

Statement and Rebuttal of Commissioner Gail Heriot

I. Introduction

A desire to lend a helping hand to those who need it—including ex-offenders—is commendable. But as most of us learn sooner or later, helping others is not always as easy as it seems—especially when increased government regulation is the only tool as one's disposal. While there are some worthy ideas out there, unworthy ones are far more common.

This briefing was about an especially ill-considered idea—the EEOC's policy on criminal background checks, particularly as reflected in its *2012 Guidance*. This policy will almost certainly do more harm than good.¹ Moreover, there is a strong argument—and I believe a meritorious one—that because the criminal background check policy is based on a disparate impact liability, it violates the U.S. Constitution—at least in the form it is administered today.²

Bad federal regulatory ideas—even when they are constitutional—can do a great deal of damage. In that respect, they are unlike many garden-variety bad ideas. If a business owner makes a mistake about what his customers want, competitors will likely take advantage of the error, and his business will suffer. With any luck, the business owner will learn from the experience and attempt a course correction. If not, his business will likely shrink or disappear altogether. But the collateral damage to the supposed beneficiaries of his bad idea is often minimal.

Government regulatory policies, on the other hand, tend not to be so isolated in their impact. When the EEOC tells employers that they risk liability for race discrimination if they reject job applicants on account of their criminal records, that action will have effects from Maine to the Midway Atoll. The self-correcting mechanism that works (albeit imperfectly) when a small business owner makes a mistake tends not to work nearly as well in the regulatory context. The most tempting course of action for a federal bureaucrat who has erred is often to deny that a mistake has been made and push ever forward.

Of course, it is not my intent to be dismissive about the very real problem of integrating ex-offenders into the job market. But there are good ways and bad ways to encourage employers to hire ex-offenders, and the EEOC has been pursuing a bad way.

For contrast, consider the Work Opportunity Tax Credit Program. See Small

¹ See *infra* at Part IV. See also *infra* at Part III (discussing how disparate impact liability deviates substantially from what Congress intended when it passed the original version of Title VII).

² See *infra* at Part V.

Business Job Protection Act, Pub. Law 104-188 (1996).³ Under that program, employers who choose to hire a qualified ex-felon get a small tax credit. No one is forced or threatened with litigation to participate. Those businesses that perceive themselves as benefiting from the arrangement will be the ones that take advantage of it. Eligibility and other ground rules are clearly defined, so no one need be confused about what the law permits.

Employers have many things to worry about when they hire. All of them are vulnerable. If they make a wrong choice, they can wind up with someone who is undependable, difficult to work with or incompetent. A bad employee can steal from the employer, harass fellow employees, drive away the customers, and cause devastating harm.⁴ Employers can end up legally responsible for the actions of their employees under doctrines of negligent hire or supervision, respondeat superior and actual or apparent authority. The need to fire an employee often brings lawsuits and thus must be avoided where possible. No wonder employers are sometimes hesitant to hire. Policymakers need to avoid making them more hesitant.

But that doesn't mean that no employer will find hiring ex-offenders an attractive option. Jobs vary immensely. Some provide the employee with very little opportunity for wrongdoing; others can be made that way by adding a little extra supervision. Individuals with criminal records vary immensely too. There are some whose integrity is not open to serious doubt; there are others who will likely do well when working with colleagues who are aware of their weaknesses and sensitive to the need to avoid creating problems. A modest tax credit can be a useful tool to persuade an employer who is considering hiring an ex-offender but has not yet taken the plunge. In the long run, if administered properly, this program can reduce crime and save the taxpayer money.⁵

The Work Opportunity Tax Credit Program allows the employers who are in the best position to offer employment to ex-offenders (or to a particular ex-offender) to self-select. Some employers may find that they are in a good position to hire a large number of ex-offenders; others may prefer to hire none. The latter group won't have to worry about their ability to prove to the satisfaction of any government bureaucrat that they had good reason for their decision; instead, they simply won't be able to enjoy the tax credit that employers who make the opposite decision will enjoy. The important thing is that the decision will be made by individuals who are intimately familiar with the actual job and job applicant at issue and have an incentive to make the right decision instead of by far away bureaucrats and judges, who have no such familiarity with the situation.

³ The Work Opportunity Tax Credit Program was originally set to expire on September 30, 1997. 110 Stat. 1772. It has been revised and extended on several occasions, most recently the American Taxpayer Relief Act, Pub. L. 112-40 (2012).

⁴ See *Employee Kills 8, Himself in Connecticut Shooting Rampage*, **L.A. TIMES** (August 4, 2010).

⁵ I do not mean to suggest that the tax code is an instrument to which Congress should routinely resort to achieve goals that are unrelated to revenue raising. It should be used sparingly for that purpose.

II. The EEOC's Policy on Criminal Background Checks

The EEOC's policy has none of the virtues of the Work Opportunity Tax Credit Program. The 2012 *Guidance* ham-fistedly discourages all employers from checking into the criminal backgrounds of its job applicants and from acting on the information they obtain if they do. Because acting on criminal background checks is thought to have a disparate impact on African-American and Hispanic employees, employers are instructed that they must be able to demonstrate a "business necessity" for doing so. But the so-called guidance provides almost no actual guidance to employers on what constitutes "business necessity."⁶ Most

⁶ It is worth emphasizing that the applicable legal standard is not reasonableness, but "business necessity." Nobody knows for sure what that means—at least not since the Civil Rights Act of 1991. Some have argued for an extraordinarily high standard. For example, William & Mary law professor Susan Grover has stated:

The overarching issue continues to be whether the term 'necessity' in the business necessity defense literally requires that the discriminatory practice be essential to the continued viability of the business, or whether it requires something less. This Article argues for the former interpretation.

Susan Grover, *The Business Necessity Defense in Disparate Impact Employment Discrimination Cases*, 30 Ga. L. Rev. 387 (1996). See also *id.* at 429 ("That defense [the business necessity defense] should require an employer to prove that its discriminatory practice is essential to its continued operation. Under the structure created by the 1991 Act, an employer must prove that the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of that goal. ... Alternatives to this standard thwart the objectives of Title VII by disproportionately favoring defendants.").

Professor Grover clarifies her use of the term "continued viability" by stating that it means that "relinquishing the discriminatory practice will compel the employer to cut back on its business, resulting in employee layoffs." *Id.* at n. 5. That is quite a standard—particularly when applied to criminal background checks. The problem with hiring an ex-offender is that it increases the *risk* to the employer, her employees, her customers and her property. It will seldom be the case that she can prove *ex ante* that it "will compel" her "to cut back" on her business, "resulting in employee layoffs." She may well be able to prove beyond any shadow of a doubt that she is being reasonable, but that is not the standard.

One thing everyone seems to agree on is that the 1991 Act and the case law that preceded it are ambiguous. Oklahoma City University law professor Andrew Spiropoulos describes the problem this way:

[T]he [Supreme] Court articulated two very different versions of the business necessity defense: a strict one that would be very difficult for employers to meet and a lenient one that would give employers more discretion. ... [T]hose who contend that the Act establishes a strict business necessity defense and those who argue that the Act enacted the more lenient business necessity defense both have plausible arguments for their interpretations founded in two different lines of Supreme Court precedent. ... [N]either side can conclusively show that their interpretation was embodied in the Act.

Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. Rev. 1478, 1483-85 (1995). As Professor Spiropoulos describes, this ambiguity was built into the Act by Congress. *Id.* Put simply, Congress punted. It left the issue to be decided in future litigation.

For its part, the EEOC has studiously avoided coming down clearly on this issue—perhaps out of concern that a court would come down clearly in the other direction. Its enforcement strategy—especially its

employers will be at sea. Even employers who decline to hire job applicants with criminal records because they are required to do so by state law are warned that they may or may not be opening themselves up to a lawsuit.⁷ If the fact that state law commands an employer to act in a particular way is not enough to establish “business necessity,” then it is doubtful that any employer could ever know for sure that it can decline to hire an employee on the basis of his criminal record.

No doubt, some employers will err on the side of not doing criminal background checks at all in order to avoid having to sink time and money into figuring out this very complex and ambiguous guidance. Some of those will later regret that decision. Others will undertake the background checks, but will be careful—against their better judgment—not to act on them in some cases in order to demonstrate their compliance with the *2012 Guidance*. Some of these employers will also come to regret their decisions.

Insofar as the EEOC’s recent pattern of enforcement provides additional guidance for worried employers, it is ill-conceived guidance. The EEOC has targeted employers whose line of work is sensitive enough that the need for clean criminal records should be viewed as an obvious business necessity. That the EEOC would pursue employers like G4S—a provider of security personnel—is strong evidence of the agency’s overreach on this issue.⁸

singling out of a security guard company, G4S, for investigation—demonstrates that it regards the standard as very high. Employers who hope to avoid becoming ensnared in litigation must act accordingly.

⁷ One of the most astonishing assertions in the draft Statement of Commissioners Kladney and Achtenberg was this:

Despite the frequent references to employers being apoplectic over the potential demands of federal and state law, **no one at the briefing could cite a case in which an actual employer found himself threatened with a federal lawsuit as a result of his scrupulous compliance with state law, or threatened with a state or local enforcement action as a result of scrupulous compliance with EEOC guidance concerning criminal records.**

Draft Statement of Commissioners Achtenberg and Kladney at 2 (boldface and underlining in original). But Julie Payne of G4S, a major provider of security personnel to the business world, testified at our briefing that Pennsylvania law requires that unarmed security officers submit to criminal background checks and that the EEOC’s investigation of her employer threatens litigation when G4S complies with that law. Testimony of Julie Payne at 8. See also James Bovard, *Perform Criminal Background Checks at Your Peril: A Federal Policy Intended to Help Minorities is Likely to Have the Opposite Effect*, **WALL ST. J.** (Feb. 14, 2013).

Has the EEOC threatened litigation against other employers merely for complying with state law? We may never know. The EEOC keeps its investigations (and hence its threatened litigation) secret—even from the Commission. See *infra* at note 32. As I indicate in that footnote, I believe the EEOC has an obligation to cooperate with the Commission, which is charged with oversight of federal enforcement of civil rights laws like Title VII.

Meanwhile, Texas recently filed a lawsuit in federal court against the EEOC for the EEOC’s role in instructing employers that the 2012 Guidance trumps Texas laws requiring criminal background checks. See Complaint in *Texas v. EEOC*, Case 5:13-cv-00255-C (N.D. Tex. filed Nov. 4, 2013).

⁸ The investigation of G4S is not the only case of overreach on the part of the EEOC. See *EEOC v. Peoplemark*, 2011 U.S. Dist. LEXIS_38696 (W.D. Mich. 2011), *aff’d* __ F.3d __ (6th Cir. Oct. 7, 2013) (lawsuit brought against company for its criminal background policy where EEOC wrongly accused employer of having

This increases the likelihood that some employers will err on the side of not doing criminal background checks (or not acting upon them) even when doing so would have been a “business necessity” under any reasonable interpretation of that standard. Instead of helping to place ex-offenders in right jobs, this approach will put ex-offenders in the wrong jobs. Moreover, to substitute for criminal background checks, some of these employers may be tempted to avoid hiring job applicants about whom they have the slightest suspicion. The result, perversely, may be more racial discrimination rather than less.

But here’s the aspect that concerns me most: The EEOC’s *2012 Guidance* and its recent pattern of enforcement may be more aggressive than what we have seen before, but it was not exactly a bolt from the blue. The notion that Title VII prohibits employers from conducting criminal background checks on job applicants unless the employer can convince a court that it is acting from business necessity arguably follows from *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that forty-two-year-old case, the Supreme Court followed the EEOC’s urging and adopted disparate impact liability, which holds that liability under Title VII does not require that the defendant employer be motivated by race, color, religion, sex or national origin. Instead, under *Griggs*, if an employer requires its job applicants to have qualifications that have a disparate impact on women or racial minorities (e.g. high school diplomas), it must be able to demonstrate to the satisfaction of the court that the qualification is job-related and that the employer is acting from business necessity. This was a stunning misinterpretation of the 88th Congress’s intent in passing Title VII in 1964, made worse by the fact that Congress acquiesced in this bad policy when it passed the Civil Rights Act of 1991 (which amended Title VII). See *infra* at Part V.⁹

Not long after *Griggs*, the U.S. Court of Appeals for the Eighth Circuit applied its logic to criminal background qualifications. It took the position endorsed by the EEOC that *Griggs* requires an employer who refuses to hire a job applicant on account of his criminal record to demonstrate business necessity for its action. Neither conscious nor unconscious

more stringent policy than it in fact had); *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. 2013) (court rejected testimony of EEOC experts, concluding that: “The story of the present action has been that of a theory in search of facts to support it. But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the Defendant”). In *Peplemark*, the trial court ordered the EEOC to pay Peplemark \$751,942.48 in attorneys’ fees, expert witness fees, and other costs. *Freeman* was also dismissed. Win or lose, however, employers who get sued are worse off—even when they are compensated for their attorneys’ fees and costs. Many, like PepsiCo, would prefer to settle prior to litigation rather than wind up in costly and time-consuming litigation. See, e.g. *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans: Company’s Former Use of Criminal Background Checks Discriminated Based on Race*, Agency Found, EEOC Press Release (Jan. 11, 2012); Evan Pontz, *Labor: Dealing with the “New” EEOC*, Inside Counsel (Nov. 14, 2011) (“Smart employers... will seek opportunities to resolve EEOC charges quickly, efficiently, through other means (such as through private settlements or private mediations) and to try to encourage the EEOC to expend its limited resources elsewhere.”)

⁹ Additionally, as I suggested in the introductory paragraphs, it is likely unconstitutional at least in the form that it is practiced today. See *infra* at Part V.

intent to discriminate on the basis of race was a necessary element of the cause of action. See *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)(*Green I*).¹⁰

In *Green I*, the Missouri Pacific Railroad had a policy of not hiring job applicants with criminal records. As a result, 5.35% of African-American and 2.23% of white job applicants were rejected.¹¹ To explain its policy, Missouri Pacific advanced the following concerns (in the court's words): "1) fear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as witness, 5) possible liability for hiring persons with known violent tendencies, 6) employment disruption caused by recidivism, and 7) alleged lack of moral character of persons with convictions." *Id.* at 1298.

This was not good enough. The *Green I* panel chided Missouri Pacific for failing to "validat[e] its policy with respect to conviction records." The EEOC had argued as amicus curiae and the court apparently agreed that the law requires an employer to prove with the precision of a social scientist that the job qualifications it uses produce better employees.

The best I can say is that if the law requires that, then "the law is an ass—a[n] idiot."¹² Job qualifications that have a disparate impact on some group under a prohibited classification are the rule, not the exception. See *infra* at Part IV(A). Yet only the very largest employers have any chance of conducting the kind of research the EEOC and the Eighth Circuit demanded in *Green I*. The rest will not have enough data—even if they have

¹⁰ *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (1970), modified on other grounds and aff'd 472 F.2d 631 (8th Cir. 1972), is also worth noting. In it, the court held that an employer could not, consistently with Title VII, decline to hire job applicants with 14 arrests for offenses other than traffic violations but no convictions. The court stated:

There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in the case is overwhelmingly to the contrary. Thus, information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment. In recognition of this irrelevance, the County of Los Angeles, a large-scale employer, has ceased to ask for arrest information in application for employment.

The court did not specify the evidence that it was relying on. Whatever it was, it was unlikely to apply to an employee with *fourteen* arrests. I am very doubtful that Judge Hill would have hired a law clerk, a housekeeper, a baby sitter or any other job applicant with a record of fourteen arrests himself without overwhelming evidence that the particular job applicant's character had changed radically.

See also *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972) (involving allegations of discrimination against state agency governed by the Fourteenth Amendment and Section 1981 rather than Title VII).

¹¹ Missouri Pacific also had a policy against hiring certain applicants with arrest records, but the numbers involved in that policy were much smaller. *Green v. Missouri Pacific Railroad*, 381 F. Supp. 992 (E.D. Mo.1974).

¹² Charles Dickens, **OLIVER TWIST** ch. 51 (1838) (quoting Mr. Bumble).

the surplus time and energy necessary to conduct the research. Can a plumbing company *prove* that plumbers with at least three years' experience do better than those with less? Probably not. Can a small bank *prove* that hiring tellers who did well in school in basic mathematics will result in fewer errors? Can a department store *prove* that job applicants with positive letters of recommendation from previous retail employers will make better sales clerks? I doubt it—not without a significant investment of time and resources. And yet they are probably right. Certainly, the EEOC cannot prove the contrary (and it conveniently did not require itself to do so).

The fact is that very little of what we know or think we know is “known” to the degree of certainty the EEOC and *Green I* demanded. If human beings only acted on what we know with scientific certainty, the result would be paralysis. At some point we all rely on experience, common sense and the spirit of experimentation. Employers making hiring and promotion decisions are no different. If the validation requirement were taken seriously (as opposed to applied only when it suits the EEOC to apply it), it would invalidate almost all job qualifications.¹³

¹³ Nevertheless, this same argument was successfully made before the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)—a case in which the employer had actually made the effort—by hiring an industrial psychologist to validate its job requirements. But the Court rejected these efforts because, among other things, the data the employer was able to generate was too scanty to be statistically significant. It is likely that the justices did not realize that their own job qualifications for hiring clerks—a law degree, law review experience, and graduation from a prestigious law school—would almost certainly fail the test they had set out in *Albemarle Paper Co.*

A few years later, the EEOC promulgated the 1978 Uniform Guidelines on Employee Selection Procedures, under which a selection procedure that has a disparate impact on the members of any race, sex, or ethnic group is considered a violation of Title VII unless the selection procedure has been validated. 29 C.F.R. § 1607.3(A). Section 1607.5 elaborated on what validation entails.

§ 1607.5

General standards for validity studies.

A. Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American

Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. Need for documentation of validity. For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. Accuracy and standardization. Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period. In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. Method of use of selection procedures. The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. Cutoff scores. Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. Use of selection procedures for higher level jobs. If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years.

Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

- (1) If the majority of those remaining employed do not progress to the higher level job;
- (2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or
- (3) If the selection procedures measure knowledges, skills, or abilities required for advancement, which would be expected to develop principally from the training or experience on the job.

J. Interim use of selection procedures. Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. Review of validity studies for currency. Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All

Green I went on to state that “blacks who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII and that the district court should enjoin MoPac's practice of using convictions as an absolute bar to employment.” *Id.* at 1298-99.¹⁴

On remand, the trial court issued an order enjoining Missouri Pacific from disqualifying job applicants on account of any past criminal conviction. But it specifically allowed Missouri Pacific to consider an applicants' prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction and/or completion of sentence, and (3) the nature of the job for which the applicant has applied. These three items have come to be known as the “*Green* factors.”

Neither side of the litigation was happy with this result. But it was the plaintiffs, not the defendant, who were most dissatisfied and appealed. They requested that the court enjoin Missouri Pacific from considering a job applicant's criminal record at all unless and until it could produce a valid study showing that ex-offenders do indeed perform poorly at Missouri Pacific as employees. A different panel of the Eighth Circuit (with only Judge Heaney in common) held that the *Green I* panel's discussion of the need for a validated study was dictum and affirmed the trial court. *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)(“*Green II*”).

Over the course of the next two decades, the EEOC issued several policy statements on the issue. The first—issued on February 4, 1987—essentially overruled an earlier EEOC decision that had curtailed employer discretion more than the *Green* factors and applied the *Green* factors instead.¹⁵ A second policy statement was issued a few months later and

circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

It was not until a decade later that the Supreme Court began to back away from *Albemarle Paper* and state that such formal validation studies are not necessarily required to demonstrate business necessity. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion). After the Civil Rights Act of 1991, the status of this issue is quite uncertain.

¹⁴ Note that the court stated that “*blacks* who have been summarily denied employment by MoPac on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII.” (Emphasis added). What about whites or Asians? One of the aspects of Chairman Castro's draft Statement that struck me is how little the arguments that he uses in favor of laws that help ex-offenders find jobs depend (or should depend) on issues of race, color, sex, religion or national origin. If it is good policy for the federal government to encourage employers to hire ex-offenders (and through the Work Opportunity Tax Credit Program I believe it is), it is not clear why this should depend on the race, color, sex, religion or national origin of the ex-offender. Trying to deal with this issue as a race question is misguided.

¹⁵ See EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (Feb. 4, 1987). An earlier decision of the EEOC had taken the position that an employer should consider (1) the number of offenses and the circumstances of each offense for which the individual was convicted; (2) the length of time intervening between the conviction for

clarified that, if an employer could show that within its applicant pool its conviction policy did not have a disparate impact, then no violation of Title VII would have occurred.¹⁶ The latter was arguably an obvious point to a lawyer familiar with disparate impact analysis, but sometimes obvious points have to be made, since these policy statements must be applied by non-lawyers.

The *2012 Guidance* moves things in the opposite direction from those two policy statements. While it insists that it “does not necessarily require individualized assessment in all circumstances ... the use of a screen that does not include individualized assessment is more likely to violate Title VII ... [and] the use of individualized assessments can help employers avoid Title VII liability....” One can be confident that employers will read this as requiring individualized assessments at least for members of the groups for whose benefit the policy is intended (African Americans and Hispanics).

Although the guidance is far from clear, an individualized assessment appears to include application of the *Green* factors followed by a second, more subjective assessment. The latter part of the procedure ordinarily must include “notice that [the job applicant] has been screened out because of a criminal conviction, an opportunity to ... demonstrate that [the employer’s policy] should not be applied due to his particular circumstances; and ... whether the additional information ... warrants an exception ... show[ing] that the policy as applied is not job related and consistent with business necessity.” *2012 Guidance* at 15.

Put differently, the *2012 Guidance* requires that employers telegraph to job applicants that they have been screened out on account of their criminal records. It thus exponentially increases the odds of a lawsuit. The vague discussion of business necessity in the guidance means that reasonable minds will disagree as to whether the employer has sufficient reason to reject a job applicant on account of his criminal record. The fact that ex-offenders are sometimes *unreasonable* should not be lost sight of.¹⁷

the offense and the employment decision; (3) the individual’s employment history; and (4) the individual’s efforts at rehabilitation. See Commission Decision No. 78-35, CCH EEOC Decisions, Para. 6720 (June 8, 1978). Employers considered the two latter factors to open up the inquiry far too broadly. *Green II* was problem enough for employers, but it was water under the bridge. Knowledge of rehabilitation efforts would require more interaction with the job applicant than is often justified under the circumstances and would likely encourage litigation. The *Green* factors narrowed the required inquiry relative to the EEOC’s earlier decision.

¹⁶ EEOC Policy Statement on the Use of Statistics Involving the Exclusion of Individuals with Criminal Records from Employment (Jul. 29, 1987). In 1990, the EEOC adopted a policy that applied specifically to the use of arrest records. See Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (Sept. 7, 1990).

¹⁷ Back in 1978, a “charging party” complained to the EEOC that he had been denied a job at a public auditorium on account of convictions for rape, drunkenness, assault & battery, carrying a pistol with a license and carrying a concealed weapon as well as various and sundry arrests, including one for burglary. He apparently did not think his record should pose a problem. The EEOC disagreed. But the *2012 Guidance* will ensure that litigation of this type will become more common, because it pushes employers hard to question their job applicants about the particular circumstances of their convictions, their efforts at rehabilitation, etc.

Once an ex-offender brings a case to the EEOC's attention (or the employer's exercise of discretion is brought to the EEOC's attention by other means), it will be the EEOC's judgment concerning what constitutes "business necessity," rather than the employer's, that counts. The only way to avoid this is for the employer to bend over backwards to hire ex-offenders.

In their draft Statement, Commissioners Kladney and Achtenberg recount a disagreement among the members of the Commission. The staff member who composed the initial draft of the report had written: "Taken as a whole it [the *2012 Guidance*] emphasizes the judgment of the EEOC over that of employers in the selection or retention of employees with criminal histories." Commissioner Kladney wanted that language removed from the report. He also objected to the staff member's suggested alternative wording, which was to place the word "subjective" before the word "judgment." In an effort to accommodate Commissioner Kladney's concerns, the Commission adopted the following, which Commissioner Kladney *also* objected to:

"Although the 2012 Guidance acknowledges as a legitimate selection concern, the physical or other security risks to customers or other employees inherent in hiring any employee, it leaves employers exposed to the discretionary judgment of the EEOC as to individual hiring decisions."

But the staff member had it exactly right. Both the original wording and the various alternatives we considered were correct. Commissioner Kladney can argue about whether this is a good thing or a bad thing, but it is difficult to deny the accuracy of the statement in its various forms. The whole point of the EEOC's guidance was to inform employers that the EEOC's (and ultimately a court's) judgment on the issue of the risk of hiring a particular ex-offender or class of ex-offenders for a particular job or class of jobs would trump the employer's. I have no confidence that the EEOC will be a better judge of these matters than employers. Instead it will almost certainly do a worse job.¹⁸

Still, the *2012 Guidance* is not the root of the problem. The root of the problem is disparate impact liability itself. I shall therefore turn to the curious history of that doctrine, its perverse consequences (particularly in the area of criminal background checks) and the troubling constitutional issues it raises.

III. The Invention of Disparate Impact Liability by the EEOC Was Contrary to the Intent of Congress in 1964, But Has Unfortunately Become Embedded in the Law through the 1991 Act, Thus Paving the Way for its Ill-Considered *2012 Guidance*.

¹⁸ If the EEOC interprets "business necessity" to require anything more than a good faith business reason for the employer's decision, the EEOC's intervention in this area is guaranteed to cause very serious problems. See *supra* at note 6. But even a very limited intervention will cause problems. Lest we forget: The EEOC is unlikely to understand an individual employer's business needs as well as the employer.

The passage of Title VII of the Civil Rights Act of 1964 was historic. But it was not intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin. As Representative William M. McCulloch and his co-authors put it:

“[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.”¹⁹

At the time, this was likely seen as an obvious, but important, point. Free enterprise has always been the engine that drives the nation’s prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow individuals the freedom to run their own business affairs when acting in a peaceable and honest manner. When exceptions become necessary (as they were in 1964), those exceptions were understood by most of their Congressional supporters as precisely that—exceptions. They were not intended to swallow the rule.²⁰

With the leadership of Rep. McCulloch and others, H.R. 7152 passed the House of Representatives on February 10, 1964 by a vote of 290 to 110.²¹ Passing the Senate would prove more difficult, since Senate rules at the time requires 67 votes to cut off the inevitable Southern filibuster. Every vote would count. Senate leaders carefully assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them. Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), co-managers of the bill on the Senate floor, emphasized this in an interpretative memorandum:

“There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests

¹⁹ Statement of William M. McCulloch et al., H.R. Rep. No. 914, 88 Cong., 2d Sess. (1964). McCulloch was the ranking member of the House Judiciary Committee and was considered by many on both sides of the aisle to have been indispensable in drafting and securing the passage of the Act. See William N. Eskridge, Jr., Philip Frickey and Elizabeth Garrett, **CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY** 3-10 (3d ed. 2001)(discussing McCulloch’s critical role in passing the Civil Rights Act of 1964).

²⁰ There is a reason that countless employers proclaim, “Our employees are our most valuable asset.” Using care in selecting employees is what gives many businesses their competitive edge. Some use tried-and-true methods to make their choices. Others use innovative approaches. Straight-jacketing employer discretion in this crucial area only serves to damage the competitiveness of American enterprise.

²¹ See Hugh Davis Graham, **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY** 129-138 (1990). Support for the bill was bipartisan with 152 Democrats and 138 Republicans voting in favor and 96 Democrats and 34 Republicans voting against. Overwhelmingly the negative votes came from members from states of the former Confederacy. *Id.*

than members of other groups. *An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.*"

Case & Clark Memorandum, 110 Cong. Rec. 7213 (emphasis added).

Note that Case and Clark used the term "bona fide qualification tests," meaning qualification tests adopted in good faith, and not "necessary" or "scientifically valid" qualification tests. To Case and Clark, the issue was whether the employer chose a particular job qualification *because* he believed that it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex or national origin. Neither the EEOC nor the courts were authorized to second-guess an employer acting in good faith.²²

Indeed, Clark and Case celebrated this aspect of Title VII, pointing out that it "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." "Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color," they wrote. Case & Clark Memorandum, 110 Cong. Rec. 7247.

Congress's intention to outlaw only discriminatory treatment and not disparate impact is made clear from Title VII's central prohibitions:

Section 703. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin*.

42 U.S.C. sec. 2000e-2 (emphasis added).

To "discriminate" against a job applicant "because of" his "race, color, religion, sex or national origin" always requires some level of intentionality.²³ As Richard K. Berg, who

²² Clark and Case's remarks were likely inspired at least in part by the controversy over *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. F.E.P.C. 1964), reprinted in 110 Cong. Rec. 5662 (1964). See *infra* at note 27.

²³ I believe that the term "discriminate" does not always require *conscious* intentionality. If an employer rejects a Hispanic job applicant, when he would have hired an applicant who is identical in every way

as an attorney in the Office of Legal Counsel at the Department of Justice helped draft the Kennedy Administration's original proposal and who advised Senator Humphrey during the debates, put it: "Discrimination is by its nature intentional. It involves both an action and a reason for action. To discriminate 'unintentionally' on grounds of race, color, religion, sex or national origin appears a contradiction in terms." See Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 **BROOKLYN L. REV.** 62, 71 (1964).²⁴

But just in case Section 703 were to be misinterpreted, the bill was amended in the Senate at the insistence of Republican Leader Everett Dirksen—without whose support the bill likely never would have gotten past the Southern filibuster. For example, at Dirksen's behest, the word "intentionally" was added to Section 706(g), which deals with judicial power to enforce the prohibitions of Section 703. As modified, Section 706(g)(1) read:

(1) If the court finds that the respondent has *intentionally* engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate. ...

42 U.S.C. sec. 2000e-5(g)(1) (emphasis added).

In explaining why the term "intentionally" was added here, Senator Humphrey said, "Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief.... The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders." 110 Cong. Rec. 12,723-28 (1964).²⁵ See also Hugh Davis Graham, *supra* note

except that he is not Hispanic, the employer is discriminating against the Hispanic applicant because of his race or national origin. To discriminate against an individual because of his race or national origin is to treat him differently from how one would have treated an otherwise identical person of a different race or national origin. The employer need not be consciously aware of the double standard he is applying. That is, however, a very great distance from disparate impact liability, which does not require that the employer be motivated by race or national origin at all, consciously, subconsciously or unconsciously.

²⁴ Berg later became Deputy General Counsel of the EEOC, where he apparently clashed with Alfred W. Blumrosen. See *infra* at 325-326.

²⁵ Dirksen's amendment and Humphrey's explanation are not in perfect harmony, since the amendment applied only to judicial remedies, while Humphrey's explanation applies generally. Dirksen may have intended to foreclose courts from intervening even in the case of unconscious disparate treatment and to leave such cases entirely to the mediation efforts of the EEOC. An employer who engaged in unconscious discrimination would essentially be allowed "one free bite." If the employer continued its practices after EEOC mediation efforts, it would be difficult for the employer to maintain that its actions were unconscious. None of this comes close to allowing disparate *impact* liability. It is simply a debate over various sorts of disparate *treatment* liability.

11 at 387 (1990); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PENN. L. REV. 1417 (2003) (both arguing that the 88th Congress would have been astonished at the application of disparate impact liability).²⁶

Dirksen also insisted that the EEOC be reconfigured to ensure that it would not exercise what he and his allies were convinced could grow to be excessive power over the employment relationship.²⁷ Dirksen saw to it that it would have neither the authority to

²⁶ Indeed, while Title VII was under consideration, an Illinois hearing examiner, interpreting the more loosely worded Illinois Fair Employment Practices Act, concluded that an employer could not administer a general intelligence test to job applicants, despite a lack of intent to discriminate on the basis of race, because African Americans had not received the kind of education that would allow them to do well on the test. *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. F.E.P.C. 1964), re-printed in 110 Cong. Rec. 5662 (1964). Title VII supporters were frantic to assure their colleagues that their proposed law would not permit such a result. Just in case, an amendment was proposed by Senator John Tower and adopted stating that notwithstanding any other provision, employers are free “to give and to act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate because of race” In the view of most observers, including newspaper editorial pages at the time, the hearing examiner had badly overreached. See *Hiring Tests Wait for the Score: Case Involving Motorola’s Employment Test Raises Issue of Whether Employers Can Use Screening Devices That Might Discriminate Against “Deprived” Persons*, **BUS. WEEK** 45 (Feb. 13, 1965) (reporting that Title VII would not permit such a result). No one in Congress defended the *Myart* decision. Not surprisingly, it was eventually overturned. *Motorola, Inc. v. Illinois Fair Employment Commission*, 34 Ill.2d 266, 215 N.E.2d 286 (1966). But see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting the Tower Amendment to impose on employers a duty to use only those tests that can be proven in court to be job-related and using it as the primary textual support for adopting rather than rejecting disparate impact liability). See also George Rutherglen & John Donohue III, **EMPLOYMENT DISCRIMINATION: LAW AND THEORY** 158 (3d ed. 2012) (critically questioning the *Griggs* interpretation of the Tower Amendment).

²⁷ This process of ensuring that the EEOC would not become an all-powerful regulator of employment practices had already begun in the House of Representatives. Although the Kennedy Administration’s original proposal did not contain a general ban on employment discrimination at all, a new proposal, which emerged in subcommittee, did so. This early version of what eventually became Title VII proposed an EEOC modeled on the National Labor Relations Board (NLRB), complete with quasi-judicial cease-and-desist enforcement authority. Such power, however, was unacceptable to most of the Republicans and some of the Democrats whose votes would be crucial to secure the bill’s passage. Over the years, these members had become increasingly concerned by what they viewed as pro-Labor bias and regulatory abuse of the NLRB (and similar biases and abuses by similarly empowered administrative agencies). In their view, administrative procedures made it difficult for courts to intervene to prevent further abuse. They argued that federal courts “so rarely overturned the decisions of such administrative tribunals that the normal burden of proof was reversed, and the accused on appeal found that ‘he must bear the burden of proving his freedom from guilt.’” See Hugh Davis Graham, **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY** 130-31 (1990) (quoting Statement of Griffin and Frelinghuysen, House Rep. No. 570 at 15).

The House bill had to be stripped of cease-and-desist authority on the part of the EEOC and it was. Instead, the bill was amended to rely on what House Republicans referred to as the “prosecutorial model” under which the EEOC would be authorized to bring actions in federal court, but those courts would ultimately control the interpretation of Title VII. This was in keeping with the standard model under which the Department of Labor enforced the recently passed Equal Pay Act, the wage-and-hour provisions of the Fair Labor Standards Act, and the unfair labor practices prohibited by the Landrum-Griffin Act. See Hugh Davis Graham at 130.

engage in substantive rulemaking nor the authority to litigate. Fearful of the tendency of administrative agencies to be captured by political ideologues, Dirksen and his Senate allies wanted an EEOC whose charge was simply to investigate and mediate complaints.

Under Dirksen's model, when a complainant was dissatisfied with the EEOC's efforts at mediation, he or she could bring a Title VII action in federal court against the employer.²⁸ The only governmental agency authorized to institute litigation against an employer on behalf of the United States was the Department of Justice and then only if it found a "pattern or practice" of violations.

Courts would thus be the primary interpreter of Title VII and not the EEOC. Dirksen adamantly opposed substantive rulemaking authority on the part of the new agency, because he saw it as an opportunity for the agency to extend Title VII's reach through the promulgation of prophylactic rules that go beyond the scope of Title VII's actual prohibitions. If the EEOC's role could be confined to investigation and mediation, Dirksen believed the risk of agency overreach would be minimized.²⁹

No one publicly objected to Dirksen's insertion of the word "intentional" into Section 706(g)(1). It was uncontroversial at the time. But some advocates were infuriated by Dirksen's reconfiguration of the EEOC. One scholar famously called it "a poor enfeebled thing." Michael I. Sovern, **LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT** 102, 205-06 (1966). It was commonplace to refer to the EEOC as a "toothless tiger" until it received the power to pursue lawsuits against employers in 1972. Indeed, the EEOC's own web site acknowledges this:

"Because of its lack of enforcement powers, most civil rights groups viewed the Commission as a "toothless tiger." Nevertheless, EEOC made significant contributions to equal employment opportunity between 1965 and 1971 by using the powers it had to help define discrimination in the workplace."³⁰

But the plain truth was that without these and other modifications to the bill required by

The prosecutorial model, however, was not satisfactory to Dirksen and a significant number of Senate Republicans whose vote were crucial to the bill's passage. The Senate version of the bill, which eventually became law, gave the EEOC the authority to mediate disputes arising out of Title VII, but nothing more.

²⁸ Another of Dirksen's amendments eliminated the ability of advocacy organizations like the NAACP to sue of behalf of victims. Dirksen wanted Title VII litigation to work the way most civil litigation does—with actual victims suing actual wrongdoers. See Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 **U. PENN. L. REV.** 1417, 1490 (2003).

²⁹ Compare *Alexander v. Sandoval*, 532 U.S. 275 (2001)(noting that *Title VI* does confer upon the Department of Justice the authority to promulgate regulations and assuming without deciding that those regulations may go somewhat beyond Title VI's ban on actual discrimination).

³⁰ See EEOC 35th Anniversary: 1965 - 1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public, available at <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html>

Dirksen, the Civil Rights Act of 1964 would not have passed.³¹ Like most major legislation, it was the product of compromise.

The story, however, did not end there. In the next phase of Title VII's history, "creative" EEOC officials, concerned about what they considered to be an otherwise "powerless" agency implementing a "weak statute," supplanted the original design of Title VII with a disparate impact framework that they believed would be more effective in "coping with the major problems of [their] time." Alfred W. Blumrosen, **BLACK EMPLOYMENT AND THE LAW** 53 (1971) ("BLACK EMPLOYMENT").

Early on, EEOC officials seized upon the idea of issuing "guidelines" (more commonly called "guidances" today) as an alternative to the substantive rulemaking power that Dirksen and his allies had denied them. **BLACK EMPLOYMENT** at 52. Given the eagerness of most employers to stay on the right side of the law, these guidances have proven to be as effective as regulations at influencing employer practices.

³¹Among the other amendments pressed by Senator Dirksen and acquiesced in by Congress were (1) a restriction requiring complaints to attempt to exhaust their remedies before state fair employment practices commissions before they file a complaint with the EEOC; (2) an exemption for employers whose employees work less than twenty weeks per year (largely designed for agricultural employers); (3) the deletion of a provision that would have allowed outside organizations like the NAACP to sue on behalf of an employee or applicant for employment; (4) the deletion of language at the beginning of Title VII suggesting broad purpose on the part of Congress. As to the fourth item on this list, see *infra* at 327-328. Most of Dirksen's changes can fairly be described as weakening the bill. But one amendment—the expansion of the definition of "employment agency" to include union hiring halls—significantly strengthened the bill. See Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 **U. PENN. L. REV.** 1417, 1490 (2003).

One of Dirksen's final additions to the bill read:

"(j) Preferential treatment not to be granted on account of existing number or percentage balance

Nothing contained in this subchapter shall be interpreted to require any employer ... subject to this subchapter to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community ... or in the available work force"

This amendment was important in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), when it was interpreted not to cover cases in which an employer was engaging in affirmative action on a voluntary basis. A slim five-member majority held that while Title VII did not *require* preferential treatment for under-represented minorities, it did, at least under certain circumstances, *permit* it. At the time, the employer, Kaiser Aluminum & Chemical Corp., was coming under pressure from the EEOC to increase the number of minority members in its craft-training positions. The Court nevertheless treated Kaiser's preferential treatment of under-represented minority member as voluntary.

Indeed, in some ways, in some ways it worked to the EEOC's advantage not to have substantive rulemaking authority. Unlike substantive rules, guidances are not subject to the Administrative Procedure Act procedures like notice and comment and thus tend to receive less public scrutiny or government oversight.³² The one-sided, truncated procedure leading up to the adoption of the *2012 Guidance* is just one example.³³

It did not take long before the EEOC began to promote disparate impact policy despite the contradiction between that policy and Title VII as it was actually passed by Congress. Alfred Blumrosen, the EEOC's first "Chief of Conciliations" and one of the architects of its disparate impact policy, was unabashed in describing the extent to which the EEOC was (and in his view should be) aggressive in its interpretation of Title VII:

Creative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination. ... [Legal education] rarely deals with the affirmative aspects of administration. Rather, the law schools provide elaborate intellectual equipment to *restrict* the efforts of administrators. Constitutional law and administrative law are still largely concerned with what government may not do, rather than with how it should decide what it may do. Students impatient with the negativism of present legal education would be better equipped as lawyers if they would focus sharply on the question of "how we can best fulfill the purposes which brought our agency into being" rather than on the question of "whether the courts will sustain this course of action."

BLACK EMPLOYMENT at 53 (emphasis in original).

Historian Hugh Davis Graham wrote in **THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY**:

The EEOC legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts [based on disparate impact theory] against employers who used either professionally developed tests or bona fide

³² The fact that Title VII and arguably other laws make EEOC investigations and mediations confidential adds to the degree to which EEOC policymaking tends to escape both public scrutiny and government oversight. See 42 U.S.C. sec. 2000e-5(b). Moreover, the EEOC's practices in this regard sometimes go beyond its statutory mandate. For example, the EEOC has refused to share information about its investigations, mediations and settlements with the Civil Rights Commission despite the fact that the Commission's authorizing statute specifically requires agencies like the EEOC to cooperate with the Commission in its oversight role. See Letter of Peggy R. Mastroianni, EEOC Associate Legal Counsel, to David Blackwood, Commission General Counsel (February 6, 2009). This is not in keeping with Title VII's original design. As Senator Hubert Humphrey explained, "It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the [EEOC's] duties under the statute. ... The amendment is not intended to hamper ... proper cooperation with other State and Federal agencies, but rather is aimed at making available to the general public of unproven charges." 110 Cong. Rec. 12297 (June 4, 1964).

³³ The statement of Commissioner Peter Kirsanow details the ways in which the EEOC failed to hear from employers.

seniority systems. The EEOC's own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional. "Under the traditional meaning," which was the "common definition of Title VII," the EEOC's first *Administrative History* observes, an act of discrimination "must be one of intent in the state of mind of the actor." ... But by the end of the Johnson administration the EEOC, by its own self-description, was disregarding Title VII's intent requirement."

Hugh Davis Graham at 248.

The *Administrative History* cited by Graham stated that "unlike state FEP agencies which continue to rely on intent," the EEOC "has begun to rely on the constructive proof of discrimination." Hugh Davis Graham at 248-49.

Writing for the NAACP's **THE CRISIS** in 1968, EEOC Commissioner Samuel Jackson reiterated this policy:

"[The] EEOC has taken its interpretation of Title VII a step further than other agencies have taken their statutes. It has reasoned that in addition to discrimination in employment, it is also an unlawful practice to fail or refuse to hire, to discharge or to compensate unevenly ... on criteria which prove to have a demonstrable racial effect without a clear and convincing business motive."

Note Jackson's admission that the EEOC's new approach is "in addition to discrimination in employment." Yet discrimination is what Title VII bans, not the use of job qualifications that "prove to have a demonstrable racial effect."

Jackson attempts to justify the EEOC's departure from Title VII's intent requirement by stating that "Congress, with its elaborate exploration of the economic plight of the minority worker, sought to establish a comprehensive instrument with which to adjust the needless employment hardships resulting from the arbitrary operation of personnel practices, as well as purposeful discrimination." Samuel C. Jackson, *EEOC vs. Discrimination, Inc*, **THE CRISIS** 16-17 (January 1968). But the statute is what it is (or it was what it was). It is no more "a comprehensive instrument with which to adjust ... needless employment hardships" than the Patriot Act is a comprehensive instrument with which to promote national security or the No Child Left Behind Act is a comprehensive instrument by which the federal government is given authority to "make schools better." Words matter.³⁴ The

³⁴ "Only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory language," the Supreme Court has stated. *Garcia v United States*, 469 U.S. 70, 75 (1984). Congress's general objective in passing Title VII may have been primarily to remove barriers to the employment of African Americans or it may have been to impress Jodie Foster. But the means it chose to accomplish that objective was to prohibit discrimination on the basis of race, color, sex, religion or national origin, and that is what counts.

88th Congress banned discrimination on the basis of race, color, sex, religion, and national origin in employment. Period.

The Supreme Court nevertheless followed the EEOC's lead in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Although the Court did not render a detailed analysis, it suggests two reasons for its decision.

The first was simple deference to the EEOC and its Guidelines on Employment Testing Procedures (August 24, 1966) as "expressing the will of Congress." *Id.* at 435_ & n. 9. But there are several problems with deference in this context. The most obvious is that the EEOC's interpretation clearly conflicts with the text of Title VII, which explicitly prohibits Courts from ordering a remedy in cases that do not involve "intentional" violations. (Remarkably, however, the Court does not even mention Section 706(g)(1)'s requirement of intention.) Next is that no argument was made as to why an agency that Congress had made every effort to render toothless should be presumed to express the will of Congress. Congress's clear intent in 1964 was to confine the EEOC to a role of investigation and mediation. Since at the time the EEOC was not the agency charged with enforcing Title VII (the only authority to litigate Title VII actions belonged to the Department of Justice), it is difficult to see why deference was appropriate.³⁵

Second, the Court adopted reasoning like Jackson's in stating that the "objective of Congress" in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30 (emphasis added). It held therefore that under Title VII "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* (emphasis added). "The touchstone is business necessity," it stated. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.³⁶

The Court's reliance on Congress's larger intent was curious in view of the pains members of the Senate had taken to avoid arguments based on its supposed larger intent. The original bill approved by the House of Representatives contained the following vague, prefatory language:

³⁵ The Court referred to the EEOC as "having enforcement responsibility" and as "the enforcing agency" for Title VII. *Id.* at 434 (emphasis added). But this was going too far. After the Dirksen amendments, the EEOC was simply a mediating agency. It had no authority to adjudicate claims or to issue cease and desist orders; it had no litigation authority. Mediators are not enforcers.

The Guidelines on Employment Testing Procedures would not be entitled to Chevron-deference today, since they do not have the force of law. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

³⁶ *Griggs* may well have involved intentional discrimination. But if so, it was incumbent upon the plaintiffs to prove their case on that theory.

The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 is a right of all persons within the jurisdiction of the United States, and it is the national policy to protect the right of the individual to be free from such discrimination.

Dirksen conditioned his support and the support of his allies on the deletion of this language. Note that it is nevertheless inconsistent with the Court's notion that the statute was intended to generally remove barriers to employment for African Americans and other under-represented minorities. Instead it expresses in flowery language a broad intention to protect *all* persons from discrimination based on race, color, sex, religion or national origin.

But even that much in the way of broad declarations was too much for Dirksen and his allies. It seems likely that they foresaw the possibility that if future courts could attribute broad declarations to Congress in passing Title VII, those courts might be tempted to reason backwards that Congress must have intended the statute to be interpreted more broadly than the actual operative language. Dirksen wanted the operative language of the statute to speak for itself: When Congress passed a law prohibiting employers from discriminating on the basis of race, color, religion, sex or national origin, it was because they wanted to prohibit employers from discriminating on the basis of race, color, religion, sex, or national origin—nothing more and nothing less.

After *Griggs*, Title VII was interpreted to demand two things of employers: (1) They must provide equality of opportunity to all persons regardless of race, color, sex, religion or national origin; and (2) In deciding upon job qualifications, they must provide equality of group results (or at least women and minorities must do as well as men and whites) unless they can prove they were driven by business necessity to do otherwise. These two requirements are at war with each other. Equality of treatment and equality of results are not the same thing.

In the ensuing years, the sweeping nature of the disparate impact liability became more evident. In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(plurality opinion) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court began to limit and clarify disparate impact liability. Only then, in 1991, did Congress pass legislation recognizing in any way the disparate impact theory. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 2(2), 3(2) 3(3), 105 Stat. 1071, 1074-75 (1991).

IV. Disparate Impact Liability, as Represented by the EEOC's 2012 Guidance, Leads to Unjustified Federal Control Over Ordinary Decisions by Employers, Provides Opportunities for Political Favoritism, Is Logically Incoherent, Creates Perverse Incentives on the Part of Employers and May Well Work to the Disadvantage of the Very Persons It Was Intended to Benefit.

A. Because all job qualifications have a disparate impact on some protected group, disparate impact theory is a sprawling, incoherent mess.

A central problem with disparate impact liability is that all job qualifications have a disparate impact. Those that relate to criminal background checks are by no means special. It is no exaggeration to state that there is always some protected group that will do comparatively well or comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinental Indian Americans (and also Hindus) are disproportionately likely to have experience in motel management. Norwegian Americans (and also Lutherans) are more likely to have experience growing durum wheat. Women tend to get better grades in school than men.³⁷ And Unitarians are more likely to have a college degree than Baptists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (recognizing that disparate impact theory would have to apply to subjective as well as objective job qualifications).³⁸

Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when an employer calls for it—apparently because a Cambodian immigrant happened to get a job at a doughnut shop and passed his skills onto members of his immigrant community. See Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. TIMES (May 26, 1995). Other disparities have more obvious origins: Non-Muslims are more likely to have an interest in wine and hence develop qualifications necessary to get a job in the wine industry than are Muslims, because Muslims tend to be non-drinkers.

Will Unitarians always be more likely to graduate from college than Baptists? Will Cambodian Americans always have a strong position in the doughnut industry? No one can say. Our multi-racial, multi-faith, multi-ethnic nation is complicated, and it won't be getting any simpler anytime soon.

Only one thing is for certain: There is no end to racial, religious, color, sex and national origin disparities in job qualifications that one will find if one looks carefully. Indeed, I will happily write a check for \$10,000 to the favorite charity of the first person who identifies an actual job qualification—one that has actually been used to separate a

³⁷ See Gail Heriot & Alison Somin, *Affirmative Action for Men? Strange Bedfellows and Strange Silences in the Public Debate Over Discrimination Against Women In College Admissions*, 12 ENGAGE 14 (December 2011).

³⁸ The qualifications that have given rise to disparate impact claims hiring, promotion and retention include veterans' preferences, employee performance reviews and seniority. See *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726 (1984); *Terry v. City of San Diego*, 2012 U.S. Dist. LEXIS 7661 (S.D. Cal. 2012); *Stagi v. Amtrak*, 407 F. Supp. 2d 671 (E.D. Pa. 2005).

significant number of successful from unsuccessful job applicants—that he or she can prove does not have a disparate impact on any racial, religious, color, sex or national origin group. I submit it cannot be done. Even picking job applicants by the first letter of their surnames will have disparate impact based on national origin (and probably other classifications).³⁹

Given all this, Representative William McCulloch's statement that the "[i]nternal affairs of employers ... must not be interfered with except to the limited extent that correction is required in discrimination practices" sounds quaint and naïve. See *supra* at note 9. So long as disparate impact liability is the law, employer discretion in hiring is just an illusion and the labor market is anything but free and flexible.⁴⁰ All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture.

Supporters of disparate impact liability sometimes argue that disparate impact's ubiquity is not a problem, because the EEOC has agreed to abide by a "four-fifths" or "80% rule." Under the Uniform Guidelines on Employee Selection Procedures, if a particular job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded by federal enforcement agencies as evidence of adverse impact." This is cold comfort. First of all, particularly when the population is broken into ethnic groups, selection rates of less than four-fifths relative to the ethnic group with the highest rate are the rule and not the exception. Consider, for example, the horse racing industry. Of the top five grossing North American jockeys of 2012, all are Hispanic males. Height and weight restrictions make it less likely that an African- or Irish-American male will qualify. Furthermore, this supposed limitation on disparate impact is not binding on private litigants (and does not even guarantee which approach federal agencies will take).

Moreover, while the "four-fifths" rule purports to be practical, it is useless in practice. Prior to adopting a particular job qualification, employers usually have no way of knowing what the selection rates will be. All they can be sure of is that the results won't be equal across the board, since nothing ever is.

As a consequence, modern hiring and firing practices must be shrouded in secrecy. Employers do not dare advertise clear job qualifications for fear they will attract a lawsuit. Performance tests, indeed any kind of innovative hiring practices, are invitations to a lawsuit.⁴¹ Wise employers try to be on good terms with the EEOC, knowing that when

³⁹ I note that Chinese-Americans disproportionately have surnames beginning with "L", "W", and "Y"; and Americans of Scottish ancestry disproportionately have surnames beginning with "Mc".

⁴⁰ Disparate impact liability has been held to apply to promotions and terminations too. See *George v. Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).

⁴¹ Heman Belz, **EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION** (1991).

everything is potentially illegal, the name of the game is to avoid antagonizing the regulator.⁴²

The *2012 Guidance* is itself a good example of how the system sometimes works. It does not prohibit or restrict employers from inquiring into applicant's arrest and conviction record. But it makes it less likely they will be willing to by requiring them to jump through hoops before they can decline to hire an applicant on account of such a record, and making it more likely they will be sued if they do decline to hire.

In general, employers cannot have rules that simply screen out ex-offenders; those that screen out some ex-offenders will be under great pressure to hire others in order to demonstrate that they are not simply screening out all of them. Employers must in most cases conduct "individualized assessments," which include "notice to the individual that he has been screened out because of a criminal conviction" and "an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances." *2012 Guidance* at 14. The procedure is so cumbersome and fraught with risk of litigation that one way or another employers will act to avoid it.

Note that disparate impact theory is essentially incoherent. Even when it is applied only for the benefit of women and minorities, for every protected group that is benefitted by prohibiting a particular job qualification, there is always a protected group that is harmed. If the EEOC hoped to benefit African Americans and Hispanics by issuing its guidance on criminal background checks, it did so with the knowledge that other groups, including Asian Americans, Quakers, and women, will be disadvantaged by reducing employers' discretion to reject applicants with criminal records. Logically, an employer who eliminates a job qualification that had worked to the advantage of Asian Americans, Quakers, and women in the past must be required to demonstrate business necessity too.

⁴² Supporters of disparate impact liability similarly argue that the EEOC has not attempted to push disparate impact to its logical limits. Apparently, we are not to worry about a body of law that makes everything potentially illegal until the day the EEOC officials are seen by these supporters as actually enforcing that law. But selective enforcement is simply an opportunity for political favoritism. It isn't law at all, and I find it troubling that anyone would be willing to subject employers to it. Moreover, I note that there has been a marked uptick in the interest of various government agencies in disparate impact liability over the past few years. Disparate impact liability is a growth industry. For example, the Department of Education has also implemented a policy of prohibiting disparate impact in school discipline. See Statement of Gail Heriot in U.S. Commission on Civil Rights, *School Discipline and Disparate Impact* 97 (2012); see also Statement of Todd Gaziano in *id.* at 87. The Department of Housing and Urban Development has attempted to apply it in the context of the Fair Housing Act. Twice this issue has been accepted for review by the Supreme Court. *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), cert. granted, ___ U.S. ___ (June 17, 2013), cert. dismissed ___ U.S. ___ (Nov. 15, 2013); *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), cert. granted 132 S. Ct. 548 (2011), cert. dismissed, 132 S. Ct. 1306 (2012). In *Gallagher*, a settlement was reached in part due to the mediation efforts of the Department of Justice, causing the case to be withdrawn from the Court's docket. See Mr. Perez Works the Phones: A Top Justice Official Interferes with a Supreme Court Case, **WALL ST. J.** (Mar. 28, 2012). Just a few weeks ago, the *Mount Holly* case was also settled. *Rigging Anti-Discrimination Law: With Township of Mount Holly v. Mount Holly Gardens Citizens, Another Disparate Impact Housing Lawsuit Gets Quashed*, **WALL ST. J.** (Nov. 18, 2013).

Note also that disparate impact liability does not simply interfere with an employer's ability to "set his qualifications as high as he likes" and a job applicant's ability to draw the employer's attention to the characteristics that make him suited for the job in question. It also interferes with the ability of state and local governments to regulate employment. The EEOC takes the position that the Supremacy Clause vaults its interpretation of Title VII regarding criminal background checks over state legislation requiring employers to run criminal background checks on certain kinds of hires (e.g. employees who work with the aged). *2012 Guidance* at 24.

B. Disparate Impact Liability at Least in the Context of Criminal Background Checks May Be Doing More Harm than Good.

Also troubling is the evidence that disparate impact liability may not even accomplish its goal of increasing employment opportunities for women and minorities.

The *2012 Guidance* is again an example. In Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 **J.L. & ECON.** 451 (2006) ("*Perceived Criminality*"), the authors discussed the double effect of using criminal background checks. As they explain, it must be kept in mind that African-American and Hispanic men are not simply more likely to have a criminal record, they are likely to be perceived that way too. Consequently, if the *2012 Guidance* discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these groups are somewhat more likely to have criminal records than white or Asian American male applicants. Put differently, the EEOC's attempt to prevent the "disparate impact effect" creates an incentive for a "real discrimination effect."

Of course, prohibiting real discrimination is exactly what Title VII was supposed to be about. Congress was well aware that some discrimination—call it "statistical discrimination"—is rooted in stereotypes that may or may not have some basis in fact. For example, women really are on average less physically able to lift heavy weights than men. But if an employer wanted an employee who was strong, well-educated, good with people, mathematically inclined or trustworthy, Congress took the position that the employer should look for evidence of those characteristics and not depend on racial, gender, religion or national origin stereotypes. But the success of that approach depends upon the ability of employers to seek evidence of the actual desired traits. If the employer is looking for trustworthy employees who will not commit crimes, they need some source of information. The applicant's criminal record (or lack of a criminal record) is often the best method for separating the cases that are most likely to be a problem from those that are not. If employers are prevented from using the information they can obtain through criminal background checks, they may be tempted, consciously or unconsciously, to dispense with the checks and use race as a proxy for criminal record.

Other employers may make adjustments to their hiring policies that are not in any way motivated by race, but which ultimately decrease the likelihood that African American and Hispanic job applicants will be hired. Suppose, for example, an employer regularly hires

young, unskilled, high school drop-outs as packers for his moving van business. Given the business location's demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of "individualized assessments" made excluding applicants with criminal records too risky, he had been doing criminal background checks on all job applicants and declining to hire most of those with a record. But after he stopped acting routinely on those checks, he hired a young, white 19-year-old who ended up stealing from one of the employer's customers. Another white recent hire turned out to have a serious drug problem (in addition to his criminal record). Criminal background checks would have identified these employees as risky, but the employer had decided he needed to hire anyway to demonstrate his compliance with the *2012 Guidance*. In order to deal with the problem, he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the demographics of the school, this yields an overall labor pool that has proportionately fewer minorities. The EEOC guidance would have accomplished precisely the opposite its intentions.

From a policy standpoint, one obvious question is which effect dominates—the disparate impact effect or the disparate treatment one. The evidence adduced by the authors of *Perceived Criminality* indicates that it could be the latter. That article examined the answers to interview questions provided by slightly over 3000 employers that hired workers without college degrees from Atlanta, Boston, Detroit and Los Angeles during the early 1990s. Approximately half those employers either always or sometimes conduct criminal backgrounds on job applicants. Further data collected in 2001 in Los Angeles showed this number had climbed from 48.2% to 62.3% for that city specifically.

The article found that employers who conduct background checks were more likely to have recently hired an African American applicant than employers who do not. Among those employers who were unwilling to hire ex-offenders, the employers who checked were 10.7% more likely to have recently hired an African American. This finding was highly significant.⁴³

⁴³ It is always difficult to tease out what is cause and what is effect. In conducting studies of this kind, one could argue that the reason that employers who undertake background checks are more likely to hire African Americans is that they face labor pools that are heavily African American and are biased against African Americans. But the authors used statistical methods to account for this possibility as best they could and still found evidence that background checks helped.

Similarly, research has been undertaken attempting to confirm or refute the hypothesis that easy availability of criminal background information overall benefits black males as a group by comparing the black-to-white wage ratio in states that make criminal records broadly available to that in states that do not. Shawn D. Bushway, *Labor Market Effects of Permitting Access to Criminal History Records*, 20 **J. CONTEMP. CRIM. JUSTICE** 276 (2004). Bushway's data did indeed show that states that make criminal records broadly available have higher black-to-white wage ratios, but those data were too skimpy for this difference to be statistically significant. Bushway has called for more research in this area. *Id.* at 288-89.

V. Since Congress's Purpose in Adopting Disparate Impact Liability in 1991 Was to Confer an Economic Benefit on Racial Minorities (and Women), It Must Be Subjected to Strict Scrutiny—Scrutiny That it Likely Cannot Withstand.

A. The Application of Disparate Impact Liability Was Intended to Be and in Fact Is Racially Discriminatory.

To my knowledge, the EEOC has never brought a disparate impact investigation or lawsuit on behalf of white males. While the Uniform Guidelines on Employee Selection Procedures do not explicitly limit disparate impact liability to cases in aid of women and minorities, such a policy can be inferred from the EEOC's enforcement history. Indeed, it is difficult to avoid.

The Supreme Court has never entertained a disparate impact case on behalf of anyone other than women and racial minorities, and its past decisions indicate it did not expect to. In *Griggs* the Court repeatedly noted that the purpose of disparate impact liability was to assist African Americans or non-whites in particular. One of the "objective[s] of Congress in the enactment of Title VII," it wrote, "was to "remove barriers that have operated in the past to favor an identifiable group of *white* employees over other employees." *Id.* at 429-30 (emphasis added). It concluded that if "an employment practice which operates to exclude *Negroes* cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431 (emphasis added). This language was consistent with the EEOC's Guidelines on Employment Testing Procedures (August 24, 1966) upon which the Court relied, which referred to the problem of "inadvertently excluding qualified minority applicants through inappropriate testing procedures" and the need to be "[m]indful of the special concerns of minorities."

In 1981, the U.S. Commission on Civil Rights issued a report that flatly stated that disparate impact liability "cannot be sensibly applied to white males" given that the purpose of the liability is to uproot historical and contemporary sexism and racism. U.S. Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 17 n.20 (1981). Contemporary commentators agreed. *See, e.g.,* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 *U.C.L.A. L. REV.* 305, 366-68 (1983) ("In sum, disparate impact has been inherently one-sided. Blacks and women may object to a test that tends to reduce job opportunities for them. ... It is probable that the courts, in an effort to reduce the intrusion on employer discretion, will continue to limit disparate impact challenges to those brought by minorities."); David A. Strauss, *The Myth of Color Blindness*, 1986 *SUP. CT. REV.* 99 (arguing that affirmative action and disparate impact theory are conceptually related).

The only court to address the issue squarely also agreed that disparate impact theory is ordinarily unavailable to white males. *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("in impact cases ... a member of a favored group must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination."). While a few white, male

private litigants have attempted to employ a disparate impact theory in Title VII cases, to our knowledge none has ever secured a judgment in his favor.

That was the zeitgeist when Congress undertook to amend Title VII in the early 1990s. Members who supported adding disparate impact liability to the statute perceived it as applying to women and racial minorities in particular. *See, e.g.*, Statement of Sen. Glenn, 137 Cong. Rec. 29,064 (1991) (“The Civil Rights Act of 1991 would reverse ... *Wards Cove v. Atonio* and restore ... *Griggs v. Duke Power Co.* In *Griggs*, the Supreme Court held that practices which disproportionately exclude qualified women and minorities from the workplace are unlawful unless they serve a business necessity.”); Statement of Sen. Metzenbaum, 137 Cong. Rec. 33,483 (1991) (The 1991 amendments provide “that employment practices which disproportionately exclude women or minorities are unlawful, unless employers prove both that these practices are ‘job related for the position in question’ and that they are ‘consistent with business necessity.’”); Statement of Sen. Dodd, 137 Cong. Rec. 29,026 (1991) (“[I]n *Wards Cove Packing Co. v. Atonio*, the Supreme Court overturned an 18-year precedent set by the *Griggs v. Duke Power Co.* decision regarding ... discrimination based upon the disparate impact of business hiring of minorities.”); Statement of Sen. Kohl, 137 Cong. Rec. 29,048 (1991) (“Under this proposal employers must justify work rules if the employee shows that the rules have a disparate impact on women and minorities.”); Statement of Rep. Ford, 137 Cong. Rec. 13,530 (1991) (“The *Griggs* standard worked well for nearly twenty years. Under *Griggs*, employers who chose to use selection practices with a significant disparate impact on women or minorities had to defend the practices by showing business necessity.”); Statement of Rep. Stenholm, 137 Cong. Rec. 13,537 (1991) (“The substitute creates a new standard of ‘business necessity’ that a business must meet to defend an employment practice whose result is a ‘disparate impact’ - meaning the percentage of the employer’s work force comprising women, minorities, or a given religious group, does not almost identically match that group’s percentage in the available labor pool.”); Statement of Rep. Fish, 137 Cong. Rec. 13,539 (1991) (“The complaining party in a disparate impact case carries the heavy burden of linking adverse impact on women or members of minority groups to a specific practice or practices unless the employer’s own conduct essentially forecloses the possibility of establishing such linkage.”). For additional examples, *see* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 **N.W. L. REV.** 1505, 1539 n.169 (2004)(“*Upside Down*”).

Contemporary media reports also support the understanding that the amendments’ disparate impact provisions apply only to women and minorities. *See, e.g.*, Robert Pear, *With Rights Act Comes Fight to Clarify Congress’s Intent*, **N.Y. TIMES** (November 18, 1991) (Under the new legislation, “[i]f workers show that a particular practice tends to exclude women or minority members, then the employer must show that the practice is ‘job-related for the position in question and consistent with business necessity.’”).

More recent scholars have agreed that “[w]hat authority there is supports the view that employment practices with disparate impacts on historically dominant classes are, as a matter of law, not actionable under Title VII.” Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 **HARV. L. REV.** 493, 528 (2003). *See* John J. Donohue III,

Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers, 53 *STAN. L. REV.* 897 (2001) (“I conclude that disparate impact analysis will not protect white males as a matter of theory. . . . The first prong of a disparate impact case—finding a practice that adversely affects a member of a protected class—will not be met since white males will not be deemed to be ‘protected’ under this doctrine.”)

Indeed, the belief that disparate impact theory is not applicable to all groups is so prevalent that no less ubiquitous an authority than Wikipedia begins its entry for “Disparate Impact” with the sentence, “in United States employment law, the doctrine of disparate impact holds that employment practices may be considered discriminatory and illegal if they have a disproportionate ‘adverse impact’ on members of a minority group.” http://en.wikipedia.org/wiki/Disparate_impact (last visited Aug. 20, 2013).

But there is also increasing recognition that this raises thorny constitutional issues. One scholar has said that he used to “firmly announce” to his students that disparate impact theory “was not available to whites and males.” See *Upside Down* at 1505. When the Court began to take the position that strict scrutiny must be employed on behalf of members of majority as well as minority races, see *Grutter v. Bollinger*, 539 U.S. 306 (2003), he began to realize that applying disparate impact theory only on behalf of women and racial minorities would raise serious constitutional difficulties. He therefore urged a reinterpretation of disparate impact liability so that it would be applicable to white males as well.

There are several problems with such a reinterpretation, which would, in essence, extend the reach of a statute whose reach is already extraordinary. Among other things, there is no evidence that Congress would have supported such an extension. Suppose Congress had passed an unconstitutional tax on Asian Americans. It would be improper for a court to simply impose that tax on all Americans, since that court has no evidence that Congress would have been willing to tax all Americans if it had known its original tax would be found unconstitutional. The proper thing for the Court to do would be to nullify the original tax and let Congress decide whether to promulgate legislation imposing a generally applicable tax. The same logic applies here.

Moreover, even if there were overwhelming evidence that Congress would prefer a generally applicable disparate impact doctrine to no disparate impact doctrine at all, it would make no difference. Even generally applicable disparate impact theory is racially discriminatory. The Constitution protects individuals from race discrimination, not groups. If disparate impact theory is applied to help African Americans where they are under-represented and whites where they are under-represented, the result is more race discrimination, not equal treatment. It doesn’t make a white applicant for a job as a New Haven fire fighter feel better to know that the playing field would be tilted in his favor if he were applying for a position in the NBA. He is only qualified for the fire fighting job.

B. In the Absence of a Compelling Purpose and Narrow Tailoring, Title VII’s Disparate Impact Liability Must Fail.

A law that discriminates on the basis of race is permissible only if there is a compelling

purpose served by it, and the discriminatory law is narrowly tailored to serve that purpose. *See Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). Congress did not attempt to offer a principled basis for upholding disparate impact liability under Title VII in the face of strict scrutiny: They apparently didn't think they were required to. I am dubious that such a basis can be offered.

A few scholars have attempted to step up to the plate, but their efforts leave much to be desired. Professor Richard Primus suggests the argument that disparate impact doctrine may have been regarded by Congress as "a prophylactic measure that is necessary because deliberate discrimination can be difficult to prove." *Primus* at 520. Ultimately, despite his view that the *Griggs* approach to Title VII is "normatively desirable," he rejects this argument as to Congress's motives as "neither technically smooth nor normatively desirable." *Id.* at 523. I agree that for the reasons Primus discusses, this does not describe Congress's motive in passing the 1991 Amendments. It cannot account for the allocation of burdens and defenses. It therefore cannot be put forth to justify disparate impact doctrine. Congress would need to re-vamp the law extensively in order to fit this very square peg into that round hole.

So what compelling purpose can be offered? And what evidence is there that it is narrowly tailored to serve such a purpose? Primus suggests workplace integration. But I submit that the evidence that this doctrine has helped integrate the workplace or even has systematically advanced the employment opportunities of African Americans, Hispanics, American Indians and/or women is thin to non-existent. *See Ian Ayres & Peter Siegelman, The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 **TEX. L. REV.** 1487 (1996) (disparate impact liability may make employers more reluctant to hire minority employees because disparate impact liability makes firing or demoting them later more risky). There is certainly no showing that it has actually served a compelling purpose or that it is narrowly tailored to that purpose. This sprawling and incoherent doctrine unduly complicates the American labor market in a time that the economy can ill-afford such a blow to its vitality.

It is interesting to compare the EEOC's efforts to require that employers (including small employers) prove that their job qualifications are job-related and a matter of business necessity with the precision of a social scientist to the utter lack of evidence that disparate impact liability is narrowly tailored to serve a compelling interest.

VI. An Addendum on the Problem of Record Error.

Another issue raised in the Kladney-Achtenberg draft Statement is that there are sometimes errors in criminal background records. It is worth pointing out here that the Kladney-Achtenberg draft Statement itself contains a few errors. These errors may tend to make the problem seem larger than it is (although it is certainly not my intent to suggest these records are perfect). For example, as evidence that errors in criminal background checks are surprisingly common, the Kladney-Achtenberg draft Statement reports that in connection with the Transportation Security Administration's FBI screenings for port workers in 2007, more than 120,000 applications for port positions were "initially

disqualified due to a background check,” but that “[m]ore than half of those applicants filed appeals to prove their eligibility and 94% of those appeals were successful.”

Not true. Overwhelmingly these were waivers and not appeals—and there is a crucial distinction between the two. TSA is required by law to fingerprint all port workers and run those fingerprints against the FBI’s database. If a record of possible past criminal activity is uncovered, the port worker is routinely notified and given the opportunity to seek a waiver *or* to appeal, depending upon the situation. Most offenses can be waived; some cannot be. If one’s offense is waivable, one need only convince TSA that, despite one’s record, one is not a security threat. When TSA sent out its notifications, it anticipated that minor offenses that bear no relationship to terrorism, such as a 30-year-old conviction for public drunkenness, would be waived at the agency’s discretion. The agency was simply following its normal procedures to notify *all* employees of any FBI record it had obtained and providing an opportunity for a response. The fact that a large number of waivers were granted is not evidence of faulty information supplied by the FBI. A high rate of successful requests for a waiver was fully expected.

Since some offenses are permanently non-waivable or waivable only after a certain period of time has passed, evidence that one has committed such an offense can be rebutted only by evidence that the port worker did not in fact commit the offense (or, in appropriate cases, that the offense occurred long enough ago to qualify for a waiver). In this situation, an appeal, rather than a waiver, is the proper procedure. Suffice it to say that there were massively more successful requests for waiver (where the accuracy of the records were not denied) than there were successful appeals (where the basis of the appeal was that the FBI records were inaccurate). Appeals are rare. The Kladney-Achtenberg draft Statement suggesting the contrary is simply inaccurate.

The Kladney-Achtenberg draft Statement also reports that a study by the National Employment Law Project, a workers’ rights organization, “found that approximately 600,000 reports obtained from the FBI contained some form of error.” For this fact, the draft statement cites an article from the Washington Post, which in fact stated, “The advocacy group [i.e. NELP] estimates that *as many as* 600,000 of those reports contain incomplete or inaccurate information.” Ylan Q. Mui, *Growing Use of FBI Screens Raises Concerns About Accuracy, Racial Bias*, **WASH. POST** (July 29, 2013)(italics added). “As many as 600,000” is not the same thing as “approximately 600,000” especially coming from an advocacy group. It is an outside estimate.

Curiously, since there are many such records in the FBI database, 600,000 would actually be an error rate of about 1%—rather low in view of the fact that as far as NELP has been able to show all the errors are due to incomplete data. NELP did no independent research and did not uncover a single case of inaccurate (as opposed to incomplete) information.

But all this is neither here nor there, because the Washington Post’s article discussion of the NELP study was inaccurate, just as the Kladney-Achtenberg draft statement’s discussion of the Washington Post article was an inaccurate account of the Washington Post

article. Following the data on this topic is like opening a set of Russian matryoshka dolls one by one and discovering that each doll is different from the previous one. NELP's 600,000 was not an estimate of the number of inaccurate records. Instead, it is NELP's estimate of the number of "workers" who are "*potentially* harmed in their job search." That would be a more serious matter if it weren't for (1) the word "potentially" and (2) the fact that it appears to be a wild guess, based on numerous inaccurate assumptions.

I wish I had the time to sort through all the information—accurate and inaccurate—that is out there concerning the accuracy of the FBI database. But given time limitations, it makes more to point out that the FBI database is not used for the kinds of background checks that are most commonly made:

1. The FBI database is not used for routine criminal background checks by potential employers that are not required by law. State records are ordinarily used for that purpose instead. According to The Attorney General's Report on Criminal History Background Checks (which is the source used by NELP):

"Most of the non-criminal justice checks using FBI-maintained criminal history are done under the authority of Pub. L. 92-544, a federal law originally passed in 1972, that allows for the sharing of FBI-maintained criminal history information for licensing and employment background checks by state or local governmental agencies. These statutes generally require background checks in certain areas that the state has sought to regulate, such as individuals employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions. The results of these checks are supplied to public agencies that apply suitability criteria established by those agencies or under state law. ... In addition, the National Child Protection Act (NCPA) and the Volunteers for Children Act (VCA) allow state governmental agencies without requiring a state statute to conduct background checks and suitability reviews of employees or volunteers of entities providing services to children, the elderly, and disabled persons." *Id.* at 19.

2. According to the same Department of Justice report, "State records are also more complete and up-to-date than the FBI-maintained records." *Id.* at 4. These are the records that private employers conducting criminal background checks are more likely to using (unless they have some statutory authority that allows them access to the FBI records). *Id.*
3. As of 2006, the rate of missing final dispositions in the FBI database was indeed unacceptably high—estimated by the Department of Justice at approximately 50%. (*Id.* at 7) Older records were more likely to contain missing data than newer records. For example, the record of an arrest might not have any information about whether the arrestee was charged or eventually convicted of a crime. (*Id.* at 7). In addition, the rate of missing

disposition data for minor crimes (like drunk driving) was higher than the rate of missing disposition data for serious crimes.

Of course, there are errors and of course more needs to be done to ensure the accuracy of both the FBI database and state and other databases. Wherever there are human beings, there will also be errors. The real issue is what the response to inevitable human error should be. Here is the answer is emphatically not to discourage employers from acting on information unless they can be absolutely sure it is accurate, seldom does anyone have the luxury of being able to make day-to-day decisions on information that they know to be 100% accurate. Instead, what is needed is a procedure for correcting and updating criminal records much as there is for correcting and updating credit records. No one should be surprised to learn that the Fair Credit Reporting Act already provides such a procedure. If there are ways to improve the procedure, I suspect most Americans would support them.

VII. CONCLUSION

The Reverend Martin Luther King, Jr. famously looked forward to when his children would be judged by the content of their character rather than the color of their skin. Current law is just the opposite. Race may be the basis for preferring one job applicant over another. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (permitting some affirmative action plans). But under the EEOC's guidance, the content of one's character, at least as revealed by one's criminal record, cannot be without risking litigation. Something is wrong with this picture.
