THE BACKGROUND CHECK BALANCING ACT: PROTECTING APPLICANTS WITH CRIMINAL CONVICTIONS WHILE ENCOURAGING CRIMINAL BACKGROUND CHECKS IN HIRING

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I. INTRODUCTION

Criminal convictions carry a stigma. The stigma associated with criminal activity may impact employment opportunities. Employers may avoid hiring individuals with criminal convictions because they fear being exposed to liability and feel a criminal conviction reflects poorly on an individual's character, making the employee less desirable and less qualified. However, once people who have been convicted of a crime have served their debt to society, they need the opportunity for meaningful employment in order to rehabilitate their lives and avoid falling into a cycle


1. See, e.g., PAUL H. ROBINSON, CRIMINAL LAW § 1.2, at 13 (1997) ("The punishment of an offender tends to stigmatize and condemn the offender and his or her conduct."); Eric Rasmusen, Stigma and Self-Fulfilling Expectations of Criminality, 39 J.L. & Econ. 519, 519 (1996) ("A convicted criminal suffers not only from public penalties but from stigma, the reluctance of others to interact with him economically and socially."); Jennifer Leavitt, Note, Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders, 34 Conn. L. Rev. 1281, 1282 (2002) ("Lifetime stigma as a felon hinders ex-offenders from fully participating as active members of society.").

2. See Leavitt, supra note 1, at 1282 (noting employers' reluctance to interact with offenders as a result of stigmatization).

3. See Avi Brisman, Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment, 28 WM. & MARY ENVTL. L. & POL'Y REV. 423, 436 (2004) ("Many employers fear those convicted of crimes or believe that ex-offenders will not be reliable employees.").
of recidivism.\textsuperscript{4} The need for protecting prospective employees from being discriminated against in employment on the basis of criminal convictions is emphasized by the large number of people with criminal histories—currently "about twenty-five percent of the nation's adult population lives a substantial portion of their lives with a criminal record."\textsuperscript{5}

Part II of this Comment discusses partial protection against employment discrimination on the basis of criminal conviction available under federal and state law. Although it can be argued that including criminal history with race, gender, and other immutable attributes as a protected category is going too far,\textsuperscript{6} such an argument ignores society's interest in rehabilitating offenders, the realities that a large number of convicts are released back into society every year, that most inmates will be released from prison, and notions of fairness in punishment.

The reality that employers must be concerned about being held liable for discriminating against potential employees when they are aware of criminal convictions suggests an incentive to avoid becoming aware of criminal convictions by not conducting background checks. Part III of this Comment addresses employers' potential tort liability to third parties injured by their employees, which creates further incentive to avoid thoroughly inquiring into their employees' criminal pasts.

While criminal convictions in some situations do not bear on a potential employee's suitability for a job and should rightfully be disregarded in the hiring process, criminal convictions may be relevant in many cases. In those situations, it is best to have accurate and complete information about an applicant's criminal history. Criminal background checks are an inexpensive, efficient way to ensure that employers have accurate and complete information regarding an applicant's background. Because private employers are somewhat limited in how they can screen

\textsuperscript{4} See Leavitt, \textit{supra} note 1, at 1282 ("Rehabilitation through employment opportunities is one clear way to stem the tide of ex-offenders leaving and re-entering society through the jailhouse doors. . . . Placement programs that specialize in rehabilitating ex-offenders frequently note the inverse correlation between recidivism rates and employment opportunities."); James R. Todd, \textit{Comment, "It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts}, 36 \textit{Ariz. St. L.J.} 725, 727 (2004) ("The temptation for recidivism increases when an ex-convict cannot obtain employment.").


\textsuperscript{6} See Thomas M. Hruz, \textit{Comment, The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records}, 85 \textit{Marq. L. Rev.} 779, 827 (2002) ("By glibly placing persons with conviction records into the ranks of protected classes, the [Wisconsin statute prohibiting employment discrimination] tacitly rates this trait equally among race, sex, religion, age, and other such innocent classifications. This mistake continues to haunt the [statute's] conviction record ban . . . ").
applicants, criminal background checks may be the only practical way for employers to investigate an applicant's relevant criminal history.

Part IV of this Comment argues that in order to ensure that employers are fully informed to make proper hiring decisions when criminal convictions are relevant, statutory obligations to perform background checks should be increased or standards for tort liability should be altered to increase the incentive for employers to investigate criminal history. Part V then concludes that increased use of background checks necessitates increased protection against employment discrimination on the basis of criminal history.

II. PROTECTIONS AGAINST DISCRIMINATION ON THE BASIS OF CRIMINAL BACKGROUND

One way of striking a balance between the conflicting societal interests of protecting individuals from employees who have evinced a willingness to commit crime and promoting the reintegration of criminal offenders into society through gainful employment is to protect individuals with criminal histories from being discriminated against in employment.

A. Protection Under Federal Law

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against individuals in employment on the basis of "race, color, religion, sex, or national origin." Claims under Title VII are analyzed under two theories, disparate treatment and disparate impact. A convicted criminal would not be able to bring a disparate treatment claim based on his or her status as a convicted criminal because convicted criminals are not one of the protected classes listed in Title VII.

7. The Employee Polygraph Protection Act of 1998 prohibits private employers from conducting polygraph examinations of employees and prospective employees and from using results of polygraph examinations in hiring and firing decisions. 29 U.S.C. §§ 2001-2009 (2000). It significantly limits the tools by which an employer can verify information regarding an applicant's history. However, the Act provides limited exemptions that allow private employers to rely on polygraph examinations when investigating applicants for certain positions. 42 U.S.C. § 2006(e)-(f).


10. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-06 (1973) (setting forth the framework for analyzing disparate treatment claims).

11. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

12. See Hruz, supra note 6, at 811 ("It is crucial to note that since a conviction record is not expressly listed in the Federal Civil Rights Act as a prohibited basis for discrimination,
However, a convicted criminal may have a disparate impact claim if he or she can show that a practice of discriminating against convicted criminals has a disparate impact on one of the enumerated protected classes. If a plaintiff can show a disparate impact on a protected class, the employer then has the opportunity "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Federal courts have indeed found that practices discriminating against applicants with criminal histories violate Title VII when they implicate a protected class. While individuals with criminal histories may have some protection under federal law, the protection is incomplete because it only applies to the extent a protected class such as race, gender, or disability is impacted.

B. Protection Under State Law

The protection against employment discrimination based on criminal history available under federal law is generally available under state law as well. Because a number of states have adopted statutes patterned after Title VII, these states similarly protect against discrimination on the basis of criminal history only to the extent it leads to a disparate impact on a protected class.

As under federal law, criminal history itself is not considered a protected class under state schemes based on Title VII. However, a few states, including Pennsylvania, Wisconsin, New York, and no disparate treatment claim can be brought on the basis of being in the class of convicted criminals.

13. See id. at 810 ("Generally, employers that refuse to hire applicants on the basis of previous criminal convictions may, in effect, disproportionately exclude minority applicants, and in many geographic areas, this disparate effect may be more probable.").


15. See, e.g., Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (finding that denying employment on the basis of conviction records amounted to discrimination on the basis of race); Gregory v. Litton Sys., 472 F.2d 631, 632 (9th Cir. 1972) (finding a violation where the employer's racially-neutral questionnaire inquiring into arrest records "operated to bar employment to black applicants in far greater proportion than to white applicants" and the employer "showed no reasonable business purpose" for inquiring into arrest records).

16. The Americans with Disabilities Act, 42 U.S.C. § 12112 (2000), may provide some similarly limited protection against employment discrimination on the basis of criminal history. See Todd, supra note 4, at 741-43 (noting that individuals would only be protected under the Act to the extent a disability, such as mental illness, was implicated).

17. See Hruz, supra note 6, at 806 (noting that courts in states without specific laws dealing with employment discrimination on the basis of criminal convictions "mostly defer to the treatment available under Title VII . . . and either explicitly or implicitly adopt the disparate impact test developed under federal law").

18. See Todd, supra note 4, at 738 (discussing state protections that "closely mirror" and stem from federal law prohibiting discrimination of protected classes).
Hawaii, do directly protect individuals with criminal convictions.\textsuperscript{19}

Pennsylvania's Criminal History Record Information Act\textsuperscript{20} governs the collection and dissemination of criminal history information. Within the Act is a provision governing the use of criminal history records for employment.\textsuperscript{21} Section 9125 regulates the use by an employer "in receipt of information which is part of an employment applicant's criminal history record information file" of the criminal history information "for the purpose of deciding whether or not to hire the applicant."\textsuperscript{22} The only permissible use of criminal history records is that "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."\textsuperscript{23}

In addition to the statutory protection offered to criminal convicts in Pennsylvania, applicants with criminal convictions are also protected from employment discrimination, at least in the public sector, under the Pennsylvania Constitution.\textsuperscript{24} The Pennsylvania Constitution provides that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."\textsuperscript{25} Pennsylvania courts have repeatedly interpreted this section "as guaranteeing an individual's right to engage in any of the common occupations of life."\textsuperscript{26} Denying public employment because of an applicant's prior conviction is a violation of that right unless some legitimate governmental goal is furthered.\textsuperscript{27} The government may be furthering a legitimate interest by precluding individuals with convictions that are "reasonably related to the person's fitness to perform the job sought" from public employment.\textsuperscript{28} Therefore, when the facts of a prior conviction are relevant to the applicant's fitness for the particular job for which he is applying,\textsuperscript{29} the government may deny

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\item \textsuperscript{19} \textit{Id.} at 730.
\item \textsuperscript{20} 18 PA. CONS. STAT. ANN. §§ 9101-9183 (West 2000).
\item \textsuperscript{21} 18 PA. CONS. STAT. ANN. § 9125 (West 2000).
\item \textsuperscript{22} \textit{Id.} § 9125(a).
\item \textsuperscript{23} \textit{Id.} § 9125(b). The statute also provides for written notification to the applicant if the employer decides not to hire the applicant in whole or in part because of his or her criminal record. \textit{Id.} § 9125(c).
\item \textsuperscript{24} \textit{See} Hunter v. Port Auth., 419 A.2d 631, 635-36 (Pa. Super. Ct. 1980) (holding that denying public employment on the basis of a prior conviction violates the Pennsylvania Constitution's guarantee of the right to engage in any of the common occupations of life).
\item \textsuperscript{25} \textit{Pa. Const.} art. I, § 1.
\item \textsuperscript{26} \textit{Hunter}, 419 A.2d at 635.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{See id.} at 638 (suggesting circumstances under which prior convictions may be relevant to suitability for particular positions, including arson convictions as relevant to the
employment on the grounds of the criminal conviction and may even make prior convictions an absolute bar to employment for certain positions.\textsuperscript{30} This distinction is mirrored in section 9125, which permits public and private employers to consider prior convictions when they are relevant to suitability for the position.\textsuperscript{31}

As Pennsylvania law illustrates, both state statutes and state constitutions can provide prospective employees with protection from discrimination on the basis of criminal conviction in situations in which federal law does not. However, the number of states that do in fact provide such protections is quite limited.\textsuperscript{32} Wisconsin and New York both have prominent anti-discrimination laws which explicitly include criminal convictions as an impermissible basis for denying employment.\textsuperscript{33}

Wisconsin's Fair Employment Act\textsuperscript{34} ("WFEA") prohibits employment discrimination on the basis of fourteen grounds, which specifically include "arrest record" and "conviction record."\textsuperscript{35} The public policy underlying such a broad prohibition is "to protect by law the rights of all individuals to obtain gainful employment," "to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state", and "to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong."\textsuperscript{36} Reasons for including criminal arrest and conviction records in the protected classes include "to secure to the ex-offender his or her rights to compete in the employment marketplace free from arbitrary and stigmatic determination made on the basis of a criminal record which bears no 'substantial relationship' to the employment,"\textsuperscript{37} and society's "interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment," which is "an integral part of the rehabilitation process."\textsuperscript{38}

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  \itemposition of fire fighter and any felony convictions as relevant to the position of police officer).
  \item30. Id.
  \item31. See supra notes 21-24 and accompanying text.
  \item32. See Hruz, supra note 6, at 803-06 (noting that aside from Wisconsin, Illinois, Hawaii, Pennsylvania, and New York, "[n]o other states have directly addressed within their laws the matter of employment discrimination based on criminal conviction records for all employers").
  \item33. Todd, supra note 4, at 730.
  \item34. WIS. STAT. ANN. §§ 111.31-.395 (West 2002).
  \item35. WIS. STAT. ANN. § 111.321 (West 2002).
  \item36. WIS. STAT. ANN. § 111.31(2) (West 2002).
  \item37. Miller Brewing Co. v. Dep't of Indus., Labor, & Human Relations, 308 N.W.2d 922, 927 (Wis. 1981).
  \item38. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 915
\end{itemize}
The Wisconsin statute, however, also contains an exception which provides that employers and licensing agencies may refuse to hire or license an individual, or terminate employment or licensing of an individual, if he or she "[h]as been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity." This substantial relation exception was originally interpreted narrowly by the Labor and Industry Review Commission ("LIRC") using a factors-specific test, a list of factors to be considered in determining whether the applicant's criminal history was substantially related to the position sought. The factors articulated by the LIRC included "the public profile or nature of the applicant's job, the principal duties of that job, the time that had elapsed since conviction, mitigating circumstances involved in the crime for which the conviction arose, evidence of rehabilitation, and . . . the number and seriousness of the crimes." The factors-specific test required case-by-case determinations because the list of factors was not exhaustive and different factors could be weighted differently.

Wisconsin courts later replaced the LIRC's factors-specific test with a broader interpretation of the substantial relation exception known as the elements-only test. The Wisconsin Supreme Court rejected the factors-specific test "requir[ing], in all cases, a detailed inquiry into the facts of the offense and the job" in favor of "[a]ssessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed," by only inquiring into "the circumstances which [sic] foster criminal activity" such as "the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." Subsequent cases have continued to use "a liberal interpretation of the substantial relationship exception," which often favors employers.

New York also has a statute prohibiting employment discrimination on the basis of criminal convictions. The statute provides two exceptions

(Wis. 1987).
40. The LIRC is an administrative agency that enforces the WFEA. See WIS. STAT. ANN. § 111.39 (West 2002).
41. Hruz, supra note 6, at 789-90.
42. Id. at 789.
43. Id. at 790.
44. Id. at 790-95.
46. Hruz, supra note 6, at 800.
47. See N.Y. CORRECT. LAW § 752 (McKinney 2003) ("No application for any license or employment . . . shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral
that allow employers to refuse to hire applicants based on criminal convictions: when "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought" and when "the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." The confusion in applying the WFEA's substantial relationship exception does not exist with New York's direct relationship and unreasonable risk exceptions because the statute provides factors to consider in applying the exceptions. Although some states, such as New York, Wisconsin, and Pennsylvania, provide direct protection against discrimination on the basis of criminal history, many states provide less protection, if any at all. Therefore, many individuals with criminal histories will go unprotected under both federal and state law.

III. EMPLOYER LIABILITY FOR ACTIONS OF EMPLOYEES

A Negligent Hiring

Many states allow recovery for harms caused by an employee through the tort action of negligent hiring. Under section 213 of the Restatement (Second) of Agency, "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others." The basis for character' when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses . . . .")

48. Id. § 752(1) (emphasis added).
49. Id. § 752(2) (emphasis added).
50. See N.Y. CORRECT. LAW § 753 (McKinney 2003) (listing factors such as the position's duties and responsibilities, the relation of the offense to the applicant's ability to fulfill such duties and responsibilities, and the remoteness of the convictions); see also Todd, supra note 4, at 736-37 (stating that the New York law is unlike many other state laws because it provides these factors to consider).
51. See Hruz, supra note 6, at 806-07 (discussing other states' "less formal and less thorough fashion" of attempting to provide protection in ways such as restricting employers from requesting certain information and noting that "some state courts have expressly declined to hold that persons with conviction records are a class deserving of fair employment protection").
52. See Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 910 n.4 (Minn. 1983) (listing jurisdictions that recognize negligent hiring as a cause of action); see also Stephen J. Beaver, Comment, Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence, 81 MARQ. L. REV. 103, 110-13 (1997) (discussing how federal and state courts have dealt with negligent hiring claims).
liability is that "the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment." Therefore, liability is not incurred simply because an employer has hired an incompetent employee, but "because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand." 

What this level of care entails depends on the situation. Different standards are suggested based on the work that is involved: "One can normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation." This distinction is also reflected in legislatures' choice to enact statutes requiring background investigations and limiting or prohibiting the employment of convicts in certain fields, such as working with children or the elderly.

In a negligent hiring action, the employer breaches his duty of care if he hires an employee whom he "knew or should have known" to be incompetent. An employer is only liable for failure to uncover information, such as criminal history, bearing on the employee's fitness when that information could have been discovered by reasonable investigation.

B. Reasonable Investigation

An employer's duty of care entails making a reasonable inquiry into an applicant's background. "The scope of the investigation [required] is directly related to the severity of risk third parties are subjected to by an incompetent employee." When the nature of the work is such that there is "a high risk of injury to third persons," an employer must exercise greater

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55. Id.
56. Id.
57. Id.
58. See infra Part IV.A.
59. Employers may also be liable under a theory of negligent retention, which differs from negligent hiring in that the employer only becomes aware that the employee is not fit after hiring him or her. Beaver, supra note 52, at 117. Because both actions deal with employers breaching a duty of care by employing—either hiring or retaining—workers the employer knew or should have known were unfit, this Comment combines the analysis of the claims.
60. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 912 (Minn. 1983) (citations omitted); see also 27 AM. JUR. 2D EMPLOYMENT RELATIONSHIP § 394 (2004) (discussing the scope of an employer's duty to investigate applicants' backgrounds).
62. Id. at 913.
care in investigating potential employees. The scope of the employer's duty to conduct a reasonable investigation is largely dependent on the amount of contact with third parties involved in the performance of an employee's duties. The more contact with third parties, the greater the risk of harm to third parties resulting from "a special relationship" between third parties and the employer, which increases the employer's duty to investigate.

In general, the scope of the duty to make a reasonable investigation is quite limited. In fact, "there is no requirement, as a matter of law, that an employer make an inquiry with law-enforcement agencies about an employee's possible criminal record, even where the employee is to deal regularly with the public." Inquiring into an applicant's background on an employment application can be considered a reasonable investigation, and there is generally no requirement that an employer go further and verify the information with a background check.

In *Evans v. Morsell*, the Court of Appeals of Maryland found that "an employer ordinarily has no duty to inquire concerning the possible criminal record of a prospective employee." The court based its reasoning on the heavy burden that regularly requiring investigations into every applicant's potential criminal history would impose on employers and prospective employees. The court noted that obtaining criminal records "may today be quite difficult." Additionally, the court reasoned that an employer is, under most circumstances, "entitled to rely upon the determination of the government's criminal justice system that the individual is ready to again become an active member of society" when an individual has served his complete sentence or has been released on parole. The court's concern for the burden that requiring background checks would place on prospective employees suggests that the court was also taking into account that potential employees with criminal

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63. *Id.* See also discussion of differing levels of care based on the nature of work *supra* Part III.A.

64. 27 AM. JUR. 2D Employment Relationship § 394 (2004).

65. *Id.*

66. *Id.; see also* Todd, *supra* note 4, at 756 ("[C]ourts still are generally unwilling to make employers perform background checks.").

67. *See* Se. Apartments Mgmt. Inc., v. Jackman, 513 S.E.2d 395, 397-98 (Va. 1999) (finding no cause of action for negligent hiring when employer required applicant to complete a detailed application concerning his background and behavioral history, even though it did not conduct an independent investigation into the applicant's criminal history).

68. 395 A.2d 480 (Md. 1978).

69. *Id.* at 484.

70. *Id.*

71. *Id.* Note that the case was decided in 1978, before the Internet made criminal records more readily available. *See infra* Part IV.C.1.

72. *Evans*, 395 A.2d at 484.
backgrounds are also entitled to rely upon the determination that they are ready to become active members of society. The court therefore seemed to implicitly recognize that once an individual has completed his sentence, he has served his debt to society and deserves the opportunity to move on with his or her life and successfully rejoin society and that the opportunity to make a living is a necessary part of reintegrating into society.

C. Incentive to Avoid Investigating an Applicant's History

The current formulations of negligent hiring and negligent retention actions discourage employers from thoroughly investigating applicants. "By not checking criminal conviction records, employers benefit by not being liable for negligent hiring." Although the tort actions require reasonable investigation, the scope of that reasonable investigation does not generally require a criminal background check. Therefore, an employer can choose to remain ignorant about the applicant's background and avoid liability. If the employer investigates more fully, it risks discovering an applicant's criminal record, which could result in opening the employer up to liability for either negligent hiring or employment discrimination. If the employer hires the applicant, it faces potential liability for negligent hiring based on the argument that the employer was aware that the employee was unfit. If the employer refuses to hire the applicant, it faces potential liability for employment discrimination based on the argument that the employer impermissibly used criminal history in deciding not to hire the applicant. Therefore, an employer whose primary concern is avoiding liability has every reason to keep itself from being fully informed.

If an employer inquires into criminal history on an application, the applicant can either answer truthfully by disclosing his or her criminal history or answer dishonestly by minimizing or hiding his or her criminal history. Applicants who take the former option are likely better candidates than applicants who take the latter option. They are more likely to be serious about improving their lives and taking advantage of the opportunity for meaningful employment. However, employers are more likely to hire applicants who take the latter option because they have no incentive to investigate further into the applicants' background rather than taking the applicants' word. Avoiding tort liability for negligent hiring/retention does not require more of an investigation. Additionally, avoiding liability

73. Todd, supra note 4, at 745.
74. See supra notes 62-72 and accompanying text.
75. See Todd, supra note 4, at 756 (noting that "company policies . . . effectively eliminate from employment contention those who indicate on their application that they have been convicted of a crime other than traffic violations," and that "prospective employees who lie on employment applications fall beneath the radar").
for discriminating against applicants on the basis of criminal convictions encourages the employer to learn as little as possible about applicants' criminal backgrounds.

IV. REQUIRING BACKGROUND CHECKS

A. Statutes

1. Existing Statutes

As suggested by the fact that the burden of investigating applicants' background increases as the risk to third parties increases, there are situations in which the potential injury to third parties seems so great that it is mandatory for an employer to thoroughly investigate a potential employee's background. Legislatures often deal with these situations by mandating background checks. The situations in which criminal background checks of potential employees are statutorily mandated are limited to certain fields of employment. These laws often prohibit individuals with convictions for certain offenses—or sometimes any offense—from being employed in these fields.

The situations in which criminal background checks are statutorily mandated are often limited to working with particularly vulnerable individuals, such as the elderly or children. Sometimes statutes are geared at positions of trust, such as those for which a license is required. States often have licensing schemes that limit occupational licensure based on criminal history. In Pennsylvania, statutes impose the requirement of criminal background checks of applicants for certain positions requiring


77. See, e.g., PA. STAT. ANN. tit. 24 § 1-111 (West 2001) (requiring background checks of prospective school employees who would have direct contact with children and prohibiting employment of applicants with convictions for certain offenses).

78. See DiLorenzo, supra note 76, at 371-72 (noting the increase in state statutes mandating background checks for employment and licensure of security personnel and employees in the gaming industry who handle large amounts of money).

79. See Mukamal & Samuels, supra note 5, at 1503-04 (noting that "[t]hirty-eight states permit . . . occupational licensing agencies to . . . rely upon arrests that did not result in conviction" and nineteen states have "standards governing the relevance of conviction records of applicants for occupational licensure").
licenses. Licensing agencies in Pennsylvania are subject to similar restrictions on the use of criminal history in licensing decisions as employers are in hiring decisions.

2. Challenges to Laws Mandating Background Checks

Laws that prohibit hiring applicants with criminal histories from certain positions and require background checks to enforce such prohibitions can be challenged on a number of grounds. They face challenges on anti-discrimination grounds, either to the extent the laws implicate protected classes under federal and state law or to the extent that state laws protect individuals with criminal histories directly. Additionally, these laws may face constitutional challenges. Federal courts have occasionally found laws prohibiting individuals with convictions from certain employment positions to be unconstitutional under the federal constitution on due process and equal protection grounds. These statutes may also be problematic under state constitutions.

In *Nixon v. Commonwealth*, a law requiring criminal background checks and prohibiting hiring applicants with certain convictions was held unconstitutional as applied to a group of prospective employees under the Pennsylvania Constitution. Pennsylvania's Older Adults Protective Services Act ("OAPSA") provides protective services for the elderly, disabled individuals, and others unable to live independently and covers facilities that provide care for these individuals. OAPSA included a criminal records chapter, which by the time the statute went into effect in 1998 required criminal record reports from any applicant seeking employment in a facility covered by OAPSA and from any employee who had worked at a facility covered by OAPSA for less than two years before

80. See, e.g., PA. STAT. ANN. tit. 22, § 16 (West 2001) (requiring criminal background checks of private detectives or investigators and prohibiting applicants who have been convicted of a felony or certain other crimes from receiving licenses); 5 PA. CONS. STAT. § 3302 (2002) (requiring criminal background check to register as an athlete agent).

81. See 18 PA. CONS. STAT. ANN. § 9124 (West 2002) (providing that licensing agencies may consider convictions, but not arrest without convictions, related to suitability of granting the license, but may not deny the license or registration based on the criminal convictions unless otherwise provided).

82. See discussion *supra* Part II.

83. Hruz, *supra* note 6, at 807 n.148.

84. 839 A.2d 277 (Pa. 2003).

85. *Id.* at 290


87. *Nixon*, 839 A.2d at 279-80 (quoting OAPSA, PA. STAT. ANN. Tit. 35, § 10225.102 (West 2001)).

the effective date. The chapter also prohibited facilities covered by OAPSA from hiring or retaining any individual who had been convicted of any one of a large number of enumerated crimes.

Under a substantive due process analysis, the Pennsylvania Supreme Court held that the criminal records chapter of OAPSA violated Article 1, section 1 of the Pennsylvania Constitution. Article 1, section 1 of the Pennsylvania Constitution guarantees "the right to pursue a lawful occupation." While the right of the health care workers who challenged the law to continue engaging in their lawful occupations is important, it is not a fundamental right. Therefore, the court subjected the criminal records chapter to a rational basis test, which requires that "a law 'must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.'"

This is where the Pennsylvania Supreme Court departed from the lower court's analysis. The Commonwealth Court questioned the relationship between the criminal records chapter and any legitimate state purpose by challenging the relevance of remote convictions to predictions of future behavior. The Commonwealth Court also suggested that the chapter in effect continues to punish convicted criminals beyond their sentences, contradicting the sentencing goal of rehabilitation.

The Pennsylvania Supreme Court instead emphasized that the government has an interest in protecting the elderly and others unable to care for themselves from being victimized. The Court noted that "barring certain convicted criminals from working with these citizens may be an effective means of protecting such citizens from abuse and exploitation." Instead of objecting to the denial of employment to individuals with criminal convictions, the court objected to the distinctions made between

90. Id. at 281-82 (citing OAPSA, 35 Pa. Const. Stat. § 10225.503 (West 2001)).
91. See id. at 290 ("[T]he criminal records chapter, particularly with regard to its application to the Employees, does not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees' right to pursue an occupation.").
92. Id. at 288. See also supra notes 24-27 and accompanying text.
94. Id. at 287-88 (quoting Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954)).
95. The Pennsylvania Supreme Court affirmed the Commonwealth Court's ruling that the criminal records chapter violated the Pennsylvania Constitution, but for different reasons. Id. at 279.
96. Id. at 284-85.
97. Id. at 285.
98. Id. at 288.
applicants or new employees who had worked at the
facilities for more than a year. While distinctions may be
made among individuals with criminal convictions, such a
distinction must satisfy the rational basis test, meaning that it
must bear a real and substantial relationship to the interest
to be achieved. The Pennsylvania Supreme Court found that "no such real and substantial relationship exists "for the
distinction between employees working at the facilities for less than a year and employees working at the facilities for more than a year, and therefore the criminal records chapter is constitutionally impermissible as applied to the employees challenging the law.

Because the criminal records chapter of OAPSA did not create an absolute bar, the Pennsylvania Supreme Court did not address whether an absolute bar on the employment of convicted criminals in certain positions would violate the constitution. Jurisdictions have varied on the issue of whether an absolute ban on employing convicts in certain positions is rationally related to a legitimate interest.

B. Expanding the Use of Background Checks

Increasing the situations in which employers must perform background checks of prospective applicants would lead to more appropriate hiring decisions. Applicants may have an incentive to lie on their applications out of fear that they will be discriminated against if they disclose their criminal histories. Because employers concerned with

99. See Nixon, 839 A.2d at 289 ("[T]he chapter no doubt permitted innumerable individuals with disqualifying criminal records to continue working with the purportedly protected population solely because they had maintained a job in a covered facility for the year preceding the effective date of the chapter. Moreover, many of these same individuals doubt continue to work with the elderly, disabled, and infirm today, in spite of the General Assembly's apparent conclusion that convicted criminals pose an unacceptable risk to that population.").
100. See supra note 94 and accompanying text.
102. Id. (noting that the distinction could be explained by a determination that convicts who had been working at a facility for more than a year "presented less of a risk because they had proven that they were not likely to harm the patient population and had established a degree of trust with their patients and management," but "if convicted criminals who had been working at a covered facility for more than a year as of [the effective date] were capable of essentially rehabilitating themselves so as to qualify them to continue working in a covered facility, there should be no reason why other convicted criminals were not, and are not, also capable of doing the same").
103. Id. at 290.
104. Id. at 288 n.16.
105. Id. See also supra text accompanying note 83.
106. Todd, supra note 4, at 744. See also discussion of limited nature of protections against employment discrimination on the basis of criminal history supra Part II.
avoiding liability have little incentive to investigate beyond the information supplied by applicants, they are not likely to detect undisclosed criminal histories. An applicant's criminal history may or may not be relevant to the position he or she is seeking. However, without sufficient information, such a determination cannot be made. If employers have incentives or are required to arm themselves with more information, they will make better hiring decisions. More accurate hiring decisions will reduce the risk of unfit employees harming third parties as a result of their employment. There is a strong social interest in maintaining public safety.

Expanding the use of background checks could be accomplished in two ways: increasing statutory obligations or altering the incentives involved in tort liability. Statutes requiring criminal background checks of applicants in certain fields are more and more prevalent. Often these statutes also bar employment in the selected field for individuals with convictions for certain offenses. Increasing general bars to employment while increasing background checks would subvert the purpose of promoting the employment of individuals with criminal convictions that do not impact their suitability for the positions they seek. However, as long as statutes limit bars or restrictions on employment to situations in which convictions are relevant to the position, they could be used effectively to increase the use of background checks. Such statutes would likely survive constitutional challenges because they distinguish among convictions based on the relation of the convictions to suitability for employment in a particular position. This distinction would likely be considered rationally related to the legitimate purpose of protecting the public.

Although the OAPSA criminal records chapter did not survive a constitutional challenge in Nixon, the court focused on an impermissible distinction between employees working at the facilities for more than a year and other employees and prospective employees rather than the distinction between an absolute bar on employment of convicts or a partial bar distinguishing between individuals convicted of different offenses.

Expanding the use of background checks could also be accomplished by altering the incentives involved in tort liability. The limited scope of the duty to conduct reasonable investigations into prospective employees' backgrounds in negligent hiring/retention actions creates a disincentive for

107. See Leavitt, supra note 1, at 1283 ("Every day, members of the public must interact with employees of all backgrounds, and therefore must rely on the competence of the employer in appropriately hiring and placing employees.").
108. See DiLorenzo, supra note 76, at 372 (discussing the "rapid increase in state laws mandating background checks").
110. Nixon, 839 A.2d at 290.
111. Id. at 289.
employers to fully investigate employees' criminal backgrounds. Altering this duty by adopting a broader interpretation of when it is foreseeable that third parties could be harmed would provide employers with more of an incentive to investigate. This would help match their desire to avoid liability with their desire to abstain from harming the public.

C. Consequences of Expanding the Use of Background Checks

1. Cost and Availability

Although courts have been reluctant to impose the costs of criminal background checks on employers, background checks are not necessarily costly anymore. "Criminal record information is increasingly available on the Internet."

Numerous private companies offer criminal history checks for a small fee. These companies market their services by emphasizing the cost-effectiveness and importance of criminal background checks. States themselves often make criminal record information available on the internet as well.

Pennsylvania is one such state. Pennsylvania's Criminal History Record Information Act contains a provision authorizing the state police to disseminate criminal history record information to state agencies and

112. See supra Parts III.B., III.C.
113. See Todd, supra note 4, at 728 (discussing the "employer's moral duty to protect society from harm" and "the employer's motivation to avoid monetary damages").
114. Mukamal & Samuels, supra note 5, at 1510.
116. See EasyBackgrounds, supra note 115 (noting that the costs of investigating employees' backgrounds make up one to two percent of the overall cost of recruiting, hiring, and training employees; that juries in negligent hiring actions award over $500,000 on average; that approximately eleven percent of the company's criminal record searches reveal criminal history; and that almost a third of all resumes include false or misleading information); eFindOutTheTruth.com, Inc., supra note 115 ("What used to cost hundreds, even thousands of dollars to uncover can now be quickly and easily obtained at a fraction of the cost.").
117. Mukamal & Samuels, supra note 5, at 1510.
118. 18 PA. CONS. STAT. ANN. §§ 9101-9183 (West 2000).
individuals and to create procedures for doing so. Under this authority, the Pennsylvania State Police has created the Pennsylvania Access to Criminal History ("PATCH") System "to better enable individuals and the public to obtain criminal history record checks." Any organization or individual can access criminal history records through PATCH for a $10.00 fee. This web-based computer application checks provided information against information in the Pennsylvania State Police Central Repository. Registering with PATCH provides billing flexibility for organizations making multiple criminal background checks.

A number of other states also make criminal record information available on the Internet. Even more states allow limited Internet access to criminal records or provide records of convicts currently serving sentences. Often the information that states provide on the Internet is available at no cost. Given the increased availability and lower cost of criminal records, requiring employers to conduct criminal background checks imposes an increasingly smaller burden.

2. Increased Importance of Anti-Discrimination Laws

Expanding the circumstances under which criminal background checks of potential employees are required could be problematic for all potential employees and especially for potential employees with criminal convictions. First, all potential employees would have to routinely submit to criminal background investigations. Submitting to the record check could be argued to be an invasion of privacy. However, courts have rejected tort claims for invasion of privacy based on criminal background checks.

Additionally, applicants are voluntarily applying for the job and thereby acquiescing to the check. This argument carries little weight,

119. 18 PA. CONS. STAT. ANN. § 9121 (West 2000).
121. Id.
122. PATCH Fact Sheet, http://www.psp.state.pa.us/patch (follow "PATCH Information" hyperlink; then follow "Fact Sheet" hyperlink) (last visited April 10, 2006).
123. Id.
124. See Mukamal & Samuels, supra note 5, at 1510 n.69 (listing states that provide access to all conviction records on the Internet and the websites where such information is available).
125. Id. at 1510-11.
126. Id. at 1511.
127. See Jensen v. State, 72 P.3d 897, 902-03 (Idaho 2003) (holding that a criminal background check did not violate plaintiff's reasonable expectation of privacy); Barr v. Great Falls Int'l Airport Auth., 107 P.3d 471, 475 (Mont. 2005) (holding that plaintiff had no reasonable expectation of privacy in his arrest record).
however, if background checks are required for more and more positions as there would be no real choice of applying for a job that did not require a background check. The "choice" would become either submit to a background check or decline to pursue an occupation.128 However, criminal convictions usually do not lead to claims of invasion of privacy because they are considered public records.129 If background checks are limited to revealing only convictions and not arrests that did not lead to convictions,130 the concern for invasion of privacy is greatly minimized.

Criminal background checks could also impose costs on prospective employees if they had to pay for the reports to be prepared and submitted to employers. That cost can easily be imposed on employers, who benefit from taking such precautions by avoiding negligence actions.

Second, expanding the requirement of background checks could be problematic for potential employees because there would be a greater potential for discrimination in hiring decisions. If more background checks are required, more convictions will be revealed. The more often employers become aware of applicants' past convictions, the greater the potential that those convictions will be used to eliminate applicants from consideration for positions. If the use of knowledge of past convictions is permissible,131 then expanding the requirement of background checks has done its job of promoting more accurate hiring decisions. However, the possibility that such knowledge may be used for impermissible reasons highlights the need for protection from employment discrimination on the basis of criminal history.

128. This choice could be especially problematic given that state constitutions could be interpreted as guaranteeing the right to pursue a lawful occupation. See supra notes 24-27, 92 and accompanying text.
130. Although some states prohibit employers and licensing agents from considering arrests that did not lead to conviction, many states do allow private and/or public employers and licensing agencies to use arrests not leading to conviction in their decision making. Mukamal & Samuels, supra note 5, at 1503-04. However, many states often provide for expunging or sealing of records of arrests that did not lead to convictions, and some of those states allow individuals to deny the existence of expunged or sealed records on employment applications. Id. at 1509. The distinction between arrest and conviction records also brings up the issues of presumption of innocence and reliability of information relevant to suitability for employment.
131. What is permissible could have different definitions depending on the context. The standards for allowing use of records in different statutory schemes, negligence actions, and the constitutional context all relate to how the conviction impacts an applicant's fitness for employment. Therefore, permissible could be interpreted here to mean—as it does in Pennsylvania's section 9125—related to suitability for the position sought.
V. CONCLUSION

If more states adopted anti-discrimination laws like Pennsylvania's statute regulating the use of conviction records in hiring decisions, prospective employees with criminal history records would be adequately protected. Those applicants with convictions that do not impact the suitability of the positions for which they apply would be protected from being turned away from employment based on those convictions, promoting the goal of rehabilitating and reintegrating offenders into society. Those applicants with convictions that do impact the suitability of the positions for which they apply would be kept out of those positions, protecting third parties from being harmed by people who were in a position to harm them because of their employment in unsuitable positions. The suitability approach of section 9125 seems logically appealing as a distinction for permissible and impermissible uses of conviction records, and it offers flexibility in determining when a conviction is relevant to a hiring decision. Experiences in states such as Pennsylvania, New York, and Wisconsin provide guidance on how to protect individuals from employment discrimination on the basis of criminal convictions while still providing employers with all the relevant information they need to make accurate hiring decisions.

132. 18 PA. CONS. STAT. ANN. § 9125 (West 2000).