

2015

Civil Disabilities in An Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring

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**CIVIL DISABILITIES IN AN ERA OF DIMINISHING
PRIVACY: A DISABILITY APPROACH FOR THE
USE OF CRIMINAL RECORDS IN HIRING**

*Andrew Elmore**

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INTRODUCTION

Long after a criminal act has occurred, the disposition entered, and the penalty imposed, the criminal record remains. It is a stigma to overcome anytime a person with a criminal conviction needs a job,¹ a loan, or an apartment.² A criminal record often penalizes people with criminal records far beyond the sentence envisioned by a judge, result-

1. Employers have a strong aversion to hiring applicants with criminal records. “Surveys find that 60 to 70 percent of employers would not knowingly hire [a person with a criminal conviction.]” DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 34 (2007).

2. Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity To Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 275–76 (2009); see also Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 972–78 (2013).

ing in severe postincarceration deterioration of health, chronic unemployment, and disruption of family and community networks.³ It is a *civil disability*, a state-imposed stigma that can serve as a lawful basis to discriminate. It often never disappears.

The United States has the largest prison population in the world. Nearly seven million individuals are under the supervision of adult correctional systems; there are over two million people in prison and jail in the United States, or approximately 1 in every 100 American adults.⁴ In the U.S., there are 70 million people with criminal records.⁵ The daunting challenge facing policymakers contemplating how to reintegrate released prisoners into society⁶ has been intensified by the mass proliferation of criminal records⁷ and their wide availability to anyone with an Internet connection.⁸

People with a criminal conviction suffer from poor employment outcomes and are far more likely to live in poverty than comparable individuals who were never incarcerated.⁹ African-American communities, already laboring against high poverty rates, shoulder the greatest burden from the collateral consequences of incarceration. Nearly one in three adult black males without a high school degree is incarcerated,¹⁰ and one-fifth of African-Americans live in poverty because of a previous incarceration.¹¹

Steady, meaningful employment is a key strategy to decelerate the revolving door that keeps prisoners incarcerated. One-and-a-half mil-

3. John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1050–53 (2009).

4. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2 tbl.1 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4843> (reporting correctional population data from 2000 to 2012).

5. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, at 13 tbl.25 (2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

6. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 8–9 (2010) [hereinafter COLLATERAL COSTS].

7. "In 2006, nearly 81 million criminal records were on file in the states, 74 million of which were in automated databases. Another 14 million arrests are recorded every year." Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, NAT'L INST. JUST. J., June 2009, at 10, 10.

8. Brad Stone, *If You Run a Red Light, Will Everyone Know?*, N.Y. TIMES, Aug. 3, 2008, at 4 (describing a Web site that provides criminal record information without cost).

9. After a criminal conviction, persons have a higher incidence of joblessness and are often shunted into secondary, informal, and less secure labor markets, such that people "with prison records are estimated to earn 30 to 40 percent less each year" than people of the same gender, race, age, and educational background. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 120–25 (2006).

10. COLLATERAL COSTS, *supra* note 6, at 8.

11. WESTERN, *supra* note 9, at 127.

lion Americans are released annually from state and federal prisons.¹² While nearly half of these released prisoners are rearrested within a year,¹³ prisoners with steady employment have fewer interactions with the criminal justice system.¹⁴ In the words of Devah Pager, “When [people with criminal records] are employed, they have less reason to engage in crime; they impose fewer burdens on the families and communities that support them; and if they desist from crime, they impose fewer costs on the taxpayers who would otherwise fund their reincarceration.”¹⁵

The large and increasing flow of people with criminal records out of incarceration, the pervasive joblessness of people with criminal records, and its economic consequence for their families, particularly in African-American communities, and the societal benefit of lowering recidivism, require a reexamination of policies intended to assist people with criminal records to successfully reintegrate into mainstream society. With the burgeoning postincarceration population, there has been an increase in legislative and scholarly interest in policies that increase societal welfare by successfully reintegrating released prisoners into society, or “reentry.”¹⁶ In 2012, the Equal Employment Opportunity Commission (EEOC) issued new guidance setting forth clear standards and best practices by which employers should conduct valid risk assessments before rejecting applicants because of a criminal record history,¹⁷ and has brought a series of cases

12. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 243920, PRISONERS IN 2012, TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1 fig.1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

13. PAGER, *supra* note 1, at 127.

14. David F. Weiman, *Barriers to Prisoners' Reentry into the Labor Market and the Social Costs of Recidivism*, 74 SOC. RES. 575, 577 (2007); see also Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 195 (2009); Karen E. Needels, *Go Directly to Jail and Do Not Collect? A Long-Term Study of Recidivism, Employment, and Earnings Patterns Among Prison Releasees*, 33 J. RES. IN CRIME & DELINQ. 471, 472 (1996). While a person with quality employment can also engage in criminal behavior if the opportunity arises, quality employment removes interest in and opportunity for criminal conduct over time. See Christopher Uggen & Melissa Thompson, *The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person Changes in Drug Use and Illegal Earnings*, 109 AM. J. SOC. 146, 147–50 (2003).

15. PAGER, *supra* note 1, at 26.

16. One commentator describes reentry as a realignment of the traditional rehabilitation goal of criminal justice, “not as a way to improve the individual offender for his or her own sake, but rather as a way to improve public safety for all of society.” Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL. 416, 419 (2009).

17. EEOC, No. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter EEOC ARREST AND CONVICTION GUIDANCE].

against employers with restrictive background check policies.¹⁸ Propelled by a nationwide “Ban the Box” movement,¹⁹ over 100 states and municipalities regulate employer inquires about an applicant’s criminal record history to limit the types of criminal record histories that can be used for employment purposes and to prohibit certain types of conviction-based disqualifications.²⁰

Reentry scholarship offers valuable critical analyses of the various approaches to regulate the use of criminal convictions in hiring, but typically do not stray from criticism of Title VII disparate impact jurisprudence and Ban the Box laws.²¹ In recommending new approaches, commentators have primarily sought to address employer concerns that background check restrictions will court negligent hiring claims.²² But, despite the fact that Ban the Box statutes take a partial step toward the procedural protections of the Americans with Disabilities Act (ADA), reentry scholarship has only recently considered the applicability of disability protections to people with civil disabilities, including criminal convictions.²³

18. See, e.g., EEOC v. Freeman, 961 F. Supp. 2d 783, 785–86 (D. Md. 2013); Complaint at 1–2, EEOC v. DolGenCorp LLC, No. 1:13-cv-04307 (N.D. Ill. filed June 11, 2013), 2013 WL 3010490; Complaint at 1, EEOC v. BMW Mfg. Co., No. 7:13-cv-01583 (D.S.C. filed June 6, 2013), 2013 WL 3010489.

19. The “Ban the Box campaign” began in 2004 with the “goal of removing conviction-based discrimination from hiring decisions by preventing the initial inquiry on employment applications.” Aaron F. Nadich, Comment, *Ban the Box: An Employer’s Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 771–72 (2014); see also Jonathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 211–12 (2014) (“As one [Ban the Box] advocate has explained: ‘We’re not asking anyone to hire ex-felons. It’s about giving them the opportunity to interview with the employer, sell themselves and tell their own story.’”).

20. See generally NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2015) [hereinafter NELP BAN THE BOX REPORT].

21. See, e.g., Nadich, *supra* note 19, at 770, 807 (supporting Rhode Island’s Ban the Box law); Smith, *supra* note 19, at 216, 218 (criticizing Ban the Box laws and supporting EEOC Arrest and Conviction Guidance).

22. See, e.g., J. McGregor Smyth, Jr., *From Arrest to Reintegration, A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42, 51 (2009); Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender’s Employment Prospects*, 61 FLA. L. REV. 581, 582 (2009); Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 523–26 (2007).

23. Kimani Paul-Emile independently proposes a “Health Law Framework,” which would apply ADA protections by prohibiting prehire criminal record inquiries by employers and requiring reasonable accommodations of criminal record histories. Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 936–40 (2014). This Article agrees that these protections would represent an important improvement over the status quo, but also finds that their effectiveness

An evaluation of normative and legal frameworks to encourage the employment of people with criminal convictions is in order. While current approaches are likely to eliminate overbroad initial hiring screens, there remains the unfinished project of reintegrating persons with criminal convictions into the workforce. For this, policy tools are needed to discourage the misuse of irrelevant criminal convictions and to encourage a contextualized evaluation of criminal convictions and the fair consideration of applicants' qualifications separate from them.

This Article proposes a disability normative and legal framework as a useful approach to guide this analysis. Disability laws first consider the privacy interests implicated in medical inquiries. If a medical inquiry has little relevance in employment and is likely to be misused or misinterpreted, it may be shielded on privacy grounds. If medical inquiries are potentially relevant, then the procedural and substantive protections codified in the ADA serve the mutually supportive goals of debiasing employers predisposed to reject qualified applicants and encouraging contextualized evaluations of them. Applied to criminal records, ADA protections would guide a contextualized evaluation of an applicant's qualifications for the job, and of the workplace risk presented by a criminal conviction. As with some medical information, however, procedural and nexus protections alone may be insufficient to dissuade employers from denying applicants based on minor, distant convictions that do not present a workplace risk. This is particularly true given the lack of objective information about the predictive force of a past conviction. A disability approach would prohibit the use of irrelevant criminal convictions by sealing or expunging them. This approach is consistent with disability norms and would counteract the pervasive assumption that any criminal background is always an unreasonable risk to persons or property, particularly when the applicant is African-American.

This Article proceeds in five parts. Part I briefly summarizes the key features of a disability normative and legal framework that apply to hiring screens, taking personality tests and genetic screens as examples. It also introduces the analogy of criminal records as a civil disability in need of disability privacy and equal opportunity protections. Part II describes the growth of criminal record history as a dominant negative credential in hiring, and the impact of overbroad criminal record hiring screens in reducing employment opportunities for people with criminal records, particularly those who are African-Ameri-

depends on the other privacy and nexus protections discussed in this Article to reduce consideration of irrelevant records and promote the fair consideration of relevant ones.

can. Part III discusses the ways in which federal, state, and local governments have responded to the increasing use of civil disabilities as negative markers in employment applications. It then evaluates these regimes, finding that Title VII disparate impact challenges often face insurmountable litigation hurdles, and that many state protections apply a vague “reasonableness” standard to apply criminal record screens. It also finds that procedural protections in some jurisdictions do not go far enough in ensuring an individualized assessment of candidates, that there are few privacy protections, and that those protections that do exist are often easily evaded. Part IV proposes a disability framework that would restrict employer access to long-ago and minor convictions that do not predict future behavior by sealing or expunging these records, while permitting employers to review the criminal records of conditional employees that may predict future behavior, and to reject those conditional employees who present a genuine risk that cannot be accommodated. Part V addresses potential criticisms of this approach—namely, that limiting criminal record inquiries will perversely increase discrimination against African-Americans and that privacy protections will not succeed in restricting employer access to civil disabilities.

This Article concludes that a disability approach will facilitate the large-scale reintegration of people with minor or long-ago criminal convictions in the workplace, but may not improve employment outcomes for recently incarcerated people or people with repeat convictions who present a real workplace risk. The success of this approach for these candidates whose criminal history may indicate a genuine workplace risk will depend on further research into the relevance of criminal record histories in making valid assessments in employment. A greater understanding of the workplace risk that a criminal conviction presents will assist employers in fairly evaluating applicants with a criminal conviction and in making reasonable accommodations for them. It would also guide criminal justice agencies seeking to allocate incentives for employers who hire applicants whose criminal convictions signal the greatest workplace risk, and determining which criminal convictions are irrelevant and should be sealed or expunged.

II. DISABILITY DISCRIMINATION IN HIRING AND ITS APPLICATION TO CIVIL DISABILITIES

Disability laws and norms, which balance the privacy and anti-discrimination interests of people with physical and mental disabilities against legitimate employer interests in inquiring about them, is directly applicable to the employment discrimination experienced by

people with civil disabilities. Like physical and mental disabilities, which are “a product of social ordering”²⁴ independent from the medical impairment of a disability, civil disabilities, such as criminal convictions and poor credit histories, are not fixed or inevitable markers of inferiority. As described in the next Part, the relevance and use of criminal records in employment has grown over time with their mass proliferation. Just as physical and mental disabilities are “informed by anxieties and fears about the fragility of health and the stigma of difference,”²⁵ criminal records trigger fears about the applicant that are often grounded in the stigma of the record rather than its risk.

People with disabilities, medical and civil alike, share a dual interest in privacy and equal opportunity.²⁶ Unlike other forms of discrimination, in which intentional discrimination is almost always unlawful,²⁷ but like physical and mental disabilities, a civil disability may be a legitimate ground to exclude an applicant if the civil disability presents an unreasonable risk to the workplace. As with a disability framework, protections for persons with criminal convictions and other civil disabilities do not primarily seek to force employers to disregard them, but rather to consider them in their full context and to reintegrate people with civil disabilities into society despite them.

Disability legal protections are grounded in the constitutional right to privacy,²⁸ which is heightened when the information at issue is highly stigmatizing, of little relevance, or likely to be misinterpreted.²⁹

24. John F. Muller, *Disability, Ambivalence, and the Law*, 37 AM. J.L. & MED. 469, 470 (2011).

25. Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 96 (2008) (discussing the social model of disabilities).

26. Scott P. Kramer, Note, *Why Is the Company Asking About My Fear of Spiders? A New Look at Evaluating Whether an Employer-Provided Personality Test Constitutes a Medical Examination Under the ADA*, 2007 U. ILL. L. REV. 1279, 1290 (“The main purpose of the ADA’s stance on medical examinations is to ensure that a ‘hidden disability remains hidden.’”); see also Maureen E. Mulvihill, Note, *Karraker v. Rent-A-Center: Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening*, 37 LOY. U. CHI. L.J. 865, 906 (2006) (“Congress enacted the ADA to prevent employers from discovering [psychiatric] disabilities and then making adverse employment decisions based on stereotypes and generalizations associated with a mental disability.”).

27. There is rarely a “bona fide occupational qualification” (BFOQ) that would permit disparate treatment on the basis of race. 42 U.S.C. § 2000e-2(e) (2012). The EEOC interprets the BFOQ exception narrowly, see 29 C.F.R. § 1604.2(a)(1) (2014), as does the Supreme Court, see *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”).

28. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (stating that there is “no question that an employee’s medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protections”).

29. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269–70 (9th Cir. 1998) (holding that genetic testing by an employer without consent violates the constitutional right to privacy).

Where medical inquiries are potentially relevant, the Americans with Disabilities Act (ADA) “reinstitutionalize[s] the concept of employment qualification”³⁰ by separating an employer’s evaluation of an applicant’s qualifications to perform necessary job duties from the consideration of whether an applicant’s disability might require reasonable environmental adaptations. The ADA accomplishes this by imposing a *procedural* requirement that prohibits medical inquiries until after the employer decides whether the applicant is suitable for the job, and a *nexus* one, requiring that an adverse determination based on a disability is sufficiently related to the applicant’s inability to perform the job.³¹ Generally, an employer cannot engage in a pre-employment inquiry about “whether the job applicant has a disability or the severity of a disability,”³² but may inquire about whether an applicant is able to perform job-related functions.³³ For example, the employer is entitled to ask how the applicant can perform the necessary job-related duties with or without an accommodation.³⁴ Otherwise, it is a *per se* violation of the ADA to make pre-employment medical inquiries.³⁵ In contrast, once an employer makes a conditional offer, the ADA permits the employer to make post-hire medical inquiries. This includes requiring a medical examination as a condi-

30. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 481 (2000).

31. 42 U.S.C. § 12112(d)(2)(A), (B); *see also* 29 C.F.R. § 1630.14(a), (c).

32. *Susie v. Apple Tree Preschool & Child Care Ctr., Inc.*, 866 F. Supp. 390, 397 (N.D. Iowa 1994); *see also Barnes v. Cochran*, 944 F. Supp. 897, 904 (S.D. Fla. 1996) (finding that “the ADA prohibits pre-offer ‘medical examinations,’” intended to discover the existence, nature, or severity of an individual’s physical or mental impairment). Questions and medical examinations focused on *discovering* the existence, nature, or severity of medical impairments violate the ADA. *See Conroy v. N.Y. State Dep’t of Correctional Servs.*, 333 F.3d 88, 95–96 (2d Cir. 2003) (reasoning that “we believe that since general diagnoses may expose individuals with disabilities to employer stereotypes, the Policy [requiring a medical certification following an absence] implicates the concerns expressed in these provisions of the ADA”); *see also Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154–55 (D. Colo. 1996) (prohibiting employers from requiring employees to disclose the prescription drugs that they take as a prohibited disability-related inquiry).

33. 29 C.F.R. § 1630.14(a) (“A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.”).

34. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 675 (1st Cir. 1995) (“The ADA does not require an employer to wear blinders to a known disability at the pre-offer stage . . .”). This exception also may compel disclosure of disabilities that would present a physical danger to the applicant or other employees. *See, e.g., EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 981 (S.D. Tex. 1996) (“Physical defects such as eyesight, hearing, limb impairment, diabetes, back or heart trouble, high blood pressure, fits, convulsions, fainting, etc., in light of the requirements of the bus driver position, are relevant job-related inquiries and are consistent with business necessity.”).

35. *Conroy*, 333 F.3d at 95–96.

tion of hire, provided that such inquiries are applied to all conditional hires for the job classification.³⁶ Similar to the Title VII disparate impact test, however, the ADA only permits employers to reject conditional employees because of physical and mental disabilities based on criteria that are job related and consistent with business necessity.³⁷

Legislatures and the judiciary have considered two types of hiring screens, personality tests and genetic screening, which demonstrate the dual goals of privacy and contextualization in a disability framework. By the mid-twentieth century, employers widely adopted personality tests to screen out applicants with negative workplace characteristics.³⁸ Commentators reviewing the predictive value of personality tests came to question their validity, particularly as a predictor of job performance.³⁹ Of specific concern was that employers would use a personality test out of context: by the 1960s, Guion and Gottier cautioned that “the validity of any personality measure must be specifically and competently determined for the specific situation in which it is to be used and for the specific purpose or criterion within that situation.”⁴⁰

After the ADA was enacted in 1990, the EEOC and courts grappled with the question of whether psychological personality tests are “medical inquiries” that cannot be administered until the applicant has been offered the position.⁴¹ In *Karraker v. Rent-A-Car*,⁴² the Sev-

36. 42 U.S.C. § 12112(d)(3)(A). However, the results of the medical inquiries must be kept confidential and available for government ADA compliance reviews on request. *Id.* § 12112(d)(3)(B)–(C).

37. 29 C.F.R. § 1630.14(b)(3).

[I]f certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part.

Id.

38. Mulvihill, *supra* note 26, at 873–74; see also Matthew W. Finkin, *From Anonymity to Transparency: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. 403, 416 (stating that by the 1980s, 11% to 17% of employers used personality tests).

39. Wesley A. Scroggins et al., *Psychological Testing in Personnel Selection, Part I: A Century of Psychological Testing*, 37 PUB. PERSONNEL MGMT. 99, 105 (2008). One study reviewed the academic literature about personality testing and found that the correlation between personality and job success is “close to zero.” Frederick P. Morgeson et al., *Are We Getting Fooled Again? Coming to Terms with Limitations in the Use of Personality Tests for Personnel Selection*, 60 PERSONNEL PSYCHOL. 1029, 1033 (2007). Other commentators found that personality tests resulted in an unacceptably high percentage of false negatives because people with high cognitive abilities were able to recognize the “correct” answers. Richard L. Griffith et al., *Do Applicants Fake? An Examination of the Frequency of Applicant Faking Behavior*, 36 PERSONNEL REV. 341, 345 (2007).

40. Robert M. Guion & Richard F. Gottier, *Validity of Personality Measures in Personnel Selection*, 18 PERSONNEL PSYCHOL. 135, 159–60 (1965).

41. 42 U.S.C. § 12112(d)(2)(A).

enth Circuit held that a personality test that could be used to diagnose mental illnesses was a medical inquiry under the ADA because “no matter how the test is used or scored—that is, whether or not [the employer] used the test to weed out applicants with certain disorders, its use of the [personality test] likely had the effect of excluding employees with disorders from promotion.”⁴³ After *Karraker*, “employers can no longer use or adapt clinical psychological personality tests to determine employment suitability—a far-reaching impact in today’s world where employment screening has become so extensive.”⁴⁴

More recently, employer genetic screens came under scrutiny regarding whether they should be contextualized under the ADA or prohibited on privacy grounds. With the advent of low-cost genetic screening, employers increasingly required their use in hiring.⁴⁵ Commentators questioned the relevance of using genetic screens in hiring because they only indicate a potential *predisposition* to a disability,⁴⁶ and are thus likely to be misread or misused, and raised concerns that patients would decline genetic tests for fear of employment discrimination.⁴⁷ For example, in 2001, the EEOC filed an ADA suit against an employer for forcing employees to undergo genetic testing to determine whether they had a genetic susceptibility to Carpal Tunnel Syndrome to lower its potential ADA and workers’-compensation liability.⁴⁸ Increasing concerns about the stigma of genetic predispositions to medical conditions, and about the accuracy of such tests, led Congress to pass the Genetic Information Nondiscrimination Act in 2008, banning genetic screens in hiring.⁴⁹

Together, these cases illustrate the disability framework approach to hiring screens. As with genetic screening, if the test is highly stigmatizing and likely to be misused, the information is shielded from use on privacy grounds. If the screen is potentially relevant and can be evaluated in context, like the personality test in *Karraker*, it is appropriately regulated under the ADA. This framework is directly applicable to civil disabilities. As described in Part III.B.2, applicants have a heightened interest in shielding employer access to irrelevant crimi-

42. 411 F.3d 831 (7th Cir. 2005).

43. *Id.* at 836–37.

44. Mulvihill, *supra* note 26, at 908.

45. Abigail Lauren Perdue, *Justifying GINA*, 78 TENN. L. REV. 1051, 1066–71, 1078–82 (2011).

46. *Id.* at 1065–68, 1082.

47. *Id.* at 1076; *see also* Joanne Barken, Note, *Judging GINA: Does the Genetic Information Nondiscrimination Act of 2008 Offer Adequate Protection?*, 75 BROOK. L. REV. 545, 554 (2009).

48. Perdue, *supra* note 45, at 1077.

49. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §§ 2000ff, 2000ff-1 to -12 (2012).

nal records, and, as with personality tests, records showing a possible workplace risk can only be fairly evaluated if separated from the applicant's qualifications for the position and grounded in a contextualized analysis.

III. THE MASS PROLIFERATION OF CRIMINAL RECORDS, AND ITS IMPACT ON PERSONS WITH CRIMINAL CONVICTIONS

The accessibility of private, prejudicial information has had profound consequences for the job prospects of people with civil disabilities. Over 90% of employers offering clerical, sales, and service positions, nearly double the rate of twenty years ago, request criminal background information from the applicant.⁵⁰ As Devah Pager writes, a criminal record is a type of “negative credential,” the archetype of “official markers that restrict access and opportunity rather than enabling them.”⁵¹ For entry-level positions requiring few hard skills or educational pedigrees, screens for negative credentials provide firms with a low-cost means to evaluate candidates without expending the resources necessary for reviewing an individual's background and qualifications through interviews, skills-based tests, or reference checks. Instantaneously and at low cost, a company may use a criminal background screen to eliminate applicants with a violence-related felony because “someone with a conviction for a violent crime is more likely than someone without one to commit a future violent crime;”⁵² or with a larceny conviction to “control[] theft.”⁵³ Or employers may screen out employees with credit histories that reveal “financial stress or burdens that might compromise their ethical obligations.”⁵⁴ Criminal record histories are the dominant, though by no means exclusive, criteria for negative credential screens.

This Part first describes the proliferation of criminal record histories, then concludes that the mass proliferation of criminal records has greatly diminished the employment prospects of people with criminal records, particularly African-Americans with criminal convictions, who trigger in employers a powerful association between race and criminality.

50. Soc'y for Human Res. Mgmt., *Background Checking: Conducting Criminal Background Checks*, at slide 3 (Jan. 22, 2010), available at http://www.slideshare.net/shrm/background-check-criminal?from=share_mail; see also Smith, *supra* note 19, at 198 (stating that half of employers used criminal conviction history to screen applicants in 1996, reaching 80% by 2003).

51. PAGER, *supra* note 1, at 32.

52. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 245 (3d Cir. 2007).

53. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 738–39 (S.D. Fla. 1989).

54. *EEOC v. Kaplan Higher Learning Edu. Corp.*, No. 10-cv-02882, slip op. at 1–3 (N.D. Ohio Jan. 28, 2013) (internal quotation marks omitted).

A. *Mass Proliferation of Criminal Background Histories and Their Use in Employment*

Criminal records have long been available through courts and private credit reporting agencies, and background checks have been a standard practice for certain employment, such as police officers. But the ease with which employers may access criminal records is a new phenomenon.⁵⁵ Before the advent of information technology, background checks were necessarily limited in scope, requiring a “case-by-case basis [inquiry] directly from whatever state or local agency maintained such records.”⁵⁶ Criminal record repositories were carefully shielded by privacy laws, which restricted the noncriminal use of criminal records to particular occupations involving direct contact with vulnerable populations or requiring the carrying of weapons.⁵⁷

The mass proliferation of criminal records follows the increasing digital flow of information, making public what was previously private or difficult to obtain. In the 1980s, national criminal databases converted from paper-and-ink fingerprints to digital ones, facilitating the electronic confirmation of federal, state, and municipal criminal records.⁵⁸ National and local criminal justice agencies increasingly permitted private companies to purchase criminal record histories, making them available for inexpensive resale to private employers seeking to conduct a comprehensive background check for hiring.⁵⁹

Now, the federal government and all states have constructed digital databases of criminal histories, which they sell or provide for free to the public.⁶⁰ Information vendors, also called credit reporting agencies, purchase this criminal record data from the various jurisdictions and consolidate the data into vast repositories that they repackage for sale to employers.⁶¹ Consumer reporting agencies with a large econ-

55. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 186–87 (2008). Federal funding and technical support for a national repository of state and federal criminal records in the 1990s has led to a comprehensive system of criminal records. All states have created comprehensive databases of criminal records, which they sell to employers and commercial information vendors. See generally *id.* at 179–87.

56. Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 262 (2012); see also Paul-Emile, *supra* note 23, at 902.

57. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 19–20 (2006) [hereinafter DOJ CRIMINAL HISTORY REPORT].

58. *Id.* at 14.

59. *Id.* at 38–40. For example, the FBI processed 9.8 million civil fingerprint-based background checks in 2005, up from 6.8 million checks in 2001, a nearly 50% increase. *Id.* at 21.

60. Jacobs & Crepet, *supra* note 55, at 179–85.

61. *Id.* at 186–87; see also DOJ CRIMINAL HISTORY REPORT, *supra* note 57, at 37.

omy of scale with sizable computing abilities can process large batches of background checks quickly and at low marginal cost.⁶² One credit reporting agency “claims to have in excess of . . . ninety million criminal records. . . . [and to have conducted] approximately 3.3 million background investigations in 2002, the overwhelming majority of which included a criminal records search.”⁶³ Alongside the formal credit reporting agencies, “a new industry has mushroomed to provide low-cost information, often through the internet.”⁶⁴ These firms have made checking criminal record histories fast, easy, and virtually free to anyone with access to the Internet.

In response to the increasing availability of criminal record history repositories, employer use of criminal record history “has increased sharply over the past decade.”⁶⁵ Almost all employers make some inquiry about criminal history, at the front end of the application through a direct inquiry to the applicant in the application, or later through a background check.⁶⁶ Many large firms require applicants to submit applications electronically, which often requires applicants to divulge their criminal record history and to consent to a background check. Criminal backgrounds, once disclosed in an electronic application or background report, are often then evaluated before the applicant has had direct contact with the employer.⁶⁷ Credit reporting agencies can automatically determine whether the candidate is acceptable to the client employer by using a “matrix” or “adjudication guideline,” provided by that client employer, which lists the types of convictions that merit automatic rejection or further evaluation.⁶⁸ In this manner, employers may use negative credentials, such as criminal background histories, to prescreen large batches of applications each day, effectively filtering many or most of them from further consideration at low cost, instantaneously, and without any human interaction.⁶⁹ As a result, from single-family household employers⁷⁰ to

62. See generally Robert M. Hunt, *A Century of Consumer Credit Reporting in America* (Fed. Reserve Bank of Phila. Research Dep't, Working Paper No. 05-13, 2005).

63. Jacobs & Crepet, *supra* note 55, at 186.

64. Weiman, *supra* note 14, at 584.

65. *Id.*

66. See PAGER, *supra* note 1, at 112–14.

67. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 388–90 (2006).

68. See *Adjudication: You Be the Judge*, HIRERIGHT (Nov. 30, 2009), <http://www.hireright.com/blog/2009/11/adjudication-you-be-the-judge/> (“Adjudication adds consistency to the background screening process and can increase efficiency across your organization, removing the guesswork and subjective individual ‘judgment calls’ from your company’s hiring guidelines.”).

69. A 2009 investigation by the New York Attorney General found at least one national retailer that used an electronic application to categorically reject any applicant who disclosed a prior conviction, raising “the disturbing possibility that the practices they engaged in may be

national, publicly traded firms, electronic applications have become a standard means to screen individuals based on self-disclosed positive and negative markers before assessing candidates individually.

B. Exclusion of People with Criminal Records from the Labor Market, Particularly African-Americans

The mass proliferation of criminal records “poses a serious challenge to reformers seeking to smooth the reentry of people with criminal records in the community.”⁷¹ Many employers state that they would not hire a person with a criminal conviction,⁷² and one study found that “a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent.”⁷³ Studies have shown that mere contact with the criminal justice system, even an arrest that did not lead to a conviction, carries a stigma that leads to poor employment outcomes for the applicant.⁷⁴ Employer audits indicate that employers confronted with an applicant with a criminal record history often reject the applicant on an immediate, instinctive aversion to people with criminal records.⁷⁵

The categorical exclusion of people with criminal convictions from the labor market has vast societal implications. Incarceration is associated with a lifetime of sporadic employment in “secondary labor

more widespread than supposed.” See Editorial, *Denied a Chance for Honest Work*, N.Y. TIMES, Jan. 18, 2010, at A30. Later EEOC suits suggest that such practices are indeed common. See, e.g., EEOC v. Freeman, 961 F. Supp. 2d 783, 789 (D. Md. 2013) (describing a typical employer screen that inquires about criminal record histories in the application and then conducts a background check, eliminating from consideration applicants whose responses or checks reveal certain types of criminal convictions); Complaint at ¶¶ 17–23, EEOC v. BMW Mfg. Co., No. 7:13-cv-01583-HMH-JDA (D.S.C. filed June 11, 2014), 2013 WL 3010489 (alleging automatic rejection of candidates after background check revealed certain convictions, without individual assessment); Complaint at ¶¶ 7–14, EEOC v. DolGenCorp, LLC, No. 1:13-cv-04307, 2014 WL 3734361 (D. Ill. July 29, 2014) (alleging use of background check and a matrix that automatically disqualifies applicants with certain convictions within a certain period of time).

70. For example, Care.com, an Internet hiring service for household employers, provides prescreening services for prospective employers, including criminal background checks. See CARE.COM, <http://www.care.com/background-checks-p1402.html> (last visited Sept. 24, 2015).

71. Jacobs & Crepet, *supra* note 55, at 178.

72. Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355, 366 fig.2 (2005).

73. Pager et al., *supra* note 14, at 199. In fact, employers are far less likely to hire a person with a criminal conviction than they are willing to admit. See generally Pager & Quillian, *supra* note 72. In one audit of employers who were first asked their willingness to hire a person with a criminal conviction and then presented with an applicant who disclosed a criminal record history, “[e]mployers generally express a greater likelihood of hiring applicants with criminal records, and a far greater likelihood in the case of black applicants, than we see in actuality.” *Id.* at 370.

74. PAGER, *supra* note 1, at 49–50, 176 n.16.

75. Pager et al., *supra* note 14, at 203.

markets with little job security, little opportunity for advancement, and miniscule earnings.”⁷⁶ As Jacobs and Crepet explain, the proliferation of criminal records entrenches people with criminal records in their subordinated status, itself a driver of recidivism: “Persons stigmatized with a criminal label face de jure and de facto discrimination in employment, housing, and access to government social welfare benefits. Restricted socioeconomic opportunities make re-offending more likely. Ironically then, the consequence of the more expansive criminal records system may be more crime.”⁷⁷

These impacts serve no legitimate criminal justice goals. The profoundly disruptive effects of a criminal conviction are not taken into account by judges imposing sentences or policymakers who recommend penalties, and are not proportionate to the offenses committed.⁷⁸ The lack of restrictions on employer inquiries does nothing to reduce recidivism or deter future unlawful conduct, and undermines the criminal justice goals of imposing penalties that have a low societal “cost” and that are proportional to the offense committed.⁷⁹ On the contrary, studies have shown that policies that promote employment reduce recidivism, promoting both deterrence and rehabilitation.

While all people with criminal records face strong headwinds in obtaining a postincarceration job, the mark of a criminal record is often an insurmountable burden for African-Americans. Race pervades an employer’s decision about the suitability of applicants. Blacks with similar qualifications as whites are less likely to be found suitable for a job by employers.⁸⁰ At the same time, “race remains stitched into

76. Bronsteen et al., *supra* note 3, at 1051.

77. Jacobs & Crepet, *supra* note 55, at 178–79 (footnote omitted).

78. Bronsteen et al., *supra* note 3, at 1049 (“[A]ny amount of incarceration creates a significantly higher likelihood that ex-inmates will suffer a variety of health-related, economic, and social harms with substantial negative hedonic consequences that will make adaptation extremely difficult.”).

79. *Id.* at 1065–66.

80. For example, a 2004 study of employer callback response rates of resumes with identical work experiences that were racially coded with “black” and “white” names found that those containing non-African-American-sounding names received more favorable treatment. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1011 & 1012 tbl.A1 (2004); see also MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 2, 11 (1991) (stating that in approximately 20% of 476 hiring audits, the white applicant was able to advance farther through the hiring process than an equally qualified black counterpart); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 153 tbl.1 (2004) (reviewing literature that shows employer-biased behavior in employment). *But see* Ronald G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON. 767, 771 (2004) (questioning Bertrand and

each and every phase of the criminal justice system,”⁸¹ African-Americans comprise only 12% of the general population but 40% of the prison population, and one in three black men can expect to spend some time in prison.⁸² There is thus a strong double bind for African-Americans, who are most likely to experience actual contact with the criminal justice system, and who labor against the racial stereotype that associates black men with criminality.⁸³

Field studies have shown that a criminal record profoundly distorts job opportunities, with race often playing a determinative role in whether an employer is willing to give people with criminal records a second chance. In a landmark study, Devah Pager measured the effect of criminal records on employment through an in-person, matched-pair audit that tested the proportion of applications that matched testers received callbacks or were called back by an employer for a job.⁸⁴ Unsurprisingly, the results showed that people with criminal records were called back by employers half as often as candidates who reported a “clean” background.⁸⁵ Moreover, matched pairs of applicants of different races reporting the same criminal conviction yielded far worse outcomes for African-Americans: employers offered call-backs to 17% of whites with criminal records but only 5% of African-Americans with criminal records.⁸⁶ As Pager notes, criminal records cannot be disentangled from race because employers often perceive the relevance of a criminal record through the lens of the race of the applicant who reports it.⁸⁷ The disparate impact of criminal record employment inquiries on race discrimination as shown in the Pager study adds to the urgency of efforts to regulate the use of criminal background checks, even as the study’s finding of persistent race discrimination in hiring adds to the complexity of the problem, as will be discussed in Part VI.A.

Mullainathan’s study design for failure to control for other forms of statistical discrimination, as “blacker” names are also associated with lower socioeconomic status and education levels).

81. Pinard, *supra* note 2, at 969.

82. PAGER, *supra* note 1, at 3.

83. See, e.g., Lyles-Chockley, *supra* note 2, at 268–71.

84. Pager’s study identically matched applicants (who were trained testers) seeking job opportunities who differed only in one key respect. In one testing group, one applicant posed as a person with a criminal conviction while the other had no conviction. PAGER, *supra* note 1, at 59–61. In another, the tester was white and the other black, and each had a conviction. *Id.* In still another, the testers again were white and black, but one posed as having a conviction while the other had no conviction. *Id.*

85. Controlling for race, employers called people with criminal records back 17% of the time while nonoffenders received a 34% callback rate. *Id.* at 67.

86. *Id.* at 90–91 fig.5.1.

87. *Id.* at 90–92 (stating that employers called back 34% of white applicants with no criminal record but just 14% of black applicants with no criminal record).

IV. AN EVALUATION OF THE REGULATION OF CIVIL DISABILITIES

This Part discusses and analyzes the effectiveness of the three types of regulations in place to limit the disclosure of and shape the evaluation of criminal background histories and other types of negative credentials for employment purposes: (1) *privacy* protections, which shield records from use; (2) *procedural* protections, which postpone the use of records in employment; and (3) *nexus* protections, which require employers to base a denial of employment on some relationship between the record and the position sought. While these protections significantly overlap,⁸⁸ this typology is nevertheless a useful starting point for evaluating civil disability protections because they generally describe different policy tools and legal regimes.

This Part finds that (1) the few privacy protections that apply to civil disabilities are easily bypassed by employer self-help; (2) procedural protections often fail to adequately separate applicant-suitability determinations and disability evaluations by permitting evaluations of a criminal conviction before the employer provides a conditional offer; and (3) nexus protections are undermined by courts that often impose a heightened Title VII disparate impact standard and by the vagueness of most state nexus protections. It concludes that current protections fail to adequately encourage employers to individually assess an applicant's qualifications and of the real workplace risk indicated by a criminal conviction.

A. *The Regulation of Civil Disabilities in Employment*

Federal, state, and local governments regulate the disclosure and evaluation of criminal records for employment purposes on antidiscrimination and privacy grounds. Privacy restrictions, enforced by the Consumer Financial Protection Bureau and Federal Trade Commission and state equivalents,⁸⁹ protect privacy interests by limiting the types of negative credentials that can be accessed from public databases for employment purposes. Privacy restrictions include *durational* limitations, or the time period in which a negative credential is available, and *dispositional* restrictions, or limits on the types of available negative credentials. A growing number of state and municipal Ban the Box jurisdictions provide for *procedural* protections that limit the use of a negative credential until after the application stage,

88. For example, individuals with a criminal record often must prove their rehabilitation before receiving a privacy protection, and rehabilitation is also a key factor in nexus protections. Procedural and nexus protections seek the same policy goal of requiring contextualized assessments of criminal records.

89. See generally DOJ CRIMINAL HISTORY REPORT, *supra* note 57, at 42–46.

for example after an employer provides a conditional offer to an applicant. Antidiscrimination laws, enforced by the EEOC and state equivalents, impose *nexus* restrictions, that is, they require that employers show a particular nexus between a negative credential and the position sought. Because antidiscrimination and privacy protections overlap, this Article discusses their nexus, procedural, durational, and dispositional protections together.

1. *Privacy Restrictions on Irrelevant Civil Disabilities for Employment Purposes*

Privacy protections limit the types of negative credentials that are appropriate for disclosure or evaluation for employment purposes. Unlike the ADA, consumer protection and antidiscrimination laws impose privacy protections that prohibit access to and use of certain civil disabilities.⁹⁰ Privacy protections categorically prohibit the availability and use of certain information because it is never relevant, or because its low relevancy is outweighed by its potential for misuse.

Most jurisdictions that regulate the use of civil disabilities in employment exclude information based on their age and type of information under the Fair Credit Reporting Act⁹¹ (FCRA) and analogous state law. State consumer-protection laws prohibit the release of information related to bankruptcies, tax liens, and past judgments after a certain number of years.⁹² The FCRA and most states permit disclosure of any criminal history, except for arrests that did not lead to a conviction, or where a charge was sealed or dismissed. Four states prohibit disclosure of criminal records after a period of time, between five and ten years, depending on the state and the severity of the crime.⁹³ Some states also limit disclosure of convictions that have been expunged or sealed,⁹⁴ such as those of juvenile offenders or criminal offenses less severe than misdemeanors.⁹⁵ Some states also provide for sealing or expungement of most convictions after a period

90. The ADA generally has no relevancy requirement for pre-employee medical inquiries. *See, e.g.*, EEOC ARREST AND CONVICTION GUIDANCE, *supra* note 17.

91. 15 U.S.C. §§ 1681–1681x (2012).

92. *See, e.g.*, N.Y. GEN. BUS. LAW § 380–j(f)(1)(i) (McKinney 2012).

93. *Id.* § 380–j(f)(1)(v), (f)(2)(iii) (prohibiting disclosure after seven years); HAW. REV. STAT. ANN. § 378-2.5(b)–(d) (LexisNexis 2010) (prohibiting disclosure after ten years); MASS GEN. LAWS ANN. ch. 276, §§ 100A–C (West 2014) (permitting employers to view felonies within the past ten years, and misdemeanors within the past five years); WASH. REV. CODE ANN. §§ 9.96A.020, 9.96A.060, 9.96A.30 (LexisNexis 2014) (prohibiting disclosure after ten years).

94. CONN. GEN. STAT. ANN. §§ 31-51i, 46a-80 (2009 & Supp. 2014); N.Y. EXEC. LAW § 296(16) (McKinney 2012); N.Y. GEN. BUS. LAW § 380–j(a)(1); WIS. STAT. ANN. § 111.335(1)(a) (West 2014).

95. N.Y. EXEC. LAW § 296(16).

of time on successful application to the sentencing court, which has the effect of prohibiting credit reporting agencies (CRAs) from reporting them.⁹⁶ Unlike other states, in which expungement is discretionary, Massachusetts *must* seal the dispositions after a period of time at the request of the person with a criminal conviction, and on certification that the person has not been convicted of crimes in other states during that period.⁹⁷

In addition to prohibiting certain information, privacy protections require the reporting of rehabilitative information in the criminal report. New York State provides for certificates of relief from disabilities,⁹⁸ which “create a ‘presumption of rehabilitation’ that must be given effect by employers and licensing boards, and that is judicially enforceable.”⁹⁹ Other states presume rehabilitation with the passage of time, but only for occupational licensing purposes, not employment.¹⁰⁰

2. *Procedural Protections: Regulation of Prehire Inquiries*

Some jurisdictions use procedural requirements to discourage the summary use of negative credentials without assessing the individual applicant’s ability to perform the work. Similar to the ADA model of regulating the manner in which employers make prehire disability inquiries, over 100 cities and counties and eighteen states prohibit some employers from inquiring about criminal record history in an initial application.¹⁰¹ Of these, twelve cities and counties and seven states prohibit private employers from inquiring about criminal record history in an initial application.¹⁰² Hawaii, New Mexico, and some cities, including New York City, prohibit criminal record inquiries until after an applicant has been provided a conditional offer of employment,¹⁰³ while others permit criminal history inquiries after the initial employ-

96. MARGARET LOVE & APRIL FRAZIER, A.B.A., *CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 9–11* (2006).

97. MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2014).

98. N.Y. CORRECT. LAW § 701 (West 2014).

99. *Id.* § 753(2).

100. LOVE & FRAZIER, *supra* note 96, at 7–8.

101. NELP BAN THE BOX REPORT, *supra* note 20, at 1.

102. The states with private-employer procedural restrictions are Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island; the cities are Baltimore, Buffalo, Chicago, Columbia, Montgomery County, Newark, New York City, Prince George’s County, Philadelphia, Rochester, San Francisco, Seattle, and Washington, D.C. See *id.* at 13–14, 66–70.

103. HAW. REV. STAT. ANN. § 378-2.5(b)–(c) (LexisNexis 2010); N.M. STAT. ANN. § 28-2-3 (West 2011).

ment application,¹⁰⁴ after the application's selection for an interview,¹⁰⁵ or after the applicant is selected as a finalist.¹⁰⁶ At some point after the initial interview, the employer is then permitted to evaluate whether a conditional employee's criminal background history should result in rejection or withdrawal of the offer of employment.

3. *Nexus Protections Requiring a Relationship Between Civil Disability and the Position Sought*

Most jurisdictions protect applicants from discrimination through *nexus* requirements: requiring that a criminal conviction bear some relationship to the position sought. All jurisdictions protect against race, national origin, and gender-based discrimination, and prohibit negative credential screens that have a disparate impact on a protected class unless the employer can show that the screen is job related and consistent with business necessity.¹⁰⁷

The EEOC presumes that rejecting applicants because of a past conviction has a disparate impact on African-Americans and Latinos, and thus violates Title VII unless the employer can establish a business necessity defense.¹⁰⁸ In its 2012 guidance on the use of criminal record history in employment, the EEOC clarified the nexus protection for determining whether an employer's rejection is job related and consistent with business necessity. It requires that employers use either a criminal conduct screen validated like other screens, or an individualized assessment that considers, at minimum, the factors previously discussed by the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.*: (1) "the nature of the crime;" (2) "the time elapsed;" and (3) "the nature of the job . . . and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy is related and consistent with business necessity."¹⁰⁹

104. MASS. GEN. LAWS. ANN. ch. 151B, § 4(9.5) (West 2014); BUFFALO, N.Y., CODE ch. 154, art. V, § 154-25 (2015).

105. MINN. STAT. ANN. § 364.021 (West Supp. 2015); R.I. GEN. LAWS ANN. § 28-5-7 (West Supp. 2014).

106. N.M. STAT. ANN. § 28-2-3; *see also* Smith, *supra* note 19, at 214–15 (cataloguing types of procedural protections by jurisdiction).

107. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see also* *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 248–49 (3d Cir. 2007); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293 (8th Cir. 1975).

108. *See* EEOC ARREST AND CONVICTION GUIDANCE, *supra* note 17. The EEOC Guidance also describes ways in which employers may rely on criminal record history to engage in disparate treatment of Black and Latino applicants, in violation of Title VII. *Id.* at 6–9.

109. *Id.* at 14 (citing *Green*, 523 F.2d at 1297).

Some state and municipal jurisdictions additionally consider people with criminal records to be a protected class and prohibit disparate treatment of people with criminal records. The precise nexus requirements differ widely among the states: that the conviction have a “reasonable relationship,”¹¹⁰ “relate,”¹¹¹ “substantially relate,”¹¹² or “directly relate”¹¹³ to or “reasonably”¹¹⁴ or “rational[ly]”¹¹⁵ bear on the position sought or the applicant’s trustworthiness.¹¹⁶ Some states in addition to those factors considered in *Green* and by the EEOC require consideration of applicant rehabilitation;¹¹⁷ the state’s public policy in favor of employment of people with criminal records; the age of the person at the time of the offense; and the nature and severity of the conviction.¹¹⁸

The next Section evaluates these protections, concluding that they fail to sufficiently encourage a contextualized assessment of applicants with a criminal conviction.

110. ARIZ. REV. STAT. ANN. § 13-904(E) (West 2010).

111. 18 PA. CONS. STAT. ANN. § 9125 (West 2012).

112. WIS. STAT. ANN. § 111.335(1)(b) (West 2012).

113. KY. REV. STAT. § 335B.020 (West 2011); MINN. STAT. ANN. § 364.03 (West Supp. 2014).

114. KAN. STAT. ANN. § 22-4710(f) (2007).

115. HAW. REV. STAT. ANN. § 378-2.5(a) (LexisNexis 2010).

116. Some jurisdictions find a direct relationship between certain offenses and positions without further need to consider factors, such as previous sex- and drug-related offenses, schools, and child-care facilities. Other jurisdictions exempt nexus requirements entirely for certain positions, particularly law enforcement and armed security guards. See, e.g., ARIZ. REV. STAT. ANN. § 13-904(E) (West 2010) (exempting law enforcement agencies); N.M. STAT. ANN. §§ 28-2-3 to -6 (West 2011) (permitting rejection of applicants with previous drug offenses from certain positions in schools and child care centers); N.Y. EXEC. LAW § 296(15) (McKinney 2010) (exempting peace officers and police); WASH. REV. CODE ANN. §§ 9.96A.020, 9.96A.030, 9.96A.060 (LexisNexis 2014).

117. See CONN. GEN. STAT. ANN. § 46a-80 (West Supp. 2014) (relationship between offense and job, rehabilitation, and time elapsed since the conviction); MINN. STAT. ANN. § 364.03 (West Supp. 2015); N.Y. CORRECT. LAW § 753(g) (McKinney 2014). Some of these states provide a certificate of rehabilitation or good conduct for applicants who have demonstrated their rehabilitation. See Williams, *supra* note 22, at 547 & n.178. For example, in New York State, a Certificate of Relief from Disabilities creates a rebuttable presumption that the individual with the criminal conviction is rehabilitated and the conviction should not result in a denial of employment or licensure. N.Y. CORRECT. LAW § 753(2).

118. *Id.* § 753(1)(a)–(h). Commentators have praised the requirement to consider a number of factors related to a criminal conviction prior to using it as a basis for disqualification of an applicant. Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1294–98 (2002) (praising how New York “amplifies and clarifies” the protections of people with criminal records in anti-discrimination law through required deliberative factors); see also Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 208–09 (2004) (approving of New York’s “contextual evaluations”).

B. Privacy Protections Are Few and Easily Bypassed by Employer Inquiries by Outside Credit Reporting Agencies

National privacy protections are quite weak, applying only to very old debts and nonpending arrest records. Strikingly, the FCRA and most states impose few limits on the disclosure by credit reporting agencies (CRAs) of criminal convictions, aside from requiring their accuracy. Equally important, the FCRA and most state privacy protections only apply to CRAs, which employers can easily bypass by inquiring about criminal record history directly from the applicant or some public source.¹¹⁹ While some states prohibit employer inquiries about older or petty marijuana-related criminal convictions, most do not.¹²⁰ Direct inquiries of applicants in most instances cannot be evaded: in most states, an applicant can be rejected for refusing to disclose convictions, and in all states, for misstating a criminal background history. Thus, even if privacy protections extended to all irrelevant and prejudicial data regarding civil disabilities held by CRAs, these could be easily accessed by employers elsewhere.

Although CRAs are required to report rehabilitative information such as certificates of disability, there are few rehabilitative dispositions for CRAs to report. Five states provide an automatic statutory “presumption of rehabilitation” to people with criminal convictions after a period of time, but this relief only applies to licenses, not employment.¹²¹ New York State, the only state in which a certificate of relief from disabilities creates a presumption of rehabilitation in private employment, grants only about 3,000 of them per year.¹²² Along with the fewer than 1,000 administrative pardons annually granted in the six states that provide them, state-granted rehabilitation findings assist an astonishingly small number of the 70 million people with criminal records. While the FCRA requires CRAs to update records to ensure their accuracy,¹²³ it is unclear the extent to which CRA updates reflect rehabilitative findings, which may deprive employers of important context in considering a criminal record.

119. Meredith J. Fried, Note, *Helping Employers Help Themselves: Resolving the Conflict Between the Fair Credit Reporting Act and Title VII*, 69 *FORDHAM L. REV.* 209, 220 (2000); see also Paul-Emile, *supra* note 23, at 918.

120. Hawaii, Massachusetts, and Washington prohibit inquiries into certain criminal convictions based on the age of the conviction. *HAW. REV. STAT. ANN.* § 378-2.5(b)–(d) (LexisNexis 2010); *MASS. GEN. LAWS ANN.* ch. 151B, § 4.9 (West 2013); *WASH. ADMIN. CODE* § 162-12-140 (2015). California and Ohio prohibit inquiries into certain marijuana-related offenses. *CAL. LAB. CODE ANN.* § 432.8 (West 2011); *OHIO REV. CODE ANN.* § 2925.04 (LexisNexis 2010).

121. LOVE & FRAZIER, *supra* note 96, at 7–8.

122. *Id.* at 3.

123. Fried, *supra* note 119, at 224–25.

C. *Procedural Protections Alone May Not Deter Discrimination*

Like the ADA, Ban the Box restrictions on prehire inquiries play a key role in preventing the categorical exclusion of applicants with civil disabilities. First, for employers seeking to screen out applicants with civil disabilities, requiring self-disclosure in the initial application is a costless and efficient manner to categorically reject them. Overbroad screens that hide categorical rejections behind a faceless application system leave the applicant with little notice that the rejection was the result of criminal record history, and with no opportunity to explain their suitability for the job. All Ban the Box laws address this problem by prohibiting criminal record inquiries until after the initial application.

Second, Ban the Box laws that require the employer to assess candidates' qualifications before inquiring about criminal records encourage employers to separate the stigma of a conviction from its risk to the workplace. Thorough, individualized assessment of a disability is impractical at the application stage, particularly by firms that rely on electronic, large-scale batch hiring. Individualized assessments are more likely when only applied to the smaller pool of candidates who the employer would otherwise hire. Isolating civil disabilities from other factors that may disqualify an individual, and after the applicant has already been found qualified for the position, encourages employers to contextualize the negative credential. As Pager, Western, and Sugie explain, for people with criminal records who trigger strong aversions by employers, "limits on interaction reduce opportunities to contextualize a conviction or to demonstrate evidence of successful rehabilitation."¹²⁴ This may be because "the interaction itself can work to clarify and shape the employers' interpretation of the criminal record."¹²⁵ Procedural protections may deter overbroad screens by inviting more thorough and individualized evaluations.

Only New Mexico and Hawaii, however, require employers to provide a conditional offer to applicants before inquiring about a criminal

124. Pager et al., *supra* note 14, at 201.

125. *Id.* at 204; *see also* Nadich, *supra* note 19, at 774 (Ban the Box laws "give[] the applicant the potential to explain the circumstances surrounding the conviction, express sincerity in his or her rehabilitation, and fuse a connection with the employer."). Joseph Fishkin provides a similar rationale for such restrictions:

The rough conception of merit operative at the initial application stage is never as nuanced as the one in the final evaluation; at the first cut, a simple "no convictions" rubric may well be the micro-efficient choice. . . . Ban the box requires employers to pay for a *more* meritocratic hiring strategy than some might otherwise choose

Joseph Fishkin, *The Anti-Bottleneck in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1469–70 (2014).

record history and conducting a background check.¹²⁶ To take two recent examples, Rhode Island's and New Jersey's Ban the Box laws prohibit employers from inquiring about criminal history in the initial application, but permit such inquiries anytime afterward, and do not impose any nexus restrictions.¹²⁷ To some supporters of Ban the Box campaigns, this has the advantage of lessening the burden of a criminal conviction without infringing on an employer's prerogative to develop its own substantive hiring policies.¹²⁸ But by failing to require employers to make a suitability determination first, these laws may not narrow the applicant pool sufficiently to encourage an individualized risk assessment. Some employers may apply the same overbroad screen at a later stage. Even when employers make a bona fide attempt to assess the candidate in an interview, employers may conflate risk with suitability, finding that anyone without a civil disability is better suited to a position than a person with one.¹²⁹ Sole reliance on procedural protections may also encourage the use of background checks,¹³⁰ which is unlikely to improve the employment prospects of people with criminal records unless the checks themselves are guided by appropriate nexus standards.¹³¹ For these reasons, while deterring overbroad initial hiring screens, some Ban the Box procedural protections may, standing alone, not result in substantially greater employment opportunities for people with criminal records.¹³²

126. HAW. REV. STAT. ANN. § 378-2.5(b)-(c) (LexisNexis 2010); N.M. STAT. ANN. § 28-2-3 (West 2011).

127. R.I. GEN. LAWS § 28-5-7 (2003); Nadich, *supra* note 19, at 768; John McDonald & Joel S. Barras, *N.J. Latest State To Limit Employers' Ability To Ask if Job Applicant Has Criminal Record*, FORBES (Aug. 12, 2014, 2:42 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/08/12/new-jersey-becomes-latest-to-ban-the-box-prohibiting-employers-from-inquiring-about-applicants-criminal-record-during-initial-application-process/>.

128. For a supportive view of this balance, see Nadich, *supra* note 19, at 796-807.

129. Smith, *supra* note 19, at 216 (faulting Ban the Box laws in which "employers retain substantial discretion in determining the weight they attach to an applicant's criminal record").

130. Nadich, *supra* note 19, at 806 ("[B]y drawing attention to the criminal conviction inquiry, the Ban the Box movement may reduce the chance that employers will forego conducting a background check.").

131. Studies have shown that increased use of background checks results in greater exclusion of people with criminal records. Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders* 29 (Inst. for Research on Poverty, Discussion Paper No. 1326-07, 2007).

132. Of course, legislative compromise requires trade-offs, and even a weak procedural protection is a significant improvement over nothing. Instead, this Article argues that New Mexico's and Hawaii's procedural protections serve important goals not met by Rhode Island's and New Jersey's, and it is not clear that applicants with civil disabilities are best served by preferencing procedural protections over nexus ones. See Nadich, *supra* note 19, at 793-94 (stating that the law Rhode Island passed was different than the bill which had stronger procedural protections and clear nexus standards).

*D. Courts Are Reluctant To Apply Nexus Standards To Strike
Down Employer Justifications for the Use
of Civil Disabilities*

Congress enacted Title VII of the Civil Rights Act of 1964 to remove “artificial, arbitrary, and unnecessary barriers to employment,”¹³³ which, in the years following Title VII’s enactment, came to include negative credentials such as criminal records and credit history with a disparate impact on a protected class.¹³⁴ But commentators have noted the general trend of courts limiting the reach of disparate impact theory by narrowing permissible statistical evidence of discrimination and by deferring to employer justifications of business necessity.¹³⁵ As a result, background check Title VII disparate impact cases after the 1970s have largely failed. Claims under state and municipal laws with vague nexus standards have met similar results, while claims requiring consideration of relevant factors, such as the postconviction history of people with criminal records, have fared better.

1. Courts Require Heightened Statistical Showing To Find Disparate Impact

In order to establish a prima facie case of employment discrimination based on a disparate impact theory, the plaintiff must (1) identify a specific employment practice that is being challenged; and (2) establish, through statistical means, that the identified employment practice “caused the exclusion of applicants . . . because of their membership in a protected group.”¹³⁶ While courts considering early negative credential disparate impact claims accepted general evidence of national

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

134. *See, e.g., Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that employer use of arrest information in hiring has an unlawful disparate impact on African-Americans), *aff'd*, 472 F.2d 631, 634 (9th Cir. 1972); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 496 (C.D. Cal. 1971) (holding that it is unlawful discrimination under Title VII for an employer to discharge employees who have had wages garnished because of its disparate impact on African-Americans); *Wallace v. Debron Corp.*, 494 F.2d 674, 677 (8th Cir. 1974) (same).

135. *See Michael Selmi, Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 721 (2006). For analysis of the limitations of disparate impact analysis in challenges to criminal background checks, see Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 12–16 (2012). *See also* Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 279–81 (2014) (stating that courts dismissing disparate impact claims seem “to question the validity of using Title VII to attack the use of criminal records information” and that Title VII is “inadequate to address the issues faced by [people with criminal records] because it under-protects that group”); Smith, *supra* note 19, at 204–10; Nadich, *supra* note 19, at 791 (“Title VII has been, and will continue to be, an inadequate vehicle for protections of ex-offenders.”).

136. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality opinion).

racial disparities, later courts have narrowed the criteria for acceptable statistical evidence.¹³⁷ Recently, courts rejected two EEOC Title VII disparate impact challenges of criminal record and credit history hiring screens for reasons that illustrate the difficulty of meeting courts' heightened standard for required statistical evidence. In *EEOC v. Freeman*,¹³⁸ the employer screened out applicants with conviction histories that included types of violence-, drug-, or property-related crimes, and applicants for certain positions based on overdue debts, foreclosures, and bankruptcies;¹³⁹ in *EEOC v. Kaplan Higher Learning Education Corp.*,¹⁴⁰ the agency sued Kaplan for its use of credit checks for most of its employees. The EEOC attacked both of these checks, alleging that they had a disparate impact on African-Americans.

The courts in *Freeman* and *Kaplan* granted summary judgment to the employers for failure to show sufficient statistical evidence of a disparate impact. Both courts ignored the EEOC guidance that presumes that such checks have a disparate impact based on race. Instead, they closely examined the EEOC's statistical evidence, expert reports analyzing the employer's internal applicant data, ultimately precluding them because of errors. Specifically, the *Freeman* court criticized the experts' sample, which "cherry-picked" data that tended to show a disparate impact.¹⁴¹ Similarly, the *Kaplan* court excluded an EEOC report that attempted to show a disparity in hiring based on race because it drew from a nonrandom sample of applicants that the EEOC could not show was representative of applicants as a whole.¹⁴²

The *Freeman* court rejected the EEOC's response that national statistics showing disparate conviction rates by race were sufficient to show the disparate impact, because "[t]he general population pool 'cannot be used as a surrogate for the class of qualified job applicants, because it contains many persons who have not (and would not) be'

137. See, e.g., *Litton Sys.*, 316 F. Supp. at 403 (accepting national arrest rates); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293–95 (8th Cir. 1975) (accepting national conviction rates).

138. 961 F. Supp. 2d 783 (D. Md. 2013).

139. *Id.* at 788.

140. No. 1:10 CV 2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013).

141. *Freeman*, 961 F. Supp. 2d at 794–96. Specifically, the expert supplemented the initial applicant dataset with rejected applicants revealed during discovery, but did not include others who were hired during that same period. *Id.*

142. *Kaplan*, 2013 WL 322116, at *5–7. The Sixth Circuit affirmed the dismissal in *Kaplan*, criticizing the EEOC for bringing "this case on the basis of a homemade methodology, crafted by a witness with no particular expertise . . . to administer it, tested by no one, and accepted only by the witness himself." *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749, 754 (6th Cir. 2014).

applying for a job with [the employer].”¹⁴³ Rejecting both firm-specific statistical evidence and national statistics of the general population, the court held that the EEOC had failed to establish a prima facie case.

After detailing these statistical failings, the *Freeman* court went on to separately hold that the EEOC’s case could not survive because the EEOC had failed to isolate a specific employment practice as required under the particularly requirement of Title VII. Under Title VII, “[w]here a hiring process has multiple elements, the plaintiff must identify the element(s) that it is challenging and ‘demonstrate that each *particular* challenged employment practice causes a disparate impact,’ unless it can demonstrate that ‘the elements’ are not capable of separation for purposes of analysis.”¹⁴⁴ Rejecting the EEOC’s argument that the hiring process was not capable of separation, the court characterized Freeman’s credit and background check policies as involving “different types of checks depending on the specific job an individual is seeking, consideration of both subjective and objective criteria, and examination of a long list of factors, any one of which might control the ultimate employment decision.”¹⁴⁵ The court held that the EEOC’s failure “to break down what is clearly a multi-faceted, multi-step policy” was an additional ground to enter summary judgment for the employer.¹⁴⁶

The courts’ criticism of the EEOC’s expert reports in *Freeman* and *Kaplan* is unlikely to have lasting impact; the Fourth Circuit narrowly affirmed *Freeman* on the basis that the expert report was properly excluded,¹⁴⁷ and the agency will undoubtedly refine its statistical approach in future disparate impact cases. Of greater import is the extent to which future courts limit acceptable statistical evidence in disparate impact cases. Federal courts have repeatedly rejected background check disparate impact claims because plaintiffs did not present sufficient proof that available African-Americans were not hired,¹⁴⁸ and have refused to make inferences from available statis-

143. *Freeman*, 961 F. Supp. 2d at 798 (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 653–54 (1989)).

144. *Id.* at 799 (citing 42 U.S.C. § 2000e-2(k)(1)(B) (2012)).

145. *Id.*

146. *Id.* at 800.

147. *EEOC v. Freeman*, 778 F.3d 463, 468 (4th Cir. 2015) (“We affirm the district court’s grant of summary judgment to Freeman solely on the basis that the district court did not abuse its discretion in excluding EEOC’s expert reports as unreliable under Rule 702.” (footnote omitted)).

148. Harwin, *supra* note 135, at 16 (discussing cases in which plaintiffs lost their disparate impact challenges for failure to present statistics “indicating that fewer blacks were hired than were qualified”); *see also* Paul-Emile, *supra* note 23, at 926–27 (noting the difficulty in Title VII

tics.¹⁴⁹ The holding in *Freeman* that the EEOC must separate out statistical disparities in each type of background check in order to challenge any of them may encourage employers to combine checks into a single hiring process to obscure the impact of any one of them. It also emboldens critiques of statistical evidence that would doom most disparate impact cases challenging the use of negative credentials in hiring. For example, critics of the EEOC's targeting of over-broad criminal conviction hiring screens argue that the EEOC should not be able to "rely upon general incarceration statistics,"¹⁵⁰ pointing out that some regions have few racial minorities, and that racial disparities in convictions vary depending on the type of offense.¹⁵¹ But such a requirement is unnecessarily burdensome, requiring independent statistical analyses of the racial disparities in thousands of dispositions across many jurisdictions.¹⁵² Requiring such "simultaneously specific and comprehensive"¹⁵³ data would also fail to capture applicants who are dissuaded from applying because of a known employer aversion to applicants with criminal histories or credit problems. In

disparate impact cases of acquiring "the empirical data necessary to show how the employer has treated similarly situated applicants").

149. See, e.g., *Freeman v. Atl. Ref. & Mktg. Corp.*, No. 92-7029, 1994 WL 156723, at *8 (E.D. Pa. Apr. 28, 1994) (dismissing a disparate impact claim for credit history discrimination, and rejecting the plaintiff's "common sense argument that the policy . . . disparately impacts blacks because blacks are generally poorer than whites and thus they will have more bad credit reports than whites"); *Howard v. Cont'l Ill. Nat. Bank & Trust Co. of Chi.*, No. 82 C 792, 1983 U.S. Dist. LEXIS 11923, at *5-7 (N.D. Ill. Nov. 7, 1983) (granting summary judgment for an employer in a Title VII claim that a bank's refusal to rehire an African-American woman because of her poor credit rating had a disparate impact because the pro se complainant failed to provide statistics showing that that African-Americans and women are more likely to have worse credit scores and "[t]he court refuses to infer this fact from statistics which show merely that members of those groups are more likely to be poor").

150. Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 998-99 (2013).

151. This argument could be extended to other areas, such as credit checks, requiring plaintiffs to identify disparities in every type of negative credit history in a particular background check.

152. See, e.g., *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028, 1030 (W.D. Mo. 2008), discussed in Connor & White, *supra* note 150, at 989-90. The court dismissed a disparate impact complaint for, *inter alia*, failure to produce evidence of statistical disparities in convictions for sex offenses, as opposed to general conviction disparities. *Id.* In that case the judge in chiding the pro se defendant for failing to produce adequate statistical proof added, "one would suppose that sex offender registries would allow tracing of individuals listed, with photographic or racial identifiers, thus allowing a statistical comparison. There may well be published studies on this subject." *Id.* at 1030 n.3.

153. Harwin, *supra* note 135, at 16 (noting that in one disparate impact case, dismissed because the court refused to accept data because it compared available applicants against incumbents for an entire job class instead of a particular entry-level position, "[t]he court left unaddressed the possibility that applicant flow data cannot not capture the full impact of policies that discouraged individuals from applying in the first place").

the case of expansive background checks in jurisdictions with few racial minorities, statistics may result in such small sample sizes that statistical significance, the hallmark of a prima facie disparate impact case, would vanish.

2. Courts Defer to Employers in Interpreting Nexus Standards

At the same time that courts apply rigorous skepticism to claims of disparate impact, they have shown comparative deference to employers' justifications for the use of the background checks. While early cases carefully scrutinized employer use of negative credentials in hiring,¹⁵⁴ now courts generally defer to the employer's articulation of business necessity under Title VII,¹⁵⁵ with "radically relaxed standards for business necessity and job-relatedness" for background check suits.¹⁵⁶

In *El v. SEPTA*,¹⁵⁷ the most recent appellate court case to examine the Title VII business necessity defense in background checks, the Third Circuit rejected the argument that in order to establish a business necessity defense, employers must consider the criminal background history of each individual candidate. In *SEPTA*, the court affirmed that an employer could use a bright-line rule in rejecting an applicant for a paratransit driver position because of his criminal record history.¹⁵⁸ The employer's background check called for the rejection of any applicant with a conviction of certain criminal offenses within seven years, or who are on probation or parole for any such crime, no matter how long ago it occurred.¹⁵⁹ *SEPTA* rejected *El* because he had been convicted of second-degree murder forty years earlier, when he was fifteen years old.¹⁶⁰

The Third Circuit held that employers may not use "common-sense" assertions of business necessity but rather "must tailor their

154. See, e.g., *Wallace v. Debron Corp.*, 494 F.2d 674, 677 (8th Cir. 1974) (reversing the trial court's determination that an employer that terminated employees because their wages are garnished met the business necessity defense standard through an affidavit that stated the company's "experience" that the "capability, enthusiasm, efficiency, and quality of performance," of employees whose wages are garnished "noticeably decrease," requiring employer to show, at minimum, that "its garnishment policy fosters employee productivity and that there [are] no acceptable alternative[s]").

155. See *Selmi*, *supra* note 135, at 753.

156. *Harwin*, *supra* note 135, at 14.

157. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007).

158. *Id.* at 235-36.

159. *Id.* at 236. The parties disputed whether this or a more expansive policy rejecting any applicant with any conviction of a felony or misdemeanor applied, but the court of appeals upheld the district court's determination that the more narrow policy applied. *Id.*

160. *Id.* at 235-36.

criteria to measure those qualities accurately and directly for each applicant.”¹⁶¹ But the court of appeals did not follow the *Green* factors, and permitted use of “bright-line” criteria to exclude applicants without requiring an individualized assessment. It is enough that “a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question [and] allows the employer to hire the applicant most likely to perform the job [in question] successfully over others less likely to do so.”¹⁶² The court held that despite SEPTA’s “loose manner” in developing a policy without considering the factors that indicate applicant risk and the EEOC’s findings that the policy failed to consider the age of the conviction and the applicant’s youth at the time of the offense, un rebutted expert testimony that a violent criminal conviction predicts future criminal activity “regardless of how much time passes” was sufficient to establish business necessity.¹⁶³

The suggestion in *SEPTA* that employers tailor criteria to measure the predictive value of the negative credential is the closest that recent federal appellate court decisions have come to the conclusion reached by the EEOC in its enforcement guidance—that the Title VII business necessity defense requires that employers either validate its background checks or perform an individualized assessment of candidates that consider a variety of relevant factors. Yet, despite its thorough discussion, *SEPTA* permitted a matrix that would reject a candidate based on a single forty-year-old negative credential without considering other factors.

Post-*SEPTA* case law considering the business necessity standard is mixed. In *Waldon v. Cincinnati Public Schools*,¹⁶⁴ the court denied a motion by the Cincinnati public school system to dismiss a Title VII disparate impact claim by nine African-American employees terminated because of a state law requiring termination of all public-school employees previously convicted of specified crimes, no matter how long ago. The court declined to accept the employer’s business necessity defense, ensuring the security of children in the schools, because

the policy operated to bar employment when their offenses were remote in time, when [the plaintiff’s] offense was insubstantial, and when both had demonstrated decades of good performance. These [p]laintiffs posed no obvious risk due to their past convictions, but

161. *Id.* at 240.

162. *Id.* at 242.

163. *SEPTA*, 479 F.3d at 247–48.

164. 941 F. Supp. 2d 884 (S.D. Ohio 2013).

rather, were valuable and respected employees, who merited a second chance.¹⁶⁵

In contrast, another court found that a law firm demonstrated “adequate business necessity” in its dismissal of an employee found to be on a sex offender registry because of the potential for harm to co-workers and to employee morale, as the firm was not required to “overlook significant potential dangers, at least to employee morale.”¹⁶⁶ Another court found that a retailer could have established a business necessity defense in terminating an employee previously convicted for domestic violence, because the company distinguished “between applicants that pose an unacceptable level of risk and those that do not.”¹⁶⁷

Courts construing general nexus state-law standards generally follow the same pattern as *SEPTA*, deferring to employer justifications for automatic disqualifications in background checks except in states that require consideration of postconviction history. For example, the Supreme Court of Wisconsin in *County of Milwaukee v. Labor & Industry Review Commission*,¹⁶⁸ interpreting that state’s requirement that a conviction “substantially relate”¹⁶⁹ to the job, rejected “an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job.”¹⁷⁰ Instead, the court held, it is enough for employers to consider the elements of the offense and determine whether they relate to the job duties in question.¹⁷¹

In contrast, in New York, where the state’s nexus standard requires consideration of evidence of rehabilitation, courts have repeatedly struck down background checks that fail to take into account evidence of rehabilitation.¹⁷² To take one example, in *El v. N.Y.C. Department*

165. *Id.* at 889.

166. *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008).

167. *Ahmad v. Kmart*, No. 08-CV-10454, 2008 U.S. Dist. LEXIS 114937, at *5 n.1 (E.D. Mich. Oct. 2, 2008).

168. 407 N.W.2d 908 (Wis. 1987).

169. *Id.* at 909–10 (citing Wisconsin Fair Employment Act, WIS. STAT. §§ 111.31–111.37).

170. *Id.* at 916.

171. *Id.* at 917; *see also* *Milwaukee Bd. of Sch. Dirs. v. Labor & Indus. Review Comm’n*, No. 00-1956, 2001 WL 641791, at *7–8 (Wis. Ct. App. 2001) (upholding an administrative determination that conviction for “injury by conduct regardless of life” does not substantially relate to a job in the school boiler room).

172. In New York, people with criminal records may obtain a “certificate of relief from disabilities” which creates a “presumption of rehabilitation” that must be given effect by employers and licensing boards, and that is judicially enforceable. N.Y. CORRECT. LAW § 753(2) (McKinney 2014); *see also* *Bonacorsa v. Van Lindt*, 523 N.E.2d 806, 808 (N.Y. 1988) (holding that a certificate of relief from disability confers a presumption of rehabilitation even when there is a

of Education,¹⁷³ an applicant for a substitute teacher position was rejected because a background check revealed a felony and several misdemeanors for burglary, trespass, and larceny, committed when he was between eighteen and twenty years old.¹⁷⁴ After his convictions, he spent the following twenty years without an offense and became accredited as a substance abuse counselor and teacher. The agency denied his application because of his felony conviction with no explanation, and did not consider rehabilitative evidence, including a certificate of relief from disabilities and a statement from him that after his troubled teenage years in foster care he has had a lifelong goal of “help[ing] and prevent[ing] children from becoming homeless and living [a] self destructive life.”¹⁷⁵ The court held that the agency determination violated that state’s nexus requirement, both for its failure to consider his certificate of relief from disabilities, and because “no discussion is included of the particular facts of this case to demonstrate how the various factors were evaluated and what weight each was given.”¹⁷⁶

Comparing the reasoning of *El* with that of *SEPTA* demonstrates the role of New York’s specific nexus factors in guiding employers and courts to consider the full context of a criminal record. Both cases involved sensitive positions, transporting disabled individuals and teaching young children. The plaintiff in *SEPTA* had a more serious conviction, but unlike *El*, it was a single conviction, and it was a far longer time ago, when the applicant was younger. Yet the *El* court found the rejection unlawful, while the *SEPTA* court held that the plaintiff effectively faced a lifetime bar. The dispositive factors in *El*, lacking in *SEPTA*, are that New York requires employers to consider postconviction history and provides people with criminal convictions with a means to show their rehabilitation,¹⁷⁷ while Title VII does not.

But New York State’s clear nexus requirements and certificate of relief from disabilities do not satisfactorily resolve the question of why federal courts so often defer to employer justifications for criminal record screens in Title VII disparate impact claims. Courts routinely

direct relationship between the offense and the job duties); *Peluso v. Smith*, 540 N.Y.S.2d 631, 635–36 (1989) (rejecting summary denial of a license to a construction inspector on same ground).

173. No. 401571/08, 2009 WL 1271992 (N.Y. Sup. Ct. 2009).

174. *Id.* at *3.

175. *Id.*

176. *Id.* at *5.

177. *El*’s certificate of rehabilitation may have been the decisive factor. In an otherwise similar fact pattern, the New York Appellate Division upheld a rejection of an applicant for a position driving a school bus because of drug-related convictions that were over a decade old. *Luther v. N.Y.C. Dep’t of Educ.*, 969 N.Y.S.2d 452, 454 (App. Div. 2013).

reject similar business necessity defenses raised in response to ADA claims,¹⁷⁸ and the EEOC enforcement guidance advises employers to individually assess applicants with criminal convictions, evaluating their postconviction history among other factors.

Grappling with this question requires an inquiry into the extent to which disparate impact doctrinal requirements may both mask and drive the judiciary's underlying hostility to the class. As the Wisconsin Supreme Court commented, "[B]eing a criminal is a voluntary act—a matter of choice. There is no 'right' to be a criminal. On the contrary, one who engages in it is universally regarded as anti-social."¹⁷⁹ For a class laboring against a judicially conferred badge of inferiority that makes it difficult to garner sympathy from judges, a disparate impact claim may be an inapt vehicle to draw a picture of stigmatized individuals seeking a second chance, as relayed sympathetically in the *El* case. A court focusing on the statistical significance of racial disparities and seemingly reasonable employer policies is more likely to blame the rejection on the individual's own bad choices.¹⁸⁰ So long as disparate impact forces plaintiffs into a framework that does not tell their stories, their negative credential—the serious conviction, the foreclosure, the tax lien—is the only narrative that courts will see.

Second, the business necessity defense in a disparate impact challenge, and other nexus tests devised under state law, draw from a doctrine that historically requires validation of employment tests, such as

178. See, e.g., *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003) (stating that the ADA requires that a medical inquiry serves a "vital" business interest, that the "inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary," and that the inquiry is "a reasonably effective method of achieving the employer's goal"); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001) ("[A]n examination that is 'job related' and 'consistent with business necessity' must, at minimum, be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."); *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001) (holding the same).

179. *Cnty. of Milwaukee v. Labor & Indus. Review Comm'n*, 407 N.W.2d 908, 914 (Wis. 1987); see also *Connor & White*, *supra* note 150, at 1003 ("Criminal conduct is a product of choice and is not an immutable characteristic of anyone's race or ethnicity. Therefore, it should not be measured as if it were like an agility test or an educational qualification that can be validated."); *Harwin*, *supra* note 135, at 13 ("Judicial opinions expressed a particular distaste for plaintiffs with criminal records."); Tiffany R. Nichols, Comment, *Where There's Smoke, There's Fire?: The Cloud of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance on Criminal Records Under Title VII*, 30 GA. ST. U. L. REV. 591, 623 (2014) ("Individuals with criminal records are the one group whom it is still permissible to hate." (internal quotation marks omitted)).

180. See, e.g., *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989). The court in *Carolina Freight*, in rejecting an EEOC disparate impact claim that Latinos were hired less often because of a company's no-felony rule, reasoned that, "[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, [sic] they should stop stealing." *Id.* at 753.

physical or intellectual requirements, to ensure that the requirements are required for job performance.¹⁸¹ As commentators have noted, however, criminal background checks are an awkward fit for validation.¹⁸² Validation of a credential such as a physical or aptitude test can be related directly to job performance by separating each responsibility of a job and determining the skills required of each.¹⁸³ In contrast, a negative credential such as a conviction history is only relevant insofar as it is a reliable predictor of negative work behavior.¹⁸⁴ This requires a more indirect inquiry into the risk that a person with a criminal conviction is likely to engage in bad conduct in the workplace in the future. Such an inquiry is necessarily contextual and often defies intuitive reasoning, far more like a personality test governed by the ADA than a strength test governed by Title VII. Lacking a firm ground to validate a hiring screen, a court may be more likely to approve of an employer's common sense justification.

Any attempt to validate civil disability hiring screens would encounter little evidence that a criminal conviction, particularly a distant, minor conviction, indicates much about workplace performance or behavior. Generally, social scientists find that a criminal record history is more weakly associated with "counterproductive work behaviors"¹⁸⁵ (CWBs) than other behavioral markers. One study found a high correlation between CWBs and adolescent conduct disorder and high childhood cognitive abilities, but "little or no predictive validity data on the relationship between past criminal behavior and counterproductive behaviors at work."¹⁸⁶ For credit history, the research is

181. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (rejecting height and weight criteria for hiring prison guards because they were not "shown to be necessary to safe and efficient job performance").

182. See Connor & White, *supra* note 150, at 991 ("It is, of course, not 'essential' to the job of delivering furniture that an applicant not have a conviction for violent crimes, and if imposed, the standard is not susceptible to the same scientific validity analysis as, for example, a pencil and paper test.").

183. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5(A) (2014); see also Connor & White, *supra* note 150, at 991.

184. Nichols, *supra* note 179, at 630 ("[R]igidly adhering to the Uniform Guidelines' Approach—apt for addressing tests that produce raw scores and quantifiable data—is not fitting for this novel form of discrimination attuned to risk rather than ability.").

185. See, e.g., Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427 (2007) (defining counterproductive work behaviors as "theft, white collar crime, absenteeism, tardiness, drug and alcohol abuse, disciplinary problems, accidents, sabotage, sexual harassment, and violence").

186. *Id.* at 1434. In some instances, "people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or to steal things from work." *Id.* at 1430. The authors offered several possible theories for this finding: that the experience of being caught and punished for criminal activity meant that people with criminal records had "learned their lesson"; that people with criminal records are more likely to fear losing their jobs; that a convic-

even more definitive: no study has found that credit history has predictive value in workplace performance.¹⁸⁷

In fact, recent studies about the recidivism rates of people with criminal records have cast doubt on the entire project of using minor or distant convictions to predict future bad behavior of any kind. Prior to *SEPTA*, recidivism research focused on recently released prisoners, with dismal findings: two-thirds of parole releases commit a new offense or violate parole within three years of release.¹⁸⁸ But the *SEPTA* court's clear ambivalence in holding that a past conviction could bar an applicant from future work, no matter how long ago, animated an effort among social scientists to study the predictive risk that people with criminal records will re-offend compared with the general population over time. Comparing "redemption rates," or the rate at which the risk of reoffense, or hazard rates, among people with criminal records approaches that of the general population, these studies have shown that hazard rates decrease steadily over time.¹⁸⁹ One cohort study of offenders and nonoffenders in a single metropolitan area found that after seven years the hazard rates of offenders are small, similar to that of comparable nonoffenders, which "supports explicit time limits in any statutory restrictions on employment."¹⁹⁰

Redemption studies have also revealed the importance of considering the age of the individual and the type of offense. The most authoritative of these studies, by Bushway, Nieuwbeerta, and Blokland, examined the sensitivity of redemption rates to two factors, the age of the person when the offense occurred, and whether the person is a "reoffender," or has more than one conviction.¹⁹¹ The Bushway study

tion is a poor indicator of illicit conduct because "most crimes go undetected"; and that individuals without a prior offense were superior at engaging in illicit conduct without being caught. *Id.* at 1434.

187. On the contrary, one study found that "[t]here was virtually no relationship between credit history and performance ratings." Laura Koppes Bryan & Jerry K. Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, 15 *PSYCHOLOGIST-MANAGER J.* 106, 123 (2012) ("While intuitively a credit history is measuring responsibility and the ability to meet deadlines, in practice this measure is probably contaminated by many other factors outside an employee's control, as well as inaccuracies. Thus, our data indicate there is no benefit from using credit history to predict employee performance or turnover.").

188. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 193427, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 1 (2002).

189. See Paul-Emile, *supra* note 23, at 945-46 (finding that because hazard rates decrease over time, "predictions regarding the risk of future crime based simply on a criminal record are likely prone to error").

190. Megan C. Kurlychek et al., *Scarlet Letters & Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *CRIMINOLOGY & PUB. POL'Y* 483, 499 (2006).

191. Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 5 *CRIMINOLOGY* 27, 28-30 (2011).

found that for one-time offenders, redemption rates shorten dramatically as the age of the offender increases, from ten years after conviction for the youngest groups of offenders, to two years for offenders between forty-two and forty-six years old.¹⁹² In contrast, reoffenders have substantially longer redemption rates, from ten years for the oldest reoffenders to twenty-three years for younger offenders with four or more offenses.¹⁹³

These findings are supported by other studies that have previously cautioned against drawing broad conclusions from an arrest or conviction, particularly after the passage of time without a subsequent conviction.¹⁹⁴ Additionally, Blumstein and Nakamura found that redemption rates of individuals with previous first-time arrests vary widely based on the nature of the crime. For individuals in their twenties, the redemption rate for individuals arrested for burglary is 3.8 years (4.3 years for aggravated assault), while those arrested for robbery is 7.7 years.¹⁹⁵ Intervening work history also plays a role in reducing the risk of recidivism.¹⁹⁶

The Bushway study found that redemption rates for single offenders converge with the general population after seven to ten years, and in concluding that “the 40-year period put forward in the *El v. SEPTA* (2007) case . . . seems too old of a score to still be in need of settlement,”¹⁹⁷ it is an illuminating postscript to *SEPTA* for two reasons. First, it undermines the assumption that a criminal offense should always be considered a negative marker to be overcome. One-time offenders over forty generally present the same hazard risk after a few years as the general population. In some cases, an older offender may have a lower hazard rate than a younger person with *no* criminal record history, suggesting that applicant age is an equally or more important marker to evaluate risk. In these cases, for one-time minor or long-ago convictions in which the individual’s hazard rate is similar to that of the general population, a criminal record provides little predictive value and likely should be disregarded.

192. *Id.* at 49–50.

193. *Id.* at 51.

194. “[F]ive years after an arrest, [people with criminal records] in their mid-twenties are just over 1 percent more likely to commit a crime than otherwise similar nonoffenders.” PAGER, *supra* note 1, at 155 & 211 n.35. In contrast, recidivism the first year after the arrest is a serious concern. *Id.* at 127.

195. Blumstein & Nakamura, *supra* note 7, at 12. Another study found that recidivism rates are higher for persons convicted of property offenses than violent offenders. Langan & Levin, *supra* note 188, at 1.

196. PAGER, *supra* note 1, at 127.

197. Bushway et al., *supra* note 191, at 52.

Even for relevant convictions, the counterintuitive nature of comparing hazard rates shows the importance of contextualizing the significance of a negative credential. Intuition is blind to the risk of hiring a younger applicant over an older one, even though age may be as important a factor as conviction history. Despite the intuitive aversion to hiring persons who have previously committed a violent crime, a previous offense involving violence has a lower hazard rate than an offense involving fraud. More broadly, the findings from these studies strongly suggest that there is no “one-size-fits-all”¹⁹⁸ analysis of a criminal record: some criminal record histories ought to be disregarded because they are distant in time (like the one in *SEPTA*), and those that are relevant are only properly evaluated when taken in context.

Nexus tests have not caught up with the conclusions reached in these studies. Post-*SEPTA* courts have not had the opportunity to determine whether the studies indicate that a background check or other negative credential does not, on its own, signify that the applicant is a greater risk to the employer than an applicant without a conviction. Redemption research may persuade courts to require an individual assessment in order to establish business necessity, as the EEOC recommends, on the ground that, like the personality test in *Karraker*, a criminal record history must take account of the larger context of the individual in order to serve as a reliable predictor of future behavior. But nexus tests that do not take account of postconviction history, particularly age, time elapsed after the record, and evidence of rehabilitation, fail to capture these nuances. Permitting employers and the courts to make intuitive, generalized assessments about the meaning of a conviction history will consistently overestimate its risk based on the stigma of the criminal record history rather than its predictive value.

While redemption research may seek to provide some rationality to employers’ background check policies,¹⁹⁹ in the process, it has revealed that validation of a background check, in the manner that background checks are often conducted, is almost impossible to conceive, and has affirmed the EEOC’s recommendation that employers conduct an individual assessment before rejecting applicants with a criminal record history. Employers lack sufficient information to engage in a reasonably accurate risk assessment of applicants based on a

198. *Id.*

199. *See, e.g.,* Kurlychek et al., *supra* note 190, at 486 (“The article is specifically designed to help employers and public policy makers determine the relevance of criminal history records for predicting future behavior, including but not limited to future arrest and conviction.”).

civil disability alone. Criminal history reports, which simply list the disposition and date, do not enable the employer to understand the relationship between a civil disability and the job sought, postconviction rehabilitation, or other relevant factors that must be evaluated for an assessment to be accurate.²⁰⁰ While a matrix could conceivably be developed that takes account of the age of the applicant and time elapsed since the conviction to provide recidivism rates for each type of conviction, such a matrix would be no more than a rule of thumb and would not eliminate the need for an individual assessment of the applicant's propensity to engage in counterproductive workplace behavior.²⁰¹ Even with this information, employers reviewing background check results may not have the necessary experience or the time to correctly evaluate them. As the EEOC has correctly instructed, the best practice would be to obtain that information through an individual assessment, taking account of all relevant factors. Employers would be wise to follow the EEOC guidance. But with mixed messages from courts on permissible background checks and whether they endorse the EEOC's view of them, and from the states on whether and how to consider the postconviction history of applicants, employers may instead conflate the stigma of a conviction with its significance or ignore the legal requirements entirely.

This Part has shown that the current approaches by which federal and state governments restrict employer use of criminal convictions in hiring face important limitations in encouraging the reintegration of people with criminal convictions into the workforce. There are few privacy protections that apply to criminal records, and most of those are easily bypassed by employer criminal conviction inquiries of applicants. Many Ban the Box laws do not require a suitability determination before considering criminal records and thereby miss an opportunity to encourage employers to individually assess candidates before considering the potential workplace risk of a criminal conviction. Finally, Title VII and state nexus standards are undermined by the judiciary's heightened statistical requirements and deference to employer justifications in hiring screen challenges.

200. Williams, *supra* note 22, at 547-48 (stating that employers lack "access to reliable information that would allow them to predict recidivism").

201. Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *CRIMINOLOGY* 575, 575-78 (1996) (likelihood of recidivism depends on a variety of personality traits, including antisocial behavior, social achievement, and ability to manage interpersonal conflict), *cited in* Williams, *supra* note 22, at 547 n.177.

V. A DISABILITY APPROACH TO REGULATE THE USE OF CIVIL DISABILITIES IN EMPLOYMENT

The previous Part explained the gaps in current privacy, procedural, and nexus protections for civil disabilities. This Part makes the case that criminal records, like other civil disabilities, are most appropriately regulated in the same manner as protections for people with physical and mental disabilities. A disability framework would first eliminate from consideration those negative credentials that offer no predictive value on privacy grounds, and then tailor nexus and procedural requirements to the stigma and relevancy of the information. In the case of relevant criminal record histories, this analysis suggests that after retiring old and minor convictions with no predictive value, background checks should be permitted after the candidate has been found otherwise qualified, and after a full consideration of applicants' postconviction history.

A. *Applying the Disability Framework to Civil Disability Discrimination*

Like applicants with mental and physical disabilities, who must overcome a stigma that associates disabilities with poor job performance, people with criminal convictions seeking employment must overcome a stigma that associates a criminal conviction with negative workplace behaviors. A disability framework would address the widespread exclusion of people with criminal records from the workplace:

- (1) By restricting employer access to long-ago and minor convictions that do not predict future behavior by sealing or expunging these records, or otherwise prohibiting their disclosure for employment purposes;
- (2) Where criminal records may predict future behavior, by permitting their disclosure to employers after the applicants have been found qualified for the position and provided a conditional offer of employment; on condition that
- (3) Employers only reject these conditional employees based on an individualized assessment that their criminal record history presents a genuine risk to the workplace that cannot be reasonably accommodated.

In this disability framework, the privacy, nexus, and procedural protections are mutually supportive. Nexus protections give effect to the procedural goal of giving applicants a chance to explain their negative credential. Procedural protections provide a process in which nexus standards are more likely to be met, and make privacy protections

more meaningful by preventing employers from seeking the prohibited information from applicants. And privacy protections prevent irrelevant, stigmatic information from tainting nexus protections.

This approach is consistent with the regulation of other disabilities and has applicability to other civil disabilities and areas outside of employment. In the case of credit history, which has no demonstrated relationship to workplace behavior, this approach would sharply limit the disclosure of credit history for employment purposes on privacy grounds, while permitting such inquiries in fields (such as lending) where credit history has predictive value. These recommendations have equal applicability to federal, state, and local laws as amendments to existing protections.

*B. Privacy Standards To Prevent Disclosure
of Irrelevant Dispositions*

Unlike for medical disabilities, there are few objective sources an employer can turn to in the case of criminal records and other civil disabilities to evaluate their significance. As discussed in Part III.D.2, accurate evaluation of a civil disability can be counterintuitive because highly prejudicial records can be irrelevant. Highly stigmatizing, long-ago convictions, such as the forty-year-old homicide in *SEPTA*, can overwhelm an employer's ability to provide a fair assessment of the candidate even though the conviction may be irrelevant as a marker of counterproductive workplace behavior or recidivism.

Given the lack of an objective source for evidence-based assessments about the workplace risk of a criminal conviction, and the likelihood that an irrelevant criminal conviction will be misused or misinterpreted, a disability framework would prohibit the use of old and minor convictions in hiring screens on privacy grounds. Federal and state criminal justice agencies, which are the most objective sources in determining the meaning of a criminal record, would dispose of criminal records no longer in need of settlement and protect this irrelevant information from disclosure for employment purposes.

Like genetic screening, applicants have a heightened privacy interest against the use of old or minor criminal conviction records that have no relevance in predicting negative workplace behaviors, and which are likely to be misused or misinterpreted in hiring screens. Redemption studies show that most convictions do not indicate a risk of recidivism significantly higher than that of the general population after a finite period of time, typically five to ten years. States should limit the criminal records available for use in hiring screens after this redemption period has elapsed. Restrictions could be relaxed if an

offender's criminal record reflects an atypically long redemption period, such as repeat offenders, and tightened if the type of conviction or age group of the offender indicates a shorter period to redemption. People with criminal records who undergo specific rehabilitative measures—for example, successful completion of a treatment program after conviction for a drug-related offense—should be eligible for administrative relief that would create a presumption of rehabilitation.

There are a number of models that states could use for this purpose. Massachusetts provides a model for time-based restrictions on criminal records for employment and on sealing convictions after those periods.²⁰² New York's certificate of relief from disabilities provides a model for conduct-based rehabilitation before standard rehabilitation periods have elapsed,²⁰³ although easing the process for issuing certificates is in order, for example, by providing for their automatic evaluation at the completion of the offender's sentence, instead of requiring a separate application.

C. *Procedural Protections Consistent with the ADA*

Second, consistent with the ADA's regulation of medical inquiries, and with Ban the Box laws in New Mexico and Hawaii, employers should be required to provide a conditional offer to applicants before inquiring about civil disabilities. Hiring screens that consider the applicant's criminal conviction before finding the applicant suitable for the job runs an unreasonable risk that the employer will find the candidate unsuitable because of the conviction.²⁰⁴ As with the ADA, this approach reconceptualizes the meaning of a criminal record, from being a negative credential that may automatically disqualify a candidate, to a potential marker of risk that should be evaluated after finding the applicant otherwise qualified. Limiting access to criminal record histories to after an applicant is found qualified for a position also improve the odds of in-person contact with employers, which is

202. MASS GEN. LAWS ANN. ch. 276, § 100A (West 2012) (prohibiting employer inquiries about single misdemeanor convictions older than five years, and requiring the sealing of convictions on request after five to ten years).

203. N.Y. CORRECT. LAW §§ 701–703 (McKinney 2012); *see also* Love & Frazier, *supra* note 96, at 3.

204. Cognitive studies have shown that individuals faced with a need to make snap, complicated judgments can result in biases against stigmatized groups. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 95 (2008). Requiring a bifurcated approach of considering an applicant's qualifications for the position before evaluating whether the applicant's criminal conviction presents an unreasonable workplace risk might decrease the likelihood of bias against persons with criminal convictions in hiring.

more likely to result in employers giving people with criminal records a fair assessment.²⁰⁵ Employers who have already found applicants qualified for a position are in a better position to isolate the risk factors of, and to contextualize, a civil disability. By limiting the number of risk assessments to only those applicants with a conditional offer, it encourages meaningful, individualized assessments, recognized by the EEOC as a best practice.

D. Nexus Protections Focused on Postconviction History

Like the ADA, the primary goal of the nexus protection for criminal convictions is to ensure that risk evaluations are contextualized. The risk of recidivism by people with criminal records approaches that of the general population based on a number of postconviction factors, including the nature of the offense, the age of the applicant, the time elapsed since the offense, and evidence of rehabilitation. Nexus standards that now provide for a general “reasonableness” standard, such as the Wisconsin statute,²⁰⁶ do not give employers and courts adequate guidance, and should be amended to require consideration of postconviction history. Drawing on the EEOC enforcement guidance and from states such as New York that require consideration of specific, relevant factors,²⁰⁷ nexus requirements should clarify that employers must consider postconviction history, including, at a minimum, the nature and gravity of the crime, the age of the applicant, time elapsed since the civil disability, and evidence of rehabilitation.

Nexus standards would also require reasonable accommodations to be made by employers. Requiring accommodation is a logical extension of nexus protections “to eliminate discrimination in an area where removing bias in evaluation is impossible.”²⁰⁸ Like other areas in which reasonable accommodations may address an anomaly in antidiscrimination law,²⁰⁹ an accommodation mandate would resolve the

205. Pager et al., *supra* note 14, at 200–01 (“[T]esters who interact with employers are between four and six times more likely to receive a callback or job offer than those who do not; and personal contact reduces the effect of a criminal record by roughly 15 percent.”).

206. *See, e.g.*, Mullings, *supra* note 135, at 289 (criticizing a Wisconsin statute’s general standard, which has resulted in “a test that has made it easier to exclude more people with criminal records”).

207. *See* EEOC ARREST AND CONVICTION GUIDANCE, *supra* note 17; N.Y. CORRECT. LAW § 753 (McKinney 2012).

208. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1368 (1991).

209. *See id.* (proposing that Title VII apply a reasonable accommodation principle to accents to address “the potential anomaly of treating physical speech impediments as more deserving of protection than accents”); *see also* Debbie N. Kaminer, *The Work–Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306–08 (2004)

anomalous distinction between legal protections for medical and civil disabilities. A reasonable accommodation in reentry may require an employer to tolerate a workplace risk somewhat higher than the general population, particularly for low-risk jobs with little interaction with the public.²¹⁰ For high-risk individuals, government subsidies and bonding programs have and should provide incentives for employers to defray the costs of accommodation.²¹¹

VI. CRITIQUES OF THE USE OF THE DISABILITY MODEL FOR CRIMINAL HISTORY

The principle critique of a disability framework is that employers will respond to the additional compliance costs by engaging in statistical discrimination against African-Americans because of a perception that blacks are more likely to engage in criminal conduct. The second critique is that restricting access to negative credentials will result in employers bypassing formal channels entirely and searching for criminal records on publicly available, electronic databases. This Part responds that a disability approach is unlikely to increase statistical discrimination against African-Americans, as it would permit criminal record inquiries, and in any event statistical discrimination is unlawful, intentional race discrimination that should be challenged under Title VII. In response to the second critique, while shielding old and minor convictions from employers requires federal and state coordination, it is likely to be followed because employers will benefit from reduced exposure to negligent hiring claims. Employers and credit reporting agencies that fail to do so should be addressed through enforcement of federal and state privacy laws.

(proposing applying reasonable accommodations to parental obligations); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1432-33 (2009) (arguing that courts incorporate an accommodation mandate in Title VII in holding employers liable for failing to address harassment of employees by customers and other third parties).

210. See Paul-Emile, *supra* note 23, at 944-45 (applying the reasonable accommodation mandate to the consideration of criminal background records in employment).

211. Strahilevitz, *supra* note 213, at 379. The federal government already provides financial incentives to hire people with criminal records. See Lyles-Chockley, *supra* note 2, at 291 (“[T]he Work Opportunity Tax Credit provides a federal incentive for employers to hire [people with criminal records], and the Federal Bonding Program makes no-cost bonds available to protect employers who hire [people with criminal records.]”). A similar argument in favor of subsidy regimes has been made for disabilities. See Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 197-99 (1998).

A. *The “Perverse Consequences” Critique: Disability Protections Will Result in More Discrimination Against African-Americans*

A corollary to the argument for greater hiring protections for persons with criminal convictions is that such protections should also address the persistent joblessness of African-Americans, who disproportionately have a criminal record.²¹² But whether this assumption is correct depends on the likely reaction of employers who initially evaluate black applicants without the benefit of a criminal background history. An important critique to a proposal to limit an employer’s access to criminal record history during the application process is the possibility that such protections would perversely increase hiring discrimination against African-Americans.

The first “perverse consequence” is if employers react to an absence of criminal record history information by assuming that all African-American applicants have a criminal record. Employers may then disproportionately reject black applicants, including those with a “clean” criminal record history. In this event, the resulting “statistical discrimination”²¹³ against blacks without a criminal history from employment may overwhelm the benefits of such protections.

There is some evidence supporting the “statistical discrimination” theory. One study by Harry Holzer, Steven Raphael, and Michael Stoll compared the racial composition of hires by employers who check criminal record history with employers who do not, and found that “employers who perform criminal background checks are more likely to hire black applicants than employers that do not.”²¹⁴ This finding supports “the proposition that in the absence of a criminal background check, employers use race to infer past criminal activity, especially employers with a strong stated aversion to hiring people with criminal records.”²¹⁵ According to its authors, “The results of this study suggest that curtailing access to criminal history records

212. See, e.g., Lyles-Chockley, *supra* note 2, at 283 (“The [successful] reentry of black [people with criminal records] presents an opportunity to directly confront racism.”).

213. Economists consider such a form of discrimination to be “statistical discrimination,” or discrimination against a protected class because of a perceived negative trait because the class is statistically more likely to possess this trait. See Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 365 (2008) (“Statistical discrimination is based, not on irrational animus, but on the use of heuristics by decisionmakers who believe—correctly or not—that observable hallmarks of membership in a group correlate with some undesirable characteristic.”).

214. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 473 (2006).

215. *Id.* at 471.

may actually harm more people than it helps and aggravate racial differences in labor market outcomes.”²¹⁶

As a first response, it is not clear that a study showing that firms that conduct background checks hire blacks more frequently than those that do not is in tension with the disability approach recommended in this Article. The proposed disability framework would not prohibit background checks, but rather guide their use by retiring irrelevant records and encouraging a contextualized evaluation of the applicant and her criminal conviction. Assuming the validity of the findings reported by the Holzer, Raphael, and Stoll study, it is still an open question whether the protections recommended in this Article would impact the racial composition of hired applicants. To the extent that the findings in the Holzer, Raphael, and Stoll study are the result of a rational choice by employers to reject applicants who may pose a true workplace risk,²¹⁷ the disability approach of filtering out only irrelevant criminal records from consideration may expand opportunity for African-Americans as a whole.²¹⁸

More to the point, whether or not the employer behavior documented by Holzer, Raphael, and Stoll is “rational,” antidiscrimination law forbids it. Simply put, in the words of EEOC Commissioner Victoria Lipnic, “where, in fact, in the absence of a criminal background check an employer chooses to use race as a proxy for criminal history, *that employer is patently violating federal civil rights law.*”²¹⁹ Other forms of statistical discrimination, such as calculating retiree benefits based on projected longevity by sex, and hiring men because of the likelihood that women will take family-related leave, have long been

216. *Id.* at 473; *see also id.* 473–75 (“Surely, calls to seal criminal history records fail to take into account this unintended consequence and the market failure associated with inferior information that employers would have as a result.”).

217. Other commentators have cast doubt on the statistical discrimination model as applied to African-American men. Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision Making*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 70–93 (2009) (stating that employers who report positive feelings about particular African-American employees “nevertheless maintain strong negative attitudes about black men generally”).

218. *See* Paul-Emile, *supra* note 23, at 949; *see also* Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders*, in STUDIES OF LABOR MARKET INTERMEDIATION 89, 122 (David H. Autor ed., 2009) (finding strong evidence that people with criminal records in states with “open records” policies have lower wages and earnings than those in states with more closed policies, and weaker evidence that “non-offenders from highly offensive groups” have improved labor market outcomes).

219. *The Impact of Criminal Background Checks and the EEOC’s Conviction Records Policy on the Employment of Black and Hispanic Workers: Hearing Before the U.S. Comm’n on Civil Rights* (Dec. 7, 2012) (statement of Victoria A. Lipnic, Comm’r, EEOC); *see also* Fishkin, *supra* note 125, at 1465 (“Disparate treatment based on characteristics such as race and sex is prohibited even when it is rational discrimination . . .”).

disfavored by the courts.²²⁰ This is true even if such statistical discrimination may prevent discrimination against protected classes.²²¹ Even if permitting prehire exclusion of people with criminal records resulted in a more racially diverse workforce, such a “bottom line” outcome is not a defense to a disparate impact claim.²²²

Any alternative approach that permits the categorical exclusion of people with criminal records to deter statistical discrimination against African-Americans has no sound basis in law or policy. To the extent that this approach is grounded in the absence of criminal record history as a protected classification under Title VII, ending a socially destructive hiring practice need not require a protected class.²²³ Moreover, over 100 cities, counties, and states confer protected class status to people with a criminal conviction.²²⁴ To the extent that the differential treatment of people with criminal records is based on size of the population, there are now seventy million people with criminal records.²²⁵ Clearly, permitting discrimination against people with civil disabilities is not called for either on the grounds that they are a small population or that they belong to a class that the public has not considered in need of protection.

As discussed in Part III.B.2, the argument that discrimination against people with criminal records ought to be allowed may rest on the notion that people with criminal records choose to become stigmatized by engaging in criminal conduct, and so are not deserving of such protection.²²⁶ But no group should be exposed to needless suffer-

220. Amanda K. Baumle & Mark Fossett, *Statistical Discrimination in Employment: Its Practice, Conceptualization, and Implications for Public Policy*, 48 *AM. BEHAVIORAL SCIENTIST* 1250, 1263–65 (2005).

221. Strahilevitz, *supra* note 213, at 377 n.56 (citing *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 493 (Ga. Ct. App. 1994), and *Hillman v. Columbia Cnty.*, 474 N.W.2d 913, 922–23 (Wis. Ct. App. 1991), as cases in which courts rejected the argument that permitting disclosure of HIV status would protect gays and blacks from statistical discrimination).

222. *Connecticut v. Teal*, 457 U.S. 440, 442 (1982).

223. Many types of employment discrimination have been prohibited against classes not historically thought of as in need of special protection, e.g., applicants subject to polygraph tests, Employee Polygraph Protection Act, 29 U.S.C. § 2002 (2012), the jobless, N.Y.C., N.Y., ADMIN. CODE tit. 8, § 8-107(21) (2014), and those selected for jury duty, Federal Jury System Improvements Act, 28 U.S.C. § 1875 (2012). See Fishkin, *supra* note 125, at 1470 (stating that Ban the Box laws and other efforts to limit “bottlenecks” that exclude people from hiring on a basis other than a protected classification are justified insofar as they reshape employment opportunities to “mak[e] a pervasive bottleneck that much less severe”).

224. NELP BAN THE BOX REPORT, *supra* note 20, at 1.

225. BUREAU OF JUSTICE STATISTICS, *supra* note 5, at 13 tbl.25. By way of comparison, when Congress enacted the ADA, it found that there are about 43 million individuals with physical or mental disabilities in the U.S. Kramer, *supra* note 26, at 1283.

226. See Connor & White, *supra* note 150, at 1003 (criticizing the EEOC’s prioritization of criminal record discrimination that has a disparate impact on racial minorities: “ultimately, any-

ing.²²⁷ Punishing people with criminal records beyond the terms of their sentence supports no legitimate criminal justice goal.²²⁸ Public policy supports the employment of people with criminal records to promote rehabilitation and reduce recidivism.²²⁹

To the extent that policies promoting equal opportunities in hiring for African-Americans and people with criminal convictions are in tension, hiring protections should seek equal opportunity in a manner that deters employer bias against both groups. This Article argues that the approach of retiring only irrelevant criminal records and allowing posthire, preplacement access to criminal record histories strikes the right balance of permitting employers access to the “clean” records of African-American applicants who may otherwise be tainted with the specter of criminality, while encouraging a fair evaluation of people with criminal convictions.

Alternatively, one might view the project of moving the employer inquiry until after a conditional offer with skepticism, because it will not actually prevent bias against people with criminal records (while possibly increasing discrimination against African-Americans). Certainly, subjectivity in hiring, whether at the initial application or at a later stage, is likely to result in the rejection of qualified African-Americans and in the overbroad exclusion of applicants with criminal records.²³⁰ Hiring managers concerned about a criminal conviction, but without access to information regarding the risk presented by one, may choose the “safe” route of rejection. As discussed in Part II.B, this is particularly the case if the applicants are African-Americans with criminal records, who suffer near-total exclusion from the

one who decides to commit a crime is likely to experience the stigma associated with that choice In those cases, so long as [sic] is that decision, and not race, that causes him disadvantage, Title VII does not protect him”). For an argument that would permit widespread access by employers to criminal history while forbidding access to HIV status, see Strahilevitz, *supra* note 213, at 377.

227. As Holzer, Raphael, and Stoll seem to agree, cautioning that wholesale employer access to criminal record repositories “is sure to punish many people with criminal records with relatively minor and distant run-ins with the law.” Holzer et al., *supra* note 214, at 475.

228. Bronsteen et al., *supra* note 3, at 1038.

229. MY BROTHER’S KEEPER TASK FORCE, REPORT TO THE PRESIDENT 10 (2014), available at http://www.whitehouse.gov/sites/default/files/docs/053014_mbk_report.pdf.

Our youth and communities suffer when hiring practices unnecessarily disqualify candidates based on past mistakes. We should implement reforms to promote successful reentry, including encouraging hiring practices, such as “Ban the Box,” which give applicants a fair chance and allow[] employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.

Id.

230. See Sarah Esther Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175, 176 (2015) (finding that employers lacking formal background check policies are more likely to reject applicants with criminal records).

workforce.²³¹ But the clearest path to remove discretion from line hiring managers, shielding *all* criminal records, may work at cross-purposes: protecting African-Americans with criminal records by expanding privacy rights could result in statistical discrimination against African-Americans generally.

These critiques, taken together, suggest that in addition to the broad contours of privacy, procedural, and nexus protections, reentry policies should encourage targeted measures that limit subjectivity in hiring. This could entail placing some responsibility in the hands of a third party more likely to conduct a valid risk assessment, such as a parole officer,²³² the dissemination by public agencies of bright-line rules that employers can use to comply with nexus requirements²³³ and, as others have recommended, affirmative defenses to negligent hiring claims for employers who have complied with the nexus requirements.²³⁴

B. The Legal Avoidance Critique: Employers Will Respond to Procedural and Nexus Protections by Evading Them, and Shielding Civil Disabilities from Disclosure Is Futile

A second critique is that employers will respond to a more regulated regime by adopting legal-avoidance tactics that will ultimately frustrate its purpose. Critics of the ADA have noted that it has not led to the mass integration of people with disabilities into the workforce, and posit that this is because the costs of compliance are greater than the costs of avoidance.²³⁵ This critique has equal force here: when employers must undergo the cost of delaying background checks to after conditional offers, and of individually assessing candidates with criminal records, it is unrealistic to expect that attempts to cordon off irrelevant, prejudicial data, as contemplated by the privacy protections recommended in this Article, will be successful. As James Jacobs and Tamara Crepet observe, “The information infrastructure is

231. PAGER, *supra* note 1, at 90–91.

232. Williams, *supra* note 22, at 552–56.

233. These rules could provide guidance on the relevance of certain types of convictions over time, and which dispositions are particularly relevant for certain occupations (e.g., convictions that would on their face permit security firms to reject applicants hiring armed peace officers because the conviction history precludes a gun permit).

234. See, e.g., Smyth, *supra* note 22, at 51–52.

235. See, e.g., Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 534–36 (2004) (reviewing THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003)) (stating that the employment of people with disabilities fell after the enactment of the ADA, leading to “perverse-effects” arguments that the ADA costs of compliance caused the drop).

too large, too entrenched, and too useful to too many people to make its contraction even a remote possibility.”²³⁶ To privacy realists, it may be more fruitful to instead require that employers obtain accurate²³⁷ information and use it in a manner consistent with the employer’s business necessity.

But no one seriously argues that *all* information about individuals is or should be available to the public. Medical reports, personal tax disclosures, attorney–client communications, and law enforcement investigations are all shielded from public view and protected in various ways to prevent their disclosure except under limited circumstances. These protections extend to the private sector as well: CRAs face significant liability for inadvertent disclosure or misreporting of an individual’s credit or criminal record histories.²³⁸ To the extent that civil disability hiring screens seek highly stigmatizing information that serve no legitimate purpose, they should be regulated accordingly.²³⁹

Critics may respond that employers restricted from obtaining full background checks from applicants and CRAs will find other means to obtain the information. Some private companies sell information about civil disabilities online in repositories that are notorious for having inaccurate and outdated material. Arguably, applicants with civil disabilities are better off with background checks conducted by reputable CRAs if evaluated by employers who responsibly evaluate them. But the easy availability of stigmatizing and often incorrect information about individuals that can be used unlawfully by employers is a separate matter. Vendors that “traffic[] in the reputations of ordinary people”²⁴⁰ are CRAs under the FCRA and are liable for incorrect or misreported information. Employers in this scenario would also violate the FCRA for failure to notify employees about a background check that resulted in an adverse determination.²⁴¹ To the extent that

236. Jacobs & Crepet, *supra* note 55, at 211; *see also* Paul-Emile, *supra* note 23, at 900.

237. Holzer et al., *supra* note 214, at 475 (stating that “the thorny implementation problems associated with 52 nonstandard information systems” raises “the nontrivial likelihood of false-positive background checks”).

238. *See, e.g.*, *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1071 (9th Cir. 2008) (holding a CRA liable for erroneously reported judgment).

239. This criticism has salience under the ADA, with the availability of low-cost testing in preplacement examinations that may inform employers of the likelihood that applicants will develop expensive medical conditions, such as genetic testing, or that carry a heavy stigma, such as sexually transmitted diseases or psychological disorders. *See generally* Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How To Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 530–42 (2001).

240. *Dennis*, 520 F.3d at 1071.

241. 15 U.S.C. § 1681m(a) (2012).

this is a problem, it is a matter of underenforcement of existing law, not a gap in the law.

Moreover, it is not clear that employers would resist heightened privacy restrictions or resort to illegal, ad hoc background checks in response to them. Privacy protections address the argument that nexus protections place employers “between Scylla and Charybdis”²⁴² for violating antidiscrimination law on the one hand and for negligently hiring people with criminal records on the other.²⁴³ Privacy protections give employers a ready defense in a negligent hiring suit: employers have no reasonable duty of care to be aware of civil disabilities that are not disclosed and that are not available to them. Privacy restrictions also relieve employers of negative media attention to their employees’ irrelevant credit or criminal history, particularly in the case of serious workplace accidents and violence where even a loose connection between a prior conviction and a tragedy has emotional resonance. Clearly, employers have an interest in protecting themselves from legal liability and negative media attention, interests that are met by limiting the availability of irrelevant, highly prejudicial employee information that can be used against them.

This critique gains force when joined with a central argument of this Article, that to the extent that relevant but prejudicial information is used in hiring, it should be used in context, just as a medical inquiry is under the ADA. Instead of too much information, current criminal conviction hiring screens may rely on too little. The existence of a criminal conviction alone cannot accurately predict the risk of an applicant’s workplace behavior, unless accompanied by a variety of other information. This critique suggests that reentry policies should develop sources of information that would signal a person with a criminal conviction’s “desistance,” such as training programs.²⁴⁴ Also, as with personality tests, if negative markers have validity in predicting counterproductive employee behavior, it is in a larger context of the applicant’s qualifications and propensity for counterproductive workplace behavior. These can be assessed in a number of valid ways: by checking references and requiring performance tests or medical inquiries. Such an inquiry that combines background checks with other

242. Nadich, *supra* note 19, at 802.

243. *Id.* at 770 (“On the one hand, the potential for liability based on negligent hiring creates an incentive to ask about convictions and conduct a background check. On the other hand, basing an employment decision on an applicant’s criminal history could lead the employer to inadvertently violate Title VII.” (footnote omitted)).

244. Shawn D. Bushway & Robert Apel, *Signaling Perspective on Employment-Based Reentry Programming: Training Completion as a Desistance Signal*, 11 *CRIMINOLOGY & PUB. POL’Y* 21, 40 (2012).

potential markers of counterproductive workplace behavior would be an improvement over the current, typical background check process, if subject to appropriate nexus, procedural, and privacy protections.

VII. CONCLUSION

Stable, meaningful employment is a key step in the reintegration of people with criminal records into society. Jobs provide people with criminal records with the resources to support themselves, renew their connections to the community, and afford them the dignity that comes with productive work. In disrupting criminal connections that cycles people with criminal records in and out of prison, employment reduces recidivism and directs government resources away from incarceration and toward rehabilitation.

This Article argues that treating criminal background histories similar to medical inquiries may facilitate the wide-scale reintegration of people with criminal convictions into the workforce. In particular, the exclusion of applicants with minor and long-ago convictions from the workforce is unfair and irrational. These applicants often pose no greater risk to the workforce than the general population, their exclusion cannot be justified by business necessity, and it imposes great costs on society, the government, and people with a conviction history. Shielding many of these convictions from use in employment applications promotes the equality goal of reintegrating people with criminal convictions into the workforce, is rational because these individuals have no greater workplace risk than the general population, and imposes few costs on employers.

However, the proposal may not advance the job prospects of applicants with recent or repeat convictions, who are and may always present a greater risk to the employer than the general population. There is a great cost in their exclusion from the workforce—their desistance would have the greatest impact on recidivism—but there is a cost to their reintegration. The pressing questions for their reintegration are how to identify those costs and who should bear them.

Further research is needed to identify the outer limit of this cost and who should bear it. While this Article, along with at least one other, proposes a reasonable accommodation mandate for applicants with a criminal record history,²⁴⁵ the ADA analogy falters here as the ADA envisions a central role for physicians in making determinations

245. See Paul-Emile, *supra* note 23, at 944–48 (proposing that employers considering applicants with criminal record histories bear a “‘reasonable accommodation’ mandate . . . [as] an essential means of reducing social marginalization and . . . a necessary component of full citizenship”).

regarding the extent to which an applicant's disability impacts her suitability for a job. But there is no such neutral party assessing the risk of individual candidates with criminal records for employment in particular jobs.²⁴⁶ And insufficient information currently exists to provide employers with a neutral, empirical basis to determine whether a criminal background presents a risk.

There is a role for government in filling this gap. Policy prescriptions "that are supported by rigorous social scientific research, especially through empirical policy analysis and program evaluation" can reduce recidivism and reduce state budgets.²⁴⁷ While significant research has been conducted to show that the importance to an employer of a conviction decreases over time, and differs depending on the conviction, there is a compelling need for more comprehensive research in this area.²⁴⁸ A risk-assessment approach to postincarceration reentry policies would study how and in what circumstances a criminal background history indicates a risk, whether for employment, housing, credit, or some other license or benefit. Privacy rights would be greatest where applicants with a particular criminal background carry no greater risk than individuals without a criminal background. Where a background does suggest a heightened risk for negative behavior, valid risk assessments would identify who should bear the cost. If the risk is reasonable, employers should bear the minor costs of reintegration, and if high, the government should tailor employment incentives, such as tax incentives, bonding, and ongoing treatment for the individual, and to reduce recidivism and the cost of postincarceration policies. Such studies should be publicly available and broadly disseminated to criminal justice agencies and private stakeholders that conduct background checks. Comprehensive research into the factors that drive recidivism—along with information about public programs to encourage employers to hire people with criminal records—would

246. Where an applicant has a parole officer, the parole officer could play the role of a treating physician by making neutral, objective determinations about a disabled candidate's suitability for a job. Williams, *supra* note 22, at 552–56. Unlike physicians, however, parole officers lack ready information about whether the applicant is a likely risk to the workplace, and as steady employment reduces recidivism, requiring parole officers to make risk assessments for potential jobs is in tension with their traditional role of encouraging measures that decrease the likelihood that people with criminal records will recidivate. *Id.* at 550–52.

247. Henry F. Fradella & Connie Ireland, *From the Legal Literature*, 44 CRIM. L. BULL. 627, 629 (2008). For example, the wide-scale introduction of specialized courts for specific social problems, such as domestic violence and drugs, that often involve mental health diagnoses and treatment has saved millions of dollars for states in which they have been opened in reduced back log of criminal cases and defendants sent to prison each year. *Id.*

248. Pinard, *supra* note 2, at 996 ("Additional 'redemptive studies' are needed. As a result, it is difficult at this point to draw clear and principled lines between those convictions that should be removed from those that should not, particularly as years pass with 'time clean.'").

assist employers seeking to improve their risk assessments of applicants with criminal record histories. Furthermore, employers seeking to limit their exposure in negligent hiring claims could rely on such research findings to show that their assessments are reasonable and thus not negligent.