

# Negligent Hiring: Recidivism and Employment with a Criminal Record

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## Abstract

This paper tackles a difficult legal and policy challenge—reducing the impact of criminal justice records on job applicants’ chances in a manner that does not spur more discrimination—by looking at how another area of law, tort liability, impacts employers’ decision-making. It uses theoretical and empirical methods to study the most common reason employers report being reluctant to hire workers with a criminal record: legal liability generated by the tort of negligent hiring. While the purpose of the tort is ostensibly to protect and make whole those harmed when an employee misbehaves in a foreseeable manner, I show that, in practice, the tort generates additional criminal behavior and worsens employment outcomes.

I first provide a survey of the current doctrine across the states and trace the origins of the tort through the common law. I show that widespread adoption of negligent hiring increased the number of property criminal offenses by over seven percent. Next, I examine state legislation clarifying the negligent hiring standard and reducing the likelihood that an employer will be found liable. I use newly constructed administrative data from over a dozen states to compare employment and recidivism rates in the states that changed their negligent hiring law to otherwise similar states that did not (a difference-in-differences analysis). I show that the laws increase employment by nine percent, wages by twenty-five to thirty-five percent, and lower reincarceration for a new criminal offense by twenty-five percent. Throughout the paper, I also address the impact of related policies by presenting new data and analysis of the effects of legislation restricting the timing of inquiries into criminal histories (Ban-the-Box legislation) and the use of hiring credits (the Work Opportunity Tax Credit).

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## 1. Introduction

There is substantial evidence that employers are less willing to hire applicants with criminal records.<sup>1</sup> Research has demonstrated that lack of employment for this population damages the returning citizens, hampers national productivity, exacerbates racial income inequality, increases crime rates, and causes a host of other problems.<sup>2</sup> However, we know less about precisely why employers are less likely to hire from this pool of potential workers. This lack of knowledge makes improving employment opportunities for this population more difficult. This paper seeks to answer three major questions: 1) how much of the employment declines caused by a person having an observable criminal record are due to employer liability under state tort law for

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<sup>1</sup> See, e.g., SOCIETY FOR HUMAN RESOURCE MANAGERS, WORKERS WITH CRIMINAL RECORDS, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-CKI%20Workers%20with%20Criminal%20Records%20Issue%20Brief%202018-05-17.pdf> and Holzer et al., *How Willing Are Employers to Hire Ex-offenders*, 23 FOCUS 40 (2004).

<sup>2</sup> Mike Mueller-Smith & Kevin Schnepel, *Diversion in The Criminal Justice System*, 88 R. ECON STUD. 883 (2021); Katherine G. Abraham & Melissa S. Kearney, *Explaining the Decline in the US Employment-to-Population Ratio: A Review of the Evidence*, 58 J. ECON. LIT. 585 (2020), and Kevin Schnepel, *Good Jobs and Recidivism*, 128 ECON. J. 447 (2018).

negligent hiring, 2) how did the adoption of tort liability for negligent hiring change criminal behavior, and 3) how did later statutory clarifications that reduced the risk of negligent hiring liability impact criminal and employment behavior? This paper presents evidence that the tort of negligent hiring ultimately results in more criminal behavior and explains a significant portion of the gap in earnings between those with and without a criminal record.<sup>3</sup> I analyze employment and criminal behavioral changes around state-wide tort recognition as well as behavioral changes around a series of statutory changes that limit and clarify negligent hiring liability. It finds that lowered liability increases earnings and reduces recidivism for returning citizens impacted by the reforms.

It is essential to understand just how extensive a footprint the criminal justice system has on the labor market. Contact with the criminal justice system carries with it a host of collateral consequences beyond the punishment initially assigned by a court. While these consequences are sprawling and varied, this paper will focus on just one: the formal and informal hindrances to labor market opportunities.<sup>4</sup> These consequences are not distributed equally but rather fall predominantly on black men. In 2017, 622,400 prisoners were released from state and federal prisons.<sup>5</sup> Many of these returning citizens are of working age. Researchers estimate that eight percent of all adults and thirty-three percent of the Black adult male population have a felony conviction.<sup>6</sup> Given that similar collateral consequences can extend to individuals who have less severe contact with the criminal justice system (such as an arrest or a conviction without imprisonment), these percentages underestimate the impacted population. There are also likely important intergenerational consequences to having a parent or caregiver who has contact with the criminal justice system. With nine percent of children with parental prison involvement, eighteen percent with a parent with a felony conviction, and thirty-nine percent with a criminal charge (sixty-two percent for Black children), consequences of the criminal justice system reach a vast proportion of the population.<sup>7</sup>

People who have been criminally convicted are substantially more likely to be unemployed.<sup>8</sup> Examining raw correlations between criminal justice exposure and employment outcomes does not tell us whether contact with the criminal justice system causes worse labor market outcomes. While more work needs to be done, there is substantial and growing evidence that criminal

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<sup>3</sup> From a utilitarian/regulatory framework conception of the tort, it is too easy to bring a successful negligent hiring claim, because by only examining the case at hand, the employer liability imposed does not sufficiently account for the applicant's likelihood of offending if the applicant remains out of work.

<sup>4</sup> David S. Kirk and Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171 (2018).

<sup>5</sup> JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>6</sup> Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795 (2017).

<sup>7</sup> Keith Finlay, Michael Mueller-Smith, & Brittany Street, *Measuring Child Exposure to the U.S. Justice System: Evidence from Longitudinal Links between Survey and Administrative Data*, Working Paper (2022), [https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2022/06/CJARS\\_KidExposure\\_20220609.pdf](https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2022/06/CJARS_KidExposure_20220609.pdf).

<sup>8</sup> Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> (“The unemployment rate of formerly incarcerated people in 2008 (the most recent year for which data are available) was 27.3% (compared to 5.8% in the general public).”

records cause a large earnings gap between those with and without criminal justice histories.<sup>9</sup> Many of these studies use individual longitudinal surveys (analysis following this approach is presented in the appendix) to estimate employment, wage, and earnings gaps.<sup>10</sup> Other studies have used different methodologies and more comprehensive administrative data, which I also use throughout this paper.<sup>11</sup> One of the most credible studies demonstrates that avoiding a felony conviction causes recidivism rates to be halved, quarterly employment to increase by fifty-three percent (or eighteen percentage points), and quarterly earnings to grow by sixty-four percent.<sup>12</sup> In other words, a person who just avoids a felony conviction (in this case due to a randomly assigned deferred adjudication) works almost two more years over the next ten years and earns about \$60,000 more than if they had received a guilty verdict.<sup>13</sup>

There are many reasons to care about the employment prospects for people with criminal histories, but one especially relevant for this paper is that better employment opportunities may

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<sup>9</sup>See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942 (2003); Devah Pager, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION, 17 (2007); Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions on Screening Practices: Evidence from Los Angeles*, Barriers to Reentry 117, 122 (Shawn D. Bushway et al. eds., 2007); Devah Pager et al., *Discrimination in a Low-wage Labor Market: A Field Experiment*, 74 AM. SOC. R. 777 (2009); Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 3 133 Q.J. ECON. 191 (2017); Peter Leasure and Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 N.Y.U. REV. OF L. & SOCIAL CHANGE, THE HARBINGER, 271, 2017; Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, 65 CRIME & DELINQUENCY 1850, 2019; Scott H. Decker et al., *Criminal Stigma, Race, and Ethnicity: The Consequences of Imprisonment for Employment*, 43 J. CRIM. JUST. 108, 2015. See also Appendix Table 2, which summarizes a comprehensive literature review regarding quantitative measures of employment gaps.

<sup>10</sup> Richard Freeman, *Crime and Employment of Disadvantage Youths*, Urban Labor Markets and Job Opportunity (George Peterson and Wayne Vroman eds., 1992); Jeff Grogger, *Arrests, Persistent Youth Joblessness, and Black/white Employment Differentials*, 74 REV. ECON. & STAT. 100 (1992); Sam Allgood et al., *The Impact of Youth Criminal Behavior on Adult Earnings*, (unpublished manuscript, <http://www.terry.uga.edu/~dmustard/earnings.pdf>); Bruce Western and Katherine Beckett, *How Unregulated is the US Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 526 (1999); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (2002); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Steven Raphael, *Early Incarceration Spells and the Transition to Adulthood*, The Price of Independence: The Economics of Early Adulthood 278 (Sheldon Danziger & Cecilia Rouse eds., 2007); James Joy et al., *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRUSTS, [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf); Jeremiah Richey, *Shackled Labor Markets: Bounding the Causal Effects of Criminal Convictions in the US*, 41 Int'l Rev. L. & Econ. 17 (2015).

<sup>11</sup> Joel Waldfogel, *The Effect of Criminal Convictions on Income and the Trust Reposed in the Workmen*, 29 J. HUM. RESOURCES 62 (1994); Jeff Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q. J. ECON. 51 (1995); Daniel Nagin & Joel Waldfogel, *The Effect of Conviction on Income Through the Life Cycle*, 18 INT'L REV. L. & ECON. 25 (1998); Robert J. Lalonde & Rosa M. Cho, *The Impact of Incarceration in State Prison on the Employment Prospects of Women*, 24 J. QUANTITATIVE CRIMINOLOGY 243 (2008); Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863 (2006); Becky Pettit & Christopher Lyons, *Status and Stigma of Incarceration: The Labor Market Effects of Incarceration by Race, Class, and Criminal Involvement*, Barriers to Reentry 203 (Shawn D. Bushway et al. eds., 2007); David J. Harding et al., *Imprisonment and Labor Market Outcomes: Evidence From a Natural Experiment*, 124 AM. J. SOC. 49 (2018); Mike Mueller-Smith & Kevin Schnepel, *Diversion in The Criminal Justice System*, 88 R. ECON. STUDIES 883 (2021); Manudeep et al., *Incarceration, Recidivism, and Employment*, 128 J. POL. ECON. 1269 (2020); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018).

<sup>12</sup> Mike Mueller-Smith & Kevin Schnepel, *id.*

<sup>13</sup> *Id.* at 16-17.

lower recidivism (and criminal behavior generally). For instance, previous research has found that prisoners released from prison into counties with 1 percent higher wages had a .05 percentage point lower probability of returning to prison.<sup>14</sup> Similar effects are found for those released into areas with higher employment growth.<sup>15</sup> Together these results suggest that exiting prison in average labor market conditions (instead of a recession) lowers recidivism by about 6.7 percent.<sup>16</sup> Many researchers have cited employment for people with criminal convictions as a critical component of reentering society, decreasing future offending and reliance on the social safety net.<sup>17</sup>

While the evidence that exposure to the criminal justice system hurts employment prospects is substantial, less is known about the precise reasons for these gaps. Understanding what mechanisms are at work is essential to policymakers seeking to implement changes. Potential explanations are plentiful. For instance, employers might be engaging in statistical discrimination, exploiting differences in average productivity, defined in terms of both output and job turn-over, between individuals with and without criminal justice histories; that is, employers might believe workers with felony convictions perform worse on the job.<sup>18</sup> Employers may have an aversion to working with ex-felons, or alternatively framed, a desire to punish individuals with a criminal record more heavily than the criminal justice system has done thus far.<sup>19</sup> Licensing and other legal restrictions may formally prohibit employers from hiring individuals with felony histories for particular categories of work, effectively shutting off certain sectors of the economy to returning citizens.<sup>20</sup> Employers may fear harm to their reputations from subsequent harmful actions by employees with criminal histories. Finally, employers may be reluctant to hire this population for fear of potential liability for an employee's harmful actions under the common law doctrines of respondeat superior and negligent hiring, regardless of the applicants' potential productivity.<sup>21</sup> This paper will focus on the importance of the under-explored employer liability channel.

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<sup>14</sup> Crystal S. Yang, *Local Labor Markets and Criminal Recidivism*, 147 J. PUB. ECON. 16, 28 (2017).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Steven Raphael & David F. Weiman, *The Impact of Local Labor Market Conditions on the Likelihood that Parolees Are Returned to Custody*, In S. Bushway, M. A. Stoll, and D. Weiman (Eds.), *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST INDUSTRIAL AMERICA* (2007). Cindy Redcross, Megan Millenky, Timothy Rudd, & Valerie Levshin, *More Than a Job: Final Results from the Evaluation of the Center for Employment Opportunities (CEO) Transitional Jobs Program*, OPRE REPORT 18 (2011). Kevin T. Schnepel, *Good Jobs and Recidivism*, 128 ECON. J. 447 (2018) doi:10.1111/econj.12415. Jeffrey Kling, *Incarceration Length, Employment, and Earnings*, 96 AMERICAN ECON. REV. 863 (2006).

<sup>18</sup> See, e.g., Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders*, Studies of Labor Market Intermediation 89 (David Autor ed., 2009).

<sup>19</sup> See generally GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* Chicago: University of Chicago Press (1957) for how discrimination impact employee and employer relationships in the economic context.

<sup>20</sup> CHIDI UMEZ AND REBECCA PIRIUS, *Barriers to Work: People with Criminal Records*, NATIONAL COUNCIL OF STATE LEGISLATURE, <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> ("The National Inventory of Collateral Consequences of Conviction, a searchable database of the collateral consequences in all U.S. jurisdictions, catalogs over 6,000 mandatory occupational licensing consequences for people with criminal records.").

<sup>21</sup> See, e.g., Monique C. Lillard, *Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709 (2007), Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination against Ex-Offenders*, 93 WASH. U. L. REV. 45 (2015), and Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265 (2018).



There are many reasons to expect the labor market consequences of a criminal record to have grown more severe over time. The evolving norms and legal rules surrounding the availability and prominence of criminal background checks likely play an important role in determining the standard of liability against an employer in a negligent hiring case. Changes to technology infrastructure reduced the cost of obtaining criminal record information and increased the prevalence of including a background check in the interview process.<sup>22</sup> To cabin the growing usage of criminal records in hiring decisions, several states and cities have enacted “Ban-the-Box” legislation which restricts when employers may solicit criminal history information from applicants.<sup>23</sup> Unfortunately, these Ban-the-Box reforms have had unintended consequences. Empirical research suggests that these reforms have exacerbated racial inequities as employers appear significantly less likely to hire young black men after Ban-the-Box policies have restricted early access to the job applicant’s criminal record.<sup>24</sup>

Other reforms have aimed at requiring employers to use criminal records appropriately. Some states have laws that limit the use of certain criminal history records, such as arrest records, to varying degrees.<sup>25</sup> At the federal level, the Equal Employment Opportunity Commission (EEOC) has issued guidance stating that employers may only implement a policy that excludes applicants with criminal histories in cases where an employer can demonstrate job relevance and business necessity.<sup>26</sup> Employers concerned with liability are thus left navigating a fine line, balancing concerns over liability for employee actions with liability for violating Title VII through discriminatory hiring practices. How frequently Title VII claims are brought under this guidance is not well documented.<sup>27</sup> These claims appear more likely after a termination than at the hiring phase, possibly because of the difficulty of showing that it was the presence of a criminal record, rather than a host of other factors, that led an employer not to hire a candidate.<sup>28</sup>

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<sup>22</sup> Finlay supra note 10.

<sup>23</sup> See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 3 133 Q.J. ECON. 191 (2017) and Jennifer L. Doleac and Benjamin Hansen, *The Unintended Consequences of ‘Ban the Box’: Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden.*, 38 J. OF LAB. ECON. 321, (2020).

<sup>24</sup> Research has suggested that restricting access to criminal justice histories may disadvantage individuals who do not have a history of criminal behavior but are members of socioeconomic groups that have a higher-than-average exposure to the criminal justice system. Thus, these policies often cause worse labor market outcomes for young, black men without criminal histories. This suggests employers engage in statistical discrimination to avoid hiring workers with a history of criminal behavior using the information available to them but tells us little to disentangle precisely why employers are reluctant to hire from this group. *Id.*

<sup>25</sup> See, e.g., Mich. Comp. Laws § 37.2205a (Employers are prohibited from using misdemeanor arrests but not felony charges), Mass. Ann. Laws. ch.21- 151B, § 4(9) (Employers are prohibited from using arrest information that did not result in a conviction), and [https://hr.4act.com/documents/State\\_Laws\\_and\\_Their\\_Impact\\_on\\_Use\\_of\\_Criminal\\_Records\\_for\\_Emplo.pdf](https://hr.4act.com/documents/State_Laws_and_Their_Impact_on_Use_of_Criminal_Records_for_Emplo.pdf) (a state by state overview).

<sup>26</sup> See generally Stacy A. Hickox, Employer Liability of Negligent Hiring of Ex-Offenders, 55 St. Louis U. L.J. 1001 (2011). See also U.S. EQUAL EMP’T 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, at 10-20 (2012), <http://www.eeoc.gov/laws/guidance/upload/arrest-conviction.pdf>.

<sup>27</sup> Work documenting the number of EEOC complaints alleging improper use of criminal records and the frequency of complaints caused by Ban-the-Box policies if scheduled to be released by the EEOC in late 2022 (research conducted by Romella El Kharzazi, Benjamin Pyle, and EEOC staff).

<sup>28</sup> Michael A. C. Lee, *Do Criminal Background Checks in Hiring Punish?*, 9 WASH. U. JUR. REV. 327, 332 (2017).

There has been less empirical work on these policy changes, so less is known about their effects. The law at once recognizes the importance of seeking and using criminal records in employment decisions and yet seeks to avoid indiscriminate use of this information. Against this backdrop of changing availability and permissibility of employer inquiry into an applicant's criminal records, state courts have increasingly held more employers liable for employee misconduct.

What gives rise to employer liability? The two most common sources of employer liability in this context (both of which are common law doctrines and thus vary by state) are respondeat superior and negligent hiring. The doctrine of negligent hiring seeks to encourage employers to fill job openings with appropriate employees and independent contractors. In contrast, the doctrine of respondeat superior imposes liability on the employer for the torts of its employees based on the understanding that the worker acts on behalf of the employer.<sup>29</sup> While respondeat superior may be a worry for some employers, it only applies to torts committed 1) by their employees, 2) for actions in the course of employment, and 3) regardless of an employer's fault.<sup>30</sup>

An example here is helpful. Consider a pizza delivery driver employed full-time by a firm who negligently runs a red light, causing a traffic accident and injuring a bystander. Here, regardless of the driver's previous driving and employment record, the firm will be liable under respondeat superior for the injuries caused by the driver's negligence because it occurred in the course of his duties as a driver. Of course, such a firm might avoid hiring drivers with poor driving records to minimize its liability risk for future accidents. Still, the firm's liability for such accidents under respondeat superior does not turn on whether the firm behaved unreasonably in hiring its drivers.

In general, respondeat superior imposes vicarious liability on the employer for the torts of its employees without distinguishing between those with and without criminal histories. Thus, this channel of liability will only cause gaps in employment outcomes between those with and without criminal records to the extent that employers believe that criminal history is relevant information about a potential employee's propensity to incur civil liability through actions directly related to their employment. Whether workers with criminal histories are more likely to commit misconduct is an open question, as are employers' perceptions of these risks. Evidence from New Zealand suggests that, at least in that setting, employees with a criminal conviction before entering the workforce were less likely than other workers to fight or steal at work.<sup>31</sup> In a study of over 10,000 workers in the U.S., workers with criminal convictions in sales jobs had a somewhat elevated risk for job separation due to misconduct. In contrast, those in customer support jobs did not.<sup>32</sup> The empirics I present do not provide evidence regarding this source of liability.

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<sup>29</sup> Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 792(1993) (referencing *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982)). See also, Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 187 (2008).

<sup>30</sup> See 29 AM. JUR. TRIALS 267 § 4 (1982 Supp. 2015) for additional details.

<sup>31</sup> Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427 (2007). This was a longitudinal study of 930 young adults. While it would be informative to have information regarding the relative rates of job misconduct by type of offense associated with pre-employment conviction, this information is not available.

<sup>32</sup> Dylan Minor et al., *Criminal Background and Job Performance*, 7 IZA J. LABOR POL'Y 8, 33 (2018) (5.9% of sales workers were discharged for misconduct compared with a base rate of 3.1%, implying a \$43 increase in crime

Employer liability may also arise from negligent hiring. Negligent hiring is more likely than respondeat superior to generate divergence in employment outcomes between individuals with criminal records and those without because criminal justice records are often allowed as evidence that the employer was negligent.<sup>33</sup> For example, suppose the pizza driver was an independent contractor. Here, there is likely no liability on respondeat superior. However, the driver's history may well matter in determining employer liability for negligent hiring. If the driver had a history of DUIs and criminal traffic offenses at the time he was hired, then the defendant could bring this evidence to bear on the issue of whether the firm was negligent in hiring the driver to deliver pizza.

As illustrated by some representative cases presented later in this work, the same conduct performed by two employees may generate differential employer liability if one employee has a criminal record while the other does not.<sup>34</sup> Negligent hiring establishes direct liability of the employer for a wider array of employment arrangements and worker behavior than respondeat superior. For instance, recovery under respondeat superior is limited when a worker is an independent contractor, while recovery under negligent hiring is not. Additionally, intentional torts of the employee (such as an assault) are frequently excluded from respondeat superior because the employee misconduct was outside the scope of employment.<sup>35</sup> But the employer may still be liable for its own negligence in hiring the employee in such a case, as the employer is deemed to have failed to exercise reasonable care towards the victim by hiring an employee who committed a second assault. States have occasionally attempted to place statutory limits on what criminal records a plaintiff can introduce as evidence in negligent hiring cases. These statutes require the records to be of the same type of misconduct as the misconduct in the current case. However, more often than not, the question of how much evidentiary value a specific criminal record has is often left up to the jury.<sup>36</sup>

Employers may have difficulty insuring against negligent hiring liability.<sup>37</sup> There has been substantial ambiguity over whether negligent hiring is covered under general liability insurance,

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related cost to the employer). This paper also notes that workers with criminal histories have longer job tenure, and thus save the employer \$746 in turnover cost.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> The likelihood of the employer being held liable for a given action by an employee increases with length of criminal record, as some have argued that juries are more likely to find an employer negligent if employees have repeated infractions.

<sup>35</sup> Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 187 (2008).

<sup>36</sup> Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L. J. 1001, 1004 (2011) ("In many negligent hiring cases, the difficult interpretations of whether the harm was reasonably foreseeable are sent to a jury.").

<sup>37</sup> Minor et al. *supra* note 23 at 3-4.



as most policies exclude intentional acts.<sup>38</sup> When negligent hiring is insurable, it tends to be limited, expensive, and infrequently used; it is most commonly excluded from policies.<sup>39</sup>

In general, how courts judge what amounts to negligent hiring varies widely across states, making it a bit challenging to identify precisely when such a cause of action emerged. Negligent hiring has been recognized broadly across the states.<sup>40</sup> While some states like Massachusetts<sup>41</sup> and Indiana<sup>42</sup> recognized negligent hiring as a cause of action in the early 1900s, the tort did not emerge to prominence in other states, like South Carolina<sup>43</sup>, Wisconsin<sup>44</sup>, and South Dakota<sup>45</sup>, until nearly a century later. For many states, recognition occurred in the mid-1980s to 1990s,<sup>46</sup> coinciding with the rise in mass incarceration. Between 1980 and 2000, the state and federal prison population increased from 315,974 inmates to 1,331,278, and about half of the states formally recognized the tort of negligent hiring—generating increased liability for the potential employers of the quickly growing released population.<sup>47</sup> Given the relatively recent adoption of the tort and our lack of knowledge and paucity of data surrounding the criminal justice system,<sup>48</sup> it is unsurprising that the standard has some kinks to work out.

While little is known about the relative magnitude of the mechanisms that drive employer reluctance to hire from the returning citizen population, employers do self-report that the chief reason they inquire into applicants' criminal backgrounds is potential liability for employee actions.<sup>49</sup> For instance, survey data shows that most organizations report that reducing legal

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<sup>38</sup> See, e.g. *Liberty Surplus Insurance v. Ledesma & Meyer Construction Co.*, 418 P. 3d 400 (2018) and Brian S. Martin, *It's no Accident, But is There Coverage?* INSURANCE J., March 11, 2002, <https://www.insurancejournal.com/magazines/mag-legalbeat/2002/03/11/18987.htm> (“there is no consistency in jurisdictions across the United States on this issue. Some jurisdictions have split rulings in their own courts. Others have agreed that the employee is not entitled to coverage, but allow the derivative negligence claim to “stand alone,” so as to create a defense obligation.”)

<sup>39</sup> Devah Pager & Bruce Western, *Investigating prisoner reentry: The impact of conviction status on the employment prospects of young Men*, NATIONAL INSTITUTE OF JUSTICE 27 (2009) (“The manager of a courier company, discussing his reluctance to hire anyone with a history of violent crime, touched on similar themes, though couched as an insurance concern: “It's an insurance problem. I can't, I can't get insurance coverage. . .”) See, e.g. *Golden Eagle Insurance Corporation v. Munoz*, 2016 Cal. App. Unpub. LEXIS 6998 (Cal. App. 4th Dist. Div. 3, Sept. 23, 2016) (“exclusion in the policy, which stated, in part, that there is no coverage for bodily injury to a person “arising out of any ... [e]mployment-related practices, policies, act or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person.””)

<sup>40</sup> Shawn D. Vance, *How Reforming the Tort of Negligent Hiring Can Enhance the Economic Activity of a State, Be Good for Business and Protect the Victims of Certain Crimes*, 6 LEGIS. & POL'Y BRIEF 171 (2014).

<sup>41</sup> *Carson v. Canning*, 180 Mass. 461.

<sup>42</sup> *Chi. & G. E. R. Co. v. Harney*, 28 Ind. 28 (1867).

<sup>43</sup> *Cf. Degenhart v. Knights of Columbus*, 309 S.C. 114, 116-17, 420 S.E.2d 495 (1992)

<sup>44</sup> *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233.

<sup>45</sup> *Rehm v. Lenz*, 1996 SD 51, 1121, 547 N.W.2d 560.

<sup>46</sup> See, e.g., *McGuire v. Arizona Protection Agency*, 125 Ariz. 380, *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828 (Cal. Ct. App. 1992), and *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316.

<sup>47</sup> <https://www.sentencingproject.org/criminal-justice-facts/>. See the appendix, showing estimated negligent hiring adoption dates by state.

<sup>48</sup> See J.J. Prescott, Benjamin Pyle, & Sonja Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020) (discussing data limitations in the recidivism context), but cf. the promising work of The Criminal Justice Administrative Records System (CJARS) available at <https://cjars.isr.umich.edu/>.

<sup>49</sup> Society for Human Resource Management (SHRM), *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3, 6 (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>. (over 50% of

liability for negligent hiring is the primary reason for running a background check.<sup>50</sup> Follow-up surveys have confirmed that the single most salient concern HR and business managers have about hiring workers with a criminal record is legal liability.<sup>51</sup> In addition, social scientists studying the impact of criminal records on employment have frequently suggested that negligent hiring is likely to reduce employment rates for people with criminal records significantly and is a good target for reform.<sup>52</sup>

Unfortunately, little data is available to study the frequency and size of negligent hiring suits, so the employer survey is the best evidence on the subject to date.<sup>53</sup> Studies focused on written opinions available via traditional legal research aggregators like Westlaw or Lexis are unlikely to generate accurate measures of the risk of potential litigation and how it has evolved.<sup>54</sup> Using data from aggregators is an especially poor measure in this setting because many service-based companies have varied their policies regarding compelled arbitration and non-disclosures in negligent hiring cases over time.<sup>55</sup> However, there have been some large and well-publicized judgments, suggesting that an employer's fear of negligent hiring liability may be associated with real costs.<sup>56</sup>

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organizations report reducing legal liability for negligent hiring to as the primary reason for running a background check). *See also* PRISCILLIA HUNT ET AL., BREAKING DOWN BARRIERS: EXPERIMENTS INTO POLICIES THAT MIGHT INCENTIVIZE EMPLOYERS TO HIRE EX-OFFENDERS Appendix at 19 (2018). [https://www.rand.org/pubs/research\\_reports/RR2142.html](https://www.rand.org/pubs/research_reports/RR2142.html). *See also* <https://www.wsj.com/articles/SB109226281621989153>, for an example of how the press understands the connection between negligent hiring and background checks. *But see* Minor et al., *supra* note 23 at fn 38, noting that “No aggregate statistics are collected on this issue. . . .”

<sup>50</sup> SHRM *supra*.

<sup>51</sup> *See, e.g.*, Society for Human Resource Managers (SHRM), *Getting Talent Back To Work* 10, (2021) [https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW\\_Report.pdf](https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf)

<sup>52</sup> Amanda Agan, *Increasing Employment of People with Records*, 16 CRIMINOLOGY & PUB. POL'y 177 (2017) (Employers are clearly concerned about the potential for liability in a negligent hiring lawsuit.); Shawn D. Bushway, & Nidhi Kalra, A Policy Review of Employers' Open Access to Conviction Records, 4 ANNUAL REV. OF CRIMINOLOGY 165 (2021) “The threat of a negligent-hiring suit, which is intended to internalize the costs of mis-hires. The adage of the 1,000-pound gorilla boxing a 100-pound weakling is apt.”; David McElhattan, *The Exception as the Rule: Negligent Hiring Liability, Structured Uncertainty, and the Rise of Criminal Background Checks in the United States*, 47 L. & SOCIAL INQUIRY 132 (2022) (“Social scientists frequently nominate negligent hiring as a key concern that leads employers to check criminal records although this rationale has not been subject to extensive empirical investigation.”).

<sup>53</sup> Minor et al., *supra* note 23 at fn 38, “One often-cited article claims employers have lost 72% of negligent hiring cases with an average settlement of more than \$1.6 million. It provides no evidence as to the use of a criminal background in such verdicts, no data on the frequency of such cases...” Another source notes that approximately 66 percent of negligent-hiring trials overall result in awards averaging \$600,000 in damages.

<https://www.jacksonlewis.com/media/pnc/6/media.1366.pdf> The Workplace Violence Research Institute reports that the average jury award for civil suits on behalf of the injured is \$3 million. Steve Kaufer, CPP and Jurg W. Mattmann, CPB, at [http://www.workviolence.com/articles/employers\\_guide.htm](http://www.workviolence.com/articles/employers_guide.htm).

<sup>54</sup> *See, e.g.*, Christina L. Boyd, Pauline T. Kim, & Margo Schlanger, *Mapping the Iceberg: The impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466 (2020) for a discussion of how reliance on published opinions can bias empirical work.

<sup>55</sup> Erin Mulvaney, *Uber, Lyft Talk Responsibility on Assaults but Deny in Court*, BLOOMBERG LAW, March 2, 2020 (Detailing that Uber “previously ended its mandatory arbitration program for assault victims.”)

<sup>56</sup> *Id.* “Large judgments have indeed been rendered for the acts of employees with criminal backgrounds, *Ward v. Trusted Health*, No. 94-4297 (Suffolk Super. Ct. Mass.) (\$26.5 million damages); *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. Dist. Ct. App. 1991); but also for the acts of employees without a criminal record,

The remainder of the paper studies the relationship between the evolution of negligent hiring doctrine, employment, and criminal behavior. Section 2 provides relevant background on the tort of negligent hiring. Section 3 presents evidence connecting changes in negligent hiring liability to labor market outcomes and criminal behavior. Section 4 discusses the results and considers how other proposed reforms in this area fit into the stylized model. Finally, section 5 provides additional context regarding how negligent hiring can relate to other policies and concludes.

## 2. Negligent Hiring Background

### 2.1. Background

While courts frame the causes of action for negligent hiring in slightly different ways, some common themes emerge. The Restatement (Second) of Torts describes the principle that an employer may be liable for harm caused by employees “who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.”<sup>57</sup> In general, the following elements need to be shown to sustain the cause of action: “(1) the employer owed the [plaintiff] a duty of reasonable care; (2) the employer breached the duty; and (3) the breach proximately caused the [plaintiff’s] harm.”<sup>58</sup> Proving these elements often turns on a showing of the following facts: (1) employment; (2) that hiring an employee with this employee’s characteristics was likely to harm third parties; (3) the employer’s actual or constructive knowledge of such characteristics; (4) the employee’s act or failure to act is the actual and proximate cause of the plaintiff’s injuries.<sup>59</sup>

Many courts are aware of the difficult trade-offs inherent in the tort of negligent hiring.<sup>60</sup> They note that without a tight proximate cause requirement, the “employer would essentially be an insurer of the safety of every person who happens to come into contact with his employee simply because of his status as employee.”<sup>61</sup> However, the tort may be needed to redress the

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Diaz v. Carcamo, 253 P.3d 535 (Ca. 2011) (\$23 million award); Glomb v. Glomb, 530 A.2d 1362, 1364 (Pa. Super. Ct. 1987) (\$1.5 million).”

<sup>57</sup> 26 RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965).

<sup>58</sup> John E. Matejkovic & Margaret E. Matejkovic, *Whom to Hire: Rampant Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827, 831 (2006).

<sup>59</sup> Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281 (2002).

<sup>60</sup> A representative explanation is given in *Wise v. Complete Staffing Servs., Inc.*, 56 S.W.3d 900, 902 (Tex. App. 2001) (“On deciding whether to impose a duty on a particular defendant, courts weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the actor. *Praesel v. Johnson*, 967 S.W.2d at 397-98; *Otis Eng’g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). Other proper considerations include whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm. *Praesel v. Johnson*, 967 S.W.2d at 397; *Graff v. Beard*, 858 S.W.2d at 920. Of these, the foremost consideration is the foreseeability of the risk. *El Chico Corp. v. Poole*, 732 S.W.2d at 311.”)

<sup>61</sup> *Bates*, 502 N.E.2d at 45. See also *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (“In recognizing the tort of negligent hiring, we emphasize that an employer is not an insurer for violent acts committed by an employee against a third person. On the contrary, liability is predicated on the employer’s hiring of a person under circumstances antecedently giving the employer reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities.”)

wrong of the “negligence of the employer in the hiring or retention of employees whose qualities unreasonably expose the public to a risk of harm” and “addresses the risk created by exposing members of the public to a potentially dangerous individual.”<sup>62</sup>

The theories put forward by various courts are echoed in previous scholarship that has explored several potential justifications for maintaining negligent hiring as a cause of action.<sup>63</sup> For example, one paper offers two public policy reasons for the tort: compensating victims harmed by employees and spreading the loss from the victim to all customers.<sup>64</sup> Note that this argument relies on the fact that the offender-employee is likely to be judgment-proof and unable to compensate the victim directly. Other scholarship points out that the tort is intended to encourage employers to hire safe and competent employees for a given role.<sup>65</sup>

The competing interests balanced by the tort of negligent hiring often come to a head in the discussion of proximate cause (although a minority of courts will alternatively frame the dispute around the scope of the duty of care).<sup>66</sup> To answer whether the harm caused by negligently hiring the employee was the type of harm that was foreseeable at the time of hire, some courts have attempted to provide structure by looking towards “the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused.”<sup>67</sup> Other courts have applied a less structured totality of the circumstances

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<sup>62</sup> *Di Cosala v. Kay*, 91 N.J. 159, 174 (N.J. 1982). See also Monique C. Lillard, *Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709, 744 (2007). “[W]e want to constrain or direct the behavior of the defendant and his compatriots only up to a point, a point often defined by the elusive term “reasonableness.” We do not want defendants to be so cautious that they are paralyzed, nor do we want to place too heavy a burden on various constituencies in society. These constituencies include potential defendant employers, current and potential employees, and defendants’ customers.” Here the court is recognizing that the damage to society from negligently hiring an individual with a criminal record is the difference between the harm from the specific wrong committed while employed less the sum of the expected harm from the same employee offending in the world in which they had not been employed plus the value to insuring the victim. This second object is non-zero on average, and if having a criminal record is a legitimate predictor of a higher probability of offending on the job, it should also be used as a predictor of a higher probability of offending absent employment. Without accounting for the crimes prevented by hiring the employee (and compensating the employer for them), holding the employer liable will over-deter hiring employees with criminal records.

<sup>63</sup> See, e.g., Creed at 193 *supra* note 20, Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination against Ex-Offenders*, 93 WASH. U. L. REV. 45, 81 (2015), and Lee *supra* note 20.

<sup>64</sup> See, e.g., Creed at 193 *supra* note 20.

<sup>65</sup> Flake at 81, *supra* note 33.

<sup>66</sup> Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001,1007 (2011) (“Liability often turns on the issue of foreseeability”). “A cause of action for negligent hiring or retention, however, does not lie whenever an unfit employee commits a criminal or tortious act consistent with a known propensity. As several courts have properly recognized, the plaintiff must establish “some [causal] connection between the plaintiff’s injury and the fact of employment.” *Dieter v. Baker Service Tools*, 739 S.W.2d 405, 408 (Tex. Ct. App. 1987); see also *Bates v. Doria*, 150 Ill. App. 3d 1025, 502 N.E.2d 454, 458, 104 Ill. Dec. 191 (Ill. App. Ct. 1986). See also, *DiCosala*, 450 A.2d at 516) and Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183 (2008) (discussing the relationship between the scope of duty and foreseeability)

<sup>67</sup> *Id.* at 1008 citing *Doe v. ATC, Inc.*, 624 S.E.2d 447,450 (S.C. Ct. App. 2005).

analysis.<sup>68</sup> A recent review of the case law concluded that “[s]tate courts are inconsistent at best in applying these general standards of liability to employers who have hired dangerous employees. . . . [and] the inconsistencies across states are even greater.”<sup>69</sup> Succinctly, “the law in this area is not clearly defined and is **highly** dependent on the individual facts of the case.”<sup>70</sup>

## 2.2. Some Representative Cases

Negligent hiring case law presents an uncertain standard for employers. It is helpful to review the contours of some representative decisions to understand why.<sup>71</sup> The selected cases will help to highlight the central questions posed by the tort: what is the scope of the duty; what are the bounds of foreseeable (proximate) harms; when should a jury decide these questions? These cases also highlight the fact-intensive nature of the disputes and the unpredictability of case outcomes.

In *Hersh v. Kentfield Builders, Inc.*, the plaintiff-customer Melvin Hersh visited a model home for an appointment with the defendant-business’s president Norman Steel.<sup>72</sup> While waiting for the meeting, the plaintiff was seriously injured in an unprovoked attack from employee Benton Hutchinson who had been tasked to do clean-up work and odd jobs at the model homes.<sup>73</sup> The relevant facts for determining negligence in this case were that ten years before he attacked Hersh, Hutchinson had been convicted of manslaughter, and he also had a conviction for carrying a concealed weapon.<sup>74</sup> The parties disagreed about whether the judge or the jury should decide whether the prior conviction was sufficient to warn the employer of Hutchinson’s violent propensities. The trial court initially left the question up to the jury, which found in favor of the plaintiff.<sup>75</sup> The Court of Appeals set aside the verdict after determining that “there was no evidence in the record to support the conclusion of negligence.”<sup>76</sup> The Supreme Court of

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<sup>68</sup> *Id.* citing *See Lingar v. Live-In Companions, Inc.*, 692 A.2d 61, 66 (N.J. Super. Ct. App. Div. 1997); *Staten v. Ohio Exterminating Co.*, 704 N.E.2d 621, 624 (Ohio Ct. App. 1997).

<sup>69</sup> Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1008.

<sup>70</sup> *Id.*

<sup>71</sup> Many of the cases reviewed in this section and some additional omitted cases are described in Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 St. Louis U. L.J. 1001, 1008. See also: <https://www.jacksonlewis.com/media/pnc/6/media.1366.pdf> (Collecting negligent hiring cases that found liability).

<sup>72</sup> *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 288 (Mich. 1971).

<sup>73</sup> *Id.*

<sup>74</sup> *Hersh v. Kentfield Builders, Inc.*, 19 Mich. App. 43, 45 n.1, 172 N.W.2d 56, 57 (1969) at FN 1.

<sup>75</sup> *Hersh* at 289. The jury instruction given by the trial court on how to weigh the evidence of the prior criminal conviction was minimal:

"Now, in order to find negligence in this case, you must find that the defendant knew or should have known of facts which would reasonably indicate that the employee, Bennie Hutchinson, had a violent or vicious nature which was likely to result in injury to someone.

"In determining negligence, you may take into account the defendant's knowledge that Hutchinson had been in prison. However, the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public. "In determining negligence, you may also take into account the experience which the defendant had with Hutchinson over the other times that he was employed before this incident."

<sup>76</sup> *Id.* at 48.



Michigan, reversing the Court of Appeals, ultimately decided that “whether the employer knew or should have known of Hutchinson’s vicious propensities should not be determined by any court as a matter of law, but by the jury.”<sup>77</sup> Some scholars have noted that when these decisions are left up to the jury, “the reported decisions offer a limited amount of guidance for employers who seek to avoid liability for negligent hiring.”<sup>78</sup> A minority of courts have been more hesitant to leave this question to the jury and are more willing to settle the question of foreseeability as a matter of law.<sup>79</sup>

Some courts are willing to find liability even though the previous criminal behavior was not directly related to the harmful act in question.<sup>80</sup> For instance, the court considered an employee’s prior convictions for rape, armed robbery, and residential burglaries sufficiently related to murder to make the employer liable for negligent hiring.<sup>81</sup> Another case found negligent hiring liability for employing a supervisor who had “served prison time for bank robbery, had been arrested for shoplifting, drug possession, a solicitation to buy drugs, disorderly conduct, and solicitation of a sex act, had admitted to using at least seven different aliases, was involved in some physical altercations at work, and participated in a doctor-supervised methadone program” who later “harassed and threatened a female employee.”<sup>82</sup> In *Hines v. Aandahl Constr. Co.*, the court upheld a negligent hiring claim when a contracted painter assaulted homeowners, based on the painter’s drug history and a recent theft of another client’s computer. However, there was no previous violent behavior.<sup>83</sup> Moreover, the employee’s previous misbehavior does not need to be recent. In *Estate of Arrington v. Fields.*, the jury found the defendant liable for exemplary damages for hiring an employee (as security) who shot the plaintiff. However, the employee’s prior actions that gave rise to the negligent hiring claim were nonviolent (burglary with intent to

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<sup>77</sup> *Hersh v. Kentfield Builders, Inc.*, 385 Mich. 410, 415, 189 N.W.2d 286, 289 (1971). The court goes on noting the competing policy concerns: “We share their concern for those persons who, having been convicted of a crime, have served the sentence imposed and so are said to have paid their debt to society and yet find difficulty in obtaining employment. In our considered view, however, their welfare as well as that of the other members of the community is better served by a rule of law which requires a jury—the conscience of the community—rather than a judge, to assay the import of that fact and the circumstances giving rise to it in determining whether their employment for a given job under given circumstances is a reasonable course to follow.”

<sup>78</sup> Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1023. The following cases also note that this question should generally be reserved for the jury: *Frye v. Am. Painting Co.*, 642 N.E.2d 995, 999 (Ind. Ct. App. 1994); *Valdez v. Warner*, 742 P.2d 517, 520-21 (N.M. Ct. App. 1987). *Lessard v. Coronado Paint & Decorating Ctr.*, 2007-NMCA-122, 142 N.M. 583, 597, 168 P.3d 155, 169, *See Gaines v. Monsanto Co.*, 655 S.W.2d 568, 571-72 (Mo. Ct. App. 1983).

<sup>79</sup> *See, e.g., F & T Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 (1979). *See also* Michael Cox, *Torts - Negligent Hiring and Retention - Availability of Action Limited by Foreseeability Requirement*, 10 N.M. L. Rev. 491 (1980).

<sup>80</sup> A number of factors which have been deemed to play into negligent hiring are listed in *Connes v. Molalla Trans. Sys., Inc.*, 831 P.2d 1316, 1321 (Colo. 1992) (en banc): “an arrest without a conviction, an arrest for a felony followed by nonprosecution, an arrest for a serious crime followed by an acquittal or a conviction of a minor offense, [and] an old conviction for a felony or misdemeanor resulting in a successful period of probation or parole without further recidivism.”

<sup>81</sup> Stacy A. Hickox, *Employer Liability of Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1008.

<sup>82</sup> *Prothro v. Nat’l Bankcard Corp.*, No. 04-C-7857, 2006 U.S. Dist. LEXIS 57553, at \*23- 25 (N.D. Ill. Aug. 3, 2006).

<sup>83</sup> *Hines v. Aandahl Constr. Co.*, No. A05-1634, 2006 Minn. App. Unpub. LEXIS 1033, at \*1 (Minn. Ct. App. Sept. 12, 2006).



commit theft, grand larceny, burglary, theft, and a bogus check charge), and his last conviction was more than 13 years before the date of hire.<sup>84</sup>

Other courts and juries have been more reluctant to find liability. For instance, in *Kirlin v. Halverson*, the court looked at the employee's previous criminal record, which included a charge of aggravated and simple assault and resisting arrest in a domestic dispute (although the employee was only convicted of resisting arrest) and a number of other previous charges and citations.<sup>85</sup> The employee, hired to perform HVAC repair and services, assaulted the plaintiff, an employee of a competitor, at the job site.<sup>86</sup> Reviewing this history and the offending employee's relatively infrequent interaction with others on the job, the court rejected the negligent hiring claim. It concluded that to decide otherwise would run counter to public policy.<sup>87</sup> In another case, a company employed a man as a truck driver, and this employee later picked up a stranded motorist and raped and murdered her.<sup>88</sup> On appeal, the court dismissed the negligent hiring claim, deciding that prior convictions for arson and aggravated assault were not enough to establish a violation of the duty to hire reasonably competent employees.<sup>89</sup> The court did note, however, that previous courts faced with different criminal histories had found the employer negligent. The court stated that while hiring a driver with prior convictions for arson and assault is not negligent in this case, hiring someone with a history of a violent sex crime might be (especially if those crimes were connected to driving or hitchhiking).<sup>90</sup> In another case, an Ohio court dismissed a negligent hiring claim for hiring an employee with a previous conviction for indecent exposure at a city park who later sexually assaulted the plaintiff (a coworker).<sup>91</sup> The court discounted two previous unsubstantiated investigations for sexual abuse and dismissed the claim, deciding that there was insufficient evidence.<sup>92</sup>

In sum, it is difficult to discern a clear pattern to these decisions beyond the feature that criminal records increase liability risk, and therefore difficult for employers to predict their exposure to negligent hiring liability when they hire employees with criminal records.

### 2.3. Changes to the Tort of Negligent Hiring

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<sup>84</sup> *Estate of Arrington v. Fields*, 578 S.W.2d 173, 177-79 (Tex. App. 1979).

<sup>85</sup> *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 51, 758 N.W.2d 436, 453 (“Halverson's record of violations of the law is lengthy. Halverson's record reveals one simple assault charge stemming from a December 1995 arrest which was subsequently dismissed; three citations for failure to maintain financial responsibility, each of which was dismissed; one traffic-light violation; three seat belt violations; fifteen speeding citations; one failure to renew a vehicle registration; one grand theft charge which was dismissed; one failure to use a child restraint device; one citation for towing a trailer without safety chains and one citation for violating brake regulations.”)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 454. The court describes the public policy concern as an over deterrence preventing “employers from hiring workers with a criminal record and ‘offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.’”

<sup>88</sup> *Stalbosky v. Belew*, 205 F.3d 890, 892 (6th Cir. 2000).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

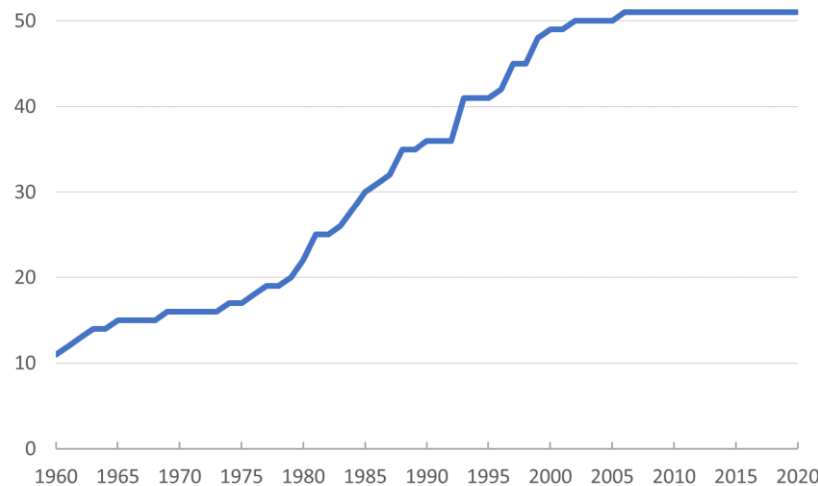
<sup>91</sup> *Prewitt v. Alexson Servs., Inc.*, No. CA2007-09-218, 2008 Ohio App. LEXIS 3612, at \*3 n.3, \*19 (Ohio Ct. App. Aug. 25, 2008).

<sup>92</sup> *Id.*

This paper studies two changes to negligent hiring liability: (1) judicial adoption through common law of negligent hiring liability in states (“negligent hiring recognition”) and (2) recent laws passed by several state legislatures aimed at limiting employer liability and clarifying what criminal record evidence plaintiffs can bring in negligent hiring claims (“negligent hiring reform”).

While employer liability for their employees has a long history, negligent hiring liability is a relatively recent phenomenon. Although it can be challenging to identify the precise point when a jurisdiction recognized the tort, a survey of the case law suggests that widespread adoption of the tort occurred between 1975-2000.<sup>93</sup> The figure below displays recognition over time across the country. This paper studies what happens in states after the recognition of the tort.

**Figure 1: Recognition of Negligent Hiring Cause of Action Over Time**



The common law expansion of the tort of negligent hiring, along with the growth in the portion of the population with a criminal record, has led many scholars and activists to call for reform. One focus of reformers is bringing greater clarity to the rules about what constitutes negligent hiring.<sup>94</sup> Previous scholarship notes that in this uncertain legal setting, “employers, like most potential defendants, are cautious and tend to overprotect themselves.”<sup>95</sup> Proposed solutions to the problem suggest that states enact “uniform requirements informing employers when they can hire an ex-convict and avoid liability”<sup>96</sup> and that at the federal level, a “revised set of EEOC guidelines would provide employers with guidance as to what constitutes due care in hiring

<sup>93</sup> Appendix Table 1.

<sup>94</sup> See, e.g., Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002) and Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 193-94 (2008).

<sup>95</sup> Monique C. Lillard, *Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709, 744 (2007).

<sup>96</sup> Timothy L. Creed, *id.*

practices and indeed a safe harbor from negligence suits.”<sup>97</sup> Some have concluded that the “absence of definitive state and federal regulations spelling out exactly what is required of certain employers [that] has led to a general reticence towards hiring known ex-offenders.”<sup>98</sup>

These calls for guidance have not fallen on deaf ears. Recent legislation has lowered employer liability and provided guidance for what factors should determine negligent hiring liability. Colorado, Texas, Minnesota, New York, New Jersey, Louisiana, D.C, Indiana, Arizona, and Iowa have all clarified how an employee’s criminal record should be considered in assessing negligent hiring liability.<sup>99</sup> Legislation is currently under consideration in Illinois<sup>100</sup> and has been previously proposed in Arkansas.<sup>101</sup> These bills were popular in the state legislatures, generally enjoying near-unanimous support.<sup>102</sup>

While these bills have some variations in their approaches and precise limitations to employer liability, they share certain common features. They do not remove employer liability for crimes that are directly associated with previous offenses, but they do restrict the use of criminal histories more generally and/or raise the standard to gross negligence. The statutes set a standard for admissibility of evidence of a criminal record that requires the historical criminal behavior to be more closely related to the offense than was permitted under the common law standard before the legislation. Many states provide more guidance regarding how closely related the previous conviction must have been to the current offense for the harm to be considered foreseeable. Prior convictions that do not meet this standard are then excluded from evidence.<sup>103</sup>

The Texas bill provides a representative example: “House Bill 1188 amends the Civil Practice and Remedies Code to prohibit a cause of action from being brought against an employer, general contractor, premises owner, or other third party solely for negligently hiring or

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<sup>97</sup> Michael L. Foreman, Professor & Dir. of Civil Rights Appellate Clinic, Pa. State Univ. Dickinson Sch. of Law, Remarks at EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/foreman.cfm>.

<sup>98</sup> Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002).

<sup>99</sup> A list of the bills that states have passed to limit employer liability follows Colorado, 2010 (House Bill 10-1023), Texas, 2013 (H.B. 1188), Minnesota, 2009 (Statute §181.981), New York, 2008 (N.Y. EXEC. L. § 296), Louisiana, 2015 (HOUSE BILL NO. 505), D.C. Re-entry Act of 2012, New Jersey, 2015 (A-1999) Indiana, 2017 (Indiana SB 312, signed as Public Law 210), Arizona, 2018 (H.B. 2311), and Iowa 2019 (Iowa HF 650).

<sup>100</sup> See Illinois HB665 and <https://www.illinoispolicy.org/negligent-hiring-liability-reforms-stall-in-illinois/>.

<sup>101</sup> Amendment No. 1 to Arkansas Senate Bill 806 (2011) (“Although framed as an initial study, the bill indicates that if it “proves feasible and prudent,” rules implementing limitation of liability shall be promulgated.”).

<sup>102</sup> <https://ogletree.com/insights/new-texas-law-limits-negligent-hiring-supervision-claims-against-employers/>. Texas H.B. 1188 was signed by Rick Perry and was passed by the Texas House of Representatives by a vote of 134-2, and it was passed by the Texas Senate by a unanimous 31-0 vote. Colorado House Bill 10-1023 was also bipartisan, “the members of the Colorado Legislature worked to clarify negligent hiring concerns in 2010 when they unanimously passed a law to address employers’ concerns about negligent hiring lawsuits.” <https://thrivecolorado.org/wp-content/uploads/2020/02/co-hiring-guide.pdf>. Iowa’s bill received unanimous votes in both houses. The New York law is a bit of an oddity as it was passed by executive order. Indiana’s bill was the most controversial, but this was due to the fact that part of the bill prohibited the state and municipalities from enacting “Ban-the-Box” laws. <https://www.indystar.com/story/news/2017/04/19/indiana-aclu-naacp-want-governor-veto-felony-hiring-bill/100134348/>

<sup>103</sup> See, e.g., Minn. Stat. Ann. § 181.981 (“Information regarding a criminal history record of an employee or former employee may not be introduced as evidence in a civil action against a private employer or its employees or agents that is based on the conduct of the employee or former employee, if: . . . (3) the record is of an arrest or charge that did not result in a criminal conviction”). Similar language appears in Colo. Rev. Stat. § 8-2-201.

failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense.”<sup>104</sup> The bill provides an exception “when (2) the employee was convicted of: (A) an offense that was committed while performing duties substantially similar to those reasonably expected to be performed in the employment, or under conditions substantially similar to those reasonably expected to be encountered in the employment, taking into consideration the factors listed in Sections 53.022 and 53.023(a)<sup>105</sup>, Occupations Code, without regard to whether the occupation requires a license; (B) an offense listed in Section 3g, Article 42.12, Code of Criminal Procedure; or (C) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure.”<sup>106</sup>

The discussions surrounding these bills explicitly recognize the trade-offs discussed above and indicate that the state legislatures were attempting to lower employer liability. The ultimate goal was to improve access to labor markets for released individuals and decrease recidivism. Consistent with this goal, the bills almost invariably contain language such as “this section does not create a cause of action” and “the protections provided by this bill to employers.”<sup>107</sup> These bills also seek to provide additional guidance regarding when plaintiffs can introduce criminal records as evidence of negligent hiring.<sup>108</sup> For instance, Texas House Bill 1188 Sections 53.022 and 53.023(a) explicitly list the factors relevant to evaluating proximate cause. These factors largely mirror guidance from the EEOC. They include the nature and seriousness of the crime, the extent to which employment might offer an opportunity to engage in further criminal activity of the type previously committed, the extent and nature of the person’s past criminal activity, the age of the person when the crime was committed, and the amount of time that has elapsed since the person’s last criminal activity.<sup>109</sup>

#### 2.4. Potential Behavioral Responses to Negligent Hiring Liability

There are many overlapping groups potentially impacted by the imposition of the tort: (1) employers and consumers, (2) victims of the harm caused by negligently hiring, (3) victims

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<sup>104</sup> HB 1188 Enrolled Bill Summary available at

<https://capitol.texas.gov/BillLookup/BillSummary.aspx?LegSess=83R&Bill=HB1188>.

<sup>105</sup> These factors are enumerated here: <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.53.htm>.

<sup>106</sup> Texas House Bill 1188. The bill also states “the protections provided . . . under this section do not apply in a suit concerning the misuse of funds . . . if, on the date the employee was hired, the employee had been convicted of a crime that includes fraud or the misuse of funds or property as an element of the offense, and it was foreseeable that the position for which the employee was hired would involve discharging a fiduciary responsibility in the management of funds or property. (d) This section does not create a cause of action or expand an existing cause of action.”

<sup>107</sup> *Id.* “(a) Employers may be reluctant, in part, to hire employees with a criminal record due to a lack of clarity regarding the employer’s risk of liability for such hire; (b) Since there is a direct correlation between employment and reduced recidivism, it is in the public interest to clarify employer liability for employers who hire persons with a criminal conviction. (2) Therefore, it is necessary and appropriate for the General Assembly to reduce unnecessary barriers to employment for persons with a criminal conviction and thereby promote economic opportunity, poverty reduction, and public safety in the state of Colorado.”

<sup>108</sup> New York has gone so far as to suggestion a rebuttable presumption against liability if the employer can show it has evaluated the factors enumerated in Section 753 and determined in good faith that such factors militate in favor of hiring of the applicant or retention of the employee. New York State Comm’n on Sentencing Reform, *The Future of Sentencing in New York State: A Preliminary Proposal for Reform* 50 (Oct. 15, 2007). See also [https://www.nycbar.org/pdf/report/Task\\_Force\\_Report08.pdf](https://www.nycbar.org/pdf/report/Task_Force_Report08.pdf).

<sup>109</sup> See Sec. 53.022 and Sec. 53.023 for a full list of the 12 factors.  
<https://statutes.capitol.texas.gov/Docs/OC/htm/OC.53.htm>

harmful by people who cannot get jobs because negligent hiring liability limits their employment prospects, and (4) job applicants with criminal records. Note that while these are helpful conceptual categories, they are not mutually exclusive.

First, consider employers. Additional negligent hiring liability imposes additional costs on employers, including more protracted and costlier searches as employers conduct additional screening and hire a smaller fraction of job applicants. Additionally, employers sued for negligent hiring will bear additional legal costs regardless of whether they win or lose. These costs will ultimately be shared with consumers (although the incidence of this cost will depend on relative supply and demand elasticities).

Second, consider victims of the harm caused by negligent hiring. A marginal expansion of employer liability will have two effects. First, it will allow other injured parties compensation for their injuries. They would otherwise not have viable paths to recovery against judgment-proof employees. Second, because employers behave more carefully in their hiring practices, there may be fewer potentially actionable behaviors from employees, thus lowering the number of victims. Whether there will be more or fewer successful negligent hiring claims after expanding employer liability depends on which of these effects is larger.

An increase in negligent hiring liability will increase the number of victims of tortious actions who cannot trace their injuries directly to negligent hiring decisions. As discussed above, the lack of employment opportunities causes an increase in criminal activity, especially for those with a history of criminal behavior. An increase in negligent hiring liability makes employers less likely to hire folks with criminal records, thus decreasing the employment opportunities for applicants with criminal records and thereby increasing recidivism and tortious behavior.<sup>110</sup>

Suppose employers cannot perfectly identify the applicants who will commit misconduct for which they will be responsible as de facto insurers via the negligent hiring tort. In that case, a rational employer will form an estimate of their expected liability from hiring the applicant. This estimate will be based on the perceived compounded probabilities that an employee will offend while employed and that the employer will be found liable for the offense, scaled by the average cost of the negligent hiring settlement or judgment. Both of the estimated probabilities will likely increase with the length and severity of an applicant's criminal record since employers believe that juries and courts are more likely to find an employer negligent when the employee has a longer record. As employer estimates of perceived liability or uncertainty of liability increase, employers may be less willing to hire individuals with criminal histories for fear of later being found negligent, even if they personally believe that such a hire was not negligent at the time of hiring.

Translating the impacts across these groups to aggregate behavioral changes is challenging. Additional employer negligent hiring risk may increase or decrease the number of total offenses. Employers will take more precautions when they think they are more likely to be found liable. This suggests there will be fewer offenses by employees. But if the employer chooses not to hire

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<sup>110</sup> It is worth noting that there are some criminal activities that won't generate tort liability and similarly some tortious activities that won't be a criminal infraction. However, in the context of negligent hiring there will be considerable overlap.

an applicant because of his criminal record, the applicant does not disappear. Instead, the applicant may remain unemployed and thus be at more risk of offending. If the decreased rate of offending related to negligent hiring is less than the increased offending rate because of unemployment, the absolute number of offenses will increase.

Of course, we do not only care about the gross number of offenses but also about the harm they generate. Altering negligent hiring liability may influence the frequency of criminal behavior and the nature of offenses committed. Being employed may change the type of criminal opportunities available to a person. For instance, employment in a customer-facing job may increase the number of person-to-person interactions. Perhaps someone not hired due to an increase in negligent hiring liability would have committed an assault on the job but instead committed a burglary off the job. Certain employment may place workers inside other people's homes or in charge of supervising other people's possession. The subsequent analysis will be able to speak to these changes in behavior. However, other differences are more difficult to measure. For instance, perhaps being harmed by an employee who is implicitly in a position of trust is inherently more damaging than being injured in other contexts.<sup>111</sup> The type of person who is the victim of the offense is also likely to change. Negligent hiring may provide deeper pockets for victims of torts, providing a compensation function.

Employers provide an uncompensated benefit to society by reducing criminal offenses generated by unemployment and transferring wealth to victims of offenses who are dealt an unexpected painful life event. This externality could be solved by providing a separate incentive to hire workers with a criminal record so that employers are fully compensated for the benefit they provide in preventing other offenses. Alternatively, the state could accomplish this insurance function through victim funds or transfer programs. State insurance may also have the attractive feature of fully compensating all injured parties, rather than just those who happened to be harmed by employed tortfeasors.

## 2.5. Mathematical Formalization Summarizing Behavioral Responses

In this subsection, I present a motivating contracting model to help provide more structure and intuition for the employers' problem. I provide a mathematical formalization of the intuitions and mechanisms addressed in the previous subsection. I model the problem as a contracting agreement between the employer and employee, with observable precautionary "effort" (where more effort creates less criminal behavior) and an agent with limited liability. Limited liability is appropriate in this setting, as most employees will face liquidity/wealth constraints if found responsible for civil penalties. This approach alters and builds on earlier work applying such modeling of vicarious liability and principal-agent contracting in a vicarious liability setting.<sup>112</sup> I abstract away from formally modeling victims' compensation when the employee is judgment

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<sup>111</sup> Of course, one could tell stories of this harm being greater in either direction. This paper is unable to bring data to bear to untangle this thorny issue.

<sup>112</sup> See, e.g., Juan Bisso & Albert H. Choi, *Optimal Agency Contracts: The Effect of Vicarious Liability and Judicial Error*, 28 INT'L REV. L. & ECON. 166 (2008) for an example of one such model.



proof by simply leaving the harm functions from each offense category as generic. However, further exploration of this element for later work is warranted.<sup>113</sup>

For simplicity, I model the agent (the job applicant) as risk-neutral. The agent chooses  $a \in \{0, 1\}$  where  $a = 0$  is when the agent engages in criminal conduct. The agent's cost of action is  $\psi$  (the opportunity cost of the foregone criminal activity) if he does not offend and is normalized to 0 otherwise.<sup>114</sup> The employer receives revenue  $R > 0$  when the worker and employer agree to a contract. Denote  $q$  as the probability that an employer has been negligent in hiring or retaining the worker, with  $q \in \{0, 1\}$  where  $q = 0$  indicates negligence. For analytic convenience it is helpful to define some conditional probabilities, the probability of no negligence given offense:  $P(q = 1|a = 0) = p_0$  and a similar probability for non-negligence given no punished criminal activity, which is set to be equal to 1  $P(q = 1|a = 1) = p_1 = 1$ . The firm offers two effective wages  $w_0, w_1$  where  $w_0$  is what is paid if the employer is found negligent, and  $w_1$  is the wage if not. While this suggests that the firm is varying compensation, one could also consider this process an effective wage, including some supervision, support, and monitoring element. Let  $L$  denote the limited liability constraint of the worker. The firm's problem in this simple example is:

$$\begin{aligned} \max_{w_0, w_1} & p_1(R - w_1) + (1 - p_1)(R - N - w_0) \quad s.t. \\ & p_1 w_1 + (1 - p_1)w_0 \geq \psi \quad (\text{IR}) \\ & (p_1 - p_0)(w_1 - w_0) \geq \psi \quad (\text{IC}) \\ & w_0, w_1 \geq L \quad (\text{LL}) \end{aligned}$$

From this contracting problem, we can generate the following conditions (assuming the limit to liability binds).<sup>115</sup> If the firm chooses to hire but does not choose to screen and monitor (i.e., to simply accept liability), the wage offer will be  $w_0, w_1 = L$ . The worker will choose any new offenses that come along such that  $L \leq \psi = j(Y + L) + (1 - j)(Y - f)$ , where  $j$  is the probability of offending without being caught,  $Y$  is the income from criminal activity,  $f$  is the criminally imposed penalty, and there is no civil penalty imposed on the worker due to the limited liability constraint. Assuming some arbitrary, unobserved probability distribution over  $Y$  generates some probability of offenses that will be deemed  $o_n$ . Further, assume that the harm caused by activity  $Y$  to the victim is  $H(Y) > Y$  and  $H'(Y) > 0$ . If the liability system fully compensates victims,  $N = H(\cdot)$ .

If, however,  $N > (R + p_0)/(1 - p_0)$ , then it will be unprofitable for the firm to hire the applicant. In this case the offense condition is  $0 \leq \psi = j(Y') + (1 - j)(Y' - f)$ . Here the opportunities to offend are allowed to vary based on whether or not the agent has been

<sup>113</sup> One could also justify such an abstraction by noting that if the policy preference is for insuring victims, the current structure could be replaced with a government payout system funded by general taxes that does not generate the behavioral distortions displayed below. See generally, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994).

<sup>114</sup> An extension to this model that should be pursued is to add uncertainty to  $\psi$ . This would allow the model to have the following interpretation: a contract is made, then the worker receives a random criminal opportunity.

<sup>115</sup> The other two constraints, "IR" and "IC," are shorthand for "individual rational" and "incentive compatible." These concepts from the mechanism design literature, roughly translate to "the contract is at least as good as not agreeing to any contract" and "each participant can achieve the best outcome by acting in accordance with their preference."

employed. Again, assuming some arbitrary, unobserved probability distribution over  $Y'$  generates some probability of offenses that will be deemed  $o_u$ . Here  $Y'$  is allowed to follow a different distribution than  $Y$ . If, for instance, the crimes available to an employed agent are more profitable, one might impose first-order stochastic dominance of  $Y$  over  $Y'$ . Because little is known about these distributions, they are left in general terms here.

For the firm to satisfy the constrained optimization problem above (i.e., if it wants to supervise/screen its hires), the firm will choose  $w_0 = L$  and  $w_1 = L + \psi/(p_1 - p_0)$ . For completeness, assume a similar offense function in the monitored problem, with offense  $\hat{Y}$  at rate  $o_s$  (one could model the supervision as shifting the distribution of  $\hat{Y}$  lower or as a shift to  $o_s$ ). The firm will only find it profitable to do so if the following inequality holds:  $L + \psi/(1 - p_0)^2 < N < (R + p_0L)/(1 - p_0)$ . Thus, by increasing  $N$ , or the liability a firm faces for its employees offending, the firm is more likely to choose the monitoring contract. However, as  $N$  increases, fewer contracts are struck since the required revenue generated by a firm match is higher. Assuming match revenue is distributed randomly across applicants, there will also be some distribution across contract types: label  $S_u$  the share who are unemployed,  $S_n$  the share in potential negligent matches, and  $S_s$  the share in non-negligent matches.

How much harm is being generated by these offenses? In the negligent contract, some fraction  $o_n$  offending with harm  $H(Y)$ , so offense harm is  $o_n H(Y)$ . In the unemployment contract, it is  $o_u H(Y')$ , and in the supervised scenario  $o_s H(\hat{Y}) < o_n H(Y')$  (in other words, if firms were constrained to hire everyone, imposing negligence liability reduces the harm of offenses). Increasing  $N$  or  $p_0$  increases the proportion of contracts that fall into either the unemployed or supervised contract structure and decreases the number of contracts in the negligent bucket, i.e.,  $S_s < S_s^*$ ;  $S_u < S_u^*$ ;  $S_n > S_n^*$ . The change in harm is thus  $(S_s - S_s^*) * o_s H(\hat{Y}) + (S_u - S_u^*) o_u H(Y') + (S_n - S_n^*) o_n H(Y)$ , or a shift in weighting of the average harm dealt by each category of contract. The first two terms are negative, while the last is positive. Thus the amount of harm is ambiguously signed and depends on the relative shifts in shares and the distribution of  $Y$  and  $Y'$  (something that can be studied by examining the composition of criminal behavior after a change in  $N$ ). In the simple model, a shift into the supervised category unambiguously lowers recidivism rates. However, whether a shift from negligent hiring to unemployment increases recidivism rates depends on whether  $o_u > o_n$ . If after  $N$  increases, recidivism increases, then the share of unemployed must offend more frequently than those who are negligently employed by an amount that is greater than the reduction of recidivism rates driven by the lower recidivism rates from supervised employees.<sup>116</sup>

The next section of this paper will address these empirical questions directly by examining the impact on recidivism and employment outcomes in several states that have changed the negligent hiring standard over time. It focuses on reforms reducing  $p_0$  and measures outcomes by looking at responses in offense rates  $\sum_{i=u,n,s} O_i$  and attempts to proxy for changes to  $H(\cdot)$  by studying changes to the composition of offense type.

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<sup>116</sup> Notably absent from this simple model are welfare considerations generated by the transfer payment acting as insurance to harmed third parties. This is akin to assuming risk-neutral third parties but is an assumption that should be studied further.

### 3. Evidence on the Impact of Changes to Negligent Hiring Liability

The theoretical concerns laid out in words in section 2.4 and mathematically in section 2.5 suggest that changes to negligent hiring liability will impact the number and type of criminal offenses as well as a host of other labor market outcomes. This section analyzes the impact of statutory changes to negligent hiring. In particular, it will focus on ten states that have passed statutes that limit employer liability for hiring individuals with criminal records (lowering  $p_0$ ).<sup>117</sup> Legislation is currently under consideration in Illinois.<sup>118</sup> It will also study the impact of tort recognition (increasing  $p_0$ ) on offending.

While these bills all aim to reduce and/or clarify employer liability for the tort of negligent hiring, they do not remove liability entirely (in terms of the model, this is akin to lowering  $p_0$  but not setting it to 0). These legislative acts do not remove liability for crimes that are directly associated with previous offenses but do restrict the introduction of criminal records in negligent hiring cases.<sup>119</sup> This restriction is consistent with legislatures wanting to encourage employers to hire workers with criminal records but not to provide these new hires with additional criminal opportunities.<sup>120</sup>

The following subsections suggest that individuals with a criminal record are more likely to be employed in states after they have enacted negligent hiring reform. There are lower recidivism rates after lowering negligent hiring liability, especially from the groups of released individuals most likely to be impacted by the reforms. There are, if anything, fewer criminal offenses after a state passes negligent hiring reform and more criminal offenses after a state recognizes the tort. Employment opportunity for those with criminal records is a plausible causal channel through which these reforms lower recidivism.

#### 3.1. The Impact of Negligent Hiring Reform on Labor Market Outcomes

Data linking criminal justice exposure and labor market outcomes are notoriously lacking and can be unreliable, although substantial efforts are being made to improve the state of data availability.<sup>121</sup> Existing studies that study the interplay between labor markets and criminal

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<sup>117</sup> A list of the bills that states have passed to limit employer liability follows New York, 2008 (N.Y. EXEC. L. § 296), Colorado, 2010 (House Bill 10-1023), D.C. Re-entry Act of 2012, Texas, 2013 (H.B. 1188), Minnesota, 2009 (Statute §181.981), New Jersey [2015] (A-1999), Louisiana, 2015 (HOUSE BILL NO. 505), Indiana, 2017 (SB312), Arizona, 2018 (H.B. 2311), Iowa, 2019 (H.F. 650).

<sup>118</sup> See Illinois HB665 and <https://www.illinoispolicy.org/negligent-hiring-liability-reforms-stall-in-illinois/>.

<sup>119</sup> Even in states that do restrict the presentation of criminal history at trial to closely related crimes, this assumes that similar previous crime is particularly informative of future similar criminal actions, a claim that is not entirely supported by careful data analysis. J.J. Prescott, Benjamin Pyle, & Sonja Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020).

<sup>120</sup> Unfortunately, a first stage is not available; I was unable to construct a systematic measure of the number and magnitude of realized and potential negligent hiring claims per year.

<sup>121</sup> See Jennifer L. Doleac, EMPIRICAL EVIDENCE ON THE EFFECTS OF BAN THE BOX POLICIES: THE STATE OF THE LITERATURE IN 2019. TESTIMONY PREPARED FOR THE US HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM. WORKING PAPER, [http://jenniferdoleac.com/wpcontent/uploads/2019/03/Doleac\\_testimony\\_BTBTB\\_2019.pdf](http://jenniferdoleac.com/wpcontent/uploads/2019/03/Doleac_testimony_BTBTB_2019.pdf) (accessed July 12, 2019), 2019.

activity has relied on either 1) administrative records from one or two jurisdictions<sup>122</sup> or 2) survey data with broader geographic coverage but a small sample of respondents with criminal histories.<sup>123</sup> However, massive improvements to criminal justice data in recent years allow the following analysis to combine administrative court and prison records covering nearly half of the U.S. population with Census survey data.<sup>124</sup> While previous studies were limited by sample size, I am able to study over 325,000 people with felony convictions and millions more with misdemeanor charges or no criminal records.

Criminal histories are measured using the Criminal Justice Administrative Records System (CJARS),<sup>125</sup> which compiles and harmonizes criminal justice records from many jurisdictions and agencies and matches this with a rich set of socio-economic data from the American Community Survey (ACS). This paper focuses on criminal court charges, classified by type (e.g., property, drug, or violent) and gravity (e.g., misdemeanor or felony) and incarceration data from prison records.

Although CJARS offers massive improvements over previously available data, it does not cover all jurisdictions over all relevant times. As CJARS continues to expand its data holdings, follow-up analysis can be conducted to expand the sample of both treated and control states. To generate estimates over comparable samples, I divide the data in three ways and present an analysis over each subsample. First, the “prison sample” includes 11 states with sufficient data on prison entries and exits to construct criminal histories over the analysis sample (2005-2019): Arizona, Colorado, Florida, Illinois, Michigan, Nebraska, North Carolina, Pennsylvania, Texas, Washington, and Wisconsin (with Arizona, Colorado, and Texas enacting reforms). An alternative “court sample” includes all states with sufficient adjudication records: Arizona, Florida, Maryland, Michigan, New Jersey, North Carolina, North Dakota, Oregon, Wisconsin, and Texas (with Arizona, New Jersey, and Texas enacting reforms). A final “pooled sample” is the union of these two sets composed of 14 states and 4 adopting states. The pooled sample has the advantage of a larger sample but potentially less comparable criminal record coverage.

Table 1 displays employment rates and the number of survey respondents with a criminal record and a specific characteristic. For instance, the first two rows show that respondents with a felony or prison record living in jurisdictions with negligent hiring reform in effect had employment rates 6 percentage points higher than people living in jurisdictions that did not have

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<sup>122</sup> See, e.g. Evan Rose, *Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example*, 39 J. LABOR ECON. 79 (2021), Osborne Jackson & Bo Zhao, *The effect of changing employers' access to criminal histories on ex-offenders' labor market outcomes: Evidence from the 2010–2012 Massachusetts CORI reform*, Working Paper no. 16-30, Federal Reserve Bank of Boston, and Steven Raphael, *The intended and unintended consequences of ban the box*, 4 ANN. REV. CRIMINOLOGY (2021): 191-207.

<sup>123</sup> The National Longitudinal Survey of Youth (NLSY) is one often used survey. However, by 2009, the survey only includes less than 250 individuals who report ever having been arrested.  
<https://www.nlsinfo.org/content/cohorts/nlsy97/topical-guide/crime/crime-delinquency-arrest>

<sup>124</sup> The importance of high-quality data with a sufficiently large sample can be seen in this exercise, as a parallel employment analysis is pursued using the Panel Study of Income Dynamics (PSID) in the appendix, which finds qualitatively similar, but less precise results.

<sup>125</sup> Keith Finlay & Michael Mueller-Smith. Criminal Justice Administrative Records System (CJARS) [dataset]. (Ann Arbor, MI: University of Michigan) (2021).

reforms in place yet. We also observe that employment rates are similar across felony records (drug, violent, property, or other convictions), while men and younger people with criminal records have higher average employment rates. Black non-Hispanic people with records report lower employment rates than white non-Hispanic or Hispanics. People with criminal records and more education have higher employment rates than those with less education.

**Table 1: ACS and CJARS Summary Employment Rates By Characteristics**

Felony/Prison Conviction and:	Average Employment	Standard Deviation	Observations
Reform in effect:			
Yes	0.63	0.48	49000
No	0.57	0.5	277000
Felony conviction type:			
Violent	0.57	0.5	71000
Property	0.57	0.49	118000
Drug	0.54	0.5	100000
Other	0.57	0.5	91000
Sex:			
Male	0.6	0.49	250000
Female	0.5	0.5	75000
Age:			
25-34	0.63	0.48	81000
35-54	0.6	0.49	185000
55-64	0.42	0.49	59000
Race/Ethnicity:			
White	0.6	0.49	201000
Black	0.48	0.5	76000
Hispanic	0.64	0.48	48000
Education:			
< High school	0.44	0.5	67000
< College (and > HS)	0.59	0.5	215000
College	0.71	0.45	43000

Any views expressed are those of the authors and not those of the U.S. Census Bureau. The Census Bureau's Disclosure Review Board and Disclosure Avoidance Officers have reviewed this information product for unauthorized disclosure of confidential information and have approved the disclosure avoidance practices applied to this release. This research was performed at a Federal Statistical Research Data Center under FSRDC Project Number 2295. (CBDRB-FY22-P2295-R9926)

The model unambiguously predicts that employment for workers with criminal records will increase when employer liability for their future actions decreases. To test whether this occurs, I use difference-in-differences and event studies to compare the outcomes for people with criminal records in states after the states enacted negligent hiring reform to similarly situated people in states that did not reform the tort. For this approach to measure the causal impact of negligent hiring reform, I need to assume that people with criminal records in reformed and non-reformed states would have had similar employment trajectories absent the reform. One way to build

confidence in this assumption is to show that prior to a liability change, the difference in labor market outcomes between treated and untreated states does not follow a clear trend and is near 0. To evaluate this assumption and generate estimates of the impact of the reform, I estimate the equation below, which parallels other works in the literature.<sup>126</sup>

$$\text{Equation 1: } Outcome_i = \alpha + \beta_1 * Reform_{m,t} + \beta_2 * Criminal\ Record + \beta_3 * Reform * Criminal\ Record + \theta_D * \mathbf{D} + \lambda_{t \times region} + \delta_{CBSA} + \delta_{CBSA \times t} + \epsilon_i$$

The subscript m indexes Core-based Statistical Areas (CBSAs), i indexes individuals, and t indexes months. From this, I estimate the impact of the reform on the employment outcome of interest for the whole population ( $\beta_1$ ) and on the population of interest, people with criminal histories ( $\beta_3$ ), while controlling for a criminal record ( $\beta_2$ ), a vector of individual characteristics **D**, including race/ethnicity categories, age fixed effects, fixed effects for years of education, and an indicator for whether the individual is currently enrolled in school, CBSA and regional fixed effects, and CBSA time-trends.

The impact of negligent hiring reform likely varies by state and time (heterogeneous treatment effects), and states implemented the reform in a staggered manner. In the presence of these two features, a standard statistical approach, two-way fixed effects, will not yield estimates of the causal relationship of interest. To account for this, I implement an imputation estimation procedure<sup>127</sup> in addition to estimating the more traditional two-way fixed effects estimation approach.

Figure 2 shows two event studies depicting the evolution of employment outcomes before and after negligent hiring liability is reformed in the prison sample. Two different outcomes are shown: in panel (A) the extensive margin (whether a worker worked in the past week) and in panel (B) the intensive margin (the inverse hyperbolic sine transform of wage earnings). These figures demonstrate that workers with criminal records had similar employment probabilities in states that would eventually reform negligent hiring and those that never reformed the tort. We verify this pattern by noting that the solid black line (which, in Panel A, displays the probability of working in reform states minus the probability of working in non-reform states) is near zero before reform implementation (denoted by t-1 and the vertical, red-dashed line). Before the reform, the 95% confidence interval (the gray shaded area) consistently includes 0 and does not exhibit any evidence of differing pre-trends.<sup>128</sup> However, in states that reformed negligent hiring, people with criminal records are more likely to be employed and earn higher wages after the reform (the solid black line increases from t to the end of the sample). The impact of the reform can be seen immediately upon enactment and seems to grow over time, perhaps as employers gain greater knowledge of the law.

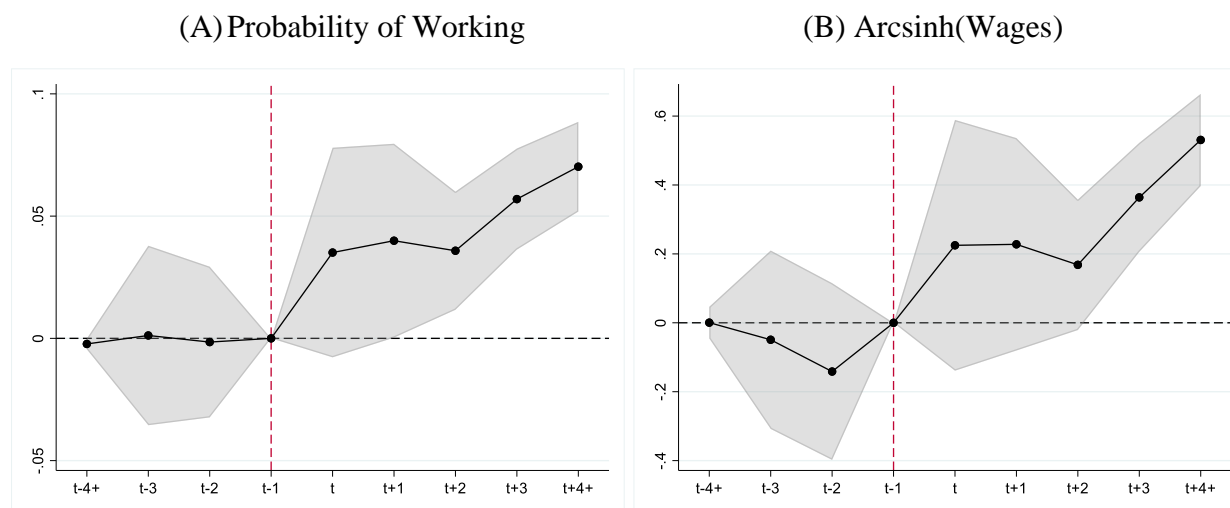
<sup>126</sup> Jennifer L. Doleac and Benjamin Hansen, *The Unintended Consequences of 'Ban the Box': Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden.*, J. OF LAB. ECON., (forthcoming April 2020).

<sup>127</sup> John Gardner, *Two Stage Difference in Differences*, WORKING PAPER (2021).

<sup>128</sup> Additional work implementing standard error calculations based on A. Colin Cameron, Jonah B. Gelbach, & Douglas L. Miller, *Bootstrap-Based Improvements for Inference with Clustered Errors*, 90 REV. ECON. & STAT. 414 (2008) is in progress.



**Figure 2: Event Study - Negligent Hiring Reform and Employment**



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These results can also be translated to point estimates, as shown in

Table 2, which considers the results for the prison sample. Panel A shows several estimation approaches focused on employment status over the past week as the outcome of interest. Panel B uses similar estimation approaches but focuses on a transformation of wage earnings (the inverse hyperbolic sine of wage earnings over the past year). Columns 1 and 2 show two-stage difference-in differences (2SDID) estimated over the full sample and two-way fixed-effects, respectively. Both approaches suggest that reforming negligent hiring liability had little impact on overall employment but significantly improved employment for workers with criminal records by between five and six percentage points. For context, in the sample considered, workers with prison records are about twenty-one percentage points less likely to be employed. This means that negligent hiring reform reduces the gap in employment rates between those with and without prison records by about twenty-five percent. In 2008, the ACS slightly altered how the employment question was asked.<sup>129</sup> Thus, some of the results could be influenced by changes in survey design. To address this technical measurement concern, columns 3 and 4 start the sample in 2008. The results are essentially unchanged when the starting year is varied. Finally, as discussed in additional depth later, a contemporaneous policy, Ban-the-Box, was often tied with negligent hiring reforms. The final columns control for Ban-the-Box adoption. Columns 5 and 6 suggest that controlling for Ban-the-Box legislation does not significantly change the estimated effect of negligent hiring reform. In panel B, the impact on wages is explored. All estimation samples begin in 2005 and show an increase in earnings by thirty-four to forty percent.

<sup>129</sup> Braedyn K. Kromer & David J. Howard. Comparison of ACS and CPS data on employment status (2010). [https://www.census.gov/people/laborforce/publications/ACS-CPS\\_Comparison\\_Report.pdf](https://www.census.gov/people/laborforce/publications/ACS-CPS_Comparison_Report.pdf).

**Table 2: The Impact of Negligent Hiring Reform on Employment (Prison Sample)****Panel A: Outcome - Employment**

	(1)	(2)	(3)	(4)	(5)	(6)
Negligent Hiring Reform	-0.002144 (0.003797)	-0.007948 (0.004868)	-0.002255 (0.003716)	-0.008019 (0.004918)	0.006932 (0.01701)	-0.001722 (0.002219)
Reform x Prison History	0.05414*** (0.01404)	0.0567*** (0.01618)	0.05145*** (0.01281)	0.05387*** (0.01466)	0.04924*** (0.01267)	0.06396*** (0.01423)
Prison History		-0.2126*** (0.007266)		-0.2116*** (0.008289)		-0.2216*** (0.008001)
Estimation	did2s	twfe	did2s	twfe	did2s	twfe
Sample	prison	prison	prison	prison	prison (08 start)	prison (08 start)
BTB Control	no	no	yes	yes	yes	yes
Obs	10940000	10940000	10940000	10940000	8841000	8841000

**Panel B: Outcome - Inverse Hyperbolic Sine (wage earnings)**

	(1)	(2)	(3)	(4)
Negligent Hiring Reform	0.00164 (0.03068)	-0.04122 (0.04709)	-0.002225 (0.03356)	-0.0436 (0.05296)
Reform x Prison History	0.395*** (0.131)	0.3797*** (0.1457)	0.3456*** (0.1044)	0.3407*** (0.1227)
Prison History		-2.146*** (0.07017)		-2.096*** (0.06827)
Estimation	did2s	twfe	did2s	twfe
Sample	prison	prison	prison	prison
BTB Control	no	no	yes	yes
Obs	10940000	10940000	10940000	10940000

State clustered robust standard errors in parentheses. \*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$ . Any views expressed are those of the authors and not those of the U.S. Census Bureau. The Census Bureau's Disclosure Review Board and Disclosure Avoidance Officers have reviewed this information product for unauthorized disclosure of confidential information and have approved the disclosure avoidance practices applied to this release. This research was performed at a Federal Statistical Research Data Center under FSRDC Project Number 2295. (CBDRB-FY22-P2295-R9926)

Next, I consider how robust the results are to sample construction and look at the court sample for people with felony convictions in Table 3. While two things are changing between the two samples (felony convictions do not necessarily require a prison sentence and a different selection of states), we see that negligent hiring reform increases employment by a slightly lower four to five percentage points. However, people with criminal records are about seventeen percentage points less likely to be employed than workers without records. Here again, negligent hiring reform accounts for about twenty-five percent of the gap between workers with and

without criminal records. These results are again robust to sample start year, estimation approach, and Ban-the-Box controls.

**Table 3: The Impact of Negligent Hiring Reform on Employment (Court Sample)**

**Panel A: Outcome - Employment**

	(1)	(2)	(3)	(4)	(5)	(6)
Negligent Hiring Reform	0.005145 (0.01026)	-0.01103*** (0.004048)	0.005104*** (0.009407)	-0.01089** (0.003902)	-0.006376* (0.003822)	-0.002067 (0.002416)
Reform x Felony History	0.04031*** (0.009126)	0.04402*** (0.007636)	0.03799*** (0.007613)	0.04163*** (0.005718)	0.04783*** (0.006681)	0.04908*** (0.006229)
Felony History		-0.172*** (0.004924)		-0.1686*** (0.005576)		-0.1769*** (0.005973)
Estimation	did2s	twfe	did2s	twfe	did2s	twfe
Sample	court	court	court	court	court (08 start)	court (08 start)
BTB Control	no	no	yes	yes	yes	yes
Obs	9575000	9575000	9575000	9575000	7728000	7728000

**Panel B: Outcome - Inverse Hyperbolic Sine (wage earnings)**

	(1)	(2)	(3)	(4)
Negligent Hiring Reform	0.03196 (0.03024)	-0.07314** (0.0343)	0.03031 (0.02967)	-0.07444** (0.03644)
Reform x Felony History	0.2722*** (0.08508)	0.2823*** (0.08146)	0.2439*** (0.06267)	0.257*** (0.05794)
Felony History		-1.739*** (0.06447)		-1.675*** (0.06863)
Estimation	did2s	twfe	did2s	twfe
Sample	court	court	court	court
BTB Control	no	no	yes	yes
Obs	9575000	9575000	9575000	9575000

State clustered robust standard errors in parentheses. \* p<0.10, \*\* p<0.05, \*\*\* p<0.01. Any views expressed are those of the authors and not those of the U.S. Census Bureau. The Census Bureau's Disclosure Review Board and Disclosure Avoidance Officers have reviewed this information product for unauthorized disclosure of confidential information and have approved the disclosure avoidance practices applied to this release. This research was performed at a Federal Statistical Research Data Center under FSRDC Project Number 2295. (CBDRB-FY22-P2295-R9926)

Finally, I pool the samples across states with either sufficient prison or court data in Table 4. Given the results of the prison sample and the felony conviction sample combining the two samples may yield similar results with more precision. While the results are broadly similar in the pooled sample, they are somewhat more variable ranging between 4 and 7 percentage points for employment and 35 to 50 percent increases in wages. In Appendix Table 3, I present a similar version merging any charge and prison.

**Table 4: The Impact of Negligent Hiring Reform on Employment (Pooled Sample)**

**Panel A: Outcome - Employment**

	(1)	(2)	(3)	(4)	(5)	(6)
Negligent Hiring Reform	0.03478 (0.03233)	-0.002413 (0.004981)	0.0339 (0.03111)	-0.002329 (0.004914)	0.0135 (0.01868)	0.001937 (0.003115)
Reform x Felony/Prison History	0.0431* (0.02308)	0.06483*** (0.01508)	0.04129* (0.0221)	0.0627*** (0.01297)	0.05696*** (0.01649)	0.07018*** (0.0134)
Prison History		-0.11*** (0.02069)		-0.1098*** (0.02006)		-0.1107*** (0.01949)
Felony History		-0.1514*** (0.009431)		-0.1446*** (0.01108)		-0.1526*** (0.01106)
Estimation	did2s	twfe	did2s	twfe	did2s	twfe
Sample	pooled	pooled	pooled	pooled	pooled (08 start)	pooled (08 start)
BTB Control	no	no	yes	yes	yes	yes
Obs	12880000	12880000	12880000	12880000	10400000	10400000

**Panel B: Outcome- Inverse Hyperbolic Sine (wage earnings)**

	(1)	(2)	(3)	(4)
Negligent Hiring Reform	0.1896 (0.1534)	0.02742 (0.05466)	0.1984 (0.1645)	0.02799 (0.0557)
Reform x Prison/Felony History	0.3973*** (0.1486)	0.4826*** (0.148)	0.3589*** (0.1336)	0.4597*** (0.1208)
Prison History	0.1486	-1.126*** (0.1942)		-1.106*** (0.1775)
Felony History		-1.523*** (0.1008)		-1.43*** (0.1173)
Estimation	did2s	twfe	did2s	twfe
Sample	pooled	pooled	pooled	pooled
BTB Control	no	no	yes	yes
Obs	12880000	12880000	12880000	12880000

State clustered robust standard errors in parentheses. \* p<0.10, \*\* p<0.05, \*\*\* p< 0.01. Any views expressed are those of the authors and not those of the U.S. Census Bureau. The Census Bureau's Disclosure Review Board and Disclosure Avoidance Officers have reviewed this information product for unauthorized disclosure of confidential information and have approved the disclosure avoidance practices applied to this release. This research was performed at a Federal Statistical Research Data Center under FSRDC Project Number 2295. (CBDRB-FY22-P2295-R9926)

Negligent hiring reform might impact different populations in different ways. The increase in employment for workers with criminal histories should correspond with the employer's perception of reduced risk. This perception is a function of the probability a potential employee offends on the job (which should remain constant before and after the reform), the harm generated by the offense (unchanged), and the probability the employer is found liable for the offense (changed). The last element (the likelihood of being held responsible) may vary

depending on the nature of the potential employee's criminal record. Thus, negligent hiring reform may impact different groups to different degrees. Additionally, because the liability term is interacted with the expected amount of liability, the reform may have heterogeneous impacts based on employer perception of the perceived underlying risk of reoffending. I consider the effect of the reform on various subpopulations in Table 5. Each set of two columns shows a separate regression to document the impact of the reform across different groups.

**Table 5: Heterogeneous Employment Impact of Negligent Hiring Reform**

Felony type		Reform impact on felony or prison history by:							
		Sex	Age		Education		Race/Ethnicity		
Violent	0.03038**** (0.004068) [.57]	Female	0.03037**** (0.01635) [.5]	Age 25-34	0.04147**** (0.01819) [.63]	< High school	0.04748**** (0.01178) [.44]	Black	0.04962**** (0.02505) [.48]
Property	0.02375**** (0.003557) [.57]	Male	0.06558**** (0.0171) [.6]	Age 35-54	0.05981**** (0.01919) [.6]	< College	0.04689**** (0.01979) [.59]	White	0.04518**** (0.01457) [.6]
Drug	0.04205**** (0.006896) [.54]			Age 55-64	0.05925**** (0.01688) [.42]	College	0.02857**** (0.01028) [.71]	Hispanic	0.03594**** (0.0143) [.64]
Other	0.03845**** (0.0138) [.57]								
Estimation	did2s		did2s		did2s		did2s		did2s
Sample	court (08 start)		pooled (08 start)		pooled (08 start)		pooled (08 start)		pooled (08 start)
BTB Control	yes		yes		yes		yes		yes
Obs	7728000		10400000		10400000		10400000		10400000

State clustered robust standard errors in parentheses. Average group employment rates are in brackets. \* p<0.10, \*\* p<0.05, \*\*\* p<0.01. Any views expressed are those of the authors and not those of the U.S. Census Bureau. The Census Bureau's Disclosure Review Board and Disclosure Avoidance Officers have reviewed this information product for unauthorized disclosure of confidential information and have approved the disclosure avoidance practices applied to this release. This research was performed at a Federal Statistical Research Data Center under FSRDC Project Number 2295. (CBDRB-FY22-P2295-R9926)

The first column of Table 5 allows the impact of negligent hiring to vary by the details of a person's criminal record. It shows the reform's effect on the probability of employment for people with a violent felony conviction, a property felony conviction, or a drug felony conviction. The reform has the largest effect on people with drug and public order/other felony convictions. The remaining columns show the varying impact of reform by sex, age, education, and race. Overall, these results suggest larger reform effects for workers with records that would be most likely to be disallowed under the reforms (older workers tend to have older records, and drug/public order offenses are less likely to be admissible evidence after reforms) or for workers employers perceive as more at risk to recidivate (male and less educated).

These columns suggest that the reform increased employment most substantially for Black men who are somewhat older and less educated. For instance, the reform increases employment for people who are Black and have a felony or prison record by more than ten percent (five percentage points) compared to seventy-five percent (4.5 percentage points) for white people with a similar criminal record. These results are encouraging, as many previous

efforts to increase employment for people with criminal records have disproportionately benefited white people.<sup>130</sup>

### 3.1.1. The Interaction of Negligent Hiring Reform and Ban-the-Box

Liability for negligent hiring and efforts to reform the tort interact with a web of other criminal justice reforms. One movement particularly connected to negligent hiring reform is Ban-the-Box (BtB). Ban-the-Box laws disallow employers to ask about criminal records until late in the hiring process and have become more widespread in recent years.<sup>131</sup> The adoption of BtB is often tied with negligent hiring reform. For instance, the same bill that New Jersey adopted BtB rules required a gross negligence standard to be reached for negligent hiring claims.<sup>132</sup> Indiana's reform limiting what criminal history can be presented in negligent hiring claims also preempted the local jurisdiction's ability to implement Ban-the-Box laws.<sup>133</sup> If either BtB or negligent hiring reforms impact employment outcomes, failure to account for both reforms in an analysis could introduce bias. For example, if both reforms increase employment for workers with criminal histories, failure to control for both policies would cause an overestimate of the increases to the studied policy.

However, it is worth noting that, unlike negligent hiring reform, BtB doesn't change the underlying economics of actually employing workers with criminal histories—it only alters the information available to employers (and changes the screening costs).<sup>134</sup> While not entirely free from controversy, academic research has found that employers remain reluctant to hire workers with criminal histories. Restricting access to direct information on criminal records results in employers using age, race, and sex as a proxy for the probability of past criminal behavior.<sup>135</sup> Previous research has suggested that Ban-the-Box causes young black men to receive fewer callbacks after applying for a job<sup>136</sup> and are less likely to be employed.<sup>137</sup> The research thus far has found some weak evidence for increased employment in the public sector but minimal labor market improvements overall for individuals with criminal histories.<sup>138</sup>

To assess whether BtB might be a potential confounder for my analysis of negligent hiring reform, I estimate Equation 1, substituting BtB reform in place of negligent hiring reform and restricting to the prison sample. While subsequent analysis should place additional focus on other groups, the analysis presented below is confined to the group previous research has indicated the

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<sup>130</sup> Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 3 133 Q.J. ECON. 191 (2017)

<sup>131</sup> See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 3 133 Q.J. ECON. 191 (2017) and Jennifer L. Doleac and Benjamin Hansen, *The Unintended Consequences of 'Ban the Box': Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden.*, J. OF LAB. ECON., (forthcoming April 2020).

<sup>132</sup> New Jersey, 2015 (A-1999) [http://www.njleg.state.nj.us/2014/Bills/A2000/1999\\_R1.PDF](http://www.njleg.state.nj.us/2014/Bills/A2000/1999_R1.PDF)

<sup>133</sup> Indiana SB 312, signed as Public Law 210.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Agan & Starr, *Id.*

<sup>137</sup> Doleac & Hanson. *Id.*

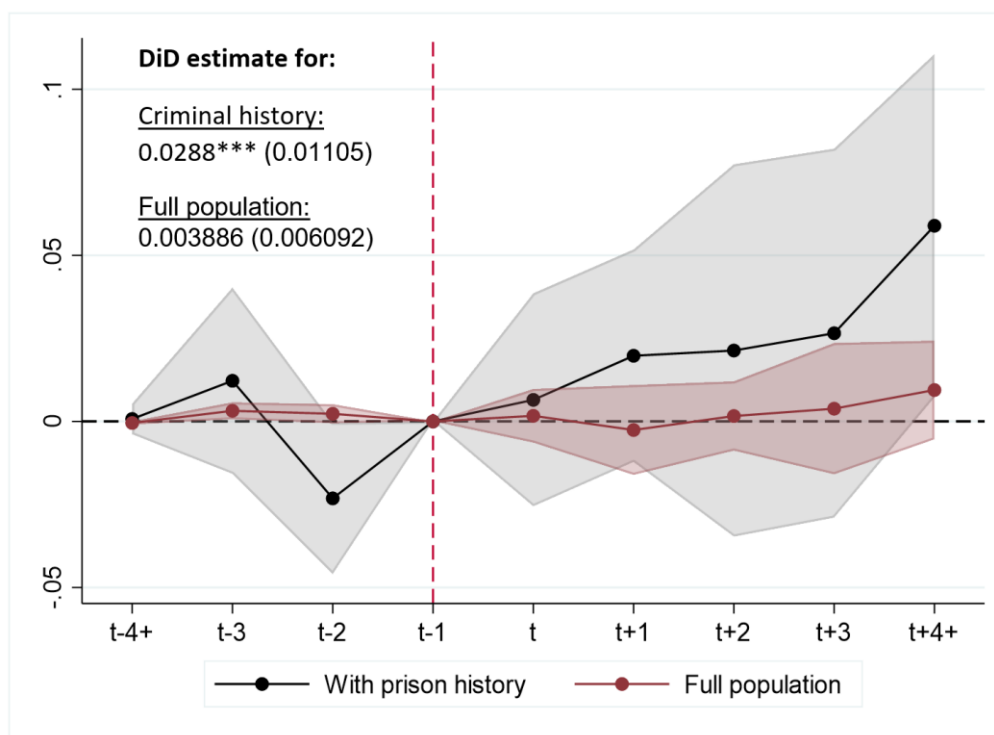
<sup>138</sup> *Id.*



most likely to benefit from BtB: young, less educated white males (white men aged 25-34 with no college degree who are not currently in prison). It is important to remember that previous research has suggested that other groups, namely people of color, may face worse opportunities due to BtB reforms.

Figure 3 suggests that BtB policies increase employment for young white men who have previously been in prison (albeit to a lesser degree than negligent hiring reform). This finding is important and relevant both independently from negligent hiring reform and as a justification for including BtB policies as a control in the negligent hiring reform analysis. In addition, this finding suggests a second look at BtB, given greater data availability and the implementation of other policies that have shaped hiring incentives for workers with criminal (e.g., EEOC enforcement, negligent hiring reform, etc.), is warranted.

**Figure 3: Event Study – Ban-the-Box and Employment of Young Less Educated White Males**



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### 3.2. The Impact of Negligent Hiring Reform on Recidivism

Whether reformed or not, the tort of negligent hiring imposes additional liability for re-offending but not for first-time offenders. Lowering the employer's negligent hiring liability reduces the cost of hiring individuals with a criminal record but leaves the cost of hiring those

without a criminal record the same. If employers are more likely to hire workers with a criminal record after the reforms, and if being employed lowers the probability of recidivating, we expect recidivism to decrease after the reform to a greater extent than overall offenses. Recidivism rates are challenging to measure for various reasons, including a lack of longitudinal data, differences in definitions and time frames across studies, and many other reasons.<sup>139</sup> To measure the impact of negligent hiring reform on recidivism, I use data from the National Corrections Reporting Program (NCRP).<sup>140</sup> While the data collection efforts underlying the NCRP began in 1983, I use the publicly available data from 1991-2019 containing information regarding prison admissions, prison releases, and year-end prison population counts. Not all states report to the NCRP each year. Therefore, I restrict this analysis to the last decade of the sample, when the number of reporting states has stabilized. I construct the recidivism rates based on a unique identifier created by Abt Associates Inc. (the organization that is the collector of the NCRP data on behalf of the BJS) and consider a recidivism event to occur if an individual is re-imprisoned for a new charge after being released.<sup>141</sup>

Limitations of this data include that one cannot observe individuals who re-offend across different states, that one must rely on potentially inconsistent voluntary state reporting, and that the NCRP uses public data where individuals are matched across observations by a third party.<sup>142</sup> In addition, there are some potential challenges with defining recidivism as a court commitment for a new crime, as certain states in the NCRP may conflate new crime prison commitment and technical parole violations. However, results are robust to restricting to states where previous research has suggested the highest quality measurement.<sup>143</sup> I count an event as recidivating if the

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<sup>139</sup> See Matthew R. DUROSE ET AL., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005–2010, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 14 (2014), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986> (discussing a variety of recidivism definitions).

<sup>140</sup> Further discussion of NCRP data issues are available in Prescott et al. *supra* note 46. The NCRP is a valuable data set in that it covers a large number of individuals and a large number of states. The NCRP data used in the following analysis comes from the Inter-university Consortium for Political and Social Research (ICPSR). Data is available from <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/37021/datadocumentation#>.

<sup>141</sup> The majority of my NCRP analysis attempts to exclude parole or reentry for technical violations.

<sup>142</sup> Some previous studies using older versions of the NCRP restrict the sample of states considered for analysis. See for instance, John F. Pfaff *The Myths and Realities of Correctional Severity: Evidence From the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. ECON. REV. 491 (2011) restricts his sample to a smaller subset of 11 states which more closely match other data sources. Similarly, Derek Neal and Armin Rick, *The Prison Boom and the Lack of Black Progress After Smith and Welch*, NBER Working Paper No. 20283 (2014) restrict to a smaller subset of 8 states. This study uses the full sample of more recently matched NCRP data available through ICPSR, but the results are qualitatively similar if we restrict our analysis to the same subsets of these other studies. Other studies using the more recent NCRP data include Crystal S. Yang, *Local Labor Markets and Criminal Recidivism*, 147 J. PUB. ECON. 16 (2017) and Amanda Y. Agan and Michael D. Makowsky, *The Minimum Wage, EITC, and Criminal Recidivism*, NBER Working Paper No. 25116 (2018). For a description of how prison terms were created, see <http://www.icpsr.umich.edu/files/NACJD/ncrp/white-paper-computing-code.pdf>.

<sup>143</sup> See footnote 7 in WILLIAM RHODES ET AL., NATIONAL CORRECTIONS REPORTING PROGRAM (NCRP) WHITE PAPER SERIES, WHITE PAPER #2: NCRP REPORTING (2011), <http://ncrp.info/LinkedDocuments/NCRP%20White%20Paper%20No%202.NCRP%20Reporting.Nov%202011.pdf> (“There are two problems. It seems likely that prison authorities (or, at least, those who enter data into data systems) are unaware of admission type. Or, if admission type is recorded accurately, the type may have little meaning. As an illustration, some offenders may be revoked for a technical violation of the conditions of supervision, while other offenders may be resentenced following a technical violation of the conditions of supervision. Both administrative actions have the same consequences, but the former implies relatively high revocation rates compared with the latter.”). See also GAES ET AL., CLASSIFYING PRISONERS AND RETURNS: PROBLEMS AND POTENTIAL SOLUTIONS, 13,

NCRP reports that the individual has been admitted to prison as a “new court commitment” within three years of release and the individual is recorded as having been in prison before in the sample.

The identification strategy here is similar in spirit to the previous subsection. I again use a two-stage difference-in-difference technique.<sup>144</sup> First, I estimate the state, time, and covariate fixed effects, using only the observations that have not adopted or will not adopt negligent hiring reform laws. The covariates controlled for are the age bracket of the individual at the time of release (as a categorical variable), the amount of time an individual served, the square of this term, the number of previous offenses, its square, and the initial commitment offense type.<sup>145</sup> This first stage is used to predict counterfactual recidivism rates in all periods and residualize the observed recidivism rates. Then the residualized recidivism rates are regressed on negligent hiring reform—either indicators for years relative to reform enactment for the event studies or an indicator for before/after reform for the overall difference-in-differences estimate.

Figure 4 shows the evolution of prison reentry recidivism rates around negligent hiring reform. Estimates to the left of 0 represent periods leading up to reform implantation. The year before enactment is omitted to have 0 relative difference between reform and non-reform states. As can be seen from the figure, recidivism rates for returning citizens were evolving in parallel across states before the reform, as the point estimates to the left of 0 display no clear trend and are statistically indistinguishable from 0. However, after negligent hiring was enacted, recidivism rates for people released in reforming states began to steadily decline relative to non-reform states. This steady decline (from about one percentage point lower in the year of reform to about five percentage points lower a few years after reform and almost eight percentage points in the longer run) suggests that the impact of the reform may grow over time. This pattern could be because employers learn about the lower liability over time, or it could be due to the interaction of employment and the timing of recidivism events (e.g., work is more likely to prevent recidivism that occurs more than one year after release).

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21 (OCT. 2015) <http://ncrp.info/LinkedDocuments/Classifying%20Prisoner%20Returns.10%208%202015.pdf> (“First we examine the distribution of admissions codes across all of the states over a 12 year period, from 2000 to 2011. The following states have 97 percent or more of new court commitments: Florida, Idaho, Maryland, North Carolina, and Washington. It seems unreasonable that these states admit almost exclusively new court commitments. Over the period of interest, only a small proportion of North Carolina offenders served terms of post confinement community supervision. We would expect most admissions to be for new commitments. However, independent investigation suggests that the rate of new commitments is still implausibly high.”).

<sup>144</sup> John Gardner, *Two Stage Difference in Differences*, WORKING PAPER (2021).

<sup>145</sup> Note that in order to construct a yearly measure of time served I subtract year of admission from year of release. This will measure time served with rounding error, since we are not measuring when within a year these events occur. Assuming this rounding error is randomly distributed, this will bias the estimate of the relationship with recidivism towards zero to measurement error. Results are robust to estimation dropping covariates.

**Figure 4: Event Study - Negligent Hiring Reform and New Crime Incarceration Recidivism**

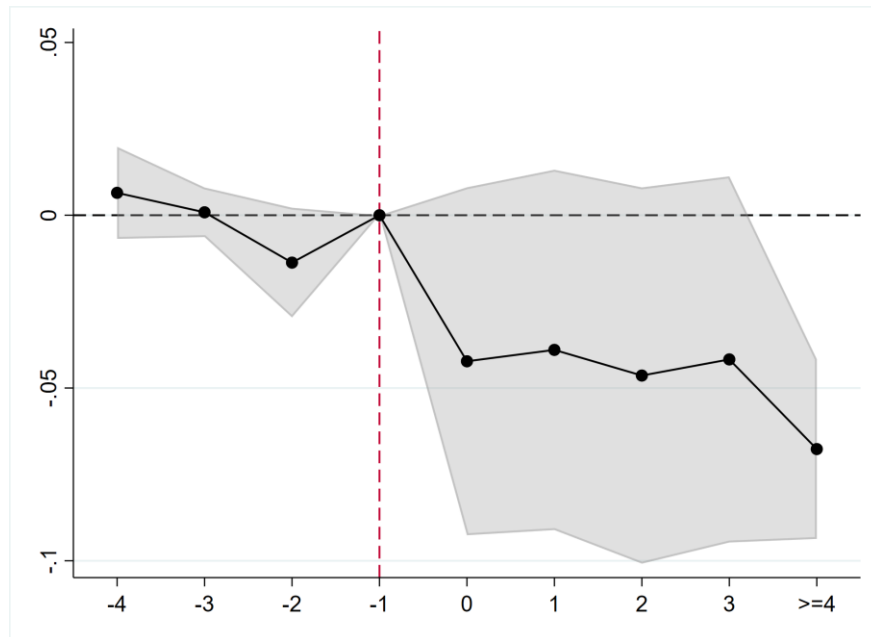


Table 6 shows the comparison between the probability an individual recidivated in states which passed and states which did not pass negligent hiring reform after controlling for other characteristics of the released population. It controls for as many factors relating to the individual's release as possible in the data (but does not control for other state factors, such as the state's unemployment rate at the time of release).<sup>146</sup> Negligent hiring reform is associated with a statistically significant 5.2 percentage point lower recidivism rate (this corresponds to over a 25% reduction to a base rate recidivism rate of about 20%, where recidivism is a new crime re-incarceration within three years of release). This decline is driven primarily by lower recidivism through new property, public order, and drug crimes. While there is some minor evidence that violent crime is also lower, this is a much smaller effect and not statistically significant. Previous research has suggested that stable employment decreases the likelihood of property crimes (as a substitute source of income) but has a less pronounced effect on violent crime (which is less likely to be financially motivated). Thus, these results are consistent with the theory that negligent hiring reform increases employment for individuals with criminal histories and that this employment decreases property and drug crimes (and has less of an impact on violent offending). Notably, there is no evidence that negligent hiring generates a substitution into more harmful violent crimes, as violent crime recidivism appears, if anything, to decline after negligent hiring reform occurs.

<sup>146</sup> Only individuals whose release occurs in a year in which negligent hiring reform is or has been enacted are considered "treated" or impacted by the policy. Notably, this excludes some of the population who is partially treated in that released individuals who return in the year prior to the enactment of the reform (or whose three-year recidivism window overlaps with some portion of the reform years) will benefit from the reform as well. Given this is the case, the estimates are likely biased somewhat towards finding no effect of the reform.

**Table 6: The Impact of Negligent Hiring Reform on Recidivism**

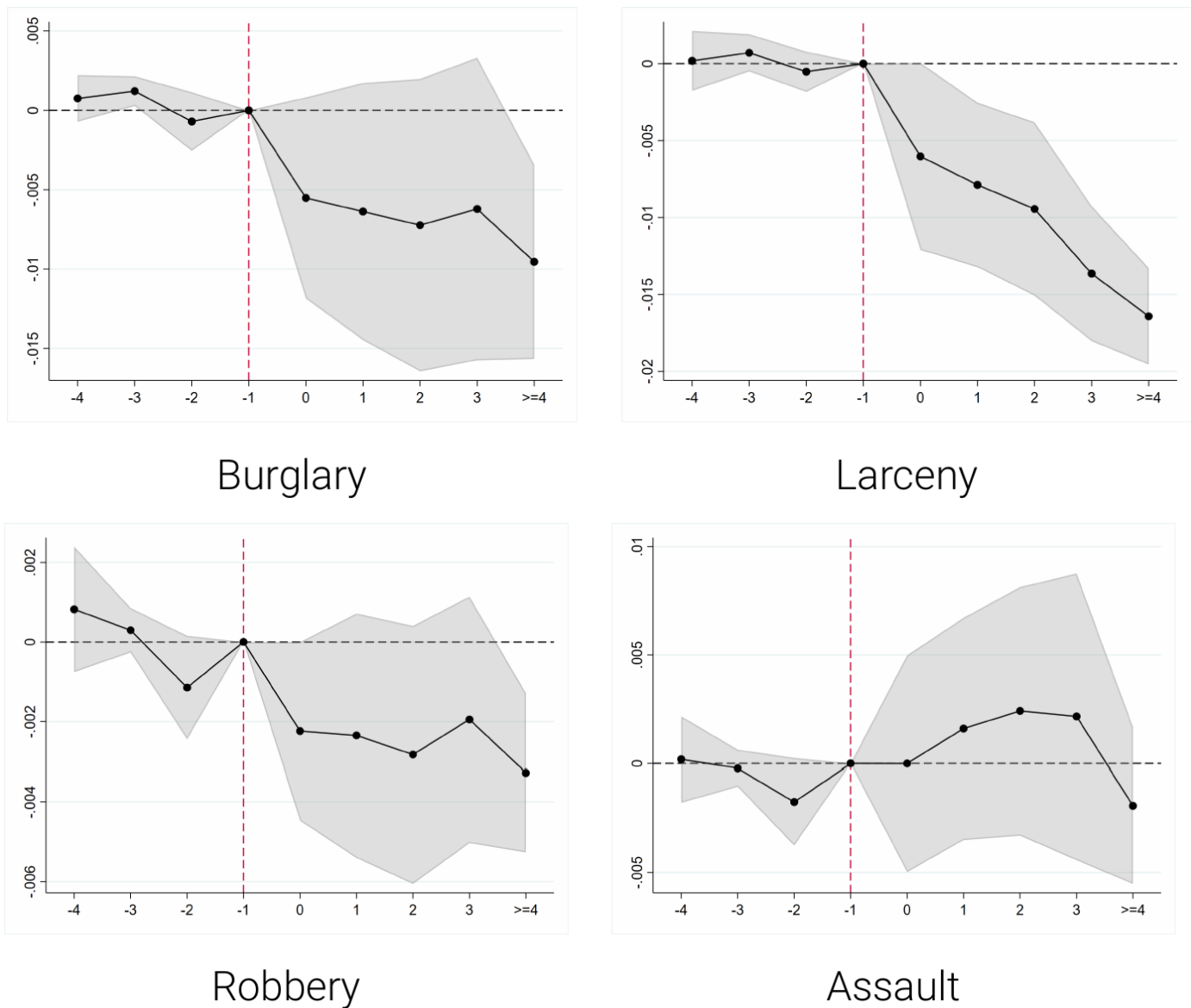
	(1)	(2)	(3)	(4)	(5)	(6)
	Any	Violent	Property	Drug	Public	Other
Neg. Hiring Reform	-0.0526*** (0.0198)	-0.00443 (0.00391)	-0.0217*** (0.00733)	-0.0224*** (0.00659)	-0.00884*** (0.00305)	-0.0000874 (0.000174)
Mean	0.200	0.0444	0.0671	0.0506	0.0450	0.00103
Obs	4945558	4945558	4945558	4945558	4945558	4945558

State clustered robust standard errors in parentheses. \*  $p < 0.1$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$ . Controls: state and year fixed effects, last offense type, num. previous offenses and square, race, gender, admission/release year, time served squared, release type, and sentence length. Data from 2010-2019.

Table 6 can also be explored graphically and at a narrower crime type definition. Figure 5 shows large and significant declines in recidivism via a new crime of burglary and larceny.<sup>147</sup> Some violent crimes more often associated with income generation, like robbery, exhibit signs of decline after negligent hiring reform. However, other violent crime-specific recidivism, like assault, does not show clear evidence of decline. These findings are consistent with the theory that lowering negligent hiring increases employment opportunities for people released from prison, which leads to a substitution away from income-generating criminal activity. A lack of decline or even a slight increase in certain other non-income generating violent crimes is also consistent with the underlying economic theory, as employment may generate an equal or greater number of person-to-person interactions.

<sup>147</sup> Additional crime-type recidivism figures are available in the appendix.

**Figure 5: Event study - Negligent Hiring Reform and Recidivism by New Offense Crime Type**



Recall that some of the policy concerns driving the laws aimed at clarifying and narrowing negligent hiring liability standards involve the crime-type of the first offense and the nature of re-offense. The reforms also clarify that a tighter connection between previous and subsequent offenses must be present for the employer to be liable. A drug possession incarceration would be unlikely to be relevant to a future homicide conducted by an employee, at least after the reforms are in effect. The proposed mechanism for recidivism reduction is increased employment. Comparing the groups that see reductions in recidivism to those with greater increases in employment, it becomes apparent that groups with larger employment gains after the reform also have larger declines in recidivism rates (e.g., people released after public order and other offenses).



**Table 7: The Impact of Negligent Hiring Reform on Recidivism by Release Conviction**

Released After:	Recidivism Crime Type:					
	(1) Any	(2) Violent	(3) Property	(4) Drug	(5) Public	(6) Other
Any	-0.0526*** (0.0198) [0.200]	-0.00443 (0.00391) [0.0444]	-0.0217*** (0.00733) [0.0671]	-0.0224*** (0.00659) [0.0506]	-0.00884*** (0.00305) [0.0450]	-0.0000874 (0.000174) [0.00103]
Violent	-0.0507*** (0.0148) [0.154]	-0.0278** (0.0109) [0.084]	-0.00977*** (0.00141) [0.027]	-0.00922*** (0.00142) [0.020]	-0.00714*** (0.00179) [0.029]	-0.000455*** (0.000159) [0.001]
Property	-0.0556** (0.0255) [0.247]	-0.00140 (0.00226) [0.035]	-0.0445** (0.0197) [0.153]	-0.0147*** (0.00450) [0.037]	-0.00167 (0.00228) [0.032]	-0.0000328 (0.000220) [0.001]
Drug	-0.0415** (0.0170) [0.183]	-0.000743 (0.00137) [0.021]	-0.00869*** (0.00186) [0.032]	-0.0330** (0.0150) [0.109]	-0.00368** (0.00172) [0.027]	0.000157 (0.000102) [0.001]
Public	-0.0797** (0.0325) [0.215]	0.00147 (0.00351) [0.037]	-0.0144** (0.00683) [0.037]	-0.0224*** (0.00830) [0.035]	-0.0514*** (0.0192) [0.119]	-0.000225 (0.000251) [0.001]

State clustered robust standard errors are in parentheses; group means are in brackets. \* p<0.10, \*\* p<0.05, \*\*\* p<0.01. Controls: state and year fixed effects, last offense type, num. previous offenses and square, race, gender, admission/release year, time served squared, release type, and sentence length. Data from 2010-2019.

Table 7 is similar in design to Table 6. However, it adds additional granularity by breaking out the analysis by the crime for which the individual was released. An appendix table presents a more detailed version of Table 7. The columns partition the released population by the most serious conviction they were imprisoned for, and the rows partition by the rate at which a specific recidivism conviction occurs. For example, in column (1), the coefficient on property crime (-.0556) indicates that people returning after a property crime conviction recidivate about 5.6 percentage points (or about twenty-three percent) less frequently after negligent hiring reform is enacted. Recall that the studied reforms do not remove liability entirely but are focused on limiting liability to new misbehavior that is particularly similar to the past conviction. The lowered recidivism rates appear widespread across release types, with the largest absolute decreases being in the recidivism of people released after public order and property incarceration spells. However, in percentage terms, the largest declines come from public order (37%) and violent (33%). The reductions in recidivism from these returning citizens are consistent with the fact that these offenses are unlikely to be particularly relevant to a negligent hiring case, and their criminal histories are more likely to be barred as evidence after negligent hiring reforms. The fact that some reforms carve out certain serious violent convictions from liability protections

does not seem to dampen the impact of the reforms in aggregate, even in the broader categories containing these offenses. One element of the negligent hiring reform is to tighten the required connection between previous criminal behavior and the triggering event for the negligent hiring cause of action. After these reforms are enacted, employers appear to feel more comfortable with their ability to match releasees to appropriate (non-liability-inducing) jobs.

### 3.3. The Impact of Negligent Hiring Reform on Offense Rates

Negligent hiring liability balances competing interests. It is possible that when states decrease employer liability, more or more harmful offenses will occur. It is also possible that “reduced crime due to more employment” will dominate the “new criminal opportunity” effect, and on balance, fewer offenses, or less harmful offenses, will occur. Offense levels will measure reported crime rates broadly. While measures of the number of offenses will encompass recidivism events, they will also include first-time offenders. However, negligent hiring liability and the statutes reforming it are most targeted at repeat offenders. Thus, relative to recidivism, we might expect to see a smaller effect on total offenses. One advantage of looking at offenses is better data coverage across states for generic offending than recidivism.

Studying offenses may better capture general equilibrium effects than the more obviously impacted recidivism rates. Measuring accounts for the possibility that potential offenders are forward-looking enough to consider future employment prospects at the time of the first offense. A related form of this worry would be that over time the common wisdom amongst potential offenders is that the expected punishment for a given crime is lower. If the calculus for the profitability of an initial offense changes (due to changes in future employability driven by changes to negligent hiring), this would be captured in the offense rates but not necessarily in recidivism statistics. A final reason to study offenses is to assess the possibility that by hiring workers with criminal records after negligent hiring reform, employers are displacing other marginal hires who then offend as first-time offenders.

The thought experiment performed here is a simple one: first, did states that passed negligent hiring reform experience fewer criminal offenses in the years following the legislation? To test this relationship, I estimate the relationship between the crime rate and negligent hiring reform using a difference-in-difference identification strategy.<sup>148</sup> I estimate this relationship using the doubly-robust methodology of Callaway and Sant’anna.<sup>149</sup> Specifically, this approach controls for state and year-specific effects, with the outcome of interest being the natural log of crime rate per 100,000 people as reported in the UCR (where property, violent, and finer crime rate measures are considered). While pre-treatment controls are not included in the primary analysis, the results are robust to their inclusion.<sup>150</sup>

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<sup>148</sup> Estimates throughout this paper are generally identified using a difference-in-differences identification strategy estimated both with panel fixed effects and more novel identification strategies that account for treatment effect heterogeneity (the fact the different reforms may have differing effects over time) and/or event studies.

<sup>149</sup> Brent Callaway & Pedro H. Sant’Anna, *Difference-in-differences with multiple time periods*, 225 J. OF ECONOMETRICS 200 (2020). Results are qualitatively similar using other methodologies, such as a stacked synthetic control strategy.

<sup>150</sup> In an unreported robustness check I also control for pre-treatment covariates. Results are qualitatively similar. Following previous work relating labor markets to criminal behavior, I construct a data set that allows for a variety

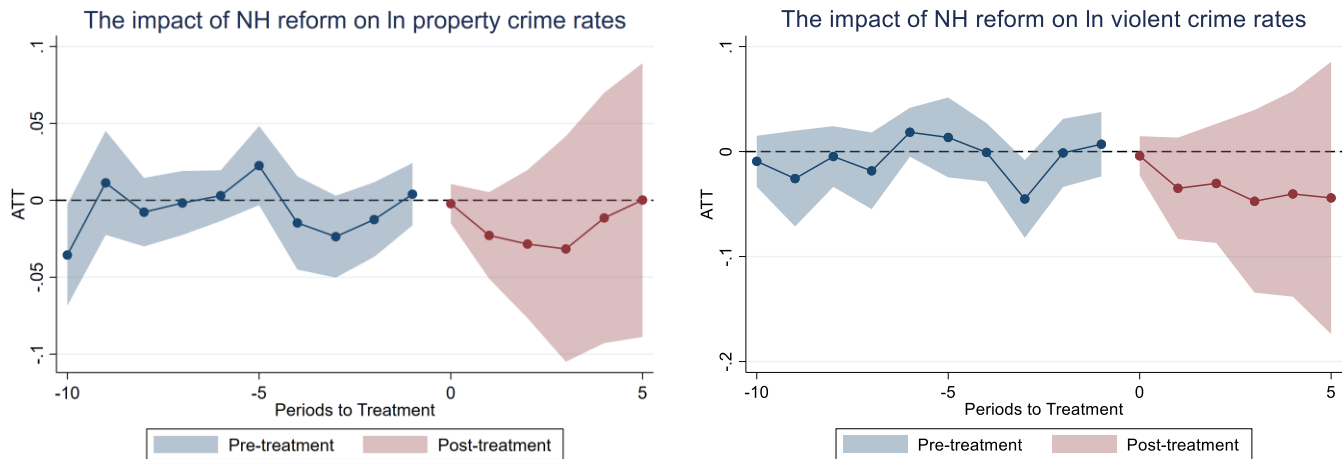
As with the other difference-in-differences exercises, to be a valid estimate of the impact of changes to negligent hiring liability, the states that change their negligent hiring policies must have similar trends in the outcome of interest as unchanged states but for the change in liability. In this case, that means that absent recognition or reformation of the tort, the offense rates in states that altered employer liability would have evolved similarly to offense rates in other states. One way to build confidence in this assumption is to show that prior to a liability change, the difference in offense rates does not follow a clear trend and is near 0.

First, I show that before negligent hiring reform, reform and non-reform states had similar trends in offense rates. However, reform states had consistently lower offense rates after reforming negligent hiring liability compared to states that never reformed negligent hiring liability (although this is not statistically insignificant). Figure 6 shows the impact of negligent hiring reform on each subsequent period's crime rate. This figure demonstrates that before passing negligent hiring reform, the states were roughly comparable, a fact that is supported by the blue line bouncing around the gray dashed line in all periods before time 0 when the reform takes place (and the standard error bars around the line always include zero as a point estimate showing that the effect is statistically indistinguishable from zero). There is no evidence that states that reformed negligent hiring were on different crime trajectories than non-reform states. However, in the six years after passing the negligent hiring reform, the states that passed the reform have consistently lower levels of offenses than the states that did not pass reforms. Both property crime and violent crime appear to decline. The event study analysis presents some weak evidence that suggests that reducing and clarifying negligent hiring liability lowers criminal activity. This indicates that many states may have more (or at least less clear) liability standards than the offense minimizing point and rules out significant increases in offending due to negligent hiring reform.

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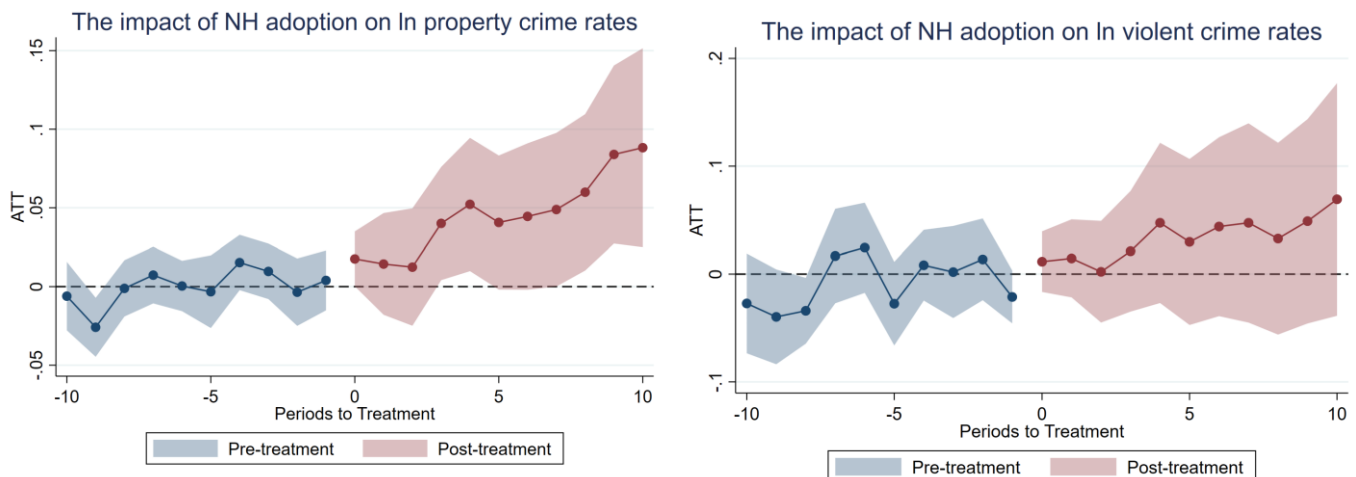
of controls including each state's unemployment rate, prison population, alcohol consumption, the percentage of the population that is living in a metropolitan area, the percentage of the population that is living in poverty, the racial breakdown of the population, the average income per worker, the average wage, and the age composition of the state. See Prescott et al. *supra* note 46, for a full discussion of the data and its relative strengths and weaknesses. I obtain Uniform Crime Reports (UCR)-based crime statistics from the Federal Bureau of Investigation (FBI). This data can be found here: <https://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm>. I collect demographic data from the U.S Census Bureau, including the proportion of a state's residents who are black and the proportion of a state's population living in metropolitan areas. For employment data, I use the Current Population Survey (CPS) Geographic Profile of Employment and Unemployment for data from 1976 onward and follow Emi Nakamura & Jon Steinsson, *Fiscal Stimulus in a Monetary Union: Evidence from US Regions*, 104 AM. ECON. REV. 753 (2014) in using a measure of employment and unemployment drawn from STEVEN DAVIS ET AL., *JOB CREATION AND JOB DESTRUCTION* (1997) for data prior to 1976. I collect wage and personal income from the Bureau of Economic Analysis (BEA), state prison populations from the Bureau of Justice Statistics (BJS), alcohol use from the National Institute of Health (NIH), and total employment from the Bureau of Labor Statistics (BLS).

**Figure 6: Event study - Negligent Hiring Reform and Offense Rates Event Studies**



Since the UCR data extends back to 1960, it is possible to study changes in offense rates after the tort is widely recognized in a state. To construct a measure of state court recognition, I build upon previous scholarship<sup>151</sup> and review case law to code when the highest court in a given jurisdiction first recognized the tort.<sup>152</sup> Figure 7 shows that states had similar offending rates before increasing employer liability. After negligent hiring becomes more widely recognized in a jurisdiction, offense rates begin to grow. The number of offenses grows over time, suggesting that additional criminal behavior occurs as people are forced out of the labor market.

**Figure 7: Event Study - Negligent Hiring Recognition and Offense Rates Event Studies**



<sup>151</sup> Shawn D. Vance, *How Reforming the Tort of Negligent Hiring Can Enhance the Economic Activity of a State, Be Good for Business and Protect the Victims of Certain Crimes*, 6 LEGIS. & POL'Y BRIEF 171 (2014).

<sup>152</sup> See Appendix Table 1.

Table 8 aggregates the censored event study figures into point estimates. Columns 1 and 2 indicate that the number of property offenses per capita increased by a statistically significant 7.1 percent and violent crimes by a more modest (and statistically insignificant) 1.5 percent after a state widely adopted negligent hiring liability. While imprecisely estimated, columns 3 and 4 suggest that after a state implanted negligent hiring reform, property offenses fell by 0.9 percent and violent offenses by 1.5 percent.

**Table 8: The Impact of Negligent Hiring on Offense Rates**

	Recognition		Reform	
	(1)	(2)	(3)	(4)
	Log property rate	Log violent rate	Log property rate	Log violent rate
Impact of Change	0.0712***	0.0145	-0.0091	-0.0151
	(0.0274)	(0.0176)	(0.0086)	(0.0121)

Robust standard errors, clustered at the state level in parentheses. \*  $p < .1$ , \*\*  $p < .05$ , \*\*\*  $p < .01$

Taken as a whole, this evidence suggests that increasing negligent hiring liability does not, in aggregate, protect people from crime. Lowering barriers to employment for people with criminal records appears to also help public safety. Notably, the offense level analysis suggests that lowering negligent hiring reform does not decrease recidivism at the cost of increasing first-time offending. If reducing liability primarily results in substitution between workers who might otherwise resort to criminal activity absent employment, we would not expect to see the relationship observed. These findings suggest that decreasing and clarifying liability improves outcomes (or at least does not worsen) for workers with criminal histories as well as other individuals who might be marginal criminal offenders.

### 3.4. Summary and Synthesis of the Empirical Evidence

While no one piece of evidence is definitive in the above analysis, all of the evidence is broadly supportive of the idea that limiting and clarifying the cause of action and appropriate evidence for negligent hiring is likely to improve several important outcomes. Novel administrative data from CJARS and the ACS suggests that the proposed employment mechanism is, in fact, the mechanism at play since individuals with a history of incarceration are more likely to be employed after release in states which have enacted negligent hiring reform. The NCRP recidivism exercises suggest that this is driven, at least in part, by lower recidivism rates, especially from the groups of released individuals most likely to be impacted by the. Finally, the UCR indicates that offenses are, if anything, more likely to decrease after a state passes negligent hiring reform, and property crimes increased after the tort was recognized. These various pieces of evidence suggest that the risks to employers imposed by the common law tort standards for negligent hiring result in more criminal offenses and worse labor market outcomes for potential workers with criminal histories,

#### 4. Discussion

The evidence and theory presented in this paper suggest that previous efforts to reform state tort law governing liability for negligent hiring policies have improved public safety and employment outcomes. These reforms contain much of the same language in model legislation by the American Legislative Exchange Council.<sup>153</sup> However, these reforms have been limited to a handful of states. Additional efforts to limit and clarify employer liability for promising returning citizens, such as certifications of employability and expungement, may be expected to have similar positive effects on the targeted populations (both sets of reforms lower  $p_0$ , the probability of being found responsible for negligently hiring an employee, for a subset of returning citizens).

The theory suggests that alternative approaches, such as capping damages or lowering reputational damage from negligent hiring (lowering  $N$ ), may also be available. Note that these first two categories of reforms (lowering liability and capping damages) reduce the compensation paid to victims. If the current level of transfers to victims is to be maintained, an additional transfer payment would be needed. One alternative reform supported by the theory of negligent hiring, but for which additional empirical work is necessary, is an expansion of the tax credit available to employers who employ workers with criminal histories (raising  $R$ , the expected revenue generated by a hire). If a hiring subsidy fully internalizes the positive externality from employment, imposing liability for offenses gets the monitoring incentives right and preserves the expressive aspects of the tort system toward negligent actions.

The bills that generated the variation used in the empirical work limited employer liability by clarifying and restricting the type of evidence that claimants can introduce in attempting to establish that an employer was negligent in hiring the employee in question (in terms of the model, this is akin to lowering  $p_0$ ). Why does this reform work? In the theoretical analysis, this type of reform was predicted to encourage employers to be more willing to hire (and perhaps pay higher wages to) people with criminal records. This increase is because many of these criminal records will no longer be relevant in a negligent-hiring case should it arise, and thus the employers will face a lower liability risk. In practice, this appears to happen.

Is there a downside to this reform? There is some theoretical concern that weakening the employer's screening incentive too far will generate more or worse criminal behavior as more dangerous employees are hired into positions that allow them greater opportunities to offend. Before this paper, there was no evidence regarding whether we are currently at the level of liability where changing the screening incentive imposed by negligent hiring liability would increase or decrease the number of offenses and recidivism. However, the evidence presented here suggests that the states that enacted the reform had too much liability (or too low a hiring subsidy). Additionally, lowering employer liability led to the same or less criminal behavior, as both recidivism and offense rates either exhibited no change or declined in the states that narrowed the scope of negligent hiring claims.

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<sup>153</sup> CIVIL LIABILITY FOR EMPLOYERS HIRING EX-OFFENDERS ACT, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (May 6, 2016), available at <https://www.alec.org/model-policy/civil-liability-for-employers-hiring-ex-offenders-act/>.



Limiting negligent hiring liability to offenses of similar types is not the only way to lower  $p_0$ . For example, this could be accomplished by barring arrest records, especially those not leading to a conviction, from being used as evidence.<sup>154</sup> Some states have taken an alternative, but perhaps complementary, route by creating a presumption against negligent hiring liability if the employee had received a certification of employability from the state.<sup>155</sup> This policy is a complementary reform but requires prior action by the released individual and thus may be limited in scope and administratively burdensome. In the compensation framework presented in the theoretical analysis earlier in this work, the certification policy moves the employer out of the compensator role. It substitutes the government agency issuing the certifications as an additional screening mechanism. This approach is similar to negligent hiring reform if employers and the government can screen at relatively similar costs, although it does not provide a transfer payment to the victims.<sup>156</sup> In practice, those who receive certificates are more likely to be employed and less likely to recidivate. However, it is unclear how much, if any, of this effect is driven by employers' lowered concern with liability as opposed to pre-existing differences between individuals that receive certificates and those that do not.<sup>157</sup>

Another approach to limiting liability under negligent hiring would be to impose a damage cap in negligent hiring cases (in terms of the model, this is akin to lowering  $N$  for a given  $H(\cdot)$ ). Several states have similar legislation in the medical malpractice context.<sup>158</sup> However, a number of these caps have been found unconstitutional, limiting the effectiveness of such a policy.<sup>159</sup> While this lowers employers' expected liability, it does not have the same effect as reducing who qualifies as a negligent hire, in that it caps employers' liability regardless of how clear their negligence was. It thus dulls the incentive for employers to screen employees for previous offenses and to monitor their behavior at work. While it may increase the hiring of released prisoners, it does so in a less targeted manner than the other potential reforms.

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<sup>154</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS ABOUT THE EEOC'S ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII (2012) available at <http://bit.ly/2wForHC> for a discussion of how arrest records can be used in hiring decisions generally. A number, but not all, states have statutes limiting the use of arrest records which did not lead to convictions: CAL. LAB.CODE § 432.7(f)(1) (West 2008); HAW.REV. STAT. §§ 378-2(1)(A), 831-3.2(e) (LexisNexis 2008); MICH.COMP. LAWS ANN. § 37.2205a(1) (West 2008); N.Y.EXEC.LAW § 296.16 (McKinney 2008); OHIO REV.CODE ANN. § 2953.55(A) (West 2008); R.I.GEN.LAWS §§ 28-5-6(7), -7(7) (2008); UTAH ADMIN. CODE r. 606-2-2(U), (V) (1994); WIS. STAT. ANN. §§ 111.325, 335(1)(a)–(b) (2007).

<sup>155</sup> See Philadelphia Works Inc., Policy Options: Limiting Employer Liability When Hiring Individuals Formerly Incarcerated, available at [https://www.philaworks.org/wp-content/uploads/2016/04/LimitingEmployerLiability\\_final\\_forwebsite.pdf](https://www.philaworks.org/wp-content/uploads/2016/04/LimitingEmployerLiability_final_forwebsite.pdf) (listing Georgia, Illinois, North Carolina, Ohio, and Tennessee as a non-exhaustive list of states with such policies).

<sup>156</sup> In theory, a victims fund could be operated by the government, thus moving the two policies towards each other. A regime in which released prisoners require a certificate to work, a victims fund pays out civil claims for offenders who have the certificate but reoffend while employed, and this fund is financed through a tax system remitted by the employers of these released individuals would be equivalent to the current system with the exception that the screening is now performed by a judge or other government official.

<sup>157</sup> See Jennifer Doleac, *Forget "Ban the Box" and Give Ex-prisoners Employability Certificates*, BROOKINGS (Dec. 15, 2016) <https://www.brookings.edu/opinions/forget-ban-the-box-and-give-ex-prisoners-employability-certificates/> (summarizing work suggesting certificates are associated with higher employment and lowered recidivism). None of the previous analysis focuses on negligent hiring reform.

<sup>158</sup> *Fact Sheet: Caps On Compensatory Damages: A State Law Summary*. Center for Justice & Democracy New York Law School (June 22, 2017).

<sup>159</sup> See <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary> or <https://www.ama-assn.org/media/14451/download> for a summary of which states have found caps unconstitutional.

The Work Opportunity Tax Credit (WOTC) allows employers to claim a tax credit for people who are on welfare programs or have barriers that discourage workforce participation (this would be akin to a shift of R, which is the revenue received from a hire).<sup>160</sup> Employers who hire people with felony records can claim this credit. To incentivize hiring, continued employment, and higher wages, the size of the credit is based on the number of hours worked and qualified wages.<sup>161</sup> The evidence presented above suggests that employers behave too cautiously regarding which released prisoners they are willing to hire. The labor market for workers with criminal histories can be expanded by lowering the employer's liability or increasing the revenue the employer receives due to the worker's employment. Increasing the attractiveness of the tax incentives for hiring this population is analogous to increasing the revenue.

However, as currently structured, the tax credit appears too small and difficult to obtain to offset an employer's liability (and other concerns). Using application-level data obtained by a Freedom of Information Act request to Virginia's Department of Labor, I find that only 3,272 credits were approved between 2018 and 2020 for workers with a felony conviction out of over 18,000 requested credits (an approval rate of eighteen percent, which is about twenty-five percent lower than the overall approval rate for WOTC requests). Moreover, of these 3,000 or so credits, a small number of employers make up a large share of approved requests (the top 10 employers make up twenty-five percent of the credits), suggesting that knowledge and ability to obtain these credits is low. In addition to lowering the costs of applying for the credit, one can increase program usage and effectiveness by making it more attractive. For example, in a recent RAND survey, expanding the tax credit from twenty-five percent to forty percent and doubling the cap to \$5,000 increased the number of employers willing to consider hiring an individual with a felony conviction by over thirty percent.<sup>162</sup>

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<sup>160</sup> U.S. GOV'T ACCOUNTING OFFICE, GAO-01-329, WORK OPPORTUNITY TAX CREDIT: EMPLOYERS DO NOT APPEAR TO DISMISS EMPLOYEES TO INCREASE TAX CREDITS (2001). It is important to understand the size and usage of this credit. Research has suggested that the WOTC credit offsets just under half of the employers' costs of the hiring process. U.S. GOV'T ACCOUNTING OFFICE, GAO-01-329, WORK OPPORTUNITY TAX CREDIT: EMPLOYERS DO NOT APPEAR TO DISMISS EMPLOYEES TO INCREASE TAX CREDITS (2001). Specifically, twenty-five percent of first year wages for employees who work between 120 and 400 hours are claimable (capped at no more than \$1500), and forty percent of wages for employees who work over 400 hours (capped at no more than \$2400). There is also a cap that the WOTC credits cannot exceed 90% of an employers' tax liability. This subsidy does not appear large enough to substantially alter employer's hiring practices. PETER CAPPELLI, ASSESSING THE EFFECT OF THE WORK OPPORTUNITY TAX CREDIT (2011). Not only does the WOTC, at least as currently structured, not have a large effect on hiring practices for the employers that know of its existence, many employers appear uninformed of the policy. The lack of the credits salience combined with modest transaction costs in claiming the credit result in only one-tenth to one-third of eligible welfare recipients obtaining WOTC certification. SARAH HAMERSMA, URBAN-BROOKINGS TAX POL'Y CTR., THE WORK OPPORTUNITY AND WELFARE-TO-WORK TAX CREDITS 3 (2005). See CHRISTINE SCOTT, CONG. RESEARCH SERV., RL30089, THE WORK OPPORTUNITY TAX CREDIT 6-9 (2013) explaining that in order to become eligible for the WOTC, two options are available with the second being substantially more common: 1) job seeker obtains a certification prior to job match and 2) employer files IRS Form 8850 by the date it makes a job offer to the (potentially) WOTC-eligible applicant. Not only this, but people with felony histories appear particularly unlikely to have received a certification as only about two-percent of WOTC certifications (or about 22,000 total people) go this group.

<sup>161</sup> I.R.C. § 51; U.S. DEP'T OF LABOR, EMPLOYER'S GUIDE TO THE WORK OPPORTUNITY CREDIT (2014).

<sup>162</sup> PRISCILLIA HUNT ET AL., BREAKING DOWN BARRIERS: EXPERIMENTS INTO POLICIES THAT MIGHT INCENTIVIZE EMPLOYERS TO HIRE EX-OFFENDERS Appendix at 19 (2018).

Increasing the size of the WOTC, at least for the released felony conviction population, would increase the salience of the credit and encourage its use. This tax credit would offset the risk of liability for employers who hire individuals with criminal records, promote employment, and thus lower recidivism rates and ensure that victims are compensated for their injuries.

## 5. Conclusion

Tort liability for negligent hiring is designed to encourage employers to screen and supervise their employees and compensate victims of misbehavior for their injuries. By allowing evidence of previous criminal behavior to establish employer liability, negligent hiring doctrine discourages employers from hiring workers with criminal records. In theory, this liability results in firms hiring workers with a lower perceived risk of reoffending and more closely supervising working environments to protect consumers from potential tortious employee conduct. However, it also results in firms hiring fewer workers with criminal histories, which generates additional offenses because these workers cannot find jobs. The act of “negligently hiring” thus has a theoretically ambiguous impact on criminal behavior. By failing to fully consider the lowered probability of offending as a consequence of employment, this liability may currently generate sub-optimal outcomes. These results do not imply that removing negligent hiring liability is necessarily optimal. However, they suggest that, on the margin, there may be some benefits to statutes similar to those enacted in states like Colorado and Texas, which clarify and narrow the role of criminal records in negligent hiring cases.

The experience of the states that have recently clarified and lowered employer liability for negligent hiring suggests that moving to a lower liability regime resulted in higher rates of employment and wages for people with criminal histories, as well as lower rates of recidivism. There is no evidence that the offenses that did occur became more harmful. This suggests that employment is an important mechanism driving these results. The empirical evidence is imperfect and better data may yield different results, especially given the small number of states that have enacted reforms and the relatively short follow-up periods available for study. Still, both theory and data suggest that narrowing and clarifying liability for negligent hiring reduces crime and allows additional workers access to the labor market.

## 6. Appendix

### 6.1. Additional Tables

**Appendix Table 1: Negligent hiring adoption cases**

<u>State</u>	<u>Case</u>	<u>Year</u>
Alabama	Nash v. Segars, 682 So. 2d 1364	1996
Alaska	Svacke v. Shelley, 359 P.2d 127	1961
Arizona	McGuire v. Arizona Protection Agency, 125 Ariz. 380	1980
Arkansas	American Auto. Auction, Inc. v. Titsworth, 292 Ark. 452	1987
California	Evan F. v. Hughson United Methodist Church, 8 Cal. App. 4th 828 (Cal. Ct. App. 1992).	1992
Colorado	Connes v. Molalla Transport System, Inc., 831 P.2d 1316 (Colo. 1992)	1992
Connecticut	Stiebitz v. Mahoney, 144 Conn. 443	1957
D.C.	487 A.2d 610 (D.C. 1985)	1985
Delaware	Draper v. Olivere Paving & Constr. Co., 54 Del. 433	1962
Florida	Mallory v. O'Neil, 69 So. 2d 313	1954
Georgia	C. K. Sec. Systems, Inc. v. Hartford Acci. & Indem. Co., 137 Ga. App. 159	1975
Hawaii	Janssen v. American Hawaii Cruises, 69 Haw. 31	1987
Idaho	Doe v. Garcia, et al., 131 Idaho 578 (1998)	1998
Illinois	Becken v. Manpower, Inc., 532 F.2d 56	1976
Indiana	n/a	1901
Iowa	Godar v. Edwards, 588 N.W.2d 701	1999
Kansas	Balin v. Lysle Rishel Post No. 68, 177 Kan. 520, 280 P.2d 623 (1955),	1955
Kentucky	Oakley v. Flor-Shin, Inc., 964 S.W.2d 438	1998
Louisiana	Smith v. Orkin Exterminating Co., 540 So. 2d 363	1989
Maine	Fortin v. The Roman Catholic Bishop of Portland, 2005 ME 57, 871 A2.d 1208	2005
Maryland	Evans v. Morsell, 284 Md. 160, 165 (Md. 1978).	1978
Massachusetts	Carson v. Canning, 180 Mass. 461	1901
Michigan	Bradley v. Stevens, 329 Mich. 556	1951
Minnesota	Ponticas v. K.M.S. Invs., 331 N.W.2d 907	1983
Mississippi	Eagle Motor Lines v. Mitchell, 78 So. 2d 482, 486–87 (Miss. 1955)	1955
Missouri	Strauss v. Hotel Continental Co., 610 S.W.2d 109, 112 (Mo. App. 1980)	1980
Montana	Vollmer v. Bramlette, 594 F. Supp. 243, 248 (D. Mont. 1984))	1984

Nebraska	Greening v. School Dist., 393 N.W.2d 51	1986
Nevada	Rockwell v. Sun Harbor Budget Suites, 925 P.2d 1175	1996
New Hampshire	Cutter v. Town of Farmington, 498 A.2d 316, 320 (N.H. 1985)	1973
New Jersey	Di Cosala v. Kay, 91 N.J. 159	1982
New Mexico	F & T Co. v. Woods, 92 N.M. 697	1979
New York	Vanderhule v. Berinstein, 285 A.D. 290	1954
North Carolina	Pleasants v. Barnes, 19 S.E.2d 627	1942
North Dakota	Schlenk v. Northwestern Bell Tel. Co., 329 N.W.2d 605	1983
Ohio	Ruta v. Breckenridge-Remy Co., 1980 Ohio App. LEXIS 12410	1980
Oklahoma	Mistletoe Express Service, Inc. v. Culp, 353 P.2d 9 (Okla. 1960)	1960
Oregon	Hansen v. Cohen, 276 P.2d 391 (Or. 1954)	1954
Pennsylvania	Dempsey v. Walso Bureau, Inc., 431 Pa. 562	1968
Rhode Island	Welsh Mfg. v. Pinkerton's, 474 A.2d 436	1984
South Carolina	Cf. Degenhart v. Knights of Columbus, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992)	1992
South Dakota	Rehm v. Lenz, 1996 SD 51, 1121, 547 N.W.2d 560.	1996
Tennessee	Mooney v. Stainless, Inc., 338 F.2d 127 (6th Cir. 1964)	1964
Texas	Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App. 1979),	1979
Utah	Retherford v. AT&T Communications of Mountain States, Inc., 844 P.2d 949 (Utah 1992).	1992
Vermont	Huminski v. Lavoie, 787 A.2d 489, 520-521 (Vt. 2001)	2001
Virginia	Big Stone Gap Iron Co. v. Ketron, 102 Va. 23, 45 S.E. 740, 102 Am. St. Rep. 839	1903
Washington	Scott v. Blanchet High Sch., 50 Wn. App. 37	1987
West Virginia	Thomson v. McGinnis, 195 W. Va. 465	1995
Wisconsin	Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233	1998
Wyoming	Cranston v. Weston County Weed & Pest Bd., 826 P.2d 251	1992

**Appendix Table 2: Impact of a criminal record on employment literature summary**

Author	Data	Technique	Employment	Hr. Wage	Earnings	Sample
Individual Longitudinal Surveys						
Freeman (1991)	NLSY	Simple Regression	21-24%			Full NLSY
Grogger (1992)	NLSY	IV (previous work)	15-24%			Full NLSY
Western (2002)	NLSY	Panel FE		7-19%		Full NLSY, at Risk NLSY
Allgood et al. (1999)	NLSY	Simple Regression			12%	Youth Prison
Western and Beckett (1999)	NLSY	Panel RE	12%			Youth Prison
Western (2006)	NLSY	Panel FE	9.7%-15.1%	12.4%-24.7%	32.2-36.9%	Risky NLSY
Raphael (2007)	NLSY	Panel FE	13-23%	17-23%		Risky NLSY
James et al. (2010)	NLSY	Panel FE	19%	11%	40%	Full NLSY
Geller et al. (2006)	FFCWS	PS weighting	2-7%	10-30%		Fathers only
Richey (2015)	NLSY	IV (w/ monotonicity)	0-19%	0-39%	0-46%	White Men
Richey (2015)	NLSY	IV (w/ monotonicity)	0-29.5%	0-44%	0-43%	Black Men
Finlay (2008)	NLSY	DD around internet access	7%	8.7%	18.7%	Full NLSY
Administrative Data						
Waldfoegel (1994)	Fed Courts	Panel FE	5-9%		12-28%	Ex-inmates to non-imprisoned convicts
Grogger (1995)	California	Panel FE	3-8%		11-30%	UI Data
Nagin and Waldfoegel (1998)	AoC	Panel FE	5.4%		7.7%	Fraud offenders
Lalonde and Cho (2008)	Illinois	Panel FE	INCREASE 4pp			Female inmates
Kling (2006)	California & Florida	Panel FE	0		INCREASE 0-33%	UI Data
Pettit and Lyons (2007)	Washington	Panel FE	INCREASE 0-30%	0-4%		UI Data
Harding et al. (2018)	Michigan	IV (Judge)	INCREASE 4-14pp			UI Data
Mueller-Smith (2015)	Texas	IV (Judge)	4.5-9pp		42%-89%	UI Data (1 yr. duration)
Bhuller et al. (2019)	Norway	IV (Judge)	43.6%		48%	Previously Employed
Dobbie et al. (2018)	Pennsylvania & Florida	IV (Judge)	24.7%		16.1%	Tax data
Mueller-Smith and Schnepel (2019)	Texas	RD	50%		183%	UI Data (10 yr impact on earnings)



**Appendix Table 3: The Impact of Negligent Hiring Reform on Employment  
(Pooled Sample, Any Charge Record)**

**Panel A: Outcome - Employment**

	(1)	(2)	(3)	(4)	(5)	(6)
Negligent Hiring Reform	0.0406 (0.03942)	-0.004619 (0.0058)	0.03996 (0.03837)	-0.004316** (0.005691)	0.02221 (0.02012)	-0.0005984** (0.003385)
Reform x Any Charge History	0.01073 (0.02477)	0.03971*** (0.01243)	0.008532 (0.02456)	0.03671*** (0.0118)	0.02087 (0.02762)	0.04388*** (0.01289)
Any Charge History		-0.07678*** (0.01252)		-0.07466*** (0.01271)		-0.08239*** (0.01383)
Estimation	did2s	twfe	did2s	twfe	did2s	twfe
Sample	pooled	pooled	pooled	pooled	pooled (08 start)	pooled (08 start)
BTB Control	no	no	yes	yes	yes	yes
Obs	12880000	12880000	12880000	12880000	10400000	10400000

**Panel B: Outcome- Inverse Hyperbolic Sine (wage earnings)**

	(1)	(2)	(3)	(4)
Negligent Hiring Reform	0.2425 (0.2201)	0.00933** (0.06104)	0.2543 (0.2313)	0.01245** (0.06126)
Reform x Any Charge History	0.154 (0.1592)	0.3008** (0.1196)	0.1062 (0.1626)	0.267** (0.1097)
Any Charge History		-0.7711*** (0.1192)		-0.7224*** (0.1214)
Estimation	did2s	twfe	did2s	twfe
Sample	pooled	pooled	pooled	pooled
BTB Control	no	no	yes	yes
Obs	12880000	12880000	12880000	12880000

**Appendix Table 4: Negligent hiring reform impact on recidivism details**

Released after:	Recidivism crime type:				
	(1) Any	(2) Violent	(3) Property	(4) Drug	(5) Public
Homicide	-0.0204*** (0.00304)	-0.0137*** (0.00264)	-0.000959*** (0.000336)	-0.00347*** (0.000257)	-0.00234*** (0.000462)
Neg Mansl	-0.0220*** (0.00619)	-0.0201*** (0.00539)	-0.00251*** (0.000642)	-0.00118 (0.00113)	-0.00156 (0.00156)
Rape, SA	-0.0790*** (0.0158)	-0.0354*** (0.0113)	-0.00436*** (0.000802)	-0.00282*** (0.000336)	-0.0392*** (0.00417)
Robbery	-0.0748*** (0.0220)	-0.0442*** (0.0164)	-0.0166*** (0.00243)	-0.0133*** (0.00195)	-0.00479** (0.00201)
Assault	-0.0348** (0.0177)	-0.0193 (0.0123)	-0.0100*** (0.00246)	-0.00972*** (0.00342)	0.000306 (0.00258)
Other Violent	-0.0381*** (0.0120)	-0.0225* (0.0122)	-0.00800*** (0.00193)	-0.0123*** (0.00171)	0.000477 (0.00170)
Burglary	-0.0695* (0.0375)	-0.00137 (0.00264)	-0.0522* (0.0293)	-0.0166*** (0.00597)	-0.00468** (0.00202)
Larceny	-0.0659*** (0.0169)	-0.00230 (0.00251)	-0.0590*** (0.0126)	-0.0144*** (0.00312)	-0.00156 (0.00218)
Auto Theft	0.0607 (0.0697)	0.00218 (0.0140)	0.0352 (0.0400)	0.00138 (0.0103)	0.0136 (0.0126)
Fraud	-0.0296 (0.0191)	-0.00169 (0.00274)	-0.0280 (0.0189)	-0.00913** (0.00365)	0.00365 (0.00428)
Other Property	-0.0553*** (0.0190)	0.00880** (0.00414)	-0.0537*** (0.0157)	-0.0168*** (0.00486)	-0.00171 (0.00326)
Drugs	-0.0432** (0.0187)	-0.000635 (0.00147)	-0.00917*** (0.00203)	-0.0340** (0.0164)	-0.00456** (0.00181)
Public Order	-0.0830** (0.0350)	0.00118 (0.00353)	-0.0156** (0.00738)	-0.0223** (0.00870)	-0.0549*** (0.0210)
Other	-0.0930*** (0.0307)	-0.0235*** (0.00499)	-0.0192 (0.0139)	-0.0426*** (0.00443)	-0.00599 (0.00370)

## 6.2. PSID Employment Analysis Replication

One data source for such questions is nationally representative surveys that ask individuals about their past behavior and/or track people over time and ask follow-up questions. I use the Panel Study of Income Dynamics (PSID) for this study. The PSID consists of data covering 1969-2017 and includes almost 80,000 individuals. I supplement the main PSID survey with an additional module, the Transition to Adulthood Supplement. Despite the more substantial number of individuals surveyed in the PSID, the number of individuals within the sample with criminal justice exposure is much smaller (862 people), leading to challenges in drawing statistical inferences from this population. This is a challenge in this section as well.

Additionally, constructing a measure of criminal justice exposure in the PSID is problematic. This paper proposes several potential methods for doing so, but none is a perfect measure of the precise object of interest to this study, the presence of an observable (by employers) criminal record for a given individual. This paper uses the following construction for generating criminal histories: if the reason an individual is a non-respondent in a given year is that they are in jail or prison, they are marked as having a criminal record starting in that year. This measure is both under and over-inclusive, as not all individuals who spend time in jail will have an observable criminal record, and some individuals may have had a criminal record without spending time in jail. As above, the analysis relies on two sources of potential variation in exposure to the policy change. First, there may be variation in policy exposure for individuals with a criminal history when a state changes its negligent hiring liability. Second, individuals may gain a new criminal history by offending in a state with an already existing negligent hiring reform.<sup>163</sup> If lowering negligent hiring liability increases employment prospects, we would expect the enactment of the reform to improve labor market outcomes for individuals with a criminal history but not for those without a record. Additionally, we expect individuals who offend within a state with a negligent hiring reform to experience smaller employment penalties than those who offend in states without negligent hiring reforms.

For inference to be valid, it is important to ensure enough individuals with convictions are in the sample and that these individuals are roughly comparable between the states that have and have not enacted negligent hiring reform. Below I present the summary statistics. The first panel splits the sample across states that have and have never enacted negligent hiring reform. One hundred twenty-nine individuals have been incarcerated in states with negligent hiring reform; 732 individuals were released in states that have not enacted reforms to curb liability for negligent hiring. States with negligent hiring reform look similar regarding state-wide earnings and employment measures to states without. However, states with negligent hiring reform are more likely to have enacted other policies related to an employer's ability to use criminal history in hiring decisions. Specifically, negligent hiring reform states are more likely to have open internet access (defined as having a relatively low-cost publicly available criminal history database) to the public for previous convictions and are more likely to have enacted "Ban-the-Box" rules.<sup>164</sup>

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<sup>163</sup> The data does not fully capture all individuals with a criminal history. Measuring criminal exposure with noise will bias results towards zero, so the impact of the studied reforms may be larger in magnitude than what is documented here.

<sup>164</sup> In the next section a number of robustness checks are considered. For instance, many states passed "Ban-the-Box" legislative around the time that negligent hiring reform laws were being enacted.

The second panel splits the sample across people who have ever been flagged as incarcerated. As expected, individuals who have been incarcerated are more than twice as likely to be unemployed (defined as looking for work), less likely to be working currently, and, contingent on being employed, earn less money.<sup>165</sup>

**Appendix Table 5: PSID summary statistics**

	Neg. Hiring Reform				Incarcerated			
	No		Yes		No		Yes	
	Obs	Mean	Obs	Mean	Obs	Mean	Obs	Mean
Ever Incarcerated	73429	0.010	5469	0.024	78037	0.000	861	1.000
Neg. Hiring Reform	73429	0.000	5469	1.000	78037	0.068	861	0.150
Unemployed	56778	0.081	3983	0.101	59908	0.080	853	0.232
Employed	40714	0.840	3585	0.837	43525	0.844	774	0.574
Log Earnings	64715	9.972	5308	10.127	69196	9.989	827	9.524
Log Wage	64100	2.634	5325	2.763	68600	2.646	825	2.442
Internet records	73429	0.129	5469	0.317	78037	0.141	861	0.289
Ban-the-Box	73429	0.057	5469	0.421	78037	0.081	861	0.189
Male	73429	0.496	5469	0.488	78037	0.492	861	0.828
Black	73429	0.351	5469	0.429	78037	0.352	861	0.683

In the table below, I identify the impact of negligent hiring reform on employment outcomes by estimating the following regression:

$$Y_{it} = X_{it}\delta_1 + \delta_2 \text{Inc}_{it} + \delta_3 \text{NHR}_{st} + \delta_4 \text{NHR}_{st} * \text{Inc}_{it} + \delta_5 \text{ANH}_{st} + \delta_6 \text{ANH}_{st} * \text{Inc}_{it} + \delta_7 Z_{st} + \lambda_i + \epsilon_{it}$$

In this equation, Y is a relevant labor market outcome (employment, earnings) for individual i, in year t. X is a vector of time-varying individual controls such as years of work experience (and its square), age (and its square), Inc. is whether an individual has been incarcerated (and thus has a criminal record) by year t, ANH is an indicator for having recognized negligent hiring, NHR is an indicator for negligent hiring reform, Z is a vector of time-varying state labor market characteristics (average wage and unemployment rate in a state), and the lambda terms are individual and year fixed effects. The coefficient associated with negligent hiring reform interacted with the previous incarceration allows us to observe the differential impact of passing such legislation on the employment prospects for those with and without criminal histories. Including a control for individual fixed effects allows inference to be drawn from changes within a given individual—in other words, this strategy is robust to unobserved differences between individuals (something that is likely a concern when comparing individuals interacting with the criminal justice system). The earnings results are similar after dropping the individual fixed effect and including additional demographic controls.

<sup>165</sup> Unemployment and employment are both analyzed because there is a third category, not being in the labor force that can occur.

**Appendix Table 6: Impact of negligent hiring in the PSID**

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Unemployed	Unemployed	Working	Working	Ln(Earn)	Ln(Earn)	Arcsinh(Earn)	Arcsinh(Earn)
Neg. Hiring Reform	0.0000653 (0.00313)	0.00115 (0.00725)	-0.00160 (0.0122)	-0.0132 (0.0162)	-0.0625** (0.0233)	-0.0379 (0.0357)	-0.168 (0.0908)	-0.132 (0.129)
Neg. Hire Adopt	0.00382 (0.00239)	0.00981 (0.00491)	0.000690 (0.00656)	-0.00542 (0.00803)	-0.00969 (0.0167)	0.0111 (0.0276)	0.0248 (0.0616)	-0.111 (0.0998)
Previously Inc.	0.00288 (0.0502)	0.0746 (0.0376)	-0.00329 (0.0560)	-0.120** (0.0346)	0.0165 (0.193)	-0.557*** (0.150)	-0.769 (0.696)	-1.598** (0.556)
Neg. Hire Ref. x Inc.	-0.0276 (0.0279)	0.0629 (0.0558)	0.0127 (0.0401)	-0.0355 (0.0420)	0.460* (0.180)	0.482** (0.176)	1.848** (0.565)	0.619 (0.822)
Neg. Hire Adopt x Inc.	0.0205 (0.0493)	0.0856* (0.0375)	-0.0129 (0.0523)	-0.0604 (0.0312)	-0.232 (0.157)	-0.202 (0.170)	-0.689 (0.588)	-0.825 (0.583)
Person FE	Yes	No	Yes	No	Yes	No	Yes	No
State FE	No	Yes	No	Yes	No	Yes	No	Yes
Year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

State clustered robust standard errors in parentheses. \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ .

Also controls for education, age, state economic conditions, and work experience

The table provides evidence that negligent hiring reform works as predicted by the theoretical analysis. Column 1 yields the following interpretation. First, it controls for a person fixed effect (labeled person FE in the table) and year fixed effects, as well as each person's age, education, work experience, and local labor market conditions. The first row, "Neg. Hiring Reform", has a coefficient of .0000653. This result suggests that the average person in a state enacting negligent hiring is just as likely to be unemployed (defined as looking for work and not currently employed) after the reform is enacted. The second row, "Neg. Hire Adopt", suggests that the average person in a state is 0.38 percentage points more likely to be unemployed after a state adopts negligent hiring for the first time. However, this is not statistically distinguishable from no effect. The third row, "Previously Inc.," suggests that a person is about 0.28 percentage points more likely to be unemployed after becoming incarcerated for the first time. The fourth row, "Neg. Hire Ref. x Inc.," is the variable of primary interest. This suggests that the average individual with a criminal record is about 2.8 percentage points less likely to be unemployed after negligent hiring reform. Row five, "Neg. Hire Adopt x Inc.," suggests that the average individual with a criminal record is about 2.1 percentage points more likely to be unemployed after the state adopts the tort of negligent hiring.

Column 2 repeats the analysis of column 1, but it no longer includes an individual fixed effect. This change means we are no longer studying what happens within the individual but are now also including variation between individuals. The results show a similar pattern to column 1, although the impact of being previously in prison is much larger, and the reform's effect flips signs. However, without being able to control for all individual characteristics, the results without individual fixed effects are more prone to unobservable variable bias. Columns 3 and 4 repeat the analysis of columns 1 and 2 but now analyze the impact on whether the person is currently working.<sup>166</sup> Odd columns include individual fixed effects, while even columns replace

<sup>166</sup> Note that the two are conceptually distinct measures as some individuals may be neither working nor looking for work, so these two variables may be of different magnitudes.

the individual fixed effects with state fixed effects. Columns 5 and 6 analyze the log of the wage for employed individuals. Columns 7 and 8 perform a similar analysis using the inverse hyperbolic sine transform of wages, which allows for 0 wages (non-employed) individuals to be included in the earnings analysis.

To summarize the table, in states that enacted negligent hiring reform, previously incarcerated individuals are about 2.8 percentage points less likely to report being unemployed and 1.3 percentage points more likely to report being employed (relative to unemployed or out of the labor force) than previously incarcerated individuals in states without the reform. However, neither of these estimates is significant at traditional levels. Previously incarcerated workers have large and statistically significant increases in earnings (conditional on being employed) after negligent hiring reform is passed, displaying an increase of about 46 percent. There appears to be an even larger effect on total earnings.

The results of recognizing negligent hiring as a cause of action are consistent with the underlying theory (in this case, more negligent hiring liability means worse labor market outcomes for the previously incarcerated), although the estimates are less precise. This is to be expected because the change in expected employer liability from what is deemed a state adoption of the standard is less stark than passing reform legislation. Common law evolves slowly, so recognizing the tort by a high court in a state may be a relatively modest change in underlying potential liability. However, adopting the tort appears to result in a 2.1 percentage point increase in unemployment for formerly incarcerated individuals, a 1.3 percentage point drop in currently working, a 23 percent decline in earnings conditional on working, and a 69 percent drop in total earnings. Both the adoption and the reform of the tort suggest that additional and less clear potential liability generate worse labor markets for the formerly incarcerated. However, given the small sample available for this analysis and the use of a two-way fixed-effect difference in differences identification strategy, it is important to interpret these as suggestive results that should be built upon with additional data before broader inferences are drawn.

#### **Appendix Table 7: Negligent hiring reform event study in the PSID**



