# COMMENTS

## EMPLOYER DISCRIMINATION AGAINST INDIVIDUALS WITH A CRIMINAL RECORD: THE UNFULFILLED ROLE OF STATE FAIR EMPLOYMENT AGENCIES[*]

*Unlike discrimination on the basis of traditionally protected characteristics such as race, employer discrimination against ex-offenders can be justified by legitimate business needs. However, when employers fail to consider the job relatedness of a prior offense or the length of time since it occurred, the broadly shared interest in integrating former offenders back into society is undermined, and the racially disparate consequences of the criminal justice system are exacerbated. Because of such concerns, a number of cities and states have enacted legislation in recent years to restrict the manner in which public employers can consider a job applicant's criminal record. While a small minority of states have similar statutes restricting private employers, no state has enacted such a law since the 1970s. As a result, Title VII's disparate impact theory of discrimination remains the main legal mechanism by which an ex-offender (from a traditionally protected class) can challenge adverse employment actions on the basis of a non-job-related criminal conviction. The general erosion of disparate impact doctrine, however, coupled with an apparent reluctance by lower courts to afford ex-offenders a Title VII remedy, has led some observers to dismiss the viability of disparate impact doctrine in the criminal record context, especially for individual plaintiffs with minimal potential for damages.*

*Lost in the debate to date has been the availability of disparate impact claims under state law and the underenforcement of such claims by state Fair Employment Practices Agencies (FEPAs). While budget-conscious FEPAs are rightfully weary of disparate impact litigation's often exorbitant costs, these costs can be effectively mitigated in the criminal record context. Based on the availability of highly probative data on both racial disparities in the criminal justice system and the minimal recidivism risk posed by ex-offenders who remain crime free for many years, this Comment proposes a set of presumptions that would enable FEPAs to limit their attention to complaints provable at trial without resort to costly statistical analyses. Although disparate impact's ultimate potential contribution to the reentry process is limited, FEPA involvement would bring significant advantages over current Title VII-based litigation and should be encouraged.*

[*] Michael Connett, J.D., Temple University Beasley School of Law, 2011. I would like to thank Ryan Hancock and Janet Ginzberg for introducing me to this area of law, Charles Nier for his helpful guidance on civil rights-related matters, and Professor Jeremi Duru for his advice on this Comment. I would also like to express my gratitude to the staff and editors of the *Temple Law Review* with whom I have greatly enjoyed working during these past two memorable years.

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## I. INTRODUCTION

A few weeks after being hired as a paratransit bus driver, Douglas El was fired when a criminal background check disclosed his "digital scarlet letter"—a forty-year old felony conviction for second-degree murder.[1] While the American Bar Association (ABA) advocates giving ex-offenders "a second chance after paying their debt to society,"[2] most employers confide that they would not knowingly hire an applicant with a criminal record.[3]

Each year, approximately 700,000 prisoners in the United States are released back into society and attempt to start life anew.[4] Due, however, to the growing utilization of criminal background checks by employers[5]—as well as employer concerns over negligent hiring liability[6] and heightened fears in the wake of 9/11[7]—individuals like Douglas El are finding it increasingly difficult to find a job. According to Janet Ginzberg, a staff attorney with Community Legal Services in Philadelphia, "many of

1. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 235 (3d. Cir. 2007); Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1200 (2006) (stating that, in an age of widespread criminal background checks, "a formerly incarcerated person wears a digital scarlet letter").

2. COMM'N ON EFFECTIVE CRIM. SANCTIONS, AM. BAR ASS'N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 27 (2007).

3. JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001); *see also* Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 271 (2009) (stating that employers are "more reluctant to hire ex-offenders than any other group of disadvantaged persons").

4. *See* David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. OF BOOKS, (Nov. 19, 2009), http://www.nybooks.com/articles/23382 (referring to number of prisoners released in 2008).

5. *See, e.g.*, Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 592–93 (2009) (noting that internet has made it easier and cheaper for employers to conduct criminal background checks); *see also* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 207 (2008) (reporting that growing number of states are making criminal record information publicly available on state websites).

6. *See* JENNIFER FAHEY ET AL., CRIME & JUSTICE INST., EMPLOYMENT OF EX-OFFENDERS: EMPLOYER PERSPECTIVES ii (2006) (reporting that half of surveyed employers would be more likely to hire ex-offenders if if there were less risk of incurring legal liability for doing so).

7. Margaret Colgate Love, *The Debt That Can Never Be Paid*, CRIM. JUST., Fall 2006, at 16, 23.

our clients tell us they had less trouble finding jobs fifteen years ago just out of prison than they do now."[8] The recent downturn in the economy has made the problem worse.[9]

Although employment discrimination against ex-offenders affects Americans of all backgrounds,[10] the problem is most acute in the African American and Hispanic communities.[11] According to the NAACP, "employers' refusal to hire persons with criminal convictions has a profound disparate impact on people of color, with stark implications for racial equality."[12] Indeed, not only do African Americans experience significantly higher conviction rates than whites, but they suffer a greater impairment in employment prospects as a result.[13]

In light of the disproportionate harm that criminal record policies have on black and Hispanic job applicants, such policies may be unlawful under Title VII of the Civil Rights Act of 1964.[14] Under Title VII's disparate impact framework,[15] federal courts in the 1970s invalidated criminal record policies that could not be justified on a business necessity basis.[16] Beginning, however, with the Supreme Court's decision in *New York City Transit Authority v. Beazer*,[17] the success rate of disparate impact claims began to plummet[18] and judicial hostility to providing ex-offenders a cause of action under Title VII began to emerge.[19]

Although post-*Beazer* jurisprudence led some to write the obituary of disparate impact as a remedy in criminal record cases,[20] three recent developments highlight the

8. Interview with Janet Ginzberg, Staff Att'y, Cmty. Legal Servs., (Nov. 24, 2009).

9. Yamiche Alcindor, *'People's Backs Are Against the Wall': Amid Downturn, a Rise in Jobless D.C. Parolees and Chances of Recidivism*, WASH. POST, Sept. 6, 2009, at C1.

10. *See* Geiger, *supra* note 1, at 1193 (reporting that one in five Americans have some form of criminal record).

11. See *infra* Part II.A for research showing severe racial disparities in the rates of arrest, conviction, and incarceration.

12. Letter from Joy Milligan, Assistant Counsel, NAACP Legal Def. and Educ. Fund, Inc., to Naomi C. Earp, Chair, U.S. Equal Emp. Opportunity Comm'n (Jan. 12, 2009) (on file with author) [hereinafter NAACP Letter].

13. See *infra* notes 43–47 and accompanying text for a review of the differential effects a criminal record has on the job prospects of similarly situated African American and white applicants.

14. 42 U.S.C. § 2000e-2 (2006). See *infra* notes 80–86 and accompanying text for a discussion of Title VII's application to criminal record policies.

15. See *infra* Part III for a review of disparate impact doctrine under Title VII.

16. *E.g.*, Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975), *appeal after remand*, 549 F.2d 1158 (8th Cir. 1977); Gregory v. Litton Sys., 472 F.2d 631, 632 (9th Cir. 1972); Dozier v. Chupka 395 F. Supp 836, 850–51 (S.D. Ohio 1975).

17. 440 U.S. 568 (1979). See *infra* notes 129–43, 455–59, and accompanying text for a discussion of *Beazer* and its impact.

18. See *infra* note 171 and accompanying text for data on the declining success rate of federal disparate impact claims since the early 1980s.

19. See *infra* notes 222–28 and accompanying text for a discussion of judicial hostility to ex-offender claims under Title VII.

20. *See, e.g.*, Irina Kashcheyeva, Comment, *Reaching a Compromise: How to Save Michigan Ex-Offenders from Unemployment and Michigan Employers from Negligent Hiring Liability*, 2007 MICH. ST. L. REV. 1051, 1065 ("[E]ven a blanket restriction on ex-offenders' employment [may be] impervious to attacks.").

doctrine's potential to provide relief in a certain category of cases. First, in 2007, the Third Circuit rebuked the highly deferential business necessity analysis used by post-*Beazer* courts and replaced it with a test that requires an objective assessment of a policy's effectiveness.[21] Second, the Equal Employment Opportunity Commission (EEOC) announced that it will be implementing "investigative and litigation strategies" to challenge employer criminal record policies,[22] and has filed several lawsuits since 2008.[23] Third, in 2009, as a result of outreach efforts by a legal services organization, the state Fair Employment Practices Agency (FEPA) in Pennsylvania announced it was going to do what few other FEPAs have done: utilize its executive authority to process criminal record claims under a disparate impact framework.[24]

This Comment makes the case that outreach efforts to FEPAs regarding the applicability of disparate impact doctrine to criminal record policies represents a promising non-legislative strategy for combating employment discrimination against ex-offenders. While FEPAs appear concerned about the costs of processing disparate impact claims, such concerns can be specifically mitigated in the criminal record context thanks to: (1) a vast amount of research on racial disparities in the criminal justice system, making it relatively easy to assess the impact of criminal record policies,[25] and (2) an emerging body of recidivism research that enables quantifiable assessments of a criminal record policy's effectiveness.[26] In assessing this research through the lens of applicable case law, this Comment proposes two presumptions at the investigatory stage that will enable FEPAs to focus their limited resources on ex-offenders with a viable cause of action that can be proved in a cost-effective manner: namely, applicants seeking jobs that involve skills many people can acquire[27] and who have demonstrated their rehabilitation by remaining crime-free for an extended period of time.[28]

Part II provides the factual background, including research on the stark racial disparities in the criminal justice system, recent findings on the recidivism risk of formerly incarcerated individuals, and employers' justifiable concerns about hiring individuals with criminal records. Part III examines disparate impact doctrine under

21. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 245 (3d Cir. 2007). See *infra* Part III.B.3 for a discussion of the Third Circuit's analysis.

22. *E-RACE Goals and Objectives*, EEOC.GOV, http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm (last visited Nov. 4, 2011); *see also* Sam Hananel, *Some Job-Screening Tactics Challenged as Illegal*, ASSOCIATED PRESS (Aug. 12, 2010), *available at* http://www.msnbc.msn.com/id/38664839/ns/business-careers/ (noting EEOC's concern that discrimination against ex-offenders is "snowballing" due to ease of conducting criminal background checks).

23. Complaint, EEOC v. Freeman, No. 8:09CV02573, 2009 WL 5082565 (D. Md. Sept. 30, 2009); Complaint, EEOC v. Peoplemark, Inc., No. 1:08CV00907, 2008 WL 4733865 (W.D. Mich. Sept. 29, 2008).

24. See *infra* Part IV.B for a discussion of the policy guidance issued by Pennsylvania's FEPA.

25. See *infra* Part II.A for data on the racial disparities in the criminal justice system.

26. See *infra* notes 52, 74–78, and accompanying text for research showing a significant risk of recidivism within three years of an individual's release from prison, but little risk after five to eight years.

27. See *infra* Part VI.C.2 for the proposal that, during the investigatory stage of a case, FEPAs should presume a prima facie case when the job at issue does not require special qualifications.

28. See *infra* Part VI.C.3 for the proposal that, during the investigatory stage of a case, FEPAs should presume the presence or absence of a valid business necessity defense based on the length of time that the complainant remained crime-free prior to applying for the job at issue.

federal law and its erosion by post-*Beazer* courts. Part IV examines disparate impact doctrine under state law, including the involvement (and lack thereof) of state FEPAs. Part V concludes the overview by looking at state statutes that directly limit employment discrimination against ex-offenders as a class.

The Comment's analysis begins in Part VI.A with a discussion of the practical advantages that would flow from FEPA engagement. Part VI.B then outlines the reasons—including common misunderstandings about disparate impact doctrine—why educational outreach efforts to FEPAs are necessary. Part VI.C proposes a set of presumptions that would effectively winnow out frivolous claims and allow FEPAs to focus on only those claims capable of prevailing at trial without resort to highly customized statistical analyses. Part VI.D examines some of the litigation obstacles that presumptively meritorious claims could face in the post-*Beazer* context. Finally, Part VI.E refutes arguments by employers that FEPA involvement will "open the floodgates" of litigation.

## II. FACTUAL BACKGROUND

### *A. Racial Disparity in Criminal Convictions*

The categorical denial of employment to ex-offenders exerts a severe disparate impact on African American and Hispanic populations.[29] African Americans are convicted at higher rates than whites for weapon crimes, property crimes, drug crimes, and violent crimes,[30] and are incarcerated at higher rates than whites in *every single state*.[31] On average, African Americans are incarcerated in state and federal prisons at a rate 6.5 times greater than whites.[32] An estimated 32.2% of African American males will spend part of their life in prison, versus 17.2% of Hispanic males and 5.9% of white males.[33] Perhaps most shockingly, 60% of African American males who drop out of high school wind up in prison.[34]

29. EQUAL EMP'T OPPORTUNITY COMM'N, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Feb. 4, 1987), *available at* http://www.eeoc.gov/policy/docs/convict1.html [hereinafter EEOC CONVICTION RECORDS].

30. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 2 (2007); *see also* FBI, CRIME IN THE UNITED STATES, 2008 tbl.43 (2009), *available at* http://www2.fbi.gov/ucr/cius2008/data/table_43.html (providing data on racial disparity in arrests for over twenty crimes).

31. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 11 (2006).

32. *See* HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 18 (2009).

33. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 (2003). The black/white disparity in incarceration rates exceeds the black/white disparity in "most other social indicators," including unemployment and wealth accumulation. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16 (2006).

34. WESTERN, *supra* note 33, at 3. The respective rate for white males who drop out of high school is 11%. *Id.* at 33. The racial disparity in incarceration rates is not limited to high school dropouts but persists among those with "some college" education as well. *Id.*

While the racial disparity in incarceration rates dates back to the segregation era,[35] it has worsened in recent decades as a result of the "war on drugs."[36] Between 1985 and 1995 the percentage of black drug offenders sentenced to prison increased by 707%—more than twice the respective 306% increase for white drug offenders.[37] Such racial disparities in drug convictions do not appear justified by disparities in actual drug use.[38] Whereas African Americans comprise 14% of "regular drug users," they represent "37% of those arrested for drug offenses and 56% of persons in state prison for drug offenses."[39] Such racial disparities in arrest and conviction rates have been attributed to both racial profiling[40] and the higher rates of poverty and unemployment[41] that African Americans continue to experience as a result of historic discriminatory practices.[42]

Once convicted, African Americans encounter greater resistance from employers than similarly situated whites.[43] In a 2009 study from New York, a criminal conviction reduced a black job applicant's chances of receiving a callback from prospective employers by 60%.[44] By contrast, the callback rate for white applicants with identical professional qualifications and criminal histories was reduced by 30%.[45] According to the authors, the study "indicates that the penalty of a criminal record is more disabling

35. *See* Cole, *supra* note 4 (noting that, in 1950s, African Americans made up thirty percent of prison population, roughly three times their representation in overall population).

36. *See* MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 19–21 (2007), *available at* http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf (detailing racially disparate effects of war on drugs).

37. Lyles-Chockley, *supra* note 3, at 261.

38. MAUER & KING, *supra* note 36, at 19–20.

39. *Id.* at 2.

40. *See* State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (documenting use of racial profiling in New Jersey's war on drugs); Lyles-Chockley, *supra* note 3, at 262 (summarizing racially discriminatory practices at various stages of criminal prosecution, including surveillance, arrest, conviction, and sentencing). *But see* Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 7–8 (2008) (discussing research showing that racial disparities in violent-crime convictions accurately mirror disparities in offending patterns).

41. Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *3 n.1 (N.D. Ill. Sept. 9, 1992) ("[I]t is not *because* people are black that the crime statistics are what they are. Every thoughtful student of our society rather correlates the incidence of crime with the incidence of poverty—and one of the aspects of United States life about which we must individually and collectively be most troubled (and must have a great national sense of guilt) is the enormous disparity that exists between blacks and non-blacks in terms of their respective percentages of people below the poverty level.").

42. *See* Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 193–94 (2008) (summarizing discriminatory practices that impeded wealth accumulation in African American community).

43. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) [hereinafter Pager I]; Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 642–43 [hereinafter Pager II].

44. Pager I, *supra* note 43, at 199.

45. *Id.*

for black job seekers than whites."[46] An earlier study from Wisconsin reported similar results.[47]

### *B. Employment as a Means of Reducing Recidivism*

In addition to exacerbating racial inequities, employment discrimination against ex-offenders undermines efforts to reintegrate ex-offenders into society and may thereby carry significant public safety implications. According to a report from the U.S. Attorney General, "[s]teady gainful employment is a leading factor in preventing recidivism."[48] Since research has linked unemployment with increased recidivism risk,[49] unnecessary barriers to ex-offender employment may "undermine the reentry that makes us all safer."[50] The Attorney General's position is consistent with the "near-universal public belief 'that helping ex-offenders find stable work [is] the most important step in helping them reintegrate into their communities.'"[51]

Studies have shown that a staggering 67.5% of prisoners are re-arrested for a felony or serious misdemeanor within three years of being released from prison.[52] In order to "break [this] cycle of criminal recidivism,"[53] President George W. Bush signed the bipartisan Second Chance Act in 2008.[54] The Act provides federal funding for educational, literacy, vocational, and job placement services, as well as substance abuse treatment, for offenders during and after incarceration.[55] In addition to funding these "reentry" programs, the federal government offers tax credits to employers who hire ex-offenders through the Work Opportunity Tax Credit Program (WOTC).[56] Such

46. *Id.*

47. Pager II, *supra* note 43, 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.").

48. OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006).

49. *See* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 2 (2001) (questioning data but noting that family formation and employment are two factors commonly identified by researchers as "predict[ing] desistance from crime"); *see also* Second Chance Act of 2007 § 3(b)(19), 42 U.S.C. § 17501(b)(19) (Supp. 2011) ("Transitional jobs programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism.").

50. OFFICE OF THE ATT'Y GEN., *supra* note 48, at 2. A decrease in recidivism through employment would not only increase public safety, but ease budgetary pressures on state governments as well. On average state governments spend over $20,000 on each inmate per year, with some states paying as much as $40,000. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, at 1, 3 (2004).

51. Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 532 (2007) (alteration in original).

52. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002).

53. 42 U.S.C. § 17501(a) (Supp. 2011).

54. Dan Eggen, *Bush Signs into Law a Program That Gives Grants to Former Convicts*, WASH. POST, Apr. 10, 2008, at A4.

55. Second Chance Act of 2007, Pub. L. No. 110-199, sec. 3(a), 122 Stat. 657, 658 (2008).

56. *Work Opportunity Tax Credit*, U.S. DEP'T OF LABOR, http://www.doleta.gov/business/Incentives/opptax/ (last visited Mar. 12, 2011).

federal programs have been complemented by various state and local initiatives.[57] For example, a number of large cities have recently enacted "ban the box" bills that prohibit public employers from asking about an individual's criminal history on job application forms.[58] The goal of ban-the-box legislation is to ensure that ex-offenders are judged on their professional qualifications prior to employers taking account of their criminal history.[59] In 2009 and 2010, statewide ban-the-box bills were signed into law in Connecticut,[60] Minnesota,[61] and New Mexico.[62]

### *C. Concerns About Workplace Productivity and Safety*

Despite the policy interests in employing ex-offenders, there are several factors that complicate the objective. First, ex-offenders tend to have less education, less job skills, and higher rates of both untreated drug addiction and mental illness than society as a whole.[63] Forty percent of prison inmates, for example, do not have a high school diploma or GED,[64] while over seventy percent of inmates report having regularly used drugs prior to entering prison.[65] Many ex-offenders thus have characteristics that make them unattractive to employers.

A second concern among employers is the strikingly high rate of recidivism that persists during the first three years after release.[66] If an employee recidivates while on the job, it not only jeopardizes workplace safety, but may expose the employer to

57. *See* Robert Rodriguez & Joan Petersilia, *Building an Employment Bridge: Making Ex-Offenders Marketable, Getting Employers to the Table, and Increasing the Likelihood of an Employment Connection* 38 (Stanford Univ. Crim. Justice Ctr. Working Papers, Cal. Sent'g & Corr. Pol'y Series, Jan. 27, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976999 (arguing for "salad-bowl" approach of federal and state initiatives—including expungement and formal certifications of rehabilitation—since "no single solution" provides the answer).

58. Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 371, 373 (2008) (stating that Boston, Chicago, Minneapolis, St. Paul, and San Francisco have each enacted ban-the-box legislation); *see also 'Ban the Box' Bill Signed into Law in Philadelphia*, NAACP, http://www.naacp.org/news/entry/ban-the-box-bill-signed-into-law-in-philadelphia (last visited Nov. 2, 2011) (reporting that Philadelphia enacted ban-the-box bill in April 2011).

59. Stoll & Bushway, *supra* note 58, at 373.

60. Gregory B. Hladky, *"Ban The Box" Law Should Help People with Criminal Records Find Jobs*, NEW HAVEN ADVOCATE, (July 6, 2010), http://www.newhavenadvocate.com/featured-news/ban-the-box-law-should-help-people-with-criminal-records-find-jobs.

61. *Minnesota Becomes First State to "Ban the Box"*, THE REAL COSTS OF PRISONS WEBLOG (May 19, 2009, 4:12 PM), http://realcostofprisons.org/blog/archives/2009/05/minnesota_becom.html.

62. Julie Roberts, *Banning the 'Box' Means Fair Shot at Rebuilding Life*, ALBUQUERQUE J., (Mar. 12, 2010), http://www.abqjournal.com/opinion/guest_columns/1285729419opinionguestcolumns03-12-10.htm.

63. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003); DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006); TRAVIS, *supra* note 3, at 25–30.

64. HARLOW, *supra* note 63, at 1 (providing data from studies conducted in 1990s).

65. *See* CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997, at 7 tbl.6 (1999) (reporting that 70.5% of black and white inmates report having regularly used drugs prior to entering prison).

66. *See* LANGAN & LEVIN, *supra* note 52, at 1 (reporting that "67.5% of prisoners were rearrested for a new offense" within three years of release).

negligent hiring liability as well.[67] Negligent hiring liability, which has been "rapidly adopted" by most states, provides that an employer is liable for the harm caused by an employee if it "knew or should have known of the employee's dangerous propensities."[68] Jury verdicts in negligent hiring cases average $3 million[69]—more than enough to "cause the bankruptcy of a small employer."[70]

Although employer concerns may be justified in many circumstances, hiring policies that fail to take into account the type of crime committed may do little to enhance workplace safety.[71] For example, the majority of people in prison were convicted of nonviolent crimes,[72] with approximately one third of released prisoners having served their time for a drug offense.[73]

Moreover, hiring policies that fail to account for the time that has elapsed since an applicant's arrest, or release from prison, risk disqualifying those who no longer pose a risk of criminal activity.[74] A recent study of a population in Philadelphia, for example, found that "the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with

67. *See* Donald R. Livingston, Address at the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), http://archive.eeoc.gov/abouteeoc/meetings/11-20-08/livingston.html (describing "legal minefield" wherein employers face liability for refusing to hire ex-offenders and liability if they hire ex-offenders who recidivate on job (internal quotation marks omitted)).

68. Watstein, *supra* note 5, at 584.

69. *Id.* at 587.

70. Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 197 (2004).

71. A Wal-Mart in Michigan, for example, was recently alleged to have barred employment to anyone with a prior felony, with no distinction made for the type of offense or how long ago it occurred. Art Aisner, *ACLU Accuses Local Walmart Store of Possibly Violating Anti-Discrimination Laws*, SALINE REP. (Dec. 28, 2009), http://www.heritage.com/articles/2009/12/28/saline_reporter/news/doc4b3297f901ad8593052723.txt. Although this Comment focuses on discrimination by *private* employers, there is also a wide array of state and federal laws disqualifying ex-offenders from both *public* employment and professional licensure that may be fairly critiqued as overbroad as well. Karol Lucken & Lucille M. Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 L. & POL'Y 46, 53–54 (2008). Six states, for example, permanently bar all ex-felons from any form of public employment. *Id.* at 53. Many other states bar ex-felons from receiving licensure for a wide range of professions. *See, e.g.*, ARK. CODE ANN. § 17-20-308(1) (2009) (listing felony as grounds for denial of barber license); MISS. CODE ANN. § 73-7-27(2)(d) (2010) (listing felony as grounds for denial of cosmetologist license). Such laws have proved vulnerable to constitutional challenge, with "a surprising number of . . . courts [finding] that occupational barriers imposed on former offenders are irrational and therefore violate equal protection." Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 2, 20 (2005). Nevertheless, despite "almost universal legal scholarly argument for removing impediments to ex-offender employment," there has been "no significant decrease in laws that bar them from employment." Clark, *supra* note 70, at 201.

72. JOHN IRWIN ET AL., JUSTICE POL'Y INST., AMERICA'S ONE MILLION NONVIOLENT PRISONERS, 3 (1999), http://www.justicepolicy.org/images/upload/99-03_REP_OneMillionNonviolentPrisoners_AC.pdf.

73. TRAVIS, *supra* note 3, at 9. The vast majority of drug offenses are for possession, usually of marijuana, and not for sale or distribution. *See* MAUER & KING, *supra* note 36, at 3 ("In 2005, four of five (81.7%) drug arrests were for possession and one of five (18.3%) for sales. Overall, 42.6% of drug arrests were for marijuana offenses.").

74. *See* COMM'N ON EFFECTIVE CRIM. SANCTIONS, *supra* note 2, at 27 ("The bottom line is that many people who are willing to work, and who pose little or no risk to the community, are being shut out of decent jobs because of their criminal record.").

no criminal record."[75] Based on these findings, the authors suggested that "after a given period of remaining crime free, it may be prudent to wash away the brand of 'offender' and open up more legitimate opportunities to this population."[76] A study in the May 2009 issue of *Criminology* added further support to these findings by assessing the risk of recidivism as a function of the offense committed.[77] Among individuals who had committed property crimes, the risk of recidivism was statistically insignificant after 4.8 years of remaining crime-free, while the risk of recidivism among violent offenders was insignificant after eight years.[78] When an ex-offender no longer presents a risk of recidivism, employment discrimination provides few, if any, benefits to society.[79]

## III. DISPARATE IMPACT UNDER FEDERAL LAW

Under Title VII of the Civil Rights Act of 1964, employers may not discriminate on the basis of a person's protected class.[80] Protected classes under the Act include race, color, sex, religion, and national origin.[81] Although individuals with criminal records are not defined as a protected class, the EEOC[82] and federal courts[83] have interpreted Title VII as prohibiting policies that discriminate against ex-offenders if such policies exert a "disparate impact" on a protected class and are not justified by business necessity.

Under the disparate impact theory of discrimination, an employer need not have any intent to discriminate against a protected class in order to be liable under Title VII.[84] As the Supreme Court held in *Griggs v. Duke Power Co.*,[85] "[t]he Act proscribes

75. Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 483 (2006) [hereinafter *Scarlet Letters*]; *see also* Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 78–80 (2007) (discussing results of Wisconsin study and concluding that recidivism risk is negligible after seven years of remaining crime-free).

76. *Scarlet Letters*, *supra* note 75, at 483–84; *see also* Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans for Ex-Felons*, 6 CRIMINOLOGY & PUB. POL'Y 697, 703 (2007) ("Blanket lifetime bans of ex-felons . . . are not supported by criminological research and should be abolished.").

77. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 335–44 (2009).

78. *Id.* at 343–44. Violent offenders were found to have higher recidivism rates than property offenders "indicating that violent offenders need to stay clean longer for the same risk-tolerance difference." *Id.* at 343.

79. *See* Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 529 (2005) (arguing that any "collateral consequence" of criminal conviction has "no justification" when divorced from preventive function).

80. 42 U.S.C. § 2000e-2 (2006).

81. *Id.* § 2000e-2(a)(1).

82. EEOC CONVICTION RECORDS, *supra* note 29.

83. *E.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242–45 (3d Cir. 2007); Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975), *appeal after remand*, 549 F.2d 1158 (8th Cir. 1977); Dozier v. Chupka, 395 F. Supp. 836, 850–51 (S.D. Ohio 1975); Gregory v. Litton Sys., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); Field v. Orkin Exterminating Co., No. CivA-00-5913, 2001 WL 34368768, at *2–3 (E.D. Pa. Oct 30, 2001).

84. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive . . . is not required under a disparate-impact theory.").

85. 401 U.S. 424 (1971).

not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[86]

In *Griggs*, the Court invalidated a high school graduation requirement that excluded a disproportionate number of African Americans due to the "inferior education" they had "long received" in segregated schools.[87] *Griggs* made clear, however, that the diploma requirement's disproportionate impact on African Americans was not, in and of itself, sufficient for invalidating the policy.[88] As the Court stressed, Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."[89] Indeed, Title VII allows facially neutral hiring policies that disproportionately harm a protected class so long as they reasonably measure the qualities needed for successful performance of the job.[90] Thus, in *Griggs*, the employer's graduation requirement was held to violate Title VII not *just* because it operated as "built-in headwinds" against African Americans, but because it also lacked any "demonstrable relationship to successful performance of the jobs."[91]

### *A. The Prima Facie Case*

As developed by *Griggs* and its progeny, and as codified by Congress in 1991, disparate impact claims utilize a three-part burden-shifting framework.[92] In the first phase of the analysis, the plaintiff has the burden of establishing a prima facie case that a specific employment policy disproportionately harms his or her protected class.[93] There is no "rigid mathematical formula" for determining when the evidence is sufficient to meet the plaintiff's burden.[94] Since the burden is to show that a specific policy is "more likely than not" to exert a disproportionate impact,[95] the plaintiff is "not required to exhaust every possible source of evidence";[96] the plaintiff's statistics thus

86. *Griggs*, 401 U.S. at 431.

87. *Id*. at 430, 436.

88. *Id*. at 430–31.

89. *Id*.

90. *Id*. at 431 (establishing that "[t]he touchstone" in disparate impact cases is "business necessity").

91. *Id*. at 430–32.

92. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (summarizing three-part burden-shifting framework established by *Griggs* and its progeny); 42 U.S.C. § 2000e-2(k) (2006) (defining "burden of proof in disparate impact cases"). In this Comment, the analysis is limited to the first two prongs of the burden-shifting scheme (e.g., the prima facie case and business necessity defense).

93. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

94. Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988) (noting that statistics for proving employment discrimination "come in infinite variety . . . and their usefulness depends on all of the surrounding facts and circumstances" (omission in original) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977)) (internal quotation marks omitted)).

95. Allen v. Seidman, 881 F.2d 375, 380 (7th Cir. 1989). This preponderance standard has been widely adopted by federal appellate courts. *E.g.*, Farrell v. Butler Univ., 421 F.3d 609, 616 (7th Cir. 2005); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 160 (2d Cir. 2001); Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 n.3 (5th Cir. 1989).

96. *Dothard*, 433 U.S. at 331.

need not establish the discriminatory impact with "scientific certainty."[97] As discussed below, courts have accepted at least three distinct methods for proving the prima facie case, two of which focus on the impact on *potential* applicants (i.e., general population analysis and relevant labor market analysis), while one focuses on the impact on *actual* applicants (i.e., applicant pool analysis).[98]

While a defendant may proffer evidence to rebut the plaintiff's prima facie case,[99] it is of no avail for a defendant to show that the plaintiff's protected class is adequately represented in the workplace if the plaintiff has demonstrated that a *specific* policy works disproportionate harm to that class.[100] As the Court reasoned in *Connecticut v. Teal*,[101] Title VII "does not permit the victim of a . . . discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."[102]

1. Impact on Potential Applicants

*a. General Population Statistics*

The Supreme Court has repeatedly reaffirmed[103] that disparate-impact plaintiffs may establish a prima facie case based on general population statistics, but only if the statistics "accurately reflect the pool of qualified job applicants."[104] According to the Court, general population statistics may accurately reflect the potential applicant pool for *low-skilled jobs* since "many persons" in society "possess or can fairly readily acquire" the skills required.[105] The Court has accepted a prima facie case based on

97. Bazemore v. Friday, 478 U.S. 385, 400–01 (1986).

98. Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 6–9 (1977); Stacey B. Babson, Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 CARDOZO. L. REV. 549, 560 n.54 (1986).

99. *Watson*, 487 U.S. at 996.

100. Connecticut v. Teal, 457 U.S. 440, 455 (1982).

101. 457 U.S. 440 (1982).

102. *Teal*, 457 U.S. at 455. In reaching this conclusion, the Court reasoned that Title VII's "principal focus" is "the protection of the *individual* employee, rather than the protection of the minority group as a whole." *Id.* at 453–54 (emphasis added).

103. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 n.6 (1989); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 586 n.29 (1979); Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

104. *Wards Cove*, 490 U.S. at 651 n.6 (internal quotation marks omitted). *See generally* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 970 (1982); Shoben, *supra* note 98, at 6–7.

105. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977). According to the Court, low-skilled jobs include programs "designed to provide expertise." Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 632 (1987); *see also* Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1554 (11th Cir. 1994) (interpreting programs "designed to provide expertise" as encompassing "entry level" jobs). The Court has also interpreted low-skilled jobs as encompassing commercial trucking positions. *Hazelwood*, 433 U.S. at 308 n.13; *see also Wards Cove*, 490 U.S. at 674–75 & n.21 (Stevens, J., dissenting) (citing, without objection, fifteen positions characterized as unskilled by the district court, including waiters/waitresses, janitors, machinist helpers, and night watchmen); Shoben, *supra* note 98, at 33 (listing "[p]olice officers, fire fighters, many factory workers, and bank tellers" as positions requiring "readily acquired skills"). *But see* Barbara Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 30–35

general population statistics in two decisions. In *Griggs*, black applicants for manual labor positions successfully proved a prima facie case against the employer's high school diploma requirement by citing state census data showing that high school graduation rates were significantly higher for whites than blacks.[106] Similarly, in *Dothard v. Rawlinson*,[107] female applicants for a correctional officer position established a prima facie case against an Alabama prison's height and weight requirement by referring to national data on the differential body size of men and women.[108]

In cases challenging criminal record policies, federal courts have also been amenable to the use of general population statistics as a proxy for the potential applicant pool.[109] In *Gregory v. Litton Systems, Inc.*,[110] an African American applicant to a mechanic position built a prima facie case based on national data showing that African Americans are arrested at significantly higher rates than whites.[111] As noted by the *Gregory* court, the racial disparity in national arrest statistics is "overwhelming and utterly convincing" and makes it "foreseeable" that a policy of denying employment to individuals with prior arrests will disproportionately impact African Americans.[112]

In accord with *Gregory*, the EEOC repeatedly relied on national data on arrests and convictions[113] when issuing "reasonable cause" findings against employer criminal record policies in the 1970s and 1980s.[114] As with *Gregory*, the EEOC concluded that

(arguing that Court's acceptance of general population statistics is based on fundamentally flawed premise that blue collar workers are "fungible").

106. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 & n.6 (1971).

107. 433 U.S. 321 (1977).

108. *Dothard*, 433 U.S. at 329–30; *see also* Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612–13 (8th Cir. 1991) (accepting prima facie case against pizza company's no-beard policy based on dermatologists' testimony that black males suffer from higher rates of skin condition that prevents them from shaving).

109. *See* Dozier v. Chupka 395 F. Supp. 836, 843, 850 (S.D. Ohio 1975) (accepting city arrest statistics as sufficient grounds for concluding that criminal record policy disproportionately affected African American applicants); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (national arrests statistics).

110. 316 F. Supp. 401 (C.D. Cal. 1970).

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

112. *Id.*

113. *E.g.*, EEOC Decision No. 81-15, 27 Fair Empl. Prac. Cas. (BNA) 1787 (1981); EEOC Decision No. 80-20, 26 Fair Empl. Prac. Cas. (BNA) 1805 (1980); EEOC Decision 78-10, 1977 WL 5336 (1977); EEOC Decision No. 77-30, 21 Fair Empl. Prac. Cas. (BNA) 1791 (1977); EEOC Decision No. 72-1460, 4 Fair Empl. Prac. Cas. (BNA) 718 (1976); EEOC Decision No. 72-1497, 4 Fair Empl. Prac. Cas. (BNA) 849 (1972); EEOC Decision No. 71-2089, 4 Fair Empl. Prac. Cas. (BNA) 148 (1971); EEOC Decision No. 71-2682, 4 Fair Empl. Prac. Cas. (BNA) 25 (1971).

114. A finding of reasonable cause conveys the EEOC's conclusion that "there is probable cause to conclude that a violation of Title VII has occurred." Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986). However, a determination of probable cause, "while final in itself, has no effect until either the [EEOC] or the charging party brings suit in district court." Georator Corp. v. EEOC, 592 F.2d 765, 769 (4th Cir. 1979) (footnote omitted). After issuing a reasonable cause finding, the EEOC may elect to either litigate the case itself or provide a right-to-sue letter to the complainant. J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of* Twombly *and* Iqbal *on Employment Discrimination Complaints and the EEOC's Mediation and Litigation Efforts*, 83 TEMP. L. REV. 757, 768–69 (2011). Since 2008, the EEOC has litigated at least two disparate impact claims against employer criminal record policies. *See generally* Complaint, EEOC v. Freeman, *supra* note 23; Complaint, EEOC v. Peoplemark,

criminal record policies have a "forseeably disparate effect."[115] The EEOC maintains this position today.[116] In its policy guidance on criminal record policies, the EEOC states that the racial disparity in conviction rates is so stark as to justify a *presumption* of disparate impact whenever an African American or Hispanic is denied a job on the basis of a criminal record,[117] irrespective of the qualifications required for the job.[118] Employers, however, may rebut this presumption by presenting "more narrowly drawn statistics," such as applicant flow data.[119] Although there may be significant differences in the receptiveness to criminal record claims among the EEOC's regional offices,[120] and although EEOC is currently facing a historically high backlog in claims,[121] some regional offices continue to issue reasonable cause findings against criminal record policies.[122]

*b. Relevant Labor Market Statistics*

Reliance on general population statistics to demonstrate an impact on qualified potential applicants becomes problematic when the job in question requires "special qualifications."[123] In such cases, the plaintiff must use data that is specifically tailored

Inc., *supra* note 23. Generally, however, the EEOC appears to favor the right-to-sue approach with criminal record cases. Interview with Janet Ginzberg, *supra* note 8.

115. EEOC Dec. No. 71-2682, 4 Fair Empl. Prac. Cas. (BNA) 25 (1971).

116. EEOC CONVICTION RECORDS, *supra* note 29.

117. *See id.* ("[A]n 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. Consequently, the Commission has held and continues to hold that such a policy or practice is *unlawful* under Title VII in the absence of a justifying business necessity." (emphasis added) (footnotes omitted)). EEOC policy guidelines are entitled to *Skidmore* deference, whereby courts assesses the "thoroughness evident in [the EEOC's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Using the *Skidmore* framework, the Third Circuit concluded that EEOC's criminal record policy is not "entitled to great deference." El v. Se. Pa. Transp. Auth., 479 F.3d 232, 244 (3d Cir. 2007).

118. EEOC CONVICTION RECORDS, *supra* note 29. According to the NAACP, the EEOC's presumption is justified for skilled jobs since "it is unrealistic to think that the extreme racial disparities in conviction rates disappear among individuals seeking more skilled areas of work." NAACP Letter, *supra* note 12, at 4.

119. EQUAL EMP'T OPPORTUNITY COMM'N, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (1987), *available at* http://www.eeoc.gov/policy/docs/convict2.html [hereinafter EEOC STATISTICS].

120. Interview with Janet Ginzberg, *supra* note 8. *See generally* Alberto Davila & Alok K. Bohara, *Equal Employment Opportunity Across States: The EEOC 1979–1989*, 80 PUB. CHOICE 223, 237 (1994) (documenting "extreme variability in successful discrimination complaints" among EEOC's regional offices); Robert J. Grossman, *Constant Inconsistency*, HR MAG., Dec. 2003, at 68, 69–72 (discussing differences among EEOC's regional offices with respect to investigation and litigation of claims).

121. Pritchard, *supra* note 114, at 758 (2011) ("[The EEOC] has been struggling to process a record-breaking number of charges that came through the agency from 2008 to 2010. During the eight years of the Bush administration, the agency suffered drastic budget cuts and a significant decrease in staffing." (footnote omitted)).

122. Interview with Janet Ginzberg, *supra* note 8.

123. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the

to represent the "relevant labor market" (i.e., members of the plaintiff's protected class within the employer's geographical region who are actually *qualified* to perform the job).[124] This is a much tougher evidentiary burden for the plaintiff to meet because it requires determining both the number of protected-class members in a specific region qualified to perform the job, and the percentage of these members who would actually be disqualified by the employer's policy.[125] Since such customized data is rarely readily available,[126] relevant labor market analyses generally necessitate complicated[127] and costly[128] statistical analyses. Nevertheless, federal courts have increasingly required these customized analyses in order to make out a prima facie case.[129] The origin of this trend has been traced to the Supreme Court's 1979 decision in *New York*

smaller group of individuals who possess the necessary qualifications) may have little probative value."). When it is unclear whether the job requires special qualifications, courts have placed the burden on the defendant to show that it does. *E.g.*, EEOC v. Radiator Specialty Co., 610 F.2d 178, 185 n.8 (4th Cir. 1979) (noting that putting burden on defendant "follows the general principle of allocation of proof to the party with the most ready access to the relevant information"); *accord* Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 483 (9th Cir. 1983).

124. *Hazelwood*, 433 U.S. at 308 (stating that when position requires special qualifications, "a proper comparison" is between composition of protected class in employer's workforce versus composition of "qualified" protected class in "relevant labor market"). The relevant labor market analysis has evolved with time. Initially, the Supreme Court accepted a prima facie case based on evidence of a racial disparity between the defendant's workforce and the relevant labor market—without proof that the challenged policy caused the disparity. Shoben, *supra* note 98, at 8–9. Later, however, the Court held that a causal link must be demonstrated between the specific policy being challenged and the observed disparity. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988); s*ee also* Foxworth v. Pa. State Police, 228 F.App'x 151, 156 (3d Cir. 2007) (dismissing plaintiff's claim because underrepresentation of African Americans in police force vis-à-vis general labor market is not proof challenged policy caused effect).

125. *See* William L. Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217, 241–45 (1986) (discussing common evidentiary considerations underlying determination of relevant labor market).

126. Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 344 (1998); NAACP Letter, *supra* note 12, at 4.

127. Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 313–14 (1993). As evident by *Wards Cove Packing Co. v. Atonio*, simply determining the geographical region from which an employer draws its employees can prove a complicated task. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 675–76 (1989) (Stevens, J., dissenting).

128. Amy R. Tabor, *Civil Rights in the '90s: The Supreme Court Overruled*, R.I. BUS. J., Mar. 1993, at 21, 25 ("The availability of expert witness fees may be particularly significant in disparate impact cases, in which sophisticated and costly statistical analysis is often necessary to determine appropriate job markets and the impact of employment practices."); *see also* Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence Is Consistent with the Age Discrimination in Employment Act*, 90 MARQ. L. REV. 227, 260 (2006) (noting that, in addition to cost of hiring expert to conduct statistical analysis, parties "may require the assistance of other experts, such as vocational experts, to provide comparative statistics for a particular geographic area"); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 982 (2005) (noting that attorneys considering disparate impact claims "may be daunted by the costs of the proof process").

129. *See* Lye, *supra* note 126, at 344 (contending that plaintiffs must now "mount virtually impossible statistical showings—impossible because, in practice, plaintiffs frequently lack access to the requisite data, expertise, or both, and because a plaintiff's definition of the relevant labor market can almost always be criticized as under- and/or over-inclusive").

*Transit Authority v. Beazer*[130]—the "first Title VII case in which the Supreme Court rejected the use of general population statistics to prove a prima facie case."[131]

In *Beazer*, the district court held that the New York Transit Authority's policy of barring methadone users from employment had a disparate impact on African Americans and Hispanics.[132] The district court's conclusion was based, in part, on a study of the New York City population which found that African Americans and Hispanics constituted roughly sixty-five percent of the individuals receiving methadone treatment in the city's public clinics.[133] The Supreme Court, however, refused to make any inferences about the characteristics of potential applicants based on the public clinic data.[134] Indeed, the Court described the data as "virtually irrelevant" since it "tells us nothing about the class of otherwise-qualified applicants."[135] Specifically, the Court noted that the data was overinclusive since only thirty-three percent of methadone patients in the public clinics had completed enough treatment (one year) to be "employable."[136] The data was also deemed underinclusive because private clinics treated about a third of the methadone-patient population and, thus, public clinics were not the sole source of methadone treatment.[137]

Although *Beazer* re-affirmed the validity of using general population statistics to make out a prima facie case,[138] critics note that its application of the rule signaled a retreat from the Court's plaintiff-friendly analyses in *Griggs* and *Dothard*.[139] In his dissenting opinion, Justice White faulted the *Beazer* majority for "hypothes[izing]" about possible, yet "unlikely," problems with the plaintiffs' data.[140] According to White, such speculation should not arise sua sponte when the defendant has not

130. 440 U.S. 568 (1979); *see also* Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 293 (2006) (stating that vitality of disparate impact doctrine has "significantly diminished" in the wake of *Beazer*); Nicole J. DeSario, Note, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 493–94 (2003) (discussing *Beazer*'s erosion of disparate impact doctrine); Lye, *supra* note 126, at 327 (same).

131. Bradford C. Mank, *Proving an Environmental Justice Case: Determining an Appropriate Comparison Population*, 20 VA. ENVTL. L.J. 365, 395 (2001).

132. *Beazer*, 440 U.S. at 578–79.

133. *Id.* at 579.

134. *Id*. at 585–86.

135. *Id*.

136. *Id.* at 585 n.28.

137. *Id.* at 586.

138. *Id.* at 586 n.29.

139. *See, e.g.*, William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 538 (2007) (describing *Beazer*'s prima facie analysis as "seemingly large change in Court policy from the *Griggs* era"); Simonson, *supra* note 130, at 292 (describing *Beazer* plaintiffs' prima facie evidence as "strong" and suggesting Court's skepticism evinces "manifest unwillingness" to provide ex-addicts remedy under Title VII). Critics also point to the Court's later decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) as a confirmation of the Court's wariness of general population statistics. For discussion of the *Wards Cove* decision, and a critique of those who contend that *Wards Cove* rejected general population statistics as an acceptable basis to establish a prima facie case, see *infra* notes 398–404 and accompanying text.

140. *Beazer*, 440 U.S. at 599 n.5 (White, J., dissenting).

proffered any evidence to justify it.[141] White noted, for example, that there was no evidence to indicate that the racial disparity in methadone use among public clinic patients would be any different among private clinic patients.[142] Similarly, White noted that there was no evidence to suggest that the racial disparity in methadone use would vanish among the "employable" methadone patients (those who had completed one year of treatment).[143]

In the wake of *Beazer*, federal courts have expressed similar skepticism about the probative value of general population statistics in criminal record cases. In *Hill v. United States Postal Service*,[144] for example, a federal district court in New York subjected the plaintiff's general population data—which included city, state, and national statistics on conviction and incarceration rates—to a withering review.[145] First, the plaintiff failed to tailor his analysis to the "relevant geographic area" from which the employer (the Post Office) drew its workforce.[146] Second, although the plaintiff was denied Post Office jobs between 1970 and 1976, his only statistics on conviction rates were derived from 1978 data.[147] Although the plaintiff produced state and national statistics on *incarceration* rates from 1970, 1971, and 1974, this was considered an insufficient proxy for *conviction* rates.[148]

Finally, the *Hill* court criticized the plaintiff's statistical analysis for failing to show "the proportion of convicted persons, either black or white, who could successfully complete the Postal Service examination."[149] Even though the plaintiff had only applied for manual labor positions, the court characterized the entrance examination as a "special qualification" which negated the probative value of general population statistics.[150] Thus, like *Beazer*, the *Hill* court held that general population statistics were an unreliable proxy of the employer's qualified potential applicants under the circumstances of the case.[151]

141. *Id.* White's view that the Court erred in speculating about conceivable problems with the plaintiffs' statistics in the absence of evidence from the defendant to justify such speculation is consistent with the majority's recitation of the rule regarding general population statistics. According to the majority, "'*evidence showing* that the figures for the general population might not accurately reflect the pool of qualified job applicants' undermines the significance of such figures." *Id.* at 586 n.29 (majority opinion) (emphasis added) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977)).

142. *Id.* at 600–01 (White, J., dissenting). White found it a "highly unlikely assumption at best" that the private clinics would be entirely white, particularly in light of statistics showing that eighty percent of New York City's heroin users ("the source of clients for both public and private methadone clinics") were black or Hispanic. *Id.* at 601 & n.7.

143. *Id.* at 600 ("I cannot . . . presume with the Court that blacks or Hispanics will be less likely than whites to succeed on methadone. I would have thought the presumption, until rebutted, would be one of an equal chance of success . . . .").

144. 522 F. Supp. 1283 (S.D.N.Y. 1981).

145. *See Hill*, 522 F. Supp. at 1302–03.

146. *Id.* at 1302.

147. *Id.* at 1302 n.24. According to the court, "evidence concerning post-1976 events" has "much less probative value than statistics for the period of the alleged continuing violation." *Id.*

148. *Id.* at 1296, 1302 n.24.

149. *Id.* at 1302.

150. *Id.* at 1302–03.

151. *Id.* at 1303.

2. Impact on Actual Applicants

A third method for establishing a prima facie case is to analyze the challenged policy's impact on the people who actually applied for the position.[152] In the early years of disparate impact litigation, the Supreme Court had expressed caution about applicant pool data.[153] In *Dothard*, for example, the Court warned that applicant data may not "adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."[154] This reservation has since been shared by at least three federal appellate courts.[155] Commentators have noted additional problems, including that applicant data is: frequently based on inadequate recordkeeping,[156] often "quite difficult" for plaintiffs to access,[157] generates significant discovery disputes,[158] may fail to show a statistically significant disparity when the applicant pool is small,[159] and requires costly reliance on experts to conduct the analysis.[160] Nevertheless, applicant pool data has certain distinct advantages,[161] and most courts now favor its use.[162]

In criminal record cases, post-*Beazer* courts have expressed a strong preference for applicant flow data over general population statistics.[163] In *EEOC v. Carolina Freight Carriers Corp.*,[164] for example, a federal district court in Florida required an

152. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 778 (2009).

153. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) ("A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.").

154. *Dothard*, 433 U.S. at 330.

155. Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 613 (8th Cir. 1991) ("[A] discriminatory work policy might distort the job applicant pool by discouraging otherwise qualified workers from applying."); Washington v. Elec. Joint Apprenticeship & Training Comm. of N. Ind., 845 F.2d 710, 712 (7th Cir. 1988) ("If the nature of the selection method is known, persons unlikely to pass through the filter that the method creates may decide not to waste their time applying."); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983) ("[P]ersons who lack the challenged requirement will self-select themselves out of the pool of applicants."). Based on this concern, courts have thrown out applicant pool data when evidence indicates that the plaintiff's class was deterred from applying. *E.g.*, EEOC v. Rath Packing Co., 787 F.2d 318, 337 (8th Cir. 1986).

156. Mank, *supra* note 131, at 397.

157. DeSario, *supra* note 130, at 494.

158. Sperino, *supra* note 128, at 260.

159. Watstein, *supra* note 5, at 597; *see also* Peresie, *supra* note 152, at 787 (explaining why statistical significance is hard to demonstrate with small applicant pools).

160. Sperino, *supra* note 128, at 260.

161. Applicant pool data is particularly useful when the impact of an employer's policy on the potential applicant pool cannot be easily assessed. Peresie, *supra* note 152, at 781. For example, when a written entrance exam is being challenged, a plaintiff cannot "make every person in the relevant labor market take [the] written test in order to determine whether [it] is fair." *Id.*

162. Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 965 (D.D.C. 1980).

163. *See, e.g.*, Matthews v. Runyon, 860 F. Supp. 1347, 1357 (E.D. Wis. 1994); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 751–52 (S.D. Fla. 1989).

164. 723 F. Supp. 734 (S.D. Fla. 1989).

applicant flow analysis despite acknowledging that the plaintiff's general population data established that the employer's policy would disparately impact potential Hispanic applicants.[165] Furthermore, the court required the applicant data despite acknowledging that it was "unavailable."[166]

In addition to requiring proof of impact on actual applicants, several post-*Beazer* courts have also required proof of statistical imbalances in the workforce as well.[167] In *Matthews v. Runyon*,[168] for example, the court faulted the plaintiff for failing to demonstrate that "nonwhites are disproportionately represented" in the workplace.[169]

3. Implications of Post-*Beazer* Prima Facie Analysis

As reflected by the post-*Beazer* emphasis on either applicant flow data or narrowly tailored analyses of the relevant labor market, plaintiffs face increasingly stringent requirements for making out a prima facie case.[170] Perhaps not surprisingly, therefore, the success rate of disparate impact claims in federal district courts has plummeted, dropping from forty-eight percent in the early 1980s to just thirteen percent in 2002.[171] By contrast, the success rate of other employment discrimination claims has been estimated to be approximately thirty-five percent.[172]

*B. The Business Necessity Defense*

If a plaintiff meets his prima facie burden, the burden shifts to the employer to prove that the challenged policy is "consistent with business necessity."[173] What constitutes "business necessity," and what is "consistent with" it, are questions that

165. *Carolina Freight*, 723 F. Supp. at 751–52.

166. *Id.* at 742. Courts have imposed similarly impossible burdens in other disparate impact cases as well. *See, e.g.*, United States v. North Carolina, 914 F. Supp. 1257, 1272 (E.D.N.C. 1996) (noting that factors which "*must* be considered" in establishing prima facie case may *not* be "within the realm of scientific possibility" (emphasis added)).

167. Watkins v. City of Chicago, 73 F. Supp. 2d 944, 949 (N.D. Ill. 1999); *Matthews*, 860 F. Supp. at 1357; Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992); *Carolina Freight*, 723 F. Supp. at 751.

168. 860 F. Supp. 1347 (E.D. Wis. 1994).

169. *Matthews*, 860 F. Supp. at 1357; *accord Williams*, 1992 WL 229849, at *2 (requiring plaintiff to demonstrate racial imbalance in work force that is "directly traceable to the challenged policy").

170. Desario, *supra* note 130, at 507. The increased evidentiary burden is particularly onerous for ex-offenders since they "tend to have even fewer resources than other traditionally protected groups." Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 1020 (2007).

171. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 739 (2006). Similarly, the rate of successful disparate impact claims in federal appellate courts fell from 28.5% in 1984–85 to 15.6% in 1999–2001. *Id.* at 738.

172. *Id.* at 739.

173. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). *But see* Kashcheyeva, *supra* note 20, at 1065 (arguing that "in practice" burden of proof is placed on plaintiff).

have long been subject to considerable debate and confusion.[174] In *Griggs*, the Court emphasized that to be justified by business necessity, the criteria measured by the policy must "be shown to be related to job performance."[175] In *Dothard*, the Court interpreted this to mean that the criteria must be "essential to good job performance."[176] As initially set forth, therefore, the business necessity standard suggested that a mere "rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential . . . ."[177]

In *Beazer*, however, the Court suggested that an employer's policy need not be essential to be necessary.[178] *Beazer* noted that an employer's policy is justified so long as it "significantly serves" a "legitimate goal[]."[179] The Court later adopted this standard in *Wards Cove Packing Co. v. Atonio*,[180] wherein it stated that "there is no requirement that the challenged practice be 'essential' or 'indispensable.'"[181] Congress, however, disagreed with *Wards Cove*'s formulation. In the 1991 amendments to the Civil Rights Act, Congress specifically instructed that the term business necessity be interpreted in accordance with *Griggs* and its pre-*Wards Cove* progeny.[182]

1. Business Necessity as Initially Applied to Criminal Record Policies

In the context of criminal record policies, the Eighth Circuit provided the first standard for determining when such policies are justified by business necessity.[183] In *Green v. Missouri Pacific Railroad Co.*,[184] the Eighth Circuit held that a hiring policy that automatically bars an applicant with a prior conviction without any consideration of the conviction's seriousness, relationship to the job, or remoteness in time, is not

174. *See* DeSario, *supra* note 130, at 502–03 (discussing "confusion" resulting from Civil Rights Act's "ambiguous" definition of business necessity); Lye, *supra* note 126, at 348 (stating that federal courts "have had difficulty defining . . . business necessity standard").

175. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

176. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

177. Williams v. Colo. Springs, Colo., Sch. Dist. # 11, 641 F.2d 835, 842 (10th Cir. 1981).

178. N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979).

179. *Id.*

180. 490 U.S. 642, 659 (1989).

181. *Wards Cove*, 490 U.S. at 659.

182. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991) (confirming that one purpose of Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court decisions prior to *Wards Cove*"); *see also* Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 488 (3d Cir. 1999) (arguing that "because the Act clearly chooses *Griggs* over *Wards Cove*, the Court's interpretation of the business necessity standard in *Wards Cove* does not survive the Act"); Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 913 (1993) (arguing that Congress's 1991 amendments to the Civil Rights Act rebuked *Wards Cove* by returning business necessity standard to "generous pro-plaintiff" interpretation). Rather than resolving the debate, however, some contend that the 1991 Amendments created additional confusion. Lye, *supra* note 126, at 348. According to the Act's amended language, a discriminatory practice is justified if it is "*consistent* with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (emphasis added). As noted by one commentator, the phrase "consistent with" "implies that 'business necessity' is not really 'necessary.'" DeSario, *supra* note 130, at 503. Moreover, significant variation exists in how federal courts have interpreted the amended language. Lye, *supra* note 126, at 348.

183. Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1159–60 (8th Cir. 1977).

184. 549 F.2d 1158 (8th Cir. 1977).

justified by business necessity.[185] In the case, the defendant had a policy of disqualifying "any applicant with a conviction for any crime other than a minor traffic offense."[186] Accordingly, the plaintiff was disqualified from consideration for an office job after disclosing that he had previously been convicted for refusing to enter the military.[187] The court noted that it could not "conceive of any business necessity that would automatically place every individual convicted of *any* offense . . . in the permanent ranks of the unemployed."[188]

2. Post-*Beazer* Application of Business Necessity

After the Supreme Court's decision in *Beazer*, courts became quite deferential to employer perceptions of business necessity.[189] Since criminal record policies are inevitably based on employer perceptions of risk, and since "courts have been inclined to defer to employers regarding risk," such policies proved particularly ripe for judicial deference.[190]

This deference was on clear display in *Williams v. Scott*.[191] According to the court, a conviction policy can be justified if it merely serves the "purpose of minimizing the *perceived risk* of employee dishonesty."[192] The court thus upheld a department store's policy of barring ex-felons from collector positions since it was "*intuitively* . . . obvious" that the policy "does not violate Title VII."[193] Similarly, in *Carolina Freight*, the court noted that it was "exceedingly reasonable" for employers "to rely upon an applicant's past criminal history in predicting trustworthiness."[194] Based on this normative judgment, *Carolina Freight* upheld the employer's decision to fire the plaintiff,[195] despite the fact that 1) it had been *fifteen years* since the plaintiff had committed a crime[196] and 2) the plaintiff had been working for the employer for four years without complaint.[197]

185. *Green*, 549 F.2d at 1160 (upholding district court's injunctive order setting forth these conditions). The *Green* court's three-pronged standard was later adopted by the EEOC. EEOC CONVICTION RECORDS, *supra* note 29.

186. Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1293 (8th Cir. 1975).

187. *Id.* at 1292–93.

188. *Id.* at 1298 (emphasis added).

189. As with the trend in the Court's approach to prima facie statistics, critics trace the trend towards increased deference in the business necessity analysis to *Beazer*. *E.g.*, Desario, *supra* note 130, at 495–96; Lye, *supra* note 126, at 328–29.

190. Williams, *supra* note 51, at 541.

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

192. *Williams*, 1992 WL 229849, at *2 (emphasis added).

193. *Id.* at *1 (emphasis added).

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

195. *Id.*

196. *Id.* at 737, 742.

197. *Id.* at 739.

### 3. A Return to Empiricism: *El v. Southeastern Pennsylvania Transportation Authority*

The deference that post-*Beazer* courts have given to employer perceptions of business necessity has led some to question the viability of disparate impact claims in the criminal record context.[198] A recent decision by the Third Circuit, however, shows that judicial deference to employer perceptions of risk has its limits.[199]

In *El v. Southeastern Pennsylvania Transportation Authority*,[200] the Third Circuit established a new standard for determining when an employer's criminal record policy is justified by business necessity.[201] Whereas the deference in *Carolina Freight* and *Williams* was based on *Wards Cove*'s relaxed definition of business necessity,[202] the Third Circuit enacted its standard based on the revised definition of business necessity set forth in the 1991 Amendments to Title VII.[203] The court found that the 1991 Amendments require that hiring criteria "effectively measure the 'minimum qualifications for successful performance.'"[204] Under this "minimum qualifications" framework, the employer must go beyond "'common-sense'-based assertions" and provide "some level of empirical proof" that "the challenged criteria 'measure[s] the person for the job.'"[205] The Third Circuit thus held that the 1991 Amendments require criminal record policies to "distinguish between individual applicants that do and do not pose an unacceptable level of risk."[206]

In the case, Douglas El was fired from a paratransit driving position with the Southeastern Pennsylvania Transportation Authority (SEPTA) when a background check revealed his forty-year-old conviction for second-degree murder.[207] Although the crime took place in a gang-related fight when he was fifteen years old, El was automatically disqualified since the offense fell within the orbit of SEPTA's bright-line ban on individuals with a "felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s)."[208] SEPTA defended its policy by

198. *E.g.*, Kashcheyeva, *supra* note 20, at 1064–65.

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

200. 479 F.3d 232 (3d Cir. 2007).

201. *El*, 479 F.3d at 242–45.

202. Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *3 (N.D. Ill. Sept. 9, 1992); *Carolina Freight*, 723 F. Supp. at 752.

203. See *supra* note 182 and surrounding text for a discussion of the 1991 Amendment's revision of the business necessity standard.

204. *El*, 479 F.3d at 242 (quoting Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 481 (3d Cir. 1999)).

205. *Id.* at 240 (alteration in original) (quoting Dothard v. Rawlinson, 433 U.S. 321, 322 (1977). The Third Circuit criticized *Carolina Freight* for failing to consider "any recidivism statistics or any other indicia of the effectiveness of [the employer's] policy." *Id.* at 244 n.11. See *supra* notes 194–97 for a discussion of *Carolina Freight*'s business necessity analysis.

206. *Id.* at 245.

207. *Id.* at 235–36.

208. *Id.* The Third Circuit distinguished the criminal record policy in *El* from the blanket bar in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975). Whereas the employer's policy in *Green* disqualified any person with "any criminal conviction," the policy in *El* disqualified those with convictions that SEPTA argued present "the highest and most unpredictable rates of recidivism." *El*, 479 F.3d at 243. Moreover, *Green* dealt with an "office job at a corporate headquarters," which unlike *El*, "did not require the

arguing that the crimes it targeted present "the highest and most unpredictable rates of recidivism."[209] Moreover, it argued that the policy was justified as applied since El would be working with a vulnerable, captive population and criminologists could not *negate* the possibility that a recidivism risk still persisted after forty years.[210]

Because the plaintiff made no attempt to rebut SEPTA's assertion that a risk of recidivism could not be ruled out,[211] the court affirmed summary judgment for SEPTA.[212] The court emphasized, however, that it would have been "a different case" if the plaintiff "hired an expert who testified that there is [a] time at which a former criminal is no longer any more likely to recidivate than the average person."[213] As noted by a lawyer with the EEOC, the Third Circuit "dropped lots of hints" that it would have reached a different decision if the plaintiff introduced criminological research showing a lack of recidivism risk after forty years of remaining crime free.[214]

### *C. Criticisms of Disparate Impact Doctrine Under Title VII*

The use of Title VII's disparate impact doctrine to combat employer discrimination against ex-offenders has been criticized by both ends of the reentry spectrum. On one hand, some commentators argue that Title VII's protections are insufficient.[215] For example, Title VII only protects ex-offenders who are part of a protected class, which leaves many ex-offenders without a remedy.[216] Moreover, even ex-offenders belonging to a protected class may be denied a remedy since Title VII only applies to employers with more than fifteen employees.[217] Further, unlike cases involving disparate treatment, Congress has amended Title VII to preclude plaintiffs in disparate impact cases from receiving compensatory or punitive damages, thus

employee to be alone with and in close proximity to vulnerable members of society." *Id.* See *supra* notes 183–88 and accompanying text for a discussion of *Green*.

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

210. *See id.* at 246–47.

211. Instead of rebutting SEPTA's argument about El's possible recidivism risk, El's attorneys focused on the absence of care SEPTA displayed in formulating the policy. *Id.* at 247–48. While the court was disturbed by SEPTA's inability to "provide . . . insight into how the policy was written," it dismissed the issue as irrelevant since "Title VII . . . does not measure care in formulating hiring policies." *Id.* at 248.

212. *Id.* at 247.

213. *Id.*

214. John Zappe, *Add 'Review Background Screening' to Your List of Resolutions*, ERE.NET (Jan. 7, 2009, 5:21 AM), http://www.ere.net/2009/01/07/add-review-background-screening-to-your-list-of-resolutions/ (internal quotation marks omitted). "What makes the [*El*] case so noteworthy," according to Arthur J. Cohen, former chair of the National Association of Professional Background Screeners, is its "indication . . . that the participation of a criminologist has relevance to the preparation of a [criminal record] policy." *Id.*

215. *E.g.*, O'Brien & Darrow, *supra* note 170, at 1027; Kashcheyeva, *supra* note 20, at 1065; James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 740–41 (2004); Watstein, *supra* note 5, at 596–97.

216. Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 984 (2006); Kashcheyeva, *supra* note 20, at 1065; Todd, *supra* note 215, at 740–41; Watstein, *supra* note 5, at 596–97.

217. 42 U.S.C. § 2000e(b) (2006).

reducing its attractiveness to plaintiffs.[218] Finally, many applicants denied a job based on a criminal record may not have a claim under Title VII if the employer does not tell them the basis for their decision.[219] Even in the rare instances when the applicant is told, Title VII may not provide protection if the applicant failed to disclose his or her criminal record on the application form[220] as many ex-offenders may be inclined to do.[221]

On the other hand, some argue that Title VII should not provide a remedy to ex-offenders at all.[222] As noted by the federal district court in *Carolina Freight*, "[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing."[223] In rejecting the idea that Title VII should provide relief to ex-offenders, the court stated that *Green*'s ban on absolute bars was "ill founded."[224] While other federal district courts have not been as explicit in their "hostility,"[225] some observers suggest that courts have been reluctant to use disparate impact doctrine to help those who have engaged in prior illegal activity.[226] Since trial courts have broad discretion in determining when a plaintiff's prima facie evidence is sufficient,[227] it is possible that the increasingly stringent requirements imposed by post-

218. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981a); *see also* Selmi, *supra* note 171, at 735 (arguing that reduced potential for damages reduces incentive to file disparate impact claims).

219. Clark, *supra* note 70, at 206; *see also* Cross v. U.S. Postal Serv., 639 F.2d 409, 410–11 (8th Cir. 1981) (dismissing claim because plaintiff could not prove that employer had policy of denying applicants with prior offenses).

220. *See* Redden v. Wal-Mart Stores, Inc., 832 F. Supp. 1262, 1266 (N.D. Ind. 1993) (discussing test for determining whether applicant's Title VII claim is defeated by "resume fraud").

221. *See* Rodriguez & Petersilia, *supra* note 57, at 4 (discussing dueling dilemmas ex-offenders face by being candid, or not being candid, about criminal record on job application).

222. *See, e.g.*, Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 507–13 (2004) (discussing trend for courts to place "moral blame" on criminal record plaintiffs and to deny relief "for a situation that was of [their] own making" (internal quotation mark omitted)); *cf.* Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992) (stating that it is "intuitively . . . obvious" that employer policy barring ex-felons "does not violate Title VII").

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

224. *Id.* at 752.

225. Lye, *supra* note 126, at 318.

226. Simonson, *supra* note 130, at 293 (arguing that broad deference given to employers, "especially in the context of past illegal behavior," suggests Title VII challenge to criminal record policy "would not hold much promise in a court today").

227. *See* Allen v. Prince George's Cnty. Md., 737 F.2d 1299, 1304 (4th Cir. 1984) (noting that trial court's assessment of statistical evidence is factual finding "subject to reversal only for clear error"); Peresie, *supra* note 152, at 778 (stating that "[e]ven the most ardent judicial idealist will recognize" that judicial discretion on which statistical analysis to favor "creates the potential for judges to choose whatever test allows their preferred party to prevail"); *cf.* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 620–21 (2004) (arguing that judges find multiple ways to dismiss "unsympathetic" disparate impact claims to reduce "probability of reversal on appeal").

*Beazer* courts evince an unspoken belief that disparate impact doctrine should not apply to criminal record cases.[228]

Some observers see a broader judicial hostility to the theory of disparate impact itself.[229] According to one critic, disparate impact doctrine was established by the *Griggs* Court in an era where employers with a long history of overt discrimination were using facially neutral policies in a thinly veiled attempt to discriminate without inviting legal sanction.[230] Under this theory, disparate impact lost its favor with courts when it was used to challenge policies that did not appear to arise from a covert effort to discriminate.[231] Consistent with this view, a district court in North Carolina has explicitly held that a successful disparate impact claim requires proof of discriminatory *intent*, reasoning that the "concept of 'unintentional discrimination' is logically impossible."[232] This criticism can be extended to disparate-impact challenges of criminal record policies, since it is doubtful that such policies stem from covert racial animus.

Finally, some critics argue that private employers should not be held liable for what is essentially a problem with the criminal justice system.[233] While acknowledging that racial disparities exist in conviction and incarceration rates, these critics argue that the problem should be dealt with directly by remedying the institutions that cause the disparities, not indirectly through employment discrimination law.[234]

228. *See, e.g.*, Farrell, *supra* note 222, at 507–13 (discussing normative basis of courts' reluctance to provide disparate impact remedy to ex-offenders); Simonson, *supra* note 130, at 292 (arguing that *Beazer*'s rejection of "strong" prima facie evidence belied "a manifest unwillingness to believe that the law should require employers to treat ex-addicts as they would other potential employees").

229. *See* Selmi, *supra* note 171, at 706 (arguing that disparate impact's declining effectiveness results from fact that courts "never fully accepted the disparate impact theory as a legitimate definition of discrimination, . . . and it was a mistake to think they would"); *see also* Ricci v. DeStefano, 129 S.Ct. 2658, 2682–83 (2009) (Scalia, J., concurring) (questioning constitutionality of disparate impact doctrine and warning that "war between disparate impact and equal protection will be waged sooner or later").

230. *See* Selmi, *supra* note 171, at 717–24.

231. *See id.* at 770 ("[A]s the cases moved farther away from the era of overt discrimination, . . . it became more difficult for courts to interpret the practices as discriminatory.").

232. United States v. North Carolina, 914 F. Supp. 1257, 1265 (E.D.N.C. 1996). Similarly, Justice Scalia has recently argued that disparate impact should merely be used as "an evidentiary tool . . . to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment." *Ricci*, 129 S.Ct. at 2682 (Scalia, J., concurring).

233. *See* Sara A. Begley & Miriam S. Edelstein, *Pennsylvania Human Relations Commission Proposes Policy Guidance that Would Presume Employers Engage in Disparate Impact Discrimination when They Use Criminal History Information*, EMP. L. WATCH (Jan. 22, 2010) (on file with author) (characterizing disparate impact challenges of criminal record policies as placing "onus on employers, who have no involvement with applicants' criminal convictions, to try to eradicate discrimination apparently caused by the criminal justice system"); *see also* Selmi, *supra* note 171, at 769–70 (suggesting that since employers are not responsible for racial disparities in criminal justice system, they should not be "liable for [these] disparities").

234. Begley & Edelstein, *supra* note 233.

## IV. DISPARATE IMPACT UNDER STATE LAW

State fair employment statutes are invariably interpreted in accordance with how federal courts and the EEOC interpret Title VII.[235] Thus, since federal courts and the EEOC have interpreted Title VII as prohibiting unnecessary employment bars to ex-offenders,[236] plaintiffs may file disparate impact claims against such policies under state law as well.[237] While the availability of such claims has generally been overlooked by commentators,[238] state courts have found them to be cognizable.[239]

### *A. The Role of State Fair Employment Practices Agencies*

In most states, state-based claims of employment discrimination must be filed with the state Fair Employment Practices Agency (FEPA).[240] As with federal administrative agencies,[241] FEPAs are given broad discretion in executing the authority legislatively granted to them.[242] FEPAs, therefore, wield significant power in determining which discrimination claims are cognizable under state law. Based on an informal survey, however, it appears that many FEPAs have declined to exercise this

235. *See, e.g.*, Francini v. Phx. Newspapers, Inc., 937 P.2d 1382, 1388 (Ariz. Ct. App. 1996) (noting that Arizona's employment discrimination statute is modeled after Title VII and thus federal case law is persuasive in interpreting statute); Heard v. Lockheed Missiles & Space Co., 52 Cal. Rptr. 2d 620, 627 (Cal. Ct. App. 1996) (noting state courts may rely on federal case law for interpreting California Fair Employment Act since Act shares same "objectives and public policy purposes" as Title VII); Florence v. Dep't of Soc. Servs., 544 N.W.2d 723, 726 (Mich. Ct. App. 1996) (noting that federal case law concerning Title VII is "highly persuasive" authority for interpreting analogous state statute).

236. *E.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242–245 (3d Cir. 2007); Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975); Gregory v. Litton Sys., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); EEOC CONVICTION RECORDS, *supra* note 29.

237. Gerlach, *supra* note 216, at 984; Watstein, *supra* note 5, at 598 n.140.

238. For example, in many reviews on the remedies available to ex-offenders denied employment, there is no reference to the availability of disparate impact claims under state law. *E.g.*, Clark, *supra* note 70, at 206–08; Geiger, *supra* note 1, at 1203; Thomas M. Hruz, Comment, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 803–19 (2002); Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1285–1301 (2002); Todd, *supra* note 215, at 729–41; Williams, *supra* note 51, at 540–45.

239. *See, e.g.*, Ekunsumi v. Cincinnati Restoration, Inc., 698 N.E.2d 503, 505–06 (Ohio Ct. App. 1997) (recognizing disparate impact as cognizable claim against employer conviction policies under state law but dismissing case for lack of merit); Lavalley v. E.B. & A.C. Whiting Co., 692 A.2d 367, 371–72 (Vt. 1997) (same). *But see* Leonard v. Corrections Cabinet, 828 S.W.2d 668, 672 (Ky. Ct. App. 1992) (interpreting plaintiff's disparate impact claim as impermissible attempt to judicially transform ex-offenders into protected class).

240. Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and Its Role in Employment Discrimination Law*, 20 GA. J. INT'L & COMP. L. 89, 95 (1990).

241. *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984) (holding that courts may not invalidate statutory interpretations by federal agencies unless "arbitrary, capricious, or manifestly contrary to the statute").

242. *See, e.g.*, Gugin v. Sonico, Inc., 846 P.2d 571, 573 (Wash. Ct. App. 1993) (noting that regulations issued pursuant to state statute are "presumed valid and will be upheld" if "reasonably consistent with the statute").

authority to process claims by ex-offenders under a disparate impact framework.[243] Thus, an untold number of ex-offenders with potentially meritorious claims are being informed by FEPAs that they have no legal recourse against the employer under state law.[244]

The failure of FEPAs to exercise their power to use the disparate impact framework appears to have several explanations. First, several FEPA representatives stated that their agency did not have jurisdiction for criminal record cases since ex-offenders are not a specified protected class under their statute.[245] Second, even when an agency officially recognizes the potential applicability of disparate impact, staff at the intake level may treat ex-offender claims under a disparate treatment framework and reject them accordingly.[246] Third, several FEPA representatives emphasized the resource-intensive nature of disparate impact analyses as a significant drawback.[247] As noted by Keith McNeil, Regional Counsel for the Ohio Civil Rights Commission, "you need to factor in how much disparate impact analyses cost,"[248] especially when states are struggling with significant budgetary shortfalls.[249] The costs of conducting sophisticated statistical analyses[250] and engaging in discovery disputes[251] are of particular concern to small agencies staffed with few, if any, attorneys.[252]

243. Telephone Interview with Michelle Dumas-Keuler, Staff Att'y, Conn. Comm'n on Human Rights and Opportunities (Aug 13, 2009) (noting that Connecticut's FEPA has not litigated any criminal background cases under a disparate impact theory); Telephone Interview with Mary Haskins, Senior Att'y, Fla. Comm'n on Human Relations (Feb. 11, 2010) (noting that no disparate impact claim against criminal record policies has been filed, to best of her knowledge, during her five-year tenure at Florida FEPA); Telephone Interview with Laura Gomez, Intake Specialist, Kan. Human Rights Comm'n (Aug. 13, 2009) (noting that Kansas FEPA does not recognize discrimination claim when applicant is denied job on basis of criminal background); Telephone Interview with Kim Howell, Admin. Assistant, Mont. Dep't of Labor and Indus., Human Rights Bureau (Sep. 3, 2009) (stating that Montana's FEPA does not consider ex-offender claims under disparate impact theory); Telephone Interview with Tim Wilson, Office Manager, Va. Human Rights Council (Feb. 11, 2010) (stating that Virginia's FEPA has "no jurisdiction" over ex-offender claims).

244. Telephone Interview with Kim Howell, *supra* note 243 (estimating that Montana's FEPA receives about two inquiries per day concerning legality of criminal record policies); Telephone Interview with Tim Wilson, *supra* note 243 (stating that Virginia FEPA informs ex-offenders that their only recourse is to lobby state representatives to pass legislation).

245. Telephone Interview with Laura Gomez, *supra* note 243; Telephone interview with Tim Wilson, *supra* note 243.

246. Two senior FEPA staff attorneys, who asked to remain anonymous, confirmed that this was a likely scenario.

247. *E.g.*, Telephone Interview with Keith McNeil, Reg'l Council, Ohio Civil Rights Comm'n (Feb. 11, 2010). Although not a FEPA, the same view was expressed by a representative of North Carolina's Human Relations Commission. Telephone Interview with Richard Boulden, Agency Counsel, N.C. Human Relations Comm'n (Feb. 11, 2010).

248. Telephone Interview with Keith McNeil, *supra* note 247.

249. *See, e.g.*, ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1–2 (2011), *available at* http://www.cbpp.org/files/9-8-08sfp.pdf (documenting current budgetary shortfalls among states). As a result of state budgetary crises, several FEPAs have had significant budget reductions in recent years. *See, e.g.*, HAW. CIVIL RIGHTS COMM'N, 2008–2009 ANNUAL REPORT 3 (2009), *available at* http://hawaii.gov/labor/hcrc/pdf/HCRC_Annual_Report_2009.pdf (stating that budget cuts have resulted in state FEPA losing seven of its thirty permanent positions).

250. See *supra* note 128 and accompanying text for a discussion of the "daunting" costs associated with disparate impact analyses.

Nevertheless, some FEPAs have processed claims by ex-offenders under the disparate impact framework. In Illinois and Wisconsin, for example, state FEPAs began applying disparate impact doctrine to criminal record claims immediately after the first federal court ruling in *Gregory*.[253] In Illinois, the FEPA repeatedly ruled in favor of the plaintiff, with at least three rulings upheld at the state appellate level.[254] In Wisconsin, FEPA administrative judges also ruled in favor of the plaintiffs.[255] Although these rulings were later overturned in state court,[256] Wisconsin's fair employment statute was soon amended to include ex-offenders as a protected class in their own right.[257]

### *B. Policy of the Pennsylvania Human Relations Commission*

The Pennsylvania Human Relations Commission (PHRC) is the latest FEPA to utilize disparate impact doctrine to process ex-offender claims.[258] PHRC's concern was prompted by the outreach efforts of the Community Legal Services (CLS), a Philadelphia-based organization that has filed numerous criminal record claims with the EEOC.[259] CLS informed PHRC that "the problem most frequently presented . . . by new clients seeking employment representation is that their criminal records have prevented their employment"[260] and that the problem "disproportionately impacts

251. Sperino, *supra* note 128, at 260 (noting that "costs of disparate impact litigation are magnified by the inevitable discovery disputes that arise when plaintiffs seek large amounts of information about a large group of employees").

252. Telephone interview with Richard Boulden, *supra* note 247 (stating that with only twelve staff, and one attorney, "we don't have the resources to do a disparate impact case").

253. *E.g.*, Bd. of Trs. of S. Ill. Univ. v. Knight, 516 N.E.2d 991, 993 (Ill. App. Ct. 1987); Abex Corp., Amsco Div. v. Ill. Fair Emp't Practices Comm'n, 364 N.E.2d 495, 496 (Ill. App. Ct. 1977); City of Cairo v. Fair Emp't Practices Comm'n, 315 N.E.2d 344, 346 (Ill. App. Ct. 1974); Am. Motors Corp. v. Dep't of Indus., Labor and Human Relations, No. 143-026, 1974 WL 2809, at *2 (Wis. Cir. 1974); Milwaukee & Suburban Transp. Corp. v. Wis. Dep't of Indus., Labor and Human Relations, 1973 WL 2711, at *3 (Wis. Cir. 1973).

254. *E.g.*, *Knight*, 516 N.E.2d at 999; *Abex Corp.*, 364 N.E.2d at 499; *City of Cairo*, 315 N.E.2d at 349.

255. *See, e.g.*, *Milwaukee & Suburban Trans. Corp.*, 1973 WL 2711, at *3 (noting FEPA's determination that, while state arrest statistics did not directly show "relative impact of discharge or suspension for arrest and conviction upon employed blacks as compared to employed whites, [it] does reach the degree of convincing power that reasonable men acting reasonably might determine the practice has a disparate impact on blacks").

256. *Am. Motors Corp.*, 1974 WL 2809, at *5–6; *Milwaukee & Suburban Trans. Corp.*, 1973 WL 2711 at *4–5.

257. *See* Hruz, *supra* note 238, at 786–87 (noting that Wisconsin statute prohibiting ex-offender discrimination was passed in 1977). In addition to the FEPAs in Illinois and Wisconsin, the Washington Human Rights Commission (WHRC) enacted a regulation that made it illegal for employers to discriminate against *any* ex-offender on the basis of a non-job related conviction. Gugin v. Sonico, Inc., 846 P.2d 571, 572 (Wash. Ct. App. 1993). An appellate court, however, invalidated the statute since the WHRC had "created a new protected class—convicted criminals" which exceeded the authority granted to the Agency by the legislature. *Id.* at 574. In response, the WHRC enacted a new regulation more narrowly tailored to address the "disparate impact on some racial and ethnic minority groups." WASH. ADMIN. CODE 162-12-140(3)(d) (2003).

258. *See generally* PA. HUMAN RELATIONS COMM'N, PROPOSED ADOPTION OF POLICY GUIDANCE (Nov. 2009), http://www.pabulletin.com/secure/data/vol39/39-48/2209.html [hereinafter PHRC POLICY GUIDANCE].

259. Interview with Janet Ginzberg, *supra* note 8.

260. Letter from Janet Ginzberg, Staff Att'y, CLS, to PHRC (June 11, 2009) (on file with author). In 2004, for example, 287 of the 957 requests that CLS received from clients seeking employment representation were cases where the client was denied a job, or terminated, on the basis of a criminal record. Brief for Erskin

African Americans and Latinos."[261] CLS's first-hand observations are consistent with state data showing that Pennsylvania's incarceration rate for African Americans is 9.2 times higher than the respective rate for whites in state prisons and jails.[262] Only nine other states have a more pronounced disparity.[263] Pennsylvania's incarceration rate for Hispanics is 5.6 times higher than the rate for whites—the third highest disparity in the country.[264]

1. PHRC's Draft Policy Guidance

In light of CLS's outreach efforts, and its own subsequent research, the PHRC issued draft policy guidance in November 2009[265] detailing how it intends to use the disparate impact framework to analyze ex-offender claims under the Pennsylvania Human Relations Act (PHRA).[266] Although it has the authority—with or without the policy—to investigate and prosecute ex-offender claims under a disparate impact framework,[267] the PHRC issued the guidance to both notify employers and educate its investigative staff.[268] While the PHRC has yet to formally adopt the guidance, it has begun processing criminal record claims in a manner consistent with it.[269]

As set forth in its draft guidance, the PHRC plans to utilize a presumption of disparate impact when investigating complaints by African American or Hispanic complainants.[270] The PHRC states that the presumption, which is consistent with the EEOC's position,[271] is justified by the nationwide racial disparities in conviction rates as well as data "showing that Pennsylvania has a more pronounced racial disparity in its conviction and incarceration rates than the nation as a whole."[272] According to Ryan Hancock, a staff attorney with the PHRC, the Agency will utilize the presumption

Butler, Steven Holloway, et al. as Amici Curiae Supporting Plaintiff/Appellant at 3, El. v. Se. Pa. Transp. Auth., 479 F.3d 232 (2007) (No. 05-3857), 2005 WL 6073755.

261. Janet Ginzberg, Senior Staff Att'y, CLS Address at PHRC (Sept. 21, 2009) (transcript on file with author).

262. PAGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 11 (2006).

263. *Id.*

264. *Id.*

265. PHRC POLICY GUIDANCE, *supra* note 258.

266. 43 PA. CONS. STAT. ANN. §§ 951–63 (2011). Under the Pennsylvania Human Relations Act, the PHRC has the authority to "formulate policies to effectuate the purposes of this act." *Id.* § 957(e). Unlike a regulation, a statement of policy "does not have the force of law." Extendicare Health Servs. Inc. v. Dist. 1199P, Serv. Emps. Int'l Union, 532 F. Supp. 2d 713, 721 (M.D. Pa. 2006). Instead, it "declares the agency's future intentions to act." *Id.*

267. Telephone Interview with Ryan Hancock, Assistant Chief Counsel, PHRC (Dec. 21, 2009).

268. *Id.*

269. Email from Ryan Hancock, Assistant Chief Counsel, to author (Nov. 4, 2011) (on file with author) (stating that PHRC is currently applying disparate impact framework to criminal record complaints filed with Agency).

270. PHRC POLICY GUIDANCE, *supra* note 258. The PHRC, however, will exempt any employer who is bound by law to reject applicants with the specific offense in question. *Id.*

271. EEOC CONVICTION RECORDS, *supra* note 29. See *supra* notes 113–19 and accompanying text for a discussion of the EEOC's position.

272. PHRC POLICY GUIDANCE, *supra* note 258.

during the investigatory phase when determining whether probable cause exists to warrant prosecution in the Commission's administrative hearings.[273] However, as with the EEOC's policy guidance, the PHRC will allow employers to rebut the presumption by "utilizing more narrowly drawn statistics," including applicant pool data.[274] Later, at the administrative hearing level, the PHRC would need to prove the prima facie case by providing sufficiently probative statistics on a case-by-case basis.[275]

In light of the presumption, the PHRC's main factual inquiry during the investigation phase will be whether the employer's policy is justified by business necessity. In making this assessment, the PHRC will consider several factors[276] but will presume an absence of business necessity if more than seven years has passed since the applicant's offense (excluding time spent in prison).[277]

2. Criticism of PHRC's Policy

In response to the PHRC's request for public comments, the business community in Pennsylvania has vigorously criticized the policy. Critics claim the policy makes it too easy for plaintiffs to establish a prima facie case and too hard for defendants to establish a business necessity defense, thereby "open[ing] the floodgates of litigation[]."[278] With regard to the prima facie case, for example, the Pennsylvania chapter of the National Federation of Independent Business (NFIB/PA) argues that the PHRC's utilization of a presumption "stands the traditional disparate impact claim on its head, by eliminating step one" in the three-part burden-shifting analysis.[279] By contrast, the NFIB/PA argues that employers will face "a nearly insurmountable

273. Interview with Ryan Hancock, *supra* note 267. The PHRC performs a dual role after receiving a complaint of unlawful discrimination. 43 PA. CONS. STAT. ANN. § 959 (2011). Initially, the PHRC serves as a neutral investigator in an attempt to determine whether the allegations are supported by probable cause. *Id.* § 959(b)(1). If probable cause is found—and if neither party elects to remove the case to state court—the PHRC's legal division serves as counsel for the complainant before the Commission's administrative law judge. *Id.* § 959(d)–(e). Rulings by the administrative judge are subject to judicial review. *Id.* § 960; *see also* Pa. State Police v. Pennsylvania, 583 A.2d 50, 52 (Pa. 1990) (stating that judicial review of PHRC rulings "is limited to a determination of whether constitutional rights have been violated, whether necessary findings of fact are supported by substantial competent evidence or whether the Commission has made an error of law").

274. PHRC POLICY GUIDANCE, *supra* note 258. The PHRC expresses a similar concern noted by the EEOC regarding the "inherent likelihood" that applicant flow data "will exclude otherwise interested applicants who chose not to apply due to the existence of an employer's conviction policy." *Id.*; *see also* EEOC STATISTICS, *supra* note 119 ("If the employer provides applicant flow data, information should be sought to assure that the employer's applicant pool was not artificially limited by discouragement."). See *supra* notes 153–55 and accompanying text for judicial discussion on this point.

275. *Id.*

276. The factors the PHRC will consider in assessing business necessity include: the "circumstances, number, and seriousness" of the applicant's prior offense(s); whether the applicant's "prior conviction substantially relates" to the applicant's "suitability" to perform the duties and responsibilities of the job; evidence of the applicant's rehabilitation; and "the manner in which the employer solicited the disqualified individual's criminal history during the hiring process." PHRC POLICY GUIDANCE, *supra* note 258.

277. *Id.*

278. Email from Floyd Warner, President, Pa. Chamber of Bus. & Indus. to Homer C. Floyd, Exec. Dir., PHRC (Jan. 26, 2010) (on file with author).

279. Email from Kevin Shivers, State Dir., Nat'l Fed'n of Indep. Bus. Pa., to Homer Floyd, Exec. Dir., PHRC (Jan. 25, 2010) (on file with author).

administrative burden" in defending the policy on business necessity grounds.[280] According to NFIB/PA, "to rebut the presumption of guilt an employer will need to hire both experienced legal counsel and a statistician to provide the 'level of empirical proof' that the Commission deems necessary."[281] The NFIB adds that the policy will be particularly burdensome for small employers as "[s]mall businesses do not have the luxury of human resources departments, or even a single employee dedicated to human resources."[282]

Because of the heightened burden placed on employers, critics argue that the PHRC policy will expose employers to excessive litigation risk in two distinct ways. First, some critics argue that the PHRC's policy will encourage African American and Hispanic ex-offenders to file frivolous claims anytime they are denied a job thereby "feed[ing] the litigious environment in Pennsylvania that is driving many of our employers elsewhere."[283] Second, some critics argue that the fear of disparate impact claims will "undoubtedly lead employers to hire certain individuals with red-flag criminal histories which, likely, will lead to more negligent hiring claims against employers."[284] The Council for Employment Law Equity (CELE), for example, cited dozens of cases from across the United States where employers have been held liable for negligent hiring liability.[285]

Although most of the negligent hiring cases cited by the CELE did not involve the hiring of ex-offenders,[286] several did.[287] In *Tallahassee Furniture Co., Inc. v. Harrison*,[288] for example, a department store was liable for the assault of a customer by an employee who had a history of violent crime, paranoid schizophrenia, and drug addiction.[289] In *Deerings West Nursing Center. v. Scott*,[290] a nursing home was liable for its employee's assault of an elderly visitor, since the employee had fifty-six prior criminal convictions at the time he was hired.[291] Finally, in *McLean v. Kirby Co*.,[292] an employer was found liable for the assault and rape of a customer by its door-to-door salesman, because the assailant had been convicted of a violent crime in the year prior

280. *Id.*

281. *Id.*

282. *Id.*

283. Letter from Mike Turzai, Republican Whip, House of Representatives, Commw. of Pa., to Homer C. Floyd, Exec. Dir., PHRC, (Jan. 26, 2010) (on file with author).

284. J. ALOYSIUS HOGAN & MARK A. DE BERNARDO, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, COMMENT IN SUPPORT OF THE USE OF CRIMINAL-BACKGROUND CHECKS IN EMPLOYMENT 10 (2010).

285. *Id.* at 4–9 (listing over thirty-five separate cases).

286. *See, e.g.*, Andrews v. Reynolds Mem'l Hosp., Inc., 499 S.E.2d 846 849–51, 857 (W. Va. 1997) (finding hospital liable for damages caused by doctor's negligent diagnosis since doctor had recently been placed on probation in another state for prescribing medications for impermissible purposes).

287. *E.g.*, Tallahassee Furniture Co., Inc. v. Harrison, 583 So.2d 744, 749 (Fla. Dist. Ct. App. 1991); McLean v. Kirby Co., 490 N.W.2d 229, 232 (N.D. 1992); Deerings W. Nursing Ctr. v. Scott, 787 S.W.2d 494, 496 (Tex. Ct. App. 1990).

288. 583 So.2d 744 (Fla. Dist. Ct. App. 1991).

289. *Tallahassee Furniture*, 583 So.2d at 749.

290. 787 S.W.2d 494 (Tex. Ct. App. 1990).

291. *Deerings*, 787 S.W.2d at 496.

292. 490 N.W.2d 229 (N.D. 1992).

to being hired and had a pending sexual assault charge as well.[293] Importantly, in all three of these cases the risk was deemed to be foreseeable to the employer at the time of hire.

## V. OTHER REMEDIES UNDER STATE LAW

In addition to disparate impact claims, several states have enacted statutes that directly restrict discrimination against ex-offenders (hereinafter "criminal record statutes"). Under these statutes, employers may not discriminate against an ex-offender if the prior offense bears no reasonable relationship to the job.[294] Unlike disparate impact claims, where the underlying policy interest is combating racial inequity, the primary policy underlying criminal record statutes is the need to rehabilitate ex-offenders in order to reduce recidivism.[295] Accordingly, criminal record statutes are color-blind.[296]

### *A. State Laws Restricting Employer Discrimination Against Ex-Offenders*

Criminal record statutes remain a rarity.[297] While fourteen states have placed restrictions on how *public* employers may consider a job applicant's prior convictions,[298] only five of these states (Hawaii, Kansas, New York, Pennsylvania, and Wisconsin) have placed restrictions on *private* employers.[299]

New York's criminal record statute—which is widely regarded as the most effective among the states[300]—classifies ex-offenders as a protected class and prohibits

293. *McLean*, 490 N.W.2d at 232, 239.

294. *See, e.g.*, HAW. REV. STAT. § 378-2.5(a) (2010) (conviction must have "rational relationship" to job to justify discrimination); KAN. STAT. ANN. § 22-4710(f) (West 2011) (conviction must "reasonably bear[] upon . . . employee's trustworthiness, or the safety or well-being of the employer's employees or customers"); N.Y. CORRECT. LAW § 752 (McKinney 2009) (conviction must have "direct relationship" to job); 18. PA. CONS. STAT. ANN. § 9125 (2011) (conviction must bear on applicant's "suitability" for position); WIS. STAT. § 111.335(c)(1) (2011) (conviction must "substantially relate" to position).

295. *See, e.g.*, N.M. STAT. ANN. § 28-2-2 (2010) ("The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.").

296. *See, e.g.*, N.Y. CORRECT. LAW § 752 (defining protected class as individuals "previously convicted of one or more criminal offenses" with no reference to race).

297. Simonson, *supra* note 130, at 286 (noting that "vast majority of states are silent when it comes to employment discrimination against individuals with criminal records").

298. ARIZ. REV. STAT. ANN. § 13-904(E) (2010); ARK. CODE ANN. § 17-1-103(b) (2009); COLO. REV. STAT. § 24-5-101 (2010); FLA. STAT. § 112.011(1)(a) (2010); HAW. REV. STAT. § 378-2.5(a); KAN. STAT. ANN. § 22-4710(f); KY. REV. STAT. ANN. § 335B.020(1) (West 2010); LA. REV. STAT. ANN. § 37:2950(A) (2010); MINN. STAT. § 364.03 (2010); N.M. STAT. ANN. § 28-2-4; N.Y. CORRECT. LAW § 752; 18. PA. CONS. ANN. STAT. § 9125; WASH. REV. CODE § 9.96A.020 (2011), WIS. STAT. § 111.335.

299. HAW. REV. STAT. § 378-2.5(a); KAN. STAT. ANN. § 22-4710(f); N.Y. CORRECT. LAW § 752; 18. PA. ANN. CONS. STAT. § 9125; WIS. STAT. § 111.335.

300. *See, e.g.*, Simonson, *supra* note 130, at 296 n.82 ("[A] number of scholars point to New York's law as the most effective at increasing employment opportunities for ex-offenders."); Leavitt, *supra* note 238, at 1294 (calling New York statute "the most finely tuned and clearly tailored statutory scheme to address employment discrimination for applicants with criminal histories"); Todd, *supra* note 215, at 757–58 (arguing

discrimination on the basis of a non-job-related prior offense.[301] The statute provides eight factors that employers must consider when assessing an applicant's criminal record, including: the "bearing" that the prior offense will have on the person's ability to perform the "specific duties and responsibilities" of the job; the passage of time since the offense; the person's age at the time of the crime; the seriousness of the offense or offenses; and any evidence of the person's "rehabilitation and good conduct."[302] This fact-specific determination is different from the "elements-only" test utilized in Wisconsin, where the employer is only required to consider the generic elements of the applicant's prior offense.[303]

New York has also taken steps to alleviate employer concerns about incurring negligent hiring liability from complying with the criminal record statute.[304] Specifically, if a employer complied in good faith with the criminal record statute when hiring an ex-offender, there is a "rebuttable presumption in favor of excluding" evidence of the applicant's prior offense if he or she recidivates on the job.[305]

New York's legislative amendment is consistent with previous case law in the state. In *Ford v. Gildin*,[306] a New York appeals court refused to impose negligent hiring liability on landlords when their employee, who had been convicted of manslaughter twenty-seven years earlier, committed an unforeseeable sex crime while on the job.[307] After considering the factors in the criminal record statute, the court determined that the landlords' hiring of the employee was "consistent with the law and public policy."[308] Accordingly, the court reasoned that "[i]mposing liability . . . would have an

that Arizona should enact legislation similar to New York's); Watstein, *supra* note 5, at 602–07 (arguing that New York's statute provides the "model" for national legislation).

301. *See* N.Y. EXEC. LAW § 296(15) (listing employment discrimination against ex-offenders as an "unlawful discriminatory practice"). Ex-offenders are a protected class in Hawaii and Wisconsin as well. *See* HAW. REV. STAT. § 378-2(1)(A) (2010) (including arrest and court records as a protected factor alongside race, sex, disability, and other traditional protected characteristics); WIS. STAT. § 111.31(1) (2011) (same).

302. N.Y. CORRECT. LAW § 753. A "presumption of rehabilitation" is established if the applicant has received a "certificate of good conduct" from the New York State Division of Parole. *Id.* § 753(2).

303. Hruz, *supra* note 238, at 793–94. Under Wisconsin's elements-only test, there is no need to conduct "a detailed inquiry into the facts." Cnty. of Milwaukee v. LIRC, 407 N.W.2d 908, 916 (Wis. 1987). There is, thus, no consideration of the length of time that has transpired since the conviction, evidence of the applicant's rehabilitation, or even a governor's pardon. Hruz, *supra* note 238, at 796. While easier for employers to administer, the test can suffer from a "high level of generality." Williams, *supra* note 51, at 547 (quoting *Cnty. of Milwaukee*, 407 N.W.2d at 919) (Abrahamson, J., concurring)). For example, "a woman who killed her abuser might be convicted of manslaughter, but the elements of that crime would likely not capture the fact that she would be unlikely to reoffend outside of the abusive context." *Id.* at 547–48 (footnote omitted).

304. N.Y. EXEC. LAW § 296(15); NEW YORK CITY BAR, AN EMPLOYER'S GUIDE TO INTERVIEWING AND HIRING PEOPLE WITH CRIMINAL CONVICTION HISTORIES 8 (2009), *available at* http://www.abcny.org/pdf/report/Ex_Offender_Employer_Guide_09.pdf.

305. NY EXEC. LAW § 296(15).

306. 613 N.Y.S.2d 139 (N.Y. App. Div. 1994).

307. *Ford*, 613 N.Y.S.2d at 140–41. As with *Ford*, several legal commentators have argued that an employer who reasonably determines that a prior offense is unrelated to the job is inherently not being negligent and should therefore not be liable for negligent hiring. *E.g.*, Lye, *supra* note 126, at 360; Todd, *supra* note 215, at 758; Watstein, *supra* note 5, at 607.

308. *Ford*, 613 N.Y.S.2d at 141.

unacceptably chilling effect on society's efforts to reintegrate ex-offenders into mainstream society."[309]

### *B. Lack of Recent Legislation Restricting Private Employers*

The National Conference of Commissioners on Uniform State Laws has adopted a model state law that prohibits public *and* private employers from discriminating against ex-offenders "solely by reason of a conviction."[310] However, although this model statute was adopted in 1978,[311] new legislation restricting private employer discrimination against ex-offenders has been lacking. Indeed, all five state statutes restricting employment discrimination by private employers were passed in the 1970s,[312] a time when the reform movement for restoring the civil rights of ex-offenders was at its zenith.[313] Moreover, in at least two of these five states—Hawaii and Wisconsin—state legislators have attempted to strike down the laws, although their efforts have been unsuccessful.[314] Finally, while there has been a flurry of ban-the-box legislation in recent years, such efforts have been directed against *public* employers.[315]

## VI. DISCUSSION

Despite significant support from the legal community that private employers should not be able to automatically bar applicants with criminal records,[316] no state has enacted such legislation in the past thirty years.[317] Organizations representing individuals with criminal records should consider legal strategies, therefore, that do not require state legislative action. As demonstrated by the recent experience in

309. *Id.* at 142; s*ee also* Leavitt, *supra* note 238, at 1309 ("Reducing an employer's fear of liability when they take a chance on hiring an applicant with a criminal history would go a long way towards fully reintegrating ex-offenders into the job market, and thereby reducing recidivism rates.").

310. MODEL SENT'G & CORR. ACT § 4-1005 (1978).

311. Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1550 n.1 (1981).

312. Hawai'i's statute was passed in 1973. Sheri-Ann S.L. Lau, *Employment Discrimination Because of One's Arrest and Court Records in Hawai'i*, 22 U. HAW. L. REV. 709, 711 (2000). New York's statute was passed in 1976. N.Y. CORRECT. LAW § 752 (McKinney 2011). Wisconsin's statute was passed in 1977. Hruz, *supra* note 238, at 786–87. Kansas's statute was passed in 1978. KAN. STAT. ANN. § 22-4710(f) (West 2011). Pennsylvania's statute was passed in 1979. 18. PA. CONS. STAT. ANN. § 9125 (2011).

313. *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1733 (2003) (stating that reform movement was undermined in the early 1980s when "political and social climate changed profoundly").

314. Hruz, supra note 238, at 802; Lau, *supra* note 312, at 715.

315. See *supra* notes 58–62 and accompanying text for a discussion of ban-the-box legislation.

316. *See, e.g.*, MODEL SENT'G & CORR. ACT § 4-1005 (1978) (providing model state law that prohibits private employer discrimination against ex-offenders solely because of prior criminal conviction); Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1517 (2003) (recommending state and federal laws that bar private employers from using "across-the-board" hiring bans on ex-offenders); O'Brien & Darrow, *supra* note 170, at 1025–26 (recommending ex-offenders be added as protected class under Title VII); *cf.* Clark, *supra* note 70, at 201 (noting "almost universal legal scholarly argument for removing impediments to ex-offender employment" in public employment context).

317. See *supra* notes 311–15 and accompanying text.

Pennsylvania, a promising, but largely unutilized, non-legislative strategy lies in educating state FEPAs about the applicability of disparate impact doctrine to criminal record claims.[318] Were FEPAs to harness their authority to provide a state forum for such claims, the protections available to ex-offenders who have turned their lives around would be significantly expanded.[319] Although FEPAs[320]—and employers[321]—have expressed concerns about processing criminal record claims under state disparate impact law, some of these concerns are premised on faulty assumptions.[322] Moreover, the reasonable concern expressed by FEPAs about the cost of processing disparate impact claims can be significantly mitigated in the criminal record context through the use of data-based presumptions that enable FEPAs to quickly identify claims that can be proved in a cost-effective manner at trial, thereby saving significant time and money in both the investigation and litigation of a complaint.[323] Further, by limiting the issuance of probable cause findings to claims that fit within certain well-defined parameters, FEPAs would have a greater chance of avoiding post-*Beazer* litigation obstacles[324] and employer concerns about "opening the floodgates of litigation" would not be realized.[325]

### *A. The Practical Advantages of FEPA Involvement*

A number of practical advantages would flow if FEPAs were to provide an alternative forum to the EEOC for resolving disparate impact claims in criminal record cases. First, establishing FEPAs as an alternative forum to the EEOC would help criminal record claimants avoid important limitations imposed by federal law. For example, the EEOC can only consider claims against employers with more than fifteen employees.[326] By contrast, FEPAs may cover claims against employers with as few as

318. See *supra* notes 258–66 and accompanying text for a discussion of how outreach efforts by a *single* legal services organization resulted in Pennsylvania's FEPA processing—for the first time in its history—criminal record claims under a disparate impact framework.

319. See *infra* VI.A for a discussion of the practical advantages that would result from FEPAs providing an alternative forum to the EEOC for resolving criminal record claims.

320. See *supra* notes 245–52 and accompanying text for a discussion of FEPA concerns about processing criminal record cases.

321. See *supra* Part IV.B.2 for the concerns expressed by Pennsylvania employers after the PHRC announced its intention to process criminal record claims. See *infra* Part VI.C.1 for a rebuttal to the claim that the PHRC's policy would place the burden of proof on the employer.

322. See *infra* Part VI.B.1 for a refutation of the common claim that FEPAs cannot consider claims by ex-offenders because ex-offenders are not a protected class. See *infra* Part VI.B.2 for a response to other common claims that disparate impact doctrine cannot, or should not, apply to criminal record cases.

323. See *infra* Part VI.C for the argument that general population statistics on the racial disparity in criminal conviction rates and research on recidivism rates among ex-offenders support the use of presumptions for both the prima facie case and business necessity defense. These presumptions, applied at the initial stage of the investigation, would enable FEPAs to quickly winnow out (1) claims with little likelihood of success at trial, and (2) potentially meritorious claims that would be cost-prohibitive to litigate.

324. See *infra* Part VI.D for a discussion of the obstacles that claims found presumptively meritorious under the conditions proposed herein may face in the post-*Beazer* litigation context.

325. See *infra* Part VI.E for a response to employers' concern that FEPA engagement would "open the floodgates" of litigation.

326. 42 U.S.C. § 2000e(b) (2006).

four employees.[327] Moreover, whereas the EEOC is under no obligation to investigate all claims,[328] some states require their FEPAs to do so.[329] Thus, establishing FEPAs as an alternative forum would ensure that fewer claims fall through the cracks—particularly when considering the historically high backlog in cases that the EEOC's regional offices are currently facing[330] and the suspicions voiced by some that not all of the regional offices are equally receptive to criminal record claims.[331]

Equally important, many FEPAs, unlike the EEOC, possess adjudicatory power and can thus adjudicate any claim for which probable cause of discrimination exists.[332] This is a particularly attractive feature for criminal record claimants who may not be able to afford litigating their case in court after receiving a right-to-sue letter from the EEOC.[333] Indeed, Title VII's bar on compensatory and punitive damages in disparate impact cases[334] significantly reduces the viability of non-class action claims under federal law since single-plaintiff claims will generally be cost-prohibitive to litigate.[335] State law, by contrast, may not impose the same limitation on damages, and even if it does, the authority of FEPAs to adjudicate enables claims with minimal potential for damages to be litigated. Indeed, a claim that has little potential for damages may often have significant potential for important injunctive relief, in the form of judicially enforceable revisions to the employer's criminal record policy.[336] Moreover, to the extent that FEPA administrative tribunals may provide a friendlier forum, some of the withering scrutiny that post-*Beazer* courts have applied to criminal record claims could possibly be avoided. This is particularly significant when considering that a FEPA tribunal's findings are generally only subject to limited judicial review.[337]

327. *E.g.*, 43 PA. CONS. STAT. § 954(b) (2011).

328. Pritchard, *supra* note 114, at 758 (discussing EEOC's decision to end policy of investigating all complaints).

329. *E.g.*, 43 PA. CONS. STAT. §§ 959(b)(1).

330. Pritchard, *supra* note 114, at 770–71.

331. See *supra* note 120 and accompanying text for the suggestion that some EEOC regional offices may not be receptive to criminal record claims.

332. *See, e.g.*, Pritchard, *supra* note 114, at 768–69 (describing non-adjudicatory procedures followed by EEOC upon completing investigation); 43 PA. CONS. STAT. §§ 959(d)–(e) (discussing adjudicatory powers of Pennsylvania's FEPA). *See generally* Andrea Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U. L. REV. 777, 825–32 (1983) (discussing common statutory framework wherein complainants alleging discrimination under state law must exhaust administrative remedies, including administrative adjudication, with state FEPA prior to seeking judicial redress).

333. *See* O'Brien & Darrow, *supra* note 170, at 1020 (noting that ex-offenders "may tend to have even fewer resources than other traditionally protected groups").

334. 42 U.S.C. § 1981a (2006).

335. *See* Joan C. Williams, *Correct Diagnosis; Wrong Cure: A Response to Professor Suk*, 110 COLUM. L. REV. SIDEBAR 24, 29 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/24_Williams.pdf. ("Proving disparate impact typically requires expensive expert testimony, which is financially more feasible in class cases than individual ones.").

336. This would be the case, for example, in claims against large employers, as revisions to a large employer's criminal record policy would help to significantly increase educational opportunities for future, rehabilitated ex-offenders.

337. Catania, *supra* note 332, at 825 ("[M]any of the states [that require complainants to exhaust their administrative remedies with the FEPA] subject the agency's factual determinations to only a limited judicial

Second, along with avoiding the pitfalls of federal law, FEPA engagement would likely encourage more employers to craft more narrowly tailored criminal record policies. In Pennsylvania, for example, the PHRC released policy guidance for the purpose of notifying employers about how the Agency intended to use disparate impact doctrine in the criminal record context.[338] While the PHRC has yet to formally adopt the policy, some law firms began advising their clients to review and, if necessary, modify their criminal record policies to minimize their legal exposure under state law.[339] Such modifications will result in fewer ex-offenders being denied, or fired, on the basis of prior offenses unrelated to the job.

Even when FEPAs are not willing to publically issue formal policy guidance, FEPA engagement would still exert pressure on employers to tailor their policies.[340] At present, for example, an untold number of ex-offenders with cognizable disparate impact claims are currently being informed that they have no legal recourse,[341] which relieves employers of pressure to revise overly broad hiring policies. By training intake staff about the applicability of disparate impact doctrine to criminal record cases, FEPA engagement would create an effective mechanism for informing ex-offenders of their rights and thereby placing pressure on employers to act lawfully.[342]

### *B. Why Educational Outreach to FEPAs Is Necessary*

As evident by the heretofore lack of engagement by FEPAs, FEPAs cannot be expected to utilize disparate impact doctrine for criminal record cases on their own initiative.[343] As highlighted, however, by the recent experience in Pennsylvania—where a *single* legal services organization managed to persuade the state's FEPA to get involved[344]—it is conceivable that some FEPAs may be amenable to outreach efforts.

review. As long as the record indicates a rational or substantial basis for the decision of the agency, the state court typically will affirm it. In light of this deferential standard of review, the agency often becomes the final arbiter of the dispute." (footnote omitted)).

338. Interview with Ryan Hancock, *supra* note 267.

339. *See, e.g.*, Jennifer L. Craighead, *Employment Law Alert*, BARLEY SNYDER LLC (Jan. 21, 2010) (on file with author) (advising employers to "[r]e-examine" their criminal record policies to assess job-relatedness and compliance with PHRC's policy).

340. As the PHRC's actions help to demonstrate, a formal policy is not necessary to begin processing criminal record clains under a disparate impact framework. Although the PHRC's proposed policy has not been officially adopted yet, the PHRC has begun applying the disparate impact framework to criminal record complaints filed with the Agency. Email from Ryan Hancock, *supra* note 269.

341. See *supra* note 246 and accompanying text for a discussion of intake staff at FEPAs assessing inquiries from ex-offenders under a disparate treatment framework and dismissing them accordingly.

342. Even among FEPAs that consider disparate impact claims too costly to investigate, intake staff could be trained to inform inquiring ex-offenders of their rights under Title VII. Cognizable claims could then be filed with the regional EEOC office.

343. See *supra* notes 243–47 and accompanying text for a discussion of the failure of FEPAs to consider criminal record claims under a disparate impact framework.

344. See *supra* notes 258–66 and accompanying text for the background surrounding the PHRC's decision to assess criminal record claims under a disparate impact framework.

### 1. Common Misperceptions Among FEPAs

Outreach efforts to FEPAs are necessary because it appears that current FEPA inaction may be premised, in part, on misunderstandings about the applicability of disparate impact doctrine to criminal record claims.[345] In particular, FEPA representatives are often under the impression that they have no jurisdiction to process criminal record claims since ex-offenders are not a protected class.[346] To address this mistaken perception, outreach efforts should make the following two points clear: first, there is no need for ex-offenders to be a protected class since criminal record claims can be assessed under the disparate impact framework;[347] second, there is no legal requirement for FEPAs to wait for state legislatures to approve the use of disparate impact doctrine in criminal record cases as FEPAs have broad executive authority to interpret the law.[348] When a FEPA's interpretation of a state fair employment statute is in accord with how the EEOC and federal courts have interpreted Title VII, state courts will invariably defer to the FEPA interpretation.[349] Since the EEOC and federal courts have both interpreted Title VII as applying to criminal record policies,[350] FEPAs have the authority to do the same.

### 2. General Criticisms of Applying Disparate Impact Doctrine to Criminal Record Claims

It is possible, and indeed quite likely, that some FEPAs will harbor similar reservations that have been expressed by critics of disparate impact doctrine.[351] Organizations engaging in outreach efforts, therefore, should be cognizant of these concerns. For example, at least three policy arguments have been raised to justify excluding ex-offenders from the orbit of disparate impact protection. First, illegal behavior is the product of individual choice and thus discrimination law should not apply.[352] Second, employers should not be held liable for the problems of societal discrimination.[353] Third, criminal record policies are not based on a covert intent to

345. See *supra* notes 243–52 and accompanying text for a review of telephone interviews with FEPA representatives.

346. See *supra* note 245 and accompanying text for a discussion of claims by FEPAs that they can only process criminal record claims if state law classifies ex-offenders as a protected class.

347. See *supra* notes 80–86 and accompanying text for a discussion of how criminal record claims by black and Hispanic ex-offenders can be assessed under a disparate impact framework.

348. See *supra* notes 241–42 and accompanying text for a discussion of the broad deference given to state FEPA interpretations of state anti-discrimination statutes.

349. See *supra* note 235 and accompanying text for a discussion of state court cases interpreting state anti-discrimination statutes in accordance with federal interpretations of Title VII.

350. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242–45 (3d. Cir. 2007); Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975), *appeal after remand*, 549 F.2d 1158 (8th Cir. 1977); Gregory v. Litton Sys., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); EEOC CONVICTION RECORDS, *supra* note 29.

351. See *supra* notes 222–34 and accompanying text for criticisms of applying disparate impact to criminal record cases.

352. See *supra* notes 222–28 and accompanying text.

353. See *supra* notes 233–34 and accompanying text.

discriminate which is what disparate impact doctrine was designed to counter.[354] None of these three arguments, however, provide a valid justification for denying ex-offenders the protections of disparate impact doctrine.

*a. Individual Volition*

First, there is no legal basis to deny the application of disparate impact doctrine in criminal record cases solely because the characteristic in question (e.g., prior criminal behavior) involves individual volition.[355] In *Griggs v. Duke Power Co.*,[356] for example, the plaintiffs' failure to complete high school was a product, in part, of individual agency.[357] However, rather than faulting the plaintiffs for dropping out of high school, the Court considered the social inequities, such as the "inferior education" that African Americans had long received in school, that fueled the racial disparity in graduation rates.[358] Moreover, in *New York City Transit Authority v. Beazer*,[359] the Court specifically applied the disparate impact framework to a policy that barred individuals who had previously used illegal narcotics.[360] Although some have suggested that the Court was more exacting in its scrutiny of the plaintiffs' prima facie case than would have otherwise been the case,[361] the Court provided no indication that the disparate impact framework is inapplicable to policies targeting individuals on the basis of prior illegal behavior.

*b. Societal Discrimination*

Second, some critics argue that employers should not have the burden of remedying larger social ills, such as inequities in the criminal justice system.[362] Such critics argue that the racial disparities in the criminal justice system should be tackled directly through reforms of the actual institutions and practices that cause the disparities rather than indirectly through employment discrimination law. There are several problems, however, with this argument. Most importantly, the Supreme Court

354. See *supra* notes 229–32 and accompanying text.

355. While beyond the scope of this Comment, the question of what constitutes individual volition or "free will" is highly contested. *E.g.*, Farrell, *supra* note 222, at 485–87. Indeed, there is a "long history of debate among academics in many disciplines" about "whether human beings are primarily active subjects that determine the courses of their own lives, or whether they are primarily objects acted upon by social, cultural, biological, or environmental forces beyond their control." *Id.* at 485. In the criminal record context, the high rates of criminal convictions in the black community have been attributed to longstanding discriminatory practices, including economic policies that inhibited black capital accumulation, and law enforcement practices that continue to utilize racial profiling. See *supra* notes 40–42 for a discussion of the structural causes of racial disparities in the criminal justice system.

356. 401 U.S. 424 (1971).

357. *See* Farrell, *supra* note 222, at 508 (noting that *Griggs* Court "could have simply stated that it was up to the plaintiff class whether or not they obtained high school diplomas").

358. *Griggs*, 401 U.S. at 430, 433.

359. 440 U.S. 568 (1979).

360. *Beazer*, 440 U.S. at 584–87.

361. *See* Simonson, *supra* note 130, at 292 (suggesting *Beazer*'s scrutiny of plaintiffs' prima facie case reflected hostility to providing Title VII remedy to drug addicts).

362. See *supra* notes 233–34 and accompanying text.

has rejected it. In *Griggs*, the power company was obviously *not* the cause of the segregated school system that had produced the low graduation rates among African Americans.[363] Nevertheless, this did not prevent the Court from restricting the manner in which employers could consider an applicant's educational background.[364] Another problem with the "societal discrimination" argument is that it misconstrues the burden that disparate impact doctrine places on employers. Employers are not being asked to remedy the racial disparities in the criminal justice system, but simply to avoid unnecessarily exacerbating the employment impact of these disparities by enacting polices that have no basis in business necessity.[365]

*c. Good Faith Defense*

Finally, some critics suggest that disparate impact doctrine was never designed to counter facially neutral policies, such as criminal record policies, where there is no covert attempt to discriminate.[366] While it may be that the *Griggs* Court developed disparate impact as a diplomatic way to invalidate facially neutral policies enacted in bad faith,[367] there is nothing in the plain language of *Griggs* to support this contention. Although it is possible that this argument may eventually find favor with current members on the Court as a means of limiting the reach of disparate impact doctrine,[368] the argument finds no support in current Court precedent and therefore has no bearing on the lower federal courts.

Further, while state courts would be able to consider this argument when considering the availability of disparate impact under state law, this is unlikely to overcome the deference that state courts give to FEPA statutory interpretations, particularly FEPA interpretations consistent with the federal understanding of Title VII.[369] Thus, since federal appellate courts and the EEOC have consistently interpreted Title VII as applying to criminal record policies, outreach efforts to FEPAs should make it clear that these three arguments are unlikely to outweigh state court deference to their executive authority.

363. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

364. *Id.* at 431 (holding that graduation requirement must be justified by business necessity).

365. *See id.* at 430–31 (emphasizing that Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination").

366. *See* Selmi, *supra* note 171, at 717–24 (arguing that disparate impact was only designed to counter facially neutral policies enacted by employers in bad faith).

367. *Id.*

368. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (stating that disparate impact may only be constitutional if used as "evidentiary tool" to "smoke out" instances of "disparate treatment").

369. See *supra* note 235 and accompanying text for a discussion of how federal court interpretations of federal statutes are highly persuasive authority for state courts interpreting analogous state law. See also *supra* note 242 and accompanying text for the broad deference state courts give to state agency interpretations of state law.

### *C. FEPA Cost Concerns Can Be Mitigated by Use of Presumptions During Investigatory Stage*

The failure of FEPAs to process criminal record cases under a disparate impact framework may not always, or not exclusively, be the result of a mistaken understanding of disparate impact doctrine. Indeed, an equally important explanation appears to be the perception that the statistical analyses required by disparate impact claims are too time- and resource-intensive for FEPAs to undertake.[370] On its face, this is a reasonable concern, particularly when considering the "daunt[ing]" costs involved with disparate impact litigation[371] and the significant budgetary cutbacks that many FEPAs have recently experienced.[372] However, the costs of processing disparate impact claims can be specifically mitigated in the criminal record context. Unlike other policies subject to disparate impact claims (e.g., subjective decision-making processes and entrance/promotion examinations), a criminal record policy is an objective selection criterion whose impact,[373] and justification,[374] can be readily assessed against general population data without extensive customized analysis.[375] Moreover, as this section demonstrates, available data on racial disparities in the criminal justice system and recidivism risk among ex-offenders is sufficient to justify the use of cost-saving presumptions during the investigation of a complaint for both the prima facie and business necessity analyses.[376]

#### 1. Learning from the PHRC

The PHRC has set forth one possible approach for the use of presumptions in the processing of criminal record claims.[377] This section provides three observations on the PHRC's presumptions. First, the PHRC's use of presumptions do not—as some have suggested—shift the burden of proof onto the defendant. Second, the PHRC's presumption of a prima facie case for *all* black and Hispanic complainants, irrespective of the job's qualifications, could overburden a budget-weary FEPA with cases too costly to prove at trial. Third, to avoid wasting limited resources on cases with little

370. See *supra* notes 247–52 and accompanying text for a review of FEPA apprehensions about the cost of disparate impact analyses.

371. Sullivan, *supra* note 128, at 982.

372. See *supra* note 249 and accompanying text for a discussion of recent cuts to FEPA budgets as a consequence of the economic recession.

373. See *supra* Part II.A for general population data demonstrating racial disparities in the criminal justice system.

374. See *supra* notes 52, 74–78, and accompanying text for research on the risk of recidivism among ex-offenders.

375. *See* Shoben, *supra* note 98, at 33–34 (arguing that broad general population data is particularly well suited for assessimg impact of hiring requirements that are "objective" and "specific" in nature (e.g., "arrest record[s]"), but not well suited for either "subjective" hiring measures (e.g., "standardless interview[s]") or objective criteria designed to assess an applicant's special qualifications (e.g., "tests" or "intracompany experience")).

376. See *infra* Parts VI.C.2 and VI.C.3 for discussion of the presumptions FEPAs could use to streamline their prima facie and business necessity analyses.

377. PHRC POLICY GUIDANCE, *supra* note 258. See *supra* Part IV.B.1 for a discussion of the PHRC's policy.

chance of prevailing at trial, the PHRC's presumption regarding business necessity should not only specify where a valid business necessity is presumptively lacking, but where it is presumptively *present* as well.

First, while critics have argued that the PHRC's presumptions "stand[] the traditional disparate impact claim on its head" by shifting the initial burden of proof onto the defendant,[378] this criticism is misplaced. The PHRC's presumptions only apply to the *investigatory* stage of a complaint, not to the adjudicatory stage.[379] Thus, the PHRC would still need to prove the prima face case and rebut the employer's business necessity defense to the satisfaction of an administrative judge.[380] Moreover, were the administration judge to rule in the PHRC's favor and the employer opted to appeal, the decision would be subject to judicial review by one of the state's appellate courts.[381] In no instance, therefore, would the PHRC's presumption change the standard of proof at the adjudicative level. Further, the PHRC policy allows employers to rebut the presumptions during the investigatory stage.[382] Thus, if an employer was in possession of applicant flow data that indicated the absence of an impact, the PHRC would reassess whether to proceed with its investigation.[383]

Second, the PHRC's presumption for the prima facie case ultimately sweeps too broadly by enabling cases that would be prohibitively expensive to prove to proceed to the adjudicative level, thereby overburdening budget-weary agencies. While the PHRC's presumption is identical to the EEOC's policy,[384] and while it is justified under the applicable "probable cause" standard used for the investigatory stage,[385] it will fail to exclude cases that require the notoriously complex and costly statistical analyses that have made disparate impact claims so unattractive to plaintiff

378. Shivers, *supra* note 279.

379. PHRC POLICY GUIDANCE, *supra* note 258 (noting that presumption will be used "when investigating complaints"); *see also* 43 PA. CONS. STAT. § 959(d)–(e) (2011) (establishing that PHRC legal counsel, after investigating complaint for probable cause, must prove case at administrative hearing). PHRC's use of streamlined procedures for determining probable cause is consistent with the requirements of due process set forth by the Supreme Court. *See* Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.").

380. Telephone Interview with Ryan Hancock, *supra* note 267.

381. *See* 43 PA. CONS. STAT. ANN. § 960 (stating that decision by PHRC's administrative judge is subject to judicial review).

382. PHRC POLICY GUIDANCE, *supra* note 258.

383. *Id.* (stating that employers may rebut presumption by providing more narrowly drawn statistics).

384. See *supra* notes 113–18 and accompanying text for a discussion of the EEOC's presumption and the justification underlying it.

385. A "probable cause" finding is based on a lower standard of proof than the preponderance standard used at trial. *E.g.*, Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986) (noting that probable cause finding by EEOC does not mean "there has been a violation" but rather "there is *reason to believe* that a violation has taken place" (emphasis added)); Thompson v. Dacco, Inc., No. 2-03-0079, 2006 WL 2038007, at *2 (M.D. Tenn. July 19, 2006) (stating that juries in Title VII cases need to "evaluate the proof [of discrimination] on a higher standard" than that used by EEOC for probable cause determinations).

attorneys.[386] Specifically, by presuming a prima facie case for *all* job-types, including those that require *special qualifications*, the PHRC's presumption fails to screen out cases that would require customized analyses at trial of the qualified labor market and/or employer's applicant pool.[387] To avoid this problem, the presumption should be limited to claims involving low-skilled jobs, as such claims could be proved through less costly analysis at trial (i.e., expert testimony concerning general population statistics).[388]

Finally, the PHRC's proposed presumption regarding business necessity only indicates when a valid defense is presumptively *lacking*, not when it is presumptively *present*. Specifically, the PHRC would presume a lack of business necessity when the job applicant had remained crime-free (excluding time served in prison) for at least seven years prior to the application.[389] By limiting the presumption to situations where the business justification is likely illegitimate, the PHRC policy risks wasting investigatory time on complaints that have little chance of success at trial (e.g., where the complainant's prior offense was committed within the past three years—a period in which the recidivism rate is remarkably high).[390] Accordingly, budget-weary FEPAs that wish to limit investigatory time on cases that cannot win at trial should opt for a presumption that cuts both ways, wherein a business necessity defense will presumptively exist when an insufficient period of time has elapsed since the complainant's offense occurred. A discussion of what such a policy might look like is provided below.[391]

2. When FEPAs Should Presume a Prima Facie Case

In order to filter out claims that pose little chance of success and/or would require costly statistical analysis at trial, FEPAs should only presume a prima facie case where the ex-offender is black or Hispanic *and* the job in question is one that does not require special qualifications.[392] By limiting the presumption to low-skilled jobs, FEPAs would be positioned to rely on general population data at trial rather than the customized data

386. *See* Sperino, supra note 128, at 259–60 (noting that disparate impact's "rigorous requirements of statistical evidence" have contributed to making the doctrine "a disfavored form"); Sullivan, *supra* note 128, at 982 (2005) (suggesting that disparate impact is unpopular with attorneys do to "daunt[ing] . . . costs of the proof process").

387. See *supra* Parts III.A.1.b and III.A.2 for a discussion of case law establishing that relevant labor market- and/or applicant pool-analysis is necessary where the job at issue requires special qualifications.

388. See *infra* Part VI.C.2 for this Comment's contention that general population statistics on racial disparities in the criminal justice system are sufficiently probative to establish a prima facie case against criminal record policies where the job in question does not require special qualifications.

389. PHRC POLICY GUIDANCE, *supra* note 258 ("A presumption against business necessity will be established if an individual has not re-offended seven or more years prior to his or her disqualification (excluding time spent in jail or prison).").

390. See *supra* notes 66–70 and accompanying text for a discussion of recidivism research showing that the recidivism rate during the first three years of release from prison is an astounding 67.5%, and the legitimate business justifications that this gives employers for denying employment.

391. See *infra* Part VI.C.3.

392. See *supra* note 105 and accompanying text for the Court's guidance on what constitutes a job without "special qualifications."

needed for relevant labor market- or applicant flow-analyses.[393] This is important because relying on general population statistics to establish the prima facie case at trial would be significantly less taxing on a FEPA's limited resources. Reliance on general population statistics is not only consistent with Supreme Court precedent,[394] but, as demonstrated here, particularly probative in cases challenging criminal record policies.

Despite claims to the contrary,[395] Supreme Court precedent still supports the use of general population data to establish a prima facie case, so long as the statistics "accurately reflect the pool of qualified job applicants."[396] While the Court has repeatedly rejected the use of general population data when the job in question requires special qualifications, it has stated that such data can accurately reflect the qualified applicants for *low-skilled* jobs (i.e., jobs that involve skills that can be readily acquired by the general population).[397] Although some point to *Wards Cove Packing Co. v. Atonio*[398] as evidence of the Court's rejection of general population statistics,[399] this criticism ignores the Court's explicit statement to the contrary[400] and obscures the unique circumstances in *Wards Cove* that made the plaintiffs' reliance on general population statistics extremely problematic. For example, while more than eighty-five percent[401] of the at-issue jobs in *Wards Cove* were *skilled* positions (e.g., accountants, boat captains, electricians, engineers, and doctors), the plaintiffs relied on general population statistics that were based *entirely* on *unskilled* workers (i.e., the defendant employer's cannery workers).[402] It was an easy call for the Court to conclude,

393. See *supra* Parts III.A.1.b and III.A.2 for discussion of relevant market- and applicant flow-analyses.

394. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 n.6 (1989); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 586 n.29 (1979); Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

395. *See, e.g.*, Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1490 (1996) (stating that "Supreme Court has rejected the use of general population statistics" (citing *Wards Cove*, 490 U.S. at 650–51); Lye, *supra* note 126, at 327 & n.60 (contending that Court's de facto bar on general population data following *Beazer* was "formally adopted" in *Wards Cove*).

396. *Wards Cove*, 490 U.S. at 651 n.6 (internal quotation marks omitted); *Beazer*, 440 U.S. at 586 n.29 (internal quotation marks omitted).

397. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (stating that use of general population statistics can be "highly probative" when "job skill . . . is one that many persons possess or can fairly readily acquire").

398. 490 U.S. 642 (1989).

399. *E.g.*, Ayres & Siegelman, *supra* note 395, at 1490; *cf.* Mank, *supra* note 131, at 398 ("[M]ost lower court decisions read *Wards Cove* to require that plaintiffs precisely identify the relevant labor market or 'appropriate pool' of qualified applicants.").

400. *Wards Cove*, 490 U.S. at 651 n.6 ("In fact, where figures for the general population might . . . accurately reflect the pool of qualified applicants, we have even permitted plaintiffs to their prima facie cases on such statistics as well." (omission in original) (citation omitted) (internal quotation marks omitted)). It is also worth noting that the *Wards Cove* opinion was written by Justice White, a judge who clearly supported the use of general population data in *Beazer*. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 598–602 (1979) (White, J., Dissenting).

401. The district court determined that only fifteen of the more than one hundred at-issue jobs were unskilled positions. *Wards Cove*, 490 U.S. at 674 n.21 (Stevens, J., dissenting).

402. *Id.* at 650–51 (majority opinion). Since plaintiffs' data was based entirely on employer's unskilled workforce, it is problematic to even characterize the data as being "general population" statistics. At least one commentator, for instance, has made a useful distinction between population data taken from society at large (e.g., national data on the height and weight of women) and population data derived entirely from "the

therefore, that this "general population" data at issue would not accurately reflect the *qualified* applicant pool for the employer's skilled workforce.[403] Even with respect to the few non-skilled jobs at issue, the non-specific nature of the hiring policies being challenged (e.g., "nepotism, a rehire preference, a lack of objective hiring criteria, [and] separate hiring channels"[404]) made it all but impossible to quantifiably assess the policies' impact on the general population.[405] In sharp contrast to these amorphous hiring policies, a criminal record policy targets a specific objective criterion (e.g., whether the applicant has a prior criminal conviction), which is precisely the type of policy that general population data can effectively assess.[406] Far from being a death knell for general population statistics, therefore, *Wards Cove* has remarkably little relevance to the use of general population data in criminal record cases.

The question in the criminal record context, therefore, is not *if* general population data can be used, but whether this data *accurately reflects* the potential applicant pool.[407] Specifically, do the state and national statistics showing severe race-based disparities in criminal conviction rates "accurately reflect" the disparities found among the qualified applicant pool for non-skilled jobs?[408] In answering this question, it is instructive to compare the data on racial disparities in the criminal justice system with the general population statistics that have, and have not, passed muster with the Supreme Court.[409]

First, according to national data from the Department of Justice, 32.2% of black males spend time in prison versus 5.9% of white males.[410] This six-fold difference is twice as large as the three-fold difference in black/white graduation rates in *Griggs*.[411]

geographic area where [the] defendant hires." Shoben, *supra* note 98, at 33–35. According to Shoben, these two types of general population statistics are relevant in distinctly different cases: society-at-large population data is relevant for assessing objective selection criteria, while local population data is relevant for assessing subjective criteria. *Id*.

403. *Wards Cove*, 490 U.S. at 651–52.

404. *Id*. at 647–48.

405. *See* Shoben, *supra* note 98, at 33–35 (arguing that broad-based general population statistics (e.g., national data) are only probative for jobs with *objective* selection criteria).

406. *Id*. at 34–35 (arguing that general population data is most appropriate for challenging "specific requirements such as height or weight standards, . . . a diploma requirement, or lack of an arrest record").

407. As evident by the Court's factual analysis in *Beazer*, general population statistics have been subject to a rather demanding degree of factual scrutiny. As a matter of law, however, they remain an acceptable means of demonstrating the prima facie case. See *supra* notes 130–43 and accompanying text for a review of the *Beazer* Court's factual analysis and *infra* Part VI.D.1 for a discussion of the resistance the presumptive prima facie case described here may face from post-*Beazer* courts.

408. See *supra* Part II.A for a review of general population statistics on the racial disparities in the criminal justice system. According to social science research, the racial disparity in incarceration rates exceeds the racial disparity for "most other social indicators," including unemployment and wealth accumulation. WESTERN, *supra* note 33, at 16.

409. The Supreme Court has utilized a similar analysis for assessing the probative value of general population statistics. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 n.12 (1977) (assessing probative value of general population data indicating fourteen-fold disparity by comparing to *Griggs*'s decision that found three-fold disparity sufficient to prove prima facie case).

410. BONCZAR, *supra* note 33, at 8.

411. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (citing state census data showing thirty-four percent of white males had graduated high school versus only twelve percent of black males).

Similar disparities exist for arrest and conviction rates as well.[412] While the racial disparities in criminal justice involvement may not be as severe as the fourteen-fold gender disparity in *Dothard v. Rawlinson*,[413] it is within the range that the Court has deemed significant.

Second, based on the uniformity of racial disparities in the criminal justice system across time,[414] region,[415] crime types,[416] and education levels,[417] the disparities in the criminal justice system are arguably as consistent as the data in *Dothard*.[418] Like *Dothard*, therefore, it is hard to reasonably conceive that the racial disparities in criminal records—documented in every single state in the country[419]—will vanish in a given geographical region or among applicants to low-skilled jobs that, by definition, most people in society can perform.[420]

Third, the general population statistics on criminal records do not suffer from the kinds of weaknesses that the Court identified with the methadone clinic data in *Beazer*.[421] In *Beazer*, the Court criticized the plaintiffs' general population statistics on methadone use for failing to include data from private clinics,[422] which comprised about 14,000 of the 40,000 methadone patients being treated in New York City.[423] This problem of underinclusivity, however, does not pertain to general population data on criminal records, since arrest rates, conviction rates, and incarceration rates are based on society as a whole.[424] The other main concern in *Beazer* was that the methadone data was *overly* inclusive. Specifically, the Court reasoned that, since many of the patients in the public clinics were not yet "employable," the data did not establish a racial disparity among methadone users who were actually *qualified* to work at the Transit Authority.[425] Although some argue that overinclusivity is an inherent and fatal

412. *See, e.g.*, DUROSE & LANGAN, *supra* note 30, at 2; FBI, *supra* note 30 (providing data on racial disparity in arrests for crimes).

413. 433 U.S. 321, 330 n.12 (1977).

414. *See* Cole, *supra* note 4 (noting that blacks disproportionate representation in prison system dates back to Jim Crow era).

415. HARRISON & BECK, *supra* note 31, at 11.

416. DUROSE & LANGAN, *supra* note 30, at 2.

417. WESTERN, *supra* note 33, at 32–33.

418. *See Dothard*, 433 U.S. at 329–31 (holding that national data on average height and weight of men and women can be used to infer height and weight characteristics of job applicants to correctional facility in Alabama).

419. HARRISON & BECK, *supra* note 31, at 11.

420. *See* NAACP Letter, *supra* note 12, at 4 (contending that, even among applicants to skilled jobs, "it is unrealistic to think that the extreme racial disparities in conviction rates [will] disappear").

421. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 584–86 (1979) (critiquing plaintiff's general population data as simultaneously over- and under-inclusive).

422. *Id.* at 586.

423. *Id.* at 574.

424. *See, e.g.*, BONCZAR, *supra* note 33 (providing nationwide data on rates of incarceration by race); DUROSE & LANGAN, *supra* note 30 (providing data from all state courts showing racial disparity in felony convictions); HARRISON & BECK, *supra* note 31, at 11 (providing data showing racial disparities in incarceration in every single state).

425. *Beazer*, 440 U.S. at 586–87 n.28.

problem with general population statistics,[426] the Court has implicitly rejected this position. Indeed, if the mere existence of some overinclusivity is fatal, no general population data would ever be probative, and the Court's repeated affirmation of general population statistics would be a nullity. The question of overinclusivity, therefore, is one of degree.

The key inquiry in the criminal record context is thus whether the general population data on conviction rates overincludes unqualified individuals to such a degree as to not accurately reflect the criminal record disparities among applicants actually qualified for such positions. On one hand, there is evidence of overinclusivity in criminal record data, including, inter alia, low levels of educational attainment (e.g., 41% of inmates have not passed high school)[427] and high rates of mental illness and substance abuse (e.g., 42% of state prison inmates have a mental health *and* substance abuse problem).[428] On their face, these statistics raise questions akin to those in *Beazer* about the applicability of criminal justice disparities to the qualified applicant pool for low-skilled jobs. However, whereas the *Beazer* Court did not have data to show that the racial disparities remained intact after limiting the data to methadone users who were "employable,"[429] there is ample data in the criminal record context to show that the racial disparities in the criminal justice system do *not* diminish when limiting the data to those without mental health or substance abuse problems and with a high school education. Indeed, the rates of mental health problems are actually *higher* among *white* inmates in each type of correctional facility that has been studied—federal prison, state prison, *and* state jail.[430] Similarly, the rate of drug use among white and black inmates has been found to be the same,[431] while the rate of alcohol abuse has been found to be *higher* among white inmates.[432] Finally, while more white inmates have graduated from high school or obtained a GED,[433] the racial disparity in incarceration rates has been

426. *See, e.g.*, Lerner, *supra* note 105, at 30–35 (arguing that general population statistics are inherently overinclusive since they include, inter alia, data on children who cannot be employed and adults not interested in the job).

427. HARLOW, *supra* note 63, at 1.

428. JAMES & GLAZE, *supra* note 63, at 5. *See generally* TRAVIS, *supra* note 3, at 25–30.

429. N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 586–87 (1979) (emphasizing lack of evidence to support conclusion that racial disparities among methadone users in public clinics would persist if considering methadone users in private clinics and if both datasets were limited to users who were actually employable).

430. JAMES & GLAZE, *supra* note 63, at 4 tbl.3 (reporting that rate of mental health problems among white inmates exceeds rate among black inmates by 7.5% in state prison, 3.7% in federal prison, and 7.8% in local jails).

431. MUMOLA, *supra* note 65, at 7 tbl.6 (presenting data showing no difference between percentage of white and black inmates reporting regular prior drug use); *see also* Dreama G. Moon et al., *Substance Abuse Among Female Prisoners*, 1 OKLA. CRIM. JUST. RES. CONSORTIUM J. 35 (1994) ("No significant racial differences were found among [female prisoners in Oklahoma] who report using street drugs: Drug users are just as likely to be White as Black. Statistically significant racial differences do emerge, however, when type of drug used is examined. Whites comprise higher proportions of every type of drug used category except cocaine.").

432. MUMOLA, *supra* note at 65, 8 tbl.7 (reporting 33.5% of surveyed white inmates versus 18.6% of black inmates had three or more positive responses in CAGE questionnaire, a diagnostic test for assessing history of alcohol dependence).

433. HARLOW, *supra* note 63, at 6 tbl. 7 (reporting that 72.9% of white inmates had at least graduated high school or received their GED versus 57.8% of black inmates).

found to *increase* when the data is limited to those who have completed high school.[434] In contrast to the situation in *Beazer*, therefore, general population data strongly suggests that the racial disparity in the criminal justice system is not diminished—and could well be enhanced—when only considering those with at least a high school education and without mental health or substance abuse problems.

General population data thus provides a clear basis for a FEPA to presume, at the investigatory stage, that criminal record policies will have a disparate impact on black applicants to low-skilled jobs. Because Supreme Court precedent allows such data to be relied upon at trial as an alternative to costly customized analyses of the relevant labor market and applicant pool, use of this presumption will enable FEPAs to focus on cases that can be proved at trial in a cost-effective manner.

3. When FEPAs Should Presume Absence or Presence of Business Necessity

In addition to using a presumption for the prima facie case, FEPAs can also use a presumption for the business necessity analysis thanks to a growing body of research on recidivism risk.[435] Under the Third Circuit's business necessity standard, a criminal record policy must be able to "distinguish between individual applicants that do and do not pose an unacceptable level of risk."[436] In making this determination, the Third Circuit has emphasized that courts should look to objective evidence such as "recidivism statistics."[437] Since recidivism statistics provide clear indications of when ex-offenders pose a very high risk, or a very low risk,[438] FEPAs can rely on this data to streamline their investigations of business necessity by quickly filtering out claims with little chance of success at trial.

As existing recidivism research makes clear, there are vast differences in risk among ex-offenders who have recently been released versus those who have remained crime-free for extended periods of time.[439] While the recidivism rate is as high as 67.5% for prisoners released within the last three years,[440] it becomes statistically insignificant after as few as five years for property offenders and as few as eight years for violent offenders.[441] Based on this data, an employer would have a presumptively strong business necessity defense for denying employment to ex-offenders released from prison within the past three years, but a presumptively weak business necessity defense when the applicant had remained crime-free for more than five to eight years

434. WESTERN, *supra* note 33, at 33 tbl.1A.1.

435. *See* Bushway & Sweeten, *supra* note 76, at 697 (noting that "social science research can calibrate the risk associated with a criminal history record").

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

437. *See id.* at 244 n.11 (critiquing *Carolina Freight* for failing to consider "any recidivism statistics or any other indicia of the effectiveness of [the employer's criminal record] policy"); *see also* Zappe, *supra* note 214 (quoting EEOC lawyer as saying *El* court "dropped lots of hints" that its decision would have been different had the plaintiff introduced recidivism research showing a lack of risk).

438. See *supra* notes 52, 74–78, and accompanying text for a summary of recent recidivism research.

439. *E.g.*, LANGAN & LEVIN, *supra* note 52, at 1; Blumstein & Nakamura, *supra* note 77, at 337, 350.

440. LANGAN & LEVIN, *supra* note 52, at 1.

441. Blumstein & Nakamura, *supra* note 77, at 343–44.

(excluding time spent in prison).[442] Accordingly, FEPAs would be justified in presuming the absence of probable cause under the first scenario, while presuming the presence of probable cause where the applicant had remained crime-free for at least five to eight years.[443]

While some claims will obviously fall in a "grey area"—where the findings of recidivism research are equivocal—FEPAs could utilize their discretion to limit the issuance of probable cause findings to cases where recidivism research indicates a clear lack of risk based on a specified degree of statistical power and significance.[444] Dismissing "grey area" cases[445] may be desirable from a cost-benefit perspective, as the equivocal nature of such cases would invite costly duels between competing experts at the adjudicatory stage that would significantly drain a FEPA's administrative resources.

Finally, since the question of what constitutes an "unacceptable risk" inherently involves a normative judgment by the trier of fact,[446] FEPAs may ultimately utilize different cut-off points for when the recidivism risk is presumptively (un)acceptable.[447] Budget-strapped FEPAs who wish to limit their consideration to only those claims with a high likelihood of success at trial, could opt for a conservative cut-off point (e.g., fifteen or more years of remaining crime-free). More ambitious FEPAs could opt for the minimum cut-off point at which recidivism research shows no statistical difference in recidivating (e.g., five years of remaining crime-free for those who committed property offenses and eight years for those who committed violent offenses). Such presumptions need not be static, but could be altered to account for future judicial interpretations of what level of risk is "unacceptable," as well as new findings from

442. *Cf.* Bushway & Sweeten, *supra* note 76, at 697 (arguing that current criminological research supports bans on individuals with "recent criminal histories" but not bans on those who have remained arrest-free for more than seven years).

443. The presumptions would not, of course, be irrebuttable. For example, where a complainant has committed a recent offense (e.g., within the past three years), but the offense is extremely minor or unrelated to the duties of the job, the presumption of a valid business necessity defense would likely be rebutted. *Cf. Green v. Mo. Pac. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) ("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." (emphasis added)). Similarly, when a complainant's prior offense is particularly problematic for the job at issue (e.g., a complainant with a prior conviction(s) for embezzling who applied for a job at a bank), the fact that a significant period of time has passed since the offense occurred would likely not be sufficient to warrant the FEPA proceeding with the case.

444. *See* Bushway & Sweeten, *supra* note 76, at 697 (suggesting that determination of when ex-offender's recidivism risk is unacceptable "is outside the realm of social science").

445. Another type of "grey area" case would be one where the particular characteristics of the applicant (e.g., a current drug or alcohol addiction or a history of employment-related disciplinary problems) provide an additional basis—not captured in recidivism research—to justify the employer's determination that the applicant posed an unacceptable risk.

446. *See* Blumstein & Nakamura, *supra* note 77, at 343–44 (showing that statistical interpretation of data hinges on normative determination of what degree of risk is acceptable).

447. *See* Telephone Interview with Richard Boulden, *supra* note 247 (noting that "we know our juries" and that likelihood of prevailing at trial influences what cases North Carolina's state civil rights agency focuses on).

recidivism research.[448] The key point is that the ready availability of recidivism research will enable FEPAs to customize a set of presumptions that can filter out claims that would be difficult and/or costly to win at trial.

### *D. The Question of Adjudication in the Post-*Beazer *Context*

While the aforementioned presumptions will help FEPAs focus their limited resources on claims that can be proved in a cost-effective manner, it is naturally possible that the claims will ultimately not prevail. Indeed, as post-*Beazer* jurisprudence clearly shows, trial courts can utilize the ample discretion afforded to them[449] to impose burdens of proof that go well beyond the applicable "more likely than not" standard[450] and encroach what could fairly be characterized as a burden of "numerical exactitude."[451] While adjudication before FEPA tribunals could conceivably avoid some of the withering scrutiny that post-*Beazer* courts have applied,[452] not all FEPAs have an administrative system for adjudicating claims.[453] Thus, with at least some FEPAs, a finding of probable cause—if it does not result in a settlement—will be subject to litigation in court. To the extent that such claims prove unsuccessful, employers would have less incentive to settle[454] and FEPAs may be less likely to invest their resources processing the claims. It is important, therefore, to consider the potential roadblocks that claims deemed to have probable cause under the presumptions set forth above, may face at trial—and what arguments can be made to overcome them.

#### 1. "Numerical Exactitude" Is an Impermissible Burden of Proof

While *Beazer* reaffirmed the use of general population statistics as a matter of law, the Court's analysis of the plaintiffs' population data arguably imposed a burden

448. In addition to length of time since release, recidivism research has accounted for other factors that may predict future risk. *See, e.g.*, Blumstein & Nakamura, *supra* note 77, at 337, 343–44 (reporting recidivism risk as function of age at first arrest and type of offense committed). Thus, some FEPAs may choose to base their presumptions on an assessment of multiple factors.

449. *E.g.*, Allen v. Prince George's Cnty., Md., 737 F.2d 1299, 1304 (4th Cir. 1984) (stating that trial judge may "accord whatever weight he considers proper" to prima facie evidence).

450. See *supra* note 95 for court decisions confirming that disparate impact plaintiffs only have burden to prove prima facie case by a preponderance of the evidence.

451. The term "numerical exactitude" was coined by Justice Stevens in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 674 (1989) (Stevens, J., dissenting).

452. Because of appellate court deference to administrative rulings, a FEPA tribunal that proves amenable to criminal record claims would provide plaintiffs a significant advantage on appeal. *See* Catania, *supra* note 332, at 825 ("As long as the record indicates a rational or substantial basis for the decision of the [FEPA tribunal], the state court typically will affirm it."). *But see id.* ("[I]t is unfair to presume that the state agency is either more or less likely to find in favor of the complainant than is a federal court.").

453. *See id.* at 819–25 (describing three main FEPA approaches for processing claims, with some following EEOC approach and issuing reasonable cause findings instead of adjudicating when settlement cannot be reached).

454. *See* Pritchard, *supra* note 114, at 788 ("[T]he process of mediation is conducted 'in the shadow of the court,' with mediation outcomes often highly influenced by the potential impact of litigation." (quoting Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC'S Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 14 (2008)).

of proof that went beyond the applicable preponderance standard.[455] By "hypothes[izing]" about "unlikely" problems in the plaintiffs' data,[456] the Court failed to follow its own declarations that statistics "need not prove discrimination with scientific certainty,"[457] and that a disparate impact plaintiff need not "exhaust every possible source of evidence."[458] Since post-*Beazer* trial courts have employed similarly speculative reasoning to dismiss stronger prima facie evidence in criminal record cases, FEPAs and attorneys representing clients with criminal records should be prepared to argue that such boundless speculation imposes on plaintiffs an impermissibly demanding burden to establish the disparate impact with "numerical exactitude."[459] An instructive example that highlights the excessively demanding nature of this standard is the Southern District of New York's decision in *Hill v. United States Postal Service*.[460]

In *Hill*, the demand for numerical exactitude can be gleaned in each of its three criticisms of the plaintiff's general population data.[461] First, the court rejected the plaintiff's statistics on conviction rates because they were from 1978 whereas the plainitff had been denied jobs between 1970 and 1976.[462] The court, however, did not provide any basis why the 1978 data would not be representative of the situation several years prior.[463] Moreover, even though the plaintiff presented data on the racial disparity in *incarceration* rates from 1970 to 1974, and even though this data closely mirrored the racial disparity in the 1978 data on *conviction* rates,[464] the court refused to make the inferential leap that rates of incarceration mirror those of conviction.[465]

Similarly, the *Hill* court faulted the plaintiff for failing to narrowly tailor his statistics to the precise geographical region served by the employer.[466] The plaintiff, who had applied to several post offices in and around New York City,[467] provided arrest and conviction statistics from New York City as well as incarceration statistics from New York State.[468] Although these city and state datasets showed similar racial disparities,[469] the court faulted the plaintiff for failing to customize the data to an undefined "Northeast Region" from which the post office drew its employees.[470] Even

455. See *supra* notes 140–43 and accompanying text for a review of Justice White's critique of the majority's opinion in *Beazer*.

456. N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 599 n.5 (1979) (White, J., Dissenting).

457. Bazemore v. Friday, 478 U.S. 385, 400–01 (1986) (Brennan, J., concurring in part).

458. Dothard v Rawlinson, 433 U.S. 321, 331 (1977).

459. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 674 (1989) (Stevens, J., dissenting) ("Our previous opinions . . . demonstrate that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case." (citations omitted)).

460. 522 F. Supp. 1283 (S.D.N.Y. 1981).

461. *Hill*, 522 F. Supp. at 1302–03.

462. *Id.* at 1302 n.24.

463. *Id.*

464. *Id.* at 1294–96.

465. *Id.* at 1302 n.24.

466. *Id.*

467. *Id.* at 1290–92.

468. *Id.* at 1295–96.

469. *Id.*

470. *Id.* at 1302.

though there was no evidence in the record to suggest that the northeast region's data would be different from New York City, New York State, or the nation as a whole, the court appeared concerned that a meaningful difference could exist.[471] Nowhere, however, did the court address the fact that the difference would need to be *dramatic* in order to erase the racial disparities,[472] particularly considering (1) the obvious overlaps between New York City, New York State, and the labor market of an employer located on the outskirts of the New York City[473] and (2) the consistency of the racial disparities across the plaintiff's city, state, and national datasets.

Finally, the *Hill* court criticized the plaintiff's evidence based on a narrow interpretation of what constitutes "special qualifications" for a job.[474] Despite the fact that the at-issue jobs were manual labor positions, the court characterized them as requiring special qualifications because applicants needed to pass an entrance examination.[475] In reaching this conclusion, the court took an expansive view of what constitutes a special qualification.[476] Since the examination was for both a "custodial laborer" and "motor vehicle operator" position,[477] it is doubtful the exam required specialized knowledge that went beyond what most people could readily acquire.[478] Moreover, the court did not assess the skills required by the exam, but appeared to assume—in the absence of evidence produced by the defendant—that it was just as likely as not that the racial disparity in conviction rates would disappear if the data was limited to individuals who could pass the exam.[479]

In hypothesizing multiple ways that the plaintiff's evidence might be flawed, the *Hill* court utilized a standard of proof that more closely resembles "numerical exactitude" than simple preponderance. To the extent that courts hearing claims litigated by FEPAs use a similarly exacting analysis, it will be difficult to rely upon general population statistics to prove the prima facie case—and the cost of litigating would increase significantly. To help avoid this fate, it should be stressed that courts should not be refuting plaintiffs' prima facie evidence on the basis of *conceivable* problems that do not have a direct basis in the evidentiary record.[480]

471. *See id.* (stating that there is "no indication as to the localities . . . included in the Northeast Region," with apparent assumption that, without this specific information, data from New York City and New York State may not be sufficiently probative).

472. *Id.*

473. *Id.* The plaintiff had applied to post offices in both Hicksville and Jamaica, New York, which are approximately fifteen to thirty miles away from Manhattan, respectively. *Id.* at 1292.

474. *Id.* at 1302–03.

475. *Id.*

476. The *Hill* court's interpretation of special qualifications is broader than the interpretation used by the Supreme Court. See *supra* note 105 for a review of the Supreme Court's guidance regarding jobs that do not involve special qualifications.

477. *Hill*, 522 F. Supp. at 1292.

478. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (noting that general population statistics are appropriate for jobs requiring skills that "many persons . . . *can fairly readily acquire*" (emphasis added)).

479. *Hill*, 522 F. Supp. at 1302.

480. This proposition is supported by the *Beazer* majority's summary of general population statistics. According to the majority, general population data loses its probative value if "*evidence show[s]*" that it does

2. Abuse of Discretion by Post-*Beazer* Courts

While the Supreme Court's factual analysis in *Beazer* helped set the trend toward heightened scrutiny of criminal record claims in motion,[481] post-*Beazer* courts have gone a step further by exceeding the boundaries on discretion that the Court has drawn. Specifically, by requiring applicant flow analyses even when unrebutted general population statistics prove an impact on potential applicants,[482] and by requiring proof that the criminal record policy caused a racial disparity in the employer's workforce,[483] post-*Beazer* courts have abused their discretion by imposing burdens of proof that run counter to the standards set forth by the Supreme Court in *Dothard* and *Connecticut v. Teal*.[484]

According to *Dothard*, "[t]here is no requirement . . . that a statistical showing of [disparate] impact must always be based on analysis of the characteristics of actual applicants."[485] This clear instruction was ignored by the district court in *EEOC v. Carolina Freight Carriers Corp*.[486] Despite acknowledging that the plaintiff's general population statistics established potential Hispanic applicants would be disproportionately impacted by the defendant's policy, the court dismissed the case because the plaintiff had not conducted an applicant flow analysis.[487] While the court's decision may have been understandable if there were evidence of bad faith in the plaintiff's failure to examine the applicant flow data, the court noted that the data had been "unavailable" to the plaintiff.[488] It is thus hard to avoid the conclusion that *Carolina Freight*'s exercise of discretion exceeded the boundary set forth in *Dothard*.

Courts have similarly exceeded the boundary set forth in *Teal*. According to *Teal*, employers cannot defend policies that produce a disparate impact with evidence that the protected class is adequately represented in the employer's workplace.[489] Despite the Court's rejection of this "bottom line" defense, several post-*Beazer* courts have required plaintiffs to show an imbalance in the workforce as a result of the criminal record policy.[490] Such a requirement clearly runs counter to *Teal* as it immunizes

not "accurately reflect" qualified applicants. N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 586 n.29 (1979) (emphasis added) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977)).

481. See *supra* note 130 and accompanying text for the observation by several commentators that the erosion in disparate impact doctrine can be traced to the *Beazer* decision.

482. *See, e.g.*, EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 751 (S.D. Fla. 1989) (finding plaintiff's general population data to sufficiently demonstrate that employer's criminal record policy "adversely impacts Hispanics at a statistically significant rate exceeding that of non-Hispanics," but dismissing prima facie case because of plaintiff's failure to "examine applicant flow data").

483. *E.g.*, Watkins v. City of Chicago, 73 F. Supp. 2d 944, 949 (N.D. Ill. 1999); Matthews v. Runyon, 860 F. Supp. 1347, 1357 (E.D. Wis. 1994); Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992); *Carolina Freight*, 723 F. Supp. at 751.

484. 457 U.S. 440 (1982).

485. Dothard v Rawlinson, 433 U.S. 321, 330 (1977).

486. 723 F. Supp. 734 (S.D. Fla. 1989).

487. *Carolina Freight*, 723 F. Supp. at 751.

488. *Id.* at 742.

489. *Teal*, 457 U.S. at 455–56.

490. *E.g.*, Watkins v. City of Chicago, 73 F. Supp. 2d 944, 949 (N.D. Ill. 1999); Matthews v. Runyon, 860 F. Supp. 1347, 1357 (E.D. Wis. 1994); Williams v. Scott, No. 92 C 5747, 1992 WL 229849, at *2 (N.D.

employers with diverse workforces from *any* disparate impact challenge; so long as the defendant has a diverse workforce, it is impossible to show that the challenged policy caused a disparity in the workforce.

While the previously described "numerical exactitude" analysis may be somewhat difficult to dislodge due to its arguable consistency with *Beazer*, the post-*Beazer* practice of requiring applicant flow analyses—irrespective of the circumstances—or proof that the employer's workforce has a racial disparity as a direct result of the criminal record policy, runs directly counter to the Court's guidance in *Dothard* and *Teal*. Accordingly, FEPAs representing criminal record plaintiffs may have a better chance in avoiding these potentially fatal pitfalls.

### *E. FEPA Engagement Will Not Open the Floodgates of Litigation*

When the PHRC announced its policy guidance, critics claimed that it would open the floodgates of litigation.[491] There are several flaws, however, underlying critics' fears of excess litigation both with respect to disparate impact and negligent hiring liability.

#### 1. Disparate Impact Liability

While PHRC's policy will facilitate more claims against employers, there are several factors that limit the extent of this litigation. First, the majority of ex-offenders who are denied jobs are never told that this was the reason for their denial.[492] Indeed, despite the fact that the vast number of employers admit in private surveys that they will not knowingly hire people with criminal records,[493] there have been notably few disparate impact claims filed against criminal record policies.[494] Thus, since a disparate impact claim requires proof that the plaintiff was denied *because* of their criminal record,[495] most ex-offenders denied jobs on the basis of their criminal record will have no cognizable claim.[496] Second, even when the applicant does find out that he was denied on the basis of a criminal record, his claim may be defeated if he failed to disclose the record on his application form[497] as many applicants do.[498] Finally, among the few ex-offenders who discover that they were denied a job on the basis of a criminal background check, many will not have a meritorious claim if they have

Ill. Sept. 9, 1992); *Carolina Freight*, 723 F. Supp. at 751. *But see* Hill v. U.S. Postal Serv., 522 F. Supp. 1283, 1303 n.25 (S.D.N.Y. 1981) (recognizing that *Teal* forbids requiring proof of racial imbalance in workplace).

491. See *supra* Part IV.B.2 for criticisms of the PHRC's policy.

492. Clark, *supra* note 70, at 206.

493. TRAVIS, *supra* note 3, at 31.

494. *See* Aukerman, *supra* note 71, at 9 (noting that "relatively few" disparate impact cases have been filed against criminal record hiring policies).

495. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (noting that disparate impact plaintiff is "responsible for isolating and identifying the specific employment practices" that caused the injury).

496. *See, e.g.*, Cross v. U.S. Postal Serv., 639 F.2d 409, 410–11 (8th Cir. 1981) (dismissing plaintiff's claim due to failure to prove that employer denied employment on basis of prior offense).

497. *E.g.*, Redden v. Wal-Mart Stores, Inc., 832 F. Supp. 1262, 1266 (N.D. Ind. 1993).

498. *See* Rodriguez & Petersilia, *supra* note 57, at 4 (discussing inclination among ex-offenders to not disclose criminal record on application).

recently been released from prison due to the high average risk of recidivism among such individuals.[499] There is, therefore, a relatively small pool of individuals who will have viable disparate impact claims.

2. Negligent Hiring Liability

Critics have also argued that the fear of disparate impact liability will lead more employers to hire ex-offenders, thereby exposing themselves to negligent hiring liability.[500] While this is an understandable concern, critics have exaggerated the difficulty of simultaneously avoiding disparate impact and negligent hiring liability. First, employers are only liable for negligent hiring if they knew, or reasonably should have known, that the applicant posed a risk.[501] If an employer, therefore, carefully considers the applicant's prior offense and is unable to find a business necessity basis for denying the job, it is unlikely that the hiring decision could be deemed negligent as the risk would not have been reasonably foreseeable.[502] If SEPTA had hired Douglas El,[503] for example, it is doubtful that it would have been subject to negligent hiring liability had he recidivated, since the recidivism risk after forty years of remaining crime-free is not objectively foreseeable.[504] Case law from New York supports this proposition. In *Ford v. Gildin*,[505] the appellate court dismissed negligent hiring claims because the employer had determined that the applicant's prior offense did not pose a risk under the "direct relationship" test set forth in the state's criminal record statute.[506] Thus, if the prior offense presents no foreseeable risk in the workplace, the employer would not be negligent in failing to foresee it.

Second, the negligent-hiring case law cited by critics does little to support their argument of an insurmountable conflict between disparate impact and negligent hiring.[507] Not only do few of the cases pertain to applicants with prior criminal records, but those that do have little probative value since the employers in these cases would have had strong business necessity defenses for denying the job. For example, in *McLean v. Kirby Co.*,[508] the applicant's one-year-old conviction for a violent offense, coupled with his pending charge of sexual violence, made it reasonably foreseeable that he might assault a customer—especially given his access, as a door-to-door salesman,

499. See *supra* Part VI.C.3 for the argument that disparate impact litigation is of little avail to recently released ex-offenders.

500. HOGAN & DE BERNARDO, *supra* note 284, at 10.

501. Watstein, *supra* note 5, at 584.

502. *See* El v. Se. Pa. Trans. Auth., 479 F.3d 232, 245 (3d Cir. 2007) (holding that employer has business necessity basis for denying jobs to applicants who pose "unacceptable risk").

503. See *supra* Part III.B.3 for a discussion of the facts in *El v. Southeastern Pennsylvania Transportation Authority*.

504. *See* Blumstein & Nakamura, *supra* note 77, at 343–44 (reporting recidivism risk to be insignificant among ex-violent offenders who remained crime-free for eight years).

505. 613 N.Y.S.2d 139 (N.Y. App. Div. 1994).

506. *Ford*, 613 N.Y.S.2d at 140–41. See *supra* notes 304–05 and accompanying text for a discussion of New York's recent codification of this rule in the state's criminal record statute.

507. See *supra* notes 285–93 and accompanying text for a review of negligent hiring cases cited by critics of the PHRC's policy.

508. 490 N.W.2d 229 (N.D. 1992).

to customers' homes.[509] Similarly, in *Deerings West Nursing Center v. Scott*,[510] the applicant's *fifty-six* prior criminal convictions at the time of hire gave the nursing home a clear basis in business necessity for denying employment—especially since the job entailed the heightened responsibility of working with a vulnerable population.[511] Thus, the mere fact that employers have been held liable for negligent hiring, including situations involving ex-offenders, is not sufficient—without more—for demonstrating that a FEPA policy on disparate impact will increase liability for negligent hiring.[512]

## VII. CONCLUSION

With most employers admitting in private surveys that they will not hire an applicant who has a prior criminal offense,[513] it is clear that employment discrimination against ex-offenders is a widespread—albeit routinely undetected—problem. It is also clear, based on overwhelming evidence of racial disparities in the nation's criminal justice system, that such discrimination disproportionately harms communities of color.[514] Less clear is what role the government should have in addressing the issue. While strong bipartisan support exists for using reentry programs and tax credits as a "carrot" to entice private employers to hire recently released ex-offenders,[515] political bodies[516] and courts[517] have proven less willing to use the "stick" of employment discrimination law.

This Comment has made the case that the disparate impact theory of employment discrimination law is a justified, necessary, and yet limited component of reintegration efforts. When assessed under the evidentiary requirements of the prima facie[518] and business necessity[519] standards, the vast racial disparities in the criminal justice system and lack of objective recidivism risk after remaining crime-free for many years[520]

509. *McLean*, 490 N.W.2d at 232, 236–39.

510. 787 S.W.2d 494 (Tex. App. 1990).

511. *Deerings*, 787 S.W.2d at 496.

512. A more meritorious criticism raised by the business community involves the impact of extending disparate impact liability to small employers. See *supra* note 282 and accompanying text. Since state anti-discrimination laws can apply to employers with as few as four employees (versus the fifteen-employee threshold under Title VII), and since firms of this size may lack the human-resources expertise to conduct business necessity analyses, FEPAs could opt to forego considering disparate impact claims against the smallest firms covered under state law.

513. TRAVIS, *supra* note 3, at 31.

514. See *supra* Part II.A for research demonstrating severe racial disparities in criminal arrest, conviction, and incarceration rates.

515. See *supra* notes 53–62 and accompanying text for a discussion of federal and state initiatives aimed at reducing recidivism, including the bipartisan Second Chance Act that provides federal funding for educational, vocational, and counseling services during and after incarceration.

516. See *supra* Part V.C for a discussion on the lack of recent legislation expressly restricting private employer discrimination against ex-offenders.

517. See *supra* notes 223–28 and accompanying text for a discussion of the reluctance by some federal courts reluctant to provide a Title VII remedy to individuals denied employment on the basis of a prior offense.

518. See *supra* Part III.A for a discussion of the evidentiary requirements for the prima facie case.

519. See *supra* Part III.B for a discussion of the evidentiary requirements for the business necessity defense.

520. See *supra* notes 52, 74–78, and accompanying text for a review of recent recidivism research.

support the feasibility of disparate impact litigation in situations where the ex-offender has remained crime-free for many years[521] and is seeking a job that many people can perform.[522] Hence, while reentry efforts are rightfully focused on the early years of an ex-offender's release (a period when the risk of recidivism is at its peak),[523] the disparate impact remedy doesn't generally apply until many years later when the ex-offender has proved his rehabilitation.[524] Reentry programs and employment discrimination law, therefore, can be seen as interventions at different points in time to ensure both the short-term *and* long-term integration of ex-offenders back into society.

Nevertheless, despite the value of disparate impact doctrine in ensuring the long-term reintegration of ex-offenders into society, it remains a relatively rare cause of action.[525] While the infrequency of disparate impact claims has several possible explanations, one that has received little attention to date concerns the failure of state Fair Employment Practices Agencies (FEPAs) to consider the issue. Because FEPA inaction appears based on doctrinal confusion about the applicability of disparate impact to criminal record claims[526] and/or cost concerns that can be mitigated in the criminal record context,[527] outreach efforts to FEPAs represent a promising non-legislative strategy for expanding the protections for those, like Douglas El, who have turned their life around.

521. See *supra* Part VI.C.3 for an assessment of recidivism research through the lens of the Third Circuit's "unacceptable risk" business necessity standard.

522. See *supra* Part VI.C.2 for the argument that, in cases involving low-skilled jobs, black plaintiffs can make out a prima facie case against criminal record policies based on general population data showing severe racial disparities in the criminal justice system.

523. *See* LANGAN & LEVIN, *supra* note 52, at 1 (reporting that 67.5% of individuals released from prison are re-arrested within three years).

524. See *supra* Part VI.C.3 for the argument that only plaintiffs who have remained crime-free for many years have a strong likelihood of success in disparate impact cases.

525. *See* Aukerman, *supra* note 71, at 9 (noting that there have been "relatively few" disparate impact challenges to criminal record hiring policies).

526. See *supra* Part VI.B.1 for an analysis of the common, yet mistaken, perception that ex-offenders need to be defined as a protected class in order to gain any protections under state anti-discrimination law.

527. See *supra* Part VI.C for an extensive discussion on how the use of presumptions during the investigatory stage can significantly minimize the cost to FEPAs of processing disparate impact claims.