BEYOND TITLE VII: RETHINKING RACE, EX-OFFENDER STATUS AND EMPLOYMENT DISCRIMINATION IN THE INFORMATION AGE

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ABSTRACT

More than 68 million people in the United States—more than one in four adults—have had some involvement with the criminal justice system that will appear on a criminal history report. A rapidly expanding, for-profit industry has developed to collect these records and compile them into electronic databases, offering employers an inexpensive and readily accessible means of screening prospective employees. Nine out of ten employers now inquire into the criminal history of job candidates, systematically denying individuals with a criminal record any opportunity to gain work experience or build their job qualifications. This is so despite the fact that many individuals with criminal records have never been convicted of a crime, as one-third of felony arrests never result in conviction. And criminal records databases routinely contain significant errors, including false positive identifications and sealed or expunged information.

The negative impact of employers’ reliance on criminal records databases falls most heavily on Black and Latino populations as studies show that the stigma of having a criminal record is significantly more damaging for racial minorities than for whites. This criminal records “penalty” limits profoundly the chance of achieving gainful employment, creating new and vexing problems for regulators, employers, and minorities with criminal records. Our existing regulatory apparatus, which is grounded in Title VII of the Civil Rights Act of 1964 and the Fair Credit Reporting Act, is ill-equipped to resolve this emerging dilemma because it fails to address systematic information failures and the problem of stigma.

This Article, therefore, proposes a new framework drawn from core aspects of anti-discrimination laws that govern health law, notably the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.

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These laws were designed to regulate the flow of information that may form the basis of an adverse employment decision, seeking to prevent discrimination preemptively. More fundamentally, they conceptualize discrimination through the lens of social stigma, which is critical to understanding and prophylactically curbing the particular discrimination that results from dual criminal record and minority status. This health-law framework attends to the interests of minorities with criminal records, allows for more robust enforcement of existing laws, and enables employers to make appropriate and equitable hiring decisions, without engaging in invidious discrimination or contributing to the establishment of a new, and potentially enduring, underclass.

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INTRODUCTION

Many Americans are struggling to find jobs in the wake of the 2008 recession, but it is particularly difficult for those with criminal records. Each year there are over 14 million arrests in the U.S. The overwhelming majority of these arrests are for non-violent crimes, minor infractions, and non-criminal offenses such as loitering and curfew violations, drunkenness, vagrancy, and disorderly conduct. These arrests -- many of which are linked to aggressive policing tactics, including, “stop and frisk” programs -- often lead to the creation of criminal records, even if no criminal charges are ultimately brought and if the charges are later dropped. Today, more than one in four Americans has a criminal record.

A rapidly expanding for-profit industry collects these records and compiles them into electronic databases creating ready access to millions of computerized criminal history records. A sizable percentage of these arrest


\[^{3}\text{In 2008 in New York State, more than 87% of adult convictions were for misdemeanors or petty offenses. (N.Y. Division of Criminal Justice Services (DCJS), Dispositions of Adult Arrests by County and Region (6/18/2009). Nationwide, only 4.2 % of the 14 million annual adult arrests resulted in charges for violent crimes. Less than 5% of all arrests in the United Stated in 2006 were for violent crimes. U.S. Department of Justice, Federal Bureau of Investigations, Crime in the United States, 2007, Table 29 (2008), available at http://www.fbi.gov/ucr/cius2007/data/table_29/html.}\]


\[^{6}\text{According to the U.S. Code, a criminal history records is “information collected by criminal justice agencies on individuals consisting of identifiable descriptions}\]
and conviction records are purchased by employers, who use them as an inexpensive and efficient means of screening potential employees.\textsuperscript{7} This practice is widespread with approximately 92 percent of employers, including Walmart, the country’s largest private employer, now inquiring into the criminal histories of prospective employees.\textsuperscript{8} In but a matter of minutes, an employer can conduct an online search of government or commercial criminal records databases, and, for a modest fee, obtain instantly an applicant’s criminal history report.

Studies have cast doubt on the assumption that the existence of a criminal record correctly forecasts one’s work behavior,\textsuperscript{9} and data show that after “staying clean” for a few years a person with a criminal record is no more likely than anyone else to have a future arrest.\textsuperscript{10} Nevertheless, 73 percent of employers, both large and small, have adopted blanket hiring

\begin{itemize}
\item and notations of arrests, detentions, indictments, and other formal criminal charges, and any disposition arising there from, including acquittal, sentencing, correctional supervision, or release.” 42 U.S.C. § 14616 (2000).
\item See Society for Human Resources Management, \textit{Background Checking: Conducting Criminal Background Checks}, 3 (Jan. 22, 1010) (2010 survey found that 92% of employers performed criminal background checks on some or all jobs) (available at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx); Steven Greenhouse, \textit{Equal Opportunity Panel Updates Hiring Policy}, \textit{The New York Times} (April 25, 2012).
\item B.W. Roberts, et al., \textit{Predicting the Counterproductive Employee in a Child-to Adult Prospective Study}, 92 J. APPL. PSYCHOL., 1427-1436 (2007); Alfred Blumstein & Kinimori Nakamura, \textit{Redemption in the Presence of Widespread Criminal Background Checks}, 47 CRIMINOLOGY 327, 339-40 (2009) (demonstrating that this an individual with a criminal record is less likely to commit a crime in the workplace than an employee who has never been convicted).
\item See Alfred Blumstein & Kinimori Nakamura, \textit{“Redemption” in an Era of Widespread Criminal Background Checks}, NAT’L INST. JUST. J. 263 (2009) (showing that the “point of redemption” is between three and seven years, depending on the age at which the arrest occurred); John H. Laud & Robert J. Sampson, \textit{Understanding Desistance from Crime}, 28 CRIME & JUST. 1, 24-25 (2001); Christopher Uggen, \textit{Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism}, 67 AM. SOC. REV. 529, 542 (2000).
\end{itemize}
prohibitions on such individuals.11 These employers include such widely recognized corporations as Bank of America (283,000 employees), Lowes (238,000 employees), Domino’s Pizza (170,000 employees worldwide), and Omni Hotel (11,000 employees in North America) among others.12 For many employers, the bar on hiring anyone with a criminal record includes applicants whose records consist of only an arrest, not a conviction: a group that constitutes one-third of all felony arrests.13

The scale of this problem is tremendous, with over 93 million computerized records representing 68 million different individuals – over 29 percent of the entire adult population of the United States.15 This problem is particularly pronounced for Blacks and Latinos, who are more likely to have a criminal record because they are arrested at rates vastly disproportionate to their share of the population and their level of actually criminal activity.16 Indeed, African Americans are up to 15 times more likely than whites to be arrested for low-level offenses,17 while Latinos are

11 See National Consumer Law Center, Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses, 3 (April 2012).
15 See Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2010, Table 1 (97,893,200 have criminal records on file in the states, including arrests). Because a number of these individuals may have records on file in multiple states, the author decreased the number by 30% to arrive at a conservative estimate of 68,525,240. As a percentage of the U.S. population over the age of 18 (234,564,071 according to the Census Bureau), 29% of the U.S. adult population has a criminal record. See U.S. Census Bureau, 2010 Census.
16 U.S. Department of Justice. Table 43 Arrests by Race, 2009. http://www2.fbi.gov/ucr/cius2009/data/table_43.html. For broader dimensions of this race exclusion, see infra Part IC.
17 Council on Crime and Justice, Low Level Offenses in Minneapolis: An Analysis of Arrests and their Outcomes, at 4 (2004). The New York City Police Department arrested, charged with misdemeanors, and incarcerated more than 353,000 people from 1997 to 2006 for the possession of small amounts of marijuana. Despite accounting for only 26% of the city’s population, African Americans constitute
three times more likely to be arrested than whites. This reliance by employers on criminal records compounds existing social and economic problems for the poorest and most marginalized populations and leads to a disproportionate exclusion of these groups from the workforce.

The increasingly common use of criminal records databases by employers has introduced a series of new and vexing problems for both employers and minority ex-offenders that the existing regulatory apparatus is ill-equipped to resolve. The relevant laws include Title VII of the Civil Rights Act of 1964, which prohibits race discrimination in employment; the Fair Credit Reporting Act (“FCRA”); and a patchwork of similar state and local laws, which together govern the collection and dissemination of consumer information, including criminal history records.

This remedial framework, however, has proven to be woefully insufficient as it does not account for several compelling concerns, including the sweeping scope of the problem due to the sheer numbers of individuals with criminal records; the significant inaccuracies that plague criminal history reports, such as false positive identifications, and the release of sealed and expunged information; the practical difficulties created by the Title VII doctrinal framework that render avoiding discrimination in hiring and challenging adverse employment decision very difficult for ex-offenders; the way information technology and the reduction in information searching costs have dramatically, and often adversely, altered how employers screen applicants for jobs; and the ways in which the combination of a criminal record and minority status creates a distinctive and powerful social stigma that studies show is significantly more

52% of these arrests. In comparison to white arrest rates for marijuana, the arrest rate for African Americans is five times greater and the arrest rate for Latinos is nearly three times greater. This is so despite the fact that federal Government studies consistently find that Whites use marijuana at higher rates than African Americans. See H. Levine & P. Small, Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007 (New York City Civil Liberties Union, April 2008).


detrimental than minority status or ex-offender status alone. The question, then, becomes how to ensure employment opportunities and encourage the reintegration of people with criminal records into a society where they face significant discrimination in employment, while balancing their interests with those of employers and society at large.

This Article proposes a legal framework that effectively addresses this dilemma by incorporating the doctrinal structure and norms of anti-discrimination laws from the health law context. This framework, which I have termed, the Health Law Framework, draws specifically from the Americans with Disabilities Act (“ADA”), which prohibits discrimination against people with disabilities in employment, and the Genetic Information Antidiscrimination Act (“GINA”), which bars genetic discrimination in employment and regulates employers’ acquisition of genetic information. This Health Law Framework offers a valuable means through which to regulate the practice of using criminal records in the screening of potential employees. The ADA, with its emphasis on “reasonable accommodations” and stigmatic harms, along with GINA and its focus on an invisible status that can form the basis of discriminatory treatment, together provide a conceptual lens for thinking about and reducing the crippling stigma that stems from dual criminal record and minority status. In addition, both the ADA and GINA operate to guard against discrimination before it occurs, and therefore hold tremendous promise for curtailing employers’ use of information technology to inappropriately screen former offenders out of the employment pool. At the same time, these laws in combination work to strengthen the enforcement of existing laws governing the collection and dissemination of criminal records data.

Importing the doctrinal architecture and norms that undergird health law anti-discrimination jurisprudence also provides a means of removing the practical barriers to litigation for ex-offenders of color. Moreover, by prioritizing the balancing of employer and employee interests along with social and economic costs, the Health Law Framework suggests a way to guarantee equal employment opportunity for former offenders, protect safety and security in the workplace, and promote the broader societal

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interest in ensuring legitimate employment opportunities for those with criminal records.

The importance of productive work for people with criminal records cannot be overstated as it allows these individuals to support themselves and their families, and offers a sense of accomplishment, satisfaction, and belonging. Studies consistently show that while employment instability can lead to increased arrest rates,\(^{24}\) stable work is the single most effective way to protect against a return to criminal activity,\(^{25}\) reducing recidivism by as much as 40 percent.\(^{26}\) Indeed, as articulated by one former offender, “when most people lose a job, they lose a job, when I lose a job I could lose my liberty and be back in prison.”\(^{27}\)

Although much has been written about the use of criminal records in employment decision-making,\(^{28}\) including scholarship highlighting the race discrimination that occurs through the use of criminal history reports in


\(^{27}\) Juan Cartagena, President and General Counsel, Latino Justice, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011).

employment, most of this work examines this issue solely through the traditional Title VII paradigm. Other scholars focus on access to information, such as Richard Epstein, Lior Jacob Strahilevitz, and Harry J. Holzer, who have suggested that permitting use of criminal records in the hiring process may improve the job prospects of African-Americans (particularly Black men) without criminal records because it may dispel the assumption of some employers that most African-Americans have a criminal record. Still other commentators argue that employers should be precluded entirely from relying on criminal history reports in the hiring process.

This Article, in contrast, contends that the public and commercial criminal records database infrastructure is so expansive and well-established that restricting access entirely would not be politically or administratively feasible. Moreover, criminal background checks can play an important role in the hiring process to the extent that this practice offers employers a means, albeit an imperfect one, of assessing the risks attendant to employing a former-offender in a position of trust. Still, allowing unfettered access to criminal records databases -- even to increase the employment prospects of those without records, as advanced by some scholars -- ignores the fact that minority populations are disproportionately represented among those with criminal records. To neglect the millions of

29 See Roberto Concepcion, Jr., Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks, 19 GEO. J. ON POVERTY L. & POL’Y 231 (2012); D. Michael A. Stoll, Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market, 1 U. CHI. LEGAL F. 381, 382 (2009);
30 See Lior Jacob Strahilevitz, Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 N.W. L. Rev. 1667 (2008); Harry J. Holzer et. al., Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, 49 J.L. & Econ. 451 (2006); Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 40 (1992) (“The strategy of law should be to encourage employers to obtain as much individual information as possible about workers so that they can, pro tanto, place less reliance on broad statistical judgments. To the extent, therefore, that the present antidiscrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not perfectly individuate workers, then by indirect it encourages the very sorts of discrimination that the law seeks to oppose.”). See also Michael A. Stoll, Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market, 1 U. Chi. Legal F. 381, 382 (2009).
people in this demographic would have tangible social and economic costs, and do little to address race discrimination.

My central argument, therefore, is that by adopting a doctrinal scheme that regulates the flow of information that may form the basis of an adverse employment decision, the Health Law Framework prevents discrimination preemptively, attends to the interests of individuals of color (those with and without criminal records), allows for more robust enforcement of existing laws, and enables employers to make appropriate and equitable hiring decisions, without engaging in invidious discrimination, or contributing to the establishment of an enduring underclass of individuals with criminal records. Indeed, by conceptualizing criminal records discrimination through the lens of social stigma rather than relying solely on the prevailing Title VII/FCRA paradigm, the Health Law Framework offers a fruitful way of understanding and curbing prophylactically the discrimination that results from membership in a racial or ethnic minority group and having a criminal record.

This Article is organized as follows. Part I surveys the operation and scope of government and commercial criminal records databases, and addresses the causes and effects of the pervasive inaccuracies contained in criminal history reports, as well as the discrimination and attendant social and economic costs that result from employers’ reliance on criminal records when making employment decisions. Part II charts the current regulatory landscape as it relates to employers’ use of arrest and conviction data, including the FCRA and Title VII. It also highlights both the practical and doctrinal deficiencies of using the FCRA/Title VII doctrinal scheme to address the race discrimination that stems from the use of criminal records in employment. Part III introduces the health laws that together form the basis of the proposed Health Law Framework: GINA and the ADA. Part IV illustrates the ways in which this legal response more effectively attends to the problems associated with the collection, dissemination and use of criminal history information; the practical difficulties individuals with criminal records face when seeking employment and challenging adverse employment actions under Title VII; the unique stigma experienced by minority ex-offenders; and the interest of employers in making efficient and appropriate employment decisions.

I. CRIMINAL RECORDS, EMPLOYMENT DISCRIMINATION AND THE BACKGROUND CHECKING INDUSTRY

Criminal background checks for employment purposes were relatively rare forty-years ago and were typically reserved for individuals in sensitive or high-ranking positions.\textsuperscript{33} Even then, a search was difficult to conduct as the background screener would not necessarily know which courts or administrative agencies to search for the relevant documents.\textsuperscript{34} In recent years, however, technological innovations have allowed for the centralization and automation of court records systems along with an explosive expansion in the number of private sector companies providing quick access to millions of computerized criminal history reports to clients including, employers, landlords, insurance companies, and private associations.\textsuperscript{35}

This Part focuses on criminal records and examines how they are incurred by individuals; recorded and filed in state, local and federal criminal records repositories; and ultimately purchased and catalogued in electronic databases, and sold to employers by commercial criminal background checking companies. In so doing, this Part investigates the problems attendant to the collection and transmission of criminal history information. This Part then delineates the discrimination that flows from employers’ acquisition and use of criminal history reports to vet potential employees.

A. Criminal History Reports and Commercial Background Checking Companies

Tens of millions of criminal background checks are conducted each year in the United States,\textsuperscript{36} many by employers who enlist the services of commercial background checking companies (“BCC”) when screening job

\textsuperscript{34} See James Jacobs and Tamara Crepet, The Expanding Scope, Use and Availability of Criminal Records, 11 N.Y.U. J. LEGIS. & PUB.’Y 177, 190 (2007-2008).
applicants or employees.  Although it is difficult to compile accurate data on the number of BCC as they are largely unlicensed and “anyone with a computer, an internet connection and access to records can start a background screening business,” it is estimated that this thriving industry is comprised of thousands of companies cataloguing and selling criminal history reports on the national, local, and regional levels. Several large players now dominate the field, including ChoicePoint (now LexisNexis), which, in 2008, enjoyed over $1 billion in annual revenue; along with First Advantage and HireRight, which reported $233 million and $69 million respectively in revenue that same year. ChoicePoint boasts that it maintains upwards of seventeen billion public records, of which ninety million are criminal records. Each of these files, however, does not necessarily belong to a unique individual as these companies count by file rather than by individual, and one person may be the subject of several charges or convictions in one or several jurisdictions.

BCCs collect and disseminate all manner of criminal justice information on the more than 68 million people in the United States with criminal records. This data includes: arrests (or notice to appear in lieu of an

37 These companies are known as “consumer reporting agencies” if they provide the information to “consumer reports” under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA).
43 See supra n. 15.
arrest), detentions, complaints, formal criminal charges (indictment or conviction; acquittal, etc.), sentencing, parole or correctional supervision, or release of a specific individual. The offenses catalogued in criminal history reports also vary from juvenile offenses and one-time arrests, where charges are dropped entirely, to extensive serious, and violent criminal histories. Yet the overwhelming majority of criminal records involve minor or nonviolent offenses (such as curfews and loitering violations, vagrancy and disorderly conduct) and often consist solely of an arrest that did not lead to conviction. Indeed, according to the Department of Justice, one-third of felony arrests never lead to conviction, and among the nearly 14 million arrests recorded in 2009, only 4.2 percent resulted in charges for serious violent crimes (murder, rape, robbery, and aggravated assault).

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44 See 28 C.F.R. § 20.23(b). Criminal justice information is a broad category, which also includes: registries, watch lists, wanted person lists, and protective order lists. It can also include intelligence information.


47 Nationwide, just 4.2% of the 14 million annual adult arrests resulted in charges for violent crimes. See Federal Bureau of Investigation, Crime in the United States 2007 (2008). Another 10 percent of all arrests were for simple assault, which do not involve a weapon or aggravated injury but do often include arrests for domestic violence and intimate partner violence. The remainder of arrests in 2009 were for: property crimes, which account for 18 percent of arrests, and include burglary, larceny-theft, motor vehicle theft, arson, vandalism, stolen property, forgery and counterfeiting, fraud, and embezzlement. Drug offenses, which account for 12 percent of arrests, and include production, distribution, and/or use of controlled substances; and other offenses, which account for 56 percent of all arrests, and include public order offenses (such as disorderly conduct, drunkenness, prostitution, liquor laws, vagrancy, loitering), driving under the influence, weapons violation, and many other violations of state or local law not specifically identified above. See id.
The records that BCCs catalogue and sell (arrest data, fingerprints, charges, and dispositions, etc.) typically originate in courts and criminal justice agencies, such as prosecutors, corrections, police, and the Federal Bureau of Investigation (“FBI”). Each of these sources is governed by specific local, state, and/or federal laws that determine how, where, and by whom these records may be searched.48 The most complete criminal history information can be found in county courthouses.49

As a general matter, records generated in state courts or criminal justice agencies are catalogued in centralized state criminal records repositories.50 All told, these state repositories hold over seventy-one million criminal history records,51 including information on non-criminal or other lesser offenses for which fingerprinting is not required.52 State repositories differ with respect to the types of records held, their completeness, how often they are updated, and whether they may be accessed by the general public and/or by BCCs. Records held in state repositories are typically available to state and local police, probation, other criminal justice personnel, as well as to some employers and membership organizations.53

The FBI also maintains a repository of criminal justice records through its National Crime Information Center (“NCIC”), which houses the interstate identification index (“III”): a comprehensive criminal history database that includes records from state repositories along with data from federal and international criminal justice agencies.54 States that provide

49 County courthouse records are retrievable on-site, although some now allow for on-line searches. See SEARCH, Nat’l Consortium for Justice Info and Statistics, Report of the Nat’l Task Force on the Commercial Sale of Criminal Justice Record Information, 1 (2005). Records pertaining to federal offenses, including financial fraud, interstate drug trafficking, bank robbery, and crimes against the government are accessible online via the federal courts’ Public Access to Court Electronic Records or Case Management Electronic case files.
53 See id.
54 See generally Nat’l Task Force to the U.S. Att’y Gen. NCJ-179358, Interstate Identification Index Name Check Efficacy (1999), available at http://www.search.org/files/pdf/III_Name_Check.pdf (describes how III data is stored and access by law enforcement personnel in order to conduct criminal
information to the III submit offender fingerprints electronically to the FBI’s Integrated Automated Fingerprint Identification System (“IAFIS”). The III stores the criminal history records that correspond to the fingerprints in the IAFIS. This allows users to search the III to determine the specific states that maintain the records pertaining to a particular subject.55 This expansive database is accessible for employment purposes only by certain state and federal government and nongovernmental personnel in specific government regulated jobs and industries.56

Although employers may perform background checks themselves to screen job applicants by either visiting the relevant courts or agencies, or by conducting an online search where possible;57 they typically lack the time or expertise necessary to conduct such searches. In addition, employers may lack authorization to access certain state records repositories or the III. As a result, most employers use BCC for employment screening purposes. BCCs obtain criminal records primarily through the use of “runners”, electronic data sharing with government agencies, and through bulk purchases of criminal records from courts or corrections departments.58 Prior to the widespread use of computerized records keeping, when a request for a criminal background information screen was received, companies would send a “runner” to the courthouses or other repositories in the locations where the subject had lived in order to “pull” the relevant files. With advances in automated recordkeeping and the advent of the internet, courts and other criminal justice agencies began computerizing their files and,
depending on the laws of the particular jurisdiction, allowed BCCs to purchase this data and later sell it to consumers. While both of these methods of acquiring files are still employed today, BCCs are increasingly purchasing criminal history information in bulk from courts and criminal justice agencies throughout the country as a means of creating proprietary national databases that can enable “instant” searches of millions of files from every state.\(^{59}\) The information catalogued in these databases is sold to consumers, including government agencies, or is “resold” to other BCCs.\(^{60}\)

### B. Problems with the Criminal History Reports

Although BCCs benefit employers by providing “one stop shopping” for information thereby increasing economic efficiency and alleviating the administrative strain on courts and administrative agencies that compile and disseminate this information; recent studies show that both commercial and government criminal history reports are riddled with errors and frequently contain significant inaccuracies, including: false positive identifications, sealed or expunged information, misleading information, and missing case disposition or resolution information.\(^{61}\) Moreover, many of the individuals indentified in criminal records databases have never been convicted of a crime, as one-third of felony arrests never results in conviction.\(^{62}\) And some offenses flagged in reports are not even violations of the criminal code in

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the reported state, yet may still be reflected in the FBI or commercial databases.63

BCCs routinely produce erroneous results because of misspellings or clerical errors. They also frequently fail to distinguish among different people who have the same name. And BCC often create files based on fabricated or fraudulently procured identity information given to law enforcement by subjects who wish to avoid discovery of prior criminal activity.64 Because BCCs lack direct access to the FBI fingerprint-based records, they tend to conduct repository searches based a subject’s name and/or another identifier, such as a social security number, birth date, or address.65 Such searches may fail by yielding false positives (incorrectly linking another person’s name to a criminal record) or false negatives (missing a criminal record because of a false or inaccurate name).66

This phenomenon is not uncommon. Consider the case of Samuel L. Jackson, the plaintiff in a 2011 federal lawsuit against a BCC company that supplied a prospective employer with an inaccurate background report. Jackson was denied a job when the report the employer received listed many possible matches in a nationwide database for Jackson, an applicant in his 20s. Three “matches” were for a 58 year-old man who was behind bars at the time the background screen was conducted, having been convicted of rape in another state in 1987, when Jackson was but three years old.67 Similarly, a recent law school graduate in San Diego was arrested on the first day of her new job because a background check revealed a warrant for her arrest for a marijuana conviction, but, as it turned out, the actual perpetrator had assumed her identity after stealing her wallet.68 It is

63 Adam Klein, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011).
64 Michelle Natividad Rodriguez, et al., 65 Million “Need Not Apply” the Case for Reforming Criminal Background checks for Employment, National Employment Law Project (2011).
68 See Michelle Natividad Rodriguez, et al., 65 Million “Need Not Apply” the Case
estimated that hundreds of thousands of these false positives and negatives occur each year.\textsuperscript{69} Such an error rate translates into substantial numbers of individuals being denied employment opportunities or facing delays in receiving jobs.

Reports also often list the same offense several times or multiple reports reflect the same incident, thus giving the appearance that the job candidate has a lengthy record.\textsuperscript{70} And records that should have been sealed or expunged can frequently be found in criminal history reports. Indeed, reports do not always contain current information because they often vary with respect to the frequency with which they are updated, and according to the Department of Justice “no single source exists that provides complete and up-to-date information about a person’s criminal history.”\textsuperscript{71} Hence, even if a state court or agency updates its files, a BCC may not retrieve these updates in a timely fashion (if at all) and by then sealed or expunged information may have already been disseminated. Erroneous reports can circulate indefinitely and applicants may never know why they were denied jobs.\textsuperscript{72}

These problems are not unique to the private sector. Recent studies show that a substantial number of state and federal criminal records databases contain incomplete criminal records. The FBI conducts nearly nine million criminal background checks per year, primarily for employment, and according to the Attorney General, nearly 50 percent of these records are incomplete or inaccurate,\textsuperscript{73} and many were erroneously


\textsuperscript{69} Craig Winston, National Association of Professional Background Screeners, The National Crime Information Center, A Review and Evaluation, 11-12 (2005) (Describing the work of a Florida task force consisting of the Bureau of Justice Statistics, the Florida Department of Law Enforcement, the U.S. Department of Housing and Urban Development and the FBI, which estimated that if Florida’s false positive rates were extrapolated to the nationwide fingerprint-based checks of the FBI conducted in 1997, then 346,000 false positives would have resulted).


\textsuperscript{72} NYTimes

attributed to individuals who had not been convicted of a crime. The American Bar Association’s Criminal Justice Section has voiced concern “that the FBI’s [criminal history database] system is so seriously flawed that it does a disservice to a large number of U.S. workers and employers who want to enter into an employment relationship but are deterred from doing so by the inaccurate FBI records.” Likewise, a 2011 Department of Justice study found that several state criminal records repositories had failed to record final dispositions for a significant number of arrests, and this problem is exacerbated by the fact that there is no standardized process for reporting arrests and dispositions at the state and local levels.

These problems with criminal history reports are exacerbated by the fact that many employers are unable to effectively interpret the data contained in the reports because much of the information is cryptic or requires specialized knowledge unique to the state or municipality where the record originated. Further, employers tend to give criminal history information more weight than it is due out of fear that hiring a former-offender will render them vulnerable to negligent hiring lawsuits. Thus, among the challenges raised by the widespread accessibility of and reliance on criminal records databases is how to address the problems with the data and employer use of this information in a way that is responsive to the needs of former offenders, employers, and society at large.

C. Race Discrimination in Employment through the use of Criminal History Reports

The employment landscape has changed dramatically in recent years for former-offenders due in large measure to the tremendous growth in the number of people who have had contact with the criminal justice system and the proliferation of employers conducting background checks, particularly since September 11, 2001. In 1989, for example, only 12 percent of the adult population in the US had criminal records, yet by 2010

74 According to one study, 5.5% of 10,000 searches were falsely attributed to individuals who had not been convicted of a crime. See id.
75 Stephen Saltzburg, Chair of the American Bar Association’s Criminal Justice Section, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, 4 (July 26, 2011).
77 The number of individuals with criminal records in state criminal history files in 1989 was 42,476,400. See Bureau of Justice Statistics, Survey of State Criminal
over 29 percent of all adults in the U.S. (more than 1 in every 4) had some involvement with the criminal justice system that would show up on a routine employment background check.\textsuperscript{78}

A disproportionate number of the estimated 68 million adults in the U.S. with criminal records\textsuperscript{79} are African American and Hispanic because they are overrepresented in the criminal justice system.\textsuperscript{80} African Americans and Hispanics are more likely than whites to be arrested for low level offenses, and are also more likely to be arrested, convicted, or sentenced for drug offenses despite the fact that their rate of drug use is comparable to that of Whites.\textsuperscript{81} Moreover, African Americans and

\textbf{History Information Systems, 1995.} Table 2. The author decreased the number by 30\% to account for individuals who have records on file in multiple states, and arrived at a conservative estimate of 29,733,480. As a percentage of the U.S. population over the age of 18 in 1989 (246,819,222 according to the Census Bureau), 12.05 of the U.S. population has a criminal record. See, U.S. Bureau of the Census, \textit{Population Estimates and Population Distribution Branches}, March 1992.

\textsuperscript{78} See \textit{Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2010}, Table 1 (97,893,200 adults have criminal records on file in the states, including arrests). Because a number of these individuals may have records on file in multiple states, the author decreased the number by 30\% to arrive at a conservative estimate of 68,525,240. As a percentage of the U.S. population over the age of 18 (234,564,071 according to the Census Bureau), over 29\% of the U.S. adult population has a criminal record. See \textit{U.S. Census Bureau, 2010 Census}.

\textsuperscript{79} See \textit{Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2010}, Table 1 (97,893,200 have criminal records on file in the states, including arrests). Because a number of these individuals may have records on file in multiple states, the author decreased the number by 30\% to arrive at a conservative estimate of 68,525,240.

\textsuperscript{80} This document uses the terms “Black” and “African American” and “Latino” and “Hispanic” interchangeably. In a recently released analysis of data on disproportionate minority contact in arrests, court processing and sentencing, new admissions, and ongoing populations in prison and jails, probation and parole, capital punishment, and recidivism; the National Council on Crime and Delinquency found that “[a]t each of these stages, persons of color, particularly African Americans, are more likely to receive less favorable results than their White Counterparts,” and that Latinos also are over-represented in comparison to whites. C. Hartney & L. Vuong, \textit{Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System} (National council on Crime and Delinquency, March 2009).

\textsuperscript{81} See, e.g., \textit{SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., Results from the 200 National Survey on Drug Use and Health: Summary of National Findings 21}, Figure 2.10 (2011).
Hispanics are arrested and incarcerated at rates that are several times their proportion of the general population. African Americans represent 28 percent of all arrests, and 39 percent of prison and jail inmates, even though they account for approximately 14 percent of the general

http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (drug usage rates for Latinos in 2009 was 7.9% compared to 8.8% for Whites); HUMAN RIGHTS WATCH, Decades of Disparity: Drug Arrests and Race in The United States 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (finding that “[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending...blacks and whites engage in drug offenses—possession and sales—at roughly comparable rates”); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVIS., Results from the 200 National Survey on Drug Use and Health: Summary of National Findings 21, (2011). http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (The rates of illicit drug in the United States in 2009 among persons aged 12 and older were 10.7 for African-Americans, 9.1% for Whites, and 8.1% for Hispanics); Harry Levine & Deborah Small, N.Y. Civil Liberties Union, Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007, at 13-16 (2008), www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (reporting that U.S. Government data indicates that Whites use Marijuana at higher rates than African Americans and Hispanics; still the marijuana arrest rate for Hispanics is approximately three times that of Whites, and the marijuana arrest rate of African Americans in five times that of Whites). The majority of Latinos incarcerated in New York State in 2009 were for drug-related offenses. See New York State Department of Correctional Services, Office of Public Information, Incarceration Statistic-2011. Yet, they have one of the lowest rates of lifetime illicit drug use, at 38.9%, as compared to Whites at 54% and African-Americans at 43.8%. See Office of National Drug Control Policy, Minorities and Drugs (2003).

82 Thomas P. Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974-2001, at 5, Table 5 (Bureau of Justice Statistics 2003); cf. pew Center on the States, Collateral Costs: incarceration’s Effect on Economic Mobility 6 (2019) (finding that incarceration in America is concentrated among African American men. Roughly 1 in every 97 white males ages 18-64 is incarcerated and the number or similarly-aged Hispanic males is 1 in 36, while for black men it is 1 in 12.”). Incarceration rates are even higher for 20 to 34 year-old men without a high school diploma or GED. Approximately 1 in 8 White men in this demographic is incarcerated, relative to 1 in 14 Hispanic men, and 1 in 3 Black men. See Pew Center on the States, One in 100: Behind Bars in America 2008, at 8, Figure 2 (2008).


population.\textsuperscript{85} Latinos constitute only 16 percent of the overall population,\textsuperscript{86} but almost 20 percent of the prison and jail population.\textsuperscript{87} Assuming current incarceration rates remain constant, among males, Blacks will have a 32 percent (1 in 3) chance of serving time in prison during their lifetime, Latinos will have a 17 percent chance (1 in 6), and whites will have a 6 percent chance (1 in 17).\textsuperscript{88} Similarly, Native Americans and Alaskan natives make up only .8 percent of the U.S. population,\textsuperscript{89} but they are 1.3 percent of those arrested,\textsuperscript{90} and the incarceration rate for Native Americans is 38 percent higher than the national average.\textsuperscript{91} These racial disparities can be attributed largely to law enforcement strategies that disproportionately target minority populations, such as the “war on drugs,”\textsuperscript{92} “stop and frisk”

\textsuperscript{85} U.S. Census Bureau, \textit{The Black Population: 2010}, at 3 (2011), \url{http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf} (showing that in 2010, “14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races”)

\textsuperscript{86} See \textit{U.S. Census Bureau, Overview of Race and Hispanic Origin: 2019}, at 3 (2011), \url{http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf} (documenting that in 2010, “there were 50.0 million Hispanics in the United States, comprising 16 percent of the total population”).

\textsuperscript{87} William J. Sabol & Heather Couture, \textit{Prison Inmates at Midyear 2007}, NCJ 221944, at 7, Table 9 (Bureau of Justice Statistics 2008).


\textsuperscript{89} U.S. Census Bureau, \textit{2006 American Community Survey Fact Sheet}.

\textsuperscript{90} Federal Bureau of Investigation, \textit{Crime in the United States, 2007} at Table 43. Although Asians and Pacific Islanders, like Native Americans, are not discussed in the current EEOC policy guidance, national statistics indicate that these groups are not disproportionately affected by the criminal justice system. For example, Asians or Pacific Islanders represent 4.5% of the population, U.S. Census Bureau, \textit{2006 American Community Survey Fact Sheet}, but only constitute .8% of all arrests, Federal Bureau of Investigation, \textit{Crime in the United States, 2007} at Table 43. Nevertheless, local or regional crime statistics may demonstrate racial disparities for Asian and Pacific Islanders.

\textsuperscript{91} Death Penalty Information Center, \textit{Native Americans and the Death Penalty}, available at \url{http://www.deathpenaltyinfo.org/native-americans-and-death-penalty}.

programs, and “broken windows” policing practices that have become popular among urban police forces. \(^{93}\)

**D. Race, Criminal History Status, and Social Stigma**

Nine out of ten employers now inquire into the criminal history of job candidates, \(^{94}\) and research shows that the existence of a record can play a decisive role in the hiring process, reducing one’s chance of receiving a callback or job offer by almost 50 percent. \(^{95}\) Yet the impact of having a criminal record is significantly worse for offenders of color, who are already more likely to experience discrimination in the labor market. Groundbreaking audit studies conducted in Milwaukee and New York City by researchers at Princeton and Harvard illustrate vividly the effects of a criminal record on hiring decisions and the employment prospects for minority job seekers. Funded by the Department of Justice’s National Institute of Justice, the studies examined the criminal record “penalty” for job seekers of different races. The first study matched pairs of black and white entry-level job seekers to test the impact of incarceration on employment outcomes for black and white job candidates. \(^{96}\) It found that whites with a criminal record were half as likely to receive a call back as whites without a record (17 percent vs. 34 percent), while blacks with a criminal record were a third as likely to receive a callback as blacks without a record (5 percent vs. 14 percent). \(^{97}\) Most disturbingly, the research also revealed that whites with a criminal record had a 40 percent higher chance of receiving a callback than blacks without a record. \(^{98}\)

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\(^{93}\) See New York Civil Liberties Union, *Stop-And-Frisk 2011: NYCLU Briefing*, (2012). See also __.


\(^{97}\) See id.

\(^{98}\) See id.
These findings were replicated in the second study that included Latino testers, which found that after controlling for race, white testers with similar job qualifications and criminal histories received job offers at higher rates than Black and Latino testers. And the researchers again found that the white testers with a purported recent felony conviction were more likely to receive a job offer than the Black and Latino testers without criminal records. These findings suggest that while ex-offenders are disadvantaged in the labor market relative to applicants with no criminal background, racial minority status combined with a criminal record creates a pronounced and particularly formidable socially stigmatic effect. Indeed, a criminal record, when combined with the age, race and social class of those most likely to come into contact with the criminal justice system -- a group that already experiences significant social disadvantage -- creates a powerful and seemingly indelible form of social marginalization.

That employers have virtually unlimited access to criminal history information only intensifies this stigma making it all but impossible for minority ex-offenders to find gainful employment. This essentially dooms these individuals -- who often struggled with poverty, low wages, and/or unstable housing prior to arrest -- to a life of social dislocation, economic instability, and civic disengagement. These negative effects, which are often more harmful than the behaviors that were the original rationale for the arrests, extend to the health and welfare of family members, particularly children.

### II. THE TITLE VII / FCRA MODEL AND ITS LIMITATIONS

This Part maps the laws that govern the use of criminal history reports in employment, beginning with the FCRA and corresponding state laws that regulate the collection, transmission, and use of such data. This Part then examines the Equal Employment Opportunity Commission’s (“EEOC”) 2012 enforcement guidance on the consideration of arrest and conviction

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records in employment, and the Title VII framework that it advances to control the race discrimination that may result from employers’ reliance on criminal history reports when screening job applicants. This Part concludes by chronicling the weaknesses of these laws and their inability to adequately protect the interests of either employers or individuals with criminal records.

**A. The FCRA’s Regulation of Criminal History Reports**

Until relatively recently, an individual with a criminal history could effectively work toward rehabilitation by getting a fresh start in a new state, city or town, thereby moving beyond a criminal past. The current age of information technology and corresponding growth of criminal records systems and databases has made such efforts virtually impossible. This is exacerbated by the fact that the laws designed to regulate the use of these databases and the criminal history reports they disseminate -- specifically, the FCRA and a patchwork of similar state laws¹⁰¹-- do not go far enough in protecting job applicants and fail to provide adequate notice, consent, access, and enforcement.

Enacted in 1970, decades before the advent of the internet,¹⁰² the FCRA was intended to promote accuracy, fairness, and privacy¹⁰³ of personal information held and disseminated by “consumer reporting agencies”¹⁰⁴ that collect and distribute credit and other consumer information¹⁰⁵ for

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¹⁰³ FCRA § 1681(b) (FCRA established to ensure that “consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer, credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information”).


¹⁰⁵ 15 U.S.C. § 1681a(f). Other statutorily authorized purposes include: determinations regarding creditworthiness, insurance underwriting, or other business transactions regarding a consumer. See id. See also SEARCH, Nat’l Consortium for Justice Info and Statistics, Report of the Nat’l Task Force on the Commercial Sale of Criminal Justice Record Information, 58 (2005) (“As defined by the FCRA, consumer reporting agencies that, for a fee or on a cooperative nonprofit basis, are in the practice of assembling or evaluating personally identifiable information obtained from third parties ad bearing upon a consumer’s credit worthiness, character, reputation, personal characteristics, or mode of living”).
employment.¹⁰⁶ Primary regulatory authority over the FCRA rests with the Federal Trade Commission ("FTC"), which, in 1998, extended the FCRA’s coverage to BCCs that sell criminal records information for employment purposes.¹⁰⁷

Some BCCs that report criminal history information, however, have avoided regulation and liability by describing themselves as not engaged in “consumer reporting” as defined by the statute.¹⁰⁸ And although the FCRA establishes national standards for employment screening -- such as requiring employers to notify and obtain consent from job applicants prior to obtaining a criminal history report, and inform job applicants if an adverse action is taken on the basis of the contents of a report¹⁰⁹ -- these provisions are inadequately enforced. Indeed in recent years several lawsuits have been filed against major BCCs and employers challenging their failure to provide “pre-adverse-action” notices and accurate reporting.¹¹⁰ These BCCs

¹⁰⁶ 15 U.S.C. § 1681a(h).  Employment purposes” is defined as “evaluating a consumer for employment, promotion, reassignment or retention as an employee.” See id. This definition has been interpreted broadly to include, “employers who are: merely considering the possibility of terminating an employee investigating allegations of workplace wrongdoing against a current employee; hiring independent contractors; or, determining whether a contractor’s employee should have a security clearance.” SEARCH, Nat’l Consortium for Justice Info and Statistics, Report of the Nat’l Task Force on the Commercial Sale of Criminal Justice Record Information, 59 (2005)
¹⁰⁷  Advisory Letter from William Haynes, Division of Credit Practices, Fed. Trade Comm’n, to Richard LeBlanc, Due Diligence, Inc. (June 9, 1998), available at http://www.ftc.gov/os/statutes/ fcra/leblanc.shtml (referring to §§ 603, 607, and 609 of the Fair Credit Reporting Act). In 1012, The Dodd-Frank Act, relocated primary regulatory responsibility for the FCRA’s consumer regulations to the newly created Consumer Financial Protection Bureau (CFPB), which is empowered to enforce the federal consumer financial laws (12 USC 5514(c)), including FCRA (12 USC 5481(12) and (14). The CFPB and FTC share some enforcement powers, 12 USC 5514(c)(3), however the law creates an exception to the CFPB's general enforcement power in 15 USC 1681s, which gives the FTC the power to enforce compliance with FCRA’s laws with respect to “consumer reporting agencies and all other persons subject thereto.” See id.
¹⁰⁸ See Logan Danielle Wayne, The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy, 102 J. CRIM. L. & CRIMINOLOGY 253, n. 88 (2012) (illustrating how FCRA §1681e(b), which defines a consumer reporting agency and what activities are covered under its provisions, is written in a way that enables data brokers to avoid coverage under the FCRA).
¹¹⁰ See Williams v. Prologistix, Case No. 1:10-cv-00956 (N.D. Ill., filed Feb. 11, 2010); Smith v. HireRight Solutions, et al., Case No. 4:10-cv-444 (N.D. Okla., filed July 7, 2010); Henderson v. HireRight Solutions, et al., Case No. 10-cv-443 (N.D. Okla., filed July 7, 2010); Hunter v. First Transit, Case No. 1:09-cv- 06178 (N.D.
include HireRight, which supplies criminal history data to such companies as Monster and Oracle; and LexisNexis, which settled a lawsuit in 2008 for $20 million. These lawsuits not only highlight the failings of the FCRA’s enforcement mechanisms, but also suggest that such practices may be widespread among employers and BCCs.

This lack of enforcement is compounded by the fact that the FCRA provides qualified immunity to covered BCC and end-users from claims based on invasion of privacy, defamation, or negligence based on the information contained in an FCRA-covered report, and state laws provide no direct regulation of these companies. Plus, the Act governs only third-party screening companies and not employers who conduct their own background checks, or end-users who access criminal justice information via government sources.

In addition, according to the FCRA, a BCC may report convictions indefinitely and may report records of arrests that did not lead to convictions so long as the arrest occurred fewer than seven years prior. The only accuracy requirement the FCRA places on BCC is that they “follow reasonable procedures to assure maximum possible accuracy.” This vague standard imposes no affirmative duty on BCCs to ensure that the information they report about individuals is accurate, current, or complete. It also allows for the disclosure and circulation of arrest

116 Courts have interpreted the FCRA’s accuracy provision (§1681e(b)) as only mandating that BCCs “weigh the potential that the information will create the misleading impression against the availability of more accurate information and eh burden of providing such information.” See, e.g., Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 42 (7th Cir. 1984).
information and expunged conviction records. In 2009, for example, the New York State Office of the Attorney General investigated ChoicePoint—a BCC that constitutes an estimated 20 percent of the industry in the US and conducts in excess of 10 million background checks each year— for creating and operating a discriminatory online employment application system for RadioShack, the nation’s second-largest retailer of consumer electronics and employer of nearly 35,000 employees. This system automatically rejected anyone who self-reported a criminal record, and the criminal history checks that ChoicePoint conducted for RadioShack disseminated sealed and dismissed convictions.

In order to have an expunged conviction removed from a BCC database, some BCCs require an aggrieved individual to personally request removal of the information, which involves undertaking the arduous and expensive task of collecting and submitting court documents, such as dispositions and expungement orders, and some BCCs even require individuals to provide copies of their criminal history reports as they appear on the BCC’S official website, which means that the affected individuals must purchase their own consumer reports in order to show that the BCC databases contain expunged information.

The FCRA also fails to protect and promote the interests of employers, who often have little knowledge of how the criminal justice system operates and may not fully comprehend how to accurately decipher the data contained in a report. This may be attributed in part to the fact that much of the information disseminated in reports is cryptic or requires specialized knowledge unique to the state or municipality where the record originated. Therefore, even when information in a report is accurate, it may still be misinterpreted in a way that leads to the denial of employment to former-offenders. Further, employers are inundated with information regarding their potential liability for negligent hiring, but they receive little

117 See Chad Terhune, The Trouble with Background Checks, BUSINESS WEEK (May 29, 2008), at 4.
121 A routine internet search for “employment background checks” will yield the websites for scores of private screening companies. These sites typically caution
guidance on how to make legitimate and fair employment decisions that are consistent with Title VII.\textsuperscript{122} Employers thus tend to give criminal history information more weight than it is due out of fear that hiring a former-offender will render them vulnerable to litigation.

Although the FTC requires BCCs to give end-users guidance on how to properly interpret criminal history reports and to offer information on the rudimentary standards that must be met by employers during the hiring process, there is virtually no enforcement of these provisions. Indeed, as currently enforced, the FCRA actually undermines state and local efforts to protect former-offenders and employers in the employment screening process. One study, for instance, found that employers in New York received unresolved arrest data in BCC reports, but did not receive corresponding information on the fact that New York prohibits the making of employment decisions based on an arrest that did not lead to a conviction.\textsuperscript{123} Further, as this example suggests, there is now substantial variation among the states with respect to the kinds of information that can be reported and the level of protection afforded to ex-offenders.\textsuperscript{124} This creates inefficiency and indeterminacy for employers operating in multiple states, which is becoming ever more common in our increasingly globalized economy.

In these ways, the laws and regulations that govern BCCs offer scant protection to individuals with criminal records, nor do they adequately protect the interests of employers, all to the detriment of minority job candidates and employees.

employers about possible liability for negligent hiring and the necessity of conducting criminal background checks, but offer no information about potential Title VII liability for conducting these screens. See, e.g., http://www.abscreening.com/info/negligenthiring.html.

\textsuperscript{122} Anecdotally, advocates on behalf of workers with criminal records frequently find that employers are unaware of the EEOC’s policies regarding employer consideration of arrest and conviction histories. Over 60% of employers in major metropolitan areas indicate that they would definitely r probably not hire an applicant with a criminal history. Harry J. Holzer et al., \textit{Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and their Determinants}, Institute for Research on Poverty, Discussion Paper No. 1243-02, at 7 (2002), available at http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf

\textsuperscript{123} Fair Credit Reporting Act, 15 U.S.C. §1681, et. seq.

\textsuperscript{124} See Legal Action Center, \textit{After Prison: Roadblocks to Reentry} (2009). Available at http://lac.org/roadblocks-to-reentry/
**B. Title VII and the 2012 EEOC Guidance**

In response to the devastating effect of a criminal record on the employment prospects of minority ex-offenders, on April 25, 2012, in a 4-to-1 vote, the EEOC issued an enforcement guidance prohibiting employers from automatically denying employment to individuals based on an arrest or conviction record.\(^{125}\) Updating and reaffirming an earlier guidance enacted in 1987 by then Commissioner Clarence Thomas, the new EEOC Guidance makes clear that employment policies summarily excluding applicants with arrest or conviction records could violate Title VII of the Civil Rights Act’s prohibition against race discrimination in employment if such actions have a disparate impact on racial and ethnic minorities.\(^{126}\)

The guidance clarifies the standards that employers must follow when making employment decisions involving former-offenders and reaffirms that the appropriate legal scheme for examining criminal records cases is Title VII of the Civil Rights Act of 1964,\(^{127}\) which states that “[i]t shall be an unlawful employment practice for an employer…to fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual…because of such individual’s race, color, religion, sex, or national origin….\(^{128}\)

According to the guidance, employers may consider criminal records when screening potential employees, but doing so may violate Title VII if the employer treats criminal history information differently for different applicants based on their race or national origin (disparate treatment). Moreover, a Title VII violation may also occur if an employer’s criminal record screening policy or practice excludes all job candidates with a criminal record because blanket exclusions may have a disparate impact on

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\(^{126}\) See 42 U.S.C. §2000e-2(k)(1)(A)(i). If an employer demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves that employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt. Id. §2000e-2(k)(1)(A)(ii).


\(^{128}\) 42 U.S.C. § 2000(e)-2(A)(1)
racial and ethnic minorities, who are statistically more likely to have a criminal history (disparate impact).

In the case of alleged disparate impact discrimination, once a plaintiff has made a prima facie case identifying the offending policy or practice, the EEOC will commence an investigation during which the employer is permitted to produce local or regional data, or its own applicant data, to demonstrate that African-Americans and/or Latinos are not arrested or convicted at disproportionately higher rates in the immediate geographic area. This evidence of a racially balanced workforce, however, is not sufficient to disprove disparate impact, as the relevant inquiry is whether the policy or practice denies employment opportunities to a disproportionate number of Title VII-protected individuals.

If the plaintiff is successful in proving disparate impact, the Title VII burden of production and persuasion shifts to the employer to show that the challenged practice is “job related” for the position in question and “consistent with business necessity,” in accordance with the analysis and burden shifting established by the Supreme Court in *Griggs v. Duke Power Company*. As articulated by the Griggs Court, “[Title VII] proscribes . . .

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129 See EEOC Enforcement Guidance at 9.
130 See EEOC Enforcement Guidance 9-10 (2012) (after a series of statistics are given from various sources the EEOC comes to the conclusion that “[n]ational data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin”).
132 See *Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (holding that “bottom line” racial balance in workforce does not preclude employers from establishing a prima facie case of disparate impact; nor does it provide employers with a defense).
practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, that practice is prohibited. In addition, it is the employer’s responsibility to show that the policy or practice “bear[s] a demonstrable relationship to successful performance of the jobs for which it is used” and “measures the person for the job and not the person in the abstract.”

The Eighth Circuit, in *Green v. Missouri Pacific Railroad*, further expanded on this analysis by identifying three factors (the “Green factors”) that must be considered when determining job relatedness and business necessity. These factors include: the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question. In 2007, the Third Circuit, in *El v. Southeastern Pennsylvania Transportation Authority*, provided even more nuance to this statutory analysis by noting that because all hiring necessarily involves “the management of risk,” an employer who seeks to avoid violating Title VII must draft its criminal records exclusion policies carefully based on empirical evidence that “accurately distinguish[es] between applicants [who] pose an unacceptable level or risk and those [who] do not.” Therefore, to demonstrate that a criminal record exclusion is job related and consistent with business necessity, an employer must show that the policy

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138 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court’s injunction allowing an employer to consider an applicant’s prior criminal record as a factor in rendering individual hiring decisions so long as the employer considered these three factors, but precluding the employer from using an applicant’s conviction record as an absolute bar to employment). See also, *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 Employment Opportunity Commission, Http://Www.Eeoc.Gov/Laws/Guidance/Qa_Arrest_Conviction.Cfm (Last Visited May 28, 2012).
139 479 F.3d 232 (3d Cir. 2007) (upholding a SEPTA policy of excluding everyone ever convicted of a violent crime from being hired as a paratransit driver, but stating that the outcome of the case might have been different had the plaintiff had “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, . . . [so] there would be a factual question for the jury to resolve). Id at 247. Cf. Shwan Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 Criminology 27, 52 (2011) (“Given
or practice closely associates the particular criminal conduct (and its dangers) with the innate risks attendant to the duties of the particular position.\textsuperscript{140}

Assessing whether a criminal record exclusion is both job related and consistent with business necessity differs depending on whether an arrest or conviction is involved. An arrest does not establish that criminal conduct has in fact occurred,\textsuperscript{141} therefore a denial of employment based on an arrest record cannot satisfy the “job related” and “business necessity” standard.\textsuperscript{142} An arrest can, however, trigger an inquiry into the underlying facts of the matter,\textsuperscript{143} and an employer may make an employment decision based on the conduct underlying the arrest if the conduct renders the person unsuitable for the position at issue.\textsuperscript{144} A record of conviction, on the other hand, will typically suffice as evidence that an individual engaged in particular conduct.\textsuperscript{145} Still, under certain circumstances it may be justifiable for an employer not to rely solely on the conviction record when screening job candidates.\textsuperscript{146}

Even if an employer succeeds in establishing that the exclusion is job related and consistent with business necessity, a Title VII plaintiff may still prevail if she can show that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate aims as effectively as the challenged practice.\textsuperscript{147}

\textsuperscript{140} \textit{EEOC Enforcement Guidance} at 14. The Commission identified two circumstances in which employers will consistently meet the job related and consistent with business necessity defense”: the employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards, or (1) the employer crafts a targeted screen that accounts for at least the three \textit{Green} factors, and then offers an chance for an individualized assessment for persons excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity. See id.

\textsuperscript{141} \textit{Id.} at 12.

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.}


\textsuperscript{146} See id. at 1. Give examples

\textsuperscript{147} \textit{Id.} at n. 59 \textit{citing 42 U.S.C.} § 2000e-2(k)(1)(A)(ii).
While the updated guidance clarified the standards that employers must follow when making employment decisions involving former offenders, as I will now explain, reliance on Title VII and the FCRA have been insufficient means of addressing the race discrimination that stems from the use of criminal history reports in employment.

**C. The Limitations of the Title VII Model**

Despite the EEOC’s laudable intentions, when applied to criminal history discrimination, the Title VII doctrinal framework produces unique difficulties that make getting hired or challenging adverse employment actions extraordinarily difficult for African Americans and Latinos with criminal records, who studies show are most vulnerable to this type of discrimination.

This is due in part to the fact that the central focus in most race discrimination in employment cases is on whether the employer was unlawfully motivated by the employee’s race when making an exclusionary employment decision. Although seemingly straightforward, this inquiry into the employer’s mental state presents thorny practical problems when applied to discrimination against former offenders because employers may lawfully consider one’s criminal history when making employment decisions, which renders unlawful discrimination difficult to detect.\(^{148}\)

Indeed, while race discrimination is believed to be wrong because race is generally understood as irrelevant to an employee’s ability to perform on the job, a criminal record is arguably relevant to employment. For instance, although a very narrow exception to Title VII’s anti-discrimination mandate allows employers to openly and legitimately base employment decisions on

certain protected characteristics -- specifically sex, religion, or national origin -- without running afoul of Title VII (such as when a theater seeks to hire actors for particular roles on the basis of gender), this “bonafide occupational requirement” (“BFOQ”) defense explicitly excludes race, which can never serve as a BFOQ under Title VII.\textsuperscript{149} Criminal history status, on the other hand, may occasionally be quite relevant to hiring, such as, for example, consideration of a recent conviction for embezzlement when hiring a bank teller or an accountant, but not consideration of a loitering conviction when hiring a bus driver. Moreover, while employers should be able to inquire into the criminal histories of those who may be placed in sensitive jobs or positions of trust, race may, consciously or unconsciously, influence negatively an employer’s evaluation of a job seeker’s criminal record thereby making the identification of unlawful discrimination more difficult.

This problem is exacerbated by employers’ reliance on information technology early in the hiring process to check a job candidate’s criminal history status. Indeed, although employers are precluded from denying applicants jobs based on an arrest record without a business justification, 

\textsuperscript{149} See 42 U.S.C. § 2000e-2(e) (2006). The EEOC guidelines emphasize both the narrowness of the BFOQ defense and its general permissibility for authenticity purposes. See 29 C.F.R. § 1604.2(a) (2011). The discrimination must be “reasonably necessary to the normal operation of that particular business or enterprise.” See 42 U.S.C. § 2000e-2(e) (2006). See also Dothard v. Rawlinson, 433 U.S. 321, 335–37 (1977) (maximum security prison, where males were segregated on the basis of their level of dangerousness, was permitted under Title VII’s BFOQ to have a policy that precluded the hiring of women as correctional counselors in a ‘contact’ position with inmates). The particular characteristic or attribute must also be inextricably linked to the central mission or essence of the job. See Huisenga v. Opus Corp., 494 N.W.2d 469, 472–73 (Minn. 1992); Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979); Kimberly A. Yuracko, \textit{Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination}, 92 Cal. L. Rev. 147, 184–91 (2004); Amy Kapczynski, \textit{Same-Sex Privacy and the Limits of Antidiscrimination Law}, 112 Yale L.J. 1257, 1259–60 (2003); Melissa K. Stull, Annotation, \textit{Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) Under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 USCS § 2000e-2(e)(1))}, 110 A.L.R. Fed. 28 (1992). The employer bears the responsibility of demonstrating that all or substantially all members of the group(s) excluded from the job would be unable to perform the duties of the position. See, e.g., Int’l Union, United Auto Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 207 (1991) (stating that they employer may not exclude women of childbearing age from certain jobs that involve the handling of lead even though the employer alleges that lead could be harmful to fetuses).
and must give the applicant an opportunity to explain a conviction before being disqualified from employment, this rarely happens because the adverse actions occur during the pre-offer period, when job candidates have little explicit knowledge of why they were denied an interview or job, and may, in fact, never know the true reason for their rejection. This in turn, limits their ability to challenge the employer’s discriminatory actions.

In addition, while disparate impact cases do not require proof of intentional discrimination, comparative evidence is critical to establishing liability under this theory.150 Plaintiffs must demonstrate that a particular employment practice disproportionately burdens members of a protected group, typically by relying upon statistical evidence. However, not only have courts made establishing proof of differential impact more onerous under Title VII,151 but the fact that criminal records discrimination occurs almost exclusively during the hiring stage makes it difficult for an aggrieved applicant to acquire the empirical data necessary to show how the employer has treated similarly situated applicants.152 Moreover, this lack of information due to the preponderance of hiring cases over firing cases increases the difficulty of bringing class actions lawsuits. These limitations severely constrain the efficacy of Title VII in preventing and redressing invidious discrimination and ensuring equality of opportunity.

Finally, neither the EEOC guidance nor Title VII addresses adequately the complex and often conflicting tangle of state and local antidiscrimination laws with which employers must contend when making hiring decisions that involve ex-offenders.153 While some states and

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152 Disparate impact suits now represent only a tiny proportion of cases filed under Title VII. See Ian Ayres & Peter Siegelman, The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas, 74 TEX. L. REV. 1487, 1494 n.27, 1496 (1996).

153 See e.g., N.Y. Correct. Law §752-54 (McKinney 2003); N.Y. Crim. Proc. Law§160.60 (McKinney 2004); N.Y. Exec. Law §296(15-(16)) (McKinney 2010); see also Haw. Rev. Stat. §Stat. §378.2.5(a)(Supp. 2009); 19 Pa. Cons. Stat. Ann. §9125 (West 2000); Wis. Stat. Ann. §111.335(1)(c) (2002). The Colorado Civil Rights Division, for example, has maintained that an employer may inquire about convictions that are substantially related to the applicant’s ability to perform a specific job, so long as the question is posed to every applicant. See
municipalities have enacted antidiscrimination statutes that offer varying degrees of protection to persons with criminal records, many apply only to public sector employment and these laws typically have anemic mechanisms of enforcement.

In light of these deficiencies with the Title VII remedial framework, it should come as no surprise that advocates and lawyers representing parties on both sides in criminal records employment discrimination cases have charged that “Title VII is not an appropriate tool for ensuring fairness for people with criminal records.” In order to more effectively address these perplexing concerns and safeguard the interests of former offenders and employers, along with the societal interest in having former offenders working in the legitimate labor market, the following Parts propose a better approach based on the ADA and GINA.

III. THE HEALTH LAW FRAMEWORK: REGULATING SOCIAL STIGMA IN THE INFORMATION AGE

Like Title VII, GINA and the ADA were enacted to protect against discrimination in employment. These laws, however, are normatively and doctrinally distinct from Title VII in ways that are quite relevant to countering employment discrimination against former offenders. This


155 Margaret Colgate Love, RELIVE FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 63 (2006) (“few states have any mechanism for enforcement of their nondiscrimination laws, and it is not clear how effective they are.”).


157 Although the EEOC has addressed race discrimination in employment against
Part maps the doctrinal contours of the ADA and GINA, and suggests that the way these laws operate to mitigate social stigma and attendant discrimination offers a useful model for conceptualizing and curtailing the discrimination in employment that results from dual criminal record and minority status.

A. The ADA and the Stigma of a Disability

A direct descendant of the Civil Rights Act of 1964, the ADA was enacted by Congress in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities”;158 “a discrete and insular minority” that has “been faced with restrictions and limitations, subject to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.”159 Crafted to provide muscular federal government support for the enforcement of its standards,160 the law strives to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency”161 to the estimated 54 million individuals in the United States with one or more physical or mental disabilities.162

Of the ADA’s five titles, the first deals with employment,163 and establishes that “no covered entity shall discriminate against a qualified individual with a disability because of the disability” in employment.164 Title I applies to both public and private employers and follows from Griggs and its progeny to the extent that it prohibits intentional and facially

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159 See 42 U.S.C. §12101(a)(8). See also See 42 U.S.C. §12101(a)(6) (noting stigma and severe disadvantages faced by those with disabilities); id. §2, 42 U.S.C. §12101(b)(1)(stating the goal of eradicating discrimination against the disabled).
161 See 42 U.S.C. §12101(b)(3).
164 See 42 U.S.C. §12112(a)(2006). Employment includes “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”
neutral employment policies that negatively affect the disabled, who, like racial minorities, face tremendous barriers to employment.

In a move intended to target misperceptions and societal stigma against the disabled, Congress enacted the ADA Amendments Act of 2008 ("ADAAA"), which expanded the definition of disability under the ADA to cover all persons with a physical or mental impairment that is not minor or transitory. The legislative history of the ADAAA indicates that Congress was concerned that the ADA failed to adequately protect individuals with highly stigmatized disabilities, such as bipolar disorder, depression, and epilepsy, which courts generally considered insufficiently debilitating to warrant protection. Coverage of such impairments was critical, because as one scholar explained, “[a]lthough the social stigma associated with visible disability is high, the stigma associated with nonvisible disabilities, such as mental illness, is even higher.”

The law as amended makes clear that the central inquiry should be on whether an adverse employment action was taken based on an actual or perceived disability, not whether the disability was sufficiently severe.

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165 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553 (2008). The 2008 Amendments Act “emphasized that the definition of disability should be construed in favor of broad coverage of individual to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis... The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.” EEOC, Notice Concerning The Americans with Disabilities Act Amendments Act of 2008, available at http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm. A plaintiff who sues for a reasonable accommodation, however, must still demonstrate a substantial limitation of a major life activity. ADA Amendments Act of 2008, at § 4(a).


168 While the original text of the ADA defined disability as any “physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment,” 42 U.S.C. §12112(a)(2006), the law as amended stated that “[n]o covered entity shall discrimination against a qualified individual on the basis of disability.” ADA Amendments Act of 2008, Pub. L. No. 110-325,§5(a), 122 Stat. 3553 (2008).
The ADAAA thus strives to alter public perception of the disabled by eradicating disability related stigma. In so doing, the law demonstrates an awareness that negative social attitudes and associations can be just as, if not more, disabling than the impairments themselves.  

B. The GINA and the Stigma of a Genetic Disorder

The GINA was similarly enacted out of concern that knowledge of a genetic predisposition for disease could result in social stigma. Hailed by Senator Edward Kennedy as the “first major new civil rights bill of the new century,” the GINA precludes discrimination on the basis of genetic information for employment and health insurance purposes. Title II of the law imposes strict confidentiality and nondisclosure requirements on all employee genetic information by prohibiting employers from requesting, requiring, or purchasing genetic information related to their employees during and after the job application or interview process.

GINA explicitly covers only genetic information to the exclusion of other recognized bases of discrimination, such as race, sex, ethnicity or age when this information “is not derived from a genetic test.” And although

172 Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881. Genetic information is defined as information about an individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual. See §101(d), 122 Stat. at 885.
173 See 29 C.F.R. §1635.3(c)(2); see also GINA §201, 42 U.S.C. § 2000ff (4)(C) (Supp. III 2009) (stating that genetic information “shall not include information
GINA is not premised on the existence of a socially cognizable “genetic underclass,” the backers of the law were nevertheless concerned that genetic discrimination could have a disproportionate effect on historically marginalized groups. Acknowledging this concern, Congress emphasized that “many genetic conditions and disorders are associated with particular racial and ethnic groups and gender,” which renders these groups more likely to be “stigmatized or discriminated against as a result of that genetic information.” Thus, GINA evinces an understanding that allowing the acquisition and use of genetic information would likely perpetuate and intensify the social disadvantage and stigma that emerges from gender, racial and ethnic minority status.

C. Racial Minorities and Stigma of a Criminal Record

Like the populations governed by the ADA and GINA, individuals from racial minority groups with criminal records experience social stigma and
are, in fact, among the most marginalized groups in the country.\textsuperscript{178} Although having a criminal record is not precisely analogous to having a disability to the extent that one can be born with a disability while one ostensibly “earns” a criminal record, this is not always the case, particularly for racial minorities. Indeed, one-third of the individuals indentified in criminal records databases have never been convicted of a crime, as many criminal history reports contain arrests, including those where the charges were dropped entirely.\textsuperscript{179} Such arrests occur most often in black and Latino communities were stop and frisk policies and indiscriminate arrests are common.

In New York City alone, in 2011, the police stopped and questioned 684,330 people, approximately 87 percent of whom were black or Latino, and 9 percent were white.\textsuperscript{180} Nearly 90 percent of those stopped had done nothing wrong, but such stops may result in an arrest that will be reflected in a criminal history report.\textsuperscript{181} This practice has been shown to be quite widespread. In 2013 a New York federal court held the New York City Police Department (“NYPD”) liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks after finding that the NYPD had for years systematically stopped innocent people without any objective reason to suspect them of engaging in wrongdoing.\textsuperscript{182}

In March of 2012, the New York Civil Liberties Union filed a federal lawsuit against the NYPD’s practice of stopping and ticketing or arresting thousands of individuals for trespassing in their own building if they failed to show identification when they went to check the mail, took out the garbage, or ventured out into the hallways.\textsuperscript{183} Another lawsuit was filed against the NYPD two years ago for employing a similar patrol system in the city’s public housing, and in 2012, a federal judge found unconstitutional the NYPD’s practice of indiscriminately stopping people in front of private residential buildings in the Bronx.\textsuperscript{184}

\textsuperscript{178} See infra Part I.D.
\textsuperscript{180} Kate Taylor, \textit{Record Number of Street Stops Prompts a Protest}, \textit{The New York Times} (February 14, 2012).
\textsuperscript{182} \textit{Floyd v. City of New York}, Nos. 08 Civ. 1034 (SAS), 12 Civ. 2274 (SAS) (August 12, 2013).
\textsuperscript{184} See Robert Stolarik, \textit{Stop and Frisk – New York City Police Department}, \textit{The
majority of those affected by these practices are members of racial minority groups.

Another federal lawsuit filed in 2012 accuses the NYPD of stopping and frisking hundreds of thousands of people each year solely on the basis of race. This has led to a dramatic increase in the number of arrests for possession of small amounts of marijuana. Many of those arrested are under the age of 26 and have typically not had the opportunity to establish themselves in the labor market. Nevertheless, they can be denied employment opportunities based on these arrests, which would appear during a routine employment background check, even if the prosecutor declined to file charges.

This problem of racial profiling by police officers is not confined to low-income communities. Consider the case of Harvard professor, Henry Louis “Skip” Gates, Jr., who was arrested in front of his own home in Cambridge Massachusetts by a local police officer responding to a reported burglary. A less well-known person under the same circumstances could later be denied a job or promotion based on a record of just such an arrest.

With respect to serious offenses, some degree of stigmatization may be appropriate and every former-offender may not be well suited to work in all jobs. These individuals, however, should be entitled to a second chance after paying their debt to society. They should not be summarily denied the opportunity to compete for legitimate employment that would enable them to support themselves and their families, pay their taxes, and make a positive contribution to their communities and the economy.

Individuals should not suffer a lifetime employment penalty for an unsubstantiated arrest, youthful indiscretion, minor infraction, or more serious offense that occurred in the remote past. Yet this is exactly what is happening and studies show that the stigma of having a criminal record is significantly more damaging for racial minorities than for whites, resulting in a criminal records “penalty” that limits profoundly their chance of achieving gainful employment. This penalty enables and sustains a chronic social and civil incapacitation of the millions of individuals with joint minority and criminal record status that effectively disables their basic ability to compete in our society and to assume a productive and responsible


place in it.\textsuperscript{187} Because the current Title VII remedial framework was
designed to address discrimination on the basis of race, gender or national
origin -- not the compound stigma and attendant disadvantages that flow
from dual criminal record and minority status -- it cannot serve as an
effective solution.

The ADA and GINA, in contrast, offer a conceptual model that may
succeed where the Title VII model has failed in addressing the stigma and
discrimination that stem from the use of criminal records in employment.
This is because, despite their similar goals, the ADA and GINA are
strikingly different from conventional race discrimination in employment
law in three important ways. First, in contrast to Title VII, both the ADA
and GINA were designed to target discrimination based on a trait or
condition that, like the existence of a criminal record, may not be readily
apparent to the casual observer, but which carries a powerful social stigma
that may form the basis of an adverse employment decision. Second, the
existence of a disabling condition, like the existence of a criminal record, is
relevant to employment decision-making and, unlike race, can be a licit
ground upon which to exclude an individual from employment.

Third, because employers are permitted to consider potentially
stigmatizing information about employees and job candidates in the health
law context as in the criminal records setting, the ADA and GINA have
established doctrinal schemes regulating the flow of information that may
form the basis of an adverse employment decision in order to preemptively
prevent discrimination, while ensuring equality of opportunity.

Conceptualizing criminal records discrimination through the lens of social
stigma offers a fruitful way of understanding and curbing prophylactically
the discrimination that results from membership in a racial or ethnic
minority group and having a criminal record.

(associating job instability with higher arrest rates); Philip Cook, \textit{The Effect of
Legitimate Opportunities on the Probability of Parolee Recidivism} 20 (Ctr. For
Justice Policy, Working Paper, 1973) (suggesting that the probability of property
crimes may go up with unemployment, while crimes of violence like murder and
assault may go down with unemployment); Karen E. Needles, \textit{Go Directly to Jail
and Do Not Collect? A Long-Term Study of Recidivism, Employment, and
Earnings Patterns Among Prison Releases}, 33 J. RES. CRIME & DELINQ. 471 (1996)
(finding crime rated decreased as wages increased); Christopher Uggen & Melissa
Thompson, \textit{The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person
the legitimate earnings tended to reduce illegal earnings); Jeremy Travis, \textsc{But They
IV. OPERATIONALIZING THE HEALTH LAW FRAMEWORK

This Part proposes the Health Law Framework, a legal model based on the ADA and GINA that shifts the focus away from the problems attendant to the FCRA/Title VII doctrinal scheme toward a legal paradigm that accounts for the unique stigma attached to dual criminal record and minority status. First, the ADA’s doctrinal architecture, which focuses on employers’ acquisition and use of stigmatizing information during the hiring process, serves a model for appropriately regulating the flow of relevant data. Second, the ADA’s normative commitments, specifically its emphasis on “reasonable accommodations” and the balancing of costs, suggest a more nuanced approach to protecting the interests of former offenders, while allowing employers to make fair and effective hiring decisions. Third, the way GINA operates to preempt discrimination by controlling employers’ use of technology to access potentially stigmatizing information holds tremendous promise as a means of curtailing employers’ reliance on criminal records to screen former offenders out of the employment pool. This Part demonstrates how importing the Health Law Framework into the criminal records context may curb the discrimination experienced by minority ex-offenders, and promote access to equality and opportunity in employment.

A. Combating Discrimination and the Stigma of Minority and Criminal Records Status

Both the ADA and GINA are designed to prohibit discrimination in employment preemptively. The ADA focuses on regulating the transmission of potentially stigmatizing data during the hiring phase because, as studies have found, the most common form of discrimination against individuals with disabilities is the denial of a job for which one is qualified, followed by the refusal of an interview on the basis of a disability. The ADA precludes employers from attempting to learn whether an applicant has a disability prior to making a job offer (i.e., the pre-offer period). Thus, although an employer may inquire into the ability

of an applicant to perform job-related functions, the employer may not elicit information likely to reveal the existence of a disability. This prohibition applies to written questionnaires and questions asked during interviews, and is intended to allow individuals with disabilities “a fair opportunity to be judged on their qualifications” and to move beyond the initial point at which an employer may unfairly judge applicants on the basis of their disabilities rather than abilities.

Once a job offer has been extended, but prior to the individual commencing work, an employer may ask disability-related questions. If, however, an individual is denied a job because these questions reveal a disability, then, as under Title VII, the employer must demonstrate that the exclusionary criteria are job-related and consistent with business necessity.

GINA prohibits employers from seeking to obtain genetic information at anytime during employment and, notably, GINA’s implementing regulations explicitly apply to the internet. The term “request” under the law is interpreted broadly to cover internet searches on individuals that are likely to result in a covered entity obtaining genetic information. This provision includes searches of court records and medical databases. Although the law outlines certain limited exceptions, including inadvertent acquisition, the EEOC regulations emphasize that receipt of genetic

189 See 42 U.S.C. §12112(d)(2)(B) (employers may ask whether an applicant can perform “essential job functions”).
190 See 42 U.S.C. §12112(d)(2)).
191 See U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, http://www.eeoc.gov/docs/guidance-inquiries.html (Sept. 27, 2000). An employer cannot ask disability related questions, whether direct (“do you have a disability”) or indirect (“have you ever taken the medication AZT?”). See Id.
193 42 U.S.C. § 12112(b) (2000); 20 C.F.R. pt. 1630 app., §§ 1630.10, 1630.14(b)(3) (2003). The employer can only withdraw the offer if it can show that the candidate is unable to perform the essential functions of the job (with or without accommodation), or that the candidate poses a significant risk of causing substantial harm to herself or others. See ___. Employers are not required to hire job applicants if they are unable to perform all of the essential functions of the job, even with reasonable accommodation. However, an employer cannot reject and job seeker simply because the disability prevents her from performing minor duties that are not essential to the job.
194 29 C.F.R. § 1635.8(a). The term “request” also includes actively listening to a third-party conversation and searching personal effects.
information will not generally be considered inadvertent unless the employer instructs the source of the material to exclude genetic information.195 The law also includes safe harbor language for commercial or publicly available information,196 however, covered employers are precluded from searching such sources with the intention of acquiring an individual’s genetic information.197

While this combined conceptual scheme may not be applicable in its entirety to the criminal records context, several aspects offer a more fine-grained and potentially more effective approach to addressing the discrimination experienced by individuals with criminal records. First, it enables these individuals to proceed beyond the phase at which an employer may unjustly use their stigmatized status as the basis for an employment exclusion. Data shows that even a brief interaction or interview, which is the norm for low wage jobs, provides a meaningful opportunity for a job candidate to demonstrate communication skills, commitment to work, and soft skills that may not be reflected on a resume.198 This personal interaction with a potential employer is particularly crucial for individuals from stigmatized racial or ethnic groups, for whom such contact has been shown to play an important role in counteracting employers’ initial stereotypes, mediating the effects of criminal stigma, and improving hiring outcomes.199

To this end, and in keeping with the ADA model, information regarding criminal records status should be restricted to the post-interview, application or conditional offer period. Thus, employers would no longer be permitted to elicit information about a job seeker’s criminal history status, including through questionnaires and application forms, prior to or during an initial

195 See 29 C.F.R. §1635.8(B)(1). Examples of inadvertent acquisition include accidentally overheard conversations regarding genetic information or information gleaned through casual conversation.
196 Publicly available sources include: newspapers, magazines, television programs, books and the internet, including social networking sites that require permission to access an individual’s information or where access is based on membership in a specific group, unless the employer can demonstrate that access to typically granted to all how request it.
197 See 29 C.F.R. §1635.8(b)(4).
198 See Devah Pager, Professor of Sociology at Princeton University, Written Testimony for EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records, 2 (November 20, 2008).
199 See Devah Pager, Professor of Sociology at Princeton University, Written Testimony for EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records, 2 (November 20, 2008).
interview or preliminary offer.\textsuperscript{200} In accordance with GINA, employers should be precluded from requesting, requiring, or purchasing a job applicant’s criminal records, including information obtained via the internet, from sources such as criminal records databases and on-line court records. Like the ADA, however, this restriction need apply only to the pre-offer period.\textsuperscript{201}

This doctrinal scheme serves several important functions. First, it lessens the burden for plaintiffs associated with demonstrating discriminatory intent, which is a major obstacle for ex-offenders under Title VII. Like employment discrimination against the disabled, employment discrimination against former-offender occurs primarily during hiring: a time when applicants may have little knowledge of why they were denied jobs. The Health Law Framework simplifies divining an employer’s motivation by forcing the employer to articulate a justification for rejecting the applicant after having already indicated approval for the candidate. Therefore, not only does this model reduce an employer’s ability to base an adverse employment action on the stigma of a criminal record and minority status, but it enables a job candidate to advance to the point where the “job related” and “consistent with business necessity” provisions of Title VII can be applied. Moreover, this model gives teeth to the Green factors, which must be considered when determining job relatedness and business necessity.\textsuperscript{202} Hence, it would become more difficult for an employer to avoid considering the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question.\textsuperscript{203}

Second, preventing employers from asking about or acquiring records during the initial interview phase would allow for more robust enforcement of the FCRA’s existing provisions that require employers to obtain a job candidate’s consent prior to conducting a background investigation through a BCC or other third-party screening company, and that mandate notifying the applicant if the report is used to make an adverse decision.\textsuperscript{204} The

\textsuperscript{200} Discuss state laws that have similar provisions.

\textsuperscript{201} This policy would be consistent with municipal and state “ban the box” measures.


\textsuperscript{203} See supra Part II.B.

\textsuperscript{204} See 15 U.S.C. § 1681(b). The FCRA does not apply to background checks conducted in-house as long as the data obtained is publicly available. See __.
Health Law Framework, for instance, would alert job candidates to when an employer has unlawfully based an employment exclusion on the existence of an arrest record in violation of the EEOC enforcement guidance. It would also let job-seekers know when a BCC has violated the FCRA by disseminating a record of an arrest that occurred more than seven years prior and that did not lead to the entry of a judgment of conviction. Although a record of a conviction may lawfully form the basis of a work exclusion, an employer is more likely to assess objectively the relevance of a job candidate’s conviction if the employer is already aware of the candidate’s qualifications and experience. This proposed model allows for this to occur.

Third, the Health Law Framework would alleviate the problems caused by the pervasive inaccuracies that now plague criminal history reports. This model would remedy the problem of false positive identifications by providing job candidates a meaningful opportunity to explain, rebut and/or check the veracity of the records being considered, in accordance with the FCRA, before being disqualified from employment. Moreover, a conviction record contained in a criminal history report may be outdated, the conviction may have been expunged, a reported felony offense may have been subsequently reduced to a misdemeanor, or there may be other evidence of an error in the record. The Health Law Framework would provide job-seekers the opportunity to identify these concerns and, if an adverse employment decision were made, compel employers to articulate the ways in which the exclusion was job related or consistent with business necessity.

With respect to enforcing the prohibition on access to criminal records information during the preliminary application period, the FCRA’s current provisions requiring employers to provide a job candidate’s signature prior to obtaining a criminal history report could be enhanced by mandating that employers provide biometric information from a job applicant, such as a fingerprint, before access to criminal records databases were permitted. Indeed, the FBI’s Automated Fingerprint Identification System already contains electronic fingerprints submitted by individual states, which correspond to specific criminal records stored in the FBI’s comprehensive criminal history database, the Interstate Identification Index. While this expansive database is currently accessible for employment purposes only to certain state and federal and nongovernmental personnel in specific government regulated jobs and industries, it could be expanded to other types of employers. The policy rationale for requiring biometric information prior to gaining access to criminal history data is that if an

205 See infra Part I.A.
offense is not of such significance that fingerprinting is required, then it
should not be used as the basis for an adverse employment decision. Thus,
minor offenses for which prosecution is highly discretionary—such as
disorderly conduct, loitering, and low-level traffic offenses—should be
excluded from consideration absent compelling circumstances. Such
offenses are generally of such little consequence that it is unclear how they
could be used to accurately predict fitness for a job.

In order to preserve experimentation at the state and local levels, the
Health Law Framework would not preempt state and local laws that provide
higher levels of protection to employers and individuals with criminal
records, including the six states and thirty cities and counties that have
instituted fair hiring protections. The federal scheme provided by the
Health Law Framework would, however, provide additional clarity for
employers and reduce the uncertainty and confusion now created by the
many, often conflicting, state and local laws. This plan would additionally
broaden an employer’s pool of workers qualified for the job.

B. Reasonable Accommodation and the Balancing of Costs

As the Court in El v. SEPTA opined, employers’ eagerness to adopt
policies or practices that exclude those with a criminal history background
is based in part on their desire to reduce their risk of tort liability.
Employers are concerned about costs that may be incurred as a result of
litigation based on a negligent hiring or negligent retention claim, or under

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206 See National League of Cities & NELP, Cities Pave the Way: Promising
Reentry Policies that Promote Local Hiring of People with Criminal
Way); see also NELP, New State Initiatives Adopt Model Hiring Policies
Reducing Barriers to Employment of People with Criminal Record (Sept.
Twenty states have specifically prohibited or advised against pre-
employment arrest inquiries in their fair employment laws due to concerns
about misuse of this information. See EEOC Guidance at 6 & n.10 (listing the
states: NY, HI, OR, WI, NJ, OH, VA, DC, CA, MD, MN, UT, WA, WV, AZ, CO,
ID, MA, MI, and MS). Ten states entirely employers from considering arrests that
never led to conviction. See Legal Action Center, Advocacy Toolkits to Combat
Legal Barriers Facing Individuals With Criminal Records, “Prohibit Inquiries
About Arrests That Never Led to Conviction,” available at
http://www.lac.org/toolkits/arrests/arrest_inquiries.htm#unfair.
the theory of respondeat superior if an employee were to engage in criminal activity at work (theft, fraud, violence). In the ADA and GINA contexts employers are similarly concerned about the increased healthcare or other costs that may be imposed as a result of hiring a disabled individual or someone with a genetic predisposition toward developing a disease. Still, the expectation under both antidiscrimination doctrines is that the employer will assume this risk. Here the ADA’s reasonable accommodation analysis is instructive.

Under the ADA, an employer cannot refuse to hire a job candidate based on a marginally increased risk, speculation about future risk, or assumptions about the disability. An employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation. If the requested accommodation causes an undue hardship -- that is, if it would require substantial difficulty or expense -- the employer would still be required to provide another accommodation that does not. 207 And an employer cannot refuse to provide an accommodation solely because it entails some costs, whether financial or administrative. Hence the reasonable accommodation mandate is an explicit recognition that the employer is best able to bear the potential costs associated with employing a disabled employee or applicant.

In the criminal records context, the assumption for many is that a record of prior arrest indicates an increased risk that the individual will commit future crimes. Data, however, reveals that once those with criminal records have desisted from crime or “stayed clean” for a few years, their chance of being arrested for a new crime essentially disappears. 208 This point is widely referred to as the “point of redemption” – when a previous arrest “no longer distinguishes the risk of future criminal arrests for that person.


compared to a similar person in the general population. This point averages from between three to seven years depending on the age at which the arrest occurred. After remaining clean for this period of time, these individuals are no more likely than anyone else to have another arrest in the future. For example, once 3.8 years has passed since the initial arrest, an 18 year-old arrested for burglary has the same risk of being arrested as an 18 year-old without a record. This point of redemption occurs after 4.3 years for aggravated assault and 7.7 years for robbery. The redemption point decreases as the individual ages, thus a person arrested for robbery at age 20 will have the same arrest rate as a non-offender after only 4 years. And individuals convicted of property crimes are significantly less likely than others to re-offend. Notably, studies show that individuals with criminal records are less likely to commit a crime in the workplace than an employee who has never been convicted. Hence, predictions regarding the risk of future crime based simply on a criminal record are likely prone to error.

This is not to suggest that there are no risks or costs associated with hiring former-offenders, which, like all hiring, involves an element of chance. However, employers are better able to assume the costs and risks

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210 Reaching the point of redemption takes longer – approximately 8 years – for individuals who commit their first crime as a juvenile or who are first arrested for a serious offense. Still, the redemption point can be reached in just three or four years for an individual who is first arrested as an adult or who commits a less serious crime. See Alfred Blumstein & Kiminori Nakamura, “Redemption” in an Era of Widespread Criminal Background Checks, NAT’L INST. JUST. J. 263 (2009).
211 See id.
214 See id.
involved in the hiring process than those who experience criminal records discrimination. Plus, as with the disabled, the social costs imposed by failing to facilitate employment for this population are tremendous. Former-offenders who were jobless after-re-entry are three times more likely to return to prison, and over the past 20 years, state spending on corrections has increased at a rate faster rate than virtually any other state budget item, creating a substantial financial burden for state and municipalities. Today, federal, state and local corrections imposes over $56 billion a year on taxpayers.217

Estimates are that 600,000 to 700,000 prisoners will be released annually in this decade, equaling 30 percent of the annual growth of the labor force.219 If they are unable to obtain legitimate employment, societal and economic expenditures will rise dramatically. Employment losses caused by criminal records discrimination now cost the country $57 to $65 billion per year, and the effect of criminal records on employment is most significant for African-American men, reducing their employment rate an average of 2.3 to 5.3 percentage points.221 Current data and the experience

217 Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, 5 (July 26, 2011).

218 Stephen Saltzburg, Chair of the American Bar Association’s Criminal Justice Section, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, 1 (July 26, 2011).

219 Richard Freeman, Can We Close the Revolving Door?: Recividivism vs. Employment of Ex-offenders in the U.S., Urban Institute Reentry Roundtable Discussion Paper, at 6, May 19-20, 2003, New York University Law School. More than 2.3 million people are incarcerated in federal and state prisons and local jails at any given time. See Jenifer Warren, Adam Gelb, Jake Horowitz, et al., Pew Ctr. on the States, One in 100: Behind Bars in America 5-7 (2008) (observing that “more than 1 in 100 adults is now locked up in America. With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258…[O]ne in every 15 black males aged 18 or older is in prison or jail…”).

220 John Schmitt & Kris Warner, CTR. for Econ. & Policy Research, Ex-Offenders and the Labor Market 14 (2010), available at http://www.cepr.net/documents/publications/ex-offenders-2010.pdf. Former offenders “lower the overall employment rates as much as 0.8 to 0.9 percentages points; male employment rates, as much as 1.5 to 1.7 percentages points; and those of less-educated men as much as 6.1 to 6.9 percentage points…. ” Id.

of advocates suggest that ex-offenders who face discrimination in the urban job market "depress the average wage for the city, which in turn negatively impacts property values, consumer spending, tax revenues" and the decisions of firms to move to urban neighborhoods.222 Moreover, many former-offenders are the primary earners for their families, thus, employment discrimination against this population has negative third party effects. For example, nearly 54 percent of those with criminal records are the parents of children under the age of 21, which means that millions of children will experience the debilitating effects of a parent’s inability to be evaluated fairly for a job.223 Nevertheless, despite these sobering social and economic costs, roughly 60 percent of former offenders remain unemployed one year after release from prison.224

In addition to allocating the costs associated with a disability, the "reasonable accommodation" mandate is an explicit recognition that removing employment barriers is an essential means of reducing social marginalization and is, indeed, a necessary component of full citizenship. The law should likewise encourage and accommodate the employment of former offenders because the importance of gainful employment for this population cannot be overstated. Overwhelming evidence indicates that stable employment is one of the best predictors of successful desistence.

the Recession of 2008, “[o]nce prison inmates are added to the jobless statistics, today joblessness among black men has remained around 40% through recessions and economic recoveries.” Bruce Western & Katherine Beckett, How Unregulated is the U.S. Labor Market: The Penal System as a Labor Market Institution, 104 Am. J. Soc. 1030 (1999). Moreover, “each male prisoner can expect to see his earning reduced by approximately $100,000 throughout his prime earning years, following his period of incarceration.” Meredith Kleykamp, Jake Rosenfeld & Roseanne Scotti, Wasting Money, Wasting Lives; Calculating the Hidden Costs of Incarceration in New Jersey 9 (2008) (citing Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA tbl.5.3 (2006)).

222 See Cornell William Brooks, Esq. Executive Director, New Jersey Institute for Social Justice, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, 1-4 (July 26, 2011). See also Bruce Western, Jeffrey R. Kling & David F. Weiman, The Labor Market Consequences of Incarceration, 7 (2001)("The sheer volume of individuals moving into and out of prison can dramatically alter the conditions of supply and demand in local labor markets); Robert J. Sampson & Charles Loeffler, Punishment’s Place: The Local Concentration of Mass Incarceration, 139 Daedalus 26 (2010).


from criminal activity.\textsuperscript{225} One New York City study, for instance, found that one-fifth to one-third of individuals admitted to prison were unemployed at the time of entry, and that 89 percent of persons who violated the terms of their parole, and hence were re-incarcerated, were unemployed at the time of violation.\textsuperscript{226} Research suggests that the positive impact of employment on ex-offenders may be the increased chance it affords them of experiencing close and frequent contact with “conventional others” and the “informal social controls” of the workplace that support stability and conformity.\textsuperscript{227} Moreover, surveys consistently demonstrate widespread public belief “that helping ex-offender find stable work [is] the most important step in helping them reintegrate into their communities.”\textsuperscript{228}

To assuage employers’ concern that hiring a former offender will render them vulnerable to negligent hiring lawsuits, the EEOC could implement this regulatory scheme and then evaluate employers’ compliance with the Green factors. Were an employer to become subject to a negligent hiring claim, the fact that the employer considered the Green factors (including the relationship between the job duties and the elements of the conviction, and the time that has passed since the conviction) should be acknowledged by courts and contribute to the employer’s defense. Moreover, the EEOC could monitor state appellate court dockets for significant negligent hiring cases, and participate as amicus in select cases as a means of ensuring that the negligent hiring doctrine does not undermine efforts to ensure employment for qualified former offenders. While every ex-offender may not be appropriate for all jobs, a criminal record should not be used to summarily dismiss an individual from the opportunity to be meaningfully considered for a job.


\textsuperscript{226} New York City Bar Association Task Force on Employment Opportunities for the Previously Incarcerated, \textit{Legal Employers Taking the lead: Enhancing Employment Opportunities for the Previously Incarcerated} (2008).

\textsuperscript{227} Christopher Uggen, \textit{Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism} 67 AM. SOC. REV. 529 (2000).

\textsuperscript{228} Jeremy Travis, \textit{But They All Come Back: Facing the Challenges of Prisoner Reentry} 183 (2005).
CONCLUSION

Employers, former-offenders, and government agencies, including the EEOC and FTC are struggling with how to address the use of criminal history reports in employment decision-making. The recommendations offered here serve as a point of departure for a more robust discussion, and provide a roadmap for where the law can and should go in attending to this problem. The EEOC must continue its bold efforts to address the disadvantages that members of racial and ethnic minority populations with criminal records experience when seeking gainful employment, yet the agency’s efforts have not gone far enough. The unfettered access to arrest and conviction data currently enjoyed by employers perpetuates bias, stigma, and discrimination against people with criminal records and widens racial disparities. In the absence of legal reform, individuals with criminal records will continue to be ostracized and shunned as criminals, and, by virtue of their limited opportunities, may be forced into crime.

The Health Law Framework I have proposed addresses these concerns by balancing the interests of those with criminal background histories, employers’ concerns regarding tort liability, and the broader interests of public safety. This health law conceptual lens, which is based on reducing social stigma and its effects, strives to incentivize those with criminal background histories to rehabilitate and enter the job market without fear that the stigma of their record and race or ethnicity will form an insurmountable barrier to employment. It also encourages employers to focus their evaluation of a criminal history report on the uniqueness of each applicant, the nature of the offense, the time since it occurred, the effort of the individual to rehabilitate, and the nature of the job: all significant and necessary factors for fair and effective employment decision-making.

The regulatory scheme offered here ensures that job candidates are first considered for employment based on their actual skills and experience before consideration of any prior arrest or conviction in an effort to move away from the unsound notion that criminal record histories serve as an accurate proxy for relevant job qualifications. This will reduce not only the chance that an employer will simply refuse to consider an applicant once a criminal history record is revealed, but also the disincentive that unregulated access to criminal history reports may create with respect to applicants’ willingness to apply for jobs. In so doing, this plan provides employers access to a deep applicant pool of workers best qualified for the job and offers potential employees a fair chance at securing employment.