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Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory

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EMPLOYMENT DISCRIMINATION AGAINST EX-OFFENDERS: THE PROMISE AND LIMITS OF TITLE VII DISPARATE IMPACT THEORY

TAMMY R. PETTINATO*

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I. INTRODUCTION

“If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.”¹ This alarming statement was made in 1989 by a Florida court in rejecting a Title VII disparate impact claim involving the use of criminal records in hiring decisions.² It illustrates the difficulty facing plaintiffs who wish to use federal anti-discrimination laws to challenge criminal records policies that prevent them from finding adequate employment.

The employment prospects facing ex-offenders are bleak.³ According to a 2000 study, 60% of those released from prison were unable to find employment within a year of their release.⁴ Some of this is caused by characteristics apart from their criminal histories.⁵ Those who have been incarcerated tend to have less education and work experience, fewer cognitive skills, and greater instances of substance abuse and other physical and mental health issues when compared with the rest of the population.⁶

1. EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989).

2. *Id.* at 754.

3. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, SENT’G & CORRECTIONS (U.S. Dep’t of Justice, Washington, D.C.), Nov. 2000, at 3.

4. *Id.*

5. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Employment Barriers Facing Ex-Offenders*, 4–5 (Urban Institute Reentry Roundtable Discussion Paper, 2003).

6. *Id.* Holzer et al. note that approximately “70% of offenders and ex-offenders are high school dropouts” and “about half are ‘functionally illiterate.’” *Id.* at 5 (quoting JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* 12 (2001)) (citing AMY HIRSCH ET AL., *EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS* 86 (2002)); Richard B. Freeman, *Crime and the Employment of Disadvantaged Youths*, in *URBAN LABOR MARKETS AND JOB OPPORTUNITY* 201, 201 (George E. Peterson & Wayne Vroman eds., 1992)). About three-fourths suffer from substance abuse problems. Holzer et al., *supra* note 5, at 5.

But beyond these factors, ex-offenders face the added burden of discrimination that is based solely on their status as ex-offenders.⁷ While it may make sense for employers to prefer employees without criminal records over ex-offenders,⁸ the result is a largely permanent underclass of citizens who are unable to ever fully reintegrate into society despite the fact that they have fulfilled the punishments meted out to them by the criminal justice system.⁹ Given that nearly half of ex-offenders are African-American and nearly one-fifth are Latino or Asian,¹⁰ this underclass is largely made up of minorities.

Currently, there is no federal anti-discrimination law aimed at protecting ex-offenders. However, because of the number of minorities affected by such discrimination,¹¹ efforts have been made to use the disparate impact theory of discrimination available under Title VII as a remedy. In this Article, I analyze both the effectiveness and desirability of using disparate impact theory as a way to reduce employment discrimination against ex-offenders. In particular, I argue that disparate impact theory is neither the panacea nor the lost cause that some other commentators have argued.¹² Instead, I argue that there are particular types of criminal-records-bar cases in which disparate impact theory remains quite viable. However, I further argue that, outside of this limited scope, pursuing such cases not only will result in predictable failure for the individual case, but also risks de-legitimizing disparate impact theory for those criminal records discrimination cases to which the courts are amenable.

Part II of this Article provides an overview of the collateral consequences of criminal convictions and particularly the burdensome employment situation facing ex-offenders. Part III provides a brief overview of disparate impact theory and discusses the Equal Employment Opportunity Commission's new enforcement guidelines on the use of arrest and conviction records in employment. Part IV analyzes how disparate impact theory has been applied in cases in which applicants were barred from employment or fired due to their criminal

7. See Holzer et al., *supra* note 5, at 11 (“Over 90% of employers surveyed are willing to consider filling their most recent job vacancy with a welfare recipient, while only about 40% are willing to consider doing so with an ex-offender.”).

8. *Id.*

9. See Freeman, *supra* note 6, at 201.

10. Holzer et al., *supra* note 5, at 5.

11. *Id.*

12. See *infra* note 77 and accompanying text.

records. In doing so, it counters one of the main critiques leveled at the use of disparate impact theory in these cases, namely that the courts are inherently hostile to them. Part V discusses and counters other critiques that have been leveled against the use of disparate impact theory in these cases. Finally, Part VI provides an evaluation of which categories of cases are most likely to succeed and fail. I argue that, rather than completely rejecting disparate impact theory in criminal records cases, most courts have drawn boundaries that, while perhaps less forgiving than advocates would like, leave open the possibility for challenging specific types of criminal records policies. However, I also note some risks associated with pursuing such cases. This Article concludes that advocates should continue to pursue disparate impact challenges to criminal records policies only in certain, well-defined categories of cases.

II. THE COLLATERAL CONSEQUENCES OF CONVICTIONS

A. Collateral Consequences Generally

Assisting those with criminal records to reintegrate into society has been recognized as a major public policy problem in recent years.¹³ Contrary to the myth that once criminals “pay their debt to society” they can start afresh, criminal records typically follow individuals around for the rest of their lives, essentially ensuring that all but the lucky few will remain on the margins of society.¹⁴ In an age in which access to criminal records is cheap, easy, and widespread¹⁵ and the legal

13. See 150 CONG. REC. 1, 38 (2004). In his 2004 State of the Union Address, former President George W. Bush announced the Prisoner Re-Entry Initiative noting, “America is the land of the second chance—and when the gates of the prison open, the path ahead should lead to a better life.” *Id.*

14. Parker v. Ellis, 362 U.S. 574, 593–94 (1960) (Warren, C.J., & Black, Douglas & Brennan, JJ., dissenting) (“Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”); see also *supra* notes 8–9 and accompanying text.

15. Holzer et al., *supra* note 5, at 9 (“In its most recent review of state privacy and security legislation, the U.S. Department of Justice concludes that criminal history record information is increasingly becoming more available to non-criminal justice users, although the degree of openness varies from state to state.”) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 1999 OVERVIEW 8–12 (2000)). Additionally, the use of criminal background checks by employers is growing. In 1996, 51% of employers conducted criminal background checks. Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 237 (2012). By 2010, that percentage had risen to 92%. *Id.*

system imposes countless restrictions on those with criminal pasts long after they have “served their time,”¹⁶ the truth is that the slate is never truly clean.

This is no small problem. Today, the United States has the highest incarceration rate in the world.¹⁷ Estimates indicate that some 3.4% of Americans will spend time in prison at some point in their lives.¹⁸ Approximately 19.8 million, or 8.6% of the adult population, have been convicted of a felony,¹⁹ and each year, more than 650,000 prisoners are released from penal institutions.²⁰ But one need not have been incarcerated to attain a black mark on his or her record. Indeed, a staggering 65 million Americans, or over one in four adults, have a criminal record of some kind.²¹

The consequences of a criminal conviction are, in many cases, devastating.²² Beyond the stigma of having a criminal record, there are a multitude of “collateral consequences”—those consequences and

16. See *infra* notes 22–26 and accompanying text.

17. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (rev. ed. 2012). For every 100,000 people, approximately 750 are in prison. *Id.*

18. Sarah Shannon et al., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010, at 11–12 (Apr. 1, 2011) (unpublished manuscript) (presented at Population Association of America 2011 Annual Meeting Program), available at <http://paa2011.princeton.edu/papers/111687>, archived at <http://perma.cc/WS8Y-8RCC>.

19. *Id.* at 12.

20. *Prisoners and Prisoner Re-Entry*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/archive/fbci/progmenu_reentry.html, archived at <http://perma.cc/SQ2N-NJKA>.

Recent studies estimate more than 700,000 individuals annually leave the prisons of our state and federal governments and return home. That is a little over 1,900 a day. That is just over four times the number of people who made similar journeys from prison to home a short twenty years ago.

Michael L. Foreman, Professor, Dir. of Civil Rights Appellate Clinic, Statement at EEOC Meeting: Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008).

21. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1, archived at <http://perma.cc/GZ2H-ZBC2>.

22. Lahny R. Silva, *In Search of a Second Chance: Channeling BMW v. Gore and Reconsidering Occupational Licensing Restrictions*, 61 U. KAN. L. REV. 495, 499 (2012) (“Today there are approximately 38,000 statutory and regulatory disqualifications triggered solely by the fact of prior felony conviction. This amounts to an average of 700 per jurisdiction, and it is estimated that 65% of these are employment related.” (footnote omitted)).

penalties a person faces beyond what is meted out as punishment for the crime committed.²³ Depending on the nature of the conviction, an ex-convict may face restrictions in access to or be excluded all together from a myriad of public benefits such as housing,²⁴ social welfare programs,²⁵ and student loans.²⁶ Such exclusions are also widespread in private markets,²⁷ and one might even face substantial difficulties on the basis of mere arrests that did not result in convictions.²⁸

B. Particular Employment Consequences

Perhaps the most devastating collateral consequence faced by those with criminal records is lower levels of employment.²⁹ In many cases, employment discrimination against those with criminal records is not only sanctioned but actually mandated by the state.³⁰ For example, several states prohibit ex-felons from all public employment.³¹ Many also restrict certain ex-offenders from obtaining a wide variety of occupational licenses.³²

23. Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 305–07 (2005).

24. Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 137–38 (2003).

25. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999).

26. See 34 C.F.R. § 668.40 (1999).

27. See *infra* Part II.B.

28. See *infra* note 35 and accompanying text.

29. Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 2–3 (2012). Prior to the current recession, between 25% and 40% of ex-offenders were unemployed. *Id.* at 3.

30. Holzer et al., *supra* note 5, at 8.

31. Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 536 (2006) ("Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina permanently deny convicted felons the right to public employment. The other forty-five states 'permit public employment of convicted felons in varying degrees.'" (footnote omitted) (quoting Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 13 (1996))).

32. *Id.* ("Some states also impose or allow restrictions on hiring or licensing ex-offenders or parolees for particular professions (*e.g.*, law, real estate, medicine, dentistry, engineering, pharmacy, nursing, physical therapy, and education). Many states further decrease ex-offenders' employment prospects through occupational licensing laws that contain character requirements that either bear no direct relation to the licensed occupation

Even when discrimination is not mandated, ex-offenders face daunting odds when looking for employment. Huge numbers of employers conduct criminal background checks,³³ and many have expressed an unwillingness to hire employees with any sort of criminal record.³⁴ This is typically a record of convictions but could include a record of arrests as well.³⁵

According to one study, a criminal record reduces the likelihood of a callback or employment offer by nearly 50%.³⁶ Only a fraction of ex-offenders are able to find jobs paying a living wage,³⁷ and those who have committed violent crimes may find it nearly impossible to find work.³⁸ The prospects of ex-offenders are only expected to get worse as background checks become more ubiquitous.³⁹

Employers often have good reasons for imposing these restrictions. First, they may have legitimate reasons to be worried about liability.⁴⁰ Next, some criminal convictions are so related to the job in question that it would be bad policy to require employers to ignore them.⁴¹ A recent

or that do not consider the individual circumstances of the crime for which the applicant was convicted.” (footnotes omitted)).

33. See Concepción, *supra* note 15, at 237.

34. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* 7 (Inst. For Research on Poverty, Discussion Paper No. 1243-02, 2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf>, archived at <http://perma.cc/CP99-RCYE>.

35. See, e.g., *Clinkscale v. City of Phila.*, No. 97-2165, 1998 WL 372138 (E.D. Pa. June 16, 1998) (order granting summary judgment) (holding that a police department’s policy of excluding applicants with any type of criminal history, including arrests without convictions, did not violate Title VII); see also Archer & Williams, *supra* note 31, at 537 (“While some may see the benefit of allowing employers to discriminate against convicted felons, it is especially difficult to rationalize such discrimination on the basis of an arrest that did not even result in a conviction. Yet, this happens in a majority of states: ‘Thirty-eight states permit all employers (public and private) and occupational licensing agencies to inquire about and rely upon arrests that did not result in a conviction.’ Arkansas, New Hampshire, and New Mexico forbid public employers to rely on arrests that did not lead to conviction, but permit private employers to do so.” (footnotes omitted) (quoting Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1503–04 (2003))).

36. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–56 (2003).

37. See Harwin, *supra* note 29, at 3; Petersilia, *supra* note 3, at 3–4.

38. Harwin, *supra* note 29 at 4 (“[O]ver ninety percent of employers turn away applicants who report a history of violent crime.”).

39. *Id.* at 3.

40. See *infra* Part V.D (discussing negligent hiring liability).

41. Archer & Williams, *supra* note 31, at 536 (“Some employment restrictions are grounded in concerns for public safety, and may therefore be appropriate. As one commentator noted: ‘[I]t is clear why persons convicted of child molestation are not

study conducted by the Society for Human Resource Management revealed several reasons employers cite for why they are hesitant to hire ex-offenders.⁴² Those reasons include the following: a general worry about having employees who are criminals, fear of liability for harm to co-workers or customers, fear of financial liability through theft, and the fact that a conviction is a general sign that the person in question lacks skills or trustworthiness.⁴³ Such concerns exist in spite of the fact that there is no research indicating that a person's criminal record, in and of itself, is indicative of poor performance on the job.⁴⁴ Although, generally speaking, those who have committed a crime in the past have a high risk of doing so in the future,⁴⁵ such statements leave out such factors as the role of unemployment itself in creating such recidivism and the lessened risk with the passage of time.⁴⁶ Indeed, studies show that, over time, people with criminal records have the same risk of committing further crimes as those with no records.⁴⁷ When the fact that

permitted to work in day care centers.” (quoting Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 *FORDHAM URB. L.J.* 1491, 1493 (2003))). However, Archer and Williams also discuss how some restrictions seem more retributive than anything else. *Id.* at 536–37 (“A wide range of jobs include restrictions that bear no reasonable relationship to the job function or a public safety concern. For example, depending on the nature of the conviction, New York may deny ex-felons employment in more than one hundred trades and professions, including barbering, plumbing, real estate, education, health care, and private security. In Virginia, individuals convicted of a felony may not work as nurses, funeral directors, pharmacists, optometrists, accountants, or dentists. And in Maryland, state agencies and licensing boards have discretion to deny or revoke a wide range of professional licenses, including those for barbers, insurance professionals, accountants, landscape architects, plumbers, and social workers.” (footnotes omitted)).

42. SOC'Y FOR HUMAN RES. MGT., *BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS* 7 (2010), available at <http://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx>, archived at <http://perma.cc/5M4L-LN35>.

43. See Harry J. Holzer, *Collateral Costs: The Effects of Incarceration on the Employment and Earnings of Young Workers* 8 (Inst. for the Study of Labor (IZA), Discussion Paper No. 3118, 2007); see also SOC'Y FOR HUMAN RES. MGT., *supra* note 42.

44. Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 *AM. BUS. L.J.* 201, 201–08 (2013) (indicating that there was “surprisingly little research” in this area and that the authors were able to identify only one relevant study, which showed no link between having a criminal record at ages thirteen to sixteen and engaging in negative work behaviors at age twenty-six).

45. See *id.* at 206. See generally *Recidivism*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=tp&tid=17#data_collections (last visited Jan. 14, 2014), archived at <http://perma.cc/NME9-M446>.

46. See Jocelyn Simonson, *Rethinking “Rational Discrimination” Against Ex-Offenders*, 13 *GEO. J. ON POVERTY L. & POL'Y* 283, 284 (2006).

47. Hickox & Roehling, *supra* note 44, at 206; see Megan Kurlychek, Robert Brame &

most crimes do not occur in the workplace is taken into account, the risks are even lower.⁴⁸

Given the role of unemployment in recidivism, such discrimination has devastating consequences not only for ex-offenders but for society as a whole.⁴⁹ Offenders who are unable to obtain employment are far more likely to engage in criminal behavior again.⁵⁰ Furthermore, the inability of ex-offenders to find work disproportionately affects black and Hispanic men, who are represented in the prison population at higher rates than any other group.⁵¹ Projections indicate that one-third of black men and one-sixth of Hispanic men will be incarcerated during their lifetimes⁵²—arrests or convictions are even higher.⁵³ Furthermore, at least one study shows that a criminal record is more likely to prevent African-Americans than whites from obtaining jobs.⁵⁴

III. DISPARATE IMPACT CHALLENGES TO CRIMINAL RECORDS EXCLUSION POLICIES

As stated previously, currently, there is no federal law directly prohibiting employment discrimination against ex-offenders. However, the disproportionate effect on certain minority groups indicates that Title VII may be used to alleviate some of this discrimination.

Title VII provides two opportunities for challenging policies that bar ex-offenders from employment: disparate treatment and disparate

Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 493–94 (2006) (finding that eighteen-year-olds with conviction records were about as likely to be arrested as those without criminal records after six to seven years without contact with the criminal justice system).

48. Hickox & Roehling, *supra* note 44, at 207.

49. See Simonson, *supra* note 46, at 284; see also Archer & Williams, *supra* note 31, at 530–31.

50. Simonson, *supra* note 46, at 284.

51. *Id.* Approximately two-thirds of inmates in the United States are African-American or Latino. *Id.*

52. Harwin, *supra* note 29, at 4. In some communities, the rates are even higher. In Washington, D.C., for example, the estimate is an astounding three-fourths of black men. ALEXANDER, *supra* note 17, at 6–7.

53. Harwin, *supra* note 29, at 4.

54. Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 644–645 (describing the results of a study in which black and white testers with equal qualifications but varying criminal records applied for low-level jobs). “Among blacks without criminal records, only 14% received callbacks relative to 34% of white noncriminals ($p < .01$). In fact, even whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%).” *Id.*

impact.⁵⁵ Disparate treatment claims allege that a member of a protected class is being treated unfavorably as compared to others.⁵⁶ Such a claim might be available if a plaintiff could prove that minority ex-offenders were being treated differently than non-minority ex-offenders.

In this Article, I focus on the other possible Title VII challenge—disparate impact. Unlike disparate treatment claims, disparate impact claims need not allege intentional discrimination; no discriminatory purpose is required.⁵⁷ Rather, a claim for disparate impact arises when a facially neutral policy has a discriminatory effect.⁵⁸ Once a plaintiff has proven that the policy has a discriminatory effect, an employer has the burden to show that the policy is “job related for the position in question and consistent with business necessity.”⁵⁹ The plaintiff may then rebut this defense if he or she can show that another, less discriminatory policy that is available to the employer would equally fulfill the business necessity.⁶⁰

Due to the disproportionately large number of ex-offenders who are minorities,⁶¹ disparate impact theory provides an opportunity for challenging policies that discriminate against ex-offenders in hiring and retention. Although such policies are neutral on their face, in effect, they operate to exclude far more minorities, particularly black and Hispanic men, from employment opportunities.

A. *The New EEOC Enforcement Guidelines*

The EEOC has long recognized that discriminating against ex-offenders disproportionately affects minorities.⁶² To that end, on April

55. 42 U.S.C. §§ 2000e–2000e-3 (2012).

56. *See id.* § 2000e-2(a)(1).

57. *See id.* § 2000e-2(k)(1)(A)(i).

58. *See id.*

59. *Id.*

60. *Id.* § 2000e-2(k)(1)(A)(ii), (C).

61. *See* Holzer et al., *supra* note 5, at 5; *see also* Simonson, *supra* note 46, at 284.

62. For example, in a 1987 policy statement, the EEOC stated, “[T]he Commission’s underlying position [is] that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, 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) (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>, archived at <http://pe>

25, 2012, it issued new guidelines for employers on the use of arrest and conviction records in employment decisions.⁶³ The guidelines consolidated and updated previous guidelines and call for an individualized assessment of candidates with prior convictions.⁶⁴ They advise employers to consider, among other factors, the nature of the crime committed, the time that has elapsed since the conviction, and the nature of the job in question.⁶⁵ The EEOC has since filed several disparate impact lawsuits aimed at enforcing the guidelines.⁶⁶

The EEOC guidelines have elicited strong negative reactions in some corners.⁶⁷ Critics have challenged the authority of the EEOC to

rma.cc/2FSF-8PNQ.

63. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter EEOC GUIDELINES], available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf, archived at <http://perma.cc/LV2W-4KAK>.

The EEOC's new guidelines are a part of their "E-RACE" (Eradicating Racism and Colorism from Employment) initiative. See *The E-RACE Initiative*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/initiatives/e-race/> (last visited Jan. 17, 2015), archived at <http://perma.cc/B5GH-RPEK>. Among other things, that initiative targets for stronger enforcement "facially neutral employment criteria" that are "significantly disadvantaging applicants and employees on the basis of race and color." *Why Do We Need E-Race?*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm (last visited Jan. 17, 2015), archived at <http://perma.cc/LRA6-AY2P>.

64. EEOC GUIDELINES, *supra* note 63, at 18–24.

65. *Id.* at 11. The complete list of factors is as follows:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Id. at 18 (footnotes omitted).

66. On June 11, 2013, the EEOC filed suit against Dollar General Corporation and BMW alleging that both company policies regarding criminal background checks caused a disparate impact against African-Americans. See Complaint at 1–2, *EEOC v. Dolgencorp, LLC*, No. 13-cv-04307 (N.D. Ill. June 11, 2013), ECF No. 1; Complaint, *EEOC v. BMW Mfg. Co.* at 1, No. 13-cv-01583 (D.S.C. June 11, 2013), ECF No. 1.

67. See, e.g., Letter from Patrick Morrissey, W. Va. Attorney Gen., et al., to Jacqueline

enforce the guidelines and the legitimacy of using disparate impact in criminal-records-exclusion cases generally.⁶⁸ While I will address those critiques later in this Article, I first want to turn to critiques that, while they support the underlying theory, question the wisdom or efficacy of using disparate impact theory in these cases.

IV. CRITIQUES OF DISPARATE IMPACT THEORY — TREATMENT IN THE COURTS

In spite of some early successes,⁶⁹ many commentators have noted the limits of Title VII in alleviating the problem of employment discrimination against ex-offenders.⁷⁰ Some of these critiques focus on the fact that Title VII is not protective enough or is simply ill-suited to the issue of ex-offender employment discrimination.⁷¹ They also point out that because Title VII applies only to those in protected classes, it excludes a large number of possible plaintiffs.⁷² Because ex-offenders are not a protected class under Title VII, only those plaintiffs who are also members of a protected class may bring suit.⁷³

These are valid objections, and I address them, as well as others, in more detail below. However, I will first address the most salient line of critique, namely, that these cases, for a variety of reasons, have become

A. Berrien, Chair, EEOC, et al. 2 (July 24, 2013) [hereinafter Morrisey et al.], *available at* <https://dojmt.gov/wp-content/uploads/EEOC-Letter-Final.pdf>, *archived at* <http://perma.cc/LZ5L-HFRP> (arguing that the EEOC's new guidelines represent "gross federal overreach"); *see also, e.g.*, *EEOC v. Freeman*, 961 F. Supp. 2d 783, 803 (D. Md. 2013) ("By bringing actions of this nature, the EEOC has placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers."); Complaint for Declaratory and Injunctive Relief at 1, 11, 15, 17, *Texas v. EEOC*, 2014 BL 232926 (N.D. Tex. 2014) (No. 13-cv-00255-C) (alleging that the new guidelines interfere with state sovereignty).

68. Complaint for Declaratory and Injunctive Relief, *supra* note 67, at 16–17.

69. *See, e.g.*, *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (Gibson, C.J., dissenting from Order Denying Petition for Rehearing En Banc); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972).

70. *See Harwin, supra* note 29, at 5 (calling the focus on disparate impact theory in this context "misdirected"); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 27 (2013) ("Title VII is not a viable mechanism for restricting criminal-record-related employment discrimination.").

71. *See Newell, supra* note 70, at 27.

72. *See infra* Part V.C.

73. 42 U.S.C. § 2000e-2(a), (m) (2012).

virtually unwinnable.

In making such arguments, some critics have argued that disparate impact itself may be a dying doctrine.⁷⁴ I do not dispute such claims here but instead focus on whether, given what is left of disparate impact theory generally, ex-offender cases are actually as unwinnable as some critics have claimed.⁷⁵

Given these parameters, the main critique levelled against using disparate impact theory in the ex-offender context argues that the courts have become hostile to such cases.⁷⁶ Critics argue that the level of proof courts require to prove a prima facie case have become untenable and that, simultaneously, their requirements for establishing a legitimate business necessity have lowered to the extent that the defense is nearly impossible to overcome.⁷⁷

There is certainly some evidence of hostility on the part of the courts. In particular, the opinions in *EEOC v. Carolina Freight Carriers Corp.*,⁷⁸ and, much more recently, *EEOC v. Freeman*,⁷⁹ both discussed in further detail below, are dripping with sarcasm and a sense almost of disbelief that the plaintiffs brought their suits.⁸⁰ Still, a few isolated cases do not evidence a general trend. In fact, a closer look at cases even in which plaintiffs have lost shows not so much a hostility toward the use of disparate impact in criminal records cases as a natural desire to balance the problem of employment discrimination against ex-offenders with the very real need of employers to have freedom in

74. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1231 (1995); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 624–25 (2011). For an overview of a variety of critiques that have been leveled against disparate impact theory, see Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 968–84 (2005).

75. See, e.g., Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1031–32 (2011); Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 318 (1998); Simonson, *supra* note 46, at 286.

76. See Connett, *supra* note 75, at 1031–32; Lye, *supra* note 75, at 344–47.

77. Lye, *supra* note 75, at 344–47.

78. 723 F. Supp. 734 (S.D. Fla. 1989).

79. 961 F. Supp. 2d 783 (D. Md. 2013).

80. See *id.*; *Carolina Freight*, 723 F. Supp. 734.

determining who will make the best employees and to avoid liability for choosing the wrong ones.⁸¹ To more clearly understand what is going on, it is necessary to take a closer look at some of the cases that have analyzed this issue in detail.

The Supreme Court has never directly addressed the use of criminal records exclusions. However, two cases in which it touched on the issue peripherally prove instructive when examining how other courts have addressed the issue.

In *McDonnell Douglas Corp. v. Green*,⁸² the Court held that an employer's refusal to rehire an employee who had engaged in illegal activity against the employer was not a violation of Title VII.⁸³ However, in doing so, the Court specifically noted that McDonnell Douglas was not excluding the plaintiff "through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee."⁸⁴ The latter caveat seems to imply that such a sweeping qualification would be suspect.

In *New York City Transit Authority v. Beazer*,⁸⁵ the Court upheld a transportation agency's policy of refusing to hire anyone who was currently using methadone, a drug used to treat addiction to illegal drugs, especially heroin.⁸⁶ In that case, the Court relied on the "safety sensitive" nature of the positions and held, without a great deal of analysis, that the policy served the "legitimate employment goals of safety and efficiency."⁸⁷ *Beazer* indicates a willingness to grant employers greater deference in their business necessity defenses when the business necessity at issue is public safety.⁸⁸

As will be shown, these two principles—a suspicion of overly broad exclusionary policies and deference to public safety concerns—color, to a greater or lesser extent, nearly all criminal-records-exclusion cases. When the employer can reasonably assert a business necessity related to public safety, the employer will virtually always win, regardless of how

81. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007).

82. 411 U.S. 792.

83. See *id.* at 804–07.

84. *Id.* at 806.

85. 440 U.S. 568 (1979).

86. *Id.* at 573, 594.

87. *Id.* at 587 n.31.

88. See *id.* at 592.

broad the exclusion is.⁸⁹ Without the public safety assertion, broad exclusionary policies will often, although not always, fall.⁹⁰ The murkier cases, and the ones most likely to show evidence of hostility, are those that fall somewhere in between: narrower policies that do not involve public safety.⁹¹

In this section, I illustrate examples of each of these types of cases in turn. I treat the last case that I discuss, *El v. Southeastern Pennsylvania Transportation Authority* (SEPTA),⁹² separately because, as will be shown, that case signals a possible step away from the current paradigm and offers a glimmer of hope for how disparate impact theory might be used to offer broader protection to minority men with criminal records.⁹³

A. Broad Exclusionary Policies

Given the EEOC's particular distaste for broad exclusionary policies as well as the oft-stated principle that Title VII protects individuals, not classes, employers who maintain such policies without also offering a compelling public safety justification would seem the most vulnerable to attack.⁹⁴ Nonetheless, while several important cases indicate that, as a general rule, this is true, there are some exceptions.

1. *Green v. Missouri Pacific Railroad Co.*

Green v. Missouri Pacific Railroad Co. (MoPac)⁹⁵ probably remains the most important case to have held that criminal records exclusionary policies have a disparate impact on minority men.⁹⁶ Indeed, the EEOC's enforcement guidelines rely heavily on the reasoning and principles enunciated in *Green*.⁹⁷

In *Green*, the court held that MoPac's policy of denying employment to anyone who had been convicted of any crime other than a minor traffic offense had a disparate impact on minorities.⁹⁸ Green was a black

89. See *infra* Part IV.B.

90. See *infra* Part IV.A.

91. See *infra* Part IV.C.

92. 479 F.3d 232 (3d Cir. 2007).

93. See *infra* Part IV.D.

94. See *El*, 479 F.3d at 243.

95. 523 F.2d 1290 (8th Cir. 1975).

96. *Id.* at 1298–99.

97. EEOC GUIDELINES, *supra* note 63, at 17–18.

98. *Green*, 523 F.2d at 1298–99.

male who had been convicted in 1967 for refusing military induction, for which he served twenty-one months in prison.⁹⁹ He disclosed his prior conviction when he applied for a position as a clerk with MoPac in 1970.¹⁰⁰

The court found that from September 1, 1971, through November 7, 1973, 3,282 blacks and 5,206 whites had applied for positions at MoPac.¹⁰¹ Of these applicants, 174 blacks, or 5.3%, were rejected due to conviction records compared to 118 whites, or 2.23%.¹⁰² The court found that this was enough to show a prima facie case of disparate impact.¹⁰³

The court then held that MoPac did not meet the requirements of the business necessity test.¹⁰⁴ MoPac offered the following justifications: “1) [F]ear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as a witness, 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.”¹⁰⁵ The court rejected these justifications because MoPac did not empirically validate them or show that “a less restrictive alternative with a lesser racial impact would not serve as well.”¹⁰⁶ The court found that, while MoPac’s proffered justifications were relevant, they did not justify an absolute bar.¹⁰⁷

In explaining its holding, the *Green* court noted that it interpreted the Supreme Court’s qualification in *McDonnell Douglas* that the plaintiff in that case could be fairly barred because he had engaged in illegal activity directly aimed at his employer “to suggest 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.”¹⁰⁸ In probably its most powerful statement against the use of broad exclusionary policies, the court stated:

99. *Id.* at 1292–93.

100. *Id.* at 1292.

101. *Id.* at 1294.

102. *Id.*

103. *Id.* at 1295.

104. *Id.* at 1298.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1296.

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.¹⁰⁹

Importantly, in discussing a prior district court case, the court seemed to endorse some tailoring measures that would allow employers to bar certain ex-offenders without running afoul of Title VII.¹¹⁰ In particular, the court discussed the desirability of examining the nature and seriousness of prior crimes, as well as their relationship to the job in question; the time that has elapsed since the conviction; the circumstances surrounding the commission of the crime; and the criminal's degree of rehabilitation.¹¹¹ These factors form the basis for the EEOC's guidelines in providing individualized consideration of given applicants.¹¹²

2. *Gregory v. Litton Systems, Inc.*

Although *Green* is considered the seminal case on the application of disparate impact theory to the use of criminal records exclusionary policies, the earliest example at the appellate level in which a court addressed the racially discriminatory effects of such policies occurred a few years earlier in *Gregory v. Litton Systems, Inc.*¹¹³ In *Gregory*, the Ninth Circuit upheld the United States District Court for the Central District of California's decision that a bright-line rule barring those with arrest records from employment violated Title VII.¹¹⁴ In its opinion, the Ninth Circuit noted that the district court had "correctly anticipated the subsequent decision" in *Griggs*¹¹⁵ "[i]n deciding that statistics demonstrated the racially discriminatory character" of Litton's criminal

109. *Id.* at 1298.

110. *Id.* at 1297 (citing *Butts v. Nichols*, 381 F. Supp. 573, 578–81 (S.D. Iowa 1974)).

111. *Id.* at 1297.

112. EEOC GUIDELINES, *supra* note 63, at 18.

113. 472 F.2d 631 (9th Cir. 1972).

114. *Id.* at 632.

115. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

records policy.¹¹⁶

Earl Gregory had been denied employment as a sheet-metal worker by Litton Systems because he had been arrested fourteen times.¹¹⁷ Litton required each applicant to reveal his or her arrest record on an employment questionnaire.¹¹⁸ The Ninth Circuit upheld the district court's finding "that the apparently racially-neutral questionnaire actually operated to bar employment to black applicants in far greater proportion than to white applicants."¹¹⁹ The Ninth Circuit further upheld the district court's finding that Litton had presented no legitimate business necessity for inquiring into the arrest records of prospective employees.¹²⁰

While the Ninth Circuit's opinion is relatively short, the district court's opinion provides more information about the underlying rationale for the decision. That court noted that "[t]here is 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."¹²¹ The district court found that African-Americans are arrested at higher rates than whites, so policies barring employment to those with arrest records have a disparate impact on African-Americans.¹²²

Importantly, the court did not discuss Litton's claimed business necessity for the policy¹²³ but instead stated simply that the discrimination was "not excused or justified by any business necessity."¹²⁴ The court did note, however, that "[t]he decision to withdraw the offer of employment was in no way predicated on any national security clearance regulations,"¹²⁵ indicating that such national security concerns, if sufficiently job-related, could have justified the

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402 (C.D. Cal. 1970).

122. *Id.* at 403.

123. This may be explained by the fact that the district court's opinion was handed down prior to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which is the seminal disparate impact case. Thus, the burden-shifting framework in disparate impact cases would not have been established at the time of the district court's decision.

124. *Gregory*, 316 F. Supp. at 403.

125. *Id.* at 402.

policy. This is an important caveat to the Litton decision because it foreshadows later courts' easy acceptance of proffered business necessities in situations that involve public safety.¹²⁶

3. *Waldon v. Cincinnati Public Schools*

A major triumph for those who support the use of disparate impact theory in criminal records cases occurred just last year in *Waldon v. Cincinnati Public Schools*.¹²⁷ In this case, the State of Ohio had enacted legislation in 2007 requiring “criminal background checks of current school employees, even those whose duties did not involve the care, custody, or control of children.”¹²⁸ Employees convicted of certain crimes were to be terminated, regardless of the time period passed since the conviction or the relationship to the employee’s present qualifications.¹²⁹

In 2008, Gregory Waldon and Eartha Britton, both African-American, were fired pursuant to the new law.¹³⁰ The defendant had fired ten employees; nine were African-American.¹³¹ Waldon and Britton filed suit, and the school district filed a motion to dismiss for failure to state a claim.¹³² The school district argued that it was merely complying with a state mandate, which was a business necessity.¹³³ The plaintiffs argued that Title VII “trump[ed] state law.”¹³⁴

The court found that there was “no question that the Plaintiff’s ha[d] adequately plead a case of disparate impact.”¹³⁵ Importantly, the court also rejected the defendant’s argument that Title VII only trumped state laws that had a discriminatory intent.¹³⁶ The court said that the case was a “close call” and noted that if it had been based on “serious recent crimes,” the policy would likely be valid due to the “employees’ proximity to children.”¹³⁷ However, the court found in this case that the

126. *See infra* Part IV.B.

127. 941 F. Supp. 2d 884 (S.D. Ohio 2013).

128. *Id.* at 886.

129. *Id.*

130. *Id.* at 886 & n.1.

131. *Id.* at 886.

132. *Id.*

133. *Id.* at 887.

134. *Id.*

135. *Id.* at 888.

136. *Id.*

137. *Id.* at 889.

plaintiffs’ “offenses were remote in time,” that Britton’s was “insubstantial,” and that “both had demonstrated decades of good performance.”¹³⁸

The *Waldon* case is important in showing the promise of disparate impact theory in criminal records cases in a number of respects. First, the court accepted, virtually without question, that criminal records bans have a disparate impact on African-Americans.¹³⁹ Second, the court rejected a business necessity defense that seemed particularly strong—the upholding of state law—reaffirming that Title VII trumps state law.¹⁴⁰ Finally, although the business necessity proffered in this case was not public safety but compliance with state law, the court’s willingness to overturn a criminal records ban in a case that involves jobs with “proximity to children” indicates a skepticism towards claims of business necessity that rely on general claims about “safety” when the crimes in question are remote in time.¹⁴¹ This latter rejection is particularly important given the amorphous nature of safety claims and the difficulty of disproving them.

4. *Williams v. Carson Pirie Scott*

*Williams v. Carson Pirie Scott*¹⁴² provides an example of a case in which a broad exclusion, here a policy excluding ex-felons from employment, was upheld even when the job in question had no public safety element.¹⁴³ Williams was fired from his job as a collector with Carson Pirie Scott after disclosing that he was an ex-felon.¹⁴⁴ The court assumed that Carson Pirie Scott’s policy had a disparate impact but said the “purpose of minimizing the perceived risk of employee dishonesty” was legitimate.¹⁴⁵ In fact, the court performed very little analysis of Carson Pirie Scott’s justification, noting, “[T]here is no basis whatever for drawing a rational inference that the absence of a felony record is

138. *Id.* Waldon had been found guilty of felonious assault in 1977 and served two years in prison. *Id.* at 886 n.1. He had worked for the school district for just under thirty years at the time of termination. *Id.* Britton had been convicted of “acting as a go-between in the purchase and sale of \$5.00 of marijuana” in 1983. *Id.* She had worked for the school district for eighteen years at the time of termination. *Id.*

139. *Id.* at 888.

140. *Id.* at 888–90.

141. *See id.* at 888–90.

142. No. 92 C 5747, 1992 WL 229849 (N.D. Ill. Sept. 9, 1992).

143. *See id.* at *2.

144. *Id.* at *1.

145. *Id.* at *2.

not ‘job related for the position in question and consistent with business necessity.’”¹⁴⁶

Carson Pirie Scott may not be a particularly instructive case in terms of its legal analysis because of its heavy reliance on the business necessity issue as it was laid down in *Wards Cove Packing Co. v. Atonio*,¹⁴⁷ which was abrogated on this point by the Civil Rights Act of 1991.¹⁴⁸ Although the case was decided after this abrogation, the court questioned whether the Civil Rights Act of 1991 applied because the hiring practice had been adopted under *Wards Cove*.¹⁴⁹ While the court also stated that it would hold the same even if the Civil Rights Act of 1991 applied,¹⁵⁰ its almost unquestioning acceptance of the defendant’s proffered business justification as well as the closeness in time of the case to the adoption of the Act makes it unlikely that it was really conducting a thorough analysis of that issue. In fact, the court simply stated, “[B]oth intuitively and as a matter of law it is obvious that an employment policy that bars the hiring of ex-felons — at least for a job as ‘collector,’ the position for which Williams applied and was originally hired — does not violate Title VII.”¹⁵¹

Nonetheless, this case does provide some instruction on the issue of whether courts are inherently hostile to criminal records exclusionary policy claims. In a footnote, the court said:

This Court has long shared the view that one major tool in the effort to reduce recidivism is the provision of employment opportunities for the ex-offender seeking to return to society. . . . But neither Title VII nor any other provision of positive law authorizes this Court to impose its own notions of sound policy on employers on pain of their being subjected to liability in case of their noncompliance with such notions.¹⁵²

146. *Id.* at *2–3.

147. 490 U.S. 642 (1989). The Court in *Wards Cove* had substantially lightened the burden on employers seeking to assert business necessity defenses. *See id.* at 659. Under *Wards Cove*, the employer had only a burden of production, rather than persuasion, and needed only to show that a given practice had a substantial justification rather than being “essential” or “indispensable” to the business. *Id.* (internal quotation marks omitted).

148. Civil Rights Act of 1991, Pub. L. No. 102-66, § 107, 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012)).

149. *Williams*, No. 92 C 5747, 1992 WL 229849, at *3.

150. *Id.*

151. *Id.* at *1.

152. *Id.* at *3 n.3.

This footnote indicates not hostility but a genuine, if perhaps overly generous in this case, concern for maintaining independence in business judgments.

B. Public Safety as a Business Necessity

The three cases discussed in this section illustrate how easy it is for employers to win cases when they can reasonably proffer a business necessity defense that is based in public safety. As may be expected, the employers in each of these cases represent quintessential public safety employers: police and fire departments.

1. *Clinkscale v. City of Philadelphia*

*Clinkscale v. City of Philadelphia*¹⁵³ represents a case in which a broad criminal records exclusionary policy operated in a particularly unfair manner and yet was accepted due to a public safety business justification.¹⁵⁴

The plaintiff in *Clinkscale* was an African-American male and an employee of the FBI who sought a position as a police officer with the Philadelphia Police Department.¹⁵⁵ At the time of his application, he had two prior arrests on his record, the first for assaulting a neighbor and the second for assaulting a police officer.¹⁵⁶ The charges regarding the neighbor were dismissed, and Clinkscale was acquitted on the charges regarding the police officer.¹⁵⁷ In fact, he had filed a lawsuit against the police department over the latter charges, and the city had settled with the plaintiff.¹⁵⁸ His record was expunged.¹⁵⁹

Clinkscale argued that the police department's policy of denying applicants to the police academy on the basis of prior arrests had a disparate impact on African-Americans.¹⁶⁰ However, the court held that the department's policy was justified, even in light of the fact that the plaintiff was likely innocent of his prior charges.¹⁶¹ The court noted that, in other cases, dropped charges may not be the result of innocence and

153. No. 97-2165, 1998 WL 372138 (E.D. Pa. June 16, 1998).

154. *Id.* at *3.

155. *Id.* at *1.

156. *Id.*

157. *Id.* at *2.

158. *Id.* at *1-2.

159. *Id.* at *2.

160. *Id.*

161. *Id.* at *3.

further opined that “[e]ven an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness.”¹⁶² The court rejected other cases that the plaintiff offered to support his view that broad exclusionary policies violate Title VII specifically because none of those cases involved the position of police officer.¹⁶³

2. *Foxworth v. Pennsylvania State Police*

A more recent police department case, *Foxworth v. Pennsylvania State Police*,¹⁶⁴ was also decided in the Eastern District of Pennsylvania, and the court applied the same reasoning as in *Clinkscale*. *Foxworth* addressed the Pennsylvania State Police’s “automatic disqualification factors” for the hiring of police cadets.¹⁶⁵ At the time of Foxworth’s application, a cadet applicant could be disqualified for past criminal behavior, regardless of whether the applicant had been arrested, if that behavior could have been charged as a “Misdemeanor–1 or higher.”¹⁶⁶

Foxworth, an African-American male, had committed a theft a few years prior to his application that was later expunged through an Accelerated Rehabilitative Disposition.¹⁶⁷ Foxworth’s record would have been grounds for automatic disqualification, and he argued that this policy had a disparate impact on African-Americans.¹⁶⁸ The court questioned whether Foxworth’s statistics adequately showed that the particular policy had a disparate racial impact but stated that, even if they did, the policy was justified as “ensuring both public safety and that police officers do not disregard, nor are perceived as disregarding, the law.”¹⁶⁹

3. *Tye v. City of Cincinnati*

Another case that accepted a business necessity of “public safety” with very little analysis was *Tye v. City of Cincinnati*.¹⁷⁰ In that case, a fire department used hiring practices that, among other things, included

162. *Id.* at *3.

163. *Id.*

164. 402 F. Supp. 2d 523 (E.D. Pa. 2005).

165. *Id.* at 528.

166. *Id.*

167. *Id.* at 527–28.

168. *Id.* at 534.

169. *Id.* at 534–36.

170. 794 F. Supp. 824 (S.D. Ohio 1992).

a criminal background check.¹⁷¹ Five black applicants applied to be fire recruits with the Cincinnati Fire Division during the 1985–1987 hiring season and were denied.¹⁷² During that same period, the background check eliminated 60% of black applicants and 30% of white applicants.¹⁷³

The court found that the background checks had a disparate impact on minorities but accepted the fire department's proffered business necessity—public safety.¹⁷⁴ In fact, the court specifically noted that “a public employer hiring a firefighter is held to a lighter burden in demonstrating that its employment criteria is job-related, because of the potential risk to public safety of hiring incompetent firefighters.”¹⁷⁵ While it is important to note that this case employed the lower burden on employers enunciated in *Wards Cove*,¹⁷⁶ the court's direct statement that employers ought to be held to a lighter burden when questions of public safety are in play is further evidence that employers who can reasonably assert a business necessity centered in public safety will have an easier time winning these types of cases.¹⁷⁷

C. Evidence of Hostility

The cases that seem to provide evidence of actual hostility on the part of the courts toward the use of disparate impact theory in criminal records exclusionary cases are those in which the employer has implemented some measures to tailor their exclusionary policy to the job in question, regardless of whether public safety is implicated.¹⁷⁸ This makes sense. If the hostility arises from a general sense that it is unfair to require employers to hire people with criminal histories just because they are members of a protected class, such concerns will be most

171. *Id.* at 827–28.

172. *Id.* at 826.

173. *Id.* at 829.

174. *Id.* at 833.

175. *Id.*

176. *Id.* The court, citing *Wards Cove*, noted that only the burden of production, but not of persuasion, shifts to the employer once the employee has made a prima facie case. *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989)). The court did not discuss why it used the *Wards Cove* standard even though the case was decided after the Civil Rights Act of 1991 had been enacted, abrogating *Wards Cove* on this point. Presumably, this was because the *Wards Cove* standard was still in place when the suit was first filed.

177. *See Tye*, 794 F. Supp. at 833.

178. *See, e.g., EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989). *See also infra* Part IV.C.

apparent in cases in which the employer has already made some effort to ensure that the exclusions are job-related. While not every case that is decided in favor of the employer under these circumstances shows evidence of hostility,¹⁷⁹ because the sense of hostility is one of the main critiques of the use of disparate impact theory,¹⁸⁰ I focus in this section on two cases that do not seem to hide the disdain that some judges feel toward the implementation of this theory in this context.

1. *EEOC v. Carolina Freight Carriers Corp.*

The opinion in *EEOC v. Carolina Freight Carriers Corp.*,¹⁸¹ the case quoted at the start of this Article, provides an example of undeniable hostility to the use of disparate impact theory in criminal records exclusionary cases. Carolina Freight had a prior-criminal-records policy which, among other things, barred employment for anyone convicted of a felony, theft, or larceny that resulted in a prison or jail sentence.¹⁸² Francisco Rios, a Hispanic man, had two prior convictions: one from 1968 for receiving stolen property, which resulted in a sentence of probation, and the second in 1969 for felony larceny, which resulted in a sentence of twenty-four to sixty months in prison, of which he served eighteen.¹⁸³ In 1980, he began working as a “casual truck driver” for Carolina Freight; he had disclosed his prior convictions during a polygraph at that time.¹⁸⁴

Rios had a good record while employed with Carolina Freight.¹⁸⁵ In 1983, he was put up for consideration for a promotion to regular employee at the company’s Fort Lauderdale terminal.¹⁸⁶ Casual employees did all of the same work as regular employees but did not

179. *See, e.g., Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1302–03 (S.D.N.Y. 1981) (holding that the plaintiffs did not make out a prima facie case of disparate impact because they failed to isolate a particular employment practice that caused a disparity); *see also, e.g., Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008) (upholding an employee’s termination for a prior rape conviction that was justified based on concerns about co-worker morale). While both of these cases were decided in favor of the defendant, neither case indicated any particular hostility to the use of disparate impact theory in criminal records cases.

180. *See supra* notes 76–80 and accompanying text.

181. 723 F. Supp. 734 (S.D. Fla. 1989).

182. *Id.* at 737–38.

183. *Id.* at 737.

184. *Id.* at 738–39.

185. *Id.* at 739.

186. *Id.* at 740.

have certain fringe benefits and were not guaranteed a forty-hour work week.¹⁸⁷ On his application for promotion, Rios did not indicate his prior convictions.¹⁸⁸ In updating his personnel file for promotion, a Carolina Freight employee discovered the first polygraph test revealing the convictions and decided he was disqualified for the regular position due to his prior convictions.¹⁸⁹ Rios's supervisor put him up for the position again in 1984, and he was again rejected.¹⁹⁰ There was no evidence in the record indicating that anyone hired for the regular positions did not meet the conviction policy standards.¹⁹¹ Rios filed a discrimination suit and was subsequently fired.¹⁹²

The EEOC filed suit on behalf of Rios challenging the portion of Carolina Freight's policy barring from employment anyone with a felony, larceny, or theft conviction that resulted in an active prison or jail sentence.¹⁹³ As evidence, the EEOC submitted a labor market analysis and a report showing that Hispanics were more likely than whites to have been sentenced to prison terms.¹⁹⁴

The court did find that Hispanics are convicted of theft at higher rates than whites and that conviction policies like the one at issue in Carolina Freight therefore adversely impact Hispanics.¹⁹⁵ However, the court found that the EEOC failed to prove there was a significant imbalance at the Fort Lauderdale terminal or that any alleged imbalance was caused by the policy, noting that the EEOC failed to adequately define the relevant labor market.¹⁹⁶ The court also said that the EEOC should have examined "applicant flow data,"¹⁹⁷ even though it acknowledged earlier that such data was unavailable.¹⁹⁸

Relying on the later-abrogated *Wards Cove*,¹⁹⁹ the court said that

187. *Id.*

188. *Id.* at 740–41.

189. *Id.* at 741.

190. *Id.*

191. *Id.*

192. *Id.* at 741–42.

193. *Id.* at 742.

194. *Id.* at 742–46.

195. *Id.* at 751.

196. *Id.*

197. *Id.*

198. *Id.* at 742.

199. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991), *as recognized in Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Carolina Freight's purported business necessity—to reduce employee theft—was sufficient because it “serves, in a significant way, the legitimate employment goals of the employer.”²⁰⁰ More telling, the court opined that the Eighth Circuit's holding in *Green*,²⁰¹ which could be read to bar all conviction policies, was “ill founded,” stating that “[t]he plaintiff's position that minorities should be held to lower standards is an insult to millions of honest Hispanics.”²⁰² In a particularly sarcastic aside, the court said that “[a]lthough [it] rejoices along with the angels of God for every sinner that repents, to say that an applicant's honest character is irrelevant to an employer's hiring decision is ludicrous.”²⁰³ Instead, an employer may refuse to hire ex-felons even though it has a disparate impact on minorities because “[t]o hold otherwise is to stigmatize minorities by saying, in effect, your group is not as honest as other groups.”²⁰⁴

The EEOC asserted that a time limit on conviction consideration would be a less discriminatory alternative.²⁰⁵ However, because they did not offer evidence to prove that this would be equally effective or have less of an impact on Hispanic truck drivers, the court did not accept this rebuttal.²⁰⁶ The court also found the policy adequate because it only barred “applicants who are *convicted* of a *theft* crime involving an *active prison sentence*,” and that “[e]mployees are not penalized for mere arrests or commission of non-theft felonies.”²⁰⁷ The court ended its discussion on the disparate impact issue noting that that even if the disparate impact argument were true, “the lesson is not to lower the employer's standards, but to raise the qualifications of Hispanics applying for jobs.”²⁰⁸

In short, the *Carolina Freight* court expressed what could be read as annoyance at the very idea that the policy in question could not be justified by business necessity. Furthermore, it did so under the guise of protecting minorities, showing a particular concern that challenges to

200. *Carolina Freight*, 723 F. Supp. at 752 (quoting *Wards Cove*, 490 U.S. at 659 (internal quotation marks omitted)).

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

202. *Carolina Freight*, 723 F. Supp. at 752.

203. *Id.* at 752–53.

204. *Id.* at 753.

205. *Id.*

206. *Id.*

207. *Id.* (emphasis in original).

208. *Id.* at 754.

such policies based on their racially discriminatory impact denigrates other members of the minority group.

2. *EEOC v. Freeman*

Another example of hostility, in at least some courts, to disparate impact cases based on criminal records exclusion policies can be found in a very recent case in the federal district court in Maryland, *EEOC v. Freeman*.²⁰⁹ In *Freeman*, the EEOC challenged the defendant's credit-check policy as having a disparate impact on African-Americans and its criminal background check policy as having a disparate impact on African-Americans and males.²¹⁰ Although the court ultimately granted summary judgment on the basis of inadequate statistics,²¹¹ the court's hostility to the very nature of the claim was evident from the opening paragraph of the opinion. The opinion opens with commentary on the virtues of criminal history and credit record background checks and notes that the reasons for such checks are "obvious."²¹²

The court's hostility to the EEOC as a body is also evident from the outset. In an unusual aside, the court noted that "[t]he present case is only one of a series of actions recently brought by the EEOC against employers who rely on criminal background and/or credit history checks in making hiring decisions."²¹³ The court also seems to be accusing the EEOC of hypocrisy, noting that "even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions."²¹⁴

The opinion's attacks on the EEOC's expert witness in the case seem particularly uncouth. At various times, words and phrases used to describe the expert, his results, and his methods include the following: "an egregious example of scientific dishonesty,"²¹⁵ "mind-boggling number of errors,"²¹⁶ and "laughable."²¹⁷ He is portrayed as a bumbling fool, with unnecessary asides such as "[a]mazingly, despite his claims of

209. 961 F. Supp. 2d 783 (D. Md. 2013).

210. *Id.* at 786, 789.

211. *Id.* at 786–87, 799.

212. *Id.* at 785.

213. *Id.* at 786.

214. *Id.*

215. *Id.* at 795.

216. *Id.* at 796.

217. *Id.*

doing so”²¹⁸ and “[f]inally, [the expert] once again managed to introduce fresh errors into his new analysis.”²¹⁹ The court seems to stop just short of calling the man stupid. Conversely, Freeman is described as a “family-owned company” (albeit one “with annual revenues exceeding \$1.3 billion”) whose policies are rational and legitimate.²²⁰

Finally, the opinion ends with a warning to employers. The court states,

Indeed, any rational employer in the United States should pause to consider the implications of actions of this nature brought based upon such inadequate data. By bringing actions of this nature, the EEOC has placed many employers in the “Hobson’s choice” of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.²²¹

The court reiterated the need for tailored, reliable statistics and then said, “To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.”²²²

D. Promising Steps: El v. Southeastern Pennsylvania Transportation Authority

While *Green* remains the seminal case on the use of disparate impact theory to challenge criminal records exclusion policies,²²³ a more recent case, *El v. Southeastern Pennsylvania Transportation Authority*,²²⁴ may prove more influential in the coming years. A close reading of the case indicates that it could actually herald a new era of holding employers to a higher standard in asserting their business necessity defenses.²²⁵

218. *Id.*

219. *Id.*

220. *See id.* at 785, 787.

221. *Id.* at 803.

222. *Id.*

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

224. 479 F.3d 232 (3d Cir. 2007).

225. *Hickox & Roehling*, *supra* note 44, at 255 (“[T]he *El* court comes closer than some previous decisions in requiring that employers establish the relevance of applicants’ criminal histories.”).

Indeed, the EEOC's new guidelines can be viewed in part as a response to what it viewed as a request for clarification from the *El* court.²²⁶

In *El*, the plaintiff, Douglas El, had been hired by King Paratransit Services, Inc., a sub-contractor of SEPTA, to drive a bus providing transportation services to people with mental and physical disabilities.²²⁷ A criminal background check turned up that El had a forty-year-old conviction for second-degree murder, which had occurred when El was fifteen years old and for which he had served three-and-a-half years.²²⁸ Although El had disclosed the conviction at the time of his application, King had not noticed it until receiving the results of El's criminal background check.²²⁹ At that time, King terminated El's employment.²³⁰

At the time of El's hiring, SEPTA had a policy barring employment for anyone convicted of driving under the influence, of a felony or misdemeanor for a crime of moral turpitude, or of a violent crime.²³¹ SEPTA also barred employment for other offenses if they had occurred within the seven years prior to employment.²³² El argued that SEPTA's policy had a disparate impact on black and Hispanic applicants because they are more likely to have criminal records than white applicants.²³³

While ultimately deciding in favor of the employer, the *El* court made a number of important observations in its holding that indicate an openness to these types of cases. First, it noted that an employer's proffered "business necessity" defense requires some level of empirical proof, rather than mere "common-sense'-based assertions."²³⁴ This signals a discomfort with the near-automatic credence given to employers asserting safety concerns in some other cases. Next, the court also reaffirmed that "more is better" justifications—e.g., the idea that, if a given quality was necessary to the performance of a job, then a policy purporting to select employees who have "more" of that quality is legitimate—did not meet the standards of the business necessity defense.²³⁵ This is important because it calls into question the notion

226. EEOC GUIDELINES, *supra* note 63, at 11–12.

227. *El*, 479 F.3d at 235.

228. *Id.* at 235–36.

229. *Id.* at 235 n.2.

230. *Id.* at 235.

231. *Id.* at 236.

232. *Id.*

233. *Id.* at 236–37.

234. *Id.* at 240.

235. *Id.*

that employers can over-exclude those with some type of criminal history based solely on the idea that those without criminal histories will generally present the least amount of risk, regardless of whether a given applicant's criminal history bears any cognizable relationship to the job in question.

The *El* court also noted an important distinction between the hiring criteria used in *Griggs* and other disparate impact cases and the hiring criteria at issue when criminal records are considered.²³⁶ The court noted that in most cases, the hiring criteria at issue is alleged to measure an applicant's actual ability to perform the job in question.²³⁷ However, in criminal records cases, the policy is not meant to measure one's ability to perform the job; indeed, no one alleged that *El*'s prior convictions made him unable to drive a bus safely or effectively.²³⁸ Rather, the policy measures "risk," in this case, whether applicants with criminal histories are more likely to pose a risk to the passengers they are transporting.²³⁹ The court noted that the standard it typically applies in test-score cases—whether the policy measures "minimum qualifications necessary for successful performance of the job in question"—was "awkward" in the criminal records context because "it is hard to articulate the minimum qualification for posing a low risk of attacking someone."²⁴⁰

The *El* court also distinguished *Green*, noting that, in that case, the job in question was an office job and "did not require the employee to be alone with and in close proximity to vulnerable members of society."²⁴¹ It also noted that the policy in *Green* was a broad ban on hiring those with criminal records regardless of how relevant the conviction was, whereas the policy at issue in *El* was more narrowly tailored to prevent an employer from hiring only "those that it argues have the highest and most unpredictable rates of recidivism and thus present the greatest danger to its passengers."²⁴²

236. Compare *id.* at 240–43, with *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–29 (1971).

237. *El*, 479 F.3d at 242.

238. *Id.* at 242–243.

239. *Id.*

240. *Id.* at 243 (quoting *Lanning v. Se. Pa. Trans. Auth.*, 181 F.3d 478, 481 (3d Cir. 1999) (internal quotation marks omitted)).

241. Compare *id.*, with *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1292–93 (8th Cir. 1975).

242. Compare *El*, 479 F.3d at 243, with *Green*, 523 F.2d at 1298.

Given the lack of on-point authority, the *El* court applied its own standard from prior cases, holding that policies must “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”²⁴³ Rejecting *El*’s contention that all bright-line policies were prohibited, the court held that “[i]f a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.”²⁴⁴ While this may seem to lean against plaintiffs, given other courts’ leniency in public safety cases, the fact that the *El* court attempted to create a standard at all in such cases indicates a desire to put at least a little more onus on the employer in defending such policies.

In *El*, SEPTA argued that its policy was consistent with business necessity because

(1) the job of a paratransit driver requires that the driver be in very close contact with passengers, (2) the job requires that the driver often be alone with passengers, (3) paratransit passengers are vulnerable because they typically have physical and/or mental disabilities, (4) disabled people are disproportionately targeted by sexual and violent criminals, (5) violent criminals recidivate at a high rate, (6) it is impossible to predict with a reasonable degree of accuracy which criminals will recidivate, (7) someone with a conviction for a violent crime is more likely than someone without one to commit a future violent crime irrespective of how remote in time the conviction is, and (8) SEPTA’s policy is the most accurate way to screen out applicants who present an unacceptable risk.²⁴⁵

The court noted that a bright-line policy could be justified if SEPTA could show that someone with a violent conviction would always pose a “materially higher risk” than someone without.²⁴⁶ It noted that to prove this, SEPTA could show that “other factors—such as age at conviction, the number of violent convictions, and/or the remoteness of that conviction—are unreliable or otherwise fail to reduce the risk to an acceptable level.”²⁴⁷ By putting this burden on the employer, *El*

243. *El*, 479 F.3d at 245.

244. *Id.*

245. *Id.*

246. *Id.* at 245–46.

247. *Id.* at 246.

indicates that such factors should be tied directly into the business necessity defense as opposed to being shouldered by the plaintiff in an attempt to prove that there is a less discriminatory alternative that the employer could have adopted.

The court ultimately relied on SEPTA's presentation of expert testimony that, regardless of the passage of time, someone with a prior conviction for a violent crime will never be "less or equally likely" to commit a violent act than someone who had never done so.²⁴⁸ The court noted that, because the plaintiff had presented no evidence to rebut this testimony, it must "take [the expert] at his word."²⁴⁹ Another SEPTA-provided expert testified that the mentally and physically disabled are more likely than other groups to be the victims of violent or sexual crime and that "employees of transportation providers commit a disproportionate share of those crimes against disabled people."²⁵⁰ The court noted that *El*'s decision not to depose the experts or to present conflicting expert testimony ultimately proved "fatal" to his case.²⁵¹

Thus, in spite of the fact that the court ultimately held in favor of the employer, the *El* court indicated no hostility toward the use of disparate impact theory to challenge criminal records policies. Instead, the court presented a thoughtful and balanced analysis of the issue and attempted to move some of the burden back on the employer.²⁵² The main difficulty remaining for plaintiffs after *El* is the difficulty of obtaining the type of statistical evidence that could help to rebut employers' proffered business necessities.²⁵³ This is a problem faced by disparate impact plaintiffs generally, but it does present particular challenges to employees in criminal-records-exclusion cases due to the lack of on-point research showing the likelihood or lack thereof that someone who committed a crime in the past will do so again and, in particular, will do so on the job. Nonetheless, the *El* court's assertion that the employer bears the burden of showing that more-tailored policies would not work as well may indicate some measure of relief for plaintiffs.²⁵⁴

248. *Id.*

249. *Id.*

250. *Id.* at 247.

251. *Id.*

252. *Id.* at 248.

253. *See id.* at 247.

254. *See id.* at 240, 249.

V. OTHER CRITIQUES OF DISPARATE IMPACT THEORY

While the most salient critique of the use of disparate impact theory in criminal records cases is that courts are hostile to these types of claims, it is important to look at other critiques that have been leveled as well. These critiques come from both sides of the spectrum, those that indicate concern for the plaintiffs and those that indicate concern for the defendants.²⁵⁵ Nonetheless, regardless of motivation, the critiques share many overlapping themes. In this section, I address four main criticisms of the uses of disparate impact theory in criminal records cases.

A. *Creating a New Protected Class*

Some critics have argued that using disparate impact theory to protect those with criminal convictions essentially amounts to creating a new protected class.²⁵⁶ Indeed, this critique was made as early as the dissent in *Green*.²⁵⁷ The dissent in that case noted, “In effect, the present case has judicially created a new Title VII protected class—persons with conviction records. This extension, if wise, is a legislative responsibility and should not be done under the guise of racial discrimination.”²⁵⁸

The obvious response to this critique is that it could be made of virtually every use of disparate impact theory. By its very nature, disparate impact protects only a subset of individuals within a protected class: women under a certain height or weight,²⁵⁹ for example, or African-Americans who do not have high school diplomas.²⁶⁰ To state that applying disparate impact theory in the context of criminal convictions is to protect only those African-American and Hispanic men who have criminal records is to state the obvious.

255. *See supra* note 70.

256. *Morrisey et al.*, *supra* note 67, at 4 (accusing the EEOC of creating a new protected class of former criminals “under the pretext of preventing racial discrimination”).

257. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1300 (8th Cir. 1975) (Gibson, C.J., dissenting from Order Denying Petition for Rehearing En Banc).

258. *Id.*

259. *See Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (holding that a prison’s minimum height and weight restrictions for prison guards violated Title VII because of the restrictions’ disparate impact on women).

260. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that a facially neutral policy requiring employees for certain positions to have high school diplomas and pass intelligence tests violated Title VII because of its disparate impact on African-Americans).

Nonetheless, there does seem to be something qualitatively different about the application of disparate impact theory to those with criminal records versus, say, those who fail to perform well on a test. This difference was noted by the court in *El v. SEPTA* in its discussion of the business necessity defense to disparate impact.²⁶¹ The court pointed out that the typical assessment of the business necessity defense involves evaluating whether a given policy or practice is related enough to the *ability to perform* the job at hand to justify its disparate impact.²⁶² While this is rarely a simple process, there is often at least an element of measurability in making the determination. For example, there are extensive testing validation requirements that make it easier to determine if a given test truly measures job performance.²⁶³

In contrast, typical business necessities proffered in criminal convictions cases rest on general concerns for hard-to-measure qualities like safety,²⁶⁴ loss prevention,²⁶⁵ and employee morale.²⁶⁶ Such qualities are hard to measure with any accuracy. While there are some studies indicating that former criminals are no more likely to commit further crimes than those without criminal histories, such studies are sparse.²⁶⁷ On the other hand, studies indicating the opposite may also not be useful because they do not account for the key question: Whether those with prior criminal histories are more likely to commit further crimes at work.²⁶⁸ General figures on recidivism are not useful in this context because they fail to account for the fact that one of the chief causes of recidivism is a lack of employment opportunity.²⁶⁹ Therefore, business necessity arguments that rest on general recidivism figures simply beg the question; the very propensity that is used to prevent people from obtaining employment would likely be alleviated if the individual could

261. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242–45 (3d Cir. 2007).

262. *Id.* at 242.

263. *See generally* 29 C.F.R. pt. 1607 (2014)

264. *See, e.g., El*, 479 F.3d at 242–43; *see also supra* Part IV.D.

265. *See, e.g., EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 754 (S.D. Fla. 1989); *see also supra* Part IV.C.1.

266. *See, e.g., Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008); *see also supra* note 179.

267. *See, e.g., Kurlychek et al., supra* note 47.

268. Hickox & Roehling, *supra* note 44, at 207 (“There is surprisingly little research examining the relationship between a criminal record and the propensity to commit workplace crimes or engage in inappropriate workplace behavior.”).

269. *See Simonson, supra* note 46, at 284; *see also Archer & Williams, supra* note 31, at 529–30.

obtain employment.

To navigate these murky waters, it may be best to turn to the original purpose of both Title VII and disparate impact theory. Two key lines of thought help to clarify this matter. First, Title VII aims to eradicate employment discrimination via two avenues: equal opportunity and equal effects.²⁷⁰ Disparate impact theory arose out of the idea that simply opening doors was not enough.²⁷¹ Instead, to have teeth, employment discrimination law also needed to address employment practices that, while seemingly opening doors, in essence provided keys to only part of the population.²⁷² There was a general recognition that dispensing with facially discriminatory policies and practices would mean little if neutral practices simply operated to perpetuate the same results.²⁷³

The other key line of thought underlying Title VII that bears a particularly close relationship to the development of disparate impact theory is that Title VII is ultimately aimed at protecting individuals not classes. This focus on individuals has been reiterated time and again in Title VII cases.²⁷⁴ In spite of the fact that disparate impact theory seems to inherently protect based on group status, there is the same underlying current of individual protection that can be found in disparate treatment cases.²⁷⁵ Both theories rest on the notion that individuals ought not to be stereotyped based on their membership in a protected class.²⁷⁶ The key difference seems to be that, while disparate treatment often shows a particular concern for those who do not possess the stereotyped characteristic,²⁷⁷ disparate impact offers protection for those who

270. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

271. See *id.*; *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645–46 (1989).

272. See *Griggs*, 401 U.S. at 429–30.

273. *Id.*

274. See, e.g., *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 705, 707–08 (1978) (holding that an employer’s pension plan that required women to make larger contributions than men based on actuarial data that women tend to live longer and thus receive greater benefits from the pension plan violated Title VII because, while women as a class live longer than men, this may not be true for individual women).

275. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

276. See *Simonson*, *supra* note 46, at 284–87.

277. See, e.g., *Price Waterhouse*, 490 U.S. at 250 (holding that adverse employment actions predicated on stereotypes about the appropriate behavior of women amounts to sex discrimination).

actually possess it.²⁷⁸ Therefore, it protects individuals precisely because they share commonalities with others in their class by asking whether these commonalities are reasonable bars to particular employment opportunities.

These twin purposes of Title VII and disparate impact theory help to put the “creating a new protected class” argument in context. On their face, criminal records policies do not seem to interfere with either equal opportunity or equal effects in their traditional sense because the characteristic that is being screened for is one that the person possessing the characteristic voluntarily took on.²⁷⁹ However, once one commits a crime, that record stays with the person forever, so a criminal history essentially becomes an immutable characteristic as unsheddable as one’s race.²⁸⁰ That being the case, the purpose of Title VII to protect individuals takes on new dimensions. Given this context, like in other disparate impact cases, individual members of protected classes must be given individual consideration precisely because they share a given trait in addition to their membership in the protected class.

Protecting individuals because of a trait that they share with a number of members of their protected class does not, then, create a new protected class based on the trait. Instead, individuals gain protection since they share that trait precisely *because* they are a member of the protected class. The sense that a new protected class is being created results from the fact that not all members of the protected class share the trait. Nonetheless, this is true of virtually all disparate impact

278. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 451–52 (1982) (rejecting the “bottom-line” defense to disparate impact, which asserted that a practice with disparate impact on a protected group should be allowed so long as an employer took later remedial efforts to eradicate the disparity, because such a defense fails to fully protect those individuals who are screened out by the practice).

279. See Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC’Y 18, 59 (2005) (noting that “[u]nderlying much of the Court’s equal protection analysis is a concern that people should not be penalized for characteristics that they did not choose and cannot change” and distinguishing the former from the latter using the related concept of “accountability”). While the same could be said of religion and pregnancy, the only other protected statuses in Title VII that can unquestionably be seen as matters of personal choice, it is well-established that the extremely personal nature of religious choices and the choice to become a parent make them more akin to in-born characteristics like race and sex than to other types of personal choices.

280. *Id.* at 63 (arguing that those with criminal records share many characteristics with other protected classes under the Equal Protection Clause and noting that unless reforms such as the expanded use of expungement are implemented, “criminal records will remain largely immutable”).

cases.²⁸¹ If all members of a protected class shared the trait, then there would be no need for disparate impact because such cases would amount to facially discriminatory policies that would be covered by disparate treatment.²⁸²

B. Risk of Validating Negative Stereotypes

While the analysis in the previous section defeats the argument that the EEOC is attempting to create a new protected class of those with criminal convictions, it brings up another concern. Saying that individuals gain protection since they share a trait precisely because of their membership in a protected class sounds innocuous when one is discussing, say, women under a certain height.²⁸³ It is decidedly more problematic when stating that African-American and Hispanic men have more criminal convictions precisely because they are African-American and Hispanic.

It is well established that minority men, particularly African-American men, suffer from multiple stereotypes associated with both their race and sex.²⁸⁴ Studies show that there is a strong and prevalent association of African-American men with criminality.²⁸⁵ Indeed, at least one scholar has argued that measures aimed at protecting African-American men with criminal records may have a negative effect on African-Americans without criminal records; the idea is that if employers cannot screen based on criminal records, then they may screen for proxies of criminality, and given the association of African-American men with criminality, such unconscious bias will result in more African-American men without criminal records being screened from employment.²⁸⁶

281. See *supra* notes 259–60 and accompanying text.

282. See *supra* note 274.

283. See *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (holding that a prison's minimum height and weight restrictions for prison guards violated Title VII because of the restrictions' disparate impact on women).

284. See David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 174 (2009) ("African-American males have been viewed as oversexed, dangerous, and threatening.").

285. Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

286. Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 2009 U. CHI. LEGAL F. 381, 406 (arguing that more limited use of criminal background checks could result in greater discrimination against non-

Nonetheless, when one takes a step back from the employment context, it is clear that the association of minority men with criminality has severe effects on that community that do not begin with the rejection from employment opportunities. Such an association is very likely both a cause and an effect of the disproportionate number of African-American and Hispanic men who are involved in the criminal justice system.²⁸⁷ The association may be a factor in causing the disproportionality by affecting both the types of laws that are implemented and, more importantly, how they are enforced.²⁸⁸ In other words, the disproportionate number of African-American and Hispanic men who have encounters with the criminal justice system is very likely at least partially caused by preexisting biases about their propensity to commit crime.²⁸⁹ They are both more likely to be arrested and more likely to be convicted, regardless of the severity of the crime.²⁹⁰ Once this occurs, the disproportionate numbers then reinforce the stereotype that African-American men and Hispanic men are more likely to engage in criminal activity.

Thus, “protecting” African-American men and Hispanic men who do not have criminal records seems like a hollow reason for rejecting the protection of those who do. It takes attention away from the inequities in the criminal justice system and, indeed, implies that there are no inequities. The underlying implication is that the criminal justice system

offenders “who are members of social groups that are disproportionately represented by ex-offenders, such as African Americans”).

287. See, e.g., Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 317 (2011–2012) (“Incarceration containerizes, legitimizes, and grounds perceptions associating race with criminality.”); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 218 (1998) (“[T]he stereotyping of African Americans as criminals affects how law enforcement agents relate to African Americans and how African Americans in turn relate to them.”); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 381 (2002) (“Throughout the drug war, African Americans have been disproportionately investigated, detained, searched, arrested and charged with the use, possession and sale of illegal drugs.”).

288. See Meares, *supra* note 287, at 218 (discussing the racialized nature of drug laws and enforcement).

289. See Simonson, *supra* note 46, at 284–85.

290. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 967–68 (2013) (“From encounters with law enforcement officers on our nation’s streets, roads and highways, to arrest, to charging decisions (including youth charged as adults) to sentencing and to incarceration, poor African-Americans and Latinos are disproportionately injected into the criminal justice system and remain stuck in it.” (footnotes omitted)).

acts as a fair measure of who is “deserving” and “not deserving” of protection. Whether it is the job of employment discrimination law to attempt to rectify these inequities is an important but separate question. Although the prevailing attitude is that employment discrimination law is not the proper venue for addressing societal discrimination,²⁹¹ it is nonetheless true that in many instances it operates to do just that. *Griggs* itself relied heavily on the fact that African-American men had been victims of a poor education system that caused them to underperform on intelligence tests.²⁹² Thus, from the start, disparate impact theory has, at least to some extent, attempted to alleviate the effects of societal discrimination, whatever the disclaimers that have since been promulgated.

Furthermore, as a philosophical matter, justifying the negative treatment of one “less deserving” segment of a group by reference to the possible consequences to the “more deserving” segment is a dangerous game. Such arguments may rest, even if not explicitly, on the assumption that discrimination against a certain group is inevitable and, that being the case, that it is better to protect at least part of the group than to protect the group as a whole.²⁹³ Furthermore, it operates to justify such discrimination by insinuating that the underlying cause of the discrimination, when not motivated by animus, is justified. This can be seen in arguments against affirmative action that rely on the negative connotations that attach to all members of the affected group regardless of whether they were beneficiaries.²⁹⁴ For example, in the education context, focusing on the negative perceptions that may attach to members of the group who would have been admitted to a given school regardless of affirmative action programs may imply that the system of

291. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 40 (2006) (arguing that an approach to discrimination law that accounts for, among other things, unconscious bias “may be asking antidiscrimination law to do too much of the work of responding to society’s inequalities”); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851 (2007) (“Current pessimism concerning the political viability of a structural approach [to employment discrimination law] . . . stems from the assumption that a structural approach aims to impose costs on employers for societal barriers to employment.”).

292. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

293. See, e.g., Morrisey et al., *supra* note 67, at 3–4.

294. Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1263 (1998) (discussing arguments against affirmative action that center around the idea “that using racial or gender preferences reinforces negative stereotypes about minorities and women”).

admissions that happens to benefit this group is inherently fair and unbiased.

Additionally, even if one accepts the premise, and it is not hard to accept, that minority men without criminal records may face unintended negative consequences from the attempt to protect those with criminal records, this may open up a new door of liability—disparate treatment. Indeed, one of the arguments the attorneys general made in their letter attacking the EEOC is that more individualized assessment of candidates for employment could lead to increases in disparate treatment lawsuits.²⁹⁵ The idea is that if employees are evaluated on an individual basis, unconscious bias against minority men will be more likely to play out in “forgiving” Caucasian men with criminal records while continuing to discriminate against minority men with criminal records.²⁹⁶ This may very well be true, but if this is the case, it may provide minority men with criminal records with an extra avenue of protection. Currently, it is particularly difficult to prove disparate treatment cases when criminal records are involved because it is difficult to find an appropriate comparator.²⁹⁷ With individualized consideration, minority men with criminal records should be better able to pinpoint when Caucasian men with similar negatives on their resume are provided with opportunities that they are denied.

C. Underinclusive

Another critique levied at the use of disparate impact theory to protect minority men with criminal records is that such a use is underinclusive.²⁹⁸ This critique is valid precisely because the critique that such policies create a new protected class is not. Title VII disparate impact theory will, in most instances, protect only minority men and, in particular, African-American and Hispanic men.²⁹⁹ This is because—precisely because there are a disproportionate number of African-

295. See Morrisey et al., *supra* note 67, at 3–4; see also Stoll, *supra* note 286, at 406.

296. See Stoll, *supra* note 286, at 406.

297. See Harwin, *supra* note 29, at 17.

298. Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 984 (2006) (noting that Title VII leaves ex-offenders who are not members of a protected class without a remedy). Another limitation on Title VII is that it applies only to employers with fifteen or more employees. 42 U.S.C. § 2000e(b) (2012).

299. See, e.g., Harwin, *supra* note 29, at 4–5; Simonson, *supra* note 46, at 284–85.

American and Hispanic men with criminal records—women of all races and Caucasian men will find it difficult to prove that criminal records policies have a disparate impact on their groups.

Nonetheless, the fact that Title VII is not a panacea for ending discrimination against those with criminal records is not a reason to avoid its use in those instances in which it is legitimate and helpful. The real risk is that too much success with Title VII could endanger other reforms aimed at assisting in the re-integration of those with criminal records generally.³⁰⁰ However, for reasons discussed later in this Article, with appropriate caution and distribution of resources, that is unlikely to be a problem.³⁰¹ It is clear that Title VII is only a small part of the solution. Limitations in disparate impact theory as a concept as well as judicial acceptance of the theory in criminal records cases indicate that other avenues of alleviating discrimination against those with criminal records must be pursued.

D. Fairness to Employers

A final critique of using disparate impact theory to protect minority men is that it is unfair to employers.³⁰² This critique can be divided into two threads: First, that individualized consideration of applicants with criminal records will be too costly,³⁰³ and second, that employers may risk liability for negligent hiring.³⁰⁴

While the possibility of liability for negligent hiring is a real concern, it may not be so onerous as those who defend criminal records policies claim.³⁰⁵ Such liability typically attaches when an employer fails to discover that an employee has a particular type of criminal record that should have put the employer on notice that other employees or its customer base could be at risk.³⁰⁶ For example, in one case, a janitorial contracting service was denied summary judgment on a negligent hiring claim when it failed to discover a janitor's prior record of assaulting a

300. See, e.g., Concepción, *supra* note 15, at 249–50.

301. See *infra* Part VI.B.

302. Morrisey et al., *supra* note 67, at 4–5.

303. *Id.*

304. See Monica Scales, Case Note, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 419, 423–24 (2002).

305. Connett, *supra* note 75, at 1062 (“[C]ritics have exaggerated the difficulty of simultaneously avoiding disparate impact and negligent hiring liability.”).

306. See *id.*

woman, and that employee assaulted a student at the university at which the contracting service had placed him.³⁰⁷

However, the general principle that employers should not indiscriminately bar those with criminal records from employment would not be implicated in such situations. Of course an employer should avoid hiring someone with a history of sexual assault in positions that involve close, unsupervised contact with the very group the employee has a history of assaulting. No one is arguing that child molesters ought to have a fair chance at jobs in day cares or that those with recent DUIs ought to be hired to drive a school bus. Individualized consideration does not require ignoring obvious unsuitability for a job; rather, it requires screening out only those who *are* obviously unsuitable.³⁰⁸ For example, the applicant with a DUI might logically be screened from the bus driver position, but it makes far less sense to screen him out of the janitor position. Failure to screen the applicant from the bus driving position might give rise to negligent hiring liability, but liability would be extraordinarily unlikely in the latter case because, assuming there are no driving duties associated with the janitorial position, the possession of a prior DUI bears no cognizable relationship to the job in question and an employer would not be reasonably expected to foresee any potential harm arising from the prior conviction.

Of course, whenever employer liability is implicated, a possible result is over-caution on the part of the employer. It has been argued, for example, that hostile environment sexual harassment liability leads to over-restriction of speech in an attempt by the employer to avoid liability.³⁰⁹ However, the over-caution suggested in allowing unchecked use of criminal history in employment decisions is particularly nefarious. It would be akin to allowing employers to avoid sexual harassment liability by refusing to hire women. Such extreme measures cannot be justified under Title VII because they perpetuate the very discrimination that Title VII is aimed at preventing.³¹⁰

307. *Blair v. Defender Servs., Inc.*, 386 F.3d 623 (4th Cir. 2004).

308. *Connett*, *supra* note 75, at 1062 (“If an employer . . . carefully considers the applicant’s prior offense and is unable to find a business necessity basis for denying the job, it is unlikely that the hiring decision could be deemed negligent as the risk would not have been reasonably foreseeable.”).

309. *See, e.g.*, Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 567–69 (1995).

310. *See* 42 U.S.C. §§ 2000e-2(a)–(m) (2012). An employer could clearly not act in the

Arguments have also been made that individualized consideration of those with criminal backgrounds will be too costly for the employer.³¹¹ The underlying sentiment is that employers will be forced to interview even those people whom they would never actually hire and whom they would be justified in not hiring even under the more stringent requirements.³¹² While this may be true in some instances, it is not inevitable. Nothing in the EEOC's guidelines or in Title VII law generally requires employers to interview any more candidates than they ordinarily would.³¹³ Instead, if a given candidate is just as qualified as or more qualified than another candidate but for his criminal record, the employer would have a chance to assess that candidate as an individual rather than screening him out up front. Under those circumstances, it is actually beneficial to employers to avoid blind, broad screens because they may discover that a given applicant who would otherwise have been screened out is actually the best person for the job. Furthermore, assuming that those with criminal records have less education and job experience than those without criminal records,³¹⁴ the number of people with criminal records who would receive interviews may increase only minimally.

VI. THE BOTTOM LINE:

THE PROMISE AND LIMITS OF DISPARATE IMPACT THEORY

Given the cases and policies that have been discussed throughout this Article, the promise and limits of disparate impact theory can be broken down into three distinct categories of cases: Those that will likely win, those that will likely lose, and those that could win if statistical evidence were improved. Understanding these distinctions is important because there is little use in pursuing costly litigation in cases that have virtually no chance of success. In such cases, money would be better spent on other avenues of enforcement or policy change.

A. Cases That Will Likely Succeed

The EEOC has shown particular concern with broad-based

way described in the example in the sexual harassment case because such an act would be an obvious example of disparate treatment on the basis of sex. *See id.*

311. Morrisey et al., *supra* note 67, at 4–5.

312. *Id.*

313. *See* 42 U.S.C. § 2000e; EEOC GUIDELINES, *supra* note 63.

314. *See* Holzer et al., *supra* note 5, at 4–5.

exclusionary policies.³¹⁵ Such policies are the most obviously unfair because they deny virtually all individual consideration for potential employees. Because of the strong underlying purpose of Title VII to protect individuals from the stereotypes of grouping,³¹⁶ cases involving broad bans are very likely to succeed.

Particularly vulnerable to attack are broad bans barring employment to those with only arrest records. Many legal authorities seem willing to recognize that arrest records are qualitatively different from conviction records because they do not indicate guilt.³¹⁷ Broad bans without regard to the type of crime committed are also vulnerable because they are overinclusive, screening out people whose prior crime has little to nothing to do with the job in question.³¹⁸

Cases in these categories are very likely to succeed in most circumstances.³¹⁹ One exception is in jobs that entail an inherent concern for public safety. In particular, police departments and fire departments appear to be given carte blanche to discriminate based on criminal backgrounds, even in cases in which the only mark on the applicant is an arrest record.³²⁰ While safety is proffered as a business necessity in many criminal records cases, courts seem particularly apt to accept it with very little question in cases in which the job function, by its very nature, is one of protection.³²¹

B. Cases That Will Likely Fail

Cases that will likely lose fall into two main categories; the first of those categories, jobs that involve public safety, has already been discussed.³²² The second category involves employers that already take

315. EEOC GUIDELINES, *supra* note 63.

316. *See, e.g., supra* note 274 and accompanying text.

317. Equal Opportunity Emp't Comm'n, *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, in MASSACHUSETTS EMPLOYMENT LAW SOURCEBOOK & CITATOR 531, 549 n.101 (Laurence J. Donoghue, David G. Abbott & Paul H. Merry eds., 2013) ("At least 13 states have statutes explicitly prohibiting arrest record inquiries and/or dissemination subject to certain exceptions."); *see also* Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972); *supra* Part IV.A.2.

318. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806–07 (1973); Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297–98 (8th Cir. 1975); *see also supra* Part IV.

319. *See supra* Part IV.A.

320. *See supra* Part IV.B.

321. *See supra* Part IV.B.

322. *See supra* Part IV.B.

into account at least some of the *Green* factors as articulated by the EEOC guidelines.³²³

As noted previously, the EEOC guidelines call for an individualized assessment of candidates based on such factors as the type of crime in question, the number of crimes committed, and the amount of time passed since the crime was committed.³²⁴ Therefore, broad bans on those with criminal records that are nonetheless time-limited and tailored to the position in question are likely to survive.

For the most part, this is as it should be. As important as the goals of re-integration and avoiding racial discrimination are, employers ought not to be forced to turn a completely blind eye to criminal histories that indicate unsuitability for particular positions. Thus, employers ought not to be barred from excluding from financially sensitive positions those with convictions for embezzlement.

More problematic are cases in which time limitations are accepted, in and of themselves, as reasonable bars to employment. Such policies might include situations such as broad bans on anyone who has been convicted of any crime in, say, the past three years. The problem with such policies is two-fold. First, such policies exacerbate recidivism because most repeat offenders re-offend within the first few years of release.³²⁵ If one of the causes of recidivism is a lack of employment opportunities, then such people are likely to get caught in a cycle of crime that may have been avoided if they had been able to secure employment directly after their convictions.

Second, it is extremely difficult to ensure compliance with such rules. Given the easy availability of criminal records that stretch far back into the past,³²⁶ it seems unlikely that employers would turn a blind eye to convictions that fall outside of the allowed time limit. Such policies rely on a kind of honor code that employers will simply stop reading the criminal record document once they get to a particular cut-off date. While it is certainly possible to request information that goes back only so far, it seems nearly impossible to prove, without inside information, that an employer complied with such a requirement.

323. EEOC GUIDELINES, *supra* note 63, at 18.

324. *Id.* at 11, 18.

325. *See supra* note 45 and accompanying text.

326. *See* Holzer et al., *supra* note 5, at 9.

C. *The In-Between Cases*

Cases that could go either way could turn into winning cases if more refined statistics were employed.³²⁷ Such cases include those in which bans are in place for only certain crimes and positions, and those where the time utilized in looking backwards at the candidate's record is not sufficiently limited.³²⁸

Plaintiffs in these types of cases would be significantly more likely to win with more sophisticated statistical analysis and the employment of better expert witnesses.³²⁹ Courts will be more likely to decide in a plaintiff's favor if the statistics employed to show a disparity are more closely tied to the labor force from which the employers' candidates are drawn.³³⁰ In other words, courts are less likely to respond well to generalized statistics about the disproportionate number of minority men with criminal records across the country. Instead, courts are looking for more specific statistics about the population near the employer and about how particular crimes, such as drug crimes, involve disproportionate convictions amongst protected classes.³³¹

Those that do respond to more general statistics tend to take disparate impact as a given and focus instead on the business necessity defense.³³² In such cases, the best line of attack for plaintiffs will be to provide expert witness testimony indicating the likelihood or lack thereof that those who have previously perpetrated a given crime will do

327. See, e.g., *EEOC v. Freeman*, 961 F. Supp. 2d 783, 798–99 (D. Md. 2013). As discussed *supra* Part IV.C.2, the court in *Freeman* was particularly disdainful of what it deemed the poor quality of the statistical evidence offered. *Freeman*, 961 F. Supp. 2d at 798–99.

328. *Id.* at 787–88; *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 236 (3d Cir. 2007).

329. See, e.g., *El*, 479 F.3d 232. As discussed *supra* Part IV.D, the court in *SEPTA* relied heavily on the fact that the defendant had presented expert witnesses whose testimony the plaintiff did not rebut. *El*, 479 F.3d at 246–47.

330. For example, a major concern of the court in *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 751 (S.D. Fla. 1989), was the fact that the statistics employed were not targeted enough to the population surrounding the Fort Lauderdale plant to which the plaintiff had applied or the population who had applied for the position. See also *supra* Part IV.C.1.

331. See, e.g., *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028 (W.D. Mo. 2008); see also *supra* note 179. In that case, the court noted that the defendant presented only general crime statistics but no statistics indicating that minority men would be disparately impacted by policies excluding those who have committed particular crimes, in that case, sex offenses. *Fletcher*, 537 F. Supp. 2d at 1030.

332. See, e.g., *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297–99 (8th Cir. 1975); *Gregory*, 316 F. Supp. 401; see also *Harwin*, *supra* note 29, at 6–7.

so again, particularly on the job.³³³

Of course, such statistics and expert witnesses may not be readily available.³³⁴ Without that information, cases in the in-between category are far more likely to fall on the loss side of the spectrum. Knowing this, a more efficient use of resources than immediately pursuing lawsuits may be to invest in better social science research. Such data, while costly to obtain up front, would not only increase the chances of winning cases in the future, but might also influence some employers to refine their own policies by causing them to re-examine their own biases.

D. A Final Word of Caution

While this Article ultimately argues that the use of disparate impact theory in criminal-records-exclusion cases is both legitimate and, in many cases, desirable, it would be unwise to end without noting two further points of consideration that must be taken into account when evaluating whether this path is the most appropriate or effective in addressing the ultimate goal of minimizing the effects of criminal records exclusions on the employment opportunities of minority men.

First, regardless of the legal merits of disparate impact theory, public opinion regarding these types of cases ought not to be ignored.³³⁵ As was noted previously, disparate impact theory, generally, has been under attack for several years.³³⁶ Most recently, Justice Scalia called the very constitutionality of the theory into question.³³⁷ Forty years on,

333. See *supra* note 329.

334. See *supra* notes 197–98 and accompanying text, noting that the court in *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989), asked for applicant-flow statistics in spite of acknowledging that they were unavailable. 723 F. Supp. at 742, 751.

335. Much of the public reaction to the new EEOC Guidelines has been negative. See, e.g., James Bovard, *Perform Criminal Background Checks at Your Peril*, WALL ST. J., Feb. 15, 2013, at A15 (“Most businesses perform criminal background checks on job applicants, but the EEOC guidance frowns on such checks and creates new legal tripwires that could spark federal lawsuits.”); Peter Kirsanow & Carissa Mulder, *The EEOC’s New Rule on Background Checks*, NAT’L REV. ONLINE (Jan. 27, 2013, 7:56 PM), <http://www.nationalreview.com/corner/338937/eoocs-new-rule-background-checks-peter-kirsanow>, archived at <http://perma.cc/9QG-U-GB5B> (“Despite the profound effect the guidance has on the nation’s employers, the EEOC hurriedly implemented the guidance without giving the public an adequate opportunity to comment on it.”). But see Editorial, *A Second Chance for Ex-Offenders*, N.Y. TIMES, June 20, 2013, at A26.

336. See *supra* note 74.

337. *Ricci v. DeStefano* 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring) (“[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”).

commentators have begun to doubt whether disparate impact theory is still needed and whether it is a valid expression of the purposes of Title VII now that at least some of the historical discrimination that seemed to be its driving force has been alleviated. The fact of the matter is that those with criminal records do not present a sympathetic class. As the rapid and scathing backlash against the EEOC's release of its new enforcement guidelines shows,³³⁸ too much attention in this area could risk undermining the theory of disparate impact as a whole.

Second, in spite of the promise of using disparate impact theory in criminal-records-exclusion cases, it remains a somewhat awkward fit, with far too many opportunities for individuals to fall through the cracks. While federal law remains inadequate to the task of providing broader employment protections to those with criminal records, it may make more sense to focus reform efforts at the state and local levels where there has been much more progress.³³⁹ Stronger and more pervasive state laws would likely offer more protection, and more quickly, while having the side effect of bolstering support for broader federal reforms by providing incubators to test out new policies and laws.

Nonetheless, in spite of these words of caution, a more concerted effort to enforce Title VII against those criminal records policies to which it applies is a welcome goal. So long as resources are focused on those cases with higher chances of winning, greater enforcement should ultimately strengthen and increase the impact of Title VII.

338. See *supra* notes 67, 335.

339. See Concepción, *supra* note 15, at 249–50 & nn.146–55.