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IN THIS ISSUE

Court Unification Next Step to Commonwealth’s Court Reform 191
By Martin W. Healy

New EEOC Guidance: Implications for Ex-Offender Reentry and Employment 195
By Garrett A. R. Yursza Warfield and David J. Rini

Case Comment
Back to the Future of Your Privacy Rights
U.S. v. Jones 214

Book Reviews
Point Made: How to Write Like the Nation’s Top Advocates 221
How to Write a Sentence: and How to Read One

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The cover image depicts the world’s largest gavel located outside the Ohio Supreme Court in Columbus, Ohio.
Photo credit: Roger Michel.
"It is among the links that are needed to forge all of the Courts into a unified system that we found the most significant managerial gaps. These gaps will not ultimately be bridged by personal talents of individual personnel, but by assuring that the best organizational structures and management practices are at work in molding the Courts into a true "system," as opposed to a loose collection of parts." Reverend J. Donald Monan S.J., 2003.

INTRODUCTION

The Massachusetts court system and its leadership team have proven to be among the hardest working and most innovative group of jurists and clerks nationally. Judges and clerks work in conditions that are both physically and emotionally challenging by laboring daily in antiquated courthouses with a severely decimated workforce caused by an unending trickle of negative budget revenues. There is much to celebrate in our court system and the constant positive attitude and administrative moves made by leadership and employees to deliver justice in an efficient and fair manner is exemplary and deserves gratitude. The recent hiring of Court Administrator Harry Spence through the collaborative legislative and court efforts to reform management practices is a giant leap forward. Nevertheless, with a ceaseless negative budget forecast much more remains to be done and the Legislature, bench and bar cannot afford to rest on its laurels. Reform of the Massachusetts court system has historically proven to be an arduous and contorted process spanning the past half-century. Reform advocates and their efforts had been met by a cadre of historically entrenched interests, many of which viewed reform as a threat to long-standing power structures that had inured to their benefit. However, the 2011 legislative passage of a historic court reform law implemented many far reaching and long-advocated for reforms. Chapter 93 of the Acts of 2011, landmark legislation drafted and filed by House Speaker Robert A. DeLeo (D-Winthrop), accomplished in a mere 120 days, more than a half-century of exhaustively studied reforms including a professionally-trained trial court administrator; individual departmental court administrators; clear lines of statutory authority, reaffirming the Supreme Judicial Court’s role as having the ultimate superintendence over the entire administrative framework of the court system; and, the creation of precisely defined roles and responsibilities between judicial and administrative personnel.

With the passage of Chapter 93, many of the major threads of more than nine exhaustive court reform studies and recommendations have been accomplished. However, one major recommendation, that has been consistently woven and advocated for throughout these independent studies—trial court unification—remains elusive. Yet, if a trial court unification measure were enacted, Massachusetts would finally join a host of other forward-looking states that have successfully moved their courts toward efficient and model management systems that are best equipped to meet the growing fiscal constraints and challenging societal needs.

HISTORY

The strength of trial court consolidation for the commonwealth’s judicial branch was advanced as early as 1956 and again in 1962, with both the Herter and Griswold Commissions recommending a “greater degree of consolidation than Massachusetts has yet achieved.” The Massachusetts Trial Court consists of seven separate departments: Boston Municipal, District, Housing, Juvenile, Land, Probate and Family, and Superior. Specifically, “[e]xperts in judicial administration quite generally agree(d) that the unification of separate tribunals into a single trial court statewide jurisdiction (was) the best method of curing the evils of a multitude of uncoordinated courts.”

The case for court unification as a model for the Massachusetts court system was fully explored in the December 1976 Report on the State of the Massachusetts Courts written by the Governor’s Select Committee on Judicial Needs, more commonly referred to as the Cox Commission. This select committee had many legal and political luminaries involved in its production, including its chair, U.S. Solicitor General Archibald Cox; former Attorney General Francis Bellotti; former District Attorney John Conte; Massachusetts Bar Association Past-President Richard Donahue; Massachusetts Bar Association Past-President Paul Sugarman; and former U.S. District Court Chief Justice G. Joseph Tauro, among others. Cox discussed, at length, the multiple benefits of a unified court system. Chiefly, among the many beneficial aspects of consolidation, is its absence of


2. Ibid.
jurisdictional barriers separating the individual trial court departments. Ideally, there would exist a single trial court whose justices could hear cases without limit to location, subject matter or amount in controversy. Further, consolidation would provide a statewide administrative structure without the redundant and costly expense of administering seven separate trial court departments. The Cox Commission stated: "Unification recognizes that the business side of the administration of justice demands the same kinds of attentive management coordination and long-range planning as the operation of any other large enterprise."

In 1991, the Massachusetts Bar Association and the Coalition for the Courts commissioned an independent international management-consulting firm, Harbridge House Inc., to conduct an in-depth, exhaustive study of the management structure of the Massachusetts court system. The examination devoted more than 1,700 hours to analyzing the courts at a cost exceeding $150,000 private dollars. The study eventually spawned the Coalition to file legislation recommending the total unification of the Massachusetts trial court system. Coalition members included many prominent members of the business, legal and minority communities, including chair, Massachusetts Bar Association Past President Leo V. Boyle; Anthony Cerce of Ernst & Young; Ronald Homer of minority-owned Boston Bank of Commerce; John Nelson of the Norton Company; Risa Nyman, of the League of Women Voters; and Dr. Jeanne Taylor of the Roxbury Comprehensive Community Health Center. The omnibus bill was delicately balanced and crafted to have minimal impact on the extant court structure by phasing in the unification process in multiple steps spanning over a five-year period. Harbridge House stated: "[F]ar from being the unified court system envisioned by the Cox Commission, the Trial Court today bears more resemblance to a collection of medieval fiefdoms, each with its own rules and cultural norms, espousing varying degrees of fealty to the Office of Chief Administrative Justice." Additionally, Harbridge House found that any program to improve the management of the trial court runs a high risk of failure unless it includes substantial unification of the seven separate departments. The adoption of a unified Trial Court would simplify and improve the management of the Trial Court and, equally important, would reduce the level of court resources required for administration. Specifically, Harbridge House called for a professional court administrator to be responsible for the daily administrative functions of the new unified system. With recent passage of Chapter 93 of the Acts of 2011, this key reform piece has already been accomplished and would be a natural complement to a newly enacted unified court system. Finally, Harbridge House called for an outside board of business professionals to provide guidance and management expertise to court leadership and its proposed court administrator. This recommendation was adopted over a decade later with the Legislature’s creation of the Court Management Advisory Board.

In March 2003, the Visiting Committee on Management in the Courts, more commonly referred to as the Monan Committee, delivered its report on the management deficiencies of the court system at the invitation of then Supreme Judicial Court Chief Justice Margaret Marshall. While the visiting committee’s mandate did not extend to jurisdictional questions, they did “from a managerial perspective, recommend considering a reduction in the number of departments of the trial court. It is possible to have specialized sessions (for example, the Business Litigation Session of the Superior Court) without having separate administrative infrastructure.” The Reverend Donald Monan, S.J. Chancellor of Boston College, chaired the visiting committee which included, among others, a number of distinguished professionals with significant managerial expertise: William Van Faasen of Blue Cross, Charles Baker of Harvard Pilgrim Health Care, former District Attorney Ralph Martin, former State Senator Patricia McGovern of Beth Israel, and the Honorable David Mazzone. Monan found that the court’s administrative structure was unclear and “rife with redundancy.” Members of the visiting committee found that while visiting local courthouses, it was never clear to them what back-office tasks were the responsibility of the administrative office of the trial court, the administrative office of the department or the staff of the first justice. A decade later this proposition still stands. “The Judiciary should eliminate overlap among administrative structures and geographic locations.” Finally, Monan found that “the existing structure of the Courts is unmanageable, inefficient and lacks accountability…the fault of a series of partial solutions that have combined to make the structure of the Courts incomprehensible to all but the most attentive observers.”

Unification and specialization can work hand-in-glove when implemented slowly and with appropriate, deliberate study. No practitioner, or jurist, would desire to practice or sit in a session that they are ill-equipped to handle. However, we see the courts progressing increasingly toward specialization by placing highly-trained, motivated jurists in “drug court,” “gun court,” “veteran’s treatment court” and “mental health court,” to name just a few. These courts are designed to handle particularly challenged litigants and they have been very successful. These sessions also allow judges with particular strengths and talents to add real value to the importance of their daily work and self-esteem. A unified system built in cooperation with individual judges over a multi-year phase and non-threatening environment has been a positive experience for many states in preventing judicial burnout while simultaneously raising public satisfaction in the overall court system.

Additionally, each gubernatorial administration has struggled to find judicial applicants with the right blend of legal experiences to place on the various pigeonholed departmental courts. Some judicial candidates lack criminal law experience but have excellent civil practice backgrounds. Perhaps those applicants would be better suited if there was flexibility for a district or superior court session instead of a permanent seat on either the Superior or District Court. Additionally, some applicants to the Probate and Family Court are strong on divorce and family law experience, but are woefully

3. Id., at 14.
4. Coalition for the Courts consisted of the Massachusetts Bar Association, the League of Women Voters of Massachusetts, Common Cause, Massachusetts Council for Public Justice, Massachusetts Taxpayers Foundation, Massachusetts Business Roundtable, and the Greater Boston Chamber of Commerce.
7. Id., at xix.
10. Ibid.
11. Id., at 5.
12. Id., at 11.
lacking in probate knowledge. A unified trial court system would help assuage these concerns and would allow court judicial leaders to find the appropriate court session for these specialized nominees. As you can see, the practice of law has, in effect, echoed the courts in that specialization is the norm and court departments that have been legislatively created, designed and funded over the last two centuries have not kept pace with the need for more flexibility that full trial court unification will provide.

**National Movement Headed for Unification**

Nationwide the fiscal climate and availability of additional funding for state court systems remains bleak. Therefore, given this stark reality, progressive states are turning to unification of their respective court systems to provide a streamlined, efficient and cost-effective way to administer justice. However, here in Massachusetts, the judiciary has been predictable in its reaction to its budget woes by responding in lockstep fashion to its funding shortfalls. Unsurprisingly, judicial leaders have mirrored many of the initial and failed responses of similarly situated jurisdictions. Limiting sessions, closing courthouses and curtailing front-line counter assistance to the public has become the short-gap judicial answer to chronic funding issues. However, these measures are temporary solutions, at best, which fail to address many of the fundamental systemic and organizational defects that are needed to sustain the long-term operation of the courts. Cuts to overall state budgets have been the result of a declining baby boom workforce population coupled with large, unfunded pension-fund liabilities. As boomers retire, the income tax revenue they once generated significantly falls and will not be replaced by higher earners for years to come. At the same time, boomers are placing a disproportionate increase on health and welfare costs to local and state governments. In fiscal year 2010, 45 state court systems have experienced significant budget deficits ranging from 2 to 16 percent. Many national economists differentiate this recession from earlier periods of financial difficulty and predict the economy may never fully recover, at least not for a considerable period of time.

Meanwhile, as these economic realities are hammering court systems, there has been a profound societal change in how courts are being utilized. Many practitioners who once turned to the courts to meet client needs are instead turning to the private justice system. Mediation, conciliation and arbitration services are providing a low cost, time efficient and predictable manner in which to “litigate” and resolve disputes. These private services are available for virtually every area of legal practice. Therefore, Massachusetts courts and other states are suffering from their inability to modernize and reengineer. As a result they are moving quickly to a justice system attracting only poorly heeled pro se citizens. A look at the past five-year period of Massachusetts Trial Court system case filings has shown a precipitous decline. From Fiscal Year 2008 to Fiscal Year 2012 overall trial court case filings have fallen by 21 percent “for all case types.” In particular, regular civil case filings have plummeted during this same timeframe by 33 percent, from 157,746 to 104,379 cases. A steep 36 percent drop in juvenile court matters shows even further decline over this five-year period.

Unification of court departments has long been the national trend. As early as 1976, the Cox Commission identified Alabama, Connecticut, the District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland and Oklahoma as states that have either unified or have made significant movement toward unification of their courts. More recently, seven states have taken on unification and reengineering efforts: Iowa, Michigan, Minnesota, New Hampshire, Oregon, Utah, and Vermont. Additionally, California, North Dakota, Puerto Rico, South Dakota, and Wisconsin have long been identified as unified systems.

Nearby, two states offer recent successes on unification. The New Hampshire Circuit Court began operation on July 1, 2011, merging the District and Probate Courts and the Family Division into a single, streamlined system designed to improve services to both the public and the bar while producing significant cost savings. The merger is the most significant overhaul of the New Hampshire judicial branch since the early 1980s, when its Legislature unified all the state courts under a single administrative and financial structure. Further, in 2008, the Vermont Legislature directed its Supreme Court to create a Commission on Judicial Operations. The 15-member commission was composed of judges, legislators, executive officials, business leaders and lawyers. The commission was mandated to address a number of issues: consolidation of staff, reorganization of court administrative functions, use of technology to reduce expenditures and improve access, reallocation of jurisdiction between courts, and a reduction of 3 percent of the judiciary’s budget. On July 1, 2010, the Vermont Legislature passed into law a unification bill that placed criminal, civil, family, environmental and probate courts under a single administrative umbrella overseen by the Supreme Court. At the time of passage court leaders predicted that restructuring would initially save more than $1 million dollars in funding.

**Future for the Courts**

Trial court unification has been exhaustively examined and continually advanced by both local and national court experts. It is a time-proven organizational structure, which simultaneously benefits the public and the administration of justice. States that have implemented court unification are forward thinkers and have positioned themselves best to meet the unpredictable fiscal challenges of the future.

Unification will help the new legislatively created Court Administrator, Harry Spence, to further instill public confidence in the administration of justice by:

- Mitigating chronic budgetary shortfalls through the efficient pooling of resources;
- Centralizing administrative resources and technology tools;
- Streamlining of budget requests;
- Allowing flexibility in judicial assignments to meet changing public demands and alleviate judicial burnout; and

16. Id. at 36.
17. Id. at 37.
• Ensuring the impartiality of judicial decisions, to the public and litigants, through a measured and rational-based system of judicial rotation.

Court Administrator Spence has been well-received and fully supported by the legal community, having worked earnestly over the past year and a half to quickly analyze and confront a myriad of court administrative issues. Thankfully, the Massachusetts Court System has a strong pool of highly talented and hard working clerks, registers, judges and administrative personnel who have absorbed the devastating loss of almost 1,400 employees over a seven-year budget period. Recent, ongoing strategic planning by the courts, through the Ripples Group consulting firm, should include an in-depth discussion and analysis of the benefits of a phased-in unified court system. A recent survey by the Ripples Group found that more than 90 percent of court employees want change, and 30 percent of those want radical systemic change. The Legislature well understands that short-gap funding its way out of previous court budget crises remains a lost treasure of the past. The answer will be found in closely examining how other states have met similar court funding shortfalls — such as measured and proven reforms like trial court unification. But for the constitutionally created Supreme Judicial Court, the Legislature has statutorily created nearly every trial court department in Massachusetts, along with the Appeals Court. The General Court’s appropriate and necessary financial stewardship over our trial courts on behalf of their constituents should be fully exercised in partnership with the courts and new reforms wisely explored.
INTRODUCTION

Jackson served over ten years in Massachusetts state prisons for drug-related crimes he committed in his early 20s. While incarcerated, he participated in prison education programs and earned two college degrees. Upon his release and with the help of a close friend, Jackson was employed part-time as an advocate for other ex-prisoners reentering communities. He has enjoyed his work in advocacy, but now in his forties Jackson has applied to a number of full-time positions with philanthropic organizations that provide community service to local neighborhoods. Even though he committed his last offense more than 20 years ago, received a college education, and maintained steady employment as an advocate for nearly ten years, Jackson has been repeatedly rejected from jobs because of his criminal record.

Jackson's story is both exceptional and typical. On one hand, he was very fortunate to land any job so soon after his release from prison. After all, the greatest risk of reoffense—and even death—is in the first few weeks after release when former inmates have the most urgent needs for employment, housing, mental health services, and substance abuse treatment. Even low-wage, part-time employment can provide some much needed financial assistance when transitioning from lockup. On the other hand, with a lengthy, albeit distant, criminal history, Jackson's continued struggle to land a new job is par for the course for the many thousands of people reentering communities after contact with the criminal justice system. These men and women are disproportionately poor, plagued by mental and physical health problems, and in great need of educational and vocational training.

Communities and families that are commonly bereft of social and financial resources keenly feel the effects of unemployed and marginalized neighbors and family members returning home from prisons and jails. Extensive reviews of state laws tell us that public officials are challenged to house, train, and employ these men and women stigmatized by a criminal record. Law enforcement agencies, probation and parole officers, and local courts must repeatedly...
face many of the men and women they have previously arrested, convicted, and released, because as Travis poignantly reminds us, “they all come back.” At the center of this tumultuous cycle are the actual offenders who are detained, supervised, monitored, and scrutinized for their mistakes after release. Ultimately, around half of all released offenders end up returning to prison or jail within three years after their release.

While ex-offenders released from prison and jail face many challenges, having a steady job reduces the risk of reoffending and promotes desistance from crime. Employment is a key juncture for ex-offenders—some employers call it a “turning point” or a “hook for change”—to leave behind criminal pasts in favor of crime-free futures. This is not to say, however, that all people respond to employment opportunities in the same ways, or that all work-based initiatives are wholly effective at reducing crime. The National Reentry Resource Center recently created a web-based clearinghouse that summarizes and evaluates empirical reentry research and expands upon the already impressive print literature on “what works” to reduce recidivism. Ex-offenders and reentry experts both commonly report that getting a job is simultaneously one of the most challenging and important aspects of successful community reintegration.

Returning ex-offenders are finding an ally in their search for employment: the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC, created in 1965 under the landmark Civil Rights Act of 1964, enforces the workplace provisions of Title VII, which prohibits racial discrimination in employment. Since the 1970s, the EEOC has examined employers’ use of criminal records and the impact such policies have on employment opportunities for racial minorities. Specifically, the EEOC has released a number of internal “guidance” documents that indicate that employers’ use of criminal records to screen out job applicants will likely have a discriminatory adverse effect on minorities (particularly black and Hispanic applicants). However, the agency has not released new guidance on the issue of criminal records since 1990, prior to the passage of the Civil Rights Act of 1991.


1. Travis, supra note 3.
6. Id. Giordano’s longitudinal study of adolescent delinquents followed up with participants in their late twenties and found that the relationship between stable employment and desistance was complicated by the status of intimate partnerships. Participants who were both married and in relationships where both partners had full-time jobs were more likely than others (e.g., where at least one partner did not have a full-time job, or where participants were not married and were jobless) to have desisted from crime.

In his well-known monograph, Making Good, based upon the Liverpool Desistance Study, Maruna argued that the positive benefits of employment are not realized for ex-offenders unless the work is voluntary, generative, and productive. See S. Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives (2001). In his study, life narratives revealed that participants valued helping others and “giving something back” in ways that were not always articulated. Id. at 118-19.

In 2000, Uggen examined data from the National Supported Work Demonstration Project, which targeted offenders, drug users, and youths with low educational attainment and chronic unemployment. See Uggen, supra note 10. Participants were provided with low-wage jobs in construction and service industries led by a counselor or supervisor. Results indicated that steady employment served as a turning point for older offenders (aged 27 and over), who recidivated 39 percent less than controls, but not for younger offenders. Even with evidence of reduced reoffending among the older participants, Uggen argued that the positive effects of low-wage work are limited. This program “did not radically shift participants along stratification dimensions such as wealth, status, or power.” Id. at 544. Offender work programs must promote job opportunities that offer financial rewards greater than minimum wage work to break class boundaries.

A more recent study followed 250 male parolees in Texas released between 2001 and 2005 to predict recidivism. See S. Tripodi et al., Is Employment Associated with Reduced Recidivism?, 54 Int’l J. of Offender Therapy and Comparative Criminology 706 (2010). Obtaining employment was not significantly related to decreases in the likelihood of incarceration, but it was associated with longer time to incarceration. In this context, the authors argued that employment evidenced positive behavioral change and prolonged crime-free living before parolees returned to prison.

14. See, e.g., What Works in Reentry Clearinghouse, A Project of the Council of State Governments Justice Center: http://nationalreentryresourcecenter.org/what_works. We point readers to this highly accessible online resource for a full review of the extant literature, but it is worth noting here that the quality of research and evidence in support of employment programs are mixed.

15. See, e.g., J. McGuire, What Works: Reducing Recidivism (1993); L.W. Sherman et al., National Institute of Justice, Preventing Crime: What Works, What Doesn’t, What’s Promising (1997); D. MacKenzie, What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents (2006). In this body of work, and in this paper, “recidivism” refers generally to reoffending, but may be officially measured by re-arrest, re-conviction, or re-incarceration for a completely new offense or technical violation (like violating parole) after an ex-offender’s initial release. Generally, programs are considered to “work” if they significantly reduce recidivism rates relative to comparison or control groups. The scientific rigor in program evaluation studies varies widely, as does the use of experimental and, more commonly, quasi-experimental research designs.


19. See EEOC Decision No. 72-1497 (1972) (challenging a hiring policy that excluded applicants based on “serious crimes”); EEOC Decision No. 74-89 (1974) (challenging a policy that considered a felony conviction a disqualifying factor without investigation into what the felony was for); EEOC Decision No. 78-03 (1977) (challenging an exclusion for crimes of “moral turpitude,” or drug charges).
Responding to the wealth of criminological and sociological research that has evidenced the disproportionate effect of the criminal justice system on minority populations over the past 20 years, the EEOC released new guidance on April 25, 2012, that directly addressed employer use of criminal record information. The new guidance is the result of the cabinet-level Interagency Reentry Council, created in 2011 by Attorney General Eric Holder to support the federal government’s reintegration of offenders into their communities. Holder recently explained at the National Second Chance Act Conference dedicated to organizations and individuals working in prisoner reentry, “When reentry fails, the costs—both societal and economic—are high [...]. Our joint commitment is to eliminate barriers to successful reentry by improving employment, housing, treatment and education opportunities for individuals who have been incarcerated so they can support themselves and their families and contribute to their communities.”

The new EEOC guidance is a positive step in the work to reintegrate ex-offenders into their communities. While the guidance is not a revolutionary change from the Commission’s previous policy statements, it requires several new procedural steps in the employment process that, if enforced correctly, should make it more difficult for employers to turn away minority ex-offenders solely for having criminal records, without considering whether they are otherwise qualified for a position. Likewise, the guidance increases the visibility of more traditional discrimination. The guidance will not, on its own, facilitate employment for ex-offenders, however. Title VII creates statutorily protected categories of persons and ex-offenders are not amongst the enumerated classes. The EEOC is only able to enforce the guidance to the extent that racial minorities, especially those who have a criminal record, are implicated by a particular employer policy. Additionally, the guidance requires employers to make an assumption about the predictive value of an ex-offender’s criminal history that is not supported by the available research. There is no theoretical or empirical consensus that an offender’s criminal history dictates specialization in future types of crime.

In section I of this article, we review prisoner reentry and its overall scale. In section II, we discuss the concept of collateral consequences, or “the rights or privileges that are lost upon conviction,” which include the legal and extralegal barriers to ex-offender employment. In section III, we introduce the new EEOC guidance and provide context for its current provisions, and in section IV, we examine the potential strengths and drawbacks of the new guidance. While this article examines reentry and ex-offender employment as national issues, we endeavor to cite statistics, studies, and cases that provide additional context for our local readers in the commonwealth. In this article, we aim to introduce prisoner reentry to an audience who may not have been exposed to the criminological and sociological literature and to contribute to the wider “reentry conversation” taking place on a national scale.

I. REENTRY: A NUMBERS GAME

A. Size of the Correctional and Reentry Populations

The United States is host to the largest correctional populations in the world, most of whom will return to communities after serving their sentences. Upon their return, ex-offenders face many challenges that lead to repeated contacts with the criminal justice system. Prisoner reentry is at the forefront of correctional research and debate, which is no surprise given the oft-cited but nonetheless startling statistics.

The number of prison and jail inmates nationwide has grown by more than 300 percent since 1980, ballooning to 2.3 million. In total, more than 7 million people were under some form of correctional supervision at year-end in 2010, with the majority under community supervision. The Bureau of Justice Statistics (BJS) has estimated that at least 95 percent of inmates in state facilities will eventually be released, which contributes in large part to the more than 700,000 ex-prisoners who return to communities each year. Massachusetts was no exception to the explosion of mass incarceration: since 1980, the state’s prison population grew by more than 330 percent and its rate of release by nearly 250 percent. It seems the punitive shift in crime control and heavy reliance on incarceration over the last 40 years have come around full circle to bite the criminal justice system on its now sizable back-end.

In 2010, the United States saw its second consecutive year with a nominal (about 1 percent) decline in the overall correctional population and its first year—since BJS started collecting jurisdictional data in 1977—that the number of releases (708,677) from state and federal prisons slightly exceeded the number of admissions (703,798). Notwithstanding these recent modest declines, mass incarceration has had a profound cumulative effect on the composition of the American population, particularly among young, minority men. About one in 100 American adults and one in 54 men over the age of 18 are in prisons and jails. The rate of incarceration is most severe among young black men between the ages of 20 and 34, one in nine of whom ends up behind bars. To uncover the overall size of the ex-offender population nationwide, Uggen and colleagues compiled the number of annual exits from prisons, jails, parole, and probation from 1948 to 2004. Controlling for recidivism and removing employment barriers.

22. EEOC 2012 Guidance, supra note 16.
27. Id.
30. L.E. Brooks et al., The Urban Institute, Prisoner Reentry in Massachusetts (2005).
33. Id.
34. C. Uggen et al., Citizenship, Democracy, and the Civic Reintegration of...
mortality rates, the authors estimated that about 4 million ex-prisoners and 11.7 million ex-felons were living in the United States in 2004. In a more recent study, researchers used federal and state correctional data from 1962 to 2008 to calculate the size of the ex-offender working population, aged 18 to 64 years. After adjusting for the aging out of the workforce and death rates, they reported that between 5.4 and 6.1 million ex-prisoners and 12.3 and 13.9 million ex-felons, were a part of the American working population in 2008. The authors further concluded that the “highest concentration” of ex-offenders were among black men and men who did not complete high school.

B. Recidivism

The many men and women leaving the correctional system reenter with alarming frequency. Three major studies provide our best estimates of recidivism nationwide and reveal that, for the most part, aggregated reoffense rates have remained relatively stable over the last 40 years. The earliest investigation by the BJS followed 16,000 inmates released from prisons in 11 states in 1983. Within three years, it was estimated that 62.5 percent of released prisoners were rearrested for a felony or serious misdemeanor, 46.8 percent were reconvicted, and 41.4 percent were re-incarcerated within prison or jail. Later, BJS researchers Langan and Levin tracked 272,111 inmates released from 15 states in 1994. Three years after release, the authors reported that 67.5 percent of prisoners had been rearrested, 46.9 percent reconvicted, and 25.4 percent resentenced to prison, and 51.8 percent re-incarcerated on either a new prison sentence or on a technical violation of the conditions of their release. Most recently, the Pew Center on the States partnered with the Association of State Correctional Administrators for an in-depth analysis of state recidivism rates. The study followed two cohorts of offenders released in 33 states in 1999 and 41 states in 2004. Aggregated three-year recidivism rates, defined by reincarceration for a new crime or technical violation, were 45.4 percent for the 1999 cohort and 43.3 percent for 2004. More clearly than in past recidivism studies, the Pew report showed that there was tremendous state-by-state variability in recidivism rates. At one extreme, California had the greatest total number of releases by far, reaching well more than 100,000 people in 1999 and 2004, and reported some of the highest recidivism rates in the country (around 60 percent). Texas had the second highest number of releases (between 56,000 and 73,000), but it reported much lower recidivism rates, around 32 percent. For comparison, Massachusetts had fewer than 3000 releases in 1999 and 2004 (excluding releases to probation), and reported recidivism rates that were comparable to the national average, near 40 percent.

C. Cost of the Correctional System

Maintaining the bloated correctional system comes at a high financial cost to states. In 2010, the total state expenditures on corrections were $51.1 billion. Expenses are inflated for myriad reasons. First, even though prisons only account for about 30 percent of the

35. Id. Not all felons spend time in a prison or jail (some get probation instead); all ex-prisoners have spent time in a prison or jail.
37. Id. The authors estimated that ex-felons make up roughly 6.6 to 7.4 percent of the total U.S. workforce.
38. Id.
40. Id.
41. Id.
43. Id.
44. Id.
46. Id.
47. Id.
48. Id. at 10-11 Exhibit 1.
50. Id.
51. Over the years, a number of studies have estimated Massachusetts’s recidivism rates in a variety of correctional settings. The earliest report followed releases from Massachusetts Department of Corrections (MDOC) prisons in 1994 and found a one-year reincarceration rate of 24 percent. See H.A. Dolan & J.A. Matthews, Massachusetts Department of Corrections, The Background Characteristics and Recidivism Rates of Releases from Massachusetts Correctional Institutions During 1994 (1998).
A BJS report that combined state with local and federal expenditures cited total correctional costs of over $74 billion in fiscal year 2007. This figure was a substantial departure from the $21.3 billion spent in 1982 and only a slight decline from the maximum annual correctional costs reported in recent history at $75.9 billion in 2002. T. Kyckelhahn, Bureau of Justice Statistics, Justice Expenditures and Employment, FY 1982-2007—Statistical Tables, 6 (Dec. 2011).
total correctional population, they are by far the most expensive way to manage offender populations. The average cost for a person on probation or parole comes in under $10 per day, while the average daily cost for a prisoner is nearly $80.53 Second, over the last 20 years America has experienced substantial growth in the amount of time inmates spend in its prisons.54 Much like in the study of recidivism rates there is tremendous state-by-state variability in sentencing and detainment practices, but between 1990 and 2009 the average time served increased by 36 percent for drug crimes, 24 percent for property crimes, and 37 percent for violent crimes.55 These longer average prison terms account for an estimated $10 billion in additional state expenditures. Third, correctional agencies are the primary caregivers for millions of persons with diverse physical and mental health treatment needs. The National Commission on Correctional Health Care estimated yearly health care costs for corrections to be around $3.5 billion.56 In Massachusetts alone, inmate medical care costs in 2010 totaled $94.4 million, which represented nearly one-fifth of the state prison budget for that year.57 Fourth, researchers from the Vera Institute of Justice revealed in their examination of 40 states that taxpayers are responsible for unbudgeted expenses tied to correctional employee benefits and pensions, inmate health care, and construction and renovation of facilities.58 All together the taxpayers in the 40 participating states covered an additional $5.4 billion in prison-related expenses, which exceeded the states’ total correctional budgets by nearly 14 percent.

In addition to the enormous expense of maintaining this correctional system, researchers have noted that the numerous barriers that prevent ex-offenders from fully accessing the labor market or working at full productivity comes at the expense of the U.S. economy. Schmitt and Warner estimated that ex-offenders’ restricted access to the labor market reduced employment rates by 0.3 to 0.9 percent for the overall working-age population, by 0.6 to 1.5 percent for the Latino population, and by 2.3 to 5.3 percent for the black population.59 They further estimated that losses in ex-offender work productivity cost the U.S. economy roughly $60 billion in 2008—more than the total cost of maintaining the correctional system itself.60 Clearly, reducing barriers to ex-offender employment is not only a goal of anti-discrimination statutes but also is a concern for our nation’s overall fiscal well-being.

Mass incarceration and prisoner reentry raise urgent fiscal and public safety concerns, but there are other dire repercussions for the many millions of Americans who are marked by a criminal record. Historically, states have forced individuals with a felony conviction to temporarily relinquish or permanently forfeit their legal and civil rights to vote, maintain parental custody, remain married, hold public office, own a firearm, or serve as a juror.62 Some of the most pervasive statutory restrictions have limited ex-offenders’ opportunities for getting and holding a job. In the next section, we discuss the collateral consequences of a criminal record for employment.

II. COLLATERAL CONSEQUENCES
Collateral consequences are the barriers that make it difficult for people to reconcile a criminal past with a crime-free future. Some of these barriers take the form legal sanctions and statutes restricting employment for ex-offenders, while others are more insidious and manifest as discrimination between potential employers and persons with a criminal record.

A. Legal Barriers to Employment
The Legal Action Center published a comprehensive state-by-state review of roadblocks to reentry, or the legal restrictions on food stamps, public assistance and housing, student loans, driver’s licenses, parenting, voting, and (key to our discussion here) employment.63 In 2004, there were 37 states that allowed employers and occupational licensing agencies to consider arrests that did not result in convictions when making employment decisions, whereas only 10 states completely prohibited such practices.64 Further, 29 states did not have regulations concerning the relevance of a criminal conviction in making hiring decisions or granting occupational licenses.65 The American Bar Association Collateral Consequences Project, which ran between 2009 and 2010, found 38,012 statutes and regulations nationally that limited or barred people with criminal records from some form of public benefit.66

The degree and severity of legal restrictions and hiring practices have continually evolved across the states in recent years,67 so the

55. Id.
59. Id.
64. Id.
65. Id. The report indicates that in these 29 states, “occupational licensing agencies can deny licenses based on any criminal conviction, regardless of history, circumstances or business necessity.” This situation is exactly what the EEOC guidance is meant to address, by requiring employers to make a connection between the applicants’ criminal records and the job roles they will actually be performing.
66. Id.
67. American Bar Association, Criminal Justice Section, “Collateral Consequences Project,” (Aug 2010), available at: http://listweb.isc.temple.edu/projects/acproject/index.cfm. When limiting the search to only legal collateral consequences that reference employment, the ABA found 7,878 statutes and regulations, of which 191 were in Massachusetts.
68. There are a number of mechanisms, including executive pardons, the expungement or sealing of criminal records, certificates of rehabilitation, and regulations that limit the consideration of convictions in employment decisions, which can restore a person’s rights to employment. See M.C. Love, The Sentencing Project,
Legal Action Center released an updated report to account for these changes.69 As of 2009, five states,70 including Massachusetts, had improved employment and occupational licensing opportunities for people with criminal histories, but the majority of states still permitted employers and agencies to deny jobs based upon arrests without convictions. In the years following the center’s updated report, 21 states reformed legislation to promote ex-offender employment, including new policies that permitted the sealing and expungement of criminal records for old, minor crimes.71

The sealing and expungement of criminal records is particularly important given their ubiquity in employer hiring practices (especially through online databases and repositories), and reported inaccuracies in federal and private databases. In a nationwide survey of criminal history information systems, the BJS reported nearly 18 million72 name-based background checks for noncriminal justice agencies in 2010, more than 75 percent of which were made via the Internet.73 Widespread public access to records may hinder ex-offender employment because criminal records: 1) have errors that may not accurately reflect a person’s involvement with the justice system,74 2) often require specialized training to evaluate and interpret complicated legal codes and offense history information,75 and 3) contain information on arrests that never led to a conviction or on temporally distant and minor crimes that could be used to influence current hiring decisions.76

B. Employer Discrimination

Ex-offenders endure much scrutiny from their potential employers, who commonly report a general distrust of and aversion to applicants with a criminal record.77 In 2006, Holzer and colleagues reported that over 60 percent of employers in their study had an aversion to hiring ex-offenders.78 Further, employers were less willing to hire ex-offenders than other stigmatized worker groups, including applicants: 1) on welfare, 2) with general equivalency diplomas (GEDs), and 3) with gaps in their employment histories.79 An unwillingness to hire ex-offenders is pervasive nationwide as evidenced by blanket no-hire practices and blatant exclusions of applicants with criminal records in job recruitment efforts. A recent investigation of Craigslist online job advertisements in 2010 found more


70. In the years following the original Legal Action Center report (2004), Connecticut, Delaware, Florida, Massachusetts, and New York removed barriers to ex-offender employment by: 1) expanding anti-discrimination laws for applicants, current employees, and persons with youthful offender histories and sealed noncriminal records; 2) prohibiting background checks and improving hiring policies that disqualify applicants and current employees before they are otherwise deemed qualified for work; 3) instituting provisional pardons for some ex-offenders; and 4) amending laws so that employment licensing refusals and revocations are no longer based upon convictions that are unrelated to the job or profession. See Legal Action Center, After Prison: Roadblocks to Reentry—Report on State Legal Barriers Facing People with Criminal Records, 2009 Update (2009), available at: http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry—2009.pdf.


72. This figure is a significant departure from the 43 million background checks reported in 2008. Bureau of Justice Statistics, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008: A CRIMINAL JUSTICE INFORMATION POLICY REPORT (2009). This is primarily due to a significant reduction in the number of background checks for noncriminal justice agencies in Washington state, which fell from 23.8 million in 2008 to 1.7 million in 2010. We were unable to discover the reason for this precipitous decline in Washington state’s background checks.


76. See generally SEARCH Group, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION, (2005). Further, the quality and accuracy of background checks is threatened when certain identifying information (e.g., social security number) is excluded from the matching of individuals and records. This increases the risk for mistaken identities via false positives (i.e., when an individual is incorrectly associated with another person’s criminal record) or false negatives (i.e., when an individual is not matched to his or her record because of inaccurate or incomplete identifying information).


78. U.S. Department of Justice, The Attorney General’s Report on Criminal History Background Checks, 3 (Jun. 2006). The Federal Bureau of Investigation maintains an extensive criminal history repository, the Interstate Identification Index, which incorporates data from all states and territories as well as international agencies. While records are biometrically matched to individuals using fingerprinting to avoid mistaken identities, the Index is missing final disposition information for about half of its records on file. This means that any employers and occupational licensing agencies that have been permitted access to the Index for screening and non-criminal justice purposes may be using records that do not accurately reflect if arrests resulted in convictions or were dismissed altogether.


than 2,500 postings that explicitly referenced applicants' criminal records, and more than 300 of these ads did not comply with basic protections under Title VII.80

When applicants' types of prior offenses are disclosed to employers, their chances of being hired can change. Peoples' willingness to hire ex-offenders is generally lower among applicants with more severe convictions (i.e., felony versus misdemeanor) and a history of violent or sexual crimes.81 Also, given that black and Hispanic men are disproportionately more likely to come into contact with the justice system than white men,82 categorical exclusions from employment based upon criminal records will affect racial minority groups more harshly than whites. Research has also uncovered racial and ethnic discrimination even after controlling for the presence of a criminal record. All things being equal, blacks and Latinos are more likely to be discriminated against by employers than whites.83 Overall, ex-offenders are less likely to have positive employment outcomes than non-offenders, racial minorities are less likely to have positive employment outcomes than whites, and minority ex-offenders are the least likely of all to have positive outcomes.84

C. Criminal Records and the “Redeemed” Ex-Offender

Since criminal records are easily and commonly accessed but applied in very different ways by states and employers, a burgeoning collection of research has started to examine their predictive value in decision-making and hiring practices. Past criminal behavior is a salient predictor of future crime and an indication to employers that a person is an above-average hiring risk,85 but the risk of recidivism steadily declines the longer a person remains crime-free. Using a sizable dataset of 13,160 males born in Philadelphia, Kurlycheck and colleagues analyzed juvenile police contacts and arrests on all participants through age 26.86 They found that the greatest risk of reoffending was in the time immediately following an arrest, but for people who last committed a crime six or seven years ago the risk of a new offense approached that for persons with no criminal record at all.87 In the following year, the same team of researchers conducted a similar study with data from a 1942 birth cohort that contained complete criminal history data for 6/7 males through age 32.88 Once again, the researchers concluded that while recent criminal records may predict short-term criminal outcomes, older records (six or seven years) fail to distinguish well between persons with and without criminal histories.89

Expanding upon the groundwork laid by these previous studies, Blumstein and Nakamura proposed that if the risk of recidivism for ex-offenders can decline until it is no greater than for their non-offender counterparts, it is possible to calculate a time to redemption from a criminal record.90 The “redeemed” ex-offender, then, is someone whose last offense is distant enough that his/her probability of committing a new crime approximates that of someone who has never committed a crime at all. Two recent studies using international datasets have estimated this time to redemption for different ex-offender groups. The first study by Soothill and Francis was conducted in England and Wales and compared the risk of reconviction for ex-offenders and non-offenders,91 as opposed to using arrest and police contact data like in Kurlycheck's research cited above. The risk of ex-offenders with either juvenile findings of guilt between the ages of 10 and 16 or a conviction between the ages of 17 and 20 approached the risk of non-offending groups around the age of 30 years.92 By comparison, ex-offenders with both juvenile findings of guilt and convictions before the age of 21 had risk levels that did not approach non-offending groups until around the age of 35 years.93 The second study by Bushway and colleagues (2011) used nationally representative longitudinal data collected in the Netherlands.94 Young first-time offenders aged 12 to 26 years were redeemed after 10 years, whereas older first-time offenders were redeemed in two to six years.95 However, repeat offenders with lengthy criminal histories (i.e., four or more offenses) had elevated levels of risk for new offenses for more than 20 years.96 Ultimately, outdated criminal records and policies that categorically disqualify persons from employment for having any offense history (no matter how distant) differentially affect "redeemed" ex-offenders, who may actually pose no greater risk to potential employers than applicants without an offense history.

No matter their origin—legal restrictions, employer racial discrimination, or outdated criminal records—collateral consequences for employment can drastically reduce ex-offenders' average time spent working each year, hourly and annual wages, and lifetime earning potential.97 According to The Pew Charitable Trusts, time spent in prisons and jails lowers total earnings for white men by 2

84. H.J. Holzer et al., Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, 49 J.R. & ECON. 451, 471 (2006), found that “in the absence of a criminal background check, employers use race to infer past criminal activity.” Overall, Holzer and colleagues found that some employers assumed that black applicants, especially young black men with spotted employment histories, were criminals even without checking their criminal backgrounds.
85. D. Pager, The Mark of a Criminal Record, 108 AM. J. SOC. 937, 958 fig. 6 (2003), Pager and colleagues found in a small dataset that minority ex-offenders had the lowest percentage of returned phone calls in their job search.
86. Id.
87. Id.
89. Id.
90. Id.
91. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. See e.g., B. Western & K. Beckett, How Unregulated is the U.S. Labor
percent, Hispanic men by 6 percent, and black men by 9 percent. The depression in total earnings has a lasting impact on lifetime socioeconomic status and makes it virtually impossible to break class boundaries. Two-thirds of previously incarcerated persons who start out in the lowest income levels stay there, whereas only 2 percent are able to reach the highest income levels. The implications of mass incarceration and wage immobility can be transmitted across generations as well, particularly within minority families. For example, black and Hispanic children are much more likely than white children to be born into families with an incarcerated father and that suffer from economic disadvantage. Barriers to stable employment for ex-offenders, then, have lasting social and fiscal implications that extend well beyond initial reentry into communities.

We now turn to our discussion of the EEOC's attempts to deal with the racially discriminatory nature of criminal records in employment.

III. THE EEOC GUIDANCE

Title VII of the Civil Rights Act of 1964 forbids employers, inter alia, from failing to hire or discharging employees due to the individual's race, color, religion, sex, or national origin. Title VII is enforced by the EEOC, or a state-level fair employment practices agency (FEPA), which has the authority to enforce the statute and promulgate regulations to achieve its ends. After nearly five decades of judicial and administrative interpretation, Title VII now prohibits both disparate treatment in the employment realm based on a protected characteristic, and policies that have a disparate impact on protected classes, regardless of whether there is discriminatory intent. The new EEOC guidance released on April 25, 2012, is an evolution of the agency's policy on employer use of criminal records to screen applicants, and represents the first revision of the policy since 1990. It follows 20 years of cumulative criminological and sociological literature that established the over-representation of racial minorities in the criminal justice system, the alarming rates of inmate release and return to correctional facilities, and the far-reaching collateral consequences of criminal records for employment outcomes. The EEOC guidance is another actor in a growing field of social policies aimed at improving life after release for ex-offenders and minority populations in particular. This guidance specifically relates to the hiring of minority ex-offenders, and sets new procedural requirements for employers to this end.

Before examining the guidance in detail, it is necessary to briefly describe how the EEOC interacts with employers in pursuing its mandate to enforce Title VII. In most cases of employment discrimination, an individual who believes he or she has experienced workplace discrimination must file a claim against the employer with the EEOC (or a state agency tasked with assisting the EEOC). The agency will then investigate the claim and determine if it appears to be true. If the EEOC's investigation shows that there is sufficient evidence that a discriminatory action took place, the agency must first attempt to remedy the action through "informal methods" (e.g., non-litigation methods, like mediation). If the agency finds no cause for a violation, it dismisses the claim and issues a "right to sue" letter to the claimant, who may then choose to pursue a claim in federal court. If it finds cause, the EEOC may choose to prosecute the case itself, turn the case over to an appropriate attorney general, and sets new procedural requirements for employers to this end.

98. Pew Charitable Trusts, Collateral Costs: Incarceration’s Effect on Economic Mobility, at 12 Table 1 (2010).
105. Disparate treatment is often considered intentional discrimination, or treating two similarly placed candidates in different ways.
106. The Law Dictionary, 2002, defines disparate impact as: "a plaintiff challenges a rule or test that on its face is nondiscriminatory, but in its effect discriminates against individuals on the basis of their race, color, religion, sex, national origin, handicap, or veteran status." Particular jurisdictions or statutes may include or remove certain categories of individuals from this type of analysis. Title VII includes these categories, less handicap and veteran status (which are covered in other statutes).
107. Disparate treatment analysis was the originally understood text of the statute; see 42 U.S.C. §2000e-2(a). Title VII came to embrace disparate impacts after the 1971 Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424, 431-32 (1971). The court held that Title VII "proscribes . . . practices that are fair in form, but discriminatory in operation." In this case, the policy in question was abstract job examinations that disproportionately disqualified Black applicants from a job. The court was clear to point out that, if the examination had some predictive relationship with how successfully an applicant would perform his or her duties, it might have seen the tests differently. As they stood, though, the examinations were not so linked, and violated Title VII. The 1991 Civil Rights Act modified Title VII to include disparate impact analysis directly in the statute. See Pub. L. No. 102-166, §105; 42 U.S.C. §2000e-2(k) (I)(A)(i). 108. See EEOC, “EEOC Issues Enforcement Guidance” (Apr. 25, 2012); A.L. Solomon, “In Search of a Job: Criminal Records as Barriers to Employment,” 270 N.J. J. 42, 46-47 (2012). These sources highlight the sequence that led to the new guidance’s being issued. In July of 2011, there was an EEOC meeting specifically focusing on arrest and conviction records as barriers to employment, and preceding a four to one vote in favor of updating the EEOC’s 20-year-old guidance on the subject. Previously, in 2008, the EEOC identified criminal records as an area of heightened concern for race-based employment discrimination, when its E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal records as a particular threat to equal opportunities for black and Hispanic applicants. See EEOC, "Questions and Answers About the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII" (2012), available at: http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.
111. Id.
112. Id. The statute mentions “conference, conciliation, and persuasion” amongst the informal techniques discussed; in general, the EEOC attempts to get employers to voluntarily redress racial discrimination.
or issue a “right to sue” letter. The guidance under discussion here only affects the manner in which the EEOC investigates an initial claim, and whether it issues a finding of cause or no cause.

A. What is a Guidance Document?

Guidance documents are an agency’s internally codified interpretations of the statutes and regulations it enforces. Guidance documents are not law themselves; any agency policy that creates legally enforceable duties must go through full notice-and-comment periods as per the Administrative Procedure Act. However, guidance documents can serve as a form of notice to the public, regulated industries, and other governmental actors about an agency’s intentions and mechanisms for enforcing its mandates. Although this interpretative power is substantial, understanding the non-binding limitation of the guidance is crucial: it does not affect the actual legal obligations of employers under Title VII nor mandate judicial agreement with the commission’s new interpretations. The EEOC claims in the guidance itself that Title VII has long embraced a legal theory of disparate impact, and at its essence, the guidance is only clarifying the EEOC’s interpretation of the “business necessity” defense by providing usable factors to assist employers in avoiding liability.

B. History of the Disparate Impact Theory of Liability and Criminal Records in Title VII

Today, disparate impact is a theory of employment discrimination under Title VII and requires a plaintiff to show that an employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” A disparate impact claim has four components. First, a plaintiff must identify the employer policy or practice in question. Second, the plaintiff must show that the policy has an adverse affect on members of Title VII’s protected classes. Though the court has never set distinct standards for the level of disproportionality required under a disparate impact claim, the basic touchstone is that a policy or practice has a lopsided effect on protected classes versus their percentage of the population. Intentional discrimination is not a component of a disparate impact claim. An employer with no discriminatory tendencies may still violate Title VII if he or she uses hiring policies that tend to disproportionately screen minority applicants out of the jobs he or she offers. Third, once an employee shows that a policy has a disproportionate effect on a protected class or classes, the burden shifts to the employer to show that the policy is “job related for the position in question and consistent with business necessity.” Fourth, the plaintiff can attempt to show that discussed will usually be some form of screening tool or selection criteria that prevents applicants from being hired for a position.

114. EEOC 2012 Guidance, at 3.
115. Office of Management and Budget Final Bulletin for Agency Good Guidance Practices, 72 FR 3432, 3434 (Jan. 25, 2007). The bulletin defines a guidance document as “an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended), that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue [...] Nothing in this Bulletin is intended to indicate that a guidance document can impose a legally binding requirement.”
117. Office of Management and Budget Final Bulletin for Agency Good Guidance Practices, 72 FR 3432, 3432 (Jan. 25, 2007). OMB states “Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.”
118. There is a separate question of what level of judicial deference guidance documents receive. In EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991), the court held that the EEOC’s guidance was entitled to only Skidmore level of deference (under Skidmore, agency decisions that do not have the force of law receive deference only to the extent that they are thorough in their research and persuasive in reasoning; they set no precedential value). Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). This would mean that an EEOC investigation that led to a cause determination because a particular employer’s policy did not meet the new interpretation of a “business necessity” may not necessarily lose in a court case in front of a federal judge; it would only help the plaintiff’s case to the degree that the EEOC’s decision was persuasive.
121. EEOC 2012 Guidance, at 9. In the context of this paper, the policies
there is an alternative policy that still meets the employer's needs without the disparate impact.126

When Title VII was originally passed in 1964, there was no textual indication that it covered disparate impact claims. Disparate treatment, or intentional discrimination, was a component of the original act,127 but it did not take long for courts to read disparate impact into the law as well. In 1971, the Supreme Court determined, in Griggs v. Duke Power Company, that Title VII prohibited employment practices that had a disparate impact on protected classes, holding: “[Title VII] proscribes [...] practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”128

The Griggs decision allowed the EEOC to begin investigating a number of employment policies that appeared on their face to be neutral but had a disproportionate effect on minority applicants, regardless of whether employers were using them with the intent to discriminate against protected classes.129 It was not long before the EEOC began analyzing employers’ use of criminal records under the new disparate impact theory.130 The EEOC, in a series of administrative decisions in the early and mid-1970s, found employers might violate Title VII under this theory if they used total employment bans for applicants who had any criminal record at all.131 In these decisions, the EEOC found that policies that automatically excluded applicants with criminal records, or with any type of offense in general, would disproportionately affect African-American and Hispanic applicants.132

Along with the disparate impact theory of liability came the business necessity defense.133 Business necessity was not codified into Title VII until disparate impact was in 1991,134 but functioned as a necessary component of the disparate impact theory in Griggs.135 Most of the EEOC work in the area of criminal records focused on how the agency would interpret the business necessity defense to disparate impact claims, and what evidence would be necessary to show that a particular policy was a “business necessity.”136

The Eighth Circuit provided a major milestone in the way the EEOC looked at criminal record policies with its 1975 decision in Green v. Missouri Public Railroad.137 In this case, the district court determined that an employer’s policy of using conviction records as a complete bar to employment was unlawful, and issued an injunction to stop the practice.138 On appeal, the Eighth Circuit Court of Appeals upheld the district court’s injunction, but held that an employer policy that disparately impacts protected classes may still survive a challenge under Title VII if it attempts to apply a reasonable screening process.139 The court identified at least three factors that a policy must consider to survive a Title VII challenge: “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 job for which the applicant has applied.”140 These three considerations have become known as the “Green factors.”

Before the agency’s interpretation was codified in its first guidance document in 1987, the EEOC went further than the Green factors required. Employers using the “business necessity” defense had to follow a two-step process. First, they had to determine if an applicant’s conviction record was “job-related.”141 If the conviction was not job-related, the employer could not exclude the applicant based on his or her record.142 Second, if the conviction was for a job-related crime, the employer was required to consider other factors that might modify whether a 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.”143 These factors included: 1) the number of offenses and the circumstances of each offense for which the individual was convicted, 2) the length of time intervening between the conviction for the offense and the employment decision, 3) the individual’s employment history, and 4) the individual’s efforts at rehabilitation.144

This initial policy on criminal records (scattered though it might have been) was likely the most sweeping of those used by the EEOC over the past 40 years because it required employers to consider succeeding of their employees, even if those policies have the side effect of lowering the number of qualified minority applicants.

129. Because Title VII always included disparate treatment as a vehicle for liability, plaintiffs who could show that an employer maintained two separate policies (in either actual practice, or blatantly) for hiring could recover. Plaintiffs could recover even if an employer’s policy was facially neutral if the employer had administered it in a way that drew a distinction between a protected group and other applicants.
130. The first set of EEOC decisions considering this topic appear to hail from 1972, just a year after Griggs. See EEOC Decision No. 72-1497 (1972) (challenging a hiring policy that excluded applicants based on “serious crimes”).
131. See EEOC Decision No. 72-1497 (1972) (challenging a hiring policy that excluded applicants based on “serious crimes”); EEOC Decision No. 74-89 (1974) (challenging a policy that considered a felony conviction, without investigation into what the felony was for, as a disqualifying factor); EEOC Decision No. 78-03 (1977) (challenging an exclusion for crimes of ‘moral turpitude,’ or drug charges).
132. Id. The EEOC’s position was supported by the weight of judicial decisions at the time. See Carter v. Gallagher, 452 F.2d 35 (8th Cir. 1971), cert. denied, 426 U.S. 950 (1972) (brought under 42 U.S.C. §§1981 and 1983); and Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La., 1971), aff’d mem., 468 F.2d 951 (5th Cir. 1972). Current data has continued to bear out this finding. EEOC 2012 Guidance, at 9-10.
136. Of the guidances the EEOC has issued in regards to criminal records, all of them have included long sections on (or in the case of the 1987 guidance, been titled) “business necessity.”
137. 523 F.2d 1290, 1293 (8th Cir. 1975).
138. Id. at 1291-93.
140. Id. at 1160.
141. Commission Decision No. 78-35, CCH EEOC Decisions (1983) ¶ 6720 (2/4/87), note 4 (describing previous agency policy). This particular factor (the safe and efficient operation of the employer’s business) comes from the Supreme Court’s decision in Dothard v. Rawlinson, 433 U.S. 321, 331 n.10 (1977), where the court held: “a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.”
142. Id. It is unclear whether agency precedent had started to determine what types of efforts at rehabilitation carried persuasive power that an applicant’s record would not affect job performance.
the EEOC wiped the “job-related” slate clean. In addition to reducing specific professions and occupations were abandoned. Essentially, types of criminal records that would be considered job-related for the administrative burdens on an employer who wished to use the presumption of disparate impact with narrower or more current statistics. Moreover, this policy suffered from some weaknesses, the most obvious of which was the amount of employer discretion in determining if a particular conviction is job-related or not. The EEOC’s policies did not state a clear set of criteria for determining which types of crimes would be job-related for which industries, or a set of tools to determine whether any particular crime could be judged as job-related.

In the EEOC’s first official guidance document on the issue of the business necessity defense for criminal record policies, it removed many of the mitigating factors it previously considered (like rehabilitation). The agency also made it clear that previous administrative decisions regarding criminal records were no longer binding precedent. Any agency decisions that set precedent for the types of criminal records that would be considered job-related for specific professions and occupations were abandoned. Essentially, the EEOC wiped the “job-related” slate clean. In addition to reducing the administrative burdens on an employer who wished to use the business necessity defense, this first guidance also lacked evaluative measures. It required employers to show they had considered the Green factors, but not what steps they needed to take to do so.

The EEOC supplemented the initial document with an additional policy statement later in 1987 discussing the statistical grounds for disparate impact.

The third guidance was released in 1990, and governed the use of arrest records as a screen for employment. Much like the first two policy statements, the 1990 statement indicated that complete bars to employment based on criminal records—in this case, arrest records—would likely violate Title VII, because national statistics indicated a disproportionately high arrest rate for minorities. Unlike convictions, though, which the EEOC determined represented reliable evidence that criminal conduct had occurred, arrest records did not conclusively determine that criminal conduct took place.

Aside from prohibiting the use of arrest records as total bars to employment, the 1990 guidance set the stage for two long-lasting policy decisions. First, it required employers to provide applicants the opportunity to explain the circumstances surrounding an arrest. These criminal history reviews were an early primogenitor of the “individualized assessment” procedure in the new guidance. Ideally, reviewing the details of applicants’ criminal histories would help employers identify applicants who posed the greatest employment risk without categorically excluding lower-risk candidates.

Second, the guidance provided examples for the first time of hypothetical scenarios that detailed where the EEOC would find cause for a Title VII claim, and where it would not. These scenarios began to illuminate what types of criminal conduct the EEOC saw as “job-related” for particular professions or occupations. For example, violent conduct would be relevant to positions that dealt with human interaction and theft-related crimes would be related to jobs that regularly involved handling or dealing with personal property or money. These assumptions about the types and degree of risk that ex-offenders pose to an employer are more or less copied in the new guidance, and represent its most prominent lapse.

C. The “Business Necessity” Defense

The EEOC has been largely silent on the issue of criminal records since the last guidance in 1990 and the passage of the Civil Rights Act of 1991. The new guidance seeks to modify the EEOC’s policy by taking a more individualized approach to criminal records.

145. Even the new guidance does not explicitly request employers consider an applicant's potential rehabilitative efforts.
147. Id. The guidance indicates, “With respect to conviction charges that are affected by this modification—that is, those raising the issue of adverse impact—Commission decisions that apply the previous standard are no longer available as Commission decision precedent for establishing business necessity. To the extent that such prior decisions are inconsistent with the position set forth herein, they are expressly overruled.” (emphasis added).
148. EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (7/29/87). While national statistics indicated that African-American and Hispanic job applicants were disproportionately likely to have criminal records, and that employer practices that banned applicants with such records would violate Title VII, the EEOC determined that if an employer could provide local or regional information that showed no disparate impact, a no-cause determination was appropriate.
150. Id. Like the July 1987 guidance, employers did have the ability to rebut the presumption of disparate impact with narrower or more current statistics.
151. Id.
152. Id. The policy statement notes that because arrests are not conclusive proof that underlying conduct has taken place, an employer “is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities.” Id.
153. EEOC, 1990, supra note 149.
154. Id. at heading 3 (describing a number of hypothetical arrest record scenarios).
155. Id. at heading 2 (discussing various court examples of links between criminal conduct and particular jobs).
156. Critics might argue that the guidance’s most prominent lapse had nothing to do with the guidance itself and more to do with the lack of resources or authority the EEOC had to enforce it. In January of 2012, the EEOC and Pepsi Beverages came to a $3.1 million conciliation on a Title VII disparate impact claim. Dow Jones Newswires, “Pepsibottling Unit Settles Discrimination Charges for $3.1M,” THE WASHINGTON POST, Jan 11, 2012, available at: http://online.wsj.com/article/BT-CO-20120111-713074.html. Pepsi had a policy that denied permanent employment to any applicant with an arrest record; a policy the 1990 guidance describes as close to a per se violation of Title VII. The conciliation was applauded as a major settlement, but it is the first such conciliation in the context of criminal records. Even discounting that most conciliations are confidential, the use of arrest records to bar applicants from employment has violated EEOC policy for over 20 years. Pam Devata and Kendra Paul, Seyfarth Shaw LLP, “EEOC Announces Its First Multi-Million Dollar Settlement Of 2012 - Based On Discrimination In The Use Of Criminal Histories In Hiring,” The Workplace Class Action Blog, Jan 12, 2012, available at: http://www.workplaceclassaction.com/eeoc-litigation/eeoc-announces-its-first-multi-million-dollar-settlement-of-2012—based-on-discrimination-in-the-us/. See also NELP, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment, at 13 (Mar. 2011).

New EEOC Guidance / 205
interpretation of the business necessity defense to a disparate impacts claim, so taking stock of the current state of the defense is necessary. The judicial standard for the business necessity defense was created loosely in \textit{Griggs}, where the court said of Title VII: “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.” In the very next sentence, however, the court went on to indicate: “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”

\textit{Griggs} provided two dueling concepts of this defense that the Supreme Court has never truly reconciled. The first sentence appears to require a defendant to show that its policy is required for the business to succeed; the second requires only a relationship between the policy and job performance. The court later helped to clarify that Title VII required employers to show their policy was “demonstrably a reasonable measure of job performance.” The phrase “business necessity” may have been a slight misnomer. The court did not require that an employer policy (in \textit{Griggs}, for example, of administering a job test) be critical to the success of the company, only that the test’s results be substantially related to showing a particular candidate would be successful in his or her job.

Cases after \textit{Griggs} that interpreted the defense followed in the same general line of reasoning: the business necessity defense requires some degree of relationship between the employment policy and overall job success. The First Circuit has also adopted this standard: in \textit{Boston Chapter, NAACP, Inc. v. Beecher}, the Court of Appeals reviewed the Massachusetts Civil Service examination for firefighters and found that the employment test violated Title VII under a disparate impact theory. The court held: “[W]hat is at issue is whether [the test] demonstrably selects people who will perform better the required on-the-job behaviors after they have been hired and trained. The crucial fit is not between test and job lexicon, but between the test and job performance.” The test was not designed professionally, it asked many questions that were unrelated to the profession, was evaluated in an arbitrary manner, and was not statistically correlated with success as a firefighter (i.e., the test did not link test performance with job performance).

\textit{Boston NAACP} does not provide one specific standard for how an employer should measure whether a policy is “job related,” but implies that research and statistical significance between a test and job performance is desirable. The EEOC’s Uniform Guidelines for Employee Selection Procedures require “validation” of measures used to select employees, and recommend a proven, statistically significant correlation between the test and job performance. As a general rule, then, courts have interpreted the business necessity defense to require some form of legitimate, empirical connection between an employer policy used to screen applicants and an applicant’s actual job performance. With this general standard in mind, we must consider the conceptual challenges of adapting this hazy test to employer use of criminal records as a screening tool. The Third Circuit noted this tension in one of the more recent cases examining employer policies that excluded applicants based on previous criminal histories, \textit{El v. SEPTA}. The plaintiff in this case was a 55-year old man hired provisionally by King Paratransit Services, a subcontractor of the Southern Pennsylvania Transportation Authority (SEPTA), to drive paratransit buses for commuters who were disabled. He was discharged when SEPTA completed a criminal records check on him, and found a 40-year-old conviction for second-degree murder (the plaintiff disclosed this fact on his application, but SEPTA staff did not notice it). SEPTA indicated that its sole reason for discharging the plaintiff was the conviction. SEPTA’s contract with King required that staff drivers not have a record of driving under the influence nor convictions for a violent offense, no matter how long ago the offense took place. The plaintiff sued under a Title VII disparate impact claim.

The court noted the difficulty in applying the standard business necessity defense in situations involving criminal records:

The standards set out in \textit{Griggs} and its progeny […] do not parallel the facts of this case […] Here […] the hiring policy has nothing to do with the applicant’s ability to drive a paratransit bus; rather, it seeks to exclude applicants who, while able to drive a bus, pose too much of a risk of potential harm to the passengers to be trusted with the job […] SEPTA could argue that successful performance of the job includes not attacking a passenger and, therefore, that the standard is still appropriate. However, the standard is worded to address ability, not risk. Yet, the issue before us is the risk that the employee will harm a passenger, and the phrase “minimum qualification” simply does not fit, as it is hard to articulate the minimum qualification for posing a low risk of attacking someone.

\begin{thebibliography}{99}
  \bibitem{EEOC 2012 Guidance} 9-12.
  \bibitem{See El v. SEPTA} 479 F.3d 232, 241 (3d Cir. 2007) (“Unfortunately, as numerous courts and commentators have noted, \textit{Griggs} and its progeny did not provide a precise definition of business necessity.”)
  \bibitem{Griggs} 401 U.S. at 436.
  \bibitem{Id.} 401 U.S. at 436.
  \bibitem{See} e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (tests that have disparate impact may not be used unless shown by professionally acceptable methods to be predictive of, or significantly correlated to, job performance); Washington v. Davis, 426 U.S. 229 (1976) (tests which have disparate impacts must be “validated” under criteria that accurately measure job performance).
  \bibitem{504 F.2d 1017} 1021-22.
  \bibitem{Id. at 1024-25.} 1024-25.
  \bibitem{Id.} 1024-25.
  \bibitem{29 CFR 1607.14} 1024-25.
  \bibitem{See El v. SEPTA} 479 F.3d 232, 240 (3d Cir. 2007).
  \bibitem{Id. at 235.} 235.
  \bibitem{Id.} 235.
  \bibitem{Id.} 235.
  \bibitem{El v. SEPTA} 479 F.3d 232, 235 (3d Cir. 2007) (emphasis added).
  \bibitem{Id. at 243} 243.
\end{thebibliography}
The court determined here that the appropriate standard for business necessity when dealing with criminal records is whether "the policy under review accurately distinguish[es] between applicants that pose an unacceptable level of risk and those that do not." 176 The court does not provide any form of statistical guidance on how to construct such a test, however, indicating that whether a policy adequately judges the risk an applicant with a criminal record poses is a factual question to be determined on a case-by-case basis. 177 El was decided ultimately on an unusual evidentiary issue: the plaintiff did not rebut SEPTA's criminological experts or even depose them, and the court dismissed his claim at the summary judgment stage as a result of it. 178 Thus, the actual disposition of this case has less precedential value than the test it provides. El appears to be the closest there is to a national standard on the business necessity defense in cases where criminal records are in play. 179

The El test (for lack of a better name) appears to be the test supported by the EEOC in the new guidance document. 180 Although the test does not offer much in the way of specificity, the general focus of the business necessity defense for employers using criminal records is whether the policy in question adequately screens out those applicants who pose too high a risk for the unique needs of the job from those who do not. A question remains about whether the empirical-connection-to-job-performance component of the standard business necessity defense exists within the El test, and if so, what form that empirical support should take.

D. The Current Guidance

The EEOC guidance released on April 25, 2012 combines and supersedes previous agency guidance into a new, multi-step process for evaluating whether employer policies that screen applicants with criminal histories are job-related and consistent with business necessity. 181 Adopting the reasoning in El v. SEPTA, the guidance indicates that an employer policy will generally be considered "job related and consistent with business necessity" if it can properly "link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." 182 In general, the new guidance requires employers to undertake a deeper, more individualized evaluation of each applicant's suitability for a particular job, but it does not add new analytic tools or categories of per se violations. 183

In essence, by combining two procedural requirements that had not previously existed side-by-side, and by mandating more focus on data to justify a criminal record exclusion policy, the new guidance narrows what policies will be considered job-related and consistent with business necessity.

As a result of this narrowing, complete bars to employment for any applicant with a criminal record will generally not satisfy the "job related and consistent with business necessity" defense to a disparate impact claim. 184 The new guidance also provides additional empirical support that criminal records exclusions will generally disparately impact minority (specifically black and Hispanic) applicants. 185

The EEOC provides two options for employers seeking to minimize liability under Title VII with this new interpretation of the risk-based "business necessity" defense: either validate 186 a policy that screens out applicants with criminal records under the Uniform Guidelines on Employee Selection Procedures, 187 or create a "targeted screen," followed by an "individualized assessment" for such applicants. 188 Because these two items can be confusing, we break them down below in their component parts.

176. Id. at 245.
177. Id. at 247. The court noted that the plaintiff’s decision not to retain his own experts or depose the defendant’s "are fatal to his claim, for a party opposing summary judgment cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Here, there is nothing in the record that raises any reasonable credibility question about SEPTA’s expert evidence, rebuttable as it may be. Id. (emphasis added; internal citations omitted).
178. El v. SEPTA has been cited favorably by every other circuit except the First and Fourth, where it has not yet been examined. It has no negative treatment to date, and has been followed over 20 times.
179. EEOC 2012 Guidance, at 11-12. The new guidance cites to El favorably, and uses the risk language throughout its discussion of the new procedural steps it recommends employers use to avoid Title VII liability.
181. Id. The guidance also discusses the difference between using arrest records and conviction records in creating a policy that screens or bars applicants from employment. Because Massachusetts made the use of arrest records unlawful as an employment screen, see MASS. GEN. LAWS ch. 151B, §9, those sections of the guidance are not applicable to Massachusetts. All references to "criminal records" in the rest of this article should be read as conviction histories and records.
183. EEOC 2012 Guidance, at 16 ("A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the Green factors because it does not focus on the dangers of particular crimes and the risks in particular positions."). This concept mirrors those found in the 1987 and 1990 guidelines.
184. EEOC 2012 Guidance, at 9-10. This does not automatically mean that every policy that screens an applicant for having a criminal record will violate Title VII’s disparate impact components; the plaintiff him- or herself must still be a member of a protected class when filing a claim. Nevertheless, the EEOC’s continued recognition that screening tools that make use of criminal records will usually implicate disparate impact analysis does give notice to employers that wish to continue using such policies that they need to ensure the policies remain valid.
185. The Uniform Guidelines for Employee Selection Procedures have been in existence since 1978 and the EEOC does not spend much time discussing this mechanism for avoiding Title VII liability.
186. The Uniform Guidelines require policies that serve as screens to job opportunities, and have an adverse impact on protected classes, be “validated” through one of the methods described in 29 CFR 1607.5. Validation as used in the Uniform Guidelines (and in conjunction with the three types of tests or studies considered acceptable under them) is the empirically proven connection between the outcome of an employment screening policy and either a job outcome, a characteristic of a successful employee, or job tasks. See 29 CFR 1607.5. The essential component of all the validation requirements is that they must be empirically proven at a significant (although not always statistically significant) level. The Uniform Guidelines require a level of conclusive proof that the selection criteria are actually related to job success and performance.
187. It is important to note that while the EEOC does not dwell on the validation option for employers, it does appear to indicate that it believes there are little data and few risk studies that link specific criminal conduct to particular job tasks. See EEOC 2012 Guidance, at 15 note 114. The sections of the Uniform Guidelines that deal with situations in which an employer cannot validate its employment screens recommend that the employer remove the adverse impact the policy causes. See 29 CFR 1607.6(B)(1)-(2).
188. EEOC 2012 Guidance, at 14.
First, a targeted screen flags applicants who may pose undue risk by examining their conviction records using at least the three factors identified in Green. These three factors are:

- **The nature and gravity of the offense or conduct:** this includes the type of harm the crime caused (bodily harm, property damage, etc.), the legal elements of the crime (the EEOC indicates that fraud, for example, requires misrepresentation and deception), and finally, the severity of the crime (misdemeanors are less severe than felonies, generally speaking).

- **The time that has passed since the offense, conduct and/or completion of the sentence:** this channels the criminological literature on the “redeemed offender” discussed in section II of this article. The guidance approvingly cites the El court’s statement that “there is a time at which a former criminal is no longer any more likely to recidivate than the average person,” which indicates that the focus of the policy should be evaluating whether enough time has passed such that an individual applicant poses a minimal risk to employers for a particular job.

- **The nature of the job held or sought:** this includes the nature of the job’s duties, identification of the job’s essential functions, the circumstances under which the job is performed, and the environment in which the duties are performed. A screen will have a better chance of being considered job related and consistent with business necessity if an employer can link risk of criminal conduct to the essential functions of the job.

A targeted screen is supposed to serve the function of identifying, at a rudimentary level, those applicants who are likely to pose an elevated risk to an employer, in a particular job role. Once an applicant has been identified by a properly designed screen, the guidance recommends that employers undertake an individualized assessment, to determine if the screen is capturing an applicant who poses heightened risk in reality, or whether other factors reduce the risk the applicant might represent.

**Individualized Assessment**

Second, an individualized assessment follows a targeted screen and consists of three sequential parts:

1. **A notice to the applicant that he or she has been screened out of the employment process because of criminal conduct:** the guidance does not provide more direction as to this component, but it likely serves only as notice to applicants that their criminal records have placed them into the screen, and to inform them that they have the opportunity to provide additional information that will place them outside of it.

2. **The opportunity for the applicant to provide additional information and context about the criminal conduct in order to convince the employer that the conduct should not disqualify him or her from the position:** amongst the information the guidance discusses as relevant in the individualized assessment are the factors or circumstances surrounding the offense, the number of offenses committed, the length of the applicant’s employment history, rehabilitation and education efforts, employment history, and whether the applicant is bonded under a federal or state bonding program.

   This list is not exhaustive, and the implication is that other information that might have risk-predictive qualities will be relevant.

3. **The employer’s determination of whether the additional information places the particular applicant outside the boundaries of the policy:** the final component of the individualized assessment is the employer’s assessment of the additional information provided by the applicant. In theory, the employer should make this determination based on whether the additional information changes whether the criminal record exclusion policy, as applied to the applicant, is job related and consistent with business necessity. Since employer policies under the new guidance are supposed to attempt to measure the risk applicants pose to an employer, if an applicant can produce information that indicates that he or she does not in fact pose a heightened level of risk, the applicant should not be excluded from employment.

While this new guidance is not a revolutionary change from previous EEOC policy statements, it is the first policy statement in the area of criminal records since 1990. Since that time, the number of people incarcerated has grown dramatically and so has the number

189. Id. at 15-16.
190. Id. at 15.
192. Id.
193. Id., at 15.
194. Id., at 16.
195. Id.
196. Id., at 16. The Guidance does not require that employers undertake an individualized assessment, but does caution that employers who choose to exclude applicants based solely on the screen would need to have a narrowly tailored screen based on relevant criminological studies.
197. EEOC 2012 Guidance, at 18.
198. Id.
199. This is the only location in the employment process where redemption is expressly included in the new guidance.
200. The Guidance cites a number of academic studies providing some evidence that employment history, rehabilitation efforts and education, and character references reduce the risk an applicant poses to an employer. See EEOC 2012 Guidance, notes 123-125. With all of these categories of information, the goal is to determine if a particular applicant, although screened by the exclusion policy, actually represents a heightened risk or not.
201. EEOC 2012 Guidance, at 14.
202. Id. at 18.
of people reentering communities each year. The guidance is cognizant of the importance of employment for ex-offender reintegration, and utilizes the scholarly research available in the field of criminology more thoroughly than did previous guidance documents. This new guidance and the interpretive rules it contains are an important addition to the prisoner reentry conversation and have implications for reentry and employment policies nationwide.

We now turn to our examination of the new guidance, its particular strengths for combating discrimination, and the drawbacks targeted screening and individualized assessments have for determining whether ex-offenders pose particular risks for employers.

IV. Analysis

In the introduction to the guidance, the EEOC discusses its mandate to enforce the employment discrimination mandate of Title VII, and immediately turns to the disproportionate rates of arrest and conviction for minority populations. In the first two paragraphs, the EEOC introduces the dual functions of the guidance: to further the broad prophylactic racial anti-discrimination commands of Title VII, and to provide a more nuanced and specific set of tools for employers to use when faced with ex-offenders as job applicants. Title VII does not list ex-offenders as a protected class and the guidance is not explicitly a document focused on reintegration returning prisoners, but the EEOC makes clear that it is aware that the collateral consequences of a criminal record fall most heavily on black and Hispanic job applicants. In many ways, the guidance seeks to address two social ills at once: 1) reducing racism that prevents ex-offenders who are members of protected classes from obtaining employment, and 2) lowering the barriers for ex-offenders (many of whom are members of protected classes) to get employment. The first is the explicit focus of the guidance; the second is the necessary implied result.

In attempting to address these issues, the EEOC also sought to require employers to use stringent procedural steps to determine whether applicants would represent a heightened risk for their positions. Perhaps the hope was that the EEOC could provide for employers a set of procedural tasks that would actually help them determine the real risk an ex-offender poses, but we argue that in reality, the toolset the EEOC provides is lacking and underdeveloped for this purpose. The targeted screen and individualized assessment are useful general procedural steps, but they do not, as currently envisioned, allow for a truly functional assessment of whether an applicant will actually represent a heightened risk for a particular job.

Where the guidance may have more impact, however, is in the realm of anti-discrimination. By requiring employers to undertake more procedural steps, and to document those steps and support them with empirical justifications, the guidance may make it more difficult for employers to discriminate against minority ex-offenders. Considering the number of ex-offenders who are members of a Title VII statutorily protected class, reducing employment discrimination against this population is a substantial step in the overall reentry project going on throughout the country.

A. Anti-Discrimination

The guidance expands the number of procedural steps an employer must take to exempt applicants from employment for having criminal records. The new guidance combines the procedural requirements contained in the earlier documents into a two-step process, including a targeted screen and individualized assessment, detailed in section III.D above. The function of all of these requirements is ultimately to reduce the workplace discrimination suffered by Title VII’s protected classes, but many of them will also function to reduce discrimination against ex-offenders in general. Thus, the guidance may serve a number of important anti-discrimination functions by: 1) reducing the number of complete bars to employment for ex-offenders, 2) making transparent disparate treatment of ex-offenders when employers do not undertake the full required process under the guidance, and 3) encouraging some employers to re-evaluate their employment practices if they take too long or are too expensive.

Reducing Complete Bars to Employment

A new component of the guidance is the amount of data that supports an assumption of disparate impact for criminal record exclusion policies. By indicating that complete bars to employment will likely violate Title VII, the EEOC has decided that criminal records are not broadly relevant to employment—they are only useable in a non-discriminatory manner if considered in a position-specific context. Especially in a low-wage market in which many ex-offenders may find themselves, any barriers that are removed between an applicant and a potential employer will have substantial end-results for applicants. Many ex-offenders have been completely blocked from finding employment by policies that automatically screen out inherent in the duties of a particular position.”

204. Partly, this more comprehensive use of criminological research is due to advances in the discipline of criminology itself. In the past 20 years, the availability of empirical research has improved, particularly studies that determine the efficacy of interventions, programs, and treatment in reducing recidivism. Moreover, there is overwhelming evidence, beyond what existed in 1990, that speaks to discriminatory practices that affect minority ex-offenders’ employment prospects through explicit legal mechanisms and extralegal employer racism. In the past five years, the criminological field has shifted its focus from mass incarceration to the aftermath of mass incarceration, primarily the release of hundreds of thousands of prisoners to communities each year.

205. As discussed below, despite the best intentions of the guidance, some recommendations it makes do not have empirical support because the research still needs to be done or because the findings that are available are mixed.

206. EEOC 2012 Guidance, at 1 (discussing in the summary the components of the guidance).

207. Id. at 10. While discussing the disparate impact that criminal record exclusions have on black and Hispanic ex-offenders, the EEOC concluded:

“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 Commission to further investigate such Title VII disparate impact charges.” The EEOC’s position is also supported by new federal cases. See, e.g., Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) (“[A] blanket policy of denying employment to any person having a criminal conviction is a [per se] violation of Title VII.”)


209. Devah Pager et al., Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers, 623 ANNALS AM. ACAD. POL. & SOC. SCI., 199, 200-01 (2009) (personal contact between an applicant and hiring manager lessens the importance of having a criminal record, and black applicants are less often called for interviews and are less able to use personal rapport to reduce the criminal record stigma). See also Pager et al., “Discrimination in a Low Wage Labor Market: A Field Experiment,” 24 AM. SOC. R., 777, 788 (2009) (“...personal contact with employers was associated with significantly
any applicants with criminal records.210

The new guidance’s assumption of disparate impact may make it easier for applicants and the EEOC to pursue employers using blanket exclusions; identifying the policy itself may be the only substantive part of the discrimination claim necessary. Once disparate impact is found, Title VII jurisprudence shifts the burden to the employer to show a business necessity for the policy.211 With disparate impact already assumed, and limited valid business necessity defenses available for blanket exclusions,212 employers who use blanket exclusions are essentially per se violating Title VII. The new guidance may encourage some employers to voluntarily reform such policies for fear of additional liability,213 and it allows the commission to pursue disparate impact claims against those that do not with a lower burden of persuasion.214 Even for employers who do not employ blanket exclusions, the assumption of disparate impact reduces the complexity of a Title VII claim to some degree by partially removing one of the elements a plaintiff needs to show to make a prima facie case. The assumption also puts employers on notice that if they wish to use any criminal record exclusion policy, they will have to undergo the targeted screen and individualized assessment procedural steps, or their policy will open them to substantial Title VII liability.

Transparency of Other Forms of Discrimination

To this point, most of our discussion has focused on the disparate impact theory of liability under Title VII: it is the theory to which the business necessity defense is attached and much of the guidance is directed. One of the possible strong anti-discrimination effects of the guidance may be to expose more intentional discrimination against minority ex-offenders, however, and open employers up to liability under a disparate treatment theory.215

In 2009, Devah Pager and her colleagues found that employers often treated black job applicants differently than their white or Hispanic counterparts.216 While her studies did not pinpoint the exact reasons behind the discriminatory treatment, the outcomes for the black testers were stark. They were offered jobs at lower rates than the other testers despite having similar qualifications, and they were often channeled into lower-paying positions than those for which they applied.217 Title VII already prohibits the types of employer activities Pager described in her study, but one of the difficulties with holding employers accountable for their violations is determining that a violation took place at all.218 Absent a blatantly discriminatory action (like a supervisor using racial epithets at an applicant, or an employer admitting they don’t hire a specific category of people), proving that a black or Hispanic applicant has been treated differently than a white applicant can be incredibly difficult, requiring statistics and the complex McDonnell Douglas burden-shifting test.219 The test is used to determine if an employment decision was based on racial animosity or unconscious racial bias in the absence of an overt discriminatory act.

One of the values of the new guidance is the multitude of procedural steps that employers must take to reduce liability: 1) construct a targeted screen,220 2) document and justify the policy on fact-based evidence,221 and 3) if an applicant is caught by an employer’s screen, give them an opportunity to share additional information that may place them outside of the screen.222 These procedures must be followed for every applicant that an employer reviews. The guidance makes it clear that inconsistencies in the hiring process—for example, not using the same hiring procedure with white applicants as black applicants223—would support a showing of disparate

210. See, e.g., Bushway, supra note 74. In this study, detailed in note 74, supra, the online job postings included clear, Title VII-violating provisions that indicated several major companies, including Domino’s Pizza, would not hire any applicant with a criminal record.

211. See Section III.B for a more detailed discussion of current disparate impact jurisprudence.

212. The EEOC only recognizes one valid exemption: federal law or regulation requiring exclusion of applicants for specific positions who have criminal records.

213. EEOC 2012 Guidance, at 25. The best practices section of the guidance recommends employers “[e]liminate policies or practices that exclude people from employment based on any criminal record.”

214. Between Green and other cases (like Field) that agree with it, an EEOC complaint filed against a company with a blanket exclusion policy presumably violates Title VII per se.

215. Title VII makes unlawful employment practices that treat similarly placed applicants differently because of a protected characteristic (like race); this theory of discrimination is called disparate treatment. See 42 U.S.C. §2000e-2(a). Disparate treatment can take the form of blatant discriminatory intent or motive, but the law also makes unlawful disparate treatment caused by subconscious bias or stereotyped thinking. See EEOC, “Race and Color Discrimination,” V.A.1, 15-10 (2006). Amongst the foundational principles embedded in the disparate treatment theory is that race is never a bona fide occupational requirement for any job, and any employer decisions made (consciously or subconsciously) to limit the number of minorities employed is a discriminatory action. Id. at 15-11.


217. Id.

218. Id. at 793. (“The episodes of discrimination recorded in this study were seldom characterized by overt racism or hostility. In fact, our testers rarely perceived any signs of clear prejudice. It was through side-by-side comparisons of our testers’ experiences that patterns of subtle, but consistent differential treatment were revealed.”)


220. EEOC 2012 Guidance, at 25. The following procedural steps are included in the guidance’s “best practices” section.

221. Id. (guidance recommends creating a “narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct” (emphasis added)).

222. EEOC 2012 Guidance, at 18.

223. Unfortunately none of the examples provided in the guidance addresses an employer’s failing to follow its own criminal records policy directly, but it can be assumed that once an employer has a solidified policy, failing to follow that policy while evaluating only certain applicants would be disparate treatment.
treatment. The *McDonnell Douglas* burden-shifting test is not necessary when there is a clear indication that an employer used one policy for white ex-offenders and a different policy for minority ex-offenders; a court does not have to infer racial animosity.

The procedural steps do not highlight racial bias that takes place during more nuanced hiring decisions—employers would still be able to follow all the necessary steps, yet discriminate against minority applicants. In those situations, the *McDonnell Douglas* test may still provide a disparate treatment remedy, although the burden of proof is more difficult. The true value of requiring more procedural steps during the hiring process is that it provides more opportunities for racial bias to surface, and makes them more obvious when they do. Some employers could follow the guidance in name only and still discriminate against minority applicants. Enough overt racial bias still exists in the job market that any policy that reduces it will likely lead to an increase in employment for minority ex-offenders.

### Reduced Discrimination Through Narrowly Defined Policies

Assuming that employers wish to avoid Title VII liability because of the costs of being sued for discrimination, some number of employers will likely attempt to follow the commands of the guideline. If they do so correctly, their criminal record exclusions will be narrowly tailored to screen applicants who have records that are related to that position based on fact-based evidence that shows a connection between the applicant’s conduct and the tasks of the job itself. Criminal records exclusions cannot be overbroad without exposing employers to disparate impact liability.

This new guidance will require a narrowing of criminal record policies for many employers. For those who are not using criminal record exclusion policies as a pretextual tool to screen out minority applicants, this narrowing will likely increase the ex-offenders in applicant pools who are qualified for the jobs they seek. Although the guidance does not require any preferential treatment for ex-offenders over non-offenders for any jobs, it does partially remove the relevance of a criminal record for ex-offenders whose records are not related to the jobs for which they are applying. Without the stigma of a criminal record, ex-offenders have more opportunities for employment.

### B. Limitations of the Guidance in Promoting Prisoner Reentry and Employment

The disproportionate involvement of racial minorities in the criminal justice system guarantees that the new guidance will touch the lives of many ex-offenders. However, prisoners and ex-offenders are not their own protected class under Title VII. Even under the new guidance and its anti-discrimination protective measures, shedding the stigma of a criminal record will still present challenges for many people. Even though their prospects after release are generally more favorable than their minority counterparts, the population of whites involved in the criminal justice system is substantial, and is not addressed by the new EEOC guidance. Further, while the guidance informs employers’ hiring practices to minimize disparate impact and treatment, its recommendations for targeted screens and individualized assessments have noteworthy limitations. In the following, we deconstruct targeted screens and individualized assessments to illustrate that, despite the guidance’s best intentions, they function by allowing employers to make a virtually untested assumption about the relationship between general risk of criminal recidivism and specific job-related outcomes.

Where “need not apply” exclusionary statements were once the hatchet in hiring practices, targeted screens and individualized assessments are now intended to be the scalpel in narrowing the at-risk pool of applicants. The issue at hand is the prediction of future outcomes.

224. *Id.* at 8.

225. The *McDonnell Douglas* test requires that a plaintiff make out a prima facie case of discrimination, before the burden shifts to the employer to show a legitimate, non-discriminatory purpose for its action. If this is successful, the burden shifts back to the plaintiff to show that the employer’s proposed purpose is pretextual and hides a discriminatory motive. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000) (though burdens shift throughout *McDonnell Douglas* test, the ultimate burden is always on the plaintiff).

226. A potentially unrealistic assumption of this benefit of the guidance is that ex-offenders will have some understanding of the procedural requirements the new guidance places on employers, and will therefore be aware that employers are required to have a targeted screen and that they are supposed to be allowed the opportunity to explain the circumstances of their arrest. Whether or not ex-offenders will actually learn this information will depend heavily on the EEOC’s outreach efforts and the success of the Mythbusters publications. These publications are one of the first steps of the Federal Interagency Reentry Council’s mission to coordinate federal efforts at prisoner reentry. The EEOC has produced one mythbuster fact sheet so far, available at: http://www.nationalreentryresourcecenter.org/documents/0000/1082/Reentry_Council_Mythbuster_Employment.pdf.

227. D. Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937 (2003). Pager found that employment outcomes were the lowest of any studied category for minority ex-offenders; removing one of those stigmatized categories in part (racial discrimination, in this hypothetical) should reduce some of the barriers for ex-offender employment.

228. See generally W. F. Cascio, *Costing Human Resources: The Financial Impact of Behavior in Organizations* (2000). Cascio estimated that discrimination lawsuits can cost upwards of $100,000 for non-class actions, and over $400,000 to defend class-actions.

229. EEOC 2012 Guidance, at 19, example 7. In this example, the EEOC decides there is no reasonable cause to find discrimination because the employer’s policy was “consistent with the evidence, and that the policy avoided overbroad exclusions.” The example indicates, at least in this hypothetical situation, that data exists that indicates Isaac’s criminal history is particularly indicative of future action. While this concept is one we debate below, the guidance requires employers to justify who their exclusion screens will pick up by referring to evidence that shows such applicants do in fact pose a heightened risk.

230. Even if the narrowing process is limited to changing blanket criminal record exclusions to policies that bar specific types of offenses, it may still increase the number of ex-offenders who are qualified for employment and not automatically blocked from it. See M. N. Rodriguez & M. Emsellem, NELP, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment, at 15-18 (Mar. 2011). See also id. at 12 (“The rise in legal actions highlights […] the widespread non-compliance of major companies with federal law […]” (emphasis added)).

231. See Pager 2003, supra note 83; Pager et al. 2009, supra note 216. If black and white applicants both receive the same number of callbacks from employers, because the stigma of criminal records is applied less harshly to blacks (because of employer fear of disparate treatment liability), it increases their contact with hiring managers, which Pager showed always had a connection with positive job outcomes.

232. As has been discussed at great length in this article, the rates of arrest and incarceration for minorities are far greater than those for whites, but whites still account for a notable proportion of people behind bars who will eventually be released. See Pew Center on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008). For reference, consider that in 2010 there were more than 451,600 white men who represented 31 percent of the total number of sentenced state and federal male prisoners, and there were 48,000 white women representing 46 percent of the sentenced female prisoners. P. Guitero et al., Bureau of Justice Statistics, PRISONERS IN 2010, 26 (2011).
behavior so that we may avoid or prevent undesired, unfortunate, or "risky" outcomes for employers. The trouble is, we are not terribly good at predicting the future. For targeted screens and individualized assessments to work as the guidance intends, employers must assume that past crimes that are job related are a good metric for predicting future employment outcomes. Unfortunately, there are some important considerations that render this assumption invalid.

While the association between past and future criminal offending is well established, there is a huge gap in the empirical research examining the relationship between risk of recidivism and specific work-based outcomes. To date, a frequently cited longitudinal study provides one (if not the only) examination of criminal history and its relationship to counterproductive employee conduct. With a sample of 930 young adults, the authors found that criminal convictions recorded before participants entered the workforce were statistically unrelated to counterproductive work behaviors. Therefore, the use of criminal history to screen out applicants who may pose problems on the job could be ineffective—but this single study is far from conclusive evidence. Additionally, the authors noted that they used adolescent criminal records, where adult criminal records may be a more salient predictor of workplace outcomes among adults. Indeed, this is a limitation that remains to be addressed by scholarly research.

Without studies that tie adult criminal history to job-specific behaviors, employers will be hard pressed to employ targeted screens that meet the EEoC's standards for excluding applicants. The guidance indicates:

An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the Green factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

Again, the "relevant and available studies" correlating recidivism and specific job performance are practically nonexistent. Rather, employers must rely upon the burgeoning research exploring the complicated relationship between time since last offense and criminal risk, and the long established but hotly debated theoretical branch of criminology regarding offense specialization.

The growing evidence that shows how risk of recidivism declines over time until an ex-offender may be considered "redeemed" is compelling, but more complicated than it may seem. On the surface, these redemption studies reviewed in section II of this paper suggest that at some calculable point in time after a person's last offense, he or she no longer poses a risk that is significantly greater than someone in the general population. What is implicit in these studies is that all people, both with and without criminal histories, have the potential to commit a crime, and thus, pose at least some risk to employers. In short, the risk of a new crime is never completely negated by time. Moreover, risk assessment is an incredibly difficult task that is only made more challenging when the behavior that is being predicted occurs relatively infrequently, particularly when predicting violence. Assessing the potential risk of violent behavior in the workplace for an ex-offender with a distant violent crime (as in El v. Septa) on his criminal record is difficult because the violence is: 1) a rare occurrence in many real-world contexts, and 2) a rare and distant occurrence in the offender's own life.

At the core of the redemption literature is the argument that time lapsed since last offense should matter when evaluating job applicants. The guidance does not set a strict time limit at which point offenders should no longer be considered "high risks" for employers. Instead, it encourages employers to access the redemption research to determine on their own a period of time after which their applicants would no longer be considered risky hires. When employers turn to this body of scholarly work, though, they will find estimates ranging from just a few years to greater than 20 years depending upon the age, type of crime, and extent of the criminal history for the applicant under consideration. This spread in potential "time to redemption" gives employers a huge amount of leeway. Employers who wish to construct a legitimate policy that accurately measures which applicants represent heightened risk therefore have no clear anchor upon which to base a policy. Employers who do not want to hire ex-offenders can also find scholarly support for policies that penalize some applicants for crimes committed many years in the past, especially if the applicant's demographic and criminal profile suggests a prolonged "time to redemption." "Time to redemption" is promoted as an opportunity for ex-offenders to break from their criminal past, and it can be. On the other hand, it may function in reality like a waiting period, potentially excluding from employment any ex-offender who has not been crime-free long enough.

Yet, it is not simply the passage of time that makes an offender
less likely to offend; it is the combination of time, aging, and life events—marriage, having children, participation in rehabilitation and treatment—that influences the risk that an ex-offender will recidivate. As employment is an important example of these life experiences, employers should be aware of the research that evidences that the jobs they offer to applicants can promote desistance and reduce the risk of future crimes. A focus on a simple numerical “time to redemption” might unduly burden ex-offenders whose crime was committed more recently than an employer’s policy dictates for forgiving a criminal record, but who have engaged in a number of other risk-reducing life activities since their offense.

Offense Specialization

In its discussion of targeted screens, the guidance says, “the Green factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions.” Derived from this statement, the conceptual issue is whether criminal conduct, which has been established to be job related, is predictive of future commissions of the same crime. In other words, the assumption is once a thief, always a thief—a maxim illustrated in the guidance’s key examples. In example 7, the guidance indicates that an employer screen excluding applicants with a criminal history of theft or fraud from a job processing credit card information and accessing client belongings is appropriately narrow and tailored to the job position in question. If, however, an ex-offender’s previous crimes do not predict a specific future criminal activity—if not the same exact crime—how should employers decide what conduct is related to their jobs?

The assumption that past criminal activity predicts the same criminal activity in the future is known as “offense specialization.” This concept has been widely debated in criminological literature for years, without consensus among leading scholars who use a diversity of theories to explain criminal activity throughout the life-course.

In a hearing before the EEOC in 2008 to discuss criminal record exclusions, Dr. Shawn D. Bushway of SUNY Albany testified that overall, offenders are “generalists,” meaning that they will commit a diversity of crimes throughout their lives. The guidance does not cite Dr. Bushway’s statement, nor does it access the long-standing theoretical debates regarding specialization versus versatility in offending. Rather, it leaves employers with a recommendation for conducting targeted screens based upon an assumption with mixed theoretical grounding and empirical support.

What the guidance appears to indicate to employers in the absence of this certainty is that common sense assumptions about criminal behavior and employment will be sufficient for a targeted screen, assuming there is some rationale to support the connection. If employers are allowed to link any form of theft-related crime to any form of job related to property (as in guidance example 7), or any form of violent crime with any personal interaction (as in El v. Septa), ex-offenders might be screened out of employment unfairly. For ex-offenders with serious offenses in their records, employers may be able to create a policy whereby nearly any criminal conduct will be related to the job tasks at hand. Again, we quote the pointed statement of Judge Ambro in El: “[It is hard to articulate the minimum qualification for posing a low risk of attacking someone.”

Conclusion

Employers have a right to access criminal records in their hiring practices. We need to ensure employers are utilizing those records in the best ways not only to reduce discrimination against an otherwise qualified segment of the workforce, but to increase positive employment outcomes for all of those involved. Employers desire employees who will do good work without incident and applicants desire the opportunity to obtain gainful employment. When these desires are satisfied, communities as well as local and national economies will benefit from a qualified and productive working population and reduced crime rates. A man like Jackson has much to offer the right employer: 10 years of experience serving as an advocate, counselor, and mentor for a stigmatized population. His skills are valuable, but discrimination and collateral consequences are keeping him from his full potential. Though not without flaws, the new EEOC guidance is one step in a very long process to break down barriers to reentry, especially those related to discrimination.


244. The guidance does consider the risk-reducing possibilities of some of these life events in the individualized assessment requirement, but does not provide any information about how to evaluate them or rank them, or how they interact with the “time to redemption.” The onus is on the ex-offender, according to the guidance, to supply this type of information, as well. EEOC 2012 Guidance, at 18.

245. Id. at 15.

246. Id. at 18-19. In example 7, the employer creates a screen that bars the employment of any applicant with a criminal conviction for theft-related crime in the past four years for any job that provides access to personal financial information. The example indicates that the employer made this policy by using data from the local county corrections department, national crime data, and recent recidivism data. The guidance does not indicate what this data says in particular, but the assumption must be that the data shows that individuals convicted for theft-related crimes posed more risk to recidivate when given opportunities to access personal information than the general population. It is not clear whether this policy would be considered “job related” if the hypothetical data were more inconclusive, or if it showed that those convicted for burglary were at no higher risk of recidivism of credit card theft or fraud than the general population.


249. El v. SEPTA, 479 F.3d 232, 243 (3d Cir. 2007).
Back to the Future of Your Privacy Rights

U.S. v. Jones

“Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth.”

In January 2012, the United States Supreme Court announced its much-anticipated decision in United States v. Jones, holding that pursuant to the Fourth Amendment “…the Government’s installation of a [Global Positioning System] device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” While it had been anticipated that the court would articulate more general constitutional limits regarding government use of technological surveillance, the majority opinion authored by Justice Scalia rested upon the government’s physical attachment of the Global Positioning System (“GPS”) device to Jones’s car, emphasizing that “[i]t is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information.”

In light of ever-increasing capabilities to conduct remote technological surveillance, including tracking by means of GPS, the court’s limited holding disappointed expectations of a more comprehensive determination. However, Justices Sotomayor and Alito each authored concurrences proposing rationale for application of the Fourth Amendment to future cases. Massachusetts had previously resolved some of these issues under the Massachusetts Constitution, as in the case of Commonwealth v. Connolly, discussed below.

As the courts address the issues left open by Jones, a critical ancillary issue is of practical importance: whether evidence should be excluded where it was obtained by law enforcement acting in reasonable reliance on existing precedent that is later overruled. Understanding of the history of Fourth Amendment jurisprudence is essential for making arguments regarding both that which the Fourth Amendment is intended to protect as well as how to ensure its enforcement.

3. Id. at 949.
4. Id.
5. Id. at 954-964.
7. See United States v. Davis, 131 S.Ct. 2419, 2423-24 (2011) (holding that “searches conducted in objectively reasonable reliance on binding precedent are not subject to the exclusionary rule.”); see also United States v. Baez, 878 F. Supp. 2d 288, 297 (D. Mass. 2012) (extending the Davis ruling to cases where

Places or People? The Shifting Conception of That Which the Fourth Amendment Protects

As the Fourth Amendment provides,

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment was inspired by the founding fathers’ intention to protect citizens from writs of assistance, such as those issued to colonial revenue officers, which allowed them to search private places arbitrarily. Early Supreme Court opinions defined “unreasonable searches and seizures” in light of colonial and contemporaneous British history, placing emphasis on physical intrusions to person or property. Entick v. Carrington and Three Other Kings Messengers, decided in England in 1765, noted as a “monument of English freedom” with which the founding fathers would have been familiar, is often cited as a guide for interpretation of original intent. There, in finding an action for trespass following government officers’ intrusion upon the plaintiff’s house, private property, and papers, Lord Camden articulated:

“…every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him.”

The invention of the telephone, and the accompanying ability to listen to a conversation from within a private location without trespassing upon it, challenged this early conception of the Fourth Amendment. In Olmstead v. United States, the court held that

“a substantial consensus among precedential courts provides a good faith basis for the investigatory initiative law enforcement agents seek to pursue.”}
there was no trespass where government agents tapped phone lines from public locations, stating that “[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment.” 15 However, Justice Brandeis’s dissent laid the groundwork for a later shift to protecting the individual rather than focusing on the location from which the surveillance occurred, stating that “[w]herever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writes of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.” 16

The Supreme Court embraced Justice Brandeis’s view in Katz v. United States,17 announcing that “the Fourth Amendment protects people, not places” and finding a violation where the government employed an eavesdropping device in a public telephone booth.18 In his concurring opinion, Justice Harlan proposed that the Fourth Amendment protects what has come to be the current test, known as the “Katz test”: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one society is prepared to recognize as ‘reasonable.’”19 Under the second prong of the Katz analysis, that which an individual “exposes to the ‘plain view’ of outsiders” would not be afforded Fourth Amendment protection, due to the individual’s failure to exhibit an objective expectation of privacy.20 This second requirement renders vulnerable any information that individuals disclose to third parties such as cellular phone and internet service providers, which is particularly problematic as technological capabilities increasingly allow for collection of comprehensive information with hyper-efficiency.21 Jones and its progeny will be critical not only for the surveillance methods addressed, but because the court must determine what shall be considered protected under the rubric of “reasonable expectation of privacy” in order to guard against proliferation of technological surveillance in everyday tasks.

The Facts of Jones

Government agents physically attached a GPS device to the exterior of Jones’s vehicle, which they used to track his locations for 28 days, collecting 2,000 pages of data.22 The government used that information to indict and convict Jones of drug trafficking conspiracy, resulting in a sentence of life imprisonment.23 At trial, the District Court denied Jones’s motion to suppress as to all data obtained when the vehicle was not located at his residence, citing precedent that there is no privacy interest in one’s movement on public roads.24 Jones’s first trial ended in a hung jury, and a second indictment based on the same conspiracy resulted in conviction and a sentence of life in prison.25 On appeal, the Court of Appeals reversed Jones’s conviction, finding that the admission of the evidence violated the Fourth Amendment.26 The Supreme Court granted certiorari.27

“18th-century Against Unreasonable Searches”28 (Justice Scalia’s Majority Opinion)

Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, affirmed, reasoning that “[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area, … a search [within the original meaning of the Fourth Amendment] has undoubtedly occurred.”29 The government had argued that there was no search due to a lack of privacy interests in the exterior of one’s vehicle and movement on public roads.30 Asserting that it was unnecessary to apply the Katz analysis, the court concluded that the case could be decided based on the government’s trespass upon Jones’s vehicle, an “effect” protected by the Fourth Amendment.31 Responding to the concurrences’ criticism that this emphasized property rights over privacy interests, the majority reasoned that freedom from such physical intrusion falls within the reasonable expectation of privacy.32 The court noted that the government’s intrusion upon private property in order to gather information would have been considered a violation at the time of the enactment of the Constitution, that the Katz standard did not eliminate existing rights, and that “the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”33 The court maintained that it applied the trespassory test prior to engaging in the Katz analysis, and that absent such physical intrusion, it would have proceeded with the Katz analysis.34

The court further explained that the attachment of a GPS device to Jones’s vehicle constituted a search because the government agents physically intruded upon the Jones’s property to attach the GPS device while it was in his possession, distinguishing cases

15. Id. at 466.
16. Id. at 475-476 (Brandeis, J., dissenting).
18. Id. at 351.
19. Id. at 361 (Harlan, J., concurring).
20. Id.
25. Id. at 949 (citing U.S. v. Maynard, 615 F.3d 544 (DC Cir. 2010)).
26. Id. at 949.
27. Id. at 953.
29. Id. at 945, 950.
30. Id. at 949 (citing United States v. Chadwick, 974 433 U.S. 1, 11 (1977)).
31. Jones, 132 S.Ct. at 951 (“We have embodied that preservation of past rights in our very definition of ‘reasonable expectation of privacy’ which we have said to be an expectation ‘that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’”) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1988)).
33. U.S. v. Jones, 132 S.Ct. 953 (2012) (“The concurrence fails our approach for ‘present[ing] particularly vexing problems’ in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. Post, at 962. We entirely fail to understand that point. For unlike the concurrence,
where the court found no violation where attachment of tracking devices occurred prior to property coming into individuals’ possession. Here, the court observed, “[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”

The court was not called upon to determine whether the search in Jones required a warrant, as the government failed to raise the argument that if the government action was considered a search, it was reasonable, thus the court deemed the argument waived. Consequently, Jones also leaves unanswered the quantum of suspicion that must be met, be it probable cause or reasonable suspicion, for a search in these circumstances to be deemed lawful.

The concurrences criticize the majority’s rationale, claiming that reliance on the government’s physical intrusion reverts to the historical conception of Fourth Amendment protections at the expense of current understanding.

“Irreducible Constitutional Minimum” (Justice Sotomayor’s Concurrence)

Although she joined in the majority opinion, Justice Sotomayor, in her separate concurrence, found the majority’s reliance on physical intrusion of property an “irreducible constitutional minimum.” She noted that with the Katz decision, “this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not ‘turn upon the presence or absence of a physical intrusion.’” Justice Sotomayor also expressed concern that the extreme efficiency by which GPS monitoring would allow the government to track intimate details of individuals’ lives would chill freedom of expression, which she suggested would influence her future analysis of an individual’s reasonable expectation of privacy.

Most significantly, she suggested that due to growing dependence on technology, “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” This would mark a drastic departure from existing precedent; however, where technology permeates human activity and communication so completely, preserving any degree of privacy from governmental intrusion may require such action.

“18th Century Tort Law” (Justice Alito’s Concurrence)

Joined by Justices Ginsburg, Breyer, and Kagan, Justice Alito proclaimed the majority’s dependence on physical intrusion “highly artificial.” He criticized the majority’s failure to address government use of GPS surveillance, the possibility of manufacturer-installed government surveillance devices, government intrusion by electronic rather than physical means, and an assumption that the “reasonable expectation of privacy” is unchanged. His agreement with the end result of the majority’s holding notwithstanding, he asserted that the proper analysis should turn on whether long-term monitoring of Jones’s vehicle violated his reasonable expectation of privacy rather than his property interests.

Due to the potential for technology to erode individual expectations of privacy, Justice Alito suggested that legislation should be enacted to define the parameters of permissible government technological surveillance, as was undertaken to pass wiretapping statutes. While such statutes may offer a tempting stopgap during the wait for further definition by case law, they would not absolve the court of defining Fourth Amendment parameters. Absent judicial guidance, legislation would likely hinder law enforcement unnecessarily or fail to protect requisite privacy interests, and require judicial review.

Justice Alito proposed distinguishing between short- and long-term surveillance, with the latter more likely to be considered a “search.” While there is no current authority for such a demarcation, he argued that it would preserve traditional expectations of privacy, as long-term surveillance would have required vast government resources prior to technological developments. He noted that the distinction may not be as relevant for extremely serious

which would make Katz the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis.” (emphasis in original).

34. Id. In United States v. Knotts, 460 U.S. 276 (1982), the court held that there was no Fourth Amendment violation where the government used a “beeper” to monitor the location of a container of chloroform, as there was no violation of reasonable expectation of privacy in that all locations were exposed to the public, and there was no physical trespass in that the government placed the beeper before the container came into Knotts’s possession. United States v. Karo, 468 U.S. 705 (1984), later adhered to Knotts, holding that there was no search or seizure where the government installed a beeper in a can of ether with the consent of the original owner, which was later transferred to Karo without his knowledge of the beeper. Id. at 711. The Jones majority distinguished those cases from here, where the vehicle was in Jones’s possession when the government agents placed the tracking device. Jones, 132 S.Ct. at 952.


36. Id.

37. Id. at 954-64 Sotomayor, J., and Alito, J., concurring).

38. Id. at 955 (Sotomayor, J., concurring).

39. Id. (Sotomayor, J., concurring).

40. Id. (quoting Katz v. United States, 389 U.S. 347, 353 (1967)).

41. U.S. v. Jones, 132 S.Ct. at 955-56 (Sotomayor, J., concurring) (“Awareness that the Government may be watching chills associative and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’”) (quoting United States v. Cuevas–Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

42. Jones, 132 S.Ct. at 957.

43. Id. at 957-58 (Alito, J., concurring) (“This case requires us to apply the Fourth Amendment’s prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle’s movements for an extended period of time. Ironically, the court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels. And for this reason, the court concludes, the installation and use of the GPS device constituted a search.”).

44. Id. at 958.

45. Id. at 996-63.

46. U.S. v. Jones, 132 S.Ct. 958 (2012). Many jurists to consider the issue subsequently support this view, discussed later in this article.

47. Id. at 962-63. See Fed. R. Crim. P. 41, recently amended to include special provisions for a “tracking device”; see also 18 U.S.C. § 3117, empowering courts to issue a warrant for a tracking device.


49. Id. But see United States v. Maynard, 615 F.3d 544, 557 (D.C. Cir. 2010), where the court interpreted the holding of Knotts, as limited to an individual’s
crimes, where the government would have been expected to go to great lengths to surveil suspects.\textsuperscript{50} The majority argued that it would be applying the \textit{Katz} test to these novel parameters that would introduce “particularly vexing problems,” requiring arbitrary cut-off points in conducting surveillance.\textsuperscript{51}

**Looking to the Future of the Fourth Amendment**

The majority characterized its \textit{Jones} rationale as a unification of the trespassory line of Fourth Amendment jurisprudence with the \textit{Katz} test.\textsuperscript{52} While Justice Sotomayor acknowledged that the existence of a physical intrusion in this case allowed the court to leave larger issues regarding government technological surveillance for another day, she proposed paradigm shifts that the other Justices may contemplate before deciding future cases. Justice Alito, while agreeing with the majority’s result, expressed readiness to answer Fourth Amendment questions raised by advancements in technological capabilities. The near even split of the Justices signals that determination of these issues, and potentially drastic changes to conceptions of Fourth Amendment protections, is on the horizon.

**Commonwealth v. Connolly — “A Right to Exclude… ‘From All the World’”\textsuperscript{53}**

Massachusetts recently addressed GPS surveillance under article 14 of the Massachusetts Declaration of Rights in \textit{Commonwealth v. Connolly},\textsuperscript{54} holding that “the installation and use of the GPS device in the circumstances…was a seizure requiring a warrant…”\textsuperscript{55} Although the \textit{Connolly} decision rested on the Massachusetts Declaration of Rights, the court noted that while federal jurisprudence under the Fourth Amendment tends to turn on whether there is a protected privacy interest in the location from which the government initiated surveillance, state courts that had considered analogous facts under their own constitutions tend to focus instead on the privacy interests of individuals in being free from such surveillance.\textsuperscript{56} As authority for this position, the \textit{Connolly} court cited Justice Brandeis’s dissent in \textit{Olmstead}, eventually the favored position adopted in \textit{Katz}. In pertinent part: “[t]he makers of our Constitution… knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”\textsuperscript{57}

The facts of \textit{Connolly} differed from \textit{Jones} in that the police had to enter Connolly’s vehicle in order to connect the GPS tracking device to the vehicle’s power source (battery) in order to power the device; in \textit{Jones} the government merely attached the device to the exterior of the vehicle.\textsuperscript{58} Regarding installation, the \textit{Connolly} court found there to be a “seizure” in the constitutional sense due to the police entry into the vehicle, operation of the vehicle’s electrical system, and the fact that the tracking device required power from Connolly’s vehicle in order to operate.\textsuperscript{59} The court found that use of the tracking device constituted a seizure in that such use converted Connolly’s vehicle to the government’s purposes, and interfered with Connolly’s “right to exclude it from ‘all the world.’”\textsuperscript{60} The \textit{Connolly} court’s conclusion addresses Justice Sotomayor’s concern regarding the ease with which the government could surveil individuals if allowed to initiate GPS tracking arbitrarily.

The \textit{Connolly} majority anticipated and rejected Justice Alito’s concerns that technological advancements will dictate and erode the \textit{Katz} test, noting that “despite the increasing use of sophisticated technological devices, there has not been a corresponding societal expectation that government authorities will use such devices to track private citizens, and have emphasized that, if no warrant is required, any individual could be tracked indefinitely without suspicion of any crime.”\textsuperscript{61}

Justice Ralph D. Gants concurred in finding that the installation of the GPS device under the facts in \textit{Connolly} constituted a seizure requiring a warrant, and further opined that even if the government had merely attached the GPS device to the exterior of Connolly’s car, as in \textit{Jones}, a warrant still would have been required.\textsuperscript{62} Like the majority in \textit{Jones}, however, Justice Gants indicated that the latter would not constitute a seizure. Instead, he found it would violate the reasonable expectation of privacy of anyone authorized to drive the vehicle.\textsuperscript{63} Resonating with Justice Alito’s \textit{Jones} concurrence, Justice Gants articulated why he found it significant to frame constitutional violation around privacy rather than property interests:

“The court’s decision suggests that the constitutional concern we have with GPS monitoring is that attaching the device to the outside of the motor vehicle interferes with the owner’s property interests. In fact, the appropriate constitutional concern is not the protection of property but rather the protection of the reasonable expectation of privacy. More specifically, the appropriate constitutional concern is that, without judicial oversight based on a finding of probable cause, the police potentially could engage in GPS monitoring of any individual and, through this device, learn what otherwise could be learned only through physical surveillance conducted seven days per week, twenty-four hours per day.”\textsuperscript{64}

50. \textit{Id.} at 810-11.
52. \textit{Id.} at 822 (citing \textit{People v. Weaver}, 12 N.Y.3d 433, 442-443 (2009)).
53. \textit{Id.} at 832-833 (Gants, J., concurring).
54. \textit{Id.} at 810-11.
55. \textit{Id.} at 818.
58. \textit{Id.} at 810-11.
60. \textit{Id.} at 822 (citing \textit{People v. Weaver}, 12 N.Y.3d 433, 442-443 (2009)).
61. \textit{Id.} at 832-833 (Gants, J., concurring).
62. \textit{Id.} at 832-833 (Gants, J., concurring).
63. \textit{Commonwealth v. Connolly}, 454 Mass. 808, 833 (Gants, J., concurring). This interpretation also comports with Justice Scalia’s explanation in \textit{Jones}: “[A] seizure of property occurs, not when there is a trespass, but ‘when there is some meaningful interference with an individual’s possessory interests in that property.’” \textit{Jones}, 132 S.Ct. at 951 n.5 (2012) (quoting \textit{United States v. Jacobson}, 466 U.S. 109, 113 (1984)).
Justice Gants not only underscores the need to frame constitutional analysis around Katz’s assertion that “the Fourth Amendment protects people, not places,” but also discerns that the quantum of suspicion necessary for lawful GPS surveillance must be probable cause supported by a warrant, a crucial question left unanswered in Jones.

Although Connolly rests solely on the Massachusetts Declaration of Rights, the rationale of both the majority and Justice Gants’s concurrence could be applied to Fourth Amendment jurisprudence in the context of technological surveillance techniques without drastically changing the conception of what the Fourth Amendment protects or relying on statutes to define the parameters, as proposed by Justices Sotomayor and Alito in their respective Jones concurrences. With technology facilitating individuals’ daily lives to a degree not seen a mere few years ago, the law must evolve rapidly to meet technological capabilities of government surveillance.

The Exclusionary Rule and Good Faith Reliance—Not “Beg[ging] for Forgiveness”

Prior to Jones, the Supreme Court considered how the exclusionary rule should apply in cases where police obtain evidence in compliance with then-binding precedent that is later held to violate the Fourth Amendment. In Davis v. United States, the court reasoned that it has been long-recognized that the suppression of evidence is proper where there are “flagrancy of police conduct” and not where actions are carried out in good faith. Accordingly, the court announced that “[b]ecause suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”

The court noted that the suppression of evidence obtained in violation of the Fourth Amendment is a common law creation intended to ensure respect for the protections embodied in the Fourth Amendment; it is not applied as a remedy to the individual whose rights have been violated. “When the police exhibit ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs… But when the police act with an objectively ‘reasonable good-faith belief’ that their conduct is lawful… or when their conduct involves only simple, ‘isolated’ negligence… the ‘deterrence rationale loses much of its force,’ and exclusion cannot ‘pay its way.’”

In the United States District Court for the District of Massachusetts, two district court judges have extended the application of the “good faith” exception described in Davis to include cases in which there is a substantial consensus among other jurisdictions, although no binding precedent authorizing the challenged conduct within the specific circuit. In United States v. Baez, Judge Douglas P. Woodlock repudiated the idea that such acceptance suborns “beg[ging] for forgiveness” rather than seeking judicial approval in advance. Judge Woodlock reasoned that “there is no meaningful deterrence value to be gained—and a great deal of benefit in terms of truth seeking and public safety to be lost—by discouraging such good faith reliance and thereby making law enforcement officers unduly cautious in pursuing investigatory initiatives.” He disagreed with the rationale articulated in United States v. Katz, where under similar circumstances, the Eastern District Court for the District of Pennsylvania suppressed the evidence at issue, warning that venturing beyond strict application of Davis could “effectively eviscerate the exclusionary remedy entirely.” Judge Woodlock took issue with the Katz decision’s characterization of the exclusionary rule as “some living entity rather than an inanimate instrument available to be deployed as necessary and when appropriate to serve enforcement of Fourth Amendment guarantees” and re-focused inquiry on cost-benefit analysis of its use—as directed by Davis—and away from “concern for imputed bodily injury to an individual”.

69. Id. at 2427 (citing United States v. Leon, 468 U.S. 897, 909 (1984)).
70. Id. at 2423-24.
71. Id. at 2426.
72. Id. at 2427-28 (internal quotation marks and citations omitted).
75. Id. at 289.
76. Id. at 292-293 (citing United States v. Marquez, 605 F.3d 604, 609-610 (8th Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir.2010); and United States v. Garcia, 474 F.3d 994, 997-98 (7th Cir. 2007)).
77. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), decided three days before cessation of GPS surveillance in Baez, created the circuit court split. In Maynard, the D.C. Circuit Court of Appeals addressed the Jones case, holding that the government action constituted a search because it violated Jones's reasonable expectation of privacy. Maynard, 615 F.3d at 555-556. The court reasoned that Knotts was not controlling, maintaining that the court there held only that individuals do not have a privacy interest in their "movements from one place to another", while reserving the issue of prolonged surveillance. Id. at 557, quoting Knotts, 460 U.S. at 281. The court emphasized that the proper inquiry is "not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." Id. at 559.
78. Baez, 858 F. at 297.
79. Id. at 296-297.
otherwise disembodied prophylactic rule.” He acknowledged the Davis court’s seeming acquiescence that its holding would yield disparate treatment of similarly situated defendants, dependent upon where challenged searches fell temporally in relation to the law becoming unsettled with one case and then re-settled with another.

Following Baze, District Court Judge Nathaniel M. Gorton similarly denied a motion to suppress evidence obtained through the use of GPS tracking devices on certain motor vehicles in United States v. Rose. There, three of the four GPS devices at issue were installed when there was unanimous consensus that warrantless GPS monitoring did not implicate the Fourth Amendment. The fourth GPS device was installed after Judge William G. Young of the United States District Court for the District of Massachusetts issued a decision in United States v. Sparks, which held that the installment of a GPS device on Sparks’s vehicle could not be considered a search or seizure due to the fact that he did not have a reasonable expectation of privacy in a parking lot shared with other tenants, nor in the exterior of his car; and that the monitoring of the GPS device, even over a long period of time, did not implicate any privacy interests and could not be considered a search. In so holding, the Sparks court explicitly rejected United States v. Maynard, the case that created the circuit split.

In Rose, Judge Gorton noted that the concerns voiced by courts such as Katz in rejecting extension of Davis beyond binding precedent had likewise been expressed by Justice Sotomayor in her concurring opinion in Davis, but had failed to carry the day. Instead, Judge Gorton referenced the majority opinion in Davis, emphasizing that the “sole purpose of the exclusionary rule is to deter future Fourth Amendment violations” and describing “suppression as a ‘last resort.’” His rationale highlighted the impracticality of a strict reading of Davis: “[i]nstead of engaging in a rigorous, cost-benefit analysis focused on the deterrence value of suppression, as Davis instructed, lower courts would necessarily spend their limited time deciding whether a situation is sufficiently analogous to a previous case to be considered “binding.” In noting that the agents did not “exhibit deliberate, reckless, or grossly negligent disregard’ for the constitutional rights of the defendants,” Judge Gorton found exclusion of the evidence inappropriate.

Notably, the appeal of the Sparks decision reached the United States Court of Appeals for the First Circuit following Jones. Although Knotts, relied on by the district court, was no longer controlling, or seizing依据 the government's assertion of good faith. The government argued that the agents' reliance in searching the defendant's vehicle was objectively reasonable reliance on the existing good faith exception. The court quoted Davis's demarcation as to the limits of officer reliance in articulating why it found that the agents' reliance in Sparks was proper: “The justifications for the good-faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing case law. The good-faith exception is, however, properly applied in cases like this one (or Davis itself), where new developments in the law have upended the settled rules on which the police relied.”

While the court seemed comfortable categorizing the agents' reliance on cases that do not involve GPS as “objectively reasonable” to inform the constitutionality of GPS surveillance, arguably it's need to engage in a deconstruction of interests underlying GPS surveillance contradicts that conclusion. Practically speaking, the limitless iterations of surveillance possible with technological innovation, from GPS to drones, inherently requires extrapolation of discrete constitutional principles to avoid hindering law enforcement investigative techniques that are not yet governed by settled law. The conflict of interests between the government and individual rights is unavoidable, as the necessity for implementation of innovative surveillance techniques also presents the threat to privacy rights.

One potential solution to the conflict is to allow for more liberal discovery of the authority relied upon in internal law enforcement memoranda. In a separate case captioned United States v. Rose, a co-defendant requested in discovery any internal Department of Justice or Federal Bureau of Investigation (“FBI”) memoranda advising agents that no warrant was needed in order to employ a GPS device under the facts of that case, which could corroborate or counter the government’s assertion of good faith. The government asserted that the claim was premature, as the defendant had not filed

(D.C. Cir. 2010), was handed down only three days before the agents stopped GPS surveillance and arrested the defendant, whereas the Katzin surveillance occurred well after the Maynard decision. Id.
81. Id. at 296-7.
82. Id. at 295 (citing Davis, at 2440, Breyer, J., dissenting).
84. Id. at 23.
86. Id. at 391.
88. Rose, 914 F. Supp. 2d at 21 (citing Sparks, 750 F. Supp. 2d at 393-396).
89. Id. at 23 (citing Davis, 131 S.Ct. at 2424-36 (Sotomayor, J., concurring)).
90. Id. at 24 (quoting Davis, at 2426-27).
92. Id. (citing Davis, at 2427-2428).
96. Sparks, at 65 (citing Knotts, for the proposition that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another” (Knotts, at 281) and United States v. Moore, 562 F.2d 106 (1st Cir. 1977) for the proposition that the critical inquiry was the defendants’ privacy interest, and “dismissing ‘the trespass involved in affixing the beepers to the underbody of the vehicles’ as ‘so minimal as to be of little consequence.’” Sparks, at 65 (quoting Moore, at 111).
98. Sparks, at 67-68 (quoting Davis, at 1267) (internal citations omitted).
100. Id., at *5.
a motion to suppress challenging the legality of the government’s actions. Magistrate Judge Jennifer C. Boal denied the defendant’s motion without prejudice, finding it premature.

*Davis’s* specification that law enforcement action must be “objectively” reasonable is of paramount importance in this context. Consequently, jurists should allow more liberal discovery regarding what authority informed law enforcement action in order to corroborate good faith reliance on existing legal precedent and bridge the gap between what may be agents’ subjective understanding based on uncertain authority, and the “‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights” standard justifying exclusion of evidence as per *Davis*.

**Conclusion**

There are no words sufficient to express the extreme to which surveillance capabilities have exceeded “the mischief which gave [the Fourth Amendment] birth.” And yet, the words of Lord Camden in *Entick v. Carrington* still provide worthy guidance to the heart of the matter of what the Fourth Amendment is designed to protect. In his *Olmstead* dissent, Justice Brandeis quoted *Boyd v. United States*, citing Lord Camden’s intentions:

> “The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctities of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment.”

As courts encounter the questions on the horizon left open by *Jones*, Justice Gants’s concurrence in *Connolly* provides a logical descendant to Justice Brandeis’s *Olmstead* dissent. Regardless of the analytic mechanisms courts employ, in order to prevent the protections of legislation from being “confined to the form that evil had theretofore taken,” ensuring the fundamentals of human liberty demands that “[o]ur constitutional analysis… focus on the privacy interest at risk from contemporaneous GPS monitoring, not simply the property interest. Only then will we be able to establish a constitutional jurisprudence that can adapt to changes in the technology or real-time monitoring, and that can better balance the legitimate needs of law enforcement with the legitimate privacy concerns of our citizens.”

—Andrea Lance

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101. *Id.*

102. *Id.*


**BOOK REVIEWS**

*Point Made: How to Write Like the Nation’s Top Advocates*, by Ross Guberman (Oxford University Press 2011), 310 pages.


Two recent books on writing deserve attention by lawyers—*Point Made: How to Write Like the Nation’s Top Advocates*, by Ross Guberman, and *How to Write a Sentence*, by Stanley Fish. Ross Guberman is a practicing lawyer and a writing teacher at the law school level and at seminars for legal professionals. Stanley Fish is first and foremost a literary theorist, and also a professor and prolific author. The value of much of Fish’s work for legal scholars lies in his analysis of the interpretation of texts. The subtitle of *How to Write a Sentence*, however, is *And How to Read One*.

*Point Made* is written for lawyers by a legal writing expert. When asked in an interview why persuasive legal writing is so difficult, Guberman noted that the apparatus of brief writing—the citations, defined terms, footnotes, and case discussions—can easily mask flaws in the prose as well as in the logic itself. Guberman takes an empirical approach in *Point Made*, using examples from the writing of the nation’s most influential lawyers. The book is structured in simple how-to format. The 50 rules are familiar ones: show, do not tell; use headings to break up sections and add persuasive effect; use colorful verbs; and so on. The real value of *Point Made*, however, is in the powerful examples culled from excellent briefs.

In a section entitled “Size Matters: The pithy sentence,” 19 different passages illustrate the point that lawyers’ sentences are often too long and that “[w]hat makes prose sing ... is variety in sentence length and structure, not adhering to strict medium-sentence-only rules.” As an experiment, Guberman suggests cutting the following sixteen word sentence to five or fewer words:

> Substituting one decisionmaker for another may yield a different result, but not in any sense a more “correct” one. The aforementioned principle is applicable to the present issue in the instant case before this Court.

In *Alaska v. EPA*, Chief Justice John Roberts cut the 16 word sentence to three, effectively turning tiresome legalese into a pithy sentence:

> Substituting one decisionmaker for another may yield a different result, but not in any sense a more “correct” one. So too here.

Guberman advocates for creative punctuation. For example, “*[t]he dash is built to interrupt. It can strike with no warning, cut you off, stop conversation in its track, and redirect content any way it pleases.*” The following example of the effective use of a dash is from Roy Engelt in *District Attorney for the Office of the Third Judicial District v. Osborne*:

> If Osborne is bound by orderly process—if he must assert a prima facie claim before discovery—then his request will fail because he has no substantive federal claim to which the discovery would relate.

Memorably, Guberman recommends liberal use of the hyphen: “Friends don’t let friends worry about what modifies what.” As examples, Guberman points again to “one of the profession’s Chief Grammarians,” Chief Justice Roberts’s ample use of hyphens in *Alaska v. EPA*: state-issued permit, orange- and red-stained creek-beds, emissions-netting approach, four-wheel drive, per-ton-removal basis.

The rules and examples are broken up throughout the book by “Interludes,” such as “Looking Good.” If a brief looks good, it is “more likely to be grasped and retained.” He advises the reader to use proportionally space fonts designed for books, such as Century, used by the Supreme Court and the Solicitor General, and to consider avoiding the ubiquitous Times New Roman. Century, as here, is especially easy to read.

Finally, at the end of the document, recast the main points in a separate conclusion. “If you’ve kept your emotions in check throughout your argument, let yourself vent a bit in your conclusion,” as Brendon Sullivan did in *United States v. Ted Stevens*.

In a case awash with extraordinary revelations, [FBI Special Agent] Joy’s complaint is perhaps the most shocking and important. An FBI Special Agent has alleged that his colleagues engaged in constitutional violations in the course of investigating and prosecuting this defendant and others. Because of their source, these allegations are highly credible. The misconduct is utterly inexcusable. The Court should dismiss the indictment or, at a minimum, grant a new trial and order discovery and an evidentiary hearing.

Professor Fish’s *How to Write a Sentence* is exactly what its name suggests. Called a “spirited love letter to the written word and a
key to understanding how great writing works,” the book dissects
the good sentence and teaches the reader how to reconstruct it.12
In contrast to Point Made, How to Write a Sentence is much more
of a reflective, philosophical treatise rather than a how-to manual.
Professor Fish opines that the job of language is so much more than
to mirror reality: “[T]he power of language is greater and more dan-
gerous than that; it shapes reality...”13

One chapter in How to Write a Sentence deals exclusively with
first sentences. First sentences “lean forward,” they anticipate, they
have “content in prospect.”14 They draw readers in and equip them
with quite specific expectations.15 First sentences are promissory
notes, and, “[w]hether they foreshadow plot, sketch in character,
establish mood, or jump-start arguments, the road ahead of them
stretches invitingly and all things are, at least for the moment, pos-
sible.”16

Last sentences, on the other hand, are more constrained in their
possibilities. They have one advantage: “[T]hey become the heirs of
the interest that is generated by everything that precedes them; they
don’t have to start the engine; all they have to do is shut it down.”17
And, in between first sentences and last sentences “content must
take center stage, for the expression of content is what writing is
for.”18

Unlike Guberman’s examples from legal briefs, Professor Fish’s
examples are chosen from literature and from essays. The examples,
therefore, are not as relevant to the legal profession as Guberman’s,
but Professor Fish’s analytical deconstruction of each is instruc-
tive from the perspective of both readers of sentences and writers of
sentences. He describes the contest between the instrumental view
of language, the “disposable vehicle of a subject matter it serves,”
and a view of language as a formal system “that refuses to efface
itself before the demands of content and instead claims generative
and determining powers.”19 The last chapter seeks to merge the two
views by analyzing sentences whose content is their form: “sentences
self-conscious about their own composition, sentences that mediate
on their own limitations, sentences that invite and resist interroga-
tion, ... sentences that are great in part because they are so deter-
minedly self-reflexive and aspire to the condition of pure objects.”20

As a book about sentence appreciation, How to Write a Sentence
offers the “reward for the effacing of ourselves before the alter of
sentences will be that ‘incidentally’ (what a great word!)—with-
out looking for it—we will possess a better self than the self we
would have possessed had we not put ourselves in service. Sentences
can save us.”21 That concluding sentence illustrates Professor Fish’s
recurring themes of the power of words and also of a melding of
reader/writer congruity with the insertion of his whimsically con-
gratulatory choice of words.

In conclusion, Point Made should be read by all legal writers. Its
step-by-step instructions are invaluable, and its examples are inspira-
tional. How to Write a Sentence should be read by all readers, legal
or otherwise. The depth of Professor Fish’s analysis of sentences,
both on a micro and a macro level, would be of benefit to all readers
of literature and non-fiction as well as readers of legal documents
and decisions.

—Janet Hetherwick Pumphrey

13. Id. at 37.
14. Id. at 99.
15. Id. at 102.
16. Id. at 119.
17. Id. at 119.
18. Id. at 135.
19. Id. at 135.
20. Id. at 136.
21. Id. at 160 (parenthetical in original).
Massachusetts Law Review seeks submissions

The Massachusetts Bar Association is seeking submissions for its quarterly publication, the Massachusetts Law Review, the longest continually run law review in the country. A scholarly journal of the MBA, the Massachusetts Law Review is circulated around the world and contains comprehensive analyses of Massachusetts law and commentary on groundbreaking cases and legislation. To submit articles or proposals for articles, e-mail jscally@massbar.org, mail to Massachusetts Law Review, 20 West St., Boston, MA 02111, or call (617) 338-0682.