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# The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance

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## The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance

*Terence G. Connor & Kevin J. White\**

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### I. INTRODUCTION

Employers consider many factors when selecting among candidates for employment. Often employers conduct only a brief review of candidates, sometimes after more extensive evaluation. But they always assess candidates on limited information, evaluating them for apparent skills, ability, competence, personality traits,

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\* The authors, partners at the law firm of Hunton & Williams LLP, acknowledge the contributions of Anna Lazarus, an associate in the firm, and Douglas Dreier, a 2012 summer associate with the firm.

appearance, and past employment history, among other things. The evaluation generally aims to determine whether a particular candidate presents either a good prospect for success or an unacceptable risk to the employer's interests and the security and safety of customers, employees, and the public. Evidence that the applicant has a history of criminal misconduct that he might repeat while employed is one factor that employers often consider.<sup>1</sup>

There are solid business reasons to consider this history. Criminological studies demonstrate that nothing predicts future criminal activity more accurately than a history of past criminal activity.<sup>2</sup> An employer's concern about loss of business assets or danger to persons exposed to its employees is well justified. Failure to identify and assess possible risks may expose the business to ruinous theft or result in serious harm to others. The question examined in this Article is whether an employer's consideration of criminal history should be subject to challenge through claims of racially discriminatory impact under the civil rights laws even though the employer uniformly considers the criminal history of all applicants and applies its judgments similarly among protected groups. This is a timely issue. The United States Equal Employment Opportunity Commission (EEOC or "the Commission") and the Departments of Labor and Justice have taken the position that using criminal history as a selection standard has a disparate impact on African Americans and Hispanics.<sup>3</sup> To avoid liability, an employer

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<sup>1</sup> Current reports indicate that roughly fifty percent of employers either always or sometimes perform some kind of review for past convictions. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 454 (2006). The choice of the masculine pronoun is intentional to reflect the perception that males are more commonly affected by such investigations. *Accord* Complaint, EEOC v. Freeman, No. 8:09-CV-02573 (D. Md. Sept. 30, 2009) (claiming that screening for criminal convictions discriminates against men, who are disproportionately over-represented in criminal convictions).

<sup>2</sup> See Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, 263 NAT'L INST. OF JUST. J. 10, 12-13 (2009) (contrasting those first arrested at sixteen with those first arrested at eighteen) [hereinafter "Redemption" in an Era of Widespread Criminal Background Checks]; Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 28, 43 (2011); see also ALFRED BLUMSTEIN & KIMINORI NAKAMURA, FINAL REPORT SUBMITTED TO THE NAT'L INST. OF JUSTICE, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RADICAL DIFFERENCES 23 n.21 (2012) ("Prior criminal history is an important predictor of recidivism and is associated with a higher risk of recidivism.").

<sup>3</sup> AMY SOLOMON, U.S. DEP'T OF JUSTICE, BRIEFING ON THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EEOC'S CONVICTION RECORDS POLICY ON THE

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may have to prove the “business necessity” for applying this standard to those applicants under the antidiscrimination laws.<sup>4</sup>

This Article explores the government’s application of the disparate impact theory of discrimination to employment decisions that turn on an applicant’s conviction for certain crimes. Part II surveys the common law principle that holds employers liable for injuries to others where they have been negligent in failing to investigate or, having investigated, failing to take actions sufficient to the discharge of a common law duty of care to those others.

Part III reviews the development of the disparate impact theory under Title VII of the Civil Rights Act of 1964, as amended and as applied to facially neutral standards for employment selection that tend to perpetuate the effects of past discrimination. In addition, Part III examines the cases involving challenges to the use of criminal convictions as a standard for selection that have been decided under the disparate impact theory.

In Part IV, this Article reviews recent guidance from the EEOC to its field offices<sup>5</sup> that would apply generalized national incarceration rates to support findings of discrimination anywhere that an employer rejects an African American or Hispanic candidate for having committed crimes that are disclosed or discovered during the application process.

Part V argues that this agency policy sweeps too broadly because, in its rush to require employers to prove the “necessity” of their standards, it fails to consider the differences in the labor market as well as in the relevant standards for evaluation of “necessity.”<sup>6</sup> Moreover, the policy may require too much under the judicially accepted standards for these cases decided under a disparate impact

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EMPLOYMENT OF BLACK AND HISPANIC WORKERS 2 (2012); Training and Employment Guidance Letter No. 31-11, U.S. Dep’t of Labor (May 25, 2012), *available at* [http://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_31\\_11\\_acc.pdf](http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_acc.pdf). Under current law, a practice is permissible if it is “job related . . . and consistent with business necessity.” 42 U.S.C. § 2000e-2(k) (2006). As this Article will show, this has been held to be a lesser standard than “necessity” as commonly understood. *See, e.g.,* *Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D.R.I. 1996), *aff’d*, 110 F.3d 2 (1st Cir. 1997).

<sup>4</sup> *Donnelly*, 110 F.3d at 2.

<sup>5</sup> *See* EEOC Enforcement Guidance No. 915.002 (2012), *available at* [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Although the Guidance does not address gender, the EEOC has nonetheless filed suit on the basis of the alleged disparate impact that background checks have on male employees. Complaint at 4, *EEOC v. Freeman*, No. 8:09-CV-02573 (D. Md. Sept. 30, 2009).

<sup>6</sup> “Necessity” is in quotes to denote that it is a term of art in this context. As will become clear, the standard Congress has adopted is, in part, well short of actual necessity.

theory.

## II. EMPLOYER LIABILITY FOR NEGLIGENT HIRING

Like every other person and entity, an employer has a common law duty of care to prevent foreseeable harm to others.<sup>7</sup> In the employment context, the Restatement of the Law of Torts describes that duty as follows:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.<sup>8</sup>

That duty is nowhere more chillingly illustrated than in the Florida case of *Tallahassee Furniture Co. v. Harrison*.<sup>9</sup> As described in that opinion, John Allen Turner did odd jobs for Tallahassee Furniture for several months.<sup>10</sup> He had a history of violent assaultive behavior, including an incident in which he stabbed his wife in the face.<sup>11</sup> He had been using heroin and cocaine with coworkers during this time and had violated his probation from an earlier conviction.<sup>12</sup> The company hired Turner for an open delivery driver position.<sup>13</sup> It made no inquiry into Turner's publicly available criminal conviction history, however, and did not even require him to fill out an application for employment that would have called for identification of that history.<sup>14</sup>

<sup>7</sup> RESTATEMENT (SECOND) OF TORTS § 283.

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS: DUTY OF MASTER TO CONTROL CONDUCT OF SERVANT § 317 (1965).

<sup>9</sup> 583 So.2d 744 (Fla. Dist. Ct. App. 1991).

<sup>10</sup> *Id.* at 748.

<sup>11</sup> *Id.* at 749.

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

<sup>13</sup> *Id.* at 748.

<sup>14</sup> *Id.*

Elizabeth Harrison was a student at Florida State University.<sup>15</sup> She purchased a couch from Tallahassee Furniture and Turner was in the crew that delivered it to her apartment.<sup>16</sup> He also helped by moving furniture around for her during the delivery.<sup>17</sup> Apparently in appreciation, Harrison gave him a television set that she no longer wanted.<sup>18</sup> Turner accepted the gift and took it away with him.<sup>19</sup>

Weeks later, on New Year's Day, Turner returned to Harrison's apartment, claiming that the company required him to produce a receipt for the television.<sup>20</sup> She left the door ajar and began to prepare a receipt for him.<sup>21</sup> Meanwhile, he asked to use her bathroom and she agreed.<sup>22</sup> Turner then entered the apartment, took a knife from her kitchen, and brutally assaulted Harrison, causing her serious and permanent injuries.<sup>23</sup>

Harrison sued Tallahassee Furniture for negligent hiring and obtained a verdict of almost \$2 million in compensatory and punitive damages that the company appealed.<sup>24</sup> In an extensive discussion of the evidence and the common law of negligent hiring, the appellate court upheld the verdict in full.<sup>25</sup> The court relied in part on expert testimony about security and criminological issues that indicated that a history of misconduct that was available for review at the time of Turner's hiring should and would have alerted the company that hiring Turner presented a risk to the company's customers, including Harrison.<sup>26</sup>

Similar cases abound across the United States.<sup>27</sup>

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<sup>15</sup> *Harrison*, 583 So.2d at 748.

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Harrison*, 583 So.2d at 748.

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

<sup>23</sup> *Id.* at 747, 748.

<sup>24</sup> *Id.* at 748.

<sup>25</sup> *Id.* at 750–63.

<sup>26</sup> *Id.* at 759–63,

<sup>27</sup> *See, e.g., Blair v. Defender Servs., Inc.*, 386 F.3d 623, 628–30 (4th Cir. 2004) (vacating summary judgment for employer on plaintiff's claims of negligent hiring and negligent retention because employer failed to conduct a criminal background check of employee, and therefore, a question of fact remained concerning whether employer should have known of employee's past violent conduct); *Beverly v. Diamond Transp. Servs., Inc.*, 1999 U.S. App. LEXIS 11136, at \*1–3 (4th Cir. June 1, 1999) (affirming jury's \$3 million award to rape victim after finding that transportation service was negligent in hiring a convicted felon without conducting a background check; employee driver who raped victim had past convictions for

Criminology experts report that a significant predictor of future criminal behavior is a record of past behavior, particularly in combination with a person's age at the time of conviction as well as his age at subsequent release from incarceration.<sup>28</sup> Given both the ready availability of Internet sources and increasingly available resources for prospective employers to make inquiry, it seems clear that failure to discover the criminal history of someone like Turner presents a question for a jury in a negligence case: whether the employer discharged its duty of care to the customer, members of the public, or other employees when it failed to check or, having checked, disregarded the predictive value of the record.<sup>29</sup> Considered either from the perspective of affirmative duty or as a matter of risk prevention, these cases drive many employers to make a

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conspiracy to commit robbery, felony robbery, possession of marijuana, reckless driving, and concealment of a firearm); *Becken v. Manpower, Inc.*, 532 F.2d 56, 57 (7th Cir. 1976) (finding that a question of fact existed as to whether employment agency was negligent in hiring employee who stole from client when the employment agency failed to conduct background checks on employees who were paroled felons); *C.R. v. Tenet Healthcare Corp.*, 87 Cal. Rptr. 3d 424, 427–28 (Cal. Ct. App. 2009) (reversing dismissal of employer negligence claims where the allegations in the complaint averred, *inter alia*, that the defendant employer failed to conduct a background check, which would have revealed employee's sex crime history); *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748, 758 (Cal. Ct. App. 1992) (“[A]n employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him.”); *TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807, 807–08 (Ga. Ct. App. 2003) (affirming jury verdict of negligence where the employer did not conduct a background check); *Harrington v. La. State Bd. of Elementary and Secondary Educ.*, 714 So. 2d 845, 847–48 (La. Ct. App. 1998) (finding the school board liable for negligent hiring where it failed to conduct a background check on a professor, who ultimately raped a female student, which would have revealed that the professor had prior convictions and served jail time for possession of marijuana with intent to distribute, theft, and interstate transportation of forged securities); *Hines v. Aandahl Constr. Co., LLC*, 2006 Minn. App. Unpub. LEXIS 1033, at \*1–2 (Minn. Ct. App. Sept. 12, 2006) (affirming lower court's holding that a contractor was negligent in hiring a painter whose employees robbed and assaulted the homeowners; the contractor knew that the painter had three prior felony convictions for burglary, was a drug addict, and had admitted to theft from another homeowner, but failed to conduct a background check and assigned painter to jobs that gave him access to private residences); *Lingar v. Live-In Companions, Inc.*, 692 A.2d 61, 62–63 (N.J. Super. Ct. App. Div. 1997) (finding a genuine issue of fact as to plaintiffs' claims for negligent hiring against home health care company whose employee stole from disabled patient and abandoned him; employer failed to conduct background check on employee who lied about prior convictions, which included possession and distribution of cocaine, shoplifting, trespassing, and receipt of stolen property); *Rucshner v. ADT Sec. Sys., Inc.*, 204 P.3d 271, 275–82 (Wash. Ct. App. 2009) (absence of employer background check could in form jury verdict for victim that failure caused injury to victim).

<sup>28</sup> See *supra* note 2.

<sup>29</sup> See *Harrison*, 583 So.2d at 740; see cases cited *supra* note 27.

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careful search before hiring.<sup>30</sup>

The same issues apply for an employer that is concerned about avoiding risk of theft or misappropriation from the business or from customers. An employer has a legitimate interest in avoiding future harm to itself and its customers from dishonesty, theft, and fraud. The employer takes an unnecessary risk if no inquiry precedes the hiring of an individual who has a record of misconduct in the past. It has been reported that companies lose about \$52 billion a year to employee theft,<sup>31</sup> and it cannot be denied that inquiring into potential employees' criminal histories, thereby avoiding harm to customers and loss to the employer, addresses legitimate business interests for employers.

### III. AN OVERVIEW OF TITLE VII

Cases like *Green v. Missouri Pacific Railroad Co.*,<sup>32</sup> in which plaintiffs bring suits against employers for considering criminal records in employment decisions, arise under Title VII of the Civil Rights Act of 1964 or parallel state laws. In 1964, Congress enacted Title VII to prevent certain types of discrimination in the workplace.<sup>33</sup> Although it swept more broadly, there is no doubt that the principal focus of the Act was to correct the history of overt racial discrimination in the United States.<sup>34</sup> Title VII declares that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[.]”<sup>35</sup> This language clearly prohibits disparate treatment of persons because of race, color, religion, sex, or national origin, but in *Griggs v. Duke Power Co.*, the Supreme Court ultimately found that Title VII prohibits not just policies that have the “purpose” but also those that

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<sup>30</sup> See EEOC Enforcement Guidance No. 915.002, *supra* note 5, at III.B; Holzer, Raphael & Stoll, *supra* note 1, at 451; see also Harry J. Holzer, Statement before United States Commission on Civil Rights at n.2 (Dec. 7, 2012) (“Employers tend to fear legal liability for theft or bodily harm done to coworkers or customers by previous offenders in a small number of well-known cases.”).

<sup>31</sup> Larry Reynolds, *Pay Policies Can Prevent Employee Theft, Fraud, Studies Show*, BLOOMBERG BNA (Nov. 28, 2012), <http://www.bna.com/pay-policies-prevent-n17179871204/>.

<sup>32</sup> 549 F.2d 1158 (8th Cir. 1977).

<sup>33</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28 & 42 U.S.C.).

<sup>34</sup> H.R. 914, 88th Cong. (1963).

<sup>35</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

have the “effect” of discriminating against any of these demographic classes.<sup>36</sup>

In *Griggs*, the Court confirmed that Title VII prohibited practices or policies that, although facially neutral, had a disparate impact by race, or other protected classes, and were not job related.<sup>37</sup> The Court considered section 703(h) of Title VII, which prohibits the use of ability tests where they are “designed, intended or used to discriminate[.]”<sup>38</sup> It seized upon the words “used to discriminate” and, although it did not conduct a textual analysis, it inferred that the phrase “used to” denotes a lesser standard than does “designed” or “intended.”<sup>39</sup> The Court then focused on the legislative history of the statute, particularly the defeat of Senator John Tower’s proposed amendment that would have explicitly authorized “professionally developed ability tests.”<sup>40</sup> Even though reliance on rejected amendments is a disfavored means of statutory interpretation,<sup>41</sup> the Court nevertheless used that rejection to hold that Congress intended to forbid the use of ability tests, at least those that perpetuated the effects of past discrimination “unless they are demonstrably a reasonable measure of job performance.”<sup>42</sup> Over the years, *Griggs*’ applicability expanded beyond ability tests and educational requirements to include any employment policy that has a disparate impact upon race, color, religion, sex, or national origin.<sup>43</sup>

The Supreme Court inferred Congress’s intent to address unintentional discrimination in 1971 with its decision in *Griggs*. Congress eventually codified this approach in 1991.<sup>44</sup> Title VII now provides that it is unlawful for an employer to “use[] a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin [if] the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]”<sup>45</sup> As

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<sup>36</sup> 401 U.S. 424, 436 (1971).

<sup>37</sup> *Id.*

<sup>38</sup> Civil Rights Act of 1964 § 703(h); *Griggs*, 401 U.S. at 433.

<sup>39</sup> *Griggs*, 401 U.S. at 433–34 (emphasis in original).

<sup>40</sup> *Id.* at 435.

<sup>41</sup> *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1844).

<sup>42</sup> *Griggs*, 401 U.S. at 436.

<sup>43</sup> *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977) (discussing gender discrimination where a prison guard was rejected for failure to meet weight requirements).

<sup>44</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2 (2006)).

<sup>45</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

part of a political compromise, however, Congress also agreed not to define the phrase “job related . . . and consistent with business necessity” with any more clarity or precision.<sup>46</sup> Congress thus left that definition to the courts to develop case-by-case.

A. *The Birth of Disparate Impact Theory*

Originally, the EEOC conceived of disparate impact theory as a “potential alternative approach” to the standard discrimination case.<sup>47</sup> The EEOC’s decision was strategic—EEOC wanted employers to work with the Agency, and knew that achieving employer compliance would be easier if, instead of stigmatizing employers by requiring a showing of intentional discrimination, it focused on issues that employers were less likely to resist.<sup>48</sup> The theory was that progress in addressing headwinds to equal opportunity was more important than assignment of motives that might attract more vigorous resistance.<sup>49</sup>

*Griggs* was not the first case in which a federal court approved of disparate impact theory. One of the first cases to hold in favor of a plaintiff on a disparate impact claim was a case involving an employer’s refusal to hire an applicant because of his arrest record.<sup>50</sup> In that case, however, as was typical of the pre-*Griggs* disparate impact cases,<sup>51</sup> the court was concerned about the likelihood that the employer had intentionally discriminated against the plaintiff because of his race and the analysis proceeded on that hypothesis.<sup>52</sup>

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<sup>46</sup> See, e.g., *Donnelly*, 929 F. Supp. at 593, *aff’d*, 110 F.3d 2 (1st Cir. 1997).

<sup>47</sup> Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 715 (2006).

<sup>48</sup> *Id.* at 715–16.

<sup>49</sup> *Id.* at 716.

<sup>50</sup> See *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972). In *Gregory v. Litton Systems, Inc.*, an employer revoked a job offer to a black man who “had previously been arrested on fourteen different occasions in situations other than minor traffic incidents,” but who “had never been convicted of any criminal offense.” *Id.* at 402. The court held in favor of the plaintiff because “[t]here [was] no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees.” *Id.* Considering nationwide arrest statistics, “Negroes are arrested substantially more frequently than whites in proportion to their numbers.” *Id.* at 403. Thus, “the possible use of [arrest] information as an illegally discriminatory basis for rejection is so great and so likely, that, in order to effectuate the policies of the Civil Rights Act, [the employer] should be restrained from obtaining such information.” *Id.*

<sup>51</sup> See generally Susan Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 292–94 (2011) (discussing the pre-*Griggs* disparate impact cases).

<sup>52</sup> See *supra* note 50.

When *Griggs* reached the Supreme Court, disparate impact doctrine was relatively well established in the lower courts.<sup>53</sup> Therefore, when the Court held in *Griggs* that “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,”<sup>54</sup> it was not giving birth to a new theory. Rather, it was following a progression, and in doing so, it held that Title VII forbids the use of employment tests that are discriminatory in effect, unless the employer meets “the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.”<sup>55</sup> The Court did not have occasion in *Griggs* to consider the likely reach of this theory. It simply set the standard for later courts to apply.

The *Griggs* Court held that neutral policies with discriminatory effects must be “related to job performance” and that the “touchstone is business necessity.”<sup>56</sup> But without a statutory text to apply, the definition of that phrase evolved in later decisions. In *Albemarle Paper Co. v. Moody*,<sup>57</sup> the Court held that tests with adverse impact are impermissible “unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”<sup>58</sup> Then in *Dothard v. Rawlinson*,<sup>59</sup> the Court stated that a discriminatory employment practice is permissible only if it is “necessary to safe and efficient job performance . . . .”<sup>60</sup> The appropriate standard seemed to vary with the facts of individual cases.

#### B. The Narrowing of Disparate Impact Theory

In 1979, in *New York City Transit Authority v. Beazer*,<sup>61</sup> the Court limited the disparate impact theory due to its considerations of employer exigency. Its decision in *Beazer* may foreshadow its treatment of background checks that can reveal prior criminal behavior.<sup>62</sup> At issue in *Beazer* was the Transit Authority’s general

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<sup>53</sup> See Selmi, *supra* note 47, at 717 (“At the time it arose, the *Griggs* case fit easily within the developing case law.”).

<sup>54</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis in original).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 431.

<sup>57</sup> 422 U.S. 405 (1975).

<sup>58</sup> *Id.* at 431.

<sup>59</sup> 433 U.S. 321 (1977).

<sup>60</sup> *Id.* at 331 n.14.

<sup>61</sup> 440 U.S. 568 (1979).

<sup>62</sup> See Linda Lye, Comment, *Title VII’s Tangled Tale: The Erosion and Confusion of*

policy against employing people who were currently using narcotic drugs, including methadone.<sup>63</sup> Even though only twenty-five percent of the Transit Authority's employees were in positions that involved a risk of danger to themselves or to the public, the Court held without extensive analysis that the narcotics rule and its application to methadone users was "job related" for all employees.<sup>64</sup> The employer's concerns about safety and efficiency were legitimate concerns, which justified the exclusion of drug users.<sup>65</sup> The Court considered this policy to be sufficiently job related and necessary where it "bears a 'manifest relationship to the employment in question.'"<sup>66</sup>

Over the next few years, as the composition of the Supreme Court changed, it narrowed disparate impact theory even further. Ultimately, in *Wards Cove Packing Co. v. Atonio*,<sup>67</sup> the Court significantly increased the burden for plaintiffs to meet the applicable prima facie standard.<sup>68</sup> *Wards Cove* held that disparate impact plaintiffs must: (1) prove their claims with statistics tailored to the relevant labor market;<sup>69</sup> (2) identify a specific employment practice alleged to cause the disparity;<sup>70</sup> and (3) prove causation.<sup>71</sup> The Court also added to the evolving "business necessity" jurisprudence. Necessity involves a determination of whether the practice at issue "serves, in a significant way, the legitimate employment goals of the employer."<sup>72</sup> More important, as far as Congress was later concerned, the Court held that the burden of persuasion was on the plaintiff to show that a given policy was *not* justified by business necessity.<sup>73</sup> By 1989, however, the Court had come to approve a selection standard that significantly serves a "legitimate employment goal[] . . . ."<sup>74</sup>

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*Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 327–29 (1998) (discussing the Court's treatment of the disparate impact theory in *Beazer* as confusing and erosive) .

<sup>63</sup> *Beazer*, 440 U.S. at 571–72.

<sup>64</sup> *Id.* at 587 n.31.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

<sup>67</sup> 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

<sup>68</sup> *Lye*, *supra* note 62, at 332.

<sup>69</sup> *Wards Cove*, 490 U.S. at 650–51.

<sup>70</sup> *Id.* at 657.

<sup>71</sup> *Id.* at 656.

<sup>72</sup> *Id.* at 659–60.

<sup>73</sup> *Id.* at 660.

<sup>74</sup> *Id.* at 659.

### C. Congressional Reaction

*Wards Cove* prompted Senator Edward Kennedy to introduce an amendment to Title VII in 1990 in order “to restore and strengthen civil rights laws that ban discrimination in employment.”<sup>75</sup> President George H.W. Bush vetoed that measure.<sup>76</sup> But the next year, President Bush’s appointment of former EEOC Chairman Clarence Thomas to the Supreme Court resulted in an unseemly confirmation battle.<sup>77</sup> In the aftermath of that fight and perhaps to address concerns that arose in that context, Congress passed, and the President signed, the Civil Rights Act of 1991.<sup>78</sup> The 1991 Act included a legislative override of *Wards Cove*.<sup>79</sup> In codifying the “business necessity” standard, Congress clearly put the burden of persuasion on the employer to prove that a practice is job related.<sup>80</sup> After significant debate over the language of “business necessity” as it had evolved through *Wards Cove*, Congress took the unusual step of expressly depriving the courts of any legislative history that might inform later decisions.<sup>81</sup>

The Civil Rights Act of 1991 clearly overrode certain features of *Wards Cove*.<sup>82</sup> It did not, however, address the Court’s requirement that plaintiffs prove that an employer’s policy has a discriminatory impact in a relevant labor market: “[O]ne should compare the racial composition . . . to the *relevant labor market*, rather than to the [general] population.”<sup>83</sup> The demographics of the fifty states are not

<sup>75</sup> S. 2104, 101st Cong. (1990).

<sup>76</sup> Steven A. Holmes, *President Vetoes Bill on Job Rights; Showdown Is Set*, N.Y. TIMES, Oct. 23, 1990, available at <http://www.nytimes.com/1990/10/23/us/president-vetoes-bill-on-job-rights-showdown-is-set.html>.

<sup>77</sup> Adam Clymer, *The Thomas Nomination, Conflict Emerges Over a 2D Witness*, N.Y. TIMES, Oct. 11, 1991, available at <http://www.nytimes.com/1991/10/11/us/the-thomas-nomination-conflict-emerges-over-a-2d-witness.html>.

<sup>78</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified as amended at 42 U.S.C. § 2000e-2 (2006)).

<sup>79</sup> Civil Rights Act of 1991 at § 3; see also *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

<sup>80</sup> § 2000e-2(k).

<sup>81</sup> See Civil Rights Act of 1991 at § 105(b) (“No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S. 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that related to *Wards Cove*. . .”).

<sup>82</sup> Civil Rights Act of 1991 at § 3.

<sup>83</sup> *Hopkins v. Canton City Bd. of Educ.*, 477 Fed. Appx. 349, 358 (6th Cir. 2012) (emphasis in original); see also *NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 477 (3d Cir. 2011) (“In showing statistical disparity, the relevant comparison is ‘between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.’”) (quoting Newark

uniform, and not all employment positions involve recruiting from a nationwide pool. For example, considering that in 2011, 26.0% of Hawaiians were white, 2.0% black, and 38.5% Asian, a Hawaiian employer should not be measured against nationwide statistics, where in the same year 78.1% of Americans were white, 13.1% black, and 5.0% Asian.<sup>84</sup> Nationwide statistics are not a relevant measure of impact unless the employer hires from a national pool. As applied to criminal background checks, these variations—and the absence of congressional agreement on what the phrase “job related and consistent with business necessity” means—are significant.

Since the enactment of the Civil Rights Act of 1991, courts have adopted varying standards in an attempt to define “job related” and “consistent with business necessity.” The following is a sample of some of the definitions adopted: (1) the “hiring criteria must effectively measure the ‘minimum qualifications for successful performances of the job in question,’” but the “hiring policies need not be perfectly tailored to be consistent with business necessity”;<sup>85</sup> (2) “the requirement [must have] a manifest relationship to the employment in question, and [be] necessary to safe and efficient job performance”;<sup>86</sup> and (3) “the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal for Title VII purposes.”<sup>87</sup>

The various efforts to arrive at definitions for “job related” and “consistent with business necessity” illustrate that these terms are not self-defining. As of the date of this Article, however, the Supreme Court has denied certiorari in two cases that could have answered these questions,<sup>88</sup> ensuring that lower courts will continue to struggle to define the ambiguous phrase until the high Court perceives the need to step in.

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Branch, NAACP v. City of Bayonne, 134 F.3d 113, 121 (3d Cir. 1998)); Lopez v. Pac. Mar. Ass’n, 657 F.3d 762, 767 (9th Cir. 2011) (“Plaintiff must have produced evidence from which a fact-finder reasonably could conclude that the one-strike rule results in fewer recovered drug addicts in Defendant’s employ, as compared to the number of qualified recovered drug addicts in the relevant labor market.”).

<sup>84</sup> *State & County QuickFacts: Hawaii*, U.S. CENSUS BUREAU (Mar. 14, 2013), <http://quickfacts.census.gov/qfd/states/15000.html>.

<sup>85</sup> *El v. S. Pa. Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007) (quoting *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 488 (3d Cir. 1999)).

<sup>86</sup> *Smith v. City of Des Moines*, 99 F.3d 1466, 1471 (8th Cir. 1996).

<sup>87</sup> *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993).

<sup>88</sup> *City of New Haven v. Briscoe*, 654 F.3d 200 (2d Cir. 2011), *cert. denied*, 132 S.Ct. 2741 (U.S. June 11, 2012) (No. 11-1024); *N. Hudson Reg’l Fire & Rescue v. NAACP*, 665 F.3d 464 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 2749 (U.S. June 11, 2012) (No. 11-1247).

*D. The Consideration of Criminal Records*

Over the past few decades, several courts have confronted the issue of whether the consideration of arrest and conviction records in employment decisions is a disparate impact violation of Title VII, but only two appellate courts have engaged in such analysis. One of the leading cases is a 1975 case, *Green v. Missouri Pacific Railroad Co.*,<sup>89</sup> in which the Eighth Circuit questioned the “necessity” of an employer’s absolute policy of refusing to employ any person convicted of a crime other than a minor traffic offense in any position.<sup>90</sup> *Green* involved the rejection of an African American Vietnam War resister for a clerical job.<sup>91</sup> In *Green*, the court held that a “sweeping disqualification for employment resting solely on past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis.”<sup>92</sup> Under *Green*, to meet the requirements of business necessity as the Eighth Circuit understood it in 1977, an employment policy must not only foster safety and efficiency, but also be essential to that goal, and there must be no acceptable alternative that would accomplish that goal equally well with a lesser racial impact.<sup>93</sup>

The employer in *Green* offered a number of reasons why its policy was consistent with business necessity, including: (1) fear of cargo theft, (2) concern over handling company funds, (3) bonding qualifications, (4) possible impeachment of the employee as a witness in proceedings where the company was a party, (5) possible liability for hiring persons with known violent tendencies, (6) employment disruption caused by recidivism, and (7) alleged lack of moral character of persons with convictions.<sup>94</sup> The court, however, rejected the employer’s reasons because it had not empirically validated the policy or considered less draconian alternatives.<sup>95</sup> The employer’s reasons may have served as legitimate considerations in making individual hiring decisions, but they did not justify an absolute ban.<sup>96</sup>

*Green* announced a three-factor test to determine whether a criminal conviction exclusion policy meets the business necessity

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<sup>89</sup> 523 F.2d 1290 (8th Cir. 1975), *aff’d*, 549 F.2d 1158 (8th Cir. 1977).

<sup>90</sup> *Id.* at 1292.

<sup>91</sup> *Id.* at 1292–93.

<sup>92</sup> *Id.* at 1296.

<sup>93</sup> *Id.* at 1299.

<sup>94</sup> *Id.* at 1298.

<sup>95</sup> *Green*, 523 F.2d at 1298.

<sup>96</sup> *Id.* at 1298.

test.<sup>97</sup> The court developed this test adopting language from a Southern District of Iowa decision, *Butts v. Nichols*.<sup>98</sup> On Equal Protection grounds, *Butts* rejected an Iowa statute that prohibited the employment of convicted felons in Iowa civil service positions.<sup>99</sup> In *Butts*, the district court invalidated the state statute because “no consideration [was] given to the nature and seriousness of the crime in relation to the job sought[;] [t]he time elapsing since the conviction[;] the degree of the felon’s rehabilitation[;] and the circumstances under which the crime was committed.”<sup>100</sup> From this language, the Eighth Circuit developed the three “*Green* factors,” which purport to correlate to the applicant’s “risk of recidivism” to whether that risk warrants denying a job to a minority convict.<sup>101</sup> These three factors are discussed in detail in Part II, *infra*, as the EEOC relied on them in drafting its 2012 Guidance.

After *Green*, the EEOC took the position that, for an employer to establish a business necessity justifying the exclusion of an individual from employment because of a conviction record, the employer must show that the offense for which the applicant or employee was convicted was job related.<sup>102</sup> If the offense was not job related and the standard excluded more African Americans than Caucasians, then the employer could not consider it in employment decisions without violating Title VII.<sup>103</sup> Even if the offense was determined to be job related, however, the employer must have examined other relevant factors to determine whether the conviction affected the individual’s ability to perform the job in a manner consistent with the safe and efficient operation of the employer’s business.<sup>104</sup> These factors were: (1) the number of offenses and the circumstances of each offense for which the individual was convicted; (2) the length of time intervening between the conviction and the employment decision; (3) the individual’s employment history; and (4) the individual’s efforts at rehabilitation.<sup>105</sup> These factors presumably were thought to correlate with the risk that the individual would recidivate.<sup>106</sup>

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<sup>97</sup> *Id.* at 1297.

<sup>98</sup> 381 F. Supp. 573 (S.D. Iowa 1974); *see also Green*, 523 F.2d at 1297 (citing *Butts*, 381 F. Supp. at 580–81).

<sup>99</sup> *Id.* at 69.

<sup>100</sup> *Butts*, 381 F. Supp. at 580–81.

<sup>101</sup> *Cf.* EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.6.b.

<sup>102</sup> EEOC, COMMISSION DECISION NO. 78-35, CCH EEOC DECISIONS ¶ 6720 (1983).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

In 1987, the EEOC incorporated the *Green* factors into the policy guidance it sent to its district offices, an interpretation that might receive deference from the courts under Supreme Court precedent requiring courts to accept an agency's statutory interpretation when the agency's interpretation is promulgated in the exercise of authority delegated by Congress, so long as the interpretation is reasonable.<sup>107</sup> Thus, in its February 4, 1987 Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, the EEOC stated that a Title VII plaintiff must show that a given employment policy had an adverse impact on the protected class to which the plaintiff belongs. The employer then must show that it "considered" the three *Green* factors—"(1) [t]he nature and gravity of the offense or offenses; (2) [t]he time that has passed since the conviction and/or completion of the sentence; and (3) [t]he nature of the job held or sought"—when it made its decision.<sup>108</sup>

When disparate impact criminal records cases reached the district courts in the 1980s, the courts accepted employer justifications. Typical was the decision in *Moses v. Browning-Feris Industries of Kansas City, Inc.*<sup>109</sup> Citing *Beazer* for support, the District Court for the District of Kansas held that use of an applicant's criminal past in determining qualifications for a position as a waste disposal worker is "justified by business necessity."<sup>110</sup> The court noted that waste disposal workers "come in close contact with the public many times during the day" and that they "occasionally have to enter a person's yard or even the front porch in order to pick up refuse."<sup>111</sup> Thus, the defendant-employer's policy was a business necessity.

Similarly, in *EEOC v. Carolina Freight Carriers Corp.*,<sup>112</sup> the Southern District of Florida ruled in favor of the defendant-employer, stating, "Can an employer refuse to hire persons convicted of a felony even though it has a disparate impact on minority members? This court's answer is a firm 'Yes'."<sup>113</sup> The court even jabbed at the authors of *Green*: "With all due respect to the members of the Eighth Circuit,

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<sup>107</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

<sup>108</sup> EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000e *et seq.* (1982), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

<sup>109</sup> No. 84-2334-S, 1986 U.S. Dist. LEXIS 20073 (D. Kan. Sept. 22, 1986).

<sup>110</sup> *Id.* at \*8-9.

<sup>111</sup> *Id.* at \*9.

<sup>112</sup> 723 F. Supp. 734 (S.D. Fla. 1989).

<sup>113</sup> *Id.* at 753.

their holding is ill founded.”<sup>114</sup> District Judge Gonzales noted that “the honesty of a prospective employee is certainly a vital consideration in the hiring decision” and that “[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.”<sup>115</sup> The court went so far as to say that “[t]o hold otherwise is to stigmatize minorities by saying, in effect, your group is not as honest as other groups.”<sup>116</sup> Additionally, the court, citing *Wards Cove*, criticized the EEOC for relying on nationwide statistics and for not “focus[ing] on the national origin composition of the jobs at issue and the national origin composition of the *relevant labor market*.”<sup>117</sup>

Even in the years after the Civil Rights Act of 1991, the courts remain reluctant to sustain disparate impact challenges to the consideration of criminal convictions in employment decisions. In 2007, in *El v. Southeastern Pennsylvania Transportation Authority*,<sup>118</sup> the Third Circuit upheld an employer’s decision under a policy not to hire anyone who has a record of any felony or misdemeanor conviction for a crime involving moral turpitude or violence.<sup>119</sup> The defendant-employer had fired the plaintiff after learning of his forty-seven-year-old conviction for second-degree murder.<sup>120</sup> The court held that the employer’s policy was job related and consistent with business necessity, although it did so on what it acknowledged was an incomplete presentation in the district court.<sup>121</sup>

In reaching its decision, the Third Circuit mentioned the *Green* factors as they appear in the EEOC’s 1987 Policy Statement.<sup>122</sup> The court, however, held that “the EEOC’s Guidelines are [not] entitled to great deference” and are “entitled only to *Skidmore* deference.”<sup>123</sup>

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<sup>114</sup> *Id.* at 752.

<sup>115</sup> *Id.* at 753.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 751 (emphasis added).

<sup>118</sup> 479 F.3d 232 (3d Cir. 2007).

<sup>119</sup> *Id.* at 235.

<sup>120</sup> *Id.* at 235–36.

<sup>121</sup> *Id.* at 249. The Third Circuit pointedly made its decision on a scant record supporting summary judgment for SEPTA. *Id.* at 246–47. It observed that plaintiff had not presented evidence that might have led to a different result. *Id.* at 247.

<sup>122</sup> 479 F.3d at 243 (explaining that under the *Skidmore* standard, an agency is entitled to “deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning”).

<sup>123</sup> *Id.* at 244 (explaining that because the EEOC’s policy document did not substantively analyze Title VII, it was not entitled to great deference) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991)). Where an agency’s statutory interpretation does not carry the force of law, courts do not afford *Chevron*-style deference (i.e., deference to the interpretation so long as it is reasonable). *See*

Thus, “the EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning.”<sup>124</sup> Because the EEOC’s 1987 Policy Statement “does not substantively analyze the statute,” the court treated it dismissively.<sup>125</sup> Despite recognizing that the *Green* factors are part of the EEOC’s 1987 Policy Statement, the Third Circuit did not evaluate the employer’s policy against the three *Green* factors.<sup>126</sup> In 2007, the ambiguous “business necessity” language from the 1991 amendments to Title VII applied, and the Third Circuit focused on whether the employer’s policy met the 1991 standard, which the court articulated as follows: “employers [must] show that a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question.”<sup>127</sup> Thus, to pass muster, a policy must attempt to distinguish between applicants who pose an unacceptable level of risk and those who do not.<sup>128</sup>

The post-*El* courts have consistently ruled in favor of employers on these claims.<sup>129</sup> Most employers have made their background check policies more nuanced than Missouri Pacific Railroad Company’s policy at issue in *Green*.<sup>130</sup> Perhaps because committing a crime, unlike failing a test, seems like an act for which a person should be held responsible and perhaps because of the prospect of putting courts in the position of requiring employers to assume risks that they are in the best position to judge, the federal courts generally

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Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–83 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

<sup>124</sup> *El*, 479 F.3d at 243.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 244.

<sup>127</sup> *Id.* at 242.

<sup>128</sup> *Id.* at 245.

<sup>129</sup> See, e.g., Foxworth v. Pa. State Police, 228 F. App’x 151, 158 (3d Cir. 2007); Naugles v. Dollar Gen., Inc., No. 4:08-CV-01943, 2010 WL 1254645, at \*5 (E.D. Mo. Mar. 24, 2010); Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1030 (W.D. Mo. 2008); Clinkscale v. City of Phila., No. Civ. A. 97-2165, 1998 WL 372138, at \*2 (E.D. Pa. June 17, 1998); Williams v. Carson Pirie Scott, No. 92 C 5747, 1992 WL 229849, at \*1 (N.D. Ill. Sept. 9, 1992). But see Field v. Orkin Exterminating Co., No. Civ. A. 00-5913, 2001 WL 34368768, at \*1–3 (E.D. Pa. Oct. 30, 2001) (granting the plaintiff leave to amend her complaint to provide more evidence regarding whether the employer’s blanket policy against hiring persons with recent criminal records violated Title VII, but not deciding whether the plaintiff would succeed on the merits of her claim).

<sup>130</sup> See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1292 (8th Cir. 1975), *aff’d*, 549 F.2d 1158 (8th Cir. 1977) (“The Missouri Pacific Railroad Company (MoPac) follows an absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense.”).

have been reluctant to interfere with such employment policies.<sup>131</sup>

For instance, in *Naugles v. Dollar General, Inc.*,<sup>132</sup> the Eastern District of Missouri held in favor of Dollar General against a Title VII plaintiff. The court noted that:

Dollar General is a retailer whose employees handle merchandise and large amounts of cash. Its employees also may be in a store alone with customers or with another employee. Dollar General therefore has a consistently-applied and non-discriminatory policy of only employing people that either have no criminal history, or whose criminal history is not related by its nature to tasks performed by Dollar General employees, or is sufficiently remote in time as not to be job-related.<sup>133</sup>

Pursuant to this neutral policy, Dollar General had rescinded its offer of employment to the plaintiff after a criminal background check revealed the plaintiff's "numerous convictions for violent crimes, such as armed robbery and armed criminal action, and his recent release from incarceration."<sup>134</sup> The court granted summary judgment to the defendant on the issue, noting also that twelve of the store's fourteen employees were African American.<sup>135</sup>

Similarly, in *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*,<sup>136</sup> the Western District of Missouri granted summary judgment to the defendant, a law firm that had discharged an employee after discovering his thirty-year-old rape conviction.<sup>137</sup> The court first criticized the plaintiff for relying upon general, all-felony statistics to prove disparate impact based on race, rather than statistics for sex offenders more specifically.<sup>138</sup> It then held that: "Sad as it may be for plaintiff, his extraordinary criminal conduct almost

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<sup>131</sup> See, e.g., *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) ("We do not sit as a 'super-personnel department,' and it is not our role to second-guess the wisdom of an employer's business decisions—indeed the wisdom of them is irrelevant—as long as those decisions were not made with a discriminatory motive. That is true no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers.") (quotations and citations omitted); *Johnson v. Weld County*, 594 F.3d 1202, 1211 (10th Cir. 2010) ("Title VII licenses us not to act as a 'super personnel department' to undo bad employment decisions; instead, it charges us to serve as a vital means for redressing discriminatory ones.").

<sup>132</sup> No. 4:08-CV-01943, 2010 WL 1254645 (E.D. Mo. Mar. 24, 2010).

<sup>133</sup> *Id.* at \*2-3.

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

<sup>135</sup> *Id.* at \*5.

<sup>136</sup> 537 F. Supp. 2d 1028 (W.D. Mo. 2008).

<sup>137</sup> *Id.* at 1030.

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

thirty years ago will likely reduce his opportunities as a prospective employee during his employable life. Race and sex discrimination laws do not impose duties on employers to overlook significant potential dangers, at least to employee morale.”<sup>139</sup> Thus, the plaintiff in *Berkowitz Oliver*—like the plaintiff in every case since *Green*—lost his disparate impact case. With only two appellate cases on the issue, the current judicial approach is to find that “job related and consistent with business necessity” is a standard that allows employers significant leeway when it comes to evaluating risk from prior criminal misconduct.

#### IV. THE NEW EEOC GUIDANCE

Following cases like *Berkowitz Oliver* and *Dollar General*, and after the Third Circuit’s rejection of the EEOC’s 1987 Policy Statement in *El*, the EEOC issued a new guidance on criminal conviction exclusion policies in 2012.<sup>140</sup> EEOC released those policies April 25, 2012, entitled *Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (“the 2012 Guidance”).<sup>141</sup> The 2012 Guidance considers nationwide conviction and incarceration rates to justify its broad hypothesis of adverse impact, while paying little attention to the relevance of labor markets and local crime rates.<sup>142</sup> This Guidance then focuses on the employer’s burden to defend and provides that employers will “consistently” satisfy the “job related and consistent with business necessity” defense when it satisfies the following requirements:

[1] [t]he employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards . . . or [2A] [t]he employer develops a targeted screen considering at least . . . the three *Green* factors[], and then [2B] provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.<sup>143</sup>

<sup>139</sup> *Id.* at 1031. In other contexts, employee morale or customer preferences have been widely rejected as a basis for a business necessity or bona fide occupational qualification under Title VII. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

<sup>140</sup> *See generally* EEOC, *supra* note 3.

<sup>141</sup> *Id.*

<sup>142</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.A.2.

<sup>143</sup> *Id.* at V.B.4; *see also* 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

Even then, the policy may violate Title VII if the employer could have adopted an alternative policy with a lesser discriminatory impact.<sup>144</sup> These four parts of the EEOC Guidance are described in turn below.

A. *Validity Studies*

According to the new EEOC Guidance, employers “may rely upon criterion-related validity studies, content validity studies or construct validity studies.”<sup>145</sup> These three types of studies are well defined in the Uniform Guidelines on Employee Selection Procedures adopted in 1978.<sup>146</sup> First, a criterion-related validity study consists of “empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.”<sup>147</sup> Second, a content validity study consists of “data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated.”<sup>148</sup> Third, a construct validity study consists of “data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.”<sup>149</sup>

The Uniform Guidelines describe the technical standards for these validity studies in detail;<sup>150</sup> however, the standards for validity studies set an unrealistically high bar for justifying a rejection based on criminal convictions. This approach would require identification of a specific standard that causes impact and, if that hurdle is overcome, a demonstration of the job relatedness of that standard to a particular job.<sup>151</sup> It is, of course, not “essential” to the job of delivering furniture that an applicant not have a conviction for violent crimes, and if imposed, the standard is not susceptible to the same scientific validity analysis as, for example, a pencil and paper test.

The EEOC acknowledges as much: “Although there may be social science studies that assess whether convictions are linked to

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<sup>144</sup> *Id.* at V.C.

<sup>145</sup> Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607.5(A) (2011).

<sup>146</sup> § 1607.

<sup>147</sup> § 1607.5(B).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> § 1607.14.

<sup>151</sup> *Id.*

future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.”<sup>152</sup> Validating the absence of a felony conviction—or the absence of indications of dishonesty or possible violence—against a set of job elements may be impossible. But honesty and the absence of indications of a proclivity to violence are central to any employer’s legitimate business interests.<sup>153</sup>

### B. *The Green Factors*

In the absence of a validity study, the Guidance would evaluate whether an employer has applied the three *Green* factors and then allowed for an individualized assessment.<sup>154</sup> The three *Green* factors strive to determine whether an applicant’s “risk of recidivism” warrants denying that individual a job if he or she is a convicted offender.<sup>155</sup>

The first *Green* factor is “the nature and gravity of the offense” or conduct.<sup>156</sup> This factor correlates with *Butts*’ consideration of the “nature and seriousness of the crime in relation to the job sought.”<sup>157</sup> The focus of this first factor is on “the harm caused by the crime.”<sup>158</sup> In weighing this factor, an employer may consider the legal elements of the crime.<sup>159</sup> In general, the EEOC treats misdemeanors as less important than felonies.<sup>160</sup>

The second *Green* factor is “the time that has passed since the conviction and/or completion of the sentence.”<sup>161</sup> This factor correlates to *Butts*’ consideration of “[t]he time elapsing since the conviction.”<sup>162</sup> *Green* provides no guidance as to how much time matters. Similarly, the EEOC Guidance states that determining

<sup>152</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.5.

<sup>153</sup> *See, e.g.*, EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989) (“[T]he honesty of a prospective employee is certainly a vital consideration in the hiring decision.”). *See also* cases cited *supra* note 27.

<sup>154</sup> *Carolina Freight Carriers Corp.*, 723 F. Supp. at 753.

<sup>155</sup> *See* EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.6.b (“Relevant and available information to make this assessment includes, for example, studies demonstrating how much the risk of recidivism declines over a specified time.”).

<sup>156</sup> *Id.* (internal quotation marks omitted).

<sup>157</sup> *Butts v. Nichols*, 381 F. Supp. 573, 580–81 (S.D. Ia. 1974).

<sup>158</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.6.a.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Green*, 549 F.2d at 1160 (internal quotation marks omitted).

<sup>162</sup> *Butts*, 381 F. Supp. at 580–81.

where to draw the line is a difficult decision that must “depend on the particular facts and circumstances of each case.”<sup>163</sup> It counsels that an employer should research studies demonstrating “how much the risk of recidivism declines over a specified time.”<sup>164</sup> Such studies have shown that a staggering 67.5% of former prisoners are re-arrested for a felony or serious misdemeanor within three years of their release from prison.<sup>165</sup> Others report different results with respect to an offender’s future criminal misconduct when compared to the general population. But the rough (albeit debatable) consensus is that, in the absence of further arrests, the risk of recidivism becomes insignificant somewhere between seven and ten years after a first offense.<sup>166</sup> Determining the risk that a given person will commit another crime is a challenging task. Many laws require the effort,<sup>167</sup> however, and the Department of Justice has even mandated that one company refuse to hire any applicant with a “felony, theft, or larceny conviction *within the applicant’s lifetime* which resulted in an active prison or jail sentence” as part of a settlement.<sup>168</sup>

The third *Green* factor is “the nature of the job” held or sought.<sup>169</sup>

<sup>163</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.6.b.

<sup>164</sup> *Id.*

<sup>165</sup> PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002).

<sup>166</sup> See Bushway, Nieuwebeerta & Blokland *supra* note 2, at 33 (“Offenders do eventually look like non-offenders, usually after a spell of between 7 and 10 years of nonoffending.”); see also “Redemption” in an Era of Widespread Criminal Background Checks, *supra* note 2, at 13 (reporting that, after 7.7 years, a person arrested at 18 for robbery, who has no further arrests, is no less likely to commit another crime than someone in the general population). These studies measure recidivism by subsequent arrests (not convictions), an issue that may call into questions consistency with other positions the EEOC takes on arrests as a standard. *Id.* at 14.

<sup>167</sup> See, e.g., 12 U.S.C.A. § 1829 (2013) (restricting persons convicted of any criminal offense involving dishonesty or breach of trust or money laundering from owning, controlling, or participating in the conduct of the affairs of an FDIC insured institution); 42 U.S.C. § 13041 (2006) (“Each agency of the Federal Government, and every facility operated by the Federal Government (or operated under contract with the Federal Government), that hires (or contracts for hire) individuals involved with the provision to children under the age of 18 of child care services shall assure that all existing and newly hired employees undergo a criminal history background check.”); N.C. Gen. Stat. § 110-90.2 (2012) (requiring criminal history checks for child care providers); 24 Pa. Stat. Ann. § 1-111 (2012) (“Administrators of public and private schools, intermediate units and area vocational-technical schools shall require prospective employees to submit with their employment application . . . a report of criminal history record information from the Pennsylvania State Police or a statement from the Pennsylvania State Police that the State Police central repository contains no such information relating to that person.”).

<sup>168</sup> EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 738 (S.D. Fla. 1989) (emphasis added).

<sup>169</sup> Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977) (internal

This factor, like the first factor, correlates to *Butts*' consideration about the "nature and seriousness of the crime in relation to the job sought."<sup>170</sup> An inquiry into the nature of the job encompasses the job's title, its duties, its essential functions, the physical environment in which the job is performed, and the circumstances under which it is performed, including the level of supervision, oversight, and interaction with co-workers or vulnerable individuals.<sup>171</sup> This factor helps link "the criminal conduct to the essential functions of the position . . . [to] assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity."<sup>172</sup>

None of the three *Green* factors appear in Title VII, which is unsurprising because they are derived from an Equal Protection case and because it was not the focus of Congress when it passed or amended Title VII to create protection for voluntary conduct that results in a conviction for a crime.<sup>173</sup> The Supreme Court has never had occasion to approve the *Green* factors, and in 2007, the Third Circuit did not apply the *Green* factors in deciding *El*.<sup>174</sup> Moreover, these factors protect only Blacks, Hispanics, and other minority groups that have been discriminated against in the past. A white person would not have been able to present a prima facie case based on the facts of *Green*.<sup>175</sup>

### C. The Individualized Assessment

The 2012 Guidance would require an employer to first consider the three *Green* factors and then to conduct an individualized assessment for the African American or Hispanic candidate. To conduct an individualized assessment, an employer must: (1) "inform[] the individual that he may be excluded because of past criminal conduct," (2) "provide[] an opportunity to the individual to demonstrate that the exclusion does not properly apply to him," and (3) "consider[] whether the individual's additional information shows that the policy as applied is not job related and consistent with

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quotation marks omitted).

<sup>170</sup> *Butts v. Nichols*, 381 F. Supp. 573, 580–81 (S.D. Ia. 1974).

<sup>171</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.6.c.

<sup>172</sup> *Id.*

<sup>173</sup> 42 U.S.C. § 2000e-2 (2006).

<sup>174</sup> *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007).

<sup>175</sup> This may prove troublesome over time as the Supreme Court ultimately takes up this issue. At least one justice has expressed reservations about the constitutionality of the disparate impact theory overall. *See Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring).

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business necessity.”<sup>176</sup> The individualized assessment may include information regarding his misidentification, mitigating facts or circumstances, his age at the time of the conviction, the number of offenses, evidence of rehabilitation, his employment history, references, and bond status.<sup>177</sup>

*D. Less Discriminatory Alternative*

Even if an employer demonstrates that its policy is job related and consistent with business necessity, whether by a validity study or a consideration of the *Green* factors coupled with an individualized assessment, the Guidance holds that the EEOC may still find reasonable cause to believe a Title VII violation has occurred if it believes that there was a less discriminatory alternative employment practice, which the employer did not adopt but which serves the employer’s legitimate goals as effectively as the challenged practice.<sup>178</sup> Factors such as the cost or burdens of a proposed alternative are relevant in determining whether the alternative would be “equally as effective as the challenged practice in serving the employer’s legitimate business goals.”<sup>179</sup>

V. THE FLAWS OF THE 2012 GUIDANCE

Title VII declares that “[i]t shall be an unlawful employment practice for an employer to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>180</sup> The Civil Rights Act of 1991 codified disparate impact theory, allowing a claim under Title VII when the plaintiff “demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .”<sup>181</sup> Thus, to state a disparate impact claim, a plaintiff must prove that an employer’s practice truly causes a disparate impact based on one of the five protected immutable characteristics of an applicant, as

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<sup>176</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.9.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at V.C.

<sup>179</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

<sup>180</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>181</sup> § 2000e-2(k)(1)(A)(i).

measured against the appropriate work force population.<sup>182</sup>

*A. The 2012 Guidance Is Based on Flawed Statistics*

The new EEOC Guidance represents an effort to advance a nationwide policy for something that is inherently local. Disparate impact plaintiffs must show that a specific practice produces a disparate impact in the “relevant labor market.”<sup>183</sup> Even though nationwide statistics may indicate that an employer’s policy has a discriminatory impact, a plaintiff cannot succeed without statistics tailored to the relevant market.<sup>184</sup> Thus, proof that African Americans in the nation have criminal records at a higher rate overall does not, in itself, show that a criminal record exclusion policy has a disparate impact on African Americans in Omaha, for example.

The EEOC justifies its 2012 Guidance by citing nationwide statistics—namely that arrest and incarceration rates across the nation are generally much higher for African American men (one in three) and Hispanic men (one in six) than for White men (one in seventeen).<sup>185</sup> Yet such statistics vary from state to state and, perhaps more significantly, from crime to crime.

1. Variations Based on State

After accounting for population, the Black-to-White ratio rate of incarceration per 100,000 people ranges from a high of 19.0 to 1.0 in the District of Columbia to a low of 1.9 to 1.0 in Hawaii.<sup>186</sup> Along with the District of Columbia, four states have a ratio at or above 12.0 to 1.0.<sup>187</sup> In contrast, five states have a ratio at or below 4.0 to 1.0.<sup>188</sup> No state has a ratio in which Blacks fare better than Whites, although data from New Mexico and Wyoming are unavailable.<sup>189</sup> For Hispanics, however, the incarceration rates vary even more substantially. After accounting for population, the Hispanic-to-White ratio rate of incarceration per 100,000 people ranges from a high of

<sup>182</sup> *Wards Cove*, 490 U.S. at 650–51.

<sup>183</sup> See cases cited *supra* note 83.

<sup>184</sup> 42 U.S.C. § 2000e-2(i)(1)(A)(i) (2006); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989).

<sup>185</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5.

<sup>186</sup> Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, THE SENTENCING PROJECT, at 11, tbl. 6 (2007). The statistics illustrate regional disparities. *Id.* at 7. While the national black-to-white ratio of incarceration is 5.6, it varies greatly among the states. *Id.* at 10.

<sup>187</sup> Those states are Iowa, Vermont, New Jersey, and Connecticut. *Id.*

<sup>188</sup> Those states are Arkansas, Alabama, Mississippi, Georgia, and Hawaii. *Id.*

<sup>189</sup> *Id.*

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6.6 to 1.0 in Connecticut to a low of 0.4 to 1.0 in Hawaii.<sup>190</sup> Only three states have a ratio at or above 5.0 to 1.0.<sup>191</sup> In nine states, Hispanics are actually less likely to be incarcerated than Whites are, even after accounting for the size difference in population.<sup>192</sup> An additional eleven states have a ratio between 1.3 to 1.0 and 1.1 to 1.0, making Hispanics only slightly more likely to be incarcerated than Whites are.<sup>193</sup> Data from eleven states are unavailable.<sup>194</sup> Significantly, these statistics do not account for differences by crime type.

After generalizing from national statistics, however, the 2012 Guidance instructs district directors to find a violation of Title VII when an employment policy excludes a minority applicant, triggering an automatic shift in the burden to the employer to prove job relatedness and consistency with business necessity.<sup>195</sup> This cannot be the law. A Hawaiian Hispanic should not be able to bring a disparate impact claim against a Hawaiian employer for the consideration of conviction records because in Hawaii, Hispanics are not adversely affected by such employment policies. Whites are actually more likely to have been incarcerated than Hispanics in Hawaii.<sup>196</sup> Similarly, while Blacks in every state are more likely than Whites to be incarcerated, there may very well be certain counties in which Blacks fare better than Whites, as Hispanics fare better than Whites in certain states.

## 2. Variations Based on Crime

Even allowing for the limited purposes of the Guidance, its focus on generalized statistics of incarceration takes inadequate notice of the likelihood that employers' decisions do not range so broadly. As the district judge found in *Fletcher*, the relevant inquiry is whether a decision was based on a specific criminal history that required a specific risk decision by the employer, not a probe into the general statistical presence of crime in society at large.<sup>197</sup> It may be that, if the plaintiff in that case had been convicted of a different crime not

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<sup>190</sup> Mauer & King, *supra* note 186, at 14, tbl. 8.

<sup>191</sup> Those states are Connecticut, Massachusetts, and Pennsylvania. *Id.*

<sup>192</sup> Those states are Nevada, Michigan, Georgia, Alaska, Florida, Arkansas, West Virginia, Louisiana, and Hawaii. Mauer & King, *supra* note 186, at 14, tbl. 8.

<sup>193</sup> Those states are Kentucky, Washington, Indiana, Texas, Virginia, Mississippi, Missouri, Tennessee, South Carolina, Oregon, and Oklahoma. *Id.*

<sup>194</sup> Those states are Alabama, Kansas, Maine, Maryland, Minnesota, New Mexico, North Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. *Id.*

<sup>195</sup> EEOC Enforcement Guidance No. 915.002, *supra* note 5, at V.B.

<sup>196</sup> See Mauer & King, *supra* note 186 at tbl. 8.

<sup>197</sup> *Fletcher*, 537 F. Supp. 2d at 1030.

involving sexual assault, the employer would have regarded it as less risky to employ him, or the court may have found that the decision was not tailored appropriately to the firm's "legitimate business objectives." That court, however, made clear that close scrutiny of those statistics reveals more appropriate models for statistical analysis than the general incarceration rates across the nation.

In sweeping all crime or incarceration statistics into every employer's decision-making, the 2012 Guidance does not consider the fact that there are crimes that present specific risks and there are crimes that may be more prevalent in one segment of society than in others. For instance, nationwide, 45.3% of all Americans who committed homicide from 1980 to 2008 were White, whereas 52.5% were Black.<sup>198</sup> With respect to workplace-related homicides in that same period, however, 70.8% of offenders were White, whereas 25.8% were Black.<sup>199</sup> Even more skewed are the statistics showing that White offenders committed 84% of homicides involving White victims, while Black offenders committed 93% of homicides involving Black victims.<sup>200</sup>

Other crimes exhibit similarly significant differences. For example, in 2006, far more stalking offenders were White than Black.<sup>201</sup> From 1993 to 2002, 21% of carjackers were White, whereas 56% of carjackers were Black.<sup>202</sup> In 2002, 64.9% of defendants convicted of intellectual property theft were White, whereas 6.1% were Black.<sup>203</sup> From 1993 to 1999, Whites committed 54.7% of violent victimizations in the workplace (defined as rape, sexual assault, robbery, aggravated assault, and simple assault, but not homicide), whereas Blacks committed 30.2%.<sup>204</sup> In 2010, 68.9% of larceny-theft offenders were White, whereas 28.3% were Black.<sup>205</sup> In 2010, 85.7%

<sup>198</sup> ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 3, tbl. 1 (2011).

<sup>199</sup> *Id.* at 12, tbl. 7.

<sup>200</sup> *Id.* at 13.

<sup>201</sup> See KATRINA BAUM, SHANNAN CATALANO & MICHAEL RAND, BUREAU OF JUSTICE STATISTICS, NCJ 224527, STALKING VICTIMIZATION IN THE UNITED STATES, at 12, app'x tbl. 2 (2009) (providing the raw numbers necessary to calculate the rates). Stalking is "primarily intraracial in nature." *Id.* at 4.

<sup>202</sup> PATSY KLAUS, BUREAU OF JUSTICE STATISTICS, NCJ 205123, CARJACKING, 1993–2002, at 1 (2004).

<sup>203</sup> MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ 205800, INTELLECTUAL PROPERTY THEFT, 2002, at 5, tbl. 3 (2004).

<sup>204</sup> DETIS T. DUHART, BUREAU OF JUSTICE STATISTICS, NCJ 190076, VIOLENCE IN THE WORKPLACE, 1993–99, at 1, 7, tbl. 13 (2001).

<sup>205</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2010, TBL. 43A, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in->

of driving while under the influence offenders were White, whereas only 11.5% were Black.<sup>206</sup> This kind of variance may be why the court in *Fletcher v. Berkowitz Oliver* required that the plaintiff produce statistics to show that Blacks are more likely to be sex offenders specifically, rather than felons generally.<sup>207</sup>

If a trucking company enacted a policy to refuse to hire any trucker who has had a DUI conviction, then no racial minority should be able to prove a disparate impact case against that employer because the policy does not actually create a disparate impact, even though the 2012 Guidance would presume a disparate impact from its reference to general national statistics. Just as a plaintiff cannot rely upon nationwide incarceration statistics, the plaintiff also cannot rely upon general incarceration statistics.

*B. Statistics Do Not Show the Full Story*

Contrary to popular wisdom, data from a study by Professors Harry Holzer, Steven Raphael, and Michael Stoll show that employers who do check backgrounds are significantly more likely to hire minorities with convictions than those who do not check backgrounds.<sup>208</sup> Because nationwide statistics show that, as a whole, African Americans are more likely to be incarcerated than Whites, this research might seem counterintuitive. But what it seems to demonstrate is that background checks dispel what otherwise might be automatic stereotypes. Examining a job applicant's background seems to avoid this stereotyping characterization.<sup>209</sup>

Employers may believe that arrest and incarceration rates are much higher for African American men than for other demographics, and conducting a background check appears to improve the prospect of hiring for Black males. Employers, however, will not have perfect information about individual applicants and employees. Employers care greatly about whether their employees have criminal records because they need to trust their employees, and they want to avoid harm to customers and other employees—harm which a jury may find to have been foreseeable. Checking backgrounds may override false assumptions that are especially likely

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the-u.s.-2010/tables/table-43/10tbl43a.xls.

<sup>206</sup> *Id.*

<sup>207</sup> *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028, 1030 (W.D. Mo. 2008).

<sup>208</sup> Holzer, *supra* note 1, at 458.

<sup>209</sup> *Id.* This study was not cited in the EEOC Guidance.

if job applicants have unexplained gaps on their resumes.<sup>210</sup> Thus, if employers check to determine whether their applicants have criminal records, they are more likely to hire African American applicants.<sup>211</sup>

If screening for criminal convictions actually makes African Americans more likely to be hired, the EEOC approach has extended beyond its statutory mission to eliminate racial discrimination.<sup>212</sup> That mission is to end discrimination based on an “individual’s race, color, religion, sex, or national origin.”<sup>213</sup> Screening for criminal convictions may actually advance that mission, and creating a new theory of discrimination is a task for Congress, not an enforcement agency.

It remains to be answered why the EEOC ignored the evidence that these background checks advance its objectives. Either the EEOC: (1) disputes the validity of these statistics; (2) is unaware of these statistics; or (3) has given itself a new mission to help convicted criminals find employment. Of these three possibilities, there is no evidence that the first one is correct. Nowhere in the EEOC Guidance does the EEOC discuss these statistics; instead, it assumes that, because “African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population,” screening for criminal convictions will have an adverse impact by race.<sup>214</sup>

This lends some credence to the second possibility: perhaps the EEOC is simply unaware that African Americans are more likely to be hired when employers consider conviction records.<sup>215</sup> “[T]he EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning,” however, and ignoring that research may be fatal to any effort to persuade the courts to accept this interpretation of Title VII.<sup>216</sup> If the EEOC is unaware of these statistics, then the agency has not been as thorough with its research as it should be.

Perhaps instead the third possibility is correct, and the EEOC has embarked upon a new mission to help convicted criminals who are African American or Hispanic to find employment. The EEOC convened on July 26, 2011 “to Examine Arrest and Conviction

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<sup>210</sup> *Id.* at 458–59.

<sup>211</sup> *Id.* at 474.

<sup>212</sup> *Id.* at 451.

<sup>213</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>214</sup> See EEOC Enforcement Guidance No. 915.002, *supra* note 5, at II.

<sup>215</sup> The 2012 Guidance does not cite to the Holzer, Raphael, Stoll article.

<sup>216</sup> *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007).

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Records as a Hiring Barrier.” At this meeting, the commissioners invited various speakers to testify and thus influence what would become the 2012 Guidance. Professor Stephen Saltzburg testified about the “hidden world of punishment” and the difficulty that offenders have in finding employment.<sup>217</sup> Saltzburg lamented that these offenders were trapped in a vicious cycle because a significant predictor of recidivism is whether an ex-convict finds employment.<sup>218</sup> The EEOC also heard from the President and Chief Executive Officer of D.C. Central Kitchen, who expressed his concern about the economic aspect of employing people with a criminal history—the cost of offenders returning to jail and the need to pay for jail amenities, as well as the lost benefit to the economy of taxes and wages from the employment of ex-offenders.<sup>219</sup> The other speakers at the meeting also spoke to the importance of reemploying ex-convicts in general; they typically were *not* focused on the impact on racial minorities of the consideration of criminal records.

The EEOC appears to be on a mission to reduce recidivism by attacking the perceived barrier to employment it believes background checks represent, but in doing so, it has ignored evidence that employment after release does not seem to have an impact on recidivism.<sup>220</sup> Employing former offenders may be a socially important goal, but compelling employers to abandon their risk management is neither within the EEOC’s statutory authority nor apparently effective for the announced purpose of the initiative. Title VII prohibits employers from adopting policies that have a disparate impact by “race, color, religion, sex, or national origin.”<sup>221</sup> “Criminal status” is not yet a protected class.<sup>222</sup> Perhaps Congress will enact greater protections for returning offenders—indeed, this is one of President Obama’s stated goals<sup>223</sup>—but it is not the EEOC’s mission.

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<sup>217</sup> Stephen Saltzburg, Professor, George Washington Univ. Law School, Written Testimony for EEOC Meeting (July 26, 2011), *available at* <http://www1.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>.

<sup>218</sup> *Id.*

<sup>219</sup> Michael F. Curtin, Jr., President & CEO, D.C. Cent. Kitchen, Written Testimony for EEOC Meeting (July 26, 2011), *available at* <http://www1.eeoc.gov/eeoc/meetings/7-26-11/curtin.cfm>.

<sup>220</sup> It is also not at all clear that there is a connection between post release employment and a reduction of recidivism. Marilyn Moses, *Ex-Offender Job Placement Programs Do Not Reduce Recidivism*, CORRECTIONS TODAY, Aug./Sept. 2012, at 106–08.

<sup>221</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>222</sup> *See id.*

<sup>223</sup> Blumstein & Nakamura, *supra* note 28, at 10.

*C. The Green Factors' Imperfect Fit with the Risk of Recidivism*

In adopting the three *Green* factors, the EEOC has acknowledged concerns from employers that an applicant or employee will recidivate and cause harm.<sup>224</sup> Unfortunately, predictions of redemption and desistance are academic projections and are uncertain reeds on which to lean in making practical risk decisions. Some studies show that at some time between seven and ten years after a first offense, a statistical offender who has not been arrested again will present no greater risk of future criminal involvement than does the general population.<sup>225</sup> These studies are based on limited data.<sup>226</sup> Obviously, an employer cannot predict with certainty whether a given job applicant will later commit a crime against it or a customer or fellow employee. It can only try to make an educated evaluation on limited information.

These recidivism studies are problematic for the EEOC Guidance because they show that the rate of recidivism is more closely tied to factors other than merely the three *Green* factors, even as enhanced by the 2012 Guidance. After all, resuming criminal activity is an act of the will, and there are more factors that may significantly predict recidivism than the EEOC has either considered or mentioned in its Guidance. The Florida Department of Corrections commissioned a study released in July 2003 to identify the factors that bore a significant relationship to recidivism in former prisoners.<sup>227</sup> A partial list of factors that have been found to be statistically significant for recidivism includes:

- race
- Hispanic ethnicity
- age at release from incarceration
- post-release supervision
- time spent in prison
- disciplinary reports in prison
- education level and

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<sup>224</sup> EEOC Enforcement Guidance, *supra* note 5, at III.

<sup>225</sup> *See supra* note 165.

<sup>226</sup> For example, they generally measure indications of recidivism from later arrests, not convictions, an issue on which EEOC and the courts may have further concerns. *See* Blumstein & Nakamura, *supra* note 28, at 14.

<sup>227</sup> FLA. DEP'T OF CORR., RESULTS: FACTORS AFFECTING RECIDIVISM RATES (2003), available at <http://www.dc.state.fl.us/pub/recidivism/2003/results.html>; *see also* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://bjs.gov/content/pub/pdf/rpr94.pdf>.

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- prior recidivism

Among these, the Guidance would acknowledge only age and prior conviction history as factors the employer might properly consider in making an “individualized assessment” of the fitness of the candidate. Risk assessment is a complicated and uncertain process. It involves many interacting factors. But this list strongly suggests that an employer who “treats” applicants similarly in making these decisions regardless of race should not be held liable for the “impact” of those decisions. No better case could be made for confining claims of discrimination in the use of criminal background checks to the disparate treatment theory of proof than the simple fact that “race” is a statistically significant predictor of recidivism.

The list indicates that an African American or a Hispanic with a prior conviction or someone who has had significant disciplinary reports in prison, minimal education, and prior recidivism is significantly more likely to make the decision to commit a crime again, leading then to an analysis of whether African Americans or Hispanics are disproportionately represented in any of these groups. On this list, the EEOC recognizes only age at release as a significant factor that should be considered in making a risk assessment. There may be many reasons for these statistically significant associations. But ultimately, anyone who decides to commit a crime is likely to experience the stigma associated with that choice. That stigma may be a disadvantage to him when compared to those who did not make the same choice. It is also possible that those who make those choices will present more often to potential employers as risky hires than will those who have not made that election. In those cases, so long as it is that decision, and not race, that causes him disadvantage, Title VII does not protect him.

This puts the problem of considering this employment practice statistically against the pool of convicted offenders in the entire United States in perspective. Criminal conduct is a product of choice and is not an immutable characteristic of anyone’s race or ethnicity. Therefore, it should not be measured as if it were like an agility test or an educational qualification that can be validated. Free choices made by individuals may have consequences, but as long as those consequences apply similarly among protected groups, Title VII does not reach them.

*D. What is “Business Necessity”?*

Even if the EEOC or private plaintiffs were successful in developing a proper statistical case of adverse impact in these cases, it

is not at all clear that the courts will require the level of proof the 2012 Guidance urges to establish “business necessity” as they have defined it in this context.

There is nothing in the case law that would suggest a validation under the Uniform Guidelines will be required to prove that failing to hire someone convicted of theft has the criterion, content or construct validity of a paper and pencil test for firefighters.<sup>228</sup> The decision on this issue turns on the employer’s sense of risk to its business or to its visitors, customers, and other employees. The employer may make its determination based on risk to the employer, such as the risk Judge Gonzales found present in *Carolina Freight*, where, for example, “the honesty of a prospective employee [was] certainly a vital consideration in the hiring decision.”<sup>229</sup> In contrast to all the processes the 2012 Guidance urges on employers seeking to show the “business necessity” of their risk management decisions, the courts have recognized that there are other legal obligations to be discharged that may not lend themselves to precise analysis. The courts’ decisions to date on this issue indicate that they are likely to continue to defer to the good faith decisions of employers that advance their legitimate business objectives, so long as the standard applies equally among protected categories of applicants.

In any event, the Guidance does not take account of these decisions in its analysis justifying the EEOC’s interpretation of the law, and this is a weakness of the approach that may deny it favorable judicial deference.<sup>230</sup>

## VI. CONCLUSION

The creative use of government power to remedy discrimination against any group is one of the great accomplishments of the 20th Century, and addressing problems in the judicial system that may cause imbalance between the races is an appropriate matter for the legislative and judicial branches today. But Congress has vested the EEOC with specified powers to address particular forms of discrimination under Title VII. As the enforcement agency, it is entitled to the deference that comes with fair interpretations of the law and appropriate analysis supporting those interpretations. The 2012 Guidance is not such a case. To the extent that the Commission has ignored data and studies that do not comport with its extra-

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<sup>228</sup> See *supra* note 145.

<sup>229</sup> See *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989).

<sup>230</sup> *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007).

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curricular purpose of addressing recidivism at large, it has taken on the role assigned to Congress under the Constitution.