Shimose v. Hawai’i Health Sys. Corp.*, 134 Haw. 479 (2015); *Wright v. Home Depot U.S.A.*, 111 Haw. 401 (2006).

144. See *Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 401; see also *Williamson v. Lowe’s*, No. 14-00025 SOM/RLP, 2015 U.S. Dist. LEXIS 13170 (D. Haw. Feb. 4, 2015) (providing an example of a district court applying the Hawaiian case law).

145. See *Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 401; see also *Crawford Complaint*, *supra* note 1.

146. See *Wright*, 111 Haw. at 412.

147. See *id.* (finding no nexus and that no “rational relationship” existed).

148. See *Shimose*, 134 Haw. at 481-83 (finding a lack of a nexus for a “rational relationship” as plaintiff would be supervised in the hospital at all times); *id.* (stating that the plaintiff had a prior drug conviction and the employment he sought involved interacting with drugs); see also *Williamson v. Lowe’s*, No. 14-00025 SOM/RLP, 2015 U.S. Dist. LEXIS 13170 (D. Haw. Feb. 4, 2015) (providing an additional example of a court applying the rational relationship standard).

149. PHILA., PA., CODE tit. 9, § 9-3504(2) (2018).

150. See HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); PHILA., PA., CODE tit.

Philadelphia's standard provides employers with much more guidance than Hawaii's when considering an applicant's convictions.¹⁵¹ Philadelphia requires an individualized assessment of the record to determine whether the applicant must be excluded by business necessity because he or she represents an unacceptable risk to the employer.¹⁵²

Crawford's criminal record, when including the arrests for theft, had some relation to the position, but likely not enough for T-Mobile to consider it under either Hawaii's or Philadelphia's rational relationship standards (assuming *arguendo* that the conviction can be considered under both standards).¹⁵³ Under the Hawaii standard, the charges of theft likely can be considered against the managerial position, be related to the position, and still not have a rational relationship with the position.¹⁵⁴ As in *Shimose*, where the drug conviction did not have a rational relationship with the position, Crawford's solitary charges of theft likely can be related to the managerial position and its responsibility for inventory.¹⁵⁵

Under Philadelphia's standard, Crawford's charges may not represent enough of a risk to the business to be excluded under business necessity.¹⁵⁶ The nature of the offense is related to the job, and the particular duties associated with the job would make theft easier.¹⁵⁷ However, three years passed between the charges and the application for employment.¹⁵⁸ Crawford also gained no additional charges or convictions in that time

9, § 9-3504(2).

151. HAW. REV. STAT. ANN. § 378-2, 2.5; PHILA., PA., CODE tit. 9, § 9-3504(2); *Shimose*, 134 Haw. at 484; *Wright*, 111 Haw. at 411-12.

152. PHILA., PA., CODE tit. 9, § 9-3504(2), (2)(a)-(f) ("Such assessment shall include: (a) The nature of the offense; (b) The time that has passed since the offense; (c) The applicant's employment history before and after the offense and any period of incarceration; (d) The particular duties of the job being sought; (e) Any character or employment references provided by the applicant; and (f) Any evidence of the applicant's rehabilitation since the conviction.").

153. See Crawford Complaint *supra* note 1, ¶¶ 13-15; see also PHILA., PA., CODE tit. 9, § 9-3504(2); HAW. REV. STAT. ANN. § 378-2, 2.5.

154. See *Shimose*, 134 Haw. at 481-83; *Wright*, 111 Haw. at 404, 412; Crawford Complaint, *supra* note 1, ¶¶ 13-15.

155. See *Shimose*, 134 Haw. at 481-83; Crawford Complaint, *supra* note 1, ¶¶ 13-15.

156. See PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that Crawford was charged, never convicted, accepted into a rehabilitation program meant to correct criminal behavior, and that the charge was "relatively minor").

157. See Crawford Complaint, *supra* note 1, ¶ 29 (stating that Crawford applied to be a Retail Associate Manager for the company).

158. See PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17, 29 (stating that Crawford was charged in 2012 and applied for the position in question in 2016).

period.¹⁵⁹ Finally, the decision to admit Crawford into an ARD program is evidence of Crawford's rehabilitation since the charge.¹⁶⁰

Moreover, under their respective statutes, employers in both Hawaii and Philadelphia were not allowed to consider arrests and charges that did not result in convictions when considering an applicant for employment.¹⁶¹ While the Hawaii Supreme Court did not find this dispositive in the Hawaii cases, it likely will be in Crawford's case because the state did not convict her of the charges levied against her and she allegedly had no other convictions on her record.¹⁶² Furthermore, all of the employers were required to present the applicants with conditional offers before conducting a criminal background check in the employment process.¹⁶³ This was not a deciding factor in *Shimose* and *Wright*, but it likely will be in Crawford's case because T-Mobile did not extend her a conditional offer when she applied for the position.¹⁶⁴ Each of these factors should play a role in deciding cases under the Philadelphia "ban the box" ordinance.¹⁶⁵

C. The "Rational Relationship" Standard and the Crawford Court's Application of Philadelphia's "Ban the Box" Law

Philadelphia's "ban the box" ordinance likely supports an outcome favorable to the plaintiff.¹⁶⁶ Crawford had no convictions on her record,¹⁶⁷ and under Philadelphia's "ban the box" ordinance, T-Mobile could not consider arrests that did not result in convictions.¹⁶⁸ Additionally, the

159. See PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint ¶¶ 13-17, 24, 141 (stating that Crawford had no convictions on her record and only the arrest record relating to the theft).

160. See PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17, 29, 141 (claiming that Crawford lacked any convictions on her record along with the approximately three year period between the entry into the program and the application).

161. HAW. REV. STAT. ANN. § 378-2, 2.5 (LexisNexis 2017); PHILA., PA., CODE tit. 9, § 9-3503(1).

162. See *Shimose v. Hawai'i Health Sys. Corp.*, 134 Haw. 479 (2015); *Wright v. Home Depot U.S.A.*, 111 Haw. 401 (2006); Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that the ARD program is not a formal conviction).

163. HAW. REV. STAT. ANN. § 378-2.5; PHILA., PA., CODE tit. 9, § 9-3504(1)(b).

164. See *Shimose*, 134 Haw. at 481-83; *Wright*, 111 Haw. at 401; Crawford Complaint, *supra* note 1, ¶¶ 13-17.

165. See PHILA., PA., CODE tit. 9, § 9-3504.

166. See also Crawford Complaint ¶¶ 145-57 (laying out the "ban the box" count against T-Mobile). See generally PHILA., PA., CODE tit. 9, § 9-3500 (laying out Philadelphia's laws as to the discrimination of individuals with criminal records);

167. Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that Crawford only had arrests and charges appear on her background check).

168. PHILA., PA., CODE tit. 9, § 9-3503(1); Crawford Complaint, *supra* note 1, ¶¶ ¶¶

ordinance requires employers to present the applicant with a conditional offer of employment before requesting and conducting a criminal background check.¹⁶⁹ T-Mobile conducted a background check before the second interview that they offered to Crawford, and did not extend a conditional offer.¹⁷⁰

Assuming *arguendo* that the Philadelphia ordinance did not restrict consideration of arrests and charges, T-Mobile would still be required to prove that a rational relationship exists between the position of Retail Associate Manager and the charges to be able to reject Crawford.¹⁷¹ T-Mobile likely could determine that Crawford's presence would present an unacceptable risk because her previous arrests included theft.¹⁷² However, business necessity likely cannot compel exclusion.¹⁷³ The nature of theft is a factor an employer would want to consider with an applicant, as the particular duties of the job would give the applicant easy access to inventory.¹⁷⁴ However, about four years passed between Crawford's conviction and her application, and she participated in an ARD program.¹⁷⁵ While the other factors in the business necessity test are not answered by the complaint, the balance of the test likely does not prove business necessity on the part of T-Mobile.¹⁷⁶

However, in applying the Hawaii Supreme Court's rational relationship standard, a single instance of arrest for theft would likely not be enough to exclude Crawford.¹⁷⁷ Rather, that single arrest may be an overbroad reading of the Philadelphia ordinance, and "[a]n overly broad reading . . . would eviscerate the protections afforded to persons with conviction

13-17.

169. PHILA., PA., CODE tit. 9, §§ 9-3504(1), (1)(b).

170. Crawford Complaint, *supra* note 1, ¶¶ 22-23, 35-37, 42.

171. PHILA., PA., CODE tit. 9, §§ 9-3504(1), (1)(b); *see also* Crawford Complaint, *supra* note 1, ¶¶ 13-17 (the plaintiff was charged with multiple counts of theft of services and of property); *id.* ¶¶ 29-32.

172. Crawford Complaint, *supra* note 1, ¶ 13 (showing that, depending on the access to inventory that T-Mobile gives a Retail Associate Manager, T-Mobile likely could determine that Crawford's presence would be risky); *see also* PHILA., PA., CODE tit. 9, § 9-3504(2).

173. PHILA., PA., CODE tit. 9, §§ 9-3504(2) ("[T]he employer may reasonably conclude . . . that exclusion of the applicant is compelled by business necessity" after considering the inexhaustible list of factors).

174. *Id.* §§ 9-3504(2)(a), (d).

175. *Id.* §§ 9-3504(2)(b), (f); *see* Crawford Complaint, *supra* note 1, ¶¶ 13, 14, 29.

176. PHILA., PA., CODE tit. 9, §§ 9-3504(2)(a)-(f). *See generally* Crawford Complaint, *supra* note 1 (claiming that there was no reason other than the arrest record to not hire Crawford).

177. *See* Shimose v. Hawai'i Health Sys. Corp, 134 Haw. 479, 486-87 (2015).

records”¹⁷⁸ In both scenarios, the ordinance likely leans in Crawford's favor, and T-Mobile likely violated the Philadelphia “ban the box” ordinance.¹⁷⁹

IV. A “RATIONAL RELATIONSHIP” STANDARD SHOULD BE INCORPORATED BY COURTS AND STATES INTO “BAN THE BOX” JURISPRUDENCE

As more cities and states adopt “ban the box” laws, more litigation will inevitably arise under these laws.¹⁸⁰ Courts should adopt a standard that gives courts plenty of leeway to interpret how broadly or narrowly they will interpret the phrasing of the laws. In deciding those standards, it will be courts that will decide whether the spirit and purposes of the laws will be followed.¹⁸¹ To prevent this, states should take the reins and give their courts the tools they need to more easily and appropriately apply “ban the box” legislation.¹⁸²

Without the guidance of state law, courts should mimic the Hawaiian Supreme Court’s application of the rational relationship standard when applying their city and state “ban the box” laws, whether or not “rational relationship” language is incorporated in the statute.¹⁸³ This does not suggest that courts outside of Hawaii implement Hawaii’s “ban the box” law. Rather, they should take guidance from the way that the Hawaiian courts have applied Hawaii’s law and interpret their states’ statutes much more narrowly than they are written. Hawaii’s standard provides ex-offenders with a better opportunity for gainful employment while also allowing employers the ability to exclude those with convictions that could be harmful to the employer if the ex-offender were to recidivate.¹⁸⁴ Providing employers a similar standard to apply across state lines, instead of a variety or a lack of standards, will likely help employers servicing multiple states know what convictions should or should not be considered on a standard job application. This consistency, and the resulting clarity of what convictions an employer can consider, would likely aid employers in balancing “ban the box” laws and negligent hiring standards in their jurisdictions.¹⁸⁵

178. *Id.* at 486.

179. *See* PHILA., PA., CODE tit. 9, § 9-3500; Crawford Complaint, *supra* note 1.

180. *See* Crawford Complaint, *supra* note 1; *see also* Complaint, Zindora Crawford v. Verizon Pennsylvania, Inc. (E.D. Pa. Jun. 2, 2014) (No. 2:14-cv-03091).

181. *See, e.g.*, Shimose v. Hawai’i Health Sys. Corp., 134 Haw. 479, 485-86 (2015).

182. *See, e.g.*, McAvoy, *supra* note 8; Smith, *supra* note 17.

183. *See* Shimose, 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006).

184. *See* Shimose, 134 Haw. at 484 (“Negative attitudes toward politically unpopular ex-offenders do not, standing alone, justify adverse employment decisions.”).

185. *See generally* Garcia, *supra* note 11 (detailing “ban the box” laws and employer

Applying this standard to a statute or ordinance that does not have this or similar language will likely be much more difficult than to one that has similar language to Hawaii's statute.¹⁸⁶ If states do not incorporate a standard into their statutes, courts will likely have to develop a common law standard of review for the application of "ban the box" laws.¹⁸⁷ While this is possible, it would be much more difficult to incorporate than a standard incorporated into a statute.¹⁸⁸

Alternatively, states looking to adopt a new "ban the box" statute, or to improve an existing statute, should add language incorporating a rational relationship standard.¹⁸⁹ However, states should define their rational relationship standard more explicitly than Hawaii did.¹⁹⁰ Philadelphia's statute contains a model for a defined rational relationship standard that would likely be easier for employers to implement.¹⁹¹ Moreover, it would likely better help courts determine what convictions are rationally related to respective employment opportunities.¹⁹² This language, that employers must "reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers, and that exclusion of the applicant is compelled by business necessity," would be an apt addition to existing and yet conceived "ban the box" laws.¹⁹³ Between these two recommendations, "ban the box" laws will likely become more effective and serve their actual purpose: providing ex-offenders with a second chance at obtaining gainful employment and leading a better life.

V. CONCLUSION

Courts will increasingly require standards to apply the "ban the box" laws as litigation arises across the country.¹⁹⁴ While the federal government has

liability for negligent hiring).

186. *See, e.g.*, MASS. ANN. LAWS ch. 6, § 171A (LexisNexis 2018); OR. REV. STAT. § 659A.360 (2018).

187. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631-33 (1994) (providing an example of a standard of review created by the Supreme Court for applying specific types of laws).

188. *See, e.g.*, PHILA., PA., CODE tit. 9, § 9-3504 (2018) (contains a rational relationship standard).

189. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); PHILA., PA., CODE tit. 9, § 9-3504; *see also* Stacy A. Hickox, *A Call to Reform State Restrictions on Hiring of Ex-Offenders*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 121, 173-76 (2016) (recommending that states consider a standard outside of "ban the box" laws that requires considering the relationship between the crime committed and the position sought).

190. *See* HAW. REV. STAT. ANN. § 378-2.5.

191. PHILA., PA., CODE tit. 9, § 9-3504.

192. *Id.*

193. *Id.*

194. *See* *Shimose v. Hawai'i Sys. Corp.*, 134 Haw. 479, 484 (2015); *Wright v. Home*

attempted to address ex-offender employment, more and more states and cities have adopted “ban the box” laws to address the problem separately.¹⁹⁵ These laws are varied in their approach to the problem.¹⁹⁶ They differ primarily in what employers they cover, what parts of a criminal record can be considered, when in the hiring process an employer can consider criminal records, and what, if any, standard to apply to the usable criminal record.¹⁹⁷ Only Hawaii’s rational relationship standard has been adequately developed.¹⁹⁸ Ex-offenders likely would be given a better chance to obtain employment and reintegrate back into society if courts were to adopt Hawaii’s standard.¹⁹⁹

Depot U.S.A., 111 Haw. 401, 411-12 (2006).

195. See, e.g., CONSIDERATION OF ARREST AND CONVICTION RECORDS, *supra* note 29, at 8-9; see also OR. REV. STAT. § 659A.360 (2018).

196. See HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 6, § 171A (LexisNexis 2018); OR. REV. STAT. § 659A.360.

197. Garcia, *supra* note 11, at 927-28.

198. See Shimose, 134 Haw. at 479; Wright, 111 Haw. at 411-12.

199. See Shimose, 134 Haw. at 479; Wright, 111 Haw. at 411-12.