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## WISCONSIN STATE LEGISLATURE ...
## PUBLIC HEARING - COMMITTEE RECORDS

# 2011-12

(session year)

# Senate

(Assembly, Senate or Joint)

# Committee on ... Labor, Public Safety, and Urban Affairs (SC-LPSUA)

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Eighth Circuit in its decision following the *Green* remand[208] and essentially eliminates the need for employers to consider the applicant's total employment history and efforts at rehabilitation.[209]

Yet some federal courts have been less than faithful in adhering to the EEOC's interpretation of business necessity. For example, one federal district court essentially dismissed the factor of time that has passed since the conviction, when it upheld a trucking company's lifetime bar of employment to drivers who have been convicted of theft crimes, arguing that the EEOC failed to produce evidence that a shorter ban would be equally effective.[210] This court instead established a relatively weak business necessity test, stating that a defendant attempting to justify its no-conviction policy need only show that the policy "'serves, in a significant way, the legitimate employment goals of the employer.'"[211] This language came directly from the 1989 United States Supreme Court decision in *Wards Cove v. Antonio*, which attempted to establish a significant change in the understanding of business necessity, even going so far as to alter the phrase to "business justification," a much more permissive-sounding connotation.[212]

It was the decision in *Wards Cove* that largely prompted Congress to pass the Civil Rights Act of 1991,[213] which strengthened and returned the business necessity defense to the nature it assumed before *Wards Cove*. As it stands now, an employment policy challenged under disparate impact must be shown by the employer to be "job-related for the position in question and consistent with business necessity."[214] Overall, as with Wisconsin's substantial relations test, the meaning of the business necessity defense remains deeply confused, with opposing viewpoints as to whether the defense should be narrowly drawn (favoring ex-convicts' employment opportunities) or broadly read (favoring employers' interests).[215]

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208. *See supra* Part II.C.2.

209. 2 EEOC Compl. Man. (CCH), *Conviction Records* § 604.10 ¶ 2088 (1998).

210. Equal Empl. Opportunity Comm'n v. Carolina Freight Carriers, 723 F. Supp. 734, 753 (S.D. Fla. 1989).

211. *Id.* at 752 (quoting Wards Cove Packaging Co. v. Antonio, 490 U.S. 642, 659 (1989)).

212. *Wards Cove*, 490 U.S. at 658 (1989).

213. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

214. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

215. *See* Lye, *supra* note 204, at 361 (recognizing how clarification of the federal business necessity test, as applied in the context of discrimination on the basis of conviction records, will prioritize these competing interests).

## III. ANALYSIS: THE BENEFIT OF LIVING IN A WORLD WITHOUT THE WISCONSIN FAIR EMPLOYMENT ACT'S PROHIBITION ON THE USE OF CONVICTION RECORDS IN EMPLOYMENT DECISIONS

A greater allowance of conviction record considerations on the part of employers should be permitted and a greater sensitivity is needed regarding the questionable principles supporting the inclusion of former criminals among the classes deserving legal protection from employment discrimination. The subject of discrimination based on criminal convictions generates a full range of emotions: from those who proclaim that a beneficial social policy is found in the offering of equal employment opportunities to those in need of rehabilitation and reintegration into normal society, to those who find the commission of criminal activity to be, at least to some degree, an exhibition of a behavior relevant to employment qualifications. The remainder of this Comment focuses on the differences between the effect of a law constructed in such a manner as the WFEA's criminal record bar versus the Title VII, disparate impact legal treatment of discrimination based on conviction records.

### *A. Critiquing the Rationale Behind Criminal Conviction Record Employment Protection*

The following four sections inspect the issue of employment discrimination based on conviction records through the lens of four partially overlapping perspectives. The first section critiques the basic notion of conferring to persons with criminal records a distinct and independent status worthy of protection from employment discrimination. The second section briefly inspects the practical matter of how criminal convictions reflect on character traits that seemingly weigh on any employer's hiring decisions. The third section addresses a related issue of how all criminal records are not created equal, and employers may reasonably desire to discriminate against certain crimes and not others, even when the crime causing the prejudice is not directly related to the job duties of an employee. Finally, this analysis touches upon the intriguing matter of how a fair employment law barring consideration of criminal records frustrates the ability of employers to shield themselves from tort liability under a theory of negligent hiring. In analyzing each of these perspectives, the analysis highlights the material differences, if any, between the legal treatment found under Wisconsin law versus under federal law.

1. Immutable Characteristics Versus Immoral Characteristics: Squaring Disparate Impact, Subject-Class Analysis, and the Status of Being a Convicted Criminal

*a. Persons with Conviction Records as a Protected Class?*

The primary fault with the WFEA's ban against discrimination based on criminal convictions lies in the resulting equation of this provision with other groups of individuals protected from employment discrimination. It is only by explicitly listing discrimination based on conviction records as unlawful that Wisconsin, or any other state, can provide ex-convicts with the same equal employment protection as racial minorities and women, and make ex-convicts a suspect class.[216] The WFEA, in so doing, has taken the spirit of readily justifiable civil rights laws and distorted their meaning so as to protect a class unworthy of being rewarded with such extra protection.

Although the intention of the law is largely based on social policy considerations of criminal rehabilitation, it remains exceedingly difficult to justify why this highly mutable trait, one terribly reflective of an individual's character, is essentially restricted for employers to consider, while the multitude of other character-relevant traits avoid legal scrutiny.[217] Regardless of whether other classes of people commonly granted employment protection under federal and state fair employment laws are also deserving, it seems apparent that former criminals, particularly those having committed violent offenses, are the least sympathetic population to receive such legal protection. Deep within the jurisprudence of employment law and equal protection law is a recognition between mutable traits, which are reflective of volitional actions of individuals, and immutable traits, which an individual acquires through birth and are usually benign.[218] Furthermore, there

216. *See* Bruce E. May, *Real World Reflections: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 204 (1995) (noting that "convicted felons are not considered a suspect class unless a state statute specifically provides for protection").

217. This assertion, of course, can be read to imply two, very different inferences: first, that even more (if not all) forms of character traits should be disallowed consideration under employment discrimination laws, especially when these traits are not readily related to the functional aspects of an individual's job; or second, that no legal restriction should be imposed on employers to consider any character elements of an individual, when character is defined through a mutable trait acquired by volitional activity on the part of the individual.

218. *See, e.g.*, Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978) (finding that racial preferences in admissions to a state medical college could be used to further compelling state

should be a recognized difference under the law between benign mutable traits, such as adherence to a creed, and rationally objectionable mutable traits, such as criminal behavior.

Because of these concerns, early cases applying disparate impact analysis implicitly understood that the underlying reason for a plaintiff's class being adversely affected by job criteria was of something beyond their control (i.e., historical discrimination, inferior schooling, et cetera.).[219] It was not until *Green* that the courts found it wise to expand disparate impact analysis to matters under an individual's control, namely the commission of crime.[220] Despite this expansion in the legitimacy of disparate impact analysis, persons claiming discrimination on the basis of criminal records rarely have a disparate treatment claim under federal law—precisely because individuals with criminal records are not specifically listed as a suspect class in need of protection under federal law. This construction is in contradistinction to Wisconsin law, where persons with criminal records *are* accorded independent protection.

In contrast to the WFEA, the protection accorded under Title VII to individuals previously convicted of crimes does an admirable, if not completely satisfactory, job of balancing the interests of racial minorities, who may be pretextually discriminated against by the use of criminal records, with the desire to refrain from passing along to former

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interests in educational diversity). In the opinion of four of the Justices (Brennan, White, Marshall, and Blackmun):

> [R]ace, like gender and illegitimacy . . . is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic . . ., it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing," . . . and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual.

*Id.* at 360–61 (citations omitted) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part). This distinction is made to highlight the inherent natural and legal differences between criminal records and other, traditionally suspect classifications under the law. Although states are free to restrict employment discrimination based on nearly any discrete characteristic, there appears to be a hierarchy of traits that define the various prohibited bases of discrimination.

219. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) (discussing how the historically inferior educational opportunities afforded to blacks allowed disparate impact analysis against employment tests that could not be justified as a business necessity).

220. *See* Lye, *supra* note 204, at 336–37.

criminals the distinction of a being a specifically protected class. This approach under federal law maintains a significant emphasis that the primary problem with employment discrimination based on conviction records is that such a policy may have a disparate, negative effect on minorities, who are, appropriately, an independently suspect and protected class under discrimination law. Although it is clear that such a policy basis underlies Wisconsin's inclusion of conviction records as a prohibited basis for discrimination,[221] there is a stark and important difference found in listing criminals as an independently protected class versus protecting another class, namely racial minorities, who may be functionally harmed by certain applications of no-conviction employment policies.

In legal terms, the nature of this debate is whether a disparate treatment or a disparate impact analysis should apply to use of conviction records in employment decisions. Under the former approach, every instance in which an employer uses the fact of an employee's or applicant's criminal past as a basis for its decision will generate a valid discrimination claim, assuming a lack of business necessity or a substantial relation between the job and the crime.[222] Under the latter approach, an employer's use of criminal histories will be permitted absent a showing that such a policy disproportionately affects another specific group granted protection from employment discrimination.[223]

There is good reason to be cautious about applying the same analysis to discrimination based on conviction record versus other characteristics, such as race. It is one thing to protect a class of individuals that has been historically subject to employment discrimination for reasons not involving an objectively negative character trait, by being sensitive to how a seemingly neutral hiring policy, like a no-conviction requirement, may have an identifiable,

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221. In fact, it is reasonable to note that Wisconsin's inclusion of conviction records as a prohibited basis for employment discrimination occurred in 1977, three years after *Green v. Missouri Pacific* and in the heyday of cases involving this issue. Given the contemporaneousness of the *Green* decision and the EEOC's subsequent development of guidelines for employers that consider criminal records in their employment decisions, it seems that Wisconsin lawmakers were attempting to codify in the state's Fair Employment Act the thrust of the emerging federal rule.

222. Under the WFEA, even if an employer's consideration of conviction records forms only part of the basis for a hiring decision, a valid claim can be found. *See* Maline v. Wis. Bell, ERD Case No. 8751378 (LIRC Oct. 30, 1989).

223. *See* Green v. Mo. Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

adverse effect on this group. It is quite another thing to alter the rationale so as to make persons convicted of criminal behavior an independently protected class. When the law rates a trait such as the evidenced involvement in criminal activity on par with immutable and benign traits such as one's race and sex, it denigrates the importance of protecting those groups truly being capriciously discriminated against. It also deprives employers of the freedom to operate their businesses as they desire, including not having their employees and customers being forced to associate with a violent convicted felon, especially if that felon has not exhibited any repentance or rehabilitation.

*b. Tackling this Issue in the Federal Courts*

Concerns about providing the force of legal protection to individuals who are discriminated against solely due to their conviction record have been articulated, rather forcefully, in some federal court decisions.

The first such critique actually occurred near the time of the original decision in *Green*, when a closely divided Eighth Circuit Court of Appeals denied Missouri Pacific's petition for rehearing en banc.[224] In the denial order, three members of the Eighth Circuit, who would have granted rehearing, presented a critical view of the rationale used by the panel that had originally decided *Green*.[225] This order, essentially a de facto dissenting opinion to the original *Green* decision, took issue both with the panel's weighing of the factual issues presented in the case[226] and with its legal rationale. With regard to the latter, Chief Judge Gibson stated that "[t]he rule enforced by Missouri Pacific . . . which prohibited the employment of those with criminal records is not racially

224. *Id.* at 1299–1300.

225. *Id.* at 1300. These three judges were Chief Judge Gibson and Judges Stephenson and Henley. Four judges voted to deny the rehearing, with Judge Webster being ineligible to vote due to having sat in district court on preliminary matters in the case. *Id.* at 1299–1300.

226. Judge Gibson's opinion argued that the evidence did not adequately show that black applicants were disqualified at a substantially higher rate than whites. *Id.* at 1300. The majority had shown that from a total job applicant pool of 8488, the challenged policy had disqualified 292 individuals, 174 black and 118 white. *Id.* at 1294. Since the applicant pool was 39% black and 61% white, an expected random distribution of the 292 disqualified would have been 114 black and 178 white. *Id.* at 1300. Instead, Judge Gibson agreed with the district court's assessment of the statistical evidence aimed at proving disparate effect, calling the disparity (ratio of 5.3% blacks excluded due to the policy to 2.23% whites) de minimus. *Id.* He also emphasized that in "the year that Green was rejected, 29 percent of the employees hired by MoPac in the St. Louis Metropolitan area were black, although blacks comprised only 16.4 percent of that area." *Id.* (citing Green v. Mo. Pac. R.R., 381 F. Supp. 992, 998–1000 (E.D. Mo. 1974)).

discriminatory. Rather, it discriminates against both blacks and whites on the basis of their criminal records."[227]

This statement captures the intellectual leap that one must make to conflate discrimination based on conviction records with discrimination based on the grounds specifically listed in Title VII. Judge Gibson, while also noting the burdensome effect such a rule will have on businesses, bemoaned what the majority had done with respect to this expansion of "suspect" classes: "In effect, the present case has judicially created a new Title VII protected class—persons with conviction records. This extension, if wise, is a legislative responsibility and should not be done under the guise of racial discrimination."[228] It appears that these dissenting Eighth Circuit judges would have rather ensured that employers' no-conviction hiring polices are not a mere pretext for disparate treatment against racial minorities or other protected classes, and limited the analysis to only such an inquiry.

More recently, a federal district court in Florida took direct issue with the logic and conclusions found in *Green*.[229] In assessing a Hispanic plaintiff's claim of disparate impact under Title VII,[230] the court called the *Green* decision "ill founded"[231] and went so far as to accuse such claims of harboring impermissible racial judgments, saying that the plaintiff's "position that minorities should be held to lower standards is an insult to millions of honest Hispanics."[232]

More pertinent was the district court's language describing how it is criminal activity that should be considered the controlling character trait when employers discriminate on the basis of conviction records, not the racial classification to which an individual may belong.[233] District Judge Gonzalez expresses this sentiment by stating, "Obviously a rule refusing honest employment to convicted applicants is going to have a disparate

227. *Id.* at 1300.

228. *Id.*

229. Equal Employment Opportunity Comm'n v. Carolina Freight Carriers Corp. 723 F. Supp. 734 (S.D. Fla. 1989). The case involved a shipping company's refusal to hire the plaintiff, a Hispanic, as a full-time truck driver due to his prior felony convictions for receipt of stolen property and the company's policy that, among other things, prohibited hiring persons who have ever received a felony, theft, or larceny conviction that resulted in a prison or jail sentence. *Id.* at 737, 742.

230. The plaintiff also asserted a claim of disparate treatment, which was denied by the court. *Id.* at 755.

231. *Id.* at 752.

232. *Id.*

233. *Id.* at 753.

impact upon thieves. That some of these thieves are going to be Hispanic is immaterial."[234] The judge then concluded, in direct opposition to *Green*, that employers should be permitted to "refuse to hire persons convicted of a felony even though it has a disparate impact on minority members."[235] Although this federal district court opinion is clearly in the minority, and of little weight in terms of legal authority,[236] Judge Gonzalez's suggestions that employment discrimination against criminals does no more than discriminate against social malcontents convicted of unlawful behavior, and not minorities, is deserving of recognition for its reasoning. Moreover, his concerns radiate even more light on the problems with state legislatures openly taking the position that former criminals deserve special protection for employment discrimination.

These opinions, although against the grain of the *Green* majority and other subsequent decisions, make two important points. First, they exhibit that the rationale of the majority in *Green* has indeed been criticized. Moreover, these disagreements arose contemporaneously with the initial *Green* decision and continue to be expressed in doubt over the Eighth Circuit's holdings. Second, they present a strong and principled argument for caution in granting protection from discrimination to individuals based solely on their criminal record, independent of the effect this discrimination may or may not cause on classes truly in need of protection from employment discrimination. The criticisms are largely on the normative basis of a compelling need to not confer to ex-convicts an independent status as a class protected from discrimination. Furthermore, other courts, while less willing to openly employ the same type of language used by judges in *Carolina Freight* and the *Green* petition for en banc review, still rule in a manner that indicates an unwillingness to enforce the rule of *Green* too stringently.[237]

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234. *Id.* Judge Gonzalez then went so far as to exclaim that "[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing." *Id.*

235. *Id.* The court added, "To hold otherwise is to stigmatize minorities by saying, in effect, your group is not as honest as other groups." *Id.*

236. This author is aware of no other federal or state court case applying Title VII to discrimination based on conviction records to expressly rule against the Eighth Circuit's holding and application of disparate impact analysis in *Green*. Furthermore, the EEOC has clearly expressed its view that prohibiting employment solely on the basis of conviction records violates Title VII. *See, e.g.*, 2 EEOC Compl. Man. (CCH), *Conviction Records* §604 ¶ 2088 (1998).

237. *See, e.g.*, Matthew v. Runyon, 860 F. Supp. 1347 (E.D. Wis. 1994) (finding summary

*c. Tackling this Issue in the Wisconsin Courts*

In *County of Milwaukee v. LIRC*,[238] the Wisconsin Supreme Court squarely addressed the issue of the fundamental difference between truly suspect classifications and a classification involving persons with criminal records.[239] It did so during its analysis of the language of the WFEA criminal record provisions and the court's determination of legislative intent.[240] The court looked at the WFEA's statutory construction and noted the key differences between the nature of "arrest record" and "conviction record" and the other listed categories protected from discrimination.[241] The court highlighted the critical difference that "[a]ll of these . . . categories except [one] are *involuntarily acquired* and one has a 'right' not to be discriminated against because of them."[242] The court then plainly drew the appropriate distinction between these benign characteristics of individuals, as compared to an individual's criminal record:

> In contrast, being a criminal is a voluntary act—a matter of choice. There is no "right" to be a criminal. On the contrary, one who engages in it is universally regarded as anti-social. It carries no "right" to engage in such activity. It alone of all the listed categories describes persons subject to fine and imprisonment upon conviction.[243]

The court concluded that, precisely because there was a special exception given to discrimination based on criminal records, the legislature intended to treat criminals differently than the other classes

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judgment for defendant after plaintiff failed to provide sufficient evidence to establish a prima facie case of disparate impact, even though employer may have considered plaintiff's arrest and conviction records in denying employment).

238. 407 N.W.2d 908 (Wis. 1987).

239. *Id.* at 914.

240. *Id.*

241. *Id.*

242. *Id.* (emphasis added). These other categories are age, race, color, handicap, sex, creed, national origin, and ancestry. *Id.* (citing WIS. STAT. § 111.32(5)(a) (1979–1980)). The one exception mentioned by the court refers to creed, which the court distinguished from conviction records by stating that creed "refers to religion, [which] we regard as a very precious right of individual choice, to be fully protected by law." *Id.*

243. *Id.* (citing WIS. CONST. art. I, § 2, which states: "There shall be neither slavery, nor involuntary servitude in this state, *otherwise than for the punishment of crime*, whereof the party shall have been duly convicted." (emphasis added)).

protected under the WFEA.[244]

While this discussion by the court, and the clear language and logic it employed, were only undertaken to determine the underlying purpose of the criminal record provision of the WFEA,[245] it correctly articulates why legal treatment of criminal records as a prohibited basis of discrimination should be treated much differently than other individual characteristics that are protected by laws against discrimination. Moreover, these concerns echo those voiced by the dissenters to *Green* in the federal courts.[246] By glibly placing persons with conviction records into the ranks of protected classes, the WFEA tacitly rates this trait equally among race, sex, religion, age, and other such innocent classifications. This mistake continues to haunt the WFEA conviction record ban, as seen through its difficult history of application and the fact that its support continues to wane.[247]

2. Criminal Activity as a Relevant Character Trait in Hiring Decisions

Employment discrimination laws must separate the laudable goal of restricting employment discrimination based solely upon an individual's inclusion in a class defined by an innocent and immutable trait from the required duty of employers to base their employment decisions on the character of an employee, along with that employee's ability to successfully perform a job. Without so doing, the law loses its moral force and begins the process of having governments intercept rational hiring decisions from employers.[248] While most prohibited bases of discrimination do not suffer this infirmity, the inclusion in the WFEA of conviction records as an impermissible basis for discrimination epitomizes this problem.

As alluded to earlier in this Comment, past criminal conduct necessarily reflects upon someone's character and, with the seeming exception of criminal records, character traits are usually permissible

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244. *Id.* ("So it was made clear by the legislature that in dealing with convicted criminals the fact of such criminality put them in a special category, different from the others listed.").

245. *Id.*

246. *See supra* Part III.A.1.b.

247. *See supra* Part II.A.2.b–c.

248. For a similar formulation of this issue, see T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 930 (1998) ("[T]he whole notion of expunging criminal records to prevent employers from 'unjustly' discriminating against former criminals appears to be based on the perception that legislators are somehow better positioned than employers regarding the hiring of former criminals.").

and even anticipated factors to consider in most employment decisions. Why an applicant's criminal past (a community "disservice") should not be allowed to be considered among such things as, for example, an applicant's community service record, is a question supporters of the WFEA criminal record provisions must answer.[249] Therefore, the entire issue of whether an individual's criminal past relates to his qualification for a job must be discussed with a significant degree of intellectual dexterity if consistent principles are to remain within employment law.

However, this contention remains largely unanswered—and unasked, for that matter—because many seemingly wish to disallow *any* character considerations on the part of employers, at least in this context. For those supportive of the WFEA criminal record prohibition, along with a broader application of federal disparate impact law with regard to the use of criminal histories, the permissible analysis begins and ends with a narrow definition of what constitutes "job qualifications."[250] Essentially, if an employer is unable to show that an ex-convict is not vocationally qualified for the job at issue, that individual should be hired.[251] Such a perspective makes a person's criminal history largely, if not completely, irrelevant. This sentiment is even found within the language of the WFEA. When Wisconsin

249. *See* T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 304 (1998) (stating that, while questioning the expungement of juvenile conviction records, "It seems rather odd that an employer may refuse to hire an individual because of his poor performance in high school algebra, but that the same person's prior conviction for rape should be hidden from the employer to protect his employment opportunities").

250. It should be noted that this matter of desiring employment discrimination laws that push toward only allowing hiring decisions on the basis of qualities directly related to job performance goes well beyond simply considerations of criminal records. Yet this entire notion is at odds, both in an economic and legal sense, with the market model of employment—which recognizes that all transactions, including those between employers and employees, are based on subjective values of the parties involved. *See* EPSTEIN, *supra* note 161, at 163–65. Therefore, a rule of law that attempts to establish the range of "valid" criteria in an employment decision will necessarily construct a list of job qualifications that may or may not reflect those actually desired by employers seeking the most "productive" employees. A complete discussion of this issue is unfortunately outside the scope of this Comment. For a complete discussion of this issue, see EPSTEIN, *supra* note 161. The point is made simply to draw the reader's attention to the rationale underlying the criticism of allowing character considerations in employment decisions, when those considerations are deemed irrelevant to the functional job responsibilities of the employee.

251. *See, e.g.*, Kindem v. City of Alameda, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980) (stating in an equal protection claim against a city policy restricting employment of ex-felons that "it has not been demonstrated that the sole fact of a single prior felony conviction renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought").

legislators articulated the purposes of the WFEA, they talked of ensuring that employment decisions are made on the merit of one's "qualifications" and not his inclusion in a specific class.[252] In making these types of statements, and concurrently inserting individuals with conviction records as one of those classes, the necessary understanding is that criminal records have *no* bearing on one's fitness for a job, at least no greater a relation than one's race or sex.

This position is untenable. First, despite a prevailing mentality that employers are (or at least should be) entirely restricted from using any subjective, non-job-related basis for their employment decisions, the doctrine of at-will employment still governs employment law.[253] Furthermore, "[f]requently misunderstood is the legal truth that the criteria used in employment decisions do not have to be job-related unless they have a discriminatory impact upon a protected class."[254] Therefore, employers working under the hiring doctrine of employment-at-will can incorporate a multitude of idiosyncratic predilections about the types of personalities they wish to employ, and among these personality traits would likely be an applicant's proclivity to criminal behavior.[255]

Second, most inquiries made into applicants' qualifications invariably deal with some element of their character, including whether their past activities reflect a work ethic suitable to the employer. Character assessment must, to at least some degree, be permitted in the employment context, and it is unquestionable that criminal activity reflects upon someone's character—again, to at least some degree. Therefore, when an employer determines an applicant's fitness for a job, certainly that applicant's history of criminal behavior has a direct bearing on that assessment.[256]

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252. WIS. STAT. § 111.31 (1999–2000); *see also supra* Part II.A.1.

253. Mark D. McGarvie, *Personality: May It Sway Employment Decisions?*, WIS. LAW., Dec. 1991, at 21, 21.

254. *Id.* at 22.

255. *See, e.g.*, Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 245 (1996) (explaining how Supreme Court Justices have established an employment law jurisprudence where the "concerns are individual, and employment decisions should be based on personal characteristics, including one's quality, ability, and resources for the job").

256. *See, e.g.*, Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 523, 76 Fair Empl. Prac. Cas. (BNA) 1219, 1228 n.7 (1988) (recognizing the argument that while Title VII restricts the use of conviction records by employers, conviction records are "certainly relevant in determining an employee's fitness or 'unfitness' for a job") (quoting Letter from Fred J.

This sentiment is expressed within the relevant case law. For example, under Wisconsin law, an employer is not deemed to have committed employment discrimination on the basis of conviction record if the employer's action is motivated by the underlying conduct of the employee, and not simply by the fact that the employee was convicted for the conduct.[257] In articulating this point, the Wisconsin Supreme Court mentioned that such an analysis relates to a legitimate character assessment on the part of employers.[258] The court opined that "[a]nalyzing prior crimes evidence with respect to its relevancy to character is clearly not prohibited."[259] Moreover, an applicant's honest character, reflected in his propensity to commit crimes, seems incredibly important to employers making hiring decisions.[260] Furthermore, the case history of Wisconsin's substantial relation exception shows instances in which administrative law judges have weighed personality factors into their determinations of deciding, ostensibly at least, whether the circumstances of the crimes committed by an applicant relate to the circumstances of the job.[261] Overall, it takes a great deal of intellectual

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Hiestand, counsel for the Association for California Tort Reform, to Governor Edmund G. Brown (Sept. 3, 1980)).

257. *See, e.g.*, City of Onalaska v. Labor & Indus. Review Comm'n, 354 N.W.2d 223 (Wis. Ct. App. 1984) (allowing employment termination based on an investigation of the employer as to the underlying illegal actions of the employee, and not based on the fact that the employee had been arrested); *see also* WASSERMAN, *supra* note 83, § 3.19 (discussing Wisconsin Department of Workforce Development, Equal Rights Division, decisions to this effect).

258. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 916 n.4 (Wis. 1987). This point was raised in a discussion by the court about the relationship between the substantial relation exception and the treatment of criminal record information under the Rules of Evidence, WIS. STAT. §§ 904.04, 906.09(1) (1979–1980).

259. *County of Milwaukee*, 407 N.W.2d at 916 n.4.

260. *See, e.g.*, Equal Opportunity Employment Comm'n v. Carolina Freight Carriers Corp. 723 F. Supp. 734, 753 (S.D. Fla. 1989). Specifically, the court stated,

> [T]o say that an applicant's honest character is irrelevant to an employer's hiring decision is ludicrous. In fact, it is doubtful that any one personality trait is more important to an employer than the honesty of the prospective employee. . . .
>
> It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness.

*Id.* *But cf.* May, *supra* note 216, at 194–202 (arguing against the effect on ex-felons of character components to state licensing laws).

261. *See, e.g.*, Thomas v. Dep't of Health & Soc. Servs., Wis. Personnel Comm'n Dec. No. 91-0013 (Apr. 30, 1993) (finding that even when "the circumstances [of a job] are not particularly conducive to committing the particular crime of which an employee has been convicted," the employer may weigh the personality traits required of the job against those

parsing to define a legal rule that allows employers to perform usual character assessment in their personnel decisions, while denying them consideration of one of the best measures of character—the absence or existence of criminal involvement. Yet the strict application of laws against employers' use of criminal records in their decisions implicitly disavows this element of an employer's hiring calculus.[262]

In this sense, the utter existence of anti-discrimination laws protecting individuals with criminal records is antagonistic to the ability of employers to make reasonable hiring choices. Unlike an employer who professes or acts upon a desire to not associate with racial minorities or women, the desire to avoid daily association with a person convicted of serious crimes against persons and property is readily justifiable, from both a personal *and* personnel perspective. For example, if two equally qualified candidates for a job confront an employer, and the employer picks a white applicant over a black applicant, a clear basis exists to allege unlawful discrimination. Yet if this logic is to apply in the same manner to equally qualified candidates whose only difference was the fact that one had a felony criminal record while the other did not, then we are left with an uncomfortable result—when such a factor is dispositive in the employment decision, which hardly seems unreasonable, a valid claim almost certainly arises under the WFEA. Under federal law, it appears such a decision is more permissible, as the disparate treatment of an individual with a criminal record is not legally dispositive for an employment discrimination claim.[263] Instead, Wisconsin law should recognize that character assessment serves, if not as part of an *ex ante* criteria for a job, at least as a measure of distinguishing between directly competing applicants.

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exhibited by the commission of a crime).

262. In some instances these laws go so far as to explicitly disallow the underlying rationale that a criminal record reflects on an applicant's character. *See, e.g.*, N.Y. CORRECT. LAW § 752 (Consol. 1987) (explicitly prohibiting employers from denying employment to someone by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses).

263. *But see* James P. Scanlan, *The Bottom Line Limitation to the Rule of* Griggs v. Duke Power Company, 18 U. MICH. J.L. REFORM 705, 737 n.125 (1985).

> A rule . . . allowing an employer, without business justification, to consider that one of two candidates for a position had a conviction record as a reason to select the other would conflict with *Griggs*, if that case is to have any real meaning, even though the employer would not consider the conviction an absolute bar.

*Id.*

Furthermore, whether a criminal record goes to basic "character" rather than to particular "fitness" and "qualification" for job performance is a taxonomy unnecessary to be undertaken if one concedes that employers are in the best position to weigh the interests of their businesses, and also that of their employees and customers.[264] In the employment context, hiring decisions are, by definition, "discriminatory," as applicants are to be chosen over other applicants for the same job based on *some reason*.[265] Employment discrimination laws serve only to restrict the bases for these judgments to *anything but* factors such as race, religion, et cetera.[266] Therefore, generally speaking, unless a factor that an employer considers either directly or indirectly implicates a protected class (e.g., racial minorities, women), it remains with the employer's discretion to weigh that factor.[267] This is why Wisconsin's expressed protection to criminals is so pernicious; it both limits the freedom of employers and does so by forcing the equating of criminal activity considerations with racial consideration, in terms of both being irrelevant to an employment decision.

There is a recognized legal principle to ward off employers that might abuse a right of character assessment as a mere pretextual means of racial discrimination. Admittedly, the weighing of an applicant's or employee's character is a subjective exercise, and all subjectively based employment decisions are reviewable for their lawfulness under disparate impact analysis.[268] Therefore, if the application of an

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264. This view is somewhat analogous to the common law "business judgment rule," which is "a judicially created doctrine that limits judicial review of corporate decision-making when corporate directors make business decisions on an informed basis, in good faith and in the honest belief that the action taken is in the best interests of the company." Einhorn v. Culea, 612 N.W.2d 78, 84 (Wis. 2000).

265. Moreover, discrimination, generally speaking, is not a vice, but simply a condition of human existence. It goes on every day in the actions of individuals who must decide, *ergo* discriminate, between life's choices. This occurs, for example, in the products they wish to buy, which social gatherings they wish to attend, how much time to spend working on a given project, and so forth, almost indefinitely.

266. *See, e.g.*, Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971) ("No federal statute prohibits discrimination per se; rather, what is prohibited is discrimination that is racially motivated."). The other primary purpose offered for why employment discrimination laws exist is to ensure that employment decisions are based predominately on merit and one's potential job performance. For a discussion of the general problems with this basis, see EPSTEIN, *supra* note 161.

267. McGarvie, *supra* note 253, at 22.

268. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that a bank's promotion policies based on subjective evaluations by supervisors can be subject to disparate impact analysis). The United States Supreme Court held that employment decisions applying

employer's subjective considerations (here, the connection between one's criminal past and character for a job) creates a disparate impact against a protected class, then it may be challenged. Moreover, although many courts have alluded to the need on the part of an employer to have a policy or repeated practice of actions that would create a disparate impact, at least one federal circuit has stated that but a single decision by an employer may be actionable under a disparate impact theory.[269]

If an employer may look back at one applicant's involvement in, for example, an extracurricular organization while attending college as a measure of that person's merit, it is entirely inconsistent to deny that same employer consideration of the fact that another applicant was, for instance, serving prison time for an armed robbery offense at this same point in his life. In other words, the logical difficulty with disallowing discrimination based upon a very legitimate mutable characteristic of someone, while concurrently allowing consideration of other character-based factors, is palpable.[270]

### 3. The Needed Permissibility of Crime-Specific Considerations in Hiring

Similar to the matter of criminal records relating generally to an individual's character, is the fact that different crimes may reflect differently on one's desirability for employment. Certain crimes reflect more noticeably on one's character, and some employers may therefore desire to weigh different crimes differently. For example, consider

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subjective standards, as opposed to standardized tests or other objective qualifications, may also be challenged under theories of disparate impact. *Id.* at 990 ("We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests.").

269. Council 31, Am. Fed'n of State, County & Mun. Employees v. Ward, 978 F.2d 373, 377–78 (7th Cir. 1992). Nonetheless, the general legal principle remains that "[i]n the absence of additional evidence of discriminatory intent, using subjective criteria in employment decisions does not alone make out a pattern or practice of discrimination." McGarvie, *supra* note 253, at 23.

270. Furthermore, employment policies against hiring applicants based on conviction records are not an "artificial barrier[] to equal employment opportunity" in that the only rational basis one would have to deny employment on those grounds would be out of malice for persons with that trait. Lye, *supra* note 204, at 319. Such an argument must only presume that functional job performance, a sometimes equally abstract notion, is the only permissible consideration an employer may make. The inference, again, is that any measure of character assessment must not only be questioned, but legally restricted. Yet character assessment is permitted under the law, and it would take a realignment of social norms to label a history of criminal behavior as "artificially" related to such a consideration.

employers who may hire most qualified applicants with criminal records, but who draw the line with individuals that have committed what the employers deem as particularly heinous crimes. In other words, one may also foresee the interest of an employer to deny employment to persons convicted of particular crimes, not because the crime is directly related to an element of the business, but because the nature of the crime is so repugnant to the ownership or current employers of that business, who must associate with such persons if they were to become employees.

After *Green v. Missouri Pacific Railroad*[271] and under present EEOC guidelines,[272] an employer under Title VII is not permitted to develop an absolute screen based on criminal record and thereby deny employment to any applicant who has been previously convicted.[273] This limitation holds even if the employer does faithfully and strictly apply the policy to all applicants and all crimes.[274] The force of this use of disparate impact theory against blanket bans on the hiring of persons with criminal records is predicated on a statistical reality that protected classes, namely racial minorities, are disproportional among the ranks of those persons with criminal records. Available statistics readily confirm this supposition.[275] The question then becomes whether hiring criteria that deny employment against applicants convicted of specific types of crimes is likewise unlawful, absent a showing of business necessity. For example, can an employer refuse to hire persons convicted of either murder or first-degree sexual assault, while hiring felons convicted of other crimes? This is precisely what occurred in the Gerald Turner case in Wisconsin,[276] in which the company to which he applied for employment had hired many ex-felons, even in the year prior to Turner's application.[277]

EEOC guidelines seem to indicate that an employment policy that is crime-specific can be justified if data show that minorities are not

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271. 523 F.2d 1290 (8th Cir. 1975).

272. 2 EEOC Compl. Man. (CCH), *Conviction Records* § 604.10 ¶ 2088 (1998).

273. *Green*, 523 F.2d at 1292.

274. 2 EEOC Compl. Man. (CCH), *Conviction Records* § 604.10 ¶ 2088 (1998).

275. In 1997, 31.6% of reported criminal arrests in the United States were made against blacks, while 66.0% were made against whites. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 22, 222 (1998). In 1998, blacks comprised 12.7% of the total U.S. population, while whites comprised 82.5%. *Id.*

276. *See supra* note 123.

277. *See* Hruz, *supra* note 123, at 12.

disproportionately convicted for that specific crime in the relevant geographical area.[278] Furthermore, federal court decisions and some EEOC rulings have allowed consideration of criminal records on an individualized basis.[279] Some courts have appropriately recognized that all criminal records are not created equal, and that applicants who have been convicted for aggravated offenses or for multiple convictions may have a bearing on an employer's determination of an individual's suitability for a job.[280] This restriction of the analysis to specific crimes can be further limited when the *Green* tests for disparate statistical impact are employed, so as to restrict the reasonable geographic area within which applicants are sought.[281] These methods of formulating the appropriate statistical comparison work to limit the scope of the denominator in the ratio of blacks to whites, affected under the policy. This allowance seems reasonable, since it appears that job-relatedness is easier to prove when a particular crime is juxtaposed against a particular job and within a particular geographic area. Likewise, an employer can only react to the existing or potential pool of applicants it faces.

Yet by making criminals a specifically protected class, employers are limited in offering applicant-flow data as a means to defend even limited occasions of discrimination based on criminal record. An employer who may have hired multiple employees with criminal records, but decided not to hire a particular applicant because of a particularly heinous criminal record, is precluded from offering as a defense evidence of their past hirings of persons with conviction records.[282] Again, this is precisely

278. 2 EEOC Compl. Man. (CCH), *Conviction Records-Statistics* § 604.10 ¶ 2089 (1998).

279. *See, e.g.*, Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972) (upholding a hotel's policy against hiring persons previously convicted of theft and receiving stolen goods for job as hotel bellman); *see also* EEOC Dec. No. 79-40, 1979 WL 6916 (Feb. 12, 1979) (stating that an employer may require that persons employed in positions with access to valuable property have no convictions for serious theft or property related crimes without violating the Title VII prohibition against race discrimination).

280. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971) (recognizing the permissibility of these considerations for a position as a firefighter given then need of protecting fellow firefighters and the general public).

281. Green v. Mo. Pac. R.R., 523 F.2d 1290, 1293 (8th Cir. 1975).

282. For example, say an employer has hired twenty ex-felons in the past year, of which ten were black and ten were white. If one applicant for a job at this employer (whether black or white) was then not hired due to his commission of an offense the employer finds particularly egregious, it would seem that evidence of these past hirings would weigh against a showing that this basis both pervaded this employer's hiring decisions or that it was derived from a racial animus.

Furthermore, it appears that the federal district courts may be amiable to the offering of

the factual situation that existed in the dispute between Gerald Turner and Waste Management, Inc.[283]

One may argue that this issue of permissible, crime-specific considerations is encapsulated within the whole "job-relatedness" question. In other words, it is the nature of both the substantial relation test under the WFEA and the business necessity test under Title VII to cause workers to compare the crime to the job. While this assertion carries truth, the difference, again, is that, for some employers, it may be solely the fact that an individual has committed a particular crime that deters the employer; there is no connection made to the functional responsibilities and performance expected on the job.

Regarding both crime-specific and character-specific considerations, Wisconsin law works to frustrate these seemingly legitimate inquiries on the part of employers, who bear the public and private burden of selecting the most productive and most amicable applicants. By essentially applying disparate treatment analysis in governing conviction policy classifications, the law takes from employers the liberty to reasonably discriminate not only between vocationally qualified people when some have criminal records and others do not, but also between various types of criminal records.

Elimination of the WFEA conviction record bar would not deny employers the ability (perhaps moral duty) to make their own independent judgment over whether to hire persons with criminal records. Unlike many state licensing laws, and some state laws that

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evidence that a discerning use of conviction records (but not a total ban based on such records) can be lawful discrimination. *See* A. B. & S. Auto Serv., Inc. v. South Shore Bank, 962 F. Supp. 1056 (N.D. Ill. 1997). Although this case concerned whether a bank's practice of considering applicants' criminal records in making loan decisions had an unlawful disparate impact on African-Americans, the court and the parties in the case extensively invoked the arguments made from cases involving employment discrimination on the basis of conviction. *Id.* at 1063 (citing, for example, to Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970)). In reaching its conclusion that the denied applicant failed to establish a prima facie case of discrimination, the court noted that "the fact that the bank's practice of considering an applicant's criminal record was not consistently applied to disqualify applicants with criminal records .... Rather, the bank has made at least three business loans to applicants with criminal records. One of these three applicants with criminal records is African-American." *Id.* (citations omitted). Such reasoning suggests that, in the absence of the WFEA, Wisconsin employers attempting to defend discrimination based on conviction records under Title VII could rely on their history of prior hirings of persons with criminal records.

283. Waste Management, Inc., Turner's potential employer, had hired thirty ex-felons between May 1999 and the time Turner filed his complaint in August 1999. *See* Hruz, *supra* note 123, at 12.

require employers to perform background criminal record checks,[284] the elimination of the WFEA's conviction record bar would not transform the state of the law so as to automatically disqualify persons with criminal records from some or all forms of public and private employment.[285] Instead, eliminating the WFEA conviction record provision simply provides employers lawful discretion on how to weigh conviction records, and places on ex-convicts the reasonable burden of proving their rehabilitation and fitness for employment despite their criminal records.

4. Negligent Hiring and Potential Liability to Employers

Unfortunately, one law's boon can be another law's bane. The WFEA, by expressly limiting the ability of employers to discriminate based on conviction records, may expose employers to liability under the theory of negligent hiring.[286]

Many states currently recognize negligent hiring as a tort action, including Wisconsin.[287] The claim arises when an employer hires someone they knew, or should have known, was prone to commit a crime against a third party while performing the employee's job duties.[288]

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284. *See* May, *supra* note 216, *passim*.

285. This point relates to the common argument that employers should not be allowed to discriminate against previously convicted felons since they have already "paid their debt to society." This argument would carry more weight if a law required employers *to not hire* someone with a criminal record. Moreover, one's public punishment for his crime should not negate an employer's private judgment as to how the reality of an applicant's conviction record reflects his ability to work for that employer. *See* Hruz, *supra* note 123, at 7–15.

286. As one legal commentator suggested, "to avoid a negligent hiring claim, an employer may well have to reject an applicant with a criminal record, notwithstanding the possibility that the employer may be subject to liability under the WFEA." BACKER ET AL., *supra* note 83, § 5.24; *see also* Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 115 (1997) ("[A]n employer could be obligated to hire an ex-convict, despite the ramifications of such a decision, if that individual is qualified for the position and the employer cannot cite any other reason to exclude him or her other than criminal convictions."); Walter Olson, *How Employers are Forced to Hire Murderers and Other Felons*, WALL ST. J., June 18, 1997, at A23 (calling the link between potential negligent hiring claims and bars on discriminatory hiring based on conviction records as being a "sued-if-you-do, sued-if-you-don't regime we impose on hapless businesses").

287. Wisconsin courts only recently recognized a negligent hiring claim in Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233 (Wis. 1998).

288. *See, e.g.*, Guillermo v. Brennan, 691 F. Supp. 1151, 1158 (N.D. Ill. 1988). "Liability for negligent hiring arises only when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed this applicant in employment where he could injure others." *Id.*; *see also*

The Wisconsin Supreme Court has ruled that plaintiffs advancing a negligent hiring claim in this state are required to show four elements, which reflect the traditional elements of a common law negligence action.[289] The plaintiff must show: "that the employer has a duty of care, that the employer breached that duty, that the act or omission of the employee was a cause-in-fact of the plaintiff's injury, and that the act or omission of the employer was a cause-in-fact of the wrongful act of the employee."[290]

It appears that negligent hiring is the "evil" counterpart to the business necessity exception and the "substantial relation" exception available under federal and state law, respectively.[291] This concern has been articulated in the history of cases involving arrest and conviction record discrimination. For example, in *Gregory v. Litton*, the seminal case on Title VII's application to the use of arrest records in employment decisions, the court stated that "[i]n this context 'business necessity' means that the practice or policy is essential to the safe and efficient operation of the business."[292] By alluding to safety concerns, the court seems to indicate a latent understanding that criminals may pose greater tendencies to mischief. This is especially true if the potential employee, as part of his job duties, will have regular contact with the general public and that involvement carries risk to third-parties.[293]

Likewise, recall the test developed by the Wisconsin Supreme Court in *County of Milwaukee* to determine whether the substantial relationship exception is satisfied under the WFEA.[294] At the root of the

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RESTATEMENT (SECOND) OF TORTS § 307 (1965) (describing negligent hiring claims).

289. *Miller*, 580 N.W.2d at 233.

290. *Id.* at 241.

291. As stated by one commentator,

> [t]he tort of negligent hiring addresses virtually the opposite problem posed by absolute conviction bars. The tort imposes liability, not on employers who exclude individuals from their workforce in reliance on extensive inquiries into long-forgotten acts, but on employers who indiscriminately hire employees with only a cursory review into background and qualifications.

Lye, *supra* note 204, at 360.

292. 316 F. Supp. 401, 403 (C.D. Cal. 1970).

293. *See* Janet E. Goldberg, *Employees with Mental and Emotional Problems: Workplace Security and Implications of State Discrimination Laws, The Americans With Disabilities Act, the Rehabilitation Act, Workers' Compensation, and Related Issues*, 24 STETSON L. REV 201, 225 (1994).

294. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908 (Wis.

court's elements-only test is a determination of whether the circumstances of the job would foster criminal activity similar to that which the applicant had previously committed.[295] The court's emphasis concerning whether the circumstances of the job relate to the circumstances of the criminal offense reflects similar considerations needed by employers attempting to avoid liability under negligent hiring.

Given the relatively recent availability of a negligent hiring claim in Wisconsin, the state's courts have not had occasion to address how this claim comports with the WFEA's ban on the use of conviction records as a reason to deny employment. Likewise, the LIRC has been silent on the relationship of the WFEA criminal record provision and negligent hiring. Yet one federal district court, applying Wisconsin law, did draw a connection between a plaintiff's negligent hiring claim and the WFEA criminal record provision.[296] In this instance, the court invoked the connection to deny the plaintiffs' claim.[297] The court found that the plaintiffs:

> [c]annot rely on Defendants' failure to look into [the employee's] criminal record to support their negligent hiring claim. Even with the benefit of all reasonable favorable inferences, nothing even hints that [the employee's] pre-hiring convictions "substantially relate" to the circumstances of his job . . . [which is] the condition necessary to trigger the statutory exception to the prohibition against employers' inquiry into such convictions.[298]

Notwithstanding the decision in *Guillermo v. Brennan*, it is certainly reasonable that plaintiffs wishing to advance a claim of negligent hiring against an employer under Wisconsin law will cite to the substantial

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1987); *see also supra* Part II.A.2.b.iii.

295. *County of Milwaukee*, 407 N.W.2d at 916.

296. Guillermo v. Brennan, 691 F. Supp. 1151 (N.D. Ill. 1988) (applying Wisconsin law). Although the Illinois federal district court conceded that Wisconsin seemingly did not allow a negligent hiring claim, it proceeded nonetheless to apply the traditional negligent hiring elements to the case. *Id.* at 1156–57.

297. *Id.* at 1161. The employee at issue had been convicted for felony burglary and misdemeanor battery, while the job for which he worked for the defendants involved installing insulation. *Id.* at 1153.

298. *Id.* at 1157 (citing WIS. STAT. ANN. § 111.333(1)(b) (1988)).

relation language in the WFEA.[299] In fact, the tribunal handling such a claim would be hard-pressed not to use analysis similar to that found under the WFEA to judge whether an employer has acted correctly to avoid negligent hiring, given that the question of whether the circumstances of the job were related to the circumstances of the crimes previously committed is material to both considerations.

It has been argued that the concern over negligent hiring liability is not that great in application, even if in theory it seems plausible; that prohibitions on employers using conviction records should not increase liability for employers under negligent hiring.[300] This fact may very well be true, but it may also be due to the hesitation on the part of courts to strictly enforce negligent hiring torts, which may be a fortunate course in its own right.[301] Nonetheless, the mere fact that the question of negligent hiring arises in the context of employment discrimination based on conviction records only shows the inherent difference between criminal records and other prohibited reasons for employment discrimination.

### *B. The "Substantial Relationship" Exception: A Self-Indicting Flaw of the Law and the Absence of a Workable Test*

Having articulated an argument for why it is imprudent on a normative level to grant legal protection from employment discrimination to individuals based on their conviction records, we can also address whether a law constructed to that effect can operate in a meaningful and consistent manner. The legal history of the WFEA's conviction record ban seems to answer this question in the negative.

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299. Witness the discussion of the court in *Guillermo*:

> [O]ne of Guillermos' complaints is that Defendants made no pre-hiring inquiry into whether Brennan had a criminal record. In that respect Wisconsin law prohibits employers from refusing to hire an individual based on his or her arrest or conviction record.... Under that statute an employer can inquire into an employee's criminal record and base an employment decision on that record only when "the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity...." Thus if Wisconsin law applies, Defendants were clearly justified in not requiring a check on Brennan's criminal record.

*Id.* at 1156 (citing WIS. STAT. ANN. §§ 111.31 to 111.335 (1988)).

300. *See, e.g.*, Lye, *supra* note 204, at 360–61.

301. For a discussion of some of the troubles with the negligent hiring doctrine see Dermot Sullivan, Note, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety*, 72 ST. JOHN'S L. REV. 581 (1998).

The WFEA's criminal record "substantial relation" exception is essentially the heart of the Act's ban on discriminatory use of criminal conviction records. As was observed in Part II.A.1, how the legal entities charged with interpreting the provision decide its effect will directly determine the level of efficacy the conviction record bar has in practice. The question remains whether a sound principle can govern the interpretation of this exception. Moreover, what does this exception tell us about the merit of the conviction record prohibition itself? And finally, how does this exception compare to its counterpart in federal law, the business necessity defense?

1. Workability of the "Substantially Related" Test

*a. Directly Competing Interests: Private Rehabilitation and Public Protection*

The preceding discussion on the questionable rationales for treating former criminals as a protected class, per se, versus protecting minorities who may be disproportionately harmed by policies against hiring criminals, may be criticized for simply missing the point. Instead, the argument may be that the merit of Wisconsin's law is precisely that it protects former criminals from discriminatory behavior, because such actions by employers, whether having a disparate impact on racial minorities or not, are not conducive to efforts at criminal rehabilitation. As the Wisconsin Supreme Court stated in *County of Milwaukee*, "It is highly desirable to reintegrate convicted criminals into the work force, not only so they will not remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them."[302] This concern over the employment difficulties possibly facing ex-convicts certainly permeates discussions about the general use of conviction records by employers, both under Wisconsin law and at the federal level.[303]

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302. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 915 (Wis. 1987).

303. *See, e.g.*, Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971).

> A past criminal record affords no basis to predict that a given person will commit a future crime. But the evidence indicates that a group of persons who have been convicted of serious crimes will have a higher incidence of future criminal conduct that [sic] those who have never been convicted.

*Id.* at 521. Other state courts dealing with this issue have made similar arguments. *See, e.g.*,

Yet we do not live in a perfect world, and the likelihood of criminal recidivism remains high for many ex-convicts.[304] Therefore, there remains a social interest in allowing persons who must come into contact with individuals formerly convicted of crimes reasonable means to secure their safety. This interest is no less existent in workplace environments.[305] In *County of Milwaukee*, the court noted that the legislature's criminal record provision and its substantial relation exception attempts to balance the competing interests of employers that wish to ensure a safe and efficient workforce with the interest of ex-convicts seeking reintegration into society.[306] The court seemed to be recognizing, quite appropriately, the certainty that these two interests necessarily compete. This discord, therefore, requires the establishment of a legal rule that will, at a minimum, favor the accomplishment of one interest over the other.[307]

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Hunter v. Port Auth., 419 A.2d 631, 634 (Pa. Super. Ct. 1980) ("To foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.") (quoting Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973)). There is also an arguable policy connection between employers using conviction records in hiring decisions and the ability of present and former welfare recipients to gain employment. *See* Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 53 (1998).

304. According to the United States Department of Justice, an estimated forty-three percent of those on probation between 1986 and 1989 were subsequently arrested at least once on felony charges within three years after having been placed on probation. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF FELONS ON PROBATION, 1986–1989, at 1 (Feb. 1992).

305. In fact, given the rash of workplace violence in recent years, employers seemingly need to be afforded even more latitude in their hiring. *See generally* Beaver, *supra* note 286, *passim*. See also the discussion over negligent hiring and discrimination based on conviction records *supra* Part III.A.4.

306. *County of Milwaukee*, 407 N.W.2d at 914–15. According to the court:

> It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

*Id.* (footnote omitted).

307. *See* Lye, *supra* note 204, at 320 (calling these competing social priorities); Myers,

Both Wisconsin courts and the federal courts have wrestled with the balancing of these competing interests. The Eighth Circuit in *Green* was noticeably cognizant of the effect such polices can have on the ability of ex-felons to find and maintain employment, remarking that such policies may have the tendency to "place every individual convicted of any offense . . . in the permanent ranks of the unemployed."[308] In *County of Milwaukee*, the court's decision recognized that "[e]mployment is an integral part of the rehabilitation process"[309] and that society has interests in both protecting its citizens and also in rehabilitating persons convicted of crime, which may include their protection from employment discrimination.[310] The Wisconsin Supreme Court remarked, however, that "[i]n balancing the competing interests . . . the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear."[311] The court concluded that the Wisconsin legislature answered this question in the form of the substantial relation test, which exists precisely to compare the circumstances of the offense to a particular job.[312] Meanwhile,

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*supra* note 43, at 910–11. Myers, while recognizing that these concerns are in "direct conflict," argues that the court in *County of Milwaukee* impermissibly rebalanced these competing social policy goals. *Id.* at 911. He argues instead that the legislature's determination of how this balance should operate was manifested in the substantial relation test. *Id.* at 913–16.

308. Green v. Mo. Pac. R.R., 523 F.2d 1290, 1298 (8th Cir. 1975); *see also supra* Part II.C.2.

309. *County of Milwaukee*, 407 N.W.2d. at 915.

310. *Id.* at 914–15.

311. *Id.* at 915–16.

312. *But see* Myers, *supra* note 43, at 913–16 (arguing that while the court recognized that the legislature employed the substantial relation test to balance these interests, the court also utterly failed to adhere to the construction of the provision as intended by the legislature). It is instructive to realize exactly how the substantial relation provision modifies the general ban against using conviction records for discriminatory purposes. In *County of Milwaukee*, the Wisconsin Supreme Court discussed the effect that the absence of the exception would have had on employers desiring to consider conviction records. *County of Milwaukee*, 407 N.W.2d at 914. It stated that without the exception, "an employer could not . . . refuse to hire a person because that person had a conviction record. This would be true in a case where the conviction had been on charges of sexual molestation of children and the individual applied for a job as a day care supervisor." *Id.* The court then suggested that such a result was against the manifest intent of the legislature and, in the words of the court, "It would be simply unconscionable to require employers in the example above to be forced to hire such an individual or face charges of discrimination." *Id.*

Conversely, although the court does not speak to this, in the absence of the WFEA criminal record prohibition, employers would be entirely free to use conviction records as a basis in their employment decisions (in the absence of a violation of federal law under Title VII, of course). The main point is that without some statutory exception, the result would be

federal courts have applied the business necessity test to imperfectly attempt this balance.[313] The questions are what is the best manner in which to balance these interests, and which should be favored?

Certainly, the determination of which social interest should be granted preference is precisely the type of social policy decision that representative legislatures must weigh. Therefore, if an expressed preference is given to the goal of securing to ex-convicts equal employment opportunities, then that is the rule courts are to follow. Nonetheless, in the absence of clear legislative intent, courts may reasonably conclude under the law that alleviating the burdens on a lawful business trump the granting of indiscriminate employment opportunities to any and all persons with criminal histories. This approach would require a great deal of deference on the part of employers to determine whether the "circumstances of a crime" relate substantially to the "circumstances of the particular job," as required under the WFEA.[314] In any event, due consideration should be given by lawmakers and judges as to whether the more appropriate legal rule would be one that places the burden of proving one's ability to work without destructive conduct on ex-criminals and not on lawful businesses.

The issue of mitigating circumstances plays directly into this discussion of the competing interests of recidivism and public safety versus rehabilitation and equal employment opportunities. At least one administrative application of the WFEA criminal record provisions has recognized that the passage of time in which an ex-criminal has been subsequently free from criminal behavior can be "a significant factor in balancing the overall goal . . . of preventing discrimination on the basis of conviction record against the goal . . . of protecting the employer against unreasonable risks."[315] The notion seems to be that as time progresses, the concern over recidivist action in the workplace should give way to the realization of employment opportunities for ex-convicts. The difficulty, though, is in deciding who should determine when these

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a law (or absence of law) that would decisively favor one or the other of these competing interests. Instead, the substantial relation exception forces some type of a balancing test, which has been largely determined by the considerations of the courts. *See also supra* Part II.A.2.b.

313. *See, e.g., Green*, 523 F.2d at 1297–98; *see also supra* Part II.C.3.

314. WIS. STAT. § 111.335(1)(c) (1999–2000).

315. Thomas v. Dep't of Health & Soc. Servs., Wis. Pers. Comm'n Dec. No. 91-0013 (Apr. 30, 1993).

factors balance in one direction or the other: employers through their own discretion or governments through the force of law?[316] The WFEA dictates that the latter route reigns, but it does so in a sometimes unclear fashion.[317]

Also relevant to this discussion is the recognition that these concerns about employment opportunities as a means of rehabilitation are due solely to the recognition of persons with criminal histories as an independently protected class. This concern does not directly, nor in any meaningful manner, relate to the protection of other classes, such as minorities.[318] This fact is especially acute under Wisconsin law, which has expressly limited discrimination against all persons with criminal records.

Overall, it is certain that social policies tied to matters of criminal recidivism and the availability of employment to ex-felons remain at the root of laws restricting employment discrimination on the basis of criminal records.[319] The inclusion of criminal records as a protected basis of discrimination has occurred for a reason, albeit one that simply presumes the interests and discretion of ex-convicts trump those of employers. For example, one commentator has framed the discussion to be one of the competing interests of "eliminating employment practices with proven discriminatory effects and the entrepreneurial interests in controlling the composition of the workforce."[320] But this is a terribly biased and incomplete formulation of the issue. The interest of employers to avoid hiring certain criminals also captures the interests of their customers and other employees, who may prefer to not associate with someone prone to criminal activity. These are not merely "entrepreneurial" interests, but also societal interests.

### *b. Directly Competing Tests: Weighing the Factors-Specific Test vs. the Elements-Only Test*

Much confusion and dismay has been generated by the practical

316. *See supra* Part III.A.2–3.

317. This problem with the WFEA criminal record provisions not giving adequate notice to employers of what is required in a decision weighing conviction records is discussed *infra* Part III.B.1.b.

318. Presumably, the concern is that all ex-convicts, whatever their race, should not be denied equal employment opportunities. Therefore, the rationale of this policy applies equally regardless of overlying concerns of racially disparate impact.

319. *See* Myers, *supra* note 43; May, *supra* note 216.

320. Lye, *supra* note 204, at 361.

difficulties with determining how the WFEA's all-important exception to the criminal record provision should apply.[321] As previously noted, there have arisen two, general competing viewpoints.[322] The first reflects a view that the exception should be construed narrowly, such that the relevant "circumstances" relate to the particular facts surrounding criminal offenses, the time passed, mitigating circumstances, efforts at rehabilitation since the conviction, and so forth. The second view believes that the courts should only look to the elements of the crime as the measure of "circumstances," and compare those elements to the job duties in question. As we have seen, since *County of Milwaukee*, the latter, elements-only approach has dominated the law's application.[323]

This development is desirable. The benefit of looking only to the statutory elements of the crime, and not the range of factual circumstances of the offense, is that it keeps the LIRC and the courts out of "the position of re-evaluating the question of criminal liability which has already been resolved by a conviction."[324] Furthermore, looking to subsequent mitigating factors, such as rehabilitation and work history, while possibly relevant to the employer's own subjective judgment, makes questionable sense to apply as a legal standard replicable in future cases.

Yet shortly after *County of Milwaukee* was decided, a critique of the

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321. The exact language of the exception reads:

> [I]t is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who: (1) Has 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; or (2) Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

WIS. STAT. § 111.335(1)(c) (1999–2000).

322. *See supra* Part II.A.2.b.

323. *See supra* Part II.A.2.b.iv.

324. Lillge v. Schneider Nat'l, ERD Case No. 199604807 (LIRC June 10, 1998). In this decision, the LIRC added that it (and the Wisconsin courts):

> must be able to rely on the fact of conviction as establishing, beyond dispute, that the convicted person engaged in the elements of the crime, and that there were no mitigating facts or circumstances which would have made a lesser charge (or no charge) more appropriate under the circumstances. Considering the factual circumstances of the offense *as asserted by the convicted person* is inconsistent with this.

*Id.* slip op. at 7.

decision was presented that focused on the various available formulations of the substantial relationship exception.[325] This critique argued that the Wisconsin Supreme Court construed the WFEA conviction record provisions, most notably its substantial relation exception, so abstractly as to, using Justice Abrahamson's words, "eviscerate[]" the statute.[326] In doing so, it has been suggested that the court ignored the legislative intent in adopting the statute, and all but countenanced employment discrimination against persons with criminal records, thereby denying them equal employment opportunities.[327]

Putting aside the legislative intent issue,[328] the primary dispute appears to be which characterization of the substantial relation exception is preferable, the factors-specific approach or the elements-

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325. *See* Myers, *supra* note 43. This article remains the most thorough critique of the *County of Milwaukee* decision within the legal literature.

326. *Id.* at 891 (citing County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 919 (1987) (Abrahamson, J., concurring)).

327. *Id.* at 915–16.

328. The argument was based on the language appearing in the different drafts of the 1977 bill relating to the substantial relation exception:

> The original bill introduced in the Assembly allowed discriminatory action because of "any . . . offense which is substantially related to the ability of [the] person to perform the duties of a particular job or licensed activity." The Legislative Reference Bureau's analysis of that language, which was attached to the original published bill, stated that "[d]iscrimination on the basis of a conviction is permitted if *the subject* of the conviction is substantially related to the ability of the person to perform the job or licensed activity." The Assembly Labor Committee submitted an amendment, which the full Assembly passed, modifying the language of the statutory exception into its final form. The legislature thus replaced the phrase "any . . . offense which is substantially related . . ." with "any . . . offense the circumstances of which substantially relate to. . . ." In making that modification, the legislature made mere determinations of the subject of an offense unlawful as justification for discriminatory action. If the legislature had intended determinations at a high level of abstraction to be lawful, there would have been no need to modify the original language.

*Id.* (footnotes omitted) (alterations in original). In response, Myers' inference from the legislative history is, like most allusions to legislative history, merely an inference. Moreover, it seems clear that given that the past fourteen years since the Wisconsin Supreme Court handed down *County of Milwaukee* have spawned no action to "reclaim" the teeth of the WFEA criminal record ban (and in fact nearly all legislative action since has been motions to eliminate the provision entirely), one could argue the Wisconsin Supreme Court's treatment was not so distant from the legislature so as to compel them to clarify their view. Such legislative action was taken by the United States Congress, in the form of the Civil Rights Act of 1991, directly in response to the United States Supreme Court's decision in *Wards Cove*, which had made similar, pro-employer changes in the relative burdens of employers and employees in proving discrimination claims. *See* RUTHERGLEN, *supra* note 160, at 25–35.

only approach? According to the critique, the factors-specific approach is preferable.[329] It touches upon Justice Abrahamson's criticism of the majority's formulation of the substantial relation test, in which she said that the test, after *County of Milwaukee*, had no well-defined meaning.[330] In fact, the elements-only test is a much more straightforward test to apply, precisely because it looks only to clearly restricted considerations, namely the elements of the crime and the duties and context of the job.

Furthermore, one must be cognizant of the practical realities employers face in hiring decisions, and the relation of these concerns to their ability to avoid liability under the WFEA's criminal record provision. In *County of Milwaukee*, the Wisconsin Supreme Court indicated an understanding of the difficulty faced by employers under a poorly specified test for establishing a substantial relation between a job and a conviction record.[331] The court mentioned that it is impractical for employers to do a "full-blown factual hearing" because that would make employment decisions get bogged down.[332] Employers that are legally held to the standards of a factors-specific approach, even if they attempt in good faith to make the correct determination, face the prospect of the LIRC or the courts second-guessing every such decision.[333] Even Justice Abrahamson, the champion of the factors-specific approach, stated in her dissent to *Lyndon Station* that:

> I believe it is error for this court to make the determination, as it does here, that the circumstances of Jessen's felony convictions in 1973 substantially relate to the circumstances of his job as police chief and that he is therefore disqualified from being police chief in 1981. In my view the Law Enforcement Standards Board (LESB), *not this court*, should make this determination. In making the determination itself the majority has, I believe, *usurped the powers* of the LESB and of the Village Board of

329. Myers, *supra* note 43, *passim*.

330. *County of Milwaukee*, 407 N.W.2d at 919 (Abrahamson, J., concurring).

331. *Id.* at 917.

332. *Id.*

333. This indeterminacy is compounded by the fact that, even if an employer's use of the substantial relation exception is valid, claims can still be threatened to be brought against the employer. Such employers will need to spend a significant amount of legal resources to defend against discrimination claims that, because they are fact-specific, will require intensive fact-finding and will not likely be susceptible to summary judgments by courts. *See* Olson, *supra* note 286, at A23 ("[F]ew employers can risk spending years and fortunes in court validating such a policy – or risk a big back-pay award should a court disagree with them. When in doubt, an employer has an incentive to take the applicant.").

> Lyndon Station; [and] has exceeded its appellate jurisdiction by acting as a factfinder.[334]

It appears that it is the elements-only test that best allows for employment-related decisions to be made "not by the court," but instead by those involved in the decision—whether a law enforcement standards board or the manager of a local department store. Moreover, given the difficulty facing employers making these inherently subjective decisions, it is not wise to put the threat of law behind such choices except for possibly the most egregious cases.

Furthermore, the elements-only test is bolstered by the fact that a criminal conviction is itself a delineation of relevant factors surrounding a crime. Those who advocate the factors-specific test have erroneously drawn upon the history of discrimination based on arrest record and applied the same rationale in developing a legal test to discrimination based on conviction record. Yet these two categories, while similar, are different in material ways.[335] Conviction records, unlike mere arrest records, do carry probative value to an employer, given that convictions are based on an actual finding of guilt accomplished through an evidentiary-laden, adversarial process.[336] Use of the factors-specific test diverts attention away from this difference and its benefit in the context of the substantial relation exception to the WFEA. The factors-specific test is more reasonable to apply to the more restrictive use of arrest records, which is still allowed if the discrimination is based not on the fact of the arrest, but on the underlying circumstances and factors that

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334. Law Enforcement Standards Bd. v. Vill. of Lyndon Station, 305 N.W.2d 89, 101–02 (Wis. 1981) (Abrahamson, J., dissenting) (emphasis added). Justice Abrahamson made this point to show that the LESB had failed to determine whether a substantial relation existed between the crimes and the job, and that the court was impermissibly doing this factual determination on its own. *Id.* at 102, 104–05. She also noted that the Village Board undertook such a consideration and concluded that the circumstances of crimes and the job were not substantially related. *Id.* at 104. Nonetheless, even had the LESB made a determination that the circumstances were substantially related (as one could have inferred even without the formality of the LESB making such determination on the record), it is unlikely that Justice Abrahamson would have then said that she and her colleagues were foreclosed from reviewing the merit of the LESB's conclusion.

335. *See supra* note 36.

336. *See, e.g.*, 2 EEOC Compl. Man. (CCH), *Policy Guidance on the Consideration of Arrest* § 604.10 ¶ 2094 (1998) ("Conviction records constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires the highest degree of proof . . . for a conviction.").

led to the arrest.[337] By contrast, the elements-only test refers only to the objective factors set out in a criminal statute—which, in the case of a criminal conviction, have all been deemed satisfied by a court of law in order to sustain a conviction.[338] Looking past these considerations only places employers, and the courts, into a conundrum of limitless factors to be compared, weighed, and shuffled.

It is precisely this issue that sparked the Wisconsin legislature's reconsideration of the criminal record provision, in which we see how the substantial relation exception fails to illuminate a clear principle that would allow the law to be applied in a consistent manner in practice. In the case of Michael Moore,[339] the LIRC determined that Moore's job as a boiler attendant in a public elementary school was not "substantially related" to his crime of "'injury by conduct regardless of life.'"[340] In deciding in Moore's favor, the LIRC found that "as a matter of law, work as a boiler attendant could never be considered substantially related to a criminal conviction for conduct regardless of life or reckless injury."[341] This conclusion was reached even though reckless injury occurred to a child,[342] and Moore would be working in a school.[343] The twisted path the LIRC took to reach its conclusion exemplifies how unprincipled application of the substantial relation test seemingly is. The LIRC admitted that the criminal traits displayed by Moore's conviction included a lack of concern for the safety and well-being of others, a disregard for human life, and extremely poor judgment.[344] Nonetheless, it found that there was nothing about a janitorial position in a school that posed a greater-than-usual opportunity for criminal

337. *See supra* note 257 and accompanying text.

338. According to the court in *County of Milwaukee*, "focusing on the elements [of the crimes] simply help[s] to elucidate the circumstances of the offense." 407 N.W.2d 908, 917 (Wis. 1987).

339. *See supra* Part II.A.2.b.v.

340. Moore v. Milwaukee Bd. of Sch. Dirs., ERD Case No. 199604335 (LIRC July 23, 1999).

341. *Id.*

342. Moore's conviction resulted from his throwing a pan of hot grease at his girlfriend and severely burning the girlfriend's twenty-month-old daughter, who was standing between them. *Id.*

343. Judge Ralph Adam Fine expressed in his dissent to the Court of Appeals' decision that "[n]o level of deference justifies validating such an internally contradictory conclusion." Milwaukee Bd. of Sch. Dirs. v. Labor & Indus. Review Comm'n, No. 00-1956, 2001 WL 641791, at *10 (Wis. Ct. App. June 12, 2001).

344. *Id.*

behavior.[345] In the Wisconsin Supreme Court's refusal to review this case, the court declined to grapple again, for the first time since *County of Milwaukee*, with how the substantial relation exception must be interpreted and applied.

The decisions made during the Moore case exhibit at least three important ramifications for the subsequent development of the WFEA's conviction record provisions. First, it appears that the Wisconsin Court of Appeals, at least in this instance, has discovered a standard of review giving great deference to the conclusions of the LIRC. This result may be questionable, given that the determination of whether a "substantial relation" exists is a question of law, not fact,[346] suggesting there should be de novo review with lesser deference to the agency. Second, and related, it is apparent that any employer (or employee) is now unclear as to how the conviction record provision of the WFEA, and its substantial relation exception, will be applied by the LIRC with enough consistency to govern employers' decisions. A law that can be applied for opposite conclusions under similar facts appears to be no law at all, and is an indictment of the current WFEA.[347] Finally, with the Wisconsin Supreme Court denying the petition for review to the Moore case—a case that, at best, minimally adheres to the holdings of *County of Milwaukee*—it seems likely that claims under this provision of the WFEA will continue to materialize, and the court may have only deferred its need to either clarify, reinvigorate, or abandon its decision in *County of Milwaukee*.

In sum, the Wisconsin Supreme Court in *County of Milwaukee* discredited the need to rely on the underlying facts during and after the commission of the crime, and instead concluded that it "is the circumstances which foster criminal activity that are important."[348] While a move in the right direction, even this test relies on a level of clairvoyance over the likelihood of recidivist criminal behavior in a particular employment setting that seems difficult to achieve and

345. *Id.*

346. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 917–18 (Wis. 1987).

347. The Milwaukee County Circuit Court hearing the Moore appeal from the LIRC admitted to the conundrum it faced. Milwaukee Bd. of Sch. Dirs. v. Labor & Indus. Comm'n, Case No. 99-CV-6637, *available at* http://www.dwd.state.wi.us/lirc/moorcrct.htm (last visited Jan. 13, 2002). Judge Frank stated, "This case illustrates just how difficult the fair and reasoned application of this law can be . . . ." *Id.*

348. *County of Milwaukee*, 407 N.W.2d at 916.

terribly discretionary to judge. Therefore, perhaps the reason there appears to be so little principle and uniformity in the application of the WFEA conviction record law is because devising a rule of law in which such characteristics are allowed limited consideration will necessarily be fraught with confusion. Yet, unlike previous criticisms of the *County of Milwaukee* decision, this contention does not necessarily go to the merit of the court's ruling.[349] In fact, given the existence of the law, and its exception, the elements-only approach is the most reasonable application of the rule, as the law's application under that approach is more operable than the competing, factors-specific interpretation of the test. The nebulous exception provision that administrative agencies and courts must apply is a child of the legislature, and it seems necessary for that branch of government to provide a guidance that is presently nonexistent.

2. Comparison to Federal Civil Rights "Business Necessity" Standard

Just as Wisconsin's Fair Employment Act allows employment discrimination on the basis of a conviction record if the circumstances of the criminal offense substantially relate to the circumstances of the job, federal law provides employers with a similar exemption: the business necessity exception.[350] Although there remains significant confusion as to the true nature and burden required by a business necessity defense to discrimination based on conviction record,[351] the business necessity test applied under federal law has a much richer history than Wisconsin's own analogous "substantial relationship" exception.[352]

By construction and application, the substantial relation exception deals in neither a bona fide occupational qualification (the defense required to defend a disparate treatment claim under Title VII) nor a business necessity (the defense required to defend a disparate impact

349. This Comment cites the problems with the *County of Milwaukee* decision only to highlight the flaws inherent in any test applied by the courts to the current law. Despite the preceding argument in favor of the elements-only test, it appears that neither formulation has an entirely clear meaning—nor could any test; it is the nebulous nature of the exception that makes it exceedingly difficult to define a clear rule that can apply equally well on a case-by-case basis.

350. *See supra* Part II.C.3.

351. *See supra* Part II.C.3 and accompanying notes.

352. Unlike Wisconsin, this exception grew out of the equitable views of the courts, and was not codified into a statutory scheme, until the Civil Right Act of 1991. 42 U.S.C. § 2000e-2(k) (1994); *see also* RUTHERGLEN, *supra* note 160, at 21 (explaining how the Civil Rights Act of 1991 codified the three-stage structure of shifting burdens of proof).

claim under Title VII). Instead, the exception acts as some type of a hybrid. It wades between emphasizing how a conviction relates to job performance potential and whether no-conviction polices are themselves suspect, absent on impact on other protected classes. Again, this occurs because Wisconsin law takes the unique route of listing criminal convictions as a specific class receiving employment protection.[353]

### *C. Peer Review: Looking to the Treatment of Conviction Record Considerations in Employment Decisions by the Majority of States*

With the vast majority of states failing to include within their fair employment laws provisions protecting persons with a criminal record from employment discrimination,[354] it may be questioned whether Wisconsin's uniqueness is desirable. Wisconsin is clearly in the minority in viewing such a policy as either in the public interest, being administratively feasible, or effective.

Of those few other states that have statutorily codified a legal prohibition against discrimination based on criminal records, or have articulated a reasonably discernable test through case law, Wisconsin may have something to learn. One commentator has suggested that Wisconsin follow the New York model, and have the state legislature insert within the WFEA statute a specific list of factors to be considered in making the substantial relation decision.[355] If the WFEA criminal record ban is to remain, such an action may be desirable. Yet, it is doubtful that such a change will do little more than alter the presumptions facing either employers or employees and redirect the type of evidence that must be put forward to rebut or support a discrimination claim.

Given that Wisconsin already leads the state-level jurisprudence on this issue, perhaps Wisconsin has more to learn from the roaring silence coming from the vast majority of states: a law restricting employers from reasonably discriminating against former criminals is unnecessary and undesirable. Moreover, in these other states, aggrieved individuals still

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353. One could even argue, given the elements-only test now applied to the "substantial relation" exception post-*County of Milwaukee*, that the federal test under business necessity is more stringent and difficult for an employer to satisfy. If this observation is true, persons alleging discrimination on the basis of conviction record in this state may already have a great likelihood of succeeding with their claim if it is brought under a claim of a Title VII violation.

354. *See supra* Part II.B.

355. Myers, *supra* note 43, at 897.

have a cause of action under federal law, to the extent they can properly allege a disparate impact on an otherwise-protected class.[356]

### *D. Legal Effect of Eliminating the Conviction Record Basis of the WFEA*

Having advocated the deletion of the conviction record provisions from the WFEA, there remains the practical question of how employment law will look after this change. The preceding analysis has highlighted some of the important, recurring themes involving the issue of whether employers should be able to discriminate based on an employee's or potential employee's conviction record. While many of these legal issues apply both to the federal and Wisconsin legal treatment of this issue, a few important differences remain.

#### 1. Resulting Status of Considering Conviction Records Absent the WFEA Conviction Record Provision

Currently, an individual alleging employment discrimination based on conviction records has the option of bringing suit under either federal law (Title VII of the Civil Rights Act) or state law (WFEA).[357] Given that a claim under the WFEA criminal record provision requires only a showing of disparate treatment against those with criminal records, while the Title VII necessitates a showing of disparate impact against minorities, a claimant is likely to pursue his or her allegation under Wisconsin law.

Elimination of this provision of the WFEA will merely deny special employment protection to a class of persons whose members are identified by one similar trait—the evidenced commission of destructive, anti-social behavior. As a result, one's criminal record will join the multitude of other factors that each separate employer may decide to weigh in his or her employment decisions.[358] In this regard, one of the most noticeable changes facing claimants of employment discrimination based on conviction record involves the type of evidence that must be

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356. *See infra* Part II.C and accompanying notes.

357. 42 U.S.C. § 2000e-7 (1994). A Title VII claim brought under federal law will preclude the claimant from bringing a similar claim arising out of the same fact pattern, on res judicata grounds. Schaeffer v. State Pers. Comm'n, Dep't of Military Affairs, 441 N.W.2d 292 (Wis. Ct. App. 1989). Likewise, a claim under WFEA reviewed by Wisconsin courts will likely bar subsequent litigation of the same claim under Title VII. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982).

358. *See* McGarvie, *supra* note 253, *passim*.

put forward to prove such claims.[359] Upon deletion of the provision, aggrieved employees will have to settle their claim under the burdens established for Title VII disparate impact analysis.[360] Unlike under Title VII's disparate impact test, a plaintiff alleging a WFEA claim is currently not required to offer evidence, statistical or anecdotal, that some *other* protected group, notably racial minorities, is disproportionately harmed by a policy against hiring persons with criminal records. Instead, once an employer invokes an applicant's criminal record as part of its basis for failing to hire that applicant, the analysis immediately turns to proof of a legitimate business reason for that decision, *viz.* the substantial relation test.

The use of criminal records by employers to deny employment to minorities, whether expressly or through a practice that has a disparate, negative effect on minorities, will remain prohibited, as likely will absolute bans on hiring persons with conviction records.[361] In other words, even absent Wisconsin's conviction record bar, criminal records cannot be used as a mere pretext for racial discrimination.

### 2. Make a Federal Case Out of It: The Benefit of the Title VII Approach vs. Wisconsin's Current Attempt

One of the primary reasons why Wisconsin's Fair Employment Act continues to bar considerations of conviction records in employment decisions is a misguided tendency among its political and legal

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359. *See supra* Part III.B.2.

360. For a summary of the resulting burdens in a Title VII disparate impact claim due to the use of one's conviction record, see Kent County Sheriff's Ass'n v. County of Kent, 826 F.2d 1485, 1492 (6th Cir. 1987). The court stated:

> In disparate (adverse) impact cases, the burden of proof shifts between the parties, starting with the plaintiff, and a somewhat similar tripartite analysis is employed: (1) the plaintiff must establish a substantial adverse impact on a protected class, (2) the employer must prove a business necessity for the practice (e.g., job-relatedness of the challenged requirement), and (3) the plaintiff must then prove that other acceptable requirements with less adverse impact exist.

*Id.* (citing SCHLEI & GROSSMAN, *supra* note 190, at 1287); *see also supra* Part II.C and accompanying notes.

361. *See* Green v. Mo. Pac. R.R., 523 F.2d 1290 (8th Cir. 1975). Although this decision has emanated from only one circuit of the federal court of appeals, no other circuit of the federal court of appeals has ruled in direct opposition to *Green*. Furthermore, EEOC Guidelines interpreting Title VII directly state that use of criminal conviction as an automatic bar to employment is impermissible, unless the policy is justified by a business necessity. *See* 2 EEOC Compl. Man. (CCH), *Conviction Records* § 604.10 ¶ 2088 (1998).

supporters to equate the elimination of this provision with the tacit allowance of employers to unabashedly discriminate against any and all persons with a criminal record.[362] Such fears are unfounded, though, as employers' use of conviction record information in personnel decisions will remain governed, and limited, by Title VII of the Civil Rights Act. Overall, Title VII law, combined with the ready aid of the EEOC, will still protect Wisconsin citizens from truly invidious discrimination. Furthermore, the deletion of this currently protected class from discrimination claims neither explicitly nor implicitly condones irrational discrimination based on criminal records; it simply permits employers the discretion to openly weigh the importance of a conviction to a job.[363] Instead, to the extent that economic and business considerations cause employers to decide that an applicant is the best person for a job, despite his conviction record, that freedom will remain, and judicious employers will still hire the most productive worker for the job.[364]

Of all the prohibited bases of discrimination in the WFEA, consideration of conviction record should go the way of the dust bin. Granting to convicted criminals a claim of disparate treatment, as Wisconsin's WFEA openly attempts, takes the spirit of *Green* and the use of disparate impact analysis with respect to criminal record considerations much too far. In *Green*, the Eighth Circuit of the United States Court of Appeals appropriately denied using Title VII disparate impact analysis to make unlawful any and all uses of criminal records as

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362. *See* Olson, *supra* note 286, at A23:

> Advocates of compulsory felon-hiring sometimes portray critics in the role of the vengeful Inspector Javert of "Les Miserables." To give employers more freedom in these matters would be to "deny someone a reason to earn a living forever," says Wisconsin state Sen. Gwen Moore (D., Milwaukee). "This says they can never be rehabilitated." That might be a fair criticism of a law that required employers to reject convicts.

*Id.*; *see also* Hruz, *supra* note 123, at 12–14.

363. *See* Olson, *supra* note 286, at A23 ("[T]he issue here is whether each employer should be free to weigh the pros and (so to speak) cons for himself."). There is also an argument that employers which rationally hire qualified individuals with conviction records unrelated to the job performed will economically benefit. *See* Funk, *supra* note 248, at 931–33. "[T]hose employers who do not harbor irrational biases will gain a competitive advantage over their biased competitors as a result of the reduced labor cost that the former will enjoy." *Id.* at 931 (citing GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39–41 (2d ed. 1971)).

364. Of course, due consideration must be given to negligent hiring claims. *See supra* Part III.A.4.

a factor in employment decisions.[365] While the theory behind disparate impact analysis under Title VII has some legitimate problems of its own,[366] it is still a more preferable mechanism to addressing the permissibility of conviction record considerations during employment decisions than WFEA's direct listing of conviction records.

The Wisconsin Supreme Court's holding in *County of Milwaukee* was certainly a step in the right direction toward discrediting unabated employment protection for formerly convicted criminals. The court recognized that the interests of employers and their associates demands a clear test expounding the application of the substantial relation defense.[367] Yet state courts, even the Wisconsin Supreme Court, are bound to interpret the law as created by the legislature, and as such they could not "eviscerate" the WFEA criminal record provision.[368] The next step should be the actual deletion of the provision from statutory law.

## IV. CONCLUSION

The Wisconsin Fair Employment Act's criminal record provision is neither desirable nor necessary. It is undesirable because it specifically confers upon persons with conviction records the status of a protected class under employment discrimination law. Instead, a mutable trait that is widely recognized as being negative, such as an individual's evidenced involvement in criminal activity, should not be placed on the same plane as other bases of discrimination derived from immutable and non-nefarious traits, such as race, sex, and the other common suspect classes protected under discrimination law. To the extent that consideration of conviction records should be restricted in employment

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365. Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977); *see also supra* Part II.C.2.

366. For a thorough analysis and critique of disparate impact theory with regard to employment discrimination laws, see generally EPSTEIN, *supra* note 161, at 182–241:

> [D]isparate impact cases, which allow courts to infer unlawful discrimination, wholly without evidence of improper motive, and solely from the (perceived) disparate consequences of certain hiring tests or procedures, represent a very different threat [than disparate treatment cases], one that poses intolerable and unnecessary demands on both the legal system and the affected employment markets.

*Id.* at 160.

367. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 917 (Wis. 1987).

368. *But cf.* Myers, *supra* note 43, at 891 (claiming the *County of Milwaukee* majority eviscerated the WFEA conviction record statute).

decisions, it should be done only in a manner closely tied to the use of this one factor as a means to deny employment to racial minorities. The law is also undesirable because it attempts to devise a balancing test of some type, any one of which seems terribly unworkable in a consistent and principled manner.

The law is unnecessary since deletion of the WFEA's criminal record provision would immediately pass on to employees the protection still available under federal law, as found in Title VII of the Civil Rights Act. Title VII law only concerns itself with discrimination based on conviction records to the extent that these policies may disproportionately restrict the employment opportunities of minorities. As a result, this protection makes the subtle yet important distinction between the effect an employer's policy may have on classes truly deserving of employment protection, such as racial minorities, as opposed to the direct protection of criminals *qua* criminals. For these primary reasons, Wisconsin lawmakers should feel comfortable in deleting from the WFEA its conviction record provision, and thereby alleviating the courts of the burden of attempting to enforce its nebulous mandates.

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