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## Ban the Box: An Employer's Medicine Masked as a Headache

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## Comments

# Ban the Box: An Employer's Medicine Masked as a Headache

Aaron F. Nadich\*

### I. INTRODUCTION

*"Have you ever been convicted of a crime?"* This was one of the many questions that employers had traditionally included on employment applications to screen out applicants, even though such criteria was often irrelevant to the employer's vacant position.<sup>1</sup> A check in the "yes" box next to this question could send an application directly to the garbage can.<sup>2</sup> However,

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1. Neal St. Anthony, *Lawyer's 10-year Push for 'Ban the Box' Succeeds*, STAR TRIB. BUS. (Jan. 17, 2014, 3:30 PM), <http://www.startribune.com/business/240894001.html>; Mark Haase, *'Ban the box': A Major Milepost on a Long Road*, MINNPOST (July 12, 2013), <http://www.minnpost.com/community-voices/2013/07/ban-box-major-milepost-long-road> (noting that "[e]mployers will have access to a better applicant pool and with diverse, qualified and motivated employees.").

2. See St. Anthony, *supra* note 1. In reality, an employer would likely be mindful of record-keeping laws and file the application instead. Nevertheless, the effect would be the same. The employer would disqualify the applicant from its hiring decision without giving the applicant an

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effective at the onset of 2014, an employer is in violation of Rhode Island's Fair Employment Practices Act ("FEPA") if it includes such a question on a Rhode Island job application.<sup>3</sup> Rhode Island's "ban the box" law<sup>4</sup> prohibits employers from including any inquiry into an applicant's criminal history on an employment application; however, the employer is allowed to ask about criminal convictions during, or after, the first interview.<sup>5</sup> Although the employer may use the same inquiry to disqualify the applicant at the interview stage, the purpose of ban the box law is to get the applicant through the employer's door, giving applicants who have been criminally convicted an opportunity to explain the circumstances surrounding the conviction.<sup>6</sup>

Despite the requisite removal of this question from applications, an employer's ultimate failure to inquire into and consider an applicant's criminal past could prove costly to the employer. Negligent hiring laws allow third parties that are injured by the actions of an employee to sue an employer based on its failure to adequately investigate the prospective employee's background, including the employee's criminal background.<sup>7</sup> While concurrent ban the box and negligent hiring laws may seem to create a "legal minefield" for the employer as it is,<sup>8</sup> these two laws do not mark the extent of the employer's potential liability based on its hiring methods. In fact, the employer can also be liable for violating Title VII of the Civil Rights Act of 1964 by

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interview. *Id.*

3. R.I. GEN. LAWS § 28-5-7 (2014).

4. The 2013 amendment to Rhode Island's FEPA, which prohibits the employer from inquiring into criminal convictions on job applications, has become known as a "ban-the-box" law because such inquiries were traditionally answered on job applications by checking a "yes" or "no" check box. See Pamela Q. Devata, Kendra K. Paul, *Rhode Island Joins The Private Employer "Ban-The-Box" Trend*, SEYFARTH SHAW LLP (July 16, 2013), <http://www.seyfarth.com/publications/MA071613LE>.

5. Mark H. Burak & Andrew Silvia, *R.I. Enacts "Ban-the-Box" Law, Limiting Employer Inquiries into Applicants' Criminal Histories*, JD SUPRA BUS. ADVISER (July 24, 2013), <http://www.jdsupra.com/legalnews/ri-enacts-ban-the-box-law-limiting-67297>.

6. St. Anthony, *supra* note 1.

7. *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 440-41 (R.I. 1984).

8. Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 TEMP. L. REV. 921, 923 (2013) (citation omitted).

doing the very thing that negligent hiring seems to encourage: conducting a background check.

Title VII prohibits employers from making hiring decision on the basis of race, color, religion, sex, and national origin.<sup>9</sup> In addition, an employer need not intend to discriminate on one of these bases to violate Title VII.<sup>10</sup> Under the “disparate impact” doctrine, an employer’s decision against hiring an individual may also violate Title VII if the hiring decision has a greater impact on members of one of the suspect classes protected under Title VII,<sup>11</sup> as compared to those that are not members of a suspect class.<sup>12</sup> For example, a police department may violate Title VII by declining to hire a woman because she does not meet a five-foot, six-inch height requirement. Although the police department may not have implemented the policy with the purpose of discriminating against women, the policy has the effect of excluding more women than it does men because women are significantly more likely to fall beneath the height threshold.<sup>13</sup>

Similarly, an employer’s refusal to hire individuals with criminal convictions may create Title VII liability because Blacks, Latinos, and Hispanics are disproportionately convicted of criminal offenses and Title VII protects against racially based discrimination.<sup>14</sup> Ultimately, if an employer’s hiring practice has caused a disparate impact, the employer may escape liability only by providing a “business necessity” defense.<sup>15</sup> That is, the

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9. 42 U.S.C. § 2000e-2(a) (2006).

10. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

11. The suspect classes protected under Title VII are race, color, religion, sex, and national origin. *See* 42 U.S.C. § 2000e-2(a).

12. *See, e.g., Costa v. Markey*, 706 F.2d 1, 5 (1st Cir. 1982).

13. This scenario is based on a suit brought against the New Bedford Police Department. *Id.* at 2. In the suit, the plaintiff offered national statistics as evidence, which showed that between the years 1960 and 1962, eighty percent of women between the age of eighteen and thirty-four fell below the height requirement. *Id.* at 3. In addition, between 1971 and 1974, women between the ages of twenty-five and thirty-four had an average height of 5 feet, 4.1 inches, while the average height of men in the same age bracket was 5 feet, 9.6 inches. *Id.* at 10.

14. 42 U.S.C. § 2000e-2(a); *see, e.g., Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298–99 (8th Cir. 1975) (holding that an employer’s policy of disqualifying individuals convicted of any crime above a minor traffic offense had an adverse impact on Black applicants, thus making the employer liable under Title VII).

15. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, CONSIDERATION OF ARREST &

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employer must show that the applicant's past conviction presented an unacceptable level of risk when weighing the specific conviction and its relation to the duties the applicant would perform if hired.<sup>16</sup>

When considering the potential for Title VII liability in conjunction with negligent hiring and ban the box laws, the employer's hiring practices can present a myriad of concerns that seem to overlap, or at a minimum, create little room for error in an employer's reasoning.<sup>17</sup> This comment examines the complications that Rhode Island employers face in making hiring decisions, suggests that Rhode Island's ban the box law and Title VII do not offer much protection for ex-offenders in employment decisions, and proposes a practical method for employers to use the ban the box law's obligatory first interview to reduce the risk of hiring-based liability while still effectuating the law's purpose.

Section II of this comment will provide an extensive discussion of the predicament faced by a Rhode Island employer in making hiring decisions while simultaneously trying to comply with the ban the box law. This section will review the text and purpose of Rhode Island's ban the box statute. In addition, this section will demonstrate the narrow balance beam on which employers must remain in order to avoid liability for negligent hiring while also not violating Title VII. On the one hand, the potential for liability based on negligent hiring creates an incentive to ask about convictions and conduct a background check.<sup>18</sup> On the other hand, basing an employment decision on an applicant's criminal history could lead the employer to inadvertently violate Title VII.<sup>19</sup>

Section III of this comment suggests that Title VII does not provide much protection for ex-offenders. First, ex-offenders are not a protected class under Title VII despite the façade of

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CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [hereinafter *Guidance*].

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

17. Ryan D. Watstein, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 582 (2009).

18. See, e.g., *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 442–43 (R.I. 1984).

19. See, e.g., *Missouri Pac. R.R.*, 523 F.2d at 1298–99.

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protection that some Title VII doctrines have created.<sup>20</sup> Moreover, although once widely successful, claims based on the disparate impact theory have been largely fruitless over the past twenty years.<sup>21</sup> Thus, despite the overlap with a protected class, ex-offenders are unlikely to be successful in arguing that an employer's hiring practices had a disproportionate impact on members of the applicant's race and, thus, will frequently remain unprotected under Title VII.

Finally, section IV proposes a method that employers can use in interviewing applicants to reduce the risk of hiring-based liability. Although ban the box laws force employers to conduct an interview before asking about criminal convictions, performing the interview can be in the employer's best interest even without the ban the box restriction. If properly conducted, the benefit that employers may gain from the interview may significantly mitigate any additional burden placed on the employer due to delaying the inquiry into the applicant's criminal history until the first interview.

## II. THE JUDICIALLY CREATED QUAGMIRE FOR EMPLOYERS MAKING HIRING DECISIONS

### A. *Ban the Box*

In 2004, All of Us or None, a grassroots civil rights organization, began an endeavor to dismantle the huge barriers that employment and housing discrimination place on ex-offenders' successful reintegration into society.<sup>22</sup> The organization started what quickly became known as the "Ban the Box campaign," with the goal of removing conviction-based discrimination from hiring decisions by preventing the initial

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20. *Gillum v. Nassau Downs Reg'l Off Track Betting Corp.*, 357 F. Supp. 2d 564, 569 (E.D.N.Y. 2005).

21. See Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 5 (2012) (noting that "since the late 1980s the federal courts have proved markedly less receptive, rejecting virtually every disparate impact challenge brought by job candidates with criminal histories.").

22. *End Discrimination at Your Workplace*, ALL OF US OR NONE, [bantheboxcampaign.org/?p=20](http://bantheboxcampaign.org/?p=20) (last visited Feb. 23, 2014) [hereinafter *End Discrimination*].

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inquiry on employment applications.<sup>23</sup> Moreover, it sought to generate nationwide results by mobilizing ex-offenders, neighborhood legal services agencies, and local elected officials.<sup>24</sup> While these efforts were initially aimed mainly at public hiring practices, the ban the box campaign eventually expanded its focus to both public and private employment.<sup>25</sup>

Ban the box laws provide ex-offenders with much more than an opportunity to work: these laws also provide them with an opportunity to reenter society, to garner a feeling of fulfillment, to form relationships, to provide for their families, and to refrain from reoffending.<sup>26</sup> Being employed significantly reduces the likelihood that *any* individual engages in criminal activity.<sup>27</sup> Likewise, ex-offenders who gain quality employment are less likely to recidivate.<sup>28</sup> Many times, it is not that ex-offenders believe a criminal lifestyle to be somehow advantageous and thus choose to commit crimes instead of gaining employment.<sup>29</sup> Rather, recidivating is often the product of limited opportunities or choices, as the inquiry into criminal convictions, which many employers include on job applications, effectively eliminates ex-offenders from consideration for employment.<sup>30</sup> The effect of

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23. *Id.*

24. *Ban the Box Campaign*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/ban-the-box-campaign> (last visited Feb. 23, 2014).

25. *End Discrimination*, *supra* note 22.

26. Rachel Levenson et al., *Beyond the Box: the Ban the Box Movement in Rhode Island*, YOUTUBE (Mar. 20, 2013), [http://www.youtube.com/watch?feature=player\\_detailpage&v=aZrPrTcltdM](http://www.youtube.com/watch?feature=player_detailpage&v=aZrPrTcltdM) [hereinafter *Beyond the Box*].

27. See Anne Piehl, *Crime, Work, and Reentry*, in URBAN INSTITUTE REENTRY ROUNDTABLE, EMPLOYMENT DIMENSIONS OF REENTRY: UNDERSTANDING THE NEXUS BETWEEN PRISONER REENTRY AND WORK 5–6 (May 19–20, 2003), available at [http://www.urban.org/uploadedpdf/410856\\_piehl.pdf](http://www.urban.org/uploadedpdf/410856_piehl.pdf).

28. See William D. Burrell, *Hiring Ex-Offenders: Time for a Different Approach*, THE CRIME REPORT (Oct. 9, 2012), available at <http://www.thecrimereport.org/viewpoints/2012-10-hiring-ex-offenders-time-for-a-different-approach>. “Extensive research shows a relationship between unemployment and recidivism.” Garcia, *supra* note 8, at 939.

29. Piehl, *supra* note 27, at 3. The employment-recidivism relationship does not rest on some individuals preferring crime over legitimate employment; rather, society does not offer them an opportunity to work. See *id.* at 2–6.

30. Michael Sweig & Melissa McClure, “*Moving the Box*” by Executive Order in Illinois, 4 DEPAUL J. FOR SOC. JUST. 17, 23 (2010).

numerous employers collectively denying employment to ex-offenders served to make any hopes of post-prison employment dismal, and in some instances, nonexistent.<sup>31</sup> Ultimately, as ex-offenders find it difficult and sometimes impossible to obtain employment, the increased likelihood of recidivism caused by being unemployed remains.<sup>32</sup> In effect, ex-offenders commonly remain in an endless cycle of crime, punishment, and unemployment.<sup>33</sup>

Society has a critical interest in eliminating this cycle of recidivism. Eliminating the recidivism cycle not only benefits individual ex-offenders by allowing them to develop a better life for themselves; the reduction in overall criminal activity will also inevitably result in a safer public.<sup>34</sup> Further, reducing criminal activity carries an economic benefit, as lower incarceration rates reduce the grave economic impact that prison operations have on the state.<sup>35</sup> As an example, it costs over \$130 million to keep the 3,570 Rhode Island residents sentenced to prison in 2006 incarcerated for two-thirds of their sentences.<sup>36</sup> To make matters worse, the number of ex-offenders has been growing at an exponential rate; in fact, over the past thirty years, Rhode Island's

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31. See, e.g., Michael D. Abernethy, *New Law Aids Job Seekers with Criminal Convictions*, TIMES-NEWS (Oct. 6, 2012), <http://www.thetimesnews.com/news/top-news/new-law-aids-job-seekers-with-criminal-convictions-1.24795> (quoting a twenty-six-year-old North Carolina resident with a misdemeanor assault conviction that “[e]mployers won’t even continue talking to you when they find out there’s something in your background.”).

32. Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.*, in URBAN INSTITUTE REENTRY ROUNDTABLE, EMPLOYMENT DIMENSIONS OF REENTRY: UNDERSTANDING THE NEXUS BETWEEN PRISONER REENTRY AND WORK 2 (May 19–20, 2003), available at [http://www.urban.org/UploadedPDF/410857\\_freeman.pdf](http://www.urban.org/UploadedPDF/410857_freeman.pdf); See Helen Lam & Mark Harcourt, *The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public*, 47 J. BUS. ETHICS 237, 242 (2003) (explaining that, given that “[e]x-offenders denied employment opportunities are more likely to feel depressed and become entrapped in a ‘vicious cycle of self-defeating behaviours’[,] . . . [i]t is not surprising that research links the more frequent incidence and longer duration of unemployment rates to higher rates of recidivism.”) (citations omitted).

33. Freeman, *supra* note 32.

34. *Rhode Island's Rhode to Reentry Initiative*, DEP'T OF CORR., available at <http://www.doc.ri.gov/documents/reentry/Reentry%20brochure%20print.pdf> [hereinafter *Rhode to Reentry*].

35. See *id.*

36. *Id.*

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prison population has increased by 625 percent.<sup>37</sup> Accordingly, it has become increasingly crucial to put an end to the cycle of recidivism; ban the box is a missile aimed directly towards this end. While the restrictions of ban the box laws vary by jurisdiction, the purpose remains the same: by preventing employers from eliminating ex-offenders from consideration before an interview, it gives the applicant the potential to explain the circumstances surrounding the conviction, express sincerity in his or her rehabilitation, and fuse a connection with the employer.<sup>38</sup> Albeit, in some situations, the employer may very well still dismiss the applicant, but in others, the employer may be more inclined to overlook the conviction.<sup>39</sup>

Facing the social challenge of recidivism, Rhode Island sought to address the problem by amending its Fair Employment Practices Act (“FEPA”).<sup>40</sup> Previously, the statute had prohibited the employer from inquiring into whether the applicant had ever been arrested or charged with a crime, but specifically provided that “nothing in this subdivision shall prevent an employer from inquiring whether the applicant has ever been convicted of any crime[.]”<sup>41</sup> However, effective January 1, 2014, FEPA prohibits “any employer<sup>42</sup> [from including] on any application for employment . . . a question inquiring or to otherwise inquire either orally or in writing whether the applicant has ever been arrested, charged with or convicted of any crime,” subject to limited

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37. Rhode Family Life Center, *Employment & Prisoner Reentry in Rhode Island*, (May 2004), available at <http://opendoorsri.org/sites/default/files/employmentbrief.pdf>; See also MICHELLE ALEXANDER, *THE NEW JIM CROW 99* (2010) (distinguishing violent crimes as bearing little relationship to the soaring incarceration rates during the past three decades). Moreover, expanding state prison populations inevitably results in more individuals who will leave jail each year with scarlet letter of “ex-offender” attached to their back. Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons about Prisoner Reentry*, 20 FED. SENT’G REP. 93, 93 (2007).

38. See Garcia, *supra* note 8, at 942.

39. *Id.*

40. R.I. GEN. LAWS ANN. § 28-5-7 (West 2006), amended by R.I. GEN. LAWS § 28-5-7 (2014).

41. *Id.*

42. This Section of FEPA does not apply to an employer with four or less employees. Katharine H. Parker et al., *Rhode Island Fourth State to “Ban the Box” for Private Employers*, PROSKAUER ROSE L.L.P. (July 19, 2013), <http://www.proskauer.com/publications/client-alert/rhode-island-fourth-state-to-ban-the-box-for-private-employers>.

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exceptions.<sup>43</sup> When applicants encounter employers who inquire into criminal history prior to interviewing, they can file a complaint with the Rhode Island Commission for Human Rights or, in appropriate circumstances, they can ask for a right to sue in state court.<sup>44</sup> As a remedy, the complainant may receive monetary damages in addition to, or as an alternative to, injunctive relief.<sup>45</sup>

Following Hawaii, Massachusetts, and Minnesota's lead, Rhode Island's amendment to FEPA made it the fourth state to ban the box for public and private employment applications.<sup>46</sup> In addition, six other states have passed ban the box laws that, so far, apply only to public employers.<sup>47</sup> By taking the conviction inquiry off of the application, the Rhode Island General Assembly has placed ex-offenders on equal footing with other applicants in their ability to obtain an interview.<sup>48</sup> While an employer may not ask about criminal convictions on an application but is still entitled to ask at the first interview,<sup>49</sup> the timing of the questioning makes all the difference.

Granting even a limited opportunity for an ex-offender to explain the circumstances surrounding a conviction, however, has

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43. R.I. GEN. LAWS § 28-5-7 (2014). The limited exceptions include (1) if "a federal or state law or regulation creates a mandatory or presumptive disqualification from employment based on a person's conviction of one or more specified criminal offenses[.]" or (2) if "a standard fidelity bond or an equivalent bond is required for the position for which the applicant is seeking employment and his or her conviction of one or more specified criminal offenses would disqualify the applicant from obtaining such a bond." *Id.*

44. Parker et al., *supra* note 42.

45. *Id.*

46. NAT'L EMP'T. L. PROJECT, STATEWIDE BAN THE BOX: REDUCING UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 2 (2014), available at <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1> [hereinafter *Unfair Barriers*].

47. *Id.* Prior to Rhode Island's FEPA amendment, the six states that had ban the box statutes that only applied to public employers were California, Colorado, Connecticut, Illinois, Maryland, and New Mexico. *Id.*

48. St. Anthony, *supra* note 1.

49. Burak & Silvia, *supra* note 5. Interestingly, given that employers can still inquire into an individual's criminal convictions, but the new process simply delays the timing for the inquiry until after the initial application process, it has been aptly argued that a more appropriate title for the movement would be "Move-the-Box." Sweig & McClure, *supra* note 30, at 23. The law does not "ban" the inquiry; it simply tells an employer when the question can be asked. *Id.*

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prompted a much larger debate. For example, one Massachusetts employer asked, “[h]ow is preventing [employers] from asking applicants about criminal history being ‘tough’ on crime?”<sup>50</sup> Although the need to be tough on crime is undeniable, assuming that such a policy cannot coexist with ban the box laws places an employer’s argument on a questionable premise. Specifically, being tough on crime requires that society punish individuals with the maximum *appropriate* penalty. This being the case, being “tough on crime” does not require lifetime unemployment; as Representative Scott Slater of the Rhode Island General Assembly stated, “I have never heard a judge sentence any individual to a lifetime of unemployment.”<sup>51</sup>

While Slater’s statement negates the “tough on crime” criticism, it nevertheless prompts a more complex question: when does a criminal’s sentence end? The obvious and technical answer to this question appears to be when the sentence imposed by the court expires. However, when considered in the employment context, answering this question in the technical sense could, in certain circumstances, ignore an employer’s interests. Most significantly, the need to consider individuals’ past criminal conduct is important to employers because the failure to do so could open the employer up to liability based on negligent hiring law.<sup>52</sup> Under the theory of negligent hiring, an employer may be directly liable to the injured party if the employer failed to conduct a proper inquiry into the prospective employee and if the employee causes harm to a third-party, even if the employee’s acts were outside the scope of employment.<sup>53</sup>

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50. Heather E. Sussman, *Hiring in Massachusetts? Criminal History Questions Must Be Removed from Job Applications by November 4, 2010*, MCDERMOTT, WILL & EMERY (Oct. 29, 2010), <http://www.mwe.com/publications/uniEntity.aspx?xpST=PublicationDetail&pub=4893>.

51. *Beyond the Box*, *supra* note 26.

52. Watstein, *supra* note 17, at 582. In addition, some employers have perceived ex-offenders as having an increased propensity to break rules or steal. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 452 (2006).

53. Michael A. Gamboli, *Negligent Hiring -- Caveat Employer*, 44 R.I.B.J. 13, 13 (Nov. 1995).

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### B. *Negligent Hiring*

Negligent hiring claims can arise in unexpected employment situations and may amount to substantial settlements or damage awards. For example, Cape Cod Disposal, a small trash collection company, employed an individual as a trash collector without conducting a background check.<sup>54</sup> The employee worked for the company for some time and was well-liked by many customers on his route.<sup>55</sup> Nevertheless, without any noticeably troubling workplace behavior, the employee brutally raped and murdered one of the company's customers, leaving her two-year old daughter clinging to the customer's lifeless body.<sup>56</sup> Under these circumstances, the victim's estate would not only have a claim against the employee, but also against the employer. Without conducting a background check, the employer did not discover that the employee was a convicted felon and subject to multiple restraining orders.<sup>57</sup> Because it was disputable whether the employer's failure to conduct a background check would be considered unreasonable, the victim's estate filed a \$10 million negligent hiring suit against the employer.<sup>58</sup> This later resulted in an out-of-court settlement for an undisclosed amount.<sup>59</sup>

In the case described above, both the brutal attack and the large lawsuit could have been avoided if the Cape Cod Disposal had known about the employee's criminal past before making its hiring decision. As illustrated, significant consequences can result from the employer's decision to hire an individual and the different steps an employer has taken to investigate that individual before making an offer of employment. Accordingly, when making any hiring decision, an employer's attention cannot be devoted just to finding a qualified individual capable of

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54. Christopher Vrontas & Stephen Coppolo, *Oops! I hired an Ax Murderer: Hiring Necessities*, 29 N.H. BUS. REV. 5 (2007), available at <http://www.nkms.com/resources/index.php?n=123>.

55. Denise Lavoie, *Defense Begins in Cape Cod Slaying Trial*, SOUTH COAST TODAY (Nov. 2, 2006, 12:00 AM), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20061102/NEWS/31102997>.

56. *Id.*

57. Vrontas & Coppolo, *supra* note 54.

58. *Id.*

59. *Id.*

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performing the work required of the vacant position.<sup>60</sup> Instead, a liability-conscious employer must also consider the harm that the potential employee may cause to third parties.<sup>61</sup>

Generally, an employer must exercise reasonable care in hiring an individual in order to avoid liability under the theory of negligent hiring.<sup>62</sup> Additionally, employers have a compelling interest in exercising such reasonable care in their hiring processes because negligent hiring suits can result in substantial damage awards.<sup>63</sup> For example, a 2001 report provided that the average settlement in negligent hiring cases was just over \$1.6 million.<sup>64</sup>

In Rhode Island, an employer has a duty “to exercise reasonable care in selecting an employee who, as far as could be reasonably known, was competent and fit for the [employment.]”<sup>65</sup> This duty imposes an obligation on the employer “to conduct a reasonable investigation into [the employee’s] work experience, background, character, and qualifications” to search for dangerous proclivities of the individual.<sup>66</sup> Given that past behavior is recognized as a potential indicator of future behavior, courts have readily accepted criminal records as evidence that the employer was on constructive notice of an employee’s dangerous propensity.<sup>67</sup>

The degree of care that an employer must exercise is conditioned on the risk of harm: “[t]he greater the risk of harm, the higher the degree of care necessary to constitute ordinary

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60. Garcia, *supra* note 8, at 932–33.

61. *Id.* at 933.

62. See Gamboli, *supra* note 53, at 13. The theory of negligent hiring is different from that of *respondeat superior*. *Id.* Under *respondeat superior*, an employer is vicariously liable for the torts of an employee that are conducted while acting “within the scope of his employment *and* in furtherance of the employer’s business.” *Id.*

63. Garcia, *supra* note 8, at 939.

64. *Id.*

65. Welsh Mfg., Div. of Textron, Inc. v. Pinkerton’s, Inc., 474 A.2d 436, 440 (R.I. 1984).

66. *Id.*

67. See, e.g., Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 913 (Minn. 1983) (holding an apartment-complex owner liable for its manager’s sexual assault of a tenant where the employee’s application limited his disclosure of past criminality to “traffic tickets” and the owner failed to discover that the employee was on parole for burglary and receiving stolen goods).

care.”<sup>68</sup> Thus, a hospital may be required to exercise a greater degree of care when hiring a doctor than a florist is required to exercise when hiring someone to water plants. Depending on the types of risk associated with a position and the extent of harm posed by these risks, a reasonable inquiry may include conducting background checks to discover relevant information that the employer may not be able to find by merely contacting references.<sup>69</sup> In addition, employers’ use of background checks to look into current and prospective employees are increasing at exponential rates because technological advances have reduced the costs of these background checks and have made them increasingly easy to access.<sup>70</sup> Given the accessibility and low cost of these background checks, an employer’s inquiry frequently must include conducting such checks and considering any relevant criminal history in its hiring decision to avoid liability.<sup>71</sup>

Indeed, an employer has every reason to conduct a background check of a potential employee. Given that past criminal offenders are more likely to re-offend,<sup>72</sup> an individual’s “criminal history can be an accurate prognosticator of an individual’s likelihood to commit a crime.”<sup>73</sup> Consequently, it is hardly surprising that one survey revealed that ninety-two percent of responding employers subjected some or all of their potential job candidates to criminal background checks.<sup>74</sup> In some instances, these background checks allow employers to proactively reduce the risk of potential theft, fraud, and workplace violence.<sup>75</sup> In addition, conducting a pre-employment criminal background check allows the employer to make a determination of the extent

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68. *Welsh Mfg., Div. of Textron, Inc.*, 474 A.2d at 440.

69. *Id.* at 441.

70. Watstein, *supra* note 17, at 592–93.

71. *Id.* at 593. In fact, state legislatures have expressly made background screening a requirement for certain jobs (mostly for those that are in “positions of trust or responsibility”). *Id.*

72. Dermot Sullivan, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York’s Need to Reevaluate Its Priorities to Promote Public Safety*, 72 ST. JOHN’S L. REV. 581, 584–85 (1998).

73. *Id.* at 584. Given that steady employment makes ex-offenders less likely to reoffend, by increasing employment opportunities with programs like ban the box, criminal history presumably will become a less accurate indicator of future criminal activity. *Id.*

74. *Guidance*, *supra* note 15, at 6.

75. *Id.*

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of risk of liability for negligent hiring, if any, that the individual will create.<sup>76</sup>

C. *Title VII's Disparate Impact*

Although the results of a criminal background check in an employment decision serve as an effective tool to limit an employer's exposure to the risk of negligent hiring liability,<sup>77</sup> employers must proceed with caution in considering the results of the background check. Indeed, criminal background checks have become a rose among thorns, as conducting criminal history checks can lead an employer to violate Title VII inadvertently.<sup>78</sup> Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin[.]"<sup>79</sup>

With pressure from the Civil Rights Movement, Congress passed Title VII of the Civil Rights Act of 1964 in an effort to eliminate, or at least ameliorate, employment discrimination based on race.<sup>80</sup> Prior to Title VII's enactment, employers had no reason to disguise any racially-motivated employment practices. Consequently, for seven years following its enactment, Title VII was used solely to dislodge intentionally discriminatory

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76. Sullivan, *supra* note 72, at 593.

77. Gamboli, *supra* note 53, at 16. The effectiveness of criminal background checks in helping the employer to avoid liability is two-fold. First, the employer may avoid liability if the background check produces "relevant information that might not otherwise be uncovered" and, as a result, the employer declines to hire a potentially dangerous applicant in the first instance. *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 441 (R.I. 1984). In addition, the employer may also avoid negligent hiring liability if the background check it conducts constitutes a "reasonable investigation." *Id.* at 440. However, performing a background check does not always preclude liability, as the court will also consider the applicant's character, work experience, and qualifications. *See id.*

78. *See, e.g., Sam Hananel, Pepsi Beverages Pays \$3M in Racial Bias Case*, USA TODAY (Jan. 11, 2012, 3:19 PM), <http://usatoday30.usatoday.com/money/industries/food/story/2012-01-11/pepsi-racial-bias-case/52498132/1> (reporting that Pepsi Beverages settled Title VII charges for \$3.1 million based on its using criminal record checks as a tool to screen out job applicants).

79. 42 U.S.C. § 2000e-2 (2006).

80. Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148 (2005).

employment practices.<sup>81</sup> This theory of liability—applying whenever an employer treats a member of a Title VII-protected group differently because of race, gender, or other protected basis—has become known as the disparate treatment theory.<sup>82</sup>

Despite Title VII's clear message that it would not tolerate employment decisions resting on improper bases, for many years some employers remained resistant to eliminating discriminatory hiring practices. Instead, these employers implemented specific hiring practices that appeared to be race-neutral, but were discriminatory in effect and would undoubtedly serve to filter out minorities. It became evident to the United States Supreme Court that if an employer were able to simply implement a policy as a pretext for a race-based decision, Title VII would be rendered meaningless.<sup>83</sup>

As an evidentiary matter, the race-neutral nature of these employment practices made the employer's intentional discrimination difficult to prove; nevertheless, the resulting effect of these practices reeked of racial discrimination.<sup>84</sup> For example, in *Griggs v. Duke Power Co.*, the employer, a power generating facility, eliminated its policy that restricted Black employees to the labor department within the company when Title VII took effect.<sup>85</sup> Simultaneously, the employer instituted a new policy prohibiting individuals that had not completed high school from transferring out of the labor department.<sup>86</sup> In addition, to qualify for any department other than the labor department, individuals would have to pass two aptitude tests.<sup>87</sup> At the time, Black individuals had received inferior education in segregated schools, and accordingly, performed far worse on these alternative transfer

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81. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 721 (2006).

82. *Guidance*, *supra* note 15, at 6.

83. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (noting that “[u]nder [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

84. *Id.* at 431 (concluding that “[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).

85. *Id.* at 427.

86. *Id.*

87. *Id.* at 427–28.

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requirements.<sup>88</sup> At that point, the circumstances appeared to suggest that the underlying intent behind implementing the policy was to produce the same effect as the preceding policy; that is, to keep Black employees restricted to the labor department.<sup>89</sup>

Nevertheless, the Supreme Court struggled to find that the discriminatory impact was intentional because the employer offered to finance two-thirds of the cost of tuition for high school training.<sup>90</sup> Accordingly, to maintain Title VII liability despite this covert practice, the Court proclaimed: “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”<sup>91</sup> This focus on the consequences, rather than solely on intent, provided the basis for the disparate impact theory of liability.<sup>92</sup> However, the Court took steps to limit this theory and gave employers the burden to prove that the policy was related to a level of knowledge or skill required of an employee in that position.

While the Court in *Griggs* took a step outside of the realm of intent, it was careful to note that:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.<sup>93</sup>

This statement provided the foundation on which the court would rest its business necessity defense. The business necessity defense requires the defendant to prove that the challenged policy “[bore] a demonstrable relationship to successful performance of the jobs for which it was used”<sup>94</sup> and must “measure the person

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88. *See id.* at 430.

89. Selmi, *supra* note 81, at 721–23.

90. *Griggs*, 401 U.S. at 432.

91. *Id.* (emphasis added).

92. *Id.*

93. *Id.* at 430–31.

94. *Id.* at 431.

for the job and not the person in the abstract.”<sup>95</sup> To link these concepts, employers have violated Title VII based on a disparate impact theory when the employer’s “neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.”<sup>96</sup>

Although the criminally convicted are not directly protected within the text of Title VII, the disparate impact theory provides some protection to ex-offenders.<sup>97</sup> In the context of employment, the fact that discrimination based on criminal convictions disproportionately affects Blacks and Hispanics can create grounds for a Title VII action.<sup>98</sup> The employer need not intend to exclude more Blacks or Hispanics in instituting its policy. Rather, the employer need only eliminate applicants from consideration on the basis of their criminal conviction. In turn, if these conviction-based decisions result in disqualifying members of one race at a higher rate than that of another race, the employer may be held liable under Title VII. Thus, the employer’s use of criminal background checks has been used against them as evidence in these disparate impact claims even though employers are encouraged to delve into an applicant’s background to reduce the risk of negligent hiring liability.<sup>99</sup>

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95. *Id.* at 436.

96. *Guidance, supra* note 15, at 8.

97. *See, e.g., Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298–99 (8th Cir. 1975) (holding that an employer’s policy that disqualified individuals convicted of anything above a minor traffic offense had an adverse impact on Black applicants, thus making the employer liable under Title VII.).

98. Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 4 (2012). While the EEOC appears to indicate that statistics can be used only against employers that eliminate Black and Hispanic ex-offenders from consideration in employment decisions, the large net that this casts ignores an important distinction that can be made in regard to the type of crime on which an employer basis its decision. For example, an employer with a more specific policy providing that the company will refuse to hire individuals convicted of embezzlement would affect Whites more than other races. *See* ANTHONY WALSH, RACE AND CRIME: A BIOSOCIAL ANALYSIS 47 (2004). Presumably, this would present an actionable claim based on disparate impact.

99. *See, e.g., El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 235 (3d Cir.

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Notably, because ex-offenders do not represent a class protected under Title VII, employers may legally discriminate against applicants based on criminal conviction; ex-offenders are protected only to the extent that the employer's discrimination negatively affects applicants of a certain race greater than those of another race.<sup>100</sup>

## III. THE CRIMINALLY CONVICTED AS A (NOT SO) PROTECTED CLASS

Despite an initial period of success,<sup>101</sup> the disparate impact theory has been largely unsuccessful in protecting ex-offenders from conviction-based employment discrimination. Because the criminally convicted are not directly recognized as a suspect class, Title VII presents no protection to job applicants that are negatively affected by the employer's conviction-based policy but are not members of a protected class.<sup>102</sup>

In addition, even when members of a given race are affected to a greater extent than another race, disparate impact claims for conviction-based employment decisions have been largely unsuccessful since the early 1980s.<sup>103</sup> While the disparate impact theory provided the initial means that allowed Title VII to enter the context of conviction-based discrimination, courts have been unwilling to accept the theory where the employer's motives do not include some indication of intentional discrimination.<sup>104</sup>

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2007). Interestingly, in a recent Maryland District Court case, it was revealed that the EEOC *itself* conducts background checks on individuals that it employs. See *EEOC v. Freeman, Inc.*, No. 8:09-cv-02573, 2010 WL 1728847, at \*2 (D. Md. Aug. 9, 2013) (emphasis added).

100. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 202 (2008).

101. See, e.g., *Missouri Pac. R.R. Co.*, 523 F.2d at 1299.

102. Garcia, *supra* note 8, at 927.

103. Harwin, *supra* note 21, at 5.

104. See *Washington v. Davis*, 426 U.S. 229, 245 (1976) (concluding, as applied to equal protection, that "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 754 (S.D. Fla. 1989) (noting that "[e]ven if [it is true that because more Hispanics have been convicted of felonies than Whites, the defendant's policy has a disparate impact on Hispanics,] the lesson is not to lower the employer's standards, but to raise the qualifications

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Accordingly, if ex-offenders are to be protected as a class, specific legislation is necessary.

A. *All Bark and Little Bite: Putting the Cuffs on the Disparate Impact Theory*

Given that the expense of a lawsuit would prevent many members of suspect classes from bringing employment discrimination claims, Congress created the Equal Employment Opportunity Commission (“EEOC”) to receive and investigate charges of employment discrimination.<sup>105</sup> In addition, in 1972, Congress passed the Equal Employment Opportunity Act, which provided the EEOC with authority to bring actions against employers in federal court.<sup>106</sup> However, although Congress granted the EEOC the authority to enforce Title VII by bringing actions in federal court, Congress withheld rulemaking authority from the agency.<sup>107</sup> When an area of law needs clarification, the EEOC issues guidelines based on the state of the law, but these guidelines do not have binding force.<sup>108</sup> In fact, not only are these guidelines non-binding, the United States Court of Appeals for the Third Circuit provided that despite the “great deference” early cases gave to EEOC’s guidelines, “[it] is entitled only to . . . deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning.”<sup>109</sup>

In 2012, the EEOC issued new guidelines entitled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,” commonly referred to as the 2012 Guidance.<sup>110</sup> The 2012 Guidance claims to “build[ ] on longstanding court decisions and

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of Hispanics applying for jobs.); *See also* Selmi, *supra* note 81, at 768 (noting that “[a]bsent the smoking gun, racial epithets, or other explicit exclusionary practices, it has been, and remains, hard to convince courts that intentional discrimination exists.”).

105. Ellen N. Derrig, Comment, *Title VII—the Doctrine of Laches As A Defense to Private Plaintiff Title VII Employment Discrimination Claims*, 11 W. NEW ENG. L. REV. 235, 235 n.2 (1989).

106. *Id.* at 236–37.

107. *See id.* at 235 n.2 (describing the EEOC’s powers). *See also* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 244 (3d Cir. 2007).

108. *See Se. Pa. Transp. Auth.*, 479 F.3d at 244.

109. *Id.* (citations omitted).

110. *See Guidance, supra* note 15.

policy documents that were issued over twenty years ago.”<sup>111</sup>

However, by cloaking the disparate impact doctrine behind the veil of “longstanding court decisions,” it implied that criminal record-based discrimination claims have been more successful than the last twenty years have evidenced.<sup>112</sup> Although this is technically correct because the court decisions mentioned in the 2012 Guidance have not been overturned, by labeling its early victories as “longstanding,” it employed a technically not-untruthful red herring. Rather than the success that the 2012 Guidance implied, the disparate impact theory has been largely under attack and eroding since the late 1980s.<sup>113</sup>

For example, in 1989, the United States District Court for the Southern District of Florida declined to recognize disparate impact as the basis for the conviction-discrimination claim in *EEOC v. Carolina Freight Carriers Corp.*<sup>114</sup> In that case, a trucking company failed to promote a Hispanic individual based on his ten-year-old convictions for receiving stolen property and larceny.<sup>115</sup> There, in considering the employer’s business necessity defense, the court supported an employer’s interest in using criminal records.<sup>116</sup> It noted that “[saying] an applicant’s honest character is irrelevant to an employer’s decision is ludicrous . . . It is exceedingly reasonable for an employer to rely upon an applicant’s past criminal history in predicting trustworthiness.”<sup>117</sup> The court further attacked the very foundation of the theory:

Obviously[,] a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves. That some of these thieves are going to be Hispanic is immaterial. That apparently a higher percentage of Hispanics are convicted of crimes than that of the “White” population may prove a number of things

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111. *Id.* at 1.

112. Harwin, *supra* note 21, at 5. The Commission’s explicit intention was that employers, victims of discrimination, and the EEOC itself, use the 2012 Guidance when investigating discrimination charges involving employment decisions based on criminal records. *Guidance*, *supra* note 15, at 3.

113. Harwin, *supra* note 21, at 5.

114. 723 F. Supp. 734, 737 (S.D. Fla. 1989).

115. *Id.*

116. *Id.* at 753.

117. *Id.*

such as: (1) Hispanics are not very good at stealing, (2) Whites are better thieves than Hispanics, (3) none of the above, (4) all of the above . . . If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.<sup>118</sup>

It appeared as though the Court was entangled in the fact that individuals with criminal convictions, at one point, chose to commit the crime. However, past personal choice is not a limit on the disparate impact doctrine. Instead, the disparate impact doctrine only requires that a race be disproportionately affected, regardless of the criteria used to produce that result. Nevertheless, this District Court incidentally made it obvious that, absent a showing of racially motivated intent, it was not going to put much stock in the more unclear disparate impact theory.

Moreover, in 2007, the United States Court of Appeals for the Third Circuit broadened the scope of the business necessity definition in *El v. Southeastern Pennsylvania Transportation Authority*.<sup>119</sup> That Court felt that although the previously applied definition originated and arguably worked well in the testing cases,<sup>120</sup> it did not adequately fit conviction-based discrimination cases.<sup>121</sup> In that case, the Southeastern Pennsylvania Transit Authority refused to hire an individual with a forty-year-old murder conviction to transport individuals with mental and physical disabilities.<sup>122</sup> The Court stated that, when applying the business necessity standard that had previously-applied to the testing cases, “minimum qualifications necessary for successful performance of the job in question” would be “awkward” in this context, because the individual’s ability to perform the job is not an issue.<sup>123</sup> Rather, the employer’s concern is with avoiding the risk of harm that the individual presents.<sup>124</sup> In the position at

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118. *Id.*

119. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242–43 (3d Cir. 2007).

120. Cases where Blacks were discriminated against because they were unable to pass the tests required for employment or advancement. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

121. *El*, 479 F.3d at 242–43.

122. *Id.* at 235.

123. *Id.* at 243 (internal quotation marks omitted).

124. *Id.*

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issue, employees would be alone and in very close contact with physically and/or mentally disabled individuals while performing their duties.<sup>125</sup> Since “disabled people are disproportionately targeted by sexual and violent criminals,” and the plaintiff offered no evidence that he did not present a risk of recidivism, the Court held that the employer’s policy was consistent with business necessity.<sup>126</sup> In doing so, the Court concluded that while the policy does not have to measure the risk perfectly, it must “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”<sup>127</sup>

In addition, since the EEOC passed its 2012 Guidance, its lack of success has been accompanied by various court criticisms. For example, in 2013, in *EEOC v. Freeman*, the United States District Court for the District of Maryland stated:

Indeed, the higher incarceration rate [of African-Americans than Caucasians] might cause one to fear that any use of criminal history information would be in violation of Title VII. However, this is simply not the case. Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States[;] . . . even the EEOC conducts criminal background investigations as a condition of employment for all employees . . . By bringing actions of this nature, the EEOC has placed many employers in the “Hobson’s choice” of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.<sup>128</sup>

In a joint letter, the Attorneys General of nine states<sup>129</sup> have

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125. *Id.* at 245.

126. *See id.* at 244, 248.

127. *Id.* at 245.

128. No. 8:09-cv-02573, 2010 WL 1728847, at \*2, \*31–32 (D. Md. Aug. 9, 2013).

129. Kim Kimzey, *Attorneys General Ask Court to Drop BMW Suit*, SPARTANBURG HERALD J. (Aug. 15, 2013) (listing Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia).

also criticized the EEOC's decision to bring suit against BMW Manufacturing Co. and Dollar General Corp. for their use of background checks in hiring decisions.<sup>130</sup> In addition to urging the EEOC to dismiss the suits, the letter provided that the EEOC's "misguided" application of the law in its Guidance is a "quintessential example of gross federal overreach" and ought to be rescinded.<sup>131</sup> Taking note of the EEOC's lack of rulemaking authority, the Attorneys General continued, "[i]f Congress wishes to protect former criminals from employment discrimination, it can amend the law."<sup>132</sup> As these instances make apparent, the courts have more recently been unwilling to extend Title VII protection to ex-offenders in many instances.

B. *Learning from Mistakes: The Court's Instinctive Commitment to Intent*

To determine the extent to which protection remains for ex-offenders, it is important to understand why the courts have sparingly applied the disparate impact doctrine over the past twenty years. The problems concerning Title VII's application to protect those with criminal records are not solely derived from the EEOC's Guidance. In fact, the complications begin within the disparate impact theory itself. While the disparate impact theory was originally intended to advance discrimination claims with questionable evidence of intent, courts have become unwilling to accept the theory without at least a scent of intentional discrimination.<sup>133</sup>

It is no surprise that courts search for underlying intentional employer conduct; after all, punishment flowing from intentional misbehavior is taught early and reinforced throughout an individual's entire life. When a four-year-old is caught turning the television on after bedtime, she is punished. Likewise, a high school student who starts a fight in school is suspended. From the time we are children we learn that wrongful conduct leads to punishment. The purpose of these punishments are to force us to learn from our mistakes and deter us from future wrongful

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130. *Id.*

131. *Id.*

132. *Id.*

133. Selmi, *supra* note 81, at 768.

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conduct. Upon coming back from school suspension, the student has learned that fighting constitutes wrongful conduct and he knows exactly what will happen if he starts another fight. However, when an employer institutes a facially neutral policy with absolutely angelic intentions, liability may follow. Consequently, by removing the intent requirement, employers may find it difficult to predict whether their actions leave them in violation of Title VII; this is what makes disparate impact controversial.<sup>134</sup>

In fact, even the Supreme Court, just five years after its decision in *Griggs*, had difficulty accepting the theory. In declining to apply the disparate impact theory to employment testing in the context of the Fifth and Fourteenth Amendments, the Supreme Court declared, “we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies ‘any person . . . equal protection of the laws’ simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.”<sup>135</sup> Indeed, without Congress’s 1991 amendment to the Civil Rights Act codifying the disparate impact theory, it might not be available to plaintiffs today.<sup>136</sup>

Civil rights and employment law theorist Professor Michael Selmi attributed the inability of the EEOC to bring successful suits on the ultimate failure of the once-expansive disparate impact theory.<sup>137</sup> He argued that it is “difficult to get courts to draw the necessary inference of discrimination” and, absent specific evidence, courts are reluctant to be convinced that intentional discrimination exists.<sup>138</sup> The disparate impact theory does not help to increase the likelihood of a court’s finding of liability because “there was never any reason to believe it would be easier for courts to make an inference of discrimination once they were told that intent was an unnecessary element of

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134. Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald A New Disparate Impact?*, 90 B.U. L. REV. 2181, 2187 (2010).

135. *Washington v. Davis*, 426 U.S. 229, 245 (1976).

136. Selmi, *supra* note 81, at 703 (noting “when adverse Supreme Court decisions threatened to eviscerate the *Griggs* decision, Congress responded by passing the Civil Rights Act of 1991.”).

137. *Id.* at 768.

138. *Id.*

proof.”<sup>139</sup> Further, Selmi noted that the disparate impact theory does not include the essential element of blameworthiness that forms the basis for a court’s willingness to remedy a situation.<sup>140</sup> Without finding intent-backed discrimination or any blameworthiness, courts sought a way out.<sup>141</sup> One trap door that the Supreme Court utilized to avoid holding the employer liable was the business necessity defense.<sup>142</sup> Without any reason to define these practices as discriminatory aside from “simply [showing] the practices might have satisfied the doctrine, courts have been quick to approve common business practices despite their disparate impact.”<sup>143</sup>

Despite the various problems with the disparate impact theory, Title VII may nevertheless provide some incidental benefits to ex-offenders. First, even the threat of ultimately unsuccessful suits may lead some employers to tailor their employment policies simply to avoid the hassle and expense. Additionally, because claimants arguing under a disparate impact theory sometimes still succeed in court,<sup>144</sup> many employers may want to avoid taking the risk that a court will decide that liability is warranted. However, these incidental benefits do not provide any assured protection for ex-offenders.

To conclude, Title VII has been, and will continue to be, an inadequate vehicle for protections of ex-offenders. The criticisms since the issuance of the 2012 Guidance evidence the courts’ unwillingness to accept the disparate impact theory without more evidence than statistics and a hiring policy that disqualifies those with a criminal record. In requiring a greater evidentiary basis, the courts are searching for the scent of discriminatory intent. Ultimately, these criticisms, coupled with the disparate impact theory’s lack of success over the past twenty years, evidence Title VII’s inability to provide adequate, if any, protection for ex-offenders.

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139. *Id.*

140. *Id.* at 773.

141. *Id.* at 773–74.

142. *Id.* at 753.

143. *Id.*

144. *See, e.g.,* Hananel, *supra* note 78 (describing a recent \$3.1 million settlement between Pepsi Beverages and the EEOC based on Pepsi’s policy to screen out job applicants that had been either arrested or convicted).

IV. RHODE ISLAND'S BAN THE BOX: DRAWING THE LINE WITH  
EX-OFFENDERS

While employers may consider ban the box laws to be nothing more than an unnecessary burden, if properly used, such laws can be beneficial to both applicants and employers. First, Rhode Island's ban the box statute represents only a modest addition to the employer's obligations, as the Rhode Island General Assembly declined to impose a substantial burden on employers, and the statute is more favorable to employers than ban the box laws in other states. Moreover, if embraced by employers, Rhode Island's ban the box law will produce the intended results even without imposing any significant burden on employers. Finally, employers may be able to use the obligatory first interview to their benefit because it allows them to make a more informed hiring decision and simultaneously avoid other hiring-based liability under Title VII and negligent hiring.

A. *Rhode Island's Ban the Box: Keeping the Employer in the Equation*

Ex-offenders are undoubtedly placed in a difficult situation. Some are convicted and immediately return to society, while others are imprisoned and return to society at a later date, but the message that society sends to both is the same: expect your job hunt to be difficult. After an individual's sentence is served, the now ex-offender presumably reclaims the rights<sup>145</sup> that the sentence took away. The courts have determined the extent of that person's punishment and it did not include unemployment. Should the mere existence of a mark within someone's criminal history serve to stifle the rest of that person's life? After all, "[e]ach of us is more than the worst thing that we've ever done."<sup>146</sup>

However, conviction-based discrimination in employment decisions would be untenable if one were to consider only the ex-offender's interest. In any hiring decision, the employer has much more to consider than the applicant's rights; it has to consider the rights of other employees and customers, as well as its own

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145. There are some exceptions. For example, a convicted felon is no longer legally able to carry a firearm. 18 U.S.C. § 922(g) (2006).

146. Bryan Stevenson, *Crime, Punishment, and Executions in the Twenty-first Century*, 147 *PROC. AM. PHIL. SOC'Y* 24, 24 (2003).

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interests. To the extent that an ex-offender's right to be given equal consideration for employment conflicts with those of the employer, employees and customers, the ex-offender's rights must necessarily concede. Correspondingly, the point at which the conflicting rights no longer overlap is the point at which the employer's discrimination in hiring must cease.

Undoubtedly, a check box on a job application does not accurately determine the point at which the applicant is no longer a risk to the employer, employees, and customers. The ban the box movement aims to present the employer with a better method for assessing the specific risk. However, this risk-assessing method does not come without cost, as whatever method is chosen will present the employer with a greater burden than simply including an inquiry on a job application. Accordingly, in enacting ban the box laws, the state must decide the extent to which it will increase the employer's obligations. Because a given state's willingness to increase the employer's burden may differ from that of another state, ban the box laws vary from jurisdiction to jurisdiction. Rhode Island's ban the box law presents a careful balance between the need for a more accurate determination of risk and the additional burden placed on employers.

Rhode Island's ban the box law aims to provide ex-offenders with a better chance of obtaining employment than before its existence and places less of a burden on employers than other ban the box laws to achieve that result. In fact, a substitute bill was introduced to the Rhode Island House of Representatives along with the now-enacted ban the box bill that would have offered substantially more protection to ex-offenders, but at a cost of additional employer obligations.<sup>147</sup> The substitute bill prohibited employers from inquiring into criminal history "[until] the applicant is a finalist or after making a conditional offer of employment."<sup>148</sup> In addition, once able to obtain the applicant's criminal record, an employer would have been permitted to deny the applicant only if:

- (1) there was a "direct relationship between one or more of the previous criminal offenses and the employment sought . . . [taking] into consideration any information

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147. H.R. 5507 Substitute A, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013).

148. H.R. 5507, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013).

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produced by the [applicant] . . . in regard to [the applicant's] rehabilitation and good conduct;"<sup>149</sup> or

(2) "the granting of the employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals, employees or the general public."<sup>150</sup>

On its face, this would have offered ex-offenders significantly more protection against discrimination in hiring decisions;<sup>151</sup> however, this additional protection would come at the expense of placing additional burdens on employers.

On February 14, 2013, the bill eventually enacted to become Rhode Island's ban the box law, H 5507A,<sup>152</sup> was introduced in the Rhode Island House of Representatives as a substitute to H 5507,<sup>153</sup> and both bills were referred to the House Labor Committee. Subsequently, H 5507, the bill including more protections for ex-offenders, died in committee, while H 5507A made it out of committee and, on July 15, 2013, was ultimately enacted. As a result, compared to the alternative, Rhode Island's current ban the box law constitutes a relatively modest additional burden on employers.

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149. *Id.*

150. *Id.*

151. It is worth noting that although Rhode Island's substitute bill, if enacted, would have *offered* more protection to ex-offenders, it does not necessarily mean that ex-offenders would be successful in enforcing these protections. Rhode Island's current ban the box law provides little evidence in order for an aggrieved individual to succeed in bringing suit; specifically, a plaintiff will succeed if the employer inquired into his or her criminal history before an interview. The substitute bill offered additional protections, but, if the employer were able to provide adequate justification, the dismissal of the employee would be permissible. *Id.* Presumably, the applicant would have the opportunity to then show that the employer's justification was merely a pretext. In bringing this type of claim, plaintiffs face a myriad of barriers including limited ability to detect discrimination and minimal incentive to pursue a suit, which consequently make failure-to-hire suits unlikely. For a detailed discussion of the many barriers in failure to hire suits, see Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 412 (1993).

152. See H.R. 5507 Substitute A, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013) (proposing the now-enacted ban the box law).

153. See H.R. 5507, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013) (proposing more protections for ex-offenders).

The main burden imposed on employers by Rhode Island's ban the box law is the prohibition on employers from inquiring into convictions "until the first interview or thereafter."<sup>154</sup> While employers may consider the restriction prohibiting inquiry into criminal history before an interview as required by Rhode Island's ban the box law to be an unnecessary burden, it is a modest burden when compared to that which the state had the opportunity to enact. In fact, other states have actually imposed greater restrictions in their ban the box laws.<sup>155</sup> For example, Hawaii's ban the box law prohibits employers from inquiring into an applicant's criminal past until after the employer makes a conditional offer of employment.<sup>156</sup> Further, if a background check reveals a criminal conviction, a conditional offer is revocable only if a conviction within the past ten years "bears a rational relationship to the duties and responsibilities of the position."<sup>157</sup> As compared to that of Hawaii, the Rhode Island ban the box law creates only a fraction of the burden placed on Hawaii employers.

B. *Ban the Box Will Work! Let Me Explain*

Assuming Rhode Island's ban the box law performs its intended function, the benefits that it will provide to ex-offenders could not be more compelling. The ex-offender's benefits go beyond simply having a job: the financial component will allow the individual to support a family; the social component will allow the individual to distance themselves from criminal relationships by forming new relationships within the workplace; and the production of quality work will allow the individual to garner the feeling of accomplishment. Consequently, when these benefits are blended, it may allow many ex-offenders to avoid what has become a revolving door at the prisons for individuals with criminal

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154. R.I. GEN. LAWS § 28-5-7 (7)(iii) (2014).

155. For example, Massachusetts additionally requires an employer who wishes to inquire into criminal history to provide an individual with a copy of their criminal history report prior to questioning and notify the individual if the report serves as the basis for an adverse decision. *Unfair Barriers*, *supra* note 46, at 5. Additionally, Minnesota's ban the box law removes the conviction inquiry from employment applications for public and private employers, while public employers have the additional restriction of job relatedness if a decision is made based on criminal conviction. *Id.* at 5-6.

156. HAW. REV. STAT. § 378-2.5 (2013).

157. *Id.*

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convictions.<sup>158</sup>

While the benefits to the ex-offender may be apparent, exactly how ban the box laws will realize those benefits is less noticeable. In fact, at least one reporter has even argued that it will make employers less likely to hire ex-offenders because employers will feel deceived by the applicant failing to volunteer criminal history upfront.<sup>159</sup> However, when a law prohibits the question from being included on the application, it is hardly conceivable that the employer would feel deceived by the fact that the ex-offender did not volunteer the information at a random location on the application.

To the contrary, an ex-offender disclosing a criminal conviction for the first time at the interview may have a better chance at being hired than if it had been disclosed on the job application. When an employer asks about criminal conviction on an application, it often results in the applicant being disqualified without receiving an interview.<sup>160</sup> However, when an employer is prohibited from inquiring into criminal convictions until the first interview, it allows the individual to “explain the nature of the crime, how long ago it was committed, when incarceration ended, [and to present] successful rehabilitation efforts and certifications if available.”<sup>161</sup> This explanation is not simply to appease the ex-offender; in fact, studies have shown that allowing the ex-offender to explain these circumstances increases the likelihood that the employer will hire that individual.<sup>162</sup>

An employer’s inquiry into criminal convictions can be relatively straightforward. Many times, it will be the same question that has been banned from employment applications: “have you ever been convicted of a crime?” However, rather than a simple “yes,” which would be the equivalent of a check in the

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158. See Piehl, *supra* note 27, at 13.

159. Eli Lehrer, *Ban the Box Goes Too Far and Not Far Enough*, HUFFINGTON POST (Dec. 27, 2013, 8:22 PM), [http://www.huffingtonpost.com/eli-lehrer/ban-the-box-goes-too-fara\\_b\\_4508127.html](http://www.huffingtonpost.com/eli-lehrer/ban-the-box-goes-too-fara_b_4508127.html).

160. St. Anthony, *supra* note 1.

161. *Ban the Box: For a Second Chance at Fair Employment*, N. CAROLINA JUST. CENTER, <http://www.ncjustice.org/?q=second-chance-alliance/ban-box-second-chance-fair-employment> (last visited Feb. 26, 2014).

162. See St. Anthony, *supra* note 1 (explaining that “[s]tudies show that providing this opportunity opens doors for ex-offenders and increases their likelihood of obtaining employment.”).

box, the interviewee could continue the statement by providing the employer with a description of the criminal activity for which he or she was convicted and likely by mentioning the time that has passed since the conviction.<sup>163</sup> Accordingly, the employer would be presented with a more detailed account of the individual's past to determine its relevance to the vacant position.

The power that an explanation carries cannot be overstated, especially when compared to a simple yes or no response. In fact, the American legal system recognizes the importance of being able to explain oneself. In a criminal trial, after a jury has returned a guilty verdict, the defendant has a right of allocution.<sup>164</sup> That is, a right "to make a statement in his own behalf, and to present any information in mitigation of punishment."<sup>165</sup> Thus, the court is forced to listen to the defendant's explanation as to why the court should mitigate his or her sentence. "By requiring the sentencing judge to listen with care to the defendant's statement, courts emphasize that the defendant's opportunity for allocution should not be viewed as an empty ritual, but rather as a vital and integral part of the sentencing process. Hearing from the defendant, therefore, matters."<sup>166</sup> The purpose of requiring such a right even after the jury has rendered a guilty verdict is that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."<sup>167</sup> As the criminal defendant's right to allocution and its underlying purpose illustrate, a trial finding a defendant guilty of a crime does not always present the entire story. There are

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163. It is worth noting that some job applications also included a line to explain the nature of the conviction. However, given the ease of distinguishing between two applicants based on the presence or absence of a check mark in the "yes" box, such an explanation tends to fall on deaf ears. The black and white distinction between a "yes" and "no" response without being forced to give meaningful consideration to the gray area contained in the explanation can render the written explanation meaningless.

164. *See, e.g.,* *Green v. United States*, 365 U.S. 301, 304 (1961) (holding that the drafters of the Federal Rules of Criminal Procedure intended by Rule 32(a) that a defendant be given the opportunity to speak before a sentence is imposed).

165. *Id.*

166. Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocution, and the Crime Victims' Rights Act*, 26 *YALE L. & POL'Y REV.* 431, 463 (2008).

167. *Green*, 365 U.S. at 304.

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other factors that must come into consideration including motive, remorse, and even a plea for mercy.

To put it simply, the mark of a guilty verdict is not the tell-all of the individual's criminal conviction. Whether faced with the black and white term of "guilty" before sentencing or "yes" indicating past criminal conviction, the individual should be given an opportunity to explain before a decision is made based on such a label alone. There are many times that the circumstances are not exactly as they appear. Alternatively, perhaps the circumstances *were* exactly as they appear, but so much time has passed and so much self-improvement has been undergone that the previous bad acts do not create a risk; rather, the bad acts serve to give this individual a reason to avoid unfavorable activity.<sup>168</sup> To make a hiring decision based solely on an individual's label as an ex-offender, in many cases, represents not only a decision based on irrelevant criteria but also an unfavorable decision.

C. *Complying With Ban the Box: Medicine Masked as a Headache*

While the thrust of ban the box is directed at assisting ex-offenders, this does not mean that employers cannot also benefit. Some employers may perceive the required interview before the employer can inquire into criminal history to be nothing more than a headache.<sup>169</sup> To these employers, ban the box represents

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168. Indeed, while it may be true that many ex-offenders recidivate, to claim that some ex-offenders cannot view their past punishment as a reason to avoid future illegal conduct would be to unequivocally denounce prisons as an effective means of achieving their goal of specific deterrence. However, the deterrence theory has been called into question, and the effectiveness of punishment at achieving deterrence exceeds the scope of this Comment. *See generally* Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty Versus Severity of Punishment*, THE SENTENCING PROJECT (Nov. 2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>; but see *Beyond the Box*, *supra* note 26 (Frank Jenestreet, co-owner of Liberty Rentals in South Kingstown, provided that criminal background has no bearing on the factors to look for in hiring an individual, he stated that, "if anything, it makes them want to succeed and try a little harder [because] they have something to prove.").

169. *See* Harry Graver, *Don't Ban the Box*, YALE DAILY NEWS (Oct. 24, 2011), <http://yaledailynews.com/blog/2011/10/24/graver-dont-ban-the-box>. ("We should not require businesses to devote unnecessary time and resources to interview a surplus of candidates they would reject once learning their criminal history [and] . . . forcing an employer to discuss a candidate's

time taken away from productivity in order to meet with someone whose criminal history may inevitably disqualify them from the position.<sup>170</sup>

1. “Ask No Questions and You’ll Hear No Lies”<sup>171</sup>

Ban the box laws merely delay the conviction inquiry until the applicant is interviewed. The delayed inquiry should not imply that the inquiry has somehow become less relevant to the hiring decision or that there is some other reason why it should not be asked. By all means, employers should use this opportunity to inquire into the interviewee’s criminal past. An employer’s best practices should be to include specific, targeted questions during the interview.<sup>172</sup> The employer’s questions should target relevant criminal history in light of the nature of the vacant position and

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potential criminal past puts him in an unnecessarily uncomfortable situation.”).

170. *Id.*

171. JAMES JOYCE, *ULYSSES* 242 (Max Bollinger ed., Urban Romantics 2013) (1922). In *Ulysses*, James Joyce presented the now proverbial statement, “[a]sk no questions and you’ll hear no lies” in response to the question of another character, “[d]id she fall or was she pushed?” *Id.* Given the gravity of the question and the implication that a response would include an incriminating statement, the individual is warning the questioner that she may feel compelled to lie in responding to the question. *Id.* Considered in the hiring context, the statement presents a double entendre. On the one hand, it could be considered literally; that is, if the employer fails to ask about criminal convictions at all during the hiring process, then it will be told no lies. Bearing in mind that an employer can easily conduct a criminal history check and dismiss an untruthful applicant, this option is adverse to the employer’s interest. On the other hand, the statement could be considered in light of the inference that it presents; when a question is asked that brings with it gravity and consequence, an individual may feel tempted to lie. In the interview setting, the criminal conviction question carries a heavy consequence, as it may result in the person being denied an offer of employment. While some individuals will lie in hopes of the employer not conducting further inquiry, others will be truthful and take the opportunity to explain the conviction. Accordingly, by inquiring into criminal history at the interview and testing the answer later with a criminal background check, the employer can use this opportunity to test the interviewee’s truthfulness, which will be especially telling given the pressure-filled setting and heightened temptation to attempt to deceive.

172. *See Guidance, supra* note 15, at 13–14 (concluding “employers [should] not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”).

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responsibilities of that position; at a minimum, the employer should seek to discover “[t]he nature and gravity of the offense” and “[t]he time that has passed since the offense . . . or completion of the sentence.”<sup>173</sup> Because of the different requirements and responsibilities of each position, the questions will vary from position to position. As such, specific relevant inquiries should be documented in a formal position-by-position interview procedure.<sup>174</sup> Formalizing this policy will perform two important functions: first, it will ensure that an employer does not stray from inquiring into only the applicant’s *relevant* criminal past;<sup>175</sup> second, it will serve as a reminder to the employer to inquire into an individual’s criminal history.

In its criminal history inquiry, an employer should be careful not to wander into irrelevant areas.<sup>176</sup> The criminal history inquiry is necessarily fact-specific, varying based on the position for which the employer is hiring and the particular duties that the individual will perform in that position. Accordingly, the criminal history that will be relevant to the employer’s hiring decision will

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173. *Guidance, supra* note 15, at 15 (citing *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977)).

174. Jeffrey B. Gilbreth & Erika M. Collins, *Will the EEOC attack your use of criminal background checks?*, NIXON PEABODY LLP, JULY 9, 2013, at 3 n. 2 3 n.2, (available at [http://www.nixonpeabody.com/files/157606\\_Employment\\_Alert\\_9JULY2013.pdf](http://www.nixonpeabody.com/files/157606_Employment_Alert_9JULY2013.pdf)) (noting that “the *Guidance* implicitly makes clear that the performance of an individualized assessment is highly recommended if an employer wants to avoid intensive EEOC scrutiny.”). “[E]mployers wishing to act conservatively to avoid EEOC scrutiny should implement policies and practices that link specific criminal conduct with the risks inherent in the duties of a particular position.” *Id.* at 3.

175. Criminal history will be more relevant for some job positions than others. In fact, it may be argued that, for certain job positions, an individual’s entire criminal history is relevant; nevertheless, it is necessary to make this determination on a position-by-position basis.

176. Doing so could land the employer in violation of Title VII. *Compare Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (concluding that, considering the position of a railroad company employee, the court “cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed”) with *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 754 (S.D. Fla. 1989) (concluding that, where trucking position required the employee to be trusted traveling alone with expensive goods, “[saying] an applicant’s honest character is irrelevant to an employer’s decision [would be] ludicrous . . . It is exceedingly reasonable for an employer to rely upon an applicant’s past criminal history in predicting trustworthiness.”).

vary depending on the employer's vacant position and the responsibilities of that position. For example, if a convenience store is looking to hire a clerk to operate the cash register, then an individual's six-year-old possession of alcohol from when they were twenty years old may be of little relevance. However, the same individual's more recent theft conviction, resulting from stealing from a previous employer's cash register, would be of abundant relevance to the position. Although it does not technically affect the individual's ability to perform the job, it places the business at a higher risk of theft.

An employer's limited inquiry into relevant criminal history maintains the pool of applicants that have marks on their criminal record that are irrelevant to the vacant position but could be more effective and efficient employees than those without any criminal history. The difficulty in obtaining quality employment may cause those with a criminal conviction to have greater appreciation for the position and avoid any potential conduct that would put their employment in jeopardy. In fact, the existence of an irrelevant criminal past may give the individual motivation to be a better employee, resulting in greater job performance.<sup>177</sup> Accordingly, by considering only relevant criminal history, the employer "will have access to a better applicant pool . . . with diverse, qualified and motivated employees."<sup>178</sup> By asking questions targeted at an interviewee's relevant criminal history,<sup>179</sup> the employer will reduce the chance of falling back on a meaningless consideration and depriving itself of a potentially better employee.

Additionally, developing and documenting a targeted position-by-position interview procedure will remind the employer to ask about an individual's criminal background.<sup>180</sup> While the effect of

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177. See *Beyond the Box*, *supra* note 26.

178. Haase, *supra* note 1, at 3.

179. While a general inquiry into an individual's criminal background may reveal more than just relevant criminal history, an employer's further inquiry should be conducted only into convictions that would be relevant to the position.

180. Another option may be to give the interviewee a second application during the interview to ensure that the question is asked. While Rhode Island's ban the box law does not provide an answer to whether this would be permissible, it would not presumably be much of an issue as long as the individual thereafter is given a meaningful interview with the opportunity to explain the conviction.

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failing to ask during the interview could be mitigated by subsequently conducting a background check, would be a waste of the employer's resources. The employer's time and money would have to be spent conducting the check where the applicant's response during the interview would have inevitably resulted in disqualification in the first place. Further, an employer should also take advantage of the ability to ask the individual about his or her criminal history in order to test the truthfulness of the applicant. An employer's ability to trust in the the prospective employee is usually a consideration in a hiring decision.<sup>181</sup> Given that the potential effect of disclosure is dismissal from consideration, an interviewee may feel tempted to lie in response to a criminal history inquiry.<sup>182</sup> The interview setting presents an interesting situation, giving the employer the ability to test an ex-offender's truthfulness in a situation where deceit is most tempting. While some interviewees may take the opportunity to explain the circumstances surrounding a conviction and rehabilitative measures, others may instead lie in hopes that the employer does not conduct a criminal background check. However, based on an interviewee's responses to criminal history inquiries, the employer will be able to verify the interviewee's response after the interview by conducting a background check. If the interviewee misrepresented his criminal past, the employer would have additional justification to refuse the interviewee for employment.<sup>183</sup>

## 2. *Navigating Between Scylla and Charybdis*

In Homer's *Odyssey*, on opposite sides of the Strait of Messina were Scylla, a six-headed sea monster, and Charybdis, a destructive whirlpool.<sup>184</sup> Odysseus, bound to travel through the

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181. David D. Kadue & William J. Dritsas, *When What You Didn't Know Can Help You--Employers' Use of After-Acquired Evidence of Employee Misconduct to Defend Wrongful Discharge Claims*, 27 BEVERLY HILLS B. ASS'N J. 117, 120 n.19 (1993) (providing that "ability to tell the truth is an essential part of every job; the defendant has no duty to accept a lie") (citing *Russell v. Frank*, 57 Empl. Prac. Dec. (CCH) ¶ 41,103 (D. Mass. 1991)).

182. *Id.* at 118 (noting that "[a]pplicants anxious for work and convinced that they are right for the job frequently misrepresent or conceal some of this information to enhance their chances for hire.").

183. *Id.* at 122.

184. Henry H. Hill, *Between Scylla and Charybdis: A Safe Midpassage?*,

Strait of Messina on his way home, needed to avoid both destructive forces to survive; however, without an area that was beyond the reach of both, Odysseus would have to choose to sail within the grasp of one of the two evil forces.<sup>185</sup> An employer's task in avoiding liability under negligent hiring without violating Title VII is much like navigating through Scylla and Charybdis; regardless of the path chosen, an employer may feel as though liability is inevitable.

Despite the narrow path upon which an employer must remain, it can use the interview required by Rhode Island's ban the box law to (1) reduce the risk of liability under negligent hiring, and (2) avoid violating Title VII. As a result, the employer's use of the interview to reduce the risk of hiring-based liability can further mitigate any burden caused by a delayed inquiry into an individual's criminal history. In fact, even if the ban the box law did not require such an interview, voluntarily conducting an interview with a definitive purpose and targeted inquiries may prove to be beneficial for the employer.

As explained in Section III, the those convicted of a crime are not protected as a class. However, an employer may still be liable if its hiring policy results in a disproportionate effect on members of a race absent a business necessity justification. By conducting a targeted interview, the employer's ability to avoid disparate impact liability<sup>186</sup> occurs on two levels: remaining off the EEOC's

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25 PEABODY J. EDUC. 66, 66 (1947).

185. Raymond v. Schoder, *Odysseus' Route*, 82 THE CLASSIC J., 319, 321 (1987). To finish the story, Odysseus chose to navigate closer to Scylla knowing that he would lose some of his men because Charybdis would have destroyed the entire ship and the sailors. *Id.*

186. Conducting an interview can also be beneficial in regard to avoiding liability based on disparate treatment. With the exchange of questions and responses, there will be many reasons that an employer may have for dismissing an applicant; an employer should feel free to dismiss an applicant for any non-discriminatory reason. *See, e.g.*, Casey v. Town of Portsmouth, 861 A.2d 1032, 1039 (R.I. 2004) (concluding that although "subjective legitimate [and] nondiscriminatory reasons could potentially mask discriminatory animus when proffered in failure to hire cases, they do not necessarily warrant a finding of pretext," where an employer's reason for dismissal was that he had a "chip on the shoulder" and gave a poor interview.). Nevertheless, an employer conducting an interview should be sure to keep detailed notes of the interview including, if applicable, its non-discriminatory reason for dismissal. *See* McGarry v. Pielech, 47 A.3d 271, 284 (R.I. 2012) (internal citation omitted) (stating that, based on missing

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radar, and providing the employer with a built-in defense.

To avoid liability under Title VII, an employer's first priority should be to remain off the EEOC's radar. In its 2012 Guidance, the EEOC provided that "[a]lthough Title VII does not require [an] individualized assessment in all circumstances, the use of a screen[ing process] that does not include individualized assessment is more likely to violate Title VII."<sup>187</sup> Conducting and using the fact-specific manner laid out throughout Section IV(B), provides the employer with the benefits described throughout this section and maintains the individualized assessment that the EEOC prefers.<sup>188</sup>

Although the Guidance explicitly stated that an individualized assessment was not required, the EEOC's subsequent actions indicate that the lack of an individualized assessment may be the trigger for the EEOC's investigation. After the 2012 Guidance, the EEOC initiated actions against BMW and Dollar General and, in both cases part of its evidentiary basis in these actions included the company's failure to conduct an individualized assessment.<sup>189</sup> The statement's implicit

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interview notes, the jury could draw an adverse inference of spoliation to infer that age motivated defendant's hiring decision.).

187. *Guidance, supra* note 15, at 2.

188. The EEOC's recommended individualized assessment includes "inform[ing] the individual that he may be excluded because of past criminal conduct; provid[ing] an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and consider[ing] whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." *Id.* at 14; In addition, the *Guidance* listed "other relevant individualized evidence," but such information will necessarily be discovered if an employer conducts a fact intensive inquiry; included in this list were:

[t]he facts or circumstances surrounding the offense or conduct; [t]he number of offenses for which the individual was convicted; [o]lder age at the time of conviction, or release from prison; [e]vidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct; [t]he length and consistency of employment history before and after the offense or conduct; [r]ehabilitation efforts, e.g., education/training; [e]mployment or character references and any other information regarding fitness for the particular position; and [w]hether the individual is bonded under a federal, state, or local bonding program.

*Id.* at 18.

189. John P. Morrison & Sarah E. Fletcher, *EEOC Takes Aim at First*

suggestion<sup>190</sup> and the EEOC's actions against BMW and Dollar General "suggest[] that the commitment to individualized assessments in a background check policy may prove to be a pivotal issue in the EEOC's interpretation of its Guidance."<sup>191</sup> Accordingly, by conducting an individualized assessment within the interview required by the ban the box law, an employer will be able to reduce the risk of appearing on the EEOC's radar.

Additionally, even if the employer is targeted by the EEOC despite having conducted an individualized assessment, a fact-intensive interview targeting relevant criminal activity will necessarily carry with it the business necessity defense. Within the Guidance, the EEOC provided employers with "circumstances in which the Commission believes employers will consistently meet the 'job related and consistent with business necessity' defense."<sup>192</sup> One of the two<sup>193</sup> circumstances is where "[t]he employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job" and, in addition, "[t]he employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity."<sup>194</sup> That being the case, the targeted interview in the manner laid out in Section IV(B) will provide the employer's best chance at remaining within the business necessity exception.

Additionally, the restrictions imposed by ban the box laws can also be beneficial to employers in evading negligent hiring. Under

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*Targets since Locking Down Employers' Use of Arrest/Conviction Information*, K & L GATES 3 (June 26, 2013), available at [http://m.klgates.com/files/Publication/390c236a-a624-43ff-a198-cf15169f42b5/Presentation/PublicationAttachment/f4f794ac-603d-45c6-bbb5-25689b398aa8/Labor\\_Employment\\_WorkplaceSafetly\\_6262013.pdf](http://m.klgates.com/files/Publication/390c236a-a624-43ff-a198-cf15169f42b5/Presentation/PublicationAttachment/f4f794ac-603d-45c6-bbb5-25689b398aa8/Labor_Employment_WorkplaceSafetly_6262013.pdf).

190. Gilbreth & Collins, *supra* note 174, at 3 n.2.

191. Morrison & Fletcher, *supra* note 189, at 3.

192. *Guidance*, *supra* note 15, at 2.

193. The other circumstance provided for is where "[t]he employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors)." *Id.* Since the Uniform Guidelines on Employee Selection Procedures are beyond the scope of this Comment, this circumstance is not considered.

194. *Id.*

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Rhode Island negligent hiring law, an employer has a duty “to exercise reasonable care in selecting an employee who, as far as could be reasonably known, was competent and fit” for the employment.<sup>195</sup> Because technological advances have reduced the costs of these background checks and made them increasingly easy to access, courts are more willing to consider it reasonable to conduct a background check in a hiring decision.<sup>196</sup> In fact, an employer can access criminal convictions within the Rhode Island court system at no cost on the Internet.<sup>197</sup>

Assuming that an employer develops formal and targeted hiring procedures, the employer’s attention will be drawn to the criminal conviction inquiry. In contrast, an employer with the criminal conviction question on an application may neglect to conduct a background check. Along the same lines, some employers may have been inclined to take the applicant at his or her word and decline to conduct a criminal background check. However, ban the box laws “may actually encourage employers to perform [background checks] since they know they can’t ask upfront.”<sup>198</sup> Accordingly, by drawing attention to the criminal conviction inquiry, the ban the box movement may reduce the chance that employers will forego conducting a background check. While an employer does not have to conduct a background check, doing so may reveal information that a less than candid interviewee failed to report. By performing a background check into an individual’s criminal history, an employer is able to discover the individual’s dangerous proclivities and refrain from hiring the individual. Accordingly, by preventing a potentially destructive act altogether, the employer avoids both the harmful results of the act and eliminates any potential liability under negligent hiring.

It is worth noting that background checks performed after the interview do not frustrate the purpose of ban the box. The interviewee has had a chance to explain any criminal history and

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195. *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 440 (R.I. 1984).

196. *Watstein*, *supra* note 17, at 592–93.

197. *See* Rhode Island Judiciary, CRIMINAL INFORMATION SEARCH, [http://courtconnect.courts.ri.gov/pls/ri\\_adult/ck\\_public\\_qry\\_main.cp\\_main\\_idx](http://courtconnect.courts.ri.gov/pls/ri_adult/ck_public_qry_main.cp_main_idx) (last visited Feb. 26, 2014).

198. *Lehrer*, *supra* note 159.

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a background check merely verifies what the employer was told. While background checks may expose individuals who do not disclose criminal convictions in an interview, these checks will only confirm what a candid interviewee reports.

## V. CONCLUSION

Rhode Island's ban the box Statute that took effect on January 1, 2014, aims to allow ex-offenders an opportunity to explain the circumstances surrounding a conviction to give them a greater possibility of gaining employment. While the employer is obligated to delay inquiry into an individual's criminal history until after an initial interview, the employer may stand to gain from this interview in certain circumstances. Particularly, if properly conducted, the interview will keep the employer off of the EEOC's radar to prevent a Title VII claim from initiating, and alternatively, provide evidence that the employer will be able to use to defend against an alleged violation of Title VII. Further, ban the box may serve as a reminder for employers to conduct investigations into an individual's criminal background, thereby preventing the harmful acts that lead to negligent hiring suits. Despite the lack of substantial protections within the law for ex-offenders, the ban the box statute illustrates the Rhode Island General Assembly's recognition of the revolving door of recidivism and a step toward a solution.