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COMMENTS

EMPLOYERS' USE OF CRIMINAL RECORDS UNDER TITLE VII

Persons with criminal records often have an inordinately difficult time securing and maintaining employment. Not only are they handicapped by their typically limited job experience and educational qualifications, but they are also placed at a severe competitive disadvantage by their arrest or conviction records. Most employers solicit information from applicants regarding their criminal records, and where such a record is found, it is often used automatically or effectively to disqualify the applicant from employment. Even in the rare case when the employer does not use the criminal record information to make hiring decisions, its mere solicitation may discourage applicants with such records from applying.

These barriers to employment, besides affecting individuals who have criminal records, also frustrate policy goals of reducing recidivism and promoting equal employment opportunities. It has often been hypothesized that unemployed ex-offenders are much more likely to commit future

1. This includes both persons with arrest records only and those with arrest and conviction records. As used in this article, the term "ex-offender" refers exclusively to a person who has been convicted of a crime. Although the term is also frequently used in the literature to refer to persons who have only an arrest record, such an application is improper, because arrest alone is not very strong evidence that the arrestee actually violated a criminal code. See Zeisel, The Future of Law Enforcement Statistics, in 2 PRESIDENT'S COMM'N ON FEDERAL STATISTICS 540 (1971).

2. See Feyerherm, The Employment History of Prison Releases, in STATE MANPOWER COUNCIL — MADISON WISCONSIN, THE GOVERNOR'S CONFERENCE ON EMPLOYMENT AND THE PREVENTION OF CRIME 145, 145-48 (1976) (of all prisoners released from confinement in 1974, only 54% were fully employed one year later and 34.4% were completely unemployed); G. POWNALL, EMPLOYMENT PROBLEMS OF RELEASED PRISONERS 48-49 (1969) (62.6% of released prisoners under federal supervision were fully employed in 1965 compared to 81% of the national civilian work force).

3. The work experience of 43.4% of all ex-offenders, compared to only 17.2% of the work force as a whole, is limited to unskilled labor or service work. Only 17.7% of ex-offenders have 12 or more years of education, compared to 45.3% of the entire work force. Sullivan, Changes in Correction: Show or Substance?, 3 MANPOWER 2 (Jan. 1971).


5. Jensen & Giegold, supra note 4, at 203-05. See notes 20, 22-23 infra.

6. EEOC COMPL. MAN. (CCH) ¶ 5304 (1979). The request for criminal record information also tends to induce false or incomplete answers that often lead to the applicant being rejected or the employee being discharged. Id. See text accompanying notes 104-06 infra.
crimes than those who find suitable employment. Studies indicate that minorities suffer a disproportionate number of arrests and convictions. For example, one study indicates that eighty-five percent of black male adults have arrest or conviction records of some kind. Since a disproportionate number of those who are denied employment by the use of criminal records are minorities, the provisions of Title VII of the Civil Rights Act of 1964 are implicated. Under the Act, it is illegal for an employer to discriminate because of an individual's race, color, religion, sex, or national origin. The Act prohibits not only discriminatory treatment, but also discriminatory effect; that is, the unintentional exclusion of a disproportionately high number of members of designated classes unless the exclusion is justified as being job-related.

Although several courts have held that an employer's use of criminal records without a sufficient job-related justification violates Title VII when it adversely impacts on minorities, such use of criminal records is nevertheless widespread. This Comment will examine the application of Title VII to an employer's use of criminal records — particularly from the per-

10. Id. § 2000e-2(a), stated in note 38 infra.
13. See generally N. MILLER, EMPLOYER — BARRIERS TO THE EMPLOYMENT OF PER-
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spective of the black applicant or employee — with the goal of evaluating the cause of the apparent inconsistency between the legal standard and the pervasive employer practice.

I. EMPLOYER PRACTICES WITH RESPECT TO CRIMINAL RECORDS

Employers routinely seek to determine whether job applicants have criminal records. Two recent national surveys suggest that a majority of employers solicit criminal record information on their application forms, and a significant number also obtain criminal record information through applicant interviews, background investigations, credit checks, and police agencies. Since larger employers more frequently obtain such information than do smaller employers, it appears that a large majority of available positions are filled by employers with access to applicants' criminal records.

Although some employers use these arrest and conviction records to

14. In a 1976 survey of employers, 79% of the respondents reported that they solicit arrest and conviction records on application forms. Jensen & Giegold, supra note 4, at 205-06. While 79% of the respondents to the Jensen and Giegold survey solicit criminal records on application forms, only 50% of the respondents to the 1976 Personnel Practices Form Survey report collecting criminal record information on application forms. Compare Jensen and Giegold, supra note 4, at 205, with BNA, Selection Procedures and Personnel Records, PPF Forum No. 114, 2 (Sept. 1976) [hereinafter cited as BNA]. Part of the discrepancy may be explained by a peculiarity in the BNA questionnaire. The questionnaire asked whether "police/arrest record" is included on application forms. Thirty-nine percent responded affirmatively without comment while an additional 11% wrote in that their form seeks information on convictions only. It is likely that additional firms seek conviction record information exclusively and answered in the negative to the police/arrest record question.

15. These methods may be used to verify or supplement the application form information. Forty-five percent of respondents to the Jensen and Giegold survey obtain arrest and conviction records through credit or security investigations, 6% through interviews with references, and 14% through police records. Jensen & Giegold, supra note 4, at 205-06. Forty-seven percent of respondents to a 1974 survey replied that they attempt to verify arrest and conviction information that applicants give them. Beason & Belt, Verifying Job Applicants' Background, THE PERSONNEL ADMINISTRATOR 29 (Nov.-Dec. 1974).


17. Thirty-nine percent of the respondents to the BNA survey reported that police/arrest record information is required on all application forms. BNA, supra note 14, at 2. Even though employers are aware that the practice was invalidated in Gregory v. Litton Sys. Inc., 316 F. Supp. 401 (C.D. Cal. 1970), aff'd in relevant part, 472 F.2d. 631 (9th Cir. 1972), Jensen and Giegold report that employers continue to seek such information on application forms. Jensen & Giegold, supra note 4, at 205.
reject candidates outright, most do not automatically eliminate candidates simply because they have been arrested or convicted.\textsuperscript{19} It is generally agreed, however, that the presence of an arrest or conviction record is detrimental to a job applicant and that persons without criminal records have an advantage.\textsuperscript{20} Just how detrimental a criminal record may be depends on several factors. The type of crime involved, the presence or absence of multiple convictions, experience of the applicant since his last conviction, and other factors all affect employers' decisions. Some employers do not adequately understand the difference, see H. Miller, supra, at 150, and others are misled by criminal record forms that do not reveal dispositions. See J. Breiteneicher, The Employment Problem of Offenders: A Primer 7 (Employment Law Center, Legal Aid Soc'y of S.F. 1974) [hereinafter referred to as Employment Law Center].

\textsuperscript{18} A significant number of employers fail to distinguish between applicants who have been convicted and those who have only been arrested. \textit{See} H. Miller, The Closed Door: The Effect of a Criminal Record in Employment with State and Local Public Agencies 147-49 (1972) (arrest records constitute an obstacle to employment even where there has been no conviction); R. Winston, A Study to Determine How Personnel Managers' Perceptions of Risk and Deservedness Affect Their Evaluation of Ex-Offenders 7 (Oct. 6, 1975) (Unpublished Harvard University M.B.A. thesis) ("... being arrested aroused suspicion and anxiety [among hirers surveyed] not only when no guilt was proven, but also where complete innocence was proven."). Some employers do not adequately understand the difference, see H. Miller, supra, at 150, and others are misled by criminal record forms that do not reveal dispositions. \textit{See} J. Breiteneicher, The Employment Problem of Offenders: A Primer 7 (Employment Law Center, Legal Aid Soc'y of S.F. 1974) [hereinafter referred to as Employment Law Center].

\textsuperscript{19} Eighty-nine percent of respondents to the 1975 Chicago-area survey stated that they would consider hiring individuals with conviction records while the remaining 11% stated that they would not. Sixty-seven percent of respondents have hired applicants with such records in the past, 9% have not, and the remaining 24% do not know. E. Tromanhauser, supra note 16, at 10-11. Eighty-two percent of employers surveyed by Jensen and Giegold do not have a formal written policy. Of those that do, less than 3% prohibit the hiring of persons with arrest records. Jensen & Giegold, supra note 4, at 202-03. Tromanhauser hypothesizes four possible reasons for a company not having a formal policy: (1) the issue does not require a policy; (2) the issue does not arise frequently enough; (3) there is an unwritten policy that they do not wish to disclose; and (4) they prefer to treat each case on its merits. E. Tromanhauser, supra note 16, at 9-10. Because most companies lack uniform policies with respect to criminal records, the way in which they are used remains somewhat a mystery. One reason that it is difficult to determine how applicants with criminal records are treated is that employment decisions can be made at various levels of management depending on the company's structure and the nature of the job. \textit{See} Jensen & Giegold, supra note 4, at 200-02. Other reasons that employers are reluctant to reveal their policies include fear of upsetting the neighborhood, of being sued, or of being bombarded with applicants. Pati, Business Can Make Ex-Convicts Productive, 52 Harv. Bus. Rev. 69, 71 (1974).

\textsuperscript{20} Respondents to Tromanhauser's survey were asked to indicate the policy that most accurately reflects company policy with respect to individuals with conviction records. Eighteen percent of the respondents reported that such convictions would automatically or usually disqualify the applicant. Thirty-nine percent said that although decisions are based on individual merit, persons without conviction records are preferred. Twelve percent concluded that persons with several convictions would probably not be considered, and 30% replied that a felony conviction alone would never disqualify an applicant. E. Tromanhauser, supra note 16, at 22. \textit{See also} R. Winston, supra note 18, at 7-8 (employers responding to a 1975 Boston-area survey demonstrated a negative bias to ex-convicts and also to persons who had been arrested and tried, even though not convicted); Employment Law Center, supra note 18, at 7 (employers react negatively to all arrest and conviction data).
and the type of job involved are all often considered by an employer.\footnote{21} Since violent crimes or those involving larceny are the greatest concern to the employer;\footnote{22} the applicant who has committed such crimes is often automatically rejected\footnote{23} regardless of whether that criminal activity is particularly related to the job sought.\footnote{24} While the presence of multiple convictions is generally not an absolute bar to employment,\footnote{25} employers are less apt to reject youthful first offenders.\footnote{26} In their hiring decisions, employers also consider the amount of time that has passed since the applicant was convicted\footnote{27} and how he or she has done in work or rehabilitation programs.\footnote{28} Even if an applicant with a criminal record fares well with respect to these criteria, however, there is evidence to suggest that the applicant's chances of being hired for a job commensurate with his or her abilities are slim unless there is a labor market shortage\footnote{29} or the applicant

\begin{footnotes}
\footnote{21}{See N. Miller, supra note 13, at 46-50; Farkas, Industrial Employer Attitudes Towards Hiring Men with Criminal Records, The Personnel Administrator 6 (July-Aug. 1974); Jensen & Giegold, supra note 4, at 203-05; Cayton & Schutz, Barriers to the Employment of Released Male Offenders 4 (U.S. Dept' of Labor, Manpower Ad., Mar. 1970). Other factors that have been considered are personal attractiveness, N. Miller, supra note 13, at 51-52, and the employer's perception of the sufficiency of the punishment that the applicant has received. R. Winston, supra note 18, at 3-6.}
\footnote{22}{See Atkinson, Fenster & Blumberg, Employer Attitudes Toward Work-Release Programs and the Hiring of Offenders, 3 Crim. Just. and Beh. 335, 338 (1976) (those convicted of murder, rape, and muggings are the least likely to be hired by the employers surveyed); Farkas, supra note 21, at 6 (employers do not want those who have been convicted of murder, sex offenses, narcotics offenses, and drunkenness); E. Tromanhauser, supra note 16, at 18 (the six crimes most disfavored by respondent employers are murder, rape, armed robbery, larceny, forgery, and embezzlement).}
\footnote{23}{More than 50% of Tromanhauser's respondents stated that conviction of a violent crime is a bar to employment. Twenty-three percent concluded that a theft conviction is also a bar to employment. E. Tromanhauser, supra note 16, at 20-21. See also Farkas, supra note 21, at 6.}
\footnote{24}{Jensen & Giegold, supra note 4, at 203. However, the type of offense is an important consideration in some businesses. See id.}
\footnote{25}{See E. Tromanhauser, supra note 16, at 19-20 (only 6% automatically bar those with multiple convictions). But see Cayton & Schutz, supra note 21, at 4 (74% of employers surveyed prefer not to hire recidivists).}
\footnote{26}{Jensen & Giegold, supra note 4, at 204-05 (many respondents indicated that they wanted to give youthful offenders a second chance); Cayton & Shutz, supra note 21, at 5 (more than half of the respondents indicated a hiring preference for young first offenders).}
\footnote{27}{Personnel officers interviewed by Jensen and Giegold indicated that the length of time that has lapsed since the last offense is an important factor in their decision. However, the minimum amount of time that was thought to be necessary to indicate rehabilitation varied widely — from "three months" to "five to ten years." Jensen & Giegold, supra note 4, at 204.}
\footnote{28}{See N. Miller, supra note 13, at 52-55 (employer concern can be reduced by third party credentialing); Farkas, supra note 21, at 7 (letters and statements of recommendations, references, and previous work records are important factors).}
\footnote{29}{See Farkas, supra note 21, at 7 (apparel and metal products manufacturers are gen-}
is a friend or relative of a company employee.\textsuperscript{30}

Despite the substantial use of criminal records in the employment market, there is little evidence to suggest that ex-offenders and those with arrest records are inferior workers or that they present significant safety risks. In fact, several studies suggest that ex-offenders perform as well as or better than other workers.\textsuperscript{31} In a Maine study, for example, the majority of respondent employers rated ex-offenders' work as quantitatively and qualitatively superior to that of the other workers.\textsuperscript{32} The majority also rated their integrity and ability to work well with others as superior,\textsuperscript{33} and most of the ex-offenders were readily accepted by their peers.\textsuperscript{34} In regard to the risk presented by ex-offenders, a Wisconsin study revealed that of more than 1,000 Wisconsin parolees, only fourteen had been accused of job-related crimes a year after release.\textsuperscript{35} Damages for the fourteen incidents totalled only $1,375, and there were no injuries to other persons.\textsuperscript{36} Similarly, a federal bonding program suffers a less than two percent loss rate for the more than 12,000 bonded ex-offenders.\textsuperscript{37}

In summary, despite the lack of evidence to suggest that arrestees or ex-offenders are either inferior workers or are more likely than other workers to commit crimes that would be injurious to the employer, most employers make use of criminal record information. This traditional reliance on criminal records in employment decisions limits job opportunities for many capable and reliable workers. Because a high percentage of those excluded are minorities, Title VII may provide relief in a substantial

\textsuperscript{30} See Pati, supra note 19, at 72 (one large manufacturer interviewed has a generally restrictive policy but seeks ex-convicts when there is a labor market shortage).
\textsuperscript{31} See Jensen & Giegold, supra note 4, at 198 (the motivation level of ex-offenders tends to be higher than the average found in the nonoffender work force); Pati, supra note 19, at 74-75 (companies that have ex-offender hiring programs report that ex-convicts have at least no greater work problems than any other group of employees — turnover rules and disciplinary problems are less).
\textsuperscript{32} The researcher surveyed Maine employers who had accepted referrals from an ex-offender placement program. Employers were asked to compare the ex-offenders with non-offenders on 10 dimensions of performance. Ex-offenders were rated as superior on all dimensions except longevity. Seventy-seven percent of respondents rated ex-offenders' quantity of work as superior to that of nonoffenders. Seventy-one percent rated the quality of their work as superior. Jolson, Are Ex-Offenders Successful Employees?, 17 CAL. MGT. REV. 65, 67 (1975).
\textsuperscript{33} Ex-offenders were rated superior in integrity by 62\% of respondents and as superior in cooperativeness by 71.2\% of respondents. \textit{Id.} at 67.
\textsuperscript{34} Ex-offenders were rated as superior in acceptability by 75\% of the respondents. \textit{Id.}
\textsuperscript{35} Feyerherm, supra note 2, at 158.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} N. Miller, supra note 13, at 16.
number of cases. Unfortunately, however, there are many subtle nuances in the statute that may impair an aggrieved claimant's chances of prevailing. Moreover, the limited enforcement of this aspect of the law by federal authorities poses additional difficulties.

II. **Title VII Restrictions on the Use of Criminal Records**

While an employer's purposeful discrimination against an individual on the basis of race, color, religion, sex, or national origin is patently unlawful under Title VII, employer practices that unintentionally have the effect of discriminating are likewise illegal. An employer can justify an employment practice that latently discriminates against an individual only by demonstrating that it is job-related. Accordingly, many courts have found the use of criminal records in employment decisions to be a violation of Title VII where the records have an adverse impact upon blacks or others protected by Title VII, and are not shown to be job-related. This is a straightforward principle in the abstract, but there is considerable controversy over the appropriate manner of determining adverse impact and job-relatedness. Since both of these elements significantly affect the applicability of Title VII to any given employment decision, they are important concepts to examine.

A. **Measuring the Adverse Impact of a Criminal Record Selection Device**

Depending on the circumstances of the alleged discrimination, the adverse impact of a single selection criterion can be gauged by either of two methods. The "applicant flow" method compares members of a protected group who actually applied for the given position with all other applicants for that position. A given selection criterion, such as a height requirement,
is said to have an adverse impact on the protected group if the percentage of that group eliminated by the criterion is significantly greater than the percentage of persons eliminated by it in other groups.\textsuperscript{42} For example, in order to determine whether an employer’s use of criminal records has an adverse impact on blacks, the percentage of black applicants who were eliminated because of criminal records is compared with the percentage of other applicants so eliminated. The second procedure, the “population cohort” method, considers characteristics of the population at large by comparing members of a protected group in the general population with the rest of the populace. With this method, a selection criterion is considered to have an adverse impact on the protected group if the percentage of that group in the population at large who would be adversely affected by that criterion is larger than the percentage of other groups in the general population who would be so affected.\textsuperscript{43} By this method, an employer’s rejection of applicants with criminal records is said to have an adverse impact on blacks where the percentage of blacks in the population with criminal records is higher than the percentage of whites with criminal records.

Unfortunately, neither method is entirely satisfactory. The applicant flow method fails to account for persons who would have applied were it not for their foreknowledge that they would be rejected. This may considerably understate the actual adverse impact a challenged practice may have on a protected group. The population cohort method may not accurately reflect the true percentage of persons who would apply for the contested job. For example, although a larger percentage of blacks than whites in the general population may have criminal records, it may be, with respect to a particular job, that the blacks who would be attracted to it do not display a higher incidence of criminal behavior than do whites attracted to the same job. In this instance, the use of the population cohort method incorrectly indicates that an adverse impact exists.

Since criminal record cases involve a chilling effect, that is, a tendency to discourage applicants who have foreknowledge that arrest or conviction records will be used, the better approach is to allow a plaintiff to demonstrate disparate impact by the population cohort method.\textsuperscript{44} While the pop-

\textsuperscript{42} See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (use of a battery of standardized tests had an adverse impact on black applicants because the battery resulted in 58% of whites passing the tests as compared with 6% of the blacks). See generally F. Morris, Jr., \textit{Current Trends in the Use (and Misuse) of Statistics in Employment Discrimination Litigation} 96-103 (1978).

\textsuperscript{43} See Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (use of high school graduation as a criterion for job qualification had an adverse impact on North Carolina blacks).

\textsuperscript{44} This method has been widely accepted in criminal record cases. See Carter v. Gal-
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ulation cohort method is also subject to error, it is preferable to the applicant flow method because the chance of error is neither as likely nor as one-sided in its effect. The Supreme Court reached a similar conclusion in *Dothard v. Rawlinson*, where a female plaintiff contended that an employer's height requirement had a disparate impact on women. In view of the chilling effect that a height requirement can be expected to have on many potential women applicants, the Court held that national statistics on the disparate impact of a height requirement are preferable to applicant flow data.

Despite its advantages over the applicant flow method, however, the population cohort method could still benefit from two refinements narrowing the population sample to likely candidates for the position in question. First, the population cohort can be limited to the geographic region from which the employer draws applicants. The Supreme Court has endorsed this refinement but also has held that national statistics are sufficient to demonstrate disparate impact where there is no reason to believe that the regional distribution is different from the national distribution. Demonstrating the disparate impact of the criminal record requirement with respect to a particular region should not be considered an undue burden on plaintiffs because county and Standard Metropolitan Statistical Area specific data are available from the Federal Bureau of Investigation and because it is unlikely that there is a region in the country where the use of criminal records does not have a disparate impact on minorities.

The second way to refine the population cohort demonstration of disparate impact is to compare only those who have the requisite qualifications for the job. To the extent that this showing is generally required only for jobs that require specialized skills, such as lawyer or teacher positions, and not for jobs requiring skills that are commonly possessed or easily attained, such as factory worker, police officer, or bank teller positions, it

46. *Id.* at 330.
does not affect most criminal record plaintiffs — those seeking nonspecialized jobs.\textsuperscript{51}

Although \textit{Dothard} appeared to be an endorsement of the population cohort method, its propriety in demonstrating adverse impact was seriously questioned by the Supreme Court in \textit{New York Transit Authority v. Beazer}.\textsuperscript{52} The plaintiffs in \textit{Beazer} were black and Hispanic discharged employees and rejected applicants who charged that the New York Transit Authority’s blanket exclusion of persons on methadone maintenance\textsuperscript{53} violated the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act. In finding that the Transit Authority’s prohibition had a disparate impact on members of two minority groups, the district and appellate courts relied on information that sixty-three percent of New Yorkers who receive methadone maintenance in public programs are black or Hispanic.\textsuperscript{54} In reversing, the Supreme Court questioned the sufficiency of this statistic for three reasons. First, since public programs constituted only sixty-five percent of all methadone maintenance programs in the area, the majority concluded that it is theoretically possible that the percentage of blacks and Hispanics enrolled in all methadone maintenance programs is much lower than sixty-three percent.\textsuperscript{55} Second, the statistic did not include an indication of the percentage of minority and nonmi-


53. Methadone maintenance programs are designed to cure heroin addiction. The participant takes regular oral doses of methadone in amounts that do not outwardly affect him but that prevent pleasurable sensations if heroin is used. Methadone in these doses also alleviates the discomfort ordinarily associated with withdrawal from heroin. \textit{Id.} at 574-75.

54. \textit{Id.} at 585. Blacks and Hispanics comprised a total of 36% of the region’s population at the time of the 1970 census. \textit{Id.} at 586-87 n.30.

55. \textit{Id.} Justice White, in dissent, however, points to an alternate study that suggests that blacks and Puerto Ricans are disproportionately represented among methadone users throughout the metropolitan area. \textit{Id.} at 600-01 (White, J., dissenting).
nority cohorts who were "otherwise qualified."\textsuperscript{56} Third, it did not include the racial and ethnic composition of applicants and of those who were rejected on the basis of their current participation in a methadone program.\textsuperscript{57}

The rejection of the plaintiff's population group showing and the observation that no applicant flow analysis was conducted might suggest that the Court has rejected \textit{Dothard} and expressed an exclusive preference for the applicant flow method to demonstrate adverse impact. But the uniqueness of the methadone maintenance situation that the Court addresses in \textit{Beazer} is distinguishable from more typical nontest criteria such as a criminal records ban and a height requirement; the exclusion in \textit{Beazer} does not appear to have created a significant chilling effect. Since exclusion was limited to those who were currently on methadone maintenance\textsuperscript{58} as ascertained by a medical test and not as a result of a question on the application form, it is unlikely that applicants were aware that methadone use was a basis for rejection. Therefore, although the Court apparently prefers the applicant comparison demonstration for a situation such as \textit{Beazer}, it should continue to accept a population comparison for selection devices that involve a chilling effect.

Nor should the Court's insistence that the population group comparison in \textit{Beazer} be limited to those who are otherwise qualified be interpreted as a requirement for all cases involving jobs with only general background requirements. The peculiarities of methadone maintenance undoubtedly influenced the Court in demanding the more stringent standard. Because only one-third of the entire methadone maintenance population is employable,\textsuperscript{59} the Court suggested that evidence of the disparate impact of the exclusion of those on methadone maintenance be expressed in terms of those who are otherwise employable.\textsuperscript{60} In contrast to the methadone maintenance situation, there is no evidence to suggest that those who are rejected because of their criminal records are otherwise unqualified in large numbers. While methadone maintenance users are likely to have other habits such as drinking and drug abuse that disqualify them in large numbers, no such tendency is apparent with respect to ex-offenders.\textsuperscript{61}

\textsuperscript{56} Id. at 585.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 570-74.
\textsuperscript{59} Id. at 586 n.28.
\textsuperscript{60} Id. at 583-87. But see id. at 599-600 (White, J., dissenting) (there is no reason to believe that minority methadone maintenance users are, as a group, otherwise qualified in smaller numbers than are nonminority methadone maintenance users).
\textsuperscript{61} See notes 32-34 and accompanying text \textit{supra}.
Therefore, it does not necessarily follow from *Beazer* that the Court will require a showing that all challenged selection criteria have disparate impact with respect to the subcohort of “qualified” persons.

Once the disparate impact of an employment selection device has been proved, it is not uncommon for an employer to try to escape liability by showing that his employment practices as a whole do not have a disparate impact on the protected group. For example, according to this “bottom line” theory, a defendant could counter a black plaintiff’s proof that the employer’s handling of criminal records has a disparate impact on blacks by showing that the employment selection process as a whole does not have a disparate impact on blacks — perhaps because other aspects of the selection procedure favor blacks. Proponents of the bottom line defense contend that it is unreasonable to punish an employer for the adverse impact of one part of its overall selection procedure when its work force as a whole is racially balanced.

This contention assumes, however, that racial

62. See 3 A. Larson, Employment Discrimination § 74.42 (1978); B. Schleif & P. Grossman, Employment Discrimination Law 1191-93 (1973). See also EEOC v. Navajo Ref. Co., 19 Fair Empl. Prac. Cas. 184 (10th Cir. 1979) (employer’s use of high school graduation and aptitude tests which eliminate a disproportionately high number of Spanish-surnamed applicants does not constitute adverse impact where the percentage of such applicants is greater than their percentage in the labor market); Smith v. Troyan, 520 F.2d 492, 497-98 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976) (a showing that there is no discrimination in the selection process as a whole negates a plaintiff’s showing with respect to one aspect of the selection process). But see Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), rev’d on other grounds, 426 U.S. 229 (1976) (the disparate impact of the police department examination is not neutralized by the fact that the percentage of blacks on the police department corresponds to their percentage in the community).

The Uniform Guidelines on Employee Selection Procedures state that as a general principle, where an employer’s total selection process for a particular job does not have an adverse impact, the federal enforcement agencies will not, in the usual case, exercise their discretion to prosecute, even where an individual component has an adverse impact. 29 C.F.R. § 1607.4(c) (1979). But in the introduction to the guidelines it is stressed that this “bottom line” principle reflects an administrative decision on how to use the limited resources of the enforcement agencies and does not reflect an opinion on the underlying legal issue. 29 C.F.R. § 1607 (1979). Nonetheless, there is reason to believe that the adoption of the bottom line doctrine will influence courts’ perceptions of the legal standard. See Note, The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies, 28 Cath. U.L. Rev. 605, 629-30 (1979).

The Uniform Guidelines specify that the enforcement agencies will continue to exercise their regulatory authority against some employment practices even in the absence of a showing that an individual employer’s overall selection process has an adverse impact. The agencies will act regardless of the bottom line “where the weight of court decisions or administrative interpretations holds that a specific selection procedure is . . . not job related in the same or similar circumstances.” 29 C.F.R. § 1607.4(c) (1979). Arrest records and height requirements are specifically mentioned as falling within this category — conviction records are not. Id.

63. See 3 A. Larson, supra note 62, § 74.42, at 14-40.
or ethnic balance is the ultimate determinant of the legality of a selection procedure under Title VII. However, none of the Supreme Court cases finding disparate impact even suggest that the discriminatory effect of a single selection criterion on a protected group may be justified by showing that a sufficient percentage of the protected group is found in the employer's work force.\textsuperscript{64} For instance, in \textit{New York Transit Authority v. Beazer},\textsuperscript{65} the Court noted that the proportion of blacks and Hispanics on the employer's work force was more than twice their proportion in the population as a whole, but it did not use this striking fact to mitigate the illegality of disparate impact on these groups caused by the methadone maintenance exclusion.\textsuperscript{66} If the Court had considered the bottom line theory to be at all viable, the overall employment of blacks and Hispanics would have been held to be a dispositive defense to the disparate impact.

This implicit rejection of the bottom line defense to disparate impact and this explicit emphasis on the job-relatedness of a criterion strictly comport with the manifest intent of Congress in Title VII to promote equal opportunity for individual job applicants rather than to achieve any racial, ethnic, or sexual balance in the national work force. Neither the statute itself, nor the legislative history, indicates that a nonjob-related limitation leading to an applicant's rejection can be made lawful by the employer's overall hiring pattern.

It should be remembered that while the absence of an overall disparate impact is probative of the lack of a discriminatory intent on the part of the employer, intent is not an element in disparate impact analysis.\textsuperscript{67} Employers' use of criminal records has a marked impact on blacks and other minorities; members of these groups have been arrested and convicted in disproportionate numbers because they have been historically subject to invidious discrimination. Congress intended that selection criteria with such effects should not be utilized in employment decisions unless they are demonstrably job-related. Therefore a plaintiff's showing that a criminal

\textsuperscript{65} 440 U.S. 568 (1979).
\textsuperscript{66} Id. at 584 n.25. This case is distinguishable from Furnco Const. Co. v. Waters, 438 U.S. 567 (1978), where the Court found no violation of Title VII because the employer's practices produced no adverse impact on members of the plaintiff's race. The plaintiff in \textit{Furnco} alleged discriminatory treatment while the plaintiffs in \textit{Beazer} alleged disparate impact. The absence of overall disparate impact is relevant in a discriminatory treatment case because it provides evidence of the employer's benign intent, but not in a disparate impact case where intent is not a necessary element. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).
\textsuperscript{67} See note 66 supra.
record criterion has a disparate impact on members of his group should be sufficient to establish a prima facie case of discrimination regardless of the overall effect of an employer's selection procedure.

B. Job-Relatedness as a Defense for the Employer

Once a plaintiff demonstrates that an employer's selection device has a disparate impact by race or other classification, the burden shifts to the employer to show that the device is "job-related." To be job-related, a selection device must be essential to safety or efficiency, have a "manifest relationship" to the employment in question, have a sufficiently compelling business purpose, and be able effectively to carry out such business purpose. It is well-settled that the fact of arrest or conviction per se cannot be considered to be an indication of an individual's unsuitability for any job. Likewise, courts have been similarly unsympathetic to employers' contentions that a particular job is so sensitive that all those with criminal records represent a danger.

On the other hand, courts pay considerably more attention to an employer's allegation of job-relatedness when a connection between the characteristics of the job and the plaintiff's specific crime can be proved. For example, in Richardson v. Hotel Corp. of America, a bellhop was discharged when the hotel became aware of his convictions for theft and receipt of stolen goods. The district court upheld the hotel's policy of requiring persons with access to guests' property to be free of property.

69. See, e.g., United States v. N.L. Indus., Inc., 479 F.2d 354, 364-65 (8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1008 (1971). But see Webster v. Richmond, 599 F.2d 793, 802-03 (7th Cir. 1979) (employer's rejection of an applicant is not in violation of Title VII in the absence of a showing that the employer makes it a pattern or practice to reject on the basis of an arrest record).
72. In Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975), for example, the plaintiff, who had been convicted for refusing military induction, was rejected for a position as a clerk in the personnel office. The court concluded that denying a job opportunity to one whose crime does not significantly bear on the requirements is not job-related. Id. at 1298. See note 12 and accompanying text supra.
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related crime records. In Milwaukee and Suburban Transport Corp. v. Wisconsin Department of Industry, Labor and Human Relations, the Wisconsin Circuit Court found "keeping cool under pressure" to be a job requirement for a bus driver and accordingly upheld the firing of a driver for an aggravated assault committed off-duty during a dice game. In Lane v. Inman, the Fifth Circuit rejected the contention that a city ordinance denying taxi driver permits to persons who have been convicted of narcotics offenses violates the Civil Rights Act of 1866. The court summarily concluded that the ordinance is "obviously job-related."

Although the connection between the crime and the job appears to be self-evident in Richardson, the job-relevance of the crimes in Milwaukee and Suburban Transport Corp. and Lane is open to question. Furthermore, basic questions on the limits of job relevance have not been settled in the courts. It is not clear, for example, whether some crimes such as those of violence and theft can be said to be relevant to most jobs since virtually all positions involve some interaction with other persons and provide some access to property.

There are three ways in which the relevance of such crimes could be limited. The first would limit job-relevance to job situations that are similar to those of the crime committed. For example, embezzlement would not be considered job-relevant for an assembly line job which gives the employee access to raw materials and finished products since stealing such items is very different in form from embezzlement. The second would limit job-relevance to situations where the indicated criminal conduct is directly relevant to major job requirements and where a breach of the prescribed standard constitutes a real threat. Under this limitation, a prohibition of persons convicted of violent crimes would not be job-relevant with respect to a factory job since working with things rather than people is the major part of the job. Also, theft would not be relevant to an office job where only office equipment could be stolen since routine office security characteristically provides adequate protection against such theft. A third possible limitation concerns the distinction between violent or irresponsible behavior on-and-off the job. By this limitation, applicant behavior

76. Richardson included his conviction on the application form, but the hotel did not take cognizance of it until three months after he was employed. When a number of thefts occurred, they went back and checked the records and discharged Richardson among others. The thefts continued for approximately a month after Richardson was dismissed. Id. at 522.
78. Id. at 265.
79. 509 F.2d 184 (5th Cir. 1975).
81. 509 F.2d at 186.
such as alcoholism or assault committed during the applicant's private life
is not necessarily held to be relevant to a job that proscribes such conduct
during working hours. While it appears that there should be some limi-
tations put to the exclusion of all ex-offenders who have committed theft or
violence-related crimes, very little case law and no administrative guide-
lines exist to assist employers in determining when such crimes are job-
relevant.

When the crime is deemed to be relevant to the job, many courts fail to
inquire beyond the mere fact of an applicant's conviction. This is inade-
quate because, even if the crime that the individual committed is job-rele-
vant, it does not necessarily follow that its use to eliminate a particular
applicant is job-related. To be job-related, a selection procedure must not
only attempt to measure a given job-relevant factor, but it must do so suc-
cessfully. Although conviction for a crime in the past is an indication
that the applicant might have the propensity to commit a similar crime in
the future, the employer should not reach this decision without first consid-
ering other factors, such as the circumstances under which the crime was
committed, the length of time which has passed since the applicant sus-
tained a conviction, and the applicant's recent employment history.

The principle that an employer should consider not only the relevance
of the crime that the applicant committed but also the probability of his
committing it in the future is supported by case law and is reflected in the
validation procedures prescribed in the Guidelines on Employee Selection
Procedures. In the often-cited case of Green v. Missouri Pacific Railroad,
the Eighth Circuit held that the railroad's blanket rejection of all ex-of-
fenders was not job-related because it was not necessary to foster safety
and efficiency. The court concluded that a person's propensity to commit a
crime should be determined by considering each ex-offender and his back-

merce Commission regulation banning truck drivers convicted of driving while under
the influence of alcohol is "arbitrary and capricious" under the Administrative Procedure Act in
the absence of evidence that a single DWI conviction is related to subsequent on-the-job
offenses).

83. See Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971). When the district court determined that the crime for which Richardson was convicted was
relevant to the position that he held, they concluded that the discharge was job-related without
consideration of his activities after his conviction.

84. An analogous conclusion was reached by the dissent in Beazer. The minority's po-
osition was that the blanket exclusion of all methadone users was not job-related because the
exclusion of a readily identifiable and severable subcohort — stabilized methadone users
applying for nonsensitive positions — was not job-related. 440 U.S. at 602-04 (White, J.,
dissenting).

85. 523 F.2d 1290 (8th Cir. 1975).
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Each of the three validation procedures approved by the Guidelines on Employee Selection Procedures encompasses both a determination that the personal characteristic sought to be measured by the selection device is relevant to the job and that the test used is an appropriate measure of the characteristic. In the case of an employer's use of criminal records, the personal characteristic that the employer is seeking to measure is the propensity to commit a particular crime. In order to reject an applicant on that basis, the employer should determine not only that the propensity is job-relevant but also that the applicant currently exhibits it. While the applicant's commission of the crime is some evidence, it is not conclusive; the employer should also consider what the applicant has done since being arrested. A background investigation will serve to identify applicants whose recent activities indicate that they no longer exhibit the propensity to criminal activity.

Requiring a background investigation on every applicant with a job-relevant criminal record will undoubtedly entail some inconvenience or expense to the employer. In some instances, the extra expense of considering a particular applicant can be a "job-related" reason for rejecting him. In *New York Transit Authority v. Beazer*, for example, the Supreme Court

86. *Id.* at 1298. The court's conclusion that each applicant should be considered individually is an application of the Eighth Circuit's job-relatedness standard — it must be shown that there is not any acceptable alternative procedure that accomplishes the goal with a lesser differential racial impact. *Id.* See generally Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach, 84 Yale L.J. 98, 107-19 (1974).

87. 29 C.F.R. § 1607.5(b) (1979). The guidelines specify that, where feasible, job-relatedness should be determined by reference to either of three statistical procedures: criterion-related validity, construct validity, or content validity. Criterion-related validity involves the determination of aspects of work behavior that are relevant to the job, the development of selection procedures to measure these aspects of work behavior, and the statistical correlation between performance on the selection procedures and performance on criterion measures of work performance. Content validity consists of the identification of work behavior required for successful performance and the development of a selection procedure that is designed to measure the particular work behavior. Content validity is generally available only where the activity measured on the selection procedure is either identical or closely related to the work behavior required on the job, such as typing tests. Construct validity involves the identification of a construct (a cognitive, psychomotor, affective, or other characteristic that has been named and defined), a statistical demonstration that the selection procedures are related to the construct, and a statistical demonstration that the construct is related to performance on an important work behavior. 29 C.F.R. § 1607.14 (1979). See generally M. Connolly & W. Connolly, 1 A Practical Guide to Equal Employment Opportunity 379-84 (rev'd ed. 1979); Note, *supra* note 62, at 610-19.

88. In their concern that Title VII not interfere with business efficiency, Congress structured the act to make job-relatedness and business necessity the final criteria of a practice's legality. Note, *supra* note 86, at 104-05, 108, 114-15. Although job-relatedness is generally limited to situations where the questioned procedure effectively predicts job performance, there may be extreme situations where the rejection of an otherwise qualified applicant
determined that excluding applicants on methadone maintenance from employment was job-related in part because the necessary screening and monitoring procedures were much more expensive than those for the typical applicant. But with respect to the use of criminal records, the cost of examining the relevant factors in an ex-offender's background is not nearly so great. In order to make an individual determination of the applicant's suitability, the employer need only gather the type of information that would surface as a result of a normal background investigation. It is therefore doubtful that the necessity of running such an investigation provides a job-relatedness justification for rejecting applicants with criminal records.

C. Employers' Use of Arrest Records to Reject Minority Applicants

Although employers can justify their use of conviction records by demonstrating that the records are job-related, it is doubtful that any job-relatedness justification exists for rejecting applicants who have been arrested, but not subsequently convicted. The use of a doubtful conviction record as a selection device presupposes that the applicant committed the crime for which he was convicted. While it is likely that persons who have been convicted of a crime probably committed it, the Supreme Court has concluded that the fact of a person's arrest has little or no probative value to show that he was engaged in any misconduct. Nevertheless, in Dozier v. Chupka, one district court suggested that job-related arrests, such as those for theft, may be used as a screening device in seeking the best firefighters. Similarly, although the Equal Employment Opportunity Commission's (EEOC) general policy prohibits using arrest records to disqualify applicants, it allows employers to reject an applicant for an arrest involving a "major crime unusually job-related." The willingness of

89. 440 U.S. at 590 n.33. The Transit Authority would have to determine that the applicant has been in a reliable methadone maintenance program and that he has faithfully abided by its rules, including strict abstinence from drugs or alcohol. Once he is hired, the employee's continued abstinence from drugs would have to be monitored. Id.

90. The EEOC recommends consideration of the following information about the applicant: number of criminal acts involved, types of criminal acts, circumstances of the criminal acts' occurrences, length of time since the conviction, and applicant's recent employment history. EEOC Compl. Man. (CCH) ¶ 5306 (1979). Information of this kind can be collected through the application form, applicant interview, and background and reference checks that most employers routinely undertake.

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these authorities to allow employers to use arrest records when the crime involved is particularly job-related is misconceived. The seriousness of the crime and the extent to which it is related to the job for which the applicant is applying is evidence that propensity to commit the crime is job-related. But it is not evidence that the individual who was arrested has such a propensity. If a person did not commit the crime, there is no reason to infer that he is likely to commit it in the future. While it is reasonable to be cautious with respect to individuals who may pose a danger to employers, the fact of an arrest for a relevant crime does not, in itself, justify rejecting the applicant.

Where employers are not justified in using arrest record information, it follows that they are not justified in soliciting it. If solicited, arrest information might well be informally used to evaluate or reject the applicant. Even if not used to evaluate candidates at all, arrest records should not be solicited because of their tendency to discourage those with arrest records from applying.94

D. Discharge of Employees

Not only do employers act on the arrest and conviction records of applicants, but they also respond to the criminal records of their current employees. Employees may be discharged for criminal acts that occurred before or after the employee began his employment. An employer will often discharge an employee for activity that occurred before employment began when the employer did not become cognizant of the criminal record or when the employee fabricated the criminal record section of the application form. Since Title VII is applicable to employee discharges as well as selection procedures,95 the legality of an employer's discharge procedure for incumbents with criminal records is determined by application of the disparate impact and job-relatedness criteria.

When employees are fired for criminal acts that occurred before they were hired, courts seek to determine disparate impact by the same method used for an applicant — comparing the effect that the device has on black and white population cohorts. For example, in Richardson v. Hotel Corp. of America, the employer fired the plaintiff when it was noticed that his application form indicated that he had been convicted of larceny.96 In

94. Several EEOC decisions conclude that the solicitation of arrest information has this effect. See EEOC Dec. No. 74-02, 6 Fair Empl. Prac. Cas. 830, 831 (1973); EEOC Dec. No. 72-1005, 4 Fair Empl. Prac. Cas. 841 (1972).
95. 42 U.S.C. § 2000e-2(a) (1976) (unlawful employment practice to affect adversely a person's status as an employee because of his race, color, religion, sex, or national origin).
96. 332 F. Supp. at 215.
Gregory v. Litton Systems, Inc., the corporation withdrew its offer of employment when the plaintiff filled out a security form indicating that he had been arrested on fourteen occasions. In both cases, the courts looked to the impact that the policy had by race on the population at large rather than on its impact on the company's employees. This procedure seems reasonable since the employee is, in effect, an applicant who was hired by mistake. The group of people affected by the employer's policy is the pool of actual and potential applicants, rather than the pool of employees.

It is somewhat more difficult to determine how disparate impact is to be measured when a plaintiff's criminal activity occurred after he had begun to work for the employer. The EEOC and at least one federal district court have come to the conclusion that the level of proof acceptable for employees who are challenging their employer's discharge is the same as for applicants who are challenging rejection. These authorities endorse the use of population cohort evidence to prove that the employer's discharge policy has a disparate impact on protected groups.

However, two courts have required that plaintiffs demonstrate that the discharge policy has an adverse impact by reference to the employer's work force itself. In Robinson v. City of Dallas, the plaintiff had argued that the city's policy of discharging employees who failed to pay their just debts had an adverse impact on blacks since blacks are more often in a default position than are whites. The Fifth Circuit concluded that even if the plaintiff did prove a national pattern, such a showing would be insufficient. Although population data has relevance to employer's practices in selecting employees from the population, the court reasoned that an employer's practice that affects only employees has a disparate impact only if the policy has affected employees disproportionately by race.

In McBride v. Delta Air Lines, Inc., the Sixth Circuit came to the same conclusion in holding that the airline's policy of discharging employees for conduct unbecoming an employee was not demonstrated to have a disparate impact where, of the fifteen employees who had been discharged for

97. 316 F. Supp. at 402.
98. EEOC Dec. No. 74-27, 2 Empl. Prac. Guide (CCH) ¶ 6396 (1973) (employer's policy of dismissing employees who have had their wages garnished has a disparate impact on racial minorities); EEOC Dec. No. 72-1497, 4 Fair Empl. Prac. Cas. 849, 850 (1972) (employer's policy of dismissing all employees who suffer convictions has a disparate effect on blacks because blacks are convicted in disproportionate numbers nationwide). Accord, Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).
99. 514 F.2d 1271, 1273 (5th Cir. 1975).
100. Id.
101. Id.
criminal conviction, nine were white and four were black.\textsuperscript{102}

The Robinson and McBride position has considerable theoretical merit. One can never be certain that the characteristics of the population at large are mirrored in the employees of a given corporation. The reason most often given for allowing population information in determining whether a given policy has a disparate impact on applicants is that the number of actual applicants may understate the number who would have applied had it not been for a chilling effect. Since a discharge policy has no chilling effect, it is reasonable to prefer a showing of the policy’s actual effect on the corporation’s employees. But since such discharges are relatively uncommon, it is very difficult to demonstrate that a policy has a disparate impact by race by looking only at actual employees. For example, in the Delta case, assuming that five of the thirteen employees, or 38.5\%, were minorities and that minorities represented eleven percent of Delta’s workforce, the percentage of minorities discharged for convictions would be more than three times their percentage in the workforce. But since the total number of discharges is so small,\textsuperscript{103} even this 300\% disproportionality does not reach the level of statistical significance. With numbers this small, it is almost impossible to demonstrate the statistical significance of a numerical disparity that does exist.

One possible solution would be to allow plaintiffs to supplement the employment discharge data that they may have with relevant information on the disparate impact that such policies have on employees with similar skill levels in similar companies. This approach would assure that employers do not have to answer for discharge policies when the policies do not have a demonstrably disparate impact on employees such as their own. At the same time it would not act to deny plaintiffs their day in court simply because the number of fellow employees in the same situation is not large enough to meet the requirements of a statistical test.

The question of how to measure the disparate impact of a discharge also arises where a plaintiff who falsely reported his criminal record is subsequently discharged. The plaintiff may have been fired either for having committed the crime that he failed to report or for having falsified his

\textsuperscript{102} 551 F.2d 113, 117 (6th Cir. 1977). Of the remaining two who were discharged, one was Hispanic. Delta’s records do not indicate the race or national origin of the other. \textsuperscript{id}

\textsuperscript{103} The fact that there are so few total instances where employees were fired does not in itself diminish the plaintiff’s case that the employer’s policy has a disparate impact on blacks. See Green v. Missouri Pac. R.R., 523 F.2d 1290, 1295 (8th Cir. 1975) (“The issue to be examined statistically is whether the questioned employment practice operates in a disparate manner upon a minority race or group, not whether the individuals actually suffering from a discriminatory practice are statistically large in number.”).
application form. Where the criminal record is for a job-related conviction, the defendant is clearly justified in discharging the plaintiff on the basis of the conviction alone. But where the arrest or conviction that was withheld does not meet the job-relatedness test, the issue of whether the discharge is valid under Title VII remains.

The conflicting opinions of the EEOC and the Eighth Circuit concern the determination of disparate impact. The EEOC contends that an employer's policy of discharging those who have falsified their application form has a disparate impact on blacks and other minorities. It reasons that, since these groups have suffered a proportionately higher number of arrests, they can be expected to be disqualified by falsifications in proportion to the number of arrests. In *Jimerson v. Kisco Co.*, however, the Eighth Circuit held that the plaintiff's showing that blacks are arrested more frequently did not meet its burden of showing that blacks as a class were excluded for falsifying arrest records at a higher rate than whites.

Although the court's rationale is logical, it does not take into account the relationship between arrests and the falsification of arrest information. Since blacks make up eleven percent of the population but account for twenty-six percent of the arrests, it is clear that the use of arrests has a very strong disparate impact by race. If white arrestees and black arrestees were equally likely to falsify arrest data, the use of falsification of arrest data as a criterion would affect blacks two-and-a-half times as often as it affects whites. Even if one were to hypothesize that twice as many of the white arrestees falsify employment application forms as do black arrestees, falsification of arrest data would still have a disparate impact that is detrimental to blacks. Since there is no reason to think that whites who have been arrested falsify their arrest records any more often than do blacks, it is reasonable to conclude that an employer's policy to discharge persons who have falsified their arrest data has an adverse impact on blacks. Nevertheless, if a firing is shown to have a disparate impact, the firing may be justified by virtue of being job-related. With respect to jobs where trustworthiness and integrity are necessary qualifications, courts can be expected to find that the policy of discharging those who have falsified their application forms is job-related. Special credence is to be attached

104. EEOC COMPL. MAN. (CCH) ¶ 5304 (1979).
106. UNIFORM CRIME REPORTS — 1977, supra note 8, at 186.
to this assertion of job-relatedness because the conduct complained of was committed against the employer himself — increasing the likelihood that the employee might engage in future breaches of trust. Yet, the irony of this result is that an employee is being fired for falsifying an answer to a question that could not have legally barred his employment initially.

E. Nonminority Use of Title VII

If an employer is constrained from using criminal record information because its use has a "discriminatory impact" on blacks as a group, the question arises as to whether he is also constrained from using the criminal record of a white employee or applicant on the grounds that such use would constitute "discriminatory treatment" of the white person. The issue arises when an employer ceases to use criminal records in evaluating black applicants but continues to use them with respect to white applicants. A white applicant who was rejected from a job because of his criminal record could assert that the employer's practice constitutes discriminatory treatment since he would not have been rejected had he been black.

One method of proving discriminatory treatment is outlined in McDonnell Douglas Corp. v. Green. There, a black applicant who had formerly been employed by the company was not rehired although he was as qualified as white applicants who were hired in his place. McDonnell Douglas asserted that they did not hire Green because he had participated in an illegal demonstration against the company. The Supreme Court held that an unsuccessful applicant can establish a prima facie case of discriminatory treatment by showing that he is a member of a protected minority, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that the employer continued to seek applicants from persons of similar qualifications. The employer can rebut the prima facie case by demonstrating a valid business purpose for rejecting the applicant, and the plaintiff in turn can submit evidence to show that the business purpose is a pretext for discriminatory treat-

108. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973) (plaintiff's engagement in an illegal "stall-in" action against the employer is a legitimate business reason justifying employer's refusal to rehire the plaintiff).
110. Id. The Court held that, in asserting that Green was not hired because of his illegal demonstration against the corporation, McDonnell Douglas had met its burden of proof to show a valid business purpose. The case was remanded to afford the plaintiff an opportunity to show that the corporation's reason was actually a pretext. Id. at 804-05.
111. Id.
ment.112

In McDonald v. Santa Fe Trail Transportation Co., the Court expanded the McDonnell Douglas discriminatory treatment test to apply to members of the majority as well as members of the minority.113 In Santa Fe, a black and two white employees were caught stealing. The white men were fired, but the black man was retained. In announcing the principle that Title VII invalidates discrimination against members of any race,114 the Court held that the plaintiffs' showing that the whites but not the blacks were fired, although all three committed the same offense, constituted a prima facie case of discriminatory treatment.115

It follows from Santa Fe that an employer who refrains from using arrest and conviction records in selection and discharge procedures when dealing with blacks should similarly refrain from using such procedures pertaining to whites. To exempt a black person from rejection or discharge for having a criminal record while holding a white person to this standard would be sufficient evidence for a white plaintiff to establish a prima facie case of discriminatory treatment. In order to justify the practice, the employer would have to show a valid business purpose for treating the black applicant differently from the white applicant. Such a demonstration would be difficult at best. Where the employer could not justify the facially neutral use of criminal records for all applicants as job-related, he would not be able to justify the selective use of such criteria on whites alone. His interest in complying with Title VII mandates that he refrain from using criminal records against blacks when their use has a disproportionate impact on blacks and cannot be justified as job-related. But it does not mandate that he continue to apply nonjob-related selection and discharge standards to whites.116

The case that has been described here is a very narrow one. A white applicant or employee could assert disparate treatment only where it could be shown that in a previous or simultaneous incident, a black applicant or
employee had been treated preferentially. In the absence of a parallel case to demonstrate that the two cases were handled differently, the plaintiff has not made a McDonnell Douglas showing of discriminatory treatment unless he can show in some other way that the company's policy of treating the two groups differently antedated the rejection of the white applicant. But the principle, if not the letter of Title VII, suggests that where use of a selection requirement has a disparate impact on one group and is not job-related, employers should abandon the requirement rather than apply it to one group and not the other.\footnote{117}{See Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975) (male caucasian police department applicant is not barred from challenging minimum height requirement on the basis of an LEAA guideline that prohibits height requirements because they have a disparate impact on women and certain minority groups). See generally 3 A. Larson, supra note 62, § 69.00.}

While it may seem remarkable that Title VII would bar an employer from using a selection device to reject a white person because the device has a disparate impact on black persons, such a result is consistent with the purposes of Title VII. Title VII is intended to bar discriminatory treatment of persons by race, color, religion, sex, or national origin when not justified by a valid business purpose as well as facially neutral practices that have a disproportionate impact and are not job-related. A remedy for a facially neutral practice that has a disproportionate impact on one group should not entail the creation of a practice that constitutes discriminatory treatment against another group.

III. RECOMMENDATIONS FOR ADMINISTRATIVE ACTION

The Equal Employment Opportunity Commission has the responsibility to enforce Title VII. While its efforts with respect to employer use of criminal records have thus far been limited to promulgating general employment selection guidelines that have little relevance to the criminal records situation\footnote{118}{It is technically feasible to do a validation study as prescribed by the Uniform Guidelines on Employment Selection only where: there are sufficient numbers of applicants such that the findings can reach statistical significance; a range of scores can be produced on the procedure; and it is possible to devise reliable measures of job performance. 29 C.F.R. § 1607.16 (1979). There would almost never be a sufficient number of workers with the appropriate types of criminal records, nor could the criminal record criterion produce a range of scores necessary for a validation process. See note 87 supra.} and to investigating complaints of individual plaintiffs, the Commission can do much more. It should lead the effort to develop and clarify the legal standards both by producing guidelines on the employment-related use of criminal records and by bringing suit on its own au-
uthority. EEOC publicity, research, and enforcement efforts would also help to ensure employer understanding and compliance.

EEOC guidelines are needed to give employers a single coherent statement of the EEOC's position and to emphasize its commitment to enforcing this application of Title VII. The guidelines should explain, for example, what methods are appropriate for measuring disparate impact, whether the bottom line defense is valid with respect to criminal records, and how job-relatedness is to be determined. When necessary, the EEOC should seek to strengthen the authority of its guidelines by bringing suits to clarify disputed issues such as the EEOC position that an exclusion, to be job-related, must take into account an individual's background.119

Publicity of several kinds can be helpful. Employers should not only be apprised of the legal requirements but should also be assured that ex-offenders can be successful employees and informed of the ways in which these workers have been successfully integrated into the work force of other businesses. Information directed to employees and to inmates who are seeking employment would help to ensure that they will be knowledgeable of their rights under Title VII.

The EEOC should also generate research to assist employers and courts in determining the job-relatedness of certain types of work. For example, in order to gauge job-relatedness, it would be helpful to know the rate of employee crime for different categories of jobs and the extent to which ex-offenders are responsible for the reported offenses. It would also be helpful to know more about the demographic characteristics and employment histories of recidivists and nonrecidivists.

Finally, the EEOC should require employers to examine their criminal record collection and use policies in comparison with EEOC's arrest and conviction record guidelines, just as they require employers to examine their overall work force distribution. Modifications, when necessary, should be made a matter of voluntary compliance in a fashion parallel to that of affirmative action.

IV. CONCLUSION

Title VII has an enormous potential for restricting and rationalizing employers' use of criminal records to hire and fire employees. Unfortunately, the Act's potential in this regard remains unfulfilled. Under the Act, an employer's use of such records is invalid if the use has a disparate impact on a group within the purview of Title VII unless the employer can demonstrate that the procedures are job-related. Since minorities suffer a

119. See note 83 and accompanying text supra.
disproportionately large number of arrests and convictions, employers' use of these records is often subject to the job-relatedness standard. However, the available survey data suggests that employers in large numbers collect and utilize criminal record information in ways prohibited by Title VII. The disparity between what the law appears to require on the one hand and contrary practices of a great number of employers on the other can be explained in two ways. First, courts do not agree on how disparate impact should be measured or in giving content to the concept of job-relatedness. Second, federal efforts at enforcement have been inadequate since administrative action has been limited to investigating complaints.

In general, plaintiff-applicants should be deemed to have demonstrated that a criminal record selection criterion has an adverse impact when they show that the criterion would negatively affect a significantly greater percentage of minorities than nonminorities among the regional populace. Plaintiffs who are discharged employees, however, should generally be required to make a more exacting demonstration of adverse impact.

In order to prove that their use of conviction records is job-related, employers should have to demonstrate that the crime committed is specifically relevant to the job applied for and that the applicant has the propensity to engage in that criminal conduct. Along these lines, employers who routinely collect and utilize arrest records violate the nature and spirit of Title VII. Since an arrest not followed by a conviction does not constitute evidence that the applicant committed the crime, arrest records can rarely, if ever, be considered job-related. Where their use has a disparate impact, arrest records should be neither solicited nor utilized in the selection process.

The disparity between the legal principles and practices will not be eliminated until the legal issues that cause justifiable confusion in the business community are eliminated and until the business community is pressed into action. Accordingly, the Equal Employment Opportunity Commission should use its authority to clarify the relevant legal standards and to promote adherence to them.

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