CHALLENGING CRIMINAL RECORDS IN HIRING UNDER THE AMERICANS WITH DISABILITIES ACT

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INTRODUCTION

One-hundred million Americans live under the shadow of a criminal record.[1] It is a branding that limits a broad range of opportunities and stands in the way of full membership in civil society,[2] particularly for the twenty million adults with a felony to their name.[3] The majority of those leaving prison also carry histories of addiction, creating an additional layer of stigma and set of barriers.[4]

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014 (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf.

2. *See* LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS (2009), http://lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry--2009.pdf.

3. Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948 to 2010*, DEMOGRAPHY (forthcoming 2017), http://users.soc.umn.edu/~uggen/former_felons_2016.pdf (estimating that as of 2010, there were approximately 19.6 million Americans who had been convicted of a felony, and noting that this number would rise in subsequent years).

4. KAMALA MALLIK-KANE & CHRISTY A. VISHER, URBAN INST., HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION 11 (Feb. 2008), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411617-Health-

Perhaps the most painful civil penalty that comes with a criminal record is the long-term damage it inflicts on employment prospects. With over 90% of employers currently conducting criminal background checks, [5] and a majority of employers articulating reluctance to hiring either a drug addict or a former offender,[6] those haunted by pasts of both addiction and criminal justice involvement frequently find themselves locked out of the job market and shunted to the sidelines of American society.[7]

The social and economic exclusion of people with criminal records has increasingly been seen as a civil rights issue, as it reinforces racial and economic inequalities and compounds the disadvantages faced by marginalized groups. Attempts to leverage existing antidiscrimination law to expand opportunity for former offenders, however, have failed to eradicate a system of legalized discrimination against criminal records holders. Despite the dramatic overrepresentation of Blacks and Latinos in the criminal justice system, race-based challenges to criminal background checks have been limited by stringent interpretations of Title VII.[8] Additionally, former offenders encountering the added obstacles to employment resulting from history of substance use disorder have found little protection under the Americans with Disabilities Act (ADA); drug addiction, though formerly covered by the Act, is often relegated to second-tier disability status.

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and-Prisoner-Reentry.PDF (7 in 10 returning prisoners report having had problems with substance abuse prior to incarceration).

5. SOC'Y FOR HUM. RESOURCE MGMT., BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS (2012), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx.

6. *See, e.g.*, Heather Stuart, *Mental Illness and Employment Discrimination*, 19.5 CURRENT OPINIONS IN PSYCHIATRY 522, 523 (2006) (discussing surveys of American employers showing that "approximately 70% are reluctant to hire someone with a history of substance abuse"); SOC'Y FOR HUM. RESOURCE MGMT., *supra* note 5 (2012 survey of employers found nearly three-quarters would see a nonviolent felony conviction as a "very influential" reason to not hire an applicant).

7. Harry Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49.2 J. L. & ECON. 451, 453–54 (2006).

8. *See, e.g.*, Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 12–13 (2012) (discussing judicial reluctance to hold in favor of Title VII plaintiffs who allege that background checks disparately impact racial minorities).

This Note argues that screening job applicants using criminal background checks violates the ADA because these hiring procedures have a negative disparate impact on individuals recovering from drug addiction. Part I describes the relationship between addiction and involvement in the criminal justice system, underscoring the ways in which the use of criminal records in hiring perpetuates the marginalization of former offenders, particularly those with histories of addiction. Part II provides an overview of the existing frameworks for protecting this group, tracing past attempts to challenge criminal background checks as race discrimination under Title VII, and highlighting the frequently stunted reach of ADA protections for recovering drug addicts. Part III turns to the ADA's frequently overlooked disparate impact provision as a potentially powerful tool for fighting discrimination on the basis of criminal history and drug addiction. Part IV argues that the disability disparate impact framework should be invoked to challenge the use of criminal records as discrimination against recovering addicts. Finally, Part V proposes that employers treat criminal record inquiries like disability-related inquiries, which would limit the potential for overreliance on these negative credentials.

I. ADDICTION, INCARCERATION, AND CRIMINAL RECORDS

Addiction in America is widespread. Over seven million Americans are currently addicted to illegal drugs and over twenty million are in recovery for substance abuse.[9] It is estimated that only around 10% of those who need treatment for an alcohol or drug problem receive it.[10] Fatal drug overdoses quadrupled between 2000 and 2014, reaching the highest level ever recorded—more people die each year from drug overdoses than from car accidents.[11] Yet, despite

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9. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERV., BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH (2015), https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf.

10. NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUM. SERV., NATIONWIDE TRENDS (2015), https://www.drugabuse.gov/publications/drugfacts/nationwide-trends ("In 2013, an estimated 22.7 million Americans (8.6 percent) needed treatment for a problem related to drugs or alcohol, but only about 2.5 million people (0.9 percent) received treatment at a specialty facility.").

11. Rose Rudd et al., *Increases in Drug and Opioid Overdose Deaths—United States, 2000–2014*, 64 MORTALITY & MORBIDITY WKLY. REP. 1378, 1379 (2016).

the prevalence of addiction, it remains a source of great shame, stigma, and marginalization.

For many years, substance abuse was widely seen as a character flaw, reflecting the moral failings and weak willpower of those in its grips. Throughout the twentieth century, however, experts increasingly shifted toward viewing addiction through the lens of disease. Scientific advances revealed biological and neurological underpinnings of addiction, and various theories emerged regarding the role of physical dependence, genetics, environmental factors, and co-occurring psychological disorders.[12]

In recent years, the "brain disease" model of addiction has gained traction. This model understands addiction as a chronic, recurring illness and treats the behavioral problems as symptoms of the disorder. [13] The latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-IV) embraces this view.[14] In a controversial move,[15] the new version of the Manual eliminates the distinction between "substance abuse" and "substance dependence" disorders, and instead offers a single clinical diagnosis of

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12. *See* BARBARA S. MCCRADY & ELIZABETH E. EPSTEIN, ADDICTIONS: A COMPREHENSIVE GUIDEBOOK (1999); JULIE NETHERLAND & BARBARA KATZROTHMAN, CRITICAL PERSPECTIVES ON ADDICTION (2012).

13. The American Society of Addiction Medicine defines addiction as a "primary, chronic disease of brain reward, motivation, memory and related circuitry" which manifests itself in biological, psychological, behavioral and emotional manners. AM. SOC'Y OF ADDICTION MED., DEFINITION OF ADDICTION, http://www.asam.org/quality-practice/definition-of-addiction (last visited Mar. 6, 2017). This model has not been universally endorsed. Some critique it for downplaying the social, economic, psychological and environmental drivers of drug use, and others take issue with the portrayal of addicts as powerless victims lacking agency, insisting that this framing undermines recovery efforts and ignores personal responsibility. *See generally* SALLY SATEL & SCOTT LILIENFELD, BRAINWASHED: THE SEDUCTIVE APPEAL OF MINDLESS NEUROSCIENCE (2013) (arguing that the addiction model downplays other drivers of drug use); Hanna Pickard, *The Purpose in Chronic Addiction,* 3 AMER. J. OF BIOETHICS NEUROSCIENCE 40 (2012) (arguing that the addiction model undermines personal responsibility).

14. *See* AM. PSYCHIATRIC ASS'N, SUBSTANCE-RELATED AND ADDICTIVE DISORDERS (2013).

15. Jennifer Matesa, *A New View of Addiction Stirs up a Scientific Storm*, THE FIX (Aug. 16, 2011), https://www.thefix.com/content/addiction-gets-medical-makeover8004. Some claim it excessively broadens the definition to capture individuals whose substance use should not be classified as a disorder, while others take issue with the "brain-disease" framing.

"substance use disorder" which exists along a continuum of severity.[16] Symptoms are grouped into four categories: impaired control, social impairment, risky use, and pharmacological criteria.[17]

When President Richard Nixon publically declared the "War on Drugs" in 1971, the disease framework for addiction was already taking hold in the medical mainstream.[18] In the preceding decade, the American Medical Association and the American Bar Association had released a report calling for treatment for drug users,[19] and the Supreme Court had issued a decision that recognized addiction as a disease.[20]

Over the next several decades, however, the nation's drug policy veered dramatically in a punitive direction. After a generation where casual drug use permeated popular culture, the public discourse regarding drug users became vitriolic, fearful, and tinged with racial undertones.[21]

The "War on Drugs" led to a proliferation of severe drug policies including harsh sentencing schemes, mandatory minimum sentences for certain crimes, and aggressive enforcement, all of which disproportionately targeted and hurt communities of color.[22] As a consequence, more than one million people were arrested for drug offenses each year throughout the 1980s and 1990s.[23] Between 1983 and 1998, the number of individuals incarcerated in state and federal prisons for drug offenses ballooned from 10,000 to almost 167,000.[24]

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16. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

17. *Id.*

18. President Richard Nixon, Press Conference (June 17, 1971).

19. JOINT COMM. OF THE AM. BAR ASS'N & THE AM. MED. ASS'N ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE? (1961).

20. *See generally* Robinson v. California, 370 U.S. 660, 666-667 (1962) (describing addiction to illegal drugs as "an illness which may be contracted innocently or involuntarily").

21. For example, Los Angeles Police Chief Daryl F. Gates testified in a Senate hearing that drug users "ought to be taken out and shot." Ronald J. Ostrow, *Casual Drug Users Should Be Shot, Gates Says*, L.A. TIMES (Sept. 6, 1990), http://articles.latimes.com/1990-09-06/news/mn-983_1_casual-drug-users.

22. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

23. Laura Sullivan, *Release of Drug Offenders Strains Communities*, NPR (Apr. 5, 2007), http://www.npr.org/templates/story/story.php?storyId=9362100.

24. Martin Y. Iguchi et al., *Elements of Well-Being Affected by Criminalizing the Drug User*, 117 PUB. HEALTH REP. S146, S147 (2002) (citing Bureau of Justice Statistics between 1983 and 1998).

The expanding reach of the criminal justice system has been devastating for people addicted to illegal drugs, particularly those already disproportionately implicated: people of color and low-income individuals.[25] The rate of substance abuse among those involved in the criminal justice system is staggering. State and federal inmates have histories of addiction at more than seven times the rate of the general public. [26] Nearly 65% of prisoners—almost 1.5 million people—met the medical criteria for substance abuse or dependence in the year preceding their arrest.[27] In 2008 and 2009, individuals with a substance use disorder were over eight times as likely to be arrested as those who did not use drugs.[28]

For the majority, addiction is not merely incidental to their incarceration. Three-quarters of state and federal prisoners report that illegal drugs played a prominent role in landing them behind bars.[29] The influence of drug addiction is most pronounced for certain categories of offenders, such as those convicted of property and drug crimes.[30]

While incarceration rates have begun to fall, decades of mass imprisonment have a long and painful aftermath.[31] As a backend

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25. While incarcerated Blacks and Latinos have lower rates of substance abuse than whites, being an addicted person of color makes one more vulnerable to incarceration, given that these groups are disproportionately incarcerated. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION (Feb. 2010), http://www.centeronaddiction.org/download/file/fid/487 [hereinafter BEHIND BARS II].

26. *Id.*

27. *Id.*

28. SUBSTANCE ABUSE & MENTAL SERV. HEALTH ADMIN., PAST YEAR ARREST AMONG ADULTS IN THE UNITED STATES: CHARACTERISTICS OF AND ASSOCIATION WITH MENTAL ILLNESS AND SUBSTANCE USE (Nov. 2012), http://media.samhsa.gov/data/2k12/DataReview/DR008/CBHSQ-datareview-008-arrests-2012.htm [hereinafter SAMHSA Report] (analyzing national data showing that 13% of individuals with a substance use disorder had been arrested compared to 1.5% for those without a substance abuse disorder). The survey notes that because this survey excludes homeless individuals and people currently incarcerated, the actual arrest rates for people with substance abuse disorders is likely significantly higher. *Id.*

29. BEHIND BARS II, s*upra* note 25, at 13.

30. *Id.* at 2.

31. *See* Keith Humphreys, *There's Been a Big Decline in the Black Incarceration Rate, and Almost Nobody's Paying Attention*, WASH. POST (Feb. 10, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/10/almost-nobody-is-paying-attention-to-this-massive-change-in-criminal-justice/?utm_term=.afabb567acdd (noting that the imprisonment rate has been falling steadily for six years,

consequence of this harsh criminal justice regime, as many as 100 million Americans—nearly one in every three adults—are plagued by a criminal record, which carries enduring and at times debilitating consequences.[32] Thirteen percent of adult males and one-third of black men have a felony conviction.[33] And the number of job-seekers with criminal records is on track to grow significantly. Every year, more than 600,000 people return from state and federal prison,[34] and nine million people cycle through jail.[35] In addition, the U.S. Sentencing Commission's new guidelines allowing early release for up to 46,000 federal drug offenders will mean that citizens will be returning home at an accelerated rate in the coming years.[36]

The ability to find and maintain employment has an enormous influence on an individual's likelihood to recidivate,[37] as

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although incarceration rates are increasing for whites); Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES (July 26, 2013), http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?_r=0; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 (2014), http://www.bjs.gov/content/pub/pdf/p13.pdf (last visited Mar. 6, 2017).

32. *See* SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS (2015), http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf (last visited Mar. 6, 2017); *see also* Alfred Blumstein & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 NAT'L INST. JUST. J. 10, 10 (2009) ("In 2006, nearly 81 million criminal records were on file in states, 74 million of which were in automated databases. Another 14 million arrests are recorded every year.").

33. Shannon, *supra* note 3, at 22–23.

34. White House Office of Press Secretary, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012 (2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf.

35. Gary Christensen et al., *Transition from Jail to Community Initiative Practice Brief: The Role of Screening and Assessment in Jail Reentry*, URBAN INST. (Apr. 2012), http://www.urban.org/sites/default/files/publication/25876/412669-The-Role-of-Screening-and-Assessment-in-Jail-Reentry.PDF.

36. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (U.S. SENTENCING COMM'N 2014); Memorandum from Office of Research & Data to Chair Saris, U.S. Sentencing Comm'n 2 (May 27, 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf.

37. *See* Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 2 (2011); John H. Laud & Robert J. Sampson, *Understanding Desistance from*

well as on prospects for recovering from addiction.[38] Unfortunately, the stigma attached to a conviction and the ease with which it can be discovered can make employment elusive. Employers are often candid about their reluctance to hire someone with a conviction; 65% admit that they would not knowingly hire an ex-offender.[39] And with the proliferation of records through online databases and a booming private vendor background check industry,[40] they need not wonder. Around 90% of employers report running criminal background checks on candidates,[41] nearly double the rate from twenty years ago.[42] The most common rationales for running these checks are fears of theft or violence in the workplace, and the threat of negligent hiring liability.[43]

Studies show that the existence of a criminal record reduces the likelihood of a callback or job offer at low-wage jobs by nearly

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Crime, in 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Mark Tonry ed., 2001) (stable employment and recovery from substance abuse correlated with lower recidivism rates).

38. *See* George E. Vaillant, *What Can Long-term Follow-up Teach Us About Relapse and Prevention of Relapse in Addiction?* 83 BRIT. J. OF ADDICTION 1147, 1152, 1154 (1988) (showing that finding stable employment is a stronger predictor of long-term successful recovery than severity or duration of addiction); E. Wolkstein et al., Work as a Critical Component of Recovery (Mar. 30. 2000) (unpublished manuscript), medicine.wright.edu/sites/default/files/page/attachments/word_work.doc.

39. J. VAN OLFEN ET AL., NOWHERE TO GO: HOW STIGMA LIMITS THE OPTIONS OF FEMALE DRUG USERS AFTER RELEASE FROM JAIL, SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POLICY (2009), https://substance abusepolicy.biomedcentral.com/articles/10.1186/1747-597X-4-10. A 2012 Society for Human Resource Management survey found that 74% would consider a nonviolent felony conviction as "very influential" reason not to hire an applicant. *See* SOC'Y FOR HUM. RESOURCE MGMT., *supra* note 5.

40. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 183–85 (2008) (identifying the increased availability of electronic records and "the emergence of a thriving private sector [criminal background checking services] industry" as two major contributors to the surging use and availability of criminal records).

41. Nearly 60% report conducting these checks on applicants for all positions. *See* SOC'Y FOR HUM. RESOURCE MGMT., *supra* note 5.

42. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 207 (2008).

43. OFFICE OF ATT'Y GEN., U.S. DEP'T OF JUSTICE, REPORT ON CRIMINAL BACKGROUND CHECKS (2006), http://www.bjs.gov/content/pub/pdf/ag_ bgchecks_report.pdf; SOC'Y FOR HUM. RESOURCE MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (2010).

50%.[44] This "penalty" nearly doubles when comparing otherwise identical black applicants.[45] Illustrative of the stigma attached to this mark, studies indicate that a criminal record becomes increasingly less influential in the hiring decision the more that the employer and applicant interact.[46]

Reentry is particularly bleak for those with histories of addiction. Fewer than half receive treatment while incarcerated,[47] and more than half relapse within months of release.[48] Indeed, drug overdose is the leading cause of death in the first year following incarceration,[49] with those possessing histories of addiction experiencing an elevated risk.[50] Substance-involved inmates have higher recidivism rates than other former offenders (52% to 31%) and are more likely to have had multiple prior arrests.[51] Among conditionally-released offenders (i.e., those on parole, supervision, or other restricted release), those with substance abuse disorders are more likely to be unemployed and to violate conditions of parole,[52] and have an average household income less than half that of their non-substance involved counterparts.[53]

Combined with the other significant factors disadvantaging this population, such as lower educational attainment, racial discrimination, economic status, and gaps in employment, it is

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44. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

45. *Id.*; *see also* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) ("While the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1.").

46. Pager et al., *supra* note 44, at 200.

47. BEHIND BARS II, *supra* note 25, at 4.

48. David Sack, *We can't afford to ignore drug addiction in prison*, WASH. POST (Aug. 8, 2014), https://www.washingtonpost.com/news/to-your-health/wp/2014/08/14/we-cant-afford-to-ignore-drug-addiction-in-prison/; Ingrid A. Binswanger et al., *Return to drug use and overdose after release from prison: a qualitative study of risk and protective factors*, 7 ADDICTION SCI. & CLINICAL PRAC. 1, 3 (2012), http://ascpjournal.biomedcentral.com/articles/10.1186/1940-0640-7-3.

49. Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. OF MED. 157, 161 (2007).

50. Ingrid A. Binswanger et al., *Mortality After Prison Release: Opioid Overdose and Other Causes of Death, Risk Factors, and Time Trends from 1999 to 2009*, 159 ANN. OF INTERNAL MED. 592, 598 (2013).

51. BEHIND BARS II, *supra* note 25, at 19–20.

52. MALLIK-KANE & VISHER, *supra* note 4, at 53.

53. BEHIND BARS II, *supra* note 25, at 58.

perhaps unsurprising that more than 60% of formerly incarcerated individuals remain unemployed one year after being released,[54] and those who find employment earn around 40% less each year than before incarceration.[55] Former offenders with histories of substance abuse, particularly women, fare worse on nearly every measure: compared to non-users, they experience worse employment prospects, higher incidence of homelessness, and increased recidivism rates compared with other returning prisoners.[56]

II. EXISTING LEGAL FRAMEWORKS AND PROTECTIONS

As millions of Americans find themselves effectively locked out of the workforce, grassroots advocates around the nation have galvanized a movement to reduce employment barriers for people with criminal records. These efforts have been particularly successful in building momentum around "Ban the Box" policies, which delay inquiry into criminal until later stages of hiring.[57] As of January 2017, twenty-four states and 150 cities and counties have adopted such policies for public sector employers.[58]

These victories, while significant, remain far from complete. Only nine states and fifteen localities have extended the ban to apply to private employers, [59] leaving most job-seekers in the private sector—which accounts for more than four-fifths of the nation's workforce—remain largely unprotected by these provisions. [60]

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54. JOAN PETERSILIA, WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC AND SOCIAL CONSEQUENCES 3 (Nov. 2000), https://www.ncjrs.gov/pdffiles1/nij/184253.pdf.

55. BRUCE WESTERN & BECKY PETTIT, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4, 11 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 120–25 (2006).

56. MALLIK-KANE & VISHER, *supra* note 4, at 45–54.

57. MICHELLE NATIVIDAD & BETH AVERY, NAT'L EMPLOYMENT LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE BARRIERS TO EMPLOYMENT OF PEOPLE WITH CONVICTION RECORDS 1 (Dec. 2016), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

58. *Id.*

59. *Id.*

60. GERALD MAYER, CONGRESSIONAL RESEARCH SERVICE, SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS (Mar. 21, 2014), https://fas.org/sgp/crs/misc/R41897.pdf. (showing that public sector jobs accounted for only 16% of American employment in 2013); Roy Maurer, *Ban-the-Box*

Furthermore, these policies typically do not limit how an employer uses or weighs criminal history information once it is permitted to obtain it.[61]

In the absence of nationwide legislation providing explicit private sector employment protections for former offenders,[62] civil rights advocates have turned to existing federal antidiscrimination law to rein in the overuse of criminal records. Litigation challenging criminal records exclusions has primarily targeted the racial disparities that these policies engender.[63] These claims are typically anchored in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, sex, religion, and national origin.[64] Part II.A discusses the disparate impact challenges brought under this statute and the limitations of this strategy.

Part II.B. turns to the Americans with Disabilities Act (ADA) provisions for those recovering from substance use disorder which should, formally at least, grant some protection for many former offenders. In practice, however, the Act has proved an underwhelming bulwark against intentional discrimination toward former substance abusers. Additionally, as described in Part II.B.1.c, the underutilization of the disparate impact provisions of the ADA has further hampered the law's efficacy in expanding opportunities for recovering drug addicts.

Movement Goes Viral, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 10, 2016) ("The majority of ban-the-box laws apply only to public employers, but blanket ban-the-box laws impacting all sectors are on the rise.").

61. Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 216 (2014).

62. *See* Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory,* 98 MARQ. L. REV. 831, 833 (2014). In 2015, President Obama unveiled an executive order delaying federal agencies' inquiries into criminal history until later in the hiring process. *See* Peter Baker, *Obama Takes Steps to Help Former Inmates Find Jobs and Homes*, N.Y. TIMES (Nov. 2, 2015), https://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html?_r=0.

63. *See* discussion *infra* Part II.A.2.

64. 42 U.S.C. § 2000e-2 (2012).

A. Title VII Disparate Impact Challenges to the Use of Criminal Records

This Section outlines the disparate treatment and disparate impact theories of discrimination under Title VII and the judicial response to claims that criminal records hiring policies constitute racial discrimination.

1. Introduction to Title VII

Title VII of the Civil Rights Act prohibits employment discrimination based on membership in the following protected classes: race, color, sex, religion, and national origin.[65] Like the ADA, it is enforced by the Equal Employment Opportunity Commission (EEOC).[66] Both intentional discrimination—"disparate treatment"—and using neutral policies or practices with discriminatory results—"disparate impact"—are forms of illegal discrimination under the Act.[67]

Plaintiffs can bring a claim of disparate treatment by presenting direct evidence of discrimination or, more commonly, by pointing to indirect evidence that supports an inference that an employment decision was discriminatorily motivated.[68] The latter form is analyzed under the burden-shifting framework introduced by the Supreme Court's *McDonnell Douglas* case.[69] Under this scheme, a plaintiff creates a rebuttable presumption of discriminatory hiring by establishing that: (1) she is a member of the protected class; (2) she is qualified for the job; (3) she applied and was rejected; and (4) the position remained open and the employer continued to seek applicants with qualifications similar to the plaintiff.[70] The employer then bears the burden of asserting a legitimate, non-discriminatory reason for its action.[71] If the employer can do so, the burden shifts back to the plaintiff to show that the employer's stated rationale is mere pretext for intentional discrimination.[72]

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65. 42 U.S.C. § 2000e-2 (2012).
66. 42 U.S.C. § 2000e-4 (2012).
67. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
68. *Id.*
69. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
70. *Id.*
71. *Id.* at 803.
72. *Id.* at 804.

Disparate impact claims, conversely, challenge facially-neutral employment policies that have discriminatory effects, regardless of the employer's intent. In a landmark decision in 1971, the Supreme Court first recognized the validity of disparate impact claims under Title VII in *Griggs v. Duke Power Co.*[73] In striking down the company's facially-neutral rule requiring workers to have a high school diploma and take an intelligence test, the Court proclaimed that the Civil Rights Act's mandate was to eviscerate the "consequences of employment practices, not simply the motivation."[74]

Congress later codified the so-called *Griggs* burden-shifting framework, which provides the basic structure of disparate impact litigation.[75] First, a plaintiff must identify the specific employment practice responsible for the imbalanced outcome.[76] In addition, she must present evidence of the policy's adverse effect, typically through statistics, showing that members of her racial, gender, or ethnic group are disproportionately excluded compared to non-group members.[77]

Once the plaintiff makes this showing, the burden shifts to the employer, who can escape liability by showing that the challenged

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73. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

74. *Id.*

75. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991). While initially, some speculated that this strategy could only be invoked in the context of racial discrimination, courts have endorsed disparate impact challenges brought by other groups protected by Title VII. *See, e.g.*, EEOC v. Synchro-Start Products, Inc., 29 F. Supp. 2d 911, 913 (N.D. Ill. 1999) (applying disparate impact to national origin grounds in analyzing English-only policy); Blake v. City of Los Angeles, 595 F.2d 1367, 1375 (9th Cir. 1979) (striking down the Los Angeles Police Department's height requirements that had disparate impact on women).

76. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion) (emphasizing that the plaintiff bears the burden of "isolating and identifying the specific employment practices" causing disparities, while acknowledging that this is made difficult by subjective, multidimensional criteria). Following the Civil Rights Act of 1991, the overall decision-making process can be analyzed as an employment process if the components of the process "are not capable of separation for analysis." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(K)(1)(B)(i) (2012)). Nevertheless, claims that identify specific hiring policies tend to be viewed more favorably by courts. *See, e.g.*, Bennett v. Nucor Corp., 656 F.3d 802, 817–18 (8th Cir. 2011) (rejecting argument that promotion procedure was incapable of separation for analysis since the procedure used both objective and subjective components).

77. Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 160 (2d Cir. 2001) ("[S]tatistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim.").

practice has a "manifest relationship" to a business necessity that justifies its continuance. [78] The employer must do so using "professionally acceptable methods" that show the employment policy is "predictive of or significantly correlated with important elements" for that particular position.[79] If the employer makes the business necessity showing, the plaintiff then has the opportunity to identify an alternative selection method that "serve[s] the employer's legitimate interest"[80] without yielding the disparities.[81] The employer must then adopt that practice or the plaintiff will prevail.[82]

Where feasible, the plaintiff's statistics should compare the actual selection rates for the different groups using the employer's applicant data. [83] Sometimes, however, a plaintiff may point to disparities between the percentages of protected class members employed by the defendant employer and the percentage of qualified class members in the relevant labor market, [84] or based upon national statistics.[85]

The disparity must be "sufficiently substantial" to create an inference that the employment policy at issue caused the imbalance.[86]

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78. *Griggs*, 401 U.S. at 424; 42 U.S.C. § 2000e-2(k)(1)(A) (2012).

79. *Griggs*, 401 U.S. at 424; Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (job related pre-employment test must be professionally validated for that particular job, not another position, unless identical to the one at issue).

80. *Albemarle Paper Co.*, 422 U.S. at 405 (requiring the alternative procedure to be as effective as the challenged criteria); *see also Watson*, 487 U.S. at 977 (O'Connor, J., concurring) (stating that the alternative practice must be as effective as the challenged practice).

81. 42 U.S.C. § 2000e–2(k)(1)(A)(ii) (2012); Allen v. City of Chicago, 351 F.3d 306, 315 (7th Cir. 2003) (stating that plaintiff must present evidence that proposed alternative policy would not result in the disparate impact).

82. 42 U.S.C. § 2000e–2(k)(1)(A)(ii).

83. Connecticut v. Teal, 457 U.S. 440, 450-456 (1982); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 585-596 (1979) (noting a preference for adverse impact statistics based on analysis of the actual applicants than data from the general population).

84. *See* NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 472 (3d Cir. 2011) (in showing statistical disparity, the relevant comparison is "between the racial composition of [the jobs at-issue] and the racial composition of the qualified . . . population in the relevant labor market.").

85. Dothard v. Rawlinson, 433 U.S. 321, 330–31 (1977) (finding national data on height and weight supported the adverse impact claim because there was no indication that local pool varied from national average); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1293 (8th Cir. 1975). This approach tends to use general or national statistics rather than the number who actually applied and were rejected.

86. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 979 (1988).

The EEOC measures this using the "80% rule": a substantial disparity is established if the selection rate for members of one group is less than 80% the rate for the group with the highest selection rate.[87] Some courts instead require statistical significance,[88] while others frame the test in terms of the standard deviation of selection rates.[89]

2. Criminal Records Policies and Title VII: Disparate Impact Claims and Obstacles

The stark racial disparities in arrest, conviction, and incarceration rates have spurred civil rights advocates, scholars, and the EEOC to critique employment policies that disfavor criminal record holders as potential Title VII disparate impact violations.[90]

Since 1982, the EEOC's position has been that hiring policies that ban all applicants with criminal records presumptively violate Title VII due to their disparate impact on blacks and Latinos, unless the employer can show that the policy is job-related and consistent with business necessity.[91] The employer can satisfy this requirement

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87. 29 C.F.R. § 1607.4(D) (2016).

88. *N. Hudson Reg'l Fire & Rescue*, 665 F.3d at 477–78 (disparities large enough that they are unlikely to be caused by chance are sufficiently substantial to raise inference of causation); Jones v. City of Boston, 752 F.3d 38, 54 (1st Cir. 2014) (stating that statistical significance, not "practical significance" or the 80% rule, is required to make out prima facie case).

89. Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) (substantial adverse impact if the selection rate is "greater than two or three standard deviations" from that of the counterparts); Meditz v. City of Newark, 658 F.3d 364, 372 (3d Cir. 2011) (statistical standard of more than two or three standard deviation is a substantial disparity for showing disparate impact).

90. U.S. Equal Emp. Opportunity Comm'n, EEOC Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [hereinafter EE OC Arrest and Conviction Enforcement Guidance] (citing statistics showing that Blacks and Latinos are arrested at 2 to 3 times the rate of the general population, and whereas approximately 1 in 17 white men are predicted to be incarcerated at some point in their lifetime, 1 in 6 Latino men and 1 in 3 Black men are expected to serve time in prison); U.S. Equal Emp. Opportunity Comm'n, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987), https://www.eeoc.gov/policy/docs/convict1.html [hereinafter EEOC Policy Statement]; MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP. LAW PROJECT, 65 MILLION NEED NOT APPLY, 4-12 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

91. EEOC Policy Statement, *supra* note 90.

by showing that its policy considers the three factors identified by the Eighth Circuit in its 1977 decision *Green v. Missouri Pacific Railroad Co.*: (1) the nature of the offense; (2) the time since the conviction or sentence; and (3) the nature of the job.[92] An employer can alternatively validate the procedure through the Uniform Guidelines on Employee Selection Procedures to show that its policy excludes only crimes that in fact relate to work performance.[93]

In 2007, the Third Circuit refined the business necessity defense as it applies to conviction policies.[94] Under this ruling, employers must show that the criminal record policy used can distinguish between candidates who pose a minimal amount of risk and those who pose a greater risk with "sufficient accuracy."[95] While ultimately finding for the defendant, the court expressed skepticism that blanket-exclusion policies could truly predict the degree of risk posed.[96] The decision suggested that expert testimony on recidivism rates or deposition that undermined the employer's credibility may have sufficed to overcome summary judgment.[97]

In 2012, the EEOC released a revised Enforcement Guidance, which emphasizes the importance of individualized, narrowly tailored criminal history policies in hiring.[98] It cites national statistics showing that blacks and Hispanics have disproportionate arrest and incarceration rates relative to whites, and states that such national data "supports a finding that criminal record exclusions have a disparate impact based on race and national origin."[99] The Guidance also announced that the Commission will take into account whether a company has a reputation for excluding applicants with a criminal record, which may have the effect of suppressing the actual adverse impact shown in the exclusion rates by deterring applicants with records from applying in the first place.[100]

The EEOC's revitalized focus on criminal records sparked a series of lawsuits which have yielded mixed results. Some companies

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92. Green v. Missouri Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).
93. 29 C.F.R. § 1607.5 (2016); *see also* EEOC Policy Statement, *supra* note 90.
94. El v. Se. Pennsylvania Transp. Auth., 479 F.3d 232, 235 (3d Cir. 2007).
95. *Id.* at 245.
96. *Id.* at 245–47.
97. *Id.* at 247 ("Had El produced evidence rebutting SEPTA's experts, this would be a different case.").
98. EEOC Arrest and Conviction Enforcement Guidance, *supra* note 90.
99. *Id.*
100. *Id.*

have settled out of court and have agreed to alter their hiring and selection policies.[101] Several federal district courts have certified classes in lawsuits brought under this theory, including one challenging the U.S. Census Bureau's practice of excluding job applicants based on criminal history.[102] A district court in another circuit rejected summary judgment in a Title VII suit against BMW's criminal background checks, though it expressed doubts that the set of individuals presented would satisfy evidentiary standards for showing disparate impact.[103]

Despite enthusiasm for this strategy, it has yet to yield large litigation successes.[104] Courts have been receptive to business-necessity defenses based on the threat that ex-offenders pose in the workplace.[105] In addition, courts have rejected plaintiffs' evidence of adverse impact for failing to meet the requisite standard of statistical proof.[106] Despite the EEOC's stance that national data

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101. Press Release, EEOC, J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records (June 28, 2013), http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm. The settlement includes a 5-year conciliation agreement requiring J.B. Hunt to review, revise if necessary, and provide additional training concerning its hiring and selection policies and practices to comply with the EEOC's guidance. *Id.*

102. Houser v. Pritzker, 28 F. Supp. 3d 222, 244 (S.D.N.Y. 2014); Mayer v. Driver Sols. Inc., No. 10-CV-1939 JCJ, 2012 WL 3578856, at *3 (E.D. Pa. Aug. 17, 2012).

103. EEOC v. BMW Mfg. Co., LLC, No. 7:13-1583-HMH, 2015 WL 5431118 (D.S.C. July 30, 2015); *see also* Waldon v. Cincinnati Pub. Sch., 941 F. Supp. 2d 884 (S.D. Ohio 2013) (school employees stated a Title VII disparate impact claim based on policy that required termination of individuals who had been convicted of specific crimes, even though the school was enforcing state law when it applied the policy).

104. *See, e.g.*, Harwin, *supra* note 8, at 12 ("Since the late 1980s, judgments have been almost uniformly grim for plaintiffs alleging that the consideration of criminal records disparately impacts black or Hispanic job applicants. Plaintiffs lost almost every case identified during this period, with judges frequently awarding summary judgment for employers."); Smith, *supra* note 61, at 203.

105. *See, e.g.*, EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 734–35 (S.D. Fla. 1989) (the employer's stated reason—that refusing to hire truck driver with felony or misdemeanor related to theft was because the drivers were in positions of trust—demonstrated business necessity, despite the fact that the employer's statements were the only indicator that the policy accurately distinguished candidates); Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008) (protecting "employee morale" found to be a sufficient business necessity to justify excluding applicant based on conviction).

106. *See, e.g.*, Smith, *supra* note 61 ("Courts in disparate impact cases—including, but not limited to those challenging employers' criminal records

can be used to show adverse impact, judges have sharply criticized this method as inadequate.[107] Other courts have demanded data demonstrating racial disparities for the particular crime or type of offense at issue, rather than simply overall conviction or arrest rates.[108] Nevertheless, the Guidance may indeed be shaping the facts on the ground, as companies may voluntarily adopt the recommendations to insulate themselves from liability.[109]

Given the current state of Title VII protections, the ADA may provide an alternative mechanism for challenging criminal record policies that avoids some of the hurdles that Title VII suits have encountered.

B. Americans with Disabilities Act (ADA) Protections for Recovering Addicts

> [P]rotections for persons who formerly used or were addicted to illegal drugs . . . is an absolutely essential component of our national war against drugs. It also helps to carry out our national commitment to encourage all those who need it to come forward for

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policies—have increasingly interpreted the standard plaintiffs must meet far more stringently, demanding that they provide a statistical analysis that is more closely tied to the employment practice at issue in the litigation."); EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 754 (6th Cir. 2014) (rejecting expert's statistics to show disparity as unrepresentative of applicant pool).

107. EEOC v. Freeman, 961 F. Supp. 2d 783, 798 (D. Md. 2013), *aff'd in part, rev'd in part sub nom.* E.E.O.C. v. Freeman, 778 F.3d 463 (4th Cir. 2015) (rejecting the national data presented because it was not representative of those applying for this job with the plaintiff); Manley v. Nat'l ProSource, Inc., No. CIV.A. H-11-2408, 2013 WL 3480385, at *8 (S.D. Tex. July 10, 2013), *aff'd sub nom.* Manley v. Invesco, 555 F. App'x 344 (5th Cir. 2014) (rejecting the use of data based on national figures that did not differentiate between different crimes). *But see* McCain v. United States, No. 2:14-CV-92, 2015 WL 1221257, at *17 (D. Vt. Mar. 17, 2015) (crediting the statistics presented in the EEOC enforcement guidance).

108. *Fletcher*, 537 F. Supp. 2d at 1030–31 (granting summary judgment on disparate impact claim because the plaintiff failed to present evidence of "racial disparities in sex offender convictions," instead relying on racial disparities for felony convictions in general).

109. *See, e.g.*, Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 142 (2014) (arguing that despite being non-binding, this Guidance "provides notice to employers of claims that might trigger enforcement attention and serves the goal of promoting voluntary compliance with the Act.").

> treatment, and to ensure that individuals who have successfully overcome drug problems will not face senseless or irrational barriers that work to impede their full reintegration into society.[110]

The Americans with Disabilities Act was enacted in 1990 to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[111] In addition to barring discrimination by covered entities, the ADA creates an affirmative obligation to provide "reasonable accommodations" so that individuals with disabilities may fully participate in society.[112]

The ADA expands upon and mirrors the structure of the Rehabilitation Act, a 1973 law prohibiting disability discrimination in federal programs.[113] Decisions interpreting the Rehabilitation Act are relevant for interpreting the ADA and vice-versa.[114]

In recognition of the prevailing "disease-model" of addiction, the ADA, like several other pieces of federal civil rights legislation, protects individuals on the basis of addiction.[115] This section will outline how recovering drug addicts are treated under Title I's employment protections.[116] The Act excludes current users of illegal drugs from protections, which, combined with the fact that the vast

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110. 135 CONG. REC. S10,765 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

111. 42 U.S.C. § 12101 (1990).

112. 42 U.S.C. § 12112(b)(5) (2012).

113. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

114. 42 U.S.C. § 12201(a) (2012); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 57–58 (4th Cir. 1995) ("To the extent possible, we adjudicate ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act."); Bragdon v. Abbott, 524 U.S. 624, 638 (1998) ("[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act.").

115. *See* 42 U.S.C. §§ 12102(1), 12210(b) (2012); Bay Area Addiction Res. & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 737 (9th Cir. 1999). The Fair Housing Act includes individuals recovering from drug or alcohol abuse in the definition of the ADA. *See* 42 U.S.C. § 3602(h) (2012); City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994). Though not mentioned in the original text of the Rehabilitation Act, the Attorney General issued an opinion in 1977 clarifying that substance abuse is a "handicap" protected by the Act. 43 Op. Att'y Gen. No. 12, 6 (Apr. 12, 1977).

116. The ADA provides protections in employment (Title I), public entities (Title II), public accommodations (Title III), and telecommunications (Title IV).

majority of employment discrimination litigation occurs for existing employees, has resulted in feeble addiction-based protections.

1. Title I: Anti-Discrimination in Employment

Title I of the ADA prohibits discrimination in employment.[117] It applies to workplaces with fifteen or more employees, state and local governments, employment agencies, and labor unions. [118] Covered employers are prohibited from discriminating against a "qualified individual on the basis of disability" in every stage of employment, including hiring, advancement, compensation, and firing.[119] The EEOC is charged with administering and enforcing this mandate.[120] A plaintiff making a challenge under Title I of the ADA must show that: (1) she is an individual with a disability within the meaning of the ADA; (2) she is qualified for the position in question; and (3) the employer discriminated against her on the basis of the disability.[121]

a. Recovering Addict as Qualified Individual with a Disability

The ADA's protections apply only to those who meet the ADA's definition of an individual with a disability.[122] An individual has a "disability" under the ADA if she (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having a disability.[123]

ADA regulations include drug addiction and alcoholism as "impairments" under the definition of disability.[124] However, while the ADA covers alcoholics who currently drink,[125] current drugs users

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117. Title I of the Americans With Disabilities Act, 42 U.S.C. §§ 12111–17 (2012).
118. 42 U.S.C.A. § 12111(b) (2012).
119. 42 U.S.C. § 12112 (2012).
120. 42 U.S.C. § 12117 (2012).
121. 42 U.S.C. § 12112.
122. 42 U.S.C. § 12102 (2012).
123. *Id.*
124. 28 C.F.R. § 35.108(b)(2) (2016).
125. DISABILITY RIGHTS SECTION, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND HIRING POLICE OFFICERS, http://www.ada.gov/copsq7a.htm (stating that an employer may require an alcoholic employee to be sober in the workplace).

are decidedly outside the scope of its protections; only an addict who has "successfully rehabilitated" and is "no longer engaging in the illegal use of drugs" can qualify as an individual with a disability.[126]

For an "impairment" to rise to the level of a "disability," it must "substantially limit[] one or more major life activities" or, if episodic or in remission, it must do so when active.[127] While "casual drug use" does not meet this standard, courts typically find addiction does.[128] Because addiction is a chronic disease, a recovering drug addict would still be considered to have a disability if a relapse would substantially limit a major life activity.[129] The 2008 amendments to the ADA expanded the list of "major life activities" to include many that are often impaired by addiction, such as sleeping, speaking, concentrating, communicating, and working.[130] In addition, many drugs interfere with major bodily functions when abused.[131]

The "current user" carve-out has made the Act's protections for drug addicts weak in practice. Employers can take adverse actions against employees or job applicants who fail or refuse to take drug

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126. 42 U.S.C. § 12114(b) (2012). Employees who are erroneously thought to be current illegal drug users *are* protected, however. *See, e.g.*, Nielsen v. Moroni Feed Co., 162 F.3d 604 (10th Cir. 1998); Jones v. Corr. Corp. of Am., 993 F. Supp. 1384 (D. Kan. 1998); Hill v. Hamilton Cty. Pub. Hosp., 71 F. Supp. 2d 936 (N.D. Iowa 1999).

127. 42 U.S.C. § 12102 (2012).

128. U.S. Equal Emp. Opportunity Comm'n, EEOC Notice No. 915.002, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), https://www.eeoc.gov/policy/docs/medfin5.pdf ("It is important to remember that past *addiction* to illegal drugs or controlled substances is a covered disability under the ADA (as long as the person is not a current illegal drug user), but past *casual* use is not a covered disability.").

129. 42 U.S.C. § 12102(d) (2012) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."); 29 CFR § 1630.2(j)(1)(vii) (2016); *see, e.g.*, MX Grp., Inc. v. City of Covington, 293 F.3d 326, 337–39 (6th Cir. 2002) (discussing the major life activities that were limited during plaintiffs' narcotics addiction and noting that the likelihood of relapse was relevant in determining whether the impairment rose to the level of a disability).

130. 29 C.F.R. § 1630.2 (2016).

131. In addition, people with histories of illegal drug addiction and drug-related crimes often face legal barriers to public housing, which one court deemed a limitation on a major life activity under the Fair Housing Act's definition of disability, which mirrors the definition under the ADA. *See* 24 C.F.R. § 982.553 (2016); United States v. S. Mgmt. Corp., 955 F.2d 914, 919 (4th Cir. 1992) (stating that Fair Housing Act should use the same definition of "handicap" as the Rehabilitation Act, and that former addicts' inability to obtain housing constituted limitation on major life activity).

tests,[132] even when addiction causes those results.[133] Though several courts have been receptive to theories that these terminations were in fact motivated by the erroneous perception that the employee was a drug addict,[134] court typically determine that such employer actions appropriately target current use.[135] Similarly, courts have found the termination of workers for drug possession or other addiction-related crimes lawful.[136]

In addition, employers are permitted to promulgate rules prohibiting drug or alcohol use at the workplace and fire those who do not comply, irrespective of addiction-status.[137] Employers are also permitted to "adopt or administer reasonable policies or procedures"

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132. The ADA explicitly allows—though it does not encourage—drug testing job applicants and employees, and it excludes such tests from the "medical examinations" category, which the Act restricts. 42 U.S.C.A. § 12114(d)(2) (2012).

133. Leaumont v. City of Alexandria, 582 F. App'x 407, 408 (5th Cir. 2014) (determining that employer's removal of a Bus Department Transit manager from safety-sensitive functions after he missed a drug test was lawful under the ADA).

134. Jones v. Corr. Corp. of Am., 993 F. Supp. 1384, 1387 (D. Kan. 1998) (finding that former employee who tested positive for marijuana established prima facie case of disability discrimination on the basis of being erroneously regarded as an addict); *see also* Hill v. Hamilton Cty. Pub. Hosp., 71 F. Supp. 2d 936, 950 (N.D. Iowa 1999) (nurse who was fired after being accused of using cocaine stated an ADA claim alleging that she was fired due to employer's erroneous perception that she was addicted to drugs).

135. *See, e.g.*, Jones v. Boston, 752 F.3d 38, 58–59 (1st Cir. 2014) (police department who fired police officers after failing drug test did not violate the ADA because the drug test was aimed at determining whether employee was currently using drugs, not whether he was an addict); Daniels v. City of Tampa, No. 8:09-CV-1151T33AEP, 2010 WL 1837796, at *1 (M.D. Fla. Apr. 12, 2010); Muhammed v. City of Philadelphia, 186 F. App'x 277, 279 (3d Cir. 2006) (finding that employee who was fired after telling supervisor he would fail drug test and then refusing to submit to testing was not protected for being "erroneously regarded" as a drug user, since he was, by his own admission, currently using drugs).

136. Pernice v. City of Chicago, 237 F.3d 783, 784 (7th Cir. 2001) (finding that the City did not violate the ADA by terminating employee who was arrested and charged with disorderly conduct and possession of cocaine while employed, even though he subsequently underwent treatment and remains drug-free); Davis-Dietz v. Sears, Roebuck & Co., 284 F. App'x 626, 631 (11th Cir. 2008) (granting employer summary judgment on ADA claim for firing worker who violated workplace rule requiring employees to report any arrests even though there was a question as to whether the DUI arrest in question was caused by alcoholism); Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (upholding agency finding that dismissal for off-duty cocaine sale to co-worker did not violate ADA).

137. *See, e.g.*, Collings v. Longview Fibre Co., 63 F.3d 828, 830 (9th Cir. 1995) (finding no ADA violation when employer fired employees who engaged in "drug-related misconduct" in the workplace).

to ensure that employees with a history of addiction are no longer using.[138] Some courts have interpreted this provision to allow testing former substance abusers more frequently than other employees.[139]

Furthermore, the malleability of what constitutes "current" has given courts expansive discretion to exclude litigants from protection, even when they have taken drastic steps toward recovery.[140] The Third Circuit, for example, upheld the termination of an employee after he sought treatment for his heroin addiction with his employer's "confidential" assistance program, finding he qualified as a current user.[141] Other circuits declare a substance abuse issue to be "current" if it is an "on-going problem."[142] Such an expansive definition places a plaintiff in a catch-22: to qualify for protection, she must establish that her past drug abuse is no longer a problem, while simultaneously asserting that it substantially limits a major life activity.

b. Intentional Discrimination on the Basis of Disability

Claims of intentional disability discrimination proceed in a manner similar to those brought under Title VII. Courts apply the *McDonnell Douglas* burden-shifting approach described in Part II.A.1

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138. 42 U.S.C. § 12114(b) (2012).

139. Buckley v. Consol. Edison Co. of New York, 155 F.3d 150, 154 (2d Cir. 1998).

140. Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 520 (2d Cir. 1991) (noting than individual is a "current substance abuser" when the problem is recent enough to "prevent him or her from performing his essential duties"); Gilmore v. Univ. of Rochester Strong Mem'l Hosp. Div., 384 F. Supp. 2d 602, 612 (W.D.N.Y. 2005) (finding that an employee terminated for tardiness allegedly related to cocaine addiction was not disabled for the purposes of the ADA because she was a current user, despite subsequent entry to rehab); Hoffman v. MCI Worldcom Comm., Inc., 178 F. Supp. 2d 152, 156 (D. Conn. 2001) (concluding that the defendant "is entitled to summary judgment because the plaintiff was 'currently engaging in illegal drug use' when [the defendant] took action"); Skinner v. City of Amsterdam, 824 F. Supp. 2d 317, 333 (N.D.N.Y. 2010); Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997) (construing "current" to mean that the drug use "has not yet permanently ended").

141. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 978 (3d Cir. 1998).

142. *See, e.g.*, Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999) ("Under the ADA, 'currently' means that the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem."); Mauerhan v. Wagner Corp., 649 F.3d 1180, 1187 (10th Cir. 2011).

to challenges based on indirect evidence.[143] A plaintiff establishes a prima facie case by showing that: (1) she meets the definition of an individual with a disability; (2) she is "otherwise qualified" for the position, meaning she can perform the "essential functions" of the job or, if her disability prevents her from doing so, she is capable of doing so with a reasonable accommodation;[144] (3) she faced an adverse employment action (i.e., being fired, demoted, or rejected as an applicant); and (4) the position in question was filled by a non-disabled person, or that similarly situated people without disabilities were otherwise given more favorable treatment.[145]

The burden then shifts to the employer to articulate a valid, non-discriminatory reason for the adverse action.[146] If the employer makes this showing, the burden returns to the plaintiff to show that the proffered reason is mere pretext.[147]

In *Raytheon v. Hernandez*, the Supreme Court considered the ADA's protection for recovering addicts in the context of neutral "no-rehire" policies.[148] The plaintiff in that case, Joel Hernandez, had previously been employed with the company for twenty-five years, when he was terminated after arriving at work under the influence of

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143. Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (applying *McDonnell Douglas* burden-shifting analysis to ADA disparate treatment claim); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996) (noting that "[i]t is now axiomatic" that the McDonnell Douglas framework "guides an analysis of claims brought under the ADA").

144. 42 U.S.C. § 12111(8) (1990).

145. Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995).

146. *Raytheon*, 540 U.S. at 54-55.

147. In some circuits, plaintiffs can also prevail by showing that while the employer's stated rationale may be legitimate, the adverse action was also partially motivated by the employee's disability (i.e., the "mixed-motive" theory). EEOC v. LHC Group, Inc., 773 F.3d 688, 702 (5th Cir. 2014) (recognizing that discrimination need not be the only motivating reason for the action, and that a plaintiff will survive summary judgment by showing employers' 'mixed motive' for adverse action). Other courts require disability to be the "but-for" cause of the adverse action. *See, e.g.*, Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (finding the ADA does not authorize mixed-motive claims and thus the plaintiff must show that his employer would not have fired him "but-for" his disability); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 332 (6th Cir. 2012) (interpreting the ADA to require but-for causation). *But see* John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements,* 83 GEO. L.J. 2009, 2042 (1995) (arguing that while the ADA requires but-for causation, lower courts commonly apply a "dynamic approach" that looks to motivating factor causation instead).

148. *Raytheon*, 540 U.S. at 46.

alcohol and testing positive for cocaine.[149] Following several years of successful treatment and sobriety, Mr. Hernandez reapplied for the position and included a letter of reference from his Alcoholics Anonymous counselor.[150] Raytheon rejected his application, citing the company's policy against rehiring former employees who had previously been terminated for violating workplace rules.[151]

Analyzing the case as a disparate treatment claim under *McDonnell Douglas*, the Court found that this neutral no-hire policy constituted a legitimate non-discriminatory reason for the employer's decision, thus flipping the burden back to Hernandez.[152] The Court remanded the case to determine whether Hernandez could make this pretext showing, although it voiced skepticism that he could do so given that the hiring manager was seemingly unaware of his history of addiction.[153]

Critically, the Court refused to consider the plaintiff's disparate impact argument, which it determined he had waived by not raising earlier in litigation. [154] It did, however, expressly acknowledge that disparate impact claims are cognizable under the ADA.[155]

Certain categories of claims have achieved slightly more favorable outcomes, particularly those involving the use of medication-assisted treatment, such as methadone, which is used primarily for opiate addiction. For example, a Pennsylvania court found that an employer that had rescinded a conditional employment offer after the applicant tested positive for methadone had failed to rebut the presumption that it had discriminated against the applicant because he was a recovering addict.[156] In addition, some

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149. *Id.* at 46–47.
150. *Id.* at 47.
151. *Id.*
152. *Id.* at 54–55, 55 n.7.
153. *Id.* at 44, 50–51.
154. *Id.*
155. *Id.* at 44, 53 ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA.").
156. EEOC v. Hussey Copper Ltd., 696 F. Supp. 2d 505, 518 (W.D. Pa. 2010) (emphasizing that the employer failed to establish that it had engaged in the individualized inquiry required to show an individual is not "otherwise qualified"). After three days of a non-jury trial, the parties reached a settlement agreement under which the employer, Hussey Copper, paid $85,000 and entered into a five-year consent decree that requires the employer to rehire the plaintiff and to take steps to reduce disability discrimination. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, Hussey Copper To Pay $85,000 To Settle

judges have granted injunctions against zoning ordinances banning drug rehabilitation facilities or methadone clinics under Title II of the ADA, which bars discrimination by public entities.[157]

Nevertheless, disparate treatment litigation has thus far garnered lackluster protections for recovering drug addicts. As the *Raytheon* case illustrates, many plaintiffs struggle to show that they are no longer current users and therefore qualify as "disabled," while simultaneously demonstrating that the employer was aware of and motivated by their status as recovering addict.[158]

c. The ADA's Inchoate Disparate Impact Framework

In addition to intentional discrimination, the ADA also prohibits neutral practices and policies that have a disparate impact

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EEOC Disability Discrimination Lawsuit (Feb. 11, 2011), https://www.eeoc.gov/eeoc/newsroom/release/2-11-11.cfm. The EEOC reached a similar settlement agreement with a Baltimore temporary labor agency that denied a woman a position after she disclosed that she would test positive for methadone in the pre-employment drug test. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, Randstad Will Pay $50,000 to Settle EEOC Disability Discrimination Lawsuit (Feb. 8, 2016), https://www.eeoc.gov/eeoc/newsroom/release/2-8-16a.cfm.

157. *See* Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 40 (2d Cir. 1997) (affirming a preliminary injunction granted against city zoning ordinance, which excluded outpatient drug-and-alcohol rehabilitation treatment center in violation of Title II of the ADA and the Rehabilitation Act.); Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 727–28 (9th Cir. 1999) (granting an injunction against a city ordinance that banned a methadone clinic because it violated Title II); *see also* Press Release, U.S. Dep't of Justice, Justice Department Settles Housing Discrimination Lawsuit Against Dalton Township, Michigan (Feb. 10, 2011), https://www.justice.gov/opa/pr/justice-department-settles-housing-discrimination-lawsuit-against-dalton-township-michigan (announcing court-approved settlement and consent decree between a Michigan township and the Department of Justice in a lawsuit alleging that the town had violated the Fair Housing Act and Title II of the ADA by refusing to issue a special permit to allow a group home for individuals recovering from addiction to continue operating). *But see* A Helping Hand, L.L.C. v. Baltimore County, Md., 515 F.3d 356, 366–67 (4th Cir. 2008) (county zoning ordinance that prevented methadone clinic from operating at a chosen location was not unlawful because jury could have reasonably found addiction to not interfere with "major life activities" defined under the ADA).

158. Dovenmuehler v. St. Cloud Hosp., No. 05-1894 MJDRLE, 2006 WL 3463394, at *9 (D. Minn. Nov. 30, 2006), *aff'd*, 509 F.3d 435, 441 (8th Cir. 2007) (finding that there was "no basis to make the leap" that the hospital's knowledge that the employee had stolen narcotics meant that she had a substance use issue).

on people with disabilities.[159] The statute defines discrimination to include "utilizing standards, criteria, or methods of administration that have the *effect* of discrimination on the basis of disability",[160] and "using qualification standards, employment tests or other selection criteria that screen out or *tend to screen* out an individual with a disability or a *class of individuals* with disabilities."[161] Such practices violate the Act unless the employer can show that they are "job-related for the position" and consistent with business necessity, and that the discriminatory effects cannot be cured with a reasonable accommodation.[162] The implementing regulations explicitly refer to "disparate impact" claims, further clarifying this theory's availability under the ADA.[163]

Despite its explicit inclusion and recognition by the Supreme Court, the ADA's disparate impact doctrine has largely been ignored by plaintiffs,[164] fumbled by the courts, and neglected in civil rights scholarship.[165] The duty to provide reasonable accommodation may partially account for this oversight. Because the accommodation

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159. *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2525 (2015) ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").

160. 42 U.S.C. § 12112(b)(3)(a) (2012) (emphasis added).

161. 42 U.S.C. § 12112(b)(6) (2012) (emphasis added).

162. 42 U.S.C. § 12113 (2012).

163. 29 C.F.R. § 1630.15 (2016); 29 C.F.R. app. § 1630.15 (2016) (Interpretive Guidance on Title I defines disparate impact in context of Title I of ADA as "uniformly applied criteria hav[ing] an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities.").

164. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 593 (2004) (noting the lack of disability disparate impact cases); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 19 (1996) (noting that ADA litigation "responds to the complexities in the inherently unique circumstances of many disabled individuals. Few of the cases brought under the ADA are class actions, and fewer still rely upon the theory of disparate impact."). A recent empirical study identified just twenty disparate impact claims under Title I of the ADA from 1992 through 2012. Sarah Johnston, *Unequal Treatment or Uneven Consequence: A Content Analysis of Americans with Disabilities Act Title I Disparate Impact Cases from 1992—2012,* 35 DISABILITY STUD. Q. 3 (2015), http://dsq-sds.org/article/view/4938/4027.

165. *See, e.g.*, Stein, *supra* note 164 (noting that disability is often excluded in conversations about civil rights disparate impact strategy).

requirement also aims to uproot unintentional burdens, it has been conflated with—and sometimes thought to supplant—disparate impact protections. [166] Group-based employment discrimination theories have not flourished in the disability context, likely because of a perceived incompatibility with the "individualized inquiry" that is the touchstone of disability law, as well as the notion that disabilities are too varied to allow class-based claims.[167]

Given all of this, a coherent disability-based theory of disparate impact has yet to emerge. The rare ADA disparate impact case is instead often analyzed under the Title VII *Griggs* framework—in part because plaintiffs often frame their claims that way. As described in Part II.A.1, under this method, a prima facie case typically requires statistical evidence showing that an employment practice disproportionately hurts members of a protected class compared to non-class members.

Title VII's demanding statistical requirements are ill-suited for ADA claims, however, and plaintiffs subjected to that standard have struggled to make out prima facie cases.[168] As commentators

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166. Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003) (clarifying that reasonable accommodation and disparate impact claims are distinct under the ADA); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652–66 (2001) (discussing the overlap between disparate impact liability and the duty of reasonable accommodation).

167. Michael Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 86 (2006); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2319 (2006) (noting that "individual claims under the ADA have eclipsed claims of disparate impact").

168. *See, e.g.*, Lopez v. Pac. Mar. Ass'n, 657 F.3d 762, 767 (9th Cir. 2011) (stating that plaintiff failed to present evidence that a collective bargaining agent's practices had a disparate impact on recovered drug addicts); Prewitt v. U.S. Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) (stating that courts should analyze Rehabilitation Act disparate impact cases under *Griggs* except "when assessing the disparate impact of a facially-neutral criterion, [they] must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because 'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.'"); Hanrahan v. Blank Rome LLP, No. CV 14-06562, 2015 WL 5783676, at *5 (E.D. Pa. Oct. 5, 2015) (finding that a law student failed to demonstrate that law firms' failure to hire him as a summer associate was the result of any specific employment practice or policy, as required to establish disparate impact claim under the ADA); Smith v. Miami-Dade Cty., 621 F. App'x 955, 959 (11th Cir. 2015) (dismissing a ADA disparate impact claim because showing that "a few people" were affected by the policy does not meet substantial comparative evidence of discriminatory effect on the disabled).

have noted, the labor market information upon which Title VII depends to show statistical disparities between groups is largely unworkable in the disability context.[169] The Census Bureau measures disability only in very crude categories that fail to account for its many variations.[170] Furthermore, whereas employers are legally required to keep statistics on their selection rates by race, gender, and ethnicity, these obligations do not extend to disability.[171] In fact, the ADA itself imposes barriers to obtaining such information by restricting inquiries into workers' disability status.[172]

In light of these difficulties, the EEOC interprets the method for showing disparate impact violations under the ADA as diverging from Title VII doctrine. While acknowledging the general similarity to the Title VII framework, the Commission explicitly disavows any requirement that plaintiffs produce statistical evidence to demonstrate adverse impact.[173] The EEOC Technical Assistance

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169. Karlan & Rutherglen, *supra* note 164, at 18 ("Labor market information plays virtually no role under the ADA.").

170. The U.S. Census Bureau currently derives its only subnational disability data from the American Community Survey (ACS), which measures disability in six broad categories: hearing, vision, cognitive, ambulatory, self-care, and independent living difficulty. *See* MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, (2012) 70-131, https://www.census.gov/content/dam/Census/library/publications/2012/demo/p70-131.pdf.; U.S. CENSUS BUREAU, *Disability—American Community Survey (ACS)*, https://www.census.gov/people/disability/methodology/acs.html. The decennial census stopped tracking disability after the 2000 Census; U.S. CENSUS BUREAU, *Decennial Census of Population and Housing*, https://www.census.gov/people/disability/methodology/acs.html.

171. 42 U.S.C. § 2000e-8 (2012); 29 C.F.R. § 1607.4 (2016) (requiring employers to maintain records regarding the race, ethnicity, and gender of its employees).

172. 42 U.S.C. § 12112(d)(2)(A) (2012); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58–59 (4th Cir. 1995) ("Under the [Americans with Disabilities] Act, even the employer is generally forbidden from inquiring about the disability of an employee or prospective employee.").

173. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOCM1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 4.3.2 (1992) [hereinafter EEOC MANUAL] ("It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard."); Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 202–03 (2005) (noting that the method of proving disparate impact under the ADA differs from the method under Title VII, making it easier for an ADA plaintiff to utilize this theory of discrimination).

Manual explains that the nature of disability requires this modification:

> Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on 'people with disabilities.'
>
> Often, there may be little or no statistical data to measure the impact of a procedure on any "class" of people with a particular disability compared to people without disabilities.

As noted previously, these statistical comparisons are used in Title VII cases to show that the selection procedure discriminates on the basis of the protected trait at issue.[174] Showing that a particular policy disproportionately excludes black applicants relative to white applicants, for example, establishes that the exclusionary effect is "on the basis of race."[175]

Because analogous data is frequently unavailable for disability cases, the plaintiff can offer other types of evidence to show a "nexus" between the selection criteria's exclusionary effect and the disability.[176] In an informal discussion letter, the EEOC sheds light on the rationale underlying the "nexus" requirement with an example: an employer's requirement that a job applicant has a high school diploma would violate Section 12112(b)(6) if it tended to screen out people whose learning disability interfered with graduation, but not if it happened to disproportionately screen out students with

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174. See *supra* Part II.A.1.

175. 29 C.F.R. § 1607.4; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (statistical comparison evidence must show that employment practice "caused the exclusion of applicants for jobs or promotions because of their membership in a protected group").

176. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,731 (July 26, 1991) (explaining in section-by-section analysis of final regulation that the ADA proscribes procedures causing an adverse impact on an individual with a disability, or class of people with disabilities, only when there is a "nexus between the exclusion and the disability. A selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section.").

learning disabilities who simply decided not to take the required courses for reasons unrelated to their impairment.[177]

Evidence that can be used to show this "because of disability" link includes the plaintiff's own experience,[178] "expert and non-expert testimony about disabilities and their effects, and even a common sense causation analysis regarding the inevitable impact of particular policies upon persons with certain types of disabilities."[179]

While the EEOC Manual and the agency's other informal statements do not have the force of law, informal administrative interpretations and guidance do present strong persuasive authority to courts.[180] And given the dearth of case law on the matter, several

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177. U.S. Equal Emp. Opportunity Comm'n, Informal Opinion Letter on High School Diploma Requirement and Disparate Impact under the ADA and Title VII (June 11, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/ada_title_vii_diploma_disparate_impact.html. It bears emphasizing that this does not require the plaintiff to show the employer was subjectively aware of this correlation to establish a disparate impact violation.

178. *See* EEOC MANUAL, *supra* note 173 (noting that because statistical data is seldom available, "the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability").

179. Brief for American Association of People with Disabilities et al. as Amici Curiae Supporting Plaintiff's Petition for Rehearing, Lopez v. Pac. Mar. Ass'n, 657 F.3d 762 (9th Cir. 2011), http://bbi.syr.edu/publications/blanck_docs/AmicusBrief_00231513.PDF (elaborating on the "common sense causation analysis" by explaining that requiring applicants to use a fill-in-the-bubbles Scantron sheet would have a disparate impact on applicants without hands, compared to those with hands). *See also* Brief of U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Supporting of Petition for Rehearing, Lopez v. Pac. Mar. Ass'n, 657 F.3d 762 (9th Cir. 2011), http://www.eeoc.gov/eeoc/litigation/briefs/lopez.txt [hereinafter EEOC Amicus Brief] (stating agency had "long taken the position that it is unnecessary and often will be impractical to require any statistical showing of disparate impact" on disabilities).

180. Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (agency manuals and enforcement guidelines are entitled to "respect" according to their "power to persuade"); Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1352 (2015) (analyzing EEOC interpretative guidance of the ADA using the *Skidmore* factors, although ultimately refusing to grant "special weight" to EEOC's interpretive guidance of the ADA because the guideline had been issued after the Supreme Court had granted certiorari and thus its timing, consistency and thoroughness of consideration "severely limit" its "power to persuade"); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 (2003) (resorting to the EEOC compliance manual the interpretation that a shareholder-director qualifies as an "employee" under the Act, which, although not binding, constitutes a "body of experience and informed judgement").

circuits have incorporated parts of the agency's analysis. The Second Circuit expressed that a "more qualitative comparison" can be used to establish disparate impact under the ADA.[181] Rather than strict statistical comparisons, plaintiffs could show a "significant correlation" between the particular disabled group and the challenged policy.[182] The Fifth Circuit has adopted the EEOC stance that an ADA plaintiff can establish disparate impact by "demonstrating an adverse impact on himself rather than on an entire group."[183] In the context of disability disparate treatment claims, similar concerns about the feasibility of presenting Title VII-type comparator evidence prompted the Fourth Circuit to "reformulate" the prima facie test for intentional discrimination.[184]

The case for a modified ADA disparate impact standard is particularly strong in the context of disabilities that are invisible and stigmatized, such as substance use disorders and psychiatric illnesses.[185] Requiring statistical evidence would essentially eliminate this method of combatting discrimination for such claims, as illustrated in *Lopez v. Pacific Maritime Association*.[186] There, the

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181. Tsombanidis v. W. Haven Fire De't, 352 F.3d 565, 577 (2d Cir. 2003).

182. *Id.*; *see also* Grider v. City & Cty. of Denver, No. 10-CV-00722-MSK-MJW, 2012 WL 1079466, at *3 (D. Colo. Mar. 30, 2012) (acknowledging that ADA plaintiffs could make out a disparate impact claim by making a "qualitative showing that they are disproportionately impacted" by the policy at issue); McDaniel v. Bd. of Educ. of City of Chicago, No. 13 C 3624, 2013 WL 3872807, at *5 (N.D. Ill. July 25, 2013) (denying a employer's motion to dismiss disparate impact claim supported by qualitative evidence). *But see* Kintz v. United Parcel Serv., Inc., 766 F. Supp. 2d 1245, 1254 (M.D. Ala. 2011) (finding that an ADA disparate impact claim must be supported by "some numbers or proportional statistics" showing adverse effect on group).

183. Gonzales v. City of New Braunfels, 176 F.3d 834, 839 (5th Cir. 1999). *But see* Femino v. NFA Corp., 274 F. App'x 8, 10 (1st Cir. 2008) (finding that evidence that a policy had a negative impact on the plaintiff was insufficient to state a claim of disparate impact against individuals suffering from fibromyalgia).

184. Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58–59 (4th Cir. 1995) (explaining the need to adjust the prima facie test for disability cases where, unlike with race, age or gender, the plaintiff is frequently unable to determine whether the replacement employee is disabled and, moreover, "even if the plaintiff could obtain such information, requiring a showing that the replacement was outside the protected class would lead to the dismissal of many legitimate disability discrimination claims, since most replacements would fall within the broad scope of the ADA's protected class").

185. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 736 (9th Cir. 1999) ("Few aspects of a handicap give rise to the same level of public fear and misapprehension as the challenges facing recovering drug addicts.").

186. Lopez v. Pac. Mar. Ass'n, 657 F.3d 762, 769 (9th Cir. 2011).

plaintiff claimed a hiring policy had a disparate impact on recovering addicts, which he attempted to show using the Title VII 80% test.[187] As litigation progressed, however, he sought to change his theory to instead rely upon the modified disability disparate impact framework, which the EEOC supported in an amicus brief.[188]

The Ninth Circuit rejected this shift, finding that he had waived this alternative argument.[189] Instead, it analyzed the case using the Title VII framework, under which the court determined he had failed to establish the adverse impact. According to the court, a successful claim would have required statistics either comparing the number of qualified former addicts in the labor market with the number of former addicts employed by the company or data showing that the hiring policy disproportionately excluded former addicts relative to non-former addicts.[190]

The dissenting judge in *Lopez* called demanding this sort of statistical data "manifestly unreasonable."[191] Underscoring the particular sensitivities surrounding addiction, he wrote:

> One of the primary limitations suffered by individuals recovering from addiction is the continuing stigma associated with their prior drug and alcohol use. It is not an accident that nearly every 12–step support group includes the word "anonymous" in its name. Thus, statistical evidence on recovering addicts is, as a practical matter, rarely available.[192]

Indeed, while attitudes may be evolving, recovering addicts remain targets of fear and sometimes outright hostility. In a 2013

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187. Lopez's statistics compared the overall selection rate with the selection rate for recovering addicts who had previously applied and were rejected for failing a drug test. *Lopez*, 657 F.3d at 767. In his petition for rehearing, Lopez asserted his claim under the alternative ADA disparate impact framework. The Court refused to consider this theory, however, which it determined he had waived: "We emphasize that we express no view on what application, if any, § 12112(b)(6) would have to the facts . . . . That question is not before us." *Id.*

188. *See* EEOC Amicus Brief, *supra* note 179.

189. *Lopez*, 657 F.3d at 766-767.

190. *Id.* at 767. Under this rule, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. § 1607.4 (2016).

191. *Lopez*, 657 F.3d at 769 (Pregerson, J., dissenting).

192. *Id.*

nationwide study, less than one-quarter of those surveyed said they would be willing to work with someone addicted to drugs and nearly two-thirds said they believed an employer should be able to deny employment on the basis of addiction.[193] Nearly 70% of employers say their company would be "uncomfortable" with hiring someone with a history of substance abuse, and experts estimate that a job applicant who is honest about being in recovery will be rejected 75% of the time.[194]

This continued prejudice breeds secrecy, making reliable large-scale employment data unattainable. It also underscores both the need for meaningful employment protection for recovering addicts and the practical difficulties in doing so under the prevailing legal understandings.

III. PROPOSAL: CHALLENGING CRIMINAL RECORDS INQUIRIES UNDER THE DISABILITY DISPARATE IMPACT THEORY

This Note argues that disparate impact claims under the ADA provide another avenue for limiting the use of criminal records in hiring. Drug addicts are overrepresented at every stage of the criminal justice system.[195] Because excluding candidates with a criminal record tends to screen out a class of individuals with disabilities—those with a history of addiction to illegal drugs—and has the effect of discrimination based on that status, such policies should violate the ADA unless an employer can show that the policy is job-related and consistent with business necessity. This claim is particularly strong under the EEOC's disability disparate impact standard, a framework that is sensible in cases of "invisible" and highly stigmatized disabilities, like drug addiction.

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193. News Release, John Hopkins School of Public Health, Study: Public Feels More Negative Toward People With Drug Addiction Than Those With Mental Illness (Oct. 2014), http://www.jhsph.edu/news/news-releases/2014/study-public-feels-more-negative-toward-people-with-drug-addiction-than-those-with-mental-illness.html.

194. Alexandra Marks, *Jobs Elude Former Drug Addicts*, CHRISTIAN SCI. MONITOR (June 4, 2002), http://www.csmonitor.com/2002/0604/p02s02-ussc.html; Teresa Scheid, *Employment of People with Mental Disorders: Business Response to the ADA's Challenge*, BEHAV. SCI. L. (1999) (nearly 70% of employers stating their company would be "uncomfortable" or "very uncomfortable" hiring someone with a history of substance abuse).

195. See *supra* Part I.A.

A. Criminal Inquiries Adversely Impact Recovering Addicts

As described in Part I, substance abuse disorder and criminal justice involvement are tightly interwoven. The prevalence of substance abuse for those at every stage of the system dwarfs the national rate.[196] State jail and prison inmates are seven times more likely, and parolees four times more likely, to have a substance use disorder compared to a member of the general public.[197] Those with a substance use disorder are more than eight times as likely to be arrested as those without, and compared with other arrestees, more likely to have prior contact with the criminal justice system.[198]

While it is estimated that around 30% of the general population has been arrested, a large-scale study of Americans in recovery from drug addiction found that over 50% had at least one prior arrest. [199] About one-third of those in recovery had been incarcerated at least once.[200] By comparison, it is estimated that 6.6% of the general public and over 32% of black men born in 2001 will face imprisonment at some point during their lifetime.[201]

Admittedly, these types of statistics would likely be insufficient to establish adverse impact under existing Title VII jurisprudence, which would require comparing the criminal history of recovering drug addicts with those never addicted, and would likely demand data reflecting the actual applicant pool or tailored to the particular labor market.[202]

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196. *See, e.g.*, BEHIND BARS II, *supra* note 25, at 5; NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUM. SERV., PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS (2014), https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice_0.pdf.

197. BEHIND BARS II, *supra* note 25, at 5.

198. SAMHSA Report, *supra* note 28 (noting that due to the fact that the survey excludes homeless individuals and people currently incarcerated, the actual arrest rates for people with substance abuse disorders is likely significantly higher).

199. ALEXANDRE LAUDET, FACES & VOICES OF RECOVERY, LIFE IN RECOVERY: REPORT ON THE SURVEY FINDINGS 4 (Apr. 2013), http://facesandvoices ofrecovery.org/resources/faces-voices-publications.html.

200. *Id.*

201. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (Aug. 17, 2003), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=836 (finding that, as of 2001, 2.7% of the general population and over 16% of black men had been imprisoned).

202. While collecting this data poses practical barriers, the evidence cited here indicates that it presumably *would* show the requisite relationship if obtained. Indeed, the disproportionate arrest rates suggest that people with

The argument is much stronger under the more flexible disability disparate impact framework. Under that standard, recovering drug addicts could make a prima facie case by showing that a criminal record policy, in effect, screened them out from consideration on the basis of their disability. Of course, to advance this claim, the plaintiffs would need to be otherwise qualified individuals with a disability. This would require, in addition to relevant job qualifications, that they not be current users—a caveat which, as noted earlier, eliminates many returning citizens.[203]

B. "On the Basis of Disability": Nexus between Criminal and Addiction History

To show that a criminal records policy screens out candidates "because of disability," a plaintiff would need to show a nexus between her criminal history (which caused her to be rejected) and her past drug addiction.[204]

For many, addiction is closely wedded with their interaction with the criminal justice system. Under the prevailing disease model,[205] drug addiction's symptoms include impairments in behavior control, inability to abstain, and "pathologically pursuing the reward of drug use."[206] These symptoms in turn, frequently result in criminal sanctions. Indeed, the DSM-IV substance-abuse diagnostic criterion

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histories of addiction are more likely to have a criminal record than the general population.

203. Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1062 (7th Cir. 2000) (finding that plaintiff must meet the definition of disability to make out a disparate impact claim).

204. 29 CFR § 1630.10(a) (2016); *see, e.g.*, Bryan v. Wal–Mart Stores, Inc., No. 14-35235, 2016 WL 6212004, at *1 (9th Cir. Oct. 25, 2016) (finding that a pharmacist who was fired due to policy dismissing any employee with a history of adverse pharmacy board action failed to establish a "causal nexus" between his forgery charges, which caused the pharmacy board to take disciplinary action, and his former drug addiction).

205. This claim is similarly persuasive under the social model of disability, which distinguishes between impairments, which are physical or psychological variations between humans, and disabilities, which are society-imposed restrictions or domination on the basis of that impairment. *See, e.g.*, Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies,* 42 COLUM. HUM. RTS. L. REV. 403, 428 (2011).

206. *See* AM. SOC'Y OF ADDICTION MED., *supra* note 13. It should be noted that drug use need not be wholly involuntary to receive protection.

includes "recurrent substance-related legal problems (e.g. arrests for disorderly conduct)."[207]

This is not to suggest that those struggling with addiction lack volition, nor that addiction supplants the role that race, socioeconomic status, education, and gender play in who the United States incarcerates. Additional significant factors notwithstanding, there is a correlation between addiction and criminal behavior, as well as involvement in the criminal justice system.[208] Research shows a significant, while complicated, relationship between drug addiction, particularly narcotic addiction, and criminal activity, particularly property crime, drug trafficking, and prostitution.[209]

Surveys of prisoners reinforce the notion that crimes are often manifestations of substance abuse disorder: 30% of property offenders and 26% of drug offenders in state prison report committing the crime for drug money. [210] Illegal drugs played a role in landing three-quarters of inmates behind bars.[211] When the very symptoms of

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207. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 182 (4th ed. 1994).

208. Michael A. Powell, *A Comprehensive Analysis of the Drug-Crime Relationship*, S. ILL. U. (Jan. 21, 2011), http://opensiuc.lib.siu.edu/gs_rp/100. One explanation for the relationship between addiction and crime is the "economic compulsion model", which posits that the high cost of increasing drug use propels the user to property crimes, which shift from theft to burglary with increasing severity as use escalates. Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 J. DRUG ISSUES 493, 146–47 (1985); Helene Raskin White & D.M. Gorman, *Dynamics of the Drug-Crime Relationship*, *in* THE NATURE OF CRIME: CONTINUITY AND CHANGE 151, 187 (U.S. Dept. of Justice ed., 2000), http://www.dldocs.stir.ac.uk/documents/02d.pdf (noting that "for addicts with little prior criminal involvement, the data support an economic motivation model; for those with heavier criminal involvement, the data support a common cause model").

209. While some studies have shown that some criminal or delinquent behavior predates addiction, it is well-documented that the likelihood of committing crime—and particularly more serious crime, such as robbery—is highest during periods of substance abuse. Tamara A. Millay et al., *Risky Business: Focus-Group Analysis of Sexual Behaviors, Drug Use and Victimization among Incarcerated Women in St. Louis,* 86 ALA. J. URB. HEALTH 810, 812 (2009) (reporting that in a focus group of St. Louis female inmates, more than half of those who reported involvement in prostitution said they did so to support their drug addiction); *see* White & Gorman, *supra* note 208, at 151, 188–89 (discussing the relationship between prostitution and addiction).

210. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (Oct. 2006), https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf.

211. BEHIND BARS II, *supra* note 25, at 13. The report considers illegal drugs "implicated" when the inmate was convicted of a drug law violation,

a disease are factors that a selection procedure uses to screen candidates, that policy adversely impacts that group on the basis of their disability.

A likely critique of this proposal would be that the ADA does not excuse misconduct by people with disabilities.[212] But while there certainly comes a point at which the relationship between a disability and associated behavior becomes too attenuated to warrant protection, by choosing to cover illegal drug addiction as a disability, the Act mandates some degree of protection—formally, at least—on the basis of past illegal conduct.

Consider the following example that the EEOC uses in a Technical Assistance Manual to discuss the ADA's protections for recovered drug users:

> A job applicant was hospitalized for treatment for cocaine addiction several years ago. He has been successfully rehabilitated and has not engaged in the illegal use of drugs since receiving treatment. This applicant has a record of an impairment that substantially limited his major life activities. If he is qualified to perform a job, it would be discriminatory to reject him based on the record of his former addiction.[213]

This hypothetical applicant commits a crime—possessing and using cocaine—and yet is protected from discrimination on the basis of this conduct. Furthermore, for many people with drug addiction

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committed their crime to get money to buy drugs, were under the influence of drugs at the time of the crime, had a history of regular drug use or had a drug use disorder. *Id.*

212. Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995) (there is a "distinction between termination of employment because of misconduct and termination of employment because of a disability"); Necaise v. Grand Casinos of Mississippi, Inc.-Biloxi, No. 1:04CV126., 2006 WL 3469604, at *2 (S.D. Miss. Nov. 30, 2006) ("[T]he ADA does not insulate an employee from adverse action taken by an employer because of misconduct in the workplace, even if his improper behavior is arguably attributable to an impairment."); Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (stating that an employee "cannot hide behind the ADA and avoid accountability for his actions").

213. EEOC MANUAL, *supra* note 173, at § 2.2(b).

issues, the criminal justice system operates as a de facto treatment center.[214]

While having a disability does not give an individual license to engage in rampant misconduct, protections for disabilities would be hollow without some degree of protection encompassing the manifestations of that impairment.[215] Applying this principle to criminal records associated with addiction does not represent a fundamental departure from ADA principles; courts have, at times, required accommodation of behavioral manifestations of mental illness that constitute criminal activity.[216]

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214. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., CHARACTERISTICS OF PROBATION AND PAROLE ADMISSIONS AGED 18 OR OLDER (Mar. 3, 2011), http://archive.samhsa.gov/data/2k10/231Parole2k11Web/231Parole2k11.htm#fn1 (2008 data "indicates that the criminal justice system is the single largest source of referral to substance abuse treatment"). This is particularly true for certain populations—for example, nearly half of American Indians receiving treatment were first referred through the criminal justice system. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., ALMOST HALF OF AMERICAN INDIAN AND ALASKA NATIVE ADULT SUBSTANCE ABUSE TREATMENT ADMISSIONS ARE REFERRED THROUGH THE CRIMINAL JUSTICE SYSTEM (Nov. 7, 2012), https://www.samhsa.gov/data/sites/default/files/Spot107AIANAdultCJAdmissions/Spot107AIANAdultCJAdmissions.pdf.

215. *See* Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 220 (2005). The Second and Ninth Circuits have embraced the notion that conduct—or misconduct—that is disability-related should be considered an extension of that disability and thus entitled to protection. *See, e.g.*, Teahan v. Metro-N. Commuter R.R. Co., 951 F.2d 511, 517 (2d Cir. 1991) (equating terminating an employee for absenteeism resulting from substance abuse issues with firing "solely by reason of" his substance abuse disorder for purposes of the Rehabilitation Act); Gambini v. Total Renal Care, 486 F.3d 1087, 1094 (2007) (employee's violent outbursts arguably symptomatic of her bipolar disorder and thus "the jury was entitled to infer reasonably that her violent outburst [. . .] was a consequence of her bipolar disorder, which the law protects as part and parcel of her disability."); Menchaca v. Maricopa Cmty. C. Dist., 595 F. Supp. 2d 1063, 1074 (D. Ariz. 2009) (school counselor's threat of violence to her supervisor may reasonably be considered part of her disability (PTSD) despite the fact that this constituted criminal conduct). The Ninth Circuit has suggested that there are exceptions for "egregious and criminal conduct," though this seems to be an articulation of the direct threat analysis. *See, e.g.*, Mayo v. PCC Structurals, Inc., 795 F.3d 941, 947 (9th Cir. 2015) (termination was proper when employee posed danger to others).

216. McKenzie v. Dovala, 242 F.3d 967, 968 (10th Cir. 2001) (Police department's disqualification of woman who would not pass background check after she shot guns at her father's grave, overdosed on drugs, and suffered self-inflicted wounds as a consequence of her PTSD may violate the ADA); EEOC v. Walgreen Co., 34 F. Supp. 3d 1049 (N.D. Cal. 2014) (EEOC brought an ADA lawsuit on behalf of a diabetic employee who was fired for stealing a bag of chips

C. Business Necessity

An employer defending a disparate impact claim bears the burden of showing that: (1) the challenged procedure is justified by "business necessity," meaning it is essential to the company's operation rather than merely a convenience;[217] (2) it is job-related, meaning it "fairly and accurately measures the individual's actual ability to perform" the job's essential functions; [218] and (3) a reasonable accommodation would not allow those screened out on account of disability to perform the key functions of the position.[219] Often in disability cases, assessing this defense involves analyzing the particular impairment implicated and whether or to what extent it limits that applicant's job performance.[220]

In the case of recovering addicts who are screened out on the basis of past conduct, however, the typical disability analysis provides an awkward fit. There are few instances where prior substance abuse may affect the day-to-day tasks of an employee—for instance, a nurse who cannot administer narcotics as part of her recovery. Even there,

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at work to stabilize her low blood sugar). Walgreens was forced to pay a $180,000 settlement. *Walgreens, diabetic employee reach $180,000 deal*, WASH. TIMES (July 3, 2014), http://www.washingtontimes.com/news/2014/jul/3/walgreens-diabetic-employee-reach-180k-deal/. The few cases where a criminal record is tied to disability have typically been brought as disparate treatment cases, where plaintiffs frequently struggle to show that an employer inferred addiction from the record. *See, e.g.*, Gonzalez Bermudez v. Potter, 675 F. Supp. 2d 251, 253 (D.P.R. 2009) (dismissing claim brought by former Postal Service employee terminated after a criminal background check revealed his conviction for two counts of drug possession; though he challenged his firing as discrimination on the basis of his drug addiction, which he had failed to disclose on his application, there was no evidence to support that the action was motivated by discriminatory intent). *But see* Josephs v. Pac. Bell, 443 F.3d 1050 (9th Cir. 2006) (affirming judgment that employer violated the ADA when it fired a service technician after obtaining his criminal record, which revealed that he had spent time in a mental institution after being found not guilty of attempted murder by reason of insanity and that he had a misdemeanor battery conviction).

217. 42 U.S.C. § 12113 (2012); Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001) (noting that business necessity is a "quite high" burden under the ADA); Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1317 (11th Cir. 2009) (explaining that while typically a high burden, satisfying business necessity is easier with a complex job requiring significant skill and risk).

218. Bates v. United Parcel Serv., Inc., 511 F.3d 974, 996 (9th Cir. 2007) (remarking that the defendant bears this burden, which it likens to the direct threat); Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306, 1311 (11th Cir. 2013).

219. 42 U.S.C. § 12113 (2012).

220. For example, considering whether an applicant who cannot speak could meet the qualifications of a receptionist with an accommodation.

however, the disabling effects could potentially be rectified through an accommodation.[221] Exclusions based on criminal history will instead typically be premised on safety concerns and likely predicated on the very stereotypes and discriminatory thinking that the Act seeks to eradicate.

Moreover, since these policies eliminate applicants at the hiring stage, assessing whether an accommodation is feasible would inappropriately require the candidate to preemptively disclose his disability early in the process. This makes hiring policies related to criminal records more appropriately guided under the rules governing pre-employment medical examinations and disability inquiries.[222]

IV. A POTENTIAL FRAMEWORK FOR ADA COMPLIANT CRIMINAL RECORDS HIRING POLICY

As discussed above, the pervasive use of criminal records in hiring poses significant implications for the employment rights of people with disabilities. As it did with guidance in the Title VII context,[223] the EEOC should promulgate regulations recognizing the potential ADA violations created by these practices and providing a framework for assessing the legality of employer practices.

And although some courts have disregarded the EEOC's Title VII criminal conviction guidance,[224] such a position position may have more bite in the context of the ADA. Unlike under Title VII, the Commission has rulemaking authority under the ADA,[225] which was strengthened under the 2008 ADA Amendments, [226] and its

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221. Wallace v. Veterans Admin., 683 F. Supp. 758, 760 (D. Kan. 1988) (finding the Veterans Administration violated the Rehabilitation Act by refusing to hire a nurse who could not administer narcotics because of her status as a recovering drug addict, and holding that relieving her of this task was a reasonable accommodation to which she was entitled).

222. 42 U.S.C. § 12112(d) (2012).

223. EEOC Arrest and Conviction Enforcement Guidance, *supra* note 90.

224. *See* Part II.A *supra*.

225. 42 U.S.C. § 12116 (2012).

226. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Jeremy Greenberg, *Not A "Second Class" Agency: Applying Chevron Step Zero to EEOC Interpretations of the ADA and ADAA*, 24 GEO. MASON U. CIV. RTS. L.J. 297, 318–19 (2014); *see also* Summers v. Altarum Inst., Corp., 740 F.3d 325, 332 (4th Cir. 2014) (applying *Chevron* deference to the EEOC's regulations regarding the definition of disability and noting that "[t]he stated goal of the ADAAA is to expand the scope of protection available under the Act as broadly as

regulations have been granted by *Chevron* deference by the Supreme Court.[227] In these regulations, the EEOC should clarify that the disparate impact disability framework has less rigid parameters than Title VII. Next, the regulations should create a rebuttable presumption that screening job candidates using criminal histories has a disparate impact on the basis of disability. Placing the burden on the employer is consistent with the ADA's proactive equality mandate, most clearly embodied by its reasonable accommodation requirement.[228]

As discussed below in Part IV.A, the regulations could approach criminal records inquiries and determinations like other disability-related questions, which are prohibited until after the employer has extended a conditional offer of employment.[229] After reviewing the criminal history, the employer should only be able to rescind its offer if it can establish that the applicant would pose a "direct threat" to others if employed.[230]

A. Criminal Records as Disability-Related Inquiries

An employer could operate an ADA-compliant criminal records policy by treating inquiries into criminal histories in a manner similar to disability-related inquiries,[231] which are prohibited until a conditional offer has been granted.[232]

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the text permits. The EEOC's interpretation—that the ADAAA may encompass temporary disabilities—advances this goal.").

227. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 84 (2002) (affording *Chevron* deference to EEOC interpretation of "direct threat").

228. Cripe v. City of San Jose, 261 F.3d 877, 881 (9th Cir. 2001) ("The ADA does not contemplate that the disabled must be integrated only into workplaces in which the work to be performed is unimportant—it requires every type of employer find ways to bring the disabled into its ranks, even when doing so imposes some costs and burdens. When enacting the ADA, Congress concluded that such is a small price to pay for the benefits of living in a society in which the disabled may realize 'equality of opportunity, full participation, independent living, and economic self-sufficiency.'")

229. 42 U.S.C.A. § 12112 (d) (2012).

230. 29 C.F.R. § 1630.2.

231. Scholars have proposed importing this ADA framework to the Title VII context. *See, e.g.*, Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 897–98 (2014); Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 9991, 9997-1002 (2015). The Ban the Box policies in some jurisdictions, including Hawaii, New York City, and Washington, D.C., have

A significant advantage of this approach is that it provides an applicant with information rarely available—the rationale for her rejection.[233] By better isolating the responsible selection procedure and establishing that the applicant is "otherwise qualified," this requirement would make it easier for plaintiffs to bring claims and would force employers to justify their criminal record exclusion policy.

More significantly, allowing the applicant the opportunity to demonstrate her qualifications and establish a human connection with the employer before disclosing her criminal history would likely reduce the number of rejections in the first place. Studies show that the stigmatizing effects of a criminal conviction are alleviated when the employer has more personal contact with the applicant,[234] and analyses of ban-the-box jurisdictions show employers hire significantly more people with criminal records following implementation of these policies.[235] Incorporating these requirements

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similar provisions. *See* Michelle Natividad Rodriguez & Nayantara Mehta, Nat'l Employment Law Project, *A Key Fair-Chance Hiring Best Practice: Delaying Conviction Inquiries Until the Conditional Job Offer*, 2 (2015), http://www.nelp.org/content/uploads/Fair-Chance-Conditional-Offer.pdf.

232. 42 U.S.C. § 12112(d)(4)(A) (2012); U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Disability–Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA) (July 27, 2000) (postponing disability-related inquiries intended to prevent employers from learning about "nonvisible disabilities, such as . . . mental illness", and then taking adverse employment actions "despite [an individual's] ability to perform the job."); U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.002, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), https://www.eeoc.gov/policy/docs/preemp.html (interpreting 29 C.F.R. §1630.3(b)(1)–(2) (1998) as prohibiting employers from asking applicants about past drug addiction or participation in a rehabilitation program, since those are "likely to elicit information about a disability").

233. *See* Karlan & Rutherglen, *supra* note 164, at 34 (noting that because job applicants with disabilities are less likely to have access to legal assistance than those employed, they are frequently unable to bring claims of discrimination, leaving employers "relatively free" to reject applications without genuinely considering possible accommodations).

234. Pager et al., *supra* note 44 (finding that testers with criminal record who interacted with employers were four to six times more likely to receive a callback or job offer, and "personal contact reduces the effect of a criminal record by roughly 15 percent").

235. *See, e.g.*, OFFICE OF THE D.C. AUDITOR, THE IMPACT OF "BAN THE BOX" IN THE DISTRICT OF COLUMBIA 16 (June 10, 2016), http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf (showing the District of Columbia hired 33% more employees with criminal records after Ban the Box policy enacted); SOUTHERN COALITION FOR

into the ADA, which applies across the nation to public and private employers with more than fifteen workers,[236] would magnify the advances made by these local efforts and help this population move out of the shadow cast by their history.

B. Direct Threat as the Proper Employer Defense

Employers can typically rebut disparate impact claims by showing that the policy in question is job-related, consistent with business-necessity, and not amenable to a reasonable accommodation.[237] Since under this approach employers would have already deemed the candidate qualified to complete the duties required by the job, an employer should be permitted to withdraw its offer only upon showing that the applicant poses a "direct threat."[238] This standard, which is a narrow defense for discriminatory safety rules, would require the employer to conduct an individualized assessment and demonstrate that its criminal records policy excludes only those who pose a significant risk of serious harm. In making that determination, the employer must analyze the duration of the risk that prospective employee's disability poses; the nature, severity, imminence, and likelihood of the potential harm; and the likelihood that it will occur.[239]

Casting the past criminal conduct as an outgrowth of substance abuse could conceivably be seen as emboldening an employer's high estimation of danger: if addiction is chronic and recurring, and criminal conduct is a natural consequence of that disease, they might argue, then shouldn't an employer be justified in excluding this group?

SOC. JUST., THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), http://www.southerncoalition.org/wp-content/uploads/2014/10/Banthe Box_WhitePaper-2.pdf ("Since the Ban the Box initiative began in 2011, the overall proportion of people with criminal records hired by the City of Durham has increased nearly 7 fold.").

236. 42 U.S.C.A. § 12111 (2012).

237. 42 U.S.C. § 12113(a) (2012); *see also* 29 C.F.R. § 1630.15 (2016).

238. 42 U.S.C. § 12113(b) (2012) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."); 42 U.S.C. § 12111(3) (2012) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation").

239. 42 U.S.C. § 12111(3); Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 274 (1987).

This standard, however, depends on the applicant's "*present* ability to safely perform the essential functions of the job."[240] The risk posed by an individual in recovery, then, should be measured in light of his behavior during times of abstinence and employment. Furthermore, the threat analysis "must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes" about drug addicts that the Act guards against.[241] Studies show that individuals who rehabilitate from drug addiction typically have low levels of criminal activity upon terminating drug use.[242] Indeed, multiple studies show that levels of criminal offenses following addiction are close to zero, casting "serious doubt upon the argument that criminality is a learned lifestyle that necessarily perseveres after the cessation of addiction."[243] These findings support restricting the availability of the direct threat defense to narrow circumstances.[244]

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240. 29 C.F.R. § 1630.2 (2016). This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

241. U.S. Equal Emp. Opportunity Comm'n, Informal Opinion Letter on the ADA and Direct Threat (Aug. 23, 2007), https://www.eeoc.gov/eeoc/foia/letters/2007/ada_confidentiality_medical_information_aug_23_2007.html ("Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."); 29 C.F.R. § 1630.2(r) (2016) ("This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.").

242. Douglas Anglin & George Speckart, *Narcotics Use and Crime: A Multisample, Multimethod Analysis*, 26 J. CRIMINOLOGY 197, 222–25 (1988); LAUDET, *supra* note 199, at 7 ("Overall, twice as many participants reported no involvement with the legal system in recovery as they had in active addiction (62% vs. 38%). Specifically, rates of arrests decrease by a factor of more than ten (from 53% to 5%) as does damaging property (from 59% to 6%). Incarceration declines sevenfold, from 34% to 5%.").

243. *Id.* at 223.

244. 29 C.F.R. app. § 1630.2(r) (2016) (emphasizing that an employer may not invoke this rationale "merely because of a slightly increased risk." Instead, "[t]he risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient.").

CONCLUSION

Millions of Americans recovering from drug addiction face tremendous barriers to employment as a result of the use of criminal records in hiring. These impediments to obtaining employment undermine recovery efforts and hinder reintegration of the formerly incarcerated.

Attempts to curtail these policies have achieved real, but modest, results. Most states do not prohibit private employers from discriminating against former offenders' criminal history, and Title VII challenges, though conceptually promising, have yet to bear fruit.

The Americans with Disabilities Act provides an additional, and as of yet untested, avenue for challenging criminal records policies in employment. The ADA protects recovering drug addicts—who are exceptionally overrepresented in the criminal justice system—from employment practices that have a negative disparate impact. These claims may be more viable than previous disparate impact challenges, since the ADA does not require plaintiffs to bring the statistical evidence needed to establish a Title VII claim.

An ADA-compliant criminal history policy would treat these records like disability-related inquiry: permissible only after an employer extends a conditional offer. An employer wishing to rescind an offer at that time should bear the burden of showing that the individual would pose a direct threat to others in the workplace. The ADA's emphasis on individualized inquiry, proactive conception of equality, and unequivocal mandate to break down disabling societal barriers makes it well-poised to chip away at this debilitating employment practice.

Federal disability legislation currently offers the illusion of protection for recovering drug addicts, but, in practice, permits rampant discrimination against this group. Loosening criminal history's stranglehold on former substance abusers would be a leap toward realizing the ADA's stated purpose: assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for those with disabilities.[245]

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245. 42 U.S.C. § 12101 (2012).