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RECONSIDERING CRIMINAL BACKGROUND CHECKS: RACE, GENDER, AND REDEMPTION

KIMANI PAUL-EMILE*

I. INTRODUCTION

The year 2015 marked the fiftieth anniversary of the influential and highly controversial “Moynihan Report,” which described poor African Americans as caught in a “culture of poverty” and helped substantiate the myth of the “welfare queen”: a woman who rejects paid employment and marriage as a prerequisite for childbearing, preferring instead to support herself and her children by claiming various forms of public assistance.¹ Today the trope of the welfare queen, along with its imagery and mythology, remains enduringly embedded in the public imagination, particularly in relation to pathology and dependence.

Occasionally, discussion in the popular media will address the structural forces that lead to women’s reliance on public services, such as the increasingly punitive child welfare and criminal justice systems that often target women of color for issues of social inequality.² Women of color, for example, are more likely than other groups to be arrested for distinct classes of crimes linked to motherhood, such as drug use during pregnancy, and even for falsifying records, when they try to use someone else’s address to get their children into better school districts.³ This can lead to a less talked about structural factor that contributes to women of color’s reliance on public assistance: the criminal record that may result from their interaction with the criminal justice system. Indeed, the targeted criminalization of these women results in a greater proportion of them having criminal records than their peers.⁴ Even an arrest that does not lead to a conviction can appear on a criminal record. This information is often used by employers to deny these women jobs,⁵ creating a troubling cycle of

* Associate Professor of Law, Fordham University School of Law. I am very grateful for the generous support provided for this research by the Robert Wood Johnson Foundation, and to the research assistance of Johanna Reppert.

1 DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

2 Julianne Hing, *Jezebels, Welfare Queens—And Now Criminally Bad Black Moms*, COLOR LINES (Aug. 8, 2011), <http://www.colorlines.com/articles/jezebels-welfare-queens-and-now-criminally-bad-black-moms>.

3 *Id.*

4 See generally, Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 896 (2014).

5 *Id.*

unemployment and dependence on government services that perpetuates the welfare queen mythology.

According to a 2011 report by the National Employment Law Project, over one-in-four adults in the United States have a criminal record.⁶ In raw numbers, that equates to sixty-five million people who have had some involvement with the criminal justice system that would be discovered during a routine criminal records search.⁷ Women of color are now the fastest growing segment of this population.⁸ The majority of their criminal records involve minor, non-violent, even *non-criminal* offenses, and often consist solely of arrests that did not lead to a conviction.⁹ Criminal history is an incredibly broad category, and it includes information on: “arrest[s] (or notice to appear in lieu of arrest); detention; indictment or other formal criminal charge (and any conviction, acquittal or other disposition arising therefrom); sentencing; correctional supervision; and release of an identifiable individual.”¹⁰ The offenses catalogued in criminal history reports also vary from juvenile offenses and one-time arrests—where charges are dropped entirely—to extensive, serious, and violent criminal histories. Notably, due to the increasingly common and often coercive use of plea bargains by prosecutors, it is estimated that “tens of thousands” of individuals with criminal records have engaged in no wrongdoing at all.¹¹

Criminal history information is readily available to employers, who, in a matter of minutes can conduct an online search of government or

6 MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L LAW EMP’T PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3–4 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf (noting that an estimated sixty-five million adults in the United States have criminal records).

7 See *id.* at 3.

8 See Hing, *supra* note 2 (observing that women of color are the fastest growing portion of the prison population).

9 Adam Klein, *Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, EEOC (July 26, 2011), <http://www1.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm?renderforprint=1>. More than 87 percent of adult convictions in 2008 in New York were for petty offenses or misdemeanors. *Id.* at n.9. Less than 5 percent of all arrests in the United States in 2007 were for violent crimes. *Crime in the United States, 2007, Table 29*, U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION (Sept. 2008) https://www2.fbi.gov/ucr/cius2007/data/table_29.html. Roughly 12–13 percent of all arrests are for non-serious offenses such as vagrancy, drunkenness, loitering, vandalism, disorderly conduct, and runaways. *Id.* Misdemeanors account for 12 percent of federal criminal cases and traffic violations account for 40 percent of misdemeanor charges. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 59 (2006), <http://www.bjs.gov/content/pub/pdf/cfjs04.pdf>.

10 See SEARCH, THE NAT’L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 5 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf> [hereinafter SEARCH]. Criminal justice information is a broad category, which also includes registries, watch lists, wanted person lists, and protective order lists. *Id.* Under certain circumstances, it can also include intelligence information. *Id.* at 5 n.10 (noting that commercial vendors have access to intelligence information only when necessary for the provision of “an information product or service to the government”).

11 Gilien Silsby, *Why Innocent People Plead Guilty*, USC NEWS (Apr. 18, 2014), <https://news.usc.edu/61662/why-innocent-people-plead-guilty/>.

commercial criminal records databases and, for free or for a modest fee, instantly obtain an applicant's criminal history report. The more than one hundred million criminal history records available on-line,¹² represent approximately 30 percent of the U.S. adult population.¹³ Just a few decades ago, background checks were difficult to conduct because a researcher had to know which courts or government agencies to check for relevant documents.¹⁴ If one suspected that an individual had records in several states, a researcher might have to go visit each one. But today tens of millions of criminal history searches are conducted each year through companies in the multi-billion dollar commercial background checking industry.¹⁵

Studies have cast doubt on the assumption that the existence of a criminal record correctly forecasts one's work behavior,¹⁶ and data show that individuals with criminal records who stay clean for a few years are no more likely than anyone else to have a future arrest.¹⁷ Still, over 90 percent of employers now conduct background checks,¹⁸ including Walmart—the nation's largest private employer.¹⁹ Nearly three-quarters of all employers

12 See SEARCH, *supra* note 10, at vi.

13 Rodriguez & Emsellem, *supra* note 6, at 3 (noting that an estimated sixty-five million adults in the United States have criminal records). The U.S. adult population (i.e. individuals over the age of eighteen) was 234,564,071 in 2010. U.S. CENSUS BUREAU, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010 (2010), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

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

15 See SEARCH, *supra* note 10, at vi.

16 Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1427 (2007); see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 339–40, 350 (2009) (demonstrating that an individual with a criminal record is less likely to be rearrested than an employee who has never been convicted).

17 See Alfred Blumstein & Kiminori Nakamura, 'Redemption' in an Era of Widespread Criminal Background Checks, NAT'L INST. JUST. J., Jun. 2009 at 10, 12–13. Fourteen million arrests are recorded annually in the United States. *Id.* at 10. The "hazard rate," or the probability over time that someone who has stayed clean will be arrested, declines to the same arrest rate for the general population at around three to seven years after an arrest occurred, depending on the age at which the individual was arrested and the crime that he/she was arrested for (robbery, burglary, or aggravated assault). *Id.* at 12.

18 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (finding that 92 percent of employers performed criminal background checks on some or all job candidates); Steven Greenhouse, *Equal Opportunity Panel Updates Hiring Policy*, N.Y. TIMES: BUSINESS DAY (Apr. 25, 2012), http://www.nytimes.com/2012/04/26/business/equal-opportunity-panel-updates-hiring-policy.html?_r=0.

19 Django Gold, *Wal-Mart Withholds Background Check Info, Suit Says*, LAW360 (May 25, 2012, 4:35 PM), <http://www.law360.com/articles/344391/wal-mart-withholds-background-check-info-suit-says>; Klein, *supra* note 9.

have adopted broad bans on the hiring of people with a criminal record.²⁰ This includes many employers that bar the hiring of individuals whose records consist of only an arrest and not a conviction—a group that constitutes one-third of all felony arrests.²¹

The scale of the problem is vast and has a significant impact on women of color, who are over-represented in the criminal justice system relative to their share of the population and their involvement in criminal activity.²² Black women represent 30 percent of those incarcerated, yet constitute only 13 percent of the female population nationally, while Hispanic women make up 16 percent of women behind bars, but only 11 percent of all women in the United States.²³ Moreover, African Americans generally are up to fifteen times more likely than whites to be arrested or cited for low-level offenses,²⁴ while Latinos are three times more likely than whites to be cited for such offenses.²⁵ This is due, in part, to policing strategies that

20 Paul-Emile, *supra* note 4, at 895 (“Nevertheless, 73% of employers, both large and small, conduct criminal background checks on all job candidates, and many have adopted broad hiring prohibitions on such individuals.”).

21 See TRACY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 1 (2008), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=891> (examining the seventy-five most populous counties in the United States).

22 FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2009 tbl.43 (2010), http://www2.fbi.gov/ucr/cius2009/data/table_43.html (showing that arrests of African Americans comprised 28 percent of total arrests); LAURA MOSKOWITZ, STAFF ATTORNEY, NAT’L EMP’T LAW PROJECT’S SECOND CHANCE LABOR PROJECT, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Nov. 20, 2008), <http://www.eeoc.gov/eeoc/meetings/11-20-08/moskowitz.cfm> (noting that Latinos constitute roughly 15 percent of the population but nearly 20 percent of the incarcerated population, and they are three times more likely to be arrested than, and twice as likely to be incarcerated, as whites); OFFICE OF LEGAL COUNSEL, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, U.S. EQUAL EMP’T OPPORTUNITY COMM’N 3 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf (“African Americans and Hispanics are arrested at a rate that is [two] to [three] times their proportion of the general population.”). For broader dimensions of this race exclusion, see *infra* Section III.C.

23 AM. CIVIL LIBERTIES UNION, FACTS ABOUT THE OVER-INCARCERATION OF WOMEN IN THE UNITED STATES (2015), <https://www.aclu.org/facts-about-over-incarceration-women-united-states>.

24 COUNCIL ON CRIME & JUSTICE, LOW LEVEL OFFENSES IN MINNEAPOLIS: AN ANALYSIS OF ARRESTS AND THEIR OUTCOMES 3–4 (2004), <http://www.crimeandjustice.org/researchReports/Low%20Level%20Offenses%20in%20Minneapolis-%20An%20Analysis%20of%20Arrests%20and%20their%20Outcomes.pdf>. The New York City Police Department arrested, charged with misdemeanors, and incarcerated more than 353,000 people from 1997 to 2006 for the possession of small amounts of marijuana. Despite accounting for only 26 percent of the city’s population, African Americans constituted 52 percent of these arrests. See HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007 4 (2008), http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf. In comparison to white arrest rates for marijuana, the arrest rate for African Americans is five times greater and the arrest rate for Latinos is nearly three times greater. *Id.* This is so despite the fact that federal government studies consistently find that young Whites use marijuana at higher rates than young African Americans. See *id.*

25 MOSKOWITZ, *supra* note 22 (noting that Latinos are three times more likely to be arrested than, and twice as likely to be incarcerated, as whites); Jared Taylor & Glayde Whitney, *Crime and Racial Profiling by U.S. Police: Is There an Empirical Basis?*, 24 J. SOC., POL., & ECON. STUD. 485,

target minority communities, such as stop-and-frisk programs, the war on drugs, and broken windows policing, which have all become popular among urban police forces.²⁶ Moreover, as demonstrated by the recently released United States Attorney General's Report on Ferguson, Missouri, in some places an individual can get a criminal citation just for being black.²⁷

Today, there are eight times as many women under correctional supervision than in 1980, increasing from 12,300 in 1980 to 182,271 by 2002. Further, between 1977 and 2007, the number of women in prison increased by 832 percent, nearly double the increase of the rate of men, and today the U.S. has more women incarcerated than any other country in the world, including Russia, China, India, and Thailand combined.²⁸ Further, women more than men tend to be arrested for low-level, nonviolent offenses, and for offenses that are "more reactive or defensive in nature" or "involve interpersonal conflicts."²⁹

In addition, having a criminal record puts African Americans at particular risk of long-term unemployment. For example, groundbreaking audit studies conducted by researchers at Harvard and Princeton Universities found that blacks and Hispanics with criminal records were particularly disadvantaged in the job market when compared to whites with criminal records.³⁰ Incredibly, the research also showed that whites *with* a purported recent felony conviction had a greater chance of receiving a callback than blacks *without* a record.³¹ These findings suggest that people of color are particularly stigmatized by having a criminal record and, indeed, suffer a "criminal records penalty." This employment penalty is exacerbated for women who, despite posing a low risk to public safety, face unique barriers to employment.³² For example, women are less likely than men to work in the manufacturing and construction industries, which are industries that are more open to hiring individuals with criminal records.³³ Women, and particularly women of color, tend to be employed in retail and care-giving jobs, which are less likely to hire those with records, and, in

499–506 (1999) (describing how federal data collection agencies treat the category "Hispanic" inconsistently, which renders fully measuring these crime rates difficult).

26 See generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000–01).

27 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 4, 62 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

28 Michele Goodwin, *Invisible Women: Mass Incarceration's Forgotten Casualties*, 94 TEX. L. REV. (forthcoming 2016).

29 CMTY. LEGAL SERV. OF PHILA., YOUNG WOMEN OF COLOR WITH CRIMINAL RECORDS: A BARRIER TO ECONOMIC STABILITY FOR LOW-INCOME FAMILIES AND COMMUNITIES 3–4 (2014), http://clsphila.org/sites/default/files/issues/Young%20Women%20with%20Criminal%20Records%20Report_0.pdf.

30 Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 785–86 (2009).

31 See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) (explaining that "the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group").

32 CMTY. LEGAL SERV. OF PHILA., *supra* note 29, at 2–3.

33 *Id.* at 4.

fact, now rely more heavily on criminal records screens than other industries.³⁴ The fact that employers have virtually unlimited access to criminal history information only intensifies this problem, making it all but impossible for these women to find gainful employment.

Our existing regulatory apparatus is grounded in the *Fair Credit Reporting Act* (“FCRA”),³⁵ *Title VII of the Civil Rights Act of 1964* (“Title VII”),³⁶ and a patchwork of similar state and local laws. This apparatus is ill-equipped to resolve this emerging dilemma because it fails to address systematic information failures and the problem of stigma. This Article proposes an alternative framework, which I have termed the “Health Law Framework,”³⁷ that draws from core aspects of anti-discrimination laws from the health law context, notably the *Americans with Disabilities Act* (“ADA”),³⁸ and the *Genetic Information Nondiscrimination Act* (“GINA”).³⁹ The ADA emphasizes “reasonable accommodation,” managing risk, and alleviating stigmatic harms. GINA focuses on regulating the flow of information regarding an invisible yet stigmatized status that can form the basis of discriminatory treatment. Together these laws provide a conceptual lens for thinking about and reducing employment discrimination based on the crippling stigma that stems from dual criminal record and minority status. In addition, both the ADA and GINA operate to guard against discrimination before it occurs, and therefore hold tremendous promise for curtailing employers’ use of information technology to inappropriately screen people with criminal records out of the employment pool. At the same time, these laws work in combination to strengthen the enforcement of existing laws governing the collection and dissemination of criminal records data.

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

34 *Id.* (women constitute 20.51 percent of retail workers, and 46.64 percent of service industry workers respectively).

35 Fair Credit Reporting Act, 15 U.S.C. § 1681(a) (1970).

36 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, e-2(a) (2006).

37 For a more detailed exposition of the Health Law Framework, see Paul-Emile, *supra* note 4.

38 Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (2006 & Supp. IV. 2010); 42 U.S.C. §§ 12101–12213 (2006 & Supp. IV. 2010).

39 42 U.S.C. § 2000ff-1(a) (2006 & Supp. IV. 2010).

II. THE CURRENT REGULATORY FRAMEWORK: TITLE VII AND THE FCRA

The current age of information technology and corresponding growth of criminal records databases has made it virtually impossible for an individual with a criminal history to rehabilitate by getting a fresh start in a new state, city or town, thereby moving beyond their criminal past. This is exacerbated by the fact that the laws designed to regulate the use of these databases and curb criminal records discrimination do not go far enough in protecting job applicants. This Part introduces these relevant laws: the FCRA and Title VII.

A. THE FCRA

The FCRA is a federal law that governs the collection and dissemination of consumer information, including criminal history reports.⁴⁰ The law requires employers to obtain consent from job applicants before conducting a background search, and to notify individuals if they are denied a job or fired because of information contained in their criminal history report.⁴¹ This law, however, is inadequately enforced.⁴² Employers typically get an application, perform an online search without the applicant's consent, and then never call the applicant back if a criminal record is found.⁴³

The FCRA is also supposed to ensure that the information contained in reports is accurate. However, it has not ensured accurate reporting. Countless studies show that criminal history reports are riddled with errors, such as the release of sealed or expunged information, or records that are missing case disposition information, such as a felony that was reduced to a misdemeanor or a case where all of the charges were dropped.⁴⁴ Records also often contain misspellings or clerical errors, which can lead to false

40 NAT'L ASS'N OF PROF'L BACKGROUND SCREENERs, CONSUMER FAQs (2014), http://portal.napbs.com/files/resource_library/Best%20Practices/Work%20Products/Consumer%20FAQ/NAPBS%20Consumer%20FAQ%20-%20APPROVED.pdf ("FCRA - The federal law that regulates the collection, dissemination, and use of consumer information, including consumer credit information."); see also ADP, THE FAIR CREDIT REPORTING ACT (FCRA): BACKGROUND SCREENING AND COMPLIANCE: A WHITE PAPER ON HOW TO BE COMPLIANT WITH FCRA BACKGROUND SCREENING REQUIREMENTS 1 (2007), <https://www.adpselect.com/pdf/ADPFairCreditReportingActWhitePaper.pdf> ("The FCRA regulates the use of reports obtained from consumer reporting agencies. As such, the FCRA also regulates consumer reporting agencies, employers ordering background screening reports from third party providers and furnishers of consumer reporting information.").

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

42 See Paul-Emile, *supra* note 4, at 917.

43 See *id.*

44 See PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES (2012), <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>. Even government-issued reports contain pervasive inaccuracies, as a 2010 study conducted by the DOJ's Bureau of Justice Statistics reported that many state criminal records repositories had not documented the final dispositions for a considerable number of arrests. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010 2-3 (2011), www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf.

positive identifications (incorrectly linking another person's name to a criminal record) or false negatives (missing a criminal record because of a false or inaccurate name).⁴⁵ Consider the case of Catherine Taylor, the plaintiff in a recent lawsuit against the background checking company ChoicePoint, now known as LexisNexis Risk Solutions.⁴⁶ Taylor had no criminal history, but her housing and employment opportunities were jeopardized when ChoicePoint reported the criminal record of another Catherine Taylor with the same date of birth and a lengthy criminal history.⁴⁷ It is estimated that hundreds of thousands of these errors occur each year.⁴⁸ Such an error rate translates into substantial numbers of individuals being denied employment opportunities or facing delays in receiving job offers. Most disturbingly, these flawed reports can circulate indefinitely, and applicants may never know why they were denied jobs.

B. TITLE VII

The other federal law used to regulate the use of criminal background checks by employers is Title VII, which prohibits discrimination on the basis of race in employment.⁴⁹ It also bars employers from automatically denying employment to individuals based on an arrest or conviction record.⁵⁰ This is because broad bans on the hiring of those with criminal records are likely to have a disparate impact on racial and ethnic minorities, who are statistically more likely to have contact with law enforcement that may result in a criminal record.⁵¹ An employer cannot reject a job candidate based on a criminal record unless the employer can show that the decision, policy, or practice is "job related" for the position in question and consistent with "business necessity."⁵² Courts have deepened this analysis by identifying three factors that must be considered when determining job-relatedness and business necessity: the nature of the crime, the time elapsed

45 See CRAIG N. WINSTON, NAT'L ASS'N OF PROF'L BACKGROUND SCREENERs, THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION 10-12 (2005), <http://besthire.com/Forms/NcicReportJuly252005.pdf> (describing how a Florida task force compared the accuracy of identifications made using name checks and those using fingerprint-based searches of the FBI's records, and found that name-checks yielded 11.7 percent false negatives and 5.5 percent false positives).

46 See YU & DIETRICH, *supra* note 44, at 15-16.

47 *Id.*

48 See WINSTON, *supra* note 45, at 11-12 (describing the work of a Florida task force consisting of the Bureau of Justice Statistics, the Florida Department of Law Enforcement, the U.S. Department of Housing and Urban Development, and the FBI, which estimated that if Florida's false positive rates were extrapolated to the nationwide fingerprint-based checks of the FBI conducted in 1997, then 346,000 false positives would have resulted).

49 See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . .").

50 See OFFICE OF LEGAL COUNSEL, *supra* note 22, at 8-9, 16.

51 See *id.* at 9-10.

52 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31, 436 (1971).

since the criminal conduct occurred, and the nature of the specific job in question.⁵³

Assessing whether a criminal record exclusion is both job-related and consistent with business necessity differs depending on whether an arrest or conviction is involved. An arrest “does not establish that criminal conduct” has occurred, therefore a denial of employment based solely on an arrest record cannot satisfy the “job related” and “business necessity” standards.⁵⁴ A record of conviction, on the other hand, will typically suffice as evidence that an individual engaged in particular conduct. Still, under certain circumstances it may be unjustifiable for an employer to rely solely on the conviction record when screening job candidates.⁵⁵

Title VII, when applied to criminal records discrimination, produces unique problems that make it incredibly difficult for people of color with criminal records to get hired or to challenge adverse employment decisions. This is due to several factors. First, race is not exactly analogous to having a criminal record. Title VII was created to target race discrimination, but criminal records discrimination is different from race discrimination. Consideration of race in hiring is illegal because race is generally understood to be irrelevant to an employee’s ability to perform on the job. Criminal history status, on the other hand, may sometimes be quite relevant to hiring. For example, if an employer is hiring a bank teller or accountant, the fact that a candidate has a recent embezzlement conviction may be quite relevant.

Moreover, while employers should be able to inquire into the criminal histories of those who may be placed in sensitive jobs or positions of trust, the applicant’s race may, consciously or unconsciously, influence negatively an employer’s evaluation of a job seeker’s criminal record, thereby making the identification of unlawful discrimination more difficult. This problem is exacerbated by employers’ reliance on information technology to check a job applicant’s criminal history early in the hiring process. Indeed, to reject a job applicant based on an arrest record, an employer must offer a valid business justification.⁵⁶ Yet this is difficult to enforce, because the adverse actions employers take in the hiring process typically occur during the pre-offer period, when job candidates have little explicit knowledge of why they were denied an interview for a job, and may, in fact, never know the true reason for their rejection. This, in turn, limits their ability to challenge employers’ discriminatory actions.

In addition, while disparate impact cases do not require proof of intentional discrimination, these cases do require comparative evidence to

53 Green v. Miss. Pac. R.R. Co., 549 F.2d 1158, 1159–60 (8th Cir. 1977).

54 See OFFICE OF LEGAL COUNSEL, *supra* note 22, at 1.

55 *Id.*

56 U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE:

CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012),
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB4.

establish liability.⁵⁷ Plaintiffs must demonstrate that a particular employment practice disproportionately burdens members of a protected group typically through statistical evidence.⁵⁸ However, not only have courts made establishing proof of differential impact more onerous under Title VII, but the fact that criminal records discrimination occurs almost exclusively during the hiring stage makes it difficult for an aggrieved applicant to acquire the empirical data necessary to show how the employer has treated similarly situated applicants. Moreover, this lack of information due to the preponderance of hiring cases over firing cases increases the difficulty of bringing class action lawsuits.

Further, Title VII does not adequately address the complex and often conflicting tangle of state and local antidiscrimination laws with which employers must contend when making hiring decisions that involve people with criminal records.⁵⁹ While some states and municipalities have enacted antidiscrimination statutes that offer varying degrees of protection to persons with criminal records, many apply only to public sector employment, and these laws typically have anemic mechanisms of enforcement.⁶⁰ Finally, neither the FCRA nor Title VII address the ways in which the combination of a criminal record and minority status creates a distinctive and powerful social stigma that studies show is significantly more harmful than minority status or ex-offender status alone.⁶¹ For these reasons, neither of these laws can effectively prevent or redress discrimination in this context or adequately ensure equality of opportunity.

III. THE HEALTH LAW FRAMEWORK: THE ADA AND GINA

Like Title VII, GINA and the ADA were enacted to protect against discrimination in employment. These laws, however, are normatively and doctrinally distinct from Title VII in ways that are relevant to countering employment discrimination against individuals with criminal records. This Part maps the normative commitments of the ADA and GINA, and suggests that the way these laws operate to mitigate social stigma and attendant discrimination offers a useful model for conceptualizing and curtailing the

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See e.g.*, N.Y. CORRECT. LAW §§ 752–54 (Consol. 2007); N.Y. CRIM. PROC. LAW § 160.60 (McKinney 2004); N.Y. EXEC. LAW § 296(15)–(16) (McKinney 1976); *see also* HAW. REV. STAT. ANN. § 378-2.5(a) (LexisNexis Supp. 2010); 18 PA. STAT. AND CONS. STAT. ANN. § 9125 (West 2000); WIS. STAT. § 111.335(1)(c) (2012).

⁶⁰ *See* NAT'L EMP'T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 26–30 (2013), <http://www.nelp.org/page/-/SCLP/2010/BantheBoxCurrent.pdf?nocdn=1> (describing laws in California, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Washington, D.C. that protect people with criminal records from employment discrimination in the public and/or private sectors).

⁶¹ *See* Pager et al., *supra* note 31, at 784–85.

discrimination in employment that results from dual criminal record and minority status.

A. THE ADA & GINA

The ADA was enacted by Congress in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁶² Among the ADA’s five titles, the first deals with employment and establishes that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability” in public or private employment.⁶³ In a move intended to target misperceptions and societal stigma against the disabled, Congress later enacted the ADA Amendments Act of 2008 (“ADAAA”), which expanded the definition of “disability” under the ADA to cover all persons with a physical or mental impairment that is not minor or transitory.⁶⁴

GINA was enacted out of concern that knowledge of a genetic predisposition for disease could result in social stigma. The law bars discrimination on the basis of genetic information in employment, and for health insurance purposes.⁶⁵ Title II of the law imposes strict confidentiality and nondisclosure requirements on all employee genetic information by prohibiting employers from requesting, requiring, or purchasing genetic information related to their employees during and after the job application or interview process.⁶⁶

I argue that the current Title VII/FCRA scheme can be strengthened by incorporating certain aspects of the ADA and GINA, which would better account for the unique stigma that attaches to dual criminal records and minority status. This is because of several factors. First, having a disability, like having a criminal record, is relevant to employment decisionmaking, and both can be used as a legitimate ground to exclude an individual from employment. This is never the case with race. Second, unlike Title VII and the FCRA, both the ADA and GINA were designed to target discrimination based on a trait or condition that may be invisible, but which carries a powerful social stigma. Third, in the health law context as in the criminal record setting, employers are allowed to consider potentially stigmatizing information about employees and job candidates. Therefore, the ADA and GINA have been designed to regulate the flow of stigmatizing information to prevent discrimination preemptively, while ensuring equal opportunity.

62 Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2006).

63 *Id.* at § 12112(a).

64 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a), 122 Stat. 3553, 3557 (2008) (codified as amended at 42 U.S.C. § 12112 (2006)).

65 Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, §§ 101-106, 201-213, 122 Stat. 881-920 (to be codified in scattered sections of 26, 29, and 42 U.S.C.).

66 *Id.* at § 202, 122 Stat. 907.

B. OPERATIONALIZING THE HEALTH LAW FRAMEWORK

Under the ADA, an employer cannot attempt to learn whether an applicant has a disability prior to making a job offer. This is to ensure that individuals with disabilities have “a fair opportunity to be judged on their qualifications.”⁶⁷ Then, once an offer has been made, but before the candidate begins work, an employer may ask disability-related questions. However, if an individual is denied a job because these questions reveal a disability, then the employer must demonstrate that the exclusion is job-related and consistent with business necessity.⁶⁸ In the criminal records context, employers should be precluded from requesting, acquiring, or purchasing a job applicant’s criminal records until after the candidate has received a conditional offer. GINA generally prohibits employers from seeking to obtain genetic information at any time during employment and, notably, GINA’s implementation regulations explicitly apply to the Internet.⁶⁹ In keeping with GINA, employers should not be permitted to search during the pre-offer period for this stigmatizing information through online sources like commercial criminal record databases.⁷⁰

This Health Law Framework allows those with criminal records to get past the phase at which an employer is most likely to exclude job candidates based on their stigmatized status. It also enables candidates to advance to the point where the “job related” and “consistent with business necessity” provisions of Title VII can be applied. This Health Law Framework would also make it easier for people with criminal records to prove intentional discrimination because it forces the employer to justify rejecting an applicant after already approving them.

In addition, the Health Law Framework would enhance the FCRA’s provisions that require employers to obtain a job candidate’s consent before conducting a background check, and that mandate notifying the applicant if the report is used to make an adverse decision. This allows the Health Law Framework to alleviate the problems caused by the pervasive errors that now plague criminal history reports. For example, it would give job seekers a meaningful opportunity to explain, rebut, or check the veracity of the

67 *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000) (citing 135 CONG. REC. S10,768 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

68 42 U.S.C. §§ 12112(d)(4)(A), 12113(a) (2006). Employers can only withdraw their offers if they can show that the candidate is unable to perform the essential functions of the job (with or without accommodation), or that the candidate poses a significant risk of causing substantial harm to self or others. Employers are not required to hire job applicants if they are unable to perform all of the essential functions of the job, even with reasonable accommodation. However, employers cannot reject job seekers simply because their disability prevents them from performing minor duties that are not essential to the job. 29 C.F.R. Pt. 1630 App. (2011); 29 C.F.R. §§ 1630.10 (2000), 1630.14(b)(3) (2003).

69 *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/regulations/gina-background.cfm> (last visited Nov. 9, 2015).

70 The law also includes safe harbor language for commercial or publicly available information. However, covered employers are precluded from searching such sources with the intention of acquiring an individual’s genetic information. *See* 29 C.F.R. § 1635.8(b)(4) (2011).

records being considered before being disqualified from employment. It would also allow a job candidate to catch a conviction record that should have been expunged, or a felony offense that was later reduced to a misdemeanor, or other errors in the record.

C. RISK AND EMPLOYER COSTS

Employers' eagerness to adopt policies or practices that exclude those with a criminal record is based in part on their concerns about managing risk.⁷¹ Employers seek to reduce their exposure to tort liability, including the costs that may be incurred as a result of litigation based on a negligent hiring or negligent retention claim, or of liability under respondeat superior, a doctrine that allows employers to be held responsible for the actions of their employees, including possible criminal activity, when those actions are performed in the course of employment.⁷² In the ADA and GINA contexts, employers are similarly concerned about the increased healthcare or other costs that may be incurred by the hiring of an individual with a disability or a genetic predisposition toward developing a disease. Still, the expectation under GINA and the ADA is that the employer will assume this risk. Here the ADA's "direct threat" and "reasonable accommodation" analyses are instructive.⁷³

Under the ADA, an employer may remove or refuse to hire an individual with a disability only if it can show that the individual would pose a "direct threat," which is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."⁷⁴ The ADA also makes clear that an employer "cannot refuse to hire . . . [a job candidate] based on a slightly increased risk, speculation about future risk, or generalizations about . . . [the] disability."⁷⁵ An employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.⁷⁶ If the requested accommodation causes an "undue hardship"—that is, "if it would require significant difficulty or expense"—the employer "still would be required to provide another accommodation that does not."⁷⁷ Also, "an employer cannot refuse to provide an accommodation solely because it entails some costs, either financial or administrative."⁷⁸ Hence the reasonable accommodation mandate serves as explicit recognition that the employer is best able to bear the potential risks and costs associated with employing a disabled employee or applicant.

71 See *El v. Se. Pa. Transp. Authority*, 479 F.3d 232, 244 (3d Cir. 2006).

72 *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

74 See *id.*

75 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, JOB APPLICANTS AND THE AMERICANS WITH DISABILITIES ACT, <http://www.eeoc.gov/facts/jobapplicant.html> (last modified Mar. 21, 2005).

76 *Id.*

77 *Id.*

78 *Id.*

In comparison, in the criminal records context, many employers assume that individuals with criminal records have a high risk of committing future crimes. Data, however, reveals that once those with criminal records have “stayed clean” for a few years, their chance of being arrested for a new crime essentially disappears.⁷⁹ This point, widely referred to as the “point of redemption,” is the point at which a prior arrest no longer distinguishes the risk of future criminal arrests for that person compared to a similar person in the general population.⁸⁰ This point averages between three to seven years, depending on the age at which the arrest occurred.⁸¹ Notably, women generally have lower rates of recidivism than men,⁸² and at least one study shows that individuals with youthful offense histories are less likely to commit a crime in the workplace than an employee who has never been convicted.⁸³ Hence, predictions regarding the risk of future crime based simply on a criminal record are likely prone to error.

This is not to suggest that there are no risks or costs associated with hiring individuals with criminal records, which, like all hiring, involves an element of chance. However, employers are better able to assume the costs and risks involved in the hiring process than those who experience discrimination based on their criminal records.⁸⁴ Plus, as with the disabled, the social costs imposed by failing to facilitate employment for this population are tremendous. For instance, employment losses caused by criminal records discrimination now cost the country \$57 to \$65 billion per year.⁸⁵ Plus, many people with criminal records, especially women of color, are the primary earners for their families, so employment discrimination against this population has negative effects on third

79 See Blumstein & Nakamura, *supra* note 17, at 13.

80 See Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT'L INST. JUST. J., Jun. 2012 at 42, 47.

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

82 CMTY. LEGAL SERV. OF PHILA., *supra* note 29, at 3.

83 See Roberts et al., *supra* note 16, at 1430–31 (“Adolescent criminal convictions were unrelated to committing counterproductive activities at work [such as absenteeism, disciplinary problems, tardiness, etc.]. In fact, according to the [study findings], people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or to steal things from work.”) (quoting from a study of New Zealand residents from birth to age twenty-six).

84 Employers who hire people with criminal records may qualify to receive federal and state tax credits through the Federal Bonding Program, which insures employers up to \$25,000 for losses due to “theft, forgery, larceny and embezzlement” by employees. See *Program Background*, THE FED. BONDING PROGRAM: U.S. DEP'T LAB. INITIATIVE, <http://www.bonds4jobs.com/program-background.html> (last visited Nov. 9, 2015); See also *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 207 (1991) (rejecting employer's argument that its fetal protection policies were necessary protection against substantial threat of liability).

85 JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET (2010), <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

parties.⁸⁶ The number of children with an incarcerated mother has increased 131 percent since 1991, significantly outpacing the number of children with a father in prison, which has increased 77 percent.⁸⁷ “More than 8.3 million children have a parent under correctional supervision, and more than one in five of these children is under five years old,”⁸⁸ which means that millions of children will experience the debilitating effects of a parent’s inability to be evaluated fairly for a job.⁸⁹

In addition, individuals with criminal records who have spent time in jail and who were jobless after re-entry are three times more likely to return to prison.⁹⁰ Today, incarceration expenditures cost taxpayers over \$56 billion annually.⁹¹ Plus, state expenditures to support the prison system have outpaced virtually all other state spending during the past twenty years, creating a substantial financial burden for states and municipalities.⁹² Estimates are that 600,000 to 700,000 prisoners will be released annually in this decade, equaling 30 percent of the annual growth of the labor force.⁹³ These individuals will need to seek stable employment, which is one of the most effective ways to protect against a released prisoner’s return to criminal activity.⁹⁴ If they are unable to obtain legitimate employment, not only do they risk recidivism, but societal and economic expenditures will rise dramatically. Therefore, although the “reasonable accommodation” mandate is about the allocation of costs, it also recognizes that removing employment barriers is a necessary means of lowering the risk of recidivism, reducing social marginalization and societal costs, and ensuring full citizenship.

86 CMTY. LEGAL SERV. OF PHILA., *supra* note 29, at 2.

87 STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 1 (2009), <http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>.

88 AM. CIVIL LIBERTIES UNION, *supra* note 23.

89 See THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1.pdf.

90 Stephen Saltzburg, *Written Testimony for EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, EEOC (July 26, 2011), <http://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

91 *Id.*

92 See Solomon, *supra* note 80, at 48.

93 Richard Freeman, Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S. 6 (May 19–20, 2003) (unpublished manuscript), http://www.urban.org/UploadedPDF/410857_Freeman.pdf. More than 2.3 million people are incarcerated in federal and state prisons and local jails at any given time. See Jenifer Warren, *One in 100: Behind Bars in America 2008*, PEW CTR. ON THE STATES 1, 5-7 (2008) (observing that “more than 1 in 100 adults is now locked up in America. With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258 . . . [O]ne in every 15 black males aged 18 or older is in prison or jail.”).

94 See Solomon, *supra* note 80, at 43 (noting that employment is an important component of successful re-entry for former offenders); see also John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1 (2001) (discussing study identifying work as a factor in effective desistance from crime); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 542 (2000) (noting the success work programs have had in crime desistance among older offenders).

To be sure, having a criminal record is not entirely analogous to being disabled or having a genetic predisposition to develop disease because one can be born with a disability while one typically “earns” a criminal record. But this is not always the case, particularly for racial minorities. As mentioned previously, women of color are often arrested for ostensible crimes that are actually just manifestations of social inequality.⁹⁵ In addition, one-third of all individuals with criminal records have never been convicted of a crime, as many criminal history reports contain only arrests, including those in which the charges were dropped entirely.⁹⁶ These arrests occur most often in black and Latino communities where aggressive policing tactics and indiscriminate arrests are common.

Using New York City as an example, of the nearly three quarters of a million people stopped and questioned by the New York City Police Department (“NYPD”) in 2011, 87 percent were black or Latino, and 9 percent were white.⁹⁷ Nearly 90 percent of those stopped had done nothing wrong, but these stops may result in an arrest that will be reflected in a criminal history report.⁹⁸ Moreover, in 2013 a New York federal court held the NYPD liable for a pattern and practice of racial profiling and unconstitutional stop-and-frisks after finding that the NYPD had, for years, systematically stopped innocent people without any objective reason to suspect them of doing anything wrong.⁹⁹ These practices have been shown to be quite widespread.¹⁰⁰ In addition, in 2012 the NYPD was sued for its practice of stopping and ticketing or arresting thousands of individuals for “trespassing in their own building if they fail[ed] to produce identification when they took out the garbage, check[ed] the mail,” or ventured out into the hallways.¹⁰¹

With respect to serious offenses, some degree of stigmatization may be appropriate, and every person with a criminal record may not be well-suited to work in all jobs. These individuals, however, should be entitled to a second chance after paying their debt to society. They should not be summarily denied the opportunity to compete for legitimate employment that would enable them to support themselves and their families, pay their

95 See *supra* Part I.

96 See Tracy Kycckelhahn & Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Apr. 1, 2008), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=891>.

97 Kate Taylor, *Record Number of Street Stops Prompts a Protest*, N.Y. TIMES (Feb. 14, 2012), <http://cityroom.blogs.nytimes.com/2012/02/14/record-number-of-street-stops-prompts-a-protest/>.

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

99 *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013); see Jim Dwyer, *Police Stops are Down; So is Murder*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/nyregion/police-stops-are-down-in-new-york-so-is-murder.html>.

100 See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

101 *Stop and Frisk, Continued*, *supra* note 98.

taxes, and make a positive contribution to their communities and the economy. Individuals should not suffer a lifetime employment penalty for an unsubstantiated arrest, youthful indiscretion, minor infraction, or even a more serious offense that occurred in the distant past. Yet this is exactly what is happening, and this is compounded for women of color due to the employment penalty they pay for having a criminal record.

This penalty enables and sustains a chronic social and civil incapacitation of the millions of individuals with joint minority and criminal record status that effectively disables their basic ability to compete in our society and to assume a productive and responsible place in it. Because the current Title VII remedial framework was designed to address discrimination on the basis of race, gender, or national origin, it is ineffective at combating the compound stigma and attendant disadvantages that flow from the combination of a criminal record and minority status.

D. LEGISLATIVE AND ADMINISTRATIVE CONSIDERATIONS

Although this proposal may seem to suggest sweeping change or new legislation for its implementation, the Health Law Framework simply modifies and strengthens existing laws, while offering several practical advantages over the current regulatory scheme. First, this discrete proposal amends Title VII and the FCRA in ways that render these laws more responsive to the needs of employers and potential employees with criminal records. The Equal Employment Opportunity Commission (“EEOC”) and Federal Trade Commission (“FTC”), which implement Title VII and the FCRA respectively, would continue to enforce these laws as amended. This is significant because the EEOC, which implements both the ADA and Title VII, is sensitive to the issue of stigma and has unique expertise with these legal doctrines. Thus, this new framework would allow these agencies to more effectively do their jobs by curbing discrimination prophylactically.

States and local governments have already had great success with fair hiring measures, such as “ban the box” laws, designed to increase the employment prospects of those with criminal records.¹⁰² The federal scheme provided by the Health Law Framework would not preempt state and local laws that provide higher levels of protection to individuals with criminal records, but would offer additional clarity for employers and reduce the uncertainty and confusion now created by the many, often conflicting, state and local laws.

E. THE USE OF RACE AS A PROXY FOR CRIMINAL RECORDS STATUS

One concern that may be raised is that if employers cannot conduct criminal record screens early in the hiring process they will use race as a proxy for criminal record status, which will result in increased employment discrimination against racial minorities. This critique misapprehends the

102 NAT’L EMP’T LAW PROJECT, *supra* note 60, at 30–31.

problem because it is based on the false assumption that employers use criminal record screenings in a race-neutral manner. Race plays a significant role in criminal record discrimination. A disproportionate number of individuals from racial minority communities have criminal records, and studies demonstrate that the harmful effects of having a criminal record are borne disproportionately by racial minorities who are less likely to be considered for employment than similarly situated white candidates. Indeed, such well-known companies as BMW Manufacturing Co. and Dollar General are currently being investigated by the EEOC for instituting criminal background screening policies that discriminate against African-Americans.¹⁰³ Thus, it is clear that there is already a detrimental over-reliance on race in the hiring process, which has a disparate impact on individuals of color.

Implementation of the Health Law Framework would minimize, rather than increase, the use of race in employment decisionmaking by adding another weapon to the arsenal of those who experience race discrimination. The Health Law Framework would not only alleviate the race discrimination that stems from criminal record discrimination, but would also force employers to be much more explicit about their use of race when making employment decisions, thus allowing applicants the ability to enforce their rights under the Title VII legal regime. Thus, Title VII, which is designed specifically to target race discrimination, could be used to amplify the discrimination reducing effect of the Health Law Framework and could also be strengthened to be more effective in countering the discrimination experienced by racial minorities in employment. In this way, adopting the Health Law Framework would reinforce Title VII, while improving the status quo, which currently allows employers to discriminate along racial lines with virtual impunity under the guise of screening job candidates for criminal records.

IV. CONCLUSION

Women are now the fastest growing segment of the population with criminal records, and minority groups are disproportionately represented among those with criminal records because innocent minorities are disproportionately subject to arrest. It is in no one's interest to neglect the millions of women of color in this demographic, particularly because they are often single mothers and the sole breadwinners for their families. Indeed, the problem of criminal record discrimination has become a significant structural factor that inhibits a woman's ability to find work and thus nurtures the myth of the welfare queen.

The health law conceptual lens is based on reducing social stigma and its effects, and it strives to incentivize those with criminal records to rehabilitate and enter the job market without fear that the stigma of their

¹⁰³ EEOC v. BMW Mfg. Co., No. 13-cv-01583, (D.S.C. filed June 11, 2013); EEOC v. Dolgencorp LLC, No. 13-cv-04307, (N.D. Ill. filed June 11, 2013).

record, race, or ethnicity will form an insurmountable barrier to employment. It also encourages employers to rely on relevant criteria in their evaluation of criminal history reports, including the uniqueness of each applicant, the nature of the offense, the time since it occurred, the effort of the individual to rehabilitate, and the nature of the job—all important and necessary elements of fair and effective employment decisionmaking.

The regulatory scheme offered here ensures that job candidates are first considered for employment based on their actual skills and experience, before consideration of any prior arrest or conviction, in an effort to avoid the unsound notion that criminal record histories accurately reflect a candidate's qualification or predict fitness for a job. This will minimize not only the chance that an employer will simply refuse to consider an applicant once a criminal record is revealed, but also the disincentive that unregulated access to criminal history reports may create with respect to applicants' willingness to apply for jobs. By providing potential employees a fair chance at securing employment, and employers access to a reserve of applicants best qualified for their job opportunities, the Health Law Framework goes a long way towards ensuring that women of color have a meaningful path to financial independence and a chance to move beyond the trope of the welfare queen.

