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Where There's Smoke, There's Fire?: The Cloud of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance on Criminal Records under Title VII

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**WHERE THERE'S SMOKE, THERE'S FIRE?: THE
CLOUD OF SUSPICION SURROUNDING FORMER
OFFENDERS AND THE EEOC'S NEW
ENFORCEMENT GUIDANCE ON CRIMINAL
RECORDS UNDER TITLE VII**

Tiffany R. Nichols¹

TABLE OF CONTENTS

INTRODUCTION	592
I. BACK TO BASICS: UNPACKING DISPARATE IMPACT AND HOW THE GUIDANCE CAME TO BE.....	596
A. <i>First Principles: Title VII and the Griggs Progeny</i>	596
B. <i>The Federal Courts' Take on Criminal History</i>	599
1. <i>On the Heels of Change: Gregory, Green and the Golden Age</i>	599
2. <i>The New Era: Dimming Prospects</i>	601
C. <i>Late to the Party? The EEOC's Enforcement Guidance, Then and Now</i>	604
1. <i>Sound the Alarm: Green's Call to Action</i>	604
2. <i>Rising from El's Ashes: April 2012's Enforcement Guidance 915.002</i>	606
II. MAKING SENSE OF A REGULATORY QUAGMIRE	611
A. <i>Matters of Interpretation</i>	612
B. <i>Intent to Bind or Binding Effect? Semantic Gymnastics Over Administrative Hurdles</i>	615
C. <i>The Supreme Court and the Federal Judiciary: Charting Their Own Course?</i>	618
1. <i>The Record on Record-Based Exclusions</i>	619
2. <i>A Private Sector Political Question?</i>	621
D. <i>What the Guidance Does Not Say</i>	624

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III. MOVING FORWARD: CAN THE ENFORCEMENT GUIDANCE WITHSTAND THE HEAT?	627
A. <i>Putting Out Fires</i>	628
1. <i>Validation Revisited</i>	628
2. <i>Clarifying the Goal</i>	630
B. <i>When the Smoke Clears: The Opportunity for Advocacy</i> ..	634
CONCLUSION	636

INTRODUCTION

Today, one in thirty-one working-age adults will have contact² with the criminal justice system.³ African-Americans and Hispanics are arrested at rates two to three times their proportion of the general population,⁴ and minority males are nearly three to six times more likely than their white counterparts to go to prison during their lifetime.⁵ What's more, inquiries into a job applicant's criminal history are increasingly universal; nearly three-quarters of

2. For the purposes of the Enforcement Guidance 915.002, references to "contact" with the criminal justice system include arrest, charge, indictment, citation, conviction, incarceration, probation, or parole. U.S. EEOC, NOTICE 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 3, 27 n.3 (2012) [hereinafter 2012 Guidance], available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

3. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

4. *Uniform Crime Reports, Arrests by Race, 2010*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls> (last visited Sept. 23, 2013) [hereinafter 2010 ARRESTS BY RACE]. As the 2012 Guidance notes, comprehensive arrest and conviction data for Hispanics is severely limited. 2012 GUIDANCE, *supra* note 2, at 8 & n.67. The Federal Bureau of Investigation's Uniform Crime Reporting Program will not track or provide arrest rates for Hispanics, nationally or regionally, until 2013. FED. BUREAU INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2011, SUMMARY OF THE UNIFORM CRIME REPORTING (UCR) PROGRAM 6 (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/about-ucr>. According to the most recent Drug Enforcement Agency Defendant Statistical System data available, however, approximately 49% of suspects arrested for drug offenses alone were Hispanic or Latino even though during the same year this demographic represented only 16.3% of the country's population. KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 4 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>; MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2010 9-10 (2010), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf>.

5. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 1, 5 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

employment applications elicit self-reporting of prior criminal behavior,⁶ and the same percentage of employers routinely conduct criminal background checks on *all* candidates.⁷

In light of a pointed Third Circuit decision and long-overdue recognition that the Internet and Fair Credit Reporting Act⁸ have fundamentally changed the game in terms of access to personal information, the Equal Employment Opportunity Commission (EEOC or Commission) recently voted to enact new enforcement guidance regulating employers' use of criminal history information.⁹

6. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 953, 955 (2003).

7. SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>. Ninety-two percent of 347 responding employers stated that they subjected all or some of their job candidates to criminal background checks while seventy-three percent of respondents confirmed checking *all* applicants' backgrounds. *Id.*

8. Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (2012). The Act defines "consumer report" to mean "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit[,] . . . character, general reputation, personal characteristics, or mode of living which is used . . . for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes; . . ." *Id.* § 1681a(d)(1) (emphasis added). Criminal background checks fall within these parameters, subject to several procedural safeguards. *E.g.*, *id.* § 1681c(a)(5) (excluding arrests that did not result in conviction if the arrests occurred more than seven years ago, but permitting convictions to be reported indefinitely); *id.* §§ 1681d(d)(3), 1681k (requiring notice to the consumer when a report furnished to an employer contains matters of public record likely to affect adversely that consumer's ability to obtain employment, and mandating that reporting agencies ensure the public record is up to date); *contra id.* § 1681c(b)(3) (reporting restrictions for arrests do not apply to individuals who earn a salary equal to \$75,000 or more).

9. Press Release, U.S. EEOC, EEOC Issues Enforcement Guidance (Apr. 25, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm>. In *El v. Southeastern Pennsylvania Transit Authority*, the Third Circuit was highly critical of the Commission's findings and the content of its 1987 policy statements addressing employers' use of conviction records to exclude potential employees, and thus was unwilling to extend much deference. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 244–45, 248 (3d Cir. 2007); see also discussion *infra* Part I.B.2.

Unlike Title VII and other antidiscrimination statutes, enforcement guidance promulgated by the EEOC is not binding legal authority. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Also unlike agency regulations subject to the rigors of the notice and comment rulemaking provisions of § 553 of the Administrative Procedure Act (APA) that earn the highest level of judicial deference under *Chevron*, the EEOC's interpretation of a statute it administers contained in opinion letters, policy statements, agency manuals, and enforcement guidelines is only "entitled to respect," and then "only to the extent that [the] interpretation[] ha[s] the 'power to persuade.'" *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–88 (2000) (citing *inter alia* *Reno v. Koray*, 515 U.S. 50, 61 (1995)); *Chevron*, 467 U.S. at 842–44; see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Chevron* thus applies to reasonable agency interpretations of an ambiguous statute contained in a regulation or to reasonable agency interpretations of its own ambiguous regulation, neither of which is the case here. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Chevron*, 467 U.S. at 842–44. The lack of deference is a theme with which the EEOC is begrudgingly familiar. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–58 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166,

Despite twenty years having passed since the EEOC last visited the subject, April 2012's Enforcement Guidance 915.002 (the Guidance) largely reiterates old themes by emphasizing the employer's burden to prove that its adverse use of criminal history is "job related" and "consistent with business necessity."¹⁰ The Guidance goes on to affirmatively assert that blanket policies against hiring former offenders are infirm—despite indication otherwise from a federal court of appeals.¹¹ And though purporting to streamline litigation, the agency's proffered pathways to avoid Title VII liability give pause to large- and small-scale employers alike: produce statistical data to "validate" employment tests or create "targeted screens" combined with an individualized assessment to ascertain *the truth* behind any given black mark.¹² According to the EEOC, only underlying facts or conduct—not necessarily the fact of arrest or conviction itself—are relevant for employment purposes.¹³

§ 109(a), 105 Stat. 1071, 1077, as recognized in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006); *El*, 479 F.3d at 244; 2012 GUIDANCE, *supra* note 2, at 3 (noting that judges are conspicuously absent from the list of intended users). However, all EEOC offices adhere to the relevant enforcement guidelines when investigating and administering discrimination charges, and courts may consider such documents as persuasive authority. *Christensen*, 529 U.S. at 587; 2012 GUIDANCE, *supra* note 2, at 3.

10. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also 2012 GUIDANCE, *supra* note 2, at 10–20; discussion *infra* Part I.C.2.

11. *El*, 479 F.3d at 245; 2012 GUIDANCE, *supra* note 2, at 16, 25. *El* urged the Third Circuit to hold that Title VII "prohibits any bright-line policy with regard to criminal convictions" and affirmatively requires that each applicant's circumstances be considered individually. *El*, 479 F.3d at 245. The court declined to go so far, indicating that bright line policies that accurately distinguish between individual applicants' level of risk are consistent with business necessity, and pointed to *Lanning v. Southeastern Pennsylvania Transportation Authority* for support. *Id.* at 245 & n.14 (citing *Lanning v. Se. Pa. Transp. Auth. (Lanning II)*, 308 F.3d 286, 291–92 (3d Cir. 2002) (affirming SEPTA's use of a bright line aerobic capacity test to bar applicants from employment as transit police officers)).

12. 2012 GUIDANCE, *supra* note 2, at 14–18; see *infra* Part I.C.2 and text accompanying notes 84 and 86 for definitions of the terms "validate" and "targeted screens." Employment testing is the practice of administering written, oral, or other tests as a means to determine the suitability or desirability of a job applicant and to narrow large applicant pools cost-effectively. U.S. OFFICE OF PERS. MGMT., ASSESSMENT DECISION GUIDE 3 (2007), available at <http://apps.opm.gov/ADT/ContentFiles/AssessmentDecisionGuide071807.pdf>. Cognitive and physical ability tests, language proficiency tests, medical inquiries, personality and integrity tests, and credit checks are common examples. U.S. EEOC, EMPLOYMENT TESTS AND SELECTION PROCEDURES FACT SHEET (Sept. 23, 2010), available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html. Regardless of form, the Court has found that "disparate impact analysis is . . . no less applicable to subjective employment criteria than to objective or standardized tests." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (plurality opinion).

13. 2012 GUIDANCE, *supra* note 2, at 12–14.

The EEOC is not authorized to regulate what is merely unfair, only what is discriminatory.¹⁴ Though Title VII extended the prohibition against discrimination in new directions, it does not prohibit discrimination on the basis of criminal history *per se*.¹⁵ Thus, this Note considers whether the EEOC's prohibition on using an individual's criminal history as a proxy for qualification is a valid interpretation of Title VII and, if so, whether the new Guidance goes far enough to establish meaningful protections for "victim" employees, especially in light of the EEOC's limited influence outside its own adjudicative sphere.¹⁶

Part I of this Note introduces the relevant principles of Title VII disparate impact analysis, the primary focus of the new Guidance.¹⁷

14. 42 U.S.C. § 2000e-5(a) (2006) ("The Commission is empowered . . . to prevent any person from engaging in any *unlawful* employment practice . . ." (emphasis added)). Like the theory of disparate impact, the EEOC's enforcement role developed over time. Title VII did not empower the EEOC to sue employers to enforce the Act, limiting the agency to "methods of conciliation and persuasion." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358 (1977). The Equal Employment Opportunity Act of 1972 (EEO Act of 1972) established an "integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Id.* at 359; see Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 186 Stat. 103 (1972) (codified as amended in scattered subsections at 42 U.S.C. § 2000e); see also *Chandler v. Roudebush*, 425 U.S. 840, 848–61 (1976) (detailing the legislative debates, proposals, and committee reports which preceded the enactment of the EEO Act of 1972 in consideration of whether the Commission or the courts should be given primary adjudicative responsibility for Title VII and the extent of that responsibility). Importantly, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties," and federal courts retain the principal authority to interpret the meaning of Title VII. *Occidental*, 432 U.S. at 368; 118 CONG. REC. S7166 (daily ed. Mar. 6, 1972) (statement of Sen. Williams) ("In any area where the new law does not address itself, . . . it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.").

15. 42 U.S.C. § 2000e-2(a) (2006) (listing race, color, religion, sex, and national origin as the bases of Title VII discrimination actions); *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) ("No federal statute prohibits discrimination *per se*; rather, what is prohibited is discrimination that is racially motivated."), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972). Title VII's provisions touched a wide range of private businesses and employers formerly beyond the reach of the Fifth and Fourteenth Amendments, and included sex among the protected classes, which at that time was not recognized on a constitutional level outside of voting. GEORGE RUTHERGLEN ET AL., *EMPLOYMENT DISCRIMINATION LAW* 6–7 (2d ed. 2007). Nevertheless, employing former offenders or addressing recidivism at-large is arguably not within the EEOC's statutory authority. See *supra* note 14; see also Connor & White, *infra* note 91, at 1001.

16. See *supra* text accompanying note 9.

17. See discussion *infra* Part I.A. Disparate treatment is beyond the focus of this Note, but "[o]f course, it is [also] unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record." U.S. EEOC, NOTICE 915.003, COMPLIANCE MANUAL 29 (2006) [hereinafter COMPLIANCE MANUAL], available at <http://www.eeoc.gov/policy/docs/race-color.pdf>. Though the new Guidance dedicates only two pages to disparate treatment analysis, a 2003 study suggests this is a significant problem. Pager, *supra* note 6, at

This section also explores the seminal decisions shaping the Guidance's policies and briefly analyzes its narrow "safe harbor" provision, the "duty" of Individualized Assessment (IA).¹⁸ Part II analyzes the strength of the Guidance from three distinct perspectives—legislative, administrative, and through the lens of the federal judiciary—in an attempt to shed light on the EEOC's method and intent.¹⁹ Finally, Part III proposes a solution to reconcile the Guidance with leading Title VII precedent and to foster predictability.²⁰ Former offenders may be able to find work when labor demands accelerate in a strong economy, but those individuals' rights—and employers' human resources challenges—should not become relevant concerns only in the midst of recession.²¹

I. BACK TO BASICS: UNPACKING DISPARATE IMPACT AND HOW THE GUIDANCE CAME TO BE

A. *First Principles: Title VII and the Griggs Progeny*

Title VII of the Civil Rights Act of 1964 was a landmark piece of legislation, expanding the protections offered by the Constitution and outlawing nearly every major form of discrimination against racial, ethnic, national, and religious minorities and women in the workplace.²² The Act's principal nondiscrimination provisions, however, did not include an express prohibition on policies or

947, 955–62 (audit sending matched pairs of black and white male college students to apply for 350 low-skilled jobs in Milwaukee to test the degree to which a criminal record affects subsequent employment opportunities).

18. See discussion *infra* Part I.B & C. The EEOC concedes that the second proposed "safe harbor" provision, an empirical showing that convictions or arrests are linked to future behaviors, traits, or conduct with workplace ramifications, is rarely possible. 2012 GUIDANCE, *supra* note 2, at 15; see also discussion *infra* Part II.B.

19. See discussion *infra* Part II.

20. See discussion *infra* Part III.

21. 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, 22 (2005).

22. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)-(d), 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)-(d) (2006)). Title VII as enacted played a role in defining virtually every aspect of the employer-employee relationship: hiring, discharge, compensation, fringe benefits, and conditions of work. 42 U.S.C. § 2000e-2(a)(1).

practices that produce disproportionate harm to a particular group.²³ But in *Griggs v. Duke Power Co.*,²⁴ the Supreme Court found that requiring a high school diploma or the ability to pass standardized intelligence tests as conditions of employment operated to disqualify blacks at a substantially higher rate than whites.²⁵ Thus interpreting Title VII to also prohibit employers' facially neutral practices that are discriminatory in operation, the Court pronounced "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."²⁶ Instituted on the company's judgment that such tests would improve the overall quality of the work force generally, neither requirement was shown to bear any demonstrable relationship to successful performance of the jobs for which it was used—desirable "inside" positions in the operations, maintenance, and laboratory departments at a steam plant.²⁷ This lack of "business necessity," therefore, would be the "touchstone" for disparate impact liability, and employers would bear the burden to prove that any qualification or test had a "manifest relationship to the employment in question."²⁸

Several decisions post-*Griggs* elaborated on the disparate impact theory and business necessity, but left the elements of the plaintiff's case (and the defendant's rebuttal) uncertain.²⁹ One group of decisions was consistent with the guidelines adopted by the EEOC, imposing exacting testing and validation requirements on defendants

23. Section 2000e-2(a) retains its original wording: it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" or "to limit, segregate, or classify his employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (emphasis added).

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

25. *Id.* at 425–26, 436.

26. *Id.* at 431–32.

27. *Id.* at 427, 431.

28. *Id.* at 431–32.

29. *See, e.g.,* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988) (plurality opinion); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 587 & n.31 (1979); *Dothard v. Rawlinson*, 433 U.S. 321, 329–33 (1977); *Washington v. Davis*, 426 U.S. 229, 249–52 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425–36 (1975).

in order to justify their practices.³⁰ The other group imposed less stringent requirements upon the employer than the EEOC, generally favoring a narrower interpretation of the theory.³¹ In 1989, the Supreme Court resolved these uncertainties in favor of defendants in *Wards Cove Packing Co. v. Atonio*, holding that a challenged practice must merely “serve[], in a significant way, the legitimate employment goals of the employer” and that cost saving could be a relevant consideration.³² Moreover, the Court clarified that, to the extent its precedent spoke of an employer’s “burden of proof” with respect to the business necessity defense, it should have been understood only to mean “burden of production.”³³ Only two years later, the Civil Rights Act of 1991 codified the prohibition on disparate impact discrimination, abrogating with force the Court’s attempt to clarify the doctrine in *Wards Cove*.³⁴ By expressly restoring the concepts of business necessity as enunciated in *Griggs* and earlier precedent—including realignment of the burdens of proof and persuasion—Congress expanded the scope of Title VII “in order to provide adequate protection to victims of discrimination.”³⁵ Congress further cabined the courts’ worldview by naming *one* memorandum as the sole source of legislative history available to interpret the contours of the business necessity defense.³⁶

30. See, e.g., *Dothard*, 433 U.S. at 329–33; *Albemarle Paper*, 422 U.S. at 425–36.

31. See, e.g., *Watson*, 487 U.S. at 999; *Beazer*, 440 U.S. at 587 & n.31; *Davis*, 426 U.S. at 249–52.

32. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 661 (1989) (“[T]here is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils . . .”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

33. *Id.* at 660.

34. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. § 2000e (2006)); see 42 U.S.C. § 2000e(m) (defining “demonstrate” to mean “meets the burdens of production *and* persuasion” (emphasis added)).

35. Civil Rights Act of 1991 §§ 3(2), (4), 105(a); 137 CONG. REC. S28680 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth). The new Act also provided for the right to a trial by jury and introduced the possibility of compensatory damages in cases of *intentional* discrimination. Civil Rights Act of 1991 § 102 (codified as amended at 42 U.S.C. § 1981a).

36. Civil Rights Act of 1991 § 105(b).

B. *The Federal Courts' Take on Criminal History*

1. *On the Heels of Change: Gregory, Green and the Golden Age*

Dramatic shifts in how disparate impact plaintiffs have fared in the federal court system play a significant role in understanding the agency's revamped enforcement strategy.³⁷ In *Gregory v. Litton Systems, Inc.*,³⁸ a California district court was one of the earliest to apply disparate impact analysis to employer policies prohibiting the hiring of applicants with criminal arrests.³⁹ After initially offering a black applicant a position as a mechanic, the company later determined through the applicant's own candid disclosures that he had been arrested fourteen times, and accordingly rescinded the offer.⁴⁰ Even though the plaintiff provided only general data on national arrest rates, the court was convinced that termination based on an arrest record had a disparate impact on black applicants.⁴¹

37. Under the statute, suits generally proceed in three phases. A plaintiff first establishes a prima facie violation by showing that an employer uses a particular employment practice that has adverse impact on members of a protected group, usually through statistics. 42 U.S.C. § 2000e-2(k)(1)(A)(i); see *Watson*, 487 U.S. at 987, 992 (noting that there is an “inevitable focus on statistics” and “on competing explanations for [statistical] disparities” in disparate impact cases). An employer may defend by demonstrating that the practice is “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i). Even if the employer meets that burden, however, a plaintiff may offer additional evidence of the employer's refusal to adopt an available alternative employment practice with less impact that continues to serve the employer's legitimate needs. *Id.* §§ 2000e-2(k)(1)(A)(ii), (C). The enforcement scheme likewise advances in three stages. Litigants must first exhaust state or local administrative proceedings before pursuing investigation and conciliation by the EEOC. *Id.* § 2000e-5(c). If the Commission is unable to secure a conciliation agreement, it may bring a civil action or refer the case to the Attorney General. *Id.* § 2000e-5(f)(1) Only when those specific third party efforts fail or are waived may an individual plaintiff be granted a private right to sue in district court. *Id.* Given individual plaintiffs' lack of success overcoming these evidentiary hurdles after *Green*, see *infra* Part I.B.II, the EEOC has transitioned its focus to “big” cases to expand the scope of relief—those with systematic discrimination among classes of plaintiffs in large industries, defined *infra* note 132.

38. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal 1970), *aff'd and vacated in part on other grounds*, 472 F.2d 631 (9th Cir. 1972).

39. In *Litton*, the employer's policy prohibited hiring applicants “who have been arrested ‘on a number of occasions’ for things other than minor traffic offenses.” *Id.* at 402. Despite this policy, the court noted that Litton had, in practice, employed persons with prior arrests—several hundreds in fact. *Id.*

40. *Id.* Thirteen of Gregory's fourteen arrests occurred before 1959, roughly a decade before his application. *Id.*

41. *Id.* at 403. Consistent with federal courts' tendency to enable plaintiffs to establish prima facie cases without extensive statistical evidence in the 1970s, the *Litton* court, in conclusory fashion, proclaimed, “Negroes are arrested substantially more frequently than whites in proportion to their

Litton's "inherent[ly]" discriminatory policy could not be justified by business necessity because the company produced *no* evidence that individuals who were arrested but not convicted of a crime would perform their jobs "less efficiently or less honestly."⁴² Nonetheless, the *Litton* court expressly limited its ruling to policies on arrests, stating that "[n]othing . . . shall prohibit the Defendant from seeking, ascertaining, considering, or using information concerning criminal convictions of applicants or existing employees."⁴³

The Eighth Circuit Court of Appeals in *Green v. Missouri Pacific Railroad Company* (MoPac) addressed conviction records, but under a different microscope.⁴⁴ Buck Green, an African-American applicant for a corporate clerk position, disclosed that he was convicted in 1967 of refusing military induction.⁴⁵ The *Green* court carefully examined the company's applicant flow data⁴⁶ and rebuffed the company's generic justifications claiming business necessity for lack of empirical validation.⁴⁷ Finding MoPac's blanket no-hire rule

numbers. The evidence on this question was overwhelming and utterly convincing." *Id.* Alexandra Harwin notes that "[s]ome courts during this period . . . required more refined statistical evidence, [often] resulting in considerably less favorable outcomes for plaintiffs." Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 7 (2012). For cases reflecting this heightened burden, see, for example, *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1302-03 (S.D.N.Y. 1981) (finding plaintiff's failure to produce applicant flow data fatal), *Powell v. Nat'l Distillers Prods. Co.*, No. C-1-76-186, 1980 WL 84, at *13 (S.D. Ohio Jan. 8, 1980) ("The biggest problem surrounding the use of statistics is that the wrong group, or 'universe,' may be selected for comparison. . . . If the universe selected is overly inclusive, the comparison cannot reflect the actual impact of a defendant's actions."), and *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 973-74 (D.D.C. 1980) (noting that applicant flow data fails to capture the "chilling" effect of criminal record inquiries).

42. *Litton*, 316 F. Supp. at 402. Though the trial court deemed the discrimination "inherent," on appeal the Ninth Circuit clarified that "*Litton* obviously intended to use the questionnaire. But there [was] no evidence of a purpose to disadvantage black applicants, nor . . . [intent] to persist in the discrimination after it was identified." *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 633 n.3 (9th Cir. 1972).

43. *Litton*, 316 F. Supp. at 404.

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

45. *Id.* at 1292.

46. *See id.* at 1294-96. Applicant flow data compares the racial composition of the employer's current employees to its applicant pool, representing the yield of recruitment efforts. Harwin, *supra* note 41, at 7. During the period from September 1, 1971, through November 7, 1973, 3,282 blacks and 5,206 whites applied for employment with MoPac. *Green*, 523 F.2d at 1294. Of these applicants, MoPac rejected 174 blacks and 118 whites because of their conviction records. *Id.* Thus, the court concluded "the policy operated automatically to exclude from employment 53 of every 1,000 black applicants but only 22 of every 1,000 white applicants." *Id.* at 1294-95.

47. *Green*, 523 F.2d at 1298. MoPac offered seven reasons why its policy was a business necessity:

violated Title VII, the court held that a policy “deny[ing] job opportunities . . . because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements” is “unnecessarily harsh and unjust.”⁴⁸ The court boldly pronounced, “We cannot conceive of *any business necessity* that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed.”⁴⁹ On remand, the district court identified three factors that an employer could use to determine whether an applicant’s prior convictions should be considered in a hiring decision: (1) the nature and gravity of the offense(s); (2) the time elapsed since the conviction or completion of sentence; and (3) the nature of the job for which the applicant applied.⁵⁰ Though *Green*’s balancing test emerged as the standard, contemporaneous district level decisions added to the discourse, demonstrating the rigorous standard of review applied against employers in disparate impact’s heyday.⁵¹

2. *The New Era: Dimming Prospects*

The tide of exacting judicial scrutiny of the 1970s did not last.⁵² From 1983 through 2002, only about one-quarter of disparate impact

“1) fear 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.” *Id.* Concluding its analysis of these justifications, the court instructed, “Although the reasons MoPac advances for its absolute bar can serve as relevant considerations in making individual hiring decisions, they in no way justify an absolute policy which sweeps so broadly.” *Id.* It did not help MoPac’s case that its own expert witness conceded that not every former offender will be a poor employee, and that it would be preferable for the company to consider such offenders on an individual basis. *Id.*

48. *Id.*

49. *Id.* (emphasis added).

50. *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

51. Harwin emphasizes that many of the early disparate impact claims succeeded—regardless of the quality of the statistics or concrete justifications presented—because the discrimination alleged was overt. Harwin, *supra* note 41, at 6. In less obvious cases, the court employed a more exacting scrutiny. See, e.g., *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (concluding convictions for theft and receipt of stolen goods were sufficiently job-related to justify refusing employment to a black applicant seeking work as a bellman after closely scrutinizing whether the position *actually* provided easy access to guests’ rooms and valuables instead of merely accepting defendant’s claim that position was “security sensitive”), *aff’d mem.*, 468 F.2d 951 (5th Cir. 1972).

52. The late 1980s and early 1990s bore a paradigm shift. See, e.g., *Fletcher v. Berkowitz Oliver*

cases succeeded in federal district courts.⁵³ Exemplifying this change in outlook is *El v. Southeastern Pennsylvania Transportation Authority* (SEPTA), where the Third Circuit Court of Appeals upheld an employer's application of a policy against hiring individuals with violent criminal convictions—sparking the EEOC to publish new guidance.⁵⁴ In *El*, King Paratransit Services, Inc. (King) conditionally hired Douglas El to drive buses serving disabled citizens in metropolitan Philadelphia.⁵⁵ King was required to ensure that no SEPTA driver have any previous conviction for a crime of violence, “moral turpitude,” or driving under the influence.⁵⁶ A background check revealed El's forty-seven year-old conviction for second-

Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008) (finding “employee morale” warranted termination of an employee with a thirty-year-old rape conviction); Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992) (suggesting that “[i]t really requires nothing more than the statement of [employer's] policy to explain its business justification” and thus finding “minimizing the perceived risk of employee dishonesty” justified a felony conviction exclusion (emphasis added)); Tye v. City of Cincinnati, 794 F. Supp. 824, 833 (S.D. Ohio 1992) (citing the “potential risk to public safety” as sufficient justification for exclusion); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752–54 (S.D. Fla. 1989) (finding it sufficient that “management believes its conviction policy is both effective and integral” and noting that “[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing”).

53. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 739 tbl.B (2006). Harwin's updated research also indicates that judgments have been “uniformly grim” for plaintiffs alleging that the consideration of criminal records disparately impacts African-American or Hispanic job applicants. Harwin, *supra* note 41, at 12. Since the late 1980s, in no case identified did a plaintiff win after a trial on the merits, and rarely did a plaintiff survive a summary judgment motion. *Id.* at 12 & n.59. *But see, e.g.*, Caston v. Methodist Med. Ctr. of Ill., 215 F. Supp. 2d 1002, 1008 (C.D. Ill. 2002) (surviving motion to dismiss); McCraven v. City of Chicago, 18 F. Supp. 2d 877, 881, 883 (N.D. Ill. 1998) (denying motion to dismiss on Title VII disparate treatment and § 1983 claims). These results explain, in part, the EEOC's favorable presumption of disparate impact, relieving plaintiffs of all legal and financial burdens of developing statistical proof. On a substantive level, in the 2009 case of *Ricci v. DeStefano*, Justice Scalia filed a concurring opinion in which he called upon the Court to confront the “evil day” when it would have to reconcile the disparate impact provisions of Title VII with the Equal Protection Clause, further suggesting that disparate impact may be on shaky legal footing. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

54. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 248 (3d Cir. 2007). The Commission viewed the *El* decision as a clear instruction that it “should provide in-depth legal analysis and updated research on this issue.” *Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, U.S. EEOC, http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (last visited Oct. 2, 2012) [hereinafter *Guidance Q&A*].

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

56. *Id.* at 236.

degree murder at age fifteen stemming from a gang fight.⁵⁷ It was El's only serious offense and the sole reason for his rejection.⁵⁸

In upholding SEPTA's application of its no-hire rule on summary judgment, the court emphasized that Title VII requires accuracy, not perfection.⁵⁹ Despite SEPTA's "apparent loose manner" in formulating and defending its policy, it nonetheless produced credible expert testimony that the policy accurately screened out applicants "likely" to commit acts of violence against its vulnerable passengers.⁶⁰ The *El* court stressed practicality: "hiring policies . . . ultimately concern the management of risk,"⁶¹ and accordingly, record-based bright line rules are *not* per se unlawful, contrary to earlier precedent.⁶² Based on the nature of the job El sought and his failure to provide any expert testimony to rebut his employer's claims, SEPTA sufficiently demonstrated that its policy "[accurately] distinguish[ed] between individual applicants [who] do and do not pose an unacceptable level of risk."⁶³

The *El* court also laid new hurdles before the EEOC. The court explicitly discredited the Commission's determination that El would not pose a threat due to the relevance of his youth and remoteness of the conviction, suggesting that such conclusions were "terse" and

57. *Id.* at 235–36.

58. *Id.* at 236.

59. *Id.* at 244–45. It is important to understand that the court was keenly aware of the case of paratransit driver David deSouza, who attacked and raped a passenger while serving as a SEPTA driver but at the time of hire had no prior convictions. *Id.* at 244 n.12.

60. *Id.* at 248. How "likely" is *too* likely or *unlikely* is a significant issue that remains largely unaddressed, even in the new Guidance. In *El*, neither the court nor the expert defined the recidivism risk for El in the position in question or whether each individual employer is able to make its own value judgment by subjectively establishing "likelihood" levels suitable for his or her business. *Id.* at 245–46; see also George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1298, 1310 (1987) [hereinafter Rutherglen, *Disparate Impact Theory*] (suggesting that disparate impact theory's objective approach, evident in the consistent emphasis on empirical evidence to measure *effects*, deems employer (or customer preference) not controlling); *infra* text accompanying note 106. SEPTA merely submitted that it presented sufficient evidence that a reasonable jury could find that "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 [the] time [since] conviction." *El*, 479 F.3d at 245. The court rather summarily agreed, at least as applied to a person with a violent criminal conviction like El. *Id.* at 245–46.

61. *El*, 479 F.3d at 244.

62. *Id.* at 245. See *infra* note 69 for a list of decisions precluding employers' use of blanket exclusionary policies.

63. *El*, 479 F.3d at 245, 247, 248.

“without explanation, analysis, or authority.”⁶⁴ It went on to question the usefulness of the EEOC’s guidelines, stating that they “do not speak to whether an employer can take [the business necessity] factors into account when crafting a bright-line policy” or deciding whether certain offenses are “serious enough to warrant a lifetime ban.”⁶⁵ The court concluded its criticisms by noting that the guidelines did not appear to be “entitled to great deference” under *United States v. Skidmore*.⁶⁶ Though the EEOC explicitly aligned its policy with *Green* in 1987, the guidelines themselves did not substantively analyze the requirements of Title VII nor bolster their assertions with scientific underpinnings.⁶⁷

C. Late to the Party? The EEOC’s Enforcement Guidance, Then and Now

1. Sound the Alarm: Green’s Call to Action

Ten years after *Green*’s final appeal, the EEOC issued its first formal policy statements adopting its interpretation of the *Green* case.⁶⁸ Consistent with the weight of judicial authority pre-*El*,⁶⁹ the

64. *Id.* at 248. Though the EEOC initially found in *El*’s favor, it was unable to resolve the dispute in conciliation. *Id.* at 237. The agency’s findings, therefore, were admissible only as relevant substantive evidence. *Id.* at 248 n.19.

65. *Id.* at 243.

66. *Id.* at 244. Under *Skidmore*, administrative guidelines earn deference only “in accordance with the thoroughness of [the] research and the persuasiveness of [the] reasoning” underlying them. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)); see also *supra* note 9.

67. *El*, 479 F.3d at 244.

68. U.S. EEOC, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (1987) [hereinafter 1987 STATISTICS GUIDANCE], available at <http://www.eeoc.gov/policy/docs/convict2.html> (explaining crime specific versus non-crime specific policies); U.S. EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987) [hereinafter 1987 CONVICTION GUIDANCE], available at <http://www.eeoc.gov/policy/docs/convict1.html>. Although the guidance was not formally issued until 1987, the EEOC had at least a decade of experience applying similar precedent to disparate impact claims brought by Blacks and Hispanics. See, e.g., EEOC Decision No. 78-35, 26 Fair Empl. Prac. Cas. (BNA) 1755 (1978) (concluding that an employee’s discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct); EEOC Decision No. 74-89, 8 Fair Empl. Prac. Cas. (BNA) 431 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 72-1497, 4 Fair Empl. Prac. Cas. (BNA) 849 (1972) (challenging a criminal record exclusion policy based on “serious crimes”); EEOC Decision No. 70-43, 2 Fair Empl. Prac. Cas. (BNA) 169 (1969) (concluding that an employee’s discharge due to the falsification of his arrest record in his

1987 statements indicated that an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.⁷⁰ Instead, employers could only review conviction information if justified by business necessity based on the *Green* factors, simplifying the analysis by eliminating consideration of an individual's employment history and efforts at rehabilitation as prescribed in earlier Commission decisions.⁷¹ The EEOC issued a third policy guideline in 1990.⁷² This time acknowledging *Litton* as its guide, the EEOC set forth that unlike convictions, "arrests alone are not reliable evidence that a person has actually committed a crime."⁷³ Therefore, in order to establish business necessity to rely on

employment application did not violate Title VII).

69. See *Green v. Mo. Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971) (finding that a conviction record may not be an absolute bar to employment as a firefighter under 42 U.S.C. §§ 1981 and 1983), *reh'g granted*, 1971 WL 10776 (Dec. 2, 1971); *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); see also *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283 (S.D.N.Y. 1981); *Craig v. Dep't of Health, Educ. & Welfare*, 508 F. Supp. 1055 (W.D. Mo. 1981); *Cross v. U.S. Postal Serv.*, 483 F. Supp. 1050 (E.D. Mo. 1979), *rev'd*, 639 F.2d 409 (8th Cir. 1981). The weight of judicial authority also reflects, however, that the courts most frequently invalidate record-based bans in *public* employment under the notion that the government is, or should be, a "model employer." See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111 (codified as amended at 42 U.S.C. § 2000e-16(a) (2006)) ("All personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 501, 87 Stat. 355, 390 (codified as amended at 29 U.S.C. § 791) (mandating federal agencies submit to the EEOC for approval an annually updated "affirmative action program plan for the hiring, placement, and advancement of handicapped individuals").

70. 1987 STATISTICS GUIDANCE, *supra* note 68. The 1987 STATISTICS GUIDANCE differs from its counterpart CONVICTION GUIDANCE in that it decreases the emphasis on the presumption of disparate impact, qualifying that "when [an] employer can present more narrowly drawn statistics showing either that Blacks and Hispanics are not convicted at a disproportionately greater rate or that there is no adverse impact in its own hiring process resulting from the convictions policy, then a no cause determination would be appropriate." *Id.* (emphasis added). To compare this policy with employers' approach for rebutting disparate impact in the 2012 Guidance, see *infra* note 81.

71. 1987 CONVICTION GUIDANCE, *supra* note 68.

72. U.S. EEOC, NOTICE 915.061, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1990) [hereinafter 1990 ARREST GUIDANCE], available at http://www.eeoc.gov/policy/docs/arrest_records.html. Like earlier conviction policies, the 1990 ARREST GUIDANCE emphasized reliance on statistics: "It is desirable to use the most current available statistics. In addition, where local statistics are available, it may be helpful to use them." *Id.* Underscoring the naivety of the EEOC (and perhaps the nation), the 1990 ARREST GUIDANCE noted that "[t]he Commission has determined that Hispanics are also adversely affected by arrest record inquiries." *Id.*

73. *Id.* In reaching this conclusion, the EEOC discussed the difference between conviction and arrest records. "Conviction records constitute reliable evidence that a person engaged in the conduct alleged

such records, an employer must not only apply *Green*, but must also “evaluate whether the arrest record reflects the applicant’s conduct.”⁷⁴ The 1990 Guidance remained largely untouched by the Commission even after Congress’s codification of disparate impact in 1991.⁷⁵

2. *Rising from El’s Ashes: April 2012’s Enforcement*⁷⁶ *Guidance 915.002*

In recent years, the EEOC and the nation as a whole increased their focus on reintegration efforts and employer use of criminal history information.⁷⁷ On July 26, 2011, the full Commission held a

since the criminal justice system requires the highest degree of proof (‘beyond a reasonable doubt’) for a conviction.” *Id.* By contrast, “[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct.” *Id.* (alterations in original) (citing *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 241 (1957)).

74. *Id.* “Where it *appears* [to the employer] that the applicant . . . engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent, exclusion is justified.” *Id.* (emphasis added). The use of “appears,” however, poses another set of legal quandaries for employers, or “investigators.” *Id.* (“[T]he investigator must determine whether the applicant is likely to have committed the conduct alleged.”). According to the 1990 ARREST GUIDANCE, this requires an employer either “to accept the employee’s denial or to attempt to obtain additional information and evaluate his/her credibility.” *Id.* “An employer need not conduct an informal ‘trial’ or an extensive investigation[,]” but it also may not “perfunctorily ‘allow the person an opportunity to explain’ and ignore the explanation,” especially when the individual’s “claims could easily be verified by . . . a previous employer or a police department.” *Id.* Reasonable efforts are affirmatively required. Other courts, and the EEOC in fact, have held that employers must show the alleged conduct was *actually committed*. See, e.g., *City of Cairo v. Ill. Fair Emp’t Practices Comm’n*, 315 N.E.2d 344, 359, 365 (Ill. Ct. App. 1974) (holding police officer applicant could not be absolutely barred from appointment solely because he had been arrested where the Army amended their desertion claim and the state “rap sheet” did not indicate the disposition of a disorderly conduct charge); EEOC Decision No. 76-87, 1976 WL 5000, at *1 n.2 (Jan. 23, 1976) (holding potential police officer could not be rejected based on one arrest five years earlier for riding in stolen car because there was no conviction and applicant asserted that he did not know that car was stolen); EEOC Decision No. 74-83, 8 Fair Empl. Prac. Cas. (BNA) 427 (1974) (finding no business justification for employer’s unconditional termination of all employees with arrest records—all five of which were black—purportedly to cut down on thefts in the workplace because the employer could produce no evidence that these employees were involved in any of the reported office thievery, nor that the charging party’s past arrest was in any way related to theft).

75. In 2006, the Commission issued a new compliance manual dedicating roughly two pages to arrest and conviction records in hiring and promotion decisions, essentially summarizing its previously issued policy guidance. COMPLIANCE MANUAL, *supra* note 17, at 29–30.

76. Note the shift in language over time, from “policy statements” to “enforcement guidance.” Counterintuitively, litigation statistics reflect that, since FY 2004, total suits filed by the EEOC and suits specifically containing Title VII claims have steadily declined. *EEOC Litigation Statistics, FY 1997 Through FY 2012*, U.S. EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Jan. 14, 2014) [hereinafter LITIGATION STATS].

77. Indeed, since 2007, the EEOC has promoted its Eradicating Racism and Colorism from

public meeting to examine arrest and conviction records as a hiring barrier.⁷⁸ After soliciting comments from the public,⁷⁹ the Commission voted to enact new guidelines because “[w]hen reentry fails, public safety, our economy, the future of families and the community as a whole are placed at risk.”⁸⁰ Like the old, the new

Employment (E-RACE) initiative. *E-RACE Goals and Objectives*, U.S. EEOC, <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm> (last visited Oct. 2, 2012). Among the goals of the E-RACE initiative is to “[d]evelop [s]trategies for [a]ddressing [twenty-first] [c]entury [m]anifestations of [d]iscrimination,” which, according to the EEOC, includes developing “investigative and litigation strategies to address selection criteria and methods that may foster discrimination based on race and other prohibited bases, such as . . . arrest and conviction records, employment tests, [and] subjective decision making . . .” *Id.* In 2011, U.S. Attorney General Eric Holder assembled a cabinet-level Interagency Reentry Council to support the federal government’s efforts across twenty agencies to promote the successful reintegration of ex-offenders. *Federal Interagency Reentry Council Overview*, NAT’L REENTRY RES. CTR., http://csgjusticecenter.org/documents/0000/1424/Reentry_Council_Overview_one-pager_v2.pdf (last visited Sept. 13, 2012). In addition to federal efforts, several state law enforcement agencies have embraced initiatives that encourage employment of ex-offenders. For example, Texas’s Department of Criminal Justice has a Reentry and Integration Division and a Reentry Task Force Workgroup that specifically focus on identifying employment opportunities for ex-offenders and barriers that affect their access to training programs. *Reentry and Integration Division—Reentry Task Force*, TEX. DEP’T CRIM. JUST., http://www.tdcj.state.tx.us/divisions/rid/rid_texas_reentry_task_force.html (last visited Sept. 13, 2012).

78. U.S. EEOC Meeting: EEOC to Examine Arrest and Conviction Records as a Hiring Barrier 3 (July 26, 2011) [hereinafter 2011 Meeting Transcript], available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm>. Chair Naomi Earp convened the first meeting on the issue in 2008. *Id.* at 2.

79. Despite holding open the record for a period of fifteen days, the EEOC chose to sidestep the APA. See 5 U.S.C. § 553 (2012). The Commission received and reviewed approximately 300 public comments from prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the American Insurance Association, the Retail Industry Leaders Association, and the D.C. Prisoners’ Project. *Guidance Q&A*, *supra* note 54. The comments, however, are only available for review in Washington, D.C., and the Commission did not circulate the Guidance in advance of its vote. *Meeting of July 26, 2011—EEOC To Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. EEOC, <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm> (last visited Jan. 6, 2014) (noting that “[a]ll comments received will be made available to members of the Commission and to Commission staff working on the matters discussed at the meeting[,]” but public review will be limited to the EEOC library); U.S. EEOC Meeting: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 7–9 (Apr. 25, 2012) [hereinafter 2012 Meeting Transcript], available at <http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm>.

80. 2011 Meeting Transcript, *supra* note 78, at 3. Chairman Berrien credited President George W. Bush and the signing of the Second Chance Act of 2007 (SCA) for these remarks. *Id.* Signed into law April 9, 2008, the SCA authorizes federal grants to government agencies and nonprofit organizations to provide educational and job placement services, as well as substance abuse treatment, housing support, and family programming for offenders during and after incarceration. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.); see also H.R. REP. NO. 110-140, at 1 (2007), reprinted in 2008 U.S.C.C.A.N. 24, 24–25 (discussing the purpose of the SCA). In addition to funding proactive reentry programs, the government offers tax credits to employers who hire ex-offenders through the Work Opportunity Tax Credit Program (WOTC). 42 U.S.C. § 17541(e); see generally *Work Opportunity Tax Credit*, U.S. DEP’T LABOR,

Guidance presumes that employer use of criminal history creates a disparate impact, and thus primarily analyzes the employer's burden to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."⁸¹ In clarifying this defense, the EEOC identified only two safe harbors⁸² through which it impressed upon the business community new and additional duties that are arguably burdensome, costly, and controversial.⁸³

<http://www.doleta.gov/business/Incentives/opptax/> (last visited Oct. 28, 2012). Though broadly configured, employment discrimination is not mentioned. *See* Second Chance Act of 2007. Furthermore, legislative authority for the SCA expired on September 30, 2010, and neither house of Congress has commenced a vote since the Senate Judiciary Committee introduced the reauthorization bill on July 21, 2011. *See* Second Chance Reauthorization Act of 2011, S. 1231, 112th Cong. (2011); *Bill Summary & Status, 112th Congress (2011-2012), S. 1231*, LIBRARY OF CONG., <http://thomas.loc.gov> (select "Advanced Search;" click "112" and "Bill Number" from Search drop-down menu; enter "S. 1231;" then follow "All Information" hyperlink) (last visited Jan. 6, 2014); Second Chance Reauthorization Act of 2013, S. 1690, 113th Cong. (2013); *Bill Summary & Status, 113th Congress (2013-2014), S. 1690*, LIBRARY OF CONG., <http://thomas.loc.gov> (select "Advanced Search;" click "113" and "Bill Number" from Search drop-down menu; enter "S. 1690;" then follow "All Congressional Actions" hyperlink) (last visited Jan. 6, 2014); *see also* NAT'L ASS'N CNTYS., LOWER JAIL RECIDIVISM AND REINVEST THE SAVINGS: SUPPORT THE SECOND CHANCE ACT (Aug. 16, 2012), available at <http://www.naco.org/legislation/policies/Documents/Justice%20and%20Public%20Safety/dh%20%20-%20%20RecidivismReinves.pdf> (last visited Jan. 6, 2014). On January 2, 2013, however, President Barack Obama signed into law the American Taxpayer Relief Act of 2012, which retroactively authorized extension of the SCA's WOTC program through December 31, 2013. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 309, 126 Stat. 2313, 2329 (2013) (codified as amended 26 U.S.C. § 51).

81. 42 U.S.C. § 2000e-2(k)(1)(A)(i); 2012 GUIDANCE, *supra* note 2, at 10 ("National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin."). Though the employer does have an opportunity to disprove the plaintiff's prima facie showing, it may be difficult to do so. "[A]n employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area" or its own applicant flow data "maintained pursuant to the Uniform Guidelines on Employee Selection Procedures." 2012 GUIDANCE, *supra* note 2, at 10; *see infra* note 84. The Commission cautions, however, that it will assess the credibility of the employer's evidence because such evidence may not reflect the "actual potential applicant pool since otherwise qualified people might be discouraged from applying." 2012 GUIDANCE, *supra* note 2, at 10 & n.79-80 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) ("stating that '[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection'" (alteration in original)). An employer's reputation in the community—"from ex-offender employment programs, individual testimony, employer statements, . . . or publicly posted notices"—may be scrutinized. 2012 GUIDANCE, *supra* note 2, at 10; *cf. supra* note 70.

82. 2012 GUIDANCE, *supra* note 2, at 2, 14. This raises the question of what other circumstances might satisfy the business necessity defense or whether the EEOC believes these are the *only* ways to do so. *See also* discussion *infra* Part II.D.

83. *See, e.g.*, 2011 Meeting Transcript, *supra* note 78, at 30, 33 (testimony of Adam Klein) (stating "[t]he problem with [criminal history] information is that it's messy, inaccurate, incredibly difficult to interpret," and that the guidelines lack predictability because there is "no indication of . . . the

First, employers can consistently meet the business necessity defense by formally validating the relationship between the criminal conduct and the duties of a particular position using the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), which generally requires empirical data or statistics.⁸⁴ As the EEOC itself recognizes, however, “social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications . . . are rare.”⁸⁵ Second, an employer may create “targeted screens” using the *Green* factors as a floor,⁸⁶ and

weighting” or measurement tools); *id.* at 12–13 (testimony of Robert Shriver) (describing the U.S. Office of Personnel Management’s policy of delaying background checks until the agency “wants to actually hire somebody” because “there’s a cost to each of these investigations”).

84. 29 C.F.R. § 1607 (2013). The Uniform Guidelines, adopted in 1978, provide the following three methods for employers to “validate” their employment tests: (1) demonstrate a statistical relationship between scores on a selection procedure and job performance (criterion validity); (2) demonstrate that the content of a selection procedure is representative of important aspects of performance on the job (content validity); or (3) demonstrate that a selection procedure measures a construct (an underlying human trait or characteristic, such as integrity) that is important for successful job performance (construct validity). *Id.* § 1607.5. The detailed technical standards for such studies are addressed in 29 C.F.R. § 1607.14.

85. 2012 GUIDANCE, *supra* note 2, at 15.

86. *Id.* at 18. Targeted screens, developed on the basis of “fact-based evidence, legal requirements, and/or relevant and available studies[,]” exclude individuals from particular positions for specified criminal conduct within a defined time period before employment. *Id.* at 17–18. The Guidance suggests that an employer may be able to justify a targeted screen *solely* by the *Green* factors without additional research, but such a screen must be “narrowly tailored to identify criminal conduct with a *demonstrably tight nexus* to the position in question.” *Id.* at 18 (emphasis added). The EEOC offers the following contrasting examples:

1. County Community Center . . . [adopts] a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration. This rule was adopted by the County’s Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.
2. “Shred 4 You” employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. . . . [The company] has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Id. at 18–20. If the past criminal conduct of an applicant from a protected class violates the targeted screen described, the EEOC is more likely to find “Shred 4 You” violated Title VII. *Id.*

engage in Individualized Assessment (IA) for any applicant excluded by the screen.⁸⁷ At the point of developing the screen, an employer's incorporation of and compliance with exclusionary state or local laws may not be a defense to liability.⁸⁸ Furthermore, IA requires an employer to provide notice to the applicant of his or her disqualification *because of* a criminal record, and then an opportunity for the rejected applicant to prove his or her case—that, based on additional information, the arrest or conviction policy “as applied” is inconsistent with business necessity.⁸⁹ And although IA may not be necessary in all cases, the EEOC does not articulate when or in what cases such assessments are excused, thus arguably establishing a *de facto* requirement by stressing that an employment screening process without IA is more likely to violate Title VII.⁹⁰

87. *Id.* at 2, 14, 18–20.

88. *Id.* at 24. The EEOC asserts that “state and local laws or regulations are preempted by Title VII if they ‘purport[] to require or permit the doing of any act which would be an unlawful employment practice’ under Title VII.” *Id.* & n.166 (alteration in original) (citing 42 U.S.C. § 2000e-7 (2006)). Thus, “if an employer’s exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.” *Id.* at 24 (emphasis in original). For analysis of this compliance dilemma, see Timothy M. Cary, *A Checkered Past: When Title VII Collides with State Statutes Mandating Criminal Background Checks*, 28 A.B.A. J. LAB. & EMP. L. 499, 517–18 (2013). As opinion columns and blogs from around the country suggest, this provision is among the Guidance’s most controversial. See, e.g., James Bovard, *Perform Criminal Background Checks at Your Peril*, WALL ST. J., Feb. 14, 2013, <http://online.wsj.com/article/SB10001424127887323701904578276491630786614.html> (criticizing the EEOC’s initiation of an action against G4S Secure Solutions (G4S) for its “refus[al] to hire a twice-convicted Pennsylvania thief as a security guard” despite G4S’s clear compliance with Pennsylvania law).

89. 2012 GUIDANCE, *supra* note 2, at 14. The new Guidance directs that employers should assess the following factors when making the individualized inquiry:

facts or circumstances surrounding the offense or conduct; [t]he number of offenses for which the individual was convicted; [o]lder age at the time of conviction, or release from prison; [e]vidence 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; [] length and consistency of employment history before and after the offense or conduct; [r]ehabilitation efforts, [including] education [or] training; [e]mployment or character references and any other information regarding fitness for the particular position; and [w]hether the individual is bonded.

Id. at 18.

90. *Id.* Despite ratifying the Guidance, Commissioner Lipnic expressed some concern over this provision:

[I]t is important to make clear that Title VII does not require an employer to provide such an individualized assessment in any instance. This means that there can and will be times . . . that an employer can lawfully screen out an applicant without further inquiry . . . I had hoped that the final Guidance would have included an example of such

II. MAKING SENSE OF A REGULATORY QUAGMIRE

Employers juggling legitimate business interests and compliance with Title VII struggle with the new EEOC guidelines that seem more expansive than what is required under current law⁹¹ and protect individuals who do not neatly fit within the traditional concepts of a suspect—or sympathetic—class.⁹² Reconciliation of the Guidance and Title VII precedent is a necessary step considering that all Title VII actions begin at the agency level.⁹³ The focus of the analysis must gauge the prospective legitimacy of the Individualized Assessment method of establishing business necessity, the

lawful targeted practices. It does not, but . . . the lack of such examples should not be taken to mean that they do not exist.

2012 Meeting Transcript, *supra* note 79, at 11. Furthermore, in theory, if the defendant carries its burden, the burden will shift back to the plaintiff to prove pretext by demonstrating that the employer refused to adopt an “alternative employment practice” that would continue to serve its legitimate business needs but in a less discriminatory fashion. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C); *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 804–05 (1973)). In practice, however, courts resolve disparate impact long before this prong, and the Guidance thus dedicates only one sentence to it. 2012 GUIDANCE, *supra* note 2, at 20.

91. See *supra* note 11 and accompanying text discussing *El v. SEPTA* and the permissibility of bright line policies. Just as the Court alluded in *Watson*, Professor George Rutherford notes that the Uniform Guidelines, discussed *supra* note 84, “[strikingly depart] from the analysis of statistical evidence . . . in the Civil Rights Act of 1991.” RUTHERGLEN, *supra* note 15, at 82; see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–99 (1988) (noting “plaintiff’s burden in establishing a prima facie case [of disparate impact] goes beyond the need to show that there are statistical disparities in the employer’s work force” to a degree of proof from which a “substantial” inference of causation may be raised, and that in defense, “employers are not required, even when defending standardized or objective tests, to introduce formal ‘validation studies’ showing that particular criteria predict actual on-the-job performance”) (emphasis added). The Uniform Guidelines do not require analysis of the relevant local labor market, nor do they require statistical significance. RUTHERGLEN, *supra* note 15, at 82; see also Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 995–99 (2013) (discussing the EEOC’s flawed use of nationwide statistics to justify the Guidance given that “impact” statistics vary from state to state and from crime to crime, and noting, for example, that “proof that African Americans in the nation have criminal records at a higher rate overall does not, in itself, show that a criminal record exclusion policy has a disparate impact on African Americans in Omaha”). Though the lenience afforded plaintiffs by the Uniform Guidelines has limited effect on their prima facie showing of disparate impact, it has dramatic implications for employers defending on the basis of business necessity. See Connor & White, *supra*, at 1003–04; see also *infra* discussion Part III.A.1.

92. See generally Aukerman, *supra* note 21, at 65. Of course, the Equal Protection Clause prohibits only intentional discrimination by government actors, and it does not have a disparate impact component. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

93. See *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 244–45 (3d Cir. 2007); *supra* note 37.

Guidance's distinct feature and the critical provision necessary to achieve the underlying goal of equalizing opportunities for former offenders.⁹⁴ Principles of statutory interpretation suggest the Guidance and IA method properly effectuate the goals of Title VII, but reliance on the Guidance to constrain private employers' freedom of action is inconsistent with the spirit of the Administrative Procedure Act (APA).⁹⁵ Moreover, the enhanced content neither improves workability nor is entitled to great deference in federal court given its breadth.⁹⁶

A. *Matters of Interpretation*

As decades of litigation reveal, business necessity—the crux of the new Guidance—does not have a plain or straightforward meaning.⁹⁷ The Civil Rights Act of 1991 specifically employed the phrase “‘business necessity,’ not ‘business convenience’ or some other weaker term,” to describe what was required for an employer to prevail against a Title VII disparate impact claim.⁹⁸ Congress further mandated that the standard must be met free of any dilution by *Wards Cove*, making its preference clear.⁹⁹ Thus, the Guidance's imposition

94. See discussion *supra* Part I.C.2. By requiring assessment of underlying conduct, the EEOC seeks to minimize stigma and dissuade fears about lawsuits alleging negligent hiring. 2012 GUIDANCE, *supra* note 2, at 6 & n.52, 18; see also *infra* note 103.

95. See *supra* text accompanying note 9. The APA requires the use of rulemaking procedures for every rule unless it falls within statutory exceptions excluding “interpretive rules,” “general statements of policy,” or when such procedures are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(A)-(B). Courts have repeatedly held that the exceptions should be construed narrowly to prevent swallowing the legislatively adjudged value in notice and comment. See, e.g., *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044–45 (D.C. Cir. 1987). See also *infra* note 115 for analysis of whether, in the context of Title VII, the EEOC has the authority to promulgate substantive regulations (as opposed to procedural regulations) at all.

96. See discussion *infra* Part II.C.

97. *Watson*, 487 U.S. at 1005 (Blackmun, J., concurring) (“Precisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula, for it necessarily involves a case-specific judgment”); see also discussion *supra* Part I.B and *infra* note 99.

98. *El*, 479 F.3d at 242. Congress's choice of statutory language also indicates that the burden is not insurmountable: the defense requires proof only that the contested practice is “‘consistent with business necessity,’” not that it is “‘required.’” RUTHERGLEN, *supra* note 15, at 83 (emphasis added).

99. See *supra* text accompanying notes 33–36. In the domain of statutory law, Congress's preference is of course controlling. RUTHERGLEN, *supra* note 15, at 10–11; Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666 (2001). The Civil Rights Act of 1991, however, did not eliminate any ambiguity by turning the clock back to *Griggs* because, on the facts of the case, the Court

of serious, good faith consideration of an applicant's qualifications exclusive of his or her criminal record through IA generally comports with Congress's pro-plaintiff approach.¹⁰⁰

Examining the larger scheme of antidiscrimination law, the second crucial question in analyzing the validity of the new Guidance is how a claim of discrimination that is asserted today resembles the kind of discrimination that Congress meant to eliminate under the Civil Rights Acts.¹⁰¹ The underlying purpose of Title VII was not to protect people with criminal records but rather to protect racial minorities.¹⁰² “If the theory of disparate impact [was] designed only to prevent hidden discrimination, then it would result in liability only when there is [some] evidence of disparate treatment”—an argument most employers would champion in light of vocal concerns that policies are designed to prevent increasingly common negligent hiring suits, not to enforce secret racial biases.¹⁰³ By contrast, if disparate impact was designed to remove arbitrary barriers that historically operated to favor opportunities for white employees, then the Guidance's heavy burden of justification on the employer rightfully serves the independent purpose of eliminating systematic disadvantages, even for former offenders.¹⁰⁴ A third key component,

was not required to choose between the distinct phrases it employed to describe the defendant's burden: “business necessity,” “related to job performance,” “meaningful study of their relationship to job-performance ability,” and “manifest relationship to the employment in question.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971). The Third Circuit in *El* acutely noted this deficiency in attempting to implement the *Griggs* standard. *El*, 479 F.3d at 241–42.

100. See Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1514–16 (1996) (arguing the most powerful argument in favor of a “strict” necessity standard is the Civil Rights Act's rejection of *Wards Cove*); see also *supra* text accompanying notes 34 and 35. But see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (noting that Title VII “does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, as recognized in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

101. RUTHERGLEN, *supra* note 15, at 14.

102. See *supra* note 15 and accompanying text.

103. RUTHERGLEN, *supra* note 15, at 73. For thorough analysis of negligent hiring claims involving former offenders and their impact on employers, see generally Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001 (2011) and Katherine A. Peebles, Note, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397 (2012).

104. RUTHERGLEN, *supra* note 15, at 73.

one must consider to what extent each theory emphasizes merit in hiring decisions.¹⁰⁵ Merit determined by the employer supports business discretion; merit set by some objective standard—like statistics—results in judicial reexamination.¹⁰⁶

Congress took many statutory interpretation tools off the table when it limited the courts to one memorandum and the *Griggs* progeny to decipher the meaning of “business necessity” under Title VII disparate impact analysis.¹⁰⁷ Turning to the seminal opinion in *Griggs*, the Supreme Court attributed to Congress the intent “to achieve equality,” a forward-looking, expansive view reflective of Title VII’s broad language.¹⁰⁸ Most recently echoing this reasoning from *Griggs*, Justice Ginsburg vigorously argued in dissent in *Ricci v. DeStefano* that, by instructing employers to avoid needlessly exclusionary selection processes, Title VII’s disparate impact provision calls for a “race-neutral means to increase minority . . . participation.”¹⁰⁹ The very facts of *Griggs*, however, seem to suggest it was a case about ferreting out hidden intent: before the effective date of the Civil Rights Act of 1964, Duke Power openly discriminated on the basis of race, and though the company implemented its “neutral” aptitude requirements on the effective date of Title VII, it was not until five months *after* the charge was filed in *Griggs* that it promoted a single black employee out of its lowest

105. *Id.* at 74 Note that in *Griggs* the Court stressed that the recognition of disparate impact is fully consistent with a competitive meritocracy. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). The Court assured that “Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor . . .” *Id.* For argument that *Griggs* and the disparate impact doctrine are in fact unfriendly to meritocratic objectives, see generally Amy Wax, *The Dead End of “Disparate Impact,”* 12 NAT’L AFF. 53 (2012).

106. RUTHERGLEN, *supra* note 15, at 74.

107. See *supra* notes 35–36 and accompanying text. This also precludes interpreters from relying on the legislative history of the Americans with Disabilities Act (ADA), the very act from which Congress copied verbatim the definition of business necessity less than one year later. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 102(b)(6), (c)(4), 103(a), 104 Stat. 327, 332–34 (codified as amended in 42 U.S.C. §§ 12112, 12113 (2006)). For additional instructive comparisons between the ADA and Title VII, see *infra* notes 115, 123 and 150.

108. *Griggs*, 401 U.S. at 429–30; RUTHERGLEN, *supra* note 15, at 11.

109. *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (alteration in original) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)).

department.¹¹⁰ Because *Griggs*'s interchangeable reliance on Title VII's multiple goals is not determinative of the Guidance's validity standing alone, the next question addresses whether the EEOC's procedural course provides the necessary force to withstand private, political, and judicial scrutiny.

B. Intent to Bind or Binding Effect? Semantic Gymnastics Over Administrative Hurdles

As described in Part I.C, the EEOC has issued a dizzying array of documents including enforcement guidance,¹¹¹ policy guidance,¹¹² policy statements,¹¹³ and compliance manuals¹¹⁴ on the issue of arrests and conviction records. However, the explicit delegation of rulemaking authority in Title VII directs the Commission to issue "suitable *procedural* regulations to carry out [its] provisions."¹¹⁵ Professor Robert A. Anthony persuasively asserts that

[t]he use of nonlegislative policy documents¹¹⁶ generally serves the important function of informing staff and the public about agency positions, and in the great majority of instances is proper and indeed very valuable[;] [b]ut the misuse of such documents—to bind, where legislative rules should have been used—carries

110. *Griggs*, 401 U.S. at 426–28 & n.2.

111. Guidances typically set forth the criteria by which the agency will select cases for prosecution or other enforcement action. See generally 2012 GUIDANCE, *supra* note 2.

112. *E.g.*, 1990 ARREST GUIDANCE, *supra* note 72.

113. *E.g.*, 1987 CONVICTION GUIDANCE and 1987 STATISTICS GUIDANCE, *supra* note 68.

114. *E.g.*, COMPLIANCE MANUAL, *supra* note 17.

115. 42 U.S.C. § 2000e-12(a) (2006) (emphasis added). The delegation provision further requires that "[r]egulations issued . . . shall be in conformity with the standards and limitations of [the APA]." *Id.* Among other laws, the agency also has primary enforcement authority over the Age Discrimination in Employment Act (ADEA) and Title I of the ADA. 29 U.S.C. § 628; 42 U.S.C. § 12116. In contrast with Title VII, the ADEA broadly authorizes the EEOC to "issue such rules and regulations as it may consider necessary or appropriate." 29 U.S.C. § 628. The explicit terms of the ADA required the EEOC to issue regulations to carry out Title I within one year of the date of the statute's enactment. 42 U.S.C. § 12116.

116. The relevant distinction between legislative rules and nonlegislative policy statements is "not the nature of the questions they address but the authority and intent with which they are issued and the resulting effect on the power of a court to depart from the decision embodied in the rule." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1321–22 & n.40 (1992).

great costs.¹¹⁷

Does the Guidance, particularly the de facto IA requirement, tip this delicate balance?

Though the intricacies of administrative rulemaking are beyond the scope of this Note, the threshold step in the analysis under the APA asks “whether a given [document] interprets sufficiently concrete statutory language to qualify as interpretive.”¹¹⁸ As shifts in judicial interpretation demonstrate, policy statements that use broad language like business necessity are amorphous but nevertheless have tangible meaning, especially when applied in the negative¹¹⁹: for instance, a retail establishment’s adherence to perceived customer preferences in enforcing a grooming policy is *not* a necessary business practice.¹²⁰ But where a policy statement uses amorphous statutory text to require parties to act affirmatively to be safe from prosecution rather than merely refrain from definable practices, it is more difficult to conclude that the statement draws any tangible meaning from the statute.¹²¹ For example, unlike the ADA, which *codifies* a duty of reasonable accommodation,¹²² Title VII has no such provision out of

117. *Id.* at 1317. The costs are perhaps less than tangible: uncertainty and confusion about the reach and legal quality of the agency’s standards breed wasted effort among private parties trying to “puzzle out” how far they are bound or affected. *Id.* This confusion and ultimate tolerance only nurtures the tendency to overregulate. *Id.* And if guidances and manuals “can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads (or, more frequently, subordinate officials) will be enticed into using them.” *Id.*

118. *Id.* at 1339; *see, e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79 (2002) (identifying the threshold question as “whether [the ADA] leaves a gap for the EEOC to fill”); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). In theory, interpretive rules do not create new law because they “merely restate or explain the preexisting . . . intentions of Congress.” Anthony, *supra* note 116, at 1313, 1324.

119. *See* Anthony, *supra* note 116, at 1339 & n.161.

120. *See, e.g.*, *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 798–99 (8th Cir. 1993) (finding Domino’s policy prohibiting delivery men from having facial hair inconsistent with business necessity and in violation of Title VII because approximately 50% of African-American men have skin condition that causes shaving to be either impossible or extremely difficult); 29 C.F.R. § 1604.2(a)(iii) (2013) (prohibiting customer preference as a justification for gender discrimination).

121. Anthony, *supra* note 116, at 1324–26, 1339 n.161.

122. 42 U.S.C. §§ 12111(9)(B), 12112(b)(5)(A)-(B) (2006); 29 C.F.R. § 1630.2(o). Professor Christine Jolls simplifies reasonable accommodation to mean any “legal rule that requires employers to incur special costs in response to the distinctive needs . . . of particular, identifiable demographic groups of employees,” and argues that important aspects of disparate impact liability are in fact accommodation requirements. Jolls, *supra* note 99, at 648.

which the EEOC can develop affirmative policy.¹²³ If the conclusion is that the Guidance goes beyond interpretation of existing legislation, the second inquiry is what the Guidance “intends substantively and whether it is meant to be binding.”¹²⁴ An agency’s intent is often difficult to ascertain, but the frequency with which the EEOC Commissioners publicly speak on this issue provides ample material from which to make an informed argument.¹²⁵

On the other hand, enforcement policy is “ordinarily issued nonlegislatively,” and the articulation of lengthy, detailed, and specific standards is not unusual.¹²⁶ Moreover, where a statement provides for the future exercise of discretion in its application, notice and comment are not required.¹²⁷ In this sense, the EEOC tiptoed the

123. See generally 42 U.S.C. § 2000e-2. In fact, Title VII contains a provision expressly prohibiting required preferences. *Id.* § 2000e-2(j). For a brief comparison of the EEOC’s rulemaking authority under ADA and Title VII, see also *supra* note 115. The ADA also comprehensively regulates pre-employment *medical* inquiries, and the Guidance seems to advocate for a similar model. Compare 29 C.F.R. § 1630.14 (permitting employers to require that a disabled employee submit to a medical exam *after* he or she has been hired or to condition a bona fide offer of employment on the results of such an exam when all entering employees are so subjected), and 29 C.F.R. § 1630.15 (indicating that if a post-offer, pre-work medical exam serves as the basis for withdrawal of an offer, the employer must show the reasons for withdrawal are either (1) “job-related and consistent with business necessity” and no reasonable accommodation would allow the individual to perform the essential functions of the job, or (2) that the rejected individual “pose[s] a direct threat to . . . health or safety”), with 2012 GUIDANCE, *supra* note 2, at 13–14 (“As a best practice, . . . the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited . . .”).

124. Anthony, *supra* note 116, at 1339.

125. See generally 2012 Meeting Transcript, *supra* note 79; 2011 Meeting Transcript, *supra* note 78; U.S. EEOC: EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), available at <http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm>.

126. Anthony, *supra* note 116, at 1338–39.

127. See *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1319–20, 1325 (D.C. Cir. 1988) (finding an agency’s “open-mindedness [toward its own rules] in individual proceedings can substitute for a general rulemaking”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987) (finding the FDA could treat its rules as pure policy statements in the future, but “must avoid giving [those rules] the kind of substantive significance that it now so plainly attaches to them”); Anthony, *supra* note 116, at 1359–63. This analysis poses a lose-lose for defendants: agencies may impose a policy with a practical binding effect upon private parties, but also plausibly argue to the courts that the informal issuance and reserved discretion prove there was no obligation to proceed legislatively. Anthony, *supra* note 116, at 1360. To remedy this circumvention, Anthony advocates instead for a test that focuses on whether and to what extent the policy constrains the discretion of its *intended targets*—private parties—so as to bind them, rather than on the discretion left to the agency itself by its own devices. *Id.* at 1360–61.

line: IA may or may not be required to comply with Title VII,¹²⁸ and the Commission expressly noted that it merely intends the Guidance to be an informative practice tool meant “to facilitate voluntary compliance.”¹²⁹ Ultimately, because employers are typically unable to tolerate the delay or cost that a contest would entail,¹³⁰ the IA norm will elude judicial scrutiny.¹³¹ The legal limbo line the EEOC has elected to dance, however, may ultimately disserve the population it seeks to protect. By failing to give its business necessity interpretation “teeth” via notice and comment while simultaneously propagating a targeted enforcement strategy,¹³² the EEOC transforms the Guidance into an omnipresent, unpredictable litigation threat that breeds distrust among employers.

C. The Supreme Court and the Federal Judiciary: Charting Their Own Course?

In the area of federal antidiscrimination law, the U.S. Supreme Court and the lower courts rarely defer to EEOC regulations and guidance even though *Skidmore* reflects that administrative interpretations *should* receive respect if they are research-driven and enacted with procedural care on an issue of statutory ambiguity.¹³³ In

128. 2012 GUIDANCE, *supra* note 2, at 18.

129. 2012 Meeting Transcript, *supra* note 79, at 13; *see also* 2012 GUIDANCE, *supra* note 2, at 3 (listing intended users).

130. For example, in 2012, 14.4% of charges filed under Title VII resulted in outcomes favorable to charging parties in the form of negotiated settlements, withdrawals of a complaint with promise of benefits, or successful conciliations. *Title VII of the Civil Rights Act of 1964 Charges, FY 1997–FY 2012*, U.S. EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Jan. 24, 2014) [hereinafter TITLE VII STATS]. Only 3.5% of unsuccessful conciliations, charges closed but considered for litigation, resulted in suits at the federal level (66 total suits filed with Title VII claims, divided by 1,899 unsuccessful conciliations during fiscal year 2012). *Id.*; LITIGATION STATS, *supra* note 76.

131. *See generally* Anthony, *supra* note 116, at 1340.

132. Issued less than two months before the Guidance, the Strategic Plan provides that identification, investigation, and litigation of systemic discrimination cases—pattern or practice, policy, and class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area—is the top priority, with prevention and education constituting secondary objectives. *See* U.S. EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016, at 3, 14 (2012) [hereinafter STRATEGIC PLAN], available at http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

133. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (finding that just because “policies and standards are not reached . . . in adversary form does not mean that they are not entitled to respect” and that the weight of such policy judgments “depend[s] upon the thoroughness evident in its

the early years after the enactment of Title VII, the courts played a unique role in filling statutory gaps and thus developed certain expertise that they are perhaps reluctant to relinquish.¹³⁴ In assessing the impact of the new Guidance as the EEOC increasingly pursues systematic enforcement actions, it is therefore important to consider the federal courts' likely gloss on the business necessity issue.

1. *The Record on Record-Based Exclusions*

The Supreme Court has not squarely addressed criminal record-based employment restrictions in the context of Title VII.¹³⁵ Although inexact bases for comparison,¹³⁶ two important themes emerge from the Court's holdings under the Fourteenth Amendment.¹³⁷ First, in all the cases where the Court invalidated record-based policies, the private interests at stake were significant: for example, *Skinner v. Oklahoma* concerned the right to bear children, and *James v. Strange* concerned the ability to protect a

consideration"); see also Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1938–49 (2006). Only twice has the Supreme Court applied *Skidmore* to EEOC policies and agreed with the agency's interpretation of an antidiscrimination law. See e.g., *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448–51 (2003) (noting that the Court was persuaded by the Compliance Manual's focus on common law "touchstone of control" in deciding whether director-shareholder physicians are employees under the ADA); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986) (finding the EEOC guidelines defining sexual harassment under Title VII "appropriately drew from, and were fully consistent with, the existing case law"). Recently, Justice Ginsburg corroborated the Court's lack of deference in this area, stating, "Recognizing EEOC's 'enforcement responsibility' under Title VII, we have previously accorded the Commission's position respectful consideration. Yet the Court today does not so much as mention EEOC's counsel." *Ricci v. DeStefano*, 557 U.S. 557, 626 (2009) (Ginsburg, J., dissenting) (citations omitted).

134. Hart, *supra* note 133, at 1954–58; see generally also Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 *ST. LOUIS U. L.J.* 225 (1976); *infra* note 195 (describing individual Justices' Title VII experience).

135. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 240 (3d Cir. 2007). In *New York City Transit Authority v. Beazer* and *McDonnell Douglas Corp. v. Green*, the Court dealt with criminal behavior on the part of an applicant, but neither case squarely addressed the issue of *past* convictions or the precise contours of the business necessity defense. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 587 & n.31 (1979) (finding employer's refusal to hire individuals using methadone to treat addiction served the "legitimate employment goals of safety and efficiency"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973) (sustaining an employer's refusal to rehire an employee on the ground that the employee participated in various disruptive, illegal protests in front of employer's premises).

136. See *supra* note 92.

137. See *James v. Strange*, 407 U.S. 128 (1972); *De Veau v. Braisted*, 363 U.S. 144 (1960); *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954); *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535 (1942); *Hawker v. New York*, 170 U.S. 189 (1898).

minimum level of income and assets from involuntary garnishment.¹³⁸ Second, much like the Guidance requires, the Court generally demanded that the legislature document a rational relationship between the restrictions and the problems they were designed to combat.¹³⁹ Most instructive of these cases is *Schware v. Board of Bar Examiners* in which the Court recognized the right to practice one's profession.¹⁴⁰ Standing for the proposition that occupational restrictions based on contact with the criminal justice system must take into consideration the lapse of time—including the political climate of the era¹⁴¹—and the nature of the offense, the *Schware* court rejected the conclusion that a past criminal conviction alone permits an inference of present immoral character.¹⁴²

Even though the right to employment is not fundamental,¹⁴³ this means-ends tailoring suggests the Court has been willing to parse the facts of arrest and conviction exclusions on a case-by-case basis; this compares favorably to the Guidance's approach requiring justification with particularity via IA under Title VII. Reconciling the roles of intent, however, is perhaps more difficult and counterintuitive: if the government intentionally discriminates against

138. *Strange*, 407 U.S. at 135–36, 140; *Skinner*, 316 U.S. at 541. By contrast, the law in *De Veau*, which the Court upheld, “merely concerned the right to be a union official, an arguably less significant interest.” Aukerman, *supra* note 21, at 37; *see also De Veau*, 363 U.S. at 158–60.

139. *E.g.*, *Strange*, 407 U.S. at 141–42 (acknowledging the state's interest in recoupment, but finding it irrational to deny income protection to former offenders solely because those debts resulted from state representation in criminal proceedings); Aukerman, *supra* note 21, at 37.

140. *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 247 (1957). Rudolph Schware was excluded from taking the bar exam in New Mexico because of his record of arrests from twenty years prior, among other things. *Id.* at 234–35.

141. *See id.* at 242–46. The bar examiners disqualified Schware, citing his membership in the Communist Party from 1932 to 1940 and his arrest for allegedly recruiting young men to aid the Loyalists in the Spanish Civil War. *Id.* at 236–37. The Court, however, noted that “Schware joined the Communist Party when he was a young man during the midst of this country's greatest depression,” and that “[d]uring the prelude to World War II many idealistic young men volunteered to help causes they believed right.” *Id.* at 242, 245. Because there was nothing in the record to indicate that Schware ever engaged in or advocated for any action to overthrow the U.S. government and few Americans would have regarded his conduct as evidence of moral turpitude at the time, the Court held that the record-based restriction deprived Schware of due process. *Id.* at 245–47; *see also Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402 (C.D. Cal 1970) (thirteen of African-American plaintiff's fourteen arrests, for which he was never convicted, occurred before 1959, during the height of the civil rights movement), *aff'd and vacated in part on other grounds*, 472 F.2d 631, 634 (9th Cir. 1972).

142. *Schware*, 353 U.S. at 243, 242.

143. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

former offenders, it will be subject only to rational basis review,¹⁴⁴ but when a private employer *unintentionally* discriminates against the same group under Title VII, it theoretically will be subjected to the comparatively heightened level of scrutiny advanced in the Guidance.¹⁴⁵

2. *A Private Sector Political Question?*

Though the Court is undoubtedly capable of parsing factual questions and policy judgments inherent in legislative tailoring, that does not mean it always will do so. “When the EEOC interprets federal antidiscrimination laws in ways that appear to favor plaintiff-employees over defendant-employers,” federal courts generally decline to defer to the agency.¹⁴⁶ In the case of Title VII litigation, the EEOC’s presumption of disparate impact as a matter of policy—softening the single greatest hurdle for plaintiffs at the initial steps of

144. The aforementioned cases spoke in terms of “rationality,” but also required “reasonably close fit” between the occupation and the offense in question. Aukerman, *supra* note 21, at 51. Aukerman thus argues that the Court in fact applies “rational basis with bite” to record-based exclusions, as the requirement for tailoring arises only under heightened scrutiny (not rational basis review); heightened scrutiny is reserved for groups that qualify as a suspect class and former offenders traditionally do not so qualify. *Id.* at 51, 66–69 & n.2.

145. See *supra* notes 86–89 and accompanying text.

146. Hart, *supra* note 133, at 1959. Indeed, recently, the Supreme Court dismissed as “nebulous,” “generic,” “circular,” and “unpersuasive” the EEOC’s conclusions with respect to the use of (1) “motivating factor” causation in Title VII retaliation cases, a standard that generally allows plaintiff-employees to elude adverse summary judgment decisions in the early stages of a case, and (2) an expansive definition of “supervisor” for the purpose of workplace harassment liability that would permit more plaintiff-employees to prove their cases with the aid of strict liability. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533–34 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 & n.4 (2013); see also, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478–82 (1999) (rejecting the EEOC’s regulation requiring that disability be evaluated without regard to mitigating measures), *overturned due to legislative action in* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 245, 256–58 (1991) (rejecting the EEOC’s opinion that Title VII applied to U.S. citizens employed overseas), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (limiting the reach of Title VII by rejecting the EEOC’s view that pregnancy discrimination was sex discrimination), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); cf. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84–87 (2002) (applying *Chevron* deference to EEOC regulation permitting employers to exclude individuals whose disabilities pose a direct threat to their own health under the ADA, thus upholding a more restrictive view of the defense than that for which the plaintiff-employee advocated).

enforcement—and the imposition of IA reflect such an imbalance.¹⁴⁷ Moreover, by necessitating detailed scrutiny of employers' human resources policies when litigation does ensue, the EEOC forces courts to enter the realm of restructuring business practices and managing routine personnel matters, which they are often reluctant to do.¹⁴⁸

Facially, however, the disparate impact issue at hand is straightforward: hiring policies excluding former offenders disproportionately impact African-Americans and Hispanics because of disparate enforcement of criminal justice—from the beat to the courtroom.¹⁴⁹ However, we cannot ignore how the “former offender” variable transforms the debate to some extent.¹⁵⁰ The occupational

147. See discussion *supra* Part I.C.

148. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (“[T]he judiciary should proceed with care before mandating that an employer must adopt a plaintiff’s alternative selection or hiring practice in response to a Title VII suit.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

149. See *supra* notes 3–5 and accompanying text. Today’s criminal justice crisis at the enforcement, prosecutorial, and sentencing levels is reminiscent of the severe educational inequalities that ultimately led the Court to find Duke Power’s professionally-designed cognitive tests and diploma requirement to violate Title VII in *Griggs*: a societal deficiency—at no fault of the employer—with lasting and pervasive effects. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (identifying longstanding educational disparities due to segregated schooling).

150. Title VII protects *all* workers against discrimination based on race, color, national origin, religion, and sex, even if they are white, male, and atheist. See 42 U.S.C. § 2000e-2(a) (2006). However, as Miriam J. Aukerman writes, people “are not born with [criminal] records, but rather acquire them as a result of their own choices.” Aukerman, *supra* note 21, at 65. Thus, the question becomes whether Title VII *should* be used for the benefit of individuals whose personal choices to act or to associate result in adverse consequences under the law for which they are accountable, and whether the IA requirement, essentially “an unfunded mandate that shifts the cost of addressing difficulties associated with [applicants’] immutable characteristics to employers,” *should* be left for the legislature to implement. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1542–43 (2011). Note that the bona fide occupational qualification (BFOQ) exception under Title VII and reasonable accommodation under the ADA operate in much the same way as IA in that they often require modification of policies to facilitate job performance and thus impose less obvious costs on employers as a result. *Id.* at 1506; Pamela S. Karlan & George Rutherglen, *Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 24–25 (1996) (suggesting that, under the ADA, for example, “employers [] might incur higher costs to accurately assess the productivity of the disabled than other applicants for employment” or to revise testing requirements that produce adverse effects on a class of applicants even though such costs may be only perceived or marginal, or indeed, produce long-term efficiency gains); see 42 U.S.C. § 2000e-2(e)(1) (indicating that businesses may qualify personnel on the basis of religion, sex, or national origin where those characteristics are “reasonably necessary to the normal operation of that particular business or enterprise”); 42 U.S.C. § 2000e(j) (mandating accommodation of religious practices and observance); 42 U.S.C. § 12111(9)(A)-(B) (defining reasonable accommodation under the ADA). Unlike IA,

and corresponding economic rights due to former offenders are unavoidably tinged with politics, perhaps more so than any other context in which the Court has routinely addressed disparate hiring.¹⁵¹ Individuals with criminal records are the “one group whom it is still permissible to hate.”¹⁵² Eschewing the lack of popular support and inevitable death in committee, a few bold politicians introduce and re-introduce legislation to correct employer abuses of credit and criminal background checks.¹⁵³ Some laws at both the federal and state levels do limit the use of such information, at least for specific positions.¹⁵⁴ However, these positive efforts to some extent reinforce the courts’ hands-off approach: “distinctive legislative response[s]” to the plight of former offenders who have unique problems may in and of themselves “belie[.] . . . a

however, both are statutorily mandated with explicit qualifications. 42 U.S.C. § 12112(b)(5)(A) (undue hardship defense); *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (noting that “[t]he BFOQ defense is written narrowly, and this Court has read it narrowly[.]” and the statute’s multiple “terms of restriction [] indicate that the exception reaches only special situations”); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding employers do not bear more than a de minimus burden to accommodate religious needs).

151. *See supra* note 149.

152. Aukerman, *supra* note 21, at 18. “Politicians compete to be the toughest on crime[.]” “websites brand thousands of people as sex offenders, prisoners, and criminals[.]” and “[m]any individuals with criminal records are literally disenfranchised.” *Id.* at 18–19, 52.

153. *See, e.g.*, Equal Employment for All Act, H.R. 321, 112th Cong. (2011) (originally submitted as H.R. 3149, 111th Cong. (2009)).

154. Only eleven states prohibit employment discrimination against individuals with criminal convictions: Colorado, Connecticut, Florida, Kentucky, Minnesota, New Mexico, and Washington prohibit discrimination by public employers, while Hawaii, New York, Pennsylvania, and Wisconsin extend that prohibition to public and private employers. MARGARET COLGATE LOVE, NAT’L ASS’N CRIMINAL DEF. LAWYERS (NACDL) RESTORATION OF RIGHTS PROJECT, CONSIDERATION OF CRIMINAL RECORDS IN LICENSING AND EMPLOYMENT (2013), available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf. Additionally, thirty-two cities or counties have enacted “ban the box” or “move the box” initiatives whereby employers either remove arrest or conviction questions from applications, defer background checks until later in the hiring process, or only perform background checks for certain positions. NAT’L EMP’T LAW PROJECT (NELP), BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 24 (2012), available at http://nelp.3cdn.net/14047d447967924539_zcm6bz5bp.pdf. Only seven of those ordinances apply to private employers. *Id.* Of course, an equal or greater number of state and federal laws specifically exclude individuals with conviction records from working in positions ranging from port workers to insurance agents, and from receiving certain benefits like Medicare. 42 U.S.C. § 1320a-7(a), (b); 18 U.S.C. § 1033(e); 46 U.S.C. § 70105(c); *see also* 2012 GUIDANCE, *supra* note 2, at 20–24.

corresponding need for more intrusive oversight by the judiciary.”¹⁵⁵ The Court is unlikely to test record-based exclusions instituted by private employers—even as reformulated by EEOC “experts” in the Guidance—because of the political charge surrounding the issue and lingering underlying disparate impact questions post-*Ricci*.¹⁵⁶

D. *What the Guidance Does Not Say*

Despite including statistics and a heft of footnotes, critics lament that the Commission ignored information disfavoring their position¹⁵⁷

155. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 443–44, 453 (1985) (rejecting heightened equal protection scrutiny for disabled individuals in part because successful legislative efforts enacted on their behalf disproved “continuing antipathy or prejudice”).

156. See generally Hart, *supra* note 133, at 1959; see also *supra* note 53. Margaret Colgate Love posits, however, that the policy goal of mitigating collateral consequences of criminal conviction finds some new legal support in *Padilla v. Kentucky*, a recent Sixth Amendment case. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (finding defense counsel has a constitutional obligation to warn defendants when a guilty plea will result in deportation); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 756–59 (2011).

157. Connor & White, *supra* note 91, at 999–1001; Letter from Todd Gaziano, Gail Heriot & Peter Kirsanaow, Comm’rs, U.S. Comm’n on Civil Rights, to EEOC (Aug. 10, 2011) [hereinafter UCCR Letter], <http://cdia.files.cms-plus.com/PDFs/US%20Commission%20on%20Civil%20Right-0001.pdf>. Economists Harry Holzer and Steven Raphael and public policy professor Michael Stoll published two scholarly papers challenging the EEOC’s position that strictly regulating the use of arrest and conviction information in hiring decisions will lead to increased employment of minority candidates. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006); Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 2009 U. CHI. LEGAL F. 381 (2009). Both studies suggest employers tend to overestimate the likelihood that African-American applicants have prior felony convictions, and thus systematic background checks may actually increase the likelihood that a minority candidate is hired because employers are able to fill their information gaps. Holzer, Raphael & Stoll, *supra*, at 452, 465 (observing that during the hiring process “[e]mployers who check [backgrounds] will be more likely to eliminate black applicants on the basis of revealed information, while employers who do not [check backgrounds] may [nevertheless] eliminate black applicants on the basis of perceived criminality,” and ultimately finding that employers who do check applicants’ backgrounds are 8.4 to 10.7% more likely to have hired an African-American into the most recently filled position); Stoll, *supra*, at 403–05 (finding, for employers that check applicants’ backgrounds, approximately 12% of their most recently hired workers were black males, “while the comparable figure for those employers who do not check is 3 percent”). Despite the fact that three members of the United States Commission on Civil Rights in their personal capacities brought the Holzer, Raphael, and Stoll data to the EEOC’s attention in a comment letter shortly after the EEOC’s initial July 26, 2011 hearing on the subject, the Guidance summarily discounts the data in a footnote. See 2012 GUIDANCE, *supra* note 2, at 7 n.57; UCCR Letter, *supra*. Reflecting the tension among even like-tasked executive branch agencies, the full Commission on Civil Rights has since initiated an investigation to determine whether the new Guidance policy encourages or discourages former offender re-entry into the job market, and most recently held public hearings in December 2012. Press Release, U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Announces Briefing on the Impact of

and punted on the important details: How far back can criminal records be checked?¹⁵⁸ Must experts craft the “targeted screens”?¹⁵⁹ Must employers develop an independent “targeted screen” for every available position?¹⁶⁰ How and by whom are independent assessments of “conduct or facts underlying an offense” to be carried out to ensure compliance?¹⁶¹ What corresponding privacy issues may be implicated? If a policy is not sufficiently “targeted,” but the employer-defendant engages in IA, is the company still liable?¹⁶² Do repeat offenses—even if mere arrests—dictate greater deference to employers? Because the Commission will presume that employers use the information obtained from their applicants and others in making employment decisions,¹⁶³ what paper trail must an employer build to disprove the assertion?

Criminal Background Checks and the EEOC’s Conviction Records Policy on the Employment of Black and Hispanic Workers (Dec. 3, 2012), *available at* http://www.usccr.gov/press/2012/PR_11-29_CriminalBackgroundChecks.pdf.

158. Under federal law, consumer reporting agencies cannot report an arrest that is over seven years old, while convictions may be reported indefinitely. 15 U.S.C. § 1681c(a)(2), (a)(5). Many experts, however, argue that the growing body of desistance and recidivism research should be figured into the calculus. One study reported that individuals who remain crime-free for ten years after conviction are no more likely to commit another offense than a person with no record. *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 331–32, 338–39 (2009). *But see infra* note 187. Another found that “by the time a person who was arrested at age 18 reaches age 24 without committing any more crimes”—only six years—he is statistically no more likely than someone with no prior record to [recidivate].” NAT’L EMP’T LAW PROJECT (NELP), *EMPLOYMENT SCREENING FOR CRIMINAL RECORDS: ATTORNEY GENERAL’S RECOMMENDATIONS TO CONGRESS 8* (2005), *available at* <http://www.justice.gov/olp/pdf/agcommentsnelp.pdf>.

159. Kevin P. McGowan, *Employers Must Justify Use of Criminal Checks Under EEOC Guidance, Speakers Say*, *HUM. RESOURCES REP.*, June 18, 2012, *available at* Bloomberg 30 HRR 666. Consider § 2000e-2(h), which generally exempts the use of “professionally developed” tests from the category of unlawful employment practices. 42 U.S.C. § 2000e-2(h). The *Griggs* court, however, noted that this safe harbor applies only to *tests*, not substantive qualifications like a diploma, and thus presumably not to record-based exclusions either—even if experts develop such policies. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–36 (1971).

160. EEOC Commissioner Victoria Lipnic, speaking at the National Conference on Equal Employment Opportunity Law almost one year after the Commission issued its revised Guidance, suggested the answer to this question is “yes”: the first step of an employer’s protocol is to create a “matrix” of available jobs and the types of criminal offenses that would preclude hiring of any given applicant. Kevin P. McGowan, *Lawyers, EEOC Official Discuss Guidance on Potential Bias in Criminal History Checks*, *DAILY LAB. REP.*, Apr. 5, 2013, *available at* Bloomberg 66 DLR B-3.

161. *See supra* text accompanying note 89.

162. McGowan, *supra* note 159.

163. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal 1970), *aff’d and vacated in part on other grounds*, 472 F.2d 631 (9th Cir. 1972); 2012 GUIDANCE, *supra* note 2, at 9 n.64.

As the aforementioned questions demonstrate, employers' discomfort with the Guidance's demand that they expend resources or tolerate significant inconvenience in order to accommodate employees' past misconduct, poor judgment, or any other formulation of character relating to legal mishaps is understandable.¹⁶⁴ Moreover, people with criminal records typically have a limited education and few job skills,¹⁶⁵ and thus the burden of the Guidance is likely to be unequally distributed across certain industries—particularly large-scale employers with high turnover.¹⁶⁶ Of even deeper concern is that application of disparate impact in protest against practices that it can never be used effectively to control may exact a high toll in corporate cooperation: will employers simply find another way to investigate an applicant's background to elude the Guidance's policies?¹⁶⁷ Aside from the details of a defense, will employers merely roll the dice, knowing that the likelihood of victory on summary judgment in federal court

164. Hoffman, *supra* note 150, at 1542.

165. JOHN SCHMITT & KRIS WARNER, CTR. ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 5–6 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>; Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Employment Barriers Facing Ex-Offenders* 4–5 (Urban Institute Reentry Roundtable Discussion Paper, 2003), available at http://www.urban.org/UploadedPDF/410855_holzer.pdf.

166. Cary, *supra* note 88, at 517–18; Hoffman, *supra* note 150, at 1542–43.

167. Aside from the criminal enforcement issues described in the text *supra* accompanying notes 3–5, numerous studies reflect another systemic problem: accurate reporting at both the state and federal levels. A significant number of criminal record databases are incomplete, recording final dispositions in only 50% of arrests. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17 (2006), available at http://www.justice.gov/olp/ag_bgchecks_report.pdf. Other studies document inaccuracies when criminal records lack “unique” information or because of “misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities.” INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 7, 22 (1999), available at http://www.search.org/files/pdf/III_Name_Check.pdf (finding approximately 5.5% of 82,601 applicants in sample were inaccurately identified by a “name check” to have records). Even if public access to criminal records has been restricted by a court order to seal or expunge, this does not guarantee that private companies or news corporations also will purge the information from their systems or media archives. SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 83 (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>; see also Douglas Belkin, *More Job Seekers Scramble to Erase Their Criminal Past*, WALL ST. J., Nov. 11, 2009, available at <http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin>.

is high and the probable loss of significant consumer goodwill low?¹⁶⁸

III. MOVING FORWARD: CAN THE ENFORCEMENT GUIDANCE WITHSTAND THE HEAT?

None of the proposed reforms seeking to modify the balance between employer prerogatives and the goals of antidiscrimination law, in the context of former offenders, address the issue of criminal records *within* the current disparate impact framework—where the EEOC has placed all its eggs.¹⁶⁹ Classifying individuals with criminal records as a suspect class under the Fourteenth Amendment,¹⁷⁰ expanding “ban the box” policies,¹⁷¹ reforming the FCRA,¹⁷² shifting to the mixed-motive model of employment discrimination,¹⁷³ using integrity testing in place of background checks,¹⁷⁴ anonymous

168. *See supra* note 53; *see also* Cary, *supra* note 88, at 517–22 (recommending, on balance, that employers should ignore the EEOC guidelines and comply with state criminal background check provisions given the low probability that an employer will face legal action by the EEOC and the high potential cost of ignoring an applicable state law, which may result in more predictable tort liability).

169. *See supra* note 17 and accompanying text.

170. *See generally* Aukerman, *supra* note 21.

171. NAT'L LEAGUE OF CITIES INST. FOR YOUTH, EDUC. & FAMILIES & NAT'L EMP'T LAW PROJECT (NELP), CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS 4–5 (2010) [hereinafter CITIES PAVE THE WAY], available at http://nelp.3cdn.net/7fcad6a8d708618e51_tcm6i6f3q.pdf. Of course, such policies still require a criminal background check for positions where it is “necessary to ensure safety and security at the workplace,” but instead delay the practice until an applicant has been selected for an interview or once a conditional offer is made, much like the current policies under the ADA over which the EEOC exercises considerable policy-shaping authority. *Id.* at 4; *see supra* note 115.

172. 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, 250–53 (2012).

173. Harwin, *supra* note 41, at 16–22. Title VII's mixed-motive framework finds discrimination whenever an employer considers any impermissible factor when making an employment decision, even if he would have made the same decision had he not considered that factor. 42 U.S.C. § 2000e-2(m) (2006).

174. Roberto Concepción, Jr., *Pre-Employment Credit Checks: Effectuating Disparate Impact on Racial Minorities Under the Guise of Job-Relatedness and Business Necessity*, 12 SCHOLAR 523, 546–48 (2010); Michael C. Sturman & David Sherwyn, *The Utility of Integrity Testing for Controlling Workers' Compensation Costs*, 50 CORNELL HOSPITALITY Q. 432, 442, 444–45 (2009) (demonstrating through prior research and current testing of 29,043 applicants at hotel company that integrity tests (1) can predict outcomes of importance to organizations, (2) elicit responses from applicants that screen potentially high-risk employees, (3) do not create disparate impact, and (4) produce returns greater than the cost of test administration).

hiring,¹⁷⁵ voluntary affirmative action programs,¹⁷⁶ and bolstering financial incentives for private employers to create jobs for people with criminal records¹⁷⁷ all rely too heavily on Congress or the courts. In light of relative congressional silence on the plight of former offenders, the solution must be to develop an analytical framework that promotes harmonization of the judicial and agency approaches now inapposite—not only the divergent standards for validation but also the purposes of the disparate impact theory—and incorporates the logic of the Third Circuit in *El*, the highest court to speak directly on the issue in at least a decade.¹⁷⁸ In any case, the EEOC must take the lead: make the Guidance binding, or go back to the drawing board, providing more detail *where it matters* and leaving less room for interpretation to foster predictability.

A. *Putting Out Fires*

1. *Validation Revisited*

Though the result in *El* may seem harsh, one of the positive aspects of the decision was its focus on practicalities.¹⁷⁹ The court recognized that application of test score precedent to former offenders challenging record-based exclusions is awkward because “successful performance of the job” or capability in the lay sense is not the primary issue.¹⁸⁰ The court also made the important distinction that Title VII does not measure care or perfection in the *formulation* of hiring policies, but rather “requires that an employer be able to show that its policy is consistent with business necessity *when challenged*.”¹⁸¹ To reconcile the growing disconnect at these

175. See generally David Hausman, Note, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012).

176. Christine Neylon O’Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 1027–28 (2007).

177. CITIES PAVE THE WAY, *supra* note 171, at 8 (describing supplemental tax credits that build on the federal WOTC and bonding programs that protect employers against certain liabilities).

178. See discussion *supra* Parts I.B.2 & II.A.

179. See *supra* text accompanying notes 61–63.

180. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 243 (3d Cir. 2007).

181. *Id.* at 248 (emphasis added).

distinct stages between practical evidence and business planning on the one hand and abstract, statistics-driven Guidance policies on the other, the content of the business necessity defense should be tied directly to the degree of impact the plaintiff proves.¹⁸² Rather than apply an undifferentiating mandate to engage in IA, for example, the context of application should matter.¹⁸³ Because an employer defends on business necessity only *after* the plaintiff makes a prima facie showing, it makes sense that the defense should be defined, at least at the first shift of the burden of proof, by reference to the plaintiff's case.¹⁸⁴

Though this relative standard does not establish a minimum threshold of business necessity or a bright line—something no doubt for which the business community still yearns—it has the advantage of minimizing judicial reexamination of hiring policies while continuing to account for the risk of hidden discrimination, a major concern of Congress and the Court in the *Griggs* era.¹⁸⁵ Professor George Rutherglen points out that after all, “[t]ests, qualifications, and selection procedures with little adverse impact are likely neither to serve as pretexts for discrimination nor to deny equality of opportunity. Employment practices with great adverse impact are likely to do both.”¹⁸⁶ The latter is where the EEOC should intensify its focus. Using a sliding scale tied to litigation realities, overbroad, merely general, unsophisticated, or bare common sense assertions still will not likely be enough for an employer to prevail in defense against even mild adverse impact, but perhaps requiring that employers create narrowly tailored position-specific policies on the basis of research of indeterminate reliability will not be necessary either.¹⁸⁷ Despite modern advances in technology and heightened

182. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1320.

183. *Id.*

184. *Id.* at 1320, 1323.

185. *Id.* at 1303–09, 1320–21.

186. *Id.* at 1324.

187. In *El*, for example, Dr. Alfred Blumstein, an authority on recidivism, all but conceded that the criminology discipline is incapable of distinguishing accurately between categories of offenders. *El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 246–47 (3d Cir. 2007). An individual's propensity to commit a future violent act generally decreases as that individual's crime-free duration increases, but “making . . . predictions of comparable low-probability events is extremely difficult, and . . .

interest in criminal justice reform, studies linking prior criminal behavior to future work-related aptitudes are not abundant, if existent at all.¹⁸⁸ Therefore, rigidly adhering to the Uniform Guidelines' approach—apt for addressing *tests* that produce raw scores and quantifiable data—is not fitting for this novel form of discrimination attuned to risk rather than ability.¹⁸⁹

2. Clarifying the Goal

*“Disputes over discrimination are the flip side of disputes over equality: discrimination identifies what is prohibited; equality is what should be achieved.”*¹⁹⁰

When the Court decided *Griggs* in 1971, it likely did not foresee that Title VII's remedial and prospective equality goals would ever come into conflict.¹⁹¹ The leading gloss on *Griggs* informs that the most compelling goal of disparate impact theory is to prevent pretextual discrimination by *institutional* defendants.¹⁹² By contrast, the EEOC's goal seems clear—achieve economic equality for former offenders, and to a lesser degree, require that employers make decisions on merit alone.¹⁹³ Accordingly, the implementation of the

[criminology] provides *no good basis* for [doing so].” *Id.* at 246 (emphasis added).

188. 2012 GUIDANCE, *supra* note 2, at 15.

189. For a brief discussion of the Tower Amendment's express authorization of an employer's use of professionally developed ability tests, see discussion *supra* note 159 and 110 Cong. Rec. 13492–503 (1964). The better way to address record-based exclusions and risk is perhaps through focusing on practical significance, which finds some support in § 4(D) of the Uniform Guidelines. 29 C.F.R. § 1607.4 (2013) (recognizing smaller or greater differences in selection rate are not determinative, but rather depend on an employer's actions or reputation, small sample size, atypical recruiting programs, and duration of proper recordkeeping).

190. RUTHERGLEN, *supra* note 15, at 14.

191. See discussion *supra* Part II.A.

192. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1309–11; David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 1014 (1989). Rutherglen argues that “[i]n hindsight, *Griggs* appears to be a case of obvious pretextual discrimination, which could equally well have been . . . [decided on the basis] of disparate treatment.” Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1331; see *supra* text accompanying note 110. The *Griggs* Court merely devised a novel way to avoid wading through the intent of the institutional agents—whose intent may conflict, whose authority may overlap, and whose actions may deviate from official policy. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1309–10.

193. Though decisions based solely on job *performance* may achieve the equality sought by the EEOC, relying on merit alone would be a “grossly simplified . . . and [an] inaccurate description of

Uniform Guidelines and development of successive enforcement guidances have rendered employment practices increasingly difficult to justify and the defendant's burden correspondingly difficult to carry at the agency level.¹⁹⁴ Unfortunately, the EEOC and the federal courts are hopelessly star-crossed, each with distinct responsibilities to carry out the promise of Title VII.¹⁹⁵

Further clarifying the burden of justification for the business necessity defense in light of these competing goals would have advantages beyond merely simplifying an employer's case. As it stands under the Guidance, requiring a complete record of multi-step IA and expertly crafted "targeted screens" formulated on the basis of sociological research only "exaggerat[es] the . . . tendency of the adversary system to generate ever more sophisticated forms of evidence."¹⁹⁶ As Part II.A suggests, these stringent proof requirements stand to serve the independent purpose of eliminating systematic disadvantages in addition to merely enforcing what is required by law, a view consistent with the EEOC's vocal wish to correct social injustices facing former offenders through the vehicle of employment.¹⁹⁷ However, the proof race likewise affects *plaintiffs*.¹⁹⁸ First, weak evidence of disparate impact—like simplistic

employment discrimination law" and of the Guidance's policies also. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 159 (2007). Because Title VII does not protect former offender status, the Guidance necessitates that an applicant challenging a criminal record exclusion be part of a protected racial or ethnic class, inherently disproving any assertion of "colorblindness." 2012 GUIDANCE, *supra* note 2, at 6.

194. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1314; *see* discussion and accompanying notes *supra* Part I.C.2 and note 91.

195. *See generally* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 380–433 (2010); *see also supra* note 14. Adding to the tension is the fact that disparate impact theory was a creation of federal common law, and individual Justices themselves have played active roles in shaping antidiscrimination law generally. It was during Justice Clarence Thomas's eight-year chairmanship of the EEOC that the Commission first issued guidance addressing conviction records. 2011 Meeting Transcript, *supra* note 78, at 3. Prior to joining the Court, Justice Ginsburg litigated several landmark sex discrimination cases that led to the development and application of intermediate scrutiny to legal classifications based on sex. *See, e.g.,* Weinberger v. Weisenfeld, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

196. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1330.

197. 2012 Meeting Transcript, *supra* note 79, at 5. After all, unemployment is not supposed to be part of the punishment for criminal conduct. Aukerman, *supra* note 21, at 22.

198. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1329–30. If defendants had some

use of national arrest rates—leads the court to impose a weak requirement of business justification.¹⁹⁹ Second, when employers face a significantly lower bar of justification, the agency risks a second significant moral loss: apathetic business and legal communities—“It’s *just* the EEOC.” To avoid these outcomes and to better serve its ends, the EEOC should subordinate its goal of equality to a significant, but manageable, view of business justification as gleaned from the courts.²⁰⁰

A recent example illustrates the frailties of the EEOC’s approach. The agency announced in January 2012 that it reached a \$3.13 million dollar conciliation settlement with PepsiCo for that company’s alleged use of an infirm criminal background check policy.²⁰¹ Though not a menial sum, PepsiCo earned over \$34.9 billion dollars in gross profit in 2011.²⁰² Though the settlement “sent a message” relative to the EEOC’s enforcement focus in this area, it is difficult to classify it as a meaningful victory when disbursed amongst at least 300 applicants and at best only pinching PepsiCo’s

realistic prospect of justifying their business practices, there would be no need to force plaintiffs to prove something tantamount to intentional discrimination through increasingly complex statistical evidence. *Id.*

199. See *Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 963 (8th Cir. 1985) (finding railroad met its burden by showing only “the rules examination is critical to . . . safe operation[s]” where the evidence of adverse impact was “scant”); *Merwine v. Bd. of Trs. for State Insts. of Higher Learning*, 754 F.2d 631, 634, 639 (5th Cir. 1985) (concluding that even if plaintiff’s statistical evidence, pulled from a narrow applicant pool for the professional librarian position at Mississippi State University, made out a prima facie case, the degree requirement was justified); Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1321.

200. The EEOC’s core mission is to “stop and remedy unlawful employment discrimination,” while “justice and equality in the workplace” is the long term “vision.” STRATEGIC PLAN, *supra* note 132, at 3. Of course, these two ideals are inextricably related because eliminating discrimination is one way of achieving greater representation of disadvantaged groups in the work force, but the Guidance’s standard of justification and the tone of recent Commission meetings indicate the latter goal seems to lead the former. See *supra* note 125.

201. Press Release, U.S. EEOC, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012) [hereinafter Pepsi Press Release], available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>. The EEOC and PepsiCo mutually agreed to publicize the settlement (normally confidential). Press Release, Nat’l Reentry Res. Ctr., In Settlement, EEOC Clarifies Law on Employer’s Use of Arrest and Conviction Records in Hiring Process (Jan. 31, 2012) (on file with the Georgia State University Law Review). More important than the dollar amount, PepsiCo must provide the EEOC with regular reports on its hiring practices and offer training to its hiring personnel and managers under the settlement. Pepsi Press Release, *supra*.

202. PepsiCo, Inc., Annual Report (Form 10-K) 121 (Feb. 27, 2012).

purse to the tune of 0.0005% of its net income.²⁰³ This result hardly seems to evince the desired deterrent effect of the strategic plan and belies the EEOC's reach in attaining widespread equality through the conciliation process.²⁰⁴ Smoking out discrimination by volume—getting more former offenders in the door and at the conciliation table because the initial bar is sufficiently low—has value in encouraging a politically powerless population to vindicate its rights and participate in the legal process, but it is also patently inefficient.²⁰⁵

In the absence of action to make the Guidance binding law, the EEOC needs a victory in federal court to positively impact its vision.²⁰⁶ As it stands now, utilizing the Guidance's stringent, broad, and judicially-insulated requirements to garner arguably small victories at the agency level will not achieve equal opportunity on the scale contemplated or needed to serve the exploding reentering offender population.²⁰⁷ The EEOC's goal of racial balance—more precisely former offender equality—need not be entirely disavowed, but it must be qualified to reflect that the *first* issue of proving impact is crucial. The further the agency moves away from

203. PepsiCo earned \$6.443 billion in net income in 2011 after the payment of costs, taxes, and interest expense. *Id.* The \$3.13 million settlement thus represents 0.000486% of that amount.

204. STRATEGIC PLAN, *supra* note 132, at 15 (“Strategy I.B.1: Ensure that remedies end discriminatory practices and deter future discrimination . . .”).

205. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 12–15, 52–53 (1996) (using empirical analysis to compare the agency's work to parallel enforcement by private attorneys). The EEOC has not published statistics reflecting Title VII charge receipts specifically alleging disparate impact on the basis of criminal record exclusions, but the volume of claims the agency handles is “substantial and increasing.” TITLE VII STATS, *supra* note 130; Selmi, *supra*, at 12. Strikingly few claims, however, are settled favorably for plaintiffs, and “the vast majority of claims are effectively dismissed.” Selmi, *supra*, at 1 n.3, 25.

206. Extensive examination of legislative history reflects that because Congress chose to rely upon judicial enforcement if administrative conciliation failed, it left application and interpretation of Title VII—including the precise definition of business necessity—largely to the federal courts. Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1307; Spiropoulos, *supra* note 100, at 1523; see also *supra* note 133 and accompanying text. For detailed accounts of the legislative history of the Civil Rights Act of 1964, the EEO Act of 1972, and the Civil Rights Act of 1991, respectively, see George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 690–96, 713–20 (1980) and Spiropoulos, *supra* note 100, at 1504–21.

207. PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 5 (2011). In 2010 alone, 708,677 individuals were released from state and federal prison. *Id.* Despite the magnitude of this issue, Professor Andrew C. Spiropoulos argues that attacking isolated practices with mild impact may cumulatively have a great effect. Spiropoulos, *supra* note 100, at 1556.

antidiscrimination law's original purpose to prevent intentional adverse employment actions, including the subtlest forms of such intent, the more it risks skepticism and running into chance.²⁰⁸ First strengthening its plaintiffs' cases, and tempering the prescription of IAs, promises a more effective long-term litigation strategy.²⁰⁹

B. When the Smoke Clears: The Opportunity for Advocacy

As a nation and an economy, we value consistency and predictability in the law, especially in the area of employment discrimination—a “very personal, sensitive, and socially important area.”²¹⁰ If, as suggested in Part III.A, the EEOC elects not to reevaluate and modify the balance of burdens to reflect the reality that it is not the only player in the enforcement game, any further efforts to “firmly suggest” accommodation through IA in the hiring process must go through proper rulemaking procedures, or in the alternative, legislative channels.²¹¹ Appropriate laws can and should correct this failure and that of the market, encouraging rehabilitation and reintegration through employment, while at the same time providing sensible limits to promote business development and assuage safety concerns.²¹²

208. See Rutherglen, *Disparate Impact Theory*, *supra* note 60, at 1323–24 (explaining that the Supreme Court requires plaintiffs to establish *substantial* disparate impact to approximate intent, not just any “slight” difference in treatment, because such a difference “may still be so small that it is not practically significant from an economic, managerial, or legal point of view”).

209. See *supra* note 206. Such an approach will hopefully garner greater respect from the federal courts and more willingness on the part of employers to respond with socially conscious hiring policies when their flexibility in carrying out everyday personnel matters is not meticulously constrained by an onerous burden of detached statistics.

210. Hoffman, *supra* note 150, at 1545.

211. 2012 Meeting Transcript, *supra* note 79, at 7 (noting that ranking congressional members expressed concern about the haste with which the Guidance was amended and specifically instructed that the Commission circulate any proposed changes to the public for six months before commencing a vote, presumably in conformity with notice and comment). As mentioned previously in note 123, more controversial is the fact that Title VII has an explicit prohibition against preferential treatment, or affirmative action. 42 U.S.C. § 2000e-2(j) (2006). Whether IA constitutes preferential treatment or whether the Guidance as a whole intends such a result for former offenders is beyond the scope of this Note.

212. See O'Brien & Darrow, *supra* note 176, at 1025–27 (analyzing the advantages of state-enacted protections and discussing new federal legislation, recommended and already proposed).

Congressional silence, however, is not surprising. It takes political clout to affect change. Former offenders lack the necessary political support, organization, or lobbying strength, especially considering they comprise a fairly non-homogenous and “invisible” group.²¹³ What’s more, congressional paralysis on any number of arguably more important issues—like deficit reduction or the instability of the Social Security system, among others—does not bode well for legislative efforts to protect and uplift this population.²¹⁴ Perhaps then the rationale of shifting the costs of procedural injustice to employers who have the ability to lobby makes sense from the standpoint of tort law—private employers represent the “cheapest cost avoider” or the party most able to bear the burden of the Guidance’s policies.²¹⁵ Applying this theory, however, fails as a means for change. With the odds concerted in employers’ favor, it is more likely that large companies—or at least their lawyers—will chalk up the risk of agency action or litigation to a cost of doing business rather than seek the benefits of clarification that a run on Capitol Hill could bring to all parties involved, including the EEOC.²¹⁶

213. Aukerman, *supra* note 21, at 64–65 (“[I]t is fairly simple to distinguish between those people who have never been convicted and those who have However, . . . [t]he contents and consequences of those records vary tremendously. . . . [T]he primary characteristics that make people with criminal records like a suspect class[—]the history of discrimination against and the political weakness of this group[—]do not apply with equal force to all [class] members.”).

214. For example, see the discussion of the Second Chance Act’s stalled reauthorization, *supra* note 80.

215. Strauss, *supra* note 192, at 1013 (“*Griggs* identifies those cases in which making a mistake will impose the least cost on the employer. In view of the danger of discrimination that arises whenever an employer uses a criterion with a disproportionate adverse effect on a protected group, it is reasonable to require the employer . . . to take the relatively inexpensive step of abandoning it.”).

216. Even if a plaintiff wins on the merits in a disparate impact case, no punitive or compensatory damages will be assessed against an employer. 42 U.S.C. § 1981a(a)(1); *see also* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004).

CONCLUSION

*“[S]ociety’s attitude toward [policies uplifting] those with criminal records is comparable to its attitude toward power plants, power lines, highways, and reservoirs: it is generally agreed that these structures are necessary and beneficial to modern society, but no one wants them to be located on or near their property.”*²¹⁷

Legal precedent²¹⁸ and common sense dictate that a criminal record can be a blunt, misleading tool to determine whether an applicant poses a “risk” of incompetence, lack of diligence, or violence on the job. However, the reality is that “employers do not [and will not] go out of their way to solicit nuanced information about applicants for entry-level [positions]” as the Guidance urges.²¹⁹ More impractical yet is the EEOC’s claim that the Guidance represents no change in policy even though it significantly increases employer burdens while requiring only minimal, if any, proof of disparate impact.²²⁰ To bring about meaningful change for those African-American and Hispanic men impacted by increasingly common record-based exclusions, the EEOC has two choices moving forward: reevaluate its core mission and improve the Guidance’s workability by incorporating the prevailing standards in the federal courts, or in the absence of temperance, fortify its current position

217. See O’Brien & Darrow, *supra* note 176, at 1028.

218. See, e.g., discussion *supra* accompanying notes 40 (*Litton*), 45 (*Green v. MoPac*), and 140–141 (*Schware*).

219. Pager, *supra* note 6, at 954. An employer’s return on investment of time and money to do so is likely to be, or perceived to be, in the red. *Id.*; see *supra* note 83.

220. See, e.g., 2012 Meeting Transcript, *supra* note 79, at 6 (statement of Commissioner Ishimaru) (“[T]hroughout the 25 years that this [policy] has been here at this Agency, our analysis . . . has been consistent and today we refine, and update, and develop it. . . . The document . . . is not radical, it’s not new, but it is necessary.”). By contrast, defending her lone dissenting vote, Commissioner Barker asserted:

The proposed revision . . . represents a major shift in the advice we have given the American public for the last 22 years. Yet, we are about to approve this dramatic shift in our interpretation of the . . . obligations of America’s businesses under Title VII without ever circulating it to the American public.

Id. at 7; see also *supra* note 81 detailing plaintiffs’ burden of proving adverse impact in agency actions.

through notice and comment.²²¹ Unfortunately, these are not easy or politically popular solutions.

Abolishing discrimination based on race or ethnicity—or even the status of having the mark of a criminal record—is an important societal goal, but an equally legitimate goal is respecting employers' autonomy.²²² Our nation deeply values free market principles and entrepreneurial decision-making appropriate and necessary to generate profits, jobs, and other less tangible contributions to the economy, especially in the wake of one of the most devastating recessions in decades.²²³ Achieving the “right” cost-benefit balance for all stakeholders is a thorny endeavor for an executive branch agency. While the Guidance and the Individualized Assessment method are certainly optimistic institutional and political responses to a vexing set of social and economic problems, they likely represent only the beginning of new uncertainty in employment discrimination law, and initiatives at other forms of compromise, but, ironically, *not* litigation.

221. It is important to understand that the Guidance's rigid necessity standard is unworkable not because it is unfair, impractical to require scientific validation when there is mild disparate impact, or because it is perceived as expensive. Spiropoulos, *supra* note 100, at 1543, 1554–56. Aside from the procedural fairness considerations under the APA, the Guidance fails because it requires scientific validation at the policy formulation stage when such validation, even today, is generally impossible. *Id.* at 1555; *see also supra* note 187 and text accompanying note 85.

222. Corbett, *supra* note 193, at 166 (“Perhaps the starkest example of . . . respect for employer prerogatives is the much-maligned employment-at-will ‘doctrine,’ which provides that employers can terminate employees for a good reason, a bad reason, or no reason at all.”); *see also* Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884) (“All may dismiss their employes [*sic*] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.”), *overruled in part by* Hutton v. Waters, 179 S.W. 134 (Tenn. 1915); *see generally* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000). Is *hiring* merely the flip side of the termination coin?

223. Corbett, *supra* note 193, at 166. *See, e.g.*, BUREAU OF LABOR STATISTICS, SPOTLIGHT ON STATISTICS: THE RECESSION OF 2007–2009 7 (2012), available at http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf; Richard Pérez-Peña, *Job Losses Persist for the Less-Educated*, N.Y. TIMES (Aug. 15, 2012), <http://www.nytimes.com/2012/08/16/us/job-losses-persist-for-the-less-educated.html>.

