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WHEN CONVICTS NEED NOT APPLY: PROPOSING CLARIFICATIONS TO THE EEOC'S 2012 GUIDELINES

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I. AN INTRODUCTION TO TITLE VII¹

When President George H.W. Bush signed the Civil Rights Act of 1991,² a bipartisan effort³ to reform the duty of American employers to refrain from racial discrimination when hiring job applicants, he stated that “[i]t is extremely important that the statute be properly interpreted by executive branch officials, by the courts, and by America’s employers so that no incentives to engage in such illegal conduct are created.”⁴ To that end, the Equal Employment Opportunity Commission (“EEOC”) gave employers new guidelines in 2012 for considering job applicants with conviction records.⁵

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1. 42 U.S.C. § 2000e-2(k) (2012).

2. Presidential Statement on Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991); *see also* Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES (Nov. 21, 1991), <http://www.nytimes.com/1991/11/22/us/reaffirming-commitment-bush-signs-rights-bill.html?pagewanted=all&src=pm> (announcing President Bush’s signing of the Civil Rights Act of 1991 and summarizing its legislative history).

3. 137 CONG. REC. S15273-01 (1991).

4. Presidential Statement on Signing S. 1745, *supra* note 2.

5. *See generally* EEOC, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter 2012 EEOC Guidelines], *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (detailing the EEOC’s current policies with respect to considering previous arrests and convictions and Title VII claims); *see also* Art Gutman, *EEOC Releases New Guidelines on Arrest & Conviction Records*, OFCCP BLOG SPOT (May 9, 2012, 10:54 AM), <http://ofccp.blogspot.com/2012/05/eeoc-releases-new-guidelines-on-arrest.html> (summarizing the EEOC’s 2012 Guidelines based upon the different analyses for arrest and conviction records, disparate treatment and disparate impact, individualized assessments, and employer best practices).

Changing statistics play a role in whether an employer's hiring practices are discriminatory.⁶ Where African-Americans and Hispanics⁷ are convicted at higher rates than Caucasians,⁸ America's employers may engage in illegal conduct by rejecting applicants with conviction records.⁹ In light of new criminal statistics¹⁰ and the fact that employers have increased access to applicants' criminal histories,¹¹ the EEOC thought it prudent to offer insight into practices that could incur Title VII liability¹² and avoid it.¹³

While the new guidelines answer many questions,¹⁴ others

6. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (noting that disparate impact claims will inevitably consider statistical information).

7. See Nancy E. Walker et al., *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System* 1, 4 (2004), available at <http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf> (reporting that Hispanics are typically convicted of lesser crimes than non-Hispanics).

8. Paul Guerino et al., *U.S. Dep't of Justice, Prisoners in 2010* 1, 27 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

9. See, e.g., John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, CTR. FOR ECON. & POLICY RESEARCH 1, 13 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf> (comparing the estimated ex-offender population against the working age population that is not incarcerated by race).

10. Guerino, *supra* note 8, at 27; see also Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006 — Statistics Tables* 1, 19 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (detailing that an average of six more African-Americans in 2006 were incarcerated for felonies than Caucasians).

11. See Carl R. Ernst & Les Rosen, *National Criminal History Database* 1, 18 (2002), available at <http://www.brpub.com/articles/CriminalHistoryDB.pdf> (concluding that employers could use online databases to review a job applicant's criminal history); see also Soc'y for Human Res. Mgmt., *Background Checking: Conducting Criminal Background Checks* 1, 4 (2010), www.slideshare.net/shrm/background-check-criminal?from=share_email (reporting that 73% of all surveyed employers conduct criminal background checks through applicants' consumer reports); see also Keisha-Ann G. Gray, *Requesting a Criminal-Background Check*, HUMAN RES. EXEC. ONLINE (Sept. 10, 2012), <http://www.hreonline.com/HRE/story.jsp?storyId=533350656> (advising New York employers on how to conduct background checks under the EEOC's 2012 Guidelines).

12. 2012 EEOC Guidelines, *supra* note 5, at 31; see also FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON HIRING/CRIMINAL RECORDS GUIDANCE (Oct. 2012), http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att5.pdf (providing information to ex-offenders as to their rights under Title VII).

13. 2012 EEOC Guidelines, *supra* note 5, at 25.

14. See EEOC, *Questions and Answer About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII* (2012) [hereinafter 2012 Guidelines Q & A], http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (summarizing the 2012 Guidelines in the context of commonly used hiring

remain.¹⁵ What the guidelines suggest and what Title VII requires do not match up neatly.¹⁶ In particular, the EEOC “recommends that employers not ask about convictions on job applications.”¹⁷ At the same time, the EEOC provides that such hiring practices could be defended as a business necessity without requiring individualized assessments.¹⁸

Accordingly, employers must choose between either following the EEOC’s recommendation or narrowly tailoring¹⁹ questions about the convictions they find impermissible to avoid disparate impact liability.²⁰ While the EEOC recommends that employers not ask about convictions on employment applications,²¹ an employer can legally do so and deny employment based on the answers given when the disqualifying convictions are consistent with a business necessity.²²

Section II of this Comment examines the analytical history of Title VII disparate impact claims leading up the 2012 Guidelines. Section III illustrates the ambiguities that can arise in interpreting these guidelines. Finally, Section IV proposes areas for clarification in future guidance.

II. THE DEVELOPMENT OF DISPARATE IMPACT CLAIMS UNDER TITLE VII

A. *Disparate Impact Analysis in the U.S. Supreme Court*

The EEOC is an executive agency that primarily enforces Title VII, the federal law making it illegal for employers to discriminate on the basis of race or national origin in their hiring practices.²³ Not only does Title VII explicitly proscribe facially-

practices).

15. See, e.g., Kevin McGowan, *Discrimination: EEOC’s Criminal Check Guidance Puts Focus on Employer Defenses, Speaker Says*, EMP. POL’Y & LAW DAILY (June 15, 2012), available at Bloomberg BNA 115 DLR A-4 6/14/12 (discussing ambiguities in the EEOC’s guidelines in assessing potential employer liability).

16. See *id.* (emphasizing that non-compliance with the EEOC’s broad outlines for best practices that the EEOC provides is not necessarily prohibited by Title VII nor indefensible as a business necessity).

17. 2012 EEOC Guidelines, *supra* note 5, at 13-14.

18. See *id.* (advising that Title VII may not require an individualized assessment depending on the case, but that the employers screening process must have a “demonstrably tight nexus” between the disqualifying conviction and the job for which the applicant has applied).

19. See *id.* at 18 (incorporating the factors considered to determine whether a hiring practice is narrowly tailored under *Green v. Mo. Pacific R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977), into the EEOC’s guidelines).

20. See *infra* p. 3.

21. 2012 EEOC Guidelines, *supra* note 5, at 13-14.

22. 42 U.S.C. § 2000e-2(k).

23. EEOC, *Overview*, EEOC.GOV, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Apr. 8, 2013).

racial hiring policies,²⁴ it also proscribes racially-neutral policies that disproportionately favor one race over another, called a “disparate impact.”²⁵ Seven years after Title VII passed, the Supreme Court acknowledged in *Griggs v. Duke Power Co.* that, where the disparate impact is attributable to race,²⁶ Title VII’s prohibitions on discrimination control.²⁷ Therefore, an employer cannot evaluate a person in the abstract when the result is that people of one race are hired more often than another.²⁸

An employer is permitted to evaluate each applicant for a job²⁹ with a hiring practice that is related to the job in question.³⁰ The extent to which a hiring practice is so related became an employer’s defense to disparate impact claims under Title VII.³¹ Thus, where a plaintiff has pled sufficient facts of a disparate impact arising from an employer’s hiring practice,³² the employer could rebut it with legitimate business reasons in the so-called “business necessity defense.”³³ Yet, *how* an employer had to prove the business necessity defense was unclear.³⁴ Contradictory notions of what an employer had to prove in court were apparent in the Court’s jurisprudence.³⁵

In 1988, the Supreme Court clarified the employer’s burden of

24. 42 U.S.C. § 2000e-2.

25. *See generally* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (stating for the first time in Supreme Court’s jurisprudence that Title VII’s purpose of eliminating racial discrimination in employment encompasses hiring policies beyond explicitly race-based criteria).

26. *See id.* at 430 (remarking that, in their employment applications, African-Americans passed the employer’s intelligence test at lower rates because of the inferior education received in segregated schools).

27. *Id.* at 434.

28. *Id.* at 436.

29. *Id.*

30. *Id.* at 431.

31. *See Watson*, 487 U.S. at 998 (holding that an employer can meet the requirements of the business necessity defense by presenting evidence that the allegedly discriminatory practice is justified).

32. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (holding that a district court may rely on generalized national statistics to prove a disparate impact in evaluating a plaintiff’s prima facie case).

33. *Watson*, 487 U.S. at 998-99 (noting that the burdens imposed on employers can be weighed in determining whether an employer’s policy serves business interests and that an employer may find it easier to determine whether its employment decisions bear a relationship to the job in question with a discretionary policy).

34. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (detailing the manner in which a plaintiff may make a prima facie case of disparate impact while not detailing how the defendant-employer could rebut that case).

35. *Compare, e.g., Watson*, 487 U.S. at 997 (stating that the plaintiff bears the burden of persuasion on every aspect of a Title VII disparate impact claim) with *Dothard*, 433 U.S. at 329 (stating that an employer must prove a business necessity defense).

proof in *Wards Cove Packing Co., Inc. v. Atonio*.³⁶ The Court held that, in any Title VII disparate impact claim, the employer merely had to present some evidence that the practice was related to employment.³⁷ The Court also held that the applicant always had the burden of persuasion.³⁸ During the course of disparate-impact jurisprudence, the employer's burden got lost in translation.³⁹ Meanwhile, Congress had made no efforts to alter the Court's conception of the business necessity defense.⁴⁰

B. Congressional Reform

Then, in the early nineties, many in the 102nd Congress sought to tighten the lenient standard that *Wards Cove* had given to employers' business necessity defense.⁴¹ The biggest question was how to do it.⁴² Congress first tried in 1990⁴³ to overturn *Wards Cove* with legislation.⁴⁴ However, this resulted in contentious

36. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989) (holding that an employer only had to provide evidence that the policy was related to the job in question, and that the defendant employer had no burden of persuasion in Title VII claims).

37. *Id.*

38. *Id.*

39. See *id.* at 664-65 (Stevens, J., dissenting) (explaining the history of disparate-impact jurisprudence following *Griggs* and arguing that the majority has reversed what courts had previously required employers to establish to meet a business necessity defense).

40. See *id.* at 666 (stating that "Congress has declined to act . . . to limit the reach of this 'disparate-impact' theory.>").

41. 137 CONG. REC. S15273-01 (statement of Sen. John Danforth); See also, Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924 (recounting that Congress sought to overturn five Supreme Court discrimination cases with the Civil Rights Act of 1990).

42. See also *Wards Cove*, 490 U.S. at 652 (expressing concern that without deference to an employer's rational business concerns, employers would be subject to overwhelming discrimination suits and thus may be tempted to adopt illegal quotas in order to avoid expensive litigation); cf. Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991) (affirming that The Civil Rights Act of 1991 would not create "incentives for employers to adopt quotas or unfair preferences.>").

43. See Richard L. Berke, *House Approves Civil Rights Bill; Veto Is Weighed*, N.Y. TIMES (Aug. 4, 1990), <http://www.nytimes.com/1990/08/04/us/house-approves-civil-rights-bill-veto-is-weighed.html?pagewanted=all&src=pm> (explaining that a chief provision of the Civil Rights Act of 1990 is to overturn *Wards Cove* by shifting the burden of persuasion on the employer).

44. Civil Rights Act of 1990, S. 2104 101st Cong. (1991); see also Thomas B. Edsall, *The Civil Rights Act of 1990—GOP Hopes Veto Will Go Over Well With White Voters*, SEATTLE TIMES (Oct. 23, 1990), <http://community.seattletimes.nwsourc.com/archive/?date=19901023&slug=1100130> (reporting that the legal burdens and damage limitations were key provisions of the Civil Rights Act of 1990 that ultimately led to President Bush's veto).

debates that went unresolved.⁴⁵

When the Civil Rights Act of 1991 was presented on the Senate floor, Senator Danforth introduced an interpretative memorandum aimed directly at reversing *Wards Cove*.⁴⁶ Thus, Sections 104 and 105 of the Act put the burden of proof on the defendant-employer that a disparate hiring practice was a business necessity.⁴⁷ The question remained as to how much an employer had to prove,⁴⁸ but not as to what had to be proven.⁴⁹ This burden shifting became the hallmark compromise in reforming discriminatory hiring post-*Wards Cove*.⁵⁰

C. Changes in the Statistical Landscape

Even with a burden-shifting framework in Title VII,⁵¹ some old problems of proof remained.⁵² Specifically, unlike disparate treatment claims where an applicant could prove discrimination

45. See Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 616 (1991) (explaining that the debates regarding codifying an employer's burden in establishing business necessity resulted in proposals that were either unsatisfactorily lenient or unsatisfactorily strict, many of which did not address the holding in *Wards Cove*).

46. See 137 CONG. REC. S15,273-01 (1991) (clarifying that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in [*Griggs*], and in the other Supreme Court decisions prior to [*Wards Cove*]."); see also, Civil Rights Act of 1991, S. 1745 102nd Cong. § 105(b) (1991) (requiring that "[n]o statements other than the interpretative memorandum . . . shall be considered legislative history, or relied upon in any way as legislative in construing . . . [b]usiness necessity."). But see Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?* 35 WM. & MARY L. REV. 1177, 1239 (1994) (concluding that the Civil Rights Act of 1991 is ambiguous such that courts could apply the *Wards Cove* standard in contravention of the Act's stated purpose in the interpretative memorandum).

47. Civil Rights Act of 1991 § 104-05, 42 U.S.C. 2000e-2 (1991).

48. See Peter M. Leibold et. al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1084 (1993) (noting that the definition of "business necessity" in the Civil Rights Act of 1991 turned on the standard a defendant-employer had to satisfy).

49. See Rotunda, *supra* note 41, at 927 (remarking that Congress did not define the term "business necessity" with any particularity).

50. See Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991) (explaining that The Civil Rights Act of 1991 reestablishes disparate impact analysis under *Griggs* "while including a compromise provision that overturns *Wards Cove* by shifting to the employer the burden of persuasion on the 'business necessity' defense.") (emphasis added).

51. *Id.*

52. See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 238 (1993) (chronicling that "every important provision of the 1991 Act would come only in the context of protracted, expensive litigation, one case at a time.").

through facially-racial hiring policies, disparate impact claims usually required the plaintiffs to provide statistics because the policy was race-neutral on its face.⁵³ The sufficiency of statistical evidence needed to prove a Title VII claim was particular to each case.⁵⁴ However, the employers did not have any control over the statistical realities against which their hiring practices would be judged.⁵⁵ This presents a unique issue in the case of conviction statistics, as many employers have hiring practices against applicants with such records.⁵⁶

1. *Disparate Impact from Conviction Rates.*

Between 1974 and 2001, the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000.⁵⁷ The number of convicts in a twenty-five year period has risen by nearly 274 percent.⁵⁸ In the last five years, one in every hundred people was behind bars.⁵⁹

Conviction rates have a special relationship with the development of disparate impact jurisprudence because demographics do not bear out evenly.⁶⁰ As of 2010, African-American men were imprisoned at a rate of 3.07%.⁶¹ Hispanic men

53. See *Watson*, 487 U.S. at 992 (noting that disparate impact claims will inevitably consider statistical information).

54. See *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979) (noting the weaknesses in a plaintiff's statistical evidence in establishing a prima facie case under Title VII). *But see Dothard* 433 U.S. at 330 (finding the plaintiff's generalized national statistical data sufficient to establish a prima facie case under Title VII).

55. See, e.g., 1 Emp. Discrim. Coord. Analysis of Federal Law § 20:73 (2012) (explaining that an employer does not bear the burden of a business necessity defense when the demographics of the local population and the employer's employees statistically match).

56. 2012 EEOC Guidelines, *supra* note 5, at 1.

57. OFFICE OF JUSTICE PROGRAMS, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

58. See THE PEW CTR. ON THE STATES, *One in 31: The Long Reach of American Corrections* 4 (2009), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (providing statistical data that the correctional population has tripled over the course of twenty-five years).

59. See THE PEW CTR. ON THE STATES, *One in 100: Behind Bars in America in 2008* 9 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (cataloging a 44,000-inmate rise in Florida prison populations from 1993 through 2007 state-by-state).

60. See *One in 31*, *supra* note 58, at 5 (reporting that African-American adults were four times as likely as whites and two and a half times as likely as Hispanics to be in the criminal justice system).

61. See *Guerino*, *supra* note 8, at 27 (reporting that 3074 of a 100,000 population of African-Americans had been sentenced under state and federal jurisdiction in 2010).

were imprisoned at 1.26%.⁶² White men, by contrast, were imprisoned at a rate of only 0.46%.⁶³ This statistical backdrop affects disparate impact claims.⁶⁴

2. Introduction of the Green-Factor Test.

In *Green v. Mo. Pacific R.R. Co.*, the Eighth Circuit dealt with whether Title VII contemplates protecting minorities against discrimination when an employer refuses to hire anyone with a conviction.⁶⁵ In that case, the employer refused to hire anyone with a conviction for anything other than a minor traffic offense.⁶⁶ The court examined the relevant statistics⁶⁷ and found that it established a *prima facie* case.⁶⁸ But under *Griggs*,⁶⁹ the question turned to the business necessity defense.⁷⁰

The employer offered a scattershot defense.⁷¹ In the face of statistical evidence that the employer's policy would disproportionately exclude African-Americans,⁷² the Eighth Circuit held that the hiring policy could not be justified,⁷³ remarking that "blacks . . . still suffer from the burdens of discrimination . . . [and denial of job opportunities] because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden."⁷⁴

On remand,⁷⁵ the district court ordered an injunction.⁷⁶ In its order, the district court listed three factors by which the employer should consider an applicant's criminal history.⁷⁷ First, the employer had to take the nature and gravity of the applicant's

62. *Id.* (reporting that 1258 of a 100,000 population of Hispanic men had been sentenced under state and federal jurisdiction)

63. *Id.* (reporting that 459 of a 100,000 population of White men had been sentenced under state and federal jurisdiction).

64. 2012 EEOC Guidelines, *supra* note 5, at 3.

65. *Green v. Mo. Pacific R.R. Co.*, 523 F.2d 1290, 1292 (8th Cir. 1975).

66. *Id.*

67. *Id.* at 1293-94.

68. *Id.* at 1295.

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

70. *Green*, 523 F.2d at 1293.

71. *See id.* at 1298 (offering business necessity defense on the grounds that the employer feared theft, negligent hiring claims for hiring violent offenders, and problems of recidivism).

72. *Id.* at 1294.

73. *Id.* at 1299.

74. *Id.* at 1298.

75. *See id.* at 1299 (ordering remand at which "the district court . . . [had to] determine whether on the date of his application [the plaintiff's] background and experience qualified him for any position with [the employer].").

76. *See Green v. Mo. Pacific R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (recounting and affirming the district court's orders from the remand ordered in 1975).

77. *Id.*

conviction into account.⁷⁸ Second, the employer had to consider the time that had passed since the applicant was either convicted or released from prison.⁷⁹ Third, the nature of the job in question would be considered.⁸⁰ Because employers' hiring policies that took these factors into consideration would be narrowly-tailored, the Eighth Circuit affirmed this order.⁸¹

Then, in *El v. SEPTA*, conviction statistics played a role in another discrimination suit based on a disparate impact theory.⁸² In that case, an African-American paratransit driver was rejected because he had been convicted of homicide forty years prior to applying.⁸³ The EEOC, in adopting the *Green* test,⁸⁴ had concluded that the employer was unable to establish that its hiring policy was suitable.⁸⁵

The Third Circuit acknowledged that the United States Supreme Court had never dealt with the issue of convictions as the basis for employment discrimination head on.⁸⁶ Relying on other Supreme Court precedent,⁸⁷ the court remarked that an employer's "common-sense"-basis for barring an applicant for any conviction would be insufficient;⁸⁸ rather an employer's hiring policy must "distinguish between applicants that pose an unacceptable level of risk and those that do not."⁸⁹ The court upheld the policy in that case.⁹⁰

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See generally* *El v. Southeastern Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007) (articulating the policy *Green*'s analysis effectuates).

83. *Id.* at 235.

84. *See id.* at 243 (remarking that the EEOC, in its compliance manual following the passage of the Civil Rights Act of 1991, had adopted *Green*'s three-factor test).

85. *Id.* at 248.

86. *Id.* at 240. *But see* *McDonnell Douglas Corp.*, 411 U.S. at 793 (holding that an employer could refuse to rehire an employee who had engaged in illegal protests); *see also* *Beazer*, 440 U.S. at 587 n. 31 (holding that a government employer could refuse to hire methadone users because of safety concerns).

87. *See Dothard*, 433 U.S. at 332 (explaining that an employer cannot evaluate an applicant in the abstract out of business necessity).

88. *See El*, 479 F.3d at 240 (relying on *Dothard* for the proposition that employer must present empirical proof that exclusionary policy is an accurate indication of the applicant's job performance).

89. *Id.* at 245.

90. *Id.* at 249 (holding that there was no evidence in the record that the employer could adopt a less discriminatory alternative practice that would serve business necessities such that the plaintiff could overcome the employer's business necessity defense).

D. The Emergence of the 2012 EEOC Guidelines

The EEOC has incorporated both *Green* and *El* into its new 2012 Guidelines.⁹¹ Employers should develop targeted screening processes⁹² and offer individualized assessments.⁹³ Yet, the EEOC explains that policies narrowly-tailored to *Green* may be permissible without individualized assessments.⁹⁴ Ambiguously, the EEOC both recommends that an employer not ask about convictions on applications⁹⁵ while implying that denying employment for the answer given might be permissible under *Green* as an exception to its individualized assessment recommendation.⁹⁶

When an employer cannot ask about convictions on an application, the employer has “Banned the Box.”⁹⁷ Many local governments have “Banned the Box,”⁹⁸ and these policies carry social and economic benefits.⁹⁹ Yet, the question remains for private employers whether they need to “Ban the Box” as well. Indeed, after the release of the new 2012 EEOC guidelines, the

91. 2012 EEOC Guidelines, *supra* note 5, at 11, 15 (establishing that the EEOC will use the *Green* factors to determine whether specific criminal conduct is related to the job in question in Title VII claims absent a valid study under Uniform Guidelines standards and approving of the holding in *El* that a hiring policy must appropriately gauge the risk an applicant poses to the employer’s business).

92. *See id.* at 15-16 (explaining that a targeted screening process will link specific criminal conduct to the position sought based upon the nature of the offense, the time elapsed, and the nature of the job).

93. *Id.* at 18 (advising that an individualized assessment should allow the applicant to explain the offense and demonstrate that the applicant should not be disqualified because of it).

94. *Id.*

95. *Id.* at 13-14.

96. *Id.* at 25.

97. *See* McGowan, *supra* note 15 (explaining that many government employers are proscribed by statute from asking about convictions on initial job applications under “Ban the Box” legislation); *see also* MASS. GEN. LAWS ch. 151b, § 4 (2012) (proscribing employers from asking applicants about arrests not leading to convictions or certain minor misdemeanor convictions during the hiring process).

98. *See, e.g.*, NATIONAL EMPLOYMENT LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 24-27 (2012), available at <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1> (detailing the municipal governments that have adopted “Ban the Box” policies in governmental hiring).

99. *See* Rebecca Nuttal, *Ban the Box Bill Gains Public Support*, NEW PITT. COURIER (Sept. 26, 2012), http://www.newpittsburghcourieronline.com/index.php?option=com_content&view=article&id=8160:ban-the-box-bill-gains-public-support&catid=38:metro&Itemid=27 (recounting Pittsburgh’s city council members statements on behalf of the city’s proposed “Ban the Box” policy).

issue is in dispute.¹⁰⁰

III. AN ANALYSIS OF HOW AMBIGUITIES IN THE 2012 GUIDELINES INDICATE A NEED FOR CLARIFICATION

The analysis below explores three chief ambiguities that arise from the 2012 Guidelines. First, employers must hypothesize on how the *Green*-Factor test would work. Because the Guidelines lack specificity on this issue, clarifying the test must be accomplished through one of the Guidelines' examples and with respect to previous cases. Second, we question whether employers face the level of Title VII exposure that Guidelines predict, especially in light of employers' economic interests at stake. Finally, the analysis explores the policy interests that the Guidelines do not explicitly address. These ambiguities reveal the need for proposed clarifications.

A. *The First Ambiguity: The 2012 Guidelines Do Not Provide an Example of Permissive Hiring Questions under Green*

The Guidelines do not have an example of a permissible, narrowly-tailored question about an applicant's prior convictions without an individualized assessment.¹⁰¹ However, Example 7 in the Guidelines can show how such an analysis might work.¹⁰² In this example, a Hispanic applicant seeks a job with a community center that will reject any applicant with a theft crime conviction in the last four years.¹⁰³ The applicant has a conviction for credit card fraud, and he is subsequently rejected after undergoing an individualized assessment.¹⁰⁴ During the assessment, he was presumably told of the employer's concern with his criminal history and given a chance to explain the offense.

The analysis should remain unchanged if no individualized assessment had been provided.¹⁰⁵ The EEOC's analysis concludes

100. McGowan, *supra* note 15.

101. *See generally* 2012 EEOC Guidelines, *supra* note 5, at 18-20 (providing two fact-pattern examples, one in which an employer uses an individualized assessment and one in which it does not, and the corresponding analyses on Title VII).

102. *Id.* at 18-19.

103. *See id.* at 19 (explaining that the community center adopted this targeted exclusion based on statistical data and recidivism research).

104. *Id.*

105. *See id.* (providing a chapeau to the individualized assessment guidance which states that "an employer may be able to justify a targeted criminal records screen solely under the *Green* factors."); *but see* Antonio L. Ingram II, *EEOC Updates Guidance on Using Criminal Records in Hiring Decisions*, EMP'T LAW COMMENTARY, July 2012, at 1, 3, *available at* <http://www.jdsupra.com/legalnews/jdsupra-24710/> (recommending that employers let applicants know that the applicant's criminal record is the reason for the rejection and allow the applicant to explain the conviction).

that the screen was properly tailored¹⁰⁶ to assess risk.¹⁰⁷ This means that the exclusion is consistent with a business necessity and there is no violation.¹⁰⁸ There should be no violation whether the employer learned about the conviction through an individualized assessment or from an answer on an application.¹⁰⁹ The Guidelines, however, are silent on the precise analysis.

Thus, the only remaining way for employers to understand how to use *Green*-Factors in hiring questions is based on previous, successful examples.

One example is *Avant v. South Cent. Bell Tel. Co.*, where an African-American male brought a Title VII action against a telephone company that had rejected his application because he had answered yes on an application to the conviction question.¹¹⁰ The plaintiff presented statistical evidence¹¹¹ of a disparate impact, similar to evidence that gave rise to the EEOC's concerns in the 2012 Guidelines.¹¹² Yet, the Fifth Circuit upheld the district court's dismissal,¹¹³ because such an exclusion was responsive to a legitimate business need.¹¹⁴

Asking about the conviction in that case and subsequent rejection on that basis fits neatly into the *Green* analysis. Provided that the exclusion considers the nature of the offense,¹¹⁵ the time since conviction,¹¹⁶ and job sought,¹¹⁷ the exclusion meets the business necessity defense.¹¹⁸ The exclusion would apply

106. *Green*, 523 F.2d at 1292.

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

108. 42 U.S.C. § 2000e-2(k).

109. *But see* Brian Carlson, *New EEOC Guidance Underscores Importance of "Individualized Assessment" in Employers' Review of Criminal Records*, SCHWARTZ HANNUM PC (Sept. 2012), <http://shpclaw.com/Schwartz-Resources/new-eeoc-guidance-underscores-importance-of-?individualized-assessment?-in-employers?-review-of-criminal-records/> (suggesting that employers can generally forgo individualized assessments only when a federal law prevents that applicant from fulfilling the job position).

110. *See Avant v. South Cent. Bell Tel. Co.*, 716 F.2d 1083, 1085 (5th Cir. 1983) (detailing that the conviction which the employee put on his application was not the same conviction for which the employee was rejected, but that the latter was discovered upon a background check).

111. *See id.* at 1087 (arguing that, because there is a disparate conviction rate between African-Americans and Caucasians, rejecting employment because of convictions results in a disparate impact).

112. 2012 EEOC Guidelines, *supra* note 5, at 8.

113. *Avant*, 716 F.2d at 1087.

114. *Id.*; *see also* *Osborne v. Cleland*, 620 F.2d 195, 199 (8th Cir. 1980) (upholding a district court's dismissal of a plaintiff's discriminatory impact case where he was terminated because, had he properly disclosed his past conviction on his application, the employer would have had a legitimate business reason for denying employment).

115. *Green*, 549 F.2d at 1160.

116. *Id.*

117. *Id.*

118. 2012 EEOC Guidelines, *supra* note 5, at 15.

irrespective of the individualized assessment,¹¹⁹ and rejection based on the answer “yes” is protected.¹²⁰

Similarly, in a request to the EEOC entitled *Buckley*, an African-American male brought a disparate impact claim against the United States Postal Service when he was denied employment because he disclosed convictions in an interview.¹²¹ The Postal Service argued that its rejection did not have to comply with *Green* because it “did not apply to this case where the agency decided appellant was ‘undesirable’ after appellant disclosed his past history in an interview.”¹²²

The EEOC disagreed, stating that *Green* did in fact apply,¹²³ the employer had not met the factors,¹²⁴ and that “there is no significant difference between rejecting appellant before he is placed on a list of eligibles or after an interview.”¹²⁵

Accordingly, while the EEOC found the employer liable, it suggests that narrowly-tailored exclusions under *Green* are employers’ best defense when it rejects an employee who discloses past convictions, irrespective of any individualized assessment.¹²⁶

These two examples are some of the few accessible EEOC documents demonstrating how *Green* could be successfully used by employers; yet, their lack of analysis and scant attention to facts leave employers mostly in the dark. The uncertainty is especially evident with respect to their specific practices, which the EEOC should have addressed when it took up this issue in the 2012 Guidelines.

119. *See id.* at 18 (stating that “Title VII thus does not necessarily require individualized assessments in all circumstances.”).

120. *See Pre-Employment Inquiries and Arrest & Conviction*, EEOC, http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited Oct. 22, 2012) (affirming that there is “no Federal law that clearly prohibits an employer from asking about arrest and conviction records.”).

121. *See Buckley*, EEOC Request No. 05800039, 1982 WL 598875 at *2 (July 26, 1982) (detailing that the applicant had been denied employment because he had been on probation, had made a false statement to a previous employer, and had attempted to cash a fraudulent check).

122. *Id.*

123. *Id.* at *3.

124. *Id.*

125. *Id.*; *see also*, Maxwell, EEOC Petition No. 03930138, 1994 WL 1841045 at *4 (Mar. 22, 1994) (applying the *Green* factor analysis in a disparate impact claim against a federal agency’s rejection of an application upon his disclosure of prior arrests and convictions).

126. *But see Individualized Assessment: What Is It and How Do I Deal With It?*, VICTIG BACKGROUND SCREENING (Apr. 27, 2012, 10:14 PM), <http://www.victig.com/2012/04/27/individualized-assessment-what-is-it-and-how-do-i-deal-with-it/> (describing an individualized assessment as one mechanism by which an employer can create a targeted screen).

B. The Second Ambiguity: The Extent of Title VII Liability when Employers Ask about Convictions

The 2012 Guidelines' recommendation that employers not ask about convictions in applications is an implicit warning that doing so can expose an employer to Title VII liability.¹²⁷ With a more in-depth treatment of *Green* in the Guidelines, employers are best shielded by also providing individualized assessments.¹²⁸ This is because the employer cannot defend against disparate impact claims with statistics from their applicant pool;¹²⁹ rather, employers must rely on their hiring procedures for that defense.

To the extent the question is not tailored under *Green*, Title VII liability is a possibility.¹³⁰ Without a thorough explanation of *Green* in the Guidelines, employers might try to curtail liability by posing the conviction question to an applicant and provide that any false statement the applicant gives will result in discharge.¹³¹ By doing so, the employer serves their business interest of not hiring a person with a conviction¹³² while "objectively assess[ing] the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience."¹³³ This would be an expensive alternative, whereas clarified Guidelines would permit the *Green*-factor business necessity justification to serve employers a less expensive alternative.

But to be sure, the *Green*-factor analysis is not the only manner in which an employer can raise a business necessity defense to Title VII liability.¹³⁴ The EEOC first recommends that employers validate the targeted screen against such records

127. 2012 EEOC Guidelines, *supra* note 5, at 25 (recommending that considering questions should also be limited to those convictions relevant to the employer's business necessity).

128. *Id.* at 18.

129. *See Dothard*, 433 U.S. at 330 (remarking that an employer's application process might not reflect the potential applicant pool against which discrimination occurred because the number that did not apply is indeterminate).

130. *See, e.g., Buckley*, 1982 WL 598875 at *2 (July 26, 1982) (finding liability for an employer that did not tailor its targeted screen according to *Green* as it related to an applicant's prior conviction).

131. *See* Stephen P. Pepe & Scott H. Dunham, *Employment Applications, Avoiding & Def. Wrongful Discharge Cl.*, Jul. 2012, at § 2:2 n. 4 (advising employers that they can win dismissal for discrimination claims when the employee's discharge arose from false statements on job applications); *see also* *Benson v. Quanex Corp., Mich. Seamless Tube Div.*, 1992 WL 63013 at *4 (E.D. Mich. Mar. 24, 1992) (holding that an employer is entitled to summary judgment against an employee's Title VII action after the employer discovers the employee lied on the job application).

132. *See, e.g., King v. Girard Bank*, No. 76-2927, 1978 WL 79 at *3 (E.D. Pa. Mar. 13, 1978) (applying *Green* to an applicant's Title VII action arising from false information he provided on a job application).

133. 2012 EEOC Guidelines, *supra* note 5, at 13.

134. *Id.* at 14.

pursuant to the Uniform Guidelines on Employee Selection Procedures (“UGESP”).¹³⁵

However, the EEOC’s recommendation on the UGESP assumes that “data about criminal conduct as related to subsequent work performance is available and such validation is possible.”¹³⁶ This validation appears unlikely because the studies would require “an investigation of suitable alternative selection procedures.”¹³⁷ Moreover, supposing it were possible, such validation is difficult for most employers to meet.¹³⁸ Thus, given that *Green* still supports a business necessity defense,¹³⁹ which can encompass questions on applications,¹⁴⁰ *Green* offers employers a less expensive alternative to strict compliance with the 2012 Guidelines.

The EEOC’s recommendation that employers not ask about convictions on the application lengthens the hiring process¹⁴¹ because they will continue to consider the applicant until that information is later revealed. Yet, Title VII has never required that employers adopt unduly burdensome hiring practices.¹⁴² Because waiting to ask about an applicant’s conviction record lengthens the process for which the applicant may not ultimately be eligible, the EEOC’s recommendation incurs a cost for the employer.¹⁴³ Indeed, reviewing and screening any one applicant could cost an employer upwards of \$687.50.¹⁴⁴

135. *Id.*; see also 29 C.F.R. § 1607.5 (2013) (providing the applicable standards for validation).

136. 2012 EEOC Guidelines, *supra* note 5, at 14.

137. 29 C.F.R. § 1607.3 (2013); see also 2012 EEOC Guidelines, *supra* note 5, at 13-14 (implying that not asking about convictions is a less discriminatory alternative because an employer will be more likely to assess the individual applicant).

138. See Arthur D. Rutkowski, *EEOC Issues New Guidance on Use of Criminal Background Criteria in Employment Decisions*, 26 NO. 5 EMP. L. UPDATE 1 (Barbara Lang Rutkowski ed. 2012) (providing editorial comments to the EEOC’s 2012 Guidelines).

139. See *id.* (recommending that employers consider the *Green* factors, when revising their hiring policies to comply with the guidelines, as they relate to that employer’s business necessities).

140. 2012 EEOC Guidelines, *supra* note 5, at 13-15.

141. See *id.* at 13-14 (emphasizing that the employer should already have knowledge of the applicant’s qualifications in the hiring process before asking about prior convictions).

142. See *Watson*, 487 U.S. at 998 (acknowledging cost to the employer as a factor that courts should consider in determining whether the hiring practice has a less-discriminatory alternative).

143. See McGowan, *supra* note 15 (quoting former EEOC general counsel’s remarks that the 2012 Guidelines’ recommendation would be an “extremely burdensome process” because the employers only learn of disqualifying convictions after time and money has been spent in the hiring process).

144. See Alicia Ciccone, *The True Cost of Hiring Employees*, THE HUFFINGTON POST (Jun. 4, 2012, 1:31 PM), http://www.huffingtonpost.com/2012/06/04/the-true-cost-of-hiring-infographic_n_1568295.html (detailing the estimated cost an average

For example, even if an applicant is not asked about convictions initially,¹⁴⁵ the employer is still permitted to perform a background check.¹⁴⁶ Indeed, most employers do.¹⁴⁷ The employer bears this cost,¹⁴⁸ and cost can be a factor in determining if an alternative hiring practice is available.¹⁴⁹ This suggests that, where an employer has tailored the questions about convictions according to *Green*, the employer can both have a Title VII permissible screen and save costs.¹⁵⁰

C. The Third Ambiguity: The Guidelines Do Not Readily Spell Out All of the Policy Considerations at Play

Given that Title VII does not forbid asking about criminal convictions¹⁵¹ nor require that employers take on applicants who present an unacceptable level of risk,¹⁵² applicants with criminal histories have considerable trouble finding employment.¹⁵³

employer faces at any one of six stages in the hiring process).

145. See Lilly Garcia, *How to Interview*, WASH. POST, (Oct. 9, 2012), <http://www.washingtonpost.com/wp-srv/jobs/how-to/improper-questions.html> (last visited Oct. 22, 2012) (describing what questions about convictions may be inappropriate for employers to ask and at what point in job interviews an employer might ask such questions).

146. See 2012 Guidelines Q & A, *supra* note 14 (advising employers that Title VII itself does not regulate the extent to which an employer can acquire an applicant's criminal history).

147. See Soc'y for Human Res. Mgmt., *supra* note 11 (reporting that only 7% of surveyed employers do not conduct criminal background checks); see also U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 136 (June 2006), available at http://www.justice.gov/olp/ag_bgchecks_report.pdf (recommending ways that private sector employers can gain access to FBI-maintained criminal histories).

148. *McGowan*, *supra* note 15.

149. See Deborah Sudbury & Elaine Rogers Walsh, *The EEOC Revisits Criminal Background Checks*, THE PRACTICAL LAWYER, Aug. 2012, at 31, 35 (explaining that the 2012 Guidelines do not define alternative employment practices with respect to background checks, but that the draft of the guidelines stated that cost to the employer is a factor evaluating alternatives).

150. See also LEGAL ACTION CTR., CRIMINAL RECORDS AND EMPLOYMENT: PROTECTING YOURSELF FROM DISCRIMINATION 7 (2001), available at http://www.lac.org/doc_library/lac/publications/CriminalRecordsAndEmployment.pdf (providing sample questions and answers regarding convictions that can arise in an interview and incorporating features of individualized assessments into the sample answers).

151. 2012 Guidelines Q & A, *supra* note 16.

152. *El*, 479 F.3d at 245.

153. See Glenn E. Martin, *EEOC issues new Policy Guidance on the Consideration of Criminal Records in Employment Decisions*, THE HUFFINGTON POST (May 3, 2012, 7:05 AM), http://www.huffingtonpost.com/glenn-e-martin/eec-issues-new-policy-guidance-on-the-consideration-of-criminal-records-employment-decisions_b_1471885.html (reporting that 700,000 incarcerated persons will return to their communities from prisons and that surveyed employers have little or no interest in hiring them).

Accordingly, the EEOC's 2012 Guidelines have been praised not only for reducing racial discrimination,¹⁵⁴ but for also facilitating convicts' reintegration.¹⁵⁵ The Guidelines themselves do not specifically cite convict reintegration as one of its goals.¹⁵⁶ However, many other mechanisms recently put in place can effectuate those goals¹⁵⁷ while not requiring employers "Ban the Box" on applications the way that the 2012 Guidelines suggest.

For example, the Attorney General's Federal Interagency Reentry Council has highlighted the Work Opportunity Tax Credit as a powerful incentive for employers to consider hiring felons.¹⁵⁸ If employers want to receive the credit,¹⁵⁹ they could tailor hiring policies around the tax credit's qualifications.¹⁶⁰ Given that other efforts are being made for effective reintegration of formerly incarcerated persons,¹⁶¹ an employer's narrowly-tailored *Green* questions, which are permitted under Title VII,¹⁶² are unlikely to impede those efforts.¹⁶³

Further, the Guidelines do not extensively explore "Banning the Box" hiring policies. For instance, many government entities have "Banned the Box,"¹⁶⁴ prohibiting check boxes on applications about criminal histories.¹⁶⁵ Supporters of "Ban the Box" argue that

154. See McGowan, *supra* note 15 (quoting EEOC assistant legal counsel that employers cannot use criminal information to discriminate).

155. Martin, *supra* note 153.

156. 2012 EEOC Guidelines, *supra* note 5, at 3 & 29 n. 16 (citing the Attorney General's reintegration projects as "other developments" that prompted the EEOC to release updated guidance).

157. *Id.*

158. See FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER! ON HIRING/CRIMINAL RECORDS GUIDANCE 3 (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1090/REENTRY_MYTHBUSTERS.pdf (providing fact sheets to former prisoners regarding federal policies that affect their rights upon their release).

159. CARINA BRYANT, *Work opportunity credit— Targeted groups*, MERTENS LAW OF FED. INCOME TAXATION § 32A:18 (2012).

160. See I.R.C. § 51(d)(4) (West 2011) (defining an ex-felon for the purposes of the tax credit).

161. 2012 EEOC Guidelines, *supra* note 5, at 3 & 29 n. 16.

162. 2012 EEOC Guidelines, *supra* note 5, at 15.

163. See, e.g., Ryan O'Hanlon, *Helping Ex-Convicts Reintegrate*, THE GOOD MEN PROJECT (Apr. 26, 2011), <http://goodmenproject.com/the-book/helping-ex-convicts-reintegrate/> (describing the Exodus Transitional Community in New York City that provides education and resources for ex-convicts to find and keep employment).

164. See, e.g., HAW. REV. STAT. § 378-2.5(b) (2012) (prohibiting questions about conviction records until a conditional offer of employment is made which can only be withdrawn consistent with a business necessity); MINN. STAT. § 364.021(a)(2009) (providing that the applicant must be selected for an interview before questions about convictions can be asked); CONN. GEN. STAT. § 46a-80(b) (1973) (prohibiting questions about conviction records until the employer has found the applicant to be otherwise qualified).

165. Mike Dunn, *Ban the Box' Law Goes Into Effect Today In Philadelphia*, CBS (Jan. 13, 2012, 4:12 AM), <http://philadelphia.cbslocal.com/2012/01/13/ban->

the laws serve a policy of giving ex-offenders the chance to interview while allowing employers to interview applicants that they might not otherwise have considered.¹⁶⁶ The EEOC's new guidelines echo these laws: "[t]he policy rationale is that an employer is more likely to objectively assess the relevance of an applicant's conviction . . . [and thus] the Commission recommends that employers not ask about convictions on job applications."¹⁶⁷ Because employers can comply with the Guidelines using *Green* questions, and because the guidelines and "Ban the Box" laws have parallel policies, *Green* questions do not necessarily impede policies served by "Ban the Box" laws.

Questions about convictions are more permissible than those about arrests because a conviction allows the presumption that the underlying conduct was actually done.¹⁶⁸ In contrast, an arrest is an accusation, not adjudication.¹⁶⁹ Some "Ban the Box" laws recognize the same distinction, prohibiting only those questions that did not lead to a conviction.¹⁷⁰ Accordingly, questions about convictions themselves and "Ban the Box" laws need not conflict.

The EEOC's Guidelines should provide the blueprint for employers to create targeted exclusions under Title VII.¹⁷¹ Thus, an employer can refuse to hire an ex-convict where the nature of the offense,¹⁷² the time since the conviction,¹⁷³ and the nature of the job¹⁷⁴ illustrate that the exclusion is related to the job.

Many "Ban the Box" laws mirror the business necessity exception.¹⁷⁵ For example, Hawaii explicitly incorporates business necessity,¹⁷⁶ which the EEOC's guidelines state the *Green* factor analysis satisfies.¹⁷⁷ Accordingly, asking about convictions tailored under *Green* does not impede the policy of "Ban the Box" laws.

IV. PROPOSED CLARIFICATIONS TO THE 2012 GUIDELINES

The *Green*-Factor analysis, affirmed by the EEOC in its 2012 Guidelines, can protect employers from Title VII liability for

the-box-law-goes-into-effect-today-in-philadelphia/.

166. *See id.* (quoting the president of a computer consulting and staffing firm in support of Philadelphia's "Ban the Box" law ordinance).

167. 2012 EEOC Guidelines, *supra* at 5, at 13-14.

168. *Id.* at 13.

169. *Id.* at 12.

170. *See, e.g.*, MASS. GEN. LAWS ch. 151b, § 4 (2012) (proscribing employers from asking applicants about arrests not leading to convictions or certain minor misdemeanor convictions at any time during the hiring process).

171. 2012 EEOC Guidelines, *supra* note 5, at 15.

172. *Id.*

173. *Id.*

174. *Id.* at 16.

175. *Id.* at 13 & 41 n. 108.

176. HAW. REV. STAT. § 378-2.5(b) (2012).

177. 2012 EEOC Guidelines, *supra* note 5, at 15.

questions about an applicant's conviction history.¹⁷⁸ Asking about convictions with "the box" is a hiring practice which, "depending on the facts and circumstances, an employer may be able to justify . . . solely under the *Green* factors."¹⁷⁹ Yet, the EEOC desires that employers not ask about convictions immediately, and rather base their employment decisions on the business's needs.¹⁸⁰ Accordingly, the EEOC should close the gap¹⁸¹ between its implied legal analysis and its recommendations. The EEOC would thus better inform employers on Title VII compliance.¹⁸² The following are proposed clarifications that could be made.

A. *The First Clarification: How Questions About Convictions Relate to the Legal Elements of Crimes*

The first *Green*-factor requires employers to consider the nature and gravity of the offense.¹⁸³ The EEOC adopted this prong of *Green* because the "nature of the offense or conduct may be assessed with reference to the harm caused (e.g., theft causes property loss)."¹⁸⁴ The nature of the offense, with reference to the harm caused by it, helps an employer distinguish between applicants that do and those that do not pose an unacceptable level of risk.¹⁸⁵

The elements of a crime are also instructive, as they delineate the harms that the criminal code seeks to prevent.¹⁸⁶ However, the connection between past behaviors resulting in these harms and counter-productivity in employment remains attenuated.¹⁸⁷

By requiring employers to ask only questions related to the harms resulting from the crimes, rather than about the convictions themselves, the EEOC (1) ensures that the questions

178. See *supra* Part III.B (analogizing the *Green*-factor analysis with courts' decisions finding no Title VII for questions about convictions on job applications).

179. 2012 EEOC Guidelines, *supra* note 5, at 18.

180. *Id.* at 13-14.

181. See *supra* notes 95-96 (emphasizing discrepancies between the EEOC's *Green* analysis and its "Ban the Box" recommendation).

182. See Carlson, *supra* note 109 (arguing that the 2012 EEOC Guidelines require an individualized assessment even if an employer is presumptively unqualified because of business necessity under *Green*).

183. *Green*, 549 F.2d at 1160.

184. 2012 EEOC Guidelines, *supra* note 5, at 15.

185. *El*, 479 F.3d at 249.

186. See, e.g., OHIO REV. CODE ANN. § 2913.02 (West 2012) (providing that aggravated theft includes elements of deception, threat, or intimidation).

187. See Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1427 (2007),

<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1044&context=managementfacpub> (reporting that criminal convictions and prior employment were unrelated to counter-productivity in employment).

are narrowly-tailored under *Green*¹⁸⁸ and (2) that the employer will be more likely to follow up with specific questions about the incident¹⁸⁹ because the applicant's answers would be vague.¹⁹⁰ Therefore, the EEOC can refine its *Green* analysis by requiring employers only ask about the harms inherent to disqualifying offenses.

The EEOC should also provide bright-line rules on durations of criminal conduct exclusions. Under *Green*, an employer's complete disregard for the time since the conviction or incarceration fails the business necessity defense.¹⁹¹ Indeed, the employer has to tailor the duration for the criminal conduct exclusion to the extent that "there is a time at which a former criminal is no longer any more likely to recidivate than the average person."¹⁹² It is here, however, that the EEOC's guidance on durations for criminal conduct exclusions ends, because whether "the duration of an exclusion is sufficiently tailored . . . will depend on the particular facts and circumstances of each case."¹⁹³

While the EEOC may be encouraging its recommended individualized assessments¹⁹⁴ by adopting case-specific requirements, such assessments are not required.¹⁹⁵ Given the cost of individualized assessments,¹⁹⁶ employers could benefit from clearer guidelines that resolve debates about employer practices.¹⁹⁷

Employers would benefit from guidelines that incorporate statistical data on the relationships between recidivism and the time since the conviction.¹⁹⁸ In particular, employers should be

188. See 2012 EEOC Guidelines, *supra* note 5, at 15 (providing the EEOC's summary of the "Nature and Gravity of the Offense or Conduct" analysis under *Green*).

189. See Sudbury, *supra* note 149, at 35 (noting that employers should ask about the circumstances surrounding a conviction when making individualized assessments).

190. See Ellen Jean Hirst, *Business Risks Rise in Criminal History Discrimination*, CHI. TRIB. (Oct. 21, 2012), http://articles.chicagotribune.com/2012-10-21/business/ct-biz-1021-eeoc-felony-20121021_1_criminal-records-eeoc-s-chicago-district-office-court-case/2 (reporting that one Chicago employer would hire ex-offenders that were qualified and does background checks "only after he knows he wants to hire someone, as a precaution.").

191. *Green*, 523 F.2d at 1298.

192. *El*, 479 F.3d at 246.

193. See 2012 EEOC Guidelines, *supra* note 5, at 15 (adopting a fact-specific analysis to the second prong of *Green*).

194. *Id.* at 18.

195. *Id.*

196. See Ciccone, *supra* note 144 (examining the costs employers incur during the hiring process for each employee).

197. See McGowan, *supra* note 15 (summarizing debates resulting from ambiguities in the EEOC's 2012 Guidelines).

198. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327,

made conscious of the ways other employment since incarceration reduces the likelihood of recidivism.¹⁹⁹ By tying such empirical data to a duration of time for the criminal conduct exclusion, an employer will more likely assess each individual applicant with respect to that data.

B. The Second Clarification: Information on Services that Provide Employment and Character References

Under *Green*, an employer's criminal conviction exclusion must be related to the nature of the particular job applied for.²⁰⁰ Yet, in its new guidelines, the EEOC's analysis of this prong is all in litigious hindsight; it does not illustrate when and where a criminal conduct exclusion would or would not be sufficiently related to the nature of the job an applicant wanted.²⁰¹

For permissible, targeted exclusions, employers need access to the services that facilitate convicts' integrations, "especially those programs that provide the ongoing support for the riskier hires."²⁰² To this end, the EEOC should provide employers with guidance on the demand-side resources that would "reduc[e] the costs, both tangible and intangible, absorbed by employers hiring former prisoners."²⁰³ Such programs "typically provide intensive job placement."²⁰⁴ Accordingly, by providing employers guidance on placement programs, the EEOC would enhance "successful employment-related interventions that engage private-sector employers and former prisoners [to the] benefit [of] the former

346 (2009), available at

http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf (concluding that employers should be given statistical information on the diminished value of criminal records over time as an incentive to hire ex-offenders).

199. See generally Maurice Emsellem & Debbie Mukamal, *The New Challenge of Employment in the Era of Criminal Background Checks*, THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 191-215 (Annette Bernhardt et al. eds., 2008) (reviewing statistics suggesting that the length and consistency of applicant's post-conviction work history is relevant in assessing that applicant's future risks).

200. See *Green*, 549 F.2d at 1160 (quoting the trial court's injunctive order on the employer's hiring practice).

201. See 2012 EEOC Guidelines, *supra* note 5, at 16 (citing *Griggs* for the proposition that a hiring practice resulting in a disparate impact can only survive where related to successful performance of a particular job).

202. Transcript of 7-26-11 Meeting, U.S. Equal Emp't Opportunity Comm'n (Jul. 26, 2011) (statement of Victoria Kane), available at <http://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm#kane>.

203. AMY SOLOMON ET AL., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 21 (2004), available at http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf.

204. See *id.* at 22 (reporting that employers who take advantage of job placement in Welfare to Work programs have similarly low turnover rates as other placement programs).

prisoner.²⁰⁵

*C. The Third Clarification: How Green Analyses Resolve
Competing Interests*

On the question of an employer's "box" on the application, there are two competing interests that need to be reconciled. The first is the employer's business interests.²⁰⁶ The second is the convict's rights to not be discriminated against on account of race or national origin.²⁰⁷

This Comment has suggested that the "box" on an employment application might not incur as much liability as the EEOC's Guidelines imply.²⁰⁸ However, when the employer does incur that liability, the damages that it must pay can be considerable.²⁰⁹ To the extent that the "box" is a discriminatory practice, it gives rise to suits by every potential employee wrongfully turned away.²¹⁰ A refined *Green* analysis will help employers avoid such catastrophic outcomes.

It's clear that the EEOC would like employers to "Ban the Box" so that they "objectively assess the relevance of an applicant's conviction."²¹¹ The policy rationale for this is well-founded, given that minorities with convictions face an up-hill battle in the job market.²¹² The EEOC will serve these applicants' interests with *Green* refined.

205. *Id.* at 5.

206. *See Griggs*, 401 U.S. at 431 (stating that an employer's business necessity is the touchstone of reconciling interest between employers and applicants under Title VII).

207. 42 U.S.C. § 2000e-2.

208. *See supra* Part III.B (assessing potential Title VII liability in light of the 2012 guidelines).

209. *See generally Starbucks Corp. v. Superior Court*, 86 Cal. Rptr. 3d 482, 485 (Cal. App. 4th Dist. 2008) (noting that the plaintiffs seek "statutory damages of \$200 per applicant—a remedy which, by [employer's] estimation, could total a whopping \$26 million" for having asked the "convictions question").

210. *See* Sam Hananel, *Pepsi Beverages pays \$3M in racial bias case*, USA TODAY (Jan. 11, 2012, 3:19 PM),

<http://usatoday30.usatoday.com/money/industries/food/story/2012-01-11/pepsi-racial-bias-case/52498132/1> (reporting Pepsi's settlement on plaintiffs' class action alleging disparate impacts from Pepsi's criminal background checks).

211. 2012 EEOC Guidelines, *supra* note 5, at 13.

212. *See, e.g.*, Jason Meisner, *Dad who posted Facebook picture of girl bound, gagged is found guilty*, CHI. TRIB. (Nov. 9, 2012), <http://www.chicagotribune.com/news/local/ct-met-facebook-domestic-abuse-20121109,0,2344445.story> (reporting on defendant's attorney's comments to the press asking "[d]o you know what it's like to be a black man in America with a felony in your background? Who's going to hire him?").

V. CONCLUSION

The EEOC would prefer employers not ask about convictions,²¹³ but as the Guidelines now stand, the *Green* analysis may still permit such questions without individualized assessments.²¹⁴ By providing employers with refined guidelines,²¹⁵ the EEOC will reconcile the employer and applicant.²¹⁶

213. See, 2012 EEOC Guidelines, *supra* note 5, at 13-14 (recommending that, as a best practice, employers “Ban the Box”).

214. See *supra* Part IV.A (examining the *Green*-Factor business necessity as it applies to conviction questions).

215. See *supra* Parts IV.A-C (proposing possible ways in which *Green* may be refined on the issue of application questions).

216. See *supra* Part IV.C (illustrating the adverse interests between an employer and an ex-offender in the hiring process).

