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THE *KOBAYASHI MARU* OF EX-OFFENDER EMPLOYMENT:  
REWRITING THE RULES AND THINKING OUTSIDE  
CURRENT “BAN THE BOX” LEGISLATION\*

I. INTRODUCTION

Philadelphia recently joined a series of states and municipalities in passing what has become known as “Ban the Box” legislation.<sup>1</sup> The “Box” in “Ban the Box” refers to the commonly used box on job application forms that asks applicants whether they have a prior criminal record.<sup>2</sup> Generally, these Ban the Box laws impose restrictions on employer inquiries into criminal histories by limiting: (1) what can be asked of prospective employees prior to their hire, (2) when the inquiries can be made, and (3) how far back into the criminal history record the employer can delve.<sup>3</sup> Most of these laws and ordinances are limited to public employers, but some impact private employers as well.<sup>4</sup>

The primary rationale for Ban the Box legislation is to prevent criminal recidivism by increasing employment opportunities for ex-offenders. Extensive research shows a relationship between unemployment and recidivism.<sup>5</sup> Generally, an employed person with a criminal record is less likely to reoffend than an unemployed person with a criminal record.<sup>6</sup> Approximately 7.5% of the U.S. adult population, or sixteen million

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1. *See* Athena D. Merritt, *Businesses Consider Effects of ‘Ban the Box’ Hiring Law*, PHIL. BUS. J. (April 29, 2011, 6:00 AM), <http://www.bizjournals.com/philadelphia/print-edition/2011/04/29/businesses-consider-effects-of-ban.html>; *see also* PHILA., PA., CODE tit. 9, ch. 9-3500 (2013) (imposing restrictions on criminal background checks performed by Philadelphia employers who employ ten or more employees).

2. Merritt, *supra* note 1.

3. *Id.*

4. *Id.*

5. *See, e.g.*, LEGAL ACTION NETWORK, NATIONAL BLUEPRINT FOR REENTRY: MODEL POLICIES TO PROMOTE THE SUCCESSFUL REENTRY OF INDIVIDUALS WITH CRIMINAL RECORDS THROUGH EMPLOYMENT AND EDUCATION 13 (2008) (noting that people with criminal records are “three times more likely” to recidivate when they are unemployed); Donald R. Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 CAP. U. L. REV. 1, 3 (1973) (noting unemployment as a primary factor in high rate of recidivism); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000) (concluding that “[o]ffenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportunities”); 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, 179 (2003) (concluding that “[a]s offenders gain more lawful opportunities . . . their illegal earnings quickly diminish”).

6. Stephen J. Tripodi et al., *Is Employment Associated With Reduced Recidivism?: The Complex*

people, are either felons or ex-felons.<sup>7</sup> Extensive research shows a relationship between unemployment and recidivism.<sup>8</sup> Generally, an employed person with a criminal record is less likely to reoffend than an unemployed person with a criminal record.<sup>9</sup> But, studies show that employers are less likely to hire ex-offenders.<sup>10</sup> Ban the Box legislation is therefore intended to aid in reducing recidivism rates by reducing the employment barriers that confront ex-offenders; by limiting an employer's access to a prospective employee's criminal background, employers will be less likely to discriminate against convicted criminals, thereby reducing criminal recidivism.<sup>11</sup>

In the majority of jurisdictions, however, negligent hiring is a cause of action that holds employers liable for hiring persons who the employer knew or should have known would create a foreseeable risk of injury to others.<sup>12</sup> Generally, the employer is negligent if the employer should have screened applicants more scrupulously and did not, or if the employer failed to respond to actual or constructive knowledge of the facts related to the heightened risk of harm.<sup>13</sup> Because of a belief that ex-offenders are more likely to commit crime, employers may end up discriminating against ex-offenders for fear of being exposed to liability under negligent hiring law.<sup>14</sup>

With the passage of Ban the Box statutes and their restrictions on employer criminal background checks, however, legislatures across the country are now voicing

*Relationship Between Employment and Crime*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 706, 708 (2010).

7. Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 281 (2006).

8. See, e.g., LEGAL ACTION NETWORK, NATIONAL BLUEPRINT FOR REENTRY: MODEL POLICIES TO PROMOTE THE SUCCESSFUL REENTRY OF INDIVIDUALS WITH CRIMINAL RECORDS THROUGH EMPLOYMENT AND EDUCATION 13 (2008) (noting that people with criminal records are three times more likely to recidivate when they are unemployed); Donald R. Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 CAP. U. L. REV. 1, 3 (1973) (noting unemployment as a primary factor in high rate of recidivism); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000) (concluding that "[o]ffenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportunities"); 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, 179 (2003) (concluding that, "[a]s offenders gain more lawful opportunities . . . their illegal earnings quickly diminish").

9. Stephen J. Tripodi et al., *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 706, 708 (2010).

10. See VERA KACHNOWSKI, EMPLOYMENT AND PRISONER REENTRY 2 (2005) (noting that a recent survey of 3,000 employers in four major metropolitan areas revealed that two-thirds of the employers would not knowingly hire an ex-prisoner); Harry J. Holzer et al., *How Willing are Employers to Hire Ex-Offenders?*, 23 FOCUS 40, 41 (2004) (noting that over forty percent of surveyed employers indicated that they would probably or definitely not be willing to hire an applicant with a criminal record for a job not requiring a college degree).

11. See *infra* Part II.A.3 for a discussion of the rationale behind Ban the Box legislation and the statistics that support it.

12. See *infra* Part II.B for a discussion of negligent hiring law.

13. Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 109 (1997).

14. Nancy B. Sasser, "Don't Ask, Don't Tell": *Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. RICH. L. REV. 1063, 1065 (2007).

an aversion to employers performing criminal background checks on prospective employees. Thus, employers are placed in a no-win situation: the common law encourages employers to conduct background checks on prospective employees to mitigate any foreseeable risk of injury, but with the passage of Ban the Box legislation, legislatures are hampering the background checks that employers can conduct. The result is a “legal minefield” in which employers face liability for not only refusing to hire ex-offenders, but also for hiring ex-offenders who later recidivate.<sup>15</sup>

This Comment will seek to marry the divergent rationales behind Ban the Box legislation and negligent hiring law. It begins by analyzing the history behind Ban the Box legislation,<sup>16</sup> noting the lack of ex-offender antidiscrimination coverage at the federal level.<sup>17</sup> A discussion of current Ban the Box statutes follows, emphasizing the peculiarities of several state statutes.<sup>18</sup> Finally, this Comment explains the various rationales behind Ban the Box legislation.<sup>19</sup>

Following the discussion of Ban the Box legislation, this Comment proceeds to analyze employers’ liability for the actions of their employees, particularly with respect to negligent hiring.<sup>20</sup> Negligent hiring law arose out of the duty employers have to keep certain third parties safe. Courts in different jurisdictions vary in their analysis of negligent hiring cases.<sup>21</sup> This creates uncertainty for employers, which in turn leads to increased compliance and litigation costs.<sup>22</sup>

Finally, this Comment suggests an ideal, uniform Ban the Box statute that should be incorporated in all jurisdictions. First, the ideal Ban the Box statute would apply to both public employers and certain private employers.<sup>23</sup> Private employers of a certain size would be exempted to avoid exposing them to the “potentially crushing expense of mastering the intricacies of the antidiscrimination laws.”<sup>24</sup> Additionally, the ideal statute would include a safe harbor for employers whose employees will have access to particularly vulnerable third parties, such as apartment complex employees with access to residents’ homes. Next, the ideal Ban the Box statute would limit the period during which an employer may perform a background check on the prospective employee to the period just after the first interview. Furthermore, the ideal Ban the Box statute would only limit an employer’s ability to access the prospective employee’s arrest

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15. See Donald R. Livingston, Partner, Akin, Gump, Strauss, Hauer & Feld, Address at the U.S. Equal Employment Opportunity Commission (Nov. 20, 2008) (noting that a legal minefield exists in which employers face liability for refusing to hire ex-offenders but also liability if they hire ex-offenders who recidivate).

16. See *infra* Part II.A for a discussion of the history of Ban the Box in the United States.

17. See *infra* Part II.A.1 for a discussion of the potential for successful claims of ex-offender discrimination under Title VII of the Civil Rights Act of 1964.

18. See *infra* Part II.A.2 for a discussion of current versions of Ban the Box legislation.

19. See *infra* Part II.A.3 for a discussion of various current versions of Ban the Box legislation in different jurisdictions.

20. See *infra* Part II.B for a discussion of negligent hiring law.

21. See *infra* Part II.B.1 for a discussion of how courts apply negligent hiring law.

22. See *infra* Part II.B.2 for a discussion of employers’ concerns regarding negligent hiring liability.

23. See *infra* Part III.A.1 for a discussion of why the ideal Ban the Box statute should only apply to public employers.

24. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (quoting *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 908 (9th Cir. 2001) (Graber, J., dissenting)).

record, but not limit the conviction information available to prospective employers, thereby allowing employers to make the most informed decision possible. Finally, the ideal Ban the Box statute would provide complying employers with a presumption that the employer was not negligent in hiring a given employee, should subsequent litigation for negligent hiring arise. By incorporating all of these provisions into a Ban the Box statute, legislatures can finally balance the interests of ex-offenders and employers in a way that supports public safety.

## II. OVERVIEW

Ban the Box legislation developed as a way to remove criminal background questions on job applications in order to protect against employment discrimination of ex-offenders.<sup>25</sup> With inadequate protection for ex-offenders under Title VII of the Civil Rights Act of 1964,<sup>26</sup> several state and local jurisdictions have adopted Ban the Box legislation to protect ex-offenders from being discriminated against when seeking employment. Hawaii,<sup>27</sup> Connecticut,<sup>28</sup> Massachusetts,<sup>29</sup> Minnesota,<sup>30</sup> and New Mexico<sup>31</sup> are among the states with Ban the Box legislation, and although each statute sets out to protect ex-offenders from employment discrimination, they differ substantially in their provisions.<sup>32</sup> Nevertheless, all Ban the Box statutes share the goal of preventing criminal recidivism by increasing employment opportunities for ex-offenders.<sup>33</sup>

Employers, however, are reluctant to hire ex-offenders for fear of liability, particularly under the theory of negligent hiring.<sup>34</sup> Negligent hiring is a cause of action under which an employer may be held liable for hiring a person who the employer knew or should have known would create a foreseeable risk of injury to others.<sup>35</sup> Although it seems straightforward, negligent hiring law can be quite unpredictable, as courts apply various standards to analyze negligent hiring cases.<sup>36</sup> In addition to being unpredictable, negligent hiring law can be very expensive for employers. When this cost is coupled with statistics showing that ex-offenders are more likely than not to

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25. See Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 757 (2007) (describing the efforts of an ex-offender group in San Francisco to combat discrimination against ex-offenders applying for city and county jobs).

26. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

27. HAW. REV. STAT. § 378-2.5 (West 2013).

28. CONN. GEN. STAT. ANN. § 46a-80 (West 2013).

29. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2013).

30. MINN. STAT. ANN. § 364.021 (West 2013).

31. N.M. STAT. ANN. § 28-2-3 (West 2013).

32. See *infra* Part II.A.2 for a discussion of several states' Ban the Box statutes.

33. See *infra* Part II.A.3 for a discussion of the rationale for Ban the Box legislation.

34. See JENNIFER FAHEY ET AL., CRIME & JUSTICE INST., EMPLOYMENT OF EX-OFFENDERS: EMPLOYER PERSPECTIVES ii (2006) (reporting that half of surveyed employers fear liability for hiring ex-offenders).

35. See RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958) (noting that an employer is subject to liability for harm resulting from his conduct if he is negligent "in the employment of improper persons . . . in work involving risk of harm to others"). See *infra* Part II.B for a discussion of negligent hiring law.

36. See *infra* Part II.B.1 for a discussion of how courts apply negligent hiring law.

reoffend, employers are all the more wary of hiring ex-offenders.<sup>37</sup>

A. *Ban the Box: An Attempt to End the Employment Discrimination of Ex-Offenders*

The Ban the Box movement began in 1998, when Hawaii imposed the first ban on criminal background checks.<sup>38</sup> Then, in 2004, a group of ex-offenders based in Oakland, California formed an organization called “All of Us or None,” which adopted the Ban the Box movement as one of its nationwide initiatives.<sup>39</sup> The organization argued that criminal background questions on job applications promote employment discrimination against ex-offenders, deter ex-offenders from applying, and even promote racial discrimination as well.<sup>40</sup> After several rallies and vigorous lobbying, San Francisco passed a resolution to eliminate the criminal record question from city job application forms—except where state or local law expressly bars people with certain convictions from a particular job—until after a tentative offer of employment has been made.<sup>41</sup> Even after a tentative offer of employment has been made, a criminal record would only be relevant if it created an unacceptable risk that the applicant could not fulfill the job’s requirements.<sup>42</sup>

Since then, Connecticut,<sup>43</sup> Massachusetts,<sup>44</sup> Minnesota,<sup>45</sup> and New Mexico<sup>46</sup> have joined Hawaii in enacting some form of Ban the Box legislation at the state level. At the local level, several cities around the country have adopted Ban the Box hiring policies and ordinances, including Chicago, Baltimore, Austin, Seattle, Jacksonville, Memphis, Cincinnati, Detroit, and Washington, D.C.<sup>47</sup> Like the statewide laws, these local laws typically only apply to public employers.<sup>48</sup> Philadelphia is the first major city to pass an ordinance that expressly covers private employers.<sup>49</sup>

37. See *infra* Part II.B.2 for a discussion of employers’ concerns regarding negligent hiring liability.

38. Carie Torrence, *Massachusetts Becomes the Second State to “Ban the Box” on All Employment Applications*, LITTLER (Aug. 11, 2010), <http://www.littler.com/publication-press/publication/massachusetts-becomes-second-state-ban-box-all-employment-applications>; see also HAW. REV. STAT. § 378-2.5 (West 2013) (allowing employers to consider criminal backgrounds only after the applicant has received a conditional offer of employment).

39. Kenneth J. Cooper, *With Less Money for Prisons, States Easing Restrictions Against Ex-Convicts*, NEW AMERICA MEDIA (Oct. 30, 2010), <http://newamericamedia.org/2010/10/cash-strapped-states-ease-restrictions-against-ex-convicts.php>.

40. Henry & Jacobs, *supra* note 25, at 757.

41. *Id.* see also S.F. Cal., Res. 764-05 (2005), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0764-05.pdf>.

42. Henry & Jacobs, *supra* note 25, at 757.

43. CONN. GEN. STAT. ANN. § 46a-80 (West 2013).

44. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2013).

45. MINN. STAT. ANN. § 364.021 (West 2013).

46. N.M. STAT. ANN. § 28-2-3 (West 2013).

47. NAT’L EMP’T LAW PROJECT, BAN THE BOX 1 (2011); e.g., Austin, Tex., Res. 20081016-012 (2008), available at <http://www.nelp.org/page/-/SCLP/Austin.Ban.the.Box.Resolution.pdf>; JACKSONVILLE, FLA., ORDINANCE, § 126.111 (2008), available at [http://nelp.3cdn.net/875d685220c2b5cbd2\\_gcm6bn5wh.pdf](http://nelp.3cdn.net/875d685220c2b5cbd2_gcm6bn5wh.pdf); MEMPHIS, TENN., ORDINANCE, NO. 5363 (2010), available at [http://www.memphistn.gov/Portals/0/pdf\\_forms/ordinances/5363\\_BanTheBox.pdf](http://www.memphistn.gov/Portals/0/pdf_forms/ordinances/5363_BanTheBox.pdf).

48. JACKSONVILLE, FLA., ORDINANCE § 126.111.

49. PHILA., PA., CODE tit. 11, § 9-3503 (2013).

### 1. Federal Antidiscrimination Law as Applied to Ex-Offenders

There is a legitimate question as to whether Ban the Box legislation is even necessary, as Title VII of the Civil Rights Act of 1964 might afford ex-offenders some level of protection.<sup>50</sup> Title VII applies to employers with more than fifteen employees.<sup>51</sup> Under Title VII, employers are prohibited from discriminating against individuals on the basis of “race, color, religion, sex, or national origin.”<sup>52</sup> Generally, claims under Title VII are analyzed under one of two different theories: disparate treatment or disparate impact.<sup>53</sup> A disparate treatment theory applies where employers treat some people less favorably because they belong to one of the enumerated protected classes.<sup>54</sup> Disparate treatment would not apply in the context of ex-offenders, however, because they are not one of the classes enumerated under Title VII.

A disparate impact theory, however, applies “where a claim is made that some facially neutral employment practice has a significantly disproportionate impact on a group protected by Title VII.”<sup>55</sup> Under a disparate impact theory, an employer who discriminated against ex-offenders—a class left unprotected by Title VII—could nevertheless be held liable under Title VII if that discriminatory treatment has a disparate impact on a protected group and is not justified by a sufficient reason.<sup>56</sup> Along these lines, Equal Employment Opportunity Commission (EEOC) regulations dictate that the use of any selection procedure that has an adverse impact on the hiring, promotion, or other employment opportunities of members of any protected class will be considered to be *per se* discriminatory unless the procedure can be linked to attributes of successful job performance.<sup>57</sup> A hiring policy that discriminated against ex-offenders could have just such an adverse impact, given that “[b]lack comprise a disproportionate number of the 2.3 million people behind bars, and thus are disproportionately affected by laws barring people with criminal records from certain employment and educational opportunities.”<sup>58</sup>

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50. See Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 983 (2006) (arguing that ex-offenders may be protected from employment discrimination under Title VII with proof that the employer’s policy of discriminating against ex-offenders has a disparate impact on one of the enumerated classes protected under Title VII).

51. See 42 U.S.C. § 2000e(b) (2012) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

52. *Id.* § 2000e-2(a)(1).

53. Gerlach, *supra* note 50, at 983.

54. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

55. *E.g.*, *Bd. of Trs. of S. Ill. Univ. v. Knight*, 516 N.E.2d 991, 995 (Ill. App. Ct. 1987) (citing *Domingo v. New Eng. Fish Co.*, 727 F.2d 1429, 1435 (9th Cir. 1984)).

56. SUSAN GROVER ET AL., *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* 51 (2011); see also *Hazen Paper*, 507 U.S. at 609 (defining disparate impact as involving “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity” (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1976))).

57. 29 C.F.R. §§ 1607.3(A), 1607.5 (2013).

58. Ezekiel Edwards, *White Convicts as Likely to Be Hired as Blacks Without Criminal Records*, DMIBLOG (Sept. 25, 2007, 9:09 AM), [http://www.dmiblog.com/archives/2007/09/white\\_convicts](http://www.dmiblog.com/archives/2007/09/white_convicts)

Thus, while people with criminal records are not a protected class under Title VII, courts have been willing to extend disparate impact rationales to cover discrimination against ex-offenders when such discrimination has an adverse impact on a disproportionate number of members of a protected class. For example, in *Green v. Missouri Pacific Railroad Co.*,<sup>59</sup> the Eighth Circuit banned blanket employment discrimination against ex-offenders, stating that “[a]lthough the employment practice in question is facially neutral, an employment test or practice which operates to exclude a disproportionate percentage of blacks violates Title VII unless the employer can establish that the practice is justified as a business necessity.”<sup>60</sup> In *Green*, the employer’s hiring policy denied employment to all applicants with any prior conviction, regardless of the conviction’s seriousness, job relatedness, and remoteness in time.<sup>61</sup> The court stated that, to be valid, a blanket policy refusing to hire any ex-offender must be a “business necessity,” and the court could not “conceive of any business necessity that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed.”<sup>62</sup>

Although the Eighth Circuit in *Green* ruled that ex-offenders may be protected from blanket employment discrimination under a disparate impact claim, there are still two potential shortcomings of Title VII protection for ex-offenders. First, the legal burden to prove a disparate impact claim under Title VII is quite high—in fact, there have been virtually no successful legal challenges under this theory since 1975.<sup>63</sup> Secondly, a plaintiff bringing a claim under Title VII—even a disparate impact claim—must still fall within one of the protected classes, and “many ex-[offenders] do not fit into a [protected class], rendering them unable to bring a disparate impact claim” under Title VII.<sup>64</sup> Thus, with relatively little protection for ex-offenders at the federal level, state and local legislatures have had to step in to protect ex-offenders from employment discrimination. One way legislatures have chosen to do this is through Ban the Box legislation.

## 2. Current Versions of Ban the Box Legislation

While Ban the Box statutes share the same goals,<sup>65</sup> each pursues these goals slightly differently. Generally, Ban the Box legislation imposes limitations on when and how employers can perform criminal background checks on prospective employees, including the point during the interview process at which employers can conduct background checks.<sup>66</sup> Ban the Box legislation also prevents employers from

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59. 523 F.2d 1290 (8th Cir. 1975).

60. *Green*, 523 F.2d at 1293 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

61. *Id.*

62. *Id.* at 1298.

63. Jocelyn Simonson, *Rethinking Rational Discrimination Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL’Y 283, 286 (2006).

64. Sasser, *supra* note 14, at 1075.

65. See *infra* Part II.A.3 for a discussion of the rationale of Ban the Box legislation.

66. See, e.g., CONN. GEN. STAT. ANN. § 46a-80(b) (West 2013) (stating that employers in Connecticut cannot even inquire about a prospective employee’s past convictions until such prospective employee has been

considering certain aspects of a prospective employee's criminal history; for example, Ban the Box legislation might limit an employer's ability to consider a prospective employee's arrest or misdemeanor record.<sup>67</sup> Some Ban the Box statutes even prevent employers from discovering any criminal convictions more than a few years old.<sup>68</sup>

Most Ban the Box legislation applies only to public employers. For example, the Minnesota Ban the Box statute only applies to public employers, preventing them from inquiring into an applicant's criminal background until the applicant is selected for an interview.<sup>69</sup> The Minnesota statute also provides exceptions where public employers have a statutory duty to conduct criminal history background checks.<sup>70</sup> Notably, under the Minnesota statute, a public employer is still allowed to notify applicants that individuals with a particular criminal history background will be disqualified from employment for particular positions.<sup>71</sup>

The Minnesota statute also imposes no limitation on what employers can discover.<sup>72</sup> The only restriction is that the employer cannot perform the criminal background check until after the applicant is selected for the interview.<sup>73</sup> Once the employer has selected the applicant for the interview, the employer is free to ask any questions concerning the employee's criminal background.

The Connecticut statute is more restrictive. Under the Connecticut Ban the Box statute, "a person shall not be disqualified from employment by the state . . . nor shall a person be disqualified . . . [from] any occupation, trade, vocation, profession or business for which a license, permit, certificate or registration is required to be issued by the state . . . solely because of a prior conviction of a crime."<sup>74</sup> Moreover, employers in Connecticut cannot even inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position.<sup>75</sup> The statute further outlines the criteria an employer must consider before denying employment to a prospective employee; the list includes: "(1) the nature of the crime and its relationship to the job for which the person has applied; (2) information pertaining to the degree of rehabilitation of the convicted person; and (3) the time

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deemed otherwise qualified for the position); HAW. REV. STAT. § 378-2.5(b) (West 2013) (stating that Hawaiian employers may only consider an applicant's criminal background after extending a conditional offer of employment to the applicant); MINN. STAT. ANN. § 364.021(a) (West 2013) (stating that a public employer in Minnesota may not inquire into the criminal background of an applicant until the applicant has been selected for an interview).

67. *E.g.*, CONN. GEN. STAT. ANN. § 46a-80(e).

68. *See, e.g.*, HAW. REV. STAT. § 378-2.5(c) (limiting Hawaiian employers from considering convictions more than ten years old from the period of incarceration).

69. MINN. STAT. ANN. § 364.021(a) (West 2013). In May of 2013, Minnesota amended their Ban the Box statute so that, beginning in 2014, its protections will broaden and include private employers as well. Act of May 13, 2013, 2013 Minn. Sess. Law Serv. ch. 61 (West 2013).

70. *Id.* § 364.021(b).

71. *Id.* § 364.021(c).

72. *Compare id.* § 364.021(a) (making no explicit limitation on the information available to employers in Minnesota), with HAW. REV. STAT. § 378-2.5(c) (barring Hawaiian employers from considering convictions more than ten years old from the period of incarceration).

73. MINN. STAT. ANN. § 364.021(a).

74. CONN. GEN. STAT. ANN. § 46a-80(a) (West 2013).

75. *Id.* § 46a-80(b).

elapsed since the conviction or release.”<sup>76</sup> Finally, the Connecticut statute forbids employers from considering a prospective employee’s arrest record.<sup>77</sup>

The Hawaii statute goes a step further than both the Minnesota and Connecticut statutes—it affects public *and* private employers.<sup>78</sup> Additionally, it only allows employers to consider an individual’s prior criminal conviction if it “bears a rational relationship to the duties and responsibilities to the position,”<sup>79</sup> but “only after the prospective employee has received a conditional offer of employment.”<sup>80</sup> Moreover, the statute limits the employer from considering convictions more than ten years old from the period of incarceration.<sup>81</sup> The statute makes exceptions available for employers who are expressly permitted to inquire into an individual’s criminal history for employment purposes pursuant to federal or state law.<sup>82</sup>

Thus, while the various state and local statutes have been collectively labeled as Ban the Box legislation, the actual statutes can vary quite substantively from one another. Some, like the Minnesota statute, only apply to government employers;<sup>83</sup> others, like the Hawaii statute, apply to private employers, too.<sup>84</sup> Some statutes limit employers to checking only criminal histories within the last ten years;<sup>85</sup> others allow the employer to access the prospective employee’s entire criminal conviction record, but contain provisions guiding employers on the proper use of those records.<sup>86</sup> In evaluating Ban the Box legislation as a whole, it is important to keep in mind all of the various types under which employers must operate.

### 3. The Rationale for Ban the Box Legislation

Despite the differences between the various Ban the Box statutes, they generally share the same goals. Whatever the exact requirements of a jurisdiction’s Ban the Box legislation, the primary rationale for Ban the Box legislation is to prevent criminal recidivism by increasing employment opportunities for ex-offenders.<sup>87</sup> For example, the Connecticut Ban the Box statute recognizes that “the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens,” and that the availability of employment opportunities for ex-

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76. *Id.* § 46a-80(c).

77. *Id.* § 46a-80(e).

78. HAW. REV. STAT. § 378-2.5(a) (West 2013).

79. *Id.*

80. *Id.* § 378-2.5(b).

81. *Id.* § 378-2.5(c).

82. *Id.* § 378-2.5(d).

83. MINN. STAT. ANN. § 364.021(a) (West 2013).

84. HAW. REV. STAT. § 378-2.5(a).

85. *See, e.g.*, HAW. REV. STAT. § 378-2.5(c) (limiting employers in Hawaii from considering convictions more than ten years old from the period of incarceration).

86. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-80(c) (West 2013) (outlining criteria employers in Connecticut must consider before denying employment to prospective employees on the bases of their criminal record).

87. Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL’Y 371, 373 (2008).

offenders “is directly related to their normal functioning in the community.”<sup>88</sup> The Connecticut Ban the Box statute thus makes it the state’s policy “to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records.”<sup>89</sup> Similarly, the New Mexico Ban the Box statute states that “the public is best protected when . . . ex-convicts are given the opportunity to secure employment . . . and that barriers to such employment should be removed to make rehabilitation feasible.”<sup>90</sup>

Approximately 7.5% of the U.S. adult population, or sixteen million people, are either felons or ex-felons.<sup>91</sup> Close to 700,000 individuals are released from state prisons annually, with that number expected to increase in the future.<sup>92</sup> Studies show that there is an increased recidivism rate for people with criminal records who are unable to find employment versus those who gain steady jobs upon release from prison.<sup>93</sup> In sum, “[t]he more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”<sup>94</sup>

Ban the Box legislation is not the government’s first attempt at reducing recidivism by increasing employment opportunities for ex-offenders. Courts have long recognized that society’s best interests are met by expanding employment opportunities for ex-offenders.<sup>95</sup> Moreover, as discussed in Part II.A.1, certain ex-offenders may be protected from employment discrimination under federal antidiscrimination law. Additionally, the Federal Bonding program protects employers by insuring against theft, forgery, larceny, or embezzlement.<sup>96</sup> Employers who hire ex-offenders may also be eligible for federal income tax credits under the Work Opportunity Tax Credit.<sup>97</sup> Nevertheless, despite current government incentives to hire ex-offenders, most ex-offenders believe it is difficult to find jobs after prison release.<sup>98</sup> Often, the mere presence of a criminal history question on an application will dissuade ex-offenders from even applying for employment out of fear that they will be discriminated against

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88. CONN. GEN. STAT. ANN. § 46a-79.

89. *Id.*

90. N.M. STAT. ANN. § 28-2-2 (West 2013).

91. Uggen et al., *supra* note 7, at 283.

92. *Cf.* HEATHER C. WEST ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISONERS IN 2009, at 6 (Dec. 2010) (noting that the U.S. prison population has grown each year since 2000).

93. *See* LEGAL ACTION NETWORK, *supra* note 5, at 13 (noting that people with criminal records are three times more likely to recidivate when they are unemployed); Stacy, *supra* note 5, at 3 (noting that one of the primary factors in the high rate of recidivism may be unemployment).

94. Andrew Von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggestion Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 605 (1997).

95. *See, e.g.*, Soto-Lopez v. N.Y.C. Civil Serv. Comm’n, 713 F. Supp. 677, 679 (S.D.N.Y. 1989) (noting “the public policy in favor of employing ex-offenders”); Haddock v. City of New York, 553 N.E.2d 987, 992 (N.Y. 1990) (noting that “the opportunity for gainful employment may spell the difference between recidivism and rehabilitation”).

96. LEGAL ACTION NETWORK, *supra* note 5, 15–16.

97. 26 U.S.C. § 51(d)(4) (2012); *see also* LEGAL ACTION NETWORK, *supra* note 5, at 15 (explaining that employers who participate in this program can reduce their tax liability by up to \$2,400 per new qualified worker); *State Tax Credits*, NATIONAL H.I.R.E. NETWORK, <http://hirenetwork.org/content/state-tax-credits> (last updated 2007) (listing state tax credits available in California, Illinois, Iowa, Louisiana, Maryland, and Texas).

98. KACHNOWSKI, *supra* note 10, at 2.

because of their criminal past.<sup>99</sup>

And those fears are not entirely unfounded. A recent study shows that a criminal record reduces the likelihood that an applicant will be offered a second interview or a job by nearly half.<sup>100</sup> Indeed, two-thirds of surveyed employers said that they would not knowingly hire an ex-offenders.<sup>101</sup> Undoubtedly, criminal convictions carry a stigma that can impact employment opportunities.<sup>102</sup> And even those employers who would not knowingly discriminate against ex-offenders may unknowingly selectively detect and retain negative information about an interviewee that is consistent with a given stereotype.<sup>103</sup> In sum, ex-offenders face “a multitude of barriers that may affect [their] successful reintegration into the community. . . . including stigmatization and discrimination . . . [and] loss of social standing in the community,” resulting in “a tendency to enquire about and reject applications for . . . employment.”<sup>104</sup>

Thus, Ban the Box legislation is meant to lower criminal recidivism by giving ex-offenders a higher chance at employment after incarceration.<sup>105</sup> Ban the Box statutes generally operate to limit how and when employers can conduct criminal background checks on prospective employees.<sup>106</sup> For instance, by postponing the criminal background inquiry until after the first interview, Ban the Box legislation can force employers to, at least initially, consider the applicant on his merits and not on the basis of his past. Ban the Box statutes aim to put ex-offenders “on equal footing with other candidates,” so that ex-offenders may have the chance to explain their criminal histories in-person during an interview.<sup>107</sup>

#### B. *Negligent Hiring: Employer Liability for Employee Misconduct*

In the majority of jurisdictions, negligent hiring is a cause of action in which liability is predicated on the employer’s hiring of a person who the employer knew or should have known would create a foreseeable risk of injury to others.<sup>108</sup> Generally, the

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99. Henry & Jacobs, *supra* note 25, at 755–56.

100. 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).

101. Holzer et al., *supra* note 10, at 41–42.

102. Gerlach, *supra* note 50, at 981 (citing PAUL H. ROBINSON, CRIMINAL LAW § 1.2, at 13 (1997) (noting that “[t]he punishment of an offender tends to stigmatize and condemn the offender and his or her conduct”)); *see also* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 519 (1996) (commenting that “[a] convicted criminal suffers not only from public penalties but from stigma, the reluctance of others to interact with him economically and socially”).

103. Pager et al., *supra* note 100, at 197.

104. Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147, 148–49 (2004).

105. Stoll & Bushway, *supra* note 87, at 373.

106. *See supra* Part II.A.2 for a discussion of the regulations regarding employers’ use of criminal background checks under several current versions of Ban the Box legislation.

107. GARY J. OBERSTEIN & JEFFREY B. GILBRETH, MASSACHUSETTS BANS CRIMINAL HISTORY QUESTIONS ON JOB APPLICATION FORMS: EMPLOYERS MUST TAKE ACTION OR RISK NONCOMPLIANCE 1 (2010).

108. *Connes v. Molalla Transport Sys., Inc.*, 831 P.2d 1316, 1321 (Col. 1992) (noting that “several jurisdictions” recognize negligent hiring as a cause of action); *see, e.g.*, *Mallory v. O’Neil*, 69 So. 2d 313, 315 (Fla. 1954) (adopting negligent hiring and retention as a cause of action in Florida, noting that the doctrine was

employer will be found to have been negligent if the employer should have screened applicants more scrupulously and did not, or if the employer failed to respond to actual or constructive knowledge of the facts creating the risk of harm.<sup>109</sup> Negligent hiring focuses on the employer's negligence in the hiring process, usually centering on whether the employer performed a reasonable investigation.<sup>110</sup> Unlike *respondeat superior*, in which the employer is vicariously liable for torts the employee commits while acting within the scope of employment,<sup>111</sup> under negligent hiring the employer is directly liable for torts the employee commits even if the employee is acting outside the scope of employment.<sup>112</sup>

The doctrine of negligent hiring originally arose to provide legal remedies to employees injured by negligent or willful acts of fellow employees.<sup>113</sup> From there, the doctrine was naturally extended to cover third parties such as customers who, while not employees, were nonetheless closely connected with the employer.<sup>114</sup> Today, employers are responsible for exercising reasonable care in selecting employees who will be brought into contact with members of the public.<sup>115</sup> Thus, the fundamental purpose of negligent hiring law is to protect people from employers who do not exercise due care in hiring employees—if the employer conducts a proper investigation, it will not hire the dangerous employee, and the employee will not be in a position to harm a third party.<sup>116</sup>

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quickly emerging in other jurisdictions); *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910–11 (Minn. 1983) (adopting negligent hiring as a cause of action in Minnesota after recognizing it as “the rule in the majority of the jurisdictions”). An employer is subject to liability for harm resulting from his conduct if he is negligent “in the employment of improper persons . . . in work involving risk of harm to others.” RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958).

109. *Beaver*, *supra* note 13, at 109; *see, e.g.*, *Strickland v. Commc'ns & Cable of Chi., Inc.*, 710 N.E.2d 55, 58 (Ill. App. Ct. 1999) (finding that negligent hiring liability exists where the proper criminal background investigation would have revealed “a negative employment history, disciplinary problems, or a criminal record other than traffic violations”).

110. *Se. Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999).

111. 29 AM. JUR. TRIALS 267 § 1.5 (1982).

112. *Id.*; *see, e.g.*, *Perkins v. Spivey*, 911 F.2d 22, 31 (8th Cir. 1990) (rejecting the idea that “an employer is not directly liable for negligently retaining an employee who assaults another person because an assault is not within the scope of employment”).

113. 29 AM. JUR. TRIALS 267 § 3.

114. *Id.*; *see, e.g.*, *Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954) (applying negligent hiring theory to plaintiff injured by an employee where plaintiff was legally upon the employer's premises); *Priest v. F. W. Woolworth Five & Ten Cent Store*, 62 S.W.2d 926, 928 (Mo. Ct. App. 1933) (applying negligent hiring where an employee harmed an invitee/licensee); *Mo., Kan. & Tex. Ry. Co. v. Day*, 136 S.W. 435, 440 (Tex. 1911) (applying negligent hiring where an employee harmed a customer).

115. *See, e.g.*, *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982) (noting that an employer “dealing with the public is bound to use reasonable care to select employees competent and fit for the work assigned to them . . . . When an employer neglects this duty and as a result [a third party is injured], the employer may be liable even though the injury was brought about by the willful act of the employee beyond the scope of his employment” (citing *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. Mun. App. 1951))).

116. *See Strickland v. Commc'ns & Cable of Chi., Inc.*, 710 N.E.2d 55, 58 (Ill. App. Ct. 1999) (requiring that the proper criminal background investigation would have revealed “a negative employment history, disciplinary problems, or a criminal record other than traffic violations” in order for the hiring to constitute the proximate cause of plaintiff's injury in a negligent hiring claim); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex. Ct. App. 1987) (noting that “the negligence in hiring the employee must be the proximate cause of

### 1. How Courts Apply Negligent Hiring Law

A cause of action for negligent hiring occurs when “an employer fails to exercise ordinary care in its hiring practices.”<sup>117</sup> An employer is negligent “when he employs a person with known propensities, or propensities which could have been discovered [through a] reasonable investigation.”<sup>118</sup> If an employer hires someone with knowledge of these propensities, the employer may be found liable for subsequent personal injury or death caused by the propensities and foreseeable acts of this employee.<sup>119</sup> The following six elements are generally required for a negligent hiring claim: (1) an employment relationship between the defendant and the tortfeasor, (2) the employee was unfit under the circumstances of the employment, (3) the employer knew or should have known that the employee was unfit, (4) the employee’s tortious act was the cause in fact of the plaintiff’s injuries, (5) the negligent hiring was the proximate cause of the plaintiff’s injuries, and (6) actual damage or harm resulted from the tortious act.<sup>120</sup>

As the Supreme Court of Minnesota noted in one of the nation’s leading negligent hiring cases, *Ponticas v. K.M.S. Investments*,<sup>121</sup> “an employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.”<sup>122</sup> Generally, this risk of harm must be foreseeable before courts will impose a duty on employers to perform a reasonable investigation.<sup>123</sup> As a Florida District Court of Appeals further explained,

[o]nly when an employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predisposed to committing a wrong under circumstances that create an opportunity or enticement to commit such a wrong, should the law impose liability on the employer.<sup>124</sup>

Most jurisdictions insist that employers owe this duty to “any member of the public” in contact with the “employment situation.”<sup>125</sup>

In sum, “[n]egligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee’s unfitness, and the issue of liability primarily focuses upon the adequacy of the employer’s pre-

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the injuries to the plaintiff”).

117. Monica Scales, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 424 (2002).

118. Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 879 (1996).

119. Beaver, *supra* note 13, at 110.

120. Cindy M. Haerle, *Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1308 (1984).

121. 331 N.W.2d 907 (Minn. 1983).

122. *Ponticas*, 331 N.W.2d at 911.

123. *See Se. Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397–98 (Va. 1999) (noting that a criminal background check was not necessary in the exercise of reasonable care).

124. *Garcia v. Duffy*, 492 So. 2d 435, 439 (Fla. Dist. Ct. App. 1986).

125. Haerle, *supra* note 120, at 1308.

employment investigation into the employee's background."<sup>126</sup> Employers owe a duty to potential victims to investigate potential employees and hire only competent people.<sup>127</sup> If an employer fails to conduct a reasonable background search of an employee, it has breached its duty of care.<sup>128</sup> Therefore, most negligent hiring claims turn on the issue of foreseeability of the risk and the degree of risk associated with the nature of the employment.<sup>129</sup>

*a. Negligent Hiring Case Analysis: Foreseeability of the Risk of Harm*

Foreseeability is established when a plaintiff demonstrates that there was a foreseeable risk that some injury might occur.<sup>130</sup> In determining foreseeability, courts have "provided few guidelines to aid employers . . . in deciding just how probing a 'reasonably sufficient' background investigation should be."<sup>131</sup> In an effort to clarify perceived inconsistencies in negligent hiring case law, commentators have categorized courts' foreseeability guidelines into one of two tests: a "prior similar incidents" test or a "totality of the circumstances" test.<sup>132</sup> A prior similar incidents test focuses on the employee's prior conviction and asks "whether the [prior] conviction was sufficiently similar to the [employee's tortious act] in question."<sup>133</sup> A totality of the circumstances test, on the other hand, not only considers the employee's prior convictions, but also evaluates other variables, including "elapsed time since conviction, mitigating factors, and number of convictions."<sup>134</sup> The result of these differing standards is that "courts and employers often struggle with the foreseeability element of a negligent hiring tort action."<sup>135</sup>

*Stansfield v. Goodyear Tire & Rubber Co.*<sup>136</sup> represents a typical prior similar incidents analysis. The employee, a courtesy van driver, had driven the female plaintiff to her home in his job capacity.<sup>137</sup> Approximately four months later, he returned, broke into her residence, and raped her.<sup>138</sup> The employer never conducted a criminal

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126. *Garcia*, 492 So. 2d at 438.

127. Haerle, *supra* note 120, at 1308.

128. Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 359 (1996).

129. *Id.* at 360.

130. *Id.*

131. *Id.*

132. See Beaver, *supra* note 13, at 109 (noting that evaluation of foreseeability is whittled down into one of two tests: "the prior similar incidents" test or the "totality of the circumstances" test); Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1008–31 (2011) (citing James R. Todd, Comment, "It's Not My Problem": *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 753–54 (2004)) (detailing both the prior similar incidents and totality of the circumstances tests).

133. Todd, *supra* note 132, at 753–54 (citing Beaver, *supra* note 13, at 109).

134. *Id.* at 754.

135. *Id.*

136. No. 21924, 1999 WL 1419253 (Va. Cir. Ct. Oct. 13, 1999).

137. *Stansfield*, 1999 WL 1419253, at \*1.

138. *Id.*

background check.<sup>139</sup> Rather, the employer simply asked on the employment application whether the driver had been convicted of a crime within the past ten years.<sup>140</sup> According to the facts pled by the plaintiff, the driver indicated that he had only one controlled substance conviction when, in fact, he had several other convictions, including “three counts of robbery with a deadly weapon and three counts of the use of a handgun in the commission of a felony or crime of violence.”<sup>141</sup> The court held that, despite these convictions, nothing which “should have been discovered by reasonable investigation” suggested that the driver would commit a sexual assault, because “[n]one of the convictions . . . against [the employee] were for sexual offenses that would put an employer on notice that [the employee] would be likely to commit sexual assaults.”<sup>142</sup> Reasoning that the exact crime was not foreseeable, the court held that the employer was not liable.<sup>143</sup>

Similarly, in *Foster v. Loft, Inc.*,<sup>144</sup> a Massachusetts appellate court held that a jury could reasonably determine that a bar patron’s injury—after a bartender allegedly punched him in the face—was foreseeable.<sup>145</sup> The court based its determination on the fact that the employer, after learning of the bartender’s criminal background, made no attempt to conduct a more thorough investigation of his work experience and character references.<sup>146</sup> Notably, the bartender’s criminal record arose out of a single incident and included convictions of assault and battery, assault with intent to commit rape, and kidnapping.<sup>147</sup>

In still another example of a prior similar incidents analysis, a New York court in *Stevens v. Lankard*,<sup>148</sup> determined that a department store employer was not liable for negligently hiring an employee who subsequently molested a boy in a store dressing room.<sup>149</sup> The employee’s background included a conviction of sodomy in another state, and he disclosed in his interview that he had “gotten into trouble” for purchasing “some liquor for minors.”<sup>150</sup> Despite this disclosure, the employer did not conduct a criminal background check.<sup>151</sup> Without addressing what constitutes a routine background check, the court ruled that the previous sodomy conviction would not have surfaced in a “routine” background check, and that as a result, the employer could not be held liable for negligent hiring.<sup>152</sup> The court reasoned that “[t]o require any more exhaustive search into an employee’s background would place an unfair burden on the business

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at \*2.

143. *Id.*

144. 526 N.E.2d 1309 (Mass. App. Ct. 1988).

145. *Foster*, 526 N.E.2d at 1313.

146. *Id.* at 1312.

147. *Id.* at 1312 n.5. The bartender only received a one-year sentence on the first charge and was placed on probation for two years on the other charges. *Id.*

148. 31 A.D.2d 602 (N.Y. App. Div. 1968).

149. *Stevens*, 31 A.D.2d at 602.

150. *Id.*

151. *Id.*

152. *Id.* at 603.

community.”<sup>153</sup>

In lieu of a prior similar incidents analysis, other courts evaluate the totality of circumstances in negligent hiring cases. The Supreme Court of Minnesota’s decision in *Ponticas v. K.M.S. Investments* is the prototypical example of a totality of circumstances test. In *Ponticas*, a manager of an apartment complex violently raped a female tenant, entering her apartment using a passkey provided by the employer.<sup>154</sup> The employer asked about the employee’s criminal background on the employment application, it neglected to conduct a criminal background check.<sup>155</sup> Although the employee stated that he had only been convicted of minor traffic crimes; in reality, the employee had an extensive criminal background that included convictions for burglary and armed robbery in the previous five years.<sup>156</sup> Applying the totality of circumstances test, the court concluded that a jury could find “that it was reasonably foreseeable that a person with a history of offenses of violence could commit another violent crime, notwithstanding the history would not have shown him to ever have committed the particular type of offense.”<sup>157</sup>

Although the analysis under a prior similar incidents test differs from the analysis under a totality of the circumstances test, whether an individual court adopts either test is not always clear, and there may even be dissension within the same court about how to best analyze a given negligent hiring case. For example, in *Blair v. Defender Services, Inc.*,<sup>158</sup> the Fourth Circuit held that a janitor’s attack on the plaintiff should have been foreseeable because a criminal background check would have revealed a protective order against the employee.<sup>159</sup> However, the dissent noted that, as long as an employer “has asked about criminal history,” “[has] been told that none exists,” and “has no reason to suspect a criminal record,” the employer is not required to perform a background check, and therefore cannot be held liable under negligent hiring law.<sup>160</sup>

A different court was also divided in *Senger v. United States*,<sup>161</sup> a negligent hiring case brought against the government after the plaintiff was assaulted by a Postal Service employee with a history of violent behavior.<sup>162</sup> Although the Postal Service was not aware of every violent incident in the employee’s criminal history, the Ninth Circuit held that the plaintiff presented enough specific facts to create a genuine issue

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153. *Id.*

154. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 909 (Minn. 1983).

155. *Id.* at 910.

156. *Id.*

157. *Id.* at 912.

158. 386 F.3d 623 (4th Cir. 2004).

159. *Blair*, 386 F.3d at 629.

160. *Id.* at 631 (Widener, J., dissenting).

161. 103 F.3d 1437 (9th Cir. 1996).

162. *Senger*, 103 F.3d at 1438, 1440. The worker’s violent history included: (1) he was tried and acquitted on murder charges; (2) he was committed to a psychiatric facility in 1976 after charges arising from an attack against his wife; (3) he was committed to other facilities for treatment of posttraumatic stress disorder stemming from his service in the Vietnam War; (4) he was convicted in 1971 for drunk and disorderly conduct and in 1977, for harassment; and (5) he was arrested in 1985 for assaulting his ex-girlfriend on the job.  
*Id.*

of fact concerning the foreseeability of the assault.<sup>163</sup> By contrast, the dissent, which would have held for the Postal Service, noted that the Postal Service had “far from complete knowledge” of the employee’s violent behavior.<sup>164</sup> The dissent also focused on the “temporal remoteness” of the prior violent incidents, which occurred between six and twenty years prior to the attack.<sup>165</sup>

Thus, courts differ as to the criminal record necessary to make a given harm foreseeable. While the court in *Blair* held that a mere protective order against an employee was sufficient to make his violent behavior foreseeable,<sup>166</sup> the court in *Stevens* held that a history of sodomy and purchasing “some liquor for minors” was not sufficient for the employer to reasonably foresee that the employee would molest a child.<sup>167</sup> Similarly, the court in *Stansfeld* held that an employee’s extensive history of violent behavior was not sufficient to foresee his sexual assault on a former customer;<sup>168</sup> yet, in *Foster*, the court held that a single incident of violence was enough to foresee that the employee would attack a patron.<sup>169</sup> These inconsistencies between jurisdictions are responsible for only some of the confusion in negligent hiring law.

*b. Negligent Hiring Case Analysis: Degree of Risk*

In addition to the foreseeability of the harm, the degree of risk posed by the nature of the employment will also have a bearing on the extent to which an employer is required to investigate. As noted by one court, “the greater the risk of harm, the higher the degree of care necessary to constitute ordinary care.”<sup>170</sup> For example, in *Williams v. Feather Sound, Inc.*,<sup>171</sup> the Florida District Court of Appeal stated that where an employee was hired to perform outdoor landscaping work, the employer did not have a duty to perform a background check because the employee would only have incidental contact with tenants.<sup>172</sup> The court noted, however, that where the employer gave a passkey to the employee so that he could perform work inside residences, the employer had a duty to investigate the employee’s background.<sup>173</sup> Indeed, in *Ponticas v. K.M.S. Investments*, the court noted that,

[a]lthough only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee

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163. *Id.* at 1443–44.

164. *Id.* at 1446 (Wallace, J., dissenting).

165. *Id.*

166. *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 629 (4th Cir. 2004).

167. *Stevens v. Lankard*, 31 A.D.2d 602, 602–03 (N.Y. App. Div. 1968).

168. *Stansfeld v. Goodyear Tire & Rubber Co.*, No. 21924, 1999 WL 1419253, at \*1–2 (Va. Cir. Ct. Oct. 13, 1999).

169. *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1310–13 (Mass. App. Ct. 1988).

170. *Welsh Mfg. v. Pinkerton’s, Inc.*, 474 A.2d 436, 440 (R.I. 1984); see also *Moses v. Diocese of Colo.*, 863 P.2d 310, 328 (Col. 1993) (noting that “[t]he requisite degree of care increases . . . when the employer expects the employee to have frequent contact with the public”); *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 913 (Minn. 1983) (recognizing that “[t]he scope of the investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee”).

171. 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980).

172. *Williams*, 386 So. 2d at 1240.

173. *Id.*

would not constitute a high risk of injury to third persons, “a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant.”<sup>174</sup>

Like the foreseeability analysis, the degree of risk analysis also varies significantly between courts. In *Southeast Apartments Management, Inc. v. Jackman*<sup>175</sup>—under facts comparable to *Ponticas*—a hotel owner hired a maintenance supervisor after receiving a detailed application containing information about the supervisor’s personal background, work experience, and behavioral history.<sup>176</sup> According to the court, “none of this information gave a hint that [the supervisor] may have had a propensity to molest women.”<sup>177</sup> The court noted that although the hotel owner did not investigate the supervisor’s prior criminal record, the hotel owner was not obligated to do so because the supervisor represented that he had “absolutely never engaged” in thirty-four types of criminal behavior listed on the employment application, other than minor traffic violations.<sup>178</sup>

Because of the lack of uniformity in application of degree of risk analysis, courts in different jurisdictions may subject almost identical facts to entirely different analyses. In *Long v. Brookside Manor*,<sup>179</sup> a negligent hiring action was brought against a nursing home when an employee assaulted an elderly woman in her room.<sup>180</sup> The nursing home neither checked with the employee’s previous employers nor conducted a criminal history check on the employee prior to hiring him.<sup>181</sup> Nevertheless, the Tennessee Court of Appeals refused to find that an investigation of these sources would have enabled the nursing home to predict that the employee would abuse the plaintiff.<sup>182</sup> As a result, the court held that the plaintiff had failed to demonstrate that the failure to take these precautions was a proximate cause of her injuries.<sup>183</sup> By contrast, under similar facts, the Texas Court of Appeals in *Deerings West Nursing Center v. Scott*<sup>184</sup> found that a defendant nursing home was negligent in the hiring of an employee who assaulted an elderly visitor.<sup>185</sup> The nursing home hired the employee without performing a background check.<sup>186</sup> As a result, the nursing home was unaware that the employee had previously committed over fifty-six thefts.<sup>187</sup> On these facts, the Texas Court of Appeals upheld the trial court’s determination that the defendant’s actions amounted to negligent hiring.<sup>188</sup>

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174. *Ponticas*, 331 N.W.2d at 913 (quoting *Kendall v. Gore Props.*, 236 F.2d 673, 678 (D.D.C. 1956)).

175. 513 S.E.2d 395 (Va. 1999).

176. *Jackman*, 513 S.E.2d at 396.

177. *Id.* at 397.

178. *Id.*

179. 885 S.W.2d 70 (Tenn. Ct. App. 1994).

180. *Long*, 885 S.W.2d at 71.

181. *Id.* at 72.

182. *Id.* at 72–73.

183. *Id.* at 74.

184. 787 S.W.2d 494 (Tex. App. 1990).

185. *Deerings*, 787 S.W.2d at 496–97.

186. *Id.* at 498.

187. *Id.* at 496.

188. *Id.* at 497.

The cases above illustrate the lack of a uniform legal standard regarding an employer's duty to perform background checks. Employers must consider both the foreseeability of the risk as well as the degree of risk given the nature of the employment. Without any concrete standard to follow, however, employers are left on their own to determine the amount of probing necessary to qualify as a reasonably sufficient background search in order to avoid being held liable under negligent hiring law.

## 2. Employers' Concerns Regarding Negligent Hiring Liability and Criminal Background Checks

Negligent hiring liability is a major concern for employers.<sup>189</sup> In addition to the unpredictability of negligent hiring case law,<sup>190</sup> a verdict in favor of the plaintiff can be very costly for employers. For example, an employer in Utah was found liable for \$185,000 after failing to perform a criminal background check on a manager that subsequently sexually abused a minor.<sup>191</sup> In California, an employer was found liable for \$255,000 in damages after failing to perform sufficient background checks on a nurse who subsequently sexually assaulted the plaintiff.<sup>192</sup> And these cases are on the lower end of the spectrum—a report completed in 2001 estimated that employers lose approximately seventy-two percent of negligent hiring cases, with the average settlement just over \$1.6 million.<sup>193</sup> Indeed, in a Georgia case involving a maintenance man who strangled a woman residing in the apartment complex where he worked, the jury found the employer liable for failing to perform an adequate criminal background check.<sup>194</sup> The maintenance man had an extensive criminal record that included convictions for rape, armed robbery, and burglary.<sup>195</sup> During the hiring process, the employer only asked whether the man had been convicted of a crime within the last five years; the man's convictions had in fact been prior to that time frame.<sup>196</sup> The jury found the employer liable for negligent hiring, and the employer was responsible for paying over \$15 million in damages.<sup>197</sup>

Moreover, while Ban the Box legislation limits when and how employers can

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189. See FAHEY ET AL., *supra* note 34, at ii (reporting that half of surveyed employers fear liability for hiring ex-offenders).

190. In addition to contradictory legal analysis in judicial opinions, reported decisions offer limited guidance because, in many negligent hiring cases, "the difficult interpretations of whether the harm was reasonably foreseeable are sent to a jury." Hickox, *supra* note 132, at 1004.

191. Verdict, Plaintiff, Pro Ami v. Newspaper Agency Corp., No. 436102, 2002 WL 33831800 (Utah St. Ct. May 2002).

192. Verdict, Plaintiff v. Defendant Hospital, No. 445773, 2004 WL 4095984 (Unknown Cal. St. Ct. July 2004).

193. Mary L. Connerley et al., *Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies*, 20 PUB. PERSONNEL MGMT. 173, 174 (2001).

194. Verdict, Estate of Danielle Jennings v. TGM Ashley Lakes, No. 400817, 2002 WL 31629981 (Ga. St. Ct. Aug. 13, 2002).

195. *Id.*

196. *Id.*

197. *Id.*

conduct criminal background checks,<sup>198</sup> employers cannot solely rely on employee self-reporting either—according to a recent survey, forty-four percent of job applicants lied on their resumes, and twenty-three percent went as far as falsifying credentials and licenses.<sup>199</sup> Even in instances where an employee is not entirely candid about the nature of his or her criminal background, the employer may still be held liable for failing to investigate the nature of the employee's criminal history.<sup>200</sup>

Finally, employers' concerns over negligent hiring liability may be warranted given that most ex-offenders will reoffend.<sup>201</sup> An extensive recidivism study conducted by the United States Department of Justice tracked almost 300,000 prisoners released in fifteen states in 1994 and found that 61.7% of offenders sentenced for violence reoffended, though not necessarily for another violent offense.<sup>202</sup> In fact, of the released prisoners who had been convicted of homicide, only 1.2% were rearrested for another homicide.<sup>203</sup> Similarly, only 2.5% of the released prisoners who had been convicted of rape were rearrested for another rape.<sup>204</sup> Nevertheless, 67.5% of the released prisoners were rearrested within three years, almost exclusively for a felony or a serious misdemeanor, making employers all the more wary of hiring ex-offenders and risking liability under negligent hiring law.<sup>205</sup>

### III. DISCUSSION

Despite strong public policy favoring the rehabilitation of ex-offenders—evidenced most recently in the passage of the various Ban the Box statutes<sup>206</sup>—an employer may face liability when it learns of an employee's criminal record and fails to determine whether the individual poses a safety risk.<sup>207</sup> Thus, employers are placed in an unwinnable situation. The common law encourages employers to conduct background checks on prospective employees to mitigate any foreseeable risk of injury.<sup>208</sup> However, with the passage of Ban the Box legislation, jurisdictions are hampering how employers can use those criminal background checks during the

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198. See *supra* Part II.A.2 for a discussion of various Ban the Box statutes.

199. IOMA, *How to Ferret Out Instances of Resume Padding and Fraud*, 6 COMPENSATION & BENEFITS FOR L. OFF. 1, 5 (2006).

200. See *supra* notes 154–57 and accompanying text for an overview of *Ponticas* decision finding that an employer is liable for negligent hiring even though the employee lied about his criminal background on the application.

201. CRIMINAL JUSTICE DATA ANALYSIS TEAM, TEX. LEGISLATIVE BUDGET BD., STATEWIDE CRIMINAL JUSTICE RECIDIVISM AND REVOCATION RATES 77 (2011) (reporting that the three-year recidivism rate for California was 58.9% in 2005, the three-year recidivism rate for Colorado was 53.2% in 2006, and the three-year recidivism rate for Illinois was 51.8%).

202. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 2 (2002).

203. *Id.* at 1.

204. *Id.*

205. *Id.*

206. See *supra* Part II.A.3 for a discussion of the rationale behind Ban the Box legislation.

207. See *supra* Part II.B.2 for a discussion of employer concerns regarding negligent hiring liability.

208. See *supra* Part II.B.1 for a discussion of negligent hiring liability.

application process.<sup>209</sup> The result is a minefield of liability concerns for employers, especially for multistate employers that may operate under various types of Ban the Box legislation.<sup>210</sup>

All of this uncertainty leaves employers in a no-win scenario: investigate too little, and courts may find you liable for negligent hiring; investigate too much, and courts may find that you have violated Ban the Box legislation. In fact, negligent hiring law may actually perpetuate employment discrimination against ex-offenders, undermining the goal of Ban the Box legislation by increasing the likelihood of recidivism.<sup>211</sup> The issue is even more clouded given that Ban the Box legislation is a relatively new phenomenon.<sup>212</sup> As a result, there is a lack of developed case law to help predict how courts will approach these competing ideals.

Despite all of this uncertainty, given the lack of protection at the federal level, some form of Ban the Box legislation clearly is needed to protect ex-offenders from employment discrimination. As previously discussed, Title VII does not currently protect ex-offenders *per se*.<sup>213</sup> A disparate treatment theory would not apply because ex-offender status is not one of the protected classes listed in Title VII. And while ex-offenders may have a Title VII claim under a disparate impact theory, the ex-offender cannot bring that claim unless the ex-offender is also a member of a protected class.<sup>214</sup> Therefore, some other avenue is necessary to protect ex-offenders from employment discrimination. A properly tailored Ban the Box statute could fill this need while limiting the uncertainty surrounding employer liability under negligent hiring law.

#### A. *The Ideal Ban the Box Statute*

Ban the Box legislation can be an important way to protect ex-offenders from employment discrimination and to reduce criminal recidivism. With all of its current incarnations, however, Ban the Box legislation is a headache for employers who are already faced with the unpredictability of negligent hiring law. Because of the uncertainties employers face under negligent hiring law, employers are unlikely to support any legislation that would impose restrictions on their ability to conduct background checks. Thus, employer liability under negligent hiring law could threaten to halt the Ban the Box movement in its tracks.

A solution could lay in a uniform, ideal Ban the Box statute. If legislatures could

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209. See *supra* Part II.A.2 for a discussion of current versions of Ban the Box legislation and the restrictions they impose on employers' use of criminal background checks.

210. See 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, 601 (2009) (noting that "[w]ith many companies expanding offices interstate, it will become difficult, if not impossible, for employers to adopt company-wide policies on the appropriate uses of ex-offender status in a system in which the laws of each state differ").

211. Sasser, *supra* note 14, at 1065 (noting that "the ambiguous nature of the tort of negligent hiring . . . can perpetuate discrimination against ex-convicts in employment, thus increasing the likelihood of recidivism").

212. See Torrence, *supra* note 38 (noting that the Ban the Box movement began in Hawaii in 1998).

213. See *supra* Part II.A.1 for a discussion of lack of potential ex-offender protections under Title VII.

214. See *supra* Part II.A.1 for a discussion of how ex-offenders might bring a disparate impact claim under Title VII and the chances of success.

reasonably tailor Ban the Box limitations, they could reduce employment discrimination and criminal recidivism without subjecting employers to more liability under negligent hiring laws. Employers need not—and in fact, should not—fear Ban the Box legislation. On the contrary, employers should support Ban the Box statutes as a way to help mitigate their uncertain liability under negligent hiring law. Legislators and ex-offender groups could garner more support for Ban the Box statutes that, in addition to protecting ex-offenders from employment discrimination, could protect employers from negligent hiring liability by setting out clearer guidelines for proper criminal history investigation.

Employers often have preconceived notions of ex-offenders as people who are untrustworthy, immoral, or even dangerous.<sup>215</sup> People with criminal records face a difficult task of making a positive first impression during an initial job interview because the interviewer will often selectively detect and retain negative information about an interviewee that is consistent with a given stereotype.<sup>216</sup> This is where Ban the Box legislation steps in: by limiting how and when employers can conduct criminal background checks on prospective employees, ex-offenders will be given a higher chance at employment after incarceration, which will lower the overall recidivism rate among the population.<sup>217</sup> By postponing the criminal background inquiry until after the first interview, Ban the Box legislation gives ex-offenders the chance to explain their criminal histories in person, so that ex-offenders can be judged on their merits, and not by their histories.<sup>218</sup>

Ban the Box statutes generally differ in three important aspects: (1) the employers that the statute applies to—the “Who?”; (2) the stage during the employment process at which employers can conduct the background check—the “When?”; and (3) the type of background information that employers can access—the “What?” The ideal Ban the Box statute will need to address each of these concerns.

1. Who: Determining the Type of Employer Covered by the Ban the Box Statute.

The first notable difference among the various Ban the Box statutes is the question of who is covered under the statute. In addressing this question, important considerations include whether private employers should be covered and the size of the employers to be covered. Additionally, drafters of a Ban the Box statute should consider whether any exceptions, or safe harbors, should be included in the statute. The ideal Ban the Box statute will cover public and private employers with over ten employees, but will contain safe harbors for employers whose employees have access to particularly vulnerable third parties.

As previously indicated, most Ban the Box legislation applies only to public employers. For example, the Minnesota Ban the Box statute only applies to public

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215. See *supra* notes 104–10 and accompanying text for a discussion of studies showing hiring discrimination toward ex-offenders.

216. Pager et al., *supra* note 100, at 197.

217. Stoll & Bushway, *supra* note 87, at 373–76.

218. See OBERSTEIN & GILBRETH, *supra* note 107, at 1 (noting that Ban the Box statutes put ex-offenders “on equal footing with other candidates”).

employers—public employers in Minnesota cannot inquire into an applicant’s criminal background until the applicant is selected for an interview.<sup>219</sup> Similarly, the Connecticut statute also only applies to public employers.<sup>220</sup> However, in addition to protecting ex-offenders from employment discrimination in public jobs, the Connecticut statute also protects ex-offenders from discrimination in their pursuit of state licenses and permits that may be necessary to obtain employment in certain fields.<sup>221</sup> Finally, at the other extreme, is the Hawaii statute, which applies specifically to both public *and* private employers.<sup>222</sup>

Some of the statutes, however, make exceptions where employers are expressly mandated by federal or state law to inquire into an individual’s criminal history. Minnesota has such an exception, allowing public employers to conduct criminal background checks where they have a statutory obligation to do so.<sup>223</sup> Indeed, Hawaii—which applies to public *and* private employers—also makes an exception where employers have a statutory duty to conduct the background check.<sup>224</sup>

If the ultimate goal is to reduce recidivism by giving ex-offenders ample employment opportunities,<sup>225</sup> it follows that ex-offenders need to have access to as many jobs as possible. The ideal Ban the Box statute must therefore apply to both public and private employers in order to ensure that ex-offenders are given ample opportunity for employment. At the very least, the ideal Ban the Box statute should include a provision—similar to the Connecticut provision—that ensures that ex-offenders will not be discriminated against in the pursuit of a license or other qualification necessary for employment in a chosen career path, pursuant to limitations discussed below. The ideal Ban the Box statute will balance the interests of employers by not extending liability under negligent hiring, while at the same time reducing criminal recidivism by providing ample employment opportunities for ex-offenders.

Although the ideal Ban the Box statute should thus apply to both public and private employers, it should not apply to all employers. There are special considerations that should limit its application to only certain private employers. Certainly, smaller employers should be exempted from the Ban the Box provisions. Criminal background checks are most important to small employers because of the high cost associated with negligent hiring litigation. As previously noted, one report estimated that employers lose approximately seventy-two percent of negligent hiring

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219. MINN. STAT. ANN. § 364.021(a) (West 2013). Recent legislative actions in Minnesota have started the process of extending Ban the Box protections to potential employees of private employers as well, effective January 1, 2014. Act of May 13, 2013, 2013 Minn. Sess. Law Serv. ch. 61.

220. CONN. GEN. STAT. ANN. § 46a-80(a) (West 2013).

221. *See id.* (stating that “a person shall not be disqualified from employment by the state . . . nor shall a person be disqualified . . . [from] any occupation, trade, vocation, profession or business for which a license, permit, certificate or registration is required to be issued by the state . . . solely because of a prior conviction of a crime”).

222. HAW. REV. STAT. § 378-2.5(a) (West 2013).

223. MINN. STAT. ANN. § 364.021(b).

224. HAW. REV. STAT. § 378-2.5(d).

225. *See supra* notes 87–90 and accompanying text for a discussion of the Ban the Box statutes in Connecticut and New Mexico, which were passed because of a belief that employment lowers recidivism.

cases, with the average settlement just over \$1.6 million.<sup>226</sup> The Supreme Court has indicated that small employers should be exempted from federal antidiscrimination statutes, such as Title VII, to spare small employers “from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail.”<sup>227</sup> Indeed, Title VII itself only applies to employers with more than fifteen employees.<sup>228</sup> This same rationale should apply to Ban the Box legislation at the state and local levels. Some local Ban the Box statutes take this into consideration; the Philadelphia ordinance,<sup>229</sup> for instance, only covers employers who employ more than ten people.<sup>230</sup> An exception for employers that employ over ten people offers the best of both worlds: plenty of employment opportunities for ex-offenders, while limiting liability for those employers that would be most harshly affected by a finding of negligent hiring.

Finally, the ideal Ban the Box statute should contain safe harbors for certain employers. Specifically, the ideal Ban the Box statute should exempt employers whose employees have access to third parties that are particularly susceptible to harm. Such a provision would partially codify negligent hiring law’s degree of risk of harm inquiry.<sup>231</sup> As previously noted, courts recognize that “the greater the risk of harm, the higher the degree of care necessary.”<sup>232</sup> Because courts analyzing the degree of risk of harm can treat similar facts differently, employers may be left wondering how much care in hiring is sufficient to avoid liability.<sup>233</sup> With an ideal Ban the Box statute that exempts those employers whose employees have access to particularly susceptible third parties, employers would at least have a better grasp of the degree of risk of harm analysis.

In order to identify which employers are covered under the safe harbors, the ideal Ban the Box statute would need to identify those third parties particularly susceptible to harm. Clearly, children would qualify as particularly susceptible, so the ideal Ban the Box statute would not apply to schools, day cares, or other organizations that have regular access to children. Similarly, the case law seems to suggest that nursing homes and apartments complexes—where employees may have access to residents’ private quarters—are particularly susceptible to crimes of violence.<sup>234</sup> Of course, drawing the

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226. Connerley et al., *supra* note 206, at 174.

227. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (quoting *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 908 (9th Cir. 2001) (Graber, J., dissenting)).

228. See 42 U.S.C. § 2000e(b) (2012) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

229. PHILA., PA., CODE tit. 11, ch. 9-3500 (2013).

230. *Id.* § 9-3502(9).

231. See *supra* Part II.B.1.b for a discussion of degree of risk of harm analysis.

232. *E.g.*, *Stevens v. Lankard*, 31 A.D.2d 602, 602–03 (N.Y. App. Div. 1968).

233. See *supra* Part II.B.1.b for a discussion of cases that have similar fact patterns but are treated differently under various courts’ interpretations of degree of risk of harm analysis.

234. See, *e.g.*, *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907 (Minn. 1983) (involving a manager at an apartment complex with access to tenants’ homes); *Long v. Brookside Manor*, 885 S.W.2d 70 (Tenn. Ct. App. 1994) (involving a nursing home attendant with access to the rooms of the elderly tenants); *Southeast Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395 (Va. 1999) (involving a hotel maintenance supervisor

line of which employers to exempt may prove difficult; while public safety is obviously important, lowering criminal recidivism through employment is equally important. Indeed, the two goals are not mutually exclusive: less criminal recidivism translates to a safer society.<sup>235</sup> The ideal Ban the Box statute should take this into consideration when determining which employers to exempt from coverage.

2. When: Determining the Stage at Which the Employer May Conduct a Criminal Background Check.

Another provision of most Ban the Box legislation sets the time during the interview process at which employers can conduct their criminal background checks. Such a provision must balance the interests of ex-offenders—who would prefer a criminal background check later in the application process<sup>236</sup>—with the interests of employers—who would prefer to conduct criminal background checks as early as possible.<sup>237</sup> The ideal Ban the Box statute would reach such a balance by preventing employers from conducting background checks until after the first or second interview, thereby giving the ex-offender applicant the opportunity to represent himself in the best light possible.

Most Ban the Box legislation prevents employers from performing the criminal background checks until just before the prospective employee is hired. In this regard, the Minnesota statute is actually one of the more employer-friendly Ban the Box statutes, as the only restriction is that the employer cannot perform the criminal background check until after the applicant is selected for the interview.<sup>238</sup> Indeed, under the Minnesota Ban the Box statute, an employer may even notify applicants in advance that individuals with a particular criminal background will be disqualified from employment for particular positions.<sup>239</sup>

By contrast, the Connecticut statute prevents employers from inquiring about a prospective employee's past convictions until after such prospective employee has been deemed otherwise qualified for the position.<sup>240</sup> Additionally, the Connecticut statute forbids employers from considering a prospective employee's arrest record.<sup>241</sup> In a similar vein, the Hawaii Ban the Box statute allows employers to conduct a criminal

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with access to the rooms).

235. See OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006) (noting that reintegration of ex-offenders "makes us all safer").

236. See *supra* notes 98–104 and accompanying text for a discussion of ex-offender fears that they will be discriminated against early in the application process by prospective employers, and the validity of those fears.

237. See Holzer et al., *supra* note 10, at 42 (noting that in a survey of Los Angeles employers, more than seventy percent ran criminal background checks before hiring potential employees).

238. MINN. STAT. ANN. § 364.021(a) (West 2013). Under the 2013 amendment to the Minnesota statute, beginning January 1, 2014, if there is no interview, a check on the potential employee's criminal history cannot be performed before the employer makes a conditional offer of employment. Act of May 13, 2013, 2013 Minn. Sess. Law Serv. ch. 61 (West 2013).

239. MINN. STAT. ANN. § 364.021(c).

240. CONN. GEN. STAT. ANN. § 46a-80(b) (West 2013).

241. *Id.* § 46a-80(e).

background check “only after the prospective employee has received a conditional offer of employment.”<sup>242</sup>

Thus, Ban the Box statutes run the gamut for when employers are allowed to conduct the background check, ranging from just after the first interview,<sup>243</sup> all the way to a conditional offer of employment.<sup>244</sup> But an employer who waits until later in the interview process will have a more difficult time disproving employment discrimination based on the applicant’s prior criminal history. For a simple example, suppose an applicant lacks a substantial work history. The employer nevertheless believes the applicant is qualified, and offers the applicant a conditional offer of employment, pending the background check. The employer then discovers that the applicant actually has a prior criminal history. At this stage in the application process, the employer will find it difficult to prove that the applicant was not hired because of his criminal background but was, instead, not hired based on his lack of work history. Fearing an employment discrimination suit, the employer reluctantly hires the individual, opening the employer to the pitfalls of negligent hiring and negligent retention law.<sup>245</sup> It is no wonder, then, that most employers prefer to conduct criminal background checks as early as possible.

However, allowing employers to conduct criminal background checks at a very early stage in the application process has its own problems. Namely, employers who conduct criminal background checks too early will do so “before most ex-offenders had any chance to demonstrate their ability to successfully hold the jobs for which they were applying.”<sup>246</sup> Furthermore, while studies show that a criminal record reduces the likelihood that an applicant will be offered a second interview or a job by nearly half,<sup>247</sup> employers are more likely to hire ex-offenders after the first interview, even if they later discover a criminal history.<sup>248</sup>

Thus, an employer that conducts a criminal background check too early could potentially miss out on otherwise superior candidates—candidates that the employer would have hired after they had gotten to know them, despite the later discovery of their criminal history. However, an employer that conducts a criminal background check too late into the interview process will—at best—disqualify the ex-offender, wasting valuable time and money spent during the interview process and potentially opening itself to antidiscrimination litigation, or—at worst—end up hiring the ex-offender in order to avoid the potentially costly antidiscrimination litigation, only to later end up defending a negligent hiring case in court.

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242. HAW. REV. STAT. § 378-2.5(b) (West 2013).

243. *See, e.g.*, PHILA., PA., CODE tit. 9, § 9-3504 (2013) (requiring that employers only wait until after the first interview before conducting the background check).

244. *See, e.g.*, HAW. REV. STAT. § 378-2.5 (allowing employers to consider criminal backgrounds only after the applicant has received a conditional offer of employment).

245. *See* J. ALOYSIUS HOGAN & MARK A. DE BERNARDO, COUNCIL FOR EMPLOYMENT LAW EQUITY, COMMENT IN SUPPORT OF THE USE OF CRIMINAL-BACKGROUND CHECKS IN EMPLOYMENT 10 (2010) (arguing that ex-offender antidiscrimination laws will “undoubtedly lead employers to hire certain individuals with red-flag criminal histories which will lead to more negligent hiring claims against employers”).

246. Holzer et al., *supra* note 10, at 42.

247. Pager et al., *supra* note 100, at 199.

248. *Id.*

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Once again, the ideal Ban the Box statute will have to balance competing interests. Here, the solution may lie in allowing employers to consider criminal backgrounds only after the first or second interview. As previously stated, employers are more likely to hire ex-offenders after the first interview, even if they later discover a criminal history.<sup>249</sup> Employers are thus more likely to balance the ex-offender's history with the traits that the ex-offender exhibits in person during the interview process. In this way, employers are better equipped to make a reasonable decision because they can take all factors into account, instead of limiting their decision to what they know solely from the ex-offender's history. By limiting background checks until after the first interview, Ban the Box legislation can satisfy its goal of allowing ex-offenders to make a positive first impression while limiting the additional liability imposed on employers.

### 3. What: Determining the Information Available to Employers in the Criminal Background Check

Ban the Box statutes can differ most substantially in the amount of information that employers are allowed to consider when conducting criminal background checks. This can be the single most controversial aspect of a given Ban the Box statute, as it restricts the information available to employers. The purpose of negligent hiring law—and, consequently, background checks—is to protect the public.<sup>250</sup> As a result, a properly tailored Ban the Box statute must balance the interests of not just employers and ex-offenders, but of the public as well. The ideal Ban the Box statute will therefore allow employers to access all of an applicant's criminal conviction history, but will provide criteria for how employers are to consider that information. Ultimately, the criteria will guide not only employers, but courts too, offering some consistency to negligent hiring law.

The Minnesota statute—again, one of the more employer-friendly Ban the Box statutes—imposes no limitation on what employers can discover in their criminal background checks.<sup>251</sup> In stark contrast, the Hawaii statute only allows employers to consider an individual's prior criminal conviction if it “bears a rational relationship to the duties and responsibilities of the position.”<sup>252</sup> Moreover, in making this assessment, employers in Hawaii are limited from accessing convictions more than ten years old from the date of incarceration.<sup>253</sup> The Hawaii statute thus interferes with the employer's duty to protect third parties from the actions of their employees—if the employee assaulted a coworker over ten years ago, the employer would not have access to this information under Hawaii law.

The Connecticut statute may be the happy medium that would allow employers to

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249. *Id.*

250. See *supra* notes 113–16 and accompanying text for a discussion of how negligent hiring law is intended to protect the public.

251. Compare MINN. STAT. ANN. § 364.021(a) (West 2013) (making no explicit limitation on the information available to employers in Minnesota), with HAW. REV. STAT. § 378-2.5(c) (West 2013) (barring Hawaiian employers from considering convictions more than ten years old from the period of incarceration).

252. HAW. REV. STAT. § 378-2.5(a).

253. *Id.* § 378-2.5(c).

access a potential employee's criminal background while protecting the ex-offender from discrimination. The Connecticut statute specially outlines the criteria that an employer must consider before denying employment to a prospective employee. The criteria include: "(1) the nature of the crime and its relationship to the job for which the person has applied; (2) information pertaining to the degree of rehabilitation of the convicted person; and (3) the time elapsed since the conviction or release."<sup>254</sup> By specifically listing the criteria to be considered, the statute gives employers much needed direction in how to consider an ex-offender's criminal history.

Moreover, these criteria would effectively codify the totality of circumstances test under negligent hiring law, which has several advantages over the prior similar incidents test. As previously noted, the prior similar incidents test focuses on the employee's prior conviction and asks "whether the [prior] conviction was sufficiently similar to the [employee's tortious act] in question."<sup>255</sup> One problem with the prior similar incidents test is that while studies show that ex-offenders are substantially likely to reoffend, they are actually unlikely to commit the same crime again, especially if the first crime was a crime of violence.<sup>256</sup> As a result, the prior similar incidents test is counterproductive in predicting whether an ex-offender will reoffend because it often turns on whether the ex-offender recommit the same crime, which is unlikely.<sup>257</sup>

The prior similar incidents test can also lead to seemingly unfair results. For example, in *Stansfield* the court held that "three counts of robbery with a deadly weapon and three counts of the use of a handgun in the commission of a felony or crime of violence" were insufficient to suggest that the employee would subsequently break into a customer's home and rape her.<sup>258</sup> Specifically, the court noted that because "[n]one of the convictions . . . against [the employee] were for sexual offenses that would put an employer on notice that [the employee] would be likely to commit sexual assaults," the exact crime committed was not foreseeable.<sup>259</sup> As *Stansfield* demonstrates, a requirement that the employee recommit the same crime is beneficial to employers, as it limits the chances that they will be found liable under negligent hiring law. However, such a requirement clearly disfavors the third parties whom employers are charged with protecting under negligent hiring doctrine. Therefore, not only does the prior similar incidents test do a poor job of predicting recidivism, but it endangers the public in the process.

On the other hand, a totality of the circumstances test evaluates a number of variables in addition to the employee's prior convictions; these variables include "elapsed time since conviction, mitigating factors, and number of convictions."<sup>260</sup> Under such a test, *Stansfield* would have almost certainly have come out differently,

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254. CONN. GEN. STAT. ANN. § 46a-80(c) (West 2013).

255. Todd, *supra* note 132, at 753-54.

256. See *supra* notes 201-05 and accompanying text for a discussion of a study showing that 61.7% of offenders sentenced for violence reoffended, though not necessarily for another violent offense.

257. See *supra* Part II.B.1.a for a discussion of the prior similar incidents test under negligent hiring law.

258. *Stansfield v. Goodyear Tire & Rubber Co.*, No. 21924, 1999 WL 1419253, at \*1-2 (Va. Cir. Ct. Oct. 13, 1999). See *supra* notes 136-43 and accompanying text for a discussion of the facts of *Stansfield* and the court's analysis of the case.

259. *Stansfield*, 1999 WL 1419253, at \*1-2.

260. Todd, *supra* note 132, at 754.

given the employee's multiple prior acts of violence.<sup>261</sup> Codifying the totality of circumstances test in the ideal Ban the Box statute would instruct courts—and employers—to balance the entirety of an ex-offender's criminal history before making a determination as to whether the particular offense at issue could have been reasonably foreseeable. Moreover, by including the specific criteria to be taken into account when considering an ex-offender's criminal history, the ideal Ban the Box statute could eliminate much uncertainty and offer guidance to courts and employers alike.

#### IV. CONCLUSION

Ban the Box legislation is a noble effort at tackling employment discrimination against ex-offenders. Extensive research shows that employment reduces criminal recidivism,<sup>262</sup> and it has been recognized that “the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens.”<sup>263</sup> Thus, it is in everyone's best interests—including employers'—to support Ban the Box legislation. Of course, employers have a legitimate concern over Ban the Box provisions that limit their ability to conduct criminal background checks, particularly in lieu of potential liability under negligent hiring law.<sup>264</sup>

In order to garner support for future Ban the Box legislation, legislatures will need to rewrite the rules and think outside current Ban the Box legislation. The ideal Ban the Box statute would adequately balance the interests of ex-offenders with the concerns employers have under negligent hiring law. First, the ideal statute would apply only to large employers who could adequately afford the “potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail,”<sup>265</sup> but with safe harbors for employers with access to particularly vulnerable third parties.<sup>266</sup> Second, the ideal Ban the Box statute would only preclude criminal background checks until after the first or second interview,<sup>267</sup> because doing so would give ex-offenders a “chance to demonstrate their ability to successfully hold the jobs for which they were applying.”<sup>268</sup> Finally, employers should be able to access an applicant's entire criminal conviction history, but with directions on how that information should be properly used.<sup>269</sup> This should properly balance the interests of ex-offenders, employers, and the public. Ultimately, by rewriting the rules and thinking outside current “Ban the Box”

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261. *Stansfield*, 1999 WL 1419253, at \*1.

262. See *supra* note 5 and accompanying text for extensive research reporting a relationship between unemployment and recidivism.

263. CONN. GEN. STAT. ANN. § 46a-79 (West 2013).

264. See *supra* Part II.B.2 for a discussion of employers' concerns under negligent hiring law.

265. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (quoting *Wells v. Clackamas Gastroenterology Assocs., P.C.*, 271 F.3d 903, 908 (9th Cir. 2001) (Graber, J., dissenting)).

266. See *supra* Part III.A.1 for a discussion of who would be covered under the ideal Ban the Box law.

267. See *supra* Part III.A.2 for a discussion of when an employer should be allowed to conduct a criminal background check.

268. Holzer et al., *supra* note 10, at 42.

269. See *supra* Part III.A.3 for a discussion of what an employer should be allowed to access in a criminal background check.

legislation, there might be a solution to this no-win situation.