

# DEFYING “COMMON SENSE?”: THE LEGITIMACY OF APPLYING TITLE VII TO EMPLOYER CRIMINAL RECORDS POLICIES

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Many ex-offenders<sup>1</sup> face steep odds when searching for employment.<sup>2</sup> Policies banning or restricting employment opportunities for those with criminal records are widespread in both the public and private sectors.<sup>3</sup> Furthermore, the number of employers checking criminal backgrounds is growing.<sup>4</sup> Given the disproportionate number of African American and Hispanic men with criminal records,<sup>5</sup> such policies naturally lead to a disproportionate number of these men facing severely limited employment prospects.

At first glance, this situation presents a classic case of “not my problem.” Ex-offenders are unlikely to garner much sympathy from either politicians or the public because, unlike people who are discriminated against due to race or

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<sup>1</sup> In this article, I use the term ex-offenders to refer to people with any kind of criminal record, from convicted felons to those who have an arrest record but no convictions. It should be noted that these groups often face separate challenges; however, a detailed breakdown of the differences is beyond the scope of this article, and, in any event, some employers do not differentiate between the groups.

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

<sup>3</sup> Most states either ban or restrict public employment of convicted felons. Many states also restrict certain ex-offenders from obtaining a wide variety of occupational licenses, and a majority of states allow both public and private employers to consider arrest records. Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: *Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 536 (2006). Many private employers have expressed an unwillingness to hire employees with any sort of criminal record. Harry J. Holzer et al., *Will Employers Hire Ex-Offenders?: Employer Preferences, Background Checks, and Their Determinants* 6–7 (Inst. for Research on Poverty, Discussion Paper No. 1243-02, 2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf>.

<sup>4</sup> In 1996, 51 percent of employers conducted criminal background checks; by 2010, that percentage had risen to 92 percent. Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL'Y 231, 237 (2012).

<sup>5</sup> Approximately two-thirds of inmates in the United States are African-American or Latino. See Jocelyn Simonson, *Rethinking “Rational Discrimination” Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 284 (2006). One-third of African American men and one-sixth of Hispanic men are projected to be incarcerated during their lifetimes. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

sex, they "made their own mess." Some people may argue that a lack of employment opportunities for ex-offenders is a justifiable consequence of their criminal behavior.

While such views are understandable, they ignore the severe impact that ex-offender unemployment has on society. Studies show that unemployment is a chief contributing factor in recidivism.<sup>6</sup> Furthermore, the racial disparity in the ex-offender population means that this particular unemployment problem has a disparate and devastating impact on African American and Hispanic communities. And from a moral perspective, it seems fundamentally unjust to continue punishing people after they have "paid their debt to society."

The EEOC has long recognized these problems and has consistently held the view that employer criminal records policies may violate Title VII if they have a disparate impact on protected classes and are not "job related for the position in question and consistent with business necessity."<sup>7</sup> To that end, on April 25, 2012, the EEOC issued new enforcement guidelines for how employers may use criminal records in their hiring processes without violating Title VII.<sup>8</sup> The guidelines consolidated and updated previous guidelines and called for a lesser reliance on bright-line exclusionary policies in favor of more individualized assessment of applicants and employees.<sup>9</sup> Since that time, the EEOC has followed up, filing several lawsuits against employers for practices deemed to violate the guidelines.<sup>10</sup>

In spite of the fact that the new guidelines merely re-affirm past policies, they have elicited strong reaction, mostly negative, from both the public and the legal community alike.<sup>11</sup> Perhaps the strongest reaction came from a group of

<sup>6</sup> See Simonson, *supra* note 5. See also Archer & Williams, *supra* note 3, at 529–30.

<sup>7</sup> See, e.g., EEOC ENFORCEMENT GUIDANCE, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 8 (2012) [hereinafter EEOC GUIDELINES], available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm); *EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as Amended*, 42 U.S.C. § 2000e et seq. (1982): *Conviction Records*, U.S. EQUAL EMP. OPP. COMMISSION (Feb. 4, 1987), <http://www.eeoc.gov/policy/docs/convict1.html> ("[T]he Commission's underlying position [is] that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.").

<sup>8</sup> See generally EEOC GUIDELINES, *supra* note 7.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> On June 11, 2013, the EEOC filed suit against Dollar General Corporation and BMW, both alleging that company policies regarding criminal background checks caused a disparate impact against African-Americans. See Complaint at 1–2, *EEOC v. Dolgencorp LLC*, No. 1:13-cv-04307 (N.D. Ill. June 11, 2013); Complaint at 1, *EEOC v. BMW Mfg. Co.*, No. 7:13-cv-01583 (D.S.C. June 11, 2013).

<sup>11</sup> See, e.g., *EEOC v. Freeman*, No. 09cv2573, 2013 WL 4464553, \*18 (D. Md. Aug. 9, 2013) ("By bringing actions of this nature, the EEOC has placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers."). See also Complaint for Declaratory and Injunctive Relief at 1, 11, 15, 17, *Texas v. EEOC*, No. 5:13-cv-00255-C (N.D. Tex. Nov. 4, 2013) (alleging that the new guidelines interfere with state sovereignty); James Bovard, *Perform Criminal Background Checks at Your Peril*, WALL ST. J., Feb. 15, 2013, at A15, available at <http://online>

nine state attorneys general who, in a July 2013 letter to the EEOC (“Attorneys General Letter”), accused the agency of “gross federal overreach.”<sup>12</sup> The letter makes several arguments for why the EEOC’s new enforcement policy is misguided and also suggests in several places that the guidelines are a misuse of power. The underlying implication of the arguments is that protecting ex-offenders from discrimination is an illegitimate expansion of Title VII. Because the letter represents a collection of critiques likely to be leveled against the EEOC in future litigation and scholarship, it deserves a close examination. In this article, I address each of the attorneys general’s arguments in turn and show both why the arguments are flawed and why the EEOC’s enforcement policy is, in fact, consistent with Title VII. But first, I briefly review the new guidelines and the legal precedent on which the guidelines rely.

### I. THE EEOC GUIDELINES

The EEOC’s new guidelines are an off-shoot of its “E-RACE” (Eradicating Racism and Colorism from Employment) initiative.<sup>13</sup> One of the areas targeted by that initiative for stronger enforcement is “facially neutral employment criteria” that are “significantly disadvantaging applicants and employees on the basis of race and color.”<sup>14</sup> The EEOC identified the use of arrest and conviction records as one of these facially neutral employment criteria, and on April 25, 2012, issued new guidelines for employers on the use of such records.<sup>15</sup>

The new EEOC guidelines encourage employers who use criminal records in employment decisions to review the seriousness of the crime, to consider how long ago the crime occurred, and to consider how relevant the crime is to the specific job in question.<sup>16</sup> They also discourage bright-line criminal records policies and instead call for an “individualized assessment” of applicants and employees.<sup>17</sup> Factors to be taken into account include:

- The facts or circumstances surrounding the offense or conduct;

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.wsj.com/news/articles/SB10001424127887323701904578276491630786614 (“Most businesses perform criminal background checks on job applicants, but the EEOC guidance frowns on such checks and creates new legal tripwires that could spark federal lawsuits.”); Peter Kirsanow & Carissa Mulder, *The EEOC’s New Rule on Background Checks*, NAT’L REV. ONLINE (Jan. 27, 2013, 7:56 PM), <http://www.nationalreview.com/corner/338937/eeocs-new-rule-background-checks-peter-kirsanow> (“Despite the profound effect the guidance has on the nation’s employers, the EEOC hurriedly implemented the guidance without giving the public an adequate opportunity to comment on it.”). In November, the state of Texas filed a lawsuit against the EEOC in federal court over the guidelines, alleging that they infringe on state sovereignty. *But see* Editorial Board, *A Second Chance for Ex-Offenders*, N.Y. TIMES, June 20, 2013, at A26.

<sup>12</sup> Letter from Patrick Morrissey, W. Va. Attorney Gen., et al., to EEOC Commissioners 2 (July 24, 2013) [hereinafter *Attorneys General Letter*], available at [http://www.wvago.gov/pdf/2013-7-24,%20EEOC%20\(bw\).pdf](http://www.wvago.gov/pdf/2013-7-24,%20EEOC%20(bw).pdf).

<sup>13</sup> See *The E-RACE Initiative*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/initiatives/e-race/> (last visited Apr. 22, 2014).

<sup>14</sup> *Why Do We Need E-RACE?*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/initiatives/e-race/why\\_e-race.cfm](http://www.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm) (last visited Apr. 22, 2014).

<sup>15</sup> See generally EEOC GUIDELINES, *supra* note 7.

<sup>16</sup> *Id.* at 2, 11, 23.

<sup>17</sup> *Id.* at 18.

- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.<sup>18</sup>

## II. LEGAL THEORY AND PRECEDENT FOR THE GUIDELINES

Currently, there is no federal anti-discrimination law aimed specifically at protecting ex-offenders. Thus, hope for federal protection against such discrimination currently lies chiefly in Title VII.

Title VII encompasses two main theories of discrimination: disparate treatment and disparate impact.<sup>19</sup> Disparate treatment requires a showing that a plaintiff or plaintiff class is being intentionally treated unfavorably because of their race, color, sex, religion, or national origin.<sup>20</sup> Disparate impact, on the other hand, requires no showing of intent. Instead, such a claim arises when a facially neutral policy has a disparate impact on one of the protected classes.<sup>21</sup> Once a plaintiff has proven that the policy has a discriminatory effect, an employer can defend the policy by showing that it is “job related for the position in question and consistent with business necessity.”<sup>22</sup> The plaintiff may then rebut this defense if he or she is able to show that another, less discriminatory policy, which would equally fulfill the business necessity, is available to employers.<sup>23</sup>

While an ex-offender might be able to make out a disparate treatment claim if he or she could show that minority ex-offenders were being treated differently than non-minority ex-offenders, in practice this is extremely difficult.<sup>24</sup> Disparate impact holds more promise. As noted earlier, the EEOC contends that because of the disproportionate number of African American and Hispanic men with criminal records, facially neutral policies excluding ex-offenders from employment may have a disparate impact on these groups.

Precedent supports the EEOC’s reading of Title VII on this issue. The EEOC’s guidelines are based chiefly on the earliest appellate case addressing past convictions, *Green v. Missouri Pacific Railroad Company (MoPac)*.<sup>25</sup> In

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

<sup>19</sup> Civil Rights Act of 1991, 42 U.S.C. § 2000e (2012).

<sup>20</sup> *Id.* § 2000e-2(a)(1).

<sup>21</sup> *Id.* § 2000e-2(k)(1)(A)(i).

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

<sup>23</sup> *Id.* §§ 2000e-2(k)(1)(A)(ii), (C).

<sup>24</sup> See Harwin, *supra* note 2, at 17.

<sup>25</sup> *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). See also EEOC GUIDELINES, *supra* note 7, at 2, 11.

that case, the Eighth Circuit found that *MoPac*'s policy of denying employment to anyone who had been convicted of any crime other than a minor traffic offense had a disparate impact on minorities.<sup>26</sup> In finding for the plaintiff, the court concluded that,

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true of blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.<sup>27</sup>

Although the Supreme Court has never directly addressed this issue, the Eighth Circuit found support in *McDonnell Douglas Corp. v. Green*.<sup>28</sup> There, the defendant argued that it was not excluding the plaintiff because of his race but because of prior criminal activity directly related to the employer.<sup>29</sup> The court noted that the exclusion was not "through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee."<sup>30</sup> The Eighth Circuit interpreted those remarks to mean that such a sweeping qualification would violate Title VII if it had a disparate impact and was not closely related to the job in question.<sup>31</sup>

Other cases have since supported this reading of Title VII, even when they were decided in favor of the defendant. For example, in *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,<sup>32</sup> a bus driver who was responsible for transporting people with mental and physical disabilities was terminated due to employer concerns about "public safety" after his forty-seven-year-old homicide conviction was uncovered.<sup>33</sup>

Although the court in *El* decided in favor of the defendant, it did so not because it disagreed that the policy had a disparate impact on minorities, but because it found the policy tailored enough to prevent hiring only "those that . . . have the highest and most unpredictable rates of recidivism and thus present the greatest danger to its passengers."<sup>34</sup> While the court did not completely reject bright-line policies, it said that they were only appropriate when they "can distinguish between individual applicants that do and do not pose an acceptable level of risk" and that whether a given policy can do so is a question of fact.<sup>35</sup> The court relied on expert testimony about the types of convictions in

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<sup>26</sup> See *Green*, 523 F.2d at 1295.

<sup>27</sup> *Id.* at 1298.

<sup>28</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>29</sup> *Id.* at 806.

<sup>30</sup> *Id.*

<sup>31</sup> See *Green*, 523 F.2d at 1296.

<sup>32</sup> *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007).

<sup>33</sup> *Id.* at 236 (noting that at the time of *El*'s hiring, SEPTA had a policy barring employment for anyone convicted of driving under the influence, of a felony or misdemeanor, for a crime of moral turpitude, or of a violent crime, and that SEPTA also barred employment for other offenses if they had occurred within the seven years prior to employment).

<sup>34</sup> *Id.* at 243.

<sup>35</sup> *Id.* at 245.

question and seemed to criticize the plaintiff for not offering contradicting expert testimony.<sup>36</sup> While *El* may suggest evidentiary challenges for plaintiffs, it did not question the inherent legitimacy of applying disparate impact theory in such cases.

More recently, the Federal District Court for the Southern District of Ohio denied a school district’s motion to dismiss, holding that the district’s policy of terminating employees who were found to have certain criminal convictions, no matter how old the conviction or how related they were to the job in question, potentially violated Title VII because of its disparate impact.<sup>37</sup> In that case, the school district had imposed the restrictions in compliance with a new state law.<sup>38</sup> Two employees with convictions, one of which was serious, were fired.<sup>39</sup> The court rejected the school district’s business necessity defense, holding that Title VII trumped state law on the issue<sup>40</sup> and that the policy was too broad because it did not account for the length of time that had passed since the crimes, the nature of the crimes, or the employees’ good performance at the jobs in question.<sup>41</sup>

Against this backdrop, I will now turn to the Attorneys General Letter and show why the letter’s criticism of the EEOC and the application of Title VII disparate impact theory in criminal records cases is fundamentally flawed.

### III. THE ATTORNEYS GENERAL LETTER

On July 24, 2013, nine state attorneys general sent a letter to the EEOC criticizing the new guidelines. The letter made a number of arguments that can be broadly divided into two categories: arguments questioning the EEOC’s authority and the legitimacy of disparate impact theory, and arguments about the negative unintended consequences of the new guidelines.<sup>42</sup> Although the EEOC subsequently issued a public response to the letter, the response failed to address all of the attorneys general’s arguments.<sup>43</sup> The rest of this article takes on each of the arguments in turn and shows why they do not represent a coherent critique of the EEOC’s new guidelines but rather an attack on the agency itself and some of the very foundations of employment discrimination law generally.

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<sup>36</sup> *Id.* at 246–47.

<sup>37</sup> *Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013).

<sup>38</sup> *Id.* at 887.

<sup>39</sup> Gregory Waldon had been found guilty of felonious assault in 1977 and imprisoned for two years. Eartha Britton had been “convicted in 1983 of acting as a go-between in the purchase and sale of \$5.00 of marijuana.” *Id.* at 886 n.1.

<sup>40</sup> *Id.* at 890. However, Title VII does not trump other federal laws. EEOC GUIDELINES, *supra* note 7, at 2.

<sup>41</sup> *See Waldon*, 941 F. Supp. 2d at 889.

<sup>42</sup> *See generally* Attorneys General Letter, *supra* note 12.

<sup>43</sup> Response Letter from U.S. Equal Emp’t Opportunity Comm’n to State Attorneys Gen. on Use of Criminal Background Checks in Employment (Aug. 29, 2013), *available at* [http://www.eeoc.gov/eeoc/newsroom/wysk/criminal\\_background\\_checks.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/criminal_background_checks.cfm) [hereinafter EEOC Response Letter].

#### IV. ARGUMENTS QUESTIONING THE EEOC'S AUTHORITY AND THE LEGITIMACY OF DISPARATE IMPACT THEORY

##### A. *Criminal Records Policies Are Not Intended to Discriminate*

Arguably the easiest of the attorneys general's arguments to dispense with is their argument that criminal records policies do not have a discriminatory purpose.<sup>44</sup> In discussing the two recent lawsuits filed by the EEOC, the letter notes, "Importantly, neither lawsuit alleges overt racial discrimination or discriminatory intent on the part of the companies . . . . To the contrary, every individual who fails a criminal background check is equally refused employment."<sup>45</sup>

This argument seems to misunderstand the nature of disparate impact theory. As noted previously, disparate impact does not require a showing of intent. Rather, disparate impact provides an avenue for combatting discrimination when facially neutral policies have a discriminatory effect. While disparate impact did not originally appear in the Civil Rights Act of 1964, it was quickly established in the courts.<sup>46</sup> As time went on and the courts began to dismantle this theory of liability, Congress stepped in and codified it in the Civil Rights Act of 1991.<sup>47</sup>

Criminal records policies are, in fact, a quintessential example of a facially neutral policy that has a discriminatory effect. Although they are, on their face, applicable to all races, they operate to exclude disproportionately African American and Hispanic men from employment opportunities. While it is certainly possible that some employers use such policies as a hidden mechanism for discriminating against minorities, such a motivation is in no way required for a finding of disparate impact.

Given that this distinction is Employment Discrimination Law 101, the attorneys general presumably knew this when they drafted the letter. Thus, their critique is really an attack on disparate impact itself. The implication of their argument is that intent *should* be required, at least in the particular circumstance of criminal records policies. But, in that case, the appropriate venue for their complaint is Congress, not the EEOC, since the latter is charged with implementing the law as it currently stands.

##### B. *Criminal Convictions are Often Job-related and Consistent with Business Necessity*

As discussed earlier, a finding of disparate impact does not automatically render a policy invalid. Instead, if the plaintiff can prove that a given policy has a discriminatory effect, the employer has the opportunity to show that the policy is "job-related for the position in question and consistent with business necessity . . . ."<sup>48</sup>

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<sup>44</sup> Attorneys General Letter, *supra* note 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672–73 (2009) (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

<sup>47</sup> Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 896 (1993).

<sup>48</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

In cases involving criminal records, some courts have treated this requirement rather lightly.<sup>49</sup> Thus, one of the chief purposes of the EEOC guidelines seems to be to strengthen this requirement and to make it more difficult to meet.<sup>50</sup> In its guidelines, the EEOC states that, to show business necessity, “the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”<sup>51</sup> The guidelines urge employers to make individualized assessments of each applicant, and state that bright-line screens are only appropriate when they are “narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.”<sup>52</sup>

The attorneys general take particular exception to this preference for individualized assessment over bright-line rules, stating, “It defies common sense to suggest that a bright-line criminal conviction screen will only rarely be ‘job related’ and ‘consistent with business necessity.’”<sup>53</sup> The letter then presents a number of reasons why an employer might want to exclude individuals with criminal histories, including concerns about safety, liability, and trustworthiness.<sup>54</sup>

However, it is unclear why these employer concerns could not be equally or better accomplished with individualized assessment rather than bright-line exclusionary policies. The letter provides only one example—positions in law enforcement—of jobs “for which the existence of any criminal history could logically and reasonably be an absolute disqualifier.”<sup>55</sup> But this example helps to show exactly why such bright-line policies are flawed. While law enforcement positions are one of the most obvious examples of a line of work in which a clean criminal history is “job-related” and “consistent with business necessity,” one can imagine hypothetical applicants who could be unfairly or unnecessarily excluded, such as someone who was wrongfully arrested.

In fact, a scenario in which a candidate was at least arguably unfairly excluded from a position with a police department occurred in *Clinkscale v. City of Philadelphia*.<sup>56</sup> In that case, the plaintiff was an African-American male who was employed by the FBI at the time he sought a position with the Phila-

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<sup>49</sup> See, e.g., *Tye v. City of Cincinnati*, 794 F. Supp. 824, 833 (S.D. Ohio 1992) (finding that “public safety” concerns were sufficient justification for not hiring firefighters with criminal records); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 752 (S.D. Fla. 1989) (“It is not required that Carolina Freight’s conviction policy be ‘essential’ or ‘indispensable’ to its business needs.”); *Strickland v. Cnty. of Monroe*, No. 00-CV-6595L, 2005 WL 1522802, at \*4 (W.D.N.Y. June 28, 2005) (holding that a twenty-five-year-old assault plea was “ample justification for refusing to hire a probation officer”); *Williams v. Scott*, No. 92 C 5747, 1992 WL 229849, at \*2 (N.D. Ill. Sept. 9, 1992) (“It really requires nothing more than the statement of [employer’s] policy to explain its business justification.”).

<sup>50</sup> It should be noted that courts are not bound by the EEOC guidelines. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–42 (1976).

<sup>51</sup> EEOC GUIDELINES, *supra* note 7, at 14.

<sup>52</sup> *Id.*

<sup>53</sup> Attorneys General Letter, *supra* note 12, at 3.

<sup>54</sup> *Id.*

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

<sup>56</sup> *Clinkscale v. City of Phila.*, No. Civ.A. 97-2165, 1998 WL 372138 (E.D. Pa. June 16, 1998).

delphia Police Department.<sup>57</sup> Several years earlier, he had been arrested twice, once for assaulting a neighbor, and another time for assaulting a police officer.<sup>58</sup> The charges regarding the neighbor were dismissed, and he was acquitted on the charges regarding the police officer.<sup>59</sup> The court agreed that the latter charge in particular was likely baseless.<sup>60</sup> The plaintiff had brought a civil rights suit against the City of Philadelphia over the matter, which was later settled, and the plaintiff's record was expunged.<sup>61</sup>

The plaintiff challenged the police department's bright-line policy of excluding all applicants to the police academy who had arrest records, arguing that it had a disparate impact on African-Americans.<sup>62</sup> The court, however, held that the policy was justified even if, as seemed likely, the plaintiff was innocent of the prior charges.<sup>63</sup> The court reasoned that "[e]ven an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness."<sup>64</sup>

The *Clinkscale* case shows precisely why more individualized consideration of applicants and employees is desirable. It seems patently unfair that an individual would be excluded for life from certain positions based on arrests that not only did not lead to convictions but that the court acknowledges were probably not legitimate in the first place. In fact, courts expressed a particular distaste for bright-line policies against those with arrest records but not convictions as early as 1972 in *Gregory v. Litton Systems*.<sup>65</sup> Given the widely documented disparity in the number of minority men who have been subjected to unlawful arrests,<sup>66</sup> the *Clinkscale* Court's dismissal of those who have been unjustly arrested as likely having a "poor attitude" seems particularly tone-deaf. Under the court's reasoning, someone like Henry Louis Gates, Jr., the esteemed Harvard scholar who was notoriously arrested as he attempted to enter his own home,<sup>67</sup> would automatically be barred from service.

However, even if one agrees that, in the case of law enforcement officers, a bright-line exclusionary policy would be appropriate, it is the exception that

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<sup>57</sup> *Id.* at \*1.

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*2.

<sup>64</sup> *Id.*

<sup>65</sup> *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that an employer's bright-line policy excluding those with arrest records violated Title VII because of its disparate impact on African American applicants).

<sup>66</sup> Indeed, Judge Fullam, the author of the *Clinkscale* opinion acknowledged as much, writing, "I will assume for present purposes that African Americans are indeed more likely than whites to be arrested; I am even willing to assume that a higher percentage of those arrests are unjustified." *Clinkscale*, 1998 WL 372138, at \*1.

<sup>67</sup> See Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 20, 2009, at A13, available at [http://www.nytimes.com/2009/07/21/us/21gates.html?\\_r=1&](http://www.nytimes.com/2009/07/21/us/21gates.html?_r=1&). Gates was arrested at his home after a neighbor reported a possible robbery when his front door jammed, and with assistance of his cab driver, he forced it open. Gates was reportedly uncooperative when police arrived, thus, perhaps, exhibiting the kind of "poor attitude" that the *Clinkscale* Court deems disqualifies from police service even those who are unjustly arrested. *Id.*

proves the rule. If there is one category of work for which a prior criminal history could make one unfit, that category is criminal justice enforcement. The obvious nexus between the lack of a criminal history and the enforcement of criminal law serves to illustrate how poor that fit is in other categories of jobs. Why, for example, should a DUI received when one was twenty-one years old translate into untrustworthiness for, say, a cashier position when one is twenty-seven?

Furthermore, the fact that the EEOC favors individualized assessments does not rule out bright-line exclusionary policies entirely.<sup>68</sup> While excluding someone from a cashier position for a six-year-old DUI would be onerous, a bright-line exclusion based on convictions for theft might be more reasonable, at least so long as the exclusion is time-limited. The limitation on bright-line rules is thus not one of eliminating their existence entirely but of eliminating overly broad rules that exclude huge categories of individuals whose prior criminal history has absolutely nothing to do with the particular job in question or who that person is today.

### C. *The EEOC is Attempting to Create a New Protected Class*

Another argument that the attorneys general made is that the “true purpose” of the enforcement guidelines is not to correctly enforce Title VII “but rather the illegitimate expansion of Title VII protection to former criminals.”<sup>69</sup> The letter essentially argues that the enforcement guidelines are creating a new protected class—former criminals—under the pretext of preventing racial discrimination.<sup>70</sup> The support the attorneys general offer for this argument is unclear, but it seems to rest chiefly on the fact that the hypothetical examples the EEOC provides for practices that may violate Title VII do not focus heavily on the race of the hypothetical employees.<sup>71</sup>

Nonetheless, this argument merits further attention because it is probably the most obvious critique of using disparate impact theory to reduce employers’ reliance on bright-line criminal records exclusionary policies. In fact, as the letter writers noted, this critique was made by the dissenting opinion in *Green* itself, which stated, “In effect, the present case has judicially created a new Title VII protected class—persons with conviction records. This extension, if wise, is a legislative responsibility and should not be done under the guise of racial discrimination.”<sup>72</sup>

On its face, the application of disparate impact theory to those with criminal records does seem uncomfortable. Paradoxically, this is because the need for some kind of anti-discrimination protection for those with criminal records is so pressing. The major public policy concerns arising from the difficulty of re-integrating those with criminal records into society combined with the lack

<sup>68</sup> EEOC Response Letter, *supra* note 43.

<sup>69</sup> Attorneys General Letter, *supra* note 12, at 3.

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

<sup>71</sup> *Id.* at 4 (“Your real target appears to be the perceived unfairness of judging an individual—of any race—solely by his or her past criminal behavior. That is the focus of the hypotheticals discussed in your guidance document.”).

<sup>72</sup> *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1300 (8th Cir. 1975) (Gibson, C.J., dissenting).

of meaningful direct legal remedies makes the argument that the goal of re-integration is being served indirectly by tying it to race seem plausible.

Nonetheless, the possibility that the EEOC's guidelines might serve another policy goal beyond alleviating discrimination against Title VII's enumerated protected classes cannot make the guidelines an illegitimate use of power unless they do not also serve to alleviate discrimination against one of the protected classes. Given the massive disproportionality in the racial composition of those with criminal records, this simply is not the case.<sup>73</sup> The fact that criminal records exclusionary policies will almost invariably disproportionately impact African American and Hispanic men means that the goal of alleviating discrimination against those with criminal records cannot be severed from the goal of alleviating race discrimination. Any discussion of the harmful effect on society and individuals of the problem of ex-offender re-entry would be meaningless without a discussion of race.

Furthermore, the argument that the EEOC is attempting to create a new protected class could be leveled against virtually all uses of disparate impact theory. Striking down minimum height restrictions could be read as not protecting women but as protecting short people.<sup>74</sup> Similarly, striking down minimum weight requirements could be read as protecting thin people.<sup>75</sup> Even *Griggs v. Duke Power Company*, the seminal disparate impact case, could fall under this criticism; instead of protecting against racial discrimination, it could be argued that disparate impact theory was creating a new protected class for those without high school diplomas.<sup>76</sup>

Thus, the argument that using disparate impact theory in criminal records exclusion cases is creating a new protected class is a red herring for an attack on the very validity of disparate impact theory itself. Disparate impact cases will, almost invariably, protect specific subsets of protected classes rather than the class as a whole. In the cases mentioned above, protection was extended not to all women, but to women who were under a certain height or weight and not to all African-Americans but to those who did not have high school diplomas. Similarly, restrictions on the use of criminal records do not protect all members of given races but only those with criminal records. That disparate impact cases may, in some situations, have the side effect of implementing policy goals that go beyond the scope of Title VII does not negate their validity.

#### *D. Racial Prejudice in the Criminal Justice System is Better Fixed in More Direct Ways*

As part of their accusation that the EEOC's new enforcement guidelines are not actually aimed at alleviating racial prejudice, the attorneys general noted that "if there is truly a concern about racial prejudice in the criminal

<sup>73</sup> Simonson, *supra* note 5, at 284–85.

<sup>74</sup> See *Dothard v. Rawlinson*, 433 U.S. 321, 323–24, 331–32 (1977) (holding that a prison's minimum height and weight restrictions for prison guards violated Title VII because of the restrictions' disparate impact on women).

<sup>75</sup> *Id.*

<sup>76</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that a facially neutral policy requiring employees for certain positions to have high school diplomas and pass intelligence tests violated Title VII because of its disparate impact on African-Americans).

justice system, there are more direct ways to reform that system than using federal dollars to compel employers to hire convicted criminals.”<sup>77</sup> The logic behind this argument seems to be that because using Title VII in these types of cases is not the most effective means of alleviating racial injustice, it must be an illegitimate means.

Once again, this argument is ill-founded. No doubt, racial prejudice in the criminal justice system requires a far more comprehensive solution than disparate impact theory can provide. Indeed, one could argue that if disparate impact theory were being used as the chief method to fix that wider problem, it ought to be abandoned in these cases—not because it is an illegitimate use of power but because it would risk providing a post hoc band-aid for a situation that requires major surgery.

But the EEOC is, of course, not tasked with reforming the criminal justice system. Rather, it is tasked with enforcing Title VII. The racial imbalance in the criminal justice system means that criminal background exclusionary policies in employment necessarily implicate the employment opportunities of certain protected classes under Title VII. And ensuring that such employment opportunities are available is precisely what the EEOC is tasked with accomplishing.

#### *E. Interference with State Sovereignty*

Finally, the attorneys general argued that the new EEOC guidelines represent an “intrusion into state sovereignty [that is] particularly egregious.”<sup>78</sup> The letter states, “[t]he guidance document purports to supersede state and local hiring laws that impose bright-line criminal background restrictions that are not narrowly tailored.”<sup>79</sup> The letter then provides several examples of state laws barring convicted felons from certain occupations that could be in danger if disparate impact cases are successful.<sup>80</sup>

Again, this argument has some validity. In fact, as noted previously, a recent federal case in Ohio held that obeying state law was not a legitimate business necessity where the law required employers to enact policies that violated Title VII.<sup>81</sup>

Nonetheless, this argument, like the argument asserting that the EEOC is attempting to create a new protected class, goes deeper than a qualm with these particular EEOC guidelines. Because, of course, the guidelines did not create the concept of federal pre-emption; Title VII has always pre-empted state law when it requires or permits unlawful employment practices.<sup>82</sup> The guidelines do not add anything new to the law; instead, they clarify rules that have been in effect for decades and represent a renewed commitment to enforcing those rules. Thus, even if the attorneys general are correct in their assessment that, under the guidelines, a multitude of state laws could be declared illegitimate, they are incorrect in their assessment that it is the guidelines themselves that

<sup>77</sup> Attorneys General Letter, *supra* note 12, at 4.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* The letter cites several West Virginia state laws barring felons from employment in occupations such as owning a pain management clinic or serving as a municipal judge.

<sup>81</sup> *Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013).

<sup>82</sup> 42 U.S.C. § 2000e-7 (2012).

would cause the illegitimacy. If the laws they cite and others are found to violate Title VII, it will be because they always violated Title VII, not because the EEOC has changed the rules.

V. ARGUMENTS ABOUT THE NEGATIVE UNINTENDED CONSEQUENCES OF THE NEW GUIDELINES

A. *Individualized Consideration Will Actually Lead to More Racism*

In furtherance of their accusation that the EEOC's new enforcement guidelines are not actually aimed at alleviating racial prejudice, the attorneys general also argue that "the individualized consideration that [the EEOC] advocates would create far more opportunity for racial discrimination than the non-discretionary screening processes allegedly used by the companies."<sup>83</sup> Although the letter does not elaborate on this argument, one can surmise that the underlying theory is that asking employers to evaluate individuals on a case-by-case basis might have the unintended consequence of increasing racial discrimination because employers will be more likely to overlook the criminal record of a white applicant or employee than that of an African American or Hispanic applicant or employee.

This argument, cynical as it may be, is not entirely without support. Indeed, at least one study has shown that white applicants with criminal records fare about the same as African American applicants without criminal records.<sup>84</sup> African American applicants with criminal records, of course, fare the worst.<sup>85</sup>

Still this argument actually shows just how necessary protections for those with criminal backgrounds are to ensuring racial equality in employment. Contrary to the letter's underlying thesis that criminal records policies and race are totally unconnected, this argument shows that the letter writers are well aware of the unintentional discrimination arising from the association of certain minorities with criminality and other undesirable characteristics.<sup>86</sup> This argument shows that even the letter writers believe that, if left to their own devices, employers will make unlawful distinctions between applicants and employees.

If this is the case, it belies the letter's earlier claim that criminal records exclusionary policies are rational, fair means of determining one's qualification for employment. If the exclusions were all truly "job-related" and "consistent with business necessity," then there would be little worry that knowing the race of the applicant or employee would change the outcome of the employment decision. Rather, it is precisely because the current exclusions are overly broad

<sup>83</sup> Attorneys General Letter, *supra* note 12, at 3–4.

<sup>84</sup> Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 644–45 (2005) (describing the results of a study in which black and white testers with equal qualifications but varying criminal records applied for low-level jobs: "Among blacks without criminal records, only 14 [percent] received callbacks relative to 34 [percent] of white noncriminals. In fact, even whites *with* criminal records (17 [percent]) received more favorable treatment than blacks *without* criminal records (14 [percent])").

<sup>85</sup> *Id.* at 642. ("While the ratio of callbacks for nonoffenders relative to offenders for whites was two to one, this same ratio for blacks is close to three to one.")

<sup>86</sup> L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2044–45 (2011) (describing several studies indicating unconscious associations of African American men with danger and criminality).

that individualized consideration presents a risk. Broad exclusionary policies could almost be read as a kind of self-insurance for the employers; by excluding a large group of people blindly, they avoid the risk of excluding individuals based on protected characteristics.

But the fact that unconscious bias leads some employers, even those with the best intentions, to discriminate is a reason to provide more protection, not less. Policies that violate Title VII under disparate impact theory ought not be justified as preventative measures against disparate treatment liability.

#### *B. Cost to Business is Prohibitive*

Lastly, the letter argues that the individualized assessment recommended in the EEOC's guidelines will "add significant costs" to businesses.<sup>87</sup> The letter states, "Employers will have to spend more time and money evaluating applicants that they would not have previously considered due to their criminal history and, in many cases, are unlikely to hire even after a more thorough vetting."<sup>88</sup>

The letter does not offer any evidence for this proposition, and it is unclear whether it is true. The guidelines do not require employers to interview more candidates for any given job; indeed, as noted earlier, they do not even require employers to forgo bright line rules entirely. This latter point particularly bears repeating because employers seeking to save time and money while staying within the bounds of the law might begin by narrowing their policies to include only those bright-line restrictions that are obviously tied to the job in question. For example, few would doubt that a year-old conviction for a DUI ought to preclude someone from a job as a delivery driver; but a ten-year-old conviction for vandalism does not bear a cognizable relationship to that same job or, for that matter, provide any other information than that, ten years ago, the person in question acted foolishly on at least one occasion. Thus, the appropriate remedy for avoiding excessive costs in both time and money is not the overkill of broad exclusionary policies but to tailor the requirement up front.

But perhaps the attorneys general's true concerns about time and money are best revealed in their statement that "more individualized assessments are liable to increase the number of discrimination suits by rejected applicants and, in turn, employers' litigation expenses."<sup>89</sup> This is probably true. If the attorneys general's assessment that employers are more likely to discriminate based on race when presented with individual cases is accurate, then they are also likely correct that such individual assessment will probably lead to more disparate treatment lawsuits.

Nonetheless, if, as the letter writers themselves predict, employers do not view white and black applicants with the same criminal records in the same way, that is all the more reason why Title VII is implicated in criminal records cases. The letter accuses the EEOC of using race as a proxy for assisting ex-convicts. But it could be equally true that employers are currently using ex-

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<sup>87</sup> Attorneys General Letter, *supra* note 12, at 4.

<sup>88</sup> *Id.*

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

convict status as a proxy for discriminating based on race.<sup>90</sup> At the very least, as noted previously, risking disparate impact liability ought not to be an insurance measure against avoiding disparate treatment liability.

## VI. CONCLUSION

As this article has shown, the attorneys general's arguments, as articulated in their letter to the EEOC, against the use of disparate impact theory to alleviate a particularly prevalent form of discrimination are misguided and, in some cases, illogical. While there may be some legitimate reasons for treating criminal records differently than other types of facially neutral policies, the attorneys general's letter does not present them. Instead, the letter is an indirect attack on the authority of the EEOC and the legitimacy of disparate impact theory. These are critiques best taken up with Congress, but as the law currently stands, they represent little more than a desire that the EEOC stop properly enforcing Title VII.

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<sup>90</sup> See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 11 (2013).