Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*

Introduction

Every week, more than 10,000 people are released from state and federal prisons in the United States.[1] Among the myriad areas in which these individuals face hurdles is employment. At first glance, this makes some sense: ex-offenders have violated society's rules, and the record of that violation could be valuable to employers in making hiring decisions. Certainly some convictions are relevant in employment, even for low-level positions with little exposure to cash or customers. But are criminal records always relevant? For example, does it really matter that a breakfast server might have a minor drug offense on his or her record? Probably not, in most cases—but the one-fifth of Americans with a criminal record[2] face widespread discrimination when seeking employment.

This Note argues the use of criminal records in hiring must be constrained because of the enormous and detrimental effect of these sweeping bans. Part I discusses the background of this issue. The vast majority of employers use criminal background checks today, and an estimated one in five Americans has a criminal history. This combination defeats equal opportunity, and because employment can decrease recidivism rates, it also harms public safety and the economy. Employers should therefore be restricted to some extent in considering criminal records.

But employers do sometimes have a legitimate interest in examining a candidate's background. Thus, Part II dissects stakeholder interests and articulates four ideal components of any policy regulating this practice. First, employers should consider the age of a conviction. Second, any

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1. *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/fbci/progmenu_reentry.html [http://perma.cc/9ANS-4PY6].

2. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf?nocdn=1 [http://perma.cc/WQ9F-6MCY] (estimating that 65 million U.S. adults have criminal records); *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html [http://perma.cc/NC9Y-PE7W] (estimating that the total U.S. population is 318,857,056).

inquiry about convictions should be delayed past the initial application. Third, employers should only consider convictions that are legitimately probative of job performance and disregard unrelated, potentially prejudicial convictions. And fourth, inquiries should incorporate a buffer mechanism, whereby the individual assessing a candidate's criminal record shares convictions with the hirer and supervisor only on a need-to-know basis. This buffer would ensure ex-offenders get a truly fair chance while allowing employers to consider fully an applicant's criminal record.

Given these elements, Part III examines existing remedies, legislation, and policy approaches to this issue. The two main approaches—disparate impact liability under Title VII of the Civil Rights Act of 1964 and fair-chance (also known as "ban the box") policies—can be strong remedies, as they generally incorporate almost all of the elements articulated in Part II. But both approaches have their limits. Disparate impact, by its very nature, provides a remedy only when discrimination has a disparate impact based on race, leaving a large portion of the ex-offender population with no remedy.[3] Fair-chance policies often apply only to government employers. And existing fair-chance policies almost universally fail to include a buffer mechanism—zero of the nineteen states and just five of the 116 cities and counties that have banned the box incorporate this concept. Thus, I argue future adopters of fair-chance policies should ensure such policies apply to private employers and incorporate the buffer mechanism articulated above. Finally, I briefly discuss how these remedies can and should be supplemented by publicity campaigns and policy changes like negligent-hiring-liability reform.

I. Identifying and Diagnosing the Issue

A. Overincarceration and the Effect of Criminal Records in Employment

The population affected by criminal background checks is enormous, and the consequences can be severe. More than 620,000 sentenced prisoners were released from prisons in the United States in 2013.[4]

3. *See* TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013 – STATISTICAL TABLES 7 tbl.3 (2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf [http://perma.cc/8T6C-YPT7] (showing 47.2% of inmates in local jails were white in 2013).

4. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 10 (2014), http://www.bjs.gov/content/pub/pdf/p13.pdf [http://perma.cc/MHY4-UBNV]. This number will see a temporary increase as a result of recent federal sentencing reforms. The Federal Sentencing Commission recently voted to retroactively reduce federal sentencing guidelines for low-level drug offenders, making an estimated 40,000 to 45,000 federal inmates eligible to seek a sentence reduction. Matt Ford, *Freedom for 6,000 Federal Prisoners*, ATLANTIC (Oct. 6, 2015), http://www.theatlantic.com/politics/archive/2015/10/6000-inmates-sentencing-reform/409339/ [http://perma.cc/VY76-CLTJ]. Six thousand of these prisoners are set to be released around November 1, 2015, and an estimated 8,550 are eligible for release between

Although it is not clear how many Americans have a criminal history,[5] a 2011 study estimated 65 million Americans—around one in five—have a criminal record.[6] And the majority of employers use criminal background checks, a trend that has been amplified in recent years.[7] In 1994, just 48% of surveyed Los Angeles employers always or sometimes checked criminal backgrounds; by 2001, this number had risen to 63%.[8] A 2010 national survey showed over 90% of employers used criminal background checks in some capacity, and 73% used them for all candidates.[9] On top of this, employers give criminal records significant weight. One survey found just 33% of central-city employers reported a willingness to hire applicants with a criminal background.[10] Employers said they were less likely to hire ex-offenders than any other disadvantaged population included in the survey: welfare recipients (82% willing to hire), GED holders (82%), applicants who had been unemployed for at least one year (68%), and even applicants with only part- or short-time work experience (48%).[11]

Of course, confounding variables might affect these results. For example, anyone who has served time will have an employment gap, and ex-offenders are generally less educated.[12] Certainly these factors will negatively influence an applicant's chances—what if employers are merely weeding out applicants based on these other negative attributes? Data

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November 1, 2015 and November 1, 2016. Sari Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html [https://perma.cc/XZT2-PZ6P].

5. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, at 2 (2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf [https://perma.cc/9R5J-JLCG] (finding over 100 million persons listed in the collective criminal history files of the fifty states, American Samoa, Guam, and Puerto Rico but noting that "individual offender[s] may have records in more than one state").

6. *See supra* note 2.

7. RODRIGUEZ & EMSELLEM, *supra* note 2, at 1. This trend has been widely attributed to two events: the information age has made criminal background checks inexpensive and easy to obtain; and since 9/11, employers have generally focused more on ensuring security in the workplace. *Id.*

8. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 457 fig.4 (2006).

9. SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx [http://perma.cc/CU2N-5DCP].

10. HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 59 tbl.3.7 (1996).

11. *Id.*

12. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), http://www.bjs.gov/content/pub/pdf/ecp.pdf [http://perma.cc/QF2W-XQ5C]; *Job Seeker Services: Ex-offender*, WORK-FORCE DEV. CTR., https://www.wfdc.org/job/offenders.htm [https://perma.cc/B6PJ-SNVF].

shows this is simply not the case.[13] In 2001, researcher Devah Pager hired two pairs of young men—one black and one white—to apply for advertised entry-level positions in Milwaukee, Wisconsin.[14] She created a fake resume listing identical credentials, with one exception: one resume within each pair included a minor, nonviolent, felony drug conviction accompanied by an eighteen-month prison sentence.[15] By measuring the callback rates for each applicant, she sought to isolate employers' treatment of a criminal record in employment.[16]

Pager took many steps to mitigate confounding variables. First, she sought to equalize the actors within each pair based on "age, race, physical appearance, and general style of self-representation."[17] And the actors within each pair took turns acting as the ex-convict to compensate for any uneven personality effect.[18] Second, Pager ensured employers would discover the applicant's criminal history even if the application did not request such information. The ex-offender resume included employment experience attained in a correctional facility, and its list of references included a parole officer, complete with a fake answering-machine message.[19] Third, Pager equalized the applicants' work experience. Where the ex-offender resume reported six months of work experience in prison, the nonoffender resume reported six months of temporary, low-skill work.[20] To account for the ex-offender's additional twelve months in prison, the nonoffender reported graduating from high school one year late.[21] Thus, both resumes reported identical work experience.[22] By nullifying these potential confounding variables, the audit effectively isolated the effect of criminal history in hiring.[23]

For both pairs, criminal history had a significant effect on callback rates. The white nonoffender applicant was called back for 34% of their applications, while the white applicant with a criminal record was called back only 17% of the time.[24] The black applicant with a clean record achieved a 14% callback rate, while the black ex-offender applicant

13. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 71 (2007) (concluding that a criminal record impacts hiring decisions).

14. PAGER, *supra* note 13, at 58–66.

15. *Id.* at 59–61.

16. *Id.* at 61.

17. *Id.* at 59.

18. *Id.*

19. *Id.* at 63.

20. *Id.*

21. *Id.*

22. *Id.*

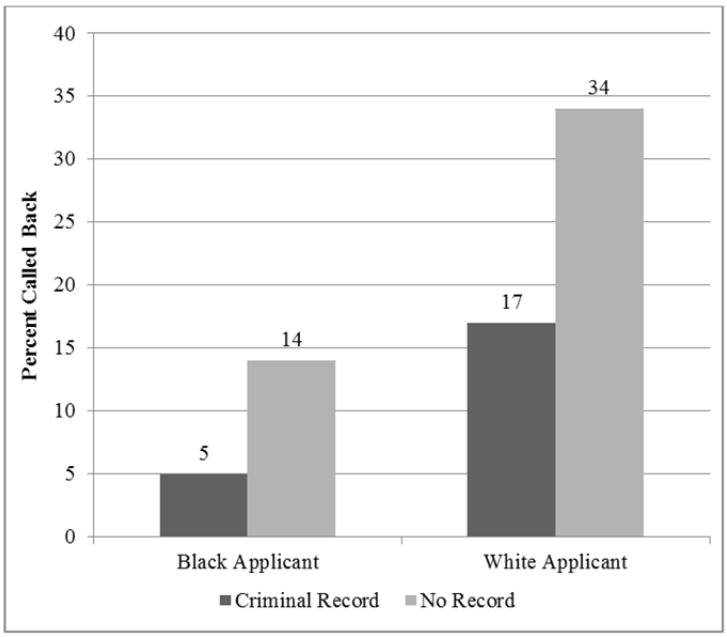
23. *Id.* at 59.

24. *Id.* at 91 fig.5.1.

received a callback from just 5% of his applications, or about one-third as often.[25] These results are reproduced below.[26]

Figure 1

The effect of a criminal record on callback rates for blacks and whites.



Pager's data demonstrates that even when candidates' qualifications are otherwise equalized, the stigma of a criminal record has a powerful effect on employers' hiring decisions. But while isolating conviction stigma was her primary goal, her data also illuminates the racial disparity in hiring. Recall that the four applicants' credentials were largely identical, and Pager attempted to select applicants with similar personality traits. Yet the black applicant with no criminal history received less than half as many callbacks as the white applicant with a clean record.[27] Shockingly, the white applicant with a felony conviction enjoyed an even higher callback rate than the black applicant with a clean record.[28] Clearly, then, race has an impact on hiring decisions. Though a full discussion of race is beyond the scope of this Note, this particular outcome will be further addressed in Part II.

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

B. Equal Opportunity for Ex-Offenders

Because criminal background checks are often discriminatory and tangibly harmful to society, they should be constrained. The data above clearly demonstrate that employers differentiate between applicants based on criminal history. This practice cannot be billed as discriminatory in all cases: after all, a criminal record is sometimes legitimately relevant to an employer's evaluation of a candidate. But as Part II will demonstrate, convictions are often irrelevant to employers' true interests. This potential for discrimination, combined with the scope of this practice—90% of employers conducting background checks, affecting the 20% of Americans with criminal records—suggests background checks must be constrained where discrimination is a possibility and where a criminal record has no probative value.

On top of this, increasing employment for ex-offenders can also benefit society by increasing public safety, decreasing prison costs, and boosting the economy as a whole. The Safer Foundation, a Chicago-based not-for-profit organization, provides employment services for people with criminal records.[29] In 2005, the three-year recidivism rate for Illinois Department of Corrections releases was 52.3%.[30] For that same period, data showed the recidivism rate for Safer Foundation clients who had achieved thirty days of consecutive employment was just 20%; for clients who had achieved a full year of employment, the rate dropped to 16%.[31] Other data suggest only older offenders are less likely to recidivate when employed, but still show strong results. In one large-scale study tracking the impact of employment on recidivism for persons with an arrest record, members of a treatment group were offered a minimum-wage job, and members of a control group were offered no job.[32] The study found that for persons ages twenty-seven and older, or half of all ex-offenders, members of the treatment group were about 8% less likely to be rearrested than the control group after one year, and 11% less likely after three years.[33] However, for the twenty-six-and-younger age bracket, the treatment group

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29. SAFER FOUND., I AM SAFER: 2014 ANNUAL REPORT 2–3 (2014), http://www.saferfoundation.org/files/documents/SAFER-ANNUAL-REPORT-FY2014.pdf [http://perma.cc/3CA9-8J3B].

30. SAFER FOUND., A ROAD BACK: SAFER FOUNDATION THREE-YEAR RECIDIVISM STUDY 2008 (2008), http://www.saferfoundation.org/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf [http://perma.cc/HY7M-SXTZ].

31. *Id.* Notably, Safer Foundation requires applicants to be drug free and "ready to work." *Getting Started with Safer*, SAFER FOUND., http://www.saferfoundation.org/client-resources/getting-started [http://perma.cc/T6UF-9UNZ]. This suggests that perhaps their clients may be the type of people who are less likely to recidivate anyway, perhaps confounding these results. Even so, the results are very strong.

32. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 535–37 (2000).

33. *Id.* at 534, 537.

tracked the control group almost exactly.[34] While the second study shows an impact only for the older half of ex-offenders, the results taken together demonstrate employment has a positive impact on recidivism overall. This decreased recidivism, in turn, would lead to greater public safety.

Finally, the decreased recidivism that would result from increased employment of ex-offenders would have a significant and positive economic impact. A report from the Economy League of Greater Philadelphia estimated the cost savings to the city per 1,500 fewer recidivists to be over $26 million.[35] And the Center for Economic and Policy Research estimated the ex-offender population's low employment rates cost the U.S. economy between $57 and $65 billion in 2008.[36] The potential for discriminatory behavior paired with the positive impact on public safety and the economy support policies that effectively diminish barriers to employment for ex-offenders.

C. Why Not Take Affirmative Steps?

Because of the positive implications of increasing ex-offender employment, some reentry programs focus on mitigating or eliminating other negative credentials in this population, like low education levels or poor job skills. For example, ex-offenders who participate in educational programs while in prison are 43% less likely to return to prison than offenders that do not.[37] These programs are extremely valuable to offenders and to society.[38] But if employers are permitted to freely overlook ex-offenders in the application process, improvements in education and credentials will be ineffectual. This Note therefore focuses on the threshold issue—ensuring ex-offenders get fair consideration in employment.

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34. *Id.* at 536–37.

35. ECON. LEAGUE OF GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 18 (2011), http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf [http://perma.cc/L25E-UJMB].

36. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 14 (2010), http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf [http://perma.cc/23VT-2SZW].

37. LOIS M. DAVIS ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION, at xvi (2013), https://www.bja.gov/Publications/RAND_Correctional-Education-Meta-Analysis.pdf [https://perma.cc/K6WC-BFBF].

38. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 175–81 (2003) (showing the effectiveness of prison rehabilitation programs).

II. Balancing Stakeholder Interests and Reality

A criminal history has a significant detrimental effect on employment prospects. Part I demonstrated that history is a negative credential on its own—that is, even when applicants are completely identical in terms of experience, employment gaps, and other qualifications, employers are significantly less likely to select applicants with a criminal background for a callback interview. This Part will dissect the arguments for and against using criminal background checks in hiring, assess their validity, and distill if, how, and when employers should be permitted to use criminal background checks.

A. How and When Background Checks Should Be Permitted

1. Risk of Recidivism Decreases with Time.—When considering criminal records, employers should explicitly consider the age of a conviction, because even though reoffending is the norm rather than the exception,[39] an ex-offender's risk of recidivism drops with time. A study by the National Institute for Justice showed the "hazard rate," or risk of arrest, for persons first arrested for robbery at age eighteen dropped below the general population for persons of the same age after 7.7 years.[40] For those arrested for aggravated assault, that number is 4.3 years; for burglary, the number is 3.8 years.[41] The hazard rate for a person arrested for robbery at age sixteen, who subsequently stayed clean, dropped below that of the general population of the same age after 8.5 years.[42] The same study also found the hazard rate for older arrestees dropped noticeably more quickly: for a person arrested at age twenty, the hazard rate dropped below the general population after just 4.4 years.[43]

Notably, researchers found arrestees' hazard rates never dropped below those of the never-arrested population.[44] This means that, even after many, many years, an ex-offender is still slightly more likely than a non-offender to commit a crime. Even so, that risk drops dramatically within just a few years of release. Employers should therefore explicitly consider

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39. *See* MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf [http://perma.cc/ESQ5-8RAV] ("About two-thirds (67.8%) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6%) were arrested within 5 years.").

40. Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, NAT'L INST. JUST. J., June 2009, at 10, 12, https://www.ncjrs.gov/pdffiles1/nij/226872.pdf [https://perma.cc/3M66-MHJJ].

41. *Id.*

42. *Id.* at 12–13.

43. *Id.* at 13.

44. *Id.* at 14.

the age of a conviction whenever they check a candidate's criminal background and give less weight to older convictions. And legislators should consider barring consideration of particularly old, low-level crimes altogether.

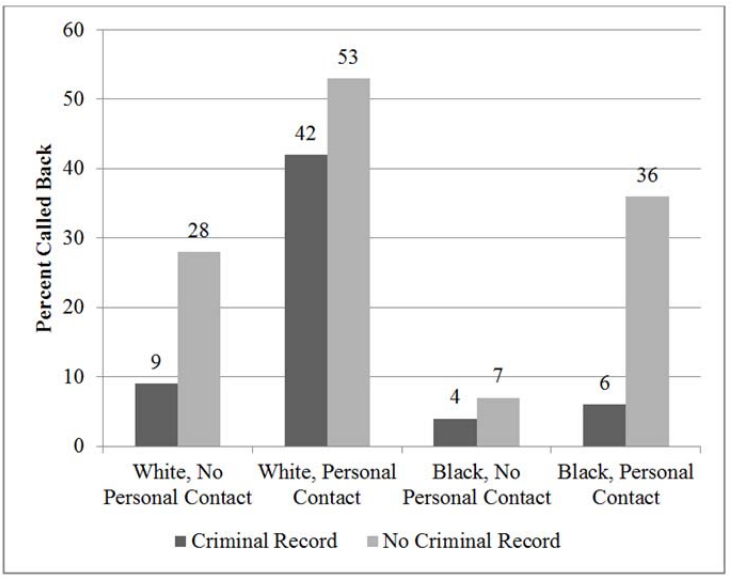
2. Deferring Inquiries Helps Overcome Stereotypes.—Even when consideration of a particular conviction is permitted, inquiries into a candidate's background should be delayed at least beyond the initial application stage. Obviously this benefits ex-offenders, because it enables them to get to a first interview more easily and make a good impression. But it also benefits employers, who might rule out otherwise qualified candidates because of a conviction.

In addition to isolating the effect of a criminal record and race on callback rates, Devah Pager's study tracked the impact of personal contact.[45] The testers in her study sometimes had the opportunity to interact with hiring managers.[46] For each applicant, personal contact increased the applicant's callback rate, and for three of the four applicants this effect was enormous. For white applicants, personal contact reduced the penalty associated with a criminal record from 70% to 20%: the disparity between the white applicants was cut nearly in half, from 19 to 11 percentage points.[47] But while the black applicant with a clean record also saw a significant bump in callbacks with personal contact—by percentage increase, the largest bump of the four categories—the increase for the black applicant with a criminal record was statistically insignificant.[48] These interactions are shown in Figure 2.[49]

45. PAGER, *supra* note 13, at 102–06.
46. *Id.* at 103.
47. *Id.* at 104, 104 fig.6.1.
48. *Id.* at 105, 105 fig.6.2.
49. *Id.* at 105 fig.6.2.

Figure 2

The correlation between personal contact, a criminal record, and callback rates for blacks and whites.



Where personal contact narrowed the gap between the white interview pair, it exacerbated that gap for the black pair. And although her data set is small, Pager concluded the disparity is not due to chance.[50] She believes this is due to the compounding stereotypes involved.[51] As Pager's data clearly shows, both applicants with a criminal record and black applicants generally experience lower callback rates than similarly qualified counterparts.[52] Pager suspects personal contact can mitigate the effect of one stereotype, as with the white applicant with a criminal background and the black applicant with a clean background.[53] But she posits the combination of the two is simply too much to overcome.[54] But while black applicants with a criminal conviction are not significantly helped by personal contact, they are not harmed either—their callback rate remained statistically similar. Since most applicants benefit from employers' deferral of consideration of criminal records, and ex-offenders are not harmed, deferral has positive outcomes for applicants as a whole.

50. *Id.* at 106.
51. *Id.*
52. *See supra* notes 23–25 and accompanying text.
53. PAGER, *supra* note 13, at 106.
54. *Id.*

Employers, too, can benefit from this deferral. Pager's data demonstrate that personal contact can enhance employers' consideration of ex-offender applicants. This suggests hiring managers are needlessly weeding out qualified applicants because of their criminal backgrounds. Therefore, background checks should be deferred beyond the initial application phase, allowing ex-offenders a greater chance at the personal contact that comes with a first interview. And, ideally, background checks should be deferred until a much later stage. For example, employers could delay background checks until they have selected a short list of finalists. This would allow the employer to see the applicant's full credentials and abilities before considering the applicant's criminal background, allowing the employer to more easily consider how a criminal conviction interacts with the applicant's skills as a whole.

B. What Crimes Matter? Employers' Interests in Using Background Checks

1. Predicting Job Performance.—In addition to the age of the conviction at the time of the background check, employers should also be constrained in the type of convictions they can consider in relation to a given position. Perhaps the principal fear employers have in hiring ex-convicts is that criminal behavior will translate to poor or even harmful job performance.[55] In a simplistic example, a person with a theft conviction might steal from the organization. Employers must therefore have the flexibility to screen for particular, relevant criminal convictions during the hiring process. However, this flexibility should be cabined so background checks are not used to screen for irrelevant crimes that might prejudice the hirer. In drawing a line, it is useful to think about the connection between the job duties or context of the position sought and the particular criminal behavior. When there is a close connection, the employer may validly consider criminal behavior; when the connection is more tenuous, employers should be prohibited from examining those criminal records. The Third Circuit and the Equal Employment Opportunity Commission (EEOC) have adopted this approach,[56] and legislatures considering fair-chance policies should too.

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55. *See* Jim Meyerle, *Former Convicts Make Bad Employees—And Other Hiring Myths Big Data Expose*, QUARTZ (Sept. 11, 2013), http://qz.com/122553/former-convicts-make-bad-employees-and-other-hiring-myths-big-data-expose/ [http://perma.cc/N4HZ-NFLF] (implying that employers believe that former convicts make bad employees).

56. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 243–45 (3d Cir. 2007) (requiring that hiring policies "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not"); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 10–20 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [http://perma.cc/RM8Q-TECQ]

a. Conviction as Probative of Job Performance.—A criminal conviction might be legitimately probative of on-the-job behavior when a person with a certain type of criminal conviction applies for a position where the person could act in accordance with past criminal behavior. If the conviction relates to a job duty, or if the candidate has acted illegally in a similar context in the past, she might be more likely than other candidates to act criminally in the future. For convictions in this category, employers' concerns are legitimate.

An employer naturally seeks to distinguish between applicants based on factors that might influence job performance.[57] Toward this goal, the employer might contact past supervisors to ask about the prospective employee's performance or ask the applicant about her performance in related positions. Likewise, if the applicant has a conviction for a crime that is very closely related to the duties of the position sought, that conviction may have some legitimate bearing on the employee's candidacy. In these situations, the conviction is a valid consideration not because of the conviction itself but because the criminal behavior is relevant to potential job performance. For example, an embezzlement conviction is interesting to a firm hiring an accountant not because of the criminal element but because of what it says about the candidate's ability to effectively perform a job with fiduciary duties.

Similarly, a conviction might be probative of performance when the position sought could give the candidate a unique opportunity to reoffend. These concerns are often valid where the position sought is largely unsupervised. The Third Circuit, for example, has upheld summary judgment in favor of a hiring practice categorically barring applicants with violent criminal convictions for a paratransit bus-driver position.[58] The court was receptive to the employer's concern for public safety, noting the position "require[d] the employee to be alone with and in close proximity to vulnerable members of society," generally without direct supervision.[59] And there are other contexts that could justify consideration of a particular conviction. For example, a theft conviction might be relevant to a night stockroom position, since that position is probably minimally supervised. Though there is no threat to public safety, the employer has an interest in identifying candidates who are more likely to steal.

Therefore, both job duties and the context surrounding the position can justify consideration of particular convictions. Contrast a robbery, for

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[hereinafter EEOC, ARREST AND CONVICTION RECORDS] (requiring employers to show that a criminal conduct exclusion policy "effectively link[s] specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position").

57. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (stating that procedures measuring job performance are "obviously . . . useful" in making employment decisions).

58. *El*, 479 F.3d at 235, 249.

59. *Id.* at 243.

example, with a reckless-driving conviction—both are relevant to a candidate's potential performance in an unsupervised bus-driver position, but for different reasons. The robbery is relevant because the position is unsupervised, the job's context; a reckless-driving conviction is relevant because it relates directly to the candidate's ability to drive safely, a job duty. A conviction can be relevant for either reason, but before an employer may consider it, there should be a clear connection to the position sought.

b. Conviction as Proxy for Moral Fiber.—Employers are also concerned that a criminal conviction indicates poor moral fiber.[60] In contrast with the examples above, this concern is not based on any connection between a particular criminal behavior and the job's context or a job duty. Rather, in this category, employers assume a person who has broken the law will make generally poor decisions that will translate to poor job performance. However, there is no data supporting this assumption, and anecdotal evidence suggests ex-offenders are no more likely to "act out" than other employees. Therefore, employers should be barred from considering criminal convictions for this discriminatory purpose.

There is no comprehensive data showing ex-offenders are any more or less likely to misbehave or be terminated than other employees. Logically, however, the formality and norms of the workplace and adequate supervision might deter ex-offenders from acting out. And people with a criminal background have difficulty finding employment, so one might expect them to behave unusually well while at work so they can keep their positions. Indeed, small-scale and anecdotal evidence suggests ex-offenders perform as well as, and perhaps even better than other employees. The Johns Hopkins Hospital, for example, hired 491 ex-offenders between 2003 and 2006.[61] An examination of employee performance evaluations for that same period showed ex-offenders had statistically similar scores to nonoffender employees.[62] And the hospital's Vice President for Human Resources said zero of the employees who were terminated for misbehavior over a period of ten years had a criminal background.[63]

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60. *See* Caron Beesley, *Conducting Employee Background Checks—Why Do It and What the Law Allows*, U.S. SMALL BUS. ADMIN. (Dec. 7, 2011), https://www.sba.gov/blogs/conducting-employee-background-checks-why-do-it-and-what-law-allows [https://perma.cc/GM9B-C2TZ] ("A background check can . . . provide insight into an individual's behavior, character, and integrity.").

61. ALT. STAFFING ALL., PERSUADING EMPLOYERS TO HIRE EX-OFFENDERS 2, 9 (2010), http://altstaffing.org/wp-content/uploads/2013/01/Persuading-Employers-to-Hire-Ex-offenders_Transcript.pdf [http://perma.cc/T8AN-BUYS].

62. *Id.* at 9.

63. *Id.* at 9–10.

Criminal convictions can be useful in hiring when they are clearly related to or probative of the candidate's fit for the position sought. Employers should be permitted to consider a conviction when it is closely related to a job duty or when the candidate will be placed in a situation mirroring the context of their criminal activity. But hirers should be prohibited from considering unrelated convictions as a proxy for moral fiber because there is no evidence that ex-offenders make poor employees.

2. Protecting the Bottom Line.

a. Negligent Hiring Liability.—In addition, employers may be concerned that ex-offenders' behavior could harm their business economically. Employers may wish to check a candidate's criminal history to protect against vicarious liability and negligent hiring liability. Under the doctrine of respondeat superior, an employer can sometimes be held vicariously liable for any action taken by an employee within the scope of employment.[64] Negligent hiring, in contrast, can create liability even where an employee's actions exceed the scope of employment.[65] Because employers can be liable for employee actions that exceed the scope of employment, employers should be able to check for convictions beyond those closely connected to the position sought. Notably, this interest conflicts with the framework discussed above, which would permit employers to consider only those convictions that are closely connected to the job opening.

Employers should be informed that negligent hiring liability is extremely uncommon: one national study found the risk of liability for a given employer in a year to be just a fraction of one percent, and only about half of negligent hiring claims involve criminal records.[66] In most states, courts focus on the adequacy of the employer's investigation into an employee's background, including references and criminal record,[67] and employers who conduct thorough checks are rarely found liable under this theory.[68] But even if it is rare, the threat is real, and employers need to be able to check criminal records to protect against this liability.

64. 29 AM. JUR. *Trials* 267 § 4 (1982 & Supp. 2015).

65. *Id.*

66. HELEN GAEBLER, WILLIAM WAYNE JUSTICE CTR. FOR PUB. INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 18 (2013), https://law.utexas.edu/publicinterest/research/criminalrecords.pdf [https://perma.cc/HA77-P9T8].

67. 29 AM. JUR. *Trials* 267 § 9.7 (Supp. 2015).

68. NAT'L WORKRIGHTS INST., BEST PRACTICE STANDARDS: THE PROPER USE OF CRIMINAL RECORDS IN HIRING 6 (2013), http://workrights.us/wp-content/uploads/2014/09/Best-Practices-Final-2.pdf [http://perma.cc/873B-MWUV].

b. Theft and Dishonesty.—Employers are also concerned ex-offenders are more dishonest than other applicants and possibly prone to steal or embezzle. Most employers purchase fidelity bonding for employees, a type of insurance that indemnifies firms against loss through theft, forgery, or other dishonest acts by employees.[69] However, private insurers often refuse to bond persons convicted of crimes involving dishonesty, labeling this and other "at-risk" populations as "not bondable."[70] This leaves employers without any insurance against the potential dishonest activity of these applicants.

However, this particular threat is firmly mitigated by the Federal Bonding Program. Since 1966, the federal government has provided free bonding for the first six months of employment for at-risk persons.[71] The program provides full reimbursement with no deductible for workplace theft by ex-offenders.[72] And it has proven incredibly successful—of 42,000 placements, just 460 proved to be dishonest, a success rate of nearly 99%.[73] Furthermore, the process requires minimal application forms or processing.[74] Employers still have an interest in checking criminal backgrounds for this purpose, though: the employer must determine which candidates have a record, so they know whether to apply for private or federal bonding. Again, this interest conflicts with the framework above. But since only dishonest crimes are deemed not bondable by private insurers, employers' investigations for this purpose should be limited to convictions involving dishonesty.

c. Replacement Costs.—A final economic reason an employer might be hesitant to hire an ex-convict is the cost of replacing the employee if she recidivates. This is a valid concern—more than two-thirds of ex-offenders are rearrested within three years, and more than three-quarters are rearrested within five years.[75] But while data is minimal, at least one study shows turnover among ex-offenders is lower than that of nonoffenders.

The Johns Hopkins Hospital hired 491 ex-offenders between 2003 and 2006, and in 2009 it conducted a study to determine the retention rate among that population.[76] The study found the turnover rate for the ex-offenders was actually lower than that of employees without records over

69. *Program Background*, FED. BONDING PROGRAM, http://www.bonds4jobs.com/program-background.html [http://perma.cc/3VNP-4H7E].

70. *Id.*

71. *Id.*; *Individuals Seeking Bonding*, FED. BONDING PROGRAM, http://www.bonds4jobs.com/individual-seeking-bonding.html [http://perma.cc/BG5Y-MLSB].

72. *Program Background*, *supra* note 69.

73. *Id.*

74. *Id.*

75. DUROSE ET AL., *supra* note 39, at 1.

76. ALT. STAFFING ALL., *supra* note 61, at 2, 9.

the first forty months of employment.[77] This is, of course, merely anecdotal evidence. It does not conclusively demonstrate ex-offenders will have a higher retention rate, let alone that this trend would apply in all job fields. But it makes sense—persons with a criminal background often have a tough time getting a job, so one might expect them to stick with a job longer. And with no hard data, anecdotal evidence is useful and suggests ex-offenders are no more likely to leave their jobs than nonoffenders.

Although employers might assume ex-offenders are more likely to act out and leave positions vacant, this argument is not supported by data. But the threats of negligent hiring liability and workplace theft are real. This suggests employers should be permitted to consider a wider range of convictions than urged above. To balance this interest in broad background checks against the interest in constraining the scope of background checks to job-related convictions, I argue firms should create a clear "buffer" between the person making the ultimate hiring decision and a candidate's full criminal history. First, the firm should choose an individual employee or department to examine each applicant's entire criminal record. This would allow the firm to protect itself from negligent hiring liability and learn of crimes involving dishonesty for bonding purposes. Second, the examiner would determine whether each conviction is either probative of job performance or relevant because of its context. Those convictions that qualify could then be forwarded to the hirer on a need-to-know basis. In this way, the firm can obtain the information it needs for bonding and negligent hiring liability but still ensure the hirer is not exposed to irrelevant and potentially prejudicial convictions.

C. Statistical Discrimination: Race, Crime, and Employment

Another benefit of the buffer mechanism is its potential to mitigate "statistical discrimination"—the use of race as a proxy for a criminal record—in hiring. Devah Pager's data shows a clear discrepancy between hiring rates for black and white males, even when equalizing candidates' qualifications.[78] This Note does not fully examine the effect of race in employment. But there is an unusual way in which race interacts with a criminal background that deserves discussion. If employers are not permitted to use background checks as they wish, they may use race as a proxy for conviction history to the detriment of nonoffender black applicants.

Employers do not want to hire candidates with a criminal background for a variety of reasons.[79] And employers are likely aware of racially

77. *Id.* at 9.

78. *See supra* notes 24–28 and accompanying text.

79. *See supra* subpart II(B).

disproportionate arrest and imprisonment rates. African-Americans are disproportionately represented in the prison population, composing 35.8% of jail inmates[80] but just 13.2% of the national population in 2013.[81] Put another way, black males ages eighteen and nineteen are 9.5 times more likely to be in prison than white males of the same age.[82] Knowing the racial imbalance in our criminal justice system, an employer that does not want to hire an ex-offender might use race as a proxy for a criminal background check when one is unavailable or not permitted.[83]

Empirical research in this area is minimal but consistent. One study examined a survey of 3,000 employers conducted between 1992 and 1994 in four major metropolitan areas.[84] Firms that said they were willing to hire an ex-offender, whether they checked criminal backgrounds or not, hired black male applicants at almost exactly the same rate.[85] But among firms who were not willing to hire an ex-offender, those who checked candidates' criminal records were nearly twice as likely to have hired a black male candidate most recently as those who did not conduct background checks.[86] Those results are reproduced in Figure 3.[87]

80. *See* MINTON & GOLINELLI, *supra* note 3, at 7 tbl.3.

81. *State & County Quickfacts*, *supra* note 2.

82. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 25 (2013), http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf [http://perma.cc/GGC7-YY9F].

83. Holzer et al., *supra* note 8, at 460.

84. *Id.* at 463.

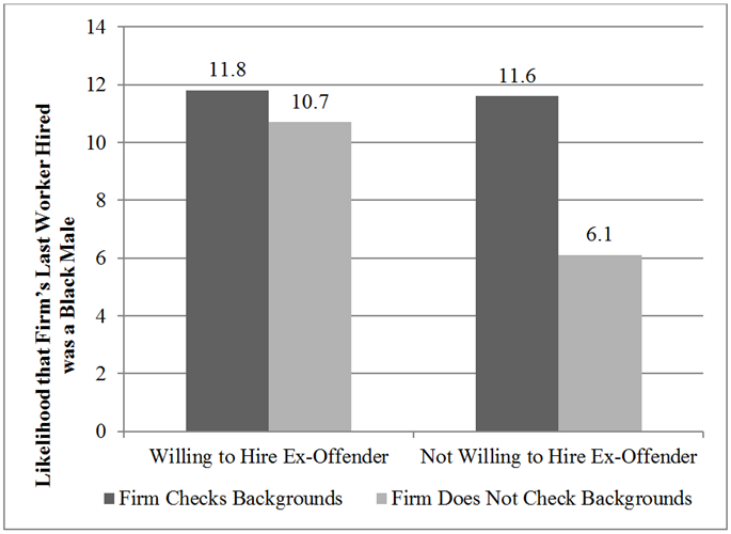
85. *Id.* at 466 tbl.2.

86. *Id.*

87. *Id.*

Figure 3

The correlation between a firm's background check policy, its expressed willingness to hire an ex-offender, and the likelihood it selected a black male as its most recent hire.



Another study examined a similar data set collected in 2001 in Los Angeles and found even more dramatic results.[88] There, 12% of employers who conducted background checks had hired a black male as their last employee, compared to just 3% of firms that did not check criminal backgrounds.[89] These data suggest firms who do not conduct criminal background checks are more likely to engage in statistical discrimination than firms that do check backgrounds—whether this is conscious or unconscious, they are less likely to hire a black applicant.

Because of the risk of statistical discrimination, any policy constraining employers' use of criminal background checks must account for the potential harm to nonoffender black male applicants. The buffer approach sketched above[90] would help mitigate that danger. This approach would give hirers the comfort of knowing *someone* at the firm was examining the candidate's full criminal record, decreasing the chances of statistical discrimination. But the buffer would prevent the hirer herself from exposure to any unfairly prejudicial convictions.

As a complementary effort, advocates should inform employers of their rights. With any new law, employers might think they are prohibited

88. Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 2009 U. CHI. LEGAL F. 381, 390–91, 403.

89. *Id.* at 403.

90. *See supra* subsection II(B)(2)(c).

from conducting background checks altogether or may perform fewer checks than they had previously for fear of liability. Therefore, a crucial part of any approach should be a comprehensive information campaign. Employers should be clearly notified of when they may and may not lawfully check a candidate's background. This will ensure employers check candidates' criminal backgrounds when appropriate, minimizing statistical discrimination.

D. Four Ideal Elements, Distilled

Given the arguments and data discussed above, there are four distinct elements that should be present in any regulatory approach to criminal background checks in employment. Taken together, these elements balance employers' need to assess candidates and ex-offenders' interest in getting a fair chance. First, employers should consider the age of criminal convictions. An ex-offender's risk of recidivism decreases significantly with time, so older convictions are not as strongly probative of future behavior as recent convictions. And individual convictions carry with them particular circumstances. Candidates should be given a chance to explain any mitigating circumstances or make the case for their rehabilitation.

Second, businesses should defer background checks until after the initial application process to mitigate the effect of stereotyping. This obviously benefits ex-offenders. But since the data suggests employers find their concerns to be unfounded once they meet such a candidate, it also benefits employers by expanding their pool of qualified applicants. Thus, deferral of background checks, at least beyond the application process, would benefit both ex-offenders and firms.

Third, employers should consider only those convictions closely related to a job skill or the context of the position sought. These convictions are a sort of negative qualification for the position—like a diploma or recommendation letter, they can help the employer predict job performance. But for unrelated convictions, there is a serious risk employers will consider convictions as merely indicative of moral fiber, leading to unfair prejudice. Employers should not consider these unrelated convictions in making employment decisions.

Fourth, in an ideal system, there should be a clear buffer between the person who initially examines a candidate's criminal record and the people who hire and eventually supervise a candidate. Employers should be required to designate a person or department to examine each candidate's criminal history and inform the hirer and supervisor of convictions only where they are clearly probative of job performance. This system enables a firm to examine a candidate's entire criminal record, thereby protecting them from negligent hiring liability, informing them of dishonest crimes for insurance purposes, and decreasing the temptation to engage in statistical

discrimination, while simultaneously diminishing the risk of prejudice due to unrelated crimes.

III. Assessing Existing Approaches

The elements articulated above manifest themselves in two major statutory approaches: disparate impact liability under Title VII of the Civil Rights Act of 1964 and the more recent fair-chance hiring, or ban the box, movement. Policy efforts also play a role, manifested in federal and local efforts to incentivize and inform employers in considering the ex-offender population. This Part discusses those approaches and assesses their strengths and weaknesses.

A. Disparate Impact Liability

One strong remedy for ex-offenders who face overly broad criminal background checks is disparate impact liability under Title VII of the Civil Rights Act of 1964 (Title VII).[91] Title VII proscribes not just disparate treatment, but also disparate impact—"practices that are fair in form, but discriminatory in operation."[92] Disparate impact was codified as a three-step process in a 1991 amendment to the Civil Rights Act.[93] First, the plaintiff must show that a specific employment practice has a disparate impact on a protected group.[94] Second, the employer has the burden of demonstrating the employment practice is both job related and tied to a business necessity.[95] Third, even if the employer meets this burden, the petitioner may demonstrate that an alternative practice would have the same effect, and that the employer refuses to adopt the alternative.[96] Since disparate impact based on race is prohibited under Title VII, and because racial minorities are more likely to have a criminal record,[97] criminal background checks in employment often violate Title VII.

1. Strengths of Disparate Impact.—Disparate impact liability has two strengths. First, it is widely available. As federal law, disparate impact liability protects ex-offenders nationwide. Second, through case law and recent guidance from the EEOC, the federal entity charged with enforcing

91. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C. and 42 U.S.C.).

92. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

93. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A) (2012)).

94. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

95. *Id.*

96. *Id.* § 2000e-2(k)(1)(A)(ii).

97. *See supra* notes 80–82 and accompanying text.

Title VII, disparate impact incorporates three of the elements urged in Part II of this Note—all except the buffer mechanism.

In *Green v. Missouri Pacific Railroad Co.*,[98] the Eighth Circuit struck down an employer's sweeping ban on employment of ex-offenders, adding that it could not conceive of any business necessity that would justify a blanket ban based on criminal background.[99] Citing an Iowa district court, the circuit court set out a three-factor test for determining whether a conviction-related qualification passes the business-necessity test.[100] The court said employers must consider (1) the nature and seriousness of the crime, (2) the time elapsed since the conviction, and (3) the relation of the crime to the position sought.[101] This widely recognized test encompasses two of the elements encouraged in this Note: the second factor requires employers to examine the age of convictions, and the first and third require employers to consider the relation of the crime to the position, implicitly requiring employers to give weight to only relevant crimes.

A variant on this test was adopted by the EEOC in a 2012 guidance.[102] This guidance recommends employers consider "[t]he nature and gravity of the offense or conduct; [t]he time that has passed since the offense, conduct and/or completion of the sentence; and [t]he nature of the job held or sought."[103] The EEOC guidance also recommends "employers not ask about convictions on job applications," deferring inquiry or background checks until later in the hiring process.[104] Therefore, the EEOC guidance incorporates the two elements recommended in this Note that were adopted in *Green*, and also encourages employers to defer background checks beyond the preliminary application phase, a third element urged in Part II.

2. Weaknesses of Disparate Impact.—Disparate impact is largely consistent with the elements articulated in Part II of this Note, but it has a number of weaknesses. First, disparate impact liability has an inherent racial lens. It provides a remedy only when a hiring practice has a clear disparate impact based on a protected class.[105] In effect, this means Title VII provides no remedy unless there is a disparate impact based on race: a hiring practice barring all applicants with any criminal conviction would comply with Title VII so long as it did not disparately impact any protected class. Such an approach does not account for the impact of

98. 523 F.2d 1290 (8th Cir. 1975).

99. *Id.* at 1298.

100. *Id.* at 1297 (citing Butts v. Nichols, 381 F. Supp. 573, 580–81 (S.D. Iowa 1974)).

101. *Id.*

102. EEOC, ARREST AND CONVICTION RECORDS, *supra* note 56, at 15.

103. *Id.*

104. *Id.* at 13–14.

105. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (prohibiting employment practices that cause "a disparate impact on the basis of race, color, religion, sex, or national origin").

discriminatory hiring practices on other vulnerable ex-offender groups, such as low-income whites.

Second, courts are not always receptive to disparate impact arguments or the EEOC guidelines. For example, the Third Circuit declined to follow the *Green* test in *El v. Southeastern Pennsylvania Transportation Authority*.[106] The defendant in *El* presented expert reports stating a violent conviction predicts future behavior (meeting the business necessity test), and the plaintiff failed to present any evidence to rebut these reports.[107] The court hinted that had the plaintiff presented some evidence showing a criminal convict is "no longer any more likely to recidivate than the average person," the plaintiff probably would have escaped summary judgment.[108] But evidence cannot support this burden—ex-offender recidivism rates approach, but never reach, that of the nonoffender population.[109] So where the Eighth Circuit forces employers to show a legitimate business necessity to support employment restrictions based on criminal records, the Third Circuit seems to shift the burden to plaintiffs by asking them to produce impossible statistics to escape summary judgment.

Furthermore, federal courts have been skeptical of or even hostile toward the EEOC in recent cases. In *EEOC v. Freeman*,[110] for example, the District Court of Maryland granted summary judgment against the EEOC and accused the Commission's expert of "cherry-pick[ing]" individuals for his data and including results that fell outside the relevant time period.[111] And in *EEOC v. Peoplemark, Inc.*,[112] the Sixth Circuit affirmed a district court order requiring the EEOC to pay $752,000 in attorney's fees because the Commission failed to drop the case promptly when it learned, during the course of litigation, that the employer did not actually have a blanket policy barring applicants with felony convictions, as the EEOC had initially alleged.[113]

Third, the 2012 EEOC guidance, while somewhat comprehensive, does not have the effect of law and is not entirely clear. Agency guidance is just that—guidance. It is not binding,[114] and while some courts will give it significant weight, others might ignore it altogether. For example, in *El*, the Third Circuit noted courts have recently interpreted such guidance as

106. 479 F.3d 232, 243–44 (3d Cir. 2007).

107. *Id.* at 246–47.

108. *Id.* at 247.

109. *See supra* section II(A)(1).

110. 961 F. Supp. 2d 783 (D. Md. 2013).

111. *Id.* at 795.

112. 732 F.3d 584 (6th Cir. 2013).

113. *Id.* at 587.

114. U.S. COMM'N ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY 17 (2013), http://www.eusccr.com/EEOC_final_2013.pdf [http://perma.cc/9GWC-JDYZ].

deserving only *Skidmore*[115] deference.[116] Furthermore, even if the guidance were binding, it does not create a bright-line test. Employers have complained about its lack of clarity.[117] Between these two uncertainties, employers will have great difficulty determining how to design an employment practice so as to avoid liability.

And fourth, because Title VII is part of an existing statute, disparate impact cannot incorporate the buffer mechanism advocated in this Note without a specific amendment.

Disparate impact can be an effective remedy. It applies nationwide, requires employers to defer consideration and consider the age of a conviction, and permits consideration of only crimes actually related to job performance. But the EEOC guidance is not law, nor is it a bright-line rule, and some courts are hostile toward disparate impact and even the EEOC. And significantly, disparate impact simply cannot be a remedy for employment practices that have no racial impact—even when they disparately impact candidates based on socioeconomic status. Advocates should use disparate impact where it fits but understand it is not always available or effective.

B. Fair-Chance Policies

A promising approach to regulating criminal background checks in employment is the fair-chance (sometimes labeled ban the box) movement. Fair-chance laws are flexible, growing rapidly, and specifically geared towards balancing the interests of local employers against those of ex-offender applicants.[118] The name ban the box comes from a box that employers sometimes include on applications requiring ex-offenders to identify themselves upon application.[119] To restrict this practice, nineteen states, Washington D.C., and 116 cities and counties have banned the box

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115. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

116. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 244 (3d Cir. 2007). Under *Skidmore*, courts defer to such guidance only to the extent that it is thoroughly researched and persuasively reasoned. *Id.* The court found that the EEOC's 2012 guidance failed to reach this threshold. *Id.*

117. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 114, at 14 (stating that employer groups supported the goals of the EEOC's 2012 guidance, but objected to "the lack of direction as to how to comply").

118. *See* MICHELLE NATIVIDAD RODRIGUEZ & NAYANTARA MEHTA, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE BARRIERS TO EMPLOYMENT OF PEOPLE WITH CONVICTION RECORDS, SEPTEMBER 2015, at 1 (2015), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf [http://perma.cc/M63X-FKDE] [hereinafter NELP SEPTEMBER 2015] ("Nationwide, over 100 cities and counties have adopted what is widely known as 'ban the box' so that employers consider a job candidate's qualifications first, without the stigma of a criminal record.").

119. Christine Owens & Nayantara Mehta, *Hey Obama, Time to #banthebox*, CNBC (July 16, 2014, 7:00 AM), http://www.cnbc.com/2015/07/16/time-to-ban-criminal-record-box-on-job-applications-commentary.html [http://perma.cc/R4FV-5AEY].

in some form.[120] These laws are often labeled fair-chance policies because many of them provide more comprehensive protections for ex-offenders.[121] And though the laws are young, early reports show they can successfully and substantially increase ex-offender employment,[122] which, in turn, can decrease recidivism and benefit society generally.[123] This section will discuss the strengths and weaknesses of these fair-chance policies, especially as they relate to the elements articulated in Part II of this Note.

1. Strengths of Fair-Chance Policies.—Fair-chance policies are flexible and often comprehensive, and many of them incorporate the elements articulated in Part II. Unlike Title VII, fair-chance policies govern every employment policy, not just those that disparately impact racial minorities. They are also flexible, and local representatives can tailor legislation to meet the needs of their community. And perhaps most importantly, these policies are rapidly gaining traction—in just the first half of 2015, five states banned the box.[124]

Fair-chance policies incorporate three of the elements articulated in Part II: deferred consideration, consideration of the age of conviction, and holistic evaluation. By their very nature, ban the box laws defer consideration of a criminal history beyond the initial application. And some of them go even further, permitting background checks only for candidates selected as finalists. Three states,[125] Washington, D.C.,[126] and forty-five cities and counties[127] require background checks be deferred until finalists are selected or conditional offers are extended.

Further, many fair-chance polices require employers to consider the age of convictions and require employers to consider the relation between the conviction and the position sought. Eight states,[128] Washington, D.C.,[129] and fifty-six cities and counties[130] require covered employers to consider the factors laid out in the 2012 EEOC guidance or something similar.

120. NELP SEPTEMBER 2015, *supra* note 118, at 1, 3–5.

121. *Id.* at 1.

122. *See* DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC 5 (2014), http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf [http://perma.cc/L5J3-U9HA] ("Since the Ban the Box initiative began in 2011, the overall proportion of people with criminal records hired by the City of Durham has increased nearly 7 fold.").

123. *See supra* notes 29–36 and accompanying text.

124. NELP SEPTEMBER 2015, *supra* note 118, at 1.

125. *Id.* at 6, 8, 11. Hawaii delays consideration until a conditional offer is made; Colorado and New Mexico delay consideration until finalists are selected for the position. *Id.*

126. *Id.* at 30. Washington, D.C., delays consideration until a conditional offer is made. *Id.*

127. *Id.* at 66–70.

128. *Id.* at 6–9, 11–12, 66–70.

129. *Id.* at 30, 70.

130. *Id.* at 66–70.

Policies in two states and one city even include explicit "lookback" limits, discouraging or altogether barring consideration of some old convictions.[131] For example, in Massachusetts, criminal records provided by the state include felony convictions for only ten years following disposition and misdemeanor convictions for only five years after disposition.[132] Though employers are not required to use the state system, the law also provides that employers cannot be held liable for negligent hiring merely because they failed to use other background-check services.[133] Employers are thereby incentivized to use the state system and no other background-check services, which will lead them to see only those crimes within the limited lookback period.

2. Weaknesses of Fair-Chance Policies.—Although fair-chance policies fit many of the elements discussed in Part II, they have their faults. First, most of these policies cover only public employers. Seven states, Washington, D.C., and just twelve local governments apply their policies to all employers;[134] a further thirteen city and county laws apply to both public employers and government contractors.[135] The remaining eleven states and ninety-one cities and counties with fair-chance laws regulate only public employers.[136] Notably, these laws can catalyze change in the private sector: Minneapolis-based employer Target decided to ban the box nationwide in response to Minnesota's legislation.[137] But full coverage is ideal, so future adopters should push for laws that apply to both public and private employers.

Second, almost none of the fair-chance laws include a buffer mechanism to distance the person who examines a candidate's conviction history from the person making a final decision. As noted above, this approach allows employers to examine a candidate's entire criminal history, protecting against negligent hiring liability and deterring statistical discrimination. But since the initial examiner screens out irrelevant

131. *Id.* at 8–9, 38. Hawaii and Newark, N.J., both use a strict bar on consideration of certain old convictions; Massachusetts provides a strong incentive to use the state's criminal record system, which provides records for only a limited lookback period. *Id.*

132. *Id.* at 9.

133. *Id.*; Sara Goldsmith Schwartz, *E-Alerts: New Massachusetts Criminal Background Check Requirements to Take Effect on May 4, 2012*, SCHWARTZ HANNUM PC (May 3, 2012), http://shpclaw.com/Schwartz-Resources/new-massachusetts-criminal-background-check-requirements-to-take-effect-on-may-4-2012/ [http://perma.cc/S3NJ-EZ9K].

134. NELP SEPTEMBER 2015, *supra* note 118, at 66–70. The states are Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island. *Id.* Notably, some of America's largest cities apply their laws to all employers—New York, Chicago, Philadelphia, San Francisco, Seattle, Baltimore, and Newark—so the effect could be significant. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 10.

convictions, the hirer and supervisor are not exposed to any unnecessarily prejudicial convictions.[138] However, zero states and just five cities and counties require this sort of procedure, and because none of these local policies extend to private employers, the pool of candidates that enjoys this buffer is very small.[139]

A third weakness is that some fair-chance laws prohibit background checks altogether for nonsensitive positions. Twenty-five cities and counties use background checks for only some positions[140]—for example, law enforcement, jobs with financial responsibility, or positions caring for children or the elderly.[141] At first glance, this seems like a good idea, because these positions might give an employee a greater opportunity to act out. From another perspective, though, these reverse-blanket bans could increase the potential for statistical discrimination against those candidates whose backgrounds are not checked.[142] A better solution would be to implement a strong buffer between the person who examines a criminal background and the actual hiring manager. With the buffer mechanism, the hiring manager can be comforted that each candidate's background has been checked by another employee and will be less tempted to engage in statistical discrimination.[143]

On the whole, fair-chance policies are useful and robust. They apply to all ex-offenders, incorporate most of the ideal elements identified in Part II, and are being embraced rapidly throughout the nation. But they are not perfect. Future adopters should push strongly for laws that apply to both public and private employers. And they should consider incorporating a buffer mechanism, so employers can consider each applicant's full criminal record without exposing hirers and supervisors to unrelated, prejudicial convictions.[144]

C. Other Efforts: Incentives and Information

Any reform to the use of criminal records in employment should be complemented by four related efforts. First, advocates should push to

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138. *See supra* subpart I(A).

139. NELP SEPTEMBER 2015, *supra* note 118, at 17, 23, 26, 35, 45. These are Alameda County, CA (records are assessed by a special unit within the county human resources (HR) department); New Haven, CT (records are assessed by the city HR department); Jacksonville, FL (assessment is centralized in the city HR department); Santa Clara County, CA (the city HR department reviews the conviction history for tentatively selected candidates); and Akron, OH (if a background check reveals a conviction, a committee conducts a holistic review). *Id.*

140. *Id.* at 66–70.

141. *See, e.g.*, *id.* at 33 (noting that the Richmond, CA "ordinance prohibits inquiry into an applicant's criminal history at any time unless a background investigation is required by State or Federal law or the position has been defined as 'sensitive'").

142. *See supra* subpart II(C).

143. *See supra* section II(D)(1).

144. *See supra* section II(D)(1).

incentivize employers to hire ex-offenders or diminish disincentives. One such incentive is the federal Work Opportunity Tax Credit (WOTC).[145] This program provides a tax credit for employers who hire, among other groups, ex-felons.[146] An employer can obtain a tax credit of up to $2,400 per year for each ex-felon it employs.[147] This is not an enormous credit, but it could be enough to influence employers on the margins. Naturally, this would create a greater incentive if the amount were increased or if it were expanded to cover other ex-offenders. Similarly, while the Federal Bonding Program's six months of free bonding for at-risk candidates[148] might incentivize employers, this program would be a greater incentive if it were expanded to cover other ex-offenders, or if it lasted longer than six months.

Negligent hiring liability reform, too, can decrease the chance an employer will overlook a qualified ex-offender. At least six states have adopted these reforms.[149] As an example, recall that Massachusetts has set a lookback limit on conviction records produced by the state and further provides that an employer cannot be held liable for failing to use other services. In effect, this means if an employer uses the state's system exclusively, it can only be held liable for negligent hiring as it relates to newer crimes.[150] And Texas recently passed a law barring negligent hiring liability unless the prior conviction was committed in a situation "substantially similar" to the current position, or the prior conviction was for one of a few very serious crimes.[151] Texas' approach is useful because it very nearly aligns the scope of a background check for negligent hiring purposes with job performance purposes.[152]

Second, some efforts have been made to educate employers, but these could be expanded and improved. Information can help employers fully understand their legal obligations. One example is the Federal Interagency Reentry Council's "Mythbuster" series, which effectively and succinctly outlines permissible and impermissible uses of background checks in

145. *Work Opportunity Tax Credit: Eligible New Hires*, U.S. DEP'T LAB. (Apr. 8, 2010), http://www.doleta.gov/business/incentives/opptax/eligible.cfm#Ex-felons [http://perma.cc/F7AJ-FBVW].

146. *Work Opportunity Tax Credit: WOTC Tax Credit Amounts*, U.S. DEP'T LAB. (Apr. 8, 2010), http://www.doleta.gov/business/incentives/opptax/benefits.cfm [http://perma.cc/FR52-8XRN].

147. *Id.*

148. *See supra* note 71 and accompanying text.

149. LEGAL ACTION CTR., STATE REFORMS REDUCING COLLATERAL CONSEQUENCES FOR PEOPLE WITH CRIMINAL RECORDS: 2011–2012 LEGISLATIVE ROUND-UP 6 (2012), http://www.nelp.org/content/uploads/2015/03/StateCollateralConsequencesLegislativeRoundupSept2012.pdf [http://perma.cc/3WP3-KGAG].

150. *See supra* notes 128–29 and accompanying text.

151. TEX. CIV. PRAC. & REM. CODE ANN. § 142.002 (West 2014).

152. *See supra* section II(B)(1).

employment.[153] Government agencies in states that have passed fair-chance policies have similar informative efforts.[154] Importantly, these efforts could be useful to inform employers when they *are* permitted to use background checks, perhaps decreasing the temptation to engage in statistical discrimination. For example, one Mythbuster document outlines the requirements for showing job relatedness and business necessity.[155] Seeing this, employers will better understand how and when they are permitted to use background checks and use them when appropriate rather than engaging in statistical discrimination.

These publicity efforts could be improved by incorporating the data underpinning fair-chance policies. For example, many employers are probably not aware that ex-offenders' risk of recidivism approaches that of the general population within just a few years of release[156] or that negligent hiring lawsuits are extremely rare.[157] Efforts to educate employers about these realities can ensure employers understand the reasons behind any legal requirements surrounding background checks. This information could even influence employers to take steps beyond those required by law, just as Target did in response to Minnesota's Fair Chance legislation.[158]

Third, states and the federal government should ensure criminal records are accurate. The Federal Trade Commission has leveraged the Fair Credit Reporting Act to force private providers to ensure accuracy,[159] but

153. *E.g.*, FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON HIRING/CRIMINAL RECORDS GUIDANCE 1 (2012), http://csgjusticecenter.org/wp-content/uploads/2012/11/Reentry_Council_Mythbuster_Employment.pdf [http://perma.cc/V36J-2447] [hereinafter FED. INTERAGENCY REENTRY COUNCIL, HIRING/CRIMINAL RECORDS GUIDANCE]; FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! CRIMINAL HISTORIES AND EMPLOYMENT BACKGROUND CHECKS 1 (2012), https://csgjusticecenter.org/wp-content/uploads/2012/11/Reentry_Council_Mythbuster_FCRA_Employment.pdf [http://perma.cc/7BQH-R2J9].

154. *See, e.g.*, *Ban the Box: Overview for Private Employers*, MINN. DEP'T HUM. RTS., http://mn.gov/mdhr/employers/banbox_overview_privemp.html [http://perma.cc/QL5V-LVX4] (indicating that the Minnesota Department of Human Rights "is seeking to engage in a comprehensive education program to encourage [ban the box] compliance by employers").

155. FED. INTERAGENCY REENTRY COUNCIL, HIRING/CRIMINAL RECORDS GUIDANCE, *supra* note 153.

156. *See supra* section II(A)(1).

157. *See supra* note 64 and accompanying text.

158. For example, Minneapolis-based Target voluntarily stopped asking about criminal records on its applications nationwide after Minnesota passed legislation requiring the same. *See supra* note 137 and accompanying text.

159. Editorial, *Accuracy in Criminal Background Checks*, N.Y. TIMES (Aug. 9, 2012), http://www.nytimes.com/2012/08/10/opinion/accuracy-in-criminal-background-checks.html [http://perma.cc/6JPN-4NYW]; *Employment Background Screening Company to Pay $2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act*, FED. TRADE COMMISSION (Aug. 8, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/employment-background-screening-company-pay-26-million-penalty [http://perma.cc/Q4CU-522S].

inaccuracy remains a problem even for FBI-provided background checks.[160] Inaccuracy can disadvantage applicants who were ultimately convicted of a lesser offense than the one for which they were charged or arrested.[161] And this also harms employers who check criminal records by unnecessarily and inaccurately diminishing their pool of qualified applicants.

Finally, advocates and agencies should seek funding for studies to fill in gaps in the literature. For example, the best evidence about ex-offenders' propensity to act out on the job is anecdotal,[162] and very few studies have looked closely at statistical discrimination.[163] Research in this area—whatever it shows—will help inform and improve future efforts at reform.

Conclusion

Employers should have some freedom in checking candidates' criminal records. Convictions are sometimes probative of job performance, and firms need to know about other types of convictions to protect against negligent hiring liability and for bonding insurance purposes. Still, because of the potential prejudicial effect of irrelevant criminal records, their use in hiring should be constrained. This Note has argued for four specific constraints. Though three of these constraints are widely implemented, the buffer mechanism is rare. Employers, advocates, and legislators should strongly consider incorporating such a mechanism into future efforts because of its many benefits. This buffer would allow firms to freely check a candidate's entire history, thereby diminishing the risk of negligent hiring liability and statistical discrimination without prejudicing the hiring manager with irrelevant convictions. Firms would thereby gain a deeper pool of qualified applicants, and ex-offenders would enjoy a true fair chance in employment.

—Ian B. Petersen

160. *See* MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT, REWARD: GOOD JOBS 1 (2013), http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf [http://perma.cc/MS5M-U7AY] ("50 percent of the FBI's records fail to include information on the final disposition of the case.").

161. *Id.*

162. *See supra* notes 59–61 and accompanying text.

163. *See supra* notes 76–85 and accompanying text.