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AN EVOLVING WORKFORCE, AN ADAPTING LAW: TITLE VII'S COVERAGE OF GENDER IDENTITY AND CRIMINAL HISTORY

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INTRODUCTION

In the half-century since the passage of the Civil Rights Act of 1964, workplace protections under the statute have expanded in a variety of ways. Legal theories that were once considered novel have increasingly been accepted in federal courts across the country, extending coverage to more employees than ever before. Yet, an analysis of these developing issues also exposes the limitations of federal antidiscrimination law. Below, this Article examines the ways that Title VII has been applied to two particularly vulnerable groups: transgender individuals and individuals with criminal records.

I. DISCRIMINATION ON THE BASIS OF GENDER IDENTITY

Although there have been significant victories for lesbian, gay, bisexual, and transgender ("LGBT") rights in recent years, there is no nationwide protection from employment discrimination on the basis of sexual orientation or gender identity. Transgender workers in particular face high rates of discrimination: Nearly half of transgender employees in a 2011 survey reported being fired, not hired, or denied promotions based on their gender identities.[1] Indeed, Vice President Joe Biden has observed that transgender discrimination is "the civil

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[1] JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011), *available at* http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

rights issue of our time."[2] While bills to add sexual orientation and gender identity to federal law have languished in Congress, some courts and agencies have interpreted Title VII, in some cases, to provide coverage for transgender workers under sex stereotyping and other legal theories. Elsewhere, advocates continue to rely on more expansive state and local civil rights laws to vindicate their clients' rights.

A. Lack of Coverage

On its face, Title VII does not include gender identity as a protected category.[3] As a result, Title VII was originally interpreted to exclude coverage for transgender individuals.[4] In 1977, the United States Court of Appeals for the Ninth Circuit rejected a claim by a transgender worker based on Title VII's prohibition on sex discrimination, asserting that "Congress had only the traditional notions of 'sex' in mind."[5] The United States Court of Appeals for the Eighth Circuit later agreed that "Congress has not shown an intention to protect transsexuals," and held that "discrimination based on one's transsexualism does not fall within the protective purview of the Act."[6] The United States Court of Appeals for the Seventh Circuit subsequently concluded, "[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."[7]

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[2] Jennifer Bendery, *Joe Biden: Transgender Discrimination Is 'The Civil Rights Issue of Our Time*,' HUFFINGTON POST (Oct. 30, 2012, 11:16 PM), http://www.huffingtonpost.com/2012/10/30/joe-biden-transgender-rights_n_2047275.html (last updated Oct. 31, 2012, 2:17 PM) (internal quotation marks omitted).

[3] Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

[4] *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977).

[5] *Holloway*, 566 F.2d at 662–63.

[6] *Sommers*, 667 F.2d at 750.

[7] *Ulane*, 742 F.2d at 1085.

B. Sex Stereotyping

Meanwhile, beginning in the late 1980s, courts began interpreting the statute's prohibition of sex discrimination more expansively. In *Price Waterhouse v. Hopkins*,[8] the United States Supreme Court found a company liable for refusing to promote a female accountant because she did not act sufficiently feminine.[9] The Court explained:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[10]

Nearly a decade later, the Supreme Court permitted a claim of same-sex sexual harassment to proceed under Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*,[11] the Court noted, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII."[12] However, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[13]

Following this expansive approach to statutory interpretation, the Ninth Circuit later applied the sex-stereotyping theory to cover a transgender prison guard under the Gender Motivated Violence Act ("GMVA"). In *Schwenk v. Hartford*,[14] the plaintiff sued a state prison guard and several prison officials for an attempted rape.[15] Relying on Title VII jurisprudence, the court held that the rulings had been rendered moot by the Supreme Court's opinion in *Price Waterhouse*, which excluded transgender persons from protection under

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[8] 490 U.S. 228 (1989).
[9] *Id*. at 272.
[10] *Id.* at 251 (alteration in original) (internal quotation marks omitted).
[11] 523 U.S. 75 (1998).
[12] *Id*. at 79.
[13] *Id.*
[14] 204 F.3d 1187 (9th Cir. 2000).
[15] *Id*. at 1192.

antidiscrimination law.[16] Therefore, a transgender plaintiff could state a Title VII claim for discrimination based on the failure to act in accordance with sex stereotypes.[17]

In 2004, the United States Court of Appeals for the Sixth Circuit followed suit in *Smith v. City of Salem, Ohio*,[18] finding that a transgender woman had successfully pleaded a Title VII sex discrimination claim, since "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."[19] In *Smith*, the plaintiff was a lieutenant with the Salem Fire Department who was suspended after informing her supervisor that she intended to transition from male to female.[20] The court found that the plaintiff stated a claim for relief, explaining that just as discrimination against women for not wearing dresses or makeup is discrimination on the basis of sex, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[21] A year later in *Barnes v. City of Cincinnati*,[22] the Sixth Circuit upheld a Title VII claim brought by a transgender police officer against the city where she alleged that she was denied a promotion because her supervisors thought she was not masculine enough.[23] Citing *Smith*, the court held that Barnes had made out a claim for discrimination based on her failure to conform to sex stereotypes.[24] In recent years, several other courts have recognized the viability of Title VII claims for sex stereotyping brought by gender nonconforming individuals.[25]

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[16] *Id.* at 1201–02.

[17] *See id.*

[18] 378 F.3d 566 (6th Cir. 2004).

[19] *Id.* at 572, 575.

[20] *Id.* at 568.

[21] *Id.* at 574.

[22] 401 F.3d 729 (6th Cir. 2005).

[23] *Id*. at 738.

[24] *Id.* at 737.

[25] *See, e.g.*, Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–64 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Doe v. City of Belleville, Ill., 119 F.3d 563, 580–81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998); EEOC v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at

C. Gender Identity Discrimination as Sex Discrimination

More recently, courts have held that Title VII's prohibition on sex discrimination encompasses discrimination against those who have transitioned from one sex to another. For example, a federal court in the District of Columbia reasoned that just as "[d]iscrimination 'because of religion' easily encompasses discrimination because of a change of religion," discrimination because of sex should also include discrimination because of a change in sex.[26] The court accepted the petitioner's argument that "discrimination on the basis of gender identity is sex discrimination."[27] In 2012, the Equal Employment Opportunity Commission ("EEOC" or "Commission") similarly held that discrimination based on gender identity, change of sex, and transgender status, is discrimination on the basis of sex, prohibited by Title VII.[28]

Such arguments have not been as persuasive with regard to sexual orientation discrimination; courts have typically rejected allegations that Title VII's prohibition on sex stereotyping extends to employees' sexual preferences or same-sex relationships.[29] Yet just last year, a federal court in D.C. found that a plaintiff had asserted a valid Title VII claim:

> Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men . . . " and that "his orientation as homosexual had removed him from [his employer's] preconceived definition of male."[30]

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*15 (W.D.N.Y. Sept. 30, 2004); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

[26] Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (emphasis omitted).

[27] *Id.* at 306.

[28] EEOC Decision No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

[29] *See, e.g.*, Creed v. Family Express Corp., No. 3:06-CV-465RM, 2009 WL 35237, at *6 (N.D. Ind. Jan. 5, 2009) (holding that harassment based on sexual preference is not actionable under Title VII); Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003) (holding that intent to change sex is not actionable under Title VII).

[30] Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted).

D. Title VII Limitations

Not all jurisdictions have adopted the above reasoning, and indeed, some courts continue to reject Title VII claims brought by transgender individuals because they are not part of an explicitly protected category.[31] Others draw a line between allowing sex-stereotyping claims by transgender plaintiffs and statutory protection for transgender workers. For example, a federal court in Georgia allowed a claim to proceed where the plaintiff alleged that she was fired because her "desire to present as a woman at work did not comport with [her employer's] stereotype of how a biological male should dress or behave."[32] The court distinguished this claim from one based on that plaintiff's gender transition, which would not have been actionable. The court observed, "While transsexuals are not members of a protected class based on sex, those who do not conform to gender stereotypes are members of a protected class based on sex."[33] However, this distinction falls apart when one considers that transgender individuals, by definition, do not conform to stereotypes associated with their gender assigned at birth.

E. State and Local Law

In New York, state and local law provide additional protections for LGBT workers, helping to fill in the gaps of Title VII's coverage. On the state level, the New York State Human Rights Law protects individuals from discrimination based on sexual orientation, although it lacks explicit coverage for discrimination on the basis of gender identity.[34] Nonetheless, it has been interpreted broadly to include transgender persons as a protected group as far back as 1977.[35] Later courts have also

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[31] *See, e.g.*, *Creed*, 2009 WL 35237, at *10 (stating that "Title VII's prohibition on sex discrimination doesn't extend so far" as to cover discrimination on the basis of transgender status); *Mulberry Lutheran Home*, 2003 WL 21525058, at *3 (holding that the plaintiff's "intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex").

[32] Glenn v. Brumby, 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010).

[33] *Id.* at 1300.

[34] N.Y. EXEC. LAW § 291 (McKinney 2015).

[35] Richards v. U.S. Tennis Ass'n, 93 Misc. 2d 713, 722, 400 N.Y.S.2d 267, 273 (Sup. Ct. N.Y. Cnty. 1977).

held that the state antidiscrimination law covers transgender individuals though the legislature has not yet amended its definition of "sex" to explicitly say so.[36]

The protections under New York City law are even stronger. In 2002, New York City amended its City Human Rights Law to redefine "gender." The definition now includes not only actual or perceived sex, but also "a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."[37]

However, some aspects of these laws still fail to provide the comprehensive remedies contained in Title VII. The New York State Human Rights Law does not provide attorney fees,[38] which limits incentives for private counsel to take such cases on contingency. Additionally, the New York City Human Rights Law has its limits with regard to public employees.[39] For example, in *Jattan v. Queens College of City University of New York*,[40] the court dismissed the plaintiff's City Human Rights claim against Queens College, an instrumentality of New York State, holding that "the City of New York does not have the power to waive the State's sovereign immunity."[41]

II. DISCRIMINATION ON THE BASIS OF CRIMINAL HISTORY

As with gender identity, criminal history is not a protected category under federal antidiscrimination law. Yet individuals with criminal records also face significant barriers to obtaining and maintaining viable employment, especially along racial lines, and Title VII has accordingly been used to provide some protection from irrational discrimination on this basis.

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[36] *See* Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 WL 737215, at *8–9 (S.D.N.Y. Dec. 24, 1996); Maffei v. Kolaeton Indus., Inc., 164 Misc. 2d 547, 554–56, 626 N.Y.S.2d 391, 395–96 (Sup. Ct. N.Y. Cnty. 1995). *See generally* Buffong v. Castle on the Hudson, 12 Misc. 3d 1193(A), 824 N.Y.S.2d 752 (Sup. Ct. Westchester Cnty. 2005).

[37] NEW YORK, N.Y., ADMIN. CODE § 8-102(23) (N.Y. Leg. Publ'g Co. 2015).

[38] *E.g.*, N.Y.C. Bd. of Educ. v. Sears, 83 A.D.2d 959, 960, 443 N.Y.S.2d 23, 25 (2d Dep't 1981).

[39] *See* Jattan v. Queens Coll. of City Univ. of N.Y., 64 A.D.3d 540, 541–42, 883 N.Y.S.2d 110, 112 (2d Dep't 2009).

[40] 64 A.D.3d 540, 883 N.Y.S.2d 110.

[41] *Id.* at 542, 883 N.Y.S.2d at 112.

A growing number of ex-offenders are encountering obstacles to employment opportunities. After all, the United States incarcerates a larger percentage of its population than any country in the world.[42] If this trend continues, approximately 6.6% of all persons born in this country in 2001 will serve time in prison during their lifetimes.[43] These high levels of incarceration are further plagued by stark racial disparities as African Americans and Hispanics are incarcerated at a rate that is two to three times their proportion of the general population.[44] One in seventeen white men is expected to serve time in prison during his lifetime; this rate rises to one in six for Hispanic men and to one in three for African-American men.[45]

Upon release from prison, there are continuing collateral consequences of a criminal record, particularly in employment. Studies have found that seventy-five percent of employers now screen their candidates by asking them to divulge their criminal history during the hiring process.[46] Such barriers to employment not only deprive ex-offenders of a second chance and frustrate the criminal justice goals of rehabilitation and reintegration into society, but they also diminish public safety, since job instability is associated with higher crime and increased recidivism.[47]

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[42] *See* Roy Walmsley, *World Prison Population List (Tenth Edition)*, INT'L CENTRE FOR PRISON STUD., 2013, at 2–6, *available at* http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf (noting the United States prison population rate of 716 per 100,000 people is the highest in the world).

[43] THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf.

[44] *Id.*

[45] *Id.*

[46] EMPLOYEESCREENIQ, BACKGROUND SCREENING TRENDS & PRACTICES: RESULTS OF EMPLOYEESCREENIQ'S 6TH ANNUAL SURVEY OF U.S.-BASED EMPLOYERS (Apr. 2015), *available at* http://content.employeescreen.com/hubfs/ESIQ_2015_survey_final2.pdf?t=1446555272215.

[47] *See* THELTON E. HENDERSON CENTER FOR SOCIAL JUSTICE AT BERKELEY LAW, A HIGHER HURDLE: BARRIERS TO EMPLOYMENT FOR FORMERLY INCARCERATED WOMEN 7 (2008), *available at* http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1001&context=werc (noting that as unemployment increases, crime increases and as wages go up, crime is reduced); *see also* NEW YORK CITY BAR ASSOCIATION TASK FORCE ON EMPLOYMENT OPPORTUNITIES FOR THE PREVIOUSLY INCARCERATED, LEGAL EMPLOYERS TAKING THE LEAD: ENHANCING EMPLOYMENT OPPORTUNITIES FOR THE PREVIOUSLY INCARCERATED 35 (2008), *available at* http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf ("Providing secure employment with prospects for advancement to the formerly incarcerated will reduce recidivism, reduce the costs of maintaining a huge prison population (thereby

Furthermore, racial inequities persist in these hiring practices: Black applicants with criminal records are hired at lower rates than whites with the same criminal history, and blacks without any criminal conviction are hired at rates similar to or even lower than whites with convictions.[48]

Two main causes of action are available to employees to challenge employers' bans on hiring applicants with criminal records. Under federal law, there is a viable cause of action based on the disproportionate racial impact of the practice. Under state law, applicants for employment are entitled to an individualized consideration of their criminal records, regardless of race.

A. Disparate Impact Analysis

Title VII prohibits discrimination by employers based on race, color, religion, sex, or national origin.[49] In 1971, the Supreme Court interpreted Title VII to proscribe not only "overt discrimination[,] but also practices that are fair in form, but discriminatory in operation."[50] Therefore, even "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."[51]

Under this framework, a plaintiff must first establish a prima facie case of disparate impact.[52] In this context, national data can be used to support a finding that criminal record exclusions have a disparate impact based on race and national origin. Applicant flow information, workforce data, criminal history background check data, demographic availability statistics, incarceration and conviction data, and relevant labor market statistics can all be used to create a prima facie showing of disparate impact. The issue is not whether the workforce is racially balanced,[53] but rather whether policy or practice deprives

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lowering taxes or reducing the pressure to raise them), strengthen family ties, and enhance public safety—all of which are important social objectives.").

[48] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 fig.6 (2003).

[49] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

[50] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[51] *Id.* at 430.

[52] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[53] Connecticut v. Teal, 457 U.S. 440, 442 (1982) (holding a "bottom line" racial balance in the workforce "does not preclude . . . employees from establishing a prima

a disproportionate number of Title VII protected individuals from employment opportunities.[54] Additionally, in assessing applicant data, a lack of applicants may also be considered probative because an employer's "application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying" because of a discriminatory policy or practice.[55]

If a plaintiff establishes a prima facie case of disparate impact, the second step of the analysis looks for employer-produced evidence that the discriminatory policy is job related and consistent with business necessity.[56] In *Griggs v. Duke Power Co.*,[57] the Court focused on the lack of a nexus between the hiring requirements and the successful performance of the job.[58] The Court held that the job requirement must "bear a demonstrable relationship to successful performance of the jobs for which it was used" and "must measure the person for the job and not the person in the abstract."[59]

Decisions by the Eighth Circuit and Third Circuit clarify the business necessity analysis in the context of criminal history bans. In 1975, in *Green v. Missouri Pacific Railroad Co.*,[60] the Eighth Circuit found that Title VII prohibited an employer from "follow[ing] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense."[61] The *Green* panel identified three factors ("*Green* factors") that were relevant in the analysis of whether

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facie case" of disparate impact, "nor does it provide [an] employer with a defense to such a case" (internal quotation marks omitted)).

[54] *Id.* at 453–54.

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

[56] *Id.* at 331.

[57] 401 U.S. 424 (1971).

[58] *Id.* at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."); *see also Dothard*, 433 U.S. at 331 n.14 (interpreting *Griggs* to require a showing that the "discriminatory employment practice . . . [is] necessary to safe and efficient job performance to survive a Title VII challenge"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) ("[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' " (quoting 29 C.F.R. § 1607.4(c) (2015))).

[59] *Griggs*, 401 U.S. at 431, 436.

[60] 523 F.2d 1290 (8th Cir. 1975).

[61] *Id.* at 1293, 1298–99.

the exclusion was job related for the position in question and consistent with business necessity: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct or the completion of the sentence, and (3) the nature of the job held or sought.[62]

The Third Circuit, in *El v. Southeastern Pennsylvania Transportation Authority*,[63] further developed the *Green* factors. The plaintiff, Douglas El, after being rejected for the job as a paratransit driver, challenged Southeastern Pennsylvania Transportation Authority's ("SEPTA") policy of excluding everyone convicted of a violent offense.[64] SEPTA terminated El after SEPTA learned of his conviction of second-degree murder forty years prior when El was fifteen.[65] Despite "reservations about [the] policy in the abstract," the Third Circuit affirmed the district court's grant of summary judgment in favor of SEPTA.[66] Title VII, according to the court, requires "the policy under review [to] accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[67] Although it affirmed the grant of summary judgment, the court noted that if El had "hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve."[68] The Third Circuit distinguished the employer's policy in *El* from the employer's policy in *Green* by emphasizing the fact that paratransit drivers have access to "vulnerable members of society."[69]

Finally, even if an employer demonstrates that its policy is job related for the position in question and is consistent with business necessity, the plaintiff may still prevail by showing that the employer's legitimate goals can be served by a less discriminatory "alternative employment practice."[70]

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[62] *Id.* at 1297 (finding that the Iowa provision in question suffered from such narrowing criteria).

[63] 479 F.3d 232 (3d Cir. 2007).

[64] *Id.* at 235–36.

[65] *Id.*

[66] *Id.* at 235.

[67] *Id.* at 245.

[68] *Id.* at 247.

[69] *Id.* at 243, 245.

[70] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988).

B. EEOC Regulations

In April 2012, the Equal Employment Opportunity Commission published EEOC Enforcement Guidance 915.002 ("Guidance") regarding employers' use of criminal records in employment screening.[71] The Commission interpreted Title VII to call for a "fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity."[72]

The Commission provided two ways by which to defend a disparate impact claim against a policy of exclusion based on criminal history: (1) validation studies of the policy pursuant to federal regulations or (2) consideration of at least the three *Green* factors, plus an individualized assessment of applicants.[73] An individualized assessment should generally include three features. The employer should: (1) inform the applicant that he may be excluded because of past criminal conduct, (2) provide an opportunity to the individual to demonstrate that the exclusion does not properly apply to him, and (3) consider whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.[74]

While noting that Title VII does not require an individualized assessment, the EEOC identifies types of additional information to consider, including the age of the applicant at the time of the offense, evidence of rehabilitation, and the facts and circumstances of the offense.[75]

Generally, the EEOC advises employers to eliminate blanket exclusions based simply on the existence of a criminal record.[76] The Commission recommends that an employer develop a "narrowly tailored written policy and procedure" for screening applicants and employees in a way that identifies essential job requirements, lists the specific offenses that may demonstrate

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[71] *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), 2012 WL 1499883.

[72] *Id.* at *12.

[73] *See id.* at *2.

[74] *Id.* at *17.

[75] *Id.*

[76] *See id.* at *16.

unfitness for performing such jobs, and identifies the duration of the exclusions.[77] The EEOC further notes that justifications for the policy and procedures should also be recorded.[78]

C. State Law

Meanwhile, New York Correction Law Article 23-A, passed in 1976, provides comprehensive coverage for all job applicants with a criminal history requiring an individualized analysis and obviating the need for plaintiffs to provide statistical analysis of racial impact.[79] Under article 23-A, an employer may not deny or terminate employment on the basis of prior criminal convictions, except under two narrowly defined circumstances:

> (1) [T]here is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.[80]

Furthermore, article 23-A codifies the *Green* factors and additional relevant information which employers must consider:

> (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
> (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
> (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
> (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
> (e) The age of the person at the time of occurrence of the criminal offense or offenses.
> (f) The seriousness of the offense or offenses.
> (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

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[77] *Id.* at *23.
[78] *Id.*
[79] *See* N.Y. CORRECT. LAW §§ 750–755 (McKinney 2015).
[80] *Id.* § 752.

> (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.[81]

Article 23-A applies to all governmental and private employers operating in New York State that employ ten or more individuals.[82]

III. CONCLUSION

Federal courts have taken laudable steps toward addressing inequality in the workplace by interpreting Title VII to provide coverage for disadvantaged groups that fall outside the statutorily proscribed categories. Yet given the limits on the law, state and local antidiscrimination statutes continue to play a role in helping employees vindicate their civil rights. The examples of transgender employees and job applicants with criminal records show that federal antidiscrimination law has in some ways adapted to address current civil rights issues, but it still has a long way to go.

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[81] *Id.* § 753(1).
[82] *Id.* § 751.