

THE COLLATERAL CONSEQUENCES OF ACQUITTAL: EMPLOYMENT  
DISCRIMINATION ON THE BASIS OF ARRESTS WITHOUT CONVICTIONS

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*Lawmakers, advocates, and scholars have trained a great deal of attention on the collateral consequences of criminal convictions, particularly the effects of conviction on employment. This article focuses on an overlooked problem: employers' widespread use of non-convictions, including acquittals, to reject job applicants or fire employees. Using real-world case studies as discussion points, this article surveys the patchwork of laws applicable to the use of non-conviction records in employment, and makes proposals for legislative solutions to a problem that threatens the employability of millions of Americans who may never have been convicted of any crime.*

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## INTRODUCTION

The collateral consequences of criminal convictions have attracted much recent attention from lawmakers, courts, and scholars. In particular, there has been extensive discussion of the barriers to employment that ex-offenders face, which has prompted new laws and an outpouring of law review articles.<sup>1</sup> However, a troubling and widespread phenomenon is often overlooked: the serious collateral consequences of *non-convictions*. A criminal charge that ends without a conviction—via dropped charges, a *nolle prosequi*, a diversion program, or even an outright acquittal—can cause lifelong damage to one’s career and earning power.<sup>2</sup> This article analyzes the scope of this problem, discusses the patchwork of federal, state, and local laws implicated when employers base hiring or retention decisions on non-convictions, and proposes legislative solutions.

Part I reviews the existing literature touching on the collateral employment consequences of non-convictions. Part II provides points of reference for analysis by giving examples of real-world firings and non-hirings of individuals never convicted of a crime. Part III surveys existing federal and state statutes, regulations, and case law. Part IV proposes legislative solutions to increase access to employment for non-convicted individuals.

### I. THE UNIQUENESS OF EMPLOYMENT DISCRIMINATION AGAINST NON-CONVICTED INDIVIDUALS

The collateral consequences of convictions affect millions of Americans. No hard numbers are available for the number of Americans with felony convictions<sup>3</sup> or for the likely larger number of Americans with misdemeanor convictions.<sup>4</sup> It is even harder to put a number on

<sup>1</sup> E.g., Margaret Colgate Love, Jenny Roberts & Cecelia Klingele, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013) (collecting statutes); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015).

<sup>2</sup> E.g., Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627 (2014) (controlled study finding that applicants for entry-level jobs were four percent less likely to be called in for an interview if their otherwise identical application disclosed a misdemeanor disorderly conduct arrest that did not result in a conviction); Gary Fields & John R. Emshwiller, *As Arrest Records Mount, Consequences Last a Lifetime*, WALL ST. J., Aug. 19, 2014, at A1 (reporting on research conducted at the newspaper’s request finding that “men with arrest records—even absent a formal charge or conviction—go on to earn lower salaries,” and are less likely to own a home, graduate from high school, or live above the poverty line).

<sup>3</sup> “This is a question the Bureau of Justice Statistics (BJS) frequently receives and, unfortunately, cannot completely answer.” *Frequently Asked Questions*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=qa&iid=404> [https://perma.cc/HL96-43HS].

<sup>4</sup> See Issa Kohler-Hausmann, *Misdemeanor Justice*, 119 AM. J. SOC. 351, 352 (2013) (“In most

Americans with arrests but not convictions, but by any estimate the number is high,<sup>5</sup> and is disproportionately high for members of racial and ethnic minority groups.<sup>6</sup> The large majority of employers now perform criminal background checks as a routine part of their hiring process,<sup>7</sup> and it is quick and inexpensive for employers to obtain background reports from commercial vendors, online state records, and informal Internet searches.<sup>8</sup>

A flurry of student publications in the early 1970s directly addressed the issue of the employment consequences of non-convictions, but these sources are outdated.<sup>9</sup> More recently, a

limited number of publications have glanced at the issue, but none have focused on it as a nationwide phenomenon.<sup>10</sup>

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jurisdictions, the largest arrest categories are for crimes below felony grade ...."); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 904 n.49 (2014) (collecting estimates); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325 (2015) ("[M]ost criminal cases are misdemeanors and often do not result in jail or prison time.").

<sup>5</sup> E.g., *id.* Paul-Emile, *supra* note 4 at 894, 896; Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million Need Not Apply*, NATIONAL EMPLOYMENT LAW PROJECT 27 n.2 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/XCW5-RPVC>] (estimating that "27.8 percent of U.S. adult population has a criminal record on file with states[.]"); ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006), [https://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) [<https://perma.cc/2T5X-MREL>] (noting that in 2001 the Bureau of Justice Statistics "estimated that over 64 million people in the United States had a state rap sheet, or about 30 percent of the Nation's adult population[.]"). See generally *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting) (noting that once arrested, "[e]ven if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination[.]").

<sup>6</sup> E.g., Paul-Emile, *supra* note 4, at 911-13; see also Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. PA. J.L. & SOC. CHANGE 515, 527-28 (2012) (noting that arrest records without convictions are particularly common for residents of low-income urban neighborhoods where police make high use of stop-and-frisk tactics). See generally Paul-Emile, *supra* note 4, at 896 ("For many employers, the bar on hiring anyone with a criminal record includes applicants whose records consist of only an arrest, not a conviction: a group that constitutes one-third of all felony arrests.").

<sup>7</sup> E.g., *Doe v. United States*, 110 F. Supp. 3d 448, 452 (E.D.N.Y. 2015), *rev'd on other grounds*, 833 F.3d 192 (2d Cir. 2016).

<sup>8</sup> E.g., Gary Fields & John R. Emshwiller, *Fighting to Forget: Long After Arrests, Records Live On*, WALL ST. J., Dec. 26, 2014, at A1 ("Nearly 80 million Americans have entries in a criminal-records file maintained by the Federal Bureau of Investigation, a product of beefed-up policing and tough-on-crime laws. Through online databases, the records are available to employers, landlords, college admissions personnel and loan officers. They thus can impose a burden long after any sentence has been served, and affect the lives of people who were arrested but never convicted.").

<sup>9</sup> E.g., Note, *Arrest Records, Hiring Policies, and Racial Discrimination*, 57 IOWA L. REV. 506 (1971); George R. Bedell, Note, *Civil Rights—An Employment Policy of Disqualifying Frequently Arrested Applicants Unlawfully Discriminates Against Blacks Under Title VII of the Civil Rights Act of 1964*, 49 TEX. L. REV. 141 (1970); Terry Calvani, Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971); Baldo M. Carneccchia, Jr., Comment, *Discriminatory Hiring Practices Due to Arrest Records—Private Remedies*, 17 VILL. L. REV. 110 (1971); Andrew L. Gates III, Comment, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629 (1974); Garland McAdoo, Jr., Comment, *Arrest Records and Employment Discrimination*, 32 U. PITT. L. REV. 254 (1971); John L. Sarratt, Comment, *Arrest Records As A Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165 (1970); Note, *Title VII—Racial Discrimination in Employment—Employers Use of Record of Arrests Not Leading to Conviction*, 17 WAYNE L. REV. 228 (1971); see also Albert G. Hess & Fré Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQ. 494 (1967).

<sup>10</sup> E.g., JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 296 (2015); Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY LAW & POL'Y 231, 240-41 (2012). Kimani Paul-Emile has proposed an intriguing approach to the use of criminal records in

Employment discrimination against the non-convicted is not a mere special case of the more general topic of discrimination against those with any sort of criminal record. Rather, it raises distinct policy and legal concerns, and it requires a particularized solution.

Arrests are not convictions. As Justice Black put it:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.<sup>11</sup>

An arrest without a conviction leaves an individual not guilty of a crime as a matter of law.<sup>12</sup> A criminal conviction is different, and whatever the value of a conviction as a predictor of good job performance,<sup>13</sup> it is *res judicata*.

In life outside the court system, an arrest often stains an individual's reputation in ways hard to undo.<sup>14</sup> As Justice Jackson wrote, "[a]rrest without more may nevertheless impair or cloud

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employment decisions, but her approach largely treats non-conviction discrimination just as a subspecies of criminal records discrimination. See Paul-Emile, *supra* note 4. Two others have discussed arrests as a general matter, with only a brief discussion of the employment context. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 839-41 (2015); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1308-11 (2000). A few student notes have addressed the issue as it applies within a single state. E.g., Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa's Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275 (2013); Sheri-Ann Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 HAWAII L. REV. 709 (2000); Natalie Lyons, Comment, *Presumed Guilty Until Proven Innocent*, 43 GOLDEN GATE U. L. REV. 485 (2013) (discussing California law); Shawn D. Stucke, Note, *Collateral Effects of Arrests in Minnesota*, 5 U. ST. THOMAS L.J. 335 (2008).

<sup>11</sup> *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957); see also *United States v. McKnight*, 33 F. Supp. 3d 577, 586 (D. Md. 2014) ("Consideration of arrest records in the hiring context would appear dubious at best." (citing *Schware*)); *United States v. Dooley*, 364 F. Supp. 75, 77 (E.D. Pa. 1973) ("[A] collection of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standards of constitutional fairness to an individual and, along with records resulting in an acquittal are not entitled to any legitimate law enforcement credibility whatsoever.").

<sup>12</sup> *But cf.* *United States v. Watts*, 519 U.S. 148, 155 (1997) (per curiam) ("An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt." (internal quotation marks and citation omitted)); *Dowling v. United States*, 493 U.S. 342, 349 (1990) ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.").

<sup>13</sup> See generally *Gregory v. Litton Sys.*, 316 F. Supp. 401, 402-03 (C.D. Cal. 1970) ("There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in the case was overwhelmingly to the contrary."), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

<sup>14</sup> See, e.g., *ACLU v. U.S. Dep't of Justice*, 750 F.3d 927, 933 (D.C. Cir. 2014) ("Individuals who are charged with a crime and ultimately prevail of course remain entitled to a version of this presumption [of innocence]. In the eyes of the law, they are not guilty. Unfortunately, public perceptions can be quite different. Aware of the heavy burden of proof that the government must satisfy in a criminal prosecution, many may well assume that individuals

one's reputation. False arrest may do that. Even to be acquitted may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted."<sup>15</sup>

## II. NO CONVICTION, BUT NO JOB

To provide a framework for analysis, this section will give real-life examples of people denied employment because of a crime for which they were not convicted. The examples begin as relatively sympathetic situations for the employee or applicant, then become closer calls, and end as relatively sympathetic situations for the employer.

### A. *Gary M. Kay: Fired Because Person With Distinguishable Name Had Been Arrested*

First Continental Trading, Inc. hired Gary Marcus Kay, but fired him after less than three weeks because a background check indicated that he had been arrested on a "felony charge of 'Receiving/Possession/Selling Stolen Vehicle.'"<sup>16</sup> The background check was in error: the actual

arrestee was one Gary Stephen Kay, who had not only a different middle name, but also a different date of birth and mailing address.<sup>17</sup>

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charged with a crime likely committed that crime regardless of how the case was ultimately resolved." (internal citation omitted)).

<sup>15</sup> *Michelson v. United States*, 335 U.S. 469, 482 (1948). Courts have proved especially ready to "wink" when a police department takes an adverse action against a non-convicted applicant or employee. *See, e.g.*, *Graham v. City of Phila.*, 402 F.3d 139, 147 (3d Cir. 2005) (stating, in rejecting Due Process Clause claims of a police officer fired after an arrest and not rehired upon acquittal, that "[t]he government has a strong interest in preserving its officials' ability to make personnel decisions and communicate the reasons for those decisions to the public, particularly where, as here, the decisions implicate matters of heightened public concern such as alleged sexual assault of a minor by a police officer."); *Delahoussaye v. New Iberia*, 937 F.2d 144, 145, 149 (5th Cir. 1991) (Fourteenth Amendment decision affirming summary judgment in favor of city that refused to hire plaintiff who had been detained, but not charged, for "alleged homosexual activity in ... public restrooms," notwithstanding plaintiff's argument that "[a] detention in itself ... is not probative of wrongdoing."); *id.* at 151 ("For purposes of testing the rationality of the City's action under a minimal scrutiny test, however, the question is not whether Delahoussaye actually engaged in misconduct on the occasions at issue, but whether the City had sufficient reason to believe that he engaged in misconduct so that its action was not wholly arbitrary or irrational."); *Clinkscale v. City of Phila.*, No. 97-cv-2165, 1998 U.S. Dist. LEXIS 9644, at \*4 (E.D. Pa. June 15, 1998) ("Plaintiff argues that in his case, the subsequently dismissed charges, acquittal and expungement of his record are consistent with actual innocence. However, in other cases, these outcomes may well be the result of other things—lack of evidence, recalcitrant witnesses, participation in an accelerated rehabilitative disposition (ARD) program, or juvenile offenses, for example. Even an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness."). *But see* *Murillo v. City of Chi.*, 61 N.E.3d 152 (Ill. App. Ct. 2016) (granting summary judgment to plaintiff who lost job as janitor at a Chicago police station because of an old arrest record).

<sup>16</sup> *Kay v. First Cont'l Trading*, 966 F. Supp. 753, 753-54 (N.D. Ill. 1997); Matt O'Connor, *Man Collects Over Firing In Mistaken Identity Case*, CHI. TRIB. (July 10, 1998), [http://articles.chicagotribune.com/1998-07-10/news/9807100096\\_1\\_chicago-mercantile-exchange-punitive-damages-new-trial](http://articles.chicagotribune.com/1998-07-10/news/9807100096_1_chicago-mercantile-exchange-punitive-damages-new-trial) [<https://perma.cc/HZ3V-G8GA>].

<sup>17</sup> *Kay*, 966 F. Supp. at 754 n.1. Such mistakes of identity are common. *E.g.*, *Drury v. TNT Holland Motor Express*, 885 F. Supp. 161 (W.D. Mich. 1994) (wherein Joseph Bruce Drury, a truck driver with a clean criminal record, was dismissed from his job because a Joseph Thomas Drury, who had the same date of birth, was convicted of driving while intoxicated); Christopher N. Osher, *Denver Police Will Alter Procedures*, DENVER POST, July 20, 2007, at B1

*B. Stephanie Settles: Denied Employment Because of an Old Arrest Record*

Stephanie Settles, a veteran employee in the customer service industry, applied for a job at a Sunoco gas station.<sup>18</sup> Sunoco rejected her application because of an arrest dating back five years that never led to a conviction.<sup>19</sup>

*C. Edward Franklin: Fired for Alleged Misdemeanor Committed While Off-Duty, Then Acquitted*

The City of Evanston learned from a newspaper report that one of its Streets and Sanitation workers, Edward Franklin, had been charged with misdemeanor marijuana possession while off-duty.<sup>20</sup> Based on that arrest, the City fired Mr. Franklin under a rule in the collective bargaining agreement prohibiting the possession of illegal drugs.<sup>21</sup> At a grievance hearing the next month, “the union argued that the City should have waited until after Franklin’s criminal charges had been resolved before disciplining him.”<sup>22</sup> His grievance was denied.<sup>23</sup> Ten days later, “Franklin’s criminal case was *nolle prossed*, and the criminal charge against him was dismissed.”<sup>24</sup>

*D. Joseph Cisco: Fired for Alleged On-Duty Crime, and Not Rehired After Acquittal*

UPS forced the resignation of delivery driver Joseph Cisco when he was charged with committing theft and trespass while making a delivery.<sup>25</sup> “After his acquittal, Cisco made repeated unsuccessful requests to be reinstated.”<sup>26</sup> The Superior Court of Pennsylvania held that UPS’s refusal to rehire was not actionable, on the grounds that “[t]his situation . . . gives rise to an inference that the reputation and business activity of U.P.S. were jeopardized by a mere arrest, even one which ultimately resulted in an acquittal.”<sup>27</sup>

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(wherein Valerie Rodriguez applied for a job but failed the employer’s criminal background check because of an outstanding warrant for a different Valerie Rodriguez).

<sup>18</sup> Press Release, Pub. Interest Law Ctr. of Phila., Sunoco Lends Support to Fair, Legal Use of Criminal Background Checks (Mar. 27, 2014), <http://www.pubintlaw.org/sunoco-lends-support-to-fair-legal-use-of-criminal-background-checks/> [<https://perma.cc/HGX5-AJJK>].

<sup>19</sup> *Id.* This scenario—a person is arrested and charged, her charge concludes with a non-conviction, and then she is denied employment because of that record—is the most basic and, likely, by far the most common of the situations discussed in this article. For similar stories, *see, e.g.*, Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record*, 54 *CRIMINOLOGY* 387, 399, 401-03, 405 (2016); Dana DiFilippo, *His Reputation Remains in Custody*, PHILA. DAILY NEWS, July 14, 2011, at 3.

<sup>20</sup> *Franklin v. City of Evanston*, 384 F.3d 838, 841 (7th Cir. 2004).

<sup>21</sup> *Id.* at 842.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Cisco v. UPS*, 476 A.2d 1340, 1341 (Pa. Super. Ct. 1984).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1344. UPS received Mr. Cisco’s acquittal with a “wink,” to use Justice Jackson’s term, *supra* note 15 and accompanying text. The court winked too:

While the full panoply of rights incident to a criminal defendant were entitlements of appellant in his trial experience, including the right to be presumed innocent until proven guilty, these rights which are ensured by both the United States and Pennsylvania Constitutions are not necessarily meant to, nor can they, be superimposed into an accused’s remaining life experiences. Thus,

*E. Tommy Keith Wall: Fired While Wrongfully Jailed*

Tommy Keith Wall was arrested in June of 2014 and charged with child rape and the production of child pornography.<sup>28</sup> He spent 105 days in jail before prosecutors dropped all charges against him and his records were expunged.<sup>29</sup> “His release, according to the dismissal statement, was prompted by further investigation of the case, which revealed the ‘wrong person’ was charged.”<sup>30</sup> While in jail, Mr. Wall lost his \$55,000 a year job with Stock Building Supply.<sup>31</sup> As he stated, “[w]hen I got papers showing I was cleared of everything I sent it to the people in management False I [got] a call from human resources saying they didn’t have any position for me and good luck with my career.”<sup>32</sup>

*F. Steven Hatfill: Fired Because Status as Suspect Threatened Employer’s Funding*

Dr. Steven Hatfill accepted a job in 2002 as the Associate Director of the National Center for Biomedical Research and Training at Louisiana State University.<sup>33</sup> Shortly thereafter, the FBI conducted a highly publicized search of his apartment as part of its investigation into the 2001 anthrax attacks.<sup>34</sup> According to a lawsuit Dr. Hatfill filed, Department of Justice personnel told LSU officials “that Dr. Hatfill should not be employed on any DOJ funded projects. Because Dr. Hatfill had been hired for the precise purpose of working on DOJ funded projects, these communications resulted in him being placed on 30-day administrative leave commencing on August 2, 2002, and eventually his termination at the end of this 30-day period.”<sup>35</sup> LSU hired him for a different position with equivalent pay, “[b]ut after Justice Department officials learned of Hatfill’s employment, they told LSU to ‘immediately cease and desist’ from using Hatfill on any federally funded program. He was let go before his first day.”<sup>36</sup> Six years later, the DOJ fully

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marriages crumble when one is adjudged guilty without ever being considered innocent and jobs are lost when the employer, for a legitimate business reason, cannot risk even someone under suspicion of having committed theft and trespass when the nature of its business is to enter onto the premises of others and to deliver parcels which belong to them .... We have concluded that a plausible and legitimate reason for appellant’s discharge existed in that his employer was protecting its reputation by discharging an employee who was accused of theft and trespass in connection with his employment, even though a jury ultimately acquitted him.

*Id.*

<sup>28</sup> Thomasi McDonald, *Johnston County Man Putting Life Back Together After He’s Cleared in Child Sex Case*, RALEIGH NEWS & OBSERVER (Nov. 28, 2014), <http://www.newsobserver.com/news/local/crime/article10178030.html> [https://perma.cc/T3S7-HJJN].

<sup>29</sup> *Id.* at 2.

<sup>30</sup> David Lohr, *Tommy Wall Loses Job, House, Reputation After Police Wrongly Charge Him With Child Rape*, HUFFINGTON POST (Dec. 4, 2014), [http://www.huffingtonpost.com/2014/12/04/tommy-wall-child-rape\\_n\\_6271070.html](http://www.huffingtonpost.com/2014/12/04/tommy-wall-child-rape_n_6271070.html) [https://perma.cc/28T6-S2D5].

<sup>31</sup> McDonald, *supra* note 28.

<sup>32</sup> Lohr, *supra* note 30.

<sup>33</sup> *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 108 (D.D.C. 2005).

<sup>34</sup> *Id.* at 107-08.

<sup>35</sup> *Id.*

<sup>36</sup> David Freed, *The Wrong Man*, ATLANTIC, May 2010, at 46, 50.

exonerated Dr. Hatfill.<sup>37</sup>

*G. George Quatrine: Fired After Being Arrested for an On-the-Job Crime, and Unwelcomed by Employer After Narrowly Escaping Conviction*

Shell Oil Company fired George Quatrine because they believed he was stealing the company's gasoline, and refused to rehire him after his acquittal.<sup>38</sup> As retold by the Sixth Circuit:

Quatrine, who was employed by Shell as a tanker truck driver, was scheduled to deliver a load of gasoline from Shell's River Rouge distribution plant to a location in Detroit. After making that delivery, Quatrine was arrested by the Clinton Township Police Department and accused of larceny under \$100.00, in that he had allegedly stolen gasoline from the tanker truck. Shell was informed of the arrest, and, after making inquiries, fired Quatrine. Subsequently, Quatrine was acquitted in state court of the larceny charge.

During his trial, a lawyer was sent by Shell to monitor the proceedings. Following Quatrine's acquittal, Shell supervisory personnel allegedly told other tanker truck drivers that Quatrine was acquitted due to having a "Mafia" lawyer who was "in cahoots" with the Clinton Township City Attorney. When Quatrine applied for unemployment compensation, Shell unsuccessfully contested the application. Finally, Shell produced a movie concerning employee theft for exhibition to Shell drivers which allegedly depicted Quatrine engaging in two criminal acts.<sup>39</sup>

The Sixth Circuit went on to add that "[i]t is clear that Mr. Quatrine was discharged not because he had an arrest record, but because Shell thought, rightly or wrongly, that Mr. Quatrine had stolen gasoline from it."<sup>40</sup>

### III. FEDERAL AND STATE LAW GIVE ONLY LIMITED PROTECTIONS TO NON-CONVICTED APPLICANTS AND EMPLOYEES

This Part summarizes the existing laws concerning employment and non-convictions. There is no comprehensive federal law safeguarding the employment rights of people without convictions, although Title VII<sup>41</sup> and the Fair Credit Reporting Act ("FCRA")<sup>42</sup> extend

<sup>37</sup> Eric Lichtblau, *Letter Officially Exonerates Scientist in Anthrax Attacks*, N.Y. TIMES, Aug. 9, 2008, at A13.

<sup>38</sup> *Quatrine v. Shell Oil Co.*, No. 87-1422, 1988 U.S. App. LEXIS 7236, at \*1 (6th Cir. 1988).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*5 (Nelson, J., concurring). Mr. Quatrine's experience is not unique. *See, e.g.*, *Salanger v. U.S. Air*, 611 F. Supp. 427, 432 (N.D.N.Y. 1985) ("Even if plaintiff had not been arrested, it is apparent that defendant would have taken the same action since it was convinced, through its internal investigation, that plaintiff had misappropriated company funds."); *Kraemer v. Labor & Indus. Review Comm'n*, 2014 Wis. App. LEXIS 400, at \*31 (Wis. Ct. App. May 20, 2014) ("Regardless of Kraemer's arrest, the County would have discharged Kraemer whenever it discovered the materials on Kraemer's computer.").

<sup>41</sup> 42 U.S.C. § 2000e-2 (2012).

<sup>42</sup> *See generally* 15 U.S.C. §§ 1681-1681x (2012).



protections in certain situations. A handful of state and local laws grant strong, enforceable rights, but most jurisdictions offer none. The individuals from the examples in Part II serve to illustrate how the various laws do and do not apply.

### A. Federal Law

#### 1. Title VII

Title VII prohibits employment policies that have a disparate impact on the basis of race or other protected categories.<sup>43</sup> From about 1970 to 1980, several federal courts held that blanket policies against hiring applicants with arrest records might have a disparate impact on racial minorities. In the earliest such case, *Gregory v. Litton Systems, Inc.*, the court found after a bench trial that “Negroes are arrested substantially more frequently than whites in proportion to their numbers,” and:

Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against Negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A substantial and disproportionately large number of Negroes are excluded from employment opportunities by Defendant’s policy.<sup>44</sup>

A few years later, a federal court in Ohio held that the “[u]se of arrests and convictions favors white Columbus men over black Columbus men.”<sup>45</sup> A Title VII case in 1980 ordered a union to stop using arrest records as a selection criterion for its apprenticeship program.<sup>46</sup> However, from the early 1980s through the present, few, if any, reported federal court decisions have applied a Title VII disparate impact analysis to employment policies based on non-convictions.<sup>47</sup>

In 2012, the Equal Employment Opportunity Commission (“EEOC”) issued an Enforcement Guidance that specifically addresses Title VII protections for non-convicted job

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<sup>43</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>44</sup> 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

<sup>45</sup> *Dozier v. Chupka*, 395 F. Supp. 836, 850 (S.D. Ohio 1975) (footnote omitted).

<sup>46</sup> *Reynolds v. Sheet Metal Workers*, 498 F. Supp. 952, 960 (D.D.C. 1980) (“Defendants have inquired in the past and will continue to inquire about arrest records in their apprentice selection process. The arrest record inquiry ... adversely affects blacks.” (internal citation omitted)), *aff’d*, 702 F.2d 221 (D.C. Cir. 1981); *see also id.* at 973 (“The defendants have made no attempt to validate the arrest inquiry as job related; consequently, it must be eliminated.”).

<sup>47</sup> One case recognized the viability of such claims as a general matter, but granted summary judgment to the employer, the Chicago Police Department, because the plaintiff made “no statistical showing whatsoever that there was any exclusion of applicants or any observed disparities in the Department, as opposed to statistical evidence that African Americans are arrested at higher rates than whites in the general population.” *Watkins v. City of Chi.*, 73 F. Supp. 2d 944, 948-49 (N.D. Ill. 1999). Another Title VII decision upheld a police department’s no-arrest policies on the theory that “[e]ven an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness.” *Clinkscale v. City of Phila.*, No. 97-2165, 1998 U.S. Dist. LEXIS 9644, at \*4 (E.D. Pa. June 15, 1998).

applicants.<sup>48</sup> Although it focuses largely on the use of convictions in employment decisions, the EEOC Guidance does note:

The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.<sup>49</sup>

The EEOC Guidance stops short of disapproving of all uses of non-conviction records in the employment context:

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.<sup>50</sup>

The EEOC Guidance breathes new life into Title VII but falls short of resolving all misuse of non-conviction records. There are no procedural protections that would protect individuals like Gary M. Kay, who lost his job because of a misidentification.<sup>51</sup> In addition, the EEOC Guidance is of no help to job applicants, such as white women, who are not members of a protected class.<sup>52</sup> Finally, disparate impact cases are notoriously difficult, costly, and protracted for plaintiffs, requiring multiple expert witnesses to prove an affirmative case and to rebut an employer's expert witnesses.<sup>53</sup> Title VII's limited utility is evinced by the absence of any reported decisions under the statute since the issuance of the EEOC Guidance—or indeed since the early 1980s—finding in favor of a job applicant denied employment because of a non-conviction.

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<sup>48</sup> See generally U.S. Equal Emp't Opportunity Comm'n, 915.002, *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012) [hereinafter EEOC Guidance].

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.*

<sup>51</sup> See *supra* notes 16-17 and accompanying text.

<sup>52</sup> Title VII criminal-record cases typically allege a disparate impact on black or Hispanic applicants, but also sometimes allege a disparate impact on male applicants. *E.g.*, *EEOC v. Freeman*, 778 F.3d 463, 464-65 & n.3 (4th Cir. 2015) (unsuccessful EEOC action alleging criminal-background policies had disparate impact on black, Hispanic, and male applicants).

<sup>53</sup> See, e.g., *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 246-47 & n.18 (3d Cir. 2007) (affirming summary judgment in favor of employer because plaintiff did not “hire[] an expert who [would have] testified that there is time [sic] at which a former criminal is no longer any more likely to recidivate than the average person” and did not rebut employer's three experts on recidivism, psychology, and statistics).

## 2. Fair Credit Reporting Act

The FCRA does not prohibit the use of conviction or arrest records in the hiring process, but it provides applicants with certain procedural protections concerning employers' use of third-party background reports. These protections should have kept the misidentified Gary M. Kay from losing his job, by first providing him with an opportunity to rebut the mistaken criminal background report.<sup>54</sup> But even if followed, the FCRA offers no help to individuals like Stephanie Settles (not hired because of an arrest without a conviction)<sup>55</sup> or Edward Franklin (fired for alleged misconduct while off-duty),<sup>56</sup> where the issue is the employer's substantive use of criminal background records, not the accuracy of those records.

Under the FCRA, before an employer obtains a consumer report—including a criminal background report<sup>57</sup>—on a current or potential employee, the employer must give written notice that this information might be used for an employment decision and obtain the employee's written consent.<sup>58</sup> Before an employer takes an adverse employment action based on information found in a background check, the employer must provide the employee with notice that it is considering making the decision, a copy of the report it relied on to make the decision, and a description of the employee's rights under the FCRA to dispute the accuracy of the information in the report with the reporting agency.<sup>59</sup> This requirement ensures that the applicant or employee has a timely opportunity to review the information in the report for accuracy.<sup>60</sup> If an employer then takes an adverse action based on information found in a background check, the employer must provide notice of such to the employee.<sup>61</sup>

The FCRA's protections are riddled with holes. For example, one hole: the consent requirement has scant practical value for job-seekers or incumbent employees. The Third Circuit has held that "an employer is not prohibited from terminating an employee if she refuses to authorize her employer to obtain her consumer credit report."<sup>62</sup> Similarly, "[i]f a job seeker routinely refused to consent to allow a potential employer to access her credit report, then she would drastically reduce her chances of finding a job."<sup>63</sup> A second hole: the FCRA applies only when the employer engages a third-party credit reporting agency, not when the employer conducts

<sup>54</sup> See *supra* notes 16-17 and accompanying text. The jury in Mr. Kay's case found an FCRA violation; after a post-trial motion, the judge upheld the finding of liability under the FCRA but reduced the FCRA damages to zero. *Kay v. First Cont'l Trading*, No. 95 C 3089, 1998 U.S. Dist. LEXIS 12920, at \*3 (N.D. Ill. Aug. 14, 1998).

<sup>55</sup> See *supra* notes 11-12 and accompanying text.

<sup>56</sup> See *supra* notes 20-24 and accompanying text.

<sup>57</sup> The FCRA uses the term "consumer report," 15 U.S.C. § 1681a(d)(1) (2012). Under the FCRA, criminal background reports are a type of consumer report. *E.g.*, *Freckleton v. Target Corp.*, 81 F. Supp. 3d 473, 480-82 (D. Md. 2015); *Burghy v. Dayton Racquet Club, Inc.*, 695 F. Supp. 2d 689, 693 (S.D. Ohio 2010).

<sup>58</sup> 15 U.S.C. § 1681b(b)(2)(A) (2012).

<sup>59</sup> *Id.* § 1681b(b)(3).

<sup>60</sup> The FCRA does not state exactly how long the employer must give the applicant or employee to respond to the report before making an adverse employment decision. Courts have tended to find five business days sufficient. *See, e.g.*, *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 435-36 (M.D. Pa. 2004) (citing H.R. Rep. No. 103-486, at 30 (1994)), *aff'd*, 135 F. App'x 499 (3d Cir. 2005).

<sup>61</sup> 15 U.S.C. § 1681m(a) (2012).

<sup>62</sup> *Kelchner v. Sycamore Manor Health Ctr.*, 135 F. App'x 499, 502 (3d Cir. 2005).

<sup>63</sup> Ruth Desmond, Comment, *Consumer Credit Reports and Privacy in the Employment Context*, 44 U.S.F. L. REV. 907, 917 (2010); see also *id.* at 917-18 ("This is what Paul Schwartz has called an autonomy trap—a situation in which a consumer technically retains control over whether or not to surrender her information, but forces such as market pressures or everyday needs render that choice meaningless in practice.").

a records check itself.<sup>64</sup> A third hole: the FCRA permits consumer reports to include “arrests” not more than seven years old.<sup>65</sup> And the largest hole: so long as the credit reporting agency and the employer comply with the FCRA’s procedural requirements, nothing in the FCRA prevents the employer from turning away applicants on the basis of non-convictions.

### B. State Statutes and Local Ordinances

State law protections vary significantly from jurisdiction to jurisdiction. Most states offer no protections to job applicants or incumbent employees with non-conviction records. A growing minority of states and some large cities do offer a degree of protection to the non-convicted.

#### 1. Prohibitions on Employers’ Considering At Least Some Non-Convictions

Only a handful of states flatly prohibit employers’ consideration of non-conviction records. California and Hawaii have the most protective statutes. In **California**, employers are forbidden to “seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction.”<sup>66</sup> Thus, for example, FedEx violated this statute when it “suspended [an employee] from his position as a driving courier after he was arrested for driving under the influence but before he had been tried on the charge,” when the employee “was later acquitted.”<sup>67</sup> Had the employee been convicted, however, FedEx could have had the wrongful termination suit dismissed.<sup>68</sup> California’s statute would protect all the example employees described in Part II.<sup>69</sup>

<sup>64</sup> See 15 U.S.C. § 1681a(d)(1) (2012) (“The term ‘consumer report’ means any written, oral, or other communication of any information *by a consumer reporting agency* . . .” (emphasis added)); *Solimen v. Morton Coll.*, No. 13-C-1962, 2013 U.S. Dist. LEXIS 128000, at \*6 (N.D. Ill. Sept. 9, 2013) (“[C]riminal background checks, if obtained from a ‘consumer reporting agency,’ are consumer reports.”). State analogues to the FCRA sometimes apply even when the employer conducts the background check itself. *E.g.*, CAL. CIV. CODE § 1786.53 (West 2016).

<sup>65</sup> 15 U.S.C. § 1681c(a)(2) (2012) (“[N]o consumer reporting agency may make any consumer report containing . . . records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.”). If the job will pay at least \$75,000 per year, the seven-year cap for arrest records does not apply. *Id.* § 1681c(b)(3). This provision has given rise to conflicting decisions about whether consumer reports may include non-arrest-record information about charges with a non-conviction disposition more than seven years old, e.g., a court record of a charge that was dismissed or resulted in an acquittal. See *Dunford v. Am. DataBank, LLC*, 64 F. Supp. 3d 1378, 1393-94 (N.D. Cal. 2014) (collecting competing cases); see also *id.* at 1394 (“[A]n arrest record is not the same as a dismissal. An arrest record resides in the police department. A dismissal resides in a courthouse.”).

<sup>66</sup> CAL. LAB. CODE § 432.7(a) (West 2016); *cf. id.* (“Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.”).

<sup>67</sup> *Piutau v. Fed. Express Corp.*, 114 F. App’x 781, 782 (9th Cir. 2004).

<sup>68</sup> See *Pitman v. City of Oakland*, 243 Cal. Rptr. 306, 309-10 (Ct. App. 1988).

<sup>69</sup> California’s law is not boundless. The Ninth Circuit has upheld a San Francisco permit scheme for drivers of tow trucks that requires permit applicants to “submit identifying information, and disclose any criminal arrest history.” *Cal. Tow Truck Ass’n v. City & Cnty. of S.F.*, 807 F.3d 1008, 1015 (9th Cir. 2015). The court recognized that the denial of a permit based solely on an arrest “would be extremely troublesome and could be separately challenged,” but

In **Hawaii**, employers may not fire, or refuse to hire, “[b]ecause of [an individual’s] arrest and court record.”<sup>70</sup> These employee protections are strong but not absolute. Under Hawaii’s statute, the Ninth Circuit decided a wrongful-termination case in favor of the employer, an airline, which fired the plaintiffs after they “were arrested by DEA agents at the Honolulu International Airport for conspiracy to promote cocaine.”<sup>71</sup> The court held “that CP Air did not violate § 378-2 when it discharged the plaintiffs. The discharges were not based on the ‘mere fact’ of the plaintiffs’ arrest and court record, but instead were due to the perception that plaintiffs were involved in drug-related activity.”<sup>72</sup> This holding is similar to that in Mr. Cisco’s case,<sup>73</sup> and would also support the termination of Mr. Quatrone.<sup>74</sup>

Two other states forbid employers from considering non-convictions when hiring, but do not extend these protections to incumbent employees in the retention and promotion contexts. In **Rhode Island**, it is unlawful “[f]or any employer to include on any application for employment, except applications for law enforcement agency positions or positions related to law enforcement agencies, a question inquiring or to otherwise inquire either orally or in writing whether the applicant has ever been arrested, charged with or convicted of any crime,” with certain exceptions for convictions (but not for non-convictions, including pending charges).<sup>75</sup> In **Pennsylvania**, the Criminal History Record Information Act states 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.”<sup>76</sup> Although Pennsylvania’s provision does not expressly bar consideration of non-convictions, courts have consistently interpreted it as doing so.<sup>77</sup> No court has read it to protect incumbent employees from termination,<sup>78</sup> but one has

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upheld the permit scheme on the grounds that “[s]imply collecting information on arrests is nonetheless pertinent to assuring accurate identification of drivers, as arrest records contain identifying information, including fingerprints and usage of aliases.” *Id.* at 1027. Relatedly, employers are allowed to “disciplin[e] an employee where the employer independently investigates the conduct giving rise to the arrest or detention.” *Pinheiro v. Civil Serv. Comm’n*, 200 Cal. Rptr. 3d 525, 536 n.3 (Ct. App. 2016).

<sup>70</sup> HAW. REV. STAT. § 378-2(a)(1) (2015). The term “arrest and court record” is defined to “include[] any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.” *Id.* § 378-1. A later-enacted subsection permits consideration of convictions under certain circumstances, but not arrests or non-convictions. *Id.* § 378-2.5; *see also* Lau, *supra* note 10, at 715-16 (tracing legislative history of § 378-2.5).

<sup>71</sup> *Kinoshita v. Canadian Pac. Airlines*, 803 F.2d 471, 473 (9th Cir. 1986).

<sup>72</sup> *Id.* at 475; *see also* *Tachera v. United Airlines*, No. 89-cv-271, 1989 U.S. Dist. LEXIS 15320, at \*20 (D. Haw. Sept. 25, 1989) (upholding termination of employee on grounds that he had been fired not because he was arrested for marijuana possession while on the job, but because he violated company policy by possessing marijuana on the job).

<sup>73</sup> *See supra* notes 25-27 and accompanying text.

<sup>74</sup> *See supra* notes 38-40 and accompanying text.

<sup>75</sup> R.I. GEN. LAWS § 28-5-7(7) (2015).

<sup>76</sup> 18 PA. CONS. STAT. § 9125(b) (2016).

<sup>77</sup> *E.g.*, *Foxworth v. Pa. State Police*, 228 F. App’x 151, 154-55 (3d Cir. 2007); *King v. Gen. Info. Servs.*, 903 F. Supp. 2d 303, 312-13 (E.D. Pa. 2012); *Commonwealth v. D.M.*, 695 A.2d 770, 773 n.2 (Pa. 1997); *see also* *Tilson v. Sch. Dist.*, No. 89-cv-1923, 1990 U.S. Dist. LEXIS 8964, at \*11-12 (E.D. Pa. July 12, 1990) (“Employers were formerly allowed to consider arrest records of prospective employees, but the word ‘arrest’ was removed by statutory amendment in 1979, effective December 11, 1982.”), *aff’d*, 932 F.2d 961 (3d Cir. 1991).

<sup>78</sup> *E.g.*, *Miller v. AutoPart Int’l*, No. 15-cv-384, 2016 U.S. Dist. LEXIS 25721, at \*6 (M.D. Pa. Mar. 2, 2016) (“Although the plaintiff finds this to be ‘absurd,’ it is clear that § 9125 is relevant only to the hiring of a potential employee, not the termination of an employee.”) (collecting federal cases); *Betchy v. Pa. Coach Lines*, 2012 Pa. Dist. &

found it to apply if the plaintiff “was hired subject to the results of a pending background check and that his termination was motivated by his criminal history or record in violation of the CHRIA.”<sup>79</sup>

Three other states, plus the District of Columbia, offer more limited protections that do not apply to certain pending charges. **New York** and the **District of Columbia** forbid employers from considering arrests or criminal charges that did not result in a conviction, unless the charge is still pending.<sup>80</sup> **Michigan** has a similar statute, but it protects only those who faced misdemeanor charges.<sup>81</sup> In addition, as the court in Mr. Quatrine’s case held, an employer in Michigan may “obtain[] an arrest record in connection with its investigation of a [crime] by a[n] employee against that employer.”<sup>82</sup> **Wisconsin** allows employers to consider pending charges only “if the circumstances of the charge substantially relate to the circumstances of the particular job.”<sup>83</sup>

**Montana** does not expressly bar employers from considering non-convictions, but the regulations of the Montana Human Rights Commission state that “pre-employment inquires” about “criminal arrests” (as opposed to “criminal convictions”) “may raise a suspicion that the employer intends to use the information to unlawfully discriminate and, therefore, should not be asked at any time during the hiring process, including, but not limited to, on application forms and during interviews.”<sup>84</sup>

## 2. Prohibitions on Employers’ Considering Expunged or Sealed Records

Sealing or expunging a record of a non-conviction can lessen (but not eliminate) the

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Cnty. Dec. LEXIS 472, at \*3-4 (Pa. Ct. Com. Pl. Apr. 19, 2012) (rejecting, on textualist grounds, employee’s argument that Pennsylvania’s statute “should be read to cover terminations because ‘it is absurd to believe that an employer cannot use a certain crime in considering whether to hire a person, but the next day, can fire that person for the same crime.’”).

<sup>79</sup> *Negron v. Sch. Dist.*, 994 F. Supp. 2d 663, 667 (E.D. Pa. 2014) (internal quotation marks omitted).

<sup>80</sup> N.Y. EXEC. LAW § 296(16) (Consol. 2015); D.C. CODE § 32-1342(a) (2016). *See generally* *People v. Patterson*, 587 N.E.2d 255, 257 (N.Y. 1991) (noting that “the legislative objective was to remove any ‘stigma’ flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing and insurance opportunities.”). New York’s statute does not prohibit basing adverse employment decisions on the conduct prompting the arrest. *See e.g.*, *Kenner v. Coughlin*, 482 N.Y.S.2d 615, 616-17 (N.Y. App. Div. 1984) (“The record makes clear that the arbitrator based his determination on the testimony of police witnesses that during a domestic argument petitioner aimed a loaded revolver at his wife, discharged it and that the bullet lodged in the wall, narrowly missing petitioner’s wife. Inasmuch as petitioner’s termination was based on acts of recklessness involving a firearm, not on the mere fact of his arrest, there was no violation of the Executive Law ...”); *see also* *Matter of Thygesen v. N. Bailey Volunteer Fire Co., Inc.*, 954 N.Y.S.2d 314, 315 (N.Y. App. Div. 2012) (holding that “media reports concerning petitioner’s arrests do not constitute ‘official records and papers ... relating to [petitioner’s] arrest or prosecution’”) (alteration and ellipsis in original)).

<sup>81</sup> MICH. COMP. LAWS § 37.2205a(1) (2015). In at least one context, this statute has been held to be preempted by federal law. *Roddy v. Grand Trunk W. R.R.*, No. 271208, 2007 Mich. App. LEXIS 177, at \*10 (Mich. Ct. App. Jan. 30, 2007) (deciding against railroad employee fired after being arrested for marijuana possession while off-duty, on grounds that Michigan statute was preempted by a federal regulation for railroad workers barring the use of controlled substances by off-duty employees).

<sup>82</sup> *Quatrine*, 1988 U.S. App. LEXIS 7236, at \*3.

<sup>83</sup> WIS. STAT. § 111.335(1)(b) (2016). Wisconsin’s statute also allows employers to base adverse decisions on arrest records if “the individual may not be bondable due to an arrest record.” *Id.* § 111.335(1)(a).

<sup>84</sup> MONT. ADMIN. R. 24.9.1406(2), (2)(h) (2015).

collateral consequences of a non-conviction.<sup>85</sup> Access to expungement varies greatly from state to state.<sup>86</sup> In the federal system, expungements are vanishingly rare.<sup>87</sup> A number of states lack blanket bans on employers' consideration of non-convictions, but do bar employers from considering sealed or expunged convictions. These statutes are helpful, of course, only if citizens have meaningful access to expungement of their non-convictions.<sup>88</sup>

**In Colorado, Connecticut, the District of Columbia, Kansas, Massachusetts, Nevada, Ohio, and Washington,** applicants are expressly permitted to answer "no" if an employment application asks whether they have non-convictions that have been expunged or sealed.<sup>89</sup> Given the regularity with which employers violate background-check laws, this explicit permission is an important safeguard for applicants' rights.

**Illinois, Indiana, New Hampshire, New Jersey, and Vermont** forbid employers to ask about expunged or sealed records, but do not give express permission for applicants to check

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<sup>85</sup> See generally Anna Kessler, Comment, *Excavating Expungement Law*, 87 TEMP. L. REV. 403 (2015). The terms "expunge" and "seal" have overlapping meanings, see *id.* at 409, but use of the terms may vary some from state to state, see, e.g., *Commonwealth v. Jagodzinski*, 739 A.2d 173, 177 n.3 (Pa. Super. Ct. 1999) ("Generally, an expunged record is physically destroyed, in files, computers, or other depositories, and therefore no longer exists. A sealed record, in contrast, is merely made inaccessible except by order of court or to certain designated officials; however, the record continues to exist.").

<sup>86</sup> See, e.g., Kessler, *supra* note 85, at 416-18; Brian M. Murray, *A New Era for Expungement Law Reform?*, 10 HARV. L. & POL'Y REV. 361, 367-74 (2016) (surveying state and federal legislative activity).

<sup>87</sup> See, e.g., *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016) (reversing, on jurisdictional grounds, the district court's decision to grant the motion to expunge all records of a valid conviction); *Sandy v. United States*, No. 08-mc-306, 2008 U.S. Dist. LEXIS 90808, at \*4 (E.D.N.Y. Nov. 7, 2008) (noting, in a non-conviction case, that "the loss of employment opportunities because of a criminal record is not an extreme circumstance justifying expungement," and collecting cases); *United States v. Sherman*, 782 F. Supp. 866, 868 (S.D.N.Y. 1991) ("[Federal] courts have rarely granted motions to expunge arrest records, let alone conviction records. This is true even where the arrests at issue resulted in acquittals or even dismissal of the charges.").

<sup>88</sup> Numerous states provide a right to expungement of certain types of non-convictions but still require formal motions, filing fees, or waiting periods; these bureaucratic and financial obstacles prevent many who are eligible for expungements from completing or even starting the process. See, e.g., Murray, *supra* note 86, at 370-73, 379 (surveying recently enacted expungement laws); *id.* at 380 n.135 (noting the financial costs of expungement); see generally *infra* note 115 (discussing automation of the expungement process).

<sup>89</sup> COLO. REV. STAT. ANN. § 24-72-702(f)(I) (West 2014); CONN. GEN. STAT. ANN. § 31-51i(d) (West 2017); D.C. CODE § 16-803(m) (West 2013); KAN. STAT. ANN. § 22-2410(g) (West 2016); MASS. GEN. LAWS ANN. ch. 276, §§ 100A, 100C (West 2012); NEV. REV. STAT. § 179.285(1)(a) (2015); OHIO REV. CODE ANN. § 2953.55(A) (West 2010); WASH. REV. CODE § 9.94A.640(3) (2016). In the District of Columbia, public-sector employers may require the disclosure of sealed records. D.C. CODE §§ 16-803(m), 16-801(11) (West 2013). In Kansas, the option to check "no" may not apply to applicants for certain types of employment, including as security personnel or in the gambling industry. KAN. STAT. ANN. § 22-2410(e) (West 2016). Two other states have statutes with less clear application in the employment context. An Arkansas statute allows a person whose record has been sealed to "state that the underlying conduct did not occur and that a record of the person that was sealed does not exist," ARK. CODE ANN. § 16-90-1417(b)(1) (2016), but does not make clear whether an employment applicant with a sealed record may deny having ever been arrested. A Missouri statute states that "[n]o person as to whom such records have become closed records shall thereafter, under any provision of law, be held to be guilty of perjury or otherwise of giving a false statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose," MO. REV. STAT. § 610.110 (West 2014), but the Missouri Supreme Court has read that statute narrowly, commenting that "the statutes express no purpose of guaranteeing total secrecy of expunged convictions, and ... these convictions may be relevant for certain purposes," *Spradling v. Supervisor of Liquor Control*, 824 S.W.2d 906, 909 (Mo. 1992).

“no.”<sup>90</sup> In Illinois, employers are also expressly permitted to base an employment decision on “other information which indicates that a person actually engaged in the conduct for which he or she was arrested.”<sup>91</sup>

### 3. Limitations on Access to Non-Conviction Information

The laws in several other states focus on employers’ access to public records containing non-conviction information, as opposed to employers’ use of such information. In **Alaska**, for instance, the state is barred by statute from releasing “nonconviction information,”<sup>92</sup> defined to mean information about charges in which no case has been pending for at least one year.<sup>93</sup> **Connecticut, Nebraska, North Dakota, Pennsylvania, and Washington** similarly restrict governmental entities from disseminating various types of non-conviction information, such as arrest records, usually if the charges are one to three years old.<sup>94</sup> **Missouri** restricts access to arrest records if no charge is filed within thirty days of the arrest.<sup>95</sup> Such statutes are helpful, but would provide cold comfort to individuals like Tommy Wall<sup>96</sup> and Steven Hatfill,<sup>97</sup> whose charges were reported in media stories easily found with an Internet search.

### 4. Public Employment or Licensure Cannot Be Barred by Non-Convictions

In several other states, non-convictions cannot bar public employment or eligibility for licenses,<sup>98</sup> but private employers may use non-conviction information. Two states, **New Hampshire** and **New Mexico**, disallow the use of non-conviction records for both public employment and licensure.<sup>99</sup> Three other states, **Arkansas, Louisiana, and Michigan**, disallow the use of non-conviction records for some or all forms of public licensure, but not for public employment.<sup>100</sup>

<sup>90</sup> 775 ILL. COMP STAT. ANN. 5/2-103(A) (West 2010); IND. CODE ANN. § 35-38-9-10(d) (West 2013); N.H. REV. STAT. ANN. § 651:5(X)(f) (2015); N.J. STAT. ANN. § 34:6B-14(c) (West 2015); VT. STAT. ANN. tit. 13 § 7606(b) (West 2016).

<sup>91</sup> 775 ILL. COMP STAT. ANN. 5/2-103(B) (West 2010).

<sup>92</sup> ALASKA STAT. ANN. § 12.62.160(b)(8) (West 2016).

<sup>93</sup> *Id.* § 12.62.900 (West 2016).

<sup>94</sup> CONN. GEN. STAT. ANN. § 46a-80(e) (West 2016); NEB. REV. STAT. ANN. §§ 29-3523(1), 29-3523(3) (West 2015); N.D. CENT. CODE ANN. § 12-60-16.6 (2016); 18 PA. CONS. STAT. § 9121(b)(2) (2016); WASH. REV. CODE §§ 10.97.030(2), 10.97.050(7) (2016). The Supreme Court of North Dakota has held that “a record subject does not have a private cause of action for damages against a party who violates provisions of our criminal history record information legislation.” *Ernst v. Burdick*, 687 N.W.2d 473, 478 (N.D. 2004).

<sup>95</sup> MO. REV. STAT. §§ 610.100(2), 610.120(1) (West 2014).

<sup>96</sup> See *supra* notes 28-32 and accompanying text.

<sup>97</sup> See *supra* notes 33-37 and accompanying text.

<sup>98</sup> Bars on licensure following conviction are widespread. For example, in Pennsylvania, convictions can disqualify an individual from obtaining licenses to practice occupations ranging from funeral director, 63 PA. STAT. ANN. § 479.11(a)(3), (10), (West 2016) to hunting permit salesperson, 67 PA. CODE § 65.3. See generally Community Legal Services, *Legal Remedies and Limitations on the Employment of People with Criminal Records in Pennsylvania* (2015), [http://clsphila.org/sites/default/files/issues/Legal%20Remedies%20and%20Limitations%20on%20the%20Employment%20of%20People%20with%20Criminal%20Records%20in%20Pennsylvania\\_0.pdf](http://clsphila.org/sites/default/files/issues/Legal%20Remedies%20and%20Limitations%20on%20the%20Employment%20of%20People%20with%20Criminal%20Records%20in%20Pennsylvania_0.pdf) [https://perma.cc/HSB5-BY9D].

<sup>99</sup> N.H. REV. STAT. ANN. § 21-1:51 (2015) (public employment); *id.* § 332-A:1 (licensure); N.M. STAT. ANN. § 28-2-3(B)(1) (West 2015) (public employment and licensure).

<sup>100</sup> ARK. CODE ANN. § 17-1-103(b)(2)(A-B) (2016); LA. REV. STAT. ANN. § 37:2950(A) (West 2016);



### 5. Judicially Vitiating State Statutes

In two states, statutes that would at least appear to give protections to non-convicted employees or applicants have been construed by courts in ways that have left them virtually without force. Under a statute in **Georgia**, for example, certain first-time offenders are eligible, upon completion of probation, to “be discharged without court adjudication of guilt.”<sup>101</sup> The statute specifies that “a discharge under this article is not a conviction of a crime under the laws of this state and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.”<sup>102</sup> Although this would appear to protect employment rights for people who have completed such a probation program, the Court of Appeals of Georgia has held that a private employer’s violation of the statute “does not give rise to a private cause of action.”<sup>103</sup> This decision strips the statute of all effect, at least in the private-employment context.<sup>104</sup>

A **Massachusetts** statute makes it unlawful

[f]or an employer . . . in connection with an application for employment, or the terms, conditions, or privileges of employment . . . to request any information [or] to make or keep a record of such information . . . [concerning] an arrest, detention, or disposition regarding any violation of law in which no conviction resulted.<sup>105</sup>

The most natural reading of this statute is that employers must not consult non-conviction records when making employment decisions. However, the Massachusetts Supreme Judicial Court has held that this law “only affects an employer’s ability to request certain criminal record information from employees and potential employees.”<sup>106</sup> By holding that “[t]he Legislature’s intent was merely to protect employees from such requests from their employers and not to proscribe employers from seeking such information elsewhere,”<sup>107</sup> the court made the statute nearly meaningless in an era in which the majority of employers use large commercial or governmental databases to run criminal background checks.<sup>108</sup>

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MICH. COMP. LAWS § 338.43(1)(a-b) (West 2015). Louisiana’s statute contains a long list of exceptions, permitting the consideration of non-convictions for licenses ranging from dentistry to embalming. LA. REV. STAT. ANN. § 37:2950(D) (West 2016).

<sup>101</sup> GA. CODE ANN. § 42-8-62 (2016).

<sup>102</sup> *Id.* § 42-8-63.

<sup>103</sup> *Mattox v. Yellow Freight Sys.*, 534 S.E.2d 561, 563 (Ga. Ct. App. 2000).

<sup>104</sup> If a *public* employer denied someone a job in contravention of the statute, it is arguable that mandamus would lie as a remedy. *Cf., e.g., Hall v. Nelson*, 651 S.E.2d 72, 76 (Ga. 2007) (affirming grant of mandamus against public school superintendent, which required her to reinstate a principal who had a clear legal right to the job).

<sup>105</sup> MASS. GEN. LAWS ch. 151B, § 4(9) (2016).

<sup>106</sup> *Bynes v. Sch. Comm. of Bos.*, 581 N.E.2d 1019, 1022 (Mass. 1991).

<sup>107</sup> *Id.* at 1021.

<sup>108</sup> *See, e.g., EEOC Guidance, supra* note 48, at 6 (“In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks.”).

## 6. “Ban the Box” Ordinances

A growing number of local governments have enacted “ban the box” ordinances that restrict how employers may inquire into applicants’ criminal histories.<sup>109</sup> Some of the stronger such ordinances prohibit consideration of non-convictions either by all employers<sup>110</sup> or by public employers.<sup>111</sup> These ordinances are of limited application to the issue under discussion: they do not apply statewide, often do not apply to smaller employers, and frequently do not create a private right of action.<sup>112</sup>

## IV. PROPOSED LEGISLATIVE REFORM

There is bipartisan support for reform.<sup>113</sup> Although a federal law would provide the most comprehensive solution, enactments at the state level are a more realistic prospect for the foreseeable future.<sup>114</sup> This article proposes such legislation, modeled after some of the best existing state laws and employer policies.<sup>115</sup>

<sup>109</sup> See generally Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NATIONAL EMPLOYMENT LAW PROJECT (2016), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [https://perma.cc/MWX9-EL2Z] (collecting state and local authorities).

<sup>110</sup> E.g., S.F., CAL., POLICE CODE art. 49, § 4904 (2015); PHILA., PA., CODE § 9-3503 (2016).

<sup>111</sup> See, e.g., N.Y.C., N.Y., EXECUTIVE ORDER No. 151, § 3 (2011) (prohibiting consideration of non-pending arrests for employment by city agencies, with certain exceptions).

<sup>112</sup> See generally Rodriguez & Avery, *supra* note 109.

<sup>113</sup> See, e.g., Fields & Emshwiller, *supra* note 2 (“In 2013, Indiana legislators approved one of the most extensive criminal record expungement laws in the country. The law was sponsored by a former prosecutor and had a range of conservative Republican backers. One had worked as a mining-company supervisor who frequently had to reject individuals after routine background checks found evidence of an old arrest.”). Legislation could directly benefit employers by providing a strong defense against negligent-hiring claims. See, e.g., *Delorenzo v. HP Enter. Servs., LLC*, No. 15-CV-216, 2016 U.S. Dist. LEXIS 125234, at \*56-64 (D.D.C. Sept. 15, 2016) (dismissing negligent-hiring claim against an employer that had hired a person with prior arrests but no convictions).

<sup>114</sup> If enough states enact laws, employers may come to prefer the uniformity of federal legislation, and could become advocates for a nationwide solution. See, e.g., John R. Emshwiller & Gary Fields, *Hiring Managers Bedeviled by Flood of Arrest Records*, WALL ST. J., Dec. 13-14, 2014, at A1 (“Companies seeking new employees are forced to navigate a patchwork of state and federal laws that either encourage or deter hiring people with criminal pasts and doing the checks that reveal them. Employers are having to make judgments about who is rehabilitated and who isn’t. And whichever decision they make, they face increasing possibilities for ending up in court.”).

<sup>115</sup> Another potential reform would be automation of the expungement process. This article does not take a position on this potential reform, as legislatures would typically consider such a reform in the context of expungement legislation, not job-discrimination legislation. Nonetheless, it bears noting that numerous states already provide for as-of-right expungement or sealing of certain types of non-conviction records, most often when there has been an acquittal as opposed to some other type of non-conviction disposition. See, e.g., *Commonwealth v. D.M.*, 695 A.2d 770, 773 (Pa. 1997) (holding that “[i]n cases of acquittal ... a petitioner is automatically entitled to the expungement of his arrest record,” but that various “factors ... and ... consideration should be evaluated in expunction cases which are terminated without conviction for reasons such as nolle prosequi or ARD.”). A few states go further, providing for expungement of certain non-convictions *by default*, i.e., without requiring the defendant to take any action. E.g., ALA. CODE § 41-9-625 (1975); N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2015). But see Kristin K. Henson, Comment, *Can You Make This Go Away?: Alabama’s Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 387 n.11 (2005)

The proposed legislation would enhance non-convicted individuals' economic self-sufficiency by restricting, but not altogether forbidding, employers' use of information about arrests or charges that have not resulted in convictions. An ideal statute would include these features:

- *General presumption.* Employers must not make adverse decisions on the basis of records of arrests or criminal cases that did not result in a conviction of the applicant, with certain exceptions described below. This general presumption would apply to charges that prosecutors never pursued or *nolle prossed*, to acquittals, to charges resolved through a diversion program if that is considered a non-conviction under applicable law, and to convictions that have been expunged, pardoned, or otherwise vacated.
- *Protections for both job applicants and incumbent employees.* The law should not distinguish between new applicants and incumbent employees facing retention or promotion decisions. Hawaii's statute is a good model, as it applies not only to hiring and firing, but also to employment agency referrals, help-wanted ads, and labor union membership.<sup>116</sup>
- *Meaningful enforceability.* The law should create a private right of action with the possibility for damages, injunctive relief, and attorneys' fees. Pennsylvania's statute is a good model.<sup>117</sup>
- *Procedural protections.* Although the FCRA provides certain procedural safeguards, some non-convicted individuals fall between its cracks.<sup>118</sup> An ideal statute would supplement the FCRA by requiring both pre- and post-adverse-action notice, along with a reasonable period for the applicant to correct inaccuracies in the reported information.<sup>119</sup>

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("Informal conversations with officials at [the Alabama Criminal Justice Information Center] indicate that despite this statutory provision, arrest records are not routinely expunged without a court order.")

Some commentators have recommended broader enactment of such expungement-by-default laws. *See, e.g., Jain, supra* note 10, at 862; Kessler, *supra* note 85, at 437-38; Joseph C. Dugan, Note, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1354 (2015). But this reform may raise serious practical and legal problems. As a practical matter, information expunged from official records is likely to persist indefinitely in places easily accessible to employers, including background-screening companies' databases and media reports, *e.g., Roberts, supra* note 4, at 341, so this reform alone would fall short of solving the problem discussed in this article. As a legal matter, at least one court has found the automatic sealing of non-conviction records to violate a newspaper's First Amendment rights. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989); *see also* John P. Sellers, III, *Sealed with an Acquittal: When Not Guilty Means Never Having To Say You Were Tried*, 32 CAP. U. L. REV. 1, 42 (2003) ("Expungement on demand ... substantially interferes with the public's qualified right of access to judicial records and places sweeping authority in the hands of the trial court to seal not only trial records, but all 'official records' pertaining to the case.").

<sup>116</sup> HAW. REV. STAT. § 378-2(a)(1) (2015).

<sup>117</sup> Pennsylvania's statute expressly creates a private right of action and allows for injunctive relief, actual damages of not less than \$100, punitive damages of \$1000 to \$10,000, and attorneys' fees and costs. 18 PA. CONS. STAT. § 9183(b)(2) (2016).

<sup>118</sup> *See supra* notes 55-56, 62-65 and accompanying text.

<sup>119</sup> Only a few state laws supplement the FCRA's procedural safeguards. *E.g., CAL. CIV. CODE* § 1786.53 (West 2016); 18 PA. CONS. STAT. § 9125(c).

- *Protection regardless of the sources of the information.* Employers' use of non-conviction information should be treated the same way regardless of whether it is obtained from the applicant himself, from informal sources such as media reports or mugshot websites, or from formal sources such as governmental or third-party criminal-record databases.<sup>120</sup>
- *Restrictions, but not a ban, on consideration of pending charges.* The law must balance the presumed innocence of individuals who face pending charges (but are available to work) against employers' concerns about hiring, or continuing to employ, people who may soon be convicted. The United States Postal Service's hiring policies are a good model.<sup>121</sup> Under the Postal Service's guidelines for hiring people with convictions, pending charges may be considered but do not automatically disqualify a candidate unless a conviction would make the applicant unsuitable for employment.<sup>122</sup> Such a "business necessity" analysis should take into account the alleged conduct's severity and relationship to job duties.
- *Leeway for employers to terminate employees in pretrial detention.* If the pending charges make the employee unable to perform the job—typically, when the employee is unable to make bail and pretrial detention lasts longer than any leave time the employer may provide—the employer should be allowed to terminate the employee, and should not be required to rehire the employee upon acquittal. A requirement that employers keep positions open in case the employee avoids conviction would impose an undue hardship on employers, particularly small businesses. While this may add to the misery of an innocent arrestee, it is in keeping with the basic principle that absent extraordinary circumstances, a criminal defendant must bear the costs of his defense.<sup>123</sup>

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<sup>120</sup> Compare N.Y. EXEC. LAW § 296(16) (Consol. 2015) (prohibiting employers from considering records of a non-conviction regardless of how the employer learns of the non-conviction), with *Foxworth v. Pa. State Police*, 228 F. App'x 151, 155 (3d Cir. 2007) (affirming summary judgment in favor of employer, where the job applicant's "case was expunged from his file, but the [employer] obtained its information from [the applicant] himself on the application, not from its criminal history background check, which came up clean").

<sup>121</sup> Notably, the United States Postal Service has long been among the largest employers of African Americans. See generally Robert Channick, Becky Yerak & Cheryl V. Jackson, *Postal Service Cutbacks to Hurt Blacks*, CHI. TRIB. (Dec. 6, 2011), [http://articles.chicagotribune.com/2011-12-06/business/ct-biz-postal-employment-1206-postal-employment-20111206\\_1\\_mail-processing-postal-service-job-cuts](http://articles.chicagotribune.com/2011-12-06/business/ct-biz-postal-employment-1206-postal-employment-20111206_1_mail-processing-postal-service-job-cuts) [<https://perma.cc/A6BM-YWU3>] ("Historically, the representation of blacks in the Postal Service has far exceeded their representation in the overall U.S. workforce. Black men accounted for 11.2 percent of career postal workers in 2002, compared with 5 percent for the overall workforce, according to a 2003 study by the U.S. General Accounting Office. And 10.1 percent of career postal workers are black women, who on average made up 6.3 percent of the overall workforce, according to the study. Blacks still make up 21 percent of the Postal Service's workforce ...").

<sup>122</sup> United States Postal Service, *Handbook EL-312, Employment and Placement*, § 514.38(b) (2015), <http://about.usps.com/handbooks/el312.pdf> [<https://perma.cc/4SSV-B989>]; see also *id.* § 514.35 ("Pending criminal charges must not result in the automatic rejection of an applicant." (citing § 514.38(b))). The Postal Service does not allow inquiries into arrest records "except where the arrest resulted in a criminal conviction, or where the charges are still pending," *id.* § 514.32, or into conviction records that have been expunged, *id.* at § 514.35.

<sup>123</sup> See, e.g., *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999) (stating that for a defendant to recover his attorneys' fees and costs after an unsuccessful federal prosecution, "a lot more is required ... than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.").

- *A time limit for consideration of open charges.* Because arrest records often linger on an individual's criminal record with no notation of a final disposition, employers should not be allowed to consider arrests over one year old unless the criminal record affirmatively indicates that prosecution remains open.<sup>124</sup>
- *Permission for employers to terminate on the basis of independent evidence of misconduct.* Employers should be allowed to fire (or not hire) individuals they reasonably believe to have committed misconduct for reasons *independent of* their arrest. Courts have commonly interpreted state statutes in this way.<sup>125</sup> Otherwise, even an employee who had indisputably committed misconduct but had avoided conviction on a technicality could use the proposed law as a sword, instead of as a shield. Also, without such a protection for employers, the law could perversely incentivize an employer who caught an employee stealing merchandise to fire him *without* reporting him to the police, lest he win acquittal and therefore convert his discharge into a tort.
- *Applicants may check "no."* In case employers nonetheless inquire about arrests that concluded with non-convictions, applicants should be expressly authorized to omit such non-convictions from their responses. This is already the law in several jurisdictions.<sup>126</sup>

The proposed legislation would appropriately handle each of the sample situations in Part II. Gary Kay<sup>127</sup> has the most sympathetic plight: he was mistaken for a different Gary Kay and fired because of his namesake's criminal record. The proposed law's pre-adverse-action notice requirement would allow misidentified people to address such problems with their employers before they are terminated.

Stephanie Settles<sup>128</sup> has what is likely the most common of the sample situations: she was turned down for a job because of an old arrest that never resulted in a conviction. Under the proposed legislation, the five-year-old arrest on her record would have been too old to factor into the employer's hiring decision. This protection would benefit innumerable people who have been arrested but not convicted, yet face lasting barriers to employment.

Edward Franklin<sup>129</sup> was fired after being arrested for an off-the-job misdemeanor, for which he was quickly acquitted. In his case, the City of Evanston should not have been allowed to fire him because his alleged misconduct—possession of a small amount of marijuana while off-duty—was minor, bore no relationship to his job, and did not cause him to miss work. A statute modeled on the Postal Service's policies would protect people like Mr. Franklin.

Joseph Cisco,<sup>130</sup> who was fired for an alleged on-the-job crime, would also have prevailed under the proposed legislation.<sup>131</sup> Under the proposed law, UPS would have been within

<sup>124</sup> Alaska, for example, uses a one-year cutoff for arrest records, ALASKA STAT. § 12.62.900(19) (2016), for purposes of limiting public access to criminal records, *see id.* § 12.62.160(b)(8).

<sup>125</sup> *See supra* notes 71-73, 80 and accompanying text.

<sup>126</sup> *See supra* note 89.

<sup>127</sup> *See supra* notes 16-17 and accompanying text.

<sup>128</sup> *See supra* notes 18-19 and accompanying text.

<sup>129</sup> *See supra* notes 20-24 and accompanying text.

<sup>130</sup> *See supra* notes 25-27 and accompanying text.

<sup>131</sup> Mr. Cisco lost on UPS's demurrer, so the court's decision, and this discussion, assume the accuracy of the facts set forth in his complaint. *Cisco v. UPS*, 476 A.2d 1340, 1340-41 (Pa. Super. Ct. 1984). While it is possible that UPS would have introduced independent evidence of Mr. Cisco's guilt had the case gone to trial, this discussion assumes the criminal charges against him were "malicious and unfounded," *id.* at 1341.

its rights to terminate Mr. Cisco once he was charged with a crime that would have made him unsuitable for employment as a delivery driver. But after he was acquitted and reapplied, UPS would not have been allowed to consider the fact of his arrest.

The hardest cases are those of Tommy Keith Wall<sup>132</sup> and Steven Hatfill.<sup>133</sup> Both were innocent, and while both were ultimately exonerated of any criminal wrongdoing, they not only had to endure lost employment, but also prolonged worry, vilification in the media, and, in Mr. Wall's case, three-and-a-half months of jail time. It would have compounded the unfairness of the situation, however, to force their employers to keep them on the payroll or to hold their positions open when they could not do their jobs (because of imprisonment in Mr. Wall's case and the threat to the employer's revenues in Mr. Hatfill's case). An inflexible mandate that employers preserve the job of an employee in such a situation could be ruinous for a small employer and would rightly be perceived as unjust in the event the employee were convicted.<sup>134</sup>

At the least-sympathetic end of the spectrum is George Quatrine,<sup>135</sup> who narrowly escaped conviction but whose employer nonetheless reasonably believed he had stolen from the company. His non-conviction appears to have reflected luck, not innocence. The proposed law would permit Shell to fire him assuming it knew he had committed theft, independent of anything in his criminal record.<sup>136</sup>

## V. CONCLUSION

Concomitant to our era of mass incarceration are arrests on a large scale. In addition, it has become trivially easy for employers to find records of arrests, no matter how old the record or minor the charge. These phenomena combine to make a minor brush with the law a lasting impediment to economic self-sufficiency, most strikingly for African Americans and low-income people. A number of approaches to this problem would be helpful, including reducing arrests as part of scaling back "stop and frisk" and mass incarceration,<sup>137</sup> and expanding access to

<sup>132</sup> See *supra* notes 28-32 and accompanying text.

<sup>133</sup> See *supra* notes 33-37 and accompanying text.

<sup>134</sup> Under the Americans with Disabilities Act, the EEOC and numerous courts have instructed that in certain circumstances, "an unpaid leave of absence can be a reasonable accommodation." *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185 n.5 (2d Cir. 2006) (collecting authorities). It could be argued that "reasonable accommodation" standards should be extended to protect an arrested employee's right to return to a job under appropriate circumstances, such as when the employer is a large enough business to absorb the unpaid leave. Cf. Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991, 1033-34 (2015) (proposing the application of ADA principles, including reasonable accommodations, in the context of ex-offender employment). However, even ADA cases do not always require employers to hold open a job for someone who must miss significant amounts of work. See, e.g., *EEOC v. Yellow Freight Sys.*, 253 F.3d 943, 948 (7th Cir. 2001) (en banc) ("The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.").

<sup>135</sup> See *supra* notes 38-40 and accompanying text.

<sup>136</sup> It would go too far to impose the full panoply of protections enjoyed by criminal defendants facing imprisonment, such as the requirement of proof beyond a reasonable doubt and the exclusion of hearsay evidence, on employers making hiring decisions on the basis of evidence of criminality. See JACOBS, *supra* note 10, at 296 ("If a sentencing judge is entitled to enhance a sentence on the basis of criminal conduct for which the defendant was acquitted, can't an employer decide not to hire the acquitted job seeker? Surely an employer does not need to have proof beyond a reasonable doubt in order to decide that a job applicant is likely to be unreliable, dishonest, or dangerous.").

<sup>137</sup> See, e.g., Paul-Emile, *supra* note 4, at 912 ("African Americans represent 28% of all arrests ... even though they account for approximately 14% of the general population." (footnotes omitted)).

expungement, which also has benefits in non-employment contexts like housing.<sup>138</sup> But a key part of the solution must be the passage of laws to guard against the misuse of non-conviction records in employment decisions. Such laws are already in place in several states, but have generally been ignored in the literature. Enactment of such laws around the country would do much to ease the burden on employment for people who have been arrested but never convicted.

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<sup>138</sup> See generally Hancock, *supra* note 6 (discussing the application and significance of expungement in Pennsylvania).