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Interviewing Stripes Instead of Suits: Addressing the Inadequacy of Indiana's Current Legislation and How to Assist Employers in Effectively Hiring Convicted Felons

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INTERVIEWING STRIPES INSTEAD OF SUITS: ADDRESSING THE INADEQUACY OF INDIANA'S CURRENT LEGISLATION AND HOW TO ASSIST EMPLOYERS IN EFFECTIVELY HIRING CONVICTED FELONS

I. INTRODUCTION

David is the owner of a small retail business.[1] He spends time and effort finding applicants who appear to be efficient and motivated workers who also fit in well with his current team of employees. Because his company is so small, David feels that he must be very careful and considerate when choosing whom he brings into his place of business. He has heard something about new legislation in Indiana that prevents him from asking about certain aspects of an applicant's criminal history.[2] Indiana's current law is confusing because David is unsure of what he is actually allowed to use when making a hiring decision.[3] Jill, a young, Hispanic woman, applies for a job at David's company and during the interview, admits to a prior criminal conviction for possession of a controlled substance. At this point, David faces a dilemma—Jill seems like a great fit for his company, but he is nervous about a potential racial discrimination suit if he chooses not to hire her or a negligent hiring lawsuit if he does hire her and she commits a crime, leaving his company liable for her misdeeds.[4]

Michael works in the human resource department of a large financial company and is in charge of hiring all new employees.[5] He sets up a job fair with the goal of hiring approximately thirty new employees for various positions throughout the company. After narrowing the applicants down to forty potential employees, he sends their information

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1 This scenario is fictional and solely the work of the author to illustrate the issues presented in this Note.

2 *See infra* Part II.C (discussing Indiana's newest legislation that limits what employers can see and use when looking at background checks of potential employees).

3 IND. CODE § 24-4-18-6 (2013) (stating that expunged records or records of Class D/Level 6 felonies that have been entered or converted to a Class A misdemeanor conviction cannot be used when making an employment decision). Due to changes in the statute that went into effect July 1, 2014, all references to Class D felonies are now congruent and will be known as Level 6 felonies. *Id.* § 24-4-18-7.

4 *See infra* Parts II.A.1–2 (examining how race can have a disproportionate effect on individuals with criminal records and the counter effect on employers who then may inadvertently commit Title VII employment discrimination).

5 This scenario is fictional and solely the work of the author to illustrate the issues presented in this Note.

off to a consumer-reporting agency ("CRA").[6] Six come back with prior convictions on their records, including Jill and four other minority applicants. Michael has used this CRA for years, but he is now worried because Indiana recently passed a new law that prohibits the use of expunged records, records removed from public access, and Level 6 felonies that have been entered or converted to Class A misdemeanors.[7] Michael believes the CRA may be reporting this prohibited information. Michael also worries that if he chooses not to hire any of these six applicants, he may become subject to an employment discrimination suit because five of the six applicants are minorities who are protected classes under Title VII.[8] He fears that his own employment may come under scrutiny by hiring one of the six whose requisite actions may result in a negligent hiring lawsuit against the company.[9]

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6 15 U.S.C. § 1681a(f)–(h) (2006). A consumer reporting agency is:

> [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. . . . the term employment purposes when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

Id.; *see* EQUAL EMP'T OPPORTUNITY COMM'N, CONSIDERATION OF ARREST & CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 6 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf, *archived at* http://perma.cc/SLQ5-RP63 [hereinafter EEOC 2012 GUIDELINES] (using CRAs to find and gather such generalized information as "arrests, convictions, [or] prison terms" while others will include more specialized information).

7 *See* IND. CODE § 24-4-18-6 (stating that a "criminal history provider may not knowingly provide a criminal history report that provides criminal history information relating to" records that have been expunged or marked as expunged and removed from the record as public access).

8 *See* E.E.O.C. v. Freeman, No. RWT 09CV2573, 2010 WL 1728847, *1 (D. Md. Apr. 27, 2010) (alleging that the employer's "use of criminal history as a hiring criterion has a disparate impact" on minority applicants while also suggesting that an individual's criminal history may not actually be job related or consistent with business necessity); E.E.O.C. v. Watkins Motor Lines, Inc., 553 F.3d 593, 594 (7th Cir. 2009) (noting that Watkins Motor Lines, after deciding to no longer hire anyone with a criminal record, refused to hire Lyndon Jackson because of his criminal record which caused the EEOC to investigate to see if the company's policy had a disparate impact on minority applicants); El v. Se. Pa. Transp. Auth. ("SEPTA"), 479 F.3d 232, 235 (3d Cir. 2007) (discussing how a seemingly neutral policy can have a disparate impact on minority applicants because they are more likely to have committed a crime or have a prior conviction on their record than white applicants).

9 *See infra* Part II.B.1 (examining the EEOC's position that individuals with a criminal history should be a protected class and the effect that discriminating against those with a criminal history can lead to Title VII discrimination lawsuits).

In both of these scenarios, each employer struggles with what to do when hiring convicted felons. Federally, Title VII of the Civil Rights Act of 1964 ("Title VII") and its enforcer, the Equal Employment Opportunity Commission ("EEOC"), prohibits employment discrimination based on race, color, sex, and religion, as well as precluding facially neutral practices that may have a disparate impact on one of Title VII's protected classes.[10] In April 2012, the EEOC published guidelines to help employers when potentially hiring someone with a criminal record.[11] States have been slow in creating their own guidelines or legislation and although some, including Indiana, have made strides toward helping employers when faced with this unique situation, the solution is woefully inadequate.[12] Indiana limits access to arrest records on background checks but fails to inform employers about what process

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10 *See* 42 U.S.C. § 2000e (2006) (defining the Civil Rights Act of 1964); IND. CODE § 22-9-1-1–5 (2007 & Supp. 2013) (including an introduction to Indiana's Civil Rights law and providing for equal opportunity of employment, education, access to public conveniences, and housing). *See generally* EEOC 2012 GUIDELINES, *supra* note 6 (consolidating the EEOC's guidance documents regarding the use of arrest and/or conviction records in employment decisions); *Laws & Guidance*, EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.giv/laws/index/cfm, *archived at* http://perma.cc/8LCB-A43M (last visited Aug. 25, 2014) (enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability).

11 *See* EEOC 2012 GUIDELINES, *supra* note 6 (addressing the problem employers suffer when choosing to potentially hire an ex-convict and including what information is available to employers when making the decision). *See* Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1159 (8th Cir. 1977); Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1291 (8th Cir. 1975) (introducing the "Green" factors); The Equal Pay Act of 1963, 29 U.S.C. § 206 (stating that sex-based wage discrimination is not allowed); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (prohibiting discrimination against individuals based on their age); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (making it illegal to discriminate against a well-qualified person with a disability or to retaliate against a person who files a complaint about discrimination); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (defining terms); 42 U.S.C. § 2000e(k) (specifying that the term "because of sex" include discrimination on the basis of pregnancy or childbirth); The Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff (prohibiting discrimination on the basis of genetic information with respect to employment). The EEOC enforces federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability. *Id.* Currently, the EEOC enforces eight separate laws. *Laws & Guidance, supra* note 10.

12 IND. CODE § 24-4-18-6. "[A] criminal history provider may not knowingly provide a criminal history report that provides criminal history information" related to expunged records, restricted records, and a felony that has been entered as a misdemeanor conviction. *Id.* However, information is accessible if it is: "(1) required by state or federal law to obtain the information; or (2) the state or a political subdivision, and the information will be used solely in connection with the issuance of a public bond." *Id.*

to follow when an individual is convicted of a felony.[13] Employers may feel vulnerable using data found in a background check because refusing to hire an individual with a criminal conviction may result in a Title VII discrimination lawsuit, as minorities are more likely to have criminal records.[14]

This Note focuses on the need to support employers when they are considering hiring an individual with a criminal record.[15] First, Part II discusses the dramatic growth of an emerging class of criminals needing jobs, the resulting potential workplace discrimination of this class, and the concept of negligent hiring.[16] It also examines the increase of criminal background checks in the United States, including Indiana, and how it affects both employers and employees.[17] Then, Part III evaluates Indiana's current legislation and its inadequacies in helping employers who are considering hiring a convicted felon.[18] Last, Part IV proposes a new statute the Indiana legislature should enact that, comporting with Title VII, would give clarity to employers when they are looking to hire a job applicant with a criminal history.[19]

II. BACKGROUND

Due to an increase in incarceration rates and a general economic downturn, there are a large number of convicts looking for jobs in the national workforce.[20] Having higher percentages of individuals with

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13 *Id.* (noting that there is only information that assists in preventing discrimination on behalf of job applicants with a criminal history but no mention of protections for employers who may hire one of these job applicants).

14 *See* Susan Adams, *Background Checks on Job Candidates: Be Very Careful*, FORBES (June 21, 2013, 11:56 AM), http://www.forbes.com/sites/susanadams/2013/06/21/background-checks-on-job-candidates-be-very-careful/, *archived at* http://perma.cc/CG3V-ZP42 (explaining the potential for Title VII discrimination suits when an employer turns away a job applicant based on criminal history, or the opposite, hiring the applicant and then suffering from a negligent hiring lawsuit).

15 IND. CODE § 24-4-18-6.

16 *See infra* Part II.A.1, II.B.1–2 (explaining the history of the EEOC, Title VII, and the growth of discrimination in the workplace).

17 *See infra* Part II.A.2 (discussing the accessibility of background checks due to technological advances and the growth of consumer reporting agencies).

18 *See infra* Part III.D (evaluating that Indiana has failed to introduce a solution for employers on how to hire a criminal who has committed, and been convicted of, a crime).

19 *See infra* Part IV (suggesting that Indiana needs to amend its current legislation to more effectively direct and instruct employers on how to safely hire, or not hire, an individual with a criminal record).

20 PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, 6 (Feb. 2008), *available at* http://www.pewstates.org/research/reports/one-in-100-85899374411, *archived at* http://perma.cc/P6XR-S34K. In 2008, white men ages eighteen and older were incarcerated at a rate of 1 in 106, while all men ages 18 and older were incarcerated at a rate

criminal records in the workplace creates a problem for employers—specifically, business owners who are experiencing a higher number of criminal applicants seeking employment.[21] Part II.A outlines the increase in the population of individuals with criminal records as well as technological advances, which allow employers more accessibility to consumer reporting agencies, which provides background check information.[22] Part II.B presents a discussion of the federal prohibition of employment discrimination under Title VII and introduces negligent hiring as its own distinct cause of action.[23] Part II.C summarizes Indiana's current legislation that addresses the hiring of individuals with criminal records as well as a discussion of other states' legislation currently in effect that protects current and future employees.[24]

A. Demonstrating Growth: Criminals in the Workplace and Employers' Use of Criminal Background Checks

A person's criminal record has become another potential employment discrimination factor which is increasing in both accessibility and awareness.[25] As the population of criminals in the

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of 1 in 54. *Id.* However, Hispanic men ages 18 and older were incarcerated at a rate of 1 in 36 and black men ages 18 and older were incarcerated at a rate of 1 in 15. *Id.* Most shocking is black men between the ages of 20 to 34 were incarcerated at a rate of 1 in every 9 men. *Id.* The number of women who were incarcerated were much lower, but percentages of Hispanic and black women were much higher than white women. *Id.* The Attorney General's report takes the higher incarceration rates and translates this into employer's widespread interest in obtaining these records to "evaluate the risk of hiring or placing someone with a criminal record in particular positions" and is also "intended to protect [current] employees, customers, vulnerable persons, and business assets." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf, *archived at* http://perma.cc/5MMZ-DGSP. Employers also feel the need to assess the risks to their assets by placing a specific individual with a criminal history in a certain position. *Id.* Some employers believe that the only way to perform due diligence when hiring someone is to have access to "good sources of criminal history information." *Id.*

21 *See infra* Part II.B.1–3 (explaining how employers can become subject to Title VII employment discrimination suits or becomes subject to negligent hiring lawsuits).

22 *See infra* Part II.A (realizing that the number of individuals with criminal histories dramatically increases as the years go by and how this new, large class of people are affected by the technological growth in accessibility of employers being able to see an individual's criminal record with relative ease).

23 *See infra* Part II.B (addressing disparate impact which may result from not hiring an individual based off their criminal history as well as how negligent hiring can result when employers feel as though they are obligated to hire an individual with a criminal history).

24 *See infra* Part II.C (examining Indiana's current legislation and how it has been used thus far in assisting employers when wanting to hire a job applicant).

25 *See* Theo Emery, *Rap Sheets Trip up the Guilty, and Even the Innocent*, L.A. TIMES (Aug. 21, 2005), http://articles.latimes.com/2005/aug/21/news/adna-rapsheet21, *archived at* http://perma.cc/JXN-7GB3 (sharing information that demonstrates how people with

workplace escalates and the convenience of using criminal background check services grows, employers are met with a demographic that has only recently become prevalent, leading to confusion and uncertainty in deciding whether or not to hire this class of individuals.[26] Part II.A.1 introduces the dramatic increase in the amount of individuals who commit crimes and how this class is now attempting to enter the workforce.[27] Part II.A.2 next examines the increase in employer ease of accessing and utilizing CRAs and background check services.[28] Part II.A.3 then considers records of arrest versus conviction and the resulting effects on job applicants with criminal histories.[29]

1. Introducing a Mostly Unprotected Class of Individuals

Statistics show that African American and Hispanic men have higher incarceration rates than men of other races and ethnicities, and this pairing of race and crime affects their ability to obtain employment more so than any other group of individuals.[30] The Bureau of Justice Statistics

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stolen identities suffer when applying for jobs). Approximately 630,000 people get out of prison each year with a criminal record. *Id.* Over the past several years, about 400 companies have begun to sell criminal histories and other information over the Internet. *Id.* These large numbers indicate that that people are aware of the increasing number of criminals potentially entering the work force which then leads employers to use background checks more often when making hiring decisions. *Id.*

[26] Ellen Jean Hirst, *Background Checks Turn into Legal Risk*, CHI. TRIB. (Oct. 21, 2012), *available at* 2012 WLNR 22333120. The author suggests that employers: (1) eliminate the question "[h]ave you ever been convicted of a felony?"; (2) revisit policies that deny employment for those with criminal histories; (3) assess job candidates with criminal histories differently; (4) take into account positive references; (5) record and document justification for hiring; and (6) give further education on Title VII and the effects it has on criminal history discrimination. *Id.*

[27] *See infra* Part II.A.1 (presenting demographics that prove that the number of criminals in the United States has increased and how this also affects the number of criminals applying for jobs).

[28] *See infra* Part II.A.2 (defining consumer reporting agency and discussing its increase in ease of use for employers conducting background checks).

[29] *See infra* Part II.A.3 (explaining the effects of arrest and conviction records on both employees and employers).

[30] *See* ONE IN 100: BEHIND BARS IN AMERICA 2008, *supra* note 20, at 6 (discussing the incarceration rates of minorities). This report states that of the current 2.2 million people incarcerated, over 900,000 are African Americans. MARC MAURER & RYAN KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1 (July 2007), *available at* http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf, *archived at* http://perma.cc/8F5Q-9UFJ. As of 2005, Hispanics were about 20% of the state and federal prison population, "a rise of 43% since 1990." *Id.* at 2. Per 100,000 citizens, approximately only 412 whites are incarcerated compared to 2290 blacks and 742 Hispanics incarcerated. *Id.* at 4. Policy issues, including drugs, sentencing, and "race neutral" policies also have an effect on the racial disparity in prison populations. *Id.* at 16–18.

("BJS") released Carson and Sabol's report on Prisoners in 2011, which demonstrates that of the male population in the United States in 2011, 3% of all African American men were incarcerated, 1.2% of all Hispanic men were incarcerated, and only 0.5% of white men were incarcerated.[31] The Sentencing Project demonstrated that from 1980 to 2012, the number of individuals incarcerated increased from 1,118,097 to 3,942,800.[32] Between 2002 and 2011, state prison populations increased at an average rate of 0.8% every year, while the federal prison population grew at a rate of 3.2% every year.[33] While minorities make up only about 30% of the U.S. population, they account for roughly 60% of those incarcerated.[34] The U.S. Sentencing Commission released information that indicates that within the federal system, African American individuals are likely to receive sentences that are 10% longer than white

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31 E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, 8 (Dec. 2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf, *archived at* http://perma.cc/64VW-AACK. The statistics state that black males between the ages of eighteen and nineteen were imprisoned at nine times the rate of white males. *Id.* Hispanic and black male prisoners over the age of sixty-five were imprisoned at a rate between three and five times those of white males. *Id.* Excluding the oldest and youngest age groups, black males were imprisoned at five to seven times the rate of white males, while Hispanic men were imprisoned two to three times the rate of white males. *Id. See* Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006) (citing E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 (Dec. 2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf, *archived at* http://perma.cc/H45Z-WSTM) (presenting strong evidence that suggests over sixty percent of employers have an aversion to hiring ex-offenders and that this is stronger than an aversion to hiring other types of stigmatized workers).

32 *See* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (Apr. 2014), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf, *archived at* http://perma.cc/PPV7-U67K (showing that the U.S. is the world leader in number of individuals in prison and that over the last forty years, there has been a 500% increase in the number of individuals incarcerated).

33 THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PEOPLE IN PRISON (Jan. 2014), *available at* http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf, *archived at* http://perma.cc/SS2N-CF8M (indicating that out of adults, it is as close as one in one hundred and eight who were in prison in 2012 and that with almost five million people on probation or parole, the number of people in America under some type of criminal supervision is close to seven million).

34 Sophia Kerby, *The Top 10 Most Startling Facts about People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/, *archived at* http://perma.cc/V4AR-D9JA. *See* ACLU, COMBATING MASS INCARCERATION–THE FACTS (June 17, 2011), https://www.aclu.org/combating-mass-incarceration-facts-0, *archived at* http://perma.cc/M6X3-UXQK (demonstrating that 25% of the world's prison population is in the United States, and from 1987 to 2007, there was a 127% jump in the amount spent on incarceration, topping out in 2007 at forty-four billion dollars).

individuals for the same crime, while the Sentencing Project reports that African Americans are 21% more likely than whites to receive the mandatory minimum sentence for a crime and are 20% more likely to be sentenced to serve time in prison.[35]

The average number of U.S. citizens incarcerated is 492 per every 100,000 citizens, averaged from 932 men and 65 women per 100,000 U.S. citizens.[36] However, this number changes dramatically when race is brought into the picture.[37] For every 100,000 U.S. citizens, 3023 African

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[35] Kerby, *supra* note 34. *See Testimony of Marc Maurer, Executive Director, The Sentencing Project*, SENT'G PROJECT (Apr. 29, 2009), http://www.sentencingproject.org/doc/dp_crack_testimony.pdf, *archived at* http://perma.cc/5F3J-2F5A (using the Federal Judicial Center to conclude that blacks are more likely to receive a mandatory minimum sentence than whites while the Commission concluded that penalty statutes are used inconsistently and disproportionately against African Americans); *see also* Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System,* HUFF. POST (July 26, 2010, 7:45 AM), http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci_b_658947.html, *archived at* http://perma.cc/5BJ3-5PG3 (using drugs, police stops, arrests, bail, legal representation, jury selection, trial, sentencing, parole, and freedom to demonstrate information on race for each step of the criminal justice system and using it to indicate an innate unfairness towards minorities).

[36] *See* CARSON & SABOL, *supra* note 31, at 8 ("At year end 2011, 492 out of every 100,000 U.S. residents were sentenced to more than one year in prison"); Quigley, *supra* note 35 (reasoning that the surge in arrests and conviction rates over the past forty years is due to the war on drugs and showing that while blacks comprise 13% of the population and 14% of drug users, over 37% of the people arrested for drug offenses are African American).

[37] *See* CARSON & SABOL, *supra* note 31, at 8 (suggesting that overall, only .5% of all white men were imprisoned in 2011 compared to 1.2% of Hispanic men and 3.0% of all African American men); Quigley, *supra* note 35 (highlighting the racial disparities within the criminal justice system); *see also* Kerby, *supra* note 34 (spending time in prison not only affects the chances of getting a job, but also affects "wage trajectories" and that after release from prison, wages for minorities grow 21% slower than white ex-convicts); Marc Maurer, *Justice for All? Challenging Racial Disparities in Criminal Justice System*, 37 HUM. RIGHTS 14, 14 (Fall 2010), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system.html, *archived at* http://perma.cc/4AN-BEHZ (introducing the many indicators of "the profound impact of disproportionate rates of incarceration in communities of color"). First, Maurer discusses disproportionate crime rates, explaining that there are higher incarceration rates for African Americans because of their higher involvement in crime. *Id.* Next, he discusses disparities in criminal justice processing. *Id.* at 14–15. The U.S. Department of Justice's national surveys found that although the percentage of traffic stops are similar from African Americans to whites, African Americans are three times more likely to be searched after being stopped. *Id.* at 15. Maurer also finds an overlap of race and class effects. *Id.* There are disadvantages faced by low-income defendants, most especially when it comes to the quality of defense counsel, and there are higher percentages of minorities who have low income. *Id.* Next, the impact of "race neutral" policies show that although the legislators attempted to create race neutral policies, the legislators should have seen the clear disparities and racial effects that now exist. Maurer, *supra* at 16. Finally, Maurer recommends that there should be a shift from the focus of drug policies and practice to ways that more effectively address substance abuse, provide equal access to justice by leveling the playing field, adopt "racial

American men were incarcerated, compared to 1238 Hispanic men and 478 white men.[38] For women, although the number per 100,000 U.S. citizens is lower, a disparity between races is still present, as there are 129 African American women per 100,000 U.S. citizens incarcerated, compared to 71 Hispanic women and 51 white women.[39] These numbers demonstrate that more than 60% of people within the prison system are people of color and that African American men are six times more likely to be incarcerated than white men.[40] An average of one in ten African American men in their thirties is in prison or jail every day.[41] Although all men have an average lifetime likelihood of imprisonment of one in nine, it decreases to one in seventeen for white males, but increases to one in three for African American males and one in six for Hispanic males.[42] For women, there is a one in fifty-six chance of lifetime

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impact statements to project unanticipated consequences of criminal justice policies," and finally attempt to respond to the racial impact of the current criminal justice decision making process. *Id*.

38 CARSON & SABOL, *supra* note 31, at 8. *See* James Williams, *Racial Disparities in the Criminal Justice System*, N.C. B. ASS'N (Feb. 9, 2011), https://criminaljustice.ncbar.org/newsletters/criminaljusticefeb11/racialdisparities, *archived at* http://perma.cc/7VMM-55WZ (claiming that the war on drugs is a major contributor to higher rates of incarceration of minorities).

39 CARSON & SABOL, *supra* note 31, at 8. *See, e.g.*, THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: AN OVERVIEW (May 2007), http://www.sentencingproject.org/doc/publications/womenincj_total.pdf, *archived at* http://perma.cc/D687-4AEM (indicating that black females are two and a half times more likely than Hispanic females and five and a half times more likely than white females to be incarcerated in both state and federal prison and that while two thirds of the women on probation are white, two thirds of women confined to prison are minorities).

40 TRENDS IN U.S. CORRECTIONS, *supra* note 32, at 5; *see* Quigley, *supra* note 35 (noting that it is more likely that minorities receive longer sentences which the author gleans from the Sentencing Project which reports that two thirds of people in the United States who are serving a life sentence are not white).

41 *See* TRENDS IN U.S. CORRECTIONS, *supra* note 32, at 5 (using a pie chart to show that 36.5% of people in state and federal prisons in 2012 are black, while 22% of the prison population is Hispanic, constituting over one half of the entire prison population); *see also* Kerby, *supra* note 34 ("While people of color make up about 30 percent of the United States' population, they account for 60 percent of those imprisoned.").

42 TRENDS IN U.S. CORRECTIONS, *supra* note 32, at 5. Using data from 1974, 1991, and 2001, Bonczar shows the percentage of individuals who were born during those years who are likely to go to prison at some point during their lifetimes. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, 1 (Aug. 17, 2003), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf, *archived at* http://perma.cc/7MY3-V8LY. For Black males born in 1974, it is 13.4%, for those born in 1991, it may be as high as 29.4%, and finally those born in 2001, the percentage increases to 32.2%. *Id.* For Hispanic males born in 1974, the percentage that may go to prison during their life time is 4%, for those born in 1991, it jumps to 16.3%, and in 2001 the percentage tops out at 17.2%. *Id*. These numbers are notably lower for white males, starting with those born in 1974, the percentage is only 2.2%. *Id.* By 1991, the

likelihood of imprisonment, but this number dramatically drops to one in one hundred and eleven for white women, but increases to one in eighteen for African American women and one in forty-five for Hispanic women.[43] These numbers show a large percentage of the minority population have criminal records, which causes employers to pay closer attention to background checks when making hiring decisions.[44]

2. Technological Advances in the Accessibility of CRAs

With the increase in accessibility of technology, more employers are beginning to utilize CRAs throughout the process of hiring new employees.[45] The Federal Bureau of Investigation ("FBI") holds and maintains most criminal history records, some of which are accessible through CRAs.[46] This information, which includes arrest and disposition information, is "submitted by state, local, and federal criminal justice agencies."[47] From there, 28 U.S.C. § 534 gives the Attorney General authority to "exchange such records and information with, and for the official use of, authorized officials of the federal government, including the United States Sentencing Commission, the States, cities, and penal

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percentage only jumps to 4.4% and by 2001, only 5.9% of those born will go to prison during their lifetime, a number significantly lower than the percentage for black and Hispanic males. *Id.*

43 TRENDS IN U.S. CORRECTIONS, *supra* note 32, at 5; *see* BONCZAR, *supra* note 42, at 1 (discussing the same percentages for minority women born in 1974, 1991, and 2001 and black women jump from 1.1% incarcerated in 1974 to 3.6% incarcerated in 1991 and in 2001, increases to 5.6%, while for Hispanic women born in 1974, it starts at .4%, increases to 1.5% in 1991 and in 2001, jumps to 2.2% incarcerated).

44 *See* CARSON & SABOL, *supra* note 31, at 7 (discussing ages and rates of imprisonment among Black, Hispanic, and white prisoners); TRENDS IN U.S. CORRECTIONS, *supra* note 32, at 5 (highlighting the racial disparities in prison populations and lifetime likelihood of imprisonment); *see also infra* Part II.A.2 (discussing the technological advances in CRAs and the increasing availability to employers of criminal background checks).

45 *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, PRE-EMPLOYMENT INQUIRIES AND ARREST & CONVICTION, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited Aug. 28, 2014), *archived at* http://perma.cc/6Z3E-FRAA (stating that the Fair Credit Reporting Act requires that employers receive permission before asking a CRA for a job applicant's criminal history report).

46 *See* ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS, *supra* note 20, at 13 (stating that the FBI maintains records on more than 48 million individuals, including some individuals with multiple entries due to separate encounters).

47 *Id.* (explaining that although states are not required to provide criminal history information to the Attorney General, states typically do so voluntarily to gain the benefit of having quick and easy access to information on an individual who committed a crime in another state).

institutions."[48] However, private employers do not have direct access to these records and must rely on consumer reports, which gather information from the sources mentioned above and other publically available sources, which may result in the employer receiving misrepresented information.[49]

Employers are forced to rely on sources other than the FBI, including third-party background screening companies which, depending on the company, may report false or incorrect information.[50] Conducting searches involves using the name of the job applicant to obtain finger-print based records, but not all states offer these services and states that offer more detailed searches can charge between thirteen and twenty-five dollars per search.[51] CRAs collect criminal history information, including arrests and convictions, by either gathering information from courts or paying to obtain it from public agencies.[52] Even though there are many CRAs that collect and offer information, there is no single

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48 *Id.* (citing 28 U.S.C. § 534 (2006)) (providing the Attorney General with the authority to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records.").

49 *Id.* at 38 (explaining that employers are subject to potential negligent hiring lawsuits when they fail to exercise due diligence when determining an applicant's criminal history and whether placement in a specific position would create an unreasonable risk). Darlene T. Martinez failed to get a job because during her background check, her name and Darlene Foster Ramirez's were switched. Josh Brodesky, *Background Checks Prone to Mistakes, Can Shut Out Jobs*, USA TODAY (Nov. 20, 2012, 1:20 PM), http://www.usatoday.com/story/money/business/2012/11/20/background-screening-gone-wrong/1716439/, *archived at* http://perma.cc/4ELY-KSUQ. Ramirez had been found guilty of drug possession. *Id.* Martinez had no choice but to figure out on her own how to remove Ramirez's felony from her record. *Id.* Legal experts have admitted that there is an accuracy issue with background checks and reports can be filled with errors due to "incomplete databases and confused identities." *Id.* During the process to get the issue corrected, innocent individuals are losing out on job opportunities. *Id.* The Society for Human Resources Management released a study that shows that about two thirds of employers conduct criminal background checks and that since companies do not have to be licensed, can vary widely in accuracy. *Id.* The National Consumer Law Center found that many databases are actually either incomplete or include outdated case information. Brodesky, *supra.*

50 *See* ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS, *supra* note 20, at 38–39 (mentioning that CRAs are regulated under the Fair Credit Reporting Act ("FRCA")).

51 *Id.* at 39–40 (including a thirty-four responding state survey which indicated that twenty-five states make name-only searches available, fifteen through repository and ten through the state court system, and twenty-five states allow finger-print based searches).

52 *Id.* at 43 (describing how the FCRA is used to regulate the use of criminal history information for employment, credit, and other purposes).

database that provides an accessible, complete record of criminal history information available for the public to use.[53]

The Fair Credit Reporting Act ("FCRA") controls consumer reports obtained from consumer reporting agencies, including the CRAs that collect criminal history information.[54] The agencies under the FCRA collect a wide variety of information, including credit, character, general reputation, personal characteristics, and criminal records.[55] A 1996 Amendment to the FCRA imposed strict regulations on using or collecting information unless "a clear and conspicuous disclosure has

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[53] *Id.* at 43–46, 54 (indicating that states may have more stringent practices than the FCRA; however, only approximately one-half of the states have their own reporting statutes).

[54] 15 U.S.C. § 1681 (2006). The statute states as follows:

> (a) Accuracy and fairness of credit reporting
> The Congress makes the following findings:
> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
> (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.
> (b) Reasonable procedures
> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

Id.

[55] *Id.* § 1681a(d)(1). A consumer report is defined as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
> (B) employment purposes; or
> (C) any other purpose authorized under section 1681b of this title.

Id.

been made in writing to the consumer at any time before the report is procured . . . [and] the consumer has authorized in writing . . . the procurement of the report by that person."[56] Before this Amendment, an employer did not need permission to obtain a report and then take action, such as refusing to hire an individual because of the information found within the background check.[57] The purpose of the 1996 Amendment is to ensure that consumer reporting agencies function as fairly and efficiently as possible for potential employers, who will then receive and utilize accurate and correct information.[58] Although CRAs strive to provide only accurate information, mistakes still occur when sending information to employers regarding arrest and conviction records.[59]

3. Distinguishing Between Arrest and Conviction Records

For employers looking at a job applicant's background check, there is a dramatic difference between an arrest record and a conviction record.[60] Typically, arrests that show up on a criminal history check are for minor

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[56] *Id.* § 1681b(b)(2)(A); Amanda L. Fuchs, *The Absurdity of the FTC's Interpretation of the Fair Credit Reporting Act's Application to Workplace Investigations: Why Courts Should Look Instead to the Legislative History*, 96 NW. U. L. REV. 339, 343 (2001) (citing the 1996 Amendment to the FRCA, 15 U.S.C. § 1681(n)–(s)).

[57] *See* Fuchs, *supra* note 56, at 343–44 (explaining that employers can be sued for not informing and gaining permission from a person before filing a report; however, refusing to let a potential employer obtain a report may have negative ramifications on a job applicant).

[58] *Id.* at 344 (citing *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 20 (1991)).

[59] EEOC 2012 GUIDELINES, *supra* note 6, at 6. Although a CRA may not generally report records of arrest that did not result in a conviction, a CRA may report convictions indefinitely. *Id.* at 5. CRAs typically have their own databases, and each compile a different set of information, including specifics such as geographic area, sources used to gather information (like county databases, law enforcement agency records, or sex offender registries), and update frequently. *Id.* at 6. Most CRAs present generalized information, such as "arrests, convictions, [or] prison terms" while others included specialized information such as specifics about "workplace theft or shoplifting cases for retail employers[.]" *Id.*

[60] *Id.* at 12. An arrest does not establish that the criminal conduct actually occurred. *Id.* Many arrests do not result in criminal charges and an updated report on the arrest may not happen (such as they were not prosecuted, convicted, or acquitted). EEOC 2012 GUIDELINES, *supra* note 6, at 12. The EEOC suggests that an exclusion of arrest records is necessary because they can, and do, include grave inaccuracies or may even continue to be reported even though they were expunged or sealed. *Id.* By contrast, conviction records can typically be sufficient to prove that the individual participated in the questionable conduct. *Id.* at 13. The EEOC suggests in this case that to not hire an individual for a particular position based on a conviction record, the job in question must directly relate to the "specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." *Id.* at 14.

crimes or non-criminal offenses.[61] Out of the nearly thirteen million arrests that occur each year—excluding traffic violations—only 4.2% and 12.5% were for violent and property crimes in 2010.[62] However, regardless of whether these arrests result in a conviction, they still appear on a typical background check.[63] Having arrests on a background check can be confusing for an employer because nearly one-third of felony arrests result in a conviction.[64] The mere fact that an individual was arrested is not proof that the individual committed the crime.[65] Per the EEOC, an employer, when choosing not to hire a job applicant, cannot use an arrest record because unlike a conviction, which is sufficient to show an individual engaged in some sort of prohibited conduct, an arrest does not give an employer that same assurance of forbidden conduct.[66]

An understanding of the difference between an arrest record and a conviction record can help employers when reviewing background checks.[67] An arrestee is presumed innocent until convicted.[68] Roughly

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61 Roberto Concepcion, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL'Y 231, 238 (2012); *see* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WRITTEN TESTIMONY OF ADAM KLEIN (July 26, 2011), http://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm, *archived at* http://perma.cc/U65V-KHTU (discussing that in a study of the FBI's database, for every 10,000 hits, 5.5% were "falsely attributed to individuals who had not been convicted of a crime[]" and that statistics for states may be worse because there is no standardized process for reporting arrests and convictions at state and local levels).

62 Concepcion, Jr., *supra* note 61, at 238. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2010, ARRESTS (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested/arrestmain.pdf, *archived at* http://perma.cc/H9PK-9FF7 (stating that in 2010, the estimated arrest rate was 4,257.6 arrests per 100,000 U.S. inhabitants).

63 *See* Concepcion, Jr., *supra* note 61, at 238 (demonstrating that arrests that typically show up on a background check are for minor crimes and non-criminal offenses); WRITTEN TESTIMONY OF ADAM KLEIN, *supra* note 61 (noting that many who are flagged in databases have never actually been convicted of a crime).

64 WRITTEN TESTIMONY OF ADAM KLEIN, *supra* note 61 (stating that these records also lead to drastic inaccuracies that can implicate an individual in a crime or arrest that he or she was never involved with).

65 PRE-EMPLOYMENT INQUIRIES AND ARREST & CONVICTION, *supra* note 45, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited Feb. 10, 2014), *archived at* http://perma.cc/WE2L-GZ5Q (contrasting criminal convictions, which is usually sufficient to demonstrate that a person did actually engage in the conduct, with criminal arrests, which are not).

66 *Id.* Currently, several state laws limit the employers' use of arrest and conviction records. *Id.* Employers who want to obtain a job applicant's background check, including criminal history, must follow the FCRA and get permission from the individual before getting the report and then give a copy of the report to the individual. *Id.*

67 *See* Elizabeth A. Gerlach, Note, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 982 (2006) (discussing the significant number of people who

only one in three felony arrests results in a conviction.[69] Similarly, in a study conducted by the Department of Justice and the BJS, many state criminal record repositories are perpetually behind in recording what happens after an arrest is made—whether the individual was exonerated or convicted.[70] Some states, like Michigan, Illinois, and Indiana have introduced legislation to prevent an employer from using arrest records when making a decision regarding employment.[71] The increase in accessibility of consumer reporting agencies allows employers to use information that may not otherwise be available, which may inadvertently lead to Title VII employment discrimination because of the higher percentages of minorities with criminal records.[72]

B. From Federal to State Law: Disparate Impact and Negligent Hiring

Although the amount of control that employers have over the hiring process is shrinking each year, both large and small employers still have quite a bit of discretion when hiring new employees.[73] However,

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have criminal histories); Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502–04 (2003) (stating that the Department of Justice estimates that nearly seven million people "are under criminal justice supervision, incarcerated in state and federal prisons and local jails, on probation, or on parole. Tens of millions more have a criminal history record on file with state or federal governments.").

68 Gerlach, *supra* note 67, at 982; Mukamal & Samuels, *supra* note 67, at 1504.

69 WRITTEN TESTIMONY OF ADAM KLEIN, *supra* note 61.

70 EEOC 2012 GUIDELINES, *supra* note 6, at 5 (presenting information in a previous study done by the DOJ and BJS that reports as little as 50% of arrest record filed in the FBI have been completed and associated with a final disposition); *see* Carl R. Ernst & Les Rosen, *"National" Criminal History Databases: Issues and Opportunities in Pre-employment Screening* 6 (Nov. 26, 2002), *available at* http://www.brbpub.com/articles/CriminalHistoryDB.pdf, *archived at* http://perma.cc/CXD3-4PAT (discussing employer responsibilities and liabilities regarding criminal background checks involving a lack of diligence, use of incomplete data, the impermissible use of data, and the use of arrest records or other impermissible data). An employer is responsible for ensuring that the information provided to him from a pre-employment screening firm is accurate, complete, and up-to-date. *Id.* Many CRAs also gather and compile information from law enforcement and correctional authorities, rather than the courts. *Id.* These records also include arrest information, which has no indication of what happened during the judicial process or the final decision by the court. *Id.* An employer should at least be aware of the limitations that CRAs present to avoid liability. *Id.* at 17.

71 775 ILL. COMP. STAT. 5/2-103 (2013); IND. CODE § 24-4-18-6 (2013); MICH. COMP. LAWS § 37.2205a (2013).

72 *See* EEOC 2012 GUIDELINES, *supra* note 6, at 4–5 (discussing the many different resources available to employers for conducting criminal background checks).

73 *See, e.g.*, Diane E. Lewis, *Job-Hunters Find Tables Have Turned: Slow Economy Ends Hiring Perks, Jobs on Demand*, BOSTON GLOBE (Nov. 17, 2001), *available at* 2001 WLNR 2239714 (stating that employers should expect a more diverse selection of workers due to the large number of current layoffs and that more people are looking for permanent or

employers are also subject to scrutiny by courts interpreting the EEOC's regulations from both Title VII and state legislation.[74] These forces are in place to ensure that employers are fair when hiring by considering the different factors that are unique to each job applicant.[75] Federal and state legislation ensure equality for job applicants and prevent discrimination on the basis of several factors including race, sex, national origin, and

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seasonal work); *The Hiring Process: More than Just A Resume*, 34 SUPERVISORY MANAGEMENT 29, 29 (Sept. 1989), *available at* 1989 WLNR 3268359 (discussing that the hiring process gets more complicated every year due to an increase in legal constraints affecting recruitment, interviewing, screening, testing, selection, and the job offer itself).

74 *See* 42 U.S.C. § 2000e (2006) (encompassing what the EEOC uses to handle employment discrimination cases); IND. CODE § 22-9-1-1–5 (referencing the Civil Rights subchapter, and including subsections: civil rights enforcement; age discrimination; Indiana affirmative action office; sexual harassment task force; and employment discrimination against disabled persons); *see also* Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1003 (2011) (demonstrating the struggle that employers may face when federal and state law differ on how to approach hiring an individual with a prior conviction). *But see* Timothy M. Cary, *A Checkered Past: When Title VII Collides with State Statutes Mandating Criminal Background Checks*, 28 ABA J. LAB. & EMP. L. 499, 510 (2013) (suggesting that state statutes actually follow, rather than conflict with, federal law and that employers are unlikely to be subjected to any EEOC action for following state law). *See generally Laws & Guidance*, *supra* note 10 (listing federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability).

75 42 U.S.C. § 2000e-2(a). The statute states that:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.; IND. CODE § 22-9-1-3(1)–(3). The Indiana statute states that:

> "Discriminatory practice" means:
> (1) the exclusion of a person from equal opportunities because of race, religion, color, sex, disability, national origin, or ancestry;
> (2) a system that excludes persons from equal opportunities because of race, religion, color, sex, disability, national origin, or ancestry;
> (3) the promotion of racial segregation or separation in any manner, including but not limited to the inducing of or the attempting to induce for profit any person to sell or rent any dwelling by representations regarding the entry or prospective entry in the neighborhood of a person or persons of a particular race, religion, color, sex, disability, national origin, or ancestry[.]

Id.

religion.[76] Part II.B.1 briefly discusses how race can have a disproportionate effect on individuals with criminal records during the hiring process.[77] Next, Part II.B.2 discusses the EEOC's recently released guidelines for employers who are looking to hire someone with a criminal record, including suggestions for state legislation.[78] Last, Part II.B.3 summarizes the introduction and effect of negligent hiring.[79]

1. Title VII's Disparate Impact Protection

The Civil Rights Act of 1964 prohibits employment discrimination based on race, color, sex, religion, and national origin.[80] The Civil Rights Act of 1991 also provides defenses for these protected classes of individuals regarding employer policies that, although not facially

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[76] 42 U.S.C. § 2000e (covering information that the EEOC focuses on protecting and litigating). *See generally Laws & Guidance*, *supra* note 10 (listing federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability, but also discussing other facially neutral laws that may have a disparate impact on minorities); RECESS READING: OCCASIONAL FEATURE FROM THE JUDICIARY COMMITTEE: THE CIVIL RIGHTS ACT OF 1964, *available at* http://www.scm.rcs.k12.tn.us/TEACHERS/bannizat/documents/AoWCivilRights.doc (last visited Mar. 4, 2014), *archived at* http://perma.cc/KK5Q-NPSF (giving a history of how the Houses adopted the Civil Rights Act of 1964). Initially, the act sought to end the use of "Jim Crow" laws, which had previously been upheld by the Supreme Court in *Plessy v. Ferguson*. *Id.* Although the original bill was quite narrow, it was amended to broaden the scope of protections during the summer of 1963, after the House Judiciary Committee held a series of hearings. *Id.* Once the bill entered the Senate, it was only after a fifty-four-day filibuster that a bipartisan group stepped forward with a compromise bill. *Id.* The House voted to adopt the Senate's bill and has since resonated in America to protect minorities from discrimination. *Id.*

[77] *See infra* Part II.B.1 (discussing the *SEPTA* case and how criminal history discrimination can turn into Title VII discrimination).

[78] *See infra* Part II.B.2 (explaining the implication of the EEOC's new guidelines on causing criminal history background checks, including the potential for further forthcoming state legislation).

[79] *See infra* Part II.B.3 (describing how racial discrimination and negligent hiring lawsuits can occur and how negligent hiring differs from the theory of *respondeat superior*).

[80] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (defining disparate impact). The statutes read:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Id.

discriminatory, have a disparate impact or discriminatory effect.[81] The Supreme Court first recognized the idea of disparate impact in *Griggs v. Duke Power*.[82] To establish a *prima facie* case of disparate impact, a plaintiff must first "prove that the challenged policy discriminates against members of a protected class."[83] After the plaintiff has established they are qualified for a specific position and then denied the position, the plaintiff must demonstrate that either the position was filled by a nonminority or that the position has remained opened.[84] After the plaintiff has established this, the burden of production shifts to the defendant to show the challenged practice was job related and consistent with business necessity.[85] Finally, the plaintiff has one last chance through the burden of persuasion to show that the discrimination was

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81 *Id.*; Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat 1071.

82 *See* Griggs v. Duke Power, 401 U.S. 424, 431 (1971) (explaining that Congress wanted removed any artificial, arbitrary, and unnecessary barriers to employment, including when "the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"); *see also* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 657–58 (1989) (indicating that a case for disparate impact does not occur simply because there is a racial imbalance, but that a specific or particular employment practice has caused the disparate impact).

83 El v. Se. Pa. Transp. Auth. ("SEPTA"), 479 F.3d 235, 239 (3d Cir. 2007). *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977) (stating that a preponderance of the evidence was necessary to prove that the employer's standard operating practice included racial discrimination); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (saying that the "tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."); *see also* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 (1977) (finding substantial evidence to show that there had been "systematic and purposeful employment discrimination").

84 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court explains a prima facie case as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

85 *Griggs*, 401 U.S. at 431 (introducing business necessity as "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"). *Contra Wards Cove*, 490 U.S. at 659 (explaining that the burden of producing evidence for a business justification lies with the employer, but that the burden of persuasion remains with the plaintiff). However, the Civil Rights Act of 1991 chose instead to codify the language of *Griggs*, which leaves the deferential approach that *Wards Cove* used as no longer applicable. *Wards Cove*, 490 U.S. at 657–58.

pre-textual.[86] Although business necessity had yet to be concretely defined in *El v. Southeast Pennsylvania Transport Authority ("SEPTA")*, the case used *Griggs* to state that to meet business necessity, the discriminatory action must "bear a demonstrable relationship to successful performance of the jobs for which it was used" as well as "prov[e] a 'manifest relationship' between the policy and job performance."[87] If an employer is able to prove business necessity, the burden shifts back to the plaintiff to prove that an alternative practice was available that the employer refused to adopt.[88]

In *SEPTA*, the plaintiff Douglas El claimed that SEPTA "unnecessarily disqualifie[d] applicants because of prior criminal convictions."[89] This case illustrates what may happen to an employer when the choice is made not to hire an applicant with, or a subsequent firing of an employee for discovery of, a criminal history.[90] In January 2000, King Paratransit Services, Inc. ("King") subcontracted with SEPTA to provide paratransit services.[91] The contract between King and SEPTA

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86 *See Burdine*, 450 U.S. at 253 (discussing that although the burden shifts to the defendant to prove some sort of business necessity, ultimately, the "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *Green*, 411 U.S. at 802–03 (noting however, that if the employer cannot bear their burden of production, then it does not shift back to the plaintiff for one last chance to show a discriminatory effect).

87 *SEPTA*, 479 F.3d at 239 (quoting *Griggs*, 401 U.S. at 431). The court also discussed *Albemarle*, 422 U.S. at 431, stating that "it elaborated on the use of discriminatory tests by adopting the EEOC's determination that test results must predict or correlate with 'important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" *Id*.

88 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006) (explaining that a plaintiff has the chance to demonstrate there were alternative employment practices available that the employer refused to adopt); *see also Wards Cove*, 490 U.S. at 660–61 (stating that a plaintiff still has the opportunity to prevail even if the respondent meets the business necessity defense by persuading the court that there was another way, "without a similarly undesirable racial effect" that would serve the employer's hiring interests, but that courts can take into consideration cost and other burdens in evaluating the alternatives presented by the plaintiff).

89 *SEPTA*, 479 F.3d at 235. El argued that the policy of not hiring criminal job applicants has a disparate impact on minority applicants because they are more likely than white applicants to have convictions on their records. *Id*. at 236–37.

90 *Id.* at 235–36. El was convicted of second-degree murder in 1960 and according to his testimony, the murder occurred during a gang-related fight. *Id*. at 235. At the time, El was fifteen and the victim was sixteen. *Id*. at 236. El claims that he was not the one who fired the gun that killed the decedent, and the court notes that he was not the only one convicted of the murder. *Id.* He served three and a half years for his crime and it is El's only violent offense. *SEPTA*, 479 F.3d at 236.

91 *Id.* at 236. King, contracting with SEPTA, was required to ensure that anyone who was a SEPTA driver or attendant have:

prevented SEPTA from hiring anyone with a violent criminal conviction.[92] El, a recently hired driver, had been convicted of second-degree murder forty years earlier and SEPTA fired him once the company discovered this information.[93] After termination, El filed a complaint with the EEOC in which he claimed that SEPTA's hiring policy violated Title VII by discriminating against him on the basis of race.[94] He further specified that the policy had a disparate impact because African Americans and Hispanics are more likely to have a criminal record.[95] The EEOC failed to resolve the dispute, leaving El to pursue the claim on his own.[96] SEPTA filed for summary judgment on four grounds, two of which were granted, ending the litigation in SEPTA's favor.[97] The court agreed that: (1) SEPTA had "submitted

> e. no record of driving under [the] influence (DUI) of alcohol or drugs, and no record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s);
> f. have no record of any conviction within the last seven (7) years for any other felony or any other misdemeanor in a category referenced below . . . and not be on probation or parole for any such crime, no matter how long ago the conviction for such crime may be.

Id.

92 *Id.* at 235. El argued that SEPTA and King chose to apply a much broader exclusion that disallowed the hiring of anyone with any sort of criminal conviction. *Id*. at 236.

93 *Id.* at 235–36 (according to El's testimony, the murder he was convicted of occurred during a gang-related fight in which a gunshot victim died for which El served three and a half years).

94 *SEPTA*, 479 F.3d at 237 (explaining that although the EEOC originally found in El's favor, they were unable to resolve the dispute with SEPTA and the Civil Rights Division of the Department of Justice then declined to pursue the matter any further). *See* CARSON & SABOL, *supra* note 31 (stating that on average, black and Hispanic males are imprisoned between three to nine times as often as white males).

95 *SEPTA*, 479 F.3d at 236–37 (attempting to claim that minorities are likely "to run afoul of the policy" more often than whites, because, although not presenting any statistics, claimed that minorities are more likely to have criminal records than white individuals). *See* MAURER & KING, *supra* note 30, at 1 (using a report from 2007 to show that out of the 2.2 million people in prison, over 900,000 are African Americans and that for every 100,000 citizens, 2290 are incarcerated African Americans compared to 412 incarcerated white individuals); Kerby, *supra* note 34 (stating that although African Americans make up only 30% of the population in the United States, approximately 60% have been or will be incarcerated during their lifetimes).

96 *SEPTA*, 479 F.3d at 237, 247 (assuming that since El continued the suit on his own, he was unable to bring the proper evidence to rebut SEPTA's, which then left the court with nothing but SEPTA's proof that summary judgment should be granted in their favor).

97 *Id*. at 237. After discovery was completed, SEPTA moved for summary judgment with four arguments. *Id.* The first argument was that it was technically not El's employer for Title VII purposes, but the court rejected this. *Id.* Second, that El had "not submitted sufficient evidence that SEPTA's policy had a disparate impact on racial minorities" but the court also rejected this. *Id.* The court accepted SEPTA's third and fourth arguments, showing sufficient evidence for business necessity and that El had not submitted his own evidence that would be sufficient enough to determine that a reasonable alternative existed

sufficient evidence to prove its policy was justified by business necessity"; and (2) El failed to submit "sufficient evidence of an alternative policy that would accomplish SEPTA's legitimate goal of public safety."[98] The court agreed with SEPTA's argument, despite having strong reservations regarding SEPTA's business necessity defense.[99] The court in *SEPTA* also took the opportunity to discuss criminal record policies, stating that the case was distinguished from other similar cases because "SEPTA's policy only prevents consideration of people with certain types of convictions[.]"[100] Although the court in

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that would accomplish SEPTA's goal of public safety. *Id. See* Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006) (indicating that the non-moving party, although receiving the benefit of all factual inferences, must also "point to some evidence in the record that creates a genuine issue of material fact" and also rebut the moving party's motion "with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument").

98 *SEPTA*, 479 F.3d at 237. SEPTA presents eight reasons why its decision is consistent with business necessity. *Id.* at 245. They are:

> (1) the job of a paratransit driver requires that the driver be in very close contact with passengers, (2) the job requires that the driver often be alone with passengers, (3) paratransit passengers are vulnerable because they typically have physical and/or mental disabilities, (4) disabled people are disproportionately targeted by sexual and violent criminals, (5) violent criminals recidivate at a high rate, (6) it is impossible to predict with a reasonable degree of accuracy which criminals will recidivate, (7) someone with a conviction for a violent crime is more likely than someone without one to commit a future violent crime irrespective of how remote in time the conviction is, and (8) SEPTA's policy is the most accurate way to screen out applicants who present an unacceptable risk.

Id. SEPTA also submitted reports from three experts that back up their position, all of which rely on recidivism rates. *Id.* at 246. Since El did not hire his own expert to rebut SEPTA's nor depose SEPTA's experts, the court is left with "little choice" than to find that a reasonable juror would find that "SEPTA's policy is consistent with business necessity." *Id.* at 247. El also bore the burden of proof and persuasion to show that there was an alternative policy that SEPTA could have adopted, but fails to do so and thus the Court found no record of evidence indicating there would be less of a disparate impact with an alternate policy in place. *Id.*

99 *SEPTA*, 479 F.3d at 235 (explaining that the court had reservations about the policy in the abstract, SEPTA had "borne the burden of proving" that their policy was consistent with the business necessity defense and El failed to rebut any expert testimony that SEPTA presented).

100 *Id.* at 243. The court noted that the Supreme Court has never directly dealt with criminal record policies when hiring, but has tangentially done so with criminal behavior in two cases: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979). *Id*. at 240. *SEPTA* also quoted expert Dr. Alfred Blumstein as saying:

> [A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten

SEPTA attempted to distinguish the facts by considering only certain types of convictions, there are other courts that have chosen to completely bar consideration of convictions and arrest records.[101]

2. The EEOC's Consideration of Arrest and Conviction Records When Hiring

Both the EEOC and current job applicants have questioned the standard employers use to determine whether or not to hire a job applicant.[102] However, the state in which the business is located holds distinct power over most hiring and firing practices.[103] State and local law control all aspects of small businesses with fewer than fifteen

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> years. But neither of these individuals can be judged to be *less or equally likely* to commit a future violent act than comparable to individuals who have no prior violent history.

Id. at 246.

101 *See infra* Part II.B.2 (presenting the EEOC's attempt to help employees by having employers apply the *Green* factors from *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977) when debating on whether to hire an individual with a criminal record).

102 *See Coverage of Business/Private Employers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employers/coverage_private.cfm (last visited Sept. 6, 2014), *archived at* http://perma.cc/68ML-Y2DG (explaining that the federal government and EEOC have influence over businesses with fifteen or more employees); Michael Laff, *Digging for Dirt: Employers Search Workers' Pasts*, DAYTONA NEWS J. (Sept. 6, 1998), *available at* 1998 WLNR 7159666 (suggesting that although employers question what appears on a resume or job application, "there is little or no protection against job-seekers who lie or withhold information on an application"); W. Berry Nixon, *How to Avoid Hiring Hazards: How to Hire Without Becoming a Candidate for a Lawsuit*, SEC. MGMT. (Feb. 2005), *available at* 2005 WLNR 25676341 (suggesting that if a person is not qualified for the job, eliminating all unqualified individuals from the hiring pool will help reduce future lawsuits).

103 *See Coverage of Business/Private Employers*, *supra* note 102 (assuming businesses with less than fifteen employees are covered by state law); *Coverage of State and Local Governments*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/employers/coverage_state_local.cfm (last visited Sept. 6, 2014), *archived at* http://perma.cc/68ML-Y2DG (stating that the EEOC has coverage only if an employer has fifteen employees or more for at least twenty calendar weeks in the past year); Laff, *supra* note 102 (discussing that private employers are hesitant to reveal hiring practices, including background checking methods, because job applicants may then criticize an employer's hiring practices). Zange first suggests that using the information found in a background check is a necessity in hiring practices today. Julia Zange, *Background Checks on Job Applicants: What is Allowed?*, MONDAQ (Feb. 26, 2013), *available at* 2013 WLNR 4827120. Zange first suggests that using the information found in a background check is a necessity in hiring practices today. *Id.* Next, "as a rule," all personal background data should first come from the job applicant and then if that is not sufficient, then an employer may collect data from a service. *Id.* The service may only be used after the job applicant is made aware that the potential employer is using this source. *Id.* When dealing with a criminal record, Zange also suggests that these records may only be inquired into when they directly relate to the job to be filled. *Id.*

employees.[104] Although state and local law govern small business practice, lawmaking on hiring practices generally stems from EEOC guidelines.[105]

The enforcement guidelines ("Guidelines") from the EEOC's 2012 release of "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" includes information regarding criminal history records, employers' use of this information, and the EEOC's interest regarding the employer's use of criminal background checks.[106] The Guidelines also discuss disparate treatment and impact when using criminal records, including practices of employers, the job as related to the crime, business necessity, and options for less discriminatory alternatives.[107] Finally, the EEOC suggests to employers several "Employer Best Practices" that, along with the other guidelines, states can use to create their own legislation.[108]

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104 *See Coverage of State and Local Governments*, *supra* note 103 (implying that if a business has less than fifteen employees, the company is subject to only state and local laws as the EEOC and the government do not cover any less).

105 *See generally* EEOC 2012 GUIDELINES, *supra* note 6, at 25–26 (offering the "best practices" for employers who are considering criminal record information when making employment decisions). The EEOC suggests that employers should create a detailed, written hiring policy and procedure for use when screening job applicants for criminal conduct. *Id.* This includes identifying essential job requirements and the circumstances under which the job is performed. *Id.* Employers should also determine specific offenses that may show unfitness for performing that specific job, but also look at an individualized assessment of the individual to see his potential to do the job successfully. *Id.* One of the most important suggestions the EEOC gives is to record all justifications for policy and procedures, as to be better prepared if the business necessity defense is needed. *Id.* Last, employers should "[t]rain managers, hiring officials, and decision-makers on how to implement the policy and procedures" when hiring to be consistent with Title VII. *Id.*

106 EEOC 2012 GUIDELINES, *supra* note 6, at 6, 12 (explaining the background, history, and growth of criminal records and employer's use of them as well as the EEOC's continued interest in protecting potential employees from discrimination).

107 *Id.* at 6–20. The guidelines explain that an employer is liable for discriminating against a Title VII protected group, including finding the practices that employers use to result in this discrimination. *Id.* at 8–9. Typically, once a plaintiff establishes proof of disparate impact, the burden of proof shifts to the employer to demonstrate that it was in fact because of business necessity that the challenged conduct occurred. *Id.* at 9–10. Generally, disparate impact occurs when an employer rejects an African American applicant based on his criminal record, but chose instead to hire a similarly situated white applicant that has a similar record to that of the rejected African American applicant. *Id.* at 6. Last, the EEOC explains that a Title VII plaintiff may still prevail if the plaintiff can find that there was a less discriminatory "alternative employment practice" that still serves the employer's business goals but has refused to adopt. *Id.* at 20.

108 EEOC 2012 GUIDELINES, *supra* note 6, at 25–26 (discussing generally how to solve the problem when employers are considering a job applicant with a criminal record, including suggestions on how to develop a policy, how to question those with a criminal record, and ensuring that these records will stay confidential).

The guidelines include a discussion of an Eighth Circuit Case, *Green v. Missouri Pacific Railroad* and the introduction of the *Green* factors.[109] The Missouri Pacific Railroad Company followed a policy of refusing employment to anyone convicted of a crime other than minor traffic offenses.[110] However, the court determined that this standard was too strict and instead chose to recognize what have become known as the *Green* factors.[111] Simplified, the holding can be narrowed down to three simple factors: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of job held or sought.[112] The 2012

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[109] *See id.* at 11 (citing Green v. Mo. Pac. R.R. Co., 549 F.2d 1158 (8th Cir. 1977)) (including (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, or completion of sentence; and (3) the nature of job held or sought).

[110] *See generally* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1292 (8th Cir. 1975) (introducing the issue of the Missouri Pacific Railroad Company following "an absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense" and whether "this policy violates Title VII of the Civil Rights Act of 1964 . . . because this practice allegedly operates to disqualify blacks for employment at a substantially higher rate than whites and is not job related"); *Green*, 549 F.2d at 1159–60 (looking at the original court's decision which states criminal convictions can be considered as a factor in the company's employment practices).

[111] *Green*, 549 F.2d at 1159–60 (explaining that Green appealed the injunctive order, claiming that proper injunctive relief enjoined the company from using conviction records as a bar to employment and from using conviction records "as a less-than-absolute disqualifying factor in hiring"). The court entered this injunctive order that later became known as the *Green* factors:

> It is hereby Ordered, Adjudged and Decreed that defendants, its agents, servants and employees shall be and are enjoined from disqualifying and denying employment to an applicant solely and automatically for the reason that the applicant has been convicted of a criminal offense; provided, however, that nothing herein shall prevent defendant from considering an applicants' prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.

Id.; *see* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 327–29 (2009) (suggesting that there is a point in time where the crime is no longer relevant to an individual's capability to be hired); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 498–99 (2006) (using criminal history records to conclude that after six or seven years, there is no indication that an individual is likely to commit a similar crime).

[112] *But see* 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, 992 (2013) (suggesting that the EEOC's 2012 Guidelines will now require employers to always have the burden to prove business necessity); EEOC 2012 GUIDELINES, *supra* note 6, at 14 (suggesting that if an employer "develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job . . . and then provides an

Guidelines use these factors to pinpoint how certain criminal conduct can be linked to particular positions within a company, but because these are only guidelines and not law, it is up to the states to create legislation that guides employers when hiring individuals with criminal histories.[113] Although the *Green* factors assist employers when hiring, if an individual gains employment and then acts outside the scope of his employment, the employer may be left liable for the actions of the employee.[114]

3. Negligent Hiring as its Own Distinct Cause of Action

Simply because of manpower, time, money, and business practices, small and large companies follow different hiring patterns.[115] Choosing not to hire someone with a criminal record may result in the rejected job applicant filing a discrimination suit against the employer.[116] Employers

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opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity").

113 *See* EEOC 2012 GUIDELINES, *supra* note 6, at 24 (suggesting that state and local laws are preempted by Title VII if they violate a protected class under Title VII but noting that criminal records are not yet considered a protected class); *see also* Butts v. Nichols, 381 F. Supp. 573, 580 (S.D. Iowa 1974) ("the State could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job").

114 *See infra* Part II.B.3 (introducing negligent hiring as its own distinct cause of action and the repercussions that employers suffer as a result of hiring someone who then breaks the law, leaving the employer liable for the wrongdoing).

115 Donna Fuscaldo, *Small vs. Large Companies: Ten Differences Between Working for the Two*, GLASSDOOR (Jan. 24, 2012), http://www.glassdoor.com/blog/small-large-companies-ten-differences-working/, *archived at* http://perma.cc/7F94-BCHH. This article lists ten differences between working for a small versus a large company. *Id.* First involves getting the job, as it is typically quicker in small businesses while for larger businesses, a person may have between five to ten interviews. *Id.* Second, is the bigger the company, the more bureaucratic it is, while third, smaller companies tend to be more a family affair. *Id.* Fourth, smaller companies allow more exposure to different aspects of the job, like "wear[ing] more than one hat." *Id.* Fifth, smaller businesses tend to have better working conditions and more flexibility, because they cannot provide the same benefits that a larger company may offer. *Id.* Sixth, there is more availability for specialization at larger firms, such as a specific expertise or job function that you may not receive at a smaller company. Fuscaldo, *supra.* Seventh, there are more opportunities at larger companies, such as promotions and movement up a career ladder. *Id.* Eighth, chances are that a person will get more opportunities to make a difference at a smaller company as it is harder to do so at larger firms with more procedures. *Id.* Ninth, smaller companies may have other priorities than making money, while larger firms may appear to only attempt to please the shareholders. *Id.* Tenth, there is more job security at a smaller company, because you may be "considered part of the family[.]" *Id.*

116 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (interpreting Title VII's purpose from Congress as making sure that there are equal employment opportunities as well as eliminating discriminatory practices which have fostered job environments that disadvantage minority citizens); Griggs v. Duke Power, 401 U.S. 424,

are also logically choosing not to hire applicants with certain criminal histories because employers are attempting to prevent theft, fraud, workplace violence, and liability for negligent hiring.[117] Negligent hiring results when an employer becomes liable for the criminal actions of an employee during and outside the course of normal employment.[118] Some employers, in an attempt to avoid a discrimination lawsuit, may hire someone in a position not suited to the employee.[119] For example, in *Ponticas v. K.M.S. Investments*, K.M.S. Investments owned an apartment complex and hired Denis Graffice as the apartment manager.[120] Resident Stephanie Ponticas noticed her refrigerator was not working and contacted Graffice, who came to the apartment to look at it.[121] Two days

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430–31 (1971) (explaining that Congress did not intend Title VII to guarantee jobs, but rather to prevent discriminatory preference to any group and to remove arbitrary and unnecessary barriers to employment when they operate only to discriminate based on race or other classification).

117 *See* Monica Scales, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 422 (2002) (showing that "[t]he possibility of employer liability creates a strong incentive for employers to adequately supervise employees" so that the employer's customers are not in danger); *see also* EEOC 2012 GUIDELINES, *supra* note 6, at 6 (discussing employers' reasons for using criminal history information). This leads to employers not hiring ex-cons at all, which then may lead to a Title VII discrimination suit. Michael Silver, *Negligent Hiring Claims Take Off*, 73 ABA J. 72, 72–78 (May 1987) (stating that society has a strong interest in rehabilitating criminals/ex-offenders, as they are less likely to re-commit a crime, but at the same time, employers have a very strong interest in reducing the risk of workplace violence); Stephen P. Shepard, Note, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 147 (2011) ("Negligent hiring is a relatively new and expanding cause of action that holds employers civilly liable for the tortious conduct of an employee."); Levi Gudde, *A Hiring Dilemma: Pre-Employment Background Checks*, ALASKA BUS. MONTHLY (Aug. 1, 2000), *available at* 2000 WLNR 10124191 (stressing that if a person, while either engaged in company business or on company property, commits a crime that causes another employee, a customer, or a client harm, the employer may be left liable).

118 Becken v. Manpower, Inc., 532 F.2d 56, 59 (7th Cir. 1976) (discussing the theory of negligent hiring as a separate cause of action and holding that although the court does not have an abundance of precedent, there is no reason to reject the theory); Tindall v. Enderle, 320 N.E.2d 764, 768 (Ind. Ct. App. 1974) (holding that Indiana law recognizes a separate cause of action for negligent hiring).

119 *See* Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 910 (Minn. 1983) (providing that the employer would not have hired the employee if his criminal record had been known); *infra* notes 120–23 (discussing the facts of the case).

120 *See Ponticas*, 331 N.W.2d at 909–10 (discussing Graffice's history which included armed robbery, burglary, and theft, as well as a problem with drinking and when K.M.S. hired him, he put falsified records of past employers).

121 *Id.* at 909 (during the visit, Graffice noticed that Ponticas' husband was out of town, to which she responded that he was going to be gone for the entire week with his band in northern Minnesota).

later, Graffice violently raped Ponticas at knifepoint.[122] The court held that K.M.S. Investments owed its' residents a "duty of exercising reasonable care in hiring a resident manager."[123]

Employer liability for negligently hiring an employee is a relatively new practice.[124] Courts have employed the doctrine of *respondeat superior*, which imposes liability on an employer for an employee's actions when the employee was acting as an agent and within the scope of his employment.[125] However, courts have begun to separate the act of negligently hiring someone and the doctrine of *respondeat superior*.[126] In *Tindall v. Enderle*, the court recognized negligent hiring as its own distinct cause of action, separate from the doctrine of *respondeat superior*.[127] This is because in negligent hiring cases, the employer must exercise a duty of reasonable care when hiring and make all attempts to be aware of the employee's predisposition to danger.[128] Section 213 of the *Restatement (Second) of Agency* addresses negligent hiring, stating "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or

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122 *Id.* After the assault, and as a direct result of such negligent hiring, Ponticas sustained personal injuries of both a physical and psychological nature. *Id*.

123 *Id.* at 911. The court held that the negligence in hiring Graffice was the proximate cause of injury, that his hiring was the only reason he was on the premises, and the only reason he came into contact with Ponticas. *Id*. at 915.

124 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, 584 (2009) (citing LABOR & EMPLOYMENT: EMPLOYMENT SCREENING, NEGLIGENT HIRING & RETENTION: CASE LAW A DUTY TO INVESTIGATE § 10.01 (Matthew Bender & Co. 2008)).

125 Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co., 833 F.2d 633, 637 (7th Cir. 1987). The court cites to two Indiana statutes: IND. CODE § 35-41-2-3(a) and § 34-4-30-1. *Id.* Together these statutes create a statutory version of *respondeat superior* which, although normally used to place liability on an employer for his employee's actions, can also be used to impose liability on a principal for torts committed by an agent within the scope of his actual or apparent authority. *Id.*

126 Watstein, *supra* note 124, at 584. The court differentiates between negligent retention and supervision, and negligent hiring. *Id.* Negligent retention and supervision, for liability to apply, means that "the employer is required to have continued retention of the employee after the employer became aware of his dangerous propensities." *Id.* For negligent hiring, "the plaintiff generally must prove only that the employer knew or should have known of the employee's dangerous propensities." *Id.*

127 Tindall v. Enderle, 320 N.E.2d 764, 768 (Ind. Ct. App. 1974) (distinguishing negligent hiring from the theory of *respondeat superior* (when an employee commits a crime that was within the scope of his employment)).

128 *See* Watstein, *supra* note 124, at 584 (citing Di Cosala v. Kay, 450 A.2d 508 (N.J. 1982)) (explaining that an employer has a duty to exercise reasonable care when hiring an employee to protect the public and that an employer may be liable for the actions of an employee even if he or she acted outside the scope of his or her employment).

reckless[.]"[129] After the *Restatement* introduced the idea of negligent hiring, states have slowly begun to adopt the theory as its own cause of action.[130] Indiana has adopted negligent hiring but does not put into place any protections for an employer who decides to hire an individual who may leave a company liable for his crimes.[131]

C. Existing Approaches to Hiring Felon Criminal Job Applicants

A movement toward enacting legislation would protect employees with criminal records but more importantly, would also assist employers when considering job applicants with criminal histories.[132] States are continually creating and updating legislation to provide guidance for employers who must make a difficult choice regarding a job applicant who has an arrest or conviction record.[133] There has yet to be any

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[129] Becken v. Manpower, Inc., 532 F.2d 56, 58 (7th Cir. 1976); *Restatement (Second) of Agency* § 213 (1958). The restatement discusses what occurs when the principal is negligent or reckless:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
> (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
> (c) in the supervision of the activity; or
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Id.

[130] *See Becken*, 532 F.2d at 59 (finding that the trial court should allow a claim based on negligent hiring). In *Malorney*, Harbour picked up the plaintiff, a seventeen-year-old hitchhiker and then proceeded to rape, sexually assault, threaten to kill, and viciously beat her in the sleeping compartment of his truck. Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1087 (Ill. Ct. App. 1986). B & L Motor Freight failed to check into driver Ed Harbor's criminal background, and although speculative, had the company done a background check, the company may have found some record of his criminal history and not hired him. *Id.* The court found that there is no evidence that the company presented on record that justified the contention that the cost of running a criminal background check on all truck driver applicants was too expensive when compared to the potential utility of doing so. *Id.* at 1089.

[131] *See Tindall*, 320 N.E.2d at 767–68 (identifying this separate cause of action as only when an agent, servant, or employee goes beyond the scope of his or her employment to commit a tortious injury upon an innocent third party individual).

[132] *See* Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977) (introducing the *Green* factors); EEOC 2012 GUIDELINES, *supra* note 6, at 4–5 (discussing the many different resources available to employers for conducing criminal background checks).

[133] 775 ILL. COMP. STAT. 5/2-103 (2013); IND. CODE § 24-4-18-6 (2013). Under Title 24, Article 4, the entirety of Chapter 18 was created in 2012, with Amendments in 2013 that

substantial adaption of the EEOC's guidelines by Indiana.[134] However, Indiana has made some attempt to create legislation to protect employees, but not employers.[135] Currently, Indiana prohibits employers from inquiring into an individual's past criminal activity.[136] While eleven states have completely prohibited arrest inquiries, at least

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went into effect July 1, 2014. IND. CODE § 24-4-18-6; MICH. COMP. LAWS § 37.2205a (2013); OHIO REV. CODE ANN. § 2925.11(D) (West 2013); WIS. STAT. § 111.31 (2013).

134 *See infra* Part III.D (examining how the steps Indiana has taken so far are inadequate in protecting employers and employees from the issues arising when criminals attempt to enter and compete in the national workforce).

135 *See supra* Part II.C (discussing what Indiana has done so far following the release of the EEOC's new guidelines on using criminal background checks during the hiring process).

136 IND. CODE § 24-4-18-1 (2013) defines criminal history information as "(1) concerning a criminal conviction in Indiana; and (2) available in records kept by a clerk of a circuit, superior, city, or town court with jurisdiction in Indiana." *Id.* Section 24-4-18-2 defines a criminal history provider as "a person or an organization that compiles a criminal history report and either uses the report or provides the report to a person or an organization other than a criminal justice agency, a law enforcement agency, or another criminal history provider." *Id.* § 24-4-18-3 defines a criminal history report as:

> Criminal history information that has been compiled primarily for the purposes of evaluating a particular person's eligibility for: (1) employment in Indiana; (2) housing in Indiana; (3) a license, permit, or occupational certification issued under state law; or (4) insurance, credit, or another financial service, if the insurance, credit, or financial service is to be provided to a person residing in Indiana.

Id. § 24-4-18-4 uses IND. CODE § 10-13-3-6 to define criminal justice agency as:

> Any agency or department of any level of government whose principal function is: (1) the apprehension, prosecution, adjudication, incarceration, probation, rehabilitation, or representation of criminal offenders; (2) the location of parents with child support obligations under 42 U.S.C. § 653; (3) the licensing and regulating of riverboat gambling operations; or (4) the licensing and regulating of pari-mutuel horse racing operations.

Id. § 24-4-18-5 defines a law enforcement agency pursuant to IND. CODE § 10-13-3-10 as "an agency or a department of any level of government whose principal function is the apprehension of criminal offenders." *Id.* Section 24-4-18-6 states that "a criminal history provider may not knowingly provide a criminal history report that proves criminal history information relating to" any set of records that has been expunged, concealed, or transferred to a Class A misdemeanor. IND. CODE § 24-4-18-7 states that:

> (a) A criminal history provider may not knowingly include criminal history information in a criminal history report if the criminal history information fails to reflect material changes to the official record occurring sixty (60) days or more before the date the criminal history report is delivered.
>
> (b) A criminal history provider that provides a criminal history report and fails to reflect material criminal history information does not violate this section if the material criminal history information was not contained in the official record at least sixty (60) days before the date the criminal history report is delivered.

Id.

thirteen others have issued "administrative guidance declaring the inquiries unlawful."[137] Indiana has recently passed legislation to restrict some aspects of information provided on background checks, including expunged or restricted records and Level 6 felony convictions if it has been entered or converted to a Class A misdemeanor conviction.[138]

This statute creates the potential for employers to violate the law for doing something that may not be clearly contrary to the law itself.[139] The new legislation prohibits employers from taking into account certain convictions that have been lessened in severity.[140] An employer who

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[137] ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS, *supra* note 20, at 49. The eleven states that have statutes explicitly prohibiting the providing of arrest records are: Alaska, Arkansas, California, Illinois, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Dakota, and Rhode Island. *Id.* The thirteen states that have issued administrative guidance are Alaska, Arizona, Colorado, Idaho, Kansas, Michigan, Missouri, Nevada, New Hampshire, New Jersey, Ohio, South Dakota, Utah, and West Virginia. *Id.*; ALASKA STAT. § 12.62.160(b)(8) (2009); ARK. CODE. ANN. § 12-12-1009(c) (2009); CAL. LAB. CODE § 432.7(a) (2013); 775 ILL. COMP. STAT. 5/2-103(A) (2010); MASS. GEN. LAWS ch. 151B § 4(9)(i) (2014); MICH. COMP. LAWS § 37.2205a(1) (2000); MISS. CODE ANN. § 45-27-12(1) (2006); NEB. REV. STAT. § 29-3523(1) (2013); N.Y. EXEC. LAW § 296(16) (2014); N.D. CENT. CODE § 12-60-16.6 (2009); R.I. GEN. LAWS § 28-5-7(7) (2013).

[138] IND. CODE § 24-4-18-6. Stating that:

> [A] criminal history provider may not knowingly provide a criminal history report that provides criminal history relating to the following: (1) A record that has been expunged by: (A) marking the record as expunged; or (B) removing the record from public access . . . (3) a record indicating a conviction of a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) if the Class D felony or Level 6 felony conviction: (A) has been entered as a Class A misdemeanor conviction; or (B) has been converted to a Class A misdemeanor conviction.

Id.; *see* Rod Fliegel et al., *Indiana Passes New Legislation Restricting Criminal History Information Reported In Background Checks*, MONDAQ (June 27, 2012), *available at* 2012 WLNR 13390698 (stating that this new legislation will "(1) prohibit certain pre-employment inquiries; (2) restrict the types of criminal history information that employers and background report providers (known as "consumer reporting agencies" or CRAs) can obtain from Indiana state court clerks; and (3) restrict the types of criminal history information that CRAs can report to employers in background reports.").

[139] Fliegel et al., *supra* note 138. The release of the EEOC's Guidance in 2012 renewed and created substantial interest concerning criminal background checks as related to Title VII of the Civil Rights Act of 1964. *Id.* This included Indiana creating brand new legislation that prohibits employers from asking an employee or job applicant about sealed and restricted records, despite the fact that they may show up on a background check. *Id.* The law will also restrict the amount of information that individuals and CRAs can get from courts, which then will limit the amount of information employers can expect to receive. *Id.* Effective a year after its release, the law will also restrict the amount of information that criminal history providers can report to others. *Id.*

[140] *Id.* (noting that currently there is no provision for a private right of action against employers who choose to ask employees or job applicants about sealed or restricted

inquires about sealed or restricted criminal records may have committed a Class B misdemeanor, which can result in a fine of up to $1000.[141] Although Indiana has made these initial steps to protect job applicants, it has yet to do anything to help employers who do end up hiring an individual who has been arrested or convicted of the multitudes of other crimes that exist.[142]

Similar to Indiana, Wisconsin, Michigan, Illinois, and Ohio have made strides to protect employees and to a lesser extent, employers, from discrimination during the hiring process.[143] Although these states

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records and it has yet to be seen if employees will argue that they should be allowed to sue employers for violating the new law).

[141] Fliegel et al., *supra* note 138 (maintaining that employers should be mindful of the law, and pay attention to the disparate impact the criminal background check may cause and ensuring appropriate consent when retrieving a background check on a job applicant).

[142] *See infra* Part III.D (explaining how the current legislation is inadequate, the effect on employers, and how what is currently in place is not enough to solve problems that employers face every day).

[143] 775 ILL. COMP. STAT. 5/2-103(A) (2013) ("[I]t is a civil rights violation for any employer . . . to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5.2 of the Criminal Identification Act as a basis to refuse to hire"); MICH. COMP. LAWS § 37.2205a (2013) ("An employer . . . shall not in connection with an application for employment . . . request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result."); OHIO REV. CODE ANN. § 2925.11(D) (West 2013) ("Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record[]"); WIS. STAT. § 111.31(2) (2013) ("It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of . . . arrest record [and] conviction record.").

Created in 1977, Wisconsin's Fair Employment Act was an attempt to prevent discriminatory treatment of job applicants with arrest and conviction records. Sheri-Ann S.L. Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 U. HAW. L. REV. 709, 724 (2000) (citing WIS. STAT. § 111.31) (demonstrating the addition of arrest and conviction records to the Fair Employment Act). The purpose of the Fair Employment Act is to eradicate employment discrimination and:

> (1) [T]hat such discrimination "substantially and adversely affects the general welfare of the state" and will "deprive [properly qualified people who are being discriminated against] of the earnings that are necessary to maintain a just and decent standard of living"; (2) "to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong"; and (3) to "foster to the fullest extent practicable the employment of all properly qualified individuals" regardless of their states in of the protected classes.

Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 784 (2002). Under Wisconsin law, employers may discriminate if the particular offense "substantially

have legislation that protects job applicants, legislators have yet to find a solution for what employers should do when faced with an applicant who has criminal record.[144] Further action is necessary to clarify and

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relate[s]" to the specifics of the job. WIS. STAT. § 111.335(1)(C) (2013). The statute states that "it is not employment discrimination to request such information when employment depends on the bondability of the individual . . . when an equivalent bond is required by state or federal law . . . or [it is an] established business practice of the employer[.]" *Id*. As to not completely bar employers from questioning a job applicant about his criminal record, the Wisconsin statute included an exception that specifies it is not employment discrimination when the circumstances of the crime committed relate to the particular job or activity that the applicant is applying for. WIS. STAT. § 111.335(1)(C)(1). The statute's language reads that "it is not employment discrimination because of [a] conviction record to refuse to employ . . . or to bar or terminate from employment . . . any individual who . . . [h]as been convicted of any felony, misdemeanor or other offense [that] substantially relate[s] to the circumstances of the particular job . . . ." *Id.*; WIS. STAT. § 111.31(2) (noting that the newest version of the statute went into effect on May 27, 2010 and that there were two previous versions, including until April 2008, and then from April 2008 to May 2010).

Similar to Wisconsin's law, Article 2 of Michigan's Elliott-Larsen Civil Rights Act states that employers cannot discriminate based on an individual's arrest records. MICH. COMP. LAWS § 37.2205a (noting that this section, although mentions arrest records where a conviction did not result, these is no information "relative to a felony charge before a conviction or dismissal"); Irina Kashcheyeva, Comment, *Reaching A Compromise: How to Save Michigan Ex-Offenders from Unemployment and Michigan Employers from Negligent Hiring Liability*, 2007 MICH. ST. L. REV. 1051, 1053 (2007); Lau, *supra*, at 727. The court mentions MICH. COMP. LAWS § 37.2205a (1999), which further states that a person cannot be found guilty of perjury or otherwise "for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section." Lau, *supra*, at 727. This legislation allows employers to discriminate based on conviction records. *See id*. (paralleling several state statutes to Hawaii's current legislation and how it compares and contrasts to the legislation already in place). A typical criminal history report includes both arrest and conviction records, some of which may be indistinguishable. Cynthia Diane Stephens, *Keeping an Arrest from Resulting in a Life Sentence in an Age of Full Disclosure of Criminal Records*, 87 MICH. B.J. 29, 30 (2008). Even though the legislation prohibits discussion of arrests, open discussion of conviction records is allowed. *See* Lau, *supra,* at 727 (discussing that in Illinois, although employers are prevented from discussing expunged or sealed records, it leaves the door wide open for discrimination for an individual who has a conviction record). Michigan also has an Internet Criminal History Access Tool that charges employers ten dollars to access records without the consent of the job applicant. *See id.* at 729 (mentioning that the Michigan State Police have this service widely accessible to all employers). The statute was last updated in 2000. *See* MICH. COMP. LAWS § 37.2205a (having its first amendment in 1982 and its last amendment effective in March of 2000).

144 *See* OHIO REV. CODE ANN. § 4112.02(A) (West 2013) ("For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person . . . to discriminate against that person with respect to hire . . . or any matter directly or indirectly related to employment."); *infra* Parts III, IV (analyzing the current lack of legislation for employers when hiring criminals and suggesting a solution when an employer decides to hire or not hire a job applicant with a criminal record); *see also* 775 ILL. COMP. STAT. 5/2-103(B) (stating that an arrest and this section should "not be construed to prohibit an employer, employment agency, or labor organization from obtaining or using

assist employers when looking to hire a job applicant with a criminal record.[145] Clarity about why an individual failed to obtain a job will help keep employers safe from Title VII discrimination and negligent hiring lawsuits.[146]

III. ANALYSIS

The ever-increasing class of criminals in the workplace causes employers to struggle between hiring an ex-convict and risking liability for negligent hiring, or not hiring the individual while unconsciously creating a case for disparate impact.[147] Although the EEOC introduced the Guidelines in 2012 to assist employers, state law in Indiana has yet to approach the problem with a satisfactory legislative solution.[148] Part III.A evaluates the holding of *SEPTA*, regarding the use of criminal background checks to bar employment resulting in disparate impact.[149] Part III.B analyzes the *Green* factors and their current use and effect on legislation.[150] Part III.C examines the necessity of criminal background checks for employers, including the importance of avoiding negligent hiring lawsuits.[151] Last, Part III.D assesses the effects of current legislation concerning the prohibition on using criminal records involving arrests and/or convictions in Indiana, as compared to other states when hiring.[152] This section also argues that Indiana's current

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other information which indicates that a person actually engaged in the conduct for which he or she was arrested").

145 *See infra* Part IV (recommending the creation of a new statute that would help employers when faced with a job applicant who has committed a crime).

146 *See infra* Part III (suggesting there is a massive inadequacy of guidance in Indiana for current employers who are considering hiring a job applicant with a criminal history).

147 *See infra* Part III.A, III.C (demonstrating how employers can become liable for either negligently hiring an individual or Title VII employment discrimination for choosing not to hire an individual).

148 42 U.S.C. § 2000e (2006); IND. CODE § 22-9-1-1–5 (2013) (referencing the Civil Rights subchapter, and including subsections on civil rights enforcement, age discrimination, Indiana affirmative action office, sexual harassment task force, and employment discrimination against disabled persons).

149 *See infra* Part III.A (discussing the *SEPTA* case and how a decision based on a criminal record can quickly turn to a Title VII employment discrimination decision in light of one of the protected classes).

150 *See infra* Part III.B (examining the *Green* factors created by *Green v. Mo. Pac. R.R. Co.*, and the potential for guidance for employers when looking to hire a criminal job applicant).

151 *See infra* Part III.C (analyzing the need for background checks by employers and the repercussions for potentially not completing due diligence when hiring a new employee).

152 *See infra* Part III.D (analyzing legislature in Indiana, as compared to Wisconsin, Michigan, Illinois, and Ohio, that involves criminal records, including the inadequacies and successes of each state).

statute is unsatisfactory and inadequate for assisting employers when faced with a criminal job applicant.[153]

A. Disparate Impact's Damaging Effect on Hiring

After realizing that the Civil Rights Act of 1964 failed to solve all employment issues, the courts began to determine other ways to protect employees from discrimination.[154] SEPTA's policy disqualified individuals with criminal records, which affects minorities because minorities are more likely than whites to have criminal records.[155] Employers often use business necessity to justify their employment decisions to not to hire someone based on his or her criminal record; unfortunately statistics show that a minority person has a higher chance of possessing a criminal record.[156] Due to a lack of guidance, when an employer chooses not to hire someone, potentially because of a conviction found on a criminal background check, the employer may fail to inform the job applicant as to the reason why the job applicant failed to obtain the job.[157] When the job applicant does not receive a reason why he lost the job opportunity, he may improperly assume it was because of his race, as opposed to the employer's concern regarding

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153 *See infra* Part III.D (arguing the inadequacy of Indiana's current statute involving criminal background checks and the how it fails to serve in helping employers when faced with an individual with a criminal record).

154 *See* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat 1071 (amending the Civil Rights Act of 1964 to "strengthen and improve Federal civil rights laws" and to clarify regarding disparate impact and treatment); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 657 (1989) (becoming ineffective after the Civil Rights Act of 1991 decided to use the *Griggs* model); Griggs v. Duke Power, 401 U.S. 424, 431 (1971) (realizing that discrimination was still happening, Congress decided that "artificial, arbitrary, and unnecessary" barriers to employment needed removed to provide the protections originally promised in Title VII).

155 El v. Se. Pa. Transp. Auth. ("SEPTA"), 479 F.3d 232, 235 (3d Cir. 2007) (arguing that *SEPTA* "unnecessarily disqualifies applicants because of prior criminal convictions—a policy that he argues has a disparate impact on minority applicants because they are more likely than white applicants to have convictions on their records").

156 *Id.* at 239 (citing *Griggs*, 401 U.S. at 431) (stating that the Supreme Court recognized that plaintiffs filing a Title VII action can make a discrimination claim without having to allege or prove discriminatory intent); CARSON & SABOL, *supra* note 31, at 8 (stating that black males between the ages of eighteen and nineteen were imprisoned at nine times the rate of white males, while Hispanic and black male prisoners over the age of sixty-five were imprisoned at a rate between three and five times those of white males and excluding the oldest and youngest age groups, black males were imprisoned at five to seven times the rate of white males while Hispanic men were imprisoned two to three times the rate of white males).

157 *See* Hirst, *supra* note 26 (explaining that the new EEOC guidance could mean that people who are not hired because of their criminal histories will at least be getting a call back, or explanation, for why that person was not hired).

hiring a criminal.[158] When this happens, as it did in *SEPTA*, an employer may then subject himself to a Title VII discrimination suit, thus bearing the burden of production to show the nondiscriminatory reason as why he chose not to hire the job candidate.[159]

Because of SEPTA's failure to inform El of its reasoning for not hiring him, SEPTA then underwent a lawsuit, which required that it prove business necessity in an effort to demonstrate that there was no violation of Title VII.[160] Had there been a statute in place that informed SEPTA on how to approach individuals with prior convictions, there's a high chance a lawsuit never would have occurred, as El would have received legal reasoning as to why he did not get the job.[161] Although business necessity is a valid and strong defense for employers, it comes too late because by the time the defense becomes necessary, the job applicant has already filed an employment discrimination lawsuit under Title VII.[162] If SEPTA had employed the use of the *Green* factors, El would have received SEPTA's reasoning for his firing and might not have filed a lawsuit, thus saving SEPTA time, money, and its reputation.[163] Although there is no way to completely prevent an individual from suing a company, if there is a law that supports employers in making hiring decisions, individuals who do not get a job

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158 *Id.* (indicating that if the EEOC guidance is incorporated into state legislation, employers may be required to call back or at least give an explanation as to why that individual was not hired).

159 *See Griggs*, 401 U.S. at 431 (discussing that if the employer cannot prove the discrimination was related to job performance, then they have not shown business necessity); *SEPTA*, 479 F.3d at 241 (detailing the Civil Rights Act of 1991 that placed the burden of persuasion on the employer as the purpose of the act is to "codify the concept of business necessity"); *Wards Cove*, 490 U.S. at 657 (explaining that there must be more than a simple racial imbalance and that it must relate to a specific employment performance for the analysis of disparate impact to even begin).

160 *Griggs*, 401 U.S. at 424 (allowing plaintiffs to create a viable employment discrimination claim without having to prove discriminatory intent by proving that the discriminatory effect is not justified by the needs of the employer); *SEPTA*, 479 F.3d at 236 (according to a contract between King and SEPTA, any SEPTA driver or attendant must have no record of a DUI, no felony or misdemeanor records, nor any record of a conviction for the past seven years).

161 *See infra* Part IV.A (introducing proposed legislation to assist employers when making hiring decisions).

162 *SEPTA*, 479 F.3d at 245 (listing eight policy reasons that proves SETPA was consistent with the business necessity defense).

163 *Id.* at 248–49 (noting that SEPTA did have a valid business necessity defense, but highlighting that had the plaintiff brought up an alternative employment practice that "serves the employer's legitimate goals" and "results in less of a disparate impact" that the analysis might not have ended there, but shifted the burden of persuasion back to El).

will be more hesitant to file a lawsuit.[164] Currently, Indiana has no limitations in place that would deter an individual with a prior conviction from suing companies who fail to hire him on the basis of disparate impact.[165] The EEOC's application of the *Green* factors as applied to state law would provide an employer with the support necessary to make confident hiring choices that do not leave the company vulnerable to lawsuits.[166]

B. The Current Lack of State Application of the "Green" *Factors*

The *Green* factors, present in the EEOC guidelines, are currently not in Indiana law to assist employers when an individual with an arrest or conviction record wants a job and the employer is unsure how to proceed.[167] For states to incorporate the *Green* factors into state law and to force employers to use them in making hiring practices safer, an employer should first look at the gravity and nature of the offense.[168] This may indicate "whether a specific crime may be relevant to concerns about risks in a particular position."[169] Evaluation of the harm caused by the crime or what constitutes the legal elements of the crime is instructive about the job applicant's character.[170] An employer needs to be sure to identify the severity of the crime and place different weight on

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[164] *See supra* Part II.D (demonstrating the laws that prevent employers from discriminating against job applicants based on some aspects of an individual's criminal history); *infra* Part IV.A (showing that there is also a way to prevent employees from filing lawsuits against employers and providing protection for employers that balances the protection currently provided to job applicants).

[165] IND. CODE § 24-4-18-6 (2013) (stating protections for employees, such as limitations on information that employers can view and use when looking at background checks; however, no protections for employers are mentioned here when a decision is made whether to hire an individual with a prior conviction on his or her record).

[166] *See infra* Part III.B (suggesting how the *Green* factors are currently not applied within state law and how doing so would increase employer confidence in hiring).

[167] *See* EEOC 2012 GUIDELINES, *supra* note 6, at 16 ("A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions[]" and that there could be no legitimate business necessity defense that would place every person convicted of any offense in the "permanent ranks of the unemployed.").

[168] *Id.* at 15; Connor & White, *supra* note 112, at 992 (focusing on the legal elements of a crime and as a rule, "the EEOC treats misdemeanors as less important than felonies").

[169] EEOC 2012 GUIDELINES, *supra* note 6, at 15 (including information regarding individualized assessment in which an employer then informs the individual that he or she could be excluded because of past criminal conduct, or because of the facts or circumstances surrounding the committed conduct or the amount of offenses committed).

[170] *Id.* at 18 (basing individualized assessment on factors such as if an individual was older at the time of conviction, if there were rehabilitation efforts, such as education and training, and if the individual was bonded at the federal, state, or local level).

a felony conviction compared to a misdemeanor conviction, thus making concessions for those with lesser crimes, but giving explanation for those with more severe crimes.[171]

Next, an employer should look at the amount of time that has passed since the offense occurred.[172] The *Green* court specified that the business necessity defense is a valid explanation for not hiring an individual because of that individual's criminal history.[173] However, if a large amount of time has passed since the conduct or offense, it may not provide a firm basis for a valid business necessity defense.[174] For criminals, there is a point in time where if he has not committed a crime for many years, his chance of committing another crime is the same as an individual who has never committed a crime.[175]

Finally, it is important to take into account the nature of the job sought because it is possible to link the criminal conduct of a job applicant to the essential function of a specific position.[176] Some jobs, such as teaching and government jobs, require stricter standards when

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171 *Id.*; Butts v. Nichols, 381 F. Supp. 573, 580 (S.D. Iowa 1974) (arguing that "convicted felons do not possess the moral qualities and characteristics which are essential for public employment" and that convicted felons cannot be relied upon to preserve the public trust).

172 EEOC 2012 GUIDELINES, *supra* note 6, at 15 (including not only the amount of time since the offense occurred, but also since the individual performed the conduct in question or completed the sentence for his or her crime); Connor & White, *supra* note 112, at 993 (discussing the risk of recidivism and presents evidence that up to 67.5% of all ex-convicts are likely to be "rearrested for a felony or serious misdemeanor within three years of their release from prison").

173 Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) (stating that even if a neutral policy is inherently discriminatory, it may be valid if there is a strong business justification, but that there must also be no acceptable alternative that will accomplish the same goal with a lesser "differential racial impact"). *See* EEOC 2012 GUIDELINES, *supra* note 6, at 15 (providing guidelines to determine whether an offense is related to potential employment in accordance with the business necessity defense).

174 *See* EEOC 2012 GUIDELINES, *supra* note 6, at 14 (discussing the sources in footnote 118 (citations omitted) which includes several articles with information on recidivism rates and the potential for redemption); Blumstein & Nakamura, *supra* note 111, at 327–28 (reaching a conclusion that there is such a thing as a "redemption point" in where an individual's risk of committing another crime decreases to the point where it can compare to an individual who has never committed a crime); Kurlychek et al., *supra* note 111, at 483 (using a 2006 study to conclude that the risk of recidivism decreases and after six or seven years after an arrest, an individual's risk of committing another crime and being arrested decreases to equally compare to an individual who has never been arrested).

175 *See* Kurlychek et al., *supra* note 111, at 483 (clarifying that after six or seven years, an individual's risk of committing another crime is the same or lesser than an individual who has never been arrested or committed a crime).

176 EEOC 2012 GUIDELINES, *supra* note 6, at 16 (using a factual inquiry to determine whether the job title may also lead to discovery of the job's duties, essential functions, circumstances under which the job is performed, and the environment where the job's duties are performed).

hiring while other positions may specifically relate to the type of crime committed by the individual.[177] When taken together, these factors give employers some guidance on how to handle a criminal job applicant.[178] However, the EEOC presents only guidelines.[179] It is up to the states to determine whether to implement these Guidelines into legislation and thus outline a clear standard for employers when choosing to hire a job applicant with a criminal background.[180]

C. Using Background Checks Helps Prevent Negligent Hiring

With the drastic increase in the number of ex-convicts entering the workforce, employers are more often requiring a criminal background check before offering employment.[181] This is not only to protect themselves and their businesses, but also to protect their customers.[182] Due to the resulting increase in discrimination against criminals

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177 *See supra* notes 119–123 and accompanying text (concerning an individual who had a criminal history of sexually assaulting women and became the manager of an apartment building).

178 EEOC 2012 GUIDELINES, *supra* note 6, at 14. An employer may be able to "justify a targeted criminal records screen solely under the *Green* factors." *Id.* However, such a screen must be narrowly tailored to identify conduct, which has a "demonstrably tight nexus" to the position to which the criminal applicant is applying. *Id.* "[T]he use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity." *Id*.

179 *Id*. at 15. Not only does the EEOC enforce federal laws that prohibit discrimination, it also provides leadership and guidance regarding all aspects of the federal government's equal employment opportunity program. *Laws & Guidance*, *supra* note 10. The Commission works hard to prevent discrimination before it occurs "through outreach, education and technical assistance programs." *Id*

180 IND. CODE § 24-4-18-6 (2013); WIS. STAT. § 111.31(2) (2013); MICH. COMP. LAWS § 37.2205a (2013); *Laws & Guidance*, *supra* note 10.

181 *See* Cary, *supra* note 74, at 510 (asserting that there are currently at least thirty-six states that have no statutory protections for applicants with criminal records and that "many employers in these states may be subject to statues requiring criminal background checks[,]" but most especially for those providing vulnerable services such as health care facilities, nursing homes, and schools); *see also* Hickox, *supra* note 74, at 1002 (stating the need for employers to avoid liability for harm caused by their employees, as an employer can be liable if he knew or should have known that their employee could have the capability of harming another).

182 *See* Scales, *supra* note 117, at 419 (citing Tallahassee Furniture Co., Inc. v. Harrison, 548 So. 2d 744 (Fla. Dist. Ct. App. 1991)) (discussing when an employee stabbed a woman and the company was liable under the theory of negligent hiring, resulting in $1.9 million in compensatory damages and $600,000 in punitive damages); Gudde, *supra* note 117 (stating that employers "have a duty to establish and maintain, a safe and secure work environment for their employees[]" as well as "a safe and secure business environment for their customers and clients[]" by doing "more than just eliminating physical hazards such as wet and slippery floors").

applying for jobs, the EEOC and states began to suggest and implement guidelines and legislation that allow for the withholding of certain criminal information.[183] Although there are protections in place to prevent employers from discriminating when hiring, employers are still obligated to create a safe and effective workplace for their customers.[184] This includes avoiding negligent hiring lawsuits, which can result from hiring a criminal who then commits a crime, leaving the employer liable.[185]

In Indiana, *Tindall v. Enderle* uses a section of the *Restatement of Agency* to explain that without exercising due care, an employer that hires "a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty" becomes liable for the harm caused.[186] Innocent bystanders have the right to be protected and employers, with careful consideration when hiring, have the best opportunity to prevent an employee from committing a crime while under the company's watch.[187] Indiana has identified negligent hiring as a distinct cause of action, but Indiana legislators have not given employers any guidance on how to avoid liability from it.[188] States, including Indiana, have enacted statutes that limit the amount of information employers may consider when using a background check

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183 IND. CODE § 24-4-18-6 (2013) (stating that "a criminal history provider may not knowingly provide a criminal history report that provides criminal history information" related to expunged records, restricted records, and a felony that has been entered as a misdemeanor conviction; however, information may be provided if it is "(1) required by state or federal law to obtain the information; or (2) the state or a political subdivision, and the information will be used solely in connection with the issuance of a public bond"); *see* EEOC 2012 GUIDELINES, *supra* note 6 (consolidating the EEOC's guidance documents regarding the use of arrest and/or conviction records in employment decisions).

184 Scales, *supra* note 117, at 423 (citing William J. Woska, *Negligent Employment Practices*, 42 LAB. L.J. 603, 603 (1991)). Woska provides several factors for courts to consider when deciding a case involving negligent employment. *Id*. These factors are: "(1) an employer's level of care when making personnel decisions; (2) to whom the duty is owed; (3) the particular employee trait that signals incompetence and the evidence that can establish that characteristic; (4) whether the employee's incompetence proximately caused the plaintiff's injury; and (5) the employer/plaintiff nexus." *Id. Gaines* states that "an employer may be directly liable for negligent hiring or negligent retention of an employee where the employer knew or should have known of the employee's dangerous proclivities, and the employer's negligence was the proximate cause of plaintiff's injury." *Id*. (citing Gaines v. Monsanto Co., 655 S.W.2d 568, 570 (Mo. Ct. App. 1983)).

185 Scales, *supra* note 117, at 423 (giving the factors for negligent hiring).

186 Tindall v. Enderle, 320 N.E.2d 764, 766–67 (Ind. Ct. App. 1974).

187 Watstein, *supra* note 124, at 585 (citing Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982)).

188 IND. CODE § 22-9-1-3(1)–(3) ("'Discriminatory practice' means: (1) the exclusion of a person from equal opportunities because of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran[.]").

during the hiring process.[189] Because an employer may not be privy to an arrest or conviction record—or for example, a felony entered as a misdemeanor—in making their decision when hiring someone, it makes it very difficult for employers to protect customers.[190]

Arguably, employers have no basis to determine if the employee they are seeking to hire will commit another crime or injure a customer.[191] These limitations leave employers open to negligent hiring liability.[192] Granting employers access to background checks at least provides an indication of what could happen if they hire an ex-convict, but it still may result in a negligent hiring lawsuit.[193] Using background checks may also not be enough to prevent an employer from being subjected to liability in a negligent hiring lawsuit; but background checks remain a necessity to at least assist employers in safeguarding against potential negligent hiring lawsuits.[194] However, Indiana law is lacking when it comes to helping employers avoid liability and obtain

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189 *Id.* § 24-4-18-6 (explaining that criminal history providers are not allowed to release information regarding expunged or restricted records); MICH. COMP. LAWS § 37.2205a (2013) (saying that an employer "shall not in connection with an application for employment" maintain a record regarding an individual's "misdemeanor arrest, detention, or disposition where a conviction did not result."); WIS. STAT. § 111.321 (2013) (stating that no employer may engage in employment discrimination based on arrest or conviction records).

190 IND. CODE § 22-9-1-3(1)–(3) (providing that an employer violates the statute by asking for information regarding a record of a Class D felony if it was instead entered as, or converted to, a Class A misdemeanor conviction or view any record that is known to be inaccurate).

191 *See* Watstein, *supra* note 124, at 593 (discussing that some positions, such as child-care workers, nursing home employees, and mortgage brokers, require a background check to combat public safety concerns and that when a criminal record does show up on a background check, that the types of crimes committed would make an employee unfit for a specific position).

192 *Id.* at 584. Some states have adopted negligent hiring; employers have to be aware of the potential for enormous damages. *Id.* Employers also have to know that there is a lack of the limits placed on the scope of employment and of protection through workers' compensation. *Id.* Employers have to be very careful to inquire into an applicant's fitness for the specific job in question. *Id.* However, to protect employees, states have the option of expunging and sealing records. *Id.* at 585. This is an inadequate method to both serving employers and employees, as sealing and expunging records ignores the public's need for protection against dangerous employees. Watstein, *supra* note 124, at 585.

193 Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1087–89 (Ill. Ct. App. 1986). Malorney looked at Harbour's background, but only verified responses regarding his driving skills and not criminal history. *Id.* at 1087. Malorney then hired the defendant Harbour who turned out had several convictions for sex-related crimes. *Id.* Soon after Harbour started working, he picked up a seventeen-year old hitchhiker and repeatedly raped, beat, and assaulted her. *Id.*

194 Scales, *supra* note 117, at 424 (stating that an employer can protect himself from a lawsuit by using ordinary due diligence and care when looking to hire from a pool of job applicants).

further knowledge about what is permissible when making a hiring decision.[195]

D. Comparing Indiana's Inadequate Legislation to Other States' Enacted Statutes

Indiana is one of the last states in the Midwest to legislate on the issue of arrest and conviction records regarding criminals entering and competing in the workforce.[196] However, the state's current solution is

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[195] *See infra* Part III.D (analyzing why Indiana law is lacking while comparing it to Wisconsin and Michigan, two states who have more protections for employees, but fails to provide any protections for employers).

[196] IND. CODE § 24-4-18-6 (2013) (releasing this new law in 2012 and updating the statute in 2014); Fliegel et al., *supra* note 138 (mentioning that employers should be mindful of the EEOC's interest in pre-employment background check screenings and the disparate impact on protected class members under Title VII). Wisconsin and Michigan are similar to Indiana, due to the population and "personality" of the Midwest. Peter Rentfrow et al., *Divided We Stand: Three Psychological Regions of the United States and Their Political, Economic, Social, and Health Correlates*, 105 AM. PSYCHOL. ASS'N 996, 1006 (Aug. 20, 2013), *available at* http://www.apa.org/pubs/journals/releases/psp-a0034434.pdf, *archived at* http://perma.cc/8Q87-TT4R (stating "the [f]riendly & [c]onventional region reflects Middle America" and "is defined by moderately high levels of [e]xtraversion, [a]greeableness, and [c]onscientiousness" which indicates the people are "sociable, considerate, dutiful, and traditional"); UNITED STATES CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES, http://www.census.gov/geo/maps-data/maps/pdfs/reference/us_regdiv.pdf (last visited Mar. 3, 2014), *archived at* http://perma.cc/YZ6R-CFS5 (stating that Indiana, Illinois, Michigan, Ohio, and Wisconsin are all part of the East North Central division of the Midwest region).

Both Wisconsin and Michigan have legislation in place protecting criminals when looking for employment; however, both states take the protection too far and leave employers vulnerable. MICH. COMP. LAWS § 37.2205a (2013); WIS. STAT. § 111.31(2) (2013). Unique to Wisconsin's Fair Employment Act is the inclusion of arrest records and conviction records, but these provisions may result in employment discrimination by employers. *See* WIS. STAT. § 111.31(1)–(4) (stating that employers that "deny employment opportunities" to any of these protected classes is a statewide concern that results in enforcement of this statute at state, county, and municipal levels). Since Wisconsin chose to include conviction records in the protected class of job applicants, it has resulted in an incredibly overbroad inclusion policy to the detriment of all employers in the state. *See id.* ("The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their . . . conviction record . . . substantially and adversely affects the general welfare of the state."). By the states' choice to ban the use of conviction records in the employment process, employers are not able to take convictions into consideration, leaving employers with no protection from a negligent hiring lawsuit. *See* Hruz, *supra* note 143, at 837 (citing *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 115 (1997)) ("[A]n employer could be obligated to hire an ex-convict, despite the ramifications of such a decision, if that individual is qualified for the position and the employer cannot cite any other reason to exclude him or her other than criminal convictions."). Although Wisconsin has made an honest attempt to protect the specific class of job applicants with criminal histories, it fails to take into account the wide-reaching negative effect it can have on employers. *See id.* at 820–37

not enough to solve the dilemma that employers encounter daily.[197] Indiana employers are faced with a startling struggle every time they attempt to hire a new employee because of the possibility of lawsuits resulting from his or her hiring choice.[198] Indiana currently has no legislation that protects employers from Title VII discrimination lawsuits or negligent hiring lawsuits relating to refusal to hire applicants with prior convictions.[199]

(suggesting people with conviction records should be a protected class; however, when hiring these individuals, employers should be allowed to take into account crime-specific considerations).

As compared to Wisconsin's Fair Employment Act, Michigan's legislation regarding employment discrimination is much less stringent. MICH. COMP. LAWS § 37.2205a. It only protects misdemeanor arrests, detention, or a disposition where a conviction did not result. *Id.*; *see* Kashcheyeva, *supra* note 143, at 1053 (suggesting that Michigan relies on the protections provided by federal statues and that "apart from the minimal constraints of these [federal] safeguards," Michigan's law does not prevent employers from discriminating on the basis of an individual's criminal record, and what little protections that are provided only deal with misdemeanor arrest records and nothing more). Although this approach lessens the potential for a negative effect on an employer, such as negligent hiring, it also fails to provide any further assistance for employers when faced with a criminal job applicant. *See* MICH. COMP. LAWS § 37.2205a (discussing what an employer may not do, rather than discussing what an employer may do when faced with a criminal job applicant). Michigan uses Title VII of the Civil Rights Act of 1964 and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to protect ex-offenders from workplace discrimination but fail to realize that employers need to provide protections to customers from ex-offenders who may break the law again and injure someone. Kashcheyeva, *supra* note 143, at 1053. "[L]ocal employers are virtually free to discriminate against ex-offenders on the basis of criminal records no matter how unrelated to the position sought and regardless of the gravity of offenses [and] fears of potentially devastating negligent hiring liability reinforce employers' inclination to do so." *Id.* Although Michigan has made strides toward protecting job applicants, it has yet to find a solution for employers when faced with a criminal job applicant. *See* MICH. COMP. LAWS § 37.2205a (specifying that an employer cannot make or maintain a record of information of an individual's "misdemeanor arrest, detention, or disposition where a conviction did not result."); Kashcheyeva, *supra* note 143, at 1077–78 (suggesting several holistic methods to fix the problem of hiring ex-offenders in Michigan, including rehabilitation certificates, individualized risk assessments, and restoration, in which an ex-offender is considered fully redeemed). Despite both Wisconsin and Michigan creating legislation to solve the problem of employment discrimination, neither have realized, nor addressed, the effects on employers and how to solve the dilemma that employers face daily when viewing the increasing number of convicts entering the workforce.

197 *See supra* Part II.B (discussing in detail what occurs when employers choose not to hire someone and also what employers may subject their customers to if they choose to hire an individual unsuited for a particular job).

198 *See supra* Part II (presenting general background on what may occur when an employer hires an individual with a criminal history).

199 IND. CODE § 24-4-18-6 (failing to inform employers of what they can do, and only informing them of what they cannot do when gathering a criminal background check on a job applicant).

Using the guidance from the EEOC, Indiana has created legislation to protect employees the best it can without adding criminals as a protected class to Title VII's Civil Rights Act of 1964.[200] Indiana's statute protects job applicants with arrest records, but not conviction records.[201] Because conviction records are available for viewing by employers, Indiana employers have more protection than some states that completely bar all ability to view and use conviction records when hiring an individual.[202]

Indiana employers consistently struggle with how to handle a situation where they face a job applicant who has been convicted of a crime because employers are still unsure if conviction records may be used when making a hiring decision.[203] After having taken some initial steps in the right direction, Indiana needs to not only continue providing protection for this rising class of criminals in the workplace, but also amend its current legislation to provide concrete assistance and protections for employers as well.[204] State law will help employers when faced with a criminal job applicant, while decreasing the risk of Title VII employment discrimination and negligent hiring lawsuits.[205]

IV. CONTRIBUTION

Having no law that guides employers on what to do when an individual with a criminal record applies to a company leaves employers vulnerable to several types of lawsuits. Therefore, state legislatures should adopt a statute that clearly outlines a path for employers to

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200 IND. CODE § 24-4-18-6; EEOC 2012 GUIDELINES, *supra* note 6, at 6 (demonstrating that disparate impact occurs when an African American with a criminal record is not offered the job but a white candidate with the same criminal record is offered the position).

201 IND. CODE § 24-4-18-6; EEOC 2012 GUIDELINES, *supra* note 6, at 12 (inquiring as to whether an arrest is enough to justify an adverse employment action and determining that an exclusion to employment based on arrest records is not job related and not consistent with business necessity).

202 WIS. STAT. § 111.31(1)–(4) (2013) ("the legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their . . . conviction record . . . substantially and adversely affects the general welfare of the state"); EEOC 2012 GUIDELINES, *supra* note 6, at 25 (limiting what an employer cannot see, such as expunged records, arrest records, and restricted records).

203 *See* Adams, *supra* note 14 (including information involving the potential for Title VII discrimination suits for turning away job applicants based on criminal history, or the opposite, hiring the applicant and suffering from a negligent hire lawsuit).

204 *See infra* Part IV (creating legislation that provides protection for employers that was not needed until the recent increase in both the amount of criminals in the workforce and the availability of background checks).

205 *See infra* Part IV (providing state law for owners of small businesses will assist them when making hiring decisions because their hiring and firing practices are not controlled directly by federal law).

follow.[206] A statute put in place that enforces a series of steps for employers to follow will guarantee that the choice to hire or not hire a job applicant with a criminal record will significantly lessen the possibility of a Title VII employment discrimination lawsuit or a negligent hiring lawsuit. Using the EEOC's 2012 Guidelines and the *Green* factors, a list of the proper and necessary methods will inform employers on how to proceed when deciding whether or not to hire someone with a prior conviction.[207] The information provided in the EEOC's 2012 Guidelines reciprocally gives employers protection because the Guidelines give the potential employee the greatest chance possible to receive a job offer. If a choice is made to not hire the job applicant, the newly created statute will require the employer to provide appropriate reasoning to the job applicant as to why he did not receive the job. This reasoning must adequately provide nondiscriminatory reasons, thus ensuring the employer is outside the purview of currently protected classes under Title VII of the Civil Rights Act of 1964.[208] Although other states have more stringent standards regarding the use of arrest and conviction records when hiring, the adoption of the proposed approach will also help employers in other states who suffer from this dilemma.[209]

The proposed model statute provides an example of the legislation that states could incorporate into already existing sections regarding criminal history, criminal backgrounds, and civil rights.[210] It addresses concerns that employers struggle with every day when hiring and suggests a solution for both large and small companies.[211] Hiring practices of large and small companies are distinct and drastically different from each other.[212] Each must be addressed as to cover the entirety of employers within the state. This approach will provide a clear and manageable standard, eliminate the dilemma that employers

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206 *See infra* Part IV.A (showing what a model statute might look like that would help employers avoid lawsuits when hiring individuals with prior convictions).

207 *See generally Laws & Guidance*, *supra* note 10 (listing federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability).

208 42 U.S.C. § 2000e (2006) (covering information similar to the EEOC and also goes by the Civil Rights Act of 1964).

209 *See supra* Parts II.C, III.D (presenting background information on Wisconsin's Fair Employment Act and analyzing how it is unsuccessful because of its overbreadth).

210 *See infra* Part IV.A (suggesting that it would fit best in the Civil Rights section of the Indiana Code because it will provide equal protection for employers).

211 *See infra* Part IV.A (making sure, since there is a difference in hiring practices of small and large employers, that both are given different ways to hire individuals with criminal convictions).

212 Fuscaldo, *supra* note 115.

face, and create protection for the class of people who are subject to two very serious and legitimate types of lawsuits.[213]

A. Proposed Legislation

The proposed statute would be filed under Indiana's Title 22, Labor and Safety, Article 9, Civil Rights, and include the following language:[214]

> *(a) There is hereby created a set of rules for employers to follow regarding the hiring of any job applicant who has a record, not limited to arrest records, but open to any with a criminal record,*
> *(b) In order to eliminate prejudice against employers by ex-job applicants regarding their failure to hire, or against individuals who have had crimes committed against their person by an employee of an employer who then becomes liable for that employee's actions, it is directed that this comprehensive list, designed to erase employers' concerns, will direct employers to properly use the following practices when hiring:*
> > *(i) Employers should apply the Green factors, which may decrease the number of claims against employers if successfully followed. The factors are as follows:*
> > > *(1) The nature and gravity of the offense or conduct committed by the job applicant;*
> > > *(2) The time that has passed since the offense, conduct, and/or the completion of the sentence; and*
> > > *(3) The nature of the job currently held by the employee or sought by the job applicant,*
> > *(ii) After the application of the Green factors, if the job applicant appears to be a serious candidate, large and small companies should handle the next step separately:*
> > > *(1) Small businesses must next follow these four steps:*
> > > > *(A) Conduct a personal meeting with the job applicant to present an opportunity to discuss the criminal record in person, including, if*

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213 *See supra* Part II.B.1 (presenting information regarding employers suffering Title VII employment discrimination suits and negligent hiring lawsuits).

214 This proposed legislation creates another subsection to Indiana's Criminal History Providers chapter and should be added to the current legislation to not only help protect criminals in the workplace, but to protect employers as well. The language is based on the EEOC's 2012 Guidelines and suggested *Green* factors.

applicable, an explanation for the crime(s) committed;

(B) Present the applicant with the opportunity to demonstrate growth and change since the commission of the crime;

(C) If applicable, a temporary job offer may be presented for a short period of trial employment, to be revisited within thirty (30) days;

(D) If applicable, inform the job applicant by (1) phone, (2) email, or (3) letter, as to the exact reason for the hiring decision,

(2) Large businesses must next follow these three steps:

(A) Present the job applicant with the opportunity to write a letter explaining the criminal record, including if applicable, an explanation for the crime(s) committed;

(B) If applicable, a shorter period of trial employment including close observation by a veteran employee, to be revisited within thirty (30) days;

(C) If applicable, inform the job applicant by (1) phone, (2) email, or (3) letter as to the exact reason for the hiring decision,

(c) As used in this section:

(i) "Employer" means the state or any political or civil subdivision thereof and any person employing six (6) or more persons within the state.[215]

(ii) "Employee" means any person employed by another for wages or salary.[216]

B. Commentary

The purpose of the EEOC is to provide guidance for employers and employees regarding Title VII employment discrimination.[217] The EEOC focuses specifically on arrest and conviction records in its 2012

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215 IND. CODE § 22-9-1-3(h) (2013). The author has taken language from this statute to provide definitions for the model legislation.

216 *Id.* § 22-9-1-3(i). The author has taken language from this statute to provide definitions for the model legislation.

217 42 U.S.C. § 2000e (2006) (covering information similar to the EEOC and also goes by the Civil Rights Act of 1964); *Laws & Guidance*, *supra* note 10 (listing federal laws that make it illegal to discriminate against a job applicant or employee because of a person's race, color, sex, religion, national origin, age, or disability).

Guidelines.[218] Taking this guidance a step further by creating legislation within Indiana legitimizes fears that employers have against Title VII employment discrimination suits and, by proxy, negligent hiring lawsuits.[219]

This proposed legislation provides a solution while assuaging fears that employers are facing with the increasing number of ex-convicts entering the workforce.[220] Section (b)(i) takes what was used in the EEOC's 2012 Guidelines and places it into law, forcing employers to follow these rules to prevent shortcuts and snap decisions when hiring, but also to protect themselves from a potential lawsuit. Section (b)(ii) involves a more holistic approach to hiring by giving employers rules on a more personal hiring experience and concrete reasoning as to why a criminal job applicant may fail to land a job.

Enacting law for employers is a significant step forward because the EEOC and most states have previously focused on protecting the employee.[221] Although the need to protect the employee is crucial because he does not have the same level of control and power that employers do, employers are still vulnerable when it comes to repercussions from scorned ex-job applicants or ex-employees.[222] This legislation assists in decreasing the number of negligent hiring and the amount of disparate impact cases filed against an employer.[223]

Disregarding the overbroad protection provided by Wisconsin to criminals with conviction records, most states, including Indiana, may only protect against persons with arrest records or something less.[224] This makes conviction records available to an employer through a background check, a vital part of the employer's hiring process.[225]

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218 *See supra* Part II.A.3 (comparing arrest records and conviction records and the availability to employers for use when making hiring decisions). *See generally* EEOC 2012 GUIDELINES, *supra* note 6, at 1 (consolidating the EEOC's guidance documents regarding the use of arrest and/or conviction records in employment decisions).

219 *See supra* Part II.B (discussing the differences between Title VII employment discrimination and the potential for a negligent hiring lawsuit).

220 *See supra* Part II.A.1 (presenting information on incarceration and release percentages as well as arrest versus conviction records).

221 *See supra* Part II.A–B (considering Title VII employment discrimination and the section regarding arrest versus conviction rates).

222 *See supra* Part II.B (weighing whether an employer would rather be subject to a Title VII employment discrimination or be a party in a negligent hiring lawsuit).

223 *See supra* Part II.C–D (pinpointing Indiana, where there is little protection, other than for employees regarding expunged or sealed records, and no protections mentioned at all for employers).

224 *See supra* Parts II.C, III.D (discussing and evaluating current legislation in Indiana as well as Michigan, Wisconsin, Illinois, and Ohio).

225 *See supra* Parts II.B, III.C (reviewing the necessity of using background checks when making employment decisions).

Employers may subconsciously discriminate because of these conviction records. This proposed legislation will help prevent discrimination from occurring, leading to honest, reasonable choices regarding the employment of a criminal job applicant.[226]

Despite good intentions, this proposed legislation may suffer criticism, as employers may contend that it places too much time and effort on the hiring process, especially for large companies. However, looking at the big picture, this legislative scheme ensures that employers are protected from lawsuits that stem from hiring practices.[227] Not only will this prevent discrimination, but it will also prevent the employer from having to endure a lawsuit. Criticism may also come from job applicants, who still may attempt to claim discrimination, either because of their criminal record or, by proxy, being one of the protected classes under Title VII's Civil Rights Act of 1964.[228] However, by following the steps provided in the proposed legislation, employers are taking every step necessary to make certain this does not happen.

Job applicants must realize that they may not always obtain the job, and that not receiving the job may have nothing to do with either their criminal record or being part of a protected class under Title VII. This proposed legislation creates clarity and understanding for employers who are confused and scared when moving through the employment process of hiring from a pool of job applicants. Adding legislation to protect a class of people who were previously unprotected while also assisting and protecting those who are already protected ensures that both sides are reasonable, understanding, and clear when either making a hiring decision or applying for a job.

V. CONCLUSION

This proposed legislation would be successful in providing a set of rules for employers to follow, to prevent any dilemmas they may encounter due to the fear of opposing lawsuits, and to clear up any confusion about hiring practices when faced with a job applicant who has a conviction record. Although federal law controls some businesses, the guidance that the EEOC puts into place does not have the force of law. By applying the guidance to state law, employers then have a clear

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226 *See supra* Part II.A, II.B.3 (examining the use and effect of employers using background checks both on the employers themselves and the job applicants).

227 *See supra* Parts II.B, III.A, III.C (introducing and then criticizing lawsuits that stem from hiring practices that may have a discriminatory effect, or may result in a lawsuit for negligently hiring an individual who then commits a crime, leaving the employer liable).

228 *See supra* Part II.B.1 (explaining the effect of disparate impact and suggesting a way to eliminate this from occurring as much as possible).

understanding of how to either hire, or not hire, an individual who has a criminal record. This new legislation, although put in Indiana's code to supplement the current law protecting employees, has the possibility of being altered and moved to other states to fit in with legislation that already exists within each specific state. In Indiana, David and Michael would never have faced the dilemmas they did had the proposed legislation been in effect.

Following the new law, David would have chosen to interview Jill and realized that her conviction was related to illegal drugs, something she admitted to readily and described as a mistake from her youth. Being in retail, he would realize that her crime would not likely put his business in any jeopardy and would likely have decided to give her a thirty-day trial period of employment. Jill may turn out to be a great employee, very talkative and who uses her experience, albeit a negative one, to connect with customers in a way his other employees cannot. Since deciding to hire her, David wonders whether he would have passed her over simply because of her criminal history if the legislation assisting him in hiring Jill had not been in place.

With the protection of the law, Michael would have decided to include those six applicants with a criminal history into his hiring pool, specifically asking them for letters explaining their criminal history and conviction record. He would likely have received a very nice and honest letter back from Jill, who was very open in her discussion of her past crimes. He would have decided to hire her, along with three others who have criminal histories, as part of the thirty employees he is in charge of hiring. Due to their circumstances, Michael may likely give all four individuals a thirty-day trial period of employment and they may all end up with a great report from their veteran employee supervisor. Thus, Michael would decide to hire them permanently, pleased that this proposed legislation gave him the opportunity to not only protect himself and his company, but to provide four people with a chance for employment that they might not have had previously.

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[*] J.D. Candidate, Valparaiso University Law School (2015); B.A., English, Indiana University–Purdue University Fort Wayne (2011). I would first like to thank my parents, Jim and Teresa, for their unwavering love and support throughout my life, but especially during the Note-writing process. Thank you for reminding me of my purpose in law school and keeping me grounded when the stress and anxiety made me question myself. I would also like to thank my mentor, Mary Zastrow, and the members of the Valparaiso University Law Review Volume 48 for their constant guidance, advice, and comments on my Note, from start to finish.