STOPPING A VICIOUS CYCLE: THE PROBLEMS WITH CREDIT CHECKS IN EMPLOYMENT AND STRATEGIES TO LIMIT THEIR USE

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The Problems With Credit Checks in Employment and Strategies to Limit Their Use

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This paper explores a new and increasingly common phenomenon: the use of credit checks by employers to evaluate potential and current employees. This practice has profound implications in this current weak economy, as those who most need jobs often are the ones turned away due to bad credit. The use of credit checks also has a disproportionate effect on racial minorities as statistically they tend to have worse credit than non-minorities. Employers often assert that credit checks are necessary, despite the lack of hard data proving a link between poor credit and poor job performance.

This paper examines two ways to combat these troublesome new policies -- through litigation and legislation. While litigation has not yet been used to challenge credit check policies directly, a case can be made that these policies violate Title VII disparate impact provisions. However, there are many obstacles to a successful credit check lawsuit, including the lack of specific statistics that courts increasingly find necessary to prove a disparate impact case. Therefore, legislation and the public policy arena in general may present a better chance of success. Currently, three states have passed some forms of anti-credit check legislation and several others currently are debating the issue in their legislatures. In the paper I offer my proposal for ideal credit check legislation and then evaluate the legislative responses that have been enacted or are under consideration at the state and federal level and how they measure up to this ideal.

I. INTRODUCTION

Kevin Palmer, who was 49 years old last August, had lived in homeless shelters for several months in California before finally landing an interview with a property management company.1 The job he interviewed for was a “glorified clerk’s job, taking homeowners’ complaints,” Mr. Palmer explained.2 Yet after a great interview during which a manager walked him around the office, introduced him to people, and even showed him an empty desk, Mr. Palmer was denied

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2 Id.
the job after a credit check revealed that he had filed for bankruptcy. The job would have
helped him get back on his feet after the bank foreclosed on his condominium, which led to his
bankruptcy filing.

Mr. Palmer eventually found a similar job at a company that did not run a credit check on
him, but his story is being repeated all over the country. Employers are increasingly turning to
credit checks as a strategy to screen job applicants and sometimes to monitor current employees
as well. During an economic downturn, the increased use of credit checks only exacerbates the
difficulty of finding work, leading to a vicious cycle: the people who most need a job (generally
those already having credit problems) are not able to get a job or keep a job, resulting in more
credit problems and no way to remedy them. Additionally, because minority populations tend to
have poorer credit scores, these credit-check policies have more of an impact on minority job
applicants than on non-minority applicants. Employers often justify these policies in vague
terms, and do not cite to concrete evidence of any connection between bad credit and poor job
performance.

Despite the troubling impact of these policies on minorities and the lack of a convincing
reason why they are necessary from a business perspective, few lawsuits on this issue have been
filed. There are very few cases that speak directly to the legality of employer credit check usage
and whether their use may potentially violate any laws, such as the disparate impact provision of
Title VII. There are older court cases that may at first glance seem analogous to the issue at hand
(e.g., employer use of arrest or conviction records), but ultimately these cases are from a time

3 Id.
4 Id.
5 Recently, however, the EEOC has at least filed one of the few, if only, credit-check lawsuit in EEOC v. Freeman
in district court in Maryland. This case involves a nationwide lawsuit alleging that a company had unlawfully
discriminated against black, Hispanic, and male job applicants by using credit history and criminal background
period during which courts approached Title VII cases with a much broader perspective than they do now. It is very difficult to predict how a claim that credit checks violate the disparate impact provision of Title VII would fare if brought to the courts today. Because of this uncertainty, it is necessary to look to other avenues for change. The only arena in which the problem is being discussed currently is in legislatures across the country (and on the federal level), and several new state have passed laws that, while not a perfect solution to the problem, are at least moving in the right direction.

In this paper I begin by outlining the problem posed by increased use of employer credit checks, highlighting the disparate impact on minorities and the lack of research proving any connection between bad credit and bad job performance. I then move on to explore whether this problem could be addressed within the framework of Title VII disparate impact litigation, and ultimately conclude that while older precedents seem helpful, there are reasons to be very cautious in seeking to curb the use of credit checks through litigation. The next section of this paper examines the political response to credit checks and how that may be more successful than litigation. I propose an ideal bill that would generally ban employer use of credit checks with some specific exceptions. I then evaluate the legislative responses that have been enacted or are under consideration at the state and federal level and how they measure up to this ideal.

II: THE PROBLEMS WITH CREDIT CHECKS FROM A SOCIAL/POLICY PERSPECTIVE

In the past few years, employers have increasingly used credit checks as a tool, often to the detriment of job applicants. About 43% of U.S. employers check a job applicant’s credit (sometimes including late payments on mortgages, rents, and student loans), representing an

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6 Thomas Frank, *Job Credit Checks Called Unfair. Needy hurt most; 5 states eye limits.* USA TODAY, February 13, 2009, 1A.
increase from 36% in 2004. While many employers run credit checks on potential employees for positions that deal with sensitive financial data or those with national security concerns, employers are not required to prove any connection between the position they are hiring for and a person’s credit history.

In fact, there are hardly any regulations in place as to what employers can do with credit checks they obtain. Rather, most of the regulations in place deal with procedural requirements, and do not actually prevent employers from using credit reports in hiring decisions. The Federal Credit Reporting Act (FCRA) clearly allows the procurement of credit reports for employment purposes. The FCRA merely mandates that employers comply with all federal and state equal employment laws in the use of credit information. Employers also must “clearly and accurately” notify job applicants when they request a credit report from an agency and an employee must give his/her approval. Undoubtedly this does not provide much protection for employees as most will assume that if they do not give permission for an employer to view their credit history, then they will not get the job. Employers must also notify applicants if their credit report is then used to make an adverse employment decision. In practice, however, job applicants will rarely challenge an employer under this provision because the

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7 Id. (citing the Society for Human Resource Management and security consultant Kroll).
9 Frank, supra note 1 (“The TSA bars people with $5,000 in overdue debt or any federal or state tax lien from working as airport screeners. That ruled out 22% of applicants from 2005 to 2007, a report found.”).
14 15 USC §§ 1681-1681t (1994).
applicant has no way of knowing why they he or she has not been hired. And the FCRA also is flawed because it allows inaccurate information to go out in credit reports to employers. The Bankruptcy Code does state that an applicant has filed for bankruptcy an employer cannot deny employment on that basis alone, but it would be difficult to show that the decision was made only because of the applicant’s bankruptcy.

Statistics clearly show that minorities are disproportionately impacted by these credit check policies, as they tend to have worse credit than non-minorities. A 1996 study in the Boston area found that minority applicants for home mortgages generally have weaker credit histories, and there is no reason to believe that minorities credit scores have improved in the intervening years. A Freddie Mac National Consumer Credit Study in 2000 and a Brookings Institution Study conducted in 2006 also found correlations between areas with high minority populations and lower average credit scores. And a 2004 Missouri study found that residents in zip codes with high minority populations tend to have much lower credit scores. Several other studies done on the housing market find similar statistics.

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15 Id.
16 Kelly Gallagher, Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for “Employment Purposes” Goes Too Far, 9 IOWA L. REV 1593, 1606 (2006) (The FCRA requires that credit reporting agencies use ‘reasonable procedures’ to ensure accuracy…but the ‘technical accuracy defense’ allows reporting agencies to void liability for factually correct information that is incomplete or misleading.”).
17 11 U.S.C. section 525(b) (1988). Under this section, added in 1984 to the Bankruptcy Code, private employers can not terminate an employee or otherwise discriminate against an employee because the employee has been a “debtor under this title or bankrupt under the bankruptcy act.” This provision has been interpreted somewhat narrowly, having been found not to apply to situations where someone has merely filed for bankruptcy. This stands in contrast to Section 525(a) which applies to the government and is written and interpreted more broadly. See http://www.pepperlaw.com/publications_update.aspx?ArticleKey=321
18 Gallagher, supra note 12 at 1606 (citing Alicia H. Munnell et al, Mortgage Lending in Boston: Interpreting HMDA Data, Am. Econ. Rev. 25, 26 (1996)).
20 Gallagher, supra note 12 at 1607 fn. 97 (citing Brent Kabler, State of MO. Dept of Ins., Insurance Based Credit Scores: Impact on Minority and Low Income Populations in Missouri, 1 (2004)).
21 A University of North Carolina study of thousands of home loans made to low-income buyers found that 33% of African-Americans had credit scores of less than 620, compared to 15% of whites; 32% of African-Americans had scores of 621 to 660 compared to 20% of whites, and 22% of Hispanic borrowers had no credit score compared to 4% of whites and 3% of blacks. Michael A. Stegman et al., Automated Underwriting: Getting to “Yes” for More
Not only do credit checks disproportionately impact minority job applicants, but credit checks are a bad predictor of an employee’s future job performance, weakening employers’ arguments for using them (with the exception of legitimate financial and national security concerns). Employers who use credit checks generally believe that employees with good credit will generally be more responsible employees, will be less likely to steal from the employer, and will be less likely to commit crimes in general.22 Employers are also undoubtedly influenced by lawsuits finding employers liable for negligent hiring and hiring of dangerous employees.23 Yet, it seems as though no social science studies have been done, and even advocates of credit checks admit there is currently no empirical data to back up claims from employers of a correlation between credit and job performance.24 Granted, more studies need to be done on the subject, but the absence of any studies showing a positive connection is significant in and of itself.25

Low-Income Applicants (slide 9) (2001), http://www.housingamerica.org/downloads/web5.ppt. A study done by the Texas Department of Insurance in 2004 found that “[I]n general, Blacks have an average credit score that is roughly 10% to 35% worse than the credit scores for Whites. Hispanics have an average credit score that is roughly 5% to 25% worse than those for Whites. Asians have average credit scores that are about the same or slightly worse than those for Whites.” Tex. Dep’t of Ins., Report to the 79th Legislature: Use of Credit Information by Insurers in Texas 13 (2004), available at www.tdi.state.tx.us/reports/pdf/creditall04.pdf

22 See Andrew Martin, As a Hiring Filter, Credit Checks Draw Questions, THE NEW YORK TIMES, April 9, 2010 1A (Eric Rosenberg of TransUnion Credit Bureau cites statistics that retailers lose 30 billion a year from employee theft, workplace violence costs employers 55 million a year in lost wages, and a third of employees put false information on their resumes); Gallagher, supra note 12 at 1599.

23 Id.

24 See Id. at 1595 fn. 3 (stating that in her searches of academic, business, legal, and social science journals she has not found any articles addressing whether or not credit scores “accurately and reliably” predict job performance or likelihood to steal and stating that articles claiming an “obvious reason” to perform credit checks on employees do not reference any data that actually shows a correlation between credit score and job performance or likelihood of stealing from an employer.); Martin, supra note 18 (Rosenberg of TransUnion Credit Bureau admitting in testimony before CT legislature that “At this point we don’t have any research to show any statistical correlation between what’s in somebody’s credit report and their job performance or their likelihood to commit fraud.”).

25 See Martin, supra note 18 (“Jerry K. Palmer, a psychology professor at Eastern Kentucky University, said his studies, though relatively small, found no correlation between the quality of an employee’s credit report and that worker’s job performance or likelihood to quit. He said he was not aware of any studies that showed a correlation between poor credit and employee fraud or violence.”); Gallagher, supra note 12 at 1595 (“The fact that…articles fail to articulate why employers should perform credit checks and claim no empirical support for this screening technique itself suggests a lack of foundation for believing credit scores reliably predicts job performance and propensity to steal from an employer.”).
Additionally, credit reports are often rife with errors, thereby undermining even the purported connection to job performance.26 Specifically, 25% of credit reports in 2005 contained errors serious enough to cause that person to be denied a loan or employment.27 And of course a person may have bad credit for reasons completely beyond that person’s control, such as disability, divorce, death in the family, illness, or identity theft, just to name a few – all circumstances that would have little to no bearing on how a person would perform in their job.28

The Equal Employment Opportunity Commission has not really weighed in on this issue in a comprehensive way, but has indicated that it recognizes credit checks are a problem. The EEOC Guide to Pre-Employment Inquiries suggests employers avoid certain inquiries of job applicants, including credit history questions, as they could potentially expose the employer to liability for disparate impact discrimination.29 The Guide explains that employment decisions made on the basis of information elicited from such questions violates Title VII “unless the information is needed to judge an applicant’s competence or qualification for the job in question.”30 The EEOC has in the past issued comprehensive guidelines to employers on how to deal with checking applicants’ criminal histories, which could also apply to the use of credit checks, as there are similarities in the two policies.31

26 U.S. Equal Employment Opportunity Commission (EEOC), Testimony before the Hawaii State Senate Committee on Labor, March 19, 2009, 3 (citing CR Investigates. Credit Scores: what You don’t know Can be held against you, CONSUMER REPORTS, Aug 2005); see also Gallagher, supra note 12 at 1598 (Citing Consumer Fed’n of Am, National Credit Reporting Ass’n, Credit Score Accuracy and Implications of Consumers (2002) (29% of credit reports contained errors that could end up with denial of credit). Similar concern over accuracy arises in the arena of criminal history checks; apparently commercial criminal databases and services have also been found to be full of error. Rebecca Oyama. Do Not (Re)Enter: the Rise of Criminal Background Tenant Screening as a violation of the Fair Housing Act. 15 Mich. J. Race and L. 181.
27 EEOC Testimony, supra note 18 (citing CR Investigates. Credit Scores: what You don’t know Can be held against you, CONSUMER REPORTS, Aug 2005, 2005 WLNR 11847414 (citing U.S. Public Interest Research Group survey)).
28 Gallagher, supra note 13 at 3.
30 EEOC Guide to Pre-Employment Inquiries, 8A Fair Empl. Pract. Man. (BNA) 443:65 (1992);
the 1970s indicating that the use of credit checks violates Title VII disparate impact provisions if done without a legitimate business necessity. The agency stated in 2005 in testimony before the Hawaii state legislature that credit checks could be “challenged” under the disparate impact framework. Additionally, on May 17, 2007 the EEOC held a public commission meeting where one of the topics discussed was the discriminatory impact of credit checks, and one of the goals of the EEOC’s E-Race initiative of November 2007 is for the Commission to issue further guidance on this matter. Even though EEOC policies generally are not given much deference by courts, it is still surprising that the EEOC has not done more to combat the potentially discriminatory use of credit checks by employers.

In short, credit checks by employers are troubling. Their connection to job performance is uncertain yet their detrimental impact on some of societies most vulnerable groups – racial minorities and the poor – is clear. As Hawaii state Rep. Marcus Oshiro put it, for those caught in a vicious cycle of bad credit and unemployment, "[i]t's almost like being forever sentenced to debtors' prison." In the next section, I consider the extent to which protection from credit checks may be found in already existing antidiscrimination laws.

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32 EEOC Dec. 72-1176, 6359 (CCH) (1972) (bank policy of using credit information to evaluate potential employees was unlawful without business justification); EEOC Dec. 74-02, 6386 (CCH) (manufacturing company’s policy of using applicant’s financial status was unlawful without business necessity).
33 EEOC Testimony, supra note 18.
34 Id. (citing Transcript, EEOC commission meeting, May 17, 2007 www.eeoc.gov/abouteeoc/meetings/5-16-07/transcript.html#12); see also www.eeoc.gov/initiatives/e-race/goals.html.
35 See EL v SEPTA 471 F.3d 232 (3rd Cir 2007) (3rd circuit finding these guidelines not entitled to deference and instead adopting a broader standard); infra pp.31-2.
36 Frank, supra note 2.
III: THE LEGAL/DOCTRINAL RESPONSE AND WHY IT IS INADEQUATE

I will first give a brief overview of the purpose and goal of the disparate impact cause of action and describe in general what a disparate impact claim looks like. I will then describe in more depth each part of a disparate impact claim – the plaintiff’s prima facie case and the defendants’ business necessity rebuttal. In each of those sections I will explore whether the legal doctrine and precedents give reasons to be hopeful or cautious about the potential for success of a credit check lawsuit under Title VII.

A. OVERVIEW OF DISPARATE IMPACT FRAMEWORK

Until 1971, the only legally cognizable employment discrimination claim based on race was a disparate treatment claim. In order to make out a successful disparate treatment claim, a plaintiff has to prove that an employer intentionally discriminated against an employee based on the employee’s race or other protected characteristic. But the limits of disparate treatment as an effective bulwark against employment discrimination increasingly became clear, as overt racism faded and more complex forms of discrimination emerged that often were unintentional and resulted from seemingly benign employer hiring policies. The landmark Supreme Court case Griggs v. Duke Power Co. in 1971 recognized this problem and established the disparate impact cause of action under Title VII. The Griggs Court recognized that Congress’ intention in passing the Civil Rights Act of 1964 was broad:

“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment

38 See Griggs v. Duke Power Company, 401 U.S. 424, 432 (1971) (“We do not suggest that either the District Court or the Court of Appeals erred in examining the employer’s intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”).
opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”

The issue in *Griggs* was whether the Duke Power Company’s policy of requiring a high school diploma or passage of an IQ test as a condition of employment was legal under Title VII. This case found, for the first time, that plaintiffs no longer needed to prove discriminatory intent in order to have a cognizable employment discrimination claim under Title VII, but rather that a discriminatory impact or effect was potentially enough for a successful claim. *Griggs* proscribed practices that are “fair in form, but discriminatory in operation” with an exception only for those practices that a defendant could show bore a “demonstrable relationship” to successful job performance.

Courts at the time were quite open about their expansive interpretation of the relatively new disparate impact cause of action under Title VII. Post-*Griggs*, these courts seemed eager to give full measure to Congress’ intentions in creating Title VII. “Indeed,” the Court wrote in a case decided soon after *Griggs*, “the entire thrust of the *Griggs* opinion is toward a liberal construction of Title VII so as to fully effectuate the congressional mandate to insure members of minority groups equal employment opportunities and eliminate employment practices which act as ‘built-in headwinds’ for minority groups.” In recent years, courts no longer necessarily take

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40 Id. at 429-30.
41 Id. (The policy had the effect of eliminating large numbers of African-Americans from those positions).
42 Id. at 431.
43 See, e.g. Johnson v. Pike Corp. of America, 332 F. Supp. 490, 494 (C.D. Cal 1971) (“the entire thrust of *Griggs* is toward a liberal construction of Title VII so as to fully effectuate the congressional mandate to insure members of minority groups equal employment opportunities and eliminate employment practices which act as ‘built-in headwinds’ for minority groups.”); Wallace v. DeBron Corp., 494 F.2d 674, 676 (8th Cir. 1974) (citing *Johnson* Court language above).
this broad approach, but that was how courts originally viewed the spirit and Congressional intent of the disparate impact cause of action.

Disparate impact cases generally involve a two-step process. First, the plaintiff must make a statistical showing that the employer’s policy does indeed have a disparate impact on a protected group. This often consists of statistics involving either the actual applicants for a job or the qualified labor pool in a relevant geographical area. Additionally, the statistical impact the plaintiff shows must be legally cognizable – that is, the court must not consider the trait at issue voluntary or mutable. If the plaintiff is able to make out a prima facie case, the employer must then show that the policy is job related or consistent with business necessity, and if the employer satisfies that burden, then the employee can rebut by showing that there is an alternative policy that would have a less discriminatory impact.

B. PLAIN’T’S PRIMA FACIE CASE

The plaintiff’s prima facie case must begin with a legally cognizable statistical showing of a disparate impact on a protected group that resulted from the policy at issue. I will first outline helpful precedents suggesting plaintiffs may be able to succeed in making a prima facie case that credit checks cause a disparate impact. I will then show that this optimism should be tempered, as more recent cases provide a more complicated picture and indicate that it is not at all clear how a suit under Title VII against credit checks would fare in today’s courts.

46 Id.
1. Helpful Precedent

The first step in making a prima facie case is to demonstrate that the policy at issue is causing a statistically significant disparate impact on minority job applicants. In United States v City of Chicago et al., one of the rare cases actually addressing the credit-check issue directly, the Northern District of Illinois found that a police department’s practice of conducting a general investigation of job applicants’ character, including credit history, had a disproportionate impact on African-Americans, and the Court granted a preliminary injunction. The Court used very broad language, concluding that using socio-economic criteria constituted discrimination because “blacks are more likely than whites to possess negative socio-economic attributes.” The Court cited to EEOC decisions containing census data indicating that a disproportionate percentage of nonwhites are below the poverty level and more likely to have financial difficulties. This case contained no actual discussion of statistics, referring only to the general EEOC study on census data, and seemed almost to be relying on stereotypes about race and economic conditions.

This expansive approach to finding a prima facie case of disparate impact is evident in other decisions and types of cases that are analogous to credit check cases. Cases involving wage garnishments raise similar issues to the use of credit checks because they involve employees who are having financial trouble and employers’ concerns over how that will affect their performance on the job. Courts in these wage garnishment cases also do not delve into the minutiae of statistics, preferring instead to make broad connections between the fact that

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50 385 F. Supp 543, 557 (N.D. IL E.D. 1974) (citing to EEOC study, that perhaps not surprisingly, used census bureau statistics to make their case, and did not talk about what percentage of blacks compared to whites in the area from which the defendant draws its workforce have relatively poor credit or financial records. It is more surprising that the court quoted from the EEOC).

51 In these cases, the plaintiffs claimed that an employer’s policy of firing individuals who have had wages garnished more than once disproportionately impacted African-Americans.

52 See Johnson, 332 F. Supp. at 494-95; Wallace, 494 F.2d at 675.
African-Americans as a group tend to be worse off financially and the fact that they therefore would be more likely to have their wages garnished, resulting in a disparate impact. For example, in *Johnson v. Pike Corp. of America*, the Court cites studies on wage garnishment, finding “that minority group members suffer wage garnishments substantially more often than others, i.e., the proportion of racial minorities among the group of people who have had their wages garnished is significantly higher than the proportion of racial minorities in the general population.” With that first step established, the Court then goes on to assert that

> “the fact that blacks and other racial minorities are so often subject to garnishment action is related to the fact that they are to a disproportionate extent from the lower social and economic segments of our society. Approximately three times the proportion of blacks as compared to whites are in the lower end of the economic scale . . . [and] minority groups members are more often in debt, are more frequently subject to questionable credit practices and harassment, and have less capacity to defend themselves.”

Cases challenging the use of arrest and/or conviction records in hiring have delved into statistics on a somewhat deeper level than the wage garnishment cases. Employer policies that exclude applicants who have been arrested or convicted are similar to credit check policies because they involve criteria that may not be in the person’s control (or could be the result of error), and employer fears of workplace theft and violence. In *Gregory v. Litton Systems*, the Court cited statistics on national arrest levels showing that African-Americans are arrested at higher rates than Whites. Yet this data was not specific in any way to the area that Litton Systems was located in or the pool of potential employees. In *Green v. Missouri Pacific Railroad Co.*, a seminal case on employer use of conviction records, the Court held that a plaintiff could make out a prima facie case of disparate impact under Title VII in 3 different

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53 *Johnson*, 332 F. Supp. at 494-95; *Wallace*, 494 F.2d at 675.
54 *Johnson*, 332 F. Supp. at 495.
56 *Gregory*, 316 F. Supp. at 403.
ways: 1) using statistics showing that blacks as a class (or in a specific geographic area) are “excluded by the employment practice in question at a substantially higher rate than whites;” 2) comparing the actual percentages of African-American to Caucasian applicants excluded by the specific employment policy at issue at a particular company; or 3) analyzing the percentage of qualified African-Americans employed by the defendant company as compared to the percentage of African-Americans in the “relevant geographical area.” The Court in *Green* concluded that the plaintiffs did make out their prima facie case because “the statistics established that MoPac’s employment practice under consideration disqualifies black applicants or potential black applicants for employment at a substantially higher rate than whites.” The Court seemed to use method two to come to this conclusion, analyzing separately the number of whites rejected due to conviction records divided by the total number of white applicants (= 1.4%) and the number of blacks rejected because of prior conviction divided by the total number of black applicants (=2.05%) and deeming that significant.

In *Carter v. Gallagher*, a 1971 case dealing with a fire department’s hiring policies, which included the use of arrest records and conviction records, the Eighth circuit affirmed the lower court’s finding that the plaintiffs had made out their prima facie case successfully using statistics. Evidence in the record showed that none of the 535 men in the fire department at issue were Black, Indian, or Mexican-American while Blacks made up 6.44% of the city’s (Minneapolis) population in 1970. The Court cited those statistics then concluded by saying simply, “statistical evidence can make a prima facie case of discrimination . . . the [lower] Court found there was no substantial evidence to rebut the inference of discrimination based on the

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57 *Green*, 523 F.2d at 1294.
58 *Id.* at 1295.
59 *Id.*
60 *Carter v Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971)
61 *Id.*
statistics.”\textsuperscript{62} Similarly, in \textit{Dozier v. Chupka}, the only statistic the Court mentioned was that 2.31\% of the Fire Department’s work force was black, compared to 9.9-18.5\% of the population in the surrounding metropolitan community of Columbus.\textsuperscript{63}

Such precedents suggest that plaintiffs bringing credit-check cases should have a relatively easy time making a statistical showing. The studies indicate that African-Americans are more likely to have bad credit and therefore to be harmed by credit checks and those general statistics seem to be all courts require in many of these cases that share analogous features to a potential credit check lawsuit.\textsuperscript{64}

Yet a plaintiff not only has to make a statistical showing, but also must make a claim of a legally cognizable disparate impact. A potential roadblock a plaintiff bringing a lawsuit might encounter there is the issue of whether one’s credit is a mutable characteristic. Unlike race or gender, most people view credit as a characteristic that a person created and therefore can potentially change, albeit perhaps not easily. Courts tend to be less sympathetic to claims of disparate impact discrimination based on a trait that is within a person’s power to change or is brought on by some action the person took.\textsuperscript{65} However, as mentioned earlier, one’s credit score and history is not entirely mutable; many credit histories contain serious errors, and many bad credit scores are due to situations entirely outside of a person’s control (and it is difficult to get

\textsuperscript{62} Id.
\textsuperscript{64} See infra, pp.4-5. The \textit{Johnson} court addresses one possible defense argument - that wage garnishments affect the poor, and don’t really primarily discriminate against racial minorities.\textsuperscript{64} The court responds to that potential argument by saying that while it may be true that among people on the same economic level wage garnishments have no disproportionate on African-Americans, the defense did not provide any statistics on this issue and “the question is immaterial . . . the fact that [the policy] may also discriminate against the poor white is irrelevant to our consideration under Title VII.” \textit{Johnson}, 332 F. Supp. at 495.
\textsuperscript{65} See, e.g., \textit{Garcia}, 998 F.2d at 1487-89 (9th Cir. 1993); \textit{Rogers} 527 F. Supp. at 231-33 (S.D.N.Y. 1981).
one’s score higher). But perhaps more importantly, there is legal precedent for successful Title VII disparate impact suits being brought on the basis of mutable characteristics.

Cases from the 1970s dealing with employers’ use of conviction and arrest records to screen job applicants (and fire employees) provide useful precedent on the issue of linking a mutable characteristic to race in a disparate impact case. Several cases, starting with *Gregory v. Litton Systems*, have found that eliminating employees from consideration based on an arrest record (and often conviction record as well) has a disparate impact on African-Americans and is illegal under disparate impact provisions of Title VII (provided it does not meet the business necessity test, which will be discussed later). In these cases, courts took it as a given that if use of arrests and convictions “favors white . . . men over black . . . men . . . defendants have used a criterion which has a discriminatory effect,” without regard for the fact that getting arrested or convicted could be seen as somewhat “voluntary.”

While the arrest/conviction cases suggest that even plaintiffs with mutable traits can state valid disparate impact claim, another category of cases, those dealing with wage garnishment, suggests that perhaps poor credit should not be viewed as a voluntary or mutable trait in the first place. In these wage garnishment cases, courts take a very narrow view of what can be

66 See infra, p. 5 fn. 18.
67 See Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening As A Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 188-89 (2009) (These cases are analagous to credit check cases in that the effect of policies that exclude from employment those with criminal backgrounds is compounded on racial minorities because they are also more likely to have been arrested or convicted of a crime, just like they are more likely to have had bad credit. Also, some state legislatures have begun to provide protection to individuals with criminal records.).
68 *Gregory*, 472 F.2d at 632; See also, *Green*, 523 F.2d at 1298 (holding that refusing employment to anyone convicted of a crime other than minor traffic offense results in a disparate impact); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp 952, 971-72 (District of D.C. 1980), aff’d, 702 F.2d 221 (D.C. Cir. 1981) (using arrest records is not acceptable policy when no attempt made to validate it); *Carter*, 452 F.2d at 320 (holding that employers can not utilize arrest records in hiring decisions but can use conviction records as long as they have some relation to the job); *Dozier*, 395 F. Supp. at 850 (holding that use of arrest records is discriminatory).
69 *Dozier*, 395 F. Supp 836 at 850. While some cases do allow employers to use conviction records adversely against employees, it is generally not because of mutability issues but rather because courts find that a conviction has a much greater link to the job itself, rendering it more of a “business necessity. *See, e.g.* Carter, 452 F.2d 315 at 320..
considered “voluntary,” or mutable, which could support an interpretation of poor credit as involuntary as well.\textsuperscript{70} It is illegal under federal law to fire someone for a one-time wage garnishment.\textsuperscript{71} In such cases courts suggest that having one’s wages garnished is not the result of voluntary action, and they therefore are sympathetic to the plight of those who had their wages garnished.\textsuperscript{72} In Wallace, the Eighth Circuit, in deciding that the lower court had erred in granting summary judgment for the defense, went so far as to note that,

“There is no evidence in the record that garnishments generally are the result of voluntary conduct undertaken with the knowledge of the consequences, and we are unwilling to take judicial notice that such is the case in the face of studies indicating that poverty is the root cause of many garnishments.”\textsuperscript{73}

The Wallace Court took a narrow view of the word voluntary, declining to expand it to include judgments of the court (wage garnishments) that have some connection to past voluntary action. And the Court recognized the link between poverty, which is not generally seen as a choice (although is certainly moremutable than other characteristics that are associated with race), and wage garnishments, which is similar to the link between poverty and a bad credit score.\textsuperscript{74}

The Court in Johnson also reacted sympathetically to the wage garnishment plaintiffs, finding that “discharging an employee solely because his wages have been garnished once or several times benefits no one; the employer loses an otherwise capable employee…the employee

\textsuperscript{70} See, e.g., Wallace, 494 F.2d at 674; Johnson, 332 F. Supp. at 490; see also §15: Race and Color Discrimination, EEOC Compliance Manual, Volume II (BNA), § 15-VI.B.2 (2005) (“We noted that similar to credit check policies, people of color have also used the disparate impact framework to challenge employer policies of discharging persons whose wages have been garnished to satisfy creditors’ judgments.”).
\textsuperscript{71} 15 U.S.C. § 1674.
\textsuperscript{72} See, e.g. Johnson, 332 F. Supp. at 496 (“Discharging an employee solely because his wages have been garnished once or several times benefits no one; the employer loses an otherwise capable employee and must…train a replacement; the employee loses his source of income and may become dependent upon unemployment compensation or welfare…”).
\textsuperscript{73} Wallace, 494 F.2d at 676.
\textsuperscript{74} Although not quite the same, as ones wages would only be garnished if you could not pay the court judgment, whereas one can have a bad credit score and not technically be in poverty.
loses his source of income and may become dependent upon unemployment compensation or welfare; and the creditor is less likely to recover his claim.”

The Johnson Court also viewed voluntariness narrowly, suggesting that wage garnishments are often “saddled on a poor ignorant person who is trapped in an easy credit nightmare.”

This type of rhetoric could support an interpretation by courts today that a person’s poor credit is not a voluntary or mutable characteristic, which could help plaintiffs in a credit check lawsuit.

These precedents suggest that plaintiffs may be able to make out a prima facie case in a suit challenging credit checks under Title VII’s disparate impact provision. They suggest that plaintiffs may be able to gather sufficient statistics and successfully argue that credit history is not a mutable characteristic.

2. Reasons for Caution

However, the recent picture is more complicated. As time went on, courts began to view disparate impact causes of action more narrowly, making it more difficult for plaintiffs to make out their prima facie case. The seminal case of Wards Cove decided in 1989 set out the modern jurisprudence on this issue.

“[The] proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market.” Ibid. It is such a comparison between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures

75 Johnson, 332 F. Supp. at 496.
76 Id.
77 See Frank, supra note 2.
78 Wards Cove, 490 U.S. 642.
indicating the racial composition of “otherwise-qualified applicants” for at-issue jobs are equally probative for this purpose.”

In recent disparate impact cases, much of the fighting is over whether the plaintiff has introduced the right kind of statistics or enough statistics to prove that the policy at issue actually results in a disparate impact on minorities. Courts do not have a unified approach to this question. Many use the four-fifths rule, holding that a prima facie case is made when one group’s “pass” (for an employment test) rate or hiring rate is less than four-fifths (80%) of another group’s rate. Yet some courts look for “statistical significance,” for confidence (generally at the 95% level) that the disparity is not due to random chance. Generally plaintiffs will advocate for whichever method makes it easier for them to prove their case, and vice-versa for the defendants. Regardless of which of these methods is used by a court in a particular case, they both involve a much more in-depth examination of statistics than the earlier cases discussed in this paper in which general connections between race and poverty or simple statistics regarding how many of a certain race were excluded by an employment policy were sufficient.

Beyond the debate over what level of significance courts should be looking for, there are often case-specific fights over what numbers should be used for the statistical calculations in the first place. These arguments deal with how to construct the applicant pool (i.e. do we look at

79 Id. at 650-651.
81 Id.
82 Id. at 773-4. Additionally, the EEOC, DOJ, and other federal governmental organizations have all adopted the four-fifths rule. Id. at 781.
83 Id. at 774.
84 Id.
85 See, infra pp. 12-16.
everyone in the entire geographical area, or just those who could be qualified to be hired, and how to determine that).  

An early employment case begins to illustrate this point. In *Reynolds*, the plaintiffs utilized all three of the methods set out in *Green* to prove their statistical prima facie case.  

The plaintiffs asked the Court to apply a rule from a previous case that found disproportionate impact based on general population demographic data alone, but the Court declined to do so because the general populations figures were *not* borne out by the composition of the defendant’s work force.  

The Court required the additional statistical step of finding labor market data, wherein the plaintiffs presented statistics showing that the percentage of blacks in the applicant pool was higher than the percentage of blacks chosen for the apprenticeship program at issue.  

The plaintiffs also presented actual applicant data, which the Court generally prefers.  

After a lengthy analysis of why the plaintiffs preferred labor pool statistics should be accepted (in this case, not just general population data in the area but rather analyzing people that were actually qualified for the job), the court combined the labor pool data with applicant data to find that the plaintiffs had made out a prima facie case.  

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86 See *Reynolds*, 498 F. Supp 952 at 965 (“Plaintiffs rely on actual applicant flow data and relevant labor force figures to show that black representation in the proper pool of applicants was between 35.5-45.5%, and therefore in excess of the percentage of blacks chosen for the apprentice program . . . The defendants claim that in this case the applicant pool is either 26.67% or 25.6% black, based on the census figures for the percentage of black males, aged 18-34, in the civilian labor force or general population in the Washington SMSA. When the percentage of blacks selected for the apprenticeship program from 1971-79 (29.0%) or for 1979 (25%) is compared to these SMSA figures, the discriminatory impact on blacks appears minimal.”).  
87 *Id.* at 963.  
88 *Id.* at 964. (In other words, the number of blacks in the apprenticeship program at issue was about equal to the percentage of blacks in the general population.)  
89 *Id.* at 965.  
90 *Id.* (showing a 12.5% difference, violating 80% standard set by EEOC. It was only “almost significant” under the 5% standard, but the court concluded that applicant flow data didn’t even show all the discrimination that was taking place).  
91 *Id.* at 968. (“Other courts have recognized that the congruence of general population percentages and racial representation in the defendant's work force should not bar consideration of more relevant evidence of discrimination. . . .[T]his refusal to be tied to general population percentages is consistent with the mandate of Title VII. As the quote from Albemarle cited earlier indicates, supra at 21, Title VII protects qualified individuals from
Courts often require more specific statistics in housing discrimination cases as well, which follow a similar framework as employment discrimination cases. In fact, courts “frequently borrow” legal standards and precedents from Title VII cases to apply in Title VIII cases and vice versa. In *Bronson v. Crestwood*, decided in 1989, the Court found that an apartment complex’s policy of requiring renters to earn income of three times the rent had a disproportionate adverse impact on minorities and therefore violated fair housing and state laws. The Court allowed the plaintiffs to use the general pool of all Yonkers renters in making statistical calculations, but subjected their use of 1980 census data (from 9 years earlier) to much scrutiny.

The problem with credit-check cases lies not only in proving the racial composition of the qualified labor pool or the applicant pool, but also in proving that the disparity is caused by the credit checks. Even if the plaintiffs can prove a disparity between blacks who are hired and either blacks in the relevant labor pool or the applicant pool, they still have to show that the main reason for the disparity is the credit check. And so the increased reliance on statistics to prove the disparity will also inform the type of credit-check data plaintiffs would need to prove causation. In other words, if plaintiffs show a disparity between blacks hired and blacks in the
applicant pool, they also will need credit information on all the applicants. (This may not be so hard to get if the employer has already done the credit checks.) But if plaintiffs point to a disparity between blacks in the general qualified labor pool versus those hired, then the plaintiffs would also need credit information from that qualified labor pool. The difficulty here is that most studies that have been done on credit checks have not been done on a local level.97

Additionally, if a credit-check is only one of multiple hiring requirements or “tests,” it may be even more difficult for plaintiffs to tease out the effect of the credit check itself.98 Under Title VII, a plaintiff must prove that the hiring factor or policy individually had a disparate impact, unless all the factors are “not capable of separation for analysis,” for example, if the employer has bad record keeping. Given that most employers probably do not use a person’s credit history as the sole hiring criteria, this may be a significant obstacle to a successful disparate impact lawsuit. Credit scores most likely correlate with other factors that employers may care about, such as class, and it will be difficult to disentangle them. Without very specific credit statistics it will be extremely difficult to prove that the credit score is the reason for any employer discrimination.

And to make the prospect of successful credit check litigation more unlikely, courts could still refuse to treat this as a cognizable disparate impact if they view credit scores as a mutable characteristic. In several recent disparate impact cases, courts have refused to recognize that a policy disproportionally burdens a group, not because the plaintiffs did not make out a sufficient statistical case, but rather because the courts felt that the policy at issue did not disproportionately burden the plaintiffs because they could choose whether or not to comply with

97 See, infra pp. 4-5.
the policy. \textsuperscript{99} This gloss on disparate impact theory is nowhere to be found in the text of the \textit{Griggs} decision, but courts are using it with increasing frequency lately and it could pose problems for the success of credit-check lawsuits. \textsuperscript{100}

For example, in \textit{Garcia v. Spun Steak}, the 9\textsuperscript{th} circuit ruled that an English-only rule did not disproportionately burden bilingual Spanish speaking employees because they could choose whether to comply with the rule, and speaking Spanish was a privilege, not a right. \textbf{Check this case reasoning – maybe focus just on the choosing/mutability part.} \textsuperscript{101} This case was different than a credit-check lawsuit in that it dealt with the “conditions, terms, or privileges” of employment, which are different than hiring criteria and a bit more nebulous. \textsuperscript{102} The Court focused on the requirement that the policy have “significant adverse effect” on the plaintiffs \textsuperscript{103} (which would be more obvious in a case where someone was not hired because of a particular policy), and concluded that it was not that difficult for Hispanic employees to comply with the English-speaking rule at issue. \textsuperscript{104} Similarly, in \textit{Rogers v. American Airlines}, the Court held that Rogers could not make a disparate impact claim for being forced to change her corn-row hairstyle because hairstyle is an “easily changed characteristic,” and, even if socio-culturally


\textsuperscript{100} Id. at 374 (explaining that a trait must be immutable for a court to find disparate impact).

\textsuperscript{101} \textit{Garcia}, 998 F.2d at1487-89.

\textsuperscript{102} Id. at 1486 (“When the alleged disparate impact is on the conditions, terms, or privileges of employment, however, determining whether the protected group has been adversely affected may depend on subjective factors not easily quantified.”).

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 488 (“Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a significant impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity. This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue. The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. In short, we conclude that a bilingual employee is not denied a privilege of employment by the English-only policy.”).
associated with a particular race or nationality, it is not an impermissible basis for distinctions in
the applications of employment practices by an employer."105 Yet it is not entirely clear that trait
mutability is what is behind courts decisions in these cases; and in fact the decisions may have
more to do with how courts view the value of the trait at issue.106

Defendants in a credit-check lawsuit may succeed at arguing that a plaintiff’s bad credit
history is the plaintiff’s own fault and is a mutable characteristic, unlike race or gender.
However, plaintiffs may be able to successfully argue that one’s credit score is not really
mutable. Bad credit is very difficult to improve, especially if that bad credit is preventing a
person from getting hired. While of course employers will argue it is the person’s fault that they
have bad credit, it is still very difficult to change once it has already happened. Additionally, not
being hired because of bad credit history is different than not being allowed to speak Spanish on
your job, or being told you can’t wear a certain hairstyle. It is much easier to change a hairstyle,
or even to speak English instead of Spanish if you are bilingual, than it is to change a bad credit
score. And once you are not hired because of your credit history, you will not get that job later
even if your credit improves.

In light of this, it is likely to be very difficult at this time for plaintiffs to establish a prima
facie case of disparate impact. If a court follows earlier precedent, plaintiffs might be able to
show the required statistical disparity because they could use more general nationwide credit
check and race statistics outlined earlier in this paper, but with courts becoming increasingly
rigid regarding plaintiffs statistical proof burdens, those figures now will most likely not

105 Rogers, 527 F. Supp. at 231-33.
106 Yuracko, supra, note 93 at 380 (“As in Rogers, however, trait mutability does not seem to really explain or drive
the court’s decision . . . The court’s effort to distinguish a no-smoking requirement from a no-beard requirement and
equate it to a no-cornrows requirement seems to have far more to do with judgments about the social meaning and
value of the trait being required than with concerns over trait mutability or impact.”).
Courts simply have not been consistent in their interpretation of statistical requirements and what traits are considered mutable and it is difficult to know whether a plaintiff would even get past the first stage of such a lawsuit. This uncertainty serves to further highlight the need to pursue other avenues to curb the use of credit checks, as well as the need for more detailed social science studies to help plaintiffs make out a prima facie case if a lawsuit is brought in the future.

C. DEFENDANT’S REBUTTAL – BUSINESS NECESSITY

Even if a plaintiff is able to make out a prima facie case, he or she can still lose if the employer can show that the policy at issue (i.e., credit checks), while resulting in a disparate impact, serves some business necessity. The Court first articulated this potential defense in Griggs, finding that a discriminatory employment test may pass muster if it “bears a demonstrable relationship to successful performance of the job for which it was used.” As in the previous section, I will first outline some cases that seem to suggest that courts might not be very sympathetic to a business necessity defense regarding credit checks. I will then argue that that any optimism should be tempered, as there is just as much evidence indicating that courts may potentially embrace a business necessity defense regarding credit checks.

1. Helpful Precedent

Several early disparate impact cases interpreted the business necessity defense quite narrowly. In Johnson, a wage garnishment case, the defense put forth several explanations as

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107 See Peresie, supra, note 76.
109 See Johnson, 332 F. Supp. at 496; Wallace, 494 F.2d at 677; Dothard v. Rawlins, 433 U.S. 321, 331 (1977); El, 479 F.3d at 240.
to why the company needed to fire those who have had their wages garnished multiple times.\textsuperscript{110} Several of the proffered reasons involved the expense and time needed to deal with the bureaucracy of wage garnishments and the “annoyance” involved in handling employees’ creditors. The Court had a very clear response to these justifications, holding that “the sole permissible reason for discriminating against actual or prospective employees involves the individual’s capability to perform the job effectively.”\textsuperscript{111} This approach leaves no room for arguments regarding “inconvenience, annoyance, or even expense to the employer.”\textsuperscript{112} The Court explained further that with the passage of Title VII, Congress intended to put an “affirmative burden” on employers in order to help end discrimination.\textsuperscript{113}

The defendant in \textit{Johnson} offered one more excuse for its wage garnishment policy - that individuals who are not making money will not perform effectively – an excuse the Court found unduly speculative.\textsuperscript{114} The defendants in \textit{Wallace} attempted to make the same argument, and also failed, as they did not “provide the District Court with basic supportive facts which establish a business necessity justification as a matter of law.”\textsuperscript{115}

In \textit{Gregory}, an arrest records case, the Court treated the defense’s purported reason for its policy with disdain, finding “that there is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in the case was overwhelmingly to the contrary.”\textsuperscript{116} The Court further noted that the County of Los Angeles had stopped asking for arrest information in employment

\begin{itemize}
\item \textsuperscript{110} 332 F. Supp. at 495.
\item \textsuperscript{111} \textit{Id.} at 495.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 496.
\item \textsuperscript{114} \textit{Id.} at 495.
\item \textsuperscript{115} \textit{Wallace}, 494 F.2d at 677.
\item \textsuperscript{116} \textit{Gregory}, 316 F. Supp 401 at 402-3.
\end{itemize}
applications, indicating its “irrelevance.”\textsuperscript{117} In \textit{Carter}, the Court considered a policy that examined job applicants’ conviction records in addition to arrest records.\textsuperscript{118} The lower court had ordered the fire department to stop using arrest records and conviction records as part of their hiring process, with limited exceptions for conviction records.\textsuperscript{119} The appellate court agreed with the lower court that arrest records have no place in the hiring process, but took a more nuanced view of convictions, finding that a per se bar from employment due to a felony or misdemeanor conviction was too broad, but that a conviction may have some bearing on the suitability of an applicant for the job of firefighter and could therefore sometimes be considered in hiring.\textsuperscript{120} Even though defendants were able to convince the Court of their argument on the point of convictions, this case still shows the Court making nuanced judgments about the connection, or lack of one, between a job qualification and the job’s requirements, and the Court’s willingness to narrowly tailor employers’ hiring criteria.

In \textit{Green}, the Court continued in this same vein but went even further, concluding that the railroad’s policy of denying employment to anyone convicted of a crime other than a minor traffic offense was not justified by business necessity (and reversing the lower court).\textsuperscript{121} The Court was quite firm in its rejection of the business necessity defense, ultimately finding that

“\textit{We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of}

\textsuperscript{117} \textit{Id.} at 403.
\textsuperscript{118} \textit{Carter}, 452 F.3d at 320.
\textsuperscript{119} \textit{Id.} at 320-21.
\textsuperscript{120} \textit{Id.} at 326 (“\textit{We are persuaded by defendants' argument that applicants' conviction records, at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a fire department position both from the standpoint of protecting fellow firemen and the public. The trial court in its discretion may require the defendants to submit to it for approval a rule with respect to the consideration to be given to an applicant's conviction record, which at a minimum should not treat conviction as an absolute bar to employment. We would not consider any rule giving fair consideration to the bearing of the conviction upon applicant's fitness for the fire fighter job to be inappropriate.”}

\textsuperscript{121} \textit{Green}, 523 F.2d at 1298.
discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”

The defense had offered justifications such as fear of cargo theft, employee handling of money, liability for hiring persons with known violent tendencies, and more. The Appellate Court reversed the lower court’s refusal to follow EEOC non-binding guidelines requiring “empirical validation” of the arrest/conviction record policies. Moreover, the Court was unsympathetic to the lower court’s argument that it is too difficult to get data on job success of ex-convicts.

The business necessity defense also exists in disparate impact housing cases. Courts seem to take the same narrow view of business necessity in Title VI housing cases as they do in Title VII arrest record cases. For example, in *Bronson*, discussed earlier, the defendants attempted to justify their policy of turning down those renters who had Section 8 vouchers or did not meet their triple income policy. They argued that these renters may not set aside enough of their Section 8 payments to pay the rent, that the Section 8 lease forces the defendant to enter into undesirable clauses, and that generally there is no law preventing the defendant from seeking to ensure that tenants will be able to pay their rent. Again, the Court rejected these justifications because they were merely “general conclusory assertions” and no evidence was offered to show that the policies are “reasonably necessary” to insure payment of rent, or that in

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122 *Id.*

123 *Id.*

124 *Green*, 381 F. Supp. at 996 (citing EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607). Similarly, in *Reynolds*, the Court refused to entertain a business necessity defense for the use of arrest records in hiring because no “attempt had been made to validate the arrest inquiry as job related.” 498 F. Supp 952 at 973. Nor, the Court in *Green* points out, had the defendants shown that there was not any “less-restrictive” alternative with a “lesser racial impact” that could not serve their business necessity just as well. *Green*, 523 F.2d at 1298 (citing *Green*, 381 F. Supp at 996).

125 Section 8 is a HUD housing choice voucher program, providing low-income people with vouchers for reduced rent that can be applied at any apartment building where they are accepted.

the past the defendant had encountered losses as a result of accepting Section 8 tenants or tenants who did not meet the triple income test.\textsuperscript{127}

Similarly in \textit{Commission on Human Rights and Opportunities v. Sullivan}, the Court found that a landlord, when deciding not to rent to a prospective tenant, may rely on the statutory exception at issue only with “respect to income requirements that bear a reasonable relationship to a prospective tenant’s ability to meet . . . rental obligations.”\textsuperscript{128} These housing cases are analogous to credit check cases, and suggest that courts should allow the use of credit checks only if an employer has demonstrated a reasonable connection between the policy and a person’s ability to do the job for which they are applying.

This precedent should give plaintiffs challenging employers’ credit check policies reason to be optimistic. The cases suggest that business necessity really means necessity, not merely avoiding an inconvenience, and that an employer must prove the connection between the policy and an employee’s job performance, not merely speculate that it is so. Therefore, if a plaintiff is able to make out a successful prima facie case, the defendant may not be able to show a business necessity, since employer justifications for using credit checks are often framed in very vague terms without any studies to back them up.\textsuperscript{129}

\textbf{2. Reasons for Caution}

In recent times however, courts simply seem unwilling to go too far in invalidating seemingly neutral employer policies, perhaps out of worry that all manner of work policies we

\begin{footnotesize}
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\item \textsuperscript{127} \textit{Id.} at 156.
\item \textsuperscript{128} 285 Conn. 208, 221 (2008), 939 A.2d 541, 551 (explaining that the statutory exception in Connecticut allowing realtors to refuse to rent to those with “insufficient income” can only be used when the income requirement bars a “reasonable relationship” to tenant’s ability to meet rental obligations).
\item \textsuperscript{129} See also \textit{Dothard}, 433 U.S. at 343 (rejecting employers’ “common sense” argument that prison guards must be strong to justify hiring criteria that roughly measured strength); \textit{El}, 479 F.3d at 240 (“the lesson is that employers cannot rely on rough-cut measures of employment-related qualities; rather they must tailor their criteria to measure those qualities accurately and directly for each applicant.”).
\end{itemize}
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take for granted could come under attack.\textsuperscript{130} Courts’ discomfort with tying the hands of employers may play out in a refusal to find a disparate impact at all, or courts may use the business necessity defense as their excuse instead. Even as far back as \textit{Washington v. Davis} in 1976, courts were expressing skepticism towards plaintiffs’ disparate impact claims and seizing on employers’ business necessity defenses to stem some of the tide of changes brought on by disparate impact lawsuits.\textsuperscript{131} After \textit{Wards Cove} in 1991, when the courts tried to replace the business necessity standard with something obviously less stringent (“business justification”)\textsuperscript{132} and shifted the burden of proof to the employee, Congress responded by passing the Civil Rights Act of 1991.\textsuperscript{133} The Civil Rights Act overturned parts of \textit{Wards Cove}, placing the burden of proof back on the employer and stating that for selection procedures, the practice must bear a “significant relationship to successful performance of the job” and “demonstrable evidence is required.”\textsuperscript{134} In essence, congress returned business necessity jurisprudence to what it was before \textit{Wards Cove}, but courts have still found ways to lessen the burden on defendants.

Indeed, in recent arrest records cases courts have broadly interpreted the business necessity defense. For example, in \textit{EL v SEPTA}, a case from 2007, the appellate court upheld summary judgment for the defendant, holding that it was acceptable policy to terminate an African-American para-transit driver for a 40-year-old murder conviction.\textsuperscript{135} The Court

\textsuperscript{130} Michael Selmi. \textit{Was the Disparate Impact Theory a Mistake}, 53 UCLA L. REV. 701, 751 (2006) (Noting, regarding the case of pregnant women, “if the disparate impact theory were applied with rigor to policies that adversely affect pregnant women or women with childrearing responsibilities, it could conceivably invalidate many central, and common, employment policies, including routine work hours, most leave policies, and mandatory overtime.”).

\textsuperscript{131} \textit{Washington v. Davis}, 426 US 229, 248 (1976) (“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”).

\textsuperscript{132} \textit{Wards Cove}, 490 U.S. 642 at 644.


\textsuperscript{134} \textit{Id.}, § 701 (A)(B)(2).

\textsuperscript{135} \textit{EL}, 479 F.3d at 235.
reiterated that an employer must present real evidence that the challenged criteria “measure[s] the person for the job and not the person in the abstract” but also held that a policy need not be “perfectly tailored.” The Court “require[s] that employers show that a discriminatory hiring policy accurately -- but not perfectly -- ascertains an applicant’s ability to perform successfully the job in question.” Additionally, the Court held that Title VII allows the employer to hire the applicant most likely to perform the job successfully over others less likely to do so.”

The Court then framed the question as one of an employer’s need to “manage[] [the] . . . risk” that an employee will “endanger the employer’s patrons,” and eventually held that even a bright-line policy against hiring people with convictions is permissible if it can “distinguish between applicants that do and do not pose an unacceptable level of risk.” In granting defendant’s motion for summary judgment, the Court almost blames the plaintiffs (and the EEOC) for not providing even a “scintilla” of support for their position. What is frustrating about this decision is that while it purports not to be putting the burden on the employee, it does exactly that by focusing on what evidence the plaintiff should have shown to rebut the defendant’s assertion of business necessity.

Additionally, the Court opened the door to more successful business necessity defenses by holding that all a policy need do is distinguish between different levels of risk. The Court distinguished between employer policies that can be justified on the basis of potential harm to fellow employees or customers (para-transit users) versus policies that are justified only by other employer needs. The Court noted that previous business necessity cases were not particularly

136 Id. at 240 (citing Dothard, 433 U.S. at 332 (citing Griggs, 401 U.S. at 436)).
137 El, 479 F.3d at 242.
138 Id.
139 Id. at 248 (Granting the EEOC policies “skidmore” deference, and finding them too “terse” to be helpful).
140 Id.
141 Oyama, supra, note 45 at 210.
instructive since the consequences in this case involved potential harm to other employees as opposed to hiring someone with a lower IQ or someone who did not pass a test. The Court then tried to draw the two types of cases together by using the “management of risk” standard. In other words, it does not matter how much, or whether, the policy at issue actually has any connection to an individual’s ability to do the job, but rather whether the policy has levels or gradations built in to better manage risk. This analysis implicitly accepts managing risk as a valid business necessity – no matter what the purported risk may be. It is unclear which category credit checks would fall into – employers could argue that employees with bad credit who end up stealing could be a risk to customers, but certainly they are not a violent risk the way that someone with a criminal past might be.

In a similar vein, some other cases seem to suggest that the magic ingredient needed to prevail on a business necessity defense is having a policy with sufficient objective criteria. In an earlier companion case to *EL v Septa*, *Lanning v Septa*, the district court originally found that the police department at issue had not shown that the fitness test that resulted in a disparate impact on women was a business necessity because the department did not demonstrate that the “cutoff measures the minimum qualifications necessary for successful performance of the job in question.” But this decision was later reversed after the court found that the minimum standards set by SEPTA were appropriate given the public safety issues at stake. This could potentially both hurt and help credit-check lawsuits. It could help because it might be hard for

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142 *EL*, 479 F.3d at 243.
143 See, e.g. *Lanning v. Septa*, 181 F.3d 478 (3rd Cir. 1999).
144 *Id.* at 489.
145 *Lanning v. Septa*, 308 F.3d 286 (3rd Cir. 2002) (“It would clearly be unreasonable to require SEPTA applicants to score so highly on the run test that their predicted rate of success be 100%. It is perfectly reasonable, however, to demand a chance of success that is better than 5% to 20%. In sum, SEPTA transit police officers and the public they serve should not be required to engage in high-stakes gambling when it comes to public safety and law enforcement. SEPTA has demonstrated that the cutoff score it established measures the minimum qualifications necessary for successful performance as a SEPTA officer.”).
employers to explain why a credit score a point lower makes an employee unfit for the job, making it harder to justify their cutoffs under this reasoning. But it also seems that when safety becomes a concern, courts give defendant employers more leeway. Even though Choicepoint, a background checking firm, stated that “credit has not turned out to be a good predictor of workplace theft” or violence, courts may very well accept the argument that it is.146

The state of disparate impact jurisprudence, particularly with regard to business necessity, is not settled. It is difficult to predict how courts might view an argument that it is necessary for an employer to carry out credit checks on potential employees, as the outcome may depend on the exact fact pattern that comes before the court, as well as the precedents in that jurisdiction. Yet these precedents do suggest that any credit check litigation may face a formidable obstacle in the form of the employer’s business necessity defense. In the media and non-legal arenas of argument over this, the most common line of defense by employers has been a sort of popular business necessity defense, with employers arguing that people with poor credit are untrustworthy workers, or more specifically, that they can’t be trusted around money, retail merchandise, or matters of national security (because they can more easily be bribed).147 Given the court’s approach to risk management and its deference to public safety concerns, these are all defenses that could potentially be validated by a court following the precedents outlined above.

IV: POTENTIAL LEGISLATIVE SOLUTIONS

While there are reasons to think that a suit against employer use of credit checks could succeed, there also are a number of reasons to believe that success would be quite difficult. This confusion and uncertainty does not provide an ideal atmosphere for litigation aimed at reducing

147 Martin, supra note 18.
the use of credit checks. Given the complicated state of disparate impact jurisprudence, and courts’ increasing skepticism about claims analogous to those involving credit checks, a political response may be more successful. I will begin by outlining my proposal for ideal credit check legislation. I will then evaluate the legislative responses that have been enacted or are under consideration at the state and federal level and how they measure up to this ideal.

In determining what an ideal credit check bill would look like, I do take political feasibility into account to some extent, yet clearly the details of the type of bill that could actually be passed would vary widely from state to state. In general, the ideal bill would prohibit employers from procuring credit reports for the purpose of screening job applicants or deciding whether to fire a current employee (any “adverse employment decision”). The bill also would inevitably contain several exceptions to the general rule, for both political and public policy reasons. It is clear from the survey of bills that have passed or are being debated that no bill could survive without at least some exceptions and, beyond politics, there are situations in which a person’s credit may have a connection to the person’s ability to perform a certain job.

There are two categories of exceptions that are necessary in this type of legislation. One is for positions in which the employee would have access to significant cash or other financial or business assets. The other important exception is for positions that have access to confidential or secure information. The rationale for these exceptions is that a person with bad credit can not be trusted around money or sensitive information that could be exchanged for money. While this argument is somewhat of a slippery slope, if these exceptions are crafted narrowly they would protect employers from some of the more serious potential consequences of hiring someone with bad credit, while still protecting employees with bad credit from discrimination in most jobs.

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148 That language comes from the proposed federal “Equal Employment For All Act.”
In order to ensure that these exceptions do not become giant loopholes, they must be worded precisely. The bill would refrain from using phrases such as “job related,” “business necessity” or “bona fide occupational qualification” without defining them, as those phrases can be interpreted in wildly different ways by the courts and allow for too much discretion.\textsuperscript{149} An ideal bill would define the minimum amount of cash or assets that an employee would have to control in order for an employer to be allowed to run a credit check for an employee in that position. The bill would also in some way define “control.” As for the exception for access to confidential and secure information, the bill also should clearly define the scope of this exception and restrict it to information that requires a security clearance or information that has been entrusted only to certain high-level employees. An exception covering anyone exposed to confidential information could include any retail employee exposed to consumer information and would be too broad.

Ideal legislation would not contain an exception for all managerial positions because such an exception could, depending on how courts interpret it, become a very large loophole and leave many employees unprotected. The link between one’s credit and one’s ability to perform as a manager seems tenuous. Additionally, the bill would not exempt any category of employer from the definition of employer, as some bills do in the case of banks.\textsuperscript{150} There is no reason to exempt banks entirely from the definition of employer under the bill, since the exception for access to financial and confidential information would cover the appropriate bank employees.

While narrow exceptions are ideal, legislators should take care not to make them unduly narrow. The policy problem with crafting exceptions that are too narrow is two-fold; first, a bill with such exceptions will not be able to pass any legislature; and, second, they may not address

\textsuperscript{149} See infra pp. 26-34.
\textsuperscript{150} See infra p. 36.
real potential threats from hiring people with bad credit for certain types of positions. For example, the potential risk in giving employees access to money or confidential information without a credit check is a serious one and should not be limited only to a certain class of such employees, such as managers, as some of the bills in state legislatures propose to do.\footnote{See CA 943, Federal Employment for All Act, infra pp. 39-40.}

Additionally, the ideal bill would not limit the liability of employers who violate the credit check law.\footnote{See infra p.40.} However, it may be possible to assuage employers’ fear about being held liable for actions by their employees that arguably could have been prevented if the employers had performed credit checks. This fear does not seem valid because it is unlikely that an employer would be found liable for not performing an illegal credit check, but perhaps that should be made explicit in the legislation. Ideally, a model bill would explicitly provide for a civil damages remedy and for attorneys fees for prevailing plaintiffs, as this would encourage those whose rights have been violated to bring a suit where they otherwise might not do so.\footnote{See Illinois Employee Credit Privacy Act.}

And as for the contentions of some opponents that a bill would increase employers’ risk of litigation, increased litigation is a price that is often paid for a new law such as this one, and should not be a reason to withhold protection from those who deserve it.

Several states recently have considered, or are still considering, various legislative proposals to limit employers’ ability to use credit histories for hiring or firing purposes. Washington, Hawaii, and Illinois are the only states to have passed credit check laws, with Washington passing its law on April 18, 2007, Hawaii on July 15, 2009, and Illinois on August 10, 2010.\footnote{Washington senate bill 5827, Hawaii Bill No. 31., Illinois House Bill 4658 (“Employee Credit Privacy Act).} Connecticut, New York Wisconsin, and Maryland currently have credit check
legislation in committee and being debated,\textsuperscript{155} while California’s Governor Schwarzenegger vetoed legislation the California assembly passed in 2009 and it seems unlikely that the legislature will be able to override that veto.\textsuperscript{156} As many as 16 states are now considering credit check legislation.\textsuperscript{157} On the federal level, Rep. Scott Cohen introduced a bill on July 10, 2009, called the “Equal Employment for All Act” that would amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks for certain employment purposes.\textsuperscript{158} The bill has 34 cosponsors and was referred to the House Committee on Financial Services in July 2009.\textsuperscript{159}

Illinois’ credit check legislation is similar in many ways to the ideal legislation described above. The Illinois bill states that the prohibition against use of credit checks does not apply if credit history is an established “bona fide occupational requirement” of a particular position, but, most importantly, the bill states unequivocally that “a satisfactory credit history is \textit{not} a bona fide occupational requirement unless at least one of the following circumstances is present [emphasis added].”\textsuperscript{160} These circumstances include positions involving: “custody” or “unsupervised access” to cash or assets of $2500 or more, “signatory power” over business assets of $100 or more per transaction, or “access to personal or confidential information, financial information, trade secrets, or state or national security information.”\textsuperscript{161} These exceptions are very specific and thorough, covering many possible situations where credit checks indeed might be necessary while attempting to limit their application as much as possible, and making the Illinois bill very close to the ideal bill in terms of how narrowly it defines its exceptions.

\textsuperscript{155} Connecticut Bill No. 5521, New York Bill A2067, and Wisconsin Bill 367.
\textsuperscript{156} Bill No. 943 passed on September 8, 2009 and Governor Schwarzenegger vetoed it.
\textsuperscript{157} Marin, \textit{supra} note 18 (noting that bills introduced in California, Maryland, and Connecticut “have been stalled amid opposition from credit bureaus and other businesses.”). \textit{See also} http://www.inc.com/news/articles/2010/03/credit-check-legislation.html
\textsuperscript{158} \textit{Equal Employment for All Act}, H.R. ___.
\textsuperscript{159} http://www.govtrack.us/congress/bill.xpd?bill=h111-3149
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
The Illinois bill also is ideal in its treatment of enforcement. It specifically addresses enforcement and is again very protective of employees, allowing any person injured by a violation of the Act to pursue civil damages as well as injunctive relief. The bill also provides for reasonable costs and attorney’s fees to be paid to a successful plaintiff. Additionally, the Illinois bill prohibits any retaliation or discrimination against an employee who files a complaint or participates in an investigation under the Act.

However, there are some aspects of the Illinois bill that are not perfect. First, the Illinois bill exempts all bank and financial institutions from the definition of employers, meaning that they don’t have to comply with the bill’s provisions for any of their employees. This is overly broad and undercuts the protections provided in the specific descriptions of the type of positions for which a credit check can be considered a “bona fide occupational qualification.” Second, the definition of “personal and confidential information” is very broad. Lastly, any “managerial” position is exempted from the credit check prohibition and that term is defined broadly and vaguely as a position that involves “setting the direction or control of the business.”

The vetoed California bill is similar to the Illinois bill, but had fewer and narrower exceptions, which may be why it was never enacted. The proposed legislation defined “job-related” as involving “access to money, other assets, or confidential information.” By narrowing the precise circumstances under which the California legislature concluded that a

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162 Id.
163 Id.
164 Id.
165 Id.
166 Id.
167 Id. [“sensitive information that a customer or client of the employing organization gives explicit authorization for the organization to obtain, process, and keep; that the employer entrusts only to managers and a select few employees; or that is stored in secure repositories not accessible by the public or low-level employees.”]
168 Id.
169 CA 943.
credit history could possibly be job-related, the proposed bill removed the discretion left in other state bills, discussed below, that allowed judges to interpret “job-related” however they saw fit.\textsuperscript{170} By defining that term in the statute, the California legislature would potentially have made it much harder for employers to assert a “job-related” need for prospective or current employee credit checks, as employers would have had to prove that the position for which they were hiring involved access to money, other assets, or confidential information. This exception for positions involving access to assets or confidential information addressed one of the concerns of the bill’s opponents – that this bill would lead to money theft or identity theft or would cause security concerns in general.\textsuperscript{171}

However, in order for a credit check to factor into an employer’s hiring decision under the California legislation, the position in question would have had to involve not only access to assets or confidential information, but also would have to have been managerial in nature or a position in city/county government or law enforcement.\textsuperscript{172} Thus, the coverage of the California bill would have been significantly broader than that of the Illinois bill, which has separate, independent exceptions for managerial positions and positions having access to financial information (thereby allowing more leeway for employers), and may explain why Governor Schwarzenegger twice vetoed the California bill.\textsuperscript{173}

The proposed federal legislation also is similar to the Illinois bill and the proposed California bill. The proposed federal bill allows employers to use credit information only when the potential job requires national security or FDIC clearance, is a position with a state or local

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\textsuperscript{170} See infra p. 40  \\
\textsuperscript{171} See Transcript, California Assembly, Senate Committee on Labor and Industrial Relations, June 24, 2009  \\
\textsuperscript{172} CA 943. This is particularly interesting since Hawaii’s bill actually exempts hiring of managerial/ supervisory employees from the entire bill – clearly there is some thought that the job of a managerial employee has some greater relation to credit history than lower level jobs do. Perhaps the thought is that managerial employees can do more harm if they are dishonest.  \\
\textsuperscript{173} California Governor Veto Message, Bill AB 2918, September 30, 2008.
\end{flushleft}
government agency that currently requires a credit check of its applicants, or involves a
“supervisory, managerial, professional or executive position at a financial institution.”
These exceptions also are quite specific like those in the Illinois bill, although given that this bill has to
pass through Congress and the Senate, it is likely there would be significant changes, and
probably weakening, of its provisions if it ever is passed. At the same time, the exception for
financial institutions is narrower than Illinois’ exception and similar to the California exception
in that it exempts only managerial positions at financial institutions. This exception strikes an
ideal balance in that it acknowledges that not every employee at a financial institution, nor every
managerial employee, has a job in which the employee’s performance can be judged by his or
her credit record. Yet, because the risk of theft of financial and confidential information is at its
highest where someone is a manager at a financial institution, such an exception is appropriate.

Other laws have exceptions that are not ideal because they are too broad. In Washington,
for example, the employer must show that credit checks are “substantially job related,” while in
Hawaii, employer credit checks must “directly relate to a bona fide occupational
qualification.”

“Substantially job related” is extremely vague, and ties the bill to changing
judicial interpretations of that term.

“Bona fide occupational qualification,” the term used in
Hawaii’s bill, refers to situations in which an employer is permitted to pursue an admittedly
discriminatory hiring policy because it is intrinsically related to the qualifications for the job (for
example, hiring only women to serve as Hooters waitresses). This formulation of the
exception still ties it to changing interpretations of that term by courts. And without any
decisions interpreting Hawaii’s or Washington’s laws, it is difficult to know exactly how state

174 Equal Employment for All Act, HR __
175 Washington senate bill 5827, Hawaii Bill No. 31.
176 See infra, pp.28-32.
courts will interpret the language of the bills, but the exceptions could potentially swallow the protections in the bills.\textsuperscript{178}

These other laws and pending legislation are also weak in their treatment of the enforcement issue. Many of them don’t specifically address enforcement, most likely because the remedy for a violation of the bill would have to come in the form of a lawsuit.\textsuperscript{179} Connecticut’s bill makes it especially difficult to hold an employer liable, as it provides that a person shall not be held liable for a violation of the bill if “he or she showed, by a preponderance of the evidence, that, at the time of the alleged violation, he or she maintained reasonable procedure to ensure compliance with this section.”\textsuperscript{180} This gives the employer an out in the case of a mistake, but presumably if the employer intended to check an applicant’s credit and use a credit report in a situation prohibited by the bill, then the employer would still be liable. The problem is that an employer might be able to argue successfully that he or she thought that the credit history was job related even if a court might not find it to be, thereby creating a significant loophole.

Most of the bills also have various types of disclosure requirements detailing when an employer must disclose to potential employees that a credit history has been requested or used.\textsuperscript{181} Yet these requirements offer no new protection, as the same disclosure requirements exist now in the Fair Credit Reporting Act and, as explained earlier, are impossible to enforce because

\textsuperscript{178} See infra, pp.28-32.
\textsuperscript{179} See Washington senate bill 5827; Hawaii Bill No. 31
\textsuperscript{180} Conn proposed bill no. 5521.
\textsuperscript{181} Connecticut proposed bill 5521 (“whenever employment is denied…because of information contained in a consumer credit report . . . the use of the .report shall so advise the consumer against whom the adverse action has been taken”); NY A2067 (does not have disclosure requirement, but says that if employee gives permission for credit check to be looked at, they have to sign a form); Wisconsin AB367 contains nothing on the subject; Washington 5827 (“a clear and conspicuous disclosure has been made in writing to the consumer before the report is procured . . . that a consumer report may be obtained for purposes of considering the consumer for employment…written statement contained in employment application materials); Hawaii and California have nothing
individuals to whom the required disclosure is not made will never learn that fact.\textsuperscript{182} Wisconsin’s proposed bill further weakens the disclosure requirements by allowing the requirement to be fulfilled by a written statement contained in employment application materials – materials that many people do not read carefully.\textsuperscript{183}

The Illinois bill, the vetoed California bill and the pending federal legislation come closest to meeting the standards of an ideal credit check statute, although none of them meet all of the criteria. The legislation enacted or under consideration in a number of other states falls even more seriously short of the ideal.

V. CONCLUSION

The increased use by employers of credit checks to screen job applicants (and current employees) is a serious public policy problem that needs to be addressed. In light of the current weak economy, any measure that makes it more difficult for people to get jobs should be scrutinized carefully and should be used only if absolutely necessary. Credit checks are especially harmful, as people often get trapped in a vicious cycle in which they can not get work and then can not pay their bills, causing their credit to worsen, which then further hurts their job prospects, and so on. And given the current housing mortgage crisis, this vicious cycle is even more prevalent. Then, of course, there is the racial bias inherent in the use of credit checks – these checks have a larger impact on minority groups, who tend to have worse credit (and more difficulty finding jobs), and therefore are more likely to get caught in that vicious cycle.

Because the link between credit checks and job performance is so tenuous, employers in general don’t seem to present very persuasive arguments in support of their use (with some

\textsuperscript{182} See, infra pp.3-4.
\textsuperscript{183} Wisconsin AB367.
specific exceptions, of course). Bad credit can occur for many reasons, including some that are beyond a person’s control, and most have no connection to job performance. There are some circumstances in which an employer might legitimately need to look at the credit history of an applicant but, as discussed above, those situations can be dealt with by exceptions in a bill that otherwise prohibits credit checks.\(^{184}\)

Given their disparate impact on minorities and the unconvincing justifications for their use, credit check policies may violate Title VII disparate impact provisions. While courts have not yet held that they do so, and may not ever so hold, the litigation approach is still something that should be considered in the public policy debate. We should be worried that these credit check policies violate the spirit of disparate impact provisions, even if courts may not find an actual violation. The entire point of disparate impact as the Court laid it out in *Griggs*, and elaborated and expanded upon in future decisions in the 1970s, was to remove barriers to minority advancement, which is why the courts no longer require in such cases that a policy have discriminatory intent as long as it has that effect.

As explained in this paper, the policy/legislative arena presents a greater chance for success in lessening the use of credit checks than litigation. There are too many obstacles to a successful Title VII disparate impact suit regarding credit checks, including statistical issues of proof, courts’ attitude towards mutability, and relaxed standards for defendants to prove business necessity. On the other hand, there has been moderate success in the legislative arena that could potentially be replicated across the country. Obviously, state-by-state legislation is more time-consuming in some ways than litigation (depending on whether it is at the state or federal level), and federal legislation would be ideal. Yet state and federal legislatures may be open to arguments that courts may not be able to consider under the strictures of Title VII as it has

\(^{184}\) *See infra pp. 33-42.*
recently been interpreted. A state-by-state approach also allows each state to craft slightly different laws, instead of having a credit check ban imposed by judicial fiat. Additionally, legislation can address the entire credit check problem at once, whereas a court decision would be limited to the specific facts of the case. Again, this is not to say that litigation should not continue, but rather that I believe that litigation could be quite effective in conjunction with legislation.

In addition to legislation, it is important for administrative agencies such as the EEOC to weigh in on this debate. This might even help goad legislatures into action. Increased social science research is needed to help with both litigation and legislation by providing more locally specific statistics to bolster arguments by litigants and by proponents arguing in favor of credit-check legislation. Public awareness is just beginning to be raised on this issue, but the more the problem is in the news and humanized, the more likely legislatures will feel pressure to pass laws to fix it. If it is presented in the right light, public sympathy may very well be on the side of passing such laws.