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## Caught Between a Rock, Negligence, Racism, and a Hard Place: Exploring the Balance Between the EEOC's Arrest and Conviction Investigation Guidelines and Society's Best Interest

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# CAUGHT BETWEEN A ROCK, NEGLIGENCE, RACISM, AND A HARD PLACE: EXPLORING THE BALANCE BETWEEN THE EEOC'S ARREST AND CONVICTION INVESTIGATION GUIDELINES AND SOCIETY'S BEST INTEREST

By: *Eniola O. Akinrinade*

## ABSTRACT

*In many instances, employers have an obligation to conduct criminal background checks on their applicants to ensure that the public that comes into contact with these employees shall not be harmed. In other instances, these criminal background checks are unnecessary as they prove to be of little relevance, yet they have the effect of causing a disparate impact within certain Title VII-protected classes, including Black Americans and Hispanics.*

*To resolve this disparate impact, the Equal Employment Opportunity Commission (“EEOC”) has set forth non-binding guidance, proposing an assessment of “Green Factors” that employers should consider before denying an ex-convict employment. In following this guidance, the EEOC aims to create equal employment opportunities for all job applicants including those with criminal histories. While this guidance and these Green factors play a large role in furthering societal benefits, many employers have raised objections to the recent EEOC guidance. Employers argue that the guidance creates a “catch-22,” forcing the employer to choose between being liable for negligent hiring and being liable for violating Title VII.*

*Because the EEOC guidance furthers fundamental societal interests, it should remain in effect. Nevertheless, the guidance must be amended in order to clarify its ambiguous language concerning “business necessity,” which will then resolve the catch-22 conflict that employers currently experience.*

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## I. INTRODUCTION

Under certain circumstances, employers are encouraged to conduct criminal background checks in order to protect the public from the employer's negligence in hiring dangerous employees.<sup>1</sup> In other circumstances, when employers conduct these criminal background checks, they open themselves up to liability due to the disparate impact these checks have on Black Americans and Hispanics.<sup>2</sup> To protect the statutorily protected classes that Black Americans and Hispanics fall in, the Equal Employment Opportunity Commission ("EEOC") has set forth guidelines regarding employers' use of criminal background checks on job applicants.<sup>3</sup> Many employers are unhappy about these guidelines, and feel it makes them choose between not conducting the checks and being negligent, or conducting the checks and adversely impacting those of particular races and ethnicities.<sup>4</sup> While these guidelines came as an unwelcome surprise to many employers, the guidelines' aim is to decrease the country's rate of recidivism and to have a positive impact on society,<sup>5</sup> but employers too have raised a legitimate concern regarding the guideline's "catch-22."<sup>6</sup>

1. See *Ponticas v. KMS Invs.*, 331 N.W.2d 907, 911 (Minn. 1983); see also discussion *infra* Part II.A.

2. See discussion *infra* Parts II.B–II.B.1.c.

3. *Enforcement Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote2anc](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote2anc) (last visited: Feb. 21, 2014) [hereinafter EEOC, ENFORCEMENT GUIDANCE]; see also discussion *infra* Part III.A.

4. Hans A. von Spakovsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment "Guidelines"*, [http://thf\\_media.s3.amazonaws.com/2012/pdf/lm81.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/lm81.pdf) (last visited Feb. 25, 2014); see also John D. Bible, *To Check or Not To Check: New EEOC Enforcement Guidance on the Use of Criminal History Information in Making Hiring Decisions*, BUS. L. TODAY 1, 1 (2013); see also discussion *infra* Part III.D.

5. See discussion *infra* Parts III.B, III.C.2.

6. See discussion *infra* Part III.D.

This Comment examines the importance of the EEOC's guidelines as they relate to equal employment opportunities for ex-convicted job applicants, and it also proposes a bright-line rule to be amended into EEOC guidance in order to resolve employers' concerns while simultaneously making the guidance less ambiguous and more effective.<sup>7</sup>

As Section I has provided an introduction, Section II will discuss the employer's risk of negligent hiring lawsuits when it does not conduct criminal background checks on applicants who wind up being ex-convicted; it will also examine the employer's possible risk of facing Title VII disparate impact suits when it does conduct these checks on these applicants. Section II will also explore the employer's "business necessity" defense to disparate impact lawsuits. Section III discusses the societal interests regarding ex-convict recidivism, the recent EEOC guidance on the use of criminal background checks, common employer objections to this guidance, and this comment's proposed solution to modify the EEOC guidance in an effort to resolve those employer objections.

## II. EMPLOYER PERSPECTIVES: LIABILITY, ADVERSE IMPACT, AND BUSINESS NECESSITY

### A. *Negligent Hiring Liability*

Conducting a criminal background check is not a violation of the law. On the contrary, many employers have a substantial interest in conducting these checks to reduce the likelihood of engaging in negligent hiring practices.<sup>8</sup>

Negligent hiring claims are state causes of action; therefore, for a plaintiff to successfully bring a negligent hiring suit against an employer, it must prove its forum state's requirements.<sup>9</sup> Generally, each state's elements rest on an adopted rule from the Restatement (Second) of Agency, or a similar but modified rule.<sup>10</sup> The Restatement (Second) of Agency dictates that:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others . . . in permitting, or failing to prevent, negligent or other tortious conduct

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7. See discussion *infra* Part III.E.

8. See RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

9. See *Stalbosky v. Belew*, 205 F.3d 890, 893 (6th Cir. 2000) (indicating that negligent hiring claims are state causes of action); see also Nesheba M. Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis*, ABA 4th Annual Section of Employment and Labor Law Conference (2010), [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/087\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087_authcheckdam.pdf) (providing a state-by-state listing of the necessary elements to prove a *prima facie* case of negligent hiring).

10. See *id.* (stating that Alaska and California, for instance, have adopted the Restatement (Second) of Agency rule regarding negligent hiring).

by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.<sup>11</sup>

Stated otherwise, an employer can be liable for the negligent acts of its employee.

Following the Restatement (Second) of Agency, courts seem to stress that employers have a duty to investigate when employers involve their employees with members of the public.<sup>12</sup> The Supreme Court of Minnesota voiced this duty in the well-cited case, *Ponticas v. KMS Investments*.<sup>13</sup> In that case, the manager of an apartment complex broke into an apartment and raped a tenant.<sup>14</sup> The manager possessed an extensive criminal background including several counts of armed robbery, burglary, and theft.<sup>15</sup> At the time of his hire, he lied about his criminal record, and his employer never conducted an investigation.<sup>16</sup> In affirming the employer's liability, the court stated, "[A]n employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public."<sup>17</sup>

Because this cause of action identifies an employer's liability when its employee relates to the public, it is important to note that, differing from the type of liability that emerges under *respondeat superior*, under a negligent hiring cause of action, the employer can be liable for the tortious acts of the employee *even when the employee is acting outside the scope of his employment*.<sup>18</sup> Typically, under this cause of action, an employer can be held liable if its employee harms a third party and the employer knew, should have known, or could have reasonably discovered the risk posed by the employee.<sup>19</sup>

In Texas, for instance, negligent hiring claims typically involve instances where an employee had a prior history of criminal behavior, driving accidents, or other misconduct, and then injures the plaintiff through some type of similar misconduct.<sup>20</sup> This is why, in many instances, courts will first consider whether the employer made an inves-

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11. § 213 cmt. d (explaining also that "[a]n agent . . . may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.").

12. See *Ponticas v. KMS Invs.*, 331 N.W.2d 907, 911 (Minn. 1983).

13. *Id.*

14. *Id.* at 909.

15. *Id.*

16. *Id.* at 910.

17. *Id.* at 911.

18. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 187 (2008); see also *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.—Fort Worth 2002, no pet.).

19. *Morris*, 78 S.W.3d at 49.

20. LITTLER MENDELSON, *THE TEXAS EMPLOYER* 2013–2014, 45 (2013).

tigation into an applicant's qualifications—including the applicant's criminal background—before determining an employer's liability.<sup>21</sup> Accordingly, a plaintiff will succeed if he can show that “the employer empowered the employee or placed the employee in a position to do the same type of harm that [the employer] should have investigated and discovered in the first place.”<sup>22</sup>

In *Read v. Scott Fetzer Co.*, the Supreme Court of Texas held an employer, Kirby, liable for negligent hiring when the employer's distributor failed to investigate the criminal background of its employee.<sup>23</sup> Kirby, a vacuum manufacturer, hired Carter as a “dealer.”<sup>24</sup> A dealer, in this instance, is one who is responsible for the door-to-door demonstration, installation, and sale of Kirby's vacuums.<sup>25</sup> Kirby conducted no investigation into Carter's criminal history prior to hiring him.<sup>26</sup> Had his criminal history been investigated, Kirby would have found that, among other things, Carter had previously been arrested for indecency with a child and that there were records on file which included witness statements, Carter's confession, Carter's guilty plea, and an indictment for the offense.<sup>27</sup> The court held that based on the evidence, had Kirby performed a background check, it would have learned of Carter's past as a sexual offender.<sup>28</sup> The court continued that a person of ordinary intelligence would know that sending a sexual offender into another person's home poses a great deal of risk.<sup>29</sup> Therefore, Kirby was held to be negligent in its actions and omission of investigation.<sup>30</sup>

Because employers are subject to liability for endangering third parties with their negligent hiring practices, it would be both an unlawful and anti-social behavior for employers to forgo background checks in instances where the public—and other vulnerable individuals in the public, such as infants and the elderly—are at risk.<sup>31</sup> For instance, in

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21. *Id.* at 47 (citing *Wasson v. Sracener*, 786 S.W.2d 414, 422 (Tex. App.—Texarkana 1990, writ denied)).

22. *Id.* at 45.

23. *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 733 (Tex. 1998).

24. *Id.* at 733–34.

25. *Id.*

26. *Id.* at 734.

27. *Id.*

28. *Id.* at 737.

29. *Id.*

30. *Id.*

31. 42 U.S.C. § 13041 (2012) requires prospective employees of “[e]ach agency of the Federal Government, and every facility operated by the Federal Government . . . that hires . . . individuals involved with the provision to children under the age of 18 of child care services shall assure that all existing and newly-hired employees undergo a criminal history background check.” See also LITTLER MENDELSON, *THE TEXAS EMPLOYER 2013–2014*, 225–26 (2013) (stating that 42 U.S.C., as well as many state statutes, require that certain applicants undergo criminal background checks. Texas statutes, for instance, require those working with “the elderly or disabled . . . institutions of higher education, mental health and mental retardation facilities, child care

*Read v. Scott Fetzer*, the court held that “Kirby had a duty to take reasonable precautions to prevent the assault on Read due to the peculiar risk involved when a person with a history of crime, violence, or sexual deviancy conducts in-home sales.”<sup>32</sup> The court reasoned that because Kirby was conducting demonstrations in the homes of the public, it had a duty of reasonable care in selecting who would perform these demonstrations.<sup>33</sup> Therefore, in many instances, these checks are not only welcomed by the greater society, but they are necessary to the public health, safety, and welfare.<sup>34</sup>

Nevertheless, in instances where employers conduct these checks, the employers open themselves up to potential Title VII lawsuits. This is due to the resulting disparate impact on classes of minorities, specifically, Black Americans and Hispanics.<sup>35</sup>

### B. *Disparate Impact*

Title VII<sup>36</sup> explicitly prohibits employers from discriminating against employees on the basis of race, natural origin, religion, or sex.<sup>37</sup> “Ex-convicts” do not stand in a category of their own as a protected class under the statute,<sup>38</sup> but Black Americans and Hispanics are considered protected classes within Title VII’s race and natural origin classes, respectively.<sup>39</sup>

In the interest of achieving equal employment opportunities between applicants and employees, a process is held to be unlawful in instances where an employer erects a barrier, policy, or practice intended to exclude or favor a protected class of people.<sup>40</sup> Contrastingly, when an employer sets forth a neutral policy that affects all classes of people equally, the policy is considered facially neutral and

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facilities, and subsidized housing residents” to undergo criminal background checks.); *see also* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 329 (2009) (“For some job positions that involve vulnerable populations, such as children and the elderly, laws require employers to conduct such background checks.”).

32. *Read*, 990 S.W.2d at 735.

33. *Id.*

34. *See* Blumstein & Nakamura, *supra* note 31, at 329.

35. *See* discussion *infra* Parts II.B–II.B.1.c.

36. 42 U.S.C. § 2000e to e-17 (2006).

37. § 2000e-2(a)(1).

38. *See* § 2000e-2(a)(1); *see also* *Sarvis v. Vt. State Colls.*, 772 A.2d 494, 500 (Vt. 2001) (stating that “Title VII, however, does not list criminal history as a class or status entitled to protection from employment discrimination.”).

39. OFFICE OF LEGAL COUNSEL, EEOC COMPLIANCE MANUAL, (Apr. 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.html#II> (stating that there is considerable overlap between race and national origin but the two are not identical. For instance, “discrimination against a Chinese American might be targeted at her Asian ancestry and not her Chinese national origin. In that case, she would have a claim of discrimination based on race, not national origin.”).

40. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (citing 42 U.S.C. § 2000e (1994)).

may be lawful. Concerning the matter of this Comment, when an employer conducts a criminal background check on all applicants equally and only rejects applicants based on the uncovering of criminal conduct, the practice of background checking is seen as being facially neutral.<sup>41</sup> But according to the landmark Supreme Court case, *Griggs v. Duke Power Co.*, “Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>42</sup> Stated otherwise, even in an instance where a policy is facially neutral, if its effects consistently and disproportionately affect or impact a protected class, the neutral policy causes a disparate impact claim of discrimination under Title VII.<sup>43</sup> Many more recent cases still follow this same framework outlined by the Supreme Court in *Griggs*.<sup>44</sup>

In order to bring forth a *prima facie* case under a disparate impact claim, a plaintiff must satisfy three elements: “[1] the existence of a statistically significant disparity among members of different groups affected by employment decisions; [2] the existence of a specific, facially neutral employment practice; and [3] a causal nexus between the specific, facially neutral employment practice and the statistical disparity.”<sup>45</sup> Employer background checks conducted on ex-convicted applicants tend to bring forth many disparate impact claims, as all of the elements necessary to establish a plaintiff’s *prima facie* case are met in such instances.<sup>46</sup>

## 1. The Prima Facie Case

### a. Disparity Among Groups

There is a disparity among groups of protected classes who are represented in the state and federal incarceration systems. In the United States, minorities, particularly Black Americans and Hispanics, constitute the majority of an overwhelmingly disproportionate percentage

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41. See EEOC, ENFORCEMENT GUIDANCE, *supra* note 3.

42. *Griggs*, 401 U.S. at 430.

43. See *id.* at 430.

44. See *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 485 (3rd Cir. 2011) (affirming that “[a] residency requirement causes a disparate impact by excluding well-qualified African-Americans who would otherwise be eligible for available firefighter positions” simply because they live in areas outside the required residence area); see also *Easterling v. Connecticut*, 783 F. Supp. 2d 323, 332 (D. Conn. 2011) (holding a policy to have a disparate impact against females where “[t]he plaintiff . . . identified the timed 1.5 mile run segment of the PFT [the facially neutral policy] as the employment practice causing the disparate impact. Specifically, the plaintiff alleges that female . . . applicants disproportionately fail the 1.5 mile run test, leaving an inadequate percentage of women in the remaining candidate pool.”).

45. *Bryant v. Johnny Kynard Logging, Inc.*, 930 F. Supp. 2d 1272, 1297 (N.D. Ala. 2013) (citing 42 U.S.C. § 2000e-2(k) (2012)); see also *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1274 (11th Cir. 2000)).

46. See discussion *infra* Parts II.B.1.a–c.



of individuals who have been through the state and federal penal system.<sup>47</sup> According to a survey conducted by The Pew Center on the States, while only one in every 106 white males is incarcerated, for Hispanic men that number is one in every thirty-six, and for black men, it is one in every fifteen.<sup>48</sup> Furthermore, one in every thirty-one adults is under correctional control, encompassing sentences such as probation, parole, or incarceration.<sup>49</sup> Of these adults under correctional control, one in every forty-five is white, one in every twenty-seven is Hispanic, and one in every eleven is black.<sup>50</sup>

While there tends to be higher rates of Black Americans and Hispanics in the prison systems, these numbers are even more shocking when weighed against the classes' representation in the overall population. For instance, in 2009, Black Americans constituted about 13% of the overall population, yet they represented 28% of arrests, and approximately 40% of inmates.<sup>51</sup> That same study reported that in state prison, Black Americans were incarcerated at six times the rate of White Americans, and Hispanics were incarcerated at a rate greater than one-and-a-half times the rate of White Americans.<sup>52</sup> Today, Bureau of Prisons data shows that Hispanic inmates constitute nearly 35% of prison inmates,<sup>53</sup> while Black Americans constitute nearly 37% of prison inmates.<sup>54</sup> Therefore, suffice it to say there is a disparity among groups of protected classes in state and federal incarceration systems.

*b. Facially Neutral Employment Practice*

Criminal background checks are presented as facially neutral employment practices. In a competitive job market, an overwhelming majority of employers conduct background checks in order to find the most suitable employees.<sup>55</sup> A criminal background check looks into an arrest record or a conviction record, but these two records are not

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47. ONE IN 100: BEHIND BARS IN AMERICA 2008, DEPARTMENT OF LABOR, THE PEW CENTER ON THE STATES 6 (2008), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf).

48. *Id.*

49. *Id.*

50. *Id.*

51. Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, NAT'L COUNS. ON CRIME & DELINQ., (Mar. 2009), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

52. *Id.*

53. *Ethnicity*, FEDERAL BUREAU OF PRISONS (Dec. 15, 2013), [http://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](http://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp).

54. *Race*, FEDERAL BUREAU OF PRISONS (Dec. 15, 2013), [http://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](http://www.bop.gov/about/statistics/statistics_inmate_race.jsp)

55. *Background Checking: Conducting Criminal Background Checks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, slide 3 (Jan. 22, 2010), <http://www.slideshare.net/shrm/background-check-criminal?> [hereinafter SHRM, *Background Checking*]; see also discussion *supra* Part I.A.

the same.<sup>56</sup> An arrest does not necessarily mean the underlying conduct has occurred.<sup>57</sup> Contrastingly, a conviction suggests that the underlying activity did occur.<sup>58</sup>

A Society for Human Resources Management (“SHRM”) survey of employers found: 73% of respondents said they conduct criminal background checks on all applicants; 19% conduct criminal background checks on select applicants; and only 7% do not conduct background checks on applicants.<sup>59</sup> Employers who issue the checks on all applicants explained that they do so primarily to ensure safety in the workplace and to reduce liability for negligent hiring practices.<sup>60</sup> In instances where these criminal background checks are used in every instance, without discriminating between individuals, the policy appears to be facially neutral.

*c. Causal Nexus*

In order to satisfy the causal nexus element, plaintiffs must show a causal nexus between the facially neutral policy and the disparity among groups.<sup>61</sup> Regarding the particular matter at hand, this is not difficult to prove.

This Comment has already shown that a significant number of Black Americans and Hispanics are incarcerated at a much higher rate than White Americans.<sup>62</sup> Additionally, recent studies of employers show that about 73% of employers conduct these checks on all job applicants and another 19% conduct these checks on select applicants.<sup>63</sup> But lastly, statistics show that a significant number of employers would find a criminal record to be “somewhat” to “very” influential on the employer’s decision to extend employment to the applicant.<sup>64</sup>

SHRM reported that 100% of polled employers were influenced *not to extend a job offer* to an applicant when a background check revealed a conviction for a violent crime;<sup>65</sup> 98% would be influenced in

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56. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 12–14.

57. *Id.* at 12–13.

58. *Id.* at 13.

59. SHRM, *Background Checking*, *supra* note 54 at slide 3.

60. *Id.* at slide 7 (showing that in being allowed to provide more than one response each, 61% of employers conduct the checks to promote safety in the workplace; 55% conduct the checks to avoid negligent hiring practices; 39% conduct the checks to prevent/reduce theft and other criminal activity; 20% conduct the checks to comply with state law; 12% conduct the checks for an overall assessment of the individual; 4% conduct the checks for “other” reasons.).

61. EEOC v. Joe’s Stone Crab, 220 F.3d 1263, 1274 (11th Cir. 2000).

62. See discussion *supra* Part I.B.1.a.

63. SHRM, *Background Checking*, *supra* note 54 at slide 3.

64. *Id.* at slide 5.

65. *Id.* These include crimes such as murder and rape; 5% of employers would be somewhat influenced and 95% would be very influenced. *Id.*

the same way by a conviction for a non-violent felony;<sup>66</sup> 93% would be influenced by a conviction for a violent misdemeanor;<sup>67</sup> 73% would be influenced by a conviction for a non-violent misdemeanor;<sup>68</sup> and 31% would be influenced by an arrest record that did not result in a conviction.<sup>69</sup> This data shows that there is a substantially higher rate of Black Americans and Hispanics who will likely be disparately impacted and denied a job following the discovery of a criminal record during a criminal background check. Therefore, a causal nexus between the facially neutral policy and the disparity among groups can successfully be shown.

### C. Business Necessity

An employer may successfully defend against a plaintiff's *prima facie* disparate impact claim by demonstrating that the practice satisfies the business necessity requirement.<sup>70</sup> The business necessity requirement is interpreted to mean "that employers may not use criteria which have a discriminatory effect unless those criteria define the minimum qualifications necessary to perform the job."<sup>71</sup> The challenged practice must be "job related for the position in question and consistent with business necessity."<sup>72</sup> In proving business necessity, the defendant bears the burden of proof, and the defendant may not use "common-sense" to prove the defense; rather, the defendant must put forth empirical evidence that the policy is related to the business necessity.<sup>73</sup>

In *El v. Southeastern Pennsylvania Transportation Authority* (SEPTA), a Black American male was hired to drive paratransit buses on the condition that he not possess a violent criminal background.<sup>74</sup> Within a few weeks of El's hire, a criminal background check revealed a forty-year-old, second-degree murder conviction.<sup>75</sup> El's employ-

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66. *Id.* These include crimes such as fraud and embezzlement; 24% of employers would be somewhat influenced and 74% would be very influenced. *Id.*

67. *Id.* These crimes include a "criminal offense that is less serious than a felony and generally punishable by a fine, a jail term of up to a year, or both"; 35% of employers said they would be somewhat influenced and 58% would be very influenced. *Id.*

68. *Id.* These crimes include a "criminal offense that is less serious than a felony and generally punishable by a fine, a jail term of up to a year, or both"; 51% of employers said they would be somewhat influenced and 22% said they would be very influenced. *Id.*

69. *Id.* 26% of employers would be somewhat influenced by an arrest record not ending in a conviction and 5% would be very influenced by it. *Id.*

70. See *Griggs v. Duke Power Co.*, 401 U.S., 424, 431 (1971); see also *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 477 (3rd Cir. 2011) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

71. *NAACP*, 665 F.3d at 477 (citing *Connecticut v. Teal*, 457 U.S. 440, 451 (1982)).

72. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

73. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 240 (3rd Cir. 2007).

74. *Id.* at 235.

75. *Id.*

ment was terminated, and he brought a Title VII disparate impact suit alleging racial employment discrimination.<sup>76</sup> In affirming the district court's rejection of El's claims, the court sought to determine if SEPTA appropriately invoked the business necessity defense and bore the burden of proof.<sup>77</sup> The court held that it did,<sup>78</sup> and that a reasonable juror could find that SEPTA's policy was related to business necessity because SEPTA put forth evidence showing that,

(1) [T]he job of a paratransit driver requires that the driver be in very close contact with passengers, (2) the job requires that the driver often be alone with passengers, (3) paratransit passengers are vulnerable because they typically have physical and/or mental disabilities, (4) disabled people are disproportionately targeted by sexual and violent criminals, (5) violent criminals recidivate at a high rate, (6) it is impossible to predict with a reasonable degree of accuracy which criminals will recidivate, (7) someone with a conviction for a violent crime is more likely than someone without one to commit a future violent crime irrespective of how remote in time the conviction is, and (8) SEPTA's policy is the most accurate way to screen out applicants who present an unacceptable risk.<sup>79</sup>

SEPTA also brought forth expert testimony to support its argument.<sup>80</sup> El made no attempt to rebut SEPTA's evidence, and therefore the court affirmed the judgment.<sup>81</sup> In affirming, the court stated that in this case, "If someone with a violent conviction presents a materially higher risk than someone without one, no matter which other factors an employer considers, then SEPTA is justified in not considering people with those convictions."<sup>82</sup>

In the instances where an employer cannot put forth compelling evidence proving that the challenged policy is consistent with business necessity, the plaintiff wins simply by putting forth the necessary elements of a *prima facie* disparate impact suit.<sup>83</sup>

### III. THE CONFLICT BETWEEN SOCIETAL INTERESTS AND THE EMPLOYER

#### A. *Society's Voice: The EEOC Guidance*

The EEOC is the federal agency charged with enforcing federal equal employment laws, including Title VII.<sup>84</sup> Title VII "prohibits

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76. *Id.*

77. *Id.* at 237.

78. *Id.* at 249.

79. *Id.* at 245.

80. *Id.* at 246.

81. *Id.* at 247.

82. *Id.* at 245.

83. *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 477 (3rd Cir. 2011) (citing *Lewis v. Chicago*, 560 U.S. 205, 212 (2010)).

84. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/> (last visited Jan.15, 2014).

employment discrimination on the basis of race, color, religion, sex, or national origin.”<sup>85</sup> The EEOC periodically sets forth non-binding enforcement guidance, issued in accordance to the efforts of the agency, to eliminate unlawful employment practices among private, federal, state, and government employers.<sup>86</sup>

In April 2012, the EEOC set forth the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions regarding the employers’ use of arrest and conviction records against applicants when making employment decisions.<sup>87</sup> The guidelines instruct that it may be unlawful for employers to issue blanket “no-hire” policies for people with criminal backgrounds.<sup>88</sup> This means that employers cannot use information regarding criminal background checks in a discriminatory manner against applicants due to the disparate impact these checks have on Black Americans and Hispanics.<sup>89</sup> Alternatively, a plaintiff’s adverse impact claim may be successfully rebutted if an employer can show that the applicant’s rejection was based on business necessity.<sup>90</sup> Nonetheless, the EEOC insists that an employer may not uncover an applicant’s prior criminal conviction and simply reject the applicant on the grounds of business necessity, when unwarranted, without consequence.<sup>91</sup>

In the EEOC’s guidance, the EEOC adopted the factors from *Green v. Missouri Pacific Railroad Co.* as a starting point for the issued guidance.<sup>92</sup> The agency reported that in order to link a criminal background to a job position, employers must first consider “[t]he nature and gravity of the offense or conduct; [2] [t]he time that has passed since the offense, conduct and/or completion of the sentence; and [3] [t]he nature of the job held or sought.”<sup>93</sup> If the factors are considered, and afterwards the employer feels that the applicant’s criminal history still warrants the applicant’s denial of employment, which means that the criminal conduct is related to the employer’s business necessity, then the likelihood that the employer’s actions will be a basis for a disparate impact claim against the employer is greatly

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85. 42 U.S.C. § 2000e (2012).

86. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 3.

87. *See generally id.*

88. *Id.* at 16–17.

89. *Id.* at 9–20; *see also* discussion *supra* Part I.B.

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

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

92. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15–16; *see also* *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158, 1159–60 (8th Cir. 1977) (affirming the lower court’s injunction that prohibited the employer’s blanket policy of rejecting employment to anyone with a criminal record, other than a traffic offense, without first considering “the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.”).

93. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15–16.

reduced.<sup>94</sup> The relevance and goals of each of these factors are outlined in the remainder of this Comment.<sup>95</sup>

### B. Society's Interest: Reducing Recidivism

Crime, punishment, and release are the essential elements of a criminal cycle that society must confront.<sup>96</sup> According to the National Institute of Justice, "Recidivism is one of the most fundamental concepts in criminal justice. Recidivism refers to a person's relapse into criminal behavior often after receiving sanctions or undergoing intervention for a previous crime."<sup>97</sup>

Statistics show that on average, within three years of prison release, a large percentage of ex-convicts reoffend and return to prison.<sup>98</sup> According to a 1983 Bureau of Justice Statistics study conducted across fifteen states, 67.5% of prisoners reoffended and returned to prison within three years.<sup>99</sup> A follow-up study in 1994 showed that, of those released from prison, "an estimated 67.5% were rearrested for a felony or serious misdemeanor within three years, 46.9% were reconvicted, and 25.4% were resentenced to prison for a new crime."<sup>100</sup> Similarly, and more recently, in 2004, a forty-one state survey revealed that 43.3% of released inmates returned to prison within three years.<sup>101</sup>

Society has a strong interest in furthering the rehabilitation of ex-convicts and avoiding recidivism.<sup>102</sup> Hiring ex-convicts is key to achieving that aim. For an ex-convict, having increased employment opportunities can decrease the rate of recidivism.<sup>103</sup> In fact, "[o]ffenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportuni-

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94. *See id.* at 15–16.

95. *See* discussion *infra* Part III.C.1–3.

96. *See* Cindy M. Haerle, *Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1325–26 (1984).

97. Office of Justice Programs, *Recidivism*, NATIONAL INSTITUTE OF JUSTICE (May 12, 2010), <http://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx>.

98. *See* Patrick A. Langan & David J. Levin, BUREAU OF JUSTICE STATISTICS, *Recidivism of Prisoners Released in 1994*, 1 (June 2, 2002) <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

99. *Id.*

100. *Id.*

101. Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* 9 (Apr. 2011), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf).

102. Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 208 (2013).

103. *See* Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000) (stating that "[W]ork appears to be a turning point in the life course of criminal offenders over 26 years old").

ties.”<sup>104</sup> Similarly, studies show that a change in the life course of an ex-offender affects the ex-offender’s risk of involvement in that crime in the future.<sup>105</sup> It has been proven that finding employment is specifically the type of powerful, life-changing event that yields an ex-convict’s desistance of further crime.<sup>106</sup> Further still, studies have shown that when ex-convicts have been provided stable employment, the rate of recidivism decreases, and there is an increase in public safety.<sup>107</sup> Therefore, to the extent that an applicant with a criminal history is at risk of criminally offending again, an employer’s extension of a job offer to that individual dramatically reduces the risk.<sup>108</sup> Having employers consider ex-convicts as potential employees beyond their conviction records is absolutely essential for society as a whole; society will find itself at a detriment if ex-convicted applicants are constantly denied employment.<sup>109</sup>

### C. *The EEOC Guidelines Encourage a Societal Gain*

“Society has a strong interest in protecting its citizens from crime . . . . [but t]hese interests conflict with the rights of ex-offenders who have paid their debt to society and have a right to rejoin the community.”<sup>110</sup>

#### 1. The Nature and Gravity of the Offense or Conduct: Relevance

The EEOC urges that before denying an applicant work simply because the applicant has a criminal history, the employer should first consider the nature and gravity of the offense.<sup>111</sup> By considering the nature and gravity of the offense, the employer can make a more informed decision about whether the crime is relevant to the position the applicant is seeking.<sup>112</sup> For instance, the employer may notice that misdemeanors that appear in a criminal history may be less severe than felonies of a similar nature that would normally appear in the

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104. *Id.*

105. Blumstein & Nakamura, *supra* note 31, at 331.

106. *Id.*

107. Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project 3, 27 n.6 (2011), available at [http://www.nelp.org/page/-/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1). (“According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state’s 54-percent average recidivism rate.”) (citing American Correctional Assoc., 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (Aug. 8, 2005)).

108. Hickox & Roehling, *supra* note 102, at 208.

109. See discussion *infra* Part III.C

110. Haerle, *supra* note 96, at 1325–26.

111. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15.

112. *Id.*

same check.<sup>113</sup> In considering differences in the types of offenses that may be revealed in a criminal background check, the employer is then given the opportunity to realize that the specific crime may not be relevant to the concerns and risks of a particular job position.<sup>114</sup>

Considering the nature and gravity of the offense encourages a societal balance as it may ensure that those who have only had minor run-ins with the law, those who had a conviction from many years ago, and those who had a conviction relating to youthful indiscretions will not be forever barred from an equal employment opportunity.<sup>115</sup> An example of this is the story of Johnny Magee.<sup>116</sup> Johnny is a developmentally disabled individual.<sup>117</sup> In 1999, at age forty, Johnny picked up a package sent to his uncle; it contained drugs.<sup>118</sup> Johnny was arrested and convicted of a “misdemeanor conspiracy to commit a drug offense.”<sup>119</sup> Then, for six years, Johnny held a landscaping job, but in 2008, budget cuts forced him to look for new work.<sup>120</sup> With his prior six years of landscaping experience, Johnny applied for a similar position at Lowes.<sup>121</sup> Lowes refused to hire him due to his conviction.<sup>122</sup> The anti-social behavior that employers seek to avoid and that would typically precede Johnny’s criminal activity would likely have been noticeably absent from Johnny’s character.<sup>123</sup> Had the employer considered the nature and gravity of Johnny’s offense, perhaps it would not have rejected him.<sup>124</sup>

Similarly, because a criminal background check can look into an arrest as well as a conviction, considering the nature and gravity of the offense will likely provide an opportunity for employers to differentiate between those with a criminal mark on their record who were arrested for an offense but were never charged or convicted, and those who were actually charged and convicted. A relevant example is the case of Arcadia Murillo who, while working as a bartender, was involved in a drug raid by police.<sup>125</sup> Due to the circumstances, Arcadia was later charged with possession of a controlled substance.<sup>126</sup> Within a month it became apparent that Arcadia had taken no part in the

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113. *Id.*

114. *See id.*

115. Natividad Rodriguez & Emsellem, *supra* note 107, at 6.

116. *Id.* at 4.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (stating also that Johnny formally had his guilt set aside when the court dismissed his conviction in 2008. The next year, he filed suit against Lowes).

123. *Id.*

124. *Id.*

125. *Id.* at 18.

126. *Id.*



drug activity, and the charges brought against her were dismissed.<sup>127</sup> Following this incident, from 2006 until 2009, Arcadia worked as a janitor at a police department.<sup>128</sup> In her second year of employment there, the city performed a background check on her, uncovered her ten-year-old dismissed arrest, and nonetheless chose to terminate her employment.<sup>129</sup>

In both of the described instances, had the employer considered the nature and gravity of the offenses surfacing in the background checks, societal interests might have been furthered. In other words, in considering this factor, many individuals who were arguably innocent, such as Arcadia Murillo and Johnny Magee, would not have been subject to a blanket bar from employment simply due to their records.

## 2. The Time that has Passed Since the Offense: Recidivism

The EEOC encourages that employers should look at “[t]he time that has passed since the offense, conduct and/or completion of the sentence.”<sup>130</sup> The EEOC notes that this factor sheds light on the fact that time lapsed since the offense may be probative of the risk that the applicant poses in a given position.<sup>131</sup> Essentially, this particular guideline factor is considering the issue of recidivism.<sup>132</sup>

Considering the time that has passed since the offense has significant societal interest underlying it. It serves to reduce recidivism and to allow employers to consider ex-convicted applicants who have not re-offended in a given amount of time.<sup>133</sup> Several studies, as well as the EEOC guidance, indicate that there reaches a point where the risk of an ex-convict reoffending diminishes to the same level of risk for the general population.<sup>134</sup> Additionally, research has shown that a “prior conviction is *not* a valid predictor of counterproductive work behavior.”<sup>135</sup>

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127. *Id.*

128. *Id.*

129. *Id.*

130. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15–16.

131. *Id.* (citing *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 247 (3rd Cir. 2007)).

132. *Id.*; *see also* discussion *supra* Part III.B.

133. *See id.* (Neither the *Green* factors nor the EEOC guidelines specified a timeline for employers to follow.).

134. Blumstein & Nakamura, *supra* note 31, at 333; *see also* Natividad Rodriguez & Emsellem, *supra* note 107, at 6 (“For example, a major study of people with felony convictions found that 18-year-olds arrested for burglary had the same risk of being arrested as same-aged individuals with no record after 3.8 years had passed since the first arrest (for aggravated assault it was 4.3 years, and for robbery it was 7.7 years). If the individual was arrested initially for robbery at age 20 instead of at age 18, then it takes the person three fewer years to have the same arrest rate as a non-offender.”) (citations omitted).

135. 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, 232–33 (citing Brent W. Roberts et al., *Predicting the Counterproductive Em-*

Again, although employers feel ex-convicted applicants are at a risk to recidivate, many who have not reoffended in years and have had a positive and rehabilitative track and employment record since the offense should be considered for employment beyond their offense alone; Darrell Langdon's story provides a relevant example.<sup>136</sup> In Darrell Langdon's youth, he had a cocaine addiction.<sup>137</sup> Despite the fact that he has been sober for twenty-five years, raised two children as a single father, and has successfully progressed through his rehabilitative life and through work with excellent qualifications, he was denied re-employment at a place where he previously worked because it was contingent on a background check.<sup>138</sup> Following this denial of employment due to Darrell's criminal background, the court granted Darrell a "certificate of good conduct" to remove this twenty-five-year-old barrier to his employment.<sup>139</sup> Darrell then reapplied to the same job and was again rejected.<sup>140</sup>

Had Darrell's employer considered the time that had passed since his criminal conduct, the employer would have likely seen that Darrell's recidivism risk was low. Darrell had not only been free from criminal conduct for a quarter century, but had also proven himself to be responsible and rehabilitated.<sup>141</sup> When employers do not consider the time that has passed since the offense, society suffers because it prohibits those who have been rehabilitated from finding employment. It also encourages recidivism by not providing a life-changing event for the ex-convict in order to prevent him from recidivating.<sup>142</sup> Moreover, when an employer considers the time that has passed since the offense and chooses to extend a job offer to an applicant, this decreases the rate of recidivism, thus making society a safer place, while also benefiting the economy.<sup>143</sup> "No healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hard hit by joblessness."<sup>144</sup>

### 3. The Nature of the Job Sought: Business Necessity

The EEOC advises employers to consider the nature of the job held or sought.<sup>145</sup> This factor examines job duties, job functions, and where the job will be performed.<sup>146</sup> "Linking the criminal conduct to

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*ployee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1427 (2007)) (modifications in original).

136. See Natividad Rodriguez & Emsellem, *supra* note 107, at 12.

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See* discussion *supra* Part III.B.

143. *See* Natividad Rodriguez & Emsellem, *supra* note 107, at 3.

144. *See id.*

145. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15–16.

146. *Id.*

the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it ‘bear[s] a demonstrable relationship to successful performance of the jobs for which it was used.’”<sup>147</sup> The EEOC considers that an across-the-board ban on applicants who possess a criminal background to be inconsistent with these guidelines and that there can be no conceivable business necessity that would deny all ex-convicts employment.<sup>148</sup> Essentially, the EEOC urges that as long as the employer can show that the criminal background check is in fact related to business necessity,<sup>149</sup> then the employer need not weigh the option of forgoing the checks. Unfortunately, determining what constitutes a business necessity is one of the more serious employer concerns.<sup>150</sup>

#### D. *The Employer’s Conflict*

After the release of the 2012 EEOC Enforcement Guidelines, some employers quickly voiced disapproval. One very serious concern employers pose is that the guidance is a “catch-22.”<sup>151</sup> The implication, to those concerned, is that business owners will be forced to choose between conducting criminal background checks and possibly be held in violation of Title VII for a disparate impact claim or forgoing the checks and then risking liability for negligent hiring practices due to criminal conduct by the employees.<sup>152</sup> While many appreciate the reality of a disparate impact claim, employers feel they should be free and able to avoid the liability and risk that may come with hiring an ex-offender without suffering consequences for their decisions.<sup>153</sup>

In addition to the employers’ concerns, nine attorneys general<sup>154</sup> came together and expressed their similar concerns to the EEOC regarding its recent guidelines.<sup>155</sup> In a July 2013 letter, Patrick Morrissey, West Virginia’s attorney general, on behalf of himself and eight other attorneys general voiced several concerns.<sup>156</sup> One particular concern,

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147. *Id.* (quoting *Griggs*, 401 U.S. at 431).

148. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 16. (quoting *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158, 1298 (8th Cir. 1977)).

149. See discussion *supra* Part II.C.

150. See discussion *infra* Part III.D.

151. von Spakovsky, *supra* note 4, at 1; see also John D. Bible, *supra* note 4, at 1.

152. See von Spakovsky, *supra* note 4, at 1.

153. Hickox, *supra* note 102, at 208.

154. This letter was written on behalf of Patrick Morrissey, West Virginia Attorney General; Luther Strange, Alabama Attorney General; John W. Suthers, Colorado Attorney General; Samuel S. Olens, Georgia Attorney General; Derek Schmidt, Kansas Attorney General; Tim Fox, Montana Attorney General; Jon Bruning, Nebraska Attorney General; Alan Wilson, South Carolina Attorney General; and John E. Swallow, Utah Attorney General. See *infra* note 155.

155. Letter from Patrick Morrissey, Att’y Gen., State of W. Va., et al., to U.S. Equal Emp’t Opportunity Comm’n, (July 24, 2013), available at: <http://www.wvago.gov/pdf/2013-7-24,%20EEOC%20%28bw%29.pdf>.

156. *Id.*

not far removed from that of the employers, was that there may be numerous nondiscriminatory reasons as to why an employer may want to conduct a criminal background check and screen out ex-convicts.<sup>157</sup> These reasons include a desire to increase the safety for customers or other employees as well as the desire to reduce negligent liability suits.<sup>158</sup> Although the EEOC guidelines serve an important purpose, the recent complaints of the attorneys general are also justified.

### 1. The Catch-22 is Grounded in the Business Necessity Defense

Business necessity is the only defense an employer has when its blanket-background-checks policy has been challenged.<sup>159</sup> Nonetheless, while the defense is clearly significant, both employers and the courts are unsure of what constitutes a business necessity.<sup>160</sup> In one opinion, the Third Circuit Court of Appeals noted that the idea of business necessity was so confusing that both the opponents and the advocates of strict business necessity claimed victory.<sup>161</sup>

Prior to the decision in *El*, there were no appellate cases earlier than 2007, other than *Green*, which directly discussed business necessity as it pertains to prior criminal convictions.<sup>162</sup> Other precedent stated that “in order to show the business necessity of a discriminatory cutoff score an employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question.”<sup>163</sup> Unfortunately, this criterion is unhelpful where the defense is applied to a criminal history, as there is no criminal-history test to correlate with job performance.<sup>164</sup> Therefore, the Third Circuit, in examining precedent and legislative history, compiled a rule regarding criminal history and business necessity.<sup>165</sup> The court stated that, “we require that employers show that a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question.”<sup>166</sup> Furthermore, the court continued its statement that “in addition, Title VII allows the employer to hire the applicant most likely to perform the job successfully over others less likely to do so.”<sup>167</sup>

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157. *Id.* at 3.

158. *Id.*

159. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 239 (3rd Cir. 2007) (“The ‘business necessity’ defense . . . serves as an employer’s only means of defeating a Title VII claim when its employment policy has a discriminatory effect.”).

160. See discussion *supra* Part II.C.

161. *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 488 (3rd Cir. 1999).

162. *El*, 479 F.3d at 243; see also *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158, 1159–60 (8th Cir. 1977).

163. *Lanning*, 181 F.3d at 481, 489 (3rd Cir. 1999).

164. See *El*, 479 F.3d at 242.

165. *Id.*

166. *Id.*

167. *Id.*

The problem posed by the difficulty in discerning a business necessity is that, when an employer feels it must conduct these background checks on all applicants out of business necessity, it cannot be sure that the law will agree.<sup>168</sup> If the law disagrees, the employer can then face liability on grounds of disparate impact claims.<sup>169</sup> On the other hand, if the employer forgoes the criminal checks for fear of violating the ambiguous guidelines, they open themselves to the risk of being sued for negligent hiring.<sup>170</sup> Therefore, without the guidelines specifically clarifying what constitutes business necessity, every blanket policy that employers implement is a roll of the dice.<sup>171</sup> Simply stated, each blanket policy carries a significant likelihood of a lose-lose situation, the alleged catch-22, leaving employers without a viable means of protecting themselves.<sup>172</sup>

#### E. *Proposed Changes to the EEOC Guidance*

While the EEOC guidelines arguably present a holistic approach to providing equal employment to all work applicants, these employer concerns are warranted and significant.<sup>173</sup> In fact, the employers' "catch-22" hidden in the EEOC guidelines poses a significant flaw in the guidance.<sup>174</sup> In order for the guidelines to work properly and serve their underlying societal interests, they must be modified to resolve the catch-22. Therefore, and in response, this Comment proposes that the EEOC's 2012 Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 guidance be amended or modified to create a bright-line definition of business necessity.<sup>175</sup> The amendment or modification should be more detailed and leave less room for misinterpretation.<sup>176</sup>

This Comment proposes that the EEOC amend its guidelines to include that the business necessity defense is always satisfied when a statute mandates the check<sup>177</sup> as well as when there is a consistent or

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168. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 10.

169. *See* discussion *supra* Part II.B.

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

171. *See generally* von Spakovsky, *supra* note 4.

172. *See id.*

173. *See generally* EEOC, ENFORCEMENT GUIDANCE, *supra* note 3; *see also* von Spakovsky, *supra* note 4.

174. *See generally* von Spakovsky, *supra* note 4; *see also* John D. Bible, *supra* note 4, at 1.

175. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 245 (3rd Cir. 2007) ("If a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.")

176. Emily J. Carson, *Off the Record: Why the EEOC Should Change its Guidelines Regarding Employer's Consideration of Employees' Criminal Records During the Hiring Process*, 36 J. CORP. L. 221, 234 (2010).

177. *See* 42 U.S.C. § 13041 (2012); LITTLER MENDELSON, *supra* note 31 (stating 42 U.S.C. § 13041 mandates certain types of federal employees who deal with children to be subject to criminal background checks. State statutes may also require employees who work with the elderly to be subject to criminal background checks.).

regular risk of having an applicant come into contact with a third party—specifically, the public.<sup>178</sup> Then, in instances where these criminal checks have been conducted, those ex-convicts possessing a criminal history of crimes of dishonesty should not be denied employment. Instead, if an applicant has a criminal history comprised only of crimes of dishonesty, an employer should then, as a secondary measure, proceed through the EEOC *Green* factors to determine if the applicant’s criminal history has any bearing on the job functions.<sup>179</sup>

Currently, the EEOC guidelines simply state that in order “[t]o establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, 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>180</sup> This particular part of the guidance as it stands is broad, ambiguous, and subject to various interpretations.<sup>181</sup> The proposed bright-line rule will sufficiently distinguish between those ex-convicted applicants who pose a minimal risk to the public, and those who pose a greater risk, which is a relevant distinction in deciding what constitutes a business necessity defense.<sup>182</sup>

### 1. Crimes of Dishonesty

Crimes of dishonesty, also referred to as breaches of trust, are defined slightly differently by different jurisdictions, but most states agree that these crimes include: bribery, fraud, forgery, making/filing false statements, perjury, counterfeiting, deception, and aiding and abetting.<sup>183</sup> Often, crimes that fall into this category are also synonymous with white collar crimes—“classes of nonviolent, illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention.”<sup>184</sup> Such crimes are contrasted with violent crimes as defined by the Federal Bureau of Investigation and include murder, forcible rape, robbery, and aggravated assault.<sup>185</sup>

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178. See discussion *supra* Part II.B (discussing a heightened responsibility on the employer when it knows its employees will be conducting business with the public; in instances where it is foreseeable that employees will come into contact with the public and employers do not conduct criminal background checks, the employer may be held liable for negligent hiring.).

179. EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 15–16.

180. *Id.* at 14.

181. See Carson, *supra* note 176, at 234.

182. See *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 245 (3rd Cir. 2007).

183. ALABAMA DEPARTMENT OF INSURANCE, *Criminal History Disclosure Form*, <http://www.aldoi.gov/licensing/CriminalHistoryForm.aspx> (last visited Feb. 15, 2014).

184. William R. Hotz, *Rethinking White-Collar Crime*, Wis. Law., Nov. 1996 at 59 (1996) (citing the U.S. Justice Department).

185. *Crime in the United States*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime> (last visited Feb. 1, 2014).

The purpose of the business necessity defense is to show that a facially neutral policy determines criteria that are necessary to perform the functions of the job.<sup>186</sup> The Third Circuit dictated that if an individual with a criminal history proves to present a “materially higher risk than someone without one, no matter which other factors an employer considers, then [the employer] is justified in not considering people with those convictions.”<sup>187</sup>

There is a strong argument that violent crimes prove to be relevant to business necessity when an employer seeks employees who will constantly be in contact with the public.<sup>188</sup> Hiring an employee with a violent history may prove a stronger likelihood of public endangerment.<sup>189</sup> Contrastingly, those with criminal histories that show mere crimes of dishonesty do not tend to have a high likelihood of endangering the public because the crimes are, by definition, nonviolent.<sup>190</sup>

## 2. Eliminating the Catch-22

This modification to the guidelines does not undermine the guidelines. Rather, the modification removes the catch-22 built into the EEOC guidance by informing employers that a background check is warranted where it is dictated by statute, and where it is foreseeable that an employee will encounter the public.<sup>191</sup> If employers are always allowed to conduct criminal background checks in these instances, it will remove the concern, confusion, and debate associated with forgoing the checks and later having negligent hiring suits brought against them if the employee harms a member of the public.<sup>192</sup> Nonetheless, the EEOC guidelines still play a crucial role in determining if an employer can or should *act upon the results* of that background check.<sup>193</sup>

If this essential bright-line rule is amended into the EEOC guidelines, employers will know exactly when they may or may not conduct blanket criminal background checks.<sup>194</sup> In instances where the job requires employees to interact with the public, the employer may conduct the check. Then, if the check results in an applicant’s criminal

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186. See discussion *supra* Part II.C.

187. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 245 (3rd Cir. 2007).

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

189. See *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1998) (stating that when a job function requires an employee to go into the home of another, there is a foreseeable risk of danger to the public); see also *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983) (“An employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.”).

190. *White-Collar Crime*, FEDERAL BUREAU OF INVESTIGATION (last visited Feb. 20, 2014), available at: [http://www.fbi.gov/about-us/investigate/white\\_collar](http://www.fbi.gov/about-us/investigate/white_collar) (defining white-collar crimes as range of fraudulent schemes).

191. See discussions *supra* Part III.D, Part III.E.

192. See discussion *supra* Part III.E.

193. See EEOC, ENFORCEMENT GUIDANCE, *supra* note 3.

194. See discussion *supra* Part III.E.

history, the employer may determine if the applicant poses a threat to public safety. If the applicant's criminal history consists of only a crime of dishonesty, a crime that does not pose significant risk to the public, the employer should then go through the EEOC's *Green* factors to determine if the criminal history does truly relate to the job function.<sup>195</sup> Contrastingly, in instances where the employers feel that the blanket policy would not be lawful because employees do not interact with the public, the employers can simply go through the *Green* factors to ensure barring an applicant from employment due to the applicant's criminal history would not cause a disparate impact, thus leaving the employer without a strong defense.<sup>196</sup>

If the EEOC amends its current guidance to provide this necessary bright-line clarification, thus leaving less room for misinterpretation and confusion regarding the defense, the employer's catch-22 dilemma would disappear and the EEOC guidelines can effectively serve their important societal interests.

#### IV. CONCLUSION

The EEOC Guidelines should not be stricken. They allow employers to consider applicants with a criminal background who may never have had a chance to be considered otherwise.<sup>197</sup> The consideration thus reduces the rate of recidivism in society, while simultaneously providing equal employment opportunities to those particular applicants within the Title VII statutorily protected classes who possess criminal histories.<sup>198</sup>

Nonetheless, in order to ensure that the EEOC guidelines are effective, they must be modified or amended to clarify what constitutes a business necessity defense to a disparate impact claim for employers.<sup>199</sup> As the EEOC guidelines stand now, they contain a catch-22 dilemma that leaves employers without a viable option.<sup>200</sup> By amending the guidelines to add a bright-line rule, employers will no longer be stuck in a catch-22 situation when attempting to follow the guidelines as they are written today.<sup>201</sup> The bright-line rule should establish that blanket-policies for criminal background checks are lawful whenever there is a constant risk that the employee will encounter the public.<sup>202</sup> Still, in instances where the background check reveals a criminal history including only crimes of dishonesty, the applicant

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195. See EEOC, ENFORCEMENT GUIDANCE, *supra* note 3, at 14 (discussing the *Green* factors).

196. See generally von Spakovsky, *supra* note 4; see generally EEOC, ENFORCEMENT GUIDANCE, *supra* note 3.

197. See generally EEOC, ENFORCEMENT GUIDANCE, *supra* note 3.

198. See discussions *supra* Parts II.B, III.B.

199. See discussion *supra* Part III.E.

200. See discussion *supra* Part III.D.

201. See discussion *supra* Part III.E.

202. See discussion *supra* Part III.E.



should not be immediately barred from employment.<sup>203</sup> Instead, the employer should then proceed through the EEOC guidance's *Green* factors to determine if the criminal history truly is relevant to the job and its functions.<sup>204</sup>

Once the EEOC guidelines are amended to remove its current ambiguous language, the guidance will prove to be a very holistic approach to the screening and hiring of job applicants with criminal histories. Of equal importance, the proposed amendment will simultaneously remove employers from the current position where they remain today—wedged between a rock, negligence, racism, and a hard place.

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203. See discussion *supra* Part III.E.2.

204. See discussion *supra* Part III.E.2.