

BEYOND TITLE VII: RETHINKING RACE, EX-OFFENDER
STATUS, AND EMPLOYMENT DISCRIMINATION IN THE
INFORMATION AGE

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INTRODUCTION

MANY Americans are struggling to find jobs in the wake of the 2008 recession, but it is particularly difficult for those with criminal records. Each year there are over thirteen million arrests in the United States.¹ The overwhelming majority of these arrests are for non-violent crimes,² minor infractions, and non-criminal offenses such as loitering and curfew violations, drunkenness, vagrancy, and disorderly conduct.³ These arrests—many of which are linked to aggressive policing tactics, including “stop and frisk” programs—often lead to the creation of criminal records, even if no criminal charges are ultimately brought or if charges are later dropped.⁴ Today, more than one in four Americans has a criminal record.⁵

A rapidly expanding for-profit industry collects these records and compiles them into electronic databases, creating ready access to millions of computerized criminal history records.⁶ These arrest and convic-

¹ Press Release, Fed. Bureau of Investigation, U.S. Dep’t of Justice, Crime in the United States, 2009 (Sept. 13, 2010), http://www2.fbi.gov/ucr/cius2009/about/crime_summary.html.

² Less than 5% of all arrests in the United States in 2006 were for violent crimes. Fed. Bureau of Investigation, U.S. Dep’t of Justice, Crime in the United States, 2007 tbl.29 (2008), available at http://www2.fbi.gov/ucr/cius2007/data/table_29.html.

³ See Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment, Nat’l Inst. Just. J., June 2012, at 42–43, available at <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf>.

⁴ See *infra* Section I.B.

⁵ Michelle Natividad Rodriguez & Maurice Emsellem, Nat’l Law Project, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment 3 (2011), available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1. According to the U.S. Census Bureau, there were 230,118,000 adults in the United States in 2008. See U.S. Census Bureau, Statistical Abstract of the United States: 2010, at 11 tbl.7 (2009).

⁶ Rodriguez & Emsellem, *supra* note 5, at 1, 11. According to the U.S. Code, the term “criminal history records” means “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release.” 42 U.S.C. § 14616(b)(4) (2006).

tion records are purchased by employers, who use them as an inexpensive and efficient means of screening potential employees.⁷ This practice is widespread with approximately 92% of employers,⁸ including Walmart, the country's largest private employer, now inquiring into the criminal histories of prospective employees.⁹ In but a matter of minutes, an employer can conduct an online search of government or commercial criminal records databases, and, for free or a modest fee, obtain instantly an applicant's criminal history report.

Studies have cast doubt on the assumption that the existence of a criminal record correctly forecasts one's work behavior,¹⁰ and data show that after staying clean for a few years a person with a criminal record is no more likely than anyone else to have a future arrest.¹¹ Nevertheless, 73% of employers, both large and small, conduct criminal background checks on all job candidates,¹² and many have adopted broad hiring prohibitions on such individuals.¹³ These employers include such widely recognized corporations as Bank of America (283,000 employees), Lowe's (238,000 employees), Domino's Pizza (170,000 employees worldwide), and Omni Hotels & Resorts (11,000 employees in North

⁷ See Rodriguez & Emsellem, *supra* note 5, at 1.

⁸ Soc'y for Human Res. Mgmt., *Background Checking: Conducting Criminal Background Checks 3* (2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (finding that 92% of employers performed criminal background checks on some or all job candidates); Steven Greenhouse, *Equal Opportunity Panel Updates Hiring Policy*, *N.Y. Times*, Apr. 26, 2012, at B3.

⁹ Django Gold, *Wal-Mart Withholds Background Check Info, Suit Says*, *Law360* (May 25, 2012, 4:35 PM), <http://www.law360.com/articles/344391/wal-mart-withholds-background-check-info-suit-says>; Adam Klein, *Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. Equal Emp't Opportunity Comm'n (July 26, 2011), available at <http://www1.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm?renderforprint=1>.

¹⁰ Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 *J. Applied Psychol.* 1427, 1428 (2007); see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327, 339–40 (2009) (demonstrating that an individual with a criminal record is less likely to be rearrested than an individual who has never been convicted).

¹¹ See Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, *Nat'l Inst. Just. J.*, June 2009, at 12–13, available at <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf> (noting that fourteen million arrests occur annually in the United States and showing that the "point of redemption" is between three and seven years, depending on the age at which the arrest occurred).

¹² See Persis S. Yu & Sharon M. Dietrich, *Nat'l Consumer Law Ctr., Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses 3* (2012), available at <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

¹³ Rodriguez & Emsellem, *supra* note 5, at 4, 13.

America).¹⁴ For many employers, the bar on hiring anyone with a criminal record includes applicants whose records consist of only an arrest, not a conviction: a group that constitutes one-third of all felony arrests.¹⁵

The scale of this problem is vast, with over 100 million computerized records¹⁶ representing sixty-five million different individuals—over 29% of the entire adult population of the United States.¹⁷ This problem is particularly pronounced for Blacks and Latinos,¹⁸ who are more likely to have a criminal record because they are arrested at rates greatly disproportionate to their share of the population and their level of actual criminal activity.¹⁹ Indeed, one study found that African Americans are up to fifteen times more likely than Whites to be either arrested or cited for low-level offenses,²⁰ while Latinos are three times more likely to be ar-

¹⁴ *Id.* at 1–2, 13.

¹⁵ See Tracy Kyckelhahn & Thomas H. Cohen, Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2004*, at 1 (2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=891> (examining the seventy-five most populous counties in the United States).

¹⁶ See SEARCH, The Nat'l Consortium for Justice Info. and Statistics, *Report of the National Task Force on Commercial Sale of Criminal Justice Record Information vi* (2005) [hereinafter SEARCH].

¹⁷ Rodriguez & Emsellem, *supra* note 5, at 3 (noting that an estimated sixty-five million adults in the United States have criminal records). The U.S. adult population (i.e. individuals over the age of eighteen) was 234,564,071 in 2010. U.S. Census Bureau, *Profile of General Population and Housing Characteristics: 2010* (2010), http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0100000US.

¹⁸ This Article uses the terms “Black” and “African American,” and “Latino” and “Hispanic,” interchangeably.

¹⁹ Fed. Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2009 tbl.43* (2010), http://www2.fbi.gov/ucr/cius2009/data/table_43.html (showing that arrests of African Americans comprised 28% of total arrests); Laura Moskowitz, *Written Testimony for EEOC Meeting to Examine Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, U.S. Equal Emp't Opportunity Comm'n (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm> (noting that Latinos constitute roughly 15% of the population but nearly 20% of the incarcerated population, and they are three times more likely to be arrested than, and twice as likely to be incarcerated as, Whites); Office of Legal Counsel, *Testimony on Arrests and Convictions*, U.S. Equal Emp't Opportunity Comm'n (Apr. 25, 2012), http://www.eeoc.gov/eeoc/meetings/4-25-12/olc_testimony.cfm (“African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population.”). For broader dimensions of this race exclusion, see *infra* Section I.C.

²⁰ Council on Crime & Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes 4* (2004). The New York City Police Department arrested, charged with misdemeanors, and incarcerated more than 353,000 people from 1997 to 2006 for the possession of small amounts of marijuana. Despite accounting for only 26% of the city's population, African Americans constituted 52% of these arrests. See Harry G. Levine & Deborah Peterson Small, *N.Y. Civil Liberties Union, Marijuana Arrest Crusade: Racial Bias*

rested than Whites.²¹ This reliance by employers on criminal records compounds existing social and economic problems for the poorest and most marginalized populations and leads to a disproportionate exclusion of these groups from the workforce.

The increasingly common use of criminal records databases by employers has introduced a series of new and vexing problems for both employers and minorities with criminal records that the existing regulatory apparatus is ill-equipped to resolve. The relevant laws include Title VII of the Civil Rights Act of 1964, which prohibits race discrimination in employment,²² the Fair Credit Reporting Act (“FCRA”),²³ and a patchwork of similar state and local laws, which together govern the collection and dissemination of consumer information, including criminal history reports.²⁴

This remedial framework, however, has proven to be woefully insufficient as it does not account for several compelling concerns, including: the sweeping scope of the problem due to the sheer numbers of individuals with criminal records; the significant inaccuracies that plague criminal history reports, such as false positive identifications and the release of sealed and expunged information; the practical difficulties created by the Title VII doctrinal framework that render avoiding discrimination in hiring and challenging adverse employment decisions very difficult for people with criminal records; the way information technology and the reduction in information searching costs have dramatically, and often adversely, altered how employers screen applicants for jobs; and the

and Police Policy in New York City 1997–2007, at 4 (2008). In comparison to White arrest rates for marijuana, the arrest rate for African Americans is five times greater and the arrest rate for Latinos is nearly three times greater. *Id.* This is so despite the fact that federal government studies consistently find that young Whites use marijuana at higher rates than young African Americans. See *id.*

²¹ Moskowitz, *supra* note 19 (noting that Latinos are three times more likely to be arrested than, and twice as likely to be incarcerated as, Whites); Jared Taylor & Glayde Whitney, Crime and Racial Profiling by U.S. Police: Is There an Empirical Basis?, *in* Race, Crime, and Justice: A Reader 213, 221–23 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (describing how federal data collection agencies treat the category “Hispanic” inconsistently, which renders fully measuring these crime rates difficult).

²² 42 U.S.C. §§ 2000a, e-2(a) (2006).

²³ 15 U.S.C. § 1681(a) (2006).

²⁴ Fifty-three U.S. jurisdictions have specifically prohibited or advised against pre-employment arrest inquiries in their fair employment laws due to concerns about misuse of this information. Nat’l Emp’t Law Project, Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records 1 (2013), <http://www.nelp.org/page/-/SCLP/2010/BantheBoxCurrent.pdf?nocdn=1>.

ways in which the combination of a criminal record and minority status creates a distinctive and powerful social stigma that studies show is significantly more detrimental than minority status or criminal record status alone.²⁵ The question, then, becomes how to ensure employment opportunities for people with criminal records in a society where they face significant employment discrimination, while balancing their interests with those of employers and society at large.

This Article will propose a legal framework that effectively addresses this dilemma by incorporating the doctrinal structure and norms of anti-discrimination laws from the health law context. This framework, which I have termed the Health Law Framework, draws specifically from Title I of the Americans with Disabilities Act (“ADA”), which prohibits discrimination against people with disabilities in employment,²⁶ and the Genetic Information Antidiscrimination Act (“GINA”), which bars genetic discrimination in employment and regulates employers’ acquisition of genetic information.²⁷

This Health Law Framework offers a valuable means through which to regulate the practice of using criminal records in screening potential employees. The ADA emphasizes “reasonable accommodation,” managing risk, and alleviating stigmatic harms. The GINA focuses on regulating the flow of information regarding an invisible yet stigmatized status that can form the basis of discriminatory treatment. Together these laws provide a conceptual lens for thinking about and reducing employment discrimination based on the crippling stigma that stems from dual criminal record and minority status. In addition, both the ADA and GINA operate to guard against discrimination before it occurs, and therefore hold tremendous promise for curtailing employers’ use of information technology to inappropriately screen people with criminal records out of the employment pool. At the same time, these laws in combination work to strengthen the enforcement of existing laws governing the collection and dissemination of criminal records data.

²⁵ See Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. Soc.* 937, 959 (2003) [hereinafter *Pager, Criminal Record*] (explaining that “the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group”); see also Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 *Wis. L. Rev.* 617, 620 [hereinafter *Pager, Double Jeopardy*] (same).

²⁶ 42 U.S.C. §§ 12111–12117 (2006 & Supp. IV 2010).

²⁷ 42 U.S.C. § 2000ff-1(a) (Supp. III 2007).

Importing the doctrinal architecture and norms that undergird health law antidiscrimination jurisprudence also provides a means of removing the practical barriers to litigation for people of color with criminal records. Moreover, by prioritizing the balancing of employer and employee interests along with social and economic costs, the Health Law Framework suggests a way to guarantee equal employment opportunity for minorities with criminal records, protect safety and security in the workplace, and promote the broader societal interest in ensuring legitimate employment opportunities for those with criminal records.

The importance of productive work for people with criminal records cannot be overstated, as it allows these individuals to support themselves and their families and offers a sense of accomplishment, satisfaction, and belonging. Studies consistently show that while employment instability can lead to increased arrest rates,²⁸ stable work is among the most effective ways to protect against a return to criminal activity.²⁹ Indeed, the general sentiment expressed by former offenders is “when most people lose a job, they lose a job, when I lose a job I could lose my liberty and be back in prison.”³⁰

Although much has been written about the use of criminal records in employment decision making,³¹ including scholarship highlighting the

²⁸ See, e.g., Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* 145–47 (1993) (linking job instability with higher arrest rates); Karen E. Needels, *Go Directly to Jail and Do Not Collect? A Long-Term Study of Recidivism, Employment, and Earnings Patterns Among Prison Releasees*, 33 *J. Res. Crime & Delinq.* 471, 485 (1996) (showing that as wages increased, crime rates decreased); Christopher Uggen & Melissa Thompson, *The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person Changes in Drug Use and Illegal Earnings*, 109 *Am. J. Soc.* 146, 166–69 (2003) (documenting that legitimate work reduced earnings from illicit work).

²⁹ See Solomon, *supra* note 3, at 43 (noting that employment is an important component of successful re-entry for former offenders); see also John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 *Crime & Just.* 1, 18 (2001) (discussing study identifying work as a factor in effective desistance from crime); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 *Am. Soc. Rev.* 529, 542 (2000) (noting the success of work programs in crime desistance among older offenders).

³⁰ Juan Cartagena, *Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. Equal Emp’t Opportunity Comm’n (July 26, 2011) (internal quotation marks omitted), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/cartagena.cfm>.

³¹ See Pager, *Criminal Record*, *supra* note 25, at 956 (demonstrating that “criminal records close doors” in the employment context); Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 *Criminology & Pub. Pol’y* 371, 371 (2008); Elizabeth A. Gerlach, *Comment, The Background Check Balancing Act:*

race discrimination that occurs through the use of criminal history reports in employment, most of this work examines this issue solely through the traditional Title VII paradigm.³² Other scholars focus on access to information. For example, Professors Richard Epstein, Harry J. Holzer, and Lior Jacob Strahilevitz have each suggested that permitting the use of criminal records in the hiring process may improve job prospects for African Americans (particularly Black men) without criminal records because it may dispel the assumption held by some employers that most African Americans have a criminal record.³³ Still other commentators argue that employers should be precluded entirely from relying on criminal history reports in the hiring process.³⁴

This Article, in contrast, contends that the public and commercial criminal records database infrastructure is so expansive and well-established that restricting access entirely would not be politically or administratively feasible. Moreover, criminal background checks can play an important role in the hiring process to the extent that this practice offers employers a means, albeit an imperfect one, of evaluating the risks attendant to employing a former offender in a position of trust. Still, allowing unfettered access to criminal records databases—even to

Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring, 8 U. Pa. J. Lab. & Emp. L. 981, 981 (2006); Jennifer Leavitt, Note, Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders, 34 Conn. L. Rev. 1281, 1286–98 (2002); Ryan D. Watstein, Note, Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects, 61 Fla. L. Rev. 581, 594 (2009).

³² See, e.g., Roberto Concepción, Jr., Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks, 19 Geo. J. on Poverty L. & Pol'y 231, 235–48 (2012); Michael A. Stoll, Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market, 2009 U. Chi. Legal F. 381, 406–07.

³³ See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 40 (1992) (“The strategy of the law should be to encourage employers to obtain as much individual information as possible about workers so that they can, *pro tanto*, place less reliance on broad statistical judgments. To the extent, therefore, that the present antidiscrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not *perfectly* individuate workers, then by indirection it encourages the very sorts of discrimination that the law seeks to oppose.”); Harry J. Holzer et al., Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, 49 J.L. & Econ. 451, 473–75 (2006); Lior Jacob Strahilevitz, Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 Nw. U. L. Rev. 1667, 1683–88 (2008).

³⁴ See, e.g., Pager, Criminal Record, *supra* note 25, at 959 (explaining that “the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group”).

increase the employment prospects of those without records, as advanced by some scholars—ignores the fact that minority populations are disproportionately represented among those with criminal records and innocent minorities are disproportionately subject to arrest. To neglect the millions of people in this demographic would have tangible social and economic costs,³⁵ and do little to address race discrimination.

My central argument, therefore, is that by adopting a doctrinal scheme that regulates the flow of information that may form the basis of an adverse employment decision, the Health Law Framework prevents discrimination preemptively, attends to the interests of individuals of color (those with and without criminal records), allows for more robust enforcement of existing laws, and enables employers to make appropriate and equitable hiring decisions, without engaging in invidious discrimination, or contributing to the establishment of an enduring underclass of individuals with criminal records. Indeed, by conceptualizing criminal records discrimination through the lens of social stigma, rather than relying solely on the prevailing Title VII/FCRA paradigm, the Health Law Framework offers a fruitful means of understanding and curbing prophylactically the discrimination that results when membership in a racial or ethnic minority group and possession of a criminal record intersect.

This Article is organized as follows. Part I will survey the operation and scope of government and commercial criminal records databases, and address the causes and effects of the pervasive inaccuracies contained in criminal history reports, as well as the discrimination and attendant social and economic costs that result from employers' reliance on criminal records when making employment decisions. Part II will chart the current regulatory landscape as it relates to employers' use of arrest and conviction data, including the FCRA and Title VII. It will also highlight both the practical and doctrinal deficiencies of using the Title VII/FCRA regulatory scheme to address the race discrimination that stems from the use of criminal records in employment. Part III will introduce the health laws that together form the basis of the proposed Health Law Framework: the GINA and ADA. It will also suggest how these laws can work to mitigate social stigma and corresponding discrimination, while effectively attending to the problems associated with

³⁵ See John Schmitt & Kris Warner, Ctr. for Econ. & Policy Research, *Ex-Offenders and the Labor Market 14* (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf> (explaining that employment losses caused by ex-offender status cost the U.S. economy \$57 to \$65 billion per year).

the collection, dissemination, and use of criminal history information. Part IV will illustrate the ways in which the Health Law Framework modifies and strengthens the FCRA and Title VII, and will discuss the practical implications, potential challenges, and expected benefits of incorporating ADA and GINA norms into the Title VII/FCRA doctrinal scheme.

I. CRIMINAL RECORDS, EMPLOYMENT DISCRIMINATION, AND THE BACKGROUND CHECKING INDUSTRY

Criminal background checks for employment purposes were relatively rare forty years ago and were typically reserved for individuals in sensitive or high-ranking positions.³⁶ Even then, a search was difficult to conduct as the background screener would not necessarily know in which courts or administrative agencies to search for the relevant documents.³⁷ In recent years, however, technological innovations have allowed for the centralization and automation of court records systems as well as an explosive expansion in the number of private sector companies providing quick access to millions of computerized criminal history reports to clients including employers, landlords, insurance companies, and private associations.³⁸

This Part will focus on criminal records and examine how they are incurred by individuals; recorded and filed in state, local, and federal criminal records repositories; purchased and catalogued in electronic databases; and sold to employers by commercial criminal background checking companies. In so doing, this Part will investigate the problems attendant to the collection and transmission of criminal history information. This Part will then delineate the discrimination that flows from employers' acquisition and use of criminal history reports to vet potential employees.

³⁶ SEARCH, *supra* note 16, at 19.

³⁷ Cf. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 190 (2008) (describing the evolution of computerized criminal records databases).

³⁸ See SEARCH, *supra* note 16, at 1.

A. Criminal History Reports and Commercial Background Checking Companies

Tens of millions of criminal background checks are conducted each year in the United States,³⁹ many by employers who enlist the services of commercial background checking companies (“BCCs”) when screening job applicants or employees.⁴⁰ Although it is difficult to compile accurate data on the number of BCCs, as they are largely unlicensed and “[a]nyone with a computer, an Internet connection, and access to records can start a background screening business,”⁴¹ it is estimated that this thriving industry is comprised of thousands of companies cataloguing and selling criminal history reports on the national, local, and regional levels.⁴² Several large players now dominate the field, including ChoicePoint (now part of LexisNexis), which, in 2007, enjoyed nearly \$1 billion in annual revenue;⁴³ First Advantage, which reported \$233 million in revenue in 2007; and HireRight, which reported \$69 million in revenue that same year.⁴⁴ In 2003, ChoicePoint boasted that it maintained upwards of seventeen billion public records, of which ninety million were criminal records.⁴⁵ Each of these files, however, does not necessarily belong to a unique individual as these companies count by file rather than by individual, and one person may be the subject of several charges or convictions in one or several jurisdictions.

BCCs collect and disseminate all manner of criminal justice information on the more than sixty-five million people in the United States

³⁹ *Id.* at vi.

⁴⁰ These companies are known as “consumer reporting agencies” if they provide the information for “consumer reports” under the FCRA. 15 U.S.C. § 1681a(d)(1), (f) (2012).

⁴¹ Yu & Dietrich, *supra* note 12, at 8 (noting that criminal background checking companies are not subject to licensing requirements).

⁴² See SEARCH, *supra* note 16, at 7.

⁴³ Press Release, Reed Elsevier, Reed Elsevier to Acquire ChoicePoint, Inc. (Feb. 21, 2008), available at <http://www.reedelsevier.com/mediacentre/pressreleases/Documents/2008/ChoicePoint%20press%20release%20FINAL%20210208.pdf>. Other companies include: Accurate Background, Inc.; ADP Screening and Selection Services, Inc.; First Advantage; HireRight; IntelliCorp Records, Inc.; and Sterling Infosystems, Inc.

⁴⁴ Chad Terhune, *The Trouble with Background Checks*, Bloomberg Businessweek (May 28, 2008), <http://www.businessweek.com/stories/2008-05-28/the-trouble-with-background-checks>.

⁴⁵ ChoicePoint Acquires ASAP, Expands Capabilities in Tenant Screening, *The Globe & Mail* (Oct. 13, 2003), http://www.globeinvestor.com/servlet/WireFeedRedirect?cf=GlobeInvestor/config&vg=BigAdVariableGenerator&date=20031013&archive=prnews&slug=2003_10_13_09_1606_1019314.

with criminal records.⁴⁶ This data includes records of: “arrest (or notice to appear in lieu of arrest); detention; indictment or other formal criminal charge (and any conviction, acquittal or other disposition arising therefrom); sentencing; correctional supervision; and release of an identifiable individual.”⁴⁷ The offenses catalogued in criminal history reports also vary from juvenile offenses and one-time arrests—where charges are dropped entirely—to extensive, serious, and violent criminal histories. Notably, due to the increasingly common and often coercive use of plea bargains by prosecutors, it is estimated that “tens of thousands” of individuals with criminal records have engaged in no wrongdoing at all.⁴⁸

According to Adam Klein, the overwhelming majority of criminal records involve minor, non-violent, and non-criminal offenses (such as loitering, disorderly conduct, vagrancy, and curfew violations) and often consist solely of arrests that did not lead to conviction.⁴⁹ With respect to more serious offenses, the U.S. Department of Justice (“DOJ”) reports that one-third of felony arrests never lead to conviction,⁵⁰ and among the nearly fourteen million arrests recorded in 2009, only 4.2% resulted in

⁴⁶ See *supra* note 17 and accompanying text.

⁴⁷ See SEARCH, *supra* note 16, at 5. Criminal justice information is a broad category, which also includes registries, watch lists, wanted person lists, and protective order lists. *Id.* Under certain circumstances, it can also include intelligence information. *Id.* at 5 n.10 (noting that BCCs have access to intelligence information when necessary for the provision of “an information product or service to the government”).

⁴⁸ See Gilien Silsby, *Why Innocent People Plead Guilty*, USC News (Apr. 18, 2014), <https://news.usc.edu/61662/why-innocent-people-plead-guilty/>. According to Judge Jed Rakoff—a former criminal defense attorney and federal prosecutor, and now a U.S. District Judge—“We have hundreds, or thousands, or even tens of thousands of innocent people who are in prison, right now, for crimes they never committed because they were coerced into pleading guilty.” *Id.*

⁴⁹ Klein, *supra* note 9. Less than 5% of all arrests in the United States in 2007 were for violent crimes. Fed. Bureau of Investigation, *supra* note 2, at tbl.29. Roughly 12% of all arrests are for non-serious offenses such as vagrancy, drunkenness, loitering, vandalism, disorderly conduct, and runaways. *Id.* Misdemeanors account for 12% of federal criminal cases and traffic violations account for 40% of misdemeanor charges. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of Federal Justice Statistics*, 2004, at 59 (2006). More than 87% of adult convictions in 2008 in New York were for petty offenses or misdemeanors. See Klein, *supra* note 9.

⁵⁰ Kyckelhahn & Cohen, *supra* note 15, at 10 (examining the seventy-five most populous counties in the United States).

charges for serious violent crimes (murder, rape, robbery, and aggravated assault).⁵¹

The records that BCCs catalogue and sell (arrest data, fingerprints, charges, dispositions, etc.) typically originate in courts and criminal justice agencies, such as prosecutors' offices, departments of corrections, police departments, and the Federal Bureau of Investigation ("FBI"). Each of these sources is governed by specific local, state, and/or federal laws that determine how, where, and by whom these records may be searched.⁵²

As a general matter, records generated in state courts or criminal justice agencies are catalogued in centralized state criminal records repositories.⁵³ All told, these state repositories hold more than 100.5 million criminal history records,⁵⁴ including information on non-criminal or other lesser offenses for which fingerprinting is not required.⁵⁵ State repositories differ with respect to the types of records held, their completeness, how often they are updated, and whether they may be accessed by the general public and/or by BCCs. Records held in state repositories are typically available to state and local police, and to probation and other criminal justice personnel, as well as to some employers and membership organizations.⁵⁶

The FBI also maintains a repository of criminal justice records through its National Crime Information Center, which houses the Inter-

⁵¹ See Fed. Bureau of Investigation, *supra* note 2, at tbl.29; Klein, *supra* note 9. Another 10% "of all arrests were for simple assault; these do not involve a weapon or aggravated injury but often include domestic violence and intimate partner violence." Solomon, *supra* note 3, at 43. Property crimes "account for 18 percent of arrests, and include burglary, larceny-theft, motor vehicle theft, arson, vandalism, stolen property, forgery and counterfeiting, fraud, and embezzlement." Amy Solomon, Written Testimony at the EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, U.S. Equal Emp't Opportunity Comm'n (July 26, 2011), available at <http://www1.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm?renderforprint=1>. Another 12% of arrests were for drug offenses, which include "production, distribution, and/or use of controlled substances." *Id.* Other offenses constitute 56% of all arrests (including public order offenses "such as disorderly conduct, drunkenness, prostitution, liquor laws, vagrancy, loitering"). *Id.*

⁵² See SEARCH, *supra* note 16, at 1.

⁵³ Criminal Justice Data Improvement Program, U.S. Dep't of Justice, <http://www.bjs.gov/index.cfm?ty=tp&tid=4> (last updated Jan. 25, 2014).

⁵⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, Survey of State Criminal History Information Systems, 2012, at 2 (Jan. 2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

⁵⁵ See SEARCH, *supra* note 16, at 34.

⁵⁶ See *id.* at 26.

state Identification Index (“III”), a comprehensive criminal history database that includes records from state repositories along with data from federal and international criminal justice agencies.⁵⁷ States that provide information to the III submit offender fingerprints electronically to the FBI’s Integrated Automated Fingerprint Identification System (“IAFIS”). The III stores the criminal history records that correspond to the fingerprints in the IAFIS. This allows users to search the III to determine the specific states that maintain the records pertaining to a particular subject.⁵⁸ This expansive database is accessible for employment purposes only by certain state and federal governments, and by nongovernmental personnel in specific government-regulated jobs and industries.⁵⁹

Although employers may perform background checks themselves to screen job applicants by either visiting the relevant courts or agencies, or by conducting an online search where possible,⁶⁰ they typically lack the time or expertise necessary to conduct such searches. In addition, employers may lack authorization to access certain state records repositories or the III. As a result, most employers use BCCs for employment screening purposes. BCCs obtain criminal records primarily through electronic data sharing with government agencies, bulk purchases of criminal records from courts or corrections departments, and the use of “runners.”⁶¹ Prior to the widespread use of computerized recordkeeping, when a request for a criminal background information screen was re-

⁵⁷ See generally Nat’l Task Force on Interstate Identification Index Name Check Efficacy, *Interstate Identification Index Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General* 21 (1999), available at http://www.search.org/files/pdf/III_Name_Check.pdf (describing how III data is stored and accessed by law enforcement personnel in order to conduct criminal history searches).

⁵⁸ See Office of the Att’y Gen., U.S. Dep’t of Justice, *The Attorney General’s Report on Criminal History Background Checks* 15 (2006), available at http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

⁵⁹ These industries include “banking, nursing home, securities, nuclear energy, . . . private security guard industries, . . . HAZMAT truck drivers and other transportation workers,” and airport workers. *Id.* at 5. Employers in some state industries also have authorized access, such as certain “civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, [and] members of regulated professions.” *Id.* at 4.

⁶⁰ Background checks are used for many purposes: tenant screening, volunteer screening, immigration purposes, fraud investigations, licensing, due diligence, prenuptial investigation, marketing, accountability, litigation research, opposition research, registered traveler programs, to satisfy curiosity, and for investigations by the media. *SEARCH*, *supra* note 16, at 19–22.

⁶¹ See *id.* at 9–10.

ceived, companies would send a runner to the courthouses or other repositories in the locations where the subject had lived in order to obtain the relevant files. With advances in automated recordkeeping and the advent of the Internet, courts and other criminal justice agencies began computerizing their files and, depending on the laws of the particular jurisdiction, allowing BCCs to purchase this data and later sell it to consumers. While both of these methods of acquiring files are still employed today, BCCs are increasingly purchasing criminal history information in bulk from courts and criminal justice agencies throughout the country as a means of creating proprietary national databases that can enable instantaneous searches of millions of files from every state.⁶² The information catalogued in these databases is sold to consumers, including government agencies, or is “resold” to other BCCs.⁶³

B. Problems with Criminal History Reports

BCCs benefit employers by providing “one-stop shopping” for information, thereby increasing economic efficiency and alleviating the administrative strain on courts and administrative agencies that compile and disseminate this information. Recent studies, however, show that both commercial and government criminal history reports are riddled with errors and frequently contain significant inaccuracies, including false positive identifications, sealed or expunged information, misleading information, and missing case disposition or resolution information.⁶⁴ Moreover, many of the individuals identified in criminal records databases have never been convicted of a crime, as one-third of felony arrests never result in conviction.⁶⁵ And some offenses flagged in reports are not even violations of the criminal code in the reported state, yet may still be reflected in the FBI or commercial databases.⁶⁶

⁶² Id. at 11.

⁶³ Id. at 9. The FCRA requires resellers to adhere to specific rules if the file being sold constitutes a “consumer report.” See 15 U.S.C. §§ 1681–1681x (2012).

⁶⁴ Yu & Dietrich, *supra* note 12, at 15. Even government-issued reports contain pervasive inaccuracies, as a 2010 study conducted by the DOJ’s Bureau of Justice Statistics reported that many state criminal records repositories had not documented the final dispositions for a considerable number of arrests. See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Survey of State Criminal History Information Systems*, 2010, at 2 (2011), available at www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf.

⁶⁵ See Kyckelhahn & Cohen, *supra* note 15, at 3 (examining the seventy-five most populous counties in the United States).

⁶⁶ Klein, *supra* note 9.

BCCs routinely produce erroneous results because of misspellings or clerical errors. They also frequently fail to distinguish among different people who have the same name. And BCCs often create files based on fabricated or fraudulently procured identity information given to law enforcement by subjects who wish to avoid discovery of prior criminal activity.⁶⁷ Because BCCs lack direct access to the FBI's fingerprint-based records, they tend to conduct repository searches based on a subject's name and/or another identifier, such as a Social Security number, birth date, or address.⁶⁸ Such searches may fail by yielding false positives (incorrectly linking another person's name to a criminal record) or false negatives (missing a criminal record because of a false or inaccurate name).⁶⁹

This phenomenon is not uncommon. Consider the case of Samuel M. Jackson, the plaintiff in a 2011 federal lawsuit against a BCC that supplied a prospective employer with an inaccurate background report.⁷⁰ Jackson was denied a job when the report the employer received listed many possible matches in a nationwide database for Jackson, an applicant in his twenties.⁷¹ Three "matches" were for Samuel L. Jackson, a fifty-eight-year-old man who was behind bars at the time the background screen was conducted, having been convicted of rape in another state in 1987, when Samuel M. Jackson was but three years old.⁷² Similarly, a recent law school graduate in San Diego was arrested on the first day of her new job because a background check revealed a warrant for her arrest for marijuana possession, but the actual perpetrator had assumed her identity after stealing her wallet.⁷³ It is estimated that hundreds of thousands of these false positives and negatives occur each year.⁷⁴ Such an error rate translates into substantial numbers of individu-

⁶⁷ Rodriguez & Emsellem, *supra* note 5, at 7, 28 n.22.

⁶⁸ See Office of the Att'y Gen., *supra* note 58, at 38–40.

⁶⁹ Rodriguez & Emsellem, *supra* note 5, at 84–85.

⁷⁰ See Yu & Dietrich, *supra* note 12, at 3; Editorial, Faulty Criminal Background Checks, *N.Y. Times*, July 25, 2012, at A24.

⁷¹ Yu & Dietrich, *supra* note 12, at 17–18.

⁷² *Id.* at 18.

⁷³ See SEARCH, *supra* note 16, at 17.

⁷⁴ See Craig N. Winston, Nat'l Ass'n of Prof'l Background Screeners, *The National Crime Information Center: A Review and Evaluation 11–12 (2005)*, available at <http://besthire.com/Forms/NcicReportJuly252005.pdf> (describing the work of a Florida task force consisting of the Bureau of Justice Statistics, the Florida Department of Law Enforcement, the U.S. Department of Housing and Urban Development, and the FBI, which estimated that if Florida's

als being denied employment opportunities or facing delays in receiving job offers.

Reports also routinely identify the same offense several times or multiple reports reflect the same incident, thus giving the impression that the job candidate has a lengthy criminal history.⁷⁵ And records that should have been sealed or expunged can frequently be found in criminal history reports.⁷⁶ Indeed, reports do not always contain current information because they often vary with respect to the frequency with which they are updated; according to the DOJ, “No single source exists that provides complete and up-to-date information about a person’s criminal history.”⁷⁷ Hence, even if a state court or agency updates its files, a BCC may not retrieve these updates in a timely fashion (if at all), and by then, sealed or expunged information may have already been disseminated. Erroneous reports can circulate indefinitely and applicants may never know why they were denied jobs.⁷⁸

These problems are not unique to the private sector. Recent studies show that a substantial number of state and federal criminal records databases contain incomplete or inaccurate criminal records. The FBI conducts nearly nine million criminal background checks per year, primarily for employment.⁷⁹ The Attorney General reports that approximately 50% of the records in the III database are flawed,⁸⁰ and many were erroneously attributed to individuals who had not been convicted of a crime.⁸¹ The American Bar Association’s Criminal Justice Section has voiced concern “that the FBI’s [criminal history database] system is so seriously flawed that it does a disservice to large numbers of U.S. workers and employers who want to enter into an employment relationship but are deterred from doing so by inaccurate FBI records.”⁸²

false positive rates were extrapolated to the nationwide fingerprint-based checks of the FBI conducted in 1997, then 346,000 false positives would have resulted).

⁷⁵ See *Faulty Criminal Background Checks*, supra note 70; see also *SEARCH*, supra note 16, at 9 (noting the ways that an incident or offense may be “reflected in multiple sources”).

⁷⁶ Yu & Dietrich, supra note 12, at 20–23.

⁷⁷ Office of the Att’y Gen., supra note 58, at 6.

⁷⁸ See *Faulty Criminal Background Checks*, supra note 70.

⁷⁹ Stephen Saltzburg, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, U.S. Equal Emp’t Opportunity Comm’n (July 26, 2011), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

⁸⁰ See Office of the Att’y Gen., supra note 58, at 3, 17.

⁸¹ According to one study, 5.5% were falsely attributed to individuals who had not been convicted of a crime. See *id.* at 25.

⁸² Saltzburg, supra note 79.

Likewise, a DOJ study found that several state criminal records repositories had failed to record final dispositions for a significant number of arrests,⁸³ and that this problem is exacerbated by the fact that there is no standardized process for reporting arrests and dispositions at the state and local levels.⁸⁴ Thus, one of the challenges raised by the widespread accessibility of and reliance on criminal records databases is how to address the problems with the data in a way that is responsive to the needs of people with criminal records, employers, and society at large.

C. Race Discrimination in Employment Through the Use of Criminal History Reports

The employment landscape has changed dramatically in recent years for individuals with criminal records due in large measure to the tremendous growth in the number of people who have had contact with the criminal justice system and the proliferation of employers conducting background checks, particularly since September 11, 2001. In 1989, for example, only 12% of the adult population in the United States had criminal records,⁸⁵ yet by 2010 over 29% of all adults in the United States (more than one in every four) had some involvement with the criminal justice system that would show up on a routine employment background check.⁸⁶

⁸³ Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, Improving Access to and Integrity of Criminal History Records 9 (2005), available at <http://www.bjs.gov/content/pub/pdf/iaichr.pdf>.

⁸⁴ Letter from Michael Sankey, CEO, BRB Publ'ns, Inc., to Richard A. Hertling, Deputy Assistant Att'y Gen., Office of Legal Policy (June 27, 2005), available at <http://www.justice.gov/olp/pdf/hertling.pdf>.

⁸⁵ The number of individuals with criminal records in state criminal history files in 1989 was 42,476,400. See Bureau of Justice Statistics, U.S. Dep't of Justice, Survey of State Criminal History Information Systems, 1995, at 15 tbl.2 (1997), available at <http://www.bjs.gov/content/pub/pdf/Sschis95.pdf>. The author decreased the number by 30% to account for individuals who have records on file in multiple states and arrived at a conservative estimate of 29,733,480. As a percentage of the U.S. population over the age of eighteen in 1989 (183,885,403 according to the Census Bureau), 16% of the U.S. population had a criminal record. See Michael R. Haines, Population, by Age: 1900–2000, in *Historical Statistics of the United States: Millennial Edition OnLine* tbl.Aa125-144 (Susan B. Carter et al. eds., 2006), available at <http://hsus.cambridge.org/HSUSWeb/table/showtablepdf.do?id=Aa125-144>.

⁸⁶ See Bureau of Justice Statistics, *supra* note 64, at tbl.1 (showing that 97,893,200 adults have criminal records on file in the states, including arrests). Because a number of these individuals may have had records on file in multiple states, the author decreased the number by 30% to arrive at a conservative estimate of 68,525,240. As a percentage of the U.S. popula-

Many of the estimated sixty-five million adults in the United States with criminal records are African American and Hispanic, who are overrepresented in the criminal justice system.⁸⁷ African Americans and Hispanics are more likely than Whites to be arrested for low-level offenses and are also more likely to be arrested, convicted, or sentenced for drug offenses despite the fact that studies consistently show that their rate of drug use is comparable to that of Whites.⁸⁸ Indeed, law enforcement data from fifty states and the District of Columbia show that African Americans are almost four times as likely to be arrested for marijuana possession as Whites; in some states—including Illinois, Iowa, and

tion over the age of eighteen (234,564,071 according to the Census Bureau), over 29% of the U.S. adult population had a criminal record in 2010. See U.S. Census Bureau, *supra* note 17, at 1.

⁸⁷In a recently released analysis of data on disproportionate minority contact in arrests, court processing and sentencing, new admissions, ongoing populations in prison and jails, probation and parole, capital punishment, and recidivism, the National Council on Crime and Delinquency found that “[a]t each of these stages, persons of color, particularly African Americans, are more likely to receive less favorable results than their White counterparts,” and that Latinos also are overrepresented in comparison to Whites. Christopher Hartney & Linh Vuong, Nat’l Council on Crime & Delinquency, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System 2* (2009), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

⁸⁸See, e.g., Levine & Small, *supra* note 20, at 13–16 (reporting that, although U.S. government data indicate that Whites use marijuana at higher rates than African Americans and Hispanics, the marijuana arrest rate for Hispanics and African Americans in New York City is approximately three and five times that of Whites respectively); Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States 1* (2009), available at www.hrw.org/sites/default/files/reports/us0309web_1.pdf (“The higher rates of black drug arrests do not reflect higher rates of black drug offending. . . . [B]lack and whites engage in drug offenses—possession and sales—at roughly comparable rates.”); Substance Abuse & Mental Health Servs. Admin., U.S. Dep’t of Health & Human Servs., *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings 21* fig.2.10 (2011), available at <http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.pdf> (reporting rates of illicit drug use in the United States in 2010 among persons aged twelve and older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); Substance Abuse & Mental Health Servs. Admin., U.S. Dep’t of Health & Human Servs., *Results from the 2009 National Survey on Drug Use and Health: Volume I. Summary of National Findings 24* fig.2.10 (2010), available at http://www.gmhc.org/files/editor/file/a_pa_nat_drug_use_survey.pdf (reporting that the drug usage rate for Latinos in 2009 was 7.9%, compared to 8.8% for Whites). The majority of Latinos incarcerated in New York State in 2009 were there for drug-related offenses. See Cartagena, *supra* note 30. Yet, they “hav[e] one of the lowest rates of lifetime illicit drug use at 38.9%, as compared to Whites at 54% and African-Americans at 43.8%.” *Id.*

Minnesota—they are eight times as likely to be arrested; and in some counties, they are ten, or even thirty times as likely to be arrested.⁸⁹

Moreover, African Americans and Hispanics are arrested and incarcerated at rates that are several times their proportion of the general population.⁹⁰ African Americans represent 28% of all arrests,⁹¹ and 38% of prison and jail inmates,⁹² even though they account for approximately 14% of the general population.⁹³ Latinos constitute only 16% of the overall population⁹⁴ but almost 20% of the prison and jail population.⁹⁵ Assuming current incarceration rates remain constant, among males, Blacks will have a 32% (one in three) chance of serving time in prison during their lifetime, Latinos will have a 17% chance (one in six), and Whites will have a 6% chance (one in seventeen).⁹⁶ Similarly, Native Americans and Alaskan natives make up only 0.8% of the U.S. popula-

⁸⁹ See Am. Civil Liberties Union, *The War on Marijuana in Black and White* 47, 49, 58 (2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

⁹⁰ Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prevalence of Imprisonment in the U.S. Population, 1974–2001*, at 5 tbl.5 (2003), available at <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>; cf. The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 6 (2010), available at [http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs\(1\).pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs(1).pdf) (finding that incarceration in America is concentrated among African-American men, asserting that “[w]hile 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12”). Incarceration rates are even higher for twenty- to thirty-four-year-old men without a high school diploma or GED. *Id.* at 8 fig.2. Approximately one in eight White men in this demographic is incarcerated, relative to one in fourteen Hispanic men, and one in three Black men. See *id.*

⁹¹ Fed. Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2010*, at tbl.43a (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls>.

⁹² William J. Sabol & Heather Couture, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Inmates at Midyear 2007*, at 7 tbl.9 (2008), available at <http://www.bjs.gov/content/pub/pdf/pim07.pdf>.

⁹³ U.S. Census Bureau, *The Black Population: 2010*, at 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (showing that, in 2010, “14 percent of all people in the United States identified as Black, either alone, or in combination with one or more other races”).

⁹⁴ U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, at 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (documenting that in 2010, “there were 50.5 million Hispanics in the United States, composing 16 percent of the total population”).

⁹⁵ Sabol & Couture, *supra* note 92, at 7 tbl.9.

⁹⁶ Office of Legal Counsel, *Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier* (July 26, 2011), available at http://www.eeoc.gov//eeoc/meetings/4-25-12/olc_testimony.cfm.

tion,⁹⁷ but they are 1.4% of those arrested,⁹⁸ and the incarceration rate for Native Americans is 38% higher than the national average.⁹⁹ These racial disparities can be attributed largely to law enforcement strategies that disproportionately target minority populations, such as the “war on drugs,”¹⁰⁰ “stop and frisk” programs,¹⁰¹ and “broken windows”¹⁰² policing practices that have become popular among urban police forces.

D. Race, Criminal History Status, and Social Stigma

Nine out of ten employers now inquire into the criminal history of job candidates,¹⁰³ and research shows that the existence of a record can play

⁹⁷ ACS Demographic and Housing Estimates: 2008–2012 American Community Survey 5-Year Estimates, U.S. Census Bureau, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_DP05 (last visited June 21, 2014).

⁹⁸ Fed. Bureau of Investigation, *supra* note 91, at tbl.43a. Although Asians and Pacific Islanders, like Native Americans, are not discussed in the current U.S. Equal Employment Opportunity Commission (“EEOC”) policy guidance, national statistics indicate that these groups are not disproportionately affected by the criminal justice system. For example, Asians and Pacific Islanders represent around 5% of the U.S. population. U.S. Census Bureau, *supra* note 97, at 2. Yet Asians and Pacific Islanders only constitute 1.2% of all arrests. Fed. Bureau of Investigation, *supra* note 91, at tbl.43a. Nevertheless, local or regional crime statistics may demonstrate racial disparities for Asian and Pacific Islanders. See John Burnett, *Hawaiians Most Likely to Be Arrested for Pot*, *Haw. Tribune Herald* (Aug. 26, 2012), <http://hawaiitribune-herald.com/sections/news/local-news/hawaiians-most-likely-be-arrested-pot.html> (noting that among Hawaiians, native Hawaiians “are more likely than any other race to be arrested on marijuana charges”).

⁹⁹ Native Americans and the Death Penalty, *Death Penalty Info. Ctr.*, <http://www.deathpenaltyinfo.org/native-americans-and-death-penalty> (last visited June 21, 2014).

¹⁰⁰ See, e.g., The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* 5–9 (2008), available at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (discussing the war on drugs and other well-documented causes of racial disparities in the criminal justice system). Data show that although Blacks constitute roughly 13% of all drug users, Blacks make up 35% of those arrested for drug offenses and approximately 53% of those incarcerated for drug convictions. Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* 45–48 (2008), available at http://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

¹⁰¹ See N.Y. Civil Liberties Union, *Stop-And-Frisk 2011: NYCLU Briefing 2* (2012), available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

¹⁰² See Jeffrey Fagan et al., *An Analysis of the NYPD’s Stop-and-Frisk Policy in the Context of Claims of Racial Bias* 11, 17 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 05-95, 2006), available at <http://ssrn.com/abstract=846365>.

¹⁰³ *Faulty Criminal Background Checks*, *supra* note 70, at A24; see also Soc’y for Human Res. Mgmt., *supra* note 8, at 3 (providing results of a 2010 survey that found that 92% of employers performed criminal background checks on some or all job candidates).

a decisive role in the hiring process, reducing one's chance of receiving a callback or job offer by almost 50%.¹⁰⁴ Yet the impact of having a criminal record is significantly worse for people of color, who are already more likely to experience discrimination in the labor market. Groundbreaking audit studies conducted in Milwaukee and New York City by researchers at Princeton and Harvard illustrate vividly the effects of a criminal record on hiring decisions and the employment prospects for minority job seekers. Funded by the DOJ's National Institute of Justice, the studies examined the criminal record "penalty" for job seekers of different races. The first study matched pairs of Black and White entry-level job seekers to test the impact of incarceration on employment outcomes for Black and White job candidates.¹⁰⁵ It found that Whites with a criminal record were half as likely to receive a callback as Whites without a record (17% versus 34%), while Blacks with a criminal record were almost a third as likely to receive a callback as Blacks without a record (5% versus 14%).¹⁰⁶ Most disturbingly, the research also revealed that Whites *with* a criminal record had a higher chance of receiving a callback than Blacks *without* a record.¹⁰⁷

These findings were replicated in the second study that included Latino testers, which found that after controlling for race, White testers with similar job qualifications and criminal histories received job offers at higher rates than Black and Latino testers.¹⁰⁸ And the researchers again found that the White testers with a purported recent felony conviction were more likely to receive a job offer than the Black and Latino testers without criminal records. These findings suggest that while job candidates with criminal records are disadvantaged in the labor market relative to applicants with no criminal background, racial minority status combined with a criminal record creates a pronounced and particularly formidable socially stigmatic effect. Indeed, a criminal record, when combined with the age, race, and social class of those most likely to

¹⁰⁴ Devah Pager et al., Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records, 623 *Annals Am. Acad. Pol. & Soc. Sci.* 195, 199 (2009); see also James B. Jacobs, Mass Incarceration and the Proliferation of Criminal Records, 3 *U. St. Thomas L.J.* 387, 420 (2006) (describing the stigma of a criminal record as a "negative curriculum vitae").

¹⁰⁵ Pager, *Criminal Record*, supra note 25, at 946.

¹⁰⁶ See id. at 957, 958 fig. 6.

¹⁰⁷ See id. at 958.

¹⁰⁸ Devah Pager et al., Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 *Am. Soc. Rev.* 777, 785–86 (2009).

come into contact with the criminal justice system—a group that already experiences significant social disadvantage—creates a powerful and seemingly indelible form of social marginalization.¹⁰⁹

That employers have virtually unlimited access to criminal history information only intensifies this stigma, making it all but impossible for minorities with criminal records to find gainful employment. This essentially dooms these individuals—who often struggle with poverty, low wages, and/or unstable housing prior to arrest—to a life of social dislocation, economic instability, and civic disengagement. These negative effects, which are often more harmful than the behaviors that were the original rationale for the arrests, extend to the health and welfare of family members, particularly children.

II. THE TITLE VII/FCRA MODEL AND ITS LIMITATIONS

This Part will map the laws that govern the use of criminal history reports in employment, beginning with the FCRA and corresponding state laws that regulate the collection, transmission, and use of such data. This Part will then examine the Equal Employment Opportunity Commission's ("EEOC") 2012 enforcement guidance on the consideration of arrest and conviction records in employment, and the Title VII framework that it advances to control the race discrimination that may result from employers' reliance on criminal history reports when screening job applicants. This Part will conclude by chronicling the weaknesses of these laws and their inability to adequately protect the interests of either employers or individuals with criminal records.

¹⁰⁹ See Pager, *Criminal Record*, supra note 25, at 959 (explaining that "the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group"); see also Pager, *Double Jeopardy*, supra note 25, at 620 (discussing the stigma associated with a criminal record). Individuals with criminal records are regularly and legally denied job opportunities, welfare benefits, housing, educational loans, voting rights, and other important social goods based exclusively on their criminal history. See Editorial Board, *In Search of Second Chances*, N.Y. Times (May 31, 2014), <http://www.nytimes.com/2014/06/01/opinion/sunday/in-search-of-second-chances.html?module=Search&mabReward=relbias%3Ar>; see also R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 823 (2004) (discussing the construction of social and racial stigma, noting that racial stigma "turns in large part upon the context in which the stigmatized individual finds her- or himself").

A. The FCRA's Regulation of Criminal History Reports

Until relatively recently, an individual with a criminal history could effectively work toward rehabilitation by getting a fresh start in a new state, city, or town, thereby moving beyond a criminal past. The current age of information technology and corresponding growth of criminal records systems and databases has made such efforts virtually impossible. This is exacerbated by the fact that the laws designed to regulate the use of these databases and the criminal history reports they disseminate—specifically, the FCRA and a patchwork of similar state laws¹¹⁰—do not go far enough in protecting job applicants and fail to provide adequate notice, consent, access, and enforcement.

Enacted in 1970, decades before the advent of the Internet, the FCRA was intended to promote accuracy, fairness, and privacy¹¹¹ of personal information held and disseminated by “consumer reporting agencies”¹¹² that collect and distribute credit and other consumer information¹¹³ for employment.¹¹⁴ Primary regulatory authority over the FCRA rests with the Federal Trade Commission (“FTC”), which, in 1998, extended the

¹¹⁰ See 15 U.S.C. §§ 1681–1681x (2012). See generally Nat'l Emp't Law Project, *supra* note 24 (describing laws in California, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Washington, D.C., that protect people with criminal records from employment discrimination in the public and/or private sectors).

¹¹¹ See 15 U.S.C. § 1681(b) (explaining that the FCRA was established to ensure that “consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information”).

¹¹² *Id.* § 1681e(b) (stating that reporting agencies must maintain accuracy standards).

¹¹³ See *id.* § 1681a(f). Other statutorily authorized purposes include determinations regarding creditworthiness, insurance underwriting, or other business transactions regarding a consumer. See *id.*; see also SEARCH, *supra* note 16, at 58 (“As defined in the FCRA, consumer reporting agencies are organizations that, for a fee or on a cooperative nonprofit basis, are in the practice of assembling or evaluating personally identifiable information obtained from third parties and bearing upon a consumer’s credit worthiness, character, reputation, personal characteristics, or mode of living.”).

¹¹⁴ See 15 U.S.C. § 1681a(h). “Employment purposes” is defined as “evaluating a consumer for employment, promotion, reassignment or retention as an employee.” *Id.* This definition has been interpreted broadly to include “employers who are: merely considering the possibility of terminating an employee; investigating allegations of workplace wrongdoing against a current employee; hiring independent contractors; or, determining whether a contractor’s employee should have a security clearance.” SEARCH, *supra* note 16, at 59.

FCRA's coverage to BCCs that sell criminal records information for employment purposes.¹¹⁵

Some BCCs that report criminal history information, however, have avoided regulation and liability by describing themselves as not engaged in "consumer reporting" as defined by the statute.¹¹⁶ And although the FCRA establishes national standards for employment screening—such as requiring employers to notify and obtain consent from job applicants prior to obtaining a criminal history report, and to inform job applicants if an adverse action is taken on the basis of the contents of a report¹¹⁷—these provisions are inadequately enforced. Indeed, in recent years several lawsuits have been filed against major BCCs and employers challenging their failure "to provide 'pre-adverse-action' notices" and accurate reporting.¹¹⁸ These BCCs include HireRight, which supplies criminal history data to such companies as Monster and Oracle, and LexisNexis, which settled a lawsuit in 2008 for twenty million dollars.¹¹⁹ These lawsuits not only highlight the failings of the FCRA's enforcement mechanisms, but also suggest that such practices may be widespread among employers and BCCs.

This lack of enforcement is compounded by the fact that the FCRA provides qualified immunity to covered BCCs and end-users from claims based on invasion of privacy, defamation, or negligence based on

¹¹⁵ See Advisory Letter from William Haynes, Div. of Credit Practices, FTC, to Richard LeBlanc, Due Diligence, Inc. (June 9, 1998), available at <http://www.ftc.gov/policy/advisory-opinions/advisory-opinion-leblanc-06-09-98> (referring to §§ 603, 607, and 609 of the FCRA). In 2012, the Dodd-Frank Act relocated primary regulatory responsibility for the FCRA's consumer regulations to the newly created Consumer Financial Protection Bureau ("CFPB"), which is empowered to enforce the federal consumer financial laws, see 12 U.S.C. § 5514(c)(1) (2012), including the FCRA. *Id.* § 5481(12), (14). The CFPB and the Federal Trade Commission ("FTC") share some enforcement powers, see, e.g., *id.* § 5514(c)(3), however, the law creates an exception to the CFPB's general enforcement power, which gives the FTC the power to enforce compliance with the FCRA with respect to "consumer reporting agencies and all other persons subject thereto." 15 U.S.C. § 1681s(a)(1).

¹¹⁶ See Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 *J. Crim. L. & Criminology* 253, 269 n.88 (2012) (illustrating how 15 U.S.C. § 1681e(b), which defines a consumer reporting agency and what activities are covered under its provisions, is written in a way that enables data brokers to avoid coverage under the FCRA).

¹¹⁷ See 15 U.S.C. § 1681b(b).

¹¹⁸ See Rodriguez & Emsellem, *supra* note 5, at 12.

¹¹⁹ See *id.* at 12 & 30 n.57 (citing *Williams v. LexisNexis Risk Mgmt.*, No. 3:06cv241, 2007 WL 2439463 (E.D. Va. Aug. 23, 2007)).

the information contained in an FCRA-covered report,¹²⁰ and state laws provide a varied regulatory patchwork for these companies.¹²¹ Plus, the Act governs only third-party screening companies and not employers who conduct their own background checks, or end-users who access criminal justice information via government sources.

In addition, according to the FCRA, a BCC may report convictions indefinitely and may report records of arrests that did not lead to convictions so long as the arrest occurred fewer than seven years prior.¹²² The only accuracy requirement the FCRA places on BCCs is that they “follow reasonable procedures to assure maximum possible accuracy.”¹²³ This vague standard imposes no affirmative duty on BCCs to ensure that the information they report about individuals is accurate, current, or complete.¹²⁴ It also allows for the disclosure and circulation of arrest information and expunged conviction records. In 2009, for example, the New York State Office of the Attorney General investigated ChoicePoint—a BCC now owned by LexisNexis that once constituted an estimated 20% of the industry in the United States and conducted ten million background checks each year¹²⁵—for creating and operating a discriminatory online employment application system for RadioShack, the nation’s second-largest retailer of consumer electronics and employer to nearly thirty-five thousand employees.¹²⁶ This system automatically rejected anyone who self-reported a criminal record, and the criminal history checks that ChoicePoint conducted for RadioShack disseminated sealed and dismissed convictions.¹²⁷

¹²⁰ See 15 U.S.C. § 1681h(e).

¹²¹ See Letter from Nat’l Ass’n of Prof’l Background Screeners to the U.S. Dep’t of Justice 7 (Aug. 4, 2005), available at http://www.justice.gov/olp/pdf/0394_001.pdf (noting that “every state has different laws relating to what information can be obtained and/or used by consumer reporting agencies and end-users with permissible purposes”).

¹²² See 15 U.S.C. § 1681c(a).

¹²³ *Id.* § 1681e(b).

¹²⁴ Courts have interpreted the FCRA’s accuracy provision (15 U.S.C. § 1681e(b)) as only mandating that BCCs “weigh the potential that the information will create a misleading impression against the availability of more accurate . . . information and the burden of providing such information.” See *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 42 (D.C. Cir. 1984).

¹²⁵ See Terhune, *supra* note 44.

¹²⁶ Assurance of Discontinuance at 5, In the Matter of the Investigation of Andrew M. Cuomo, Attorney General of the State of New York, of RadioShack Corp., No. 09-148 (Oct. 9, 2009).

¹²⁷ *Id.* at 5–6.

As Logan Danielle Wayne describes it, individuals must go through a difficult process to delete their records from a BCC database:

Currently, the only way to remove an expunged conviction from a data broker's records is to personally request that the information be removed. This process is arduous and involves the submission of several documents including court dispositions and expungement orders. In fact, some data brokers even require that one submit along with this request a copy of the information as it appears on the report from their websites. This requirement is particularly troubling because it forces individuals to purchase their own consumer reports before finding out whether any one database contains an expunged conviction.¹²⁸

The FCRA also fails to protect and promote the interests of employers, who often know little about how the criminal justice system operates and may not fully comprehend how to accurately decipher the data contained in a report. As Adam Klein notes, this may be attributed in part to the fact that much of the information disseminated in reports is confusing or requires familiarity with the laws and procedures of the individual state or municipality where the record originated.¹²⁹ Therefore, even when information in a report is accurate, it may still be misinterpreted in a way that leads to employment being denied to a person with a criminal record. Further, employers are inundated with information regarding their potential liability for negligent hiring,¹³⁰ but they typically receive little direction on how to make legitimate and equitable employment decisions that are consistent with Title VII.¹³¹ Employers thus tend to give criminal history information more weight than it is due out of fear that

¹²⁸ Wayne, *supra* note 116, at 267.

¹²⁹ See Klein, *supra* note 9.

¹³⁰ A routine Internet search for "employment background checks" will yield the websites for scores of private screening companies. These sites typically caution employers about possible liability for negligent hiring and the necessity of conducting criminal background checks, but offer no information about potential Title VII liability for conducting these screens. See, e.g., Negligent Hiring, American Business Services, <http://absscreening.com/index.php/negligent-hiring> (last visited June 21, 2014).

¹³¹ Anecdotally, advocates of workers with criminal records frequently find that employers are unaware of the EEOC's policies regarding employer consideration of arrest and conviction histories. In addition, "Over 60 percent of employers indicate that they would 'probably not' or 'definitely not' be willing to hire an applicant with a criminal record." Harry J. Holzer et al., Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants, Institute for Research on Poverty 7 (Discussion Paper No. 1243-02, 2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302>.

hiring an individual with a criminal record will render them vulnerable to litigation.

In addition, the FTC does not compel BCCs to offer end-users guidance “on how to properly interpret criminal history reports or what basic standards should be used as part of the hiring process.”¹³² Indeed, as currently enforced, the FCRA actually undermines state and local efforts to protect people with criminal records and employers in the employment screening process. For instance, one expert found that employers in New York received unresolved arrest data in BCC reports, but did not receive corresponding information on the fact that “New York law prohibits employment decisions to be based on arrests that do not lead to convictions.”¹³³ Further, as this example suggests, there is now substantial variation among the states with respect to the kinds of information that can be reported and the level of protection afforded to people with criminal records.¹³⁴ This creates inefficiency and indeterminacy for employers operating in multiple states, which is becoming ever more common in our increasingly globalized economy.

In these ways, the laws and regulations that govern BCCs offer scant protection to individuals with criminal records, and do not adequately protect the interests of employers, all to the particular detriment of minority job candidates and employees.

B. Title VII and the 2012 EEOC Guidance

In response to the devastating effect of a criminal record on the employment prospects of racial minorities, on April 25, 2012, in a four-to-one vote, the EEOC issued an enforcement guidance prohibiting employers from automatically denying employment to individuals based on an arrest or conviction record.¹³⁵ Updating and reaffirming earlier guidances, including one enacted in 1987 by then-Chair Clarence Thomas, the new EEOC guidance makes clear that employment policies summar-

¹³² Klein, *supra* note 9.

¹³³ Cartagena, *supra* note 30.

¹³⁴ See Legal Action Center, *After Prison: Roadblocks to Reentry*, <http://lac.org/roadblocks-to-reentry/> (last visited June 21, 2014) (providing a catalogue of state laws regarding access to criminal records).

¹³⁵ See U.S. Equal Emp’t Opportunity Comm’n, *EEOC Enforcement Guidance No. 915.002, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, at 8–9 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

ily excluding applicants with arrest or conviction records could violate Title VII of the 1964 Civil Rights Act's prohibition against race or national origin discrimination in employment if such actions have a disparate impact on racial and ethnic minorities.¹³⁶

According to the guidance, employers may consider criminal records when screening potential employees, but doing so may violate Title VII if the employer treats criminal history information differently for different applicants based on their race or national origin (disparate treatment).¹³⁷ Moreover, a Title VII violation may also occur if an employer's criminal record screening policy or practice excludes all job candidates with a criminal record because blanket exclusions may have a disparate impact on racial and ethnic minorities,¹³⁸ who are statistically more likely to have a criminal history.¹³⁹

In the case of alleged disparate impact discrimination, once a plaintiff has identified the offending policy or practice, the EEOC will com-

¹³⁶ See 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."); see also EEOC Decision No. 78-35, 26 Fair Empl. Prac. Cas. (BNA) 1755 (1978) (finding reasonable an employee's discharge given his pattern of criminal behavior and the severity and recentness of his criminal conduct); EEOC Decision No. 78-03, 1977 EEOC LEXIS 26 (Nov. 7, 1977) (challenging employer exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 74-89, 8 Fair Empl. Prac. Cas. (BNA) 431 (1974) (challenging employer policy that considered a felony an adverse factor leading to disqualification); EEOC Decision No. 72-1497, 4 Fair Empl. Prac. Cas. (BNA) 849 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); U.S. Equal Emp't Opportunity Comm'n, EEOC Compliance Manual, Section 15: Race & Color Discrimination, § 15-VI.B.2 (Apr. 19, 2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>; U.S. Equal Emp't Opportunity Comm'n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Sept. 7, 1990), available at http://www.eeoc.gov/policy/docs/arrest_records.html; U.S. Equal Emp't Opportunity Comm'n, EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987), available at <http://www.eeoc.gov/policy/docs/convict2.html>; U.S. Equal Emp't Opportunity Comm'n, EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

¹³⁷ U.S. Equal Emp't Opportunity Comm'n, *supra* note 135, at 1, 6.

¹³⁸ See U.S. Equal Emp't Opportunity Comm'n, EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, at 9 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

¹³⁹ *Id.* at 9–10 (concluding that "[n]ational data . . . support[] a finding that criminal record exclusions have a disparate impact based on race and national origin").

mence an investigation during which the employer is permitted to produce “regional or local data,” or its own applicant data, to demonstrate that “African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer’s particular geographic area.”¹⁴⁰ This evidence of a racially balanced workforce, however, is not sufficient to disprove disparate impact,¹⁴¹ as the relevant inquiry is whether the policy or practice denies employment opportunities to a disproportionate number of Title VII-protected individuals.¹⁴²

If the plaintiff is successful in proving disparate impact, the Title VII burden of production and persuasion shifts to the employer to show that the challenged practice is “job related” for the position in question and “consistent with business necessity,”¹⁴³ in accordance with the analysis and burden-shifting established by the Supreme Court in *Griggs v. Duke Power Company*.¹⁴⁴ As articulated by the *Griggs* Court, “[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”¹⁴⁵ In addition, it is the employer’s responsibility to show that the policy or practice “bear[s] a demonstrable relationship to successful performance of the jobs for which it was used” and “measure[s] the person for the job and not the person in the abstract.”¹⁴⁶

In *Green v. Missouri Pacific Railroad Company*, the U.S. Court of Appeals for the Eighth Circuit further expanded on this analysis by identifying three factors (the “*Green* factors”) that must be considered when

¹⁴⁰ Id. at 10 (“The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures, workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics.”) (footnotes omitted).

¹⁴¹ See *Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (holding that “bottom line” racial balance in a workforce does not preclude employees from establishing a prima facie case of disparate impact, nor does it provide employers with a defense).

¹⁴² See id. at 453–54. The Commission will also assess the probative value of the employer’s applicant data because the “application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying” because of a purportedly discriminatory policy or practice. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

¹⁴³ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

¹⁴⁴ 401 U.S. 424, 431–32, 436 (1971).

¹⁴⁵ Id. at 431.

¹⁴⁶ Id. at 431, 436.

determining job-relatedness and business necessity. These factors include the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question.¹⁴⁷ In 2007, the Third Circuit, in *El v. Southeastern Pennsylvania Transportation Authority*, provided even more nuance to this statutory analysis by noting that, because all hiring necessarily involves “the management of risk,” an employer who seeks to avoid violating Title VII must draft its criminal records exclusion policies carefully based on empirical evidence that “accurately distinguish[es] between applicants [who] pose an unacceptable level of risk and those [who] do not.”¹⁴⁸ Therefore, to demonstrate that a criminal record exclusion is job-related and consistent with business necessity, an employer must show that the policy or practice closely associates the particular criminal conduct (and its dangers) with the innate risks attendant to the duties of the particular position.¹⁴⁹

Assessing whether a criminal record exclusion is both job-related and consistent with business necessity differs depending on whether an arrest or conviction is involved. An arrest “does not establish that criminal

¹⁴⁷ *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1159–60 (8th Cir. 1977) (upholding the district court’s injunction allowing an employer to consider an applicant’s prior criminal record as a factor in rendering individual hiring decisions so long as the employer considered these three factors, but precluding the employer from using an applicant’s conviction record as an absolute bar to employment); see also U.S. Equal Emp’t Opportunity Comm’n, Questions and Answers About the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (last visited May 28, 2012) (outlining the four factors).

¹⁴⁸ 479 F.3d 232, 244–45 (3d Cir. 2007); see also *id.* at 247 (upholding a Southeastern Pennsylvania Transportation Authority policy of excluding everyone ever convicted of a violent crime from being hired as a paratransit driver, but stating that the outcome of the case might have been different had the plaintiff “hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person . . . [so] there would be a factual question for the jury to resolve”); cf. Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 *Criminology* 27, 52 (2011) (“Given the results of the current as well as previous studies, the 40-year period put forward in the *El v. SETPA* (2007) case discussed earlier generally seems too old of a score to be still in need of settlement.”).

¹⁴⁹ U.S. Equal Emp’t Opportunity Comm’n, *supra* note 138, at 14. The Commission identified two circumstances in which employers will “consistently meet the ‘job related and consistent with business necessity’ defense . . . [(1) [t]he employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards” or (2) the employer crafts a “targeted screen” that accounts for at least the three *Green* factors, and then offers a chance “for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.” *Id.*

conduct has” in fact occurred;¹⁵⁰ therefore a denial of employment based solely on an arrest record cannot satisfy the “job related” and “business necessity” standard.¹⁵¹ An arrest can, however, trigger an inquiry into the underlying facts of the matter,¹⁵² and “an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question.”¹⁵³ A record of conviction, on the other hand, will typically suffice as evidence that an individual engaged in particular conduct.¹⁵⁴ Still, under certain circumstances it may be unjustifiable for an employer to rely solely on the conviction record when screening job candidates.¹⁵⁵ Even if an employer succeeds in establishing that the exclusion is job-related and consistent with business necessity, a Title VII plaintiff may nevertheless prevail if she can show that there is a “less discriminatory ‘alternative employment practice’ that serves the employer’s legitimate goals as effectively as the challenged practice.”¹⁵⁶

While the updated guidance clarified the standards that employers must follow when making employment decisions involving people with criminal records, as I will now explain, reliance on Title VII and the FCRA has been an insufficient means of addressing the race discrimination that stems from the use of criminal history reports in employment.

C. The Limitations of the Title VII Model

Despite the EEOC’s critical efforts and laudable intentions, when applied to criminal history discrimination, the Title VII doctrinal framework produces unique difficulties that make getting hired or challenging adverse employment actions extraordinarily difficult for African Americans and Latinos with criminal records, whom studies show are most vulnerable to this type of discrimination.

This is due in part to the fact that the central focus in most race discrimination employment cases is on whether the employer was unlawfully motivated by the employee’s race when making an exclusionary employment decision. Although seemingly straightforward, this inquiry

¹⁵⁰ Id. at 12.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id. at 12.

¹⁵⁴ Id. at 1.

¹⁵⁵ See id.

¹⁵⁶ Id. at 35 n.59 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006)).

into the employer's mental state presents thorny practical problems when applied to discrimination against former offenders because employers may lawfully consider one's criminal history when making employment decisions, which renders unlawful discrimination difficult to detect.¹⁵⁷

Indeed, while race discrimination is believed to be wrong because race is generally understood as irrelevant to an employee's ability to perform on the job, a criminal record is arguably relevant to employment. For instance, although a very narrow exception to Title VII's antidiscrimination mandate allows employers to openly and legitimately base employment decisions on certain protected characteristics—specifically sex, religion, or national origin—without running afoul of Title VII (such as when a theater seeks to hire actors for particular roles on the basis of gender), this “bona fide occupational qualification” (“BFOQ”) defense explicitly excludes race.¹⁵⁸ Criminal history status, on the other

¹⁵⁷ The deficiency and indeterminacy of the Title VII doctrinal framework has generated much legal commentary and criticism in other contexts as well. See, e.g., Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks*, Pretext, and the “Personality” Excuse, 18 Berkeley J. Emp. & Lab. L. 183, 186–87 (1997); Catherine J. Lancot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 La. L. Rev. 539, 553 (2001); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2236–38 (1995); Ann C. McGinley, *!VIVA LA EVOLUCIÓN!*: Recognizing Unconscious Motive in Title VII, 9 Cornell J.L. & Pub. Pol'y 415, 420 (2000); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 285–86 (1997); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 Emp. Rts. & Emp. Pol'y J. 37, 74 (2000); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577, 578 (2001).

¹⁵⁸ See 42 U.S.C. § 2000e-2(e) (2006). The EEOC guidelines emphasize both the narrowness of the BFOQ defense and its general permissibility for authenticity purposes. See 29 C.F.R. § 1604.2(a) (2011). The discrimination must be “reasonably necessary to the normal operation of that particular business or enterprise.” See 42 U.S.C. § 2000e-2(e). As an example, a maximum security prison, where males were segregated on the basis of their level of dangerousness, was permitted under Title VII's BFOQ provision to have a policy that precluded the hiring of women as correctional counselors in a “contact” position with inmates. *Dothard v. Rawlinson*, 433 U.S. 321, 335–37 (1977). The particular characteristic or attribute must also be inextricably linked to the central mission or essence of the job. See *Huisenga v. Opus Corp.*, 494 N.W.2d 469, 472–73 (Minn. 1992); *Kraft, Inc. v. State*, 284 N.W.2d 386, 388 (Minn. 1979); Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 Yale L.J. 1257, 1259–60 (2003); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Calif. L. Rev. 147, 184–91 (2004); Melissa K. Stull, *Annotation, Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) Under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 USCS § 2000e-2(e)(1))*, 110 A.L.R. Fed. 28, 33–37

hand, may at times be quite relevant to hiring, such as consideration of a recent conviction for theft or financial fraud when hiring a bank teller or an accountant, as opposed to consideration of a loitering conviction when hiring a forklift operator. Moreover, while employers should be able to inquire into the criminal histories of those who may be placed in sensitive jobs or positions of trust, race may, consciously or unconsciously, influence negatively an employer's evaluation of a job seeker's criminal record, thereby making the identification of unlawful discrimination more difficult.

This problem is exacerbated by employers' reliance on information technology early in the hiring process to check a job candidate's criminal history status. Indeed, to reject a job applicant based on an arrest record, an employer must offer a valid business justification. Yet this rarely happens because the adverse actions occur during the pre-offer period, when job candidates have little explicit knowledge of why they were denied an interview or job, and may, in fact, never know the true reason for their rejection. This, in turn, limits their ability to challenge employers' discriminatory actions.

In addition, while disparate impact cases do not require proof of intentional discrimination, comparative evidence is critical to establishing liability under this theory.¹⁵⁹ Plaintiffs must demonstrate that a particular employment practice disproportionately burdens members of a protected group, typically by relying upon statistical evidence. However, not only have courts made establishing proof of differential impact more onerous under Title VII,¹⁶⁰ but the fact that criminal records discrimination occurs almost exclusively during the hiring stage makes it difficult for an aggrieved applicant to acquire the empirical data necessary to show how the employer has treated similarly situated applicants.¹⁶¹ Moreover, this

(1992). The employer bears the responsibility of demonstrating that "all or substantially all" members of the group(s) excluded from the job would be unable to perform the duties of the position. See, e.g., *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) (quoting *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)) (stating that the employer may not exclude women of childbearing age from certain jobs that involve the handling of lead even though the employer alleges that lead could be harmful to fetuses).

¹⁵⁹ See *Griggs*, 401 U.S. at 431–32. Once a disparate impact has been shown, the employer bears the burden of demonstrating that the challenged practice "is job related . . . and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁶⁰ See Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 *Tex. L. Rev.* 1487, 1492 (1996).

¹⁶¹ Disparate impact suits now represent only a tiny proportion of cases filed under Title VII. See *id.* at 1494 n.27, 1496.

lack of information due to the preponderance of hiring cases over firing cases increases the difficulty of bringing class action lawsuits. These limitations severely constrain the efficacy of Title VII in preventing and redressing invidious discrimination and ensuring equality of opportunity.

Finally, neither the EEOC guidance nor Title VII adequately addresses the complex and often conflicting tangle of state and local antidiscrimination laws with which employers must contend when making hiring decisions that involve people with criminal records.¹⁶² While some states and municipalities have enacted antidiscrimination statutes that offer varying degrees of protection to persons with criminal records, many apply only to public sector employment¹⁶³ and these laws typically have anemic mechanisms of enforcement.¹⁶⁴

In light of these deficiencies with the Title VII remedial framework, it should come as no surprise that advocates and lawyers representing parties on both sides in criminal records employment discrimination cases have argued that “Title VII is not an appropriate tool for ensuring fairness for people with criminal records.”¹⁶⁵ In order to more effectively address these perplexing concerns and safeguard the interests of employers and those with criminal records, along with the societal interest in having criminal records holders working in the legitimate labor market, the following Parts will propose a better approach based on the ADA and GINA.

¹⁶² See, e.g., N.Y. Correct. Law §§ 752–54 (Consol. 2005); N.Y. Crim. Proc. Law § 160.60 (Consol. 1996); N.Y. Exec. Law § 296(15)–(16) (McKinney 2010); see also Haw. Rev. Stat. Ann. § 378-2.5(a) (LexisNexis Supp. 2010); 18 Pa. Cons. Stat. Ann. § 9125 (West 2000); Wis. Stat. § 111.335(1)(c) (2012).

¹⁶³ See Nat’l Emp’t Law Project, *supra* note 24, at 29–30 (describing laws in California, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Washington, D.C. that protect people with criminal records from employment discrimination in the public and/or private sectors).

¹⁶⁴ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 63 (2006) (“*Few states have any mechanism for enforcement of their nondiscrimination laws, and it is not clear how effective they are.*”).

¹⁶⁵ Erica Goode, *Internet Lets a Criminal Past Catch Up Quicker*, N.Y. Times, Apr. 29, 2011, at A17.

III. THE HEALTH LAW FRAMEWORK: REGULATING SOCIAL STIGMA IN THE INFORMATION AGE

Like Title VII, the ADA and GINA were enacted to protect against discrimination in employment. These laws, however, are normatively and doctrinally distinct from Title VII in ways that are quite relevant to countering employment discrimination against former offenders.¹⁶⁶ Part III will map the normative commitments of the ADA and GINA, and suggest that the way these laws operate to mitigate social stigma and attendant discrimination offers a useful model for conceptualizing and curtailing the discrimination in employment that results from dual criminal record and minority status.

A. *The ADA and the Stigma of a Disability*

A direct descendant of the Civil Rights Act of 1964, the ADA was enacted by Congress in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”¹⁶⁷ “a discrete and insular minority” that has “been faced with restrictions and limitations, subject[] to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.”¹⁶⁸ Crafted to provide muscular federal government support for the enforcement of its standards,¹⁶⁹ the law strives to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency”¹⁷⁰ to the estimated fifty-four million individuals in the United States with one or more physical or mental disabilities.¹⁷¹

Of the ADA’s five titles, the first deals with employment,¹⁷² and establishes that “[n]o covered entity shall discriminate against a qualified

¹⁶⁶ Although the EEOC has addressed race discrimination in employment against former offenders, it has not addressed how the ADA and GINA may apply in this context.

¹⁶⁷ 42 U.S.C. § 12101(b)(1) (2006).

¹⁶⁸ *Id.* § 12101(a)(7); see also *id.* § 12101(a)(6) (noting stigma and severe disadvantages faced by those with disabilities); *id.* § 12101(b)(1) (stating the goal of eradicating discrimination against the disabled).

¹⁶⁹ See *id.* § 12101(b)(2)–(4).

¹⁷⁰ *Id.* § 12101(a)(8).

¹⁷¹ See Press Release, U.S. Census Bureau, 20th Anniversary of the Americans with Disabilities Act: July 26 (May 26, 2010), available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff13.html.

¹⁷² See 42 U.S.C. §§ 12111–17 (2006).

individual with a disability because of the disability” in employment.¹⁷³ Title I applies to both public and private employers and follows from *Griggs* and its progeny to the extent that it prohibits intentional and facially neutral employment policies that negatively affect the disabled, who, like racial minorities, face tremendous barriers to employment.

In a move intended to target misperceptions and societal stigma against the disabled, Congress enacted the ADA Amendments Act of 2008 (“ADAAA”), which expanded the definition of disability under the ADA to cover *all* persons with a physical or mental impairment that is not minor or transitory.¹⁷⁴ The legislative history of the ADAAA indicates that Congress was concerned that the ADA failed to adequately protect individuals with highly stigmatized disabilities—such as bipolar disorder, depression, and epilepsy—which courts generally considered insufficiently debilitating to warrant protection.¹⁷⁵ Coverage of such impairments was critical because, as one scholar explained, “[a]lthough the social stigma associated with visible physical disability is high, the stigma associated with nonvisible disabilities; such as mental illness, is even higher.”¹⁷⁶

The law as amended makes clear that the central inquiry should be on whether discrimination has occurred, not on whether the disability was

¹⁷³ See *id.* § 12112(a). Employment includes “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.*

¹⁷⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12112 (Supp. II 2008)). The 2008 Amendments Act:

Emphasize[d] that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. . . . The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

U.S. Equal Emp’t Opportunity Comm’n, Notice Concerning The Americans with Disabilities Act (ADA) Amendments Act of 2008, http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm (last visited Jan. 27, 2014). A plaintiff who sues for a reasonable accommodation, however, must still demonstrate a substantial limitation of a major life activity. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(3)(A) (2006)).

¹⁷⁵ See Jeannette Cox, Disability Stigma and Intraclass Discrimination, 62 Fla. L. Rev. 429, 455 n.92 (2010). The legislative history of the ADA also indicates an intent to address the stigma attached to disability status. See S. Rep. No. 93-1297, at 37–38, 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388–91, 6413–14.

¹⁷⁶ Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* 8 (Allison Risko & Amy J. Clarke eds., 2001).

sufficiently severe.¹⁷⁷ The ADAAA thus strives to alter public perception of the disabled by eradicating disability-related stigma. In so doing, the law demonstrates an awareness that negative social attitudes and associations can be just as, if not more, disabling than the impairments themselves.¹⁷⁸

B. The GINA and the Stigma of a Genetic Disorder

The GINA was similarly enacted out of concern that knowledge of a genetic predisposition for disease could result in social stigma. Hailed by Senator Edward Kennedy as the “first major new civil rights bill of the new century,”¹⁷⁹ the GINA precludes discrimination on the basis of genetic information for employment and health insurance purposes.¹⁸⁰ Title II of the law imposes strict confidentiality and nondisclosure requirements on all employee genetic information by prohibiting employers from requesting, requiring, or purchasing genetic information related to their employees during and after the job application or interview process.¹⁸¹

¹⁷⁷ While the original text of the ADA defined disability as any “physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment,” 42 U.S.C. § 12102(2)(A)–(C) (2006), the law as amended stated that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability.” ADA Amendments Act of 2008 § 5(a).

¹⁷⁸ See Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. Mich. J.L. Reform 585, 586–87 (2003) (discussing past and present stereotypes and stigmas associated with mental illness).

¹⁷⁹ Kathy L. Hudson et al., *Keeping Pace with the Times – The Genetic Information Nondiscrimination Act of 2008*, 358 New Eng. J. Med. 2661, 2662 (2008) (quoting U.S. Senator Edward Kennedy) (internal quotation marks omitted); see also Genetic Information Nondiscrimination Act of 2008, H.R. 493, 110th Cong. § 2 (2008) (enacted) (giving background information describing legislators’ motivations).

¹⁸⁰ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, §§ 101–106, 201–213, 122 Stat. 881–920 (to be codified in scattered sections of 26, 29, and 42 U.S.C.). The law applies to private and public sector employers, employment agencies, and insurance companies. See Daniel Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008*, 19 Geo. Mason U. C.R. L.J. 311, 313 (2009). Genetic information is defined as information about an “individual’s genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual.” See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 101, 122 Stat. 885 (codified as amended at 29 U.S.C. § 1191b(d) (2006)).

¹⁸¹ See Genetic Information Nondiscrimination Act of 2008 § 202.

The GINA explicitly covers only genetic information to the exclusion of other recognized bases of discrimination, such as race, sex, ethnicity or age, where this information “is not derived from a genetic test.”¹⁸² And although the GINA is not premised on the existence of a socially cognizable “genetic underclass,”¹⁸³ the backers of the law were nevertheless concerned that genetic discrimination could have a disproportionate effect on historically marginalized groups.¹⁸⁴ Acknowledging this concern, Congress emphasized that “many genetic conditions and disorders are associated with particular racial and ethnic groups and gender,” which render these groups more likely to be “stigmatized or discriminated against as a result of that genetic information.”¹⁸⁵ Thus, the GINA evinces an understanding that allowing the acquisition and use of genetic information would likely perpetuate and intensify the social disadvantage and stigma that emerges from gender, racial, and ethnic minority status.¹⁸⁶

C. Racial Minorities and the Stigma of a Criminal Record

Like the populations governed by the ADA and GINA, individuals from racial minority groups with criminal records experience social stigma and are, in fact, among the most marginalized groups in the coun-

¹⁸² Genetic Information Nondiscrimination Act of 2008, 29 C.F.R. § 1635.3(c)(2) (2011); see also 42 U.S.C. § 2000ff(4)(C) (Supp. III 2010) (stating that genetic information “shall not include information about the sex or age of any individual”).

¹⁸³ See Jessica L. Roberts, Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act, 63 Vand. L. Rev. 439, 484 (2010) (observing that GINA is “without a recognized category of people targeted by its protections”).

¹⁸⁴ See Elaine Draper, The Screening of America: The Social and Legal Framework of Employers’ Use of Genetic Information, 20 Berkeley J. Emp. & Lab. L. 286, 288, 291 (1999) (arguing that the use of an employee’s genetic information in employment decision making will “exacerbate existing racial and class stratification”); Elizabeth Pendo, Race, Sex, and Genes at Work: Uncovering the Lessons of *Norman-Bloodsaw*, 10 Hous. J. Health L. & Pol’y 227, 229, 250–53 (2010) (noting that employers’ acquisition and use of employees’ genetic information “often reflect[] and reinforce[] long-standing patterns of stratification by race and sex”).

¹⁸⁵ See 42 U.S.C. § 2000ff (Supp. II 2006) (explaining this finding by referencing historical discrimination against carriers of sickle cell anemia—“a disease which afflicts African-Americans”).

¹⁸⁶ See, e.g., Draper, *supra* note 184, at 288, 291 (explaining that employers’ access to and use of genetic information “exacerbate existing racial and class stratification” because genetic information is used to reinforce the pre-existing “layering of our society by race and ethnicity, gender, and social class”); Pendo, *supra* note 184, at 229, 250–53 (observing “that the acquisition and use of genetic information in the workplace is not neutral, and often reflects and reinforces long-standing patterns of stratification by race and sex”).

try.¹⁸⁷ Although having a criminal record is not precisely analogous to having a disability to the extent that one can be born with a disability while one ostensibly “earns” a criminal record, this is not always the case, particularly for racial minorities. Indeed, one-third of the individuals identified in criminal records databases have never been convicted of a crime as many criminal history reports contain arrests, including those where the charges were dropped entirely.¹⁸⁸ Such arrests occur most often in Black and Latino communities where stop and frisk policies and indiscriminate arrests are common.

To use New York City as an example, in 2011, the police stopped and questioned 684,330 people, approximately 87% of whom were Black or Latino, and 9% of whom were White.¹⁸⁹ Nearly 90% of those stopped had engaged in no wrongdoing, but such stops may result in an arrest that will be reflected in a criminal history report.¹⁹⁰ This practice has been shown to be quite widespread. In 2013, a New York federal court held the New York City Police Department (“NYPD”) liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks after finding that the NYPD had for years systematically stopped innocent people without any objective reason to suspect them of doing anything wrong.¹⁹¹

In March of 2012, the New York Civil Liberties Union filed a federal lawsuit against the NYPD’s practice of stopping and ticketing or arresting thousands of individuals for “trespassing in their own buildings if they fail[ed] to produce identification when they took out the garbage, check[ed] the mail,” or ventured out into the hallways.¹⁹² Another law-

¹⁸⁷ See *supra* Sections I.D and III.C.

¹⁸⁸ See Kyckelhahn & Cohen, *supra* note 15, at 1, 3 (examining the seventy-five most populous counties in the United States).

¹⁸⁹ Kate Taylor, Record Number of Street Stops Prompts a Protest, N.Y. Times City Room Blog (Feb. 14, 2012, 5:05 PM), <http://cityroom.blogs.nytimes.com/2012/02/14/record-number-of-street-stops-prompts-a-protest/>.

¹⁹⁰ See e.g., Editorial, Stop and Frisk, Continued, N.Y. Times (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/opinion/stop-and-frisk-continued.html> (describing a federal lawsuit against the NYPD for stopping and arresting individuals who had engaged in no wrongdoing).

¹⁹¹ *Floyd v. City of New York*, Nos. 08 Civ. 1034 SAS, 12 Civ. 2274 SAS, 2013 WL 4046217, at *1, *2 (S.D.N.Y. Aug. 12, 2013); see Jim Dwyer, Police Stops are Down; So is Murder, N.Y. Times, Feb. 5, 2013, at A18, available at <http://www.nytimes.com/2013/02/06/nyregion/police-stops-are-down-in-new-york-so-is-murder.html>.

¹⁹² See Editorial, *supra* note 190. Such a trespass arrest would be reported to New York’s security guard licensing agency, which could result in the loss of a potential job. See Jeffrey

suit was filed against the NYPD in 2010 for employing a similar patrol system in the city's public housing,¹⁹³ and in 2013, a federal judge found unconstitutional the NYPD's practice of indiscriminately stopping people in front of private residential buildings in the Bronx.¹⁹⁴ The overwhelming majority of those affected by these practices are members of racial minority groups.¹⁹⁵

Another federal lawsuit filed in 2012 accused the NYPD of stopping and frisking hundreds of thousands of people each year solely on the basis of race.¹⁹⁶ This policy has led to a dramatic increase in the number of arrests for possession of small amounts of marijuana.¹⁹⁷ Many of those arrested are under the age of twenty-six and have typically not had the opportunity to establish themselves in the labor market.¹⁹⁸ Nevertheless, they can be denied employment opportunities based on these arrests, which would appear during a routine employment background check, even if the prosecutor declined to file charges.

This problem of racial profiling by police officers is not confined to low-income communities. Consider the case of Harvard Professor Henry Louis "Skip" Gates, Jr., who was arrested in front of his own home in Cambridge, Massachusetts by a local police officer responding to a reported burglary.¹⁹⁹ A less well-known person under the same circumstances could later be denied a job or promotion based on a record of such an arrest.

With respect to serious offenses, some degree of stigmatization may be appropriate and every former offender may not be well suited to work in all jobs. These individuals, however, should be entitled to a second chance after paying their debt to society. They should not be summarily

Toobin, Rights and Wrongs: A Judge Takes on Stop-and-Frisk, *The New Yorker* (May 27, 2013), http://www.newyorker.com/reporting/2013/05/27/130527fa_fact_toobin.

¹⁹³ See Editorial, *supra* note 190.

¹⁹⁴ See Joseph Goldstein, Police Stop-and-Frisk Program in Bronx Is Ruled Unconstitutional, *N.Y. Times* (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html?_r=0.

¹⁹⁵ N.Y. Civil Liberties Union, Stop-And-Frisk 2011, NYCLU Briefing 5–7 (2012).

¹⁹⁶ See *Ligon v. City of New York*, 925 F. Supp. 478, 484–85 (S.D.N.Y. 2013); see also N.Y. Civil Liberties Union, *supra* note 195, at 7 (concluding that in the New York City area, "[y]oung black and Latino males were the targets of a hugely disproportionate number of stops in 2011").

¹⁹⁷ See Levine & Small, *supra* note 20, at 4.

¹⁹⁸ *Id.*

¹⁹⁹ See Abby Goodnough, Harvard Professor Jailed; Officer Is Accused of Bias, *N.Y. Times* (July 21, 2009), <http://www.nytimes.com/2009/07/21/us/21gates.html>.

denied the opportunity to compete for legitimate employment that would enable them to support themselves and their families, pay their taxes, and make a positive contribution to their communities and the economy.

Individuals should not suffer a lifetime employment penalty for an unsubstantiated arrest, youthful indiscretion, minor infraction, or more serious offense that occurred in the remote past.²⁰⁰ Yet this is exactly what is happening, and studies show that the stigma of having a criminal record is significantly more damaging for racial minorities than for Whites, resulting in a criminal records “penalty” that limits profoundly their chances of achieving gainful employment.²⁰¹ This penalty enables and sustains a chronic social and civil incapacitation of the millions of individuals with joint minority and criminal record status that effectively disables their basic ability to compete in our society and to assume a productive and responsible place in it.²⁰² Because the current Title VII remedial framework was designed to address discrimination on the basis of race, gender, or national origin—not the compound stigma and attendant disadvantages that flow from dual criminal record and minority status—it cannot serve as an effective solution.

The ADA and GINA, in contrast, offer a conceptual model that may succeed where the Title VII scheme has failed in addressing the stigma and discrimination that stem from the use of criminal records in the context of employment. This is because, despite their similar goals, the ADA and GINA are strikingly different from conventional race discrimination employment law in three important ways. First, in contrast to Title VII, both the ADA and GINA were designed to target discrimination

²⁰⁰ For example:

[W]ith just a few exceptions, criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service. The exceptions involve certain statutory bars to Federal employment. For example, 5 USC 6313 includes a 5-year bar if you are convicted of inciting a riot. 18 U.S.C. 2381 bans from future Federal employment anyone who has been convicted of treason. One of the most common statutory debarments is 18 USC 922. It requires an indefinite bar from any position requiring the individual to ship, transport, possess, or receive firearms or ammunitions if you were convicted of a misdemeanor crime of domestic violence.

Robert H. Shriver, III, Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, U.S. Equal Emp’t Opportunity Comm’n (July 26, 2011), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/shriver.cfm>.

²⁰¹ Pager et al., *supra* note 104, at 196, 200; see also Pager, *Criminal Record*, *supra* note 25, at 959 (documenting the racially disparate negative impact of having a criminal record).

²⁰² See, e.g., Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* 168 (2005); Uggen & Thompson, *supra* note 28, at 166 (finding that legitimate earnings tend to reduce illegal earnings).

based on a trait or condition that, like the existence of a criminal record, may not be readily apparent to the casual observer, but which carries a powerful social stigma that may form the basis of an adverse employment decision. Second, the existence of a disabling condition, like the existence of a criminal record, is relevant to employment decision making and, unlike race, can be a licit ground upon which to exclude an individual from employment.

Third, because employers are permitted to consider potentially stigmatizing information about employees and job candidates in the health law context as in the criminal records setting, the ADA and GINA have established doctrinal schemes regulating the flow of information that may form the basis of an adverse employment decision in order to preemptively prevent discrimination, while ensuring equality of opportunity. Conceptualizing criminal records discrimination through the lens of social stigma offers a fruitful way of understanding and curbing prophylactically the discrimination that results from membership in a racial or ethnic minority group and having a criminal record.

IV. OPERATIONALIZING THE HEALTH LAW FRAMEWORK

This Part will propose the Health Law Framework, a legal model based on the ADA and GINA that modifies and strengthens the existing Title VII/FCRA doctrinal scheme by accounting for the unique stigma that attaches to dual criminal record and minority status. This Part will demonstrate the ways in which the doctrinal structure and normative commitments of the ADA and GINA can be incorporated into Title VII and the FCRA to enable the EEOC and FTC to more effectively accomplish their goals of ensuring employment opportunities for people with criminal records, while balancing the interests of employers and society at large.

The Health Law Framework, therefore, adopts the ADA's focus on limiting employers' acquisition and use of stigmatizing information during the hiring process, which serves as a model for appropriately regulating the flow of data relevant for employment decision making in the criminal records setting. The Health Law Framework also incorporates the ADA's emphasis on "reasonable accommodations," managing risk, and balancing costs, which together suggest a more nuanced approach to protecting the interests of people with criminal records, while allowing employers to make fair and effective hiring decisions. In addition, the way the GINA operates to preempt discrimination by controlling em-

employers' use of technology to access potentially stigmatizing information holds tremendous promise as a means of curtailing employers' reliance on criminal records to screen people of color with criminal records out of the employment pool.

This Part will explain how these doctrinal aspects and attendant norms of the ADA and GINA animate the Health Law Framework by allowing for more robust enforcement of Title VII and the FCRA. It then will illustrate the practical implications, potential challenges, and expected benefits of the Health Law Framework.

A. Incorporating Specific ADA and GINA Norms into the Title VII/FCRA Scheme

As discussed in Part II, the Title VII/FCRA regulatory scheme has several doctrinal and practical deficiencies that make getting hired and challenging employment discrimination very difficult for minorities with criminal records, as it fails to address several important concerns, including: the significant inaccuracies contained in many criminal history reports; the practical difficulties created by Title VII that render avoiding discrimination in hiring and challenging adverse employment decisions exceptionally difficult for people of color with criminal records; the way information technology has altered considerably, and often adversely, the way employers screen applicants for jobs; and the ways in which dual criminal records and minority status produce a unique and debilitating stigma that can form an almost insurmountable barrier to legitimate employment. The Health Law Framework, with its reliance on ADA and GINA norms, provides a better approach.

Both the ADA and GINA are designed to prohibit discrimination in employment preemptively. The ADA focuses on regulating the transmission of potentially stigmatizing data during the hiring phase because, as studies have found, the most common form of discrimination against individuals with disabilities is the denial of a job for which the individual is qualified, followed by the refusal of an interview on the basis of a disability.²⁰³ The ADA precludes employers from attempting to learn

²⁰³ See Harris Interactive Inc., Detailed Results from the 2004 NOD-Harris Survey of Americans with Disabilities 7 (2004), available at <http://nod.org/assets/downloads/NOD-Harris-Results-2004.pdf>; see also Am. Bar Ass'n Comm'n on Mental & Physical Disability Law, The National Conference on the Employment of Lawyers with Disabilities 10–11 (2006), available at http://www.abanet.org/disability/docs/conf_report_final.pdf (reporting

whether an applicant has a disability prior to making a job offer (that is, during the pre-offer period). Thus, although an employer may inquire into the ability of an applicant to perform job-related functions,²⁰⁴ the employer may not elicit information likely to reveal the existence of a disability.²⁰⁵ This prohibition applies to written questionnaires and questions asked during interviews,²⁰⁶ and it is intended to allow individuals with disabilities “a fair opportunity to be judged on their qualifications”²⁰⁷ and to move beyond the “initial barrier” at which an employer may unfairly judge applicants on the basis of their “disabilities rather than abilities.”²⁰⁸

Once a job offer has been extended, but prior to the individual commencing work, an employer may ask disability-related questions. If, however, an individual is denied a job because these questions reveal a disability, then, as under Title VII, the employer must demonstrate that the exclusionary criteria are job-related and consistent with business necessity.²⁰⁹

The GINA generally prohibits employers from seeking to obtain genetic information at any time during employment and, notably, the GINA’s implementation regulations explicitly apply to the Internet. For example, the term “request” is interpreted broadly to cover Internet searches on individuals that are likely to result in a covered entity ob-

that almost half of individuals surveyed believed that they were denied employment opportunities because of their disabilities).

²⁰⁴ See 42 U.S.C. § 12112(d)(2)(B) (2006) (explaining that employers may ask whether an applicant can perform “job-related functions”).

²⁰⁵ See *id.* § 12112(d)(2)(A).

²⁰⁶ See U.S. Equal Emp’t Opportunity Comm’n, *supra* note 138, at 15. An employer cannot ask disability related questions, whether direct (“do you have a disability”) or indirect (“have you ever taken the medication AZT?”). *Id.* at 3–4.

²⁰⁷ *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000) (internal quotation marks omitted) (citing 135 Cong. Rec. § 10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

²⁰⁸ *Id.*

²⁰⁹ 42 U.S.C. §§ 12112(d)(4)(A), 12113(a). The employer can only withdraw the offer if it can show that the candidate is unable to perform the essential functions of the job (with or without accommodation), or that the candidate poses a significant risk of causing substantial harm to herself or others. Employers are not required to hire job applicants if they are unable to perform all of the essential functions of the job, even with reasonable accommodation. However, an employer cannot reject a job seeker simply because the disability prevents her from performing minor duties that are not essential to the job. 29 C.F.R. pt. 1630 app. (2003); 29 C.F.R. § 1630.10 (2000); 29 C.F.R. § 1630.14(b)(3) (2003).

taining genetic information.²¹⁰ This provision includes searches of court records and medical databases. Although the law outlines certain limited exceptions, including inadvertent acquisition, the EEOC regulations emphasize that receipt of genetic information will not generally be considered inadvertent unless the employer instructs the source of the material to exclude genetic information.²¹¹ The law also includes safe harbor language for commercial or publicly available information;²¹² however, covered employers are precluded from searching such sources with the intention of acquiring an individual's genetic information.²¹³

While this combined conceptual scheme may not be applicable in its entirety to the criminal records context, several aspects offer a more fine-grained and potentially more effective approach to addressing the discrimination experienced by individuals of color with criminal records. First, it enables these individuals to proceed beyond the initial phase at which an employer may unjustly use their stigmatized status as the basis for employment exclusion. Data show that even a brief interaction or interview, which is the norm for low-wage jobs, gives job candidates the chance to show their work ethic, communication skills, and other "soft skills" that are difficult to capture on a resumé.²¹⁴ This personal interaction with a potential employer is particularly crucial for individuals from stigmatized racial or ethnic groups, for whom such contact has been shown to play an important role in neutralizing employers' initial biases, thereby mediating the effects of criminal stigma and im-

²¹⁰ 29 C.F.R. § 1635.8(a) (2011). The term "request" also includes actively listening to a third-party conversation and searching personal effects.

²¹¹ See 29 C.F.R. § 1635.8(b)(1) (2011). Examples of inadvertent acquisition include accidentally overheard conversations regarding genetic information or information gleaned through casual conversation. *Id.* § 1635.8(b)(3)(ii)(A)–(B).

²¹² 29 C.F.R. § 1635.8(b)(4). Publicly available sources include: "newspapers, magazines, periodicals, or books, or through electronic media, such as information communicated through television, movies, or the Internet," as well as "social networking sites and other media sources which require permission to access from a specific individual or where access is conditioned on membership in a particular group, unless the . . . [employer] can show that access is routinely granted to all who request it." *Id.* § 1635.8(b)(4)(ii).

²¹³ See *id.* § 1635.8(b)(4)(iii)–(iv).

²¹⁴ See Devah Pager, Written Testimony for EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records, U.S. Equal Emp't Opportunity Comm'n (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm>. Moreover, according to Professor Pager, "in the case of black ex-offenders, for whom employers' concerns are likely particularly strong, limits on interaction reduce opportunities to contextualize a conviction or to demonstrate evidence of successful rehabilitation." *Id.*

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proving hiring outcomes.²¹⁵ To this end, and in keeping with the ADA model, information regarding criminal record status should be restricted to the conditional-offer period. Thus, employers would no longer be permitted to elicit information about a job seeker's criminal history status, including through questionnaires and application forms, prior to or during an initial interview, unless the job is one for which background checks are required by law.²¹⁶

In accordance with the GINA, employers should be precluded from requesting, requiring, or purchasing a job applicant's criminal records, including information obtained via the Internet, from sources such as criminal records databases and online court records. Like the ADA, however, this restriction need apply only to the pre-conditional-offer period.²¹⁷

With respect to enforcing the Health Law Framework's prohibition on access to criminal history information until the preliminary offer phase, the FCRA already requires employers to provide a job candidate's signature prior to obtaining a criminal history report. These provisions could be enhanced by mandating that employers provide biometric information from a job applicant, such as a fingerprint, before access to criminal records databases is permitted.²¹⁸ Indeed, the FBI's Automated Fingerprint Identification System already contains electronic fingerprints submitted by individual states, which correspond to specific criminal records stored in the FBI's comprehensive criminal history database, the III.²¹⁹ While this expansive database is currently accessible for employment purposes only to certain state and federal and nongovernmental personnel in specific government-regulated jobs and industries, it could be expanded to other types of employers.

²¹⁵ *Id.*

²¹⁶ State and federal laws require background checks for positions that involve working with children, the elderly, or the disabled, and for jobs where the applicant must be granted certain security clearances. See Jacobs, *supra* note 104, at 395–96.

²¹⁷ This policy would be consistent with municipal and state “ban the box” measures. At least fifty-three cities and counties—including Chicago, IL; Philadelphia, PA; San Francisco, CA; Worcester, MA; Austin, TX; and Baltimore, MD—have enacted “ban the box” laws, which postpone criminal background checks until the end of the hiring process. See Nat'l Emp't Law Project, *supra* note 24, at 31–32. Ten states have adopted ban the box laws; thirteen cities and counties apply ban the box laws to private contractors; and Philadelphia, PA and Newark, NJ apply these laws to private employers. See *id.* at 1.

²¹⁸ See SEARCH, *supra* note 16, at 84–86 (calling for commercial industry to increase use of fingerprint and other biometric tools in its identification verification methodologies).

²¹⁹ See *supra* Section I.A.

The policy rationale for requiring biometric information prior to gaining access to criminal history data is that if an offense is not of such significance that fingerprinting is required, then it should not be used as the basis for an adverse employment decision. Thus, low-level infractions that call for discretionary prosecutorial decision making—such as curfew violations, disorderly conduct, false alarms, minor traffic violations, and loitering—should be excluded from consideration “absent compelling circumstances.”²²⁰ Such offenses are generally of such little consequence that it is unclear how they could be used to accurately forecast one’s suitability for employment.²²¹

1. *Benefits of the Health Law Framework*

This doctrinal scheme serves several important functions. First, it lessens the burden for plaintiffs associated with identifying the specific practice that is responsible for the rejection, which is a major obstacle under Title VII for minorities with criminal records. Like employment discrimination against the disabled, employment discrimination against people with criminal records occurs primarily during hiring: a time when applicants may have little knowledge of why they were denied jobs. The Health Law Framework simplifies divining whether discrimination has occurred by forcing the employer to articulate a justification for rejecting the applicant after having already indicated approval of the candidate.

Not only does this model preempt discrimination by reducing an employer’s ability to base an adverse employment action on the stigma of a criminal record and minority status, it enhances Title VII by enabling a job candidate to advance to the point where the “job related” and “consistent with business necessity” provisions of Title VII can be applied.²²² This model also gives teeth to the *Green* factors—the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question—which must be considered when determining job-relatedness and business necessity.²²³ Hence, it would be-

²²⁰ See Moskowitz, *supra* note 19.

²²¹ See *id.*

²²² 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (setting forth the “job related” and “consistent with business necessity” tests used in disparate impact employment discrimination cases).

²²³ See *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977); see also U.S. Equal Emp’t Opportunity Comm’n, *supra* note 147.

come more difficult for an employer to avoid these considerations.²²⁴ Yet, the framework would also protect employers to the extent that they may still, in accordance with Title VII, distinguish between an arrest and conviction when determining job-relatedness and consistence with business necessity.²²⁵

Second, preventing employers from asking about or acquiring records until the conditional-offer phase would allow for more robust enforcement of the FCRA's existing provisions that require employers to obtain a job candidate's consent prior to conducting a background investigation through a BCC or other third-party screening company, and that mandate notifying the applicant if the report is used to make an adverse decision.²²⁶ The Health Law Framework, for instance, would alert job candidates when an employer has unlawfully based an employment exclusion on the existence of an arrest record in violation of the EEOC enforcement guidance. It would also let job seekers know when a BCC has violated the FCRA by disseminating a record of an arrest that occurred more than seven years prior and that did not lead to the entry of a judgment of conviction. Although a record of a conviction may lawfully form the basis of a work exclusion, an employer is more likely to assess objectively the relevance of a job candidate's conviction if the employer is already aware of the candidate's qualifications and experience. This proposed model allows for this to occur.

Third, the Health Law Framework would alleviate the problems caused by the pervasive inaccuracies that now plague criminal history reports. In so doing, it would protect the interests of individuals with criminal records as well as individuals who have had no involvement with the criminal justice system but who may unknowingly have a record due to identity theft or error. The Health Law Framework, for example, would remedy the problem of false positive identifications by providing job candidates a meaningful opportunity to explain, rebut, and/or check the veracity of the records being considered, in accordance with the FCRA, before being disqualified from employment. A conviction record contained in a criminal history report may be outdated, the conviction may have been expunged, a reported felony offense may

²²⁴ See *supra* Section II.B.

²²⁵ Moreover, under Title VII employers are given more latitude in determining business necessity, particularly when dealing with serious offenses that have occurred recently or when they are related to the nature of the job in question. See *supra* Section II.B.

²²⁶ See 15 U.S.C. § 1681b(b)(2)(A), (b)(3)(A) (2012).

have been subsequently reduced to a misdemeanor, or there may be other evidence of an error in the record. This proposed framework would provide job seekers with the opportunity to identify these concerns and, if an adverse employment decision were made, compel employers to articulate the ways in which the exclusion was job-related or consistent with business necessity.

2. Practical Implications of the Health Law Framework

This proposal may seem to suggest sweeping change or require new legislation for its implementation; however, the doctrinal architecture exists for accomplishing these norms. The Health Law Framework simply modifies and strengthens existing laws, while offering several practical advantages over the current regulatory scheme. First, this discrete proposal amends Title VII and the FCRA in ways that render these laws more responsive to the needs of employers and potential employees with criminal records.

In addition, the EEOC and FTC are already tasked with guarding against the discrimination that stems from the use of criminal history reports in employment, and this framework allows these agencies to more effectively do their jobs by curbing discrimination prophylactically. Thus, the Health Law Framework does not alter the existing federal administrative structure, as the EEOC and FTC would continue enforcing their respective statutes as amended. This is significant because the EEOC, which enforces both the ADA and Title VII, is sensitive to the issue of stigma and has unique expertise with these legal doctrines.

Further, enforcing antidiscrimination norms in the criminal records context through the Health Law Framework confers several benefits that are unavailable through the use of an agency guidance document. For example, unlike the EEOC's guidance, which was not devised through the formal rulemaking process, actions taken under the Health Law Framework would have a basis in the statutory language of Title VII and would therefore be entitled to judicial deference.²²⁷ And unlike enforcement of the EEOC guidance, the Health Law Framework requires no additional congressional funding.

All told, importing the Health Law Framework into the criminal records context would provide the EEOC and FTC with a more effective

²²⁷ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (setting the standard for judicial deference to agency decision making).

mechanism for curbing the employment discrimination experienced by individuals with dual criminal records and minority status, while promoting access to equality and opportunity in employment. Although the doctrinal changes attendant to the Health Law Framework are modest, the effects for those with criminal records are of substantial consequence.

Significantly, states and local governments have already had great success with similar measures designed to ease the barriers to employment created by having a criminal record. Thirteen states and fifty-three cities and counties have enacted fair hiring protections,²²⁸ including “ban the box” laws;²²⁹ while several states have instituted other mechanisms, such as certificates of relief, to increase the employment prospects of those with criminal records.²³⁰ In order to preserve experimentation at the state and local levels, the Health Law Framework would not preempt state and local laws that provide higher levels of protection to employers

²²⁸ See Moskowitz, *supra* note 19, at n.47 (observing that a few states “presume rehabilitation after a specified number of years has passed since completion of a sentence if there has been no further involvement with the criminal justice system”); see also Nat’l Emp’t Law Project, *supra* note 24, at 30–31 (summarizing policies in the fifty-three states and cities that have explicitly prohibited or advised against pre-employment arrest inquiries in their fair employment laws due to concerns about the potentially discriminatory use of this information).

²²⁹ So-called “ban the box” measures seek to remove the box on employment applications that require an applicant to reveal the existence of a criminal record. Only after the applicant has secured an interview or been found qualified for the position may an employer inquire into the existence of a criminal record. If a criminal record is disclosed at this stage, the employer must determine the relevance of the record to the position in question, and, depending on the jurisdiction, consider additional factors, such as the amount of time since the conviction occurred, and evidence of rehabilitation. See, e.g., Minn. Stat. Ann. § 364.021(a) (West 2012) (“A public employer . . . may not . . . consider . . . the criminal record or criminal history of an applicant . . . until the applicant has been selected for an interview”); N.M. Stat. Ann. § 28-2-3(A) (West 2012) (“A board, department or agency of the state or any of its political subdivisions . . . shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.”); see also *Green*, 549 F.2d at 1159–60 (stating that the employer must consider “the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied”).

²³⁰ See e.g., 730 Ill. Comp. Stat. Ann. 5/5-5.5-15(a) (West 2013) (providing that “a certificate of relief from disabilities to an eligible offender” may be issued by the circuit court that imposed the sentence); N.Y. Correct. Law § 701(1) (Consol. 2005) (“A certificate of relief from disabilities may be granted . . . to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed . . . by reason of his conviction”); N.C. Gen. Stat. § 15A-173.2(a) (2013) (providing that misdemeanor or felony ex-offenders may petition the court “where the individual was convicted for a Certificate of Relief relieving collateral consequences”).

and individuals with criminal records. The federal scheme provided by the Health Law Framework would, however, provide additional clarity for employers and reduce the uncertainty and confusion now created by the many, often conflicting, state and local laws.

B. Challenges Raised by the Health Law Framework

1. Risk and Employer Costs

As the court in *El v. Southeastern Pennsylvania Transportation Authority* opined, employers' eagerness to adopt policies or practices that exclude those with a criminal record is based in part on their concerns about managing risk.²³¹ Employers seek to reduce their exposure to tort liability, including the costs that may be incurred as a result of litigation based on a negligent hiring or negligent retention claim, or under the theory of respondeat superior if an employee were to engage in criminal activity at work (such as theft, fraud, or violence). In the ADA and GINA contexts, employers are similarly concerned about the increased healthcare or other costs that may be imposed as a result of hiring a disabled individual or someone with a genetic predisposition toward developing a disease. Still, the expectation under both antidiscrimination doctrines is that the employer will assume this risk. Here the ADA's direct threat and reasonable accommodation analyses are instructive.

Under the ADA, an employer may remove or refuse to hire an individual with a disability if the employer can show that the individual would pose a "direct threat,"²³² which is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."²³³ Thus, in accordance with the ADA, an employer "cannot refuse to hire [a job candidate] based on a slightly increased risk, speculation about future risk, or generalizations about [the] disability."²³⁴ An employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.²³⁵ If the requested accommodation causes an "undue hardship"—that is, "if it would require sig-

²³¹ See 479 F.3d 232, 244 (3d Cir. 2006).

²³² See 42 U.S.C. § 12113(b) (2000); 29 C.F.R. § 1630.2(r) (2012).

²³³ 29 C.F.R. § 1630.2(r).

²³⁴ U.S. Equal Emp't Opportunity Comm'n, Job Applicants and the Americans with Disabilities Act, www.eeoc.gov/facts/jobapplicant.html (last modified Mar. 21, 2005).

²³⁵ *Id.*

nificant difficulty or expense”—the employer “still would be required to provide another accommodation that does not.”²³⁶ And “an employer cannot refuse to provide an accommodation solely because it entails some costs, either financial or administrative.”²³⁷ Hence the reasonable accommodation mandate serves as an explicit recognition of the fact that the employer is best able to bear the potential costs associated with employing a disabled employee or applicant.

In the criminal records context, the assumption for many is that a record of prior arrest or conviction indicates an increased risk that the individual will commit future crimes. Data, however, reveal that once those with criminal records have desisted from criminal activity or “stayed clean” for a few years, their chance of being arrested for a new crime essentially disappears.²³⁸ This point is widely referred to as the “‘point of redemption’—when a prior arrest no longer distinguishes the risk of future criminal arrests for that person compared to a similar person in the general population.”²³⁹ This point averages from three to seven years, depending on the age at which the arrest occurred.²⁴⁰ After remaining “clean for this period of time, these individuals were no more likely than anyone else to have another arrest in the future.”²⁴¹ For example, once 3.8 years has passed since the initial arrest, an eighteen-year-old arrested for burglary has the same risk of being arrested as an eighteen-year-old without a record.²⁴² This point of redemption occurs after 4.3 years for aggravated assault and after 7.7 years for robbery.²⁴³ The redemption point decreases as the individual ages, thus a person arrested for robbery at age twenty will have the same arrest rate as a non-offender after only 4.4 years.²⁴⁴ And individuals convicted of property crimes are significantly less likely than others to re-offend.²⁴⁵ Notably, at least one study shows that those with youthful offense histories are less likely to commit

²³⁶ See *id.*

²³⁷ *Id.*

²³⁸ Blumstein & Nakamura, *supra* note 11, at 13.

²³⁹ See Solomon, *supra* note 51.

²⁴⁰ Reaching the point of redemption takes longer—approximately eight years—for individuals who commit their first crime as a juvenile or who are first arrested for a serious offense. Still, the redemption point can be reached in just three or four years for an individual who is first arrested as an adult or who commits a less serious crime. *Id.*

²⁴¹ See *id.*

²⁴² See Blumstein & Nakamura, *supra* note 11, at 12–13.

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See Rodriguez & Emsellem, *supra* note 5, at 6.

a crime in the workplace than an employee who has never been convicted.²⁴⁶ Hence, predictions regarding the risk of future crime based simply on a criminal record are likely prone to error.

This is not to suggest that there are no risks or costs associated with hiring people with criminal records, which, like all hiring, involves an element of chance. However, employers are better able to assume the costs and risks involved in the hiring process than those who experience criminal records discrimination.²⁴⁷ Plus, as with the disabled, the social costs imposed by failing to facilitate employment for this population are tremendous. For instance, individuals released from prison without jobs are three times more likely to return to prison,²⁴⁸ and state expenditures to support the prison system have outpaced virtually all other state spending during the past twenty years, creating a substantial financial burden for states and municipalities.²⁴⁹ Today, federal, state, and local corrections budgets impose costs over \$56 billion a year on taxpayers.²⁵⁰ Estimates are that 600,000 to 700,000 prisoners will be released annually in this decade, equaling 30% of the annual growth of the labor force.²⁵¹ If they are unable to obtain legitimate employment, societal and economic expenditures will rise dramatically.

²⁴⁶ See Roberts et al., *supra* note 10, at 1429–30 (“Adolescent criminal convictions were unrelated to committing counterproductive activities at work [such as absenteeism, disciplinary problems, tardiness, etc.]. In fact, according to the [study findings], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or to steal things from work.”) (quoting from a study of New Zealand residents from birth to age twenty-six).

²⁴⁷ Employers who hire people with criminal records may qualify to receive federal and state tax credits through the Federal Bonding Program, which insures employers up to \$25,000 for losses due to “theft, forgery, larceny and embezzlement” by employees. See Program Background, The Federal Bonding Program: A U.S. Department of Labor Initiative, <http://www.bonds4jobs.com/program-background.html> (last visited June 21, 2014); see also *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) (rejecting employer’s argument that its fetal protection policies were necessary protection against substantial threat of liability).

²⁴⁸ Saltzburg, *supra* note 79.

²⁴⁹ Solomon, *supra* note 51.

²⁵⁰ Saltzburg, *supra* note 79.

²⁵¹ Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.* 6 (May 19–20, 2003) (unpublished manuscript), http://www.urban.org/UploadedPDF/410857_Freeman.pdf. More than 2.3 million people are incarcerated in federal and state prisons and local jails at any given time. See Jenifer Warren, *Pew Ctr. on the States, One in 100: Behind Bars in America 2008*, at 5–7 (2008) (“[M]ore than 1 in 100 adults is now locked up in America. With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of

Employment losses caused by criminal records discrimination now cost the country \$57 to \$65 billion per year,²⁵² and the effect of this type of discrimination on employment is most significant for African American men, reducing their employment rate an average of 2.3 to 5.3 percentage points.²⁵³ A study of New Jersey neighborhoods suggests that people with criminal records who face discrimination in the urban job market “depress the average wage for the city, which in turn negatively impacts property values, consumer spending, tax revenues” and the decisions of firms to move to urban neighborhoods.²⁵⁴ Moreover, many individuals with criminal records are the primary earners for their families; thus, employment discrimination against this population has negative third-party effects. For example, nearly 54% of those with criminal records are the parents of children under the age of eighteen, which means that millions of children will experience the debilitating effects of a parent’s inability to be evaluated fairly for a job.²⁵⁵ Nevertheless, despite these sobering social and economic costs, roughly 60% of the formerly incarcerated remain unemployed one year after release from prison.²⁵⁶

2008 stood at 2,319,258. . . . [O]ne in every 15 black males aged 18 or older is in prison or jail.”).

²⁵² Schmitt & Warner, *supra* note 35. Former offenders “lower overall employment rates as much as 0.8 to 0.9 percentage points; male employment rates, as much as 1.5 to 1.7 percentage points; and those of less-educated men as much as 6.1 to 6.9 percentage points.” *Id.*

²⁵³ *Id.* Even prior to the Recession of 2008, “[o]nce prison inmates are added to the jobless statistics, total joblessness among black men has remained around 40% through recessions and economic recoveries.” Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 *Am. J. Soc.* 1030, 1044 (1999). Moreover, “each male prisoner can expect to see his earnings reduced by approximately \$100,000 throughout his prime-earning years, following his period of incarceration.” Meredith Kleykamp et al., *Drug Policy Alliance, Wasting Money, Wasting Lives: Calculating the Hidden Costs of Incarceration in New Jersey* 9 (2008), available at <http://www.drugpolicy.org/resource/wasting-money-wasting-lives-calculating-hidden-costs-incarceration-new-jersey>.

²⁵⁴ See Cornell William Brooks, *Written Testimony at the EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. Equal Emp’t Opportunity Comm’n (July 26, 2011), available at <http://www1.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm?renderforprint=1>; see also Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, *Daedalus*, Summer 2010, at 20, 26–27; Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 *Crime & Delinq.* 410, 414–15 (2001) (“The sheer volume of individuals moving into and out of prison can dramatically alter the conditions of supply and demand in local labor markets.”).

²⁵⁵ The Pew Charitable Trusts, *supra* note 90, at 4.

²⁵⁶ Am. Bar Ass’n Comm’n on Effective Criminal Sanctions, *Report to the House of Delegates on Employment and Licensure of Persons with a Criminal Record in Second Chances*

In addition to allocating the costs associated with a disability, the “reasonable accommodation” mandate recognizes explicitly that removing employment barriers is an essential means of reducing social marginalization and is, indeed, a necessary component of full citizenship. The law should likewise encourage and accommodate the employment of individuals with criminal records because the importance of gainful employment for this population cannot be overstated. Overwhelming evidence indicates that stable employment is one of the best predictors of successful desistance from criminal activity.²⁵⁷ One New York City study, for instance, found that one-fifth to one-third of individuals admitted to prison were unemployed when admitted; and among those reincarcerated for parole violations, 89% were unemployed when the violation was committed.²⁵⁸ Research suggests that the positive effect of employment on the formerly incarcerated may be the increased chance it affords them of experiencing “close and frequent contact with conventional others” and the “informal social control[s]” of the workplace that support stability and adherence to social norms.²⁵⁹ Moreover, surveys consistently demonstrate widespread public belief “that helping ex-offenders find stable work [is] the most important step in helping them reintegrate into their communities.”²⁶⁰

To assuage employers’ concerns that hiring an individual with a criminal record will render them vulnerable to negligent hiring lawsuits, the EEOC could implement this regulatory scheme and then evaluate employers’ compliance with the *Green* factors.²⁶¹ As suggested by Cornell William Brooks, were an employer to become subject to a negligent hiring claim, the fact that the employer considered the *Green* factors (including the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question) should be

in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies 26, 27 (2007).

²⁵⁷ Christy A. Visher et al., Ex-offender Employment Programs and Recidivism: A Meta-Analysis, 1 J. Experimental Criminology 295, 311 (2005); see also Travis, supra note 202, at 168; Laub & Sampson, supra note 29, at 17–24 (discussing studies that identify work as a factor in effective desistance from crime).

²⁵⁸ N.Y.C. Bar Ass’n, Legal Employers Taking the Lead: Enhancing Employment Opportunities for the Previously Incarcerated 15 (2008), available at http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf.

²⁵⁹ Uggen, supra note 29, at 529, 531.

²⁶⁰ Travis, supra note 202, at 183.

²⁶¹ See Brooks, supra note 254.

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acknowledged by courts and used to support the employer's defense.²⁶² The EEOC could also track and participate in significant negligent hiring cases as a means of ensuring that the negligent hiring doctrine does not compromise the EEOC's efforts to ensure employment opportunity for qualified individuals.²⁶³

2. The Use of Race as a Proxy for Criminal Record Status

One concern that may be raised is that if employers cannot conduct criminal record screens early in the hiring process they will use race as a proxy for criminal record status, which will result in increased employment discrimination against racial minorities. This critique misapprehends the problem, as it is based on the assumption that employers use criminal record screens in a race neutral manner. Quite the contrary is true: Race plays a significant role in criminal record discrimination. As discussed previously, a disproportionate number of individuals from racial minority communities have criminal records.²⁶⁴ And studies demonstrate that the harmful effects of having a criminal record are borne disproportionately by racial minorities who are less likely to be considered for employment than a similarly situated White job candidate.²⁶⁵ Thus, it is clear that there is already a detrimental over-reliance on race in the hiring process, which has a disparate impact on individuals of color.

Implementation of the Health Law Framework would minimize rather than increase the use of race in employment decision making by adding another weapon to the arsenal of those who experience race discrimination. The Health Law Framework would not only alleviate the race discrimination that stems from criminal records discrimination, but also force employers to be much more explicit about their use of race when making employment decisions, thus driving their actions into the Title VII legal regime. Title VII, which is designed specifically to target race discrimination, could be used to amplify the discrimination reducing effect of the Health Law Framework and could also be strengthened to be more effective in countering the discrimination experienced by racial minorities in employment.

²⁶² Id.

²⁶³ See id.

²⁶⁴ Supra Section I.C.

²⁶⁵ Supra Section I.D.

Adopting the Health Law Framework while reinforcing Title VII is far better than maintaining the status quo, which allows employers to discriminate along racial lines with virtual impunity under the guise of screening job candidates for criminal records. Like all novel legal frameworks, the Health Law Framework must be adjusted and refined over time. Still, its implementation would do much to improve the employment prospects of the millions of individuals with dual criminal record and minority status, while combating race discrimination generally, and attending to the social, economic, and human costs imposed by criminal records discrimination.

3. *Efficacy of the ADA and GINA*

Some have contended that, although the ADA has improved the lives of the disabled in many important ways, structural factors have precluded the law from significantly increasing employment opportunities for this population.²⁶⁶ These factors include a “lack of personal-assistance services, assistive technology, and accessible transportation and, above all, the current setup of our health insurance system.”²⁶⁷ These structural barriers, however, are unique to the disabled and would not hinder the ability of the Health Law Framework to improve the chance of securing employment for those with criminal records.

Moreover, the ADA, like the GINA, serves an important expressive function, and the normative commitments that undergird both laws are likely to do the same in the criminal records setting. Indeed, the ADA has spurred the altering of social norms and attitudes toward the disabled in a decidedly positive way. The Health Law Framework may serve the same function in the criminal records setting without removing the sometimes-appropriate stigma that we may want to impose in this context. The reality, however, is that most criminal records are the result of a nonviolent or minor offense, or just an arrest; and innocent minorities are disproportionately subject to arrest. These individuals should not be shut out of the licit labor market, but rather should be able to compete for employment. This framework prompts employers to focus on the qualities and qualifications that are relevant to an individual’s ability to

²⁶⁶ See Samuel R. Bagenstos, *The Future of Disability Law*, 114 *Yale L.J.* 1, 23 (2004) (noting the “deep-rooted structural barriers” that keep the disabled out of the workforce); Vai Io Lo, *Promotion of the Employment of Persons with Disabilities in Japan, the United States, and China: Carrot, Stick, or Both?*, 29 *Ariz. J. Int’l & Comp. L.* 578, 580–81 (2012) (same).

²⁶⁷ Bagenstos, *supra* note 266.

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perform a given job, and it benefits employers by broadening the pool of qualified workers, while saving employers money by limiting background checks to only those in the final stages of consideration. Although every person with a criminal record may not be appropriate for all jobs, a criminal record should not be used to summarily dismiss an individual from the opportunity to be meaningfully considered for a job.

CONCLUSION

Employers, persons with criminal records, and government agencies, including the EEOC and FTC, are grappling with how to effectively deal with the use of criminal history reports in employment decision making. This proposal offers a point of departure for a more robust discussion, and provides a roadmap for where the law can and should go in attending to this problem. The EEOC must continue its bold efforts to address the disadvantages that members of racial and ethnic minority populations with criminal records experience when seeking gainful employment, yet the agency's efforts have not gone far enough. The unfettered access to arrest and conviction data currently enjoyed by employers perpetuates bias, stigma, and discrimination against people with criminal records and widens racial disparities. In the absence of legal reform, individuals with criminal records will continue to be ostracized and shunned as criminals, and, by virtue of their limited opportunities, may be forced into crime.

The Health Law Framework I have proposed addresses these concerns by strengthening both Title VII and the FCRA in ways that give the EEOC and FTC the tools necessary to more effectively curb employment discrimination. In so doing, this framework balances the equal employment opportunity interests of those with criminal records, the interests of those without criminal records in the accurate reporting of their status, employers' concerns regarding tort liability, and the public interest in workplace safety and security. This health law conceptual lens, which is based on reducing social stigma and its effects, strives to incentivize those with criminal records to rehabilitate and enter the job market without fear that the stigma of their record and race or ethnicity will form an insurmountable barrier to employment. It also encourages employers to rely on relevant criteria in their evaluation of criminal history reports, including the uniqueness of each applicant, the nature of the offense, the time since it occurred, the effort of the individual to reha-

bilitate, and the nature of the job—all important and necessary elements of fair and effective employment decision making.

The regulatory scheme offered here ensures that job candidates are first considered for employment based on their actual skills and experience, before consideration of any prior arrest or conviction, in an effort to avoid the unsound notion that criminal record histories accurately reflect a candidate's qualification or predict fitness for a job. This will minimize not only the chance that an employer will simply refuse to consider an applicant once a criminal record is revealed, but also the disincentive that unregulated access to criminal history reports may create with respect to applicants' willingness to apply for jobs. In so doing, this plan provides employers access to a deep reserve of applicants best qualified for the job and offers potential employees a fair chance at securing employment.