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Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records

Alexandra Harwin

INTRODUCTION

For job applicants, questions about criminal history are ubiquitous. Nearly three quarters of employment applications inquire into an applicant's criminal background,¹ and nearly half of employers routinely follow up with background checks.² Criminal convictions of whatever kind and whatever vintage³ serve as an automatic bar to employment in professions as diverse as barbering, plumbing, bartending, and ambulance driving.⁴ Moreover, a criminal history often serves as an effective bar to employment in jobs that are ostensibly open to individuals with criminal records. With more than sixty percent of employers refusing to hire ex-offenders,⁵ “[m]any ex-offenders

1. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955 fig.4 (2003); J. Craig Wallace, Mary G. Tye & Stephen J. Vodanovich, *Applying for Jobs Online: Examining the Legality of Internet-Based Application Forms*, 29 PUB. PERSONNEL MGMT. 497, 500 tbl.2 (2000).

2. Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, U. CHI. LEGAL F. 381, 392 (2009) (also noting that an additional twenty percent of employers sometimes run background checks).

3. These policies persist even though individuals who committed crimes long ago are no more likely than their counterparts in the population at large to offend. Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007) (people with criminal records who desist from crime for seven years have a risk of offending similar to people without criminal records); *but see* Patrick A. Langan & David J. Levin, Dep't of Justice, Bureau of Justice Statistics Special Report, *Recidivism of Prisoners Released in 1994* (2002) (finding that 67.5% of prisoners released in 1994 were rearrested within three years).

4. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 192 (1995).

5. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Patillo, David Weiman & Bruce Western eds., 2004); *see also* JENNIFER FAHEY, CHERYL ROBERTS & LEN ENGEL, CRIME AND JUSTICE INSTITUTE, *EMPLOYMENT OF EX-OFFENDERS: EMPLOYER PERSPECTIVES* (2006); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say*

report that they are treated in effect, as a criminal ‘class’ in the labor market, with little or no allowance being made for the wide range of circumstances that resulted in their incarceration, or for the equally wide range of motivations, skills and aptitudes within this heterogeneous population.”⁶ As economist Harry Holzer explains,

[E]mployers might be unwilling to hire those with criminal records for many reasons – such as the risk of legal liability if a previous offender harms a customer or coworker, the risk of financial liability if the offender engages in theft, fears of personal violence, and the negative signals that a period of incarceration sends about their general skills or trustworthiness.⁷

That stigma – what sociologist Devah Pager calls the “mark of a criminal record”⁸ – substantially depresses the already weak employment and earning prospects of criminal offenders. These individuals tend to have lower educational and cognitive skill levels, higher rates of substance abuse, more mental and physical health problems, and more limited work histories than their counterparts in the general population.⁹ These preexisting labor market liabilities are exacerbated if these offenders have been incarcerated.¹⁰ It is little wonder, then, that even before the current recession it was estimated that between twenty-five and forty percent of ex-offenders were unemployed.¹¹ Over time, the job prospects for criminal offenders are only expected to worsen as employers continue to gain easier and cheaper access to criminal records.¹²

Versus What They Do, 70 AM. SOC. R. 355 (2005) (finding employers who profess that they are willing to hire offenders actually are no more likely to do so).

6. Jamie Peck & Nik Theodore, *Carceral Chicago: Making the Ex-Offender Employability Crisis*, 32 INT’L J. URBAN & REGIONAL RESEARCH 251, 264 (2008).

7. Harry J. Holzer, *Collateral Costs: The Effects of Incarceration on the Employment and Earnings of Young Workers* (IZA Discussion Paper No. 3118, Oct. 2007).

8. See Pager, *supra* note 1.

9. Richard Freeman, *Can We Close the Revolving Door? Recidivism vs. Employment of Ex-Offenders in the United States*, 19 tbl.5 (Urban Institute Reentry Roundtable Discussion Paper 2003), available at http://www.urban.org/uploadedpdf/410857_freeman.pdf; Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q. J. ECON. 51 (1995); Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Employment Barriers Facing Ex-Offenders*, 4-6 (Urban Institute Reentry Roundtable Discussion Paper 2003), available at http://www.urban.org/uploadedPDF/410855_holzer.pdf.

10. Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. R. 863 (2006); Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410 (2001).

11. PETER FINN, U.S. DEP’T OF JUSTICE, *SUCCESSFUL JOB PLACEMENT FOR EX-OFFENDERS: THE CENTER FOR EMPLOYMENT OPPORTUNITIES* 4 (1998); JEREMY TRAVIS ET AL., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* 31-32 (2001).

12. Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders*, in *STUDIES OF LABOR MARKET INTERMEDIATION* (David H. Autor, ed. 2009) (finding that online access to state criminal history records reduced the employment of ex-offenders but did not improve employment outcomes for non-offenders); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11

These employment disadvantages disproportionately affect black and Hispanic men, who are arrested, convicted, and incarcerated at far higher rates than white men.¹³ Blacks and Hispanics are also implicated in violent crimes at substantially higher rates than whites,¹⁴ offenses that are especially damaging for employment prospects; over ninety percent of employers turn away applicants who report a history of violent crime.¹⁵ While employers persist in treating criminal records as indications of serious deviance, spells of incarceration are becoming common experiences for minority men without college educations.¹⁶ All in all, a staggering one in three black men and one in six Hispanic men are projected to be incarcerated during their lifetimes,¹⁷ and the number of minority men who experience arrest or conviction – the typical subjects of employer inquiry – will be much higher. Such interactions with the criminal justice system make the already bleak employment opportunities for black and Hispanic men¹⁸ that much worse.

The staggering racial impact of policies that disadvantage or disqualify

N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008).

13. See Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131 (2007); Casey T. Harris et al., *Are Blacks and Hispanics Disproportionately Incarcerated Relative to Their Arrests? Racial and Ethnic Disproportionality Between Arrest and Incarceration*, 1 RACE & SOC. PROBS. 187 (2009); Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261 (2007); Darrell Steffensmeier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 J. QUANTITATIVE CRIMINOLOGY 241 (2006).

14. See, e.g., Joanne M. Kaufman, *Explaining the Race/Ethnicity-Violence Relationship: Neighborhood Context and Social Psychological Processes*, 22 JUST. Q. 224 (2005); Gary LaFree, Eric P. Baumer & Robert O'Brien, *Still Separate and Unequal? A City-Level Analysis of the Black-White Gap in Homicide Arrests Since 1960*, 75 AM. SOC. R. 75 (2010).

15. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 128 fig.4.3 (Shawn Bushway, Michael A. Stoll & David F. Weiman, eds. 2007) (9.2% of employers are willing to hire individuals charged with violent offenses, versus 45.8% willing to hire those with drug offenses).

16. Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. R. 151 (2004) (estimating that approximately thirty percent of black men without a college education and sixty percent of black men who dropped out of high school are incarcerated at some point during their lifetime, establishing incarceration as "a normal stopping point on the route to midlife" more common among black men than receiving a college education or engaging in military service).

17. Thomas Bonczar, Dep't of Justice, Bureau of Justice Statistics Special Report, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

18. See, e.g., Bureau of Labor Statistics tbl.A-2 (providing statistics on participation in the labor force by race, age, and sex).

applicants with criminal records have prompted efforts to use Title VII, the federal statute that prohibits employment discrimination based on race, sex, color, national origin, and religion, to advance the employment interests of racial minorities who have been arrested, convicted, or incarcerated. Title VII targets two different types of discrimination: “disparate treatment” – employment decisions that are motivated in whole or in part by prohibited considerations such as race and sex – and “disparate impact” – ostensibly neutral employment decisions that disproportionately harm members of protected class.

While Title VII does not prohibit discrimination on the basis of criminal history per se,¹⁹ those who have been passed over for jobs, or fired from them because of their arrest or conviction records, have attempted to pursue their discrimination claims indirectly by alleging a racially disparate impact.²⁰ In those disparate impact claims, unsuccessful job candidates have argued that facially neutral inquiries about criminal records disproportionately disadvantage black and Hispanic job applicants, while employers have defended such questions as job-related and justified by business necessity.

This Essay explores the history and prospects of using Title VII to protect minority men from employment discrimination based on prior arrests, convictions, or incarcerations. Part I discusses early Title VII cases challenging employment decisions based on criminal history, finding that in the 1970s and early 1980s federal district courts and the Equal Employment Opportunity Commission (“the EEOC”) were amenable to disparate impact cases challenging blanket exclusions of job applicants with criminal, especially arrest, records. Part II demonstrates, however, that since the late 1980s the federal courts have proved markedly less receptive, rejecting virtually every disparate impact challenge brought by job candidates with criminal histories. Part III argues that this focus on disparate impact, a claim that rarely succeeds in courts today, is misdirected. In light of social science research showing that perceptions of crime are inevitably shaped by racial considerations, the time is ripe for a new wave of mixed motives cases to challenge employment decisions that take criminal history into account.

I. THE GOLDEN AGE: DISPARATE IMPACT IN THE 1970S AND EARLY 1980S

While in the 1970s and early 1980s Title VII suits involving employers’ consideration of arrest and conviction records had only mixed results overall, those cases that challenged the disparate impact of automatic and absolute bans

19. Title VII only covers discrimination “because of [an] individual’s race, color, religion, sex, or national origin.” Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000).

20. For Title VII purposes, the term “race” includes Hispanic ethnicity. *See, e.g., Rasco v. Potter*, 265 Fed. Appx. 279 (5th Cir. 2008); *Beauchat v. Mineta*, 257 Fed. Appx. 463 (2d Cir. 2007); *Almazan v. Pepperidge Farms, Inc.*, 210 Fed. Appx. 511 (7th Cir. 2006).

to employment based on criminal records enjoyed considerable success.

A. The Federal Courts

Title VII disparate impact suits generally proceed in three stages. First, the plaintiff can make a prima facie case of disparate impact by showing that an employment practice has an adverse impact on members of a protected group, usually through the use of statistical evidence. Second, the employer can rebut the prima facie case by showing that the challenged practice is job-related for the position in question and consistent with business necessity. Third, plaintiff can attempt to show that the employer's justification is pretextual.²¹

Today only one quarter to one third of disparate impact cases succeed in district courts,²² but in the 1970s and early 1980s disparate impact claims were among the most successful Title VII suits brought by ex-offenders.²³ Many of these early disparate impact claims succeeded because the discrimination alleged was overt. Moreover, federal courts often enabled plaintiffs to establish prima facie cases without extensive statistical evidence, and judges looked skeptically upon employer defenses.

1. Statistical Evidence

The level of statistical proof required to establish disparate impact was still in flux during the 1970s and early 1980s.²⁴ While no court would find disparate impact without any statistical support whatsoever,²⁵ even quite general evidence on racial stratification in the criminal justice system was often sufficient to establish that policies automatically disqualifying ex-offenders were racially discriminatory. The district court in *Gregory v. Litton Systems, Inc.*, for example, was convinced that termination based on an arrest record had

21. See William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 530-31 (2007).

22. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 739 tbl.B (2006). See also Gordon, *supra* note 21, at 550 ("It has become progressively more difficult for plaintiffs to establish a prima facie case of disparate impact; it has become easier for defendants to demonstrate the business necessity and job relatedness of their employment policies; and it has seemingly become easier for the same defendants to avoid a finding of pretext in the third stage of the disparate impact analysis.").

23. See, e.g., *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (invalidating a policy of refusing to consider applicants convicted of crimes besides minor traffic offenses); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952 (D.D.C. 1980) (invalidating the use of arrest records as "knock-out" criteria).

24. On changing standards of proof under the disparate impact theory, see Gordon, *supra* note 21.

25. See, e.g., *Osborne v. Cleland*, 620 F.2d 195 (8th Cir. 1980); *Jimerson v. Kisco Co.*, 542 F.2d 1008, 1010 (8th Cir. 1976) (*per curiam*); *Craig v. Dep't of Health, Educ. & Welfare*, 508 F. Supp. 1055 (W.D. Mo. 1981); *Rose v. E. Neb. Human Serv. Agency*, 510 F. Supp. 1343 (D. Neb. 1981).

a disparate impact on black applicants, even though the plaintiff provided only general data on national arrest rates: “Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing.”²⁶ Likewise, the court in *Green v. Missouri Pacific Railroad Co.* accepted national data on black and white conviction rates, in addition to looking at the company’s applicant flow data – which show differences in the selection rates of candidates who actually applied for jobs with the employer.²⁷

Some courts during this period, however, required more refined statistical evidence, resulting in considerably less favorable outcomes for plaintiffs. National data on arrests and convictions were held woefully lacking in *Hill v. United States Postal Service*, in which the court found that the plaintiff’s failure to produce applicant flow data – statistics comparing the racial composition of the employer’s employees to its applicants – was fatal to his claim that the Postal Service’s refusal to hire people with criminal convictions disparately impacted minority applicants.²⁸ *Powell v. National Distillers Products Co.*²⁹ explained the objection: “The biggest problem surrounding the use of statistics is that the wrong group, or ‘universe,’ may be selected for comparison. If the universe selected is overly inclusive, the comparison cannot reflect the actual impact of a defendant’s actions.”³⁰ Yet, even courts that relied on narrower statistical measures recognized that applicant flow data failed to capture the many individuals who had been dissuaded from applying for jobs in the first place because of inquiries into criminal records. As the court in *Reynolds v. Sheet Metal Workers Local 102* asserted, “This court must conclude that arrest records played a role in the selection process, as a factor in chilling potential applicants and as an element affecting an applicant’s evaluation.”³¹

2. Standards of Job-Relatedness and Business Necessity

Another factor contributing to the relative success of early disparate impact claims was that federal courts in the early 1970s and 1980s required a rather close match between policies disadvantaging or disqualifying people with criminal records and employers’ claims of job relatedness and business necessity. The court in *Richardson v. Hotel Corporation of America* concluded that convictions for theft and receipt of stolen goods were sufficiently job-

26. *Gregory v. Litton Sys., Inc.*, 316 F.Supp. 401, 403 (C.D. Cal. 1970), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

27. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1293-95 (8th Cir. 1975).

28. *Hill v. United States Postal Serv.*, 522 F. Supp. 1283 (S.D.N.Y. 1981).

29. *Powell v. Nat’l Distillers Prod. Co.*, 1980 WL 84 (S.D. Ohio 1980).

30. *Id.* at *13.

31. *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 973 (D.D.C. 1980) (emphasis added); see also Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV 1073 (1992).

related to justify terminating a bellman only after closely scrutinizing whether the position actually provided access to valuables, instead of merely accepting defendant's claim that the position was "security sensitive."³² Likewise, in *Craig v. Department of Health, Education, and Welfare*, the court identified a close connection between the basis for the employee's termination, a felony conviction for possession of a stolen government check, and the requirements of a mail room job, which, among other responsibilities, involved the handling of government checks.³³ Employers who failed to provide such concrete justifications were treated skeptically. *Green v. Missouri Pacific Railroad Co.* held that to establish business necessity for a policy disqualifying all job applicants with criminal records, the company would have to go beyond the generic justifications it had provided and present empirical validation to substantiate its claims.³⁴ Even though disparate impact suits require no proof of discriminatory intent, such skepticism about employer defenses seemed to have been prompted by awareness among the judges that racial prejudice was widespread. The court in *Green*, for example, explicitly acknowledged the history of discrimination against blacks:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. *This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society.* To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.³⁵

But courts still deferred to employers when the circumstances of the termination or refusal to hire implicated some wrongdoing by the plaintiff besides the actions that had resulted in his criminal record. In a large number of cases, termination or refusal to hire was held to be nondiscriminatory because it was based ostensibly not on the plaintiff's criminal history itself but rather on his false denial of having a criminal record on his employment application.³⁶ Some plaintiffs, in turn, attempted to challenge employer policies of discharging employees for falsifying applications, arguing that such terminations themselves had a disparate impact on black applicants with criminal records. These claims invariably failed, however, without any data to

32. *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972).

33. *Craig v. Dep't of Health, Educ. & Welfare*, 508 F. Supp. 1055, 1057 (W.D. Mo. 1981).

34. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

35. *Id.* (emphasis added).

36. *See, e.g., Merriweather v. Am. Cast Iron Pipe Co.*, 362 F. Supp. 670, 672 (N.D. Ala. 1973).

establish that any such impact existed.³⁷

3. Arrest Records Versus Conviction Records

It was a mixed blessing for plaintiffs that courts during this period tended to carefully distinguish between arrest records and conviction records. Courts were highly skeptical of policies predicated on arrest records, including one that held against an employer who refused to hire an applicant who had been arrested fourteen times.³⁸ But courts issued considerably less favorable rulings in challenges to employers' use of conviction records, upholding such decisions more often than not. Moreover, many of the best rulings for plaintiffs in the 1970s and early 1980s explicitly limited their holdings to situations in which employers based their decisions on arrests that had not resulted in convictions. In *Reynolds v. Sheet Metal Workers Local 102*, the court explicitly recognized the legitimacy of employer concerns about convicted offenders: "Arrest inquiries are to be distinguished from inquiries concerning convictions. Use of the latter reflects *recognizable employer concerns* not now before this court."³⁹ The court in *Gregory v. Litton Systems, Inc.*, made even clearer that its ruling was limited to policies concerning arrest records: "Nothing contained in the injunction shall prohibit the Defendant from seeking, ascertaining, considering, or using information concerning criminal convictions of applicants or existing employees."⁴⁰ Needless to say, such circumscribed rulings did little to advance the employment interests of convicted offenders.

B. The Equal Employment Opportunity Commission

Insofar as these early cases succeeded, they no doubt benefited from the support of the Equal Employment Opportunity Commission, the federal agency charged with enforcing the dictates of Title VII. The EEOC was involved in a number of cases in the 1970s contesting employers' use of arrest and conviction records, litigating itself some of the most influential cases of the period.⁴¹ In the 1980s, the EEOC drew on the early disparate impact jurisprudence favorable to plaintiffs in formulating its own positions regarding employers' consideration of arrest and conviction records, appropriate

37. *Jimerson v. Kisco Co.*, 542 F.2d 1008, 1010 (8th Cir. 1976) (*per curiam*); *King v. Girard Bank*, 1978 WL 79 (E.D.Pa. 1978); *Osborne v. Cleland*, 620 F.2d 195 (8th Cir. 1980).

38. *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972).

39. *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 973 n.19 (D.C.D.C. 1980) (emphasis added).

40. *Gregory v. Litton Sys., Inc.*, 316 F.Supp. 401, 404 (C.D. Cal. 1970).

41. See, e.g., *EEOC v. Guar. Sav. & Loan Ass'n*, 561 F.2d 1135 (5th Cir. 1977); *EEOC v. Louisville & N. R. Co.*, 505 F.2d 610 (5th Cir. 1974); *EEOC v. Riss Int'l Corp.*, 525 F. Supp. 1094 (W.D. Mo. 1981); *E.E.O.C. v. Local 638*, 401 F. Supp. 467, 482 (S.D.N.Y. 1975); *E.E.O.C. v. Humko Prod.*, 1973 WL 267 (W.D. Tenn. 1973). The EEOC lacked litigation authority prior to the Equal Employment Opportunity Act of 1972.

responses to application falsification,⁴² and the types of statistical proof required to demonstrate disparate impact.⁴³ In various enforcement guidelines, policy interpretations, and compliance manuals, the agency articulated its position that black and Hispanic job applicants are disparately impacted by the consideration of arrest and conviction records and demanded that employers not disqualify individuals unless their criminal histories were closely related to the jobs they sought or held.

The EEOC recognized the disparate impact of these policies as a matter of policy, without requiring jobs applicants to produce their own statistical proof. “[T]he Commission’s underlying position [is] that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”⁴⁴ The policy relieved plaintiffs of the burden – both legal and financial – of developing statistical proof of disparate impact, instead leaving it “open to the respondent/employer to present more narrow local, regional, or applicant flow data, showing that the policy probably will not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool.”⁴⁵ Offenders who subsequently initiated EEOC proceedings, like plaintiffs in the federal cases reviewed above, tended to lose more cases than they won,⁴⁶ but the rebuttable presumption of disparate impact eliminated a major financial obstacle to pursuing litigation in the first place.

Consistent with its analysis of the racial impact of hiring policies disfavoring offenders, the EEOC adopted a categorical rule that it is unlawful, without business necessity, to disqualify job candidates based on criminal records.⁴⁷ It demanded that employers consider applicants individually and

42. The EEOC, like many early courts, considers the falsification of application information a legitimate, nondiscriminatory reason for discharge or refusal to hire. *See, e.g., Capers v. Potter*, EEOC App. No. 01A02696 (Aug. 29, 2002); *Desvignes v. Henderson*, EEOC App. No. 01A02743 (July 28, 2000); *Mitchell v. Dalton*, EEOC App. No. 01960267 (March 4, 1998); *Lozano v. Reno*, EEOC App. No. 06960063 (Aug. 25, 1995).

43. *See, e.g., Matthews v. Runyon*, EEOC App. No. 01920662 (Aug. 4, 1992) (citing *Green v. Missouri Pacific Railroad* and *Reynolds v. Sheet Metal Workers Local 102*); *Perkins v. Frank*, EEOC App. No. 01890895 (June 1, 1990) (same); *Wright v. United States Postal Service*, EEOC App. No. 01860893 (Aug. 6, 1987) (citing *Gregory v. Litton Systems, Inc.*).

44. EEOC, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982) (Feb. 4, 1987).

45. EEOC, Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987).

46. This is consistent with Michael Selmi’s finding that only fifteen percent of cases filed with the EEOC result in some grant of relief. Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 13 (1996).

47. *See* EEOC, *supra* note 45.

provided specific guidelines to assess the propriety of using conviction and arrest records. The EEOC abandoned the somewhat lax approach federal courts had taken to conviction records, instead requiring employers to undertake a two-step inquiry: first to determine whether the conviction was job-related; and second to determine whether the conviction would affect the candidate's ability to safely perform the job, considering the number of offenses and circumstances of each, the time since conviction, the individual's employment history, and any efforts at rehabilitation.⁴⁸ The agency simplified the test in 1985, requiring employers to engage in a holistic inquiry about the nature and gravity of the offense, the time since conviction or completion of the sentence, and the nature of the job.⁴⁹ The revision had the potential to expand employers' use of criminal records, since it eliminated the threshold requirement of job-relatedness. But in its own adjudicative procedures the EEOC rigorously applied these tests, for example using the requirement of job-relatedness to prevent employers from considering a conviction for possession of an unregistered firearm when hiring a factory worker,⁵⁰ a hit and run conviction when hiring a kitchen worker,⁵¹ and a murder conviction when hiring a crane operator.⁵² For arrest records, the EEOC required even more. The agency called on employers to also assess the likelihood that a candidate had actually committed the crime for which he had been arrested, by "examin[ing] the surrounding circumstances, offer[ing] the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, mak[ing] the follow-up inquiries necessary to evaluate his/her credibility."⁵³

The EEOC thus adopted policies favorable to plaintiffs, but still the agency's influence outside its own adjudicative proceedings was limited. The federal courts have the final word in interpreting the meaning of Title VII,⁵⁴ and courts defer to the EEOC's decisions only insofar as they are persuasive.⁵⁵

48. *Id.*

49. *Id.*

50. EEOC Dec. No. 80-10 (Aug. 1, 1980).

51. EEOC Dec. No. 79-61 (May 8, 1979) (complainants' other convictions, however, were found to be sufficiently job-related to justify the failure to hire).

52. EEOC Dec. No. 80-17 (Aug. 12, 1980). For more recent examples, see *Beaton v. Dep't of Justice*, EEOC App. No. 01996580 (Sept. 10, 2002); *Rodriguez v. Halter*, EEOC Appeal No. 01983135 (Apr. 13, 2001).

53. EEOC, 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. § 2000e *et seq.* (1982) (Sept. 7, 1990).

54. This delegation of substantive rulemaking to the courts rather than the EEOC was intentional. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010). *But see* Rebecca Hanner White, *EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (arguing that there was an implied delegation of substantive rule-making authority to the EEOC).

55. *Gilbert v. General Electric Co.*, 429 U.S. 125, 140-42 (1976) ("[C]ourts properly may accord less weight to such guidelines than to administrative regulations which Congress has

As the Supreme Court explained in *Gilbert v. General Electric Co.*, “The weight [accorded to the EEOC’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁵⁶ The EEOC’s position on disparate impact has been remarkably consistent over the past three decades, but, as we shall see, federal courts since the late 1980s have not been persuaded of the thoroughness or validity of its “more expansive, employee-friendly reading” of Title VII.⁵⁷

II. THE NADIR: DISPARATE IMPACT FROM THE LATE 1980S TO THE PRESENT

Since the late 1980s, judgments have been almost uniformly grim for plaintiffs alleging that the consideration of criminal records disparately impacts black or Hispanic job applicants.⁵⁸ Plaintiffs lost almost every case identified during this period, with judges frequently awarding summary judgment for employers.⁵⁹

In part, the high loss rate reflected the fact that over fifty percent of the cases were brought pro se.⁶⁰ Many pro se plaintiffs floundered because of

declared shall have the force of law . . . or to regulations which under the enabling statute may themselves supply the basis for imposition of liability . . .”).

56. *Id.* at 142 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). See also *United States v. Mead Corp.*, 533 U.S. 218 (2001).

57. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1959 (2006).

58. Most plaintiffs were male, but few male plaintiffs claimed discrimination based on both race and sex. *But see Black v. Safer Found.*, 2003 WL 21823483 (N.D. Ill. Aug. 6, 2003) (separate claims of race and sex discrimination); *Lee v. City of Chicago*, 202 F.3d 274 (7th Cir. 1999) (intersectional claim of race plus sex discrimination). The only court to give any attention to an intersectional claim for black males summarily rejected it. See *Taylor v. Procter & Gamble Dover Wipes*, 184 F.Supp.2d 402 (D. Del. 2002).

59. To the extent that any plaintiffs could claim victory, it was only for surviving a motion for summary judgment. See, e.g., *Caston v. Methodist Med. Ctr. of Ill.*, 215 F.Supp.2d 1002 (C.D. Ill. 2002); *McCraven v. City of Chicago*, 18 F. Supp. 2d 877 (N.D. Ill. 1998); *Brown v. City of New York*, 869 F.Supp. 158 (S.D.N.Y. 1994). In no cases identified did a plaintiff win after a trial on the merits.

60. See, e.g., *Ramos v. Equiserve, Inc.*, 146 Fed. Appx. 565 (3d Cir. 2005); *Johnson v. Port Auth. of N.Y. and N.J.*, 2009 WL 2227921 (E.D.N.Y. July 24, 2009); *Gillum v. Nassau Downs Reg’l Off Track Betting Corp. of Nassau*, 357 F.Supp.2d 564 (E.D.N.Y. 2005); *Porter v. Dep’t of Corr.*, 1988 WL 156344 (W.D. Mich. Sept. 7, 1998); *Morke v. Archer Daniels Midland Co.*, 2010 WL 1526531 (W.D. Wis. Apr. 15, 2010); *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt LLP*, 537 F. Supp. 2d 1028 (W.D. Mo. 2008). In not one case did a pro se litigant survive a motion to dismiss or for summary judgment; procedural defects were generally to blame. See generally Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 *NOTRE DAME L. REV.* 889 (2006) (finding racial distinction cases brought pro se lose at statistically significantly higher rates); Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 *HASTINGS L. J.* 821 (1997) (plaintiffs lose

procedural defects,⁶¹ while others failed to properly identify their theory of discrimination – disparate impact or disparate treatment. Many plaintiffs who intuited disparate impact saw their Title VII suits thrown out because they failed to explicitly link employers’ use of arrest records or criminal records to their race.⁶² Over and over again, plaintiffs who alleged that they had been discriminated against under Title VII because they had a criminal record were told by judges in some form or another, “Plaintiff’s status as a convicted felon is not a protected class under Title VII.”⁶³

But even in cases where plaintiffs properly alleged disparate impact, their claims faced hostility from the bench, even where disparate impact was properly alleged. The overwhelmingly unfavorable outcomes that plaintiffs experienced to some extent reflected increasing judicial skepticism towards employment discrimination cases in general and disparate impact suits in particular. Recent studies indicate that plaintiffs win less than one fifth of employment discrimination cases tried before a judge,⁶⁴ and most cases that are appealed are ultimately affirmed.⁶⁵ Michael Selmi captured the approach that the federal courts have taken to disparate impact cases from the late 1980s through the present: “[I]t seems that the general consensus today is that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence.”⁶⁶

But this general skepticism towards racial discrimination claims cannot account fully for the near-zero win rates for plaintiffs contesting the consideration of criminal records. Judicial opinions expressed a particular distaste for plaintiffs with criminal records. A Florida court captured the zeitgeist when it dismissed the very notion of a disparate impact claim brought by individuals with criminal records: “Can an employer refuse to hire persons

over seventy-five percent of non-prisoner pro se civil suits).

61. See, e.g., *Sales v. New York City Transit Auth.*, 2010 WL 87758 (S.D.N.Y. Jan. 7, 2010) (failure to exhaust administrative remedies); *Irwin v. Miami-Dade County Pub. Sch.*, 2009 WL 497648 (S.D. Fla. Feb. 25, 2009) (failure to secure EEOC right to sue letter); *Rucker v. Time Warner Cable*, 2008 WL 5245972 (E.D. Wis. Dec. 15, 2008) (failure to exhaust administrative remedies); *Smith v. Waukegan Sch. Dist. No. 60*, 2005 WL 425483, (N.D. Ill. Feb. 17, 2005) (untimely).

62. See, e.g., *Porter v. Dep’t of Corr.*, 1988 WL 156344 (W.D. Mich. Sept. 7, 1998); *Morke v. Archer Daniels Midland Co.*, 2010 WL 1526531 (W.D. Wis. Apr. 15, 2010); *Hammonds v. Ill. Dep’t of Labor*, 1989 WL 152970 (N.D. Ill. Nov. 17, 1989); *Parks v. NYC Dep’t of Corr.*, 253 Fed. Appx. 141 (2d. Cir. 2007); *Mooney v. Mid S. Health Sys.*, 2008 WL 276291 (E.D. Ark. Jan. 30, 2008).

63. *Gillum v. Nassau Downs Reg’l Off Track Betting Corp. of Nassau*, 357 F.Supp.2d 564, 569 (E.D.N.Y. 2005).

64. Michael Selmi, *Why Employment Discrimination Cases Are So Hard To Win*, 61 LA. L. REV. 555, 560 tbl.2 (2001).

65. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL’Y REV. 103, 105-06 (2009).

66. Selmi, *supra* note 64, at 563.

convicted of a felony even though it has a disparate impact on minority members? This court's answer is a firm 'Yes.' To hold otherwise is to stigmatize minorities by saying, in effect, your group is not as honest as other groups."⁶⁷ Any disparate impact was entirely the fault of job applicants with criminal records; in no way were the employers who refused them to blame. "If Hispanics do not wish to be discriminated against because they have been convicted of theft," the court advised, "then they should stop stealing."⁶⁸ Courts from the late 1980s and onward routinely acted on such attitudes, we shall see, taking employer defenses at face value while carefully scrutinizing plaintiffs' evidence of disparate impact.

A. Deferring to Employers

Since the 1980s, federal courts have held employers who disqualify job applicants with criminal records to radically relaxed standards for business necessity and job-relatedness. The court in *EEOC v. Carolina Freight Carriers Corp.*, exemplifies this relaxed standard, holding: "It is not required that Carolina Freight's conviction policy be 'essential' or 'indispensable' to its business needs."⁶⁹ The court in *Tye v. City of Cincinnati* lowered the requirements of the job relatedness justification even further by invoking amorphous public safety concerns:

We refuse to hold the City to a higher standard than we would any other employer. In fact, a public employer hiring a firefighter is held to a lighter burden in demonstrating that its employment criteria is [sic] job-related, because of the potential risk to public safety of hiring incompetent firefighters.⁷⁰

Employer interests as attenuated as "minimizing the *perceived risk* of employee dishonesty" justified a policy of disqualifying all job candidates with felony convictions in *Williams v. Carson Pirie Scott*,⁷¹ and a law firm's concerns about "employee morale" warranted the termination of an employee with a thirty-year old rape conviction in *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt LLP*.⁷²

Far from requiring the kind of empirical justification that some earlier courts had demanded, judges since the late 1980s have taken employers at their word regarding their "potential" or "perceived" needs. One court expressly disavowed any scrutiny, claiming, "It really requires nothing more than the

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

68. *Id.*

69. *Id.*

70. *Tye v. City of Cincinnati*, 794 F.Supp. 824, 833 (S.D. Ohio 1992).

71. *Williams v. Carson Pirie Scott*, 1992 WL 229849, at *2 (N.D. Ill. Sept. 9, 1992).

72. *Fletcher v. Berkowitz*, 537 F. Supp. 2d 1028, 1028 (W.D. Missouri 2008).

statement of [employer's] policy to explain its business justification."⁷³ Other courts simply assumed that criminal records, even those incurred many decades prior, were relevant, as when the judge in *Strickland v. County of Monroe*⁷⁴ considered a twenty-five-year-old assault plea "ample justification for refusing to hire a probation officer." Likewise, the court in *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt LLP* intuited, "whether or not it would be good public policy to encourage the employment of serious sex offenders after decades of presumably good behavior, I am satisfied there is adequate business necessity for an employer to decline to employ such an individual or to terminate him after information is received..."⁷⁵ The courts were especially deferential to employers claiming some risk to public safety, however minimal or undefined. In *El v. Southeastern Pennsylvania Transit Authority*,⁷⁶ the court upheld a bus driver's termination for a forty-seven-year-old homicide, figuring that "a reasonable juror would necessarily find that [the] policy is consistent with business necessity"⁷⁷ since "former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act."⁷⁸ And in *Clinkscale v. City of Philadelphia*, the court upheld a policy disqualifying applicants based on arrests not resulting in convictions because of "serious public safety concerns,"⁷⁹ which the defendant was never required to detail.

Whereas courts in the 1970s and early 1980s had carefully distinguished between arrests and convictions, later courts, like the one in *Clinkscale*, had no qualms about upholding employer policies that disqualified applicants or employees based on arrests that had never resulted in convictions. In *Ramos v. Equiserve, Inc.*, a case alleging disparate treatment in addition to disparate impact, the Third Circuit, in a stark divergence from EEOC policy, suggested that the weight an employer placed on an employee's arrest record was beyond the reach of Title VII. "[Employer] may have acted unfairly in rushing to judgment when it construed [plaintiff's] arrest record as a record of convictions, but Title VII does not prohibit unfairness or wrongheaded decisions in the workplace."⁸⁰ In sum, however sweeping the exclusions and however attenuated the rationales, employers' justifications for and methods of

73. *Williams v. Carson Pirie Scott*, 1992 WL 229849 at *2 (ND. Ill. Sept. 9, 1992).

74. *Strickland v. County of Monroe*, 2005 WL 1522802, at *4 (W.D.N.Y. June 28, 2005) (emphasis added).

75. *Fletcher v. Berkowitz*, 537 F. Supp. 2d 1028, 1031 (W.D. Missouri 2008) (emphasis added).

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

77. *Id.* at 247.

78. *Id.* at 246. The court's holding that it was "consistent with business necessity" to disqualify candidates who are "at least slightly" more likely to commit a crime than the general population was at odds with its prior acknowledgement of the frailties of "more is better" reasoning. *See id.* at 241.

79. *Clinkscale v. City of Philadelphia*, 1998 WL 372138, at *2 (E.D. Pa. June 16, 1998).

80. *Ramos v. Equiserve, Inc.*, 146 Fed. Appx. 565, 569 (3d Cir. 2005).

restricting the employment of individuals with criminal records faced minimal scrutiny.

B. Scrutinizing Evidence of Impact

While federal courts were lowering the standards for employers, they were elevating the standards of proof required for plaintiffs to establish disparate impact, effectively barring plaintiffs unable to afford expert statisticians from pursuing disparate impact claims. Since the late 1980s, federal courts have ceased to accept general population statistics on arrests or convictions as evidence of disparate impact.⁸¹

Instead, plaintiffs were expected to produce data that were simultaneously specific and comprehensive – incomplete data sets would not suffice. In *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt LLP*,⁸² for example, the court found that the plaintiff failed to make a prima facie case of disparate impact because his statistics concerned general felony rates and not just the specific felony for which he was convicted. Courts also sought more refined statistics on the population qualified to perform and actually seeking the job at issue; plaintiffs lost their disparate impact challenges in *Matthews v. Runyon*⁸³ and *Black v. Safer Foundation*⁸⁴ because they presented no statistics indicating that fewer blacks were hired than were qualified. In *Foxworth v. Pennsylvania State Police*,⁸⁵ the plaintiff presented statistics on percentages of blacks among civilian and trooper employees and on incumbency versus availability percentages, but the court found fault with the data because they were not limited to the cadet position the plaintiff sought. The court left unaddressed the possibility that applicant flow data cannot capture the full impact of policies that discouraged individuals from applying in the first place.

III. A WAY FORWARD: MIXED MOTIVES CLAIMS

From the foregoing it is clear that in recent decades, Title VII's disparate impact theory has provided little relief for the minorities whose arrest or conviction records have dimmed their employment prospects. Yet scant attention has been paid to Title VII's other theory of discrimination, disparate treatment, which imposes liability when an employer would have made a different decision had the individual not been a member of a protected class.⁸⁶

81. See, e.g., *McCraven v. City of Chicago*, 109 F.Supp.2d 935 (N.D. Ill. 2000).

82. *Fletcher v. Berkowitz*, 537 F. Supp. 2d 1028 (W.D. Missouri 2008).

83. *Matthews v. Runyon*, 860 F. Supp. 1347 (E.D. Wis. 1994).

84. *Black v. Safer Found.*, 2003 WL 21823483 (N.D. Ill. Aug. 6, 2003).

85. *Foxworth v. Pa. State Police*, 228 Fed. Appx. 151 (3d. Cir. 2007).

86. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

The EEOC's analysis of the prospects of using the disparate treatment theory has been limited to a brief and conclusory pronouncement in its compliance manual: "Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record."⁸⁷

Perhaps justifying that cursory assessment is the fact that the few litigants who have turned to disparate treatment thus far have not fared much better than those who have invoked disparate impact. Their claims have failed primarily because plaintiffs usually have been unable to avail themselves of a common way of proving disparate treatment: pointing to a similarly situated employee whom the employer treated differently.⁸⁸ In the cases surveyed, many black or Hispanic applicants simply could not identify whites with criminal records who had been treated more favorably.⁸⁹ But even when they could identify a white person with a criminal record who had been treated better, their claims faltered because courts distinguished the crimes involved. In *Silvera v. Orange County School Board*,⁹⁰ the court rejected a comparison between black and white men convicted of similar crimes because the black man also had several arrests. In *Oaks v. City of Philadelphia*,⁹¹ the court rejected a comparison between two police officers who both had domestic violence arrests because the injuries allegedly inflicted by the black officer were perceived as more severe. Likewise, in *Taylor v. Procter & Gamble Dover Wipes*,⁹² the court rejected a black man's comparison to various white employees because their conduct was deemed not of "comparable seriousness." In the few cases where comparisons were considered valid, courts often held that plaintiffs needed to identify more comparators. In *Foxworth v. Pennsylvania State Police*,⁹³ for example, the fact that a police department had hired one white cadet with a conviction but not a single black one, was held as insufficient evidence of pretext. So long as disparate treatment litigation for minorities with criminal records remains focused on comparators, it seems doomed to fail. Given that whites are arrested and convicted at much lower rates – and often for different types of crimes – the likelihood of finding a white comparator who works in the same company, for the same supervisor,⁹⁴ and was arrested for or convicted of the same or a

87. EEOC, COMPLIANCE MANUAL § 15.VI.B.2.

88. See Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002).

89. See, e.g., *White v. Florida Dep't of Highway Safety & Motor Vehicles*, 343 Fed.Appx. 532 (11th Cir. 2009).

90. *Silvera v. Orange County School Board*, 244 F.3d 1253 (11th Cir. 2001).

91. *Oaks v. City of Philadelphia*, 2002 WL 32373708 (E.D. Pa. 2002).

92. *Taylor v. Procter & Gamble Dover Wipes*, 184 F. Supp.2d 402 (D. Del. 2002).

93. *Foxworth v. Pennsylvania State Police*, 228 Fed. Appx. 151 (3d Cir. 2007).

94. See, e.g., *Burrell v. Bentsen*, 1993 WL 535076 at *7 (S.D.N.Y. Dec. 21, 1993) ("Employees are not 'similarly situated' merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance

substantially similar crime is, at best, slim.

I propose a better strategy – one centered on contemporary sociological, economic, and psychological scholarship.⁹⁵ The research considered below suggests that, at least in the United States, *whenever* a criminal record is contemplated, race is considered, at least unconsciously. While there are myriad reasons for an employer to refuse an employee with a criminal history,⁹⁶ those considerations invariably weigh more heavily on applicants of color. As Christine Jolls and Cass Sunstein put it, “an ‘honest’ concern about an employee may very often be both ‘honest’ and (unbeknownst to the decisionmaker) entirely a product of the employee’s status as an African-American worker.”⁹⁷ Procuring expert testimony on how implicit bias figures into employers’ consideration of minorities with criminal records could prove far more reliable than scouring employment records for suitable comparators to prove disparate treatment and far less expensive than collecting and tabulating the targeted data required to prove disparate impact. The following remarks sketch the sociological, economic, psychological, and historical expertise that could be deployed to promote the employment interests of black men with criminal records, who already initiate most of these suits and for whom the evidence of disparate treatment is strongest.

Studies of hiring practices conducted by economists and sociologists provide the necessary context to understand the racial dimensions of employment decisions based on criminal records. Even when resumes disclose no criminal record, blacks are already fifty percent less likely than whites to receive callbacks for jobs, according to economists Marianne Bertrand and Sendhil Mullainathan’s pioneering resume study.⁹⁸ Some experts argue that such

evaluation and discipline, and must have engaged in conduct similar to the plaintiff’s, without such differentiating or mitigating circumstances that would discipline their conduct or the appropriate discipline for it.”)

95. See David L. Faigman, Nilanjana Dasgupta, Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 *Hastings L.J.* 1389 (2008); Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context; Social Cognitive Science in Employment Discrimination*, 4 *ANN. REV. L. & SOC. SCI.* 123 (2008). There is evidence, however, that contemporary courts may be less swayed than their predecessors by legal scholarship. See Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 *OKLA. L. REV.* 659, 660 (1998) (finding that courts have declined in their use of legal scholarship by forty-seven percent over the previous two decades).

96. Concerns about negligent hiring or retention liability are among the reasons most frequently discussed. See, e.g., Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 *ST. THOMAS L. REV.* 183 (2008).

97. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *CAL. L. REV.* 969, 979 (2006) (citing Linda Hamilton Krieger & Susan Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 *CALIF. L. REV.* 997, 1036-38 (2006)).

98. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *AM. ECON. R.*

disparities reflect statistical discrimination against blacks – who average higher crime rates than other racial groups⁹⁹ – that would be alleviated once criminal records are taken into account. Audit studies designed by sociologist Devah Pager, however, demonstrate that when criminal records are disclosed, racial disparities in hiring actually worsen.¹⁰⁰ That’s because black men pay a much higher penalty for their criminal histories than white men do; one study found that black men who disclosed a narcotics conviction resulting in an eighteen month prison sentence saw their chances of receiving a callback drop – from already depressed levels – by as much as sixty percent, whereas white men who reported the same record had their chances of a callback decline by just half that amount.¹⁰¹ Testimony summarizing these findings – which any sociologist at a local college or university should be able to provide – could alert courts that even when crimes are identical, employers disqualify blacks far more readily than whites.

While no audit studies are available that examine employment outcomes when violent crimes are disclosed, historical and psychological evidence provides reason to believe that blacks experience even greater penalty for violent crimes. Historians have demonstrated that a cultural trope associating black men with criminality has persisted throughout this nation’s history, and the perceived link between black men and violent crime has only intensified since the 1970s and 1980s.¹⁰² The conflation of crime and race in contemporary culture is so complete, however subconscious, that one scholar has observed that “talking about crime is talking about race.”¹⁰³ A recent experiment, showing that the mere mention of crime increases attention to race, “reveal[s] that ostensibly race-neutral concepts such as crime can become racialized. Not only are Blacks thought of as criminal, but also crime is thought of as Black.”¹⁰⁴ Such research casts serious doubt that any employer decision based

991 (2004). See also Devah Pager, Bart Bonikowski & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. R. 777 (2009); Eden B. King et al. *What’s in a Name? A Multiracial Investigation of the Role of Occupational Stereotypes in Selection Decisions*, 36 J. APPLIED SOC. PSYCH. 1145 (2006).

99. 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, 453-55 (2006) (indicating that the perception of criminality may negatively affect the hiring of blacks).

100. Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (2005); Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009). In light of the severe penalties that black offenders face, it is especially troubling that employers appeared more likely in audit studies to ask black candidates than white candidates whether they have a criminal record. Pager, *supra*, at 643.

101. Pager, Western & Sugie, *supra* note 100, at 199-200.

102. Kelly Welsh, *Black Criminal Stereotyping and Criminal Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276-277 (2007).

103. Melissa Heckman Barlow, *Race and the Problem of Crime in Time and Newsweek Cover Stories, 1946 to 1995*, 25 SOC. JUST. 149, 150 (1998).

104. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J.

on criminal records can ever be “color-blind.”¹⁰⁵ Indeed, as psychologists may attest, the fact that the very consideration of crime promotes the consideration of race may explain why the disparate treatment of black job applicants grows worse, not better, when employers make inquiries into criminal history.

These findings fit Title VII’s mixed-motive framework, which finds discrimination whenever an employer considers an impermissible factor when making an employment decision, even if he would have made the same decision had he not considered that factor.¹⁰⁶ The mixed motive framework is advantageous because, as we have seen, stereotypes linking race and criminality are rampant. While *EEOC v. Riss International* predated the development of the mixed motives framework, it provides a model for judicial skepticism when an employer’s professed reason for terminating an employee too closely resembles racial stereotypes. Addressing the termination of a man who failed to disclose some regulatory infractions, the court held, “Further racial inference may be drawn from the purported reason for discharge, in that a common prejudicial stereotype of ‘typical’ black dishonesty was apparently drawn and acted upon with hardly a scintilla of evidence.”¹⁰⁷ As sociologists Becky Pettit and Bruce Western note, having a criminal record “confers a *persistent status* that can significantly influence life trajectories,”¹⁰⁸ a lifelong stigma perhaps best illustrated by the many cases we have seen of discrimination against individuals with criminal records many decades old.¹⁰⁹

Because most of the research in the area concerns the fortunes of black men in particular, rather than blacks of both sexes or men of any race, the social scientific evidence may be strongest for an “intersectional” claim based on both race and sex. Federal courts have widely legitimated such claims for women of color,¹¹⁰ but thus far hardly any have recognized intersectional claims brought by men of color.¹¹¹ The few successes have involved a

PERSONALITY & SOC. PSYCHOL. 876, 883 (2004).

105. The visual metaphor of “color-blindness” is especially apt in light the wealth of psychological studies using visual attendance as a proxy for the salience of race. *See, e.g.*, Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL PSYCH. 1322 (2008).

106. 42 U.S.C. § 2000e-2(m).

107. *EEOC v. Riss Int’l Corp.*, 525 F. Supp. 1094 (W.D. Mo. 1981).

108. Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. R. 151, 152 (2004).

109. *See, e.g.*, *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007) (involving a forty-seven year old homicide).

110. *Jefferies v. Harris County Community Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980); *Lam v. University of Hawaii*, 40 F.2d 1441 (9th Cir. 1994).

111. This despite the intellectual groundwork established by a small but persistent group of advocates for intersectional claims brought by black men *qua* black men. *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity, Intersectionality, Assimilation, Identify Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552 (2009); Floyd

diagnosable illness that afflicts only black men,¹¹² a condition that many consider *sui generis*. While several black male plaintiffs with criminal records alleging disparate impact have attempted to bring intersectional claims, they have been rejected not only by the federal courts¹¹³ but also by the generally more receptive EEOC.¹¹⁴ It is unclear whether the economic, sociological, psychological, historical, and criminological¹¹⁵ evidence illuminating the links between black men, crime, and underemployment would fare better under a mixed motives theory. Therefore, black men with criminal records face a dilemma: while an intersectional disparate impact claim would have the most evidentiary support, it probably would also face the most judicial resistance.

Of course, even an intersectional mixed-motives claim is no panacea for the ills that job applicants with criminal records face. Its broad reach, finding discrimination even when an illegitimate consideration is not outcome determinative,¹¹⁶ is advantageous for litigants since former offenders of all races experience inferior employment outcomes. Yet to this broad basis for liability attach more limited remedies. According to the Civil Rights Act of 1991, once a plaintiff establishes that race played a role in an adverse

D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L. R. 23 (1997).

112. The condition is pseudofolliculitis barbae, which makes it difficult to shave. These cases did not explicitly describe the claims involved as “intersectional,” but their analysis – examining the impact of employer policies on black men *qua* black men – was nonetheless intersectional in nature. *See, e.g., Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610 (8th Cir.1991); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993); *Johnson v. Memphis Police Dep’t*, 713 F. Supp. 244 (W.D. Tenn. 1989); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981); *Richardson v. Quik Trip Corp.* 591 F. Supp. 1151 (S.D. Iowa 1984).

113. The only court to give any attention to an intersectional claim for black males summarily rejected it. *Taylor v. Procter & Gamble Dover Wipes*, 184 F.Supp.2d 402 (D. Del. 2002).

114. The EEOC has acknowledged the disparate impact of these policies on blacks and Hispanic in general, but it has expressly declined to find any disparate impact on blacks and Hispanic males in particular. *See Jackson v. United States Postal Serv.*, Appeal No. 01821770 (Oct. 7, 1982) (“The disparate impact theory discussed herein as to a conviction policy has been applied only to blacks and/or Hispanics, not to males. Therefore, analysis of the agency’s policy herein applies only to complainant’s race discrimination allegations, not to his allegations as to discrimination because of sex.”); EEOC Dec. 76-102 (Mar. 25, 1976) (“There is no evidence of record or otherwise, that males are or have ever been, subjected to a greater number of arrests and convictions because of any historical deprivation of their rights predicated upon their sex.”).

115. Darrell Steffenmeier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity in Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 J. QUANTITATIVE CRIMINOLOGY 241 (261) (finding that only male offenders experience racial disparities in incarceration; whereas black women are sentenced to prison at comparable rates to white women, black men are sentenced to prison at much higher rates than white men).

116. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (2000) (“...an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

employment decision, he is entitled to symbolic remedies, such as declaratory and injunctive relief. But so long as the employer can show that he would have taken the same action even if race had played no role – hardly a problem when criminal records are involved – the plaintiff is not entitled to compensatory or punitive damages and the employer is under no obligation to hire (or reinstate) him.¹¹⁷ Though these forms of relief are no doubt better than nothing, they are admittedly not what litigants want most.

CONCLUSION

Despite some early successes in the 1970s and early 1980s, minority males with criminal records have been largely unsuccessful in challenging the disparate impact of employer practices of considering arrest, conviction, or incarceration records. Courts in recent decades have grown skeptical of such litigation, expressing distaste for such litigants, distrust for their claims of statistical impact, and deference to employer claims of business necessity. A more promising approach may be a litigation strategy focused on the discriminatory application of these policies, to which the economic, sociological, psychological, and historical literatures all attest. In the United States, crime and race are concepts so conflated that consideration of the one inevitably, if almost always subconsciously, promotes consideration of the other; the research on these points is overwhelming. The mixed-motive framework, attuned to racial considerations without requiring them to be outcome determinative, appears promising. Perhaps this strategy – exposing the racial stereotypes that employers and even judges act on when considering criminal records – can move an otherwise unreceptive federal bench.

117. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(g)(2)(B) (2000) (“[If] a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . .”).