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Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy

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EMPLOYMENT DISCRIMINATION ON THE BASIS OF CRIMINAL HISTORY: WHY AN ANTI-DISCRIMINATION STATUTE IS A NECESSARY REMEDY

ELIZABETH WESTROPE*

The harms of mass incarceration do not end when an individual is released from prison. Instead, criminal records haunt approximately 70 million people throughout the United States today. Criminal histories follow persons convicted of crimes for the rest of their lives, creating collateral consequences that make it difficult for these individuals to get back on their feet and re-integrate into society.

Gaining employment is one of the most crucial steps for returning citizens to take in order to regain stability in their lives. Yet, it remains one of the biggest obstacles. Employers are often wary of hiring persons with criminal records due to fear of liability and the social stigma that frequently attaches to formerly incarcerated individuals.

While some remedies exist for returning citizens to clear their record from public view and (in theory) get a clean slate, they are inadequate. This Comment will describe the four most predominant remedies that purport to address the problem of employment discrimination against persons with criminal records: 1) expungement statutes; 2) Fair Credit Reporting Act protections in the context of background checks; 3) Title VII claims; and 4) ban the box provisions. It will then explain how each of these remedies fails to rectify the problem. This Comment argues that an anti-discrimination statute that bans employment discrimination against individuals with criminal records is necessary in order to benefit both the individuals themselves and society as a whole. The conclusion discusses the design of such a statute and ways that legislators should work together to ensure its passage.

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INTRODUCTION

In 2003, a twenty-one year old man lost control of his car after a night of drinking, killing his close friend.¹ The man, “Jay,” was convicted of

¹ Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT’L INST. OF JUST. (June 15, 2012), <https://www.nij.gov/journals/270/Pages/criminal->

involuntary manslaughter and sentenced to thirty-eight months in state prison.² Jay wrote to the U.S. Department of Justice (DOJ), detailing his struggles of re-entering society as a convicted felon.³ Jay described the hard work he had put forth to turn his life around since his release: he had been sober for more than eight years, was succeeding in college, and had shared his story in schools, treatment facilities, and correctional institutions so that others could learn from his mistakes.⁴ Yet he also told the DOJ that he had “nothing to show for it,” since he was repeatedly denied job opportunities because of his felony.⁵ Jay explained that he had participated in numerous interviews and sent out more than 200 resumes for positions that he was more than qualified to fill, but employers routinely denied his applications because of his criminal record.⁶

Unfortunately, Jay’s story is not unique. Since 2005, approximately 700,000 persons have been released from prison annually.⁷ Approximately one in three people in the U.S. has some type of criminal record.⁸ Individuals with criminal records strive to fully re-integrate into the community but face tremendous obstacles.⁹ Over 38,000 statutes impose collateral consequences on individuals convicted of a crime.¹⁰ More than half of these laws involve denial of job opportunities.¹¹ In addition to the economic strain that unemployment puts on individuals with criminal records, it also increases their chances of re-offending.¹²

Recidivism impacts not only the individual, but also communities. Beyond the safety concerns that are associated with re-offending, there are serious economic and social consequences that society must face as a result

records.aspx. The man’s name was changed in the article to protect his identity.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 264 (2014).

⁸ Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325–26 (2015).

⁹ See Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1218–19 (2010) (“Given the breadth and permanence of collateral consequences, [ex-offenders] are perhaps more burdened and marginalized by a criminal record today than at any point in U.S. history.”).

¹⁰ Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII in Discrimination Against Persons with Criminal Records*, 12 SEATTLE J. FOR SOC. JUST. 109, 112 (2013).

¹¹ *Id.*

¹² *Id.*

of denying jobs to individuals with criminal records. For example, employers may miss out on tax incentives,¹³ and more unemployed individuals might rely on public assistance rather than becoming part of the tax base.¹⁴ Additionally, refusing to hire persons with records contributes to low diversity in the workforce.¹⁵ Racial diversity is widely recognized as important to economic success—it is “associated with increased sales revenue, more customers, greater market share, and greater relative profits”—so there are many financial incentives ensuring that employers are not discriminating against formerly incarcerated persons in their hiring processes.¹⁶ Nevertheless, more than 60% of employers refuse to hire individuals with criminal records.¹⁷

This Comment pursues two goals. First, it lists out current remedies that attempt to address the problem of employment discrimination against individuals with criminal records and points out the deficiencies of these remedies. Second, it proposes a new solution to rectify this problem and improve the employment prospects of individuals with criminal records.

Part I explores four current remedies and argues that each one is unsuccessful in providing adequate relief for persons with criminal records. Section I.A begins by discussing expungement statutes and their limitations in the digital age. Section II.B describes the current protections for job applicants under the Fair Credit Reporting Act and why those protections fail to fully protect individuals from employment discrimination due to the restricted application of the Fair Credit Reporting Act. Section I.C discusses theoretical protections under Title VII but describes how those protections are often unsuccessful in reality for litigants with criminal records, particularly those who are not minorities. Section I.D examines “ban the box” provisions that currently exist in some states and explains how these provisions can actually increase racial discrimination in the hiring process for individuals with no criminal history.

Part II proposes a new solution to prevent employment discrimination against individuals with criminal records. Lawmakers must enact a statute that explicitly prohibits employment discrimination on the basis of criminal

¹³ *Id.* at 113–14 (“[T]he Work Opportunity Tax Credit (WOTC) provides tax incentives for employers who hire persons with felony records within one year from the date of conviction or release from prison.”).

¹⁴ *Id.* at 117.

¹⁵ *Id.* at 114.

¹⁶ Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 219 (2009).

¹⁷ Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 2 (2012).

history, with limited exceptions. This statute should require employers to proactively list disqualifying offenses for every job posting and needs to prohibit employers from considering offenses committed over seven years prior to a job application.

A statute must be enacted that explicitly prohibits employment discrimination against individuals on the basis of criminal history except in certain limited instances. The proposed statute builds off the Equal Opportunity Employment Commission's (EEOC) regulation that prevents employers from disqualifying job candidates purely on the basis of criminal records. However, the proposed solution improves upon the EEOC's regulation in a few ways. First, the EEOC's guidelines only have strength within the agency's own adjudicative proceedings whereas a statute applies more broadly. Second, the suggested statute would require employers to proactively list disqualifying offenses for every job posting. This would increase transparency and prevent applicants from wasting their time and resources applying for positions from which they will later be disqualified. Third, the statute would include a time component. Employers would be barred from considering offenses that an individual had committed more than seven years ago.

This Comment concludes by addressing employers' fears that this statute would result in an increased number of negligent hiring claims and attempts to mitigate employers' concerns through statistics that show the relative rareness of re-offending on the job. Employers are also provided with ways that they can insulate themselves from potential negligent hiring claims if an individual with a criminal record were to commit a crime while working. Finally, the political realities of passing this proposed statute are discussed, including an analysis of why the bill might appeal to legislators and how legislators can use the Americans with Disabilities Act (ADA) as a model for garnering bipartisan support.

I. CURRENT REMEDIES

A. EXPUNGEMENT STATUTES

In examining expungement statutes, this Comment focuses on two points. First, it provides basic background information about such statutes. Second, it makes the argument that these statutes are insufficient in the digital era.

1. Background

Expungement statutes are laws that require criminal records to be

destroyed or sealed.¹⁸ In most states, expungement is a remedy that can be obtained only by petitioning the court.¹⁹ In such states, it is within the court's discretion whether to grant the requested relief.²⁰ For instance, in Illinois, there is no absolute right to an expungement even when a person is statutorily eligible.²¹

Expungement statutes were originally developed in the 1940s in the realm of juvenile criminal records.²² The purpose of these early expungement statutes was to "lessen the stigma" on those involved in youthful crime.²³ Over time, expungement statutes have been broadened in many states and now apply to adults.²⁴

The primary purpose of modern expungement laws is to limit public access to certain criminal records in order to increase employment opportunities and housing options for individuals with criminal records, with the ultimate goal of lowering recidivism rates.²⁵ The central premise behind expungement laws is that if persons with criminal records are able to obtain jobs and housing, they will be more likely to become productive members of society rather than return to lives of crime.²⁶ In promoting this purpose, expungement statutes seek to balance the legitimate need of law enforcement to maintain public safety against the desire to afford all citizens with employment opportunities.²⁷

So-called "second-chance" criminal justice reforms currently have

¹⁸ David Louis Raybin, *Expungement of Arrest Records: Erasing the Past*, 44 TENN. B.J., 22, 22–23 (2008).

¹⁹ *Judicial Expungement, Sealing, and Set-Aside*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/> (last visited Oct. 30, 2017); ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ILLINOIS CRIMINAL RECORDS: EXPUNGEMENT AND OTHER RELIEF, § 1.1 at 1–4 (2016) (noting that Illinois is such a state).

²⁰ ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, *supra* note 19, at § 1.6 at 1–12.

²¹ *Id.*

²² Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMM.LAW CONSP. 123, 134 (2010).

²³ T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 290 (1998).

²⁴ See MARGARET COLGATE LOVE ET AL., JUDICIAL RESTORATION MECHANISMS—EXPUNGEMENT AND SEALING, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 7:17, 1 (2016); Roberts, *supra* note 8, at 322.

²⁵ See LOVE ET AL., *supra* note 24, at 324; Shenequa L. Grey, *Contemporary Issues in Louisiana Law: Expungement*, 43 S.U. L. REV. 41, 45 (2015).

²⁶ See, e.g., Grey, *supra* note 25, at 45.

²⁷ *Id.*

“growing momentum.”²⁸ Second-chance reforms within the criminal justice context refer to efforts to ameliorate the difficulties that formerly incarcerated persons face after their release. The movement began with the passage of the Second Chance Act of 2007, which addressed many issues facing returning citizens trying to re-integrate into society.²⁹ While second-chance reforms can involve programs other than expungement laws, expungement is one way that states across the country address the collateral consequences impacting individuals with criminal records. In 2016 alone, Kentucky authorized the expungement of felonies for the first time in history, New Jersey reduced the waiting periods for when expungement can be sought in certain instances and enacted automatic expungement for some offenses, and Maryland allowed the expungement of misdemeanor convictions for the first time.³⁰

The question is whether or not these expungement expansions are wise. Because the positive impact of expungement statutes is severely limited in the digital age, expungement within the second-chance reform movement, though well-intentioned, is ultimately misguided.

2. *Limitations on Expungement Laws in the Digital Age*

In today’s internet era, expungement is imperfect.³¹ With the rise of Google, “there is no way to eliminate all traces of the underlying event.”³² Furthermore, the Internet “hosts vast democratic forums” that are protected under the First Amendment, which even more severely curbs the efficacy of expungement orders.³³ There is “no guarantee that merely removing one’s name from an official database will render one’s reputation untarnished by news of an arrest.”³⁴ Even if someone takes the time to get his or her record expunged and pays the requisite legal fees, it may not have any impact on an employer’s ability to discover the individual’s criminal record. A quick Google search can essentially undo the effect of the expungement order. This Comment notes four Internet sources that severely hamper the efficacy of expungement laws: for-profit mug shot websites, police blotter websites,

²⁸ Joshua Gaines, *Expungement Expansion Round-Up*, COLLATERAL CONSEQUENCES RES. CTR. (May 23, 2016), <http://ccresourcecenter.org/2016/05/23/expungement-expansion-round-up-2016-edition/>.

²⁹ Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L. L. REV. 249, 255 (2016).

³⁰ See Gaines, *supra* note 28.

³¹ See Joshua D. Carter, *A Practitioner’s Guide to Expunging and Sealing Criminal Records in Illinois*, 100 ILL. B.J. 642, 645 (2012).

³² *Id.*

³³ Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 526 (2015).

³⁴ *Id.* at 535.

social media posts, and online news stories.

For-profit mug shot websites are one digital source that make it difficult for individuals with expungement orders to truly erase their criminal past. Mug shot websites publish mug shots and booking details of individuals collected from police departments through Freedom of Information Act (FOIA) requests.³⁵ Many for-profit mug shot websites profit by charging a fee to remove information regarding an expunged arrest.³⁶ Fees to remove mug shots or other information pertaining to an arrest can be as much as \$400.³⁷ This can be an additional cost barrier for an individual with a criminal record who is seeking employment.

Many police blotter websites document crimes and arrests.³⁸ After an arrest is expunged, it often still remains on such sites, meaning it is never truly removed from the public record.³⁹ Even if an arrest is expunged, the arrest is not considered a private matter.⁴⁰ Courts have held that just because a criminal record has been expunged, the fact of an arrest is never truly removed from the public record since it remains on court records and dockets.⁴¹ Because it remains a public fact, an expunged arrest is not entitled to privacy protection under tort law.⁴² Because arrest information is considered public record, persons with criminal records have no legal remedy of removal from a police blotter website or a mug shot website, meaning anyone who has access to the Internet, including employers, can easily uncover arrest information.⁴³

Social media sites can also reveal information regarding expunged arrests. According to a CareerBuilder study, two in five companies use social

³⁵ Peter Lowe, *Applicants' Mug Shots May be Just a Click Away*, 19 NO. 4 ME. EMP. L. LETTER 4 (2013).

³⁶ Roberts, *supra* note 8, at 345–46.

³⁷ Lowe, *supra* note 35, at 1.

³⁸ See, e.g., *Police Blotter*, VILL. OF ANTIOCH POLICE DEP'T., http://www.antiochpd.com/?page_id=629 (last visited Sept. 23, 2017); *Police Blotter*, VILL. OF WESTCHESTER, <http://www.westchester-il.org/Index.aspx?NID=230> (last visited Oct. 30, 2017); *Weekly Police Blotter*, VILL. OF GRAYSLAKE, <http://www.villageofgrayslake.com/index.aspx?NID=201> (last visited Sept. 23, 2017).

³⁹ *Puricelli v. Borough of Morrisville*, 820 F. Supp. 908, 918 (E.D. Pa. 1993).

⁴⁰ *Schmidt v. Deutsch Larrimore Farnish & Anderson, LLP*, 876 A.2d 1044, 1048 (Pa. Super. Ct. 2005).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html> (explaining that mug shot websites, in particular, can appear in Google searches when employers are researching job candidates; this can limit employment opportunities for individuals with criminal records).

networking sites to screen applicants.⁴⁴ For example, employers might access social media posts about an expunged arrest or references to time spent in jail on an applicant's social media page. Courts have provided job applicants with very little protection in this realm. For instance, a woman's statement on a social networking site that a man was a "criminal" was not actionable as defamation because it was true, even though the man's conviction was later expunged.⁴⁵ The court held that the expungement "did not prevent others from making true statements about his criminal history."⁴⁶

One of the most significant limitations on expungement in the digital age arises from Internet archives of news stories. A simple Google search may result in news stories about an arrest or conviction that was later expunged. There is little that individuals with criminal records can do to remedy this issue, due to a combination of news media ethics and journalists' First Amendment rights. Many journalists feel a professional obligation to gather and report facts, not erase them. According to journalists, newspapers cannot "be in the business of erasing the past."⁴⁷ They cannot obliterate facts that already happened.⁴⁸ The most they can do is correct inaccurate information. Since an expungement does not render the original story about an arrest or conviction inaccurate, there is no duty on the part of the journalist to edit the piece.⁴⁹ Instead, journalists have an ethical obligation to tell the truth about alleged criminal wrongdoings rather than cover up those alleged wrongdoings by deleting files or redacting archives.⁵⁰ At the same time, courts have interpreted the First Amendment's freedom of the press protections to allow journalists to freely report on a wide variety of criminal matters without interference from the court, so that they can serve as vital "watchdogs" on government.⁵¹

Attorneys' attempts to use courts to limit public access to news stories about expunged crimes have been largely unsuccessful. For instance, one Pennsylvania defense attorney sought to have his client's expungement order include the removal of articles mentioning his client's arrests from two newspapers' online archives.⁵² The editor-in-chief of one of the publications,

⁴⁴ Lowe, *supra* note 35, at 1.

⁴⁵ Chaker v. Mateo, 209 Cal. App. 4th 1138, 1149–50 (Cal. Ct. App. 2012).

⁴⁶ *Id.* at 1150.

⁴⁷ Calvert & Bruno, *supra* note 22, at 137.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 126–27.

⁵² Emilie Lounsberry, *Judge Rescinds Order for 2 Pennsylvania Newspapers to Delete Archives*, PHILA. INQUIRER (July 7, 2010), <http://www.philly.com/philly/news/local/20100>

the Pennsylvania State University student newspaper, strongly defended the newspaper's First Amendment rights to keep the original stories on their internet archives, without any corrections or redactions.⁵³ She said the newspaper "is a record of history as it happens" and thus could not be ordered by a court to redact the stories.⁵⁴ The executive editor of the second newspaper, the *Centre Daily Times*, likewise criticized the attorney's request by pointing out that his newspaper's archives could not simply be expunged in the same way as courts' archives.⁵⁵ He went on to state that "facts are facts and we don't go back and alter the historical record to suit someone."⁵⁶ The judge ultimately agreed with the newspaper editors and rescinded the expungement order.⁵⁷

A plaintiff in another case sought injunctive relief to require an Internet publication to remove articles about her arrest from its website, social media pages, and search engine.⁵⁸ She was ultimately exonerated and had the arrest records sealed.⁵⁹ Despite her exoneration, the court held that she could not allege defamation since the reports on the website were true; they were based on a press release issued by the local police department regarding the arrest and the allegations.⁶⁰ The court explained that the articles at issue accurately reported on the plaintiff's arrest and the charges brought against her.⁶¹ While the underlying charges ultimately were dismissed, expunged, and sealed, this had no effect on the truthfulness of the articles at the time of their publication.⁶²

As these rulings demonstrate, individuals with criminal records have very few routes to rid the internet of news stories about their expunged arrests due to a combination of robust freedom of the press protections and news media ethics. Furthermore, even if journalists were willing to purge their own websites of news stories about expunged arrests, ridding the entire internet of a news story once it has spread beyond a newspaper's own website to a database such as Westlaw or ProQuest proves highly difficult.⁶³

708_Judge_rescinds_order_for_2_Pennsylvania_newspapers_to_delete_archives.html.

⁵³ Calvert & Bruno, *supra* note 22, at 139.

⁵⁴ *Id.*

⁵⁵ *Id.* at 140.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Russell v. Del. Online, No. 15-794-SLR, 2016 WL 3237597, at *3 (D. Del. June 20, 2016).

⁵⁹ *Id.*

⁶⁰ *Id.* at 7.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Calvert & Bruno, *supra* note 22, at 138.

Given the limitations on the efficacy of expungement orders in the Internet era, expungement no longer offers a meaningful remedy for individuals with criminal records who are seeking employment. The primary purpose of expungement statutes is to remove arrests and convictions from public view.⁶⁴ However, if an employer can simply find expunged arrests via for-profit mug shot websites, police blotter sites, social media posts, or online news stories, the expungement order becomes moot. Rather than continuing to expand expungement statutes and clogging the courts with expungement hearings, another remedy must be made available to individuals with criminal records seeking employment.

B. FAIR CREDIT REPORTING ACT

1. Background and Current Protections for Individuals with Criminal Records

The Fair Credit Reporting Act (FCRA) is a federal statute enforced by the Federal Trade Commission.⁶⁵ Originally enacted in 1970, the law aims to protect consumers by improving the accuracy of consumer reports.⁶⁶ While most people familiar with consumer reports associate them with personal credit score reports, they may also contain criminal background information.⁶⁷

FCRA provides some protection for job applicants with expunged records.⁶⁸ The statute requires that “[w]henver a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁶⁹ Many data collection companies that provide background check services to employers are considered “consumer reporting agencies” (CRAs) and are therefore regulated under FCRA.⁷⁰ Eighty-seven percent of employers conduct criminal background checks on

⁶⁴ See Grey, *supra* note 25, at 45; Roberts, *supra* note 8, at 325–26.

⁶⁵ Carlin & Frick, *supra* note 10, at 120.

⁶⁶ *Id.*; Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 965 (6th Cir. 1998) (“FCRA is aimed at protecting consumers from inaccurate information in consumer reports and at the establishment of credit reporting procedures that utilize correct, relevant, and up-to-date information in a confidential and responsible manner.”); Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 659 (D. Wyo. 1974) (“The general purpose of the FCRA is to protect the reputation of a consumer.”).

⁶⁷ Carlin & Frick, *supra* note 10, at 121–22.

⁶⁸ 15 U.S.C.A. § 1681e (2006).

⁶⁹ 15 U.S.C.A. § 1681e(b) (2006).

⁷⁰ Roberts, *supra* note 8, at 345.

all job applicants.⁷¹ FCRA is therefore beneficial for individuals with expunged records in terms of official criminal background checks provided to employers by CRAs. Convictions that have been expunged should not be found on a consumer report in most jurisdictions.⁷²

Under FCRA, most adverse information, such as arrest records, must be removed from a consumer's report if it is more than seven years old.⁷³ This helps individuals who were arrested in the past but were never convicted. Even if such an individual does not get the arrest record expunged, he does not have to worry about an employer accessing the information in the report.

If an employer considers taking adverse action against an applicant based on the information in a CRA-prepared background report, the employer must first give the applicant a copy of the background report along with a document that summarizes the individual's rights under FCRA.⁷⁴ This is important because it gives individuals an opportunity to dispute inaccurate information contained in the report, such as a conviction or an arrest that has been expunged.

After adverse action is taken against an applicant on the basis of a background report, additional information must be provided to the applicant, including notice that adverse action has been taken, contact information about the CRA that supplied the report, a statement that the CRA did not make the decision, and a notice of the individual's rights to dispute the information in the report.⁷⁵

Courts have interpreted FCRA's requirements favorably for individuals with expunged records.⁷⁶ In *Ridenour v. Multi-Color Corporation*, a CRA allegedly obtained criminal record information from a third party, and did not itself review courthouse records or attempt to verify the completeness or current status of the information before furnishing the record to an employer via a background report.⁷⁷ The information contained incomplete and inaccurate reports about a prior conviction, which the CRA then included in the consumer report it submitted to the employer.⁷⁸ The court held that the plaintiff sufficiently alleged a violation of FCRA's public records disclosure provision in § 1681k(a), which allowed him to survive the defendant's

⁷¹ Carlin & Frick, *supra* note 10, at 113.

⁷² *Id.* at 135.

⁷³ 15 U.S.C.A. § 1681c(a) (2006).

⁷⁴ Carlin & Frick, *supra* note 10, at 124–25.

⁷⁵ *Id.* at 125.

⁷⁶ *See infra* notes 77–82.

⁷⁷ 147 F. Supp. 3d 452 (E.D. Va. 2015).

⁷⁸ *Id.* at 458.

motion to dismiss.⁷⁹

Similarly, in *Haley v. Talentwise*, criminal charges against a consumer (which were ultimately dismissed) that were more than seven years old were included in a consumer report sent to the consumer's employer.⁸⁰ The report also included misinformation by stating in one place that the charges were dismissed, but in another that they had resulted in a conviction.⁸¹ The court denied the defendant's motion to dismiss, holding instead that the plaintiff had sufficiently pled in his complaint that CRA violated FCRA by not following reasonable procedures to ensure the maximum possible accuracy of the information.⁸²

2. Limitations of FCRA's Protections

Although FCRA can benefit individuals with old arrests or expunged records in certain states, it is limited in its protection for three reasons: it can only regulate information provided by credit reporting agencies, it is inequitably applied due to variations in state expungement laws, and conviction records can remain on background check reports indefinitely.⁸³

FCRA is too narrow in scope since it can only regulate the information provided to prospective employers by organizations that are considered CRAs.⁸⁴ CRAs consist solely of persons or companies that regularly engage in the practice of assembling or evaluating information for the purpose of furnishing consumer reports to third parties that will be used as a factor in establishing the consumer's eligibility for employment, credit, or insurance purposes.⁸⁵ Thus, FCRA does not do anything to limit employers' access to information about criminal records discovered on the internet since news organizations, social media sites, and blog posts cannot reasonably be considered CRAs. Therefore, even with FCRA in place, there is no "provision which prohibits a private individual . . . from disseminating information of any arrest, indictment, trial, or conviction of an individual whose record has been expunged."⁸⁶ With the current prevalence of online information available to employers, FCRA is too narrow in its protections. The statute, while a partial remedy, does not adequately ensure that hiring managers will not learn about an individual's criminal history and consider

⁷⁹ *Id.* at 457–58.

⁸⁰ 9 F. Supp. 3d 1188, 1190–91 (W.D. Wash. 2014).

⁸¹ *Id.*

⁸² *Id.* at 1192–93.

⁸³ See *infra* notes 84–90.

⁸⁴ 15 U.S.C.A. § 1681a(d)(1); 15 U.S.C.A. § 1681(b) (2006).

⁸⁵ 15 U.S.C.A. §§ 1681a(d), (f) (2006).

⁸⁶ *Shifflet v. Thomson Newspapers (Ohio), Inc.*, 431 N.E.2d 1014, 1018 (Ohio 1982).

it when making hiring decisions.

A second reason why FCRA is limited in its scope is that expungement statutes vary from state to state. Because some states do not entirely erase expunged convictions from their records, CRAs in these states can legally report expunged information on official background checks.⁸⁷ This results in an inequitable application of FCRA's protections, thereby causing greater employment discrimination against certain individuals based merely on the state where they reside.⁸⁸

A third reason why FCRA is limited in its scope is because—although expunged arrests older than seven years must be excluded from official background reports—conviction records can remain on the reports indefinitely.⁸⁹ So even if an individual was convicted of a crime decades ago during their youth, the conviction record can legally still appear on an official background report provided to an employer by a CRA.⁹⁰

FCRA is an insufficient remedy for persons with criminal records due to its narrow and inequitable protections.

C. TITLE VII LITIGATION IN THE CONTEXT OF CRIMINAL RECORDS

1. Background

Title VII of the landmark Civil Rights Act of 1964 protects certain classes of individuals from employment discrimination.⁹¹ Under Title VII, an individual can pursue employment discrimination claims on the basis of criminal history using one of two strategies. The first is to assert a disparate impact claim.⁹² Indeed, some plaintiffs with criminal records asserted disparate impact claims and experienced success in the 1970s and 1980s.⁹³ But this strategy is ultimately flawed because it only applies to minorities—rather than all individuals with criminal records—facing employment discrimination, and is generally unsuccessful today because of changes in the attitudes of judges towards plaintiffs with criminal histories and the higher

⁸⁷ *Id.* at 1084; *see also* Carlin & Frick, *supra* note 10, at 136 n.162. (explaining that Washington and Minnesota are two examples of states where expunged convictions are still allowed to appear on background reports).

⁸⁸ *See* Carlin & Frick, *supra* note 10, at 136 n.162.

⁸⁹ 15 U.S.C.A. § 1681c(a)(5) (2006).

⁹⁰ 15 U.S.C.A. § 1681c (2006).

⁹¹ 42 U.S.C. § 2000e-2(a)(1) (2006). Title VII protects individuals against employment discrimination on the bases of race, color, national origin, sex, and religion. *See* Carlin & Frick, *supra* note 10, at 141.

⁹² Carlin & Frick, *supra* note 10, at 142.

⁹³ *See infra* notes 106–113.

statistical requirements that judges now expect plaintiffs to meet.⁹⁴

An individual can also challenge employment discrimination on the basis of criminal history by asserting a mixed motives claim.⁹⁵ Some academics have proposed the use of mixed motives claims as an alternative to the generally unsuccessful disparate impact claims.⁹⁶ Mixed motive claims are a risky strategy for plaintiffs, however, because they have never been tested in court in this context, they only apply to minorities, and they only provide a narrow, limited remedy.⁹⁷ Thus, both strategies available under Title VII are flawed.

2. Disparate Impact Claims

a. Background

To make a disparate impact claim, a plaintiff must make a prima facie case by showing that a certain employment practice has an adverse impact on members of a protected group, usually through the use of statistical evidence.⁹⁸ The defendant employer can then rebut the prima facie case by showing that the employment practice is job-related for the position in question and consistent with business necessity.⁹⁹ If the employer is successful, the plaintiff can still prevail by showing that the employer's justification is pretextual.¹⁰⁰ In the context of criminal records, a violation requires that an employer's practice of screening applicants for criminal records disparately impacts a protected class without a business necessity.¹⁰¹

Courts have consistently held that convicted felons are not a protected class and that criminal history cannot form the basis of a Title VII claim.¹⁰²

⁹⁴ See Harwin, *supra* note 17, at 14–16. Judges have been more deferential to employers in recent years and have also required plaintiffs asserting disparate impact claims to provide more specific and accurate statistics supporting their claims.

⁹⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 18 (1991).

⁹⁶ See Harwin, *supra* note 17, at 16–21; see generally Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 115 (2010); Nina Kucharczyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-The-Box Legislation*, 85 FORDHAM L. REV. 2803, 2831–33 (2017).

⁹⁷ See Harwin, *supra* note 17, at 16–21.

⁹⁸ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339–40 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971).

⁹⁹ See *Griggs*, 401 U.S. at 431.

¹⁰⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973).

¹⁰¹ Carlin & Frick, *supra* note 10, at 141.

¹⁰² *Gillum v. Nassau Downs Reg'l Off Track Betting Corp.*, 357 F. Supp. 2d 564, 569

Although Title VII does not explicitly prohibit discrimination on the basis of criminal history, some plaintiffs have tried to pursue their discrimination claims indirectly by alleging a racially disparate impact of hiring practices based on criminal history.¹⁰³ Unsuccessful job candidates have argued that inquiries into an applicant's criminal history, while facially neutral and without explicit reference to race, end up disproportionately harming black and Hispanic job applicants.¹⁰⁴ Employers have usually defended against these types of challenges by claiming that although the hiring process may have reduced the number of minorities in the applicant pool, the hiring decisions were all job-related and justified by business necessity.¹⁰⁵

b. 1970s–1980s

During the 1970s and 1980s, disparate impact claims addressing employment discrimination against individuals with criminal records enjoyed some success. In *Gregory v. Litton Systems, Inc.*, the Ninth Circuit held that termination based on an arrest record had a disparate impact on black applicants, despite the plaintiff only providing general data on national arrest rates that showed blacks are arrested much more frequently than whites in proportion to their general population numbers.¹⁰⁶ Judges during the 1970s and 1980s were often more willing to accept broad, general data in disparate impact cases than judges today.¹⁰⁷

Additionally, courts during the '70s and '80s required a close match between policies disqualifying individuals with criminal records and the employers' claims of job relatedness and business necessity.¹⁰⁸ In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit held that to establish business necessity for a policy disqualifying all job applicants with criminal records, the company could not simply rely on generic justifications that

(E.D.N.Y. 2005); *Quick v. Runyon*, No. 96-CV-0474, 1997 WL 177858, at *1 (E.D.N.Y. Mar. 25, 1997).

¹⁰³ Harwin, *supra* note 17, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 472 F.2d 631, 632 (9th Cir. 1972).

¹⁰⁷ *See, e.g., Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1293–95 (8th Cir. 1975) (accepting national data on white and black conviction rates, in addition to the company's applicant data, which showed differences in the selection rates of candidates who applied for jobs with the employer); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (finding that plaintiff's broad, general data on national arrest rates was sufficient to establish that employer's termination of employees on the basis of arrest records had a disparate impact on black employees).

¹⁰⁸ Harwin, *supra* note 17, at 7.

employees with criminal records would harm the business.¹⁰⁹ The company argued that it was a business necessity to not hire applicants with criminal records to protect itself against the following: possible theft; potential liability for hiring individuals with “known violent tendencies”; “employment disruption caused by recidivism”; and the employment of a workforce lacking moral character.¹¹⁰ The court rejected these arguments and instead required the company to present empirical validation to substantiate its claims that hiring individuals with criminal convictions would harm the company.¹¹¹ This requirement of such a close nexus arguably helped plaintiffs to be more successful than they are today in Title VII litigation on this issue.¹¹² However, even during this era, the courts often upheld employers’ use of conviction records as a justification for not hiring applicants.¹¹³ Usually, the applicant was only successful in discrimination lawsuits if he or she argued against an employer’s policy or practice that discriminated against candidates on the basis of arrest records rather than conviction records. That likely reflected judges’ conscious or unconscious bias against plaintiffs with criminal histories.

c. Late 1980s–Present

Since the late 1980s, disparate impact claims alleging employment discrimination against applicants with criminal records have been much less successful.¹¹⁴ One reason for the high failure rate: over 50% of the cases are brought pro se.¹¹⁵ Many pro se plaintiffs suffer due to procedural defects or their inability to properly identify a theory of discrimination under Title VII.¹¹⁶

Even plaintiffs represented by counsel have had difficulty winning employment discrimination cases in recent years.¹¹⁷ Judges have become

¹⁰⁹ 523 F.2d at 1298.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Harwin, *supra* note 17, at 7–8.

¹¹³ *Id.* at 9.

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 12–13.

¹¹⁷ See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429 (2004) (finding that plaintiffs in employment discrimination cases are less likely to win than other plaintiffs and that employment discrimination cases settle less often than other types of lawsuits); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560 (2001) (showing that plaintiffs in employment discrimination cases often do not fare well in lower courts due to various biases affecting courts, with success rates of only 18.7% in bench

more reluctant to get involved in the he-said, she-said battles that employers and employees undertake to win their respective claims and defenses.¹¹⁸ Thus, over the past two decades, federal district and appellate judges have put in place a variety of substantive and procedural obstacles that make it more difficult for plaintiffs to prevail in employment discrimination cases.¹¹⁹ For instance, lower courts have consistently defied the Supreme Court's interpretation of pleading requirements under Rule 8 of the Federal Rules of Civil Procedure (FRCP).¹²⁰ Lower courts, particularly in employment discrimination cases, frequently impose heightened pleading requirements on plaintiffs in order for them to survive motions to dismiss.¹²¹ Some scholars have posited that these heightened requirements are due to courts' heavy workloads and judges' fears that frivolous employment discrimination suits would only further clog their dockets.¹²²

Some courts have used a "summary judgment-plus" standard to rid their schedules of frivolous employment discrimination suits.¹²³ This approach, which is used most notably by the Seventh Circuit, suggests that summary judgment is appropriate when the court decides that the plaintiff does not have a reasonable prospect of winning at trial.¹²⁴ The Seventh Circuit has admitted that its use of this summary judgment standard stems from its view that many Title VII claims are frivolous and that allowing them to move past the summary judgment stage would add to an already overburdened judiciary.¹²⁵ These procedural mechanisms severely limit plaintiffs' abilities to successfully litigate Title VII cases, including those related to criminal record discrimination. Recent studies show that plaintiffs win less than one-fifth of employment discrimination cases involving bench trials.¹²⁶ The even lower success rate for plaintiffs addressing the consideration of criminal records in hiring decisions may reflect a particular "distaste" for plaintiffs with criminal records, possibly due to the social stigma placed upon persons

trials, compared with success rates of 43.6% for insurance cases and 41.8% for personal injury cases); Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), <https://www.wsj.com/articles/SB123500883048618747>.

¹¹⁸ Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 482 (2008).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 543–51; see also D. Michael Henthorne, *Pleading Plausibility: Applying Twombly and Iqbal to Employment Litigation*, 52 No. 3 DRI for Def. 28 (2010).

¹²¹ Reeves, *supra* note 118, at 546.

¹²² *Id.* at 544–47.

¹²³ *Id.* at 551–52.

¹²⁴ *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989).

¹²⁵ Reeves, *supra* note 118, at 552–53.

¹²⁶ Harwin, *supra* note 17, at 13.

with criminal records in the United States.¹²⁷

Courts also defer to employers on job-relatedness and business necessity much more than they did in the past.¹²⁸ Furthermore, courts today usually require plaintiffs to present very detailed statistical evidence rather than the broad, general data that plaintiffs often used in the 1970s and 1980s.¹²⁹ These tendencies further hurt plaintiffs' odds of prevailing on a Title VII claim alleging employment discrimination because of criminal history.

3. *Mixed Motives Strategy*

Some scholars have proposed bringing a mixed motives claim under Title VII to target employers discriminating against applicants with a criminal history.¹³⁰ Title VII's mixed motive framework finds discrimination whenever an employer considers an impermissible factor, such as race, sex, or disability, when making an employment decision.¹³¹ If the plaintiff proves by a preponderance of the evidence that the employer took the impermissible factor into consideration, the employer can make a limited affirmative defense by alleging that it would have made the same decision even if it had not relied upon the illegitimate factor.¹³² However, the affirmative defense merely restricts the remedies available to the plaintiff to declaratory relief, injunctive relief, and attorney's fees; it does not eliminate liability.¹³³ In the context of criminal records, a mixed motive claim would allege that race was the impermissible factor upon which an employer relied. Some argue that this could be a useful framework because stereotypes linking race and criminality are "rampant," but this strategy is academic as of now; it has not yet been utilized in actual cases.¹³⁴

The mixed motives strategy has its shortcomings. First, it is only available for minorities with criminal records.¹³⁵ Also, this method has never been tested in court, so it is possible that judges would not be persuaded by

¹²⁷ *Id.*

¹²⁸ *Id.* at 14.

¹²⁹ *Id.* at 16.

¹³⁰ *Id.* at 20.

¹³¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243–44 (1989).

¹³² *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003).

¹³³ *Id.* at 94.

¹³⁴ Harwin, *supra* note 17, at 20–22.

¹³⁵ *Id.* at 18–19. This strategy primarily focuses on "how implicit bias regarding race figures into employers' consideration of minorities with criminal records." Because minorities tend to be arrested and convicted at much higher rates than white applicants, and these statistics in turn create racial biases or stereotypes in the minds of some employers, the mixed motives framework would be of little use to a white applicant whom an employer discriminated against based on his or her criminal history. *Id.*

it, especially considering their lack of sympathy for litigants with criminal histories and their tendency to defer to employers. Finally, if an employer successfully asserts an affirmative defense, the relief provided to plaintiffs is very limited; as such, many plaintiffs would likely not find the litigation process worth the time and effort given that the only remedies are declaratory relief, injunctive relief, and attorney's fees.¹³⁶

4. Title VII Protections are Insufficient

Because Title VII protection only works by virtue of claiming indirect racial discrimination, it only applies to minority job applicants. Although many individuals with criminal records in the U.S. today are minorities¹³⁷ and successful Title VII litigation could make a difference for many, a better solution would be one open to all individuals with a criminal record, regardless of race. This is essential to helping everyone with a criminal record facing employment discrimination and more effective than separate, race-dependent remedies.

Also, even if a solution was found for minorities with criminal records, neither mixed motives nor disparate impact claims are the optimal remedy given the aforementioned limitations. Therefore, Title VII does not provide adequate protection for persons with criminal records.

D. BAN THE BOX

"Ban the box" statutes refer to laws requiring companies to remove check boxes on job applications that inquire into the applicant's arrest or conviction record.¹³⁸ Advocates of "ban the box" statutes allege that getting rid of the box allows individuals with a criminal record to more easily find stable employment.¹³⁹ The idea is that absent any indication of criminal history, deserving applicants are more likely to get an interview, and ultimately a job, from a prospective employer who might have initially denied the application based on criminal history.

While this may seem like a beneficial policy at first blush, there are two

¹³⁶ 42 U.S.C. § 2000e-5(g)(2)(B) (1995). In mixed motives cases, the court may grant declaratory relief, injunctive relief, and attorney's fees and costs but shall not award damages.

¹³⁷ Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html>. In 2010, minorities made up 59% of the incarcerated population in the United States. *Id.* Thus, upon release, minorities will make up a significant portion of individuals with criminal records in the country.

¹³⁸ See generally Robert J. Nobile & Kendra K. Paul, *Increasing Trend in "Ban the Box" Laws for Criminal Background Checks*, 255 EMP. L. COUNSELOR NL 2 (Nov. 2011).

¹³⁹ *Id.*

flaws with “ban the box” statutes. First, “ban the box” statutes increase racial discrimination, especially amongst minorities who do not have criminal records. Second, the statutes fail to adequately protect applicants with criminal records at later stages in the interview process.

Studies have shown that “ban the box” statutes significantly increase racial discrimination in the interview callback phase of the hiring process, especially amongst individuals who do not have a criminal record.¹⁴⁰ Some researchers have attributed this increase in racial discrimination to employers using race as a proxy for determining criminal history in the absence of the box.¹⁴¹ Thus, banning the box may benefit black men with criminal records at the expense of black men without records who, without the box, can no longer easily signal that they do not have a criminal record.¹⁴² Banning the box therefore ends up most positively impacting white men with a criminal record, “at the expense of black men without [criminal] records.”¹⁴³ This is a troubling implication since it hurts members of a protected class.

In addition to increased racial discrimination in the initial phase of the hiring process, employers can usually still inquire about convictions either after selecting the applicant for an interview or after making a conditional offer of employment.¹⁴⁴ Therefore, banning the box does not ensure that people with criminal records will be more likely to get jobs, only that they are more likely to get first-round interviews.¹⁴⁵

Hawaii has a different “ban the box” model than most other states.¹⁴⁶ Hawaii has banned the box on job applications so that no employer can inquire into an applicant’s criminal record until after a conditional offer of employment has been made.¹⁴⁷ Even if the employer subsequently discovers a criminal history at that point in time, it can only consider a conviction record which bears a rational relationship to the duties of the position applied for.¹⁴⁸ But this model is still flawed because it does not solve the issue of increased racial discrimination in the initial callback phase. Employers might

¹⁴⁰ Alex Tabarrok, *Ban the Box or Require the Box?*, MARGINAL REVOLUTION (June 20, 2016), <http://marginalrevolution.com/marginalrevolution/2016/06/ban-the-box-or-require-the-box.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

¹⁴⁶ Nobile & Paul, *supra* note 138, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

still fear wasting time and effort interviewing and vetting a candidate who has a criminal record, which might lead them to use race as a proxy for determining an applicant's criminal history. So while Hawaii's model is an improvement from "ban the box" statutes without the rational relationship to job duties test, it still falls short of an ideal solution because of possible increased racial discrimination in the initial interview process.

II. PROPOSED ANTI-DISCRIMINATION STATUTE

A. INTRODUCTION

In order to provide individuals with criminal records with a universal and successful remedy against employment discrimination, a statute that explicitly bars employment discrimination based on criminal history needs to be adopted. This Section proposes a model for an anti-discrimination statute. The statute must adopt the EEOC's approach to discrimination against applicants with criminal histories, add a requirement that employers list disqualifying offenses up front, and implement a time limit past which employers cannot consider old offenses.

Next, this Section discusses negligent hiring claims to address fears that employers or the public may have as a result of this proposed statute. It explains how implementing this statute and increasing persons with criminal records within the workforce would not result in an increased number of negligent hiring claims or pose a risk to public safety.

The proposed statute would avoid the deficiencies of previous approaches. For example, the primary issue with expungement statutes and FCRA protections is that they do not protect against employers finding adverse criminal information online. The proposed statute would avoid that problem since the protection does not depend on keeping the criminal history a secret. Instead, applicants could be up front and transparent about their criminal history without fear of negative employment consequences.

While FCRA is limited in its protections in part because convictions older than seven years can legally remain on the background check reports, the proposed statute would implement a time limit barring consideration of convictions or arrests older than seven years so that individuals who have not committed a crime for many years can benefit from improved employment prospects.

Another issue with Title VII protections is that they do not protect non-minorities. That would not be an issue with the proposed statute because it would not require any connection to race or any other protected classification. Instead, it would forbid discrimination against criminal history in and of itself, regardless of an applicant's race.

Finally, the proposed statute would avoid the issues brought about by “ban the box” laws. The proposed statute will not result in increased employment discrimination against black men because applicants will have the opportunity to be straightforward regarding their criminal history. Nor will it result in hiring discrimination later on in the interview process because employers will be forced to list disqualifying offenses upfront in the job posting. Thus, applicants with convictions for those offenses would not spend unnecessary time applying for the job and applicants who may have committed other non-disqualifying offenses need not worry because the employer would be forbidden from discriminating against them in any of the interview rounds.

There is reason to be hopeful that such a statute could be passed with bipartisan support given the current views on mass incarceration and collateral consequences of both parties. While this statute may initially seem like it could not garner bipartisan support, economic incentives and public awareness of collateral consequences could pressure legislators to vote in favor of it.¹⁴⁹ The hope would be that politicians could learn from the passage of other anti-discrimination statutes, such as the Americans with Disabilities Act (ADA), to find ways to work together across the aisle. This Comment concludes by discussing how the statute could appeal to politicians on both sides of the aisle and how the ADA could serve as a model for passing anti-discrimination legislation with bipartisan support.

B. THE EEOC’S APPROACH TO EMPLOYMENT DISCRIMINATION ON THE BASIS OF CRIMINAL RECORDS

The EEOC has “adopted a categorical rule that it is unlawful, without business necessity, to disqualify job candidates based on criminal records.”¹⁵⁰ As early as the 1980s, the EEOC recognized the disparate racial impact of employers’ hiring policies regarding applicants with criminal records, which led to the adoption of policies favorable to plaintiffs.¹⁵¹ If an individual has a criminal record, the EEOC used to require employers to first “determine

¹⁴⁹ See Jonathan Easley, *GOP Contenders Embrace Criminal Justice Reform*, HILL (July 15, 2015), <http://thehill.com/campaign-issues/248069-gop-contenders-embrace-criminal-justice-reform>. Governor Rick Perry cited ex-offenders’ difficulties to obtain employment as a reason for concern and sought to reduce collateral consequences for those individuals. Senator Rand Paul similarly hoped to increase employment amongst ex-offenders by reforming expungement and sealing statutes.

¹⁵⁰ Harwin, *supra* note 17, at 10.

¹⁵¹ *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, U.S. EQUAL EMP OPPORTUNITY COMM’N (July 29, 1987), <https://www.eeoc.gov/policy/docs/convict2.html>; Harwin, *supra* note 17, at 9–10.

whether the conviction was job-related.”¹⁵² Then, the employer had “to determine whether the conviction would affect the candidate’s ability to safely perform the job.”¹⁵³ Employers had to consider factors like number of offenses the applicant had committed, the circumstances of each one, the time since the conviction occurred, the individual’s employment history, and the rehabilitation efforts of the individual.¹⁵⁴ The EEOC simplified the process in 1985; now, employers must simply engage in a “holistic inquiry” that considers “the nature and gravity of the offense, the time lapsed since conviction, and the nature of the job.”¹⁵⁵

The EEOC still uses the holistic inquiry today to prohibit discrimination against job applicants with convictions wholly unrelated to the job in question.¹⁵⁶ The switch to the holistic inquiry had the potential to harm applicants with criminal records since it eliminated the threshold requirement of job-relatedness.¹⁵⁷ However, the EEOC “rigorously applied” this holistic test and usually looked for job-relatedness when evaluating the nature of the offense and the responsibilities of the job.¹⁵⁸ For instance, the EEOC prevented “employers from considering a conviction for possession of an unregistered firearm when hiring a factory worker;¹⁵⁹ a hit-and-run conviction when hiring a kitchen worker;¹⁶⁰ or a murder conviction when hiring a crane operator.”¹⁶¹ The EEOC’s focus on the nexus between the particular offense and the duties of the job, even under the holistic analysis, shows how essential the job-relatedness function is when evaluating employment discrimination against applicants with criminal records. Thus, the proposed statute includes a job-relatedness requirement, but goes further than the EEOC’s guidelines by forcing employers to list disqualifying offenses prior to posting job openings. This forces employers to contemplate job-relatedness proactively in order to avoid finding some sort of attenuated connection between an applicant’s offense and the duties of the job after interviewing an applicant.

Unlike Title VII’s lack of protections for persons with criminal records, the EEOC’s guideline makes these individuals an inherently protected class. But “the agency’s influence outside its own adjudicative proceedings [is]

¹⁵² Harwin, *supra* note 17, at 11.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

limited.”¹⁶² Courts defer to the EEOC’s decisions only insofar as they find the decisions to be persuasive.¹⁶³ In *Gilbert v. General Electric Co.*, the Supreme Court explained that the weight accorded to the EEOC’s judgment in a particular case depends on the thoroughness of the judgment, the quality of its reasoning, and its overall persuasiveness.¹⁶⁴ Furthermore, *Gilbert* explained that since Congress “did not confer upon the EEOC the authority to promulgate rules or regulations” pursuant to Title VII, courts may accord less weight to EEOC guidelines than to the administrative regulations that Congress has declared have the force of law.¹⁶⁵ This is why the EEOC’s approach should be codified—so that it can have the full force of law and more positively impact litigants.

C. DISQUALIFYING OFFENSES

Codifying the EEOC’s guidelines would not force employers to hire individuals with records directly related to the job in question. The proposed anti-discrimination statute would allow an exception for discrimination against those who have committed a crime that is substantially related to the tasks necessary to perform a given job. However, the list of disqualifying offenses must be contemplated by the employer prior to posting the job opening to the general public. A list of disqualifying offenses must be published at the time the position is advertised for the sake of transparency and fairness. This would protect applicants from wasting their time applying for a position they are not qualified to obtain. It would also protect against employers retroactively coming up with ways that the job is related to an offense based on the record of a certain job applicant. This avoids one issue brought about by “ban the box” statutes: discrimination on the basis of criminal history in later interview rounds. If an applicant knew that he would be disqualified from a job based on his criminal record, he could avoid wasting his time researching the company, applying for the position, and traveling to the interview(s). Moreover, it protects against applicants getting embarrassed or discouraged when they are denied the position based solely on their criminal past. Thus, by requiring a list of disqualifying offenses, the statute can limit harm to human dignity and save time.

D. TIME LIMIT

A time component eliminating all convictions (even those which would otherwise be disqualifying offenses) occurring before a certain date from

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 429 U.S. 125, 142 (1976).

¹⁶⁵ *Id.* at 141.

consideration is essential. The statute would build off of FCRA's prohibition on including arrests in criminal background reports that are more than seven years old. The proposed statute would be superior to FCRA in that it would also prevent employers from considering conviction records that are older than seven years, rather than just arrests. This would resolve FCRA's failure to protect individuals with old convictions on their record. Such a provision would be particularly helpful in protecting applicants who committed youthful indiscretions or those who have been fully rehabilitated and crime-free for many years.¹⁶⁶

E. NEGLIGENT HIRING CONCERNS

Many employers fear hiring an employee with a criminal record out of concern that the individual will re-offend while on the job, making the employer civilly liable for negligent hiring.¹⁶⁷ Negligent hiring is a "cause of action that holds employers civilly liable for the tortious conduct of an employee."¹⁶⁸ The "[l]iability is based on the employer's negligence in selecting . . . an employee who was unfit for [his or her] position and whose unfitness created 'an unreasonable risk of harm to others.'"¹⁶⁹ Employers need not be concerned about negligent hiring claims under the proposed statute for four reasons.

First, individuals with criminal records are statistically unlikely to commit crimes while on the job.¹⁷⁰ Even employees with recent criminal records generally are not terminated for disciplinary problems.¹⁷¹ The statistics improve with time. "[S]tudies have suggested that after a few years, a person with a criminal record is less likely than persons without a record to commit crimes."¹⁷² After seven years without committing any offenses, there is little to no difference in the risk of future offending between those with a

¹⁶⁶ See, e.g., *Miller v. Alabama*, 567 U.S. 460 (2012) (explaining that crimes committed during youth are less indicative of deep-seated criminality because children who commit crimes often take greater risks than adults due to immaturity, a diminished sense of responsibility, and more vulnerability to negative influences).

¹⁶⁷ Stephen P. Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 173 (2011).

¹⁶⁸ *Id.* at 147.

¹⁶⁹ *Id.* at 151.

¹⁷⁰ See, e.g., Carlin & Frick, *supra* note 10, at 115. A study conducted by Johns Hopkins Hospital workforce found that employees with criminal records had higher retention rates than those without a record and even those who *were* fired, were not let go in response to disciplinary problems or crimes committed on the job.

¹⁷¹ *Id.*

¹⁷² *Id.* at 119.

criminal record and those without one.¹⁷³ This further strengthens the proposal that employers should not be able to consider convictions that are more than seven years old.

Second, employers can proactively protect themselves by receiving insurance in the form of bonds from the federal government.¹⁷⁴ Bonds are available as a hiring incentive tool through the U.S. Department of Labor's Federal Bonding Program (FBP).¹⁷⁵ The bonds are available free of charge as an incentive to hire applicants who were previously incarcerated, who were in recovery from substance use disorders, or who have other backgrounds that can pose barriers to obtaining gainful employment. Employers can cash in the bonds if an employee causes a loss to the employer such as theft, larceny, forgery, or embezzlement.¹⁷⁶ The bonds also cover liability for lawsuits alleging negligent hiring or retention.¹⁷⁷

Third, negligent hiring claims are difficult for plaintiffs to prove. Hiring someone who has a felony record may not mean the employer is liable for negligent hiring. The high standard that plaintiffs must meet is as follows: "1) the employer must owe a duty of care to the injured person; 2) the employer must breach the duty of care; and 3) the employer's action must have caused the injury."¹⁷⁸ In addition, the injury must be actual or threatened physical injury.¹⁷⁹ An employer will only have a duty of care if it was foreseeable that the employee would be a threat to the public.¹⁸⁰ Even a conviction for a violent felony is not evidence that a person is a threat to public safety for negligent hiring purposes unless the job would allow the applicant access to people in "vulnerable situations."¹⁸¹ By limiting such an employee's interaction with the public, an employer can lower its risk of being found negligent.

F. POLITICAL REALITIES: PASSING THE PROPOSED STATUTE IN A CONSERVATIVE POLITICAL CLIMATE

This Comment next discusses the political realities of passing the proposed statute into law. Many aspects of the statute and the current political climate make it eligible for Congressional support. Legislators

¹⁷³ Shepard, *supra* note 167, at 178.

¹⁷⁴ Carlin & Frick, *supra* note 10, at 118.

¹⁷⁵ *About the FBP*, THE FED. BONDING PROGRAM, <http://bonds4jobs.com/about-us> (last visited Feb. 8, 2017).

¹⁷⁶ Carlin & Frick, *supra* note 10, at 118.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 119.

¹⁸¹ *Id.*

should look to the ADA as a model for passing an anti-discrimination statute with bipartisan support.

1. Economics

The proposed statute would appeal to legislators from an economic perspective. By reducing barriers to employment, the law would enable more people to work who would otherwise be unemployed and dependent on government services.¹⁸² This could lead to a diversion of public benefits to other sources or a reduction in taxes.¹⁸³ Additionally, by allowing individuals with criminal records to more fully re-integrate into society, recidivism rates will likely drop.¹⁸⁴ This would lower the cost spent on prison systems and increase public safety.

2. Current Political Climate

The current political climate would likely lead politicians to feel that they could support the bill without facing negative backlash. Even many traditionally conservative states, like Texas, Georgia, and Alabama, have

¹⁸² See Matt Phillips & Kathleen Caulderwood, *Locked Up, Then Locked Out*, VICE NEWS (Jan. 5, 2017), <https://news.vice.com/story/criminal-records-are-keeping-millions-of-men-out-of-the-workforce-and-its-hurting-the-economy>. Unemployment is high amongst ex-offenders due in large part to concerns that employers have about hiring ex-offenders. In a 2003 survey of California businesses, 71% said they probably or definitely would not hire an applicant with a criminal record. *Id.*; see also John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 10 CTR. FOR ECON. AND POL'Y RES. (Nov. 2010) (stating “[o]nly about 40% of employers would ‘definitely’ or ‘probably’ hire applicants with criminal records, especially for jobs that involve dealing with customers or handling money.”); Nathalie Baptiste, *After Incarceration, What Next?*, AM. PROSPECT (Jan. 26, 2016), <http://prospect.org/article/after-incarceration-what-next>. “Approximately 60 percent of ex-offenders remain unemployed one year their release.” *Id.*

¹⁸³ See Phillips & Caulderwood, *supra* note 182. A 2014 study conducted by the Center for Economic and Policy research estimated the economic cost of unemployed ex-offenders to be as much as \$87 billion, which is roughly half a percentage point of GDP. See Cherie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, CTR. FOR ECON. AND POL'Y RES. (June 2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5>.

¹⁸⁴ Stephen Tripodi et al., *Is Employment Associated with Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, FL. ST. UNIV. LIB. 10–11 (2010). In the authors’ study, obtaining employment upon release from prison was associated with a reduction in recidivism. See also Caitlin Curley, *Denying Employment to Ex-Offenders Increases Recidivism Rates*, GENFKD (Mar. 17, 2017), <http://www.genfkd.org/denying-employment-ex-offenders-increases-recidivism-rates>. A five-year study conducted by Indiana’s Department of Corrections found that an offender’s post-release employment was “significantly and statistically correlated with recidivism, regardless of the offender’s classification.” *Id.*

embraced criminal justice reforms.¹⁸⁵ In his inaugural speech in 2015, Republican Governor Nathan Deal of Georgia said that “an ex-con with no hope of gainful employment is a danger to us all,”¹⁸⁶ indicating that conservative politicians could be open to legal changes that ease the burden on formerly incarcerated persons’ inabilities to find employment. The Heritage Foundation, a leading conservative think tank, has a strong stance on collateral consequences.¹⁸⁷ It has published information detailing the harms of collateral consequences on individuals with criminal records, particularly regarding employment opportunities.¹⁸⁸ The organization advises legislators to “reassess existing collateral consequences to ensure that, rather than merely being imposed as an additional punishment, they truly make sense from a public safety standpoint.”¹⁸⁹ Thus, given the recent support for criminal justice and collateral consequences reforms, legislators would likely feel comfortable voting in favor of the proposed statute.

3. *The ADA as a Model*

Politicians should use the ADA as a model for how to garner bipartisan support for an anti-discrimination statute. In the context of the ADA, legislators were able to work across the aisle for the sake of the greater good.¹⁹⁰ Although it may seem that disability rights are less controversial than rights for persons with criminal records, there was a great deal of disagreement over the passage of the ADA in the late 1980s.¹⁹¹ Critics claimed that individuals with disabilities were being accommodated unnecessarily and that the ADA caused an undue regulatory and economic burden on businesses.¹⁹² Despite this initial resistance by some conservative politicians, the two major parties were able to work together to pass the ADA and protect a minority population from harmful discrimination. The bill was

¹⁸⁵ John G. Malcolm, *Why Conservative Governors are Embracing Criminal Justice Reform*, MEDIUM (Mar. 4, 2016), <https://medium.com/@heritage/why-conservative-governors-are-embracing-criminal-justice-reform-68b7bd85cc1b#yjjd7v192>.

¹⁸⁶ *Id.*

¹⁸⁷ John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, HERITAGE FOUND. (Mar. 7, 2017), <http://www.heritage.org/crime-and-justice/report/collateral-consequences-protecting-public-safety-or-encouraging-recidivism>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Susan Milligan, *Bad Manners, Worse Lawmaking*, U.S. NEWS (July 27, 2015), <https://www.usnews.com/opinion/blogs/susan-milligan/2015/07/27/25-years-ago-the-americans-with-disabilities-act-was-a-bipartisan-triumph>.

¹⁹¹ *History of Bipartisanship*, BIPARTISAN POL’Y CTR., <https://bipartisanpolicy.org/history-of-bipartisanship-2/> (last visited Sept. 23, 2017).

¹⁹² *Id.*

initially proposed by Reagan appointees in the National Council on Disability, sponsored by a Republican in the Senate and a Democrat in the House, passed by a Democrat-controlled Senate and House, and supported and signed into law by Republican President George H.W. Bush.¹⁹³

Prior to the passage of the ADA, individuals with disabilities were routinely denied rights that most members of society take for granted, such as the right to vote, the ability to obtain a driver's license, and equal employment opportunities.¹⁹⁴ Similarly, convicted felons are often disenfranchised,¹⁹⁵ cannot get a driver's license,¹⁹⁶ and face tremendous employment obstacles.¹⁹⁷ Since the proposed statute is an anti-discrimination statute designed to protect a vulnerable population of society, using the ADA as a model for bipartisan support would best ensure success in Congress. Legislators could use the ADA as a model by reaching across the aisle and uniting to better the lives of persons with criminal records who, like individuals with disabilities, are a stigmatized population that needs help securing meaningful employment.

CONCLUSION

Persons with criminal records lack an adequate remedy to ensure equal employment opportunities. This results in rampant employment discrimination, leading to higher rates of recidivism and greater taxpayer costs.¹⁹⁸ It also leads to a lower quality of life for individuals with criminal records grappling with unemployment or working in positions for which they are overqualified.¹⁹⁹ In a country with a "mass criminalization" problem,²⁰⁰ employment discrimination against individuals with criminal records affects

¹⁹³ Robert L. Burgdorf, Jr., *Why I wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.198b0d2c6428.

¹⁹⁴ *Id.*

¹⁹⁵ Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT (Oct. 6, 2016), <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

¹⁹⁶ Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias, and Limits on Their Rights*, ABA J. (June 2013), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions.

¹⁹⁷ BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 3–4 (2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1.pdf. More than 60% of ex-offenders are unemployed one year after being released from prison. *Id.* Those who do find jobs earn 40% less pay annually. *Id.*

¹⁹⁸ See *supra* note 12, 14.

¹⁹⁹ See *supra* note 9.

²⁰⁰ Roberts, *supra* note 8, at 325.

a large number of people and, in turn, has significant societal impacts.

A new remedy must be adopted to improve the employment prospects of individuals with criminal records. An explicit anti-discrimination statute should be adopted that bans discrimination in the employment context against individuals based on the existence of a criminal record. This Comment has advocated for the adoption of the EEOC's rule that it be unlawful, without business necessity, to disqualify job candidates based on criminal records. It has also discussed how businesses can mitigate their liability risks for negligent hiring to alleviate any fears that hiring managers may have about employing persons with criminal records. This remedy proves superior to other current options because it is universal, fair, and avoids the issue of employers finding out about criminal records through the Internet or media. Individuals could take comfort in their honesty on job applications regarding their criminal history, without worrying about the stigma associated with a criminal past. They would also not waste time applying to jobs for which they would be unqualified due to their criminal past. The increased transparency and decreased discrimination would result in greater workplace diversity, improved employment chances for persons with criminal records, less recidivism, and lower costs to taxpayers in the form of unemployment benefits, welfare, and incarceration fees.

Since the current remedies are insufficient, society as a whole would benefit from a statute banning employment discrimination against persons with criminal records.

