CREDIT CHECKS UNDER TITLE VII: LEARNING FROM THE CRIMINAL BACKGROUND CHECK CONTEXT

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Nearly half of all employers consider applicants' credit histories when making some hiring or promotion decisions—and they risk violating Title VII of the Civil Rights Act of 1964 (Title VII) when they do so. Employer credit checks have a potentially disparate impact on minorities and an attenuated relationship to asserted concerns about job performance and employee theft. The case law analyzing disparate impact challenges to credit check policies, meanwhile, is sparse, leaving employers with little direction as they shape their practices.

This Note suggests that the Equal Employment Opportunity Commission (EEOC) issue detailed guidance on employers' use of credit checks and proposes a novel framework drawn from agency guidance on the use of criminal records, which adopts the Eighth Circuit's Green *factors. Specifically, the EEOC ought to recommend that employers take into account the source or type of debt, the time between the "negative behavior" and the employment decision, and the nature of the job; the guidelines should also advocate for individualized assessments. Guidance along these lines would clarify what constitutes lawful credit check usage and benefit the job-seekers that Congress intended to protect with Title VII's enactment.*

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INTRODUCTION

While the economy has undoubtedly improved since the Great Recession,[1] some are still feeling the effects of the crisis. Blacks and Hispanics have been slower to recover, with both groups having experienced a significant decline in household median wealth since 2010[2] and higher long-term unemployment rates than have Whites.[3] And those who turned to credit cards to make ends meet or missed mortgage payments during the recession may still bear the mark on their credit reports.[4] Today, these individuals might find that their financial difficulties continue to serve as barriers to much-needed employment by way of employer credit checks.

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[1] *See* Kate Davidson & Sarah Portlock, *Jobless Claims Fall to Lowest Level Since 2000*, WALL ST. J. (Jan. 29, 2015, 10:33 AM), http://www.wsj.com/articles/jobless-claims-dropped-to-265-000-in-jan-24-week-1422538451; Chico Harlan, *U.S. Added 292,000 Jobs in December; Unemployment Rate Steady at 5 Percent*, WASH. POST (Jan. 8, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/08/u-s-to-release-december-jobs-data/; Joe Light, *The Percentage of Mortgages Entering Foreclosure Is at Its Lowest Level Since 2005*, WALL ST. J. (Nov. 17, 2015, 10:07 AM), http://blogs.wsj.com/economics/2015/11/17/foreclosure-starts-hit-lowest-level-since-2005/.

[2] Minorities were hit particularly hard by the recession. From 2010 to 2013, Black households experienced a 33.7% drop in median wealth to $11,000, while the median wealth of Hispanic households declined by 14.3% to $13,700. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/. In comparison, the median wealth of White households increased by 2.4% to $141,900. *Id.*

[3] Floyd Norris, *A Drop in the Long-Term Unemployed*, N.Y. TIMES, July 26, 2014, at B3 (presenting a graph that shows higher long-term unemployment rates among Blacks and Hispanics as compared to Whites).

[4] In most cases, the Fair Credit Reporting Act of 1970 (FCRA), 15 U.S.C. §§ 1681–1681x (2012), allows for the reporting of negative information that is up to seven years old, with a ten-year reporting period for bankruptcies. *Id.* § 1681c(a).

Roughly half of employers examine at least some applicants' credit histories when making employment decisions,[5] a practice that disproportionately impacts minorities and builds upon disparities in unemployment and poverty rates, wealth, and predatory lending between Whites and non-Whites.[6] One survey indicated that one in ten participants who identified as unemployed was told that she was not hired on the basis of her credit report, though the actual number of individuals affected by such policies may be even higher.[7] The relationship between an individual's credit history and job performance or the likelihood of an employee committing theft at work, meanwhile, may be attenuated at best.[8] Some states and localities have responded to the prevalence of credit checks by enacting legislation restricting their use by employers.[9]

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[5] *See* SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING—THE USE OF CREDIT BACKGROUND CHECKS IN HIRING DECISIONS 8 (2012), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/2012BackgroundCheck_Credit_FINAL.pptx (finding that thirty-four percent of employers surveyed conduct credit checks for specific jobs and an additional thirteen percent conduct credit checks for all jobs). A credit report provides information about one's credit accounts and repayment history, including the amount and types of debt owed, property rental information, and judgments issued. *See What Is a Credit Report?*, CONSUMER FIN. PROTECTION BUREAU (Feb. 27, 2014), http://www.consumerfinance.gov/askcfpb/309/what-is-a-credit-report.html.

[6] *See infra* Section I.B (detailing underlying disparities).

[7] Amy Traub, *Credit Reports and Employment: Findings from the 2012 National Survey on Credit Card Debt*, 46 SUFFOLK U. L. REV. 983, 986–87 (2013) (noting the weak oversight of FCRA standards and reluctance among employers to report use of credit reports in hiring).

[8] *See, e.g.*, Laura Koppes Bryan & Jerry K. Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, 15 PSYCHOLOGIST-MANAGER J. 106, 119 (2012) (finding virtually no correlation between credit histories and performance ratings or termination decisions); Ann Carrns, *No Link Seen Between Low Credit Scores and Bad Job Behavior*, N.Y. TIMES (Nov. 8, 2011, 11:09 AM), http://bucks.blogs.nytimes.com/2011/11/08/no-link-seen-between-low-credit-scores-and-bad-job-behavior/ (discussing a research study that "showed that poor credit scores weren't related to an employee's propensity . . . to steal from an employer or engage in other 'deviant' behavior").

[9] As of 2015, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington have enacted legislation limiting the use of credit checks by employers. Heather Morton, *Use of Credit Information in Employment 2015 Legislation*, NAT'L CONF. ST. LEGISLATURES (June 2, 2015), http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2015-legislation.aspx. Chicago, Cook County (Illinois), Madison (Wisconsin), and New York City are four municipalities that have passed similar local laws. Rosemarie Lally, *Using Workers' Credit Information Increasingly Prohibited*, SOC'Y FOR HUM. RESOURCE MGMT. (July 28, 2015), http://www.shrm.org/legalissues/stateandlocalresources/pages/states-credit-history.aspx.

Some advocate for a federal legislative solution that would provide universal employment protections as opposed to coverage that is contingent on membership in a protected class—and Senator Elizabeth Warren and Representative Steve Cohen have (unsuccessfully) attempted such action with the Equal Employment for All Act, which

Potentially discriminatory employer practices fall within the domain of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."[10] Though the EEOC has recently brought cases on behalf of minority applicants aggrieved by the use of credit checks,[11] the agency has yet to issue guidance on the circumstances under which employment credit checks are justified under Title VII.[12] The lack of EEOC guidance, together with the relative dearth of judicial decisions analyzing credit check policies on the merits, has meant that employers remain uncertain about the legality of these policies.[13] To address the potentially dispa-

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they most recently introduced in 2015. *See* Equal Employment for All Act of 2015, H.R. 3524, 114th Cong.; Equal Employment for All Act of 2015, S. 1981, 114th Cong. (1st Sess. 2015). Given the persistent gridlock and intransigence in the nation's capital, however, and the acute impact on minorities, *see infra* Section I.B, this Note is devoted to analyzing credit check policies under the Title VII framework.

[10] 42 U.S.C. § 2000e-2 (2012).

[11] *See infra* Section I.C (summarizing recent EEOC litigation).

[12] For all EEOC guidance, see *Guidance (by Subject Area)*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/guidance/subject.cfm (last visited June 21, 2016). In 2014, the EEOC jointly with the Federal Trade Commission did publish a guide for employers on the use of background checks. EQUAL EMP'T OPPORTUNITY COMM'N & FED. TRADE COMM'N, BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW (2014), https://www.ftc.gov/system/files/documents/plain-language/pdf-0142-background-checks-what-employers-need-know.pdf; *see also* Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC and FTC Offer Joint Tips on Use of Employment Background Checks (Mar. 10, 2014), https://www.eeoc.gov/eeoc/newsroom/release/3-10-14.cfm (listing date of publication of EEOC and Federal Trade Commission brochure as March 10, 2014). The document, however, simply includes general statements from the EEOC on "treating everyone equally," EQUAL EMP'T OPPORTUNITY COMM'N & FED. TRADE COMM'N, *supra*, at 2; *accord id.* at 4 (discussing applying "the same standards to everyone"), and properly disposing of information, *id.* at 6. While it broadly advises employers to "[t]ake special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion," *id.* at 4, the brief publication does not single out the issues presented by consideration of applicants' credit histories. In a similar vein, the EEOC highlights pre-employment inquiries about financial information as a potential prohibited practice on its website but offers only cursory advice for employers on the subject. *Pre-Employment Inquiries and Financial Information*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/financial_information.cfm (last visited June 1, 2016) ("[A]n employer must not have a financial requirement if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular race, color, national origin, religion, or sex.").

[13] Employers' use of credit reports is regulated by the FCRA, which requires employers to: (1) inform applicants that they may access reports for employment purposes; (2) obtain authorization from the applicant to do so; and (3) in the event of a decision not to hire the applicant because of credit information, provide a copy of the report to the applicant in addition to a description of her rights under the statute. 15 U.S.C. § 1681b(b)(2)–(3) (2012). Nonetheless, "employer compliance with this rule is difficult to

rate impact of credit checks, the EEOC ought to issue detailed guidance on their use by employers and, in doing so, draw upon the factors that the agency has recognized when evaluating employers' use of criminal background checks. These guidelines would aid employers in developing policies that comply with Title VII.

This Note proceeds in three parts. Part I provides an overview of disparate impact doctrine, background on employment credit checks, and challenges to such policies under the disparate impact framework. Recognizing the likelihood of the disparate impact of credit checks on protected minorities, and assuming that a significant adverse impact can be shown, this Note then focuses on a consideration of business justifications for the use of credit checks and analogous policies. Part II looks to criminal background checks in employment and analyzes the approach of the EEOC and courts to the issue, including the Eighth Circuit's standard in *Green v. Missouri Pacific Railroad Co*.[14] Part III contributes to the scholarship with both a novel proposal to modify the *Green* factors[15] for the credit check context and an agency-centric approach to mitigating the impact of employer credit check policies.[16] In particular, this Part suggests that the EEOC issue guid-

monitor or enforce. As a result, job applicants may never realize that they were not hired because of their credit report and further may not realize that their credit report contains errors." AMY TRAUB, DEMOS, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB 10 (2013), http://www.demos.org/sites/default/files/publications/Discredited-Demos.pdf. Refusing to consent to a credit check, moreover, would likely cost the applicant the job. *See* Kristen McNamara, *Bad Credit Derails Job Seekers*, WALL ST. J. (Mar. 16, 2010, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703909804575123611107626180 ("[R]efusing is likely a deal breaker, career counselors say."). Relatedly, the Bankruptcy Code prohibits employers from discriminating against former debtors. *See* 11 U.S.C. § 525 (2012) (protection against discriminatory treatment). This Note, however, focuses solely on the permissibility of credit checks under Title VII.

14 549 F.2d 1158 (8th Cir. 1977).

15 The *Green* factors are the three considerations highlighted in the district court's injunction, which the Eighth Circuit subsequently affirmed in *Green v. Missouri Pacific Railroad Co.*, *id.* at 1159–60. *See infra* note 91 and accompanying text (listing the factors in detail).

16 Existing scholarship on employers' use of credit checks, in contrast, has focused on judicial and legislative action. *See, e.g.*, Roberto Concepción, Jr., *Pre-Employment Credit Checks: Effectuating Disparate Impact on Racial Minorities Under the Guise of Job-Relatedness and Business Necessity*, 12 SCHOLAR 523, 541–48 (2010) (recommending either legislation or employers' voluntarily cessation of credit check usage); Beverley Earle et al., *The Legality of Pre-Employment Credit Checks: A Proposed Model Statute to Remedy an Inequity*, 20 VA. J. SOC. POL'Y & L. 159 (2012); Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1482–83 (2014) (advancing an "anti-bottleneck" principle to be used by courts); Kelly Gallagher, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1617–20 (2006) (proposing that Congress either amend the FCRA or enact employment legislation banning discrimination based on credit); Sharon Goott Nissim, *Stopping A Vicious Cycle: The*

ance highlighting three factors, reminiscent of those identified by the Eighth Circuit in *Green*, for evaluating employers' business necessity arguments for credit check policies: (1) the source or type of debt, (2) the time between the "negative behavior" and the employment decision, and (3) the nature of the job. Additionally, the agency should strongly recommend, as it does in the criminal records context, that employers make individualized assessments. The issuance of precise EEOC guidelines would help ensure "that no false lines are drawn in assuring equality of the right and opportunity to make a decent living."[17]

I
EMPLOYMENT CREDIT CHECKS UNDER TITLE VII

One year after the enactment of Title VII[18] and one month before the EEOC opened its doors,[19] Lyndon B. Johnson spoke to Howard University's graduating class.[20] Noting the sobering unemployment rates among minorities, he stated: "Despite the court orders and the laws, despite the legislative victories and the speeches, for [the great majority of Blacks] the walls are rising and the gulf is widening."[21] Johnson highlighted "inherited, gateless poverty" and the long history of discrimination as the basic reasons for the disparities while also acknowledging that disadvantages form "a seamless web.

Problems with Credit Checks in Employment and Strategies to Limit Their Use, 18 GEO. J. ON POVERTY L. & POL'Y 45, 71–73 (2010) (suggesting model legislation); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1695 (2012) (lending "normative support to legislative efforts to establish a stronger financial history antidiscrimination norm"); Taylore Karpa, Note, *"An Equal Opportunity Employer": Proposed Judicial and Legislative Solutions to Restrict the Disparate Impact Caused by Employer Use of Credit Checks*, 49 NEW ENG. L. REV. 83, 85, 103–15 (2014) (proposing "bringing a case alleging disparate impact and . . . a stronger bill sharply restricting the employer use of credit checks"). While Fishkin notes the role of fact-finding institutions such as the EEOC in determining "where and how to apply the anti-bottleneck principle" that he articulates, Fishkin, *supra*, at 1482–83, the EEOC is not the primary actor in his analysis.

17 John F. Kennedy, President, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), *in* 1963 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 483, 491 (1964).

18 *1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html (last visited July 10, 2016) (marking July 2, 1964, as the date that Title VII was passed and signed into law).

19 *Milestones: 1965*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/history/35th/milestones/1965.html (last visited Feb. 1, 2015) (marking July 2, 1965, as the EEOC's opening date).

20 *See* Lyndon B. Johnson, President, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), *in* 1966 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 635–40 (1966).

21 *Id.* at 637.

They cause each other. They result from each other. They reinforce each other."[22] In 1971, the Supreme Court in *Griggs v. Duke Power Co.*[23] appeared to recognize the same truth as it "reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination."[24] Section I.A lays out the doctrinal framework that has stemmed from *Griggs*. Section I.B explains why employer credit check policies are problematic under Title VII. Section I.C summarizes the disparate impact challenges to date over credit check usage in employment decisions.

A. The Disparate Impact Framework

The landmark *Griggs* decision held that employment practices or tests, even if they are not motivated by discriminatory intent, are prohibited if they act as "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[25] The first step for plaintiffs bringing a Title VII disparate impact claim is to establish the prima facie case: identify a specific facially neutral screening practice, qualification, or test that has a significant adverse impact on a protected group.[26] As codified in the 1991 amendments to Title VII, if the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."[27] Where the employer meets the burdens of production and persuasion,[28] the employee must then show that there exists an alternative practice—which the employer refuses to adopt—that would serve the employer's needs with a less adverse impact.[29]

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[22] *Id.* at 637, 638.

[23] 401 U.S. 424 (1971).

[24] Smith v. City of Jackson, 544 U.S. 228, 262 (2005) (O'Connor, J., concurring) (speaking of the Court in *Griggs*).

[25] *Griggs*, 401 U.S. at 431.

[26] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

[27] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). Despite the seemingly heavy burden on the employer, "judges since the late 1980s have taken employers at their word regarding their 'potential' or 'perceived' needs." Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 14 (2012) (noting that judges stopped requiring empirical scrutiny of employers' needs).

[28] *See* 42 U.S.C. § 2000e(m) (defining "demonstrates" as "meet[ing] the burdens of production and persuasion").

[29] *Id.* § 2000e-2(k)(1)(A)(ii) (describing the employee's burden of proof).

The Court does not rely on a "rigid mathematical formula"[30] to determine what constitutes a sufficiently adverse impact but instead asks whether the practice at issue "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[31] The applicant pool from which plaintiffs must derive statistics has varied depending on the nature of the job in question. While general evidence was enough for some courts in the 1970s,[32] the judiciary became increasingly hostile to disparate impact challenges in the late 1980s.[33] The Supreme Court's *Wards Cove Packing Co. v. Atonio* decision in 1989 clarified that a comparison of the "racial composition of the *qualified persons in the labor market* and the persons holding at-issue jobs" was what was generally required[34]—that is,

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[30] *Watson*, 487 U.S. at 995.

[31] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Some courts have used a "four-fifths rule"—that is, that "a 'selection rate' for any racial group less than four-fifths of the 'selection rate' for another group" constitutes evidence of disparate impact—developed by the EEOC under the Uniform Guidelines on Employee Selection Procedures as a baseline. *See* Jones v. City of Boston, 752 F.3d 38, 49 (1st Cir. 2014) (discussing the lower court's adoption of the rule). However, this rule has been criticized and "the Supreme Court and the EEOC have emphasized that courts should not treat the rule as generally decisive." *Id.* at 51 (rejecting the four-fifths rule).

[32] *See, e.g.*, Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (stating, in a case involving hiring for sheet metal workers, that Blacks "nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as 'suspicion arrests'. Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against negro applicants"), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1973). Similarly, the EEOC in the early 1970s indicated a willingness to accept nationwide statistics on poverty, for example, to establish a prima facie case. *See, e.g.*, EEOC Decision No. 74-2 6, Fair Empl. Prac. Cas. (BNA) 830, 1973 WL 3926, at *1–2 (July 10, 1973) (finding that the manufacturing company's policy of taking into account overdue loans was unlawful); EEOC Decision No. 72-1176, 5 Fair Empl. Prac. Cas. (BNA) 960, 1972 WL 4005, at *1 (Feb. 28, 1972) (citing statistics to find that the bank's credit check policy was unlawful).

[33] *See* Harwin, *supra* note 27, at 12–16 ("The overwhelmingly unfavorable outcomes that plaintiffs [in criminal records cases] experienced to some extent reflected increasing judicial skepticism towards employment discrimination cases in general and disparate impact suits in particular.").

[34] 490 U.S. 642, 650 (1989) (emphasis added), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). "[M]easures indicating the racial composition of 'otherwise-qualified applicants'" would suffice where labor market statistics are difficult to obtain. *Wards Cove*, 490 U.S. at 650. While the Civil Rights Act of 1991 superseded the *Wards Cove* decision on the issues of "business necessity" and "job related[ness]," Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (stating a legislative purpose to codify these concepts from *Griggs*), the relevant labor market analysis still holds, *see, e.g.*, Meditz v. City of Newark, 658 F.3d 364, 375 (3d Cir. 2011) (remanding after concluding that the lower court must determine the relevant labor market and minimum qualifications for the job in question); Carpenter v. Boeing Co., 456 F.3d 1183, 1196–97 (10th Cir. 2006) (stating that the population for statistical comparison must match or reflect the population of qualified persons). In applying disparate impact doctrine, lower courts have defined the relevant applicant pool by considering the actual applicants for the

"[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[35] Nonetheless, general population figures are still acceptable if they "accurately reflect" the qualified application pool,[36] such as when "the job skill . . . is one that many persons possess or can fairly readily acquire."[37]

Under the disparate impact framework, courts have found the use of standardized tests,[38] discharge based on wage garnishments,[39] and consideration of arrest and conviction records[40] to be potentially unlawful barriers to employment. Few courts, however, have addressed Title VII challenges to the use of credit checks in hiring or promotion decisions[41]—a policy that operates to reinforce discrimination and poverty among the groups that Title VII is meant to protect.

B. The Potential Disparate Impact of Credit Check Policies

Recent research and scholarship has drawn attention to racial disparities in credit scores and the impact of pre-employment credit

job in question or the racial composition of the types of jobs in question as a proxy method. Scott Baker, Comment, *Defining "Otherwise Qualified Applicants": Applying an Antitrust Relevant-Market Analysis to Disparate Impact Cases*, 67 U. CHI. L. REV. 725, 732–34 (2000).

35 Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (comparing the case before it, which was brought by applicants for teaching positions, with *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which jobs required "the ability to drive a truck[,] . . . [a skill] that many persons possess or can fairly readily acquire").

36 *Wards Cove*, 490 U.S. at 651 n.6 (quoting Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977), which was a challenge to height and weight requirements for correctional counselor positions in an Alabama state prison, as an example of a case in which general (national) statistics were acceptable).

37 *Hazelwood*, 433 U.S. at 308 n.13.

38 *See, e.g.*, Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n of N.Y., 630 F.2d 79, 106 (2d Cir. 1980) (finding that the City's exam for entry-level police officers violated Title VII).

39 *See, e.g.*, Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 495–96 (C.D. Cal. 1971) (rejecting the employer's business necessity argument regarding a policy of firing employees whose wages have been garnished). Adverse actions based on failure to pay creditors' judgments are akin to decisions that take into consideration one's credit history in that both are based on an employee's financial status.

40 *See, e.g.*, Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1293, 1298–99 (8th Cir. 1975) (holding that the employer's policy of denying employment to applicants who have been convicted of "any crime other than a minor traffic offense" violated Title VII); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (deciding that a discharge based on arrest records was unlawful).

41 *See* Nissim, *supra* note 16, at 46 (noting that few cases comment on the legality of employer credit checks); Shepard, *supra* note 16, at 1733 (same).

checks on minorities.[42] A national survey conducted by Demos in 2012 revealed a twenty-three percent gap between Black and White households that "describe their credit scores as good or excellent"; of those households carrying credit card debt who could identify their credit score range, more than a third of Black households had credit scores below 620 while only fifteen percent of White households fell into the same category.[43] A comprehensive Federal Reserve Board report to Congress, prepared in part by using a nationally representative sample of credit scores, found that "[d]ifferent demographic groups have substantially different credit scores, on average," and that, "on average, blacks and Hispanics have lower credit scores than non-Hispanic Whites and Asians."[44] Several other studies similarly found correlations between credit scores and race.[45]

The reality of racial disparities in unemployment, poverty rates, and wealth supports the position that minorities would be disproportionately impacted by employer policies that screen applicants on the basis of their credit histories.[46] The unemployment rate among Blacks

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[42] *See* CATHERINE RUETSCHLIN, DEMOS, & DEDRICK ASANTE-MUHAMMAD, NAACP, THE CHALLENGE OF CREDIT CARD DEBT FOR THE AFRICAN AMERICAN MIDDLE CLASS 16–17 (2013), http://www.demos.org/sites/default/files/publications/CreditCardDebt-Demos_NAACP_0.pdf (displaying survey results); TRAUB, *supra* note 13, at 8 (detailing findings from a national survey showing how credit checks disadvantage Blacks and Hispanics); Concepción, *supra* note 16, at 530–35 (citing general statistics, studies, and decisions concerning credit scores); Gallagher, *supra* note 16, at 1612 (referring to a study, which "identif[ies] a correlation between minority status and poor credit history," by the Missouri Department of Insurance); Nissim, *supra* note 16, at 48 ("Statistics clearly show that minorities are disproportionately impacted by these credit check policies, as they tend to have worse credit than non-minorities."); *id.* at 48–51 (explaining the problems with employer credit checks more broadly); Shepard, *supra* note 16, at 1730–32 (citing studies); *see also Remarks of Sarah Crawford*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Oct. 20, 2010), http://www1.eeoc.gov//eeoc/meetings/10-20-10/crawford.cfm (citing studies).

[43] TRAUB, *supra* note 13, at 8. Fifty-nine percent of White households "report[ed] scores of 700 or above, displaying strong credit, while less than one quarter of African Americans (24 percent) [were] able to attain the same high credit rating status." *Id.* Demos is a progressive public policy organization that has published several reports on credit check policies and engaged in advocacy on the issue. *See also infra* note 52 (noting the organization's research on credit card debt).

[44] BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT S-2, S-3 (2007), http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf.

[45] *See Remarks of Sarah Crawford*, *supra* note 42 (referring to a 2007 Freddie Mac study that found that Blacks and Hispanics had lower credit scores than Whites had, as well as studies by Freddie Mac and the Brookings Institution correlating "areas with high minority populations and lower average credit scores").

[46] *Cf.* EEOC Decision No. 72-427, 4 Fair Empl. Prac. Cas. (BNA) 304, 1971 WL 3943, at *1 (Aug. 31, 1971) (inferring the disparate impact of a credit check policy on the basis of Census statistics showing higher poverty rates for non-Whites); Ylan Q. Mui, *For Black Americans, Financial Damage from Subprime Implosion Is Likely to Last*, WASH. POST

has consistently been about twice as high as the White unemployment rate,[47] and that among Hispanics has also historically been higher than that of Whites.[48] Black individuals additionally constitute a disproportionately larger share of the long-term unemployed than do other racial groups.[49] The difference in the poverty rate between Whites and non-Whites is even starker—in 2013, the poverty rates for Blacks, Hispanics, and non-Hispanic Whites were 27.2%, 23.5%, and 9.6% respectively.[50] The wealth gap, meanwhile, has grown wider as a result of the recent recession, as White households now hold thirteen times the median net worth of Black households and ten times that of Hispanic households.[51] The significant differences in access to finan-

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(July 8, 2012), http://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwNmzWW_story.html ("Research by VantageScore found that the two biggest contributors to consumers' deteriorating credit were the fall of home prices and unemployment. Activists say the demographic that has borne the brunt of those head winds are black Americans.").

While this Note largely focuses on the disparate impact of credit check policies on minorities, research suggests that women too are disproportionately affected by these employer practices. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 175, 185 (2000) (stating that women face greater economic hardship than men do following divorce proceedings); Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 954, 978–81 (2012) (discussing "coerced debt" that domestic violence victims may carry and adding that women are more likely than men to be saddled with such debt); FED. TRADE COMM'N, REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS 11–12 (2009), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-white-house-council-women-and-girls/100528cwg-rpt.pdf (noting that women are more likely than men to hold subprime loans); Abby Hayes, *The Debt Gender Gap: How Women Can Close It*, U.S. NEWS & WORLD REP. (June 26, 2015, 9:00 AM), http://money.usnews.com/money/blogs/my-money/2015/06/26/the-debt-gender-gap-how-women-can-close-it (finding that women are more likely than men to carry credit card debt).

[47] CTR. FOR POPULAR DEMOCRACY & ECON. POLICY INST., WALL STREET, MAIN STREET, AND MARTIN LUTHER KING JR. BOULEVARD: WHY AFRICAN AMERICANS MUST NOT BE LEFT OUT OF THE FEDERAL RESERVE'S FULL-EMPLOYMENT MANDATE 6 (2015), http://populardemocracy.org/sites/default/files/FedUp%20Report%2003022015%20web.pdf; *see also Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age*, U.S. BUREAU LAB. STAT. (Jan. 8, 2016), http://www.bls.gov/news.release/empsit.t02.htm (documenting the January 2016 seasonally adjusted unemployment rates of 4.3% for Whites and 8.8% for Blacks).

[48] U.S. BUREAU OF LABOR STATISTICS, THE RECESSION OF 2007–2009, at 3 (2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

[49] *See* JOSH MITCHELL, THE URBAN INST., WHO ARE THE LONG-TERM UNEMPLOYED? 4, 11 exhibit 3 (2013), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412885-Who-Are-the-Long-Term-Unemployed-.PDF (analyzing data from the 2012 Current Population Survey and the 2012 Annual Social and Economic Supplement).

[50] CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 13 tbl.3 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf.

[51] Kochhar & Fry, *supra* note 2.

cial resources and stable sources of income across racial and ethnic groups may not only lead minority households to rely more frequently on various lines of credit, but may also mean that these households will be more likely to encounter difficulties when payments are due.[52] In addition, a relative lack of financial resources might explain the greater likelihood of young Blacks incurring student debt as compared to young Whites.[53]

Moreover, intentional discrimination may explain some disparities in credit scores. Large lenders have drawn ire for targeting and steering Black and Hispanic borrowers toward risky subprime loans:[54] Wells Fargo recently settled with the Justice Department over fair lending claims,[55] and Morgan Stanley is in the midst of litigation

[52] Demos has produced multiple reports highlighting the reliance of households on credit cards as a "plastic safety net" in the face of unemployment, medical bills, or a general lack of savings. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 42, at 1 (reporting that many people use credit cards to replace diminished incomes, social services, and personal wealth); *see also, e.g.*, AMY TRAUB, DEMOS & NAT'L COUNCIL OF LA RAZA, CREDIT CARD DEBT IN THE LATINO COMMUNITY (2014) [hereinafter CREDIT CARD DEBT IN THE LATINO COMMUNITY], http://www.demos.org/sites/default/files/publications/Latinos&CreditCardDebt_0.pdf; AMY TRAUB, DEMOS, THE DEBT DISPARITY: WHAT DRIVES CREDIT CARD DEBT IN AMERICA (2014), http://www.demos.org/sites/default/files/publications/DebtDisparity_1.pdf (analyzing factors that typically indicate higher credit card debt); AMY TRAUB & CATHERINE RUETSCHLIN, DEMOS, THE PLASTIC SAFETY NET: FINDINGS FROM THE 2012 NATIONAL SURVEY ON CREDIT CARD DEBT OF LOW- AND MIDDLE-INCOME HOUSEHOLDS (2012), http://www.demos.org/sites/default/files/publications/PlasticSafetyNet-Demos.pdf; Paul Kiel, *Debt and the Racial Wealth Gap*, N.Y. TIMES, Dec. 31, 2015, at SR7 (noting that "Black families were much more likely to report difficulty in recovering from a financial setback or to have fallen behind on a bill in the past year" and highlighting that, even controlling for income, debt collection rates in mostly Black neighborhoods are twice as high as those in mostly White communities).

[53] *See* RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 42, at 12 ("In 2008, . . . [e]ighty percent of African American college grads took out some amount of loans in order to attain a higher education, compared to 65 percent of whites.").

[54] *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 135–36 (2003) (noting the 2002 prosecution against Citibank and stating more generally that "steering hits minority homeowners with particular force. Several researchers have shown that minority families are far more likely than white families to get stuck with subprime mortgages, even when the data are controlled for income and credit rating").

[55] *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), http://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief. Additionally, in 2011, Countrywide settled with the Justice Department over lending discrimination claims, Press Release, U.S. Dep't of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination, and in 2012, another bank holding company settled with the Justice Department over a practice in which "black borrowers in Atlanta were charged $745 more in fees than white borrowers with similar credit histories and qualifications," Mui, *supra* note 46. More recently, Wells Fargo has

brought by the American Civil Liberties Union under the Fair Housing Act.[56] Burdened with loans linked to greater default risks, Black and Hispanic homeowners have been more likely to fall behind on mortgage payments and/or enter foreclosure than have White homeowners,[57] contributing to racial disparities in credit. In a similar vein, Hispanic communities have disproportionately been the target of credit card scams and have faced lending discrimination in the form of not being offered the same opportunities as other communities to reduce credit card debt.[58] Payday lenders, who couple short-term loans with exorbitant interest rates, tend to concentrate their operations in minority neighborhoods as well.[59]

These national statistics on financial disparities by race could be used to establish disparate impact where the positions in question do not require special qualifications.[60] Though this Note contends that

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been sued by the City of Oakland over the bank's alleged discriminatory mortgage lending practices. Complaint, City of Oakland v. Wells Fargo Bank, No. 3:15-CV-04321 (N.D. Cal. Sept. 21, 2015).

[56] *See* Complaint at 1–3, Adkins v. Morgan Stanley, No. 12-CV-7667(HB) (S.D.N.Y. Oct. 15, 2012) (alleging that Morgan Stanley violated the Fair Housing Act by targeting Black borrowers in the Detroit area with "exceedingly high-cost and high-risk residential mortgage loans").

[57] *See* DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 6, 10 (2010), http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf ("Expressed as a share of the total number of homeowners as of 2006, we estimate that 11% of all African-American homeowners and 17% of Latino homeowners have already lost or are likely to lose their homes—compared to 7% of non-Hispanic whites.").

[58] *See* CREDIT CARD DEBT IN THE LATINO COMMUNITY, *supra* note 52, at 14–15 (referring to disproportionate credit card scams among Hispanics, as well as a June 2014 settlement for $169 million between the Consumer Financial Protection Bureau and GE Capital Retail Bank for excluding over 100,000 cardholders "who indicated that they preferred to communicate in Spanish or had a mailing address in Puerto Rico" from promotional programs to reduce credit card debt).

[59] *See, e.g.*, WARREN & TYAGI, *supra* note 54, at 159 & n.106 (stating that these lenders target minority areas); HAYDAR KURBAN ET AL., HOWARD UNIV. CTR. ON RACE & WEALTH, THE ECONOMIC IMPACT OF PAYDAY LENDING IN ECONOMICALLY VULNERABLE COMMUNITIES: ALABAMA, FLORIDA, LOUISIANA, AND MISSISSIPPI 23–24 (2014), http://www.coas.howard.edu/centeronraceandwealth/reports&publications/1214-the-economic-impact-of-payday-lending-in-economically-vulnerable-communities.pdf ("[P]ayday stores are disproportionately located in zip code areas that are heavily minority . . . ."); WEI LI ET AL., CTR. FOR RESPONSIBLE LENDING, PREDATORY PROFILING: THE ROLE OF RACE AND ETHNICITY IN THE LOCATION OF PAYDAY LENDERS IN CALIFORNIA 2 (2009), http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (finding that, in California, "[e]ven after controlling for income and a variety of other factors, payday lenders are 2.4 times more concentrated in African American and Latino communities").

[60] *See supra* notes 36–37 and accompanying text (explaining that general population statistics may be appropriate where general population is thought to reflect the composition of applicant pool); *cf.* U.S. EQUAL EMP'T OPPORTUNITY COMM'N,

general statistics of economic disparities should be accepted in the absence of any reason to believe that they are unrepresentative of the potential labor pool, some courts may require that statistics be more localized or tailored to the labor market of the geographical area.[61] In those situations, statistics particular to the region that reveal significant racial disparities in poverty or unemployment may be more persuasive. Applicant flow data that details the demographics of applicants and selected employees would best demonstrate any disparities between the qualified pool and those holding the at-issue jobs, but those comparisons are difficult to calculate[62] and have posed issues for the EEOC in recent cases.[63] Still, courts should be cognizant that applicant flow data "itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."[64]

C. Challenges to Date

Case law on permissible employer credit checks under Title VII is limited but not nonexistent. An overview of the challenges to date reveals that establishing a prima facie showing of disparate impact

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ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 10 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf ("National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the [EEOC] to further investigate such Title VII disparate impact charges.").

[61] *See, e.g.*, EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 295 (7th Cir. 1991) ("The court found that the factors that enter into this definition [of the relevant labor market] include the location and accessibility of the employer, commuting patterns, and the employer's applicant flow. Based on its analysis of these factors, the trial court found that Chicago (the city only, not the metropolitan area) was the relevant labor market . . . ."); *see also* Candice S. Thomas, Comment, *"Felony" Is the New N-Word: Statistical Evidence to Measure a Disparate Impact Claim for the Use of Criminal Records Checks in Employment Decisions*, 82 U. CIN. L. REV. 1295, 1307–08 (2014) (describing statistical methods of proving disparate impact).

[62] "Commentators have noted additional problems, including that applicant data is: frequently based on inadequate recordkeeping, often 'quite difficult' for plaintiffs to access, generates significant discovery disputes, may fail to show a statistically significant disparity when the applicant pool is small, and requires costly reliance on experts to conduct the analysis." Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1025 (2011) (footnotes omitted).

[63] *See infra* notes 71–72 (describing court criticisms of the EEOC's proffered statistics at the prima facie stage); *see also* EEOC v. Freeman, 961 F. Supp. 2d 783, 798 (D. Md. 2013) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), for the proposition that, to establish the prima facie case with national statistics, "the general populace must be representative of the relevant applicant pool").

[64] Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

remains a hurdle for plaintiffs. Nevertheless, several judicial decisions in the 1970s and early 1980s suggest that courts are willing to engage in a serious examination of asserted business necessity justifications once the initial burden is met.

1. Establishing Disparate Impact

Title VII litigation since 1990 over employer credit check policies illustrates the complexity of demonstrating disparate impact and, perhaps, increasing judicial skepticism towards such claims. In 1994, the Eastern District of Pennsylvania granted an employer's motion for summary judgment on a disparate impact challenge, thereby upholding its use of credit reports in hiring and promotion decisions.[65] The court concluded that solely referring to "a common sense argument" that a disparate impact will result from a credit check policy for managerial positions "because blacks are generally poorer than whites and thus they will have more bad credit reports" is insufficient to establish a prima facie case; the plaintiff must present a statistical comparison of the qualified applicant pool to those who hold the job at issue.[66] The presentation of a similar qualitative argument in *United States v. City of Chicago*,[67] however, was not problematic. In that 1974 case, the Northern District of Illinois stated generally that the consideration of a law enforcement applicant's financial history would be discriminatory because "blacks are more likely than whites to possess negative socio-economic attributes."[68]

Flawed expert reports, meanwhile, were largely to blame for the EEOC's loss at summary judgment in two 2013 cases.[69] First, in *EEOC v. Kaplan Higher Learning Education Corp.*, the EEOC's expert used "race rating" to determine the race of each applicant for the positions in question, which involved reviewing photographs obtained from the Departments of Motor Vehicles and then assigning the individuals a race by visual means.[70] The Northern District of Ohio not only found "race rating" to be a highly questionable manner by which to determine race, but also excluded the expert testimony on

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[65] Freeman v. Atl. Ref. & Mktg. Corp., No. 92-7029, 1994 WL 156723, at *8–9 (E.D. Pa. Apr. 28, 1994).

[66] *Id.* at *8.

[67] 385 F. Supp. 543 (N.D. Ill. 1974).

[68] *Id.* at 557.

[69] EEOC v. Freeman, 961 F. Supp. 2d 783, 792–98 (D. Md. 2013) (identifying issues with the agency's expert reports), *aff'd*, 778 F.3d 463 (4th Cir. 2015); EEOC v. Kaplan Higher Learning Educ. Corp., No. 1:10 CV 2882, 2013 WL 322116, at *7–11 (N.D. Ohio Jan. 28, 2013) (discussing problems with the EEOC's expert report), *aff'd sub nom* EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014).

[70] *Kaplan*, 2013 WL 322116, at *5.

the grounds that it was "skewed and unreliable" because it was not based on a representative sample.[71] While the expert reports presented in the second case, *EEOC v. Freeman*, did not rely on "race rating," the District of Maryland concluded that: (1) the database that served as the basis for the reports was "rife with material errors and unexplained discrepancies" and contained "cherry-picked" data; (2) the expert disclosures were untimely; and (3) the national statistics offered did not reflect the composition of the applicant pool and were inapplicable to the case at hand.[72]

2. *Considering Business Justifications*

Credit check policies may have received increased attention since the economic downturn, but they are not a new phenomenon. Earlier cases addressing challenges to employers' credit check practices, in fact, provide more guidance on the characteristics of lawful credit check usage than do cases litigated in the past twenty-five years. These earlier cases, which actually engage in an examination of job-relatedness, consider the use of credit history in two occupational contexts: law enforcement and financial services.

Courts have differed on the relevance of an individual's financial situation to law enforcement positions. In *United States v. City of Chicago*, the Northern District of Illinois granted injunctive relief where a background investigation for a job at the police department included, in part, a consideration of an applicant's financial condition.[73] The court explained that the police department failed to show that the screening furthered its goal of "protect[ing] itself from those who would undermine it or work at cross purposes with it."[74] In contrast, one year later, the Southern District of Indiana upheld a similar character investigation, which included consideration of an applicant's credit, for trooper positions. The court cited to the close relationship between an applicant's credit and her "credibility [and the] likelihood

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[71] *Id.* at *10. On appeal, the Sixth Circuit affirmed and criticized the EEOC for its "homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 754 (6th Cir. 2014). The appellate court also noted that the agency itself utilizes credit checks for a number of positions. *Id.* at 750.

[72] *Freeman*, 961 F. Supp. 2d at 795–98. In affirming the district court's decision, Judge Agee of the Fourth Circuit wrote in a concurring opinion that he "hope[d] that the agency will reconsider pursuing a course that does not serve it or the public interest well," making reference to the recent *Kaplan* decision. EEOC v. Freeman, 778 F.3d 463, 468, 470 (4th Cir. 2015) (Agee, J., concurring).

[73] United States v. City of Chicago, 385 F. Supp. 543, 557 (N.D. Ill. 1974).

[74] *Id.*

of being [a] victim[ ] of inducement by the criminal element" as "vital factors" of troopers' job performance.[75]

Judicial decisions considering credit check policies for positions within financial institutions have been more consistent. In *EEOC v. United Virginia Bank/Seaboard National*, the Eastern District of Virginia upheld the employer policy for business necessity reasons, citing the fiduciary nature of a banking business "that handles other people's money" as a justification for the employer's practice.[76] The same fiduciary nature of the employer bank in *Paxton v. Union National Bank* may explain the Eastern District of Arkansas's findings that "the bank has a legitimate interest in the credit history of its employees" and that a mail clerk-messenger's poor credit history and misrepresentation of related facts "present ample justification" for his termination.[77] These decisions, however, appear to conflict with contemporary EEOC decisions finding the use of credit checks for bank employees (including one in which the charging party directly handled deposits) unlawful.[78]

What a permissible credit check policy looks like remains unclear after these cases, which fail to offer a thorough legal analysis of when the use of credit checks is appropriate. Though courts suggest that the nature of the employer's work is an important consideration, they do not present a clear indication of valid job-related justifications, particularly when read in conjunction with agency decisions. The lack of well-developed case law on permissible business justifications for credit check usage in employment decisions has left employers in largely unchartered waters as they craft their policies. But an examination of judicial and executive responses to an analogous employer screening practice may help to fill the void.

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[75] Bailey v. DeBard, No. IP 74-458-C, 1975 WL 227, at *17 (S.D. Ind. July 31, 1975).

[76] No. 75-166-N, 1977 WL 15340, at *15 (E.D. Va. Oct. 7, 1977), *aff'd*, 615 F.2d 147 (4th Cir. 1980).

[77] 519 F. Supp. 136, 168 (E.D. Ark. 1981), *aff'd in part, rev'd in part on other grounds*, 688 F.2d 552 (8th Cir. 1982).

[78] *See* EEOC Decision No. 72-1176, 5 Fair Empl. Prac. Cas. (BNA) 960, 1972 WL 4005, at *1, *3 (Feb. 28, 1972) (finding that a bank credit check policy was unlawful even for positions where duties included "[c]ash control"); EEOC Decision No. 72-427, 4 Fair Empl. Prac. Cas. (BNA) 304, 1971 WL 3943, at *1–2 (Aug. 31, 1971) (finding that the bank's refusal to hire for the position of computer operator on the basis of credit record was unlawful).

II
The Business Necessity Analysis in the Criminal Background Check Context

As with credit checks in employment, the use of criminal background checks in hiring and promotion decisions is prevalent and has a potentially unlawful disparate impact on minorities due to underlying racial inequalities.[79] Section II.A describes the relatively detailed job-relatedness inquiry in cases analyzing the legality of criminal record use. Section II.B discusses EEOC guidance on criminal records, informed by the Eighth Circuit's *Green* decision, which identifies factors that employers should consider to verify and bolster their business necessity arguments. Section II.C finds that the EEOC's guidance has likely influenced employer practices, even if the judiciary has not wholly embraced the EEOC's position. The practical outcomes suggest that the standards put forth by the EEOC in the criminal records context are a useful framework for analyzing credit check policies under Title VII.

A. Initial Challenges to Criminal Background Check Policies

Gregory v. Litton Systems, Inc.[80] is among the earliest cases evaluating an employer's criminal background check practice. The plaintiff's offer of employment as a sheet-metal worker had been withdrawn after he had disclosed his arrest record for non-traffic offenses, as per the employer's policy.[81] The Central District of California found the employer's standard practice unlawful, citing the irrelevance of one's arrest record to her "suitability or qualification for employment."[82] Soon after the *Litton* decision, and that of the Supreme Court in *Griggs*, a less favorable outcome for individuals with criminal records came out of Louisiana, where a district court deemed it "reasonable for management of a hotel to require that per-

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[79] *See generally* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.–C.L. L. REV. 197 (2014) (discussing disparate impact challenges to criminal background check practices, the Ban the Box movement to remove questions about criminal records from job applications, and EEOC efforts to date with respect to use of criminal records).

[80] 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972).

[81] *Id.* at 402 ("Litton has a 'standard policy' of not hiring applicants who have been arrested 'on a number of occasions' for things other than minor traffic offenses. . . . [N]ew employees, before entering their duties, [must] fill out a form . . . which requires a listing of all arrests other than those involving minor traffic offenses.").

[82] *Id.* at 403. In upholding the decision, the Ninth Circuit noted that the trial judge "correctly anticipated" the Court's opinion in *Griggs*. Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972).

sons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes."[83] Though the court recognized that a prior criminal record does not necessarily predict future criminal behavior, it stated that the higher probability of a future offense among those with convictions supported such a policy.[84]

While the reasoning in the above decisions aligns with *Griggs*'s somewhat undefined requirement of demonstrating job-relatedness,[85] the Eighth Circuit later offered a more developed framework for applying the doctrine to criminal background check policies. In *Green*, the railroad company categorically prohibited the employment of "any person convicted of a crime other than a minor traffic offense."[86] After determining that Green had established a prima facie case of disparate impact,[87] the court considered the question of whether business necessity justified the practice. Citing *Litton*, *Butts v. Nichols* (a case from an Iowa district court),[88] and its own precedent, the Eighth Circuit concluded that no "business necessity . . . would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[89] It would be "unnecessarily harsh and unjust," stated the court, to deny employment due to "some conduct which may be remote in time or does not significantly bear upon the particular job requirements."[90] On remand, the district court enjoined Missouri Pacific's criminal background check practice but left room for the consideration of an applicant's record "so long as [the employer] takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the

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

[84] *Id.*

[85] *See* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 321 (1998) (noting that the Court in *Griggs* "did not specify whether business necessity was established merely by a demonstration of job-relatedness or if it required some showing in addition to a demonstration of job-relatedness" and citing examples of courts' various interpretations of the opinion).

[86] Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1292 (8th Cir. 1975).

[87] The court noted both racial disparities in applicant flow data and general statistical evidence of racial differences in conviction rates. *Id.* at 1294–95.

[88] 381 F. Supp. 573, 581–82 (S.D. Iowa 1974) (holding a statute barring felons from civil service employment invalid under the Equal Protection Clause).

[89] *Green*, 523 F.2d at 1298.

[90] *Id.*

job for which the applicant has applied"[91]—the three elements now referred to as the *Green* factors.

B. EEOC Adoption of the Green *Factors*

The EEOC has thrice issued guidance on the use of criminal records in employment.[92] As a note, Congress restricted the EEOC's rulemaking authority under Title VII to promulgating procedural, as opposed to substantive, regulations.[93] The agency consequently issues its substantive interpretations of Title VII as less formal "enforcement guidance, interpretive guidance, policy guidance, policy statements, technical assistance manuals, and compliance manuals," which are not legally binding.[94] Courts nonetheless may defer to the EEOC's interpretations to the extent that these guidelines have the "power to persuade," a determination that takes into account "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," and like factors.[95]

Published in 1987, ten years after the initial articulation of the *Green* factors,[96] the first EEOC guidelines on criminal records aligned the agency's "requirements for establishing business necessity" wholly with the Eighth Circuit's decision.[97] Under the policy statement, an employer must show that it considered the *Green* factors: the "nature and gravity of the offense or offenses," "time that has passed since the conviction and/or completion of the sentence," and "nature of the job

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[91] Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977) (quoting the trial court's injunctive order).

[92] *See infra* notes 97–105 and accompanying text (identifying guidance).

[93] Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1941 (2006). The Age Discrimination in Employment Act, in comparison, does not include a similar limitation. *Id.*

[94] *Id.* at 1942.

[95] *Id.* at 1940–41 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (discussing the proper deference to be accorded to EEOC guidelines), *superseded by statute on other grounds*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified in 42 U.S.C. § 2000e(k)).

[96] *See supra* note 91 and accompanying text (listing the *Green* factors).

[97] *EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Feb. 4, 1987) [hereinafter *EEOC Policy Statement*], http://www.eeoc.gov/policy/docs/convict1.html. Prior to the first guidelines, the EEOC required the employer to provide not only evidence that the offense serving as the basis for disqualification was job-related, but also an examination of "whether the conviction affected the individual's ability to perform the job in a manner consistent with the safe and efficient operation of the employer's business." *Id.* The latter included a consideration of the person's employment history and rehabilitation efforts, as well as the "number of offenses and the circumstances of each offense" and the "length of time . . . between the conviction for the offense and the employment decision." *Id.*

held or sought."[98] In 1990, the EEOC issued more detailed policy guidance.[99] In this second version, the agency expressly distinguished the use of conviction records from the use of arrest records, highlighting that arrests do not necessarily indicate commission of a crime.[100] As a result, employers taking into account arrest records must additionally "examine the surrounding circumstances, offer the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, make the follow-up inquiries necessary to evaluate his/her credibility."[101] The policy guidance included illustrative examples of the manner in which employers should evaluate arrest records and emphasized that blanket exclusions "will almost never withstand scrutiny."[102] It also walked through the business justification analysis, collecting agency decisions and case law and noting industry- or occupation-specific concerns.[103]

The EEOC most recently updated its guidance on the use of criminal records in 2012, for the first time since Congress's 1991 amendment of Title VII.[104] The fifty-five-page enforcement guidance builds upon previous issuances and focuses primarily on the potentially unlawful disparate impact of criminal records.[105] In addition to reiterating the consideration of the *Green* factors and the different treatment of arrests and convictions,[106] the EEOC discusses the validation of procedures used to screen applicants and individualized assessments as two ways in which employers can "consistently meet the 'job related and consistent with business necessity' defense."[107] An individualized assessment, it explains, would generally entail:

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[98] *Id.* The requirement of the consideration of the individual's employment history and rehabilitation efforts was not retained. *Id.*

[99] *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html.

[100] *Id.* ("[A]rrests alone are not reliable evidence that a person has actually committed a crime." (citing Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957))).

[101] *Id.*

[102] *Id.*

[103] For example, the EEOC recognized that "[e]ven where the employment at issue is not a law enforcement position or one which gives the employee easy access to the possessions of others, close scrutiny of an applicant's character and prior conduct is appropriate where an employer is responsible for the safety and/or well being of other persons." *Id.*

[104] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 60. The 1991 amendments superseded certain post-*Griggs* case law to provide, in part, that "if the plaintiff meets this [prima facie] burden, the burden of persuasion, not just the burden of production, shifts to the defendant to show a business necessity for the practices with disparate impact." Phillips v. Cohen, 400 F.3d 388, 398 (6th Cir. 2005).

[105] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 60, at 1.

[106] *Id.* at 11–14.

[107] *Id.* at 14.

"inform[ing] the individual that he may be excluded because of past criminal conduct; provid[ing] an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and consider[ing] whether the individual's additional information shows that the policy as applied is not . . . consistent with business necessity."[108] The guidance additionally addresses the interaction of employers' obligations under Title VII and federal and state restrictions on employment.[109] Lastly, the document supplements examples of hypothetical employment situations with "best practices" for employers.[110]

C. The Influence of the Green *Factors and EEOC Guidance*

EEOC guidance has provided an important baseline for evaluating and shaping criminal background check policies.[111] Admittedly, courts have had mixed reactions to *Green* and the EEOC guidelines,[112] which may be explained by not only disagreements with their analysis, but also a broader movement towards more employer-friendly judicial positions and acceptance of employers' purported business needs.[113] Nonetheless, research suggests that employers have pragmatically heeded EEOC guidance.[114]

1. The Judicial Response

Courts have varied in their reactions to *Green* and the related agency guidance. Among the most critical decisions is *EEOC v. Carolina Freight Carriers Corp.*, which upheld a freight company's practice of barring from employment individuals who had been convicted of felony, theft, or larceny that resulted in an active prison sentence.[115] The district court declared *Green*'s holding to be "ill

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[108] *Id.* at 18.

[109] *Id.* at 20–24.

[110] *Id. passim*.

[111] *See id.* at 15 ("[T]he *Green* factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions.").

[112] *Compare* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 754 (S.D. Fla. 1989) (criticizing *Green*), *with* Craig v. Dep't of Health, Educ. & Welfare, 508 F. Supp. 1055, 1057 (W.D. Mo. 1981) (applying the legal principles of *Green*).

[113] *See* Harwin, *supra* note 27, at 14 ("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."); Smith, *supra* note 79, at 208 (noting that in the decades following *Green*, "many courts have embraced a more employer-deferential interpretation of the business necessity defense").

[114] *See infra* Section II.C.2 (discussing the influence of EEOC guidance).

[115] 723 F. Supp. at 750, 754, 756 (S.D. Fla. 1989). The court did not dispute that the employer's policy would have a disparate impact on Hispanics. *Id.* at 753. Additionally, the court acknowledged—but did not consider relevant—the fact that the employee's

founded" because it could "be broadly read to bar all employment conviction policies," and it upheld the employer's policy since "[i]t is exceedingly reasonable" to predict one's honesty on the basis of her criminal record.[116] In subsequent years, lower courts in Illinois, Missouri, and Pennsylvania also implied a disagreement with the rationale of *Green* (and EEOC guidance) as they found for the employers in the respective cases.[117]

Other courts have weighed the *Green* factors more heavily in their evaluations of challenges to criminal background check policies. Most recently, the District Court for the Northern District of California applied the *Green* factors in finding for a Latino applicant who was denied employment as a corrections officer after he had indicated that he had used an invalid Social Security Number in the past; in the process, the court also held that the EEOC's 2012 Guidance was entitled to *Skidmore* deference.[118] Another district court used the *Green* factors as a baseline in evaluating an employer's policy,[119] while a different court applied the same factors in denying an employer's motion to dismiss.[120] Although not considering a Title VII claim, the District Court of Connecticut also cited *Green* in invalidating a state law, which categorically prohibited felons from "holding a precious metals license," under the Equal Protection Clause.[121] Relatedly, the

"conviction and prison term were over ten years old at the time he applied for employment and he had no subsequent convictions." *Id.* at 752.

116 *Id.* at 752–53.

117 *See* Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008) ("Sad as it may be for plaintiff, his extraordinary criminal conduct almost *thirty years ago* will likely reduce his opportunities as a prospective employee during his employable life. Race and sex discrimination laws do not impose duties on employers to overlook significant potential dangers, at least to employee morale." (emphasis added)); Clinkscale v. City of Philadelphia, No. 97–2165, 1998 WL 372138, at *2 (E.D. Pa. June 16, 1998) (rejecting the argument that the dismissal of criminal charges against the plaintiff, their expungement, and his acquittal could overcome the police department's proffered business necessity argument for a categorical bar on employment for individuals with a record of one or more arrests); Williams v. Carson Pirie Scott Co., No. 92 C 5747, 1992 WL 229849, at *2–3 (N.D. Ill. Sept. 9, 1992) ("[B]oth intuitively and as a matter of law it is obvious that an employment policy that bars the hiring of ex-felons—at least for a job as 'collector[ ]' . . . —does not violate Title VII.").

118 Guerrero v. Cal. Dep't of Corr. & Rehab., 119 F. Supp. 3d 1065, 1078–82 (N.D. Cal. 2015).

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

120 Waldon v. Cincinnati Pub. Sch., 941 F. Supp. 2d 884, 889–90 (S.D. Ohio 2013). The court quoted *Green* in ruling that it was unable to conclude that the school system's practice, pursuant to state law, of conducting background checks for all positions and terminating any employees if they "had been convicted of any . . . specified crimes, no matter how far in the past they occurred, nor how little they related to the employee's present qualifications," was a business necessity. *Id.* at 886, 889–90.

121 Barletta v. Rilling, 973 F. Supp. 2d 132, 139–40 (D. Conn. 2013).

Green factors and EEOC guidance informed the content of at least one court-approved settlement.[122]

The Third Circuit is the only other appellate court to expressly consider a challenge to the use of conviction records. *El v. Southeastern Pennsylvania Transportation Authority* (SEPTA) discussed both *Green* and the EEOC guidelines in upholding summary judgment in favor of the employer.[123] The case was brought by a Black man who had been conditionally hired as a bus driver and who was then discharged after the subcontractor learned of his forty-year-old conviction for murder.[124] The Third Circuit distinguished *Green* on two counts: First, *Green* dealt with a position at a corporate building and did not implicate a public safety concern, whereas El would be "alone with and in close proximity" to passengers.[125] Second, whereas the employer bar in *Green* applied to individuals with any criminal conviction, the policy in *El* was narrower and more job-related (albeit still a bright-line rule), covering only those who have records of driving under the influence, convictions for crimes of moral turpitude or violence, or convictions within the past seven years (or are currently on probation) for select offenses.[126] The Third Circuit determined that EEOC guidance was silent on whether bright-line bans that take the factors into account or lifetime bars for particular offenses might be lawful.[127] Either way, the court stated, "it does not appear that the EEOC's Guidelines are entitled to great deference."[128] The court ultimately concluded that the relevant question should be whether the "policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk"—a question for the jury.[129] Though the Third Circuit did not strictly follow the *Green* factors or the EEOC guidelines, it did weigh SEPTA's consideration of some of the *Green* factors in favor of finding for the employer.[130]

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122 *See* Mayer v. Driver Sols., Inc., No. 10–CV–1939 (JCJ), 2012 WL 3578856, at *1 (E.D. Pa. Aug. 17, 2012) ("The injunctive relief requires Defendants to modify [their] . . . hiring policy . . . . Defendants cannot bar applicants with felonies that are more than 10 years old or misdemeanors that are more than 5 years old, unless they are for certain specific crimes . . . . Defendants must consider mitigating factors in addition to the criminal history.").

123 479 F.3d 232, 235, 243 (3d Cir. 2007).

124 *Id.* at 235–36.

125 *Id.* at 243.

126 *Id.* at 236, 243.

127 *Id.* at 243.

128 *Id.* at 244.

129 *Id.* at 245.

130 *Id.* at 243–48. The 2007 decision prompted, in part, the EEOC's revision of its existing guidance. *Questions and Answers About the EEOC's Enforcement Guidance on*

A pending EEOC case, *EEOC v. Dollar General*,[131] may provide further insight into courts' willingness to defer to or follow the agency's most recent guidance on criminal records—provided that it is not dismissed or settled before a determination on the merits.[132] In the lawsuit, the EEOC included the failure to allow for individualized assessment as part of its argument that the defendant's policies are not consistent with business necessity.[133]

2. *The Independent Impact of EEOC Guidance*

Despite the mixed reception by courts, research indicates that many employers do view the *Green* factors and EEOC guidance as important guideposts.[134] A 2010 study by the Society for Human Resource Management found that, when asked how influential certain factors were in the decision to hire an individual with a criminal record, eighty-one percent of employers that conduct background checks stated that the severity of the offense was "very influential"; seventy-three percent stated that the "relevance of the criminal

the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www1.eeoc.gov//laws/guidance/qa_arrest_conviction.cfm (last visited Feb. 27, 2016) (stating that the EEOC "examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions" following the Third Circuit's decision, which had "noted . . . that the [EEOC] should provide in-depth legal analysis and updated research on this issue").

131 EEOC v. Dolgencorp LLC, No. 1:13-cv-04307 (N.D. Ill. filed June 11, 2013).

132 Under a September 2015 consent decree, BMW settled similar claims brought by the EEOC for $1.6 million. Consent Decree, EEOC v. BMW Mfg., No. 7:13-cv-01583-HMH, 2015 WL 5511210 (D.S.C. Sept. 8, 2015). Two other EEOC cases that challenged criminal background checks were recently dismissed at earlier stages. *See* EEOC v. Peoplemark, Inc., 732 F.3d 584, 587 (6th Cir. 2013) ("The [EEOC] filed a complaint . . . alleging that Peoplemark had a blanket, companywide policy of denying employment opportunities to persons with felony records and that this companywide policy had a disparate impact on African Americans. As it turned out, the alleged companywide policy did not exist. Eventually, the Commission dismissed its claim . . . ."); *supra* note 72 and accompanying text (discussing criticisms of the expert testimony presented in *Freeman*, in which the EEOC challenged the employer's use of both criminal background checks and credit checks).

133 Complaint at 3–4, EEOC v. Dolgencorp LLC, No. 1:13-cv-04307 (N.D. Ill. June 11, 2013).

134 Frank Dobbin has argued that the arrow runs the other way: Equal opportunity policies and mandates endorsed by courts, Congress, and the EEOC largely ratified programs that had already been embraced by personnel experts. FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2011). Though it seems that corporate best practices do inform legal doctrine, these practices—by virtue of being the *best* practices used at *leading* firms, *id.* at 3—are unlikely to be representative of the policies adopted by the average employer, which might not consult human resource professionals. Moreover, introducing revised legal mandates is essential to shaping the incentives of the many employers that may otherwise choose to stick with the status quo or minimum requirements under the law.

activity to the position applied for" was "very influential"; and fifty-six percent stated that the "length of time since the criminal activity" was "very influential."[135] A more recent survey of Michigan employers demonstrated that, among the seventy-six percent of employers that "were at least willing to consider hiring ex-offenders," ninety-eight percent gave some weight to the "nature of the offense, nature of the job, and time since release from prison"; ninety-six percent also considered "evidence of the applicant's rehabilitation."[136] The Michigan researchers accordingly concluded that "among those employers at least willing to consider hiring ex-offenders, the factors that the EEOC regulations require be taken into account are being considered."[137] That twenty-four percent of employers surveyed were unwilling to consider hiring individuals with criminal records as a blanket rule, however, suggests that there are limits to the influence of the EEOC's guidance.[138]

Why would employers follow agency guidance that does not have the force of law? Aside from the guidance's potential power to persuade,[139] the likely reasons for compliance include the complexity of employment discrimination law, the limited time and resources of many companies, and the EEOC's expertise as the federal enforcer of Title VII.[140] Additionally, "organizations that work with employers and human resources professionals have encouraged their members to revisit, and if necessary, revise, their criminal records policies" in light of the guidelines.[141] EEOC guidance also informs the agency's charge

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135 *Background Checking: Conducting Criminal Background Checks*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check_Criminal.pptx.

136 Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 229 (2013).

137 *Id.*

138 *See id.* at 228. "Any increasing employer unwillingness to even consider hiring ex-offenders may be explained by growing employer concern in recent decades concerning negligent hiring liability." *Id.* at 221.

139 *See supra* note 95 and accompanying text (describing *Skidmore* deference).

140 *See* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 211 & nn.56 & 59 (2014) ("[C]ompliance with employment discrimination law can be difficult and employers still tend to look to the EEOC for guidance on how to comply. . . . Small businesses, lacking the time and resources needed to challenge the EEOC's position, will likely follow its guidance in developing compliance policies." (footnote omitted)); *cf.* Hart, *supra* note 93, at 1953–54 (arguing for greater judicial deference to the EEOC's interpretations).

141 Smith, *supra* note 79, at 223 & n.143 (citing as examples a staff management blog and a post by Jones Day); *see also* Susan K. Gauvey & Tom Webb, *A New Look at Job Applicants with Criminal Records*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 22, 2013), http://www.shrm.org/legalissues/federalresources/pages/applicants-criminal-records.aspx (noting developments "in the legislative, executive and judicial arenas on employment of ex-offenders," and advising companies to "review and rethink their hiring policies and use

determinations and the issues considered by EEOC staff when working to investigate and resolve cases.[142] The possibility of facing costly "EEOC-initiated investigations and litigation challenging . . . policies that the EEOC considers to be . . . unlawful under Title VII" may thereby shape employer practices by serving a deterrent function (even if those cases are ultimately unsuccessful in the courts).[143] Indeed, in an announcement of a $3.13 million settlement with Pepsi over its criminal background check policies, the acting director of the EEOC regional office in which the initial charge was filed stated: "We hope that employers with unnecessarily broad criminal background check policies take note of this agreement and reassess their policies to ensure compliance with Title VII."[144] The impact of EEOC guidance on employers' use of criminal records suggests that the agency should take similar action in the context of employer credit checks.

III
A Modification of the *Green* Factors for Credit Check Policies

In a 2007 EEOC meeting on employment testing and screening, Adam T. Klein, a partner at Outten & Golden LLP, noted the absence of EEOC guidance on the use of credit checks and requested its issuance.[145] Nine years later, the agency has yet to follow

more targeted screening processes for, and a more individualized assessment of, ex-offender applicants").

142 *See* U.S. Equal Emp't Opportunity Comm'n, *supra* note 60, at 3 ("The [EEOC] intends this document for use by . . . EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions."). In fiscal year 2014, thirty-eight percent of EEOC conciliations were successful, with a forty-seven percent success rate for systemic investigations, which include challenges to "discriminatory barriers in recruitment and hiring." *Systemic Discrimination*, U.S. Equal Emp. Opportunity Commission, http://www.eeoc.gov/eeoc/systemic/ (last visited Feb. 27, 2016); *What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. Equal Emp. Opportunity Commission, http://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (last visited Feb. 27, 2016). Where conciliation is unsuccessful, the agency files a complaint in court in less than eight percent of cases. *What You Should Know: The EEOC, Conciliation, and Litigation*, *supra*. The EEOC "achieved a favorable resolution in approximately 90 percent of all district court resolutions." *Id.*

143 Lauren Timmons, *Whose Role Is It Anyway? Applying Title VII to Employers' Criminal Conviction Record Policies*, 49 Wake Forest L. Rev. 609, 620 (2014) ("Thus, employers are not technically required to follow the EEOC's Guidance, but they ignore it at their own peril.").

144 Press Release, U.S. Equal Emp't Opportunity Comm'n, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm (quoting Julie Schmid of the Minneapolis Area Office).

145 Adam T. Klein, Deputy Managing Partner, Outten & Golden LLP, Statement at the U.S. Equal Employment Opportunity Commission Meeting on Employment Testing and

through.[146] While the EEOC has called attention to credit checks as an employment screening procedure subject to challenge,[147] heard testimony on the topic,[148] recognized in informal discussion letters that disparate impact claims may arise from such policies,[149] and counseled employers on their use in a cursory manner,[150] the agency can do more. Assuming that the disparate impact of credit checks can be established,[151] the EEOC should articulate the considerations for distinguishing between lawful policies supported by business necessity and unlawful policies that are not justified. As opposed to the standard articulated in *El*, which asks whether the practice distinguishes between applicants who present an unacceptable level of risk and those who do not, guidance on credit check usage should be proposed along the lines of the *Green* factors. *Green*'s three-factor test lends itself to greater predictability and uniformity of outcomes because it is simpler to apply: Discerning whether concrete factors are accounted for is easier than determining whether a practice passes a more ambig-

Screening (May 16, 2007), http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/transcript.html#12; *see also Remarks of Sarah Crawford*, *supra* note 42 ("The EEOC should provide . . . more comprehensive guidance on the interplay of Title VII and the use of credit checks.").

146 In 2009, though, the acting chairman of the EEOC told the *New York Times* that credit checks were an active concern and that the agency "would probably issue guidance on the proper use of credit checks." Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 6, 2009, at A1.

147 *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL SECTION 15: RACE AND COLOR DISCRIMINATION 15–30 (2006), http://www.eeoc.gov/policy/docs/race-color.pdf ("Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees' credit history."); *Employment Tests and Selection Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last modified Sept. 23, 2010) (including credit checks in a list of "employment tests and other selection procedures" that can violate Title VII if they have a disparate impact on protected classes and are unsupported by a business justification).

148 Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Public Meeting Explores the Use of Credit Histories as Employee Selection Criteria (Oct. 20, 2010), http://www.eeoc.gov/eeoc/newsroom/release/10-20-10b.cfm; Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Spotlights Employment Testing and Screening in the 21st Century Workplace (May 16, 2007), http://www.eeoc.gov/eeoc/newsroom/release/archive/5-16-07.html.

149 Letter from Peggy R. Mastroianni, Legal Counsel, U.S. Equal Emp't Opportunity Comm'n (Apr. 19, 2013), http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_criminal_and_credit_history.html; Letter from Dianna B. Johnston, Assistant Legal Counsel, U.S. Equal Emp't Opportunity Comm'n (Mar. 9, 2010), http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html.

150 *See supra* note 12 (discussing general recommendations that the agency has offered).

151 *But see supra* notes 33–35, 61–63 and accompanying text (noting statistical difficulties that plaintiffs face); *supra* Section I.C.1 (summarizing recent challenges to credit check policies under the disparate impact framework).

uous risk-analysis test.[152] This Part first considers an argument for a categorical prohibition on employer credit checks and then details a proposal for EEOC guidance on tailored credit checks.

A. The Argument for a Categorical Ban on Credit Checks

Recall that Title VII requires that employment tests or screening procedures, if they have a disparate impact on protected classes, "have a manifest relationship to the employment in question" and "demonstrably [be] a reasonable measure of job performance."[153] Employers primarily utilize credit checks in their employment decisions for the asserted purpose of preventing employee theft, fraud, and mismanagement, as well as to "reduce legal liability for negligent hiring."[154] More generally, employers cite to an applicant's credit history as an indicator of "overall trustworthiness" and "quality."[155]

Recent empirical research, however, has called into question any correlation between credit history and either proclivity to commit a crime or job performance. Laura Koppes Bryan and Jerry Palmer examined the predictive nature of credit reports in employment in a study of employees within the financial services industry.[156] They found that "[v]irtually all of the correlations between the predictors," such as number of late payments, "and performance ratings were near zero,"[157] and that the predictors bore no reliable relationship to termi-

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[152] *See* Kelsey Sullivan, Comment, *Risky Business: Determining the Business Necessity of Criminal Background Checks*, 2014 U. CHI. LEGAL F. 501, 526–27 (2014) (recognizing that a court following *El* "could choose to look at none of [the *Green*] factors, or to look at more factors, as long as they fall within the umbrella term 'risk,'" and that a "rule based on risk provides insufficient notice to employers about what could constitute a successful business necessity defense").

[153] Griggs v. Duke Power Co., 401 U.S. 424, 432, 436 (1971).

[154] SOC'Y FOR HUMAN RES. MGMT., *supra* note 5, at 10; *see also* Andrew J. Hawkins, *Council Snubs Biz Community on Credit-Check Ban*, CRAIN'S N.Y. BUS. (Sept. 12, 2014, 1:21 PM), http://www.crainsnewyork.com/article/20140912/BLOGS04/140919946/council-snubs-biz-community-on-credit-check-ban (quoting testimony from the Securities Industry and Financial Markets Association); Andrew Martin, *As a Hiring Filter, Credit Checks Draw Questions*, N.Y. TIMES, Apr. 9, 2010, at B1 (referring to comments by representatives of TransUnion and Experian).

[155] SOC'Y FOR HUMAN RES. MGMT., *supra* note 5, at 10; Andrew Weaver, *Is Credit Status a Good Signal of Productivity?*, 68 ILR REV. 742, 742 (2015); *see also* Rachel Farrell, *Why Do Employers Care About Your Credit?*, CNN (July 12, 2010, 10:16 AM), http://www.cnn.com/2010/LIVING/07/12/cb.employers.your.credit/ (quoting the president of an executive search company as saying: "If, for example, an applicant reports a significant level of personal debt obligations or credit delinquencies that might distract that person from his or her job responsibilities, then a hiring entity may take that information into consideration when comparing such an applicant to another comparative candidate without such distractions").

[156] Bryan & Palmer, *supra* note 8, at 112–13.

[157] *Id.* at 115.

nation decisions.[158] Similarly, another study analyzing credit scores and performance data "showed that poor credit scores weren't related to an employee's propensity . . . to steal from an employer or engage in other 'deviant' behavior."[159] A 2014 analysis also "indicate[d] that credit status does not contain a meaningful signal about the unobserved character-related components of employee productivity."[160] Even a representative of the credit bureau TransUnion admitted in 2009 that the bureau lacked "any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."[161]

Given studies that cast doubt upon the claim that credit checks are "a reasonable measure of job performance,"[162] one might wonder whether Title VII should prohibit credit checks altogether. In the criminal background check context, comparable questions have been raised about the lack of "solid statistical foundation" linking a prior criminal conviction to a propensity for workplace violence.[163] Yet the fact that courts have nonetheless afforded employers deference in disparate impact challenges over the past few decades—including in some challenges to credit check policies—suggests that they are unlikely to require empirical proof of employers that proffer a plausible explanation for the need for credit history considerations.[164]

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158 *Id.* at 119.

159 Carrns, *supra* note 8 (referring to Jeremy B. Berneth et al., *An Empirical Investigation of Dispositional Antecedents and Performance-related Outcomes of Credit Scores*, 97 J. APPLIED PSYCHOL. 469 (2012)).

160 Weaver, *supra* note 155, at 767.

161 Martin, *supra* note 154. *But see* James D. Phillips & David D. Schein, *Utilizing Credit Reports for Employment Purposes: A Legal Bait and Switch Tactic?*, 18 RICH. J.L. & PUB. INT. 133, 154–55 (2015) (critiquing the Bryan and Palmer study based on sample size and manipulation and highlighting a longitudinal study by Edward Oppler that provides some support for a connection between financial history and "counterproductive work behavior," though ultimately noting that "not an overwhelming number of studies validate the work performance-good credit link").

162 Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); *see* Concepción, *supra* note 16, at 537–41 (arguing that credit history is not a meaningful signal of job performance, noting that credit reports are overinclusive in reflecting non-employment-related traits, and highlighting that inaccuracies may be present in credit reports).

163 Susan K. Gauvey & Tom Webb, *A New Look at Job Applicants with Criminal Records*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 22, 2013), http://www.shrm.org/legalissues/federalresources/pages/applicants-criminal-records.aspx.

164 *See supra* notes 84–86 and accompanying text (discussing challenges to employer credit check policies); *supra* note 113 and accompanying text (noting judicial trends). With respect to employment tests, however, courts are more stringent. *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 429–36 (1975) (identifying defects in the validation study of an employment test and holding that the employer failed to prove that the test was job-related); *Griggs*, 401 U.S. at 433–36 (describing EEOC guidelines and Title VII legislative history before stating that employment tests do not have "controlling force unless they are *demonstrably* a reasonable measure of job performance" (emphasis added)). The Third

Additionally, any EEOC guidance that wholly prohibits credit checks would conflict with some state and federal laws and regulations requiring consideration of credit history.[165] The following Section therefore advocates an alternative approach.

B. Guidance for Targeted Credit Checks

As described in Part II, the Eighth Circuit—and later the EEOC—identified three factors in the context of criminal records use by employers that were relevant to a consideration of business necessity arguments: (1) "the nature and gravity of the offense or offenses"; (2) "the time that has passed since the conviction and/or completion of sentence"; and (3) "the nature of the job for which the applicant has applied."[166] While the factor of the nature of the job translates easily to the analogous area of employment credit checks, the other factors must be modified to some degree. This Note suggests that the considerations for evaluating business necessity in the context of credit history usage ought to be: (1) the source or type of debt; (2) the time between the "negative behavior" and the employment decision; and (3) the nature of the job. To the extent that an employer believes credit history is relevant because it might reveal poor money management or suggest that the individual has a motivation to steal from the employer or its clients,[167] these three factors inform whether there is a relationship between the credit information in question and the pur-

Circuit's reasoning in *El* presents one explanation for the difference in treatment: Employment tests in hiring are "designed or used—at least allegedly—to measure an employee's ability to perform the relevant jobs." El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242 (3d Cir. 2007). Background checks, meanwhile, are used to uncover the attendant risks of employing an individual, notwithstanding her satisfaction of the minimum qualifications for the position. *Id.* at 242–43. A test that measures concrete skills is more readily subject to empiricism than a policy to determine the potential—which may or may not be actualized—of exhibiting "unprofessional" behavior. *Cf.* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 769 (2006) ("[W]ithout the established standards that govern testing claims, the judicial determination [of business necessity] is almost entirely subjective in nature, leaving courts to make normative judgments regarding the merits of the challenged practice. . . . [C]ourts routinely defer to employer practices in making those judgments . . . .").

165 *See, e.g.*, TRAUB, *supra* note 13, at 14 ("[M]any federal agencies require credit checks as part of their determination of suitability for federal employment."); Letter from Julie Bauer, Senior Vice President, Office of Gov't Relations, Fin. Indus. Regulatory Auth., to Jon Paul Lupo, Dir., Office of City Legislative Affairs, Office of the Mayor of N.Y.C. (Feb. 18, 2015), http://s3.amazonaws.com/cdn.orrick.com/files/FINRA.pdf (detailing a 2015 rule promulgated by the Financial Industry Regulatory Authority and approved by the Securities and Exchange Commission).

166 Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1159–60 (8th Cir. 1977) (quoting the trial court's injunctive order).

167 *See supra* notes 154–55 and accompanying text (noting employer justifications for consideration of credit history).

ported business needs. This Section additionally proposes that the EEOC recommend individualized assessments, as it does with respect to criminal records,[168] to account for potential inaccuracies in a credit report and to allow candidates an opportunity for explanation.

1. Three Considerations

a. The Source or Type of Debt

In the EEOC's 2012 guidance on criminal records, the agency explained the inclusion of the nature and gravity of the offense as a factor by stating that it is "the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position."[169] One should similarly inquire, in the context of credit checks, as to whether the nature of the debt considered by the employer may be relevant for employment purposes. Generally, debts that stem from circumstances outside one's control, such as medical emergencies, are (arguably) more relevant to an employer with legitimate apprehension about employee theft resulting from financial desperation than to an employer whose asserted reason for checking an applicant's financial history is a concern about "responsibility."

While one might assert that "[o]ver-consumption" indicates financial irresponsibility, and that financial irresponsibility is a job-related concern, negative credit is not necessarily the result of something within a person's command.[170] Certain types of debt, such as medical debt, or sources of debt, such as separation or divorce, arise out of circumstances that either are beyond one's control or "bear no relation to employment suitability."[171] One might also think that adverse employment actions based on default judgments stemming from predatory payday loans, which are *intended* to "trap" borrowers, is likewise inappropriate.[172] And where loss of income is the cause of negative credit information, employers conducting credit checks should reevaluate consideration of the resulting debt if reductions in force or other wholly external factors (for which the applicant cannot bear fault) are what led to the termination from employment.

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168 *See supra* notes 107–08 and accompanying text (detailing the EEOC's 2012 guidance on use of criminal records).

169 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 60, at 15.

170 *Statement of Adam T. Klein, Esq.*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 16, 2007), http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html.

171 *Id.*

172 *See generally* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259–70 (2002) (defining predatory lending); Paul Kiel, *The Payday Playbook: How High Cost Lenders Fight to Stay Legal*, PROPUBLICA (Aug. 2, 2013, 9:00 AM), http://www.propublica.org/article/how-high-cost-lenders-fight-to-stay-legal (reporting on initiatives to ban payday lending).

b. The Time Between the "Negative Behavior" and the Employment Decision

The second *Green* factor, time elapsed since the criminal offense or completion of the sentence, is linked to the issue of the risk of recidivism.[173] While there is no real analogue to recidivism with respect to one's credit situation or history, one might argue that the length of time since the recording of negative credit information is relevant in determining whether one has reformed or "rehabilitated" her financial management skills and financial situation, thereby reducing concerns over fiscal irresponsibility and potential theft or fraud, respectively.[174]

Federal statute dictates how long certain financial information can remain on one's credit report.[175] Judgments, paid tax liens, accounts placed for collection, and most other adverse information can stay on one's credit report for seven years, and bankruptcy information for ten years.[176] The argument that a financial misstep is relevant several years later is attenuated, even if one accepts employers' arguments that an applicant's current financial situation may influence future job performance or propensity to steal. Though determining when the "negative behavior" occurred in the credit context is more difficult than in the criminal records context, where the conviction or time of release is an easily identifiable date, the length of time since one's credit history improved or debts began to be repaid should be considered in the business necessity analysis.

c. The Nature of the Job

The EEOC guidance on arrest and conviction records states that "it is important to identify the particular job(s) subject to the exclusion"—which includes identifying not only the position's title, but also the nature of the responsibilities and the circumstances and environment in which the job is performed—to help establish that the policy "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[177] The same should be highlighted in the context of credit checks. Information about the nature of the job is relevant whether the employer articulates concerns about employee

173 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 60, at 15.

174 *But see supra* notes 156–61 (noting the lack of empirical evidence correlating credit situation with propensity to steal or commit fraud).

175 *See* 15 U.S.C. § 1681c(a) (2012) (identifying time periods beyond which information must be excluded).

176 *Id.*

177 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 60, at 16 (alteration in original) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

theft—since the potential for theft is contingent on access to cash, credit card information, or bank accounts—or financial management—which may or may not be implicated by the job description.

Earlier cases and existing legislation recognize the importance of the specifics of the job at issue. In the few opinions addressing challenges to credit checks on the merits, the courts paid special notice to the nature of the job and the business of the employers, which, in those cases, were law enforcement departments and banks.[178] State laws restricting the use of credit checks by employers have also allowed exceptions for certain types of positions, such as those that involve access to a corporate credit card, or employers, such as federally insured banks.[179] The EEOC need not present an exhaustive list of (the characteristics of) positions for which the consideration of credit information is justified; nonetheless, the EEOC should emphasize that credit check policies that apply broadly to a wide swath of positions (for example, all positions at a financial institution) may not be tailored enough to meet the business necessity standard if the specific duties and other details of the positions do not have a clear relationship to information that can be gleaned from a credit report.

2. Individualized Assessments

As noted in Part II, the EEOC in its most recent guidance of criminal records use in employment decisions recommended that employers conduct individualized assessments before an employment decision is made.[180] Providing applicants with an opportunity to discuss their history and the circumstances at the root of the problem at issue is just as, if not more, important with respect to individuals' credit reports. A consultant testifying before the EEOC, recognizing the potential disparate impact of credit check policies and that poor credit may be due to situations beyond one's control, rightly stated that "it would seem prudent for organizations using an applicant's credit history to . . . [examine] whether a poor credit history is an

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178 *See supra* Section I.C (summarizing challenges to date).

179 *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51tt(a)(4) (West 2016) (listing descriptions of exempt positions); OR. REV. STAT. § 659A.320(2) (2015) (same); *see also* Earle et al., *supra* note 16, at 194–219 (summarizing enacted and proposed state legislation). Some advocacy groups have voiced opposition to the inclusion of numerous exemptions. *See, e.g.*, Memorandum from Demos to Mayor Bill de Blasio et al. (2014), http://www.demos.org/sites/default/files/publications/Memorandum.pdf (arguing against "[u]njustified exemptions that weaken and undermine legislation on employment credit checks"); Nikita Stewart, *Group Urges New York City to End Credit Checks by Employers*, N.Y. TIMES, Jan. 15, 2015, at A22 ("'Sometimes the exemptions look benign, but they eat the law alive,' said Sarah Ludwig . . . of the New Economy Project, a justice advocacy organization.").

180 *Supra* notes 107–08 and accompanying text.

anomaly or is indicative of a problematic lifestyle that might impact behavior at work."[181] Notably, the Society for Human Research Management found in 2010 that sixty-five percent of employers in its studies allow applicants to explain the content of their credit report before a final hiring decision is made; twenty-two percent allow for explanation only after the hiring decision is made; and thirteen percent offer no such opportunity.[182]

Engaging in a discussion about an applicant's financial history may be more personally invasive than similar discussions about an applicant's criminal history,[183] but there are compelling reasons for including individualized assessments. First, inaccuracies in credit reports are common. A particularly concerning 2004 study found that seventy-nine percent of credit reports contained mistakes, with a quarter of credit reports "contain[ing] serious errors that could result in the denial of credit, such as false delinquencies or accounts that did not belong to the consumer."[184] The Federal Trade Commission's 2012

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[181] *Remarks of Michael Aamodt*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Oct. 20, 2010), http://www1.eeoc.gov/eeoc/meetings/10-20-10/aamodt.cfm.

[182] SOC'Y FOR HUMAN RES. MGMT., SHRM RESEARCH SPOTLIGHT: CREDIT BACKGROUND CHECKS (2010), https://www.shrm.org/Research/SurveyFindings/Articles/Documents/CCFlier_FINAL.pdf.

[183] Criminal records are more widely available than are credit reports. *Compare* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008), *with* FED. TRADE COMM'N, A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT, https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf (last visited Feb. 25, 2016) (highlighting that the FCRA restricts access to one's credit report to "those with a valid need"). As a result, individualized assessments with respect to credit history may seem more invasive than those with respect to criminal history. Nevertheless, to the extent that an employer already has access to an applicant's credit report, which has detailed information about one's financial history extending as far back as ten years, *supra* notes 4–5, a policy of engaging in a discussion about that same information is unlikely to spur additional privacy concerns in most cases. *But see* AMY TRAUB, DEMOS, THE PROBLEM WITH EMPLOYMENT CREDIT CHECKS 3 (2013), http://www.demos.org/sites/default/files/publications/EqualEmploymentAllAct-Demos_0.pdf (stating that an opportunity for explanation may "force[ ] job applicants to choose between discussing a recent divorce, confidential medical issues, and/or very personal details regarding the abusive dynamics in a relationship, or risk losing a job opportunity"); *see also supra* note 46 (describing how divorce and domestic abuse may lead to financial disparities on the basis of gender).

[184] ALISON CASSADY & EDMUND MIERZWINSKI, NAT'L ASS'N OF STATE PIRGs, MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 4 (2004), http://cdn.publicinterestnetwork.org/assets/BEevuv19a3KzsATRbZMZlw/MistakesDoHappen2004.pdf; *see also, e.g.*, *CFPB Takes Action Against Two of the Largest Employment Background Screening Report Providers for Serious Inaccuracies*, CONSUMER FIN. PROTECTION BUREAU (Oct. 29, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-two-of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies/ (noting that providers impermissibly included non-reportable information and failed "to take basic steps to assure accuracy," which "potentially affected consumers' eligibility for employment").

report to Congress, which detailed the results of the first national credit report accuracy study, revealed that twenty-six percent of participants had "at least one potentially material error on at least one of their three credit reports."[185] Moreover, even when an individual becomes aware of an error's existence, correcting one's credit report has presented its own hurdles. One of the three credit bureaus, Experian, recently settled a putative class action lawsuit brought over Fair Credit Reporting Act claims that it required a full social security number to process a dispute and that it "subsequently fail[ed] to update consumer files with accurate information."[186] The Mississippi Attorney General has also alleged that Experian has not taken "basic steps to ensure the accuracy" of its reports, resulting in identity mix-ups and other serious mistakes.[187]

Additionally, the categories of debt stated on one's report may not make clear the source of, or circumstances leading to, that debt. While most employers state that medical debt, for one, is unlikely to affect hiring decisions,[188] it may be impossible to distinguish medical debt from other credit card debt if a household uses a "plastic safety net" to pay for medical expenses.[189] An individualized assessment or engaging in a dialogue, meanwhile, may be the only way for a candidate to provide an explanation for negative credit information and to ameliorate the employer's concerns.[190] In recommending these assess-

185 FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at i (2012), https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf. Examples of material errors for the purposes of the study include errors in the number of missed or late payments or accounts sent to collection and accounts not belonging to the participant. *Id.* at 17–18 (defining material error). The report notes that the confirmed error rate might have underestimated the percentage of errors. *Id.* at 29, 32 (acknowledging that the sample was "slightly younger and slightly more educated than the U.S. average," which "may cause credit report error rates to be underestimated").

186 David Siegel, *Experian Settles FCRA Suit over Credit Dispute Process*, LAW360 (July 16, 2014, 8:41 PM), http://www.law360.com/articles/558059/experian-settles-fcra-suit-over-credit-dispute-process.

187 *Id.*

188 SOC'Y FOR HUMAN RES. MGMT., *supra* note 5, at 17.

189 *See Remarks of Sarah Crawford*, *supra* note 42 (citing a study that revealed that "families with medical debt had 43% more credit card debt than those without medical debt" and that a majority of low- and middle-income households paid for medical expenses with credit cards); *see also supra* note 52 (citing reports that discuss use of credit cards as a safety net).

190 In a 2013 article, the *New York Times* described the efforts of Alfred J. Carpenter, who was laid off in the recession and then underwent knee surgery and rehabilitation without health insurance, to secure employment. Gary Rivlin, *The Long Shadow of Bad Credit in a Job Search*, N.Y. TIMES, May 11, 2013, at BU1. He was rejected from multiple shoe salesman positions despite having six years of experience selling high-end shoes; one employer informed him that his poor credit history had a role in the decision. *Id.* Mr.

ments, the EEOC could also provide illustrative examples, as it did in its 2012 guidance on criminal records,[191] of situations in which adverse employment actions arising out of credit check policies would or would not raise flags.

Conclusion

In a disparate impact case challenging an employer's policy of discharging employees whose wages have been garnished, the District Court for the Central District of California aptly recognized: "The cycle of poverty and discrimination [has] to be broken someplace; employment, Congress decided, should be one of those places."[192] "The discrimination" resulting from the employer's practice, the court continued, "is the result of broader patterns of exclusion and discrimination practiced by third parties and fostered by the whole environment in which most minorities must live. . . . If the employer were permitted to discriminate . . . the effort to break the desperate ring of discrimination would soon fail."[193]

The court's statement applies well to the problem of credit checks in employment decisions, which likewise compound upon existing racial inequalities, create additional barriers to economic opportunity for minorities, and potentially violate the rights of protected groups under Title VII. This Note has proposed that the EEOC issue detailed guidance on credit check policies to ensure that there is a "manifest relationship"[194] between the credit information being evaluated and employers' professed needs. While parties bringing disparate impact

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Carpenter lamented the fact that the employers did not provide him an opportunity to explain his financial situation. *Id.*

Though some contend that employers' use of individualized assessments in this context creates the potential of discriminatory treatment, *e.g.*, Traub, *supra* note 183, at 3 ("Questions about medical debt particularly impact people with disabilities, for whom disclosure of a medical condition may lead to discriminatory treatment."), the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (2012) (prohibiting discrimination "on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"), would provide sufficient protections. Moreover, the ADA would not impede individualized assessments: the statute permits voluntary disclosures by applicants of "a nonvisible disability," as well as employer inquiries about an individual's "well being" and "nondisability-related impairments" before the extension of an employment offer. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)*, U.S. Equal Emp. Opportunity Commission (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

191 *Supra* notes 102, 110 and accompanying text.

192 Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 496 (C.D. Cal. 1971).

193 *Id.*

194 Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

challenges to credit check policies in courts might continue to grapple with satisfying burdens of statistical proof or demonstrating the existence of an alternative practice, the identification of markers of potentially discriminatory credit check usage would nonetheless aid employers seeking to abide by the law and benefit employees who may be vulnerable to adverse employment actions. Greater clarity along these lines would, in the spirit of *Griggs*,[195] strengthen efforts to end the damaging cycle of discrimination and inequality.

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[195] *See supra* note 24 and accompanying text (discussing the goal of *Griggs*).