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Hiring Sexters to Teach Children: Creating Predictable and Flexible Standards for Negligent Hiring in Schools

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HIRING SEXTERS TO TEACH CHILDREN:
CREATING PREDICTABLE AND FLEXIBLE
STANDARDS FOR NEGLIGENT HIRING
IN SCHOOLS

Kelly M. Feeley*

Cindy is a sixteen-year-old girl who sends a naked picture of herself to her boyfriend, Josh, by using her camera phone and e-mail. Josh, who is also sixteen, shares the pictures with several of his friends. After the couple break-up a month later, Josh is angry and forwards Cindy’s naked picture to the entire student body at their high school, causing Cindy much embarrassment and shame. Both Cindy and Josh are reprimanded by the school administration and by their parents for their behavior. The state attorney uses her discretion to charge neither as a sexual predator/child pornographer, and instead, puts both through the juvenile system where they receive education about the consequences of their behavior—Cindy for creating the picture, and Josh for possessing and distributing the picture—however, neither receives an adjudication or mark on their record. Six years later, Cindy completes college and after working at a bank for several years, decides to pursue a teaching position at a local middle school. She passes the background screening and application process and uses her sexting experience in high school as a teaching tool with students about what not to do and how her misjudgment could have landed her with a criminal record and prevented her from holding many jobs, including

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teaching. The students respond well to Cindy, because they see her as closer to a peer than a “parent,” and take her advice to heart.1

I. INTRODUCTION

When it comes to educating children, we want schools to hire teachers who will challenge, encourage, and benefit students, possibly like Cindy in the hypothetical above.2 However, to hire the most qualified teachers, schools must conduct sound background investigations to help determine who meets these and other criteria.3 This is particularly true when the safety and education of children are at stake. One of the greatest fears for parents and society is that schools will hire teachers who will threaten or harm children during the learning process.4 Thus, many schools refuse to hire, or are statutorily barred from hiring, anyone with a criminal record. Given the current treatment of sexting as a crime in many jurisdictions, someone like Cindy might well be barred from employment in many school districts out of a concern for potential liability for negligent hiring.5 The problem is that there is little clear evidence that sexting correlates to more significant criminal activity, such as other sexual crimes or pedophilia. Thus, schools are in a potentially difficult situation, uncertain how to apply current rules and practices regarding negligent hiring to the growing number of potential teaching candidates with a record of sexting. This article sets forth a way for schools and legislatures to negotiate a balance between predictability and flexibility in hiring decisions regarding applicants with such a record.

Over the last 100 years, the investigative process prior to hiring employees has been a subject of significant legal concern. A growing body of common law has developed legal rules, protocols, and even recently, some statutes, that address the guidelines and limits to hiring.6 When, however, there is a breakdown in the investigative hiring process or a flaw in the investigative procedure, and an undesirable applicant is hired, the negligent hiring cause of action seeks to provide a remedy to compen-

1. This narrative is a hypothetical created by the author; the circumstances are loosely based on sexting cases discussed in articles that are cited in this article.
4. Regotti, supra note 2.
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sate the injured parties by allowing recovery against the employer for his or her negligence in hiring the applicant.7

Negligent hiring becomes particularly problematic when it involves schools and those educating children.8 The vulnerability of children and the need to appropriately educate them are key concerns. Therefore, it is crucial to ensure that all teachers, school administrators, and school staff hired are qualified and deemed safe to be around children.9 With states taking different approaches, there is tension in the law of how best to ensure qualified hiring.10 Further, silence in the federal law makes this legal area open to even greater interpretation.11

The hiring of school employees has a new dimension as laws about sexting are developing, and the impact these laws will have on the hiring process is unclear.12 “Sexting” refers to sharing, exchanging, or disseminating sexually suggestive text messages or photos, either nude or semi-nude, to others using cell phones or the Internet.13 One only needs to look to the news today to see the enormous effect of sexting.14 Very recently,

8. Regotti, supra note 2, at 334. The public holds teachers to a much higher standard than the average employee. Id.
9. Id. at 339.
12. Henry F. Fradella & Marcus A. Galeste, Sexting: The Misguided Penal Social Control of Teenage Sexual Behavior in the Digital Age, 47 CRIM. L. BULL. art. 4 (2011). Although convicted sexters are, or may be, prohibited from seeking many forms of employment, this article will limit its scope to the impact on the education system only. Much sexting occurs at school, or between and among students, therefore the direct future impact on schools is a natural outcome. Id. Future articles may address other cross-sections between sexters and other employment.
for example, a sexting scandal that resulted in the resignation of Congressman Anthony Weiner, highlights the seriousness of sexting.\textsuperscript{15}

The long-term effect of sexting is not limited to a loss of employment or a media scandal. In some instances, sexting may be criminalized, resulting in offenders being permanently labeled as sexual predators or child pornographers.\textsuperscript{16} This criminal history can serve to eliminate the possibility of those offenders ever working in a school system.\textsuperscript{17}

Sexting can take many forms and is not limited to certain individuals, with participants ranging from teenagers to politicians to law enforcement officers and the elderly.\textsuperscript{18} As such, there is a rising concern of whether eliminating these otherwise qualified applicants from working in a school would create more harm than benefit. If teaching by example is pedagogically effective,\textsuperscript{19} youthful sexters who have made an impulsive decision to send a nude or semi-nude picture of themselves to a boyfriend or girlfriend in their youth may be particularly well-suited to help others learn from their mistakes. As in Cindy’s case, described in the opening


\textsuperscript{17}. Some examples of state sexting statutes are: ARIZ. REV. STAT. § 8-309 (LexisNexis 2010) (unlawful to use an electronic communication device to transmit or display a visual depiction of sexually explicit conduct of a child); FLA. STAT. ANN. § 847.0141 (West 2012); LA. REV. STAT. ANN. § 14:81.1.1 (2010); NEB. REV. STAT. § 28-320.02 (2009) (criminalizes using an electronic communication device to entice a person under 16); NEB. REV. STAT. § 28-813.01 (2009) (unlawful to knowingly possess a visual depiction of sexually explicit conduct of a child); R.I. GEN. LAWS § 11-9-1.4 (2011) (H.B. 5094 created this statute and was adopted and took effect on July 12, 2011, but it has not been codified yet); UTAH CODE ANN. § 76-10-1204 (West 2009) (violating child pornography laws is a misdemeanor if violator is under eighteen); UTAH CODE ANN. § 76-5b-201 (West 2011) (criminalizes sexual exploitation of a minor through child pornography, not sexting); VT. STAT. ANN. tit. 13, § 2802b (2009) (listing the penalties when a minor electronically disseminates indecent material).

\textsuperscript{18}. See supra text and notes accompanying notes 14 and 15.

\textsuperscript{19}. Regotti, supra note 2, at 333. “[S]chool districts should ensure that they are hiring and employing those exemplars whose actions children will emulate.” Id.
hypothetical, prior improper behavior may serve as a teaching tool that can produce a positive utilitarian result.20

Equally problematic, however, is the sexter who does cause future harm after otherwise passing through the investigative hiring process. At the far extreme, the sexter who uses sexting as a gateway to a future life involving pedophilia or other sexually-based criminal behavior should be barred from exposing children to this inappropriate and sometimes devastating behavior on school grounds.21 Society may forgive a youthful sexting indiscretion, but it will not excuse adults, like former-Congressman Anthony Weiner, for engaging in sexting that is inappropriate, unprofessional, and potentially indicative of a more serious problem.

To attempt to balance these extreme behaviors and resulting concerns, we must examine the current law and the impact it has or can have on sexters working in a school environment. In that legal review, we must remember that as a democratic society, we strive for both predictability and flexibility in the law.22 Predictability is crucial so that society knows what behavior is expected and accepted.23 Flexibility is also crucial so that laws can adapt to changes in society’s values, morals, acceptable behavior, and most notably, technology.24 Flexibility also accounts for unique circumstances that warrant differentiation. Achieving this Aristotelian approach of predictability balanced with flexibility in our legal structure is challenging, and achieving this with past sexters as future employers in a school environment proves even more difficult.

This article examines whether the combination of current negligent hiring laws for schools and the ramifications of sexting—both past and prospective—in the later hiring process can best balance those goals of predictability and flexibility. Part II provides a historical overview of the creation and evolution of the negligent hiring cause of action.25 It also looks at the application of the negligent hiring cause of action. Part III examines some of the problems associated with the negligent hiring cause of action. It covers the different approaches taken by a variety of jurisdictions regarding how employers may shield themselves from negligent hir-

20. See opening hypothetical involving Cindy, supra note 1.
22. Symeon C. Symeonides, Exception Clauses in American Conflicts Law, 42 AM. J. COMP. L. SUPP. 813, 813 (1994) (quoting Aristotle as posing the desire for both certainty and flexibility in the law and the tension that creates).
23. Id. at 813–14 n.1.
24. Id.
25. See infra Parts III and IV for a more detailed discussion of the history of negligent hiring in the workplace and in schools.
ing liability and how potential plaintiffs might pierce that shield to hold employers liable. It also examines the impact of ex-offender status on current normative hiring processes. Part IV examines the development and application of the negligent hiring cause of action in the school system. Part V discusses the growth of this new sexting phenomenon, how sexting is defined, the psychological impact of sexting, and the different approaches states have taken to address and punish it. Part VI examines the delicate balance of negligent hiring in schools and the growing number of sexters searching for future employment in the school system, the limits prohibitive statutes create for qualified applicants from teaching or working in a school environment, and the actual or perceived protection these prohibitive statutes ensure for students and children in the education system. Part VI also inspects the current negligent hiring laws in schools and whether they are sufficiently predictable and flexible to address not only sexting, but future technologically-based crimes that have not yet been identified.

This article will limit itself to the intersection of negligent hiring in schools and the rise of sexting. Although sexting will impact other occupations and employment areas, the need to protect children is paramount and demands greater scrutiny. The goal of this article is to provide greater transparency for both schools and sexters about the expectations and limitations of each in the educational system’s hiring process and to suggest methods to map out more predictable yet flexible legal directions for all involved.

II. NEGLIGENT HIRING HISTORY

Tort law covers a wide variety of causes of action for injuries sustained by one person as the result of the negligence of another. Jurisdictions vary on how to assess whether a breach of duty was committed and what remedy should be afforded for a given tort action. Simply put, however, negligence causes of action attempt to assign percentages of liability or responsibility to the party or parties at fault for causing others harm.

26. See infra Part IV for a more detailed discussion of the birth and rise of sexting.

27. See infra Part VI for a more detailed discussion of the varied approaches to categorizing and punishing sexting and its potential impact on hiring in schools. Furthermore, although this article is limited to the intersection of negligent hiring in schools and sexting, some of the problems faced and suggestions made may bear on other occupations and employment areas.


29. Id.
In the area of employment law, negligent hiring is a tort cause of action that has evolved over time and has been adopted by most states.\(^{30}\)

Negligent hiring focuses on an employer’s liability and responsibility for employing a dangerous person because of a failure to conduct a thorough and complete investigation of that person’s background, experience, criminal history, violent tendencies, and risks to others.\(^{31}\) The employer’s liability also stems from a failure to foresee the potential danger that the employee poses to others based on the information that the employer knew or should have known at the time of hire.\(^{32}\) A victim injured by this employee should be able to seek recovery from the most responsible party.\(^{33}\) Although a cause of action may be available directly against the employee, many times the law precludes this, and instead, the employer is held responsible for hiring the employee and putting the victim in harm’s way.\(^{34}\) Negligent hiring is a cause of action that covers private and public employers, including the school system.\(^{35}\) The negligent hiring cause of action, however, is not without its limits and uncertainty to both employers and potential plaintiffs.

A better understanding of the negligent hiring cause of action requires an examination of its creation and evolution from employment law principles, rather than agency law, to encompass much more than an employee’s official duties and responsibilities.\(^{36}\) Employment law includes an employer’s duty to create a safe working environment for its employees.\(^{37}\) Agency law, including respondeat superior and worker’s compensation laws, establishes an employer’s liability from the acts of employees within that employee’s job duties or on work premises.\(^{38}\) Negligent hiring casts a much wider net and this Part addresses how the negligent hiring cause of

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31. Id. at 186.
32. Id.
34. See Creed, supra note 10, at 184.
35. Bruce Beezer, School District Liability for Negligent Hiring and Retention of Unfit Employees, 56 Educ. L. Rep. 1117, 1120 (1990). Although some states limit negligent hiring claims against schools under sovereign or governmental immunity finding hiring to be “a discretionary governmental function that is necessary to carry out public education.” Id.
37. See Platt, supra note 6, at 699.
38. Respondeat superior is “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” Black’s Law Dictionary 1426 (9th ed. 2009). Workers’ compensation is “[a] system of providing benefits to an employee for injuries occurring in the scope of employment.” Id. at 1745.
action is designed to provide employers instruction on how to avoid hiring undesirable employees and to provide potential plaintiffs with guidance on how to establish a claim for negligent hiring, and the confusion that both face.

A. The Creation and Evolution of the Negligent Hiring Cause of Action

The law of torts is designed to assign or apportion liability to those most responsible for injuring another. Simple negligence embodies the notion that when one owes a duty of care to another, breaches that duty, and as a result, that breach injures another party, the breaching party should be held responsible for the injured party’s damages. Over time, the law has created duties employers owe toward their employees and customers to create the negligent hiring cause of action.

Respondeat superior holds employers liable for their employees’ acts as long as the employee was acting to advance the employer’s interests or was acting within the course and scope of the employee’s employment duties. The employer is seen as situated in the shoes of its employee, making the employer vicariously liable for the employee’s acts. The rationalization for holding the employer liable is the control the employer wields over its employees and the benefit the employer receives as a result of the employee’s conduct. The employer is seen to prosper because of the work of its employees.

So for example, if an employee is vacuuming a portion of a store as part of the employee’s duties and a customer trips over the vacuum hose or cord, the store owner/employer would be liable under the doctrine of respondeat superior. If, however, the injured party in the above scenario was a fellow employee, workers’ compensation laws would create the employer’s liability. BLACK’S LAW DICTIONARY, supra note 38, at 1745. Workers’ compensation laws attempt to insulate employers from unlimited lawsuits for employees sustaining injuries while fulfilling their employment duties, either from their own negligence or the negligence of other employees. 99 C.J.S. Workers’ Compensation § 11 (2011), available at

41. Platt, supra note 6, at 698.
42. Id. at 699.
43. Id.
44. See id.
46. See id. If, however, the injured party in the above scenario was a fellow employee, workers’ compensation laws would create the employer’s liability. BLACK’S LAW DICTIONARY, supra note 38, at 1745. Workers’ compensation laws attempt to insulate employers from unlimited lawsuits for employees sustaining injuries while ful
The theory of respondeat superior is based on vicarious liability and therefore agency law, because the employer’s liability is premised on the act of the employee. The employee is the employer’s agent, who the employer both controls and benefits from, creating an agency relationship. Respondent superior creates limits on recovery for an injured party, however, if the injury is sustained because an employee acted outside the course and scope of his or her employment duties. Then, the employer is not vicariously liable for those employee’s acts because the employer is not in control of those acts and does not direct them or benefit from them.

Negligent hiring extends an employer’s liability beyond respondeat superior by permitting those injured by employees to recover against the “deep pocket” employer, when respondeat superior is not a viable option because the employee’s behavior falls outside of the scope of the employee’s employment duties. Negligent hiring was born from the fellow servant rule, which charges employers with a duty to create and maintain a safe work environment for their employees. The fellow servant rule

Westlaw CJS. Workers’ compensation laws allow an injured employee to receive medical treatment, lost wages, and compensation for injuries that occurred as a result of their own negligence or another employee’s negligence while on the job. Unless, however, the injuries resulted from an intentional act outside of the offending employee’s duties, a direct action against the offending employee is generally not permitted. See Watstein, supra note 7, at 586. But even workers’ compensation may not bar an employee from bringing a negligent hiring cause of action against his or her employer for injuries the employee received while on the job by another employee who the employer knew or should have known was a danger to others at the time of hiring. Id. Public policy demands that the exclusivity of workers’ compensation be pierced for injuries caused by sexual harassment.

47. See Lake, supra note 36, at 447.
49. See id.
50. See id.
51. Id. at 697–700. Respondeat superior covers employees’ acts that are “within the scope of the employment or in furtherance of their employer’s interests.” Id. at 698–99. Respondeat superior has been recognized in the law of the Greeks and Romans. Id. at 698 n.13. Negligent hiring involves victims who seek to impose “liability on third-party employers for an employee’s tortious or criminal acts.” Morgan Fife, Comment, Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations, 2006 BYU L. REV. 569, 570. However, it differs from respondeat superior because an employer may be liable for actions outside of the employee’s duties “if, among other things, the employer had either actual or constructive knowledge that the employee was unfit for the employment.” Id.
52. Platt, supra note 6, at 699. As early as 1867, courts initially did not allow an employee
requires that employers “hire and retain competent employees.” Just as employers have a duty to maintain safe equipment on their premises, so must they hire and supervise employees who are “safe” for other employees, customers, and others with whom they would come in contact as part of their job.

In its infancy, the theory of negligent hiring allowed employees to hold their employers liable for hiring a knowingly incompetent employee who would foreseeably cause harm to other employees and was quite similar to respondeat superior. Over time, courts expanded the scope of negligent hiring to include recovery by those injured by the acts of an employee that were outside of that employee’s employment duties. In doing so, the number of individuals who could recover under a negligent hiring theory was additionally expanded.

While respondeat superior attempted to reduce an employer’s liability by limiting it to torts committed by employees within the course and scope of their employment, negligent hiring actually increases or expands an employer’s liability. Negligent hiring is less concerned with whether the harm is a result of an employee’s actual job duties and more with whether the employer should have anticipated the employee acting outside of his or her job duties and causing the harm. The rationalization for expanding an employer’s liability is that between the injured party and the employer, employers are in a better position to bear the costs of compensating for the injuries. Employers are also in “the best

53. Platt, supra note 6, at 699.
54. Fife, supra note 51, at 578.
55. Platt, supra note 6, at 700.
56. Id.
57. Id.
58. Id.
59. Id.
60. See id. at 713; Watstein, supra note 7, at 585–86. There are three compelling policy reasons to extend employer liability to negligent hiring:

First, and most importantly, courts have recognized that innocent third parties have a right to be protected from an employee’s dangerous propensities . . . . Second, employers are arguably in the best position to prevent harm caused
position to know the characteristics and risks associated with the job” making it their “duty to hire with care.” Therefore, those injured by an employee may have a cause of action directly against the employer for hiring an employee known to be dangerous, or foreseeably believed to be dangerous, at the time of hiring.

B. Application of the Negligent Hiring Cause of Action

Courts agree that the purpose behind the negligent hiring cause of action is to hold employers liable for hiring an applicant that the employer knew, or should have known, at the time of hiring posed a reasonably foreseeable risk of harm to others. Courts also agree that employers are in the best position to shoulder that burden. Negligent hiring focuses on the entry point for that employee into that particular employment situation. It is at this gate-keeping function that employers must take great care to ensure that those known dangerous persons are not employed and so not allowed to harm other employees, customers, patients, students, or staff. If an employer fails in its duty to conduct an appropriate investigation of a potential employee and another is injured as a result of this person’s employment, the employer may be sued by the injured party. Negligent hiring seeks to encourage employers to conduct thorough and complete investigations of applicants to prevent them from ever posing a risk to others connected to the employment. This “duty to screen” is the first line of defense to protect others and is founded on tort principles rather than agency law. Although jurisdictions address this duty to by employees with dangerous propensities. With the range of background checks available today, there is no reason why employers should not make inquiries into the criminal histories of employees when the type of employment renders such an inquiry appropriate. Finally, courts may—explicitly or implicitly—follow a “deep pockets” theory—where the court chooses to place the costs of a victim’s loss in the hands of the entity best capable of bearing it. In most cases, this entity will not be the individual tortfeasor, but the large corporate employer who will almost always carry insurance policies providing for at least some protection from negligent hiring jury verdicts.

Id. (footnotes omitted).

61. Lake, supra note 36, at 452.
62. See id.
63. See generally id.
64. See id.
65. Id. “Negligent hiring is premised upon the idea of improper employment; an employer hires an employee that she or he knows or should have known could cause harm to others. Because the employer is in the best position to know the characteristics and risks associated with the job, it is his or her duty to hire with care.” Id. (footnotes omitted).
66. Id.
67. Id.
screen or conduct a reasonable and appropriate investigation differently.\(^{68}\) jurisdictions are, however, more consistent with what is required to establish a negligent hiring cause of action.\(^{69}\)

Generally, a negligent hiring claim consists of six conjunctive elements.\(^{70}\) First, there must be an employment relationship between the defendant employer and the offending employee.\(^{71}\) Second, under the circumstances of the position sought, the offending employee must have been unfit.\(^{72}\) Third, the employer must have conducted a reasonable and appropriate investigation and knew or should have known that the employee was unfit at the time the employee was hired.\(^{73}\) Fourth, the offending employee’s actions must have been the cause of the harm the plaintiff suffered.\(^{74}\) Fifth, the negligent hiring of the offending employee must have proximately caused the harm to the plaintiff.\(^{75}\) Sixth, and finally, the plaintiff must have actually suffered harm as a result of the offending employee’s actions.\(^{76}\)

Other courts have viewed these elements as merging into three elements once a duty has been established to exist from the employer to the plaintiff.\(^{77}\) First, the employer was required to conduct and failed to conduct an appropriate investigation of the applicant.\(^{78}\) Second, the employer would have known of the applicant’s unsuitability for the position had an appropriate investigation been conducted.\(^{79}\) Third, and finally, the employer was unreasonable for hiring the applicant with the information that the employer knew or should have known about the applicant at the time of hiring.\(^{80}\)

Regardless of the wording used by the courts, the focus of a negligent hiring claim is on the employer’s investigation of the applicant, the

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68. For a detailed discussion of some of the varied approaches taken in different jurisdictions of what constitutes a reasonable and appropriate investigation, see infra Part III.A.

69. See Watstein, supra note 7, at 584–85.

70. Creed, supra note 10, at 186.


72. Id.

73. Id.

74. Id.

75. Id.

76. Id.

77. See Platt, supra note 6, at 705 n.72 (citing Garcia v. Duffy, 492 So. 2d 435, 441 (Fla. Dist. Ct. App. 1986)).

78. Id.

79. Id.

80. Id.
information the employer knew or should have known about the applicant from that investigation, and the foreseeability that the applicant should not have been hired for that position as a result of that information known.81 This focus keeps the burden on the employer as the party in the best position to bear it, as opposed to the injured plaintiff.82 The negligent hiring elements focus on the employer’s duty to perform a reasonable and appropriate investigation of each applicant, because that employer knows best what duties, responsibilities, and contact with others the job entails.83 The focus also remains on the employer due to his or her ability to process and evaluate the information discovered from a pre-employment investigation and to determine the likelihood that the applicant will cause harm to others.84 Finally, the focus is on the employer to balance the need to fill the position with the need to protect both other employees and members of the public who would interact with the applicant once he or she was on the job.85

The fellow servant rule, grounded in this employer-focused approach to liability, has expanded to protect not only those who work with the offending employee, but also those customers, clients, or other members of the public who would interact with the offending employee.86 Employers must consider whether an employee may harm someone within his or her job description, whether an employee may have access to someone’s home or office, or even whether an employee will establish a relationship with someone.87

III. NEGLIGENT HIRING PROBLEMS

Over the past 150 years, courts have aimed to expand and further define the negligent hiring cause of action as distinct from a fellow servant claim and to allow relief to a larger number of individuals harmed by an employer’s failure to properly investigate and hire employees.88 Over

81. See Creed, supra note 10, at 188–93.
82. See Watstein, supra note 7, at 585–86.
83. Id. at 585.
84. Id.
85. See id.
86. Platt, supra note 6, at 699–701.
88. Oswald, supra note 52, at 1774. There are in fact three “negligent” causes of action used to hold employers liable for their employees’ actions. See Timothy P. Glynn, The Limited Viability of Negligent Supervision, Retention, Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota,
the past forty years, negligent hiring emerged in common law and even in some statutes with increased interest and vigor.\(^89\) Despite negligent hiring, there remains much confusion for employers about what exactly is required of them to avoid negligently hiring an applicant and how to safeguard others from the harm that the applicant would be reasonably foreseeable to cause.\(^90\)

The difficulty faced by employers, and even potential plaintiffs involved in negligent hiring claims, therefore, requires a review of the varied legal guidelines employers are provided from different jurisdictions as to what constitutes an appropriate investigation, how to conduct that investigation, and how to analyze the investigation’s results to determine whether an applicant is a potential danger. These varied legal approaches include: protecting former employers from defamation claims for sharing information about an applicant to a future employer, such as in Idaho and Louisiana;\(^91\) creating an employer’s presumption against having negligently hired an applicant if a five-step background investigation is conducted, such as in Florida;\(^92\) to an eight-factor test to evaluate the

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\(^{24}\) WM. MITCHELL L. REV. 581, 583 (1998). This article will focus on negligent hiring. Negligent hiring occurs when the employer knew or should have known at the time of hiring that the applicant was reasonably, foreseeably likely to cause harm to others. \(\text{Id. at 606.}\) Negligent retention is virtually identical to negligent hiring except for the timing involved. \(\text{Id.}\) Negligent retention focuses on what the employer knew or should have known after the employee was hired. \(\text{Id.}\) Negligent supervision establishes an employer’s liability when the employer knew or should have known about an employee’s foreseeable tendency to cause harm to others and failed to supervise the employee so as to avoid such harm. \(\text{Id. at 594–95; Platt, supra note 6, at 703–705.}\) The elements required for a negligent hiring cause of action include the presence of a duty by the employer to the plaintiff, arising out of the employment and plaintiff’s relationship so that that plaintiff is within a foreseeable zone of danger or risk. \(\text{Id.}\) Then the plaintiff must establish that the employee was unfit for the position hired. \(\text{Id.}\) Next, the plaintiff must show the employer breached that duty by failing to use an adequate standard of care when hiring or retaining the employee. \(\text{Id.}\) Last, the tortious act must have been committed by the employee. \(\text{Id. at 705 n.73.}\) Negligent infliction of emotional distress is also a recognized theory of recovery against an employer, but that theory will not be addressed here.

\(^{89}\) Oswald, supra note 52, at 1774–75.

\(^{90}\) Creed, supra note 10, at 190; Shepard, supra note 11, at 157–64. Even the state and federal courts treat negligent hiring differently, causing increased confusion for employers. \(\text{Id.}\)

\(^{91}\) IDAHO CODE ANN. § 44-201 (2011); LA. REV. STAT. ANN. § 23:291 (2003). For a more detailed explanation of these two states’ approaches to negligent hiring, see \(\text{infra Part III.A.1–2.}\)

\(^{92}\) FLA. STAT. ANN. § 768.096 (West 2009). For a more detailed explanation of Florida’s presumption against negligent hiring for employers, see \(\text{infra Part III.A.3.}\)
“foreseeability” of an applicant’s propensity for future violence based on the results of a background investigation, such as in New York.\footnote{N.Y. CORRECT. LAW § 753(1) (McKinney 2011).}

Further complicating matters, the negligent hiring cause of action is designed to protect others from being harmed by a “foreseeably” dangerous applicant.\footnote{Glynn, supra note 88, at 606.} However, the largest group affected by concerns over negligent hiring liability is ex-offenders.\footnote{See generally Michael A. Stoll, Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market, 1 U. CHI. LEGAL F. 381, 381–83 (2009).} As a society, we believe that if offenders have served their time and been rehabilitated, they should be ushered back into the workforce, otherwise, they could return to a life of crime, which would greater harm society.\footnote{Id. at 389.} A discussion of the way negligent hiring laws harm ex-offenders in particular is necessary to better understand the problems this cause of action poses.

A. The Varied Approaches to Negligent Hiring Laws in Different Jurisdictions

Like many torts, what is reasonable or appropriate is decided on a case-by-case basis.\footnote{Sharon Swenson Howard, Negligent Hiring and Employer Liability in the Selection of Employees, 49 EDUC. LAW REP. 1, 4 (1989) (“The degree of diligence necessary when conducting the investigation is dependent on the position to be filled and upon the level of risk which would incur from the performances of the position.”).} What is considered an “appropriate” investigation hinges on the type of employment sought, the duties involved in that employment, the amount of contact with others, and other considerations.\footnote{Id. at 3.} Appropriateness must be established on a case-by-case basis to account for the interaction between these varied factors.\footnote{Id.}

Although both employers and potential plaintiffs would likely prefer more definitive guidelines and rules, the nature of tort claims, and especially negligence claims, necessitate courts to consider each fact and circumstance as they find them.\footnote{Oswald, supra note 52, at 1776.} This prevents the proverbial “black letter law” for these causes of action, but attempts to allow an appropriate degree of flexibility to address unforeseen variables.\footnote{Platt, supra note 6, at 703. “There is no bright-line standard . . . because an employee’s fitness varies depending upon the particular job.” Id. But it is this uncertainty for employers that may encourage more thorough background screening of potential employees to avoid liability. Watstein, supra note 7, at 588.}
Some states have enacted statutes to provide guidance to employers about what an appropriate investigation may or must include while other states use a common law approach to provide guidance. One state might encourage employers to share negative information about a former employee to a future employer while protecting those employers who share. Other states may limit employers to only asking very limited and specific questions of a former employer that yield little, if any, useful information to determine the employee’s propensity for violence. No statute or case can anticipate every situation, and therefore consistent with general negligence principles, the application and interpretation of even these cases and statutes are subjective.

In negligent hiring claims, employers feel vulnerable to possible liability for uncertain torts that have not yet happened. Employers feel vulnerable because their liability stems from the foreseeability that a potential employee will commit some harmful act in the future. More complicated still is that an employer must predict the foreseeability of harm based on what is known about the employee at the time of hiring. Employers are faced with increasing uncertainty about how to conduct an appropriate investigation, how to evaluate the results of that investiga-

102. Howard, supra note 97, at 4–5. For instance in Georgia, the plaintiffs, parents of a woman killed by an apartment maintenance worker, prevailed on a negligent hiring cause of action claim against the apartment complex because the complex failed to conduct a background check that would have revealed convictions for “rape, armed robbery, robbery, robbery by force, larceny, credit card theft, and at least three residential burglaries.” TGM Ashley Lakes, Inc. v. Jennings, 590 S.E.2d 807, 811–12 (Ga. Ct. App. 2003). In Louisiana, the legislature enacted Louisiana Revised Statute section 23.291(B) that provides that “[a]ny prospective employer who reasonably relies on information pertaining to an employee’s job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability including liability for negligent hiring . . . based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.” LA. REV. STAT. ANN. § 23:291 (2012) (indicating that a criminal background check may be required by law).

103. See supra text and note accompanying note 91.


105. Platt, supra note 6, at 712; Oswald, supra note 52, at 1782–88.

106. Id.


tion,\textsuperscript{109} and how to predict what those results might indicate about that potential employee’s propensity for violence.\textsuperscript{110}

Employers can protect themselves from liability if they conduct a thorough enough background check on an applicant that would allow employers to discover all of the applicant’s prior bad acts to help predict future behavior.\textsuperscript{111} In the past, employers could protect themselves by \textit{not} conducting background checks so that they did not have actual or constructive knowledge of an employee’s proclivity for harmful behavior.\textsuperscript{112} However, with the evolution of negligent hiring claims requiring that the employer knew, or should have known, about the employee’s risk of danger and harm to others, not doing anything is no longer an option for employers to protect themselves.\textsuperscript{113} More knowledge is not only en-

\textit{Id.} Additionally, confusion for employers stem from whether they are statutorily required to conduct criminal background checks or whether they just perceive that they are. Stoll, \textit{supra} note 95, at 393. Employers that are not required to conduct background checks, but may perceive such an obligation, may use private sources (other than criminal justice agencies) or other sources, such as the Internet to conduct them. \textit{Id.} Those employers required to criminal background checks must use certain governmental agencies such as the Bureau of Criminal Identification and are barred from using private vendors because those private vendors may not be privy to as much information as the government. \textit{Id.} Additionally, employers who wish to expand their businesses into different states are faced with different requirements in each state. Watstein, \textit{supra} note 7, at 601.

\textsuperscript{109} Interpreting the results of even a criminal background check can be challenging for employers. See Stoll, \textit{supra} note 95, at 408–409. For example, employers may make decisions about an applicant’s arrest record, rather than convictions, and make predictions about those applicants’ propensity for violence. \textit{Id.} at 411. Or an ex-offender may have less work experience because of being incarcerated, which may impact how the employer views that applicant. \textit{Id.} at 385. Negligent hiring laws are ambiguous enough to cause confusion, therefore giving employers some discretion regarding how to interpret the results of a criminal background check could help employers “navigate around the negligent hiring law of their state.” \textit{Id.}

\textsuperscript{110} Stoll, \textit{supra} note 95, at 386.

\textsuperscript{111} Platt, \textit{supra} note 6, at 707 (“Courts have found that the absence of a criminal record, a very old criminal record, or a record for unrelated criminal activity, would not make the subsequent action foreseeable.”) (footnotes omitted).


\textsuperscript{113} Fife, \textit{supra} note 51, at 584. An employer must have actual or constructive knowledge of problems with an employee to establish the employer negligently hired the employee. \textit{Id.}

A plaintiff establishes an employer’s actual knowledge of an employee’s incompetence by demonstrating that the employer either possessed evidence of the incompetence or has witnessed evidence of such. Of course, a plaintiff need not prove that the employer had actual knowledge of an employee’s incompetence; the employer will be equally liable if the plaintiff can show that
couraged, but in many cases, required, specifically regarding positions that would put a potential employee in contact with those more vulnerable to harm like children, the elderly, and the mentally disabled.\textsuperscript{114} “Should have known” requires an employer to investigate and evaluate the applicant’s past behavior, the responsibilities and requirements of the job sought, and the actual or potential contact with others as part of that job to predict the potential for foreseeable harm.\textsuperscript{115}

Despite employers knowing that they must conduct a reasonable investigation of all applicants, what determines a “reasonable investigation” is unclear, thus causing continued confusion for employers in both the public and private sector.\textsuperscript{116} Employers struggle with how much detail their background checks must include in terms of scope and depth,\textsuperscript{117} who should conduct the background checks,\textsuperscript{118} and how to deal with the cost of

\textquote{\footnotesize the employer had constructive knowledge of the employee’s incompetence. A plaintiff demonstrates constructive knowledge on the part of the employer where “information indicating that the employee was incompetent was available to the employer and that the employer would have known of this information had it exercised reasonable care in hiring or retaining the incompetent employee.”}\textquote{Id. (footnotes omitted). And if there is nothing in the employee’s background that would have made the current behavior foreseeable, an employer’s failure to properly investigate the employee’s background is not the proximate cause of the plaintiff’s injuries. Id. at 585. The behavior must be foreseeable, not within the realm of possibility. Id.}

\textquote{114. Stoll, supra note 95, at 386–87. However, just because someone has a criminal record, does not automatically exclude that applicant from becoming a potential employee, unless it is a position at a school or other entity that limits employment of those convicted of certain crimes. Id.}

\textquote{115. Id. at 595–97.}

\textquote{116. Barbara A. Lee, Who Are You? Fraudulent Credentials and Background Checks in Academe, 32 J.C. & U.L. 655, 675–79 (2006). Although private employers may have some additional leeway in determining how detailed a background check should be, those employers are bound by some statutory requirements when certain positions are sought—such as those who care for children, the elderly, or the disabled. Stoll, supra note 95, at 386–87.}

\textquote{117. Sasser, supra note 108, at 1080–81. For instance in Virginia, courts have virtually avoided defining what constitutes a “reasonable investigation” and instead focus more on whether the employee’s behavior at the time of hire was foreseeable. Id. “The courts have not instructed employers on the extent of the effort they should make to investigate a potential employee’s background, especially his or her background, and have not conveyed how employers should proceed with hiring decisions once an investigation has been made.” Id.}

\textquote{118. Stoll, supra note 95, at 393. For some employers statutorily required to conduct criminal background checks, use of the Bureau of Criminal Identification is required. Id. However, those employers not bound by statute may use private vendors or other sources to conduct criminal investigations. Id.}
such background checks. But even more important is the evaluation of the information revealed from such background checks.  

For some employers, a certain type of background check is required when hiring a new employee in fields that involve the provision of medical care or security services, or having contact with children. Statutes govern what type and level of criminal background search that must be conducted to collect enough information to help an employer determine foreseeability of potential risk or harm that the employee may pose. Therefore, for these specific employers, they must conduct a criminal background check, but for other employers, it is optional, and may be seen as too time consuming or costly.  

Although with the Internet discovering information about people is becoming easier, there are still some state and federal background-search programs and organizations that can uncover more specific or detailed information about an applicant. Running background checks is expensive and employers worry about their cost. Yet at the same time employers want to limit their liability from negligent hiring claims and background checks provide employers with the information they might need to limit that liability. Some employers have purchased criminal background check software and trained employees to conduct the searches to make the process a little easier and more cost-effective, while other employers will contract with an outside organization to con-
duct the searches for them. The costs associated with these background searches are commonly passed along to potential employees.

In addition to cost, serious concerns arise regarding the quality of the information obtained. A criminal background check will not uncover all relevant information. An applicant may have been arrested and released, may have served time in jail but not prison, had a record expunged or sealed, or not had his/her criminal record updated recently. For instance, some states allow a person with an expunged or sealed record to answer “no” to questions posed on an employment application about past arrests and convictions. Further, some background checks may not reveal expunged or sealed records because the state orders that those records be destroyed. Juvenile records also present a curious situation because often they are sealed, expunged, or labeled as “adjudications” (rather than “convictions”) and therefore may not be revealed during a background check.

Another issue arises regarding the level of specificity a criminal background check will reveal. As the opening hypothetical intimates, a conviction for possession or distribution of child pornography may be based on a teenager “sexting,” but the criminal background check may not provide all of the specifics regarding the incident. With limited details, employers are left to assume the applicant was guilty of an act far extreme from sending a racy photo to a significant other as a teenager. Some statutes prohibit potential employees with criminal histories from

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127. See Stoll, supra note 95, at 393. 

128. See Clark & Thomas, supra note 3, at 328–29. In 2008 in Ohio, a state background check cost $22 with an additional charge for annual monitoring. Id. at 328. An FBI background check cost $24. Id. at 329. Another source indicates that background checks can cost as much as $200 for one state, with the price increasing for checks in additional states. Lee, supra note 116, at 674. This cost may encourage employers to conduct inexpensive Internet-only searches, which may not give complete or accurate results. Id.

129. Fife, supra note 51, at 604. “Criminal background checks find people only if they have criminal histories. Given the fact that child abuse is one of the most under-reported crimes—with as much as ninety percent of child abuse cases going unreported—the likelihood that criminal background checks would reveal many of the potential abusers is small.” Id.

130. Lee, supra note 116, at 674. “[T]he National Criminal File does not include criminal records from all states, is only updated every six months, and contains primarily records of individuals who were incarcerated in prisons, but not in jails.” Id.


132. Id. at 464.

133. Id.
being hired to sensitive positions, like teaching\textsuperscript{134} or practicing medicine,\textsuperscript{135} but just because some negative history exists in an applicant’s past, a per se exclusion from employment may not serve the employer’s best interests.

Conversely, with the ease and accessibility of the Internet, despite a criminal record being sealed or expunged, information about the crime may still be available on the Internet with even more detail because the incident was reported in a newspaper, on a local news station, or a blog or social networking site.\textsuperscript{136} So although the criminal background check may only reveal the title of the criminal statute violated, which by itself would not preclude the applicant from employment, the Internet may provide many more details that could discourage an employer from hiring the applicant.\textsuperscript{137}

Although employers seek to keep their workplace safe to employees, customers, and others who are welcomed or invited onto their premises, employers seek more concrete guidelines and rules to follow—both to ensure others’ safety and reduce their own liability.\textsuperscript{138} To better understand the level of uncertainty that employers face, a review of some of the varied approaches and guidelines taken by different jurisdictions is appropriate. These include Idaho’s and Louisiana’s approaches to protect and even encourage employers to share negative information about a former employee to a future employer.\textsuperscript{139} They also include Florida’s systematic investigatory process to trigger a presumption against negligent hiring.\textsuperscript{140} Finally, they include New York’s eight-part test to evaluate an applicant’s criminal history to determine that applicant’s likelihood of committing similar or foreseeable harm in the new position sought.\textsuperscript{141}

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\item[134.] See, \textit{e.g.}, FLA. STAT. ANN. § 1012.315 (West 2011) (providing that a person is not eligible for a teaching certification, for employment as instructional personnel, or as a school board administrator if a criminal background check reveals a felony or misdemeanor conviction for certain enumerated offenses).
\item[135.] Stoll, \textit{supra} note 95, at 386.
\item[136.] See Dickerson, \textit{supra} note 131, at 463.
\item[137.] See, \textit{e.g.}, \textit{Pages of Evidence Against Casey Anthony Released}, WESH.COM (Aug. 25, 2008), http://www.wesh.com/news/17291165/detail.html (reporting on the Casey Anthony case in Orlando, Florida in June and July 2011, with much evidence being released to the public even two years before the trial; however, not much of the evidence was admissible at trial).
\item[138.] See Creed, \textit{supra} note 10, at 190–91.
\item[139.] See IDAHO CODE ANN. § 44-201 (2011); LA. REV. STAT. ANN. § 23:291 (2012).
\item[140.] FLA. STAT. ANN. § 768.096 (West 2011).
\item[141.] N.Y. CORRECT. LAW § 753(1) (McKinney 2011).
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1. Idaho

To protect employers from negligent hiring claims, Idaho seeks to encourage sharing information concerning a former employee to prevent future incidents.\(^{142}\) Idaho’s “reference immunity statute” attempts to shield employers from defamation claims when employers provide information about a past employee to a potential new employer.\(^{143}\)

The statute provides that when an employer, in good faith, “provides information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of that employee” the employer “may not be held civilly liable for the disclosure or the consequences of providing the information.”\(^{144}\) The statute also creates “a rebuttable presumption that an employer is acting in good faith when the employer provides [the] information” above, which is “rebuttable only upon showing by clear and convincing evidence that the employer disclosed the information with actual malice or with deliberate intent to mislead.”\(^{145}\)

Quite troublesome, however, is the statute’s failure to define “job performance,” “professional conduct,” or even “evaluation,” leaving employers to interpret what those terms mean, and how much information to provide about a former employee.\(^{146}\) In addition to lacking clear definitions of “job performance,” “professional conduct,” or “evaluation,” the employer has no affirmative duty to disclose information about a former employee.\(^{147}\) Therefore, a former employee could have posed safety concerns at his former job, but the employer is not required to disclose that information, even if a new employer asks, because the statute does not create a must to disclose.\(^{148}\)

Although the statute seeks to protect employers from defamation claims for disclosing certain information about a former employee, the statute does not require disclosure, creating both uncertainty for the employer about whether to disclose and what to disclose. This can result in an employer hiring an employee who they would not have hired had the new employer known of the employee’s past behavior.\(^{149}\) This could also lead to the new employer being sued for negligent hiring if the employee


\(^{143}\) See id.

\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) See Winward, supra note 104, at 363.

\(^{147}\) See id.


\(^{149}\) See Winward, supra note 104, at 362–63.
injures someone as part of his new job, when he would not have been hired had the new employer known of his past.\footnote{See id. For a more detailed discussion of the elements of a negligent hiring claim and the duty of employers to conduct an appropriate investigation of applicants and evaluate the results of that investigation to determine the likelihood that the applicant will cause future harm, see \textit{supra} Part II.B, III.}

2. Louisiana

Like Idaho, Louisiana protects employers from defamation claims when those employers provide “accurate information about a current or former employee’s job performance or reasons for separation . . . provided such employer is not acting in bad faith.”\footnote{\textsc{La. Rev. Stat.} § 23:291(A) (2012).} However, Louisiana created a more explicit “reference immunity statute” that defines “job performance” with more clarity, as well as creating a presumption against negligent hiring for new employers who rely on information about an applicant from a former employer.\footnote{See \textsc{La. Rev. Stat.} § 23:291 (2012).}

Louisiana’s definition of “job performance” includes but is not limited to “attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions.”\footnote{\textsc{La. Rev. Stat.} § 23:291(C)(5) (2012).} This broad definition encourages employers to disclose more specific information about a former employee than the Idaho statute does.\footnote{Compare \textsc{La. Rev. Stat.} § 23:291 (2012), with \textsc{Idaho Code Ann.} § 44-201 (2011).} The more specific the information provided, the more likely the new employer can make an informed decision about whether to hire.\footnote{See Winward, \textit{supra} note 104, at 362–63.} Further, the statute seeks to protect those new employers from negligent hiring claims when that employer “reasonably relies on” the above information from a former employer “based upon such reasonable reliance, unless further investigation . . . is required by law.”\footnote{\textsc{La. Rev. Stat.} § 23:291(B) (2012).}

Unfortunately, even with its more explicit language, Louisiana’s statute does not require employers to disclose negative information about a former employee. As in Idaho, a former employer in Louisiana that knows about a former employee’s violent tendencies or behavior is under no obligation to share that information with a new employer.
3. Florida

Florida has also attempted to create some security for employers through a presumption against negligent hiring statute. Under Florida’s statute, if an employer conducts any one of five investigative methods, that employer is entitled to a presumption against a finding of negligent hiring.\textsuperscript{157} These methods include conducting a criminal background check, contacting references, requiring a completed employment application, participating in an interview, and checking the applicant’s driver’s license.\textsuperscript{158} Moreover, these five investigative methods are connected by the word “or” between methods four and five, indicating that they are disjunctive not conjunctive—making just one method of investigation sufficient for an employer to comply with the statute, rather than all five.\textsuperscript{159} Finally, the statute goes even further to state that “[t]he election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee.”\textsuperscript{160}

This presumption statute seems to indicate that an employer is presumed to have not been negligent if the employer at least conducts an interview, with no guidance about what that interview should entail, include, or exclude. The statute, however, also provides that even if the employer fails to conduct any of the specified investigative methods, it is not presumed to have been negligent. Therefore, the employer feels as if it both does and does not have to conduct at least one investigative method listed to be protected.

Finally, the Florida presumption statute also makes no specific mention of schools. So it remains unclear whether schools are entitled to the presumption against negligent hiring if they conduct one of the listed investigative methods, all five of the investigative methods, or how to otherwise overcome the presumption.\textsuperscript{161} From the plaintiff’s perspective, this presumption statute seems to protect the employer in all instances. There


\textsuperscript{158} \textit{Id.} at (1)(a), (d)–(e).


\textsuperscript{160} \textit{Id.}

\textsuperscript{161} See \textit{Fla. Stat. Ann.} § 1012.315 (West 2011). The Florida Legislature has addressed schools specifically through Section 1012.315, which prevents schools from hiring applicants with certain criminal backgrounds. \textit{Id.} This limitation has not been expanded to all non-school employers. \textit{Id.} Florida is considering changing its negligent hiring presumption statute from disjunctive to conjunctive by requiring all five investigative methods before the presumption is triggered; however, such a change has been only proposed, not implemented. \textit{See H.B. 449, 2011 Leg., 113 Sess. ( Fla. 2011).}
is a virtual absence of any caselaw interpreting and applying the statute to prevent a negligent hiring claim.

While Idaho’s and Louisiana’s statutes seek to protect employers for disclosing information about a former employer, they also, along with Florida’s statutes, seek to provide some protection against negligent hiring claims for the new employer who relies on information provided or conducts a several-step investigation. However, none of these approaches provides adequate flexibility to evaluate an ex-offender’s criminal history as it relates to the position currently sought.

4. New York

It is New York that has provided the most comprehensive approach to determining how the information revealed from an applicant’s background check should be used to determine the foreseeability of that applicant causing future harm. The pervasive thread running through negligent hiring claims is the issue of how to process and evaluate an applicant’s criminal history in determining whether the applicant presents a foreseeable harm to others.\footnote{162. See Stoll, \textit{supra} note 95, at 386–90. Although some jobs are simply closed to those with convictions for felonies—jobs involving health care services, security, or children contact—other positions that require or encourage background checks may allow for some discretion on whether an ex-offender is eligible for hire. \textit{Id.} at 386.} In New York, an employer or public agency cannot deny employment based solely on an applicant’s status as an ex-offender.\footnote{163. N.Y. \textsc{correct. law} § 752 (McKinney 2011).} The inquiry requires a deeper determination of whether there is a direct relationship between the prior criminal record and the employment sought. New York has established eight factors for employers to consider in making a determination: (1) that New York public policy seeks to encourage the employment of ex-offenders; (2) the specific job duties; (3) the impact, if any, the prior conviction will have on the potential employee’s fitness and ability to perform such duties; (4) the date of the conviction; (5) the potential employee’s age at the time of the conviction; (6) the type of offense; (7) information supporting the potential employee’s rehabilitation and good conduct; and (8) “the safety and welfare of specific individuals or the general public.”\footnote{164. Sullivan, \textit{supra} note 112, at 597.}

New York’s statute provides the most concrete collection of factors to consider when determining “foreseeability” of whether an applicant’s criminal history would indicate a likelihood of future harm to others if hired for the job sought. These factors, however, are still open to interpretation in terms of how they should be balanced against each other, how much weight each carries, and whether failure of one factor by de-
fault causes the failure of another factor. With all of the specificity that it does provide, it still leaves employers and applicants unsure about what criminal history will absolutely preclude or permit employment for certain positions. It is again this uncertainty that leaves employers concerned about liability for negligent hiring claims.

Although Idaho, Louisiana, Florida, and New York have provided some guidance and protection to employers and plaintiffs about the scope of, limitations to, and issues involved in negligent hiring claims, they represent the varied approaches that create problems for employers on how to avoid negligent hiring liability and for plaintiffs on how to establish such claims. Despite these jurisdictions taking different approaches to protect both employers and potential plaintiffs from harm, these “protections” do not extend to ex-offenders, who are most negatively affected by an employer’s need to avoid liability for negligent hiring.

B. Ex-Offenders: Reaping Little Benefit from the Negligent Hiring Cause of Action

A large class of people negatively affected by the threat to employers for negligent hiring liability is ex-offenders. After serving their time in jail or prison, many ex-offenders attempt to assimilate back into society by seeking employment but face severe obstacles in doing so. Among these are high recidivism rates and crippling qualifications. For instance, in just one study conducted by the U.S. Department of Justice, almost 272,111 ex-offenders from fifteen states were examined. The study placed sex offenders into four categories: released rapists, released sexual assaulter, related child molesters, and released statutory rapists. This number of offenders released from prison in 1994 represents two-thirds of all prisoners released in the United States that year. Among those 272,111 were 262,420 released prisoners whose imprisonment offense was not a sex offense. Non-sex offenders include inmates, both male and female, who were in prison for violent crimes (such as murder or robbery), property crimes (such as burglary or motor vehicle theft), drug crimes, and public order offenses. Like the 9,691 male sex offenders examined in this report, all non-sex offenders were serving prison terms of one year or more in State prison when they were released in 1994.

The study placed sex offenders into four categories: released rapists, released sexual assaulter, related child molesters, and released statutory rapists. Id. However, an obstacle to classifying sex offenders into types was that the labels “rape,” “sexual assault,” “child molestation,” [and] “statutory rape” were not widely
study determined that 68 percent of ex-offenders were rearrested within three years for a new crime, and 47.8 percent of these ex-offenders were reconvicted. As has been noted, “[a]s of December 31, 2001, an estimated 5.6 million American adults had served time in prison at one point in their lives.” Using these statistics alone, “one in fifteen people will serve part of their lives behind bars.” Therefore, ex-offenders comprise a large and increasing group of applicants searching for employment after their release.

Contributing to recidivism rates, ex-offenders’ work qualifications atrophy in prison. Even before prison, many offenders suffer from poor cognitive skills or lack interpersonal skills, both of which may only weaken and worsen while incarcerated. Further, some employers assume an applicant has a propensity for violence or general criminality based on the mere existence of a criminal record, or because the applicant belongs to a specific race or age group. Therefore, not only are some ex-offenders’ work qualifications actually weaker than other applicants but an employer’s perception of their qualifications and propensity for violence creates additional barriers to ex-offenders’ employability.

used in State statutes, and when they were used they did not always confirm to the study’s definitions of them. In deciding which type of sex offender to classify the prisoner as, importance was attached not to the label the law gave to his conviction offense, but to how well the law’s definition of the offense fit the study’s definition of the type.

Id. at 37.

169. Id. at 14. In a study of sexual ex-offenders in Ohio conducted by the State of Ohio Department of Rehabilitation and Correction in April 2001, the statistics revealed that the recidivism rate for sexual offenders was higher at 34 percent over a ten-year period. STATE OF OHIO, DEP’T OF REHAB. & CORRECT., TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 8 (2001), available at http://drc.ohio.gov/web/Reports/Ten_Year_Recidivism.pdf.

170. Watstein, supra note 7, at 595.

171. Id.

172. See id. Sex offenders can cause even greater concern than non-sex offenders in terms of recidivism because many sexual crimes go unreported and therefore, unpunished, making tracking recidivism rates of sex offenders even more challenging. Mark C. Lear, Just Perfect for Pedophiles? Charitable Organizations that Work with Children and Their Duty to Screen Volunteers, 76 TEX. L. REV. 142, 178 (1997).

173. Stoll, supra note 95, at 385.

174. Id.; see also id. at 387 n.35 (quoting Paul Gendreau et. al, A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!, 34 CRIMINOLOGY 575, 588 (1996)). Factors such as “age, criminal history, companions, family factors, gender, social achievement, and substance abuse are significant and potent predictors of recidivism.” Id.

175. See Stoll, supra note 95, at 401.
Employers seeking to avoid liability for negligent hiring may avoid hiring ex-offenders for fear that they may cause harm to others regardless of their prior offense.176 Because employers’ negligent hiring liability stems from their failure to foresee that an applicant would cause others harm if employed,177 employers shy away from hiring ex-offenders who may foreseeably pose an increased risk of harm to others and create an increased liability to the employers.178 The harm that negligent hiring claims cause to ex-offenders as a group requires a closer examination.

Much research has been conducted that shows the recidivism rate of ex-offenders is worse when, after serving their time and being rehabilitated, they are unable to secure employment, which for some offenders is a requirement of parole.179 Without employment to give ex-offenders income, as well as a sense of purpose and responsibility, many get frustrated and desperate and return to a life of crime, thereby increasing recidivism rates.180

With increased recidivism rates, employers are further discouraged from hiring ex-offenders.181 Although public policy encourages employers to hire ex-offenders under the theory of rehabilitation, employers struggle with an implicit requirement that they insure that ex-offenders will not commit future crimes while on the job.182 The “foreseeability” element of negligent hiring leaves employers open to liability if an applicant’s past criminal history should have indicated to the employer that the applicant was likely to cause the future harm committed.183 Therefore, some employers avoid hiring applicants with any criminal record to protect themselves against a “foreseeable” harm that may occur.184 The potential cost to employers to defend against negligent hiring claims and to

176. See id.
177. See id. at 388.
178. See id. at 388–89.
179. Creed, supra note 10, at 194.
180. Id. Additionally, employers may presume certain demographic groups, such as African American males, have a criminal history even when their records are clean. Thus ex-offenders may receive fewer employment opportunities. Stoll, supra note 95, at 389–90.
181. Creed, supra note 10, at 194.
182. Id.
183. Platt, supra note 6, at 707.
184. Stoll, supra note 95, at 385. However, other employers may be more likely to hire an ex-offender after conducting a background check to learn of the details of the crime. Id. at 387–89. A background check can provide mitigating information, such as the gravity of the offense, the nonviolent nature of the offense, how recently the crime was committed, the age at which the applicant committed the crime, etc. Id. at 388. However, juvenile adjudications may not be available if they have been sealed or expunged. Dickerson, supra note 131, at 464.
compensate victims causes employers to further “hesitate to employ ex-convicts.” Although some states have enacted laws prohibiting employers from discriminating against ex-offenders from employment “based solely on their status as ex-convicts,” other states have enacted laws barring ex-offenders from even applying for certain positions involving security, health care, or contact with children.

Further, many ex-offenders lack sufficient work experience and qualifications to even compete with other applicants. Having been out of the workplace for at least one year; a lack of education, social skills, and cognitive skills; or having been banned from social networks that could lead to employment are all characteristics that can make ex-offenders less than viable employment candidates. The jobs for which ex-offenders may be qualified tend to be lower-paying and largely involve manual labor. In this struggling economy, jobs are difficult to find for anyone and even more so for those with a criminal record. A high unemployment rate correlates with an increased number of highly qualified and trained individuals applying for a limited number of jobs, regardless of the job’s skill level, making it even less likely that employers will hire an ex-offender.

Employers seek to avoid liability for negligent hiring. There are problems with the varied approaches taken by different jurisdictions, all of which give employers unclear or even contradictory guidelines on how to conduct a reasonable and appropriate investigation and how to evaluate the information discovered as a result of that investigation. Further, the “foreseeability” element of negligent hiring claims creates an additional burden on employers to predict what future harm an applicant may cause. Employers must balance this “foreseeability” requirement with so-

185. Stoll, supra note 95, at 388.
186. Creed, supra note 10, at 196.
187. Stoll, supra note 95, at 386.
188. Id. at 385.
189. Id.
190. Id. at 385.
191. Rodolfo A. Camacho, How to Avoid Negligent Hiring Litigation, 14 WHIT- TIER L. REV. 787, 801 (1993). The mere fact that an applicant has a criminal record “does not automatically render that employee ‘incompetent.’” Id. However, according to a 2007 employer survey, “unsurprisingly, [the] employer aversion to [hire] ex-offenders is quite high.” Stoll, supra note 95, at 385.
192. Just the mere fact that an employer needs to conduct a background check on an applicant can make it more likely that any blemishes discovered will have a negative effect on that ex-offender’s employment chances. Stoll, supra note 95, at 389. In fact, some applicants are denied employment because of a perceived fear that because of their race, gender, or age, they are more likely to commit a crime. Id. This tends to be especially true for African American males. Id.
ciety’s desire to assimilate ex-offenders into the workplace to foster continued rehabilitation. Although the purpose of the negligent hiring cause of action is to protect employers and potential plaintiffs, a side effect is the negative impact on ex-offenders, and ultimately society, if recidivism rates increase because ex-offenders cannot secure employment.

IV. NEGLIGENT HIRING CLAIMS AND SCHOOLS

Negligent hiring claims can also be brought against schools.193 Most states provide clearer guidance to schools as to what a reasonable and appropriate investigation must include in order to hire a teacher, administrator, or even staff member.194 Most states have statutory mandates requiring that criminal background checks be conducted to license a teacher in either public or chartered non-public schools.195

The National Association of State Directors of Teacher Education and Certification (NASDTEC), sought to collect information from each state regarding teacher licensure requirements.196 Of the thirty-seven states that supplied information to NASDTEC, twenty-three states required a background check before a teacher could be certified.197 Also, eleven states required that background checks be required for any employment at a school,198 but not just for teacher certification.199 Three states had no policy requiring background checks at all.200

Schools should be held to high standards when scrutinizing the backgrounds of employees because those employees will be “charged with the supervision of children, [so schools] need to be especially vigilant to avoid litigation which is increasing related to the selection of employees.”201 Children fall into a more vulnerable group of persons in need of

194. Lake, supra note 36, at 457.
195. Clark & Thomas, supra note 3.
196. Id. at 320.
197. Id.
198. Id. Any employment could include administrators, staff, maintenance workers, etc. See generally 42 U.S.C. § 16962(b)(2) (2006).
199. Clark & Thomas, supra note 3, at 320.
200. Id.
201. Howard, supra note 97, at 8–9.
protection; this places an affirmative duty on schools to protect the students.\textsuperscript{202} Under the theory of \textit{in loco parentis},\textsuperscript{203} schools owe the same duty to their students that those students’ parents owe to their children.\textsuperscript{204} Therefore, schools have a duty to “exercise a degree of care commensurate with the nature and danger of the business in which [it] is engaged,’ starting by employing a level of screening that meets the basic care requirements.”\textsuperscript{205}

Furthermore, if a criminal background check reveals certain felony or misdemeanor convictions for enumerated crimes, that applicant is prohibited from working at a school, sometimes in any capacity at all.\textsuperscript{206} These limitations do not apply only to administrators and educators, but extend to those working on school grounds and having any contact with students.\textsuperscript{207}

Private schools, including religious institutions,\textsuperscript{208} are also not immune from negligent hiring suits. Although suits against private or religi-

\begin{itemize}
\item \textsuperscript{202} Lake, \textit{supra} note 36, at 452–53.
\item \textsuperscript{203} \textsc{Black’s Law Dictionary}, \textit{supra} note 38, at 858 (defining \textit{in loco parentis} as “[o]ff, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.”).
\item \textsuperscript{204} Lake, \textit{supra} note 36, at 452–53.
\item \textsuperscript{205} \textit{Id.} at 453 (alteration in original).
\item \textsuperscript{206} Stoll, \textit{supra} note 95, at 386; see, e.g., \textsc{Fla. Stat. Ann.} § 1012.315 (West 2011).
\item \textsuperscript{207} Watstein, \textit{supra} note 7, at 594. Those who work in the cafeteria, maintenance, and custodial services would fall into this category. For instance, Florida prohibits applicants who “were convicted of a crime involving moral turpitude” from being “hired into any position that requires direct contact with students.” \textit{Id.} at (2)(d). In California, in the late 1990s, “noncredentialed substitute employees” (i.e., a substitute custodian) were not subject to required criminal background checks. Clark & Thomas, \textit{supra} note 3, at 316–17. The law in California has since been changed. \textit{Id.} In fact, school volunteers can even be subject to background checks and banned from campus based on a criminal history. Lake, \textit{supra} note 36, at 453–54.
\item \textsuperscript{208} See Scott v. Blanchet High Sch., 747 P.2d 1124 (Wash. Ct. App. 1987); Doe v. Malicki, 771 So.2d 545, 547 (Fla. Dist. Ct. App. 2000). If the plaintiff’s claim requires no inquiry into the church’s religious doctrine or practices, and instead involves determining whether the church, as an employer, knew of the defendant’s past criminal history or inappropriate behavior and hired the defendant anyway, then a negligent hiring claim against a church or other religious institution is permissible. \textit{Id.} The inquiry turns on tort law principles and not religious canons and doctrine. Kelly H. Sheridan, \textit{Comment, Staying Neutral: How Washington State Courts Should Approach Negligent Supervision Claims Against Religious Organizations}, 85 \textsc{Wash. L. Rev.} 517, 539–45 (2010). With the increase in molestation charges against clergy, courts have struggled to keep church and state separate without violating freedom of religion and the Establishment Clause, and the solution is the neutral application of law. \textit{Id.} at 543–44. This is not a perfect solution and courts have not drawn a clear line regarding
ious institutions may require plaintiffs to overcome additional hurdles, a negligent hiring cause of action can still be brought against a private school.

Therefore, schools face the same problems that non-educational employers face with negligent hiring claims. Different jurisdictions take varied approaches to how employers can try to shield themselves from negligent hiring liability and how potential plaintiffs may pierce that shield to establish liability. Also problematic for schools is whether some of those varied approaches taken by different jurisdictions apply to schools as employers.

Further, ex-offenders are usually banned from applying for positions at a school based on the nature of certain crimes committed. Schools, therefore, are virtually precluded from furthering society’s goal of employing ex-offenders to aid in their rehabilitation. A school’s duty to protect children from harm and further their education outweighs society’s need to employ ex-offenders on a school campus.

how that neutral application should apply, but seem to be moving in the direction of allowing negligent hiring claims against churches. Id. at 530–33.

As for additional hurdles that plaintiffs must overcome in civil causes of action against religious institutions, “religious institutions have repeatedly asserted immunity based on the Free Exercise and Establishment Clauses of the First Amendment, and have in many instances succeeded on this defense.” Lisa J. Kelty, Comment, Malicki v. Doe: The Constitutionality of Negligent Hiring and Supervision Claims, 69 BROOK. L. REV. 1121, 1122 (2004). However, if plaintiffs can prove that their negligent hiring claims do “not involve conduct rooted in religious belief” but instead require applying “neutral principles of tort law and... d[o] not excessively entangle the state in church matters[,]” the First Amendment would not act to bar negligent hiring claims. Id. at 1123.

Just a few examples of negligent hiring claims maintained against a religious institution are Wills v. Brown Univ., 184 F.3d 20 (1st Cir. 1999); Anonymous v. Lyman Ward Military Acad., 701 So. 2d 25 (Ala. Civ. App. 1997); Clark & Thomas, supra note 3, at 323–24. This article is focused on public schools with the knowledge that the same concerns that public schools can face with sexters may also be experienced by private schools. Kelty, supra note 209, at 1136 (proposing that negligent hiring causes of action should not be permitted against religious institutions because it inherently requires a review of religious canons and beliefs that separation of church and state mandates for a cause of action to proceed).

For a detailed discussion of the problems employers face from negligent hiring claims, see supra Part III.

For a detailed discussion of the varied approaches in negligent hiring claims taken in different jurisdictions, see supra Part III.A.

See, e.g., FLA. STAT. ANN. § 768.096 (West 1999). Florida’s presumption against negligent hiring statute is silent as to whether schools can benefit from the presumption. Id.

Stoll, supra note 95, at 386.

See id.
Negligent hiring applies to schools as it applies to other forms of employment with the exception that schools are held to an even higher standard than other employers. Schools must ensure that thorough background investigations are conducted on teachers and other potential employees, and that those results are scrutinized to prevent harm to any of the students or even other employees. Although every employer should seek to create and maintain a safe work environment, educating children and standing in the shoes of their parents requires an even greater responsibility.

V. THE EMERGENCE OF SEXTING AND Sexters

To complicate matters further, during the past four to five years, a new crime has emerged: sexting. Generally, “sexting” is defined as using a mobile phone to send “sexually explicit photographs or messages.” This material may be sent via a phone application on a cellular phone, by text or e-mail to another cell-phone user, or uploaded to a social networking site. As a result, it can be easily shared with one or thousands of people, locally or around the world.

216. Leary, supra note 21, at 488.

217. The Oxford English Dictionary defines sexting as “the sending of sexually explicit photographs or messages via mobile phone.” OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/sexting?region=us (last visited Aug. 18, 2011). Oxford further warns that, “like it or not, sexting is part of growing up in 2010.” Id. 18.2.2(c).

218. Leary, supra note 21, at 492–93.

219. See Marsha Levick & Kristina Moon, Prosecuting Sexting as Child Pornography: A Critique, 44 VAL. U. L. REV. 1035, 1037 (2010) (stating that adolescents do not consider the probability that their messages will be shared with others not originally intended).


75% of those ages 12–17 now have cell phones, up from 45% in 2004. These cell users place calls on their phones much less often than dashing off texts. Teens typically make about five calls per day on the cells. But they still prefer to deal with their parents by calling them, rather than texting them. The Pew Internet Project report also documents that many teens use their cells for an array of activities beyond texting and talking. Of the 75% of teens who have cell phones: 83% use their phones to take pictures. 64% share pictures with others. 60% play music on their phones. 46% play games on their phones. 32% exchange videos on their phones. 31% exchange instant messages on their phones. 27% go online for general purposes on their phones. 23% access
The ramifications of sexting, however, are far more difficult and long-lasting.\footnote{Leary, supra note 21, at 488.} Both the federal government and the states are struggling with how to categorize and punish sexters and sexting, which creates additional problems and long-term consequences that may not have been intended by current laws.\footnote{See generally Julia Halloran McLaughlin, Crime and Punishment: Teen Sexting in Context, 115 Penn. St. L. Rev. 135 (2010).} Therefore, to understand the emergence of this new phenomenon, a review of how sexting is specifically defined, the psychological impacts of sexting, and how sexting is being punished is required.

A. Sexting Defined

The idea of sexting is a more recent phenomenon that started to make its national debut around 2007.\footnote{Technically, “sexting” is not a legal term, but has become a label for certain behavior that, when it involves minors, becomes a prosecutable offense being compared to child pornography. Id. at 491–94.} Although still relatively new, sexting has received wide media attention, which in turn has caused both “sensationalism and oversimplification of a complex and multifaceted issue.”\footnote{See Levick & Moon, supra note 219, at 1037 (discussing the possibility of sexting adolescents being prosecuted for possession and distribution of child pornography).} State courts struggle with how to label, define, and categorize sexting.\footnote{Id. at 487.} In the media, the portrayal of sexting has encompassed a variety of situations and circumstances that include: minors taking sexually explicit photos of themselves; minors taking sexually explicit photos of themselves and others engaged in sexual conduct; minors sharing those photos to others via cell phones with or without the minor’s knowledge; minors requesting other minors to take and share such sexually explicit pictures; minors posing as another minor to obtain such sexually explicit pictures to send to others; adults sending sexually explicit pictures of themselves to minors; adults possessing sexually explicit pictures of minors; and, even adults sending sexually explicit pictures of themselves to other adults.\footnote{Id. at 493.} The emphasis remains on sexually explicit pictures, although some definitions include sexually explicit text messages, without pictures, as sexting.\footnote{Id.}
Others, however, have coined the term “self-produced child pornography” (SPCP), which is defined as visual images “that meet the definition of child pornography and were originally produced by a minor with no coercion, grooming, or adult supervision whatsoever.” Sexting and SPCP are related, but not synonymous, because sexting can include words without pictures, while SPCP requires visual images that meet the definition of child pornography. For purposes of this article, the term “sexting” is meant to include visual images and SPCP, not just words alone that could rise to the level of a punishable offense, and not a provocative image and text between adults.

Teenagers have always been curious about their sexuality and have a need to explore and experiment with that sexual curiosity. Sexting is a natural evolution of teenagers sharing their sexual curiosity with other teenagers, only now they do it via ever-expanding technological advancements in communication. Teenagers today cannot imagine a time without cell phones, text messaging, camera phones, webcams, and instant messaging. So while diaries and Polaroid pictures were once the means for documenting or sharing that sexual curiosity, cell-phone cameras, texting, and the Internet—with their capacity to broadcast to countless others in a matter of seconds—have taken their place. More and more teenagers are sharing nude or semi-nude pictures with others via their cell phones and the Internet without a full appreciation for the conse-

228. Id. at 488.  
229. Id. at 491.  
230. Id. at 495. Although definitions of child pornography differ, federal statutes define it as “visual depictions of actual children engaged in ‘sexually explicit conduct,’” which means “actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.” Id. (quoting 18 U.S.C. § 2256(2)(B) (2006)). The “self” in SPCP refers to the subject in the images.  
231. Levick & Moon, supra note 219, at 1039.  
232. Id.  
234. Id. at 1039. The likelihood that cell-phone use will increase is well-documented. Eraker, supra note 13, at 560. A study of teen cell-Phone use conducted by the mobile phone industry indicates that “54% of teenage girls and 40% of teenage boys think that their social life would ‘end’ or significantly worsen if texting were no longer available on cell phones.” Id.  
235. Levick & Moon, supra note 219, at 1040–41. In a recent survey of teenagers,
quences of doing so. Disturbingly, even though some teenagers are aware of the risks, they choose to sext anyway, whether because of peer pressure or simply because it has become commonplace. Some teenagers even feel compelled to sext because of pressure from the media. The normalcy of sexting—as a result of advancing technology and increased accessibility to technology—creates a breeding ground for impulsive decisions with long-lasting and unintended results.

B. Psychological Impact of Sexting

With the push of a button, a teenager can share a nude or semi-nude picture of themselves or another minor to hundreds if not thousands of people. The impact of that “simple” decision, however, has far-reaching and even permanent consequences to one’s reputation and psychological health.

The psychological impact of sexting actually begins with the teenage brain’s decision to sext. Research shows that the brain of a teenager is undeveloped and influenced easily by what and who are in their environment. Moreover, the teenage brain is more susceptible to making impulsive decisions without considering or appreciating the consequences. Teenagers generally display more impetuous behavior than adults, and in terms of reckless behavior, teenagers are statistically overrepresented in every category. With the advancements of technology creating new and immediate forms of communication, these impulsive decisions have immediate and far-reaching effects.

20% of teens have engaged in sexting. Most teen sexting is sent between partners in a relationship (i.e., between boyfriend and girlfriend), or to someone the sender is interested in dating. Seventy-one percent of teen girls and 67% of teen boys who have sexted say they sent this content to a boyfriend or girlfriend. Another 21% of teen girls and 39% of teen boys say they sent such content to someone they wanted to date. Youths’ responses highlight that the usual purpose and motivation of sexting is typical adolescent sexual exploration. Among teens that have sent nude or semi-nude text messages, 66% of girls and 60% of boys say that did so to be “fun or flirtatious[,]” 52% of girls did so as a “sexy present” for their boyfriend[,] 40% of girls said they sent sexually suggestive texts “as a joke” and 34% did so “to feel sexy.”

Id. (footnotes omitted).

236. Leary, supra note 21, at 505.
237. Eraker, supra note 13, at 561–63.  
238. Arcabascio, supra note 233, at 5.
239. Id.
240. Levick & Moon, supra note 219, at 1038.  
The focus of child pornography laws is to prevent the sexual abuse and exploitation of children. Sexting, however, usually involves the “victim” taking a picture of him or herself and voluntarily sending it to another. Therefore, the “element of exploitation is often absent in the practice of sexting.” But despite the absence of intended exploitation, the potential harm to those children in the pictures is very real. The presence of the image on the Internet makes its existence permanent and outside the control of the subject of the image for eternity. The initial dissemination of the image may cause some harm, but the repeated dissemination to a larger and more diverse group over time may cause exponential harm.

The known psychological harm caused by sexting is documented, real, and potentially indefinite. However, the infancy of sexting prevents a full and complete prediction of the harm that will or can result. Ten years from now, new studies may reveal harms that have not yet been considered or feared. Not only is the complete harm caused by sexting unclear and indefinite, but the varied approaches to categorizing and punishing sexting are causing problems and confusion.

C. Categorizing and Punishing Sexting

As sexting becomes more prevalent, prosecutors are facing the daunting task of dealing with minors involved in or responsible for sexting. Child pornography statutes are at least partially responsible for

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242. Levick & Moon, supra note 219, at 1042.

243. Id. at 1044.

244. Leary, supra note 21, at 522.

245. Id. at 522–23. The harm that victims of child pornography suffer “can be inflicted in two ways: harming the victim in its creation and ‘the injury to the victim by the publication of the images.’” Id.

246. See generally id.

247. Id.

248. Id. at 489.
creating some of the challenges for prosecutors. When “[l]egislatures . . . drafted child pornography statutes and authorized such severe penalties for the production, distribution, and possession of such images[,] [they] did not contemplate the phenomenon of sexting in which teenagers, not predators, snapped pictures of themselves.” States have started to respond to this increase in offenders by either adjusting their current laws or creating new crimes that specifically cover sexting. But there is little consistency among the states, with some seeking to decriminalize sexting altogether, others limiting the offenses to juvenile court, and others falling somewhere in between.

Many states recognize the stigma involved with being registered as a sex offender and seek to avoid severe punishments for first-time offenders and/or consider diversion programs as a more appropriate penalty. Some states are pushing for prosecutorial flexibility and discretion with sexters so that the punishment can adequately fit the offense and not place a sexual offender or predator label on a juvenile who may not have

249. Id.
251. Leary, supra note 21, at 555–56. Recently, Florida Governor Rick Scott signed a bill that gives minors who sext three strikes. Melissa Eichman, Gov. Scott Reduces Punishment for Minors Caught “Sexting,” Bay News 9, (June 22, 2011), http://www.baynews9.com/article/news/2011/june/267311/Gov.-Scott-reduces-punishment. The first sexting offense will result in community service and a fine. Id. The second sexting offense will result in a misdemeanor of the first degree. Id. Finally, the third sexting offense will become a felony. Id. The law went into effect on October 1, 2011. Id.
252. Terri Day, The New Digital Dating Behavior—Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability, 33 HASTINGS COMM. & ENT. L.J. 69, 76 (2010) (finding that to include “sexters” within a sexual offender registry “dilutes the importance of the sex offender registries”). Society wants to label actual offenders for minor indiscretions. Id. Additionally, punishing sexters as sex offenders consumes limited community resources. Id. Finally, many argue that punishing teens so severely does not act to effectively deter such behavior because many offenders do not fully understand the gravity of sexting to begin with. Id.
253. Leary, supra note 21, at 555–65. Diversion programs allow prosecutors to determine whether a juvenile’s behavior should be addressed by “diverting” from more traditional juvenile court punishments. Diversion programs recognize that harshly punishing juveniles may not be the best approach especially for first-time offenders who would benefit more from education and an understanding of the consequences of their actions on the victims. Id. at 554.
possessed the mental and emotional development to make informed and well-reasoned judgments.\textsuperscript{255}

There also exists the concern that although sexting regarding “minors may contribute to the problem of the sexual abuse of children because these images may ‘whet [ ] the appetites of pedophiles’ and may be used to groom future victims, such indefinite potential for future harm cannot bring sexting images within the definition of child pornography.”\textsuperscript{256} But just because these images could be used for immoral or improper purposes does not mean they should be banned outright.\textsuperscript{257}

Some states are now looking to reverse earlier felony convictions, which resulted from legislatures and courts taking a serious approach to sexting, and reduce the charges to a misdemeanor.\textsuperscript{258} Other states are seeking to have the juvenile’s record expunged once a diversion program is completed.\textsuperscript{259} Those states that lean toward diversion programs and those that are otherwise pursuing how to handle sexting, view education as a significant tool for helping juveniles understand the consequences and dangers of sexting by balancing “the reality of juveniles’ decreased culpability in certain situations.”\textsuperscript{260} In fact, there is a push for cell-phone sellers and distributors to include information about the dangers of sexting along with new or renewed contracts for wireless service provision.\textsuperscript{261}

\textsuperscript{255} Id. at 555–65.
\textsuperscript{256} Wastler, supra note 250, at 700.
\textsuperscript{257} Id. Of course the other side of this argument is that if these images are placed outside of the child pornography context, law enforcement may be unable to establish probable cause allowing a proper investigation into the origins and subject of the image. Id. If an image is deemed not to be child pornography, it may never be able to be considered as such at a later time. Id. This allows for the possibility that a potential pedophile will go unnoticed and unpunished until another more heinous act is committed. See generally id.
\textsuperscript{258} See generally supra text and notes accompanying notes 14 and 15.
\textsuperscript{259} Leary, supra note 21, at 556.
\textsuperscript{260} Id. at 553–55. Sexting consequences are not limited to legal ones because some sexual abuse victims have admitted to the fear and paranoia they feel knowing that there are pictures and/or videos of them out in cyberspace forever. Id. at 535–38. They frequently wonder who will, or has, seen them and how that will impact their lives and reputations. Id. However, even those involved in SPCP and sexting who are not abused, do not necessarily know or appreciate the possible long term effects that inappropriate visual images and texts may have on their future. Id.
\textsuperscript{261} Id. at 553–55.
VI. THE SMOOHEST ROUTE TO ADDRESSING NEGLIGENT HIRING IN SCHOOLS AND SEXTING REQUIRES BOTH PREDICTABILITY AND FLEXIBILITY

As early as the days of Aristotle, society has sought both predictability and flexibility in the law—predictability in knowing what behavior is allowed or prohibited, and flexibility to allow the law to deal with societal changes. Logically, therefore, negligent hiring laws that cover schools should also be both predictable and flexible. The laws must be predictable enough to inform the public who may or may not work in the school system or on school grounds, but flexible enough to make allowances for changes in the law and advancements of technology, such as sexting.

Child pornography and sex offender laws did not contemplate teenage sexters as their intended target, but were designed to track pedophiles and serious sex offenders who are potential threats to the community. In fact, two-thirds of those registered on sex offender registries around the world pose little risk and are not the “most dangerous predators” those lists were designed to track. That does not mean that some sexters will not pose a danger to others in the future, but that future bad behavior may not have any connection to a teenage sexting infraction because “compared to sexual offenses involving physical harm, such as molestation or rape, sexting is much less severe, especially since most sexting materials are self-produced.” A per se rule that excludes any individual with a sexting conviction from working in the school system may provide predictability as to who is barred from working at a school, but not flexibility as to consider the specific circumstances of the crime committed.

Further, allowing anyone with a criminal record—for any known past crimes or future crimes not yet created—to work in a school in order to promote the theory of rehabilitation may be flexible, but not predict-
able as to the harm those ex-offenders could cause to students, teachers, or staff. If emphasis is placed on predictability alone, the result is a draconian attempt to cure an evil that may not exist. If emphasis is placed solely on flexibility, the result may render schools a breeding ground for pedophiles and child pornographers. Therefore, negligent hiring laws must strike a proper balance of predictability so that only applicants with specific criminal histories will be banned from working at schools, with flexibility for schools to evaluate the details of other applicants’ criminal histories to determine whether school employment is appropriate. This balance is crucial to address newer crimes, like sexting, and future crimes, especially those rooted in technology.

A. Predictability in Negligent Hiring Laws in Schools: Alone, It May Be Too Restrictive

Providing a safe environment in schools for students, teachers, administrators, and staff is one of society’s critical concerns. This duty to provide a safe school environment must be weighed against society’s desire to rehabilitate ex-offenders through employment. Currently, negligent hiring claims encourage discrimination against ex-offenders seeking employment. Further still, many states mandate that ex-offenders of particular crimes be barred from working in schools. As more sexters are prosecuted as child pornographers or sexual predators, the pool of ex-offenders prohibited from working in the school system will increase. In some states, a sexter who has already been convicted and forced to register as a sex offender is precluded from obtaining employment in a school within that state. However, that same sexter, because of the sex offender registration, may also be precluded from employment in a school in a different state where sexting is punished much differently, and sex offender registration is not required or even contemplated by the state’s approach to sexting.

269. Platt, supra note 6, at 707. Employers are responsible to consider the foreseeability of harm an applicant could cause if hired and rely on criminal histories to evaluate that foreseeability. Stoll, supra note 95, at 385.

270. New York’s correction law’s eight-factor test may present a solid guide to creating the proper balance of predictability and flexibility in negligent hiring. N.Y. CORRECT. LAW § 753 (McKinney 2011).

271. For a detailed discussion of the negative impact of negligent hiring on ex-offenders seeking employment, see supra Part III.B.

272. See e.g., FLA. STAT. ANN. § 1021.315 (West 2011); Stoll, supra note 95, at 386.

273. Leary, supra note 21, at 515–18. The Federal Sex Offender Registration and Notification Act (SORNA) that can require juveniles to register as a sex offender, if adjudicated of certain crimes. Id. This SORNA registration requirement may include
Statutes aimed at protecting students, faculty, administrators, and staff in a school environment satisfy society’s need for predictability in the law because the states are clear and specific about who is eligible for employment on school grounds. In fact, these statutes provide enough clarity to ensure that sexters convicted under sexual predator statutes, child pornography statutes, or even moral turpitude statutes, will be banned from school employment. If more sexters are convicted under sexual predator, child pornography, or moral turpitude statutes, the pool of qualified, or even eligible, applicants for school employment will become more shallow. With less qualified faculty, administrators, and staff to run our schools, students could potentially face a different type of harm—a poor education or damaging educational experience. At the far extreme, less-educated students may lead to increased crime in the future. This is certainly not the result contemplated by the negligent hiring cause of action.

Although society seeks predictability in the law so that society knows what behavior is permitted or banned, in viewing that predictability as it applies to negligent hiring in schools and the impact of sexting, it may create an undesirable result. Therefore, predictability without juveniles who engage in SPCP through sexting, as long as the offenders are “‘14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.’” Id. at 516 (emphasis omitted) (quoting 42 U.S.C. § 16911(8) (2006)).

SORNA was designed to express the minimum requirements for sex offender registries, and create some uniformity throughout the nation. Therefore, some states may require sex offender registration in additional circumstances. However, the question then becomes not simply whether a state allows juvenile sex offender registration, but whether it does so for child pornography adjudications. According to the National Center for Juvenile Justice, not all states apply sex offender registration to juveniles. Thirty-nine states permit or require adjudicated juveniles to register as sex offenders for certain crimes and other states forbid it.

Id. at 517 (footnotes omitted). Further, it stands to reason that if one state’s statute prohibits those with criminal histories of specific enumerated crimes from employment, then even though that state may not punish sexting as a felony or a child pornography-related offense, the fact that another state where the infraction occurred does punish it as such and required the offender to register as a sexual predator, would prevent that applicant from being hired in a school in the first state. See id.

275. Id.; see also FLA. STAT. ANN. § 1012.315 (West 2011).
276. See Levick & Moon, supra note 219, at 1037–38.
277. Stoll, supra note 95, at 385.
278. Symeonides, supra note 22.
flexibility may not be sufficient to address sexting or even future crimes that stem from technologies that have not yet emerged.

B. Predictability with Flexibility in Negligent Hiring Laws in Schools: May Be the Right Blend

Because schools are entrusted with educating and supervising children, they are held to a higher standard than most employers to ensure that they hire applicants who will pose little or no danger to students, faculty, and staff. However, creating predictability for schools in their hiring requirements is difficult, if not impossible, based on the varied approaches states have taken regarding categorizing and punishing sexting. Too much uniformity and rigidity also has the potential to harm the applicant pool by excluding those not intended to be excluded, and perhaps even including others who should not be. Predictability combined with the flexibility to evaluate an applicant’s criminal record may provide a better balance between the need to keep our schools safe, and the need to foster ex-offenders’ rehabilitation through employment when the crime is one stemming from youthful indiscretion.

Many with criminal records are either precluded or limited from working in a school environment and sexting laws may increase the number of employees with criminal records. This creates several issues for schools in their hiring processes. First, the law must clearly define what an appropriate investigation entails for schools to avoid negligent hiring liability, or at least protect themselves from it. An appropriate investigation procedure should explain how to best obtain an applicant’s criminal history including criminal background checks, detailed employment applications, and reference checks. With specific guidelines, these investigative steps or methods could satisfy society’s need for predictability in the law. Second, schools must be given some discretion to evaluate the information discovered during that investigation that may include sexting infractions. Instead of a per se rule excluding all applicants with sexting infractions from employment in schools, applying a series of factors to the

279. Clark & Thomas, supra note 3, at 324–25.
280. See supra Part III.A.
281. See Leary, supra note 21, at 510–11. When offenders are under eighteen, society is compelled to act and help them get rehabilitated rather than punishing them. Id.
284. Winward, supra note 104, at 369–70.
285. Symeonides, supra note 22.
286. See generally Creed, supra note 10, at 190–91.
infraction to help determine the applicant’s potential for any harmful behavior in the future may be more accurate.287 This discretion can satisfy society’s need for foreseeability.

Requiring criminal background checks of all teachers and employees who would or could have contact with students is both a low and critical threshold, but one that must at least be required as a starting point in all states.288 The results of these criminal background checks must then be evaluated and supplemented by an Internet search for those indiscretions that may not have resulted in a conviction, but still made their way to the media.289

Next, schools should require and request detailed employment applications that disclose all convictions, and specifically all charges—whether resulting in a conviction or not—regarding sexting. Applicants should be asked to identify their role or roles in the sexting infraction: the subject of the photo, the one who took the photo, the one who distributed the photo, and the one who received the photo.290 In addition to their role in the sexting infraction, applicants should be required to disclose whether they were charged and/or convicted as a primary or secondary sexter.291 A primary sexter is one who is both the subject and distributor of the photo.292 A secondary sexter is one who “receives the photo from the subject or another distributor and then distributes the photos to one or more additional recipient(s).”293 Generally, a minor who engages in primary sexting is seen as less culpable than one who engages in secondary sexting.294 The reason is that primary sexting usually occurs in the

287. New York’s correction statute listing eight factors to evaluate an applicant’s past criminal history to determine the likelihood that the applicant will cause future harm in an employment capacity may serve as a solid framework here. N.Y. CORRECT. LAW § 753 (McKinney 2011).

288. See generally Dickerson, supra note 131 (advocating that criminal background checks should not be limited to those working or volunteering at schools, but should be conducted on students seeking admission to colleges and other higher learning institutions).

289. Regotti, supra note 2, at 336–37. A school was found liable for negligent hiring when it failed to take rumors about a teacher’s molestation of students seriously resulting in an eight-year stretch of molestation. Id. (citing Stoneking v. Bradford Area Sch. Dist., 667 F.Supp. 1088 (W.D. Pa. 1987)).

290. Elizabeth M. Ryan, Note, Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults, 96 IOWA L. REV. 357, 360–61 (2010).

291. Id. at 361.

292. Id.

293. Id.

294. Id.
context of a committed relationship, while secondary sexting requires more intent and aforethought.295

Schools should conduct reference checks that target sexting offenses in addition to other offenses and questionable behavior.296 States should encourage the free flow of information among employers regarding former employees, even if this requires legislation protecting former employers from a defamation charge for disclosing damaging, although truthful, information about an applicant’s past sexting behavior to a potential new employer.297 It is this full disclosure that must be required from all former employers to a potential new employer, and especially schools, to better ensure that those hired to teach, administrate, or work around children are the least likely to harm a child.298

Once these “predictable” investigative steps are completed, schools must be given some flexibility or discretion to evaluate the results of the investigation, if those results include sexting. This flexibility provides schools with a greater chance of hiring a fit and qualified applicant while still promoting society’s need to rehabilitate ex-offenders through employment.

Although employers may have some discretion to determine whether applicants’ criminal histories make them a suitable or fit candidate for the position sought,299 schools are much more restricted from doing so when certain crimes are involved.300 With sexting, the widely varied and disparate treatment by different states and even federal statutes301 almost demands a more discretionary approach to evaluating the severity of the infraction and the foreseeability that the infraction indicates the likelihood of future harm. A uniform approach adopted by federal and state law about sexting may eliminate the need for a discretionary evaluation, however, until this uniform approach is adopted, discretion provides the best alternative solution.

Although no parent wants to take the chance that a child molester will be a teacher at their child’s school, sexting does not automatically ensure that the offender is a sexual predator or child pornographer.302 Again, the infancy of sexting has created such problems for sexters and

295. Id. at 379–80.
296. Watstein, supra note 7, at 593–94.
297. Id.
298. Id.
299. E.g., N.Y. CORRECT. LAW § 753 (McKinney 2011).
300. E.g., FLA. STAT. ANN. § 1012.315 (West 2011).
301. For a more detailed discussion of the varied approaches to punishing sexting, see supra Part V.C.
302. See Leary, supra note 21, at 497.
employers, especially schools, alike. The research is limited as to the scientific certainty, if any, that sexting leads to sexual molestation, child pornography, rape, or other criminal sexual behavior.303 Time will tell whether there is a definitive connection between sexting as a youth or young adult and these more abhorrent criminal sexual behaviors.

Until research and science can provide that “predictability” of what behavior youthful sexting will precipitate, a discretionary approach to evaluate a sexting infraction would best suit schools in determining an applicant’s potential for harm.304 These reasons advocating prosecutorial discretion also support why a discretionary approach for schools to evaluate past sexting infractions is so crucial. Although currently the number of sexting cases being prosecuted nationwide is relatively small,305 this number could increase. With its increase, the impact of punishing sexting severely could have an equal and negative impact on the number qualified applicants to teach, work, or volunteer at schools. Further, sexting is only one of the “newer” technologically-based crimes. With rapid improvements and updates with technology and how we communicate with one another, sexting is just representative of future crimes that will impact negligent hiring in schools and negligent hiring generally. Sexting, however, provides a framework to examine both the current problems faced by schools with negligent hiring and problems that may be faced in the future, requiring a more flexible approach.

Flexibility is best evidenced by New York’s eight-factor approach for employers to evaluate an applicant’s criminal background.306 This discretionary approach has received much attention and praise because it provides some structure and guidance for employers as to how to determine the foreseeability that an applicant will cause future harm based on past behavior.307

For the same sound reasons that New York’s discretionary approach for employers generally is effective in hiring decisions, so should it be for schools and sexting. These eight factors consider the real impact that a sexting infraction committed while an applicant was seventeen would realistically have on the likelihood that the applicant would cause a student or fellow faculty member harm. The factors would allow schools the flexi-

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303. See id. at 501–505.
304. Id. at 496–97 (discussing the need for prosecutorial discretion in punishing sexters).
305. Day, supra note 253, at 79. Although the media and Internet publish articles about sexters being charged, few cases are actually reported. Id. Many result in plea bargains and others may be protected by juvenile proceedings. Id.
306. N.Y. CORRECT. LAW § 753 (McKinney 2011).
ability to ferret out those “youthful offenders” who may not have possessed adequate or fully developed mental and emotional capacity to make good judgments at the time the applicant sexted.

It would also allow schools to determine whether the sexting incident was an isolated occurrence or one of a series of incidents indicating the applicant’s more serious potential to harm. Although uncertainty remains, however, about how many juveniles who SPCP or sext are exhibiting signs of being a sexual predator rather than natural curiosity with one’s sexuality at that age, the flexible approach offered by New York can help address this uncertainty through these eight factors.

Therefore, the guidance of a predictable investigation process coupled with a flexible approach to evaluate the results of that investigation when sexting is discovered, would balance society’s need to know what conduct is permitted or prohibited, while adapting to advances in technology and the emergence of new crimes. The predictability that society seeks in the law would be satisfied with more explicit instructions to schools of what an appropriate investigation must include. The flexibility that society seeks in the law would be satisfied with some guided discretion to evaluate a past sexting infraction to help determine the true likelihood that this ex-offender would cause harm on a school campus.

**VII. CONCLUSION**

The negligent hiring cause of action was created to allow injured plaintiffs to recover against employers who did not use care and caution when hiring dangerous employees. It also sought to encourage employers to improve their investigative methods and techniques to avoid negligently hiring a dangerous applicant.

One way employers sought to avoid negligent hiring liability was to avoid or limit hiring ex-offenders for fear that their potential to cause future harm was higher than non-offenders. This creates tension with society’s desire to foster an ex-offender’s rehabilitation through employment. Many states, in fact, have correction laws prohibiting discriminating against ex-offenders from employment. However, most states also provide an exception, when the unreasonable safety or welfare risk to others would outweigh granting an ex-offender employment.

308. Leary, supra note 21, at 501–505.


310. Id.
And schools fall into the category where risk to children is a primary concern, making some ex-offenders ineligible for employment at a school in any capacity.

With the emergence of sexting as a new crime that federal and state laws have been uniformly unable to categorize and punish, the pool of ex-offenders is increasing. As the number of ex-offenders increases, the number of eligible applicants for employment at schools decreases. Sexting may be as harmless as sharing a picture of oneself with a boyfriend or girlfriend or may be nefarious enough to rise to the distribution of child pornography. Until a more uniform approach is taken to address sexting, schools—and even employers generally—face additional difficulties with negligent hiring claims. To allow a balanced and equitable solution, states should provide schools with predictable directions and instruction on what constitutes an appropriate background investigation. States should also give schools flexibility in evaluating the results of that investigation when it includes a sexting offense.

This article seeks to examine the positive impact of a predictable and flexible approach to negligent hiring laws so that employers can better protect themselves from liability and injured plaintiffs can still have a remedy for injuries sustained by negligent hiring. Additionally, the article seeks to consider negligent hiring and technology from enough perspectives, that harm resulting from negligent hiring may be avoided before it ever occurs. To avoid harm, schools must be armed with the tools necessary to weed out those applicants truly foreseeable of committing future harm from those who made an error as a young adult in love. Sexting exemplifies this struggle and is only representative of future crimes based on our ever-improving and changing technology. The advancements in technology can tip the scales of justice unless we restore balance with the right blend of predictability and flexibility.