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Reconsidering Disparate Impact Under Title VII: Business Necessity as Risk Management

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INTRODUCTION

The theory of disparate impact, despite its reaffirmation in the Civil Rights Act of 1991,[1] has fallen into an inauspicious state of uncertainty. The landmark decision in *Washington v. Davis* called into question the doctrine's constitution-

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1. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 666 (2001) ("While a majority of the Supreme Court is perhaps inclined toward a somewhat narrower conception of disparate impact liability, Congress has made clear its preference, which, in this area of statutory law, is of course controlling.").

al legitimacy, and, ever since, disparate impact has become increasingly difficult to reconcile with conservative equal protection jurisprudence.[2] Specifically, the theory underlying disparate impact—preventing facially neutral practices from perpetuating adverse effects on protected classes—conflicts with an understanding of equal protection as "more individualistic, more formal, and less concerned with history and social structure."[3] But the theory underlying disparate impact focuses on discriminatory *effect*, as opposed to *intent*, which necessarily entails recognition of hierarchal structures of inequality. Disparate impact transcends discrete instances of discrimination in its larger aim to achieve integration. The legal controversy stems, in part, from this ambitious and affirmative scope.

To make matters worse, the doctrine's efficacy appears outmoded. While disparate impact under Title VII remains an operative method of recourse for employment discrimination, hiring cases are rarely litigated.[4] Perhaps this is a result of a problematic evidentiary framework.[5] The prima facie requirements

2. Washington v. Davis, 426 U.S. 229, 239 (1976) (declining to read the disparate impact theory of harm into the Equal Protection Clause of the Fourteenth Amendment). *See also* Ricci v. DeStefano, 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."). Scalia's forewarning, however, has not exactly come to pass. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, for example, the Court held that disparate impact claims are cognizable under the Fair Housing Act. 135 S. Ct. 2507, 2525 (2015). But the Court also imposed limitations at the pleading stage to prevent abusive claims, noting that lower courts should "avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." *Id.* at 2524. The Court's analysis trends toward a more defendant-friendly standard, bringing it in line with *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which, as I will argue, rests on questionable theoretical grounds.

3. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493, 498 (2003).

4. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1497 (1996).

5. The disparate impact evidentiary framework consists of three prongs. First, the plaintiff carries the initial burden of establishing a prima facie case of discrimination, requiring that the plaintiff establish that (1) the plaintiff is a member of a protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite possessing the requisite qualifications, the plaintiff was rejected; and (4) after rejection, the position remained open, and the employer continued to seek applicants or hired someone outside the protected class. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Second, once the plaintiff has established a prima facie case, the defendant may rebut the inference of discrimination by showing that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *cf.* Tex. Dep't of Cmty.

for demonstrating a statistical disparity have been heightened;[6] the defendant's burden of persuasion on the business necessity defense has been weakened;[7] and, practically speaking, during hiring many "adverse actions occur during the pre-offer period, when job candidates have little explicit knowledge of why they were denied an interview or job, and may, in fact, never know the true reason for their rejection."[8] Under the burden-shifting evidentiary framework, courts do not want to engage in an arbitrary interpretation of statistics, nor do they want to tell businesses how they should handle employment practices. Such judicial decision-making invites an ex post, ad hoc approach without clear guidelines on culturally contested matters of race and social status. Courts unwilling to make these decisions find an escape in disparate impact's malleable doctrine.

A timely and consequential manifestation of this legal attrition occurs when employers discriminate on the basis of criminal history. The tough-on-crime, "broken windows" approach to criminal justice has disproportionately impacted marginalized communities.[9] Blacks, for example, "constitute approximately 13% of the U.S. population but account for 28% of arrestees and 45% of persons convicted of crime."[10] Employers then use readily accessible criminal records of these arrests and convictions to screen out ex-offender applicants.[11] Exclusion-

Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (analyzing the employer's burden of production in the disparate treatment context). Third, if the defendant successfully rebuts the inference of discrimination, then the plaintiff may still prevail by demonstrating an "alternative employment practice" that has a less severe disparate impact while still fulfilling the employer's legitimate business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2012).

6. *See* Ayres & Siegelman, *supra* note 4, at 1492.

7. *See* Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 319 (1998).

8. Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 926 (2014).

9. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6 (2001) ("The broken windows theory, aggressive misdemeanor arrests, and intensive stops and frisks have become not a *substitute* but a *supplement*—a supplement that feeds into and itself produces a dramatic increase in detentions, arrests, and criminal records. What we are left with today is a system of severe punishments for major offenders and severe treatment for minor offenders and ordinary citizens, especially minorities, a double-barreled approach with significant effects on large numbers of our citizenry.").

10. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 285 (2015).

11. Approximately 73% of employers conduct criminal background checks on all job candidates. *See* PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER L. CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 3 (Apr. 2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf.

ary hiring policies reinforce existing inequalities in the labor market, which, in turn, exacerbate the difficulty of reintegration into society. An estimated 55% of young black ex-offenders are unemployed in any given week,[12] and employment losses due to criminal records cost the economy a staggering $57 billion to $65 billion per year.[13] Considering the more than 600,000 offenders released each year and the countless others still under supervised release, an ex-offender underclass greatly affects the U.S. labor market.[14] Both the sheer magnitude and the racially disproportionate effects of these costs warrant reconsideration of disparate impact liability—the purpose of which is to remove functional inequity. In the past, ex-offenders have encountered limited success in pursuing disparate impact claims against exclusionary hiring practices.[15]

I posit that disparate impact's futility can be attributed to the current state of the business necessity defense. I do not deny that heightened pleading requirements also pose problems for meritorious claims, but that discussion is beyond the scope of this Note. In originally endorsing disparate impact under Title VII, the Supreme Court offered a simple explanation of the defendant's burden: "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."[16] But, over time, the courts have failed to expound a consistent interpretation of business necessity,[17] a problem exacerbated by

12. This statistic is dated, coming from a well-known 1979 National Longitudinal Survey of Youth. There is unfortunately a paucity of data on this subject. S*ee* HARRY J. HOLZER ET AL., URBAN INST., EMPLOYMENT BARRIERS FACING EX-OFFENDERS 3 (2003), http://www.urban.org/uploadedPDF/410855_holzer.pdf.

13. *See* JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 14 (Nov. 2010), http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.

14. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS PRISONERS IN 2013, at 10 (Sept. 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf.

15. *See*, *e.g.*, Green v. Mo. P.R. Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (holding that employment discrimination on the basis of prior convictions constituted racial discrimination in violation of Title VII); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 402 (C.D. Cal. 1970) (finding disparate impact liability because a company's exclusionary hiring policy based on arrest records was not justified by business necessity), *aff'd*, 472 F.2d 631 (9th Cir. 1972); Waldon v. Cincinnati Pub. Sch., 941 F. Supp. 2d 884, 889 (S.D. Ohio 2013). It is important to note, however, that Title VII does not prohibit employment discrimination on account of criminal history *per se*. *See* 42 U.S.C. § 2000e-2(a) (2012).

16. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).

17. *Compare* Nash v. Consolidated City of Jacksonville, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995), *aff'd*, 85 F.3d 643 (11th Cir. 1996) ("The business necessity doctrine is very narrow . . . . An employer does not meet its burden of establishing the job relatedness of a test by merely showing a rational basis for the test."), *with* Donnelly v. R.I. Bd. of Governors for Higher Educ., 929 F. Supp. 583, 593 (D.R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997) (holding that a defendant must demonstrate

"confusion over the purpose and the applicability of the doctrine"—including confusion over the definitional elements of business necessity.[18] Congress unfortunately compounded the problem by codifying the doctrinal confusion in the Civil Rights Act of 1991.[19] The current articulation of business necessity remains unclear, and, without neutral, predictable rules for adjudication, business necessity inevitably devolves into a reasonableness determination on the margins. Legally, the business necessity threshold is too low: an indeterminate standard allows employers to escape liability by pointing to any abstract risk associated with hiring an ex-offender. Considering the difficulty of statistically showing a prima facie case of disparate impact, the addition of a weakened business necessity risks under-inclusivity—giving courts, already hostile to employment cases, far too much subjective leeway to dispose of valid claims. Doctrinally, an artificially low burden of *persuasion* collapses into disparate treatment's defensive burden of *production*, obscuring culpability distinctions under Title VII.[20] And, conceptually, the current business necessity defense is funda-

that "the challenged practice is reasonably necessary to achieve an important business objective"). *See also* discussion *infra* Part II.A.

18. Lye, *supra* note 7, at 319.

19. Since the deliberations proved contentious, Congress stipulated that courts could not consider any document other than an interpretive memorandum for legislative history purposes. *See* Civil Rights Act of 1991, Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(k) (2012)). This interpretive memorandum is unhelpful and nearly tautological, declaring that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed. 2d 733 (1989)." 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991). The disparate impact implications of the Civil Rights Act of 1991 have been a source of scholarly debate. *Compare* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1157 (1993) (arguing that *Wards Cove* is still good law) *with* Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 910-13 (1993) (contending that *Wards Cove* is no longer controlling).

20. *See* Lye, *supra* note 7, at 348 n.168 (listing cases in which courts conflate disparate impact with disparate treatment). While the distinction between disparate impact and treatment has never been clear, the application of the burdens of proof is supposed to be different. *See Wards Cove*, 490 U.S. at 670 (Stevens, J., dissenting) ("In a disparate-treatment case there is no 'discrimination' within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. . . . In contrast, intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case.").

mentally at odds with the purpose of disparate impact doctrine. The watered-down standard indulges the very presumption that disparate impact is meant to counter: that artificial barriers in the labor market may reinforce systemic discriminatory effects.

Rather than admit defeat on disparate impact, as some scholars have suggested,[21] I am reluctant to abandon the existing framework without first attempting to advance a proper understanding of the doctrine. Even if the practical efficacy of the doctrine remains dubious, "law's symbolic or expressive functions are sometimes more important than its immediate practical consequences," according to Professor Richard Primus, "and the story we tell about disparate impact doctrine still plays a significant role in shaping how we think about the nature and purposes of antidiscrimination law."[22] Indeed, disparate impact conveys a powerful social meaning: discrimination is less about subjective intentions and more about the objective status of historically disadvantaged populations. This "more robust" conception of disparate impact is precisely what needs to be sustained in the face of a less amenable antidiscrimination canon.[23] Perhaps now more than ever, disparate impact's contemplation of systemic effects is needed to ensure equality of opportunity in today's society—a society that often overlooks enduring yet less perceptible discrimination in its desire to become post-racial.

But here this Note departs from the prevailing disparate impact literature. This Note is less about the idea of disparate impact writ large—which has been overwritten for a relatively narrow issue of law[24]—and more about an analytic construct that offers a novel contribution to antidiscrimination scholarship. This Note looks to reconceptualize disparate impact's doctrinal framework by extrapolating from the Third Circuit's notion of "risk management" as an in-

21. *See* Paul-Emile, *supra* note 8, at 935 (arguing that the disparate impact doctrine should be replaced with the health law framework embodied by the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, which regulates "the flow of information that may form the basis of an adverse employment decision in order to preemptively prevent discrimination, while ensuring equality of opportunity"). This would require a statutory reform; legislative approbation is, of course, unlikely given the current political environment. *See also* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 767-82 (2006) (contending that disparate impact theory was premised on the mistaken belief that a legal doctrine could achieve politically contested forms of integration and affirmative action).

22. Primus, *supra* note 3, at 499.

23. *Id.*

24. In a similar vein, affirmative action, which is often closely associated with disparate impact theory, suffers from the same criticism. *See* Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 813 (1998) (characterizing affirmative action as one of the most oversaturated areas of legal scholarship).

terpretation of business necessity.[25] I define risk management as a conceptual model or procedure in which institutions must determine whether the benefits of hiring an ex-offender are reasonably proportional to the costs. This method is broader than traditional cost-benefit analysis and contemplates an evaluation of competing interests by the factfinder. Risk management provides a workable heuristic for measuring exclusionary hiring practices against ex-offenders and, quite possibly, a solution to the indeterminacy of disparate impact's malleable doctrine.

Risk management differs from the current articulation of business necessity in two crucial ways. First, risk management offers a systematic, process-based method for adjudicating cases under Title VII. The concept lays out neutral criteria for empirically testing whether a challenged employment practice is sufficiently related to business necessity or is a mere pretext for discrimination. Second, risk management reconciles the tension underlying business necessity, striking a compromise between the "balancing" of "competing social and entrepreneurial interests" and "forc[ing] us, and the courts, to recognize the stakes of the decision."[26] The concept attempts a reconciliation of these interests—all while the *process* itself remains apathetic to the political undertones surrounding disparate impact. The truth is that imposing disparate impact liability represents a Calabresian tragic choice of sorts—between the economic risks associated with hiring an ex-offender and the moral value our society places on fair opportunity in the labor market.[27] Risk management does not care about society's response to this tragic choice; rather, it cares about *how* we arrive at that response. Indeed, getting the procedure right may at least mean minimizing the conflict inherent in tragic choices.[28] Ultimately, risk management moves us away from a problematic doctrine and towards a more robust procedure that seeks an optimal level of liability through a clear, bright-line standard. A more robust procedural framework will, in turn, properly complement the substantive, remedial objectives of Title VII.

This Note proceeds in two Parts. First, I lay out a working model of risk management, which would require employers to think more carefully about criminal recidivism and approximate the costs and benefits of employing an ex-offender. Second, I develop a legal justification. Risk management, as I argue, accords with a proper doctrinal understanding of disparate impact, consistent with controlling precedent and antidiscrimination law. Taken together, the ar-

25. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 244 (3d Cir. 2007).

26. Lye, *supra* note 7, at 358.

27. *See generally* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978).

28. As an analogue, the concept of deterrence in criminal law arguably provides neutral justifications for outcomes and, in doing so, sanitizes "incessant illiberal conflict over" deeply-entrenched values by displacing expressive moralizing in the law. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999). My hope is that risk management may be a way to avoid cognitive illiberalism in enforcing civil rights.

gument counsels a higher threshold for business necessity in the hopes of reducing the stigma of a criminal history and, ultimately, improving fair opportunity in the labor market.

I. Defining Risk Management: Procedural and Normative Dimensions

This Part sketches what a functional policy of risk management should look like. I first offer an instructive case study to analyze the practice of risk management through the lens of cost-benefit analysis. I then offer some theoretical notes to distinguish risk management from traditional cost-benefit analysis. It is important to note that cost-benefit analysis does not underpin risk management as a matter of law, nor is it necessarily normative for the purposes of evaluating business necessity. I merely use cost-benefit analysis to illustrate a broader point about how risk management makes use of an empirical proportionality analysis. Finally, I briefly turn to the normative dimension of risk management, addressing a very important question: whose judgments should control for the purposes of risk management? This discussion is also not meant to be exhaustive or dispositive; rather, it is only a starting point to better understand business necessity as risk management.

A. El v. Southeastern Pennsylvania Transportation Authority*: A Case Study*

The Third Circuit's decision in *El v. Southeastern Pennsylvania Transportation Authority* provides an illustrative example of disparate impact's problematic doctrine. Douglas El, a black paratransit driver, brought suit alleging a violation of Title VII after Southeastern Pennsylvania Transportation Authority (SEPTA) terminated him upon discovery of his forty-year old second-degree homicide conviction.[29] Notably, El, who was fifteen at the time of this gang-related homicide, had only served three-and-a-half years, and the court intimated that he might not have been the triggerman.[30] After El demonstrated a prima facie case of discrimination, the Third Circuit interpreted the business necessity defense to require that "the policy under review accurately distinguish between applicants that pose an *unacceptable level of risk* and those that do not."[31] Challenged hiring practices, in other words, "ultimately concern the management of risk."[32] This novel idea of business necessity as risk management begs further analysis. Curiously, however, the court rather summarily disposed of the plaintiff's claim and affirmed summary judgment for SEPTA.

29. *El*, 479 F.3d at 232, 235-36.

30. *Id*.

31. *Id*. at 245 (emphasis added).

32. *Id*. at 244.

The *El* decision has received an inordinate amount of attention in the literature—which is troubling, given its procedural disposition and many factual quirks.[33] The *El* court, in particular, intimated bad lawyering, questioning why the plaintiffs failed to refute SEPTA's business necessity.[34] The case is an unfortunate vehicle, which helps to explain why the court, perhaps inadvertently, did not hold the defendant to its burden of persuasion. The end result more closely tracks disparate treatment's defensive burden of production, which entails a perfunctory showing of an employer's legitimate reason for an adverse employment decision. SEPTA merely points to a general risk of recidivism to justify its policy of categorically excluding ex-offenders convicted of violent crimes. Although the plaintiff could still have shown a less injurious alternative, no one at SEPTA could advance a tailored, let alone coherent, policy rationale.[35] This is where the concept of risk management comes into play.

As a preliminary matter, I propose the following definition of risk management: a procedure in which institutions analyze (preferably ex ante) whether the benefits of hiring an ex-offender are *reasonably proportional* to the costs. This definition provides a benchmark for determining acceptable levels of risk and, as I will argue, is derived from existing antidiscrimination law.[36] On one hand, the proportionality component represents a process in which employers must think carefully about the qualitative and quantitative aspects of accommodating an ex-offender's risk. Employers should tailor a discriminatory hiring practice to a job-related risk, making sure to proportionally weigh the costs and benefits of accommodating that risk. Recidivism rates, the amount of time passed since an arrest or conviction, the nature of the underlying offense, and

33. *See*, *e.g*, JACOBS, *supra* note 10, at 277; STEVEN RAPHAEL, THE NEW SCARLET LETTER?: NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD 51 (2014); Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 30-31 (2011); Timothy M. Cary, *A Checkered Past: When Title VII Collides With State Statutes Mandating Criminal Background Checks*, 28 ABA J. LAB. & EMP. L. 499, 503-05 (2013); Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 987-88 (2013); Johnathan A. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 209-10 (2014); Tiffany R. Nichols, Note, *Where There's Smoke, There's Fire?: The Cloud of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance on Criminal Records Under Title VII*, 30 GA. ST. U. L. REV. 591, 602-04 (2013).

34. *El*, 479 F.3d at 247.

35. With ill-defined business necessity, it might become more difficult for the plaintiff to demonstrate and validate the third prong of disparate impact's burden-shifting framework, a less injurious alternative. *See* Anita M. Alessandra, Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1783-84 (1989).

36. *See* discussion *infra* Parts II.A-B.

the type of job sought should inform this calculus. Assuming that a rough proportionality is met, the question then becomes whether the benefits and costs of hiring an ex-offender are reasonable in a case-specific context, which, in turn, depends on a deliberative process that accounts for a community's norms and expectations. This is where the reasonableness component of risk management comes in, allowing juries to settle factual disputes and, in doing so, to balance empirical findings with expressive considerations of risk and equity. With these procedural and normative dimensions of risk management, we now have a rough conceptual framework in place.

How, then, would risk management apply when employers discriminate on the basis of criminal history? Since employers are often concerned with tort liability for negligent hiring or retention, they should have the burden of devising a carefully tailored hiring policy when the cost of doing so is less than the cost of liability, discounted by the probability of an ex-offender recidivating. In this sense, employers may be the least cost avoider in a larger scheme to optimally deter risky negligence.[37] Employers are best able bear the costs of an employee's risk up to the point at which the cost of accommodation is greater than the cost of negligence. When the accommodative costs associated with hiring an ex-offender become unreasonably high in this assessment, then the employer's business necessity improves welfare and is probably justified. With this understanding, a factfinder might then excuse disparate impact under the doctrinal framework of Title VII. This empirical understanding of risk management, in turn, supports an objective threshold for business necessity.

Recall the fact pattern in the *El* case. SEPTA believed that hiring Douglas El, who had a forty-year-old homicide conviction, would potentially harm its vulnerable paratransit customers. The concern may appear reasonable at first glance, but a proper understanding of business necessity dictates otherwise. SEPTA should empirically demonstrate that Douglas El poses a significant risk, the costs of which foreclose accommodation. SEPTA did call expert witnesses, who relied on recidivism statistics from the U.S. Department of Justice that tracked ex-offenders for only three years.[38] Referring to Douglas El, however, the court noted that these "statistics do not demonstrate that someone in this position—or anything like it—is likely to recidivate."[39] In a footnote, the court further challenged the empirical sufficiency of SEPTA's flawed assessment:

> SEPTA too heavily emphasizes the sixth alleged fact: that it is impossible to predict which criminal will recidivate. This fact, if proved, is of little use because it is also impossible to predict which *non*-criminal will commit a crime. What matters is the risk that the individual presents, taking into account whatever aspects of the person's criminal history are relevant. Thus, if screening out applicants with very old violent criminal convictions accurately distinguishes between those who

37. *See* Paul-Emile, *supra* note 8, at 945-46.

38. *El*, 479 F.3d at 246.

39. *Id.*

> present an unacceptable risk, then reliance on this factor is appropriate; if the criterion is inaccurate or overbroad in the case of very old convictions, then it is inappropriate for Title VII purposes.[40]

A factfinder could arguably stop right here. SEPTA failed to accurately show that the particular risk of hiring Douglas El was unacceptably higher than hiring a non-offender. A business necessity defense that simply ignores the remoteness of a conviction is inappropriate under Title VII. A simple cost-benefit analysis, moreover, shows that SEPTA's exclusion of ex-offenders with remote convictions is unjustified. It turns out that the time to redemption—the point at which an ex-offender's probability of a new conviction converges or intersects with a non-offender's probability of conviction—for offenders who were between the ages of seventeen and twenty-one when the underlying offense occurred is approximately thirteen to sixteen years.[41] Since Douglas El was fifteen years old at the time of his conviction in 1960, he presumably reached the point of redemption when he applied to work at SEPTA in 2000. He therefore shared a baseline probability of conviction with the general population—roughly 1.75%.[42]

If we multiply this probability times the cost of something terrible happening—say, the cost of a negligent hiring suit against SEPTA following a violent incident on the job—the risk is monetized at approximately $28,000.[43] This represents the cost of accommodating an ex-offender like Douglas El. Notably, we have no compelling reason to believe that this cost is any higher than employing a non-offender from the general population. If the factfinder can infer that the benefits of hiring Douglas El are *reasonably proportional* to $28,000, then SEPTA fails to justify its business necessity.[44] The reasonableness compo-

40. *Id.* at n.16.

41. Bushway et al., *supra* note 33, at 51. *Compare* Megan C. Kurlychek et al., *Enduring Risk: Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007) (finding that the point of redemption for ex-offenders occurs seven years after arrest or first contact with police), *with* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 335, 349-50 (2009) (concluding that offenders arrested in New York in 1980 for robbery, burglary, or aggravated assault had a declining probability of recidivism with time clean).

42. *See* Bushway et al., *supra* note 33, at 36.

43. For this calculation, I approximate the average settlement cost for a negligent hiring suit, which is $1.6 million. *See* Mary L. Connerley et al., *Criminal Background Checks for Prospective and Current Employees: Current Practices Among Municipal Agencies*, 30 PUB. PERSONNEL MGMT. 173, 174 (2001).

44. I purposely do not define the benefits of hiring an ex-offender, because it is ultimately up to the factfinder to determine these benefits within reason. But they might include increased labor productivity, tax breaks, and other intangible social benefits. *See, e.g.*, U.S. DEP'T OF LABOR, EMPLOYER'S GUIDE TO THE WORK OPPORTUNITY TAX CREDIT (Aug. 2014), http://www.doleta.gov/business/incentives/opptax/PDF/WOTC_Employer_Guide.pdf.

nent ensures that an empirical analysis cannot ignore the intangible social benefits and costs of hiring an ex-offender. On the one hand, the public may perceive a danger in the employment of ex-offenders. This perception, whether rational or not, creates real-life costs when the public refrains from commercial activity.[45] Gainful employment for ex-offenders, on the other hand, improves well-being, provides an immeasurable dignitary value, and reduces recidivism, which, in turn, decreases corrections costs.[46] A factfinder is best suited to intuitively perform this balancing act and, in the case of Douglas El, could have imposed disparate impact liability, since the risk was relatively insignificant given the remoteness of the underlying offense and the importance of providing a second chance. To avoid liability, SEPTA should have tailored its exclusionary policy to reflect points of redemption for prospective employees with criminal histories. In reality, however, SEPTA used an arbitrary hiring policy to functionally disadvantage Douglas El and others like him.

Businesses may find it practically difficult to conduct and quantify these risk assessments. Rates of recidivism and points of redemption estimates are variable, not immutable characteristics of individuals.[47] If business necessity requires some degree of empirical validation, as I will argue, then employers should at the very least try to use risk management, starting with what we do know about recidivism. In New York State, for example, the point of redemption for an eighteen-year-old convicted of burglary is only about 3.8 years.[48] The time to redemption increases for more violent crimes: 4.3 years for aggravated assault and 7.7 years for robbery.[49] We also know that time to redemption is inversely related to the number of offenses and an ex-offender's age.[50] How should an employer make sense of this information? Perhaps a good starting point is to reform exclusionary hiring policies that adversely affect ex-offenders well past their point of redemption. A more exacting look into the costs and benefits can be used for all other ex-offenders who have not reached their point of redemption for a particular offense. Employers will need better criteria for appraising the monetary costs and benefits of accommodating ex-offenders.

45. *Cf.* CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE 171 (2014) (discussing the costs of societal fears under the cost-benefit approach).

46. *See* PEW CTR. ON THE STATES, PEW CHARITABLE TRS., STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 26 (Apr. 2011), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2011/PewStateofRecidivismpdf.pdf (suggesting that if states could reduce recidivism rates by just 10%, they could, in total, save $635 million in corrections costs annually).

47. *See* Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 172 (2014).

48. S*ee* Blumstein & Nakamura, *supra* note 41, at 339. The point of redemption is simply defined as the point at which "the risk of reoffending has subsided to the level of a reasonable comparison group." See *id.* at 332.

49. *See id.*

50. *See* Bushway et al., *supra* note 33, at 52.

But, fortunately, data-driven risk management is already becoming the new administrative norm.

The criminal justice system, in particular, has recently made a shift towards incorporating risk management into its policymaking apparatus.[51] Reconciling the public interest in safety, rehabilitation, and an efficient expenditure of resources is the new paradigm, and "[t]he ideology of risk is now considered at the heart of such a balancing act. Information about a defendant's risk of recidivism informs an expanding number and variety of criminal justice decisions."[52] The Federal Post-Conviction Risk Assessment, for example, uses algorithmic scoring of a variety of factors—including employment, education, substance abuse history, and family status—to better inform policies for ex-offenders on supervised release.[53] The move towards data-driven policies creates the unexplored possibility for institutions like the Equal Employment Opportunity Commission (EEOC) to distribute information on criminal risk to large employers. Better data systems will help employers tailor exclusionary policies against ex-offenders in proportion to their individual risk. The more sufficient and reliable the data, the more weight a factfinder should be entitled to give to a business necessity. In an era of excessive criminalization, risk management can be used to define what constitutes an *actual* business necessity. When no business necessity exists, we can remove the stigma of a criminal record, achieving equitable opportunities in the labor market.

B. Distinguishing Risk Management From Cost-Benefit Analysis

Despite the possibility for better assessment, risk management does not countenance a traditional, welfare-maximizing cost-benefit analysis. The Third Circuit only requires hiring policies that "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not," implying the kind of rough proportionality analysis found in Americans with Disabilities Act (ADA) cases.[54] But examining business necessity through the theoretical lens of cost-benefit analysis will prove to be a valuable exercise, elucidating the larger issues at stake.

Cost-benefit analysis is often the prevailing norm in risk management. In managing tort and environmental risk, for example, cost-benefit analysis seeks economic efficiency—the point at which the marginal cost of a particular risk

51. *See* Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 88 (2015) ("The contemporary approach seeks to achieve multiple goals: manage costs and resources, constrain overdependence on imprisonment, utilize effective alternative rehabilitative programming, reduce recidivism risk, and simultaneously improve public safety.").

52. *Id.*

53. *Id.* at 94.

54. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 245 (3d Cir. 2007).

regulation is equal to its marginal benefit. Cost-benefit analysis is considered desirable for its consistency, transparency, and procedural fairness. By treating all cases alike, it eliminates arbitrary differences in outcomes that stem, in part, from our own cognitive biases in measuring risk. In fact, the public's perception of risk often differs from that of the scientific community. Despite the infinitesimal chance of harm, the public, for example, fears nuclear power because the health risk is "involuntarily suffered, new, unobservable, uncontrollable, catastrophic, delayed, a threat to future generations, or likely accompanied by pain or dread."[55] In other words, as Justice Oliver Wendell Holmes astutely observed, "most people think dramatically, not quantitatively."[56] Thus, the public's demand for regulation may be irrational from a utilitarian perspective. Such irrationality counsels against institutionalizing public misperceptions for a very simple reason: society can improve more lives in the aggregate by investing in cost-effective regulations.[57] Risk management should therefore prioritize the most potent dangers by assessing the severity and frequency of risk.

By definition, however, risk management goes beyond traditional cost-benefit analysis based exclusively on monetary quantification. In evaluating whether the benefits of hiring an ex-offender are proportional to the risk, the concept constitutes an informational monitoring tool for employers engaging in risk-based discrimination. Rather than setting a welfare-maximizing benchmark, the goal is to have a consistent and transparent process in which employers can make a well-reasoned hiring decision. In this sense, risk management closely incorporates the more holistic cost-benefit approach in regulatory law[58]—encompassing both qualitative and quantitative evaluations. This ap-

55. STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 33 (1993).

56. Letter from Oliver Wendell Holmes, Jr. to Canon Patrick Augustine Sheehan (July 5, 1912), *in* HOLMES-SHEEHAN LETTERS: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN 45 (David H. Burton ed., 1976), *quoted in* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 37 (1993).

57. *See* BREYER, *supra* note 55, at 50 (arguing that public misperception, legislative overreaction, and "the uncertainties of the regulatory process" create a vicious cycle that undermines efficient levels of health and safety); W. KIP VISCUSI, RATIONAL RISK POLICY 127-28 (1998); W. Kip Viscusi, *Risk Equity*, 29 J. LEGAL STUD. 843, 871 (2000).

58. *See, e.g.*, Matthew Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis*, 3 REG. & GOVERNANCE 72, 72 (2009) ("The basic thrust of *New Foundations of Cost-Benefit Analysis* is to detach cost-benefit analysis (CBA) from Kaldor-Hicks efficiency, which we argue lacks moral relevance . . . and instead to see CBA as a rough, administrable proxy for overall wellbeing.") (internal citation omitted); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1498 (2002) ("We mean to use the term in a modest, nonsectarian way, seeing cost-benefit analysis as a tool and a procedure, rather than as a rigid formula to govern outcomes. Thus understood, cost-benefit analysis requires a full

proach largely coheres with President Barack Obama's Executive Order 13,563, "Improving Regulation and Regulatory Review," which authorizes each government agency to "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including human dignity, fairness, and distributive impacts."[59] Qualitative specification is desirable because it prevents cost-benefit analysis from construing these intrinsic values as efficiency tradeoffs or commodities that can be bought and sold on the open market.[60] To contemplate intangible social benefits and dignitary values, Professor Cass Sunstein offers a useful heuristic called "breakeven analysis" in which "agencies do not quantify unquantified or unmonetized benefits (because they are by hypothesis unable to do so), but instead specify how high such benefits would have to be in order for the benefits to justify the costs."[61] Although this analytic process features prominently in regulatory policy, Sunstein acknowledges profound implica-

accounting of the consequences of an action, in both quantitative and qualitative terms. Officials should have this accounting before them when they make decisions.").

59. Exec. Order No. 13,563, 3 C.F.R. 215 (2011). This Executive Order begins to lay the foundation for a more democratic and less technocratic approach to cost-benefit analysis. Indeed, the Executive Order acknowledges as much insofar as "[r]egulations *shall* be adopted through a process that involves public participation" and an "open exchange of information and perspectives" amongst the public, affected stakeholders, and government officials. *Id.* (emphasis added).

60. *See* Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1766-70 (2014).

61. Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 195 (2014). Sunstein also offers a real-life example in antidiscrimination law. In the context of disability rights, the U.S. Department of Justice (DOJ) proposed a regulation designed to increase spatial wheelchair access in bathrooms. Although "the monetized costs of these requirements substantially exceed[ed] the monetized benefits," DOJ explained its rationale for departing from the traditional regulatory cost-benefit analysis: "The additional benefits that persons with disabilities will derive from greater safety, enhanced independence, and the avoidance of stigma and humiliation—benefits that the Department's economic model could not put in monetary terms—are, in the Department's experience and considered judgment, likely to be quite high." Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,170 (Sept. 15, 2010) (codified as amended at 28 C.F.R. pt. 35 (2013)). The total monetized costs of the regulation exceeded the benefits by approximately $454 million, but the costs, when annualized and divided by the estimated 677 million annual uses, came out to be about 5 cents per use. The DOJ concluded that the realization of human dignity by millions of users was well worth the $454 million shortfall. *See* Sunstein, *supra*, at 195 n.111.

tions for other areas of law where accounting matters and requires some level of classifying tradeoffs.[62]

In the context of risk management, then, breakeven analysis can inform the inquiry into whether the benefits of hiring an ex-offender are proportional to the costs. Indeed, the calculation in the *El* case study above operates as a simple breakeven analysis. The costs of accommodating the risk could be roughly monetized, but the benefits—ranging from the dignitary value of successful reintegration to increased labor productivity—could not be so readily quantified. The question then became whether the dignitary and distributive gains warranted the accommodation. A decision maker could have easily concluded that, qualitatively, "the nature and gravity of the dignitary values at stake" overshadowed relatively minor costs.[63] For the business necessity doctrine, the value added is increased accountability and consistency, which give decision makers a better idea of what sensible tradeoffs look like when tragic choices must be confronted. "A great virtue of cost-benefit analysis, or a proportionality test," according to Sunstein, "is that it puts the resistance to its proof. It should be clear that a competent cost-benefit analysis calls for attention to the benefits to the employee, not simply to the employer, of requested accommodations."[64] By forcing the defense to meet its evidentiary burden, a robust proportionality analysis exposes "erroneous intuitions, or hostility and prejudice"[65]—a sort of cognitive illiberalism[66]—lurking beneath a decision to impose liability. Accordingly, risk management advances a predictable, bright-line application of the business necessity standard.

Risk management ultimately calls for a proportionality test—a weighing of the costs and benefits—informed by the principles of the new cost-benefit analysis. Thus far, I have begun a preliminary account of *how* risk should be regulated when employers discriminate on the basis of a criminal history. But Title VII "does not enact . . . Kaldor and Hicks's understanding of economic efficiency."[67] Risk management, that is, presupposes that proportionality and cost-benefit analysis are preeminent values in identifying a business necessity. The next step of the argument requires a justification of *why* risk management is de-

62. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895 (2007) (assessing the role of cost-benefit analysis in the context of the Americans with Disabilities Act).

63. Bayefsky, *supra* note 60, at 1737.

64. Sunstein, *supra* note 62, at 1906-07.

65. *Id.* at 1907.

66. *See generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117 (2007) (arguing that people in a liberal democracy lack the psychological capacity to interpret and administer law "without indulging sensibilities pervaded by our attachments to highly contested visions of the good").

67. Sunstein, *supra* note 62, at 1907.

sirable. In the next Part, I address the normative implications of risk management in the enforcement of civil rights.

C. The Normative Dimension: Value Judgments in Risk Management

The functional account of risk management suffers from a few shortcomings. First, the proportionality analysis outlined above is oversimplified. The probability of recidivism varies greatly depending on a number of exogenous factors,[68] and the costs of accommodation may not be limited to tort liability. Second, the risk management model also presupposes that the regulated risk will probabilistically take place. But an ex-offender may *choose* not to recidivate given better job prospects in the labor market. Risk management largely ignores this agency. Third, as a result of undervaluing when empirical uncertainties abound, risk management may be morally reproachable, insofar as it fails to reflect community values regarding our preferred policy goals.

The third shortcoming, in particular, begs important questions: Whose judgments are normative for the purposes of risk management? Should the social values of the community control, or should scientific understanding of risk govern? In the context of the Americans with Disabilities Act (ADA), Professor Samuel Bagenstos calls attention to the dialectical tension between expressive perceptions of risk and technocratic risk regulation.[69] Although risk management may "counterbalance" cognitive bias and political subordination, there is no guarantee that it conforms to a community's "value judgments."[70] Institutional decision-makers adhere to social norms when expressing judgments, and these judgments often conflict with scientific understanding. The judgment comes down to the question, "Is the risk worth running? As the democrats have shown, that is at bottom a value question."[71] The answer may plausibly be no when it comes to employing ex-offenders who have previously violated a community's trust. In response, Bagenstos stakes out a middle ground, arguing for "a strong rule of deference" to risk assessments when the scientific consensus clearly supports one party over the other.[72] This compromise seems workable,

68. *See, e.g.*, Julie Horney et al., *Criminal Careers in the Short-Term: Intra-Individual Variability in Crime and Its Relation to Local Life Circumstances*, 60 AM. SOC. REV. 655, 668 (1995) (arguing that short-term changes in criminal involvement are strongly related to variation in local life circumstances, including substance abuse, living arrangements, and relationships).

69. Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1481-82 (2001).

70. *Id.* at 1486-87.

71. *Id.* at 1496.

72. *Id.* at 1495. *See also id.* at 1512 ("The results of the various uses of technocracy in the disability-related risk context suggest that politically liberal advocates of equitable responses to risk are not well served by simply embracing technocratic processes or using them as the presumptive framework for policymaking. Nor, however, are

but the injection of an expressive, normative dimension into cost-benefit analysis, especially when difficult decisions come down to the margin, will, at heart, turn on a value-laden judgment.

Professor Douglas Kysar, perhaps the most eloquent critic of cost-benefit analysis, might attribute this devolution to the "perils of prediction," meaning that the "tools of risk assessment and cost-benefit analysis . . . inevitably leave a moral remainder in the form of eliminable empirical uncertainties, irresolvable valuation questions, and other non-technocratic issues that implicate collective responsibility."[73] In "crowd[ing] out other ways of conceptualizing wellbeing and promoting its attainment," cost-benefit analysis loses "collective engagement" with the "normative dimensions" of civil rights law.[74] This is a real problem and one that must be reconciled with risk management as an objective threshold for the business necessity defense. I argue that risk management can perform this delicate balancing act as part of a dialectic—reconciling or synthesizing technocratic procedure with substantive values. The proportionality component mandates a process in which employers must think carefully about the qualitative and quantitative aspects of accommodating an ex-offender's risk. In situations in which a selective bias against a systematically disadvantaged group has taken hold, the process should satisfy both advocates of cost-benefit analysis and a democratic approach to risk regulation. The reasonableness component of risk management, on the other hand, allows factfinders to expressively consider the risk of hiring an ex-offender. The normative dimension leaves room for moral self-awareness and preserves collective engagement with civil rights law, allowing contentious questions to be resolved by the political community.

Consequently, the primary normative issue in making business necessity as risk management work is political in nature. The legitimacy of risk management ultimately depends on the relevant governing political and institutional systems. Deliberative processes should inform risk management, respecting the dignitary value that the community places on equality of opportunity. Admittedly, collective engagement with civil rights law is far from straightforward and continues to be polemical in our politics. We can also hardly consider ex-offenders, diffuse and anonymous citizens reintegrating into society, as part of the governing political community. This casts any deliberative process underlying risk management in a precarious light. But, then again, it is precisely because ex-

they well served by rejecting technocratic tools outright. Technocratic approaches seem likely to serve the cause of equity when the relevant technocratic decisionmakers are well positioned to hear and take seriously the interests of disadvantaged groups, when general public attitude or imbalances of political power would otherwise lead to an inequitable distribution of the benefits and burdens of risk, and when political and legal avenues provide a check on inequitable actions by the technocrats themselves.").

73. DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 16 (2010).

74. *Id*. at 16-17.

offenders lack political power that judicial enforcement of Title VII should seek to protect a class of citizens internalizing the burden of overcriminalization and failed "broken windows" policies. As social mores on criminal justice change and the problem of mass incarceration reaches the public's consciousness,[75] placing value on helping ex-offenders in the labor market becomes imperative. Risk management provides a framework to instantiate that valuation in the enforcement of civil rights. And we cannot forget that risk management operates under a superstructure rooted in equal opportunity—Title VII of the Civil Rights Act, which has been repeatedly reaffirmed as reflecting a foundational norm in American political culture.[76]

II. The Doctrinal Compatibility of Risk Management

After describing a process-based method for determining a business necessity and reconciling the standard with normative values, the argument now requires a legal justification.

I argue that business necessity as risk management aligns with a proper doctrinal understanding of disparate impact as glossed by controlling precedent. Although the disparate impact doctrine never endorsed the concept of risk management until the Third Circuit's *El* decision, courts have sought a more systematic, process-based method for adjudicating cases under Title VII. The case law comprehends the objective rationality and objectivity that underlies risk management. First, I briefly summarize the relevant authority before contending that risk management can be derived from employment discrimination law. Second, I argue that business necessity as risk management is analytically similar to the reasonable accommodation standard of the ADA. From the outset, it is worth noting the nexus between disparate impact, codified in the Civil Rights Act of 1991, and reasonable accommodation, codified in the ADA of 1991, as a reaffirmation of the Second Reconstruction.[77] These laws go beyond formal classifications, as Owen Fiss famously championed, scrutinizing "the subordinate status of a specially disadvantaged group."[78]

75. Amongst calls for reform, the politics of criminal justice may be changing. *See, e.g.*, Record Expungement Designed to Enhance Employment Act of 2014, S. 2567, 113th Cong. (2014); Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. Times (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice reform.html.

76. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1237 (2001).

77. Disparate impact has been incorporated into the ADA. *See* Gonzales v. City of New Braunfels, 176 F.3d 834, 839 n.26 (5th Cir. 1999) (referring to 42 U.S.C. § 12112(b)(3), (6) (1997)) ("Recognized as an actionable form of discrimination under Title VII, the disparate impact theory has been adopted entirely by the ADA.").

78. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 157 (1976).

A. Risk Management in Employment Discrimination Law

The starting point is *Griggs v. Duke Power Co.*,[79] the canonical case that extended Title VII of the Civil Rights Act of 1964 to incorporate the theory of disparate impact. Chief Justice Burger, writing for a unanimous court, defines the scope of Title VII:

> 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 opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the act, practice, 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.[80]

We begin to see that disparate impact really concerns "barriers that have operated in the past." To remedy the entrenchment of discriminatory effects, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[81] Notably, the Court in *Griggs* reproved the lower court for finding that the respondent's past discriminatory practices were beyond the reach of Congress's remedial prerogative.[82] *Griggs* therefore validated disparate impact as an appropriate mechanism to enforce Title VII's comprehensive scope and to rectify long-standing discriminatory barriers in employment. These social barriers, including inferior public education in racially segregated communities, are what "operate invidiously to discriminate on the basis of racial or other impermissible classification."[83] Although the Court showed some ambivalence about the use of race as a proxy for an inequitable distribution of social functionings,[84] the language of the opinion still gives substantial teeth to Title VII. *Griggs*'s bottom line supports equality of opportunity

79. 401 U.S. 424 (1971). In *Griggs*, thirteen black employees of a North Carolina power plant challenged their employer's conditions for employment, including a high school diploma and standardized aptitude tests for positions outside of labor. *Id.* at 427-28.

80. *Id*. at 429-30.

81. *Id*. at 432.

82. *Id*. at 428.

83. *Id.* at 431.

84. *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 95-96 (2000) ("[T]he opinion simultaneously retains and deploys the discourse of individualism associated with formal-race, as it insists that (1) individuals have merit and qualifications independent of their racial identity; and (2) distributive fairness consists in distributing opportunities on the basis of these race-neutral traits.").

insofar as arbitrary social and natural contingencies cannot impede employment prospects.

"More than that," the *Griggs* court added, "Congress has placed on the employer the burden of showing that any given requirement must have a *manifest* relationship to the employment in question."[85] After the plaintiff demonstrates a prima facie case of discrimination, the evidentiary burden shifts to the defendant to show that the challenged employment practices constitute a business necessity. To demonstrate this business necessity, the defendant must rationalize the discriminatory practice, justifying why it is the *sine qua non* for the employment context. The burden necessitates objective proof through "meaningful study" of the discriminatory practice's relationship to job-performance ability.[86] To hold otherwise would undermine the defendant's burden by allowing an employer's subjective intentions to legitimate an adverse employment decision.[87] Under the Court's interpretation of business necessity, the employer's intentions are irrelevant because the doctrine requires demonstrable proof that the employment practices actually advance a race-neutral policy.

Unfortunately, the Court's confusing and inconsistent interpretation of the business necessity standard came to a head in *Watson v. Fort Worth Bank & Trust*.[88] Justice O'Connor, writing for a nonbinding plurality, held that the *Griggs* "formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[89] The opinion reduced the employer's affirmative burden of persuasion, diluting the original business necessity standard in *Griggs* and collapsing it into disparate treatment analysis—which only requires a defendant to produce a nondiscriminatory reason for an adverse employment decision.[90] The *Watson* interpretation of business necessity fails to recognize the fundamental difference between disparate impact and disparate treatment. Since disparate impact is not about intent, a mere nondiscriminatory justification "is simply not enough to legitimatize a practice that has the effect of excluding a protected class from job

85. 401 U.S. at 432 (emphasis added).

86. *Id*. at 431.

87. In *Griggs*, the vice president of the company testified that the employment requirements in question would improve the overall quality of the workforce, *id.* at 431. But the Court rejected this testimony because the employees who did not pass the aptitude tests continued to perform satisfactorily, signaling that an employer's intent is neither sufficient nor necessary for establishing a business necessity. *See id*. at 431-32.

88. 487 U.S. 977 (1988).

89. *Id*. at 997.

90. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

opportunities at a significantly disproportionate rate."[91] If nondiscriminatory reasons were sufficient to escape disparate impact liability, then employment practices would continue to engender the effects of past discrimination.

One year later, the conservative plurality in *Watson* earned a majority when Justice Kennedy joined the Court. In *Wards Cove Packing Co. v. Atonio*, Justice White, clarifying and even relaxing the reasoning in *Watson*, wrote, "[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[92] The challenged policy need not be "'essential'" or "'indispensable'" to the business necessity.[93] This language is contradictory, rendering business necessity a mere formality, rather than an affirmative burden for employers defending policies that have a disparate impact. Contrary to *Griggs*, this interpretation also obfuscates the need for a challenged employment criterion to bear a direct relationship to job performance.[94]

Beyond the doctrinal deconstruction, moreover, *Wards Cove* implicitly undermines the social meaning of disparate impact when a demonstrable inequity, lacking sufficient justification, no longer leads to an inference of past injustice.[95] This is irreconcilable with *Griggs*'s theory of disparate impact as a legal remedy for the historical entrenchment of discriminatory practices in the labor market. Perhaps even more troubling, the Court's analysis in its latest foray into disparate impact—albeit in the fair housing context—still cuts against *Griggs*'s social meaning. In *Texas Department of Housing and Community Affairs v. Inclusive*

91. *Watson*, 487 U.S. at 1004 (Blackmun, J., concurring in part and concurring in the judgment).

92. 490 U.S. 642, 659 (1989). In *Wards Cove*, the respondents, a diverse class of seasonal cannery workers in Alaska who lived in separate dormitories and ate in separate mess halls, alleged that their de facto segregation was a result of petitioners' discriminatory hiring and promotion practices.

93. *Id.*

94. Under the business necessity standard, *Griggs* and its progeny espouse some level of empirical analysis to measure the relationship between the challenged employment practice and job performance. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (holding that height and weight requirements must be correlated to strength essential to job performance in order to constitute a business necessity); 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.") (internal quotation marks omitted); *cf.* Easterling v. Connecticut, 783 F. Supp. 2d 323, 335-43 (D. Conn. 2011) (interpreting job relatedness and business necessity in the context of an employment practice requiring a physical fitness test).

95. *See Wards Cove*, 490 U.S. at 662 (Blackmun, J., dissenting) ("One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.").

Communities Project, Inc., Justice Kennedy quoted from the *Wards Cove* opinion approvingly while disapproving of a racially conscious disparate impact framework.[96] The Court, fearful of disparate impact liability leading to racial quotas in housing, instructed courts to "avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."[97] With the addition of a defendant-friendly "robust causality requirement" at the pleading stage—connecting the statistical showing to a discriminatory housing policy—future claims will seemingly have to allege more than a disparate impact.[98] Once again, the disparate impact framework appears to be slipping into a disparate treatment analysis, demanding more direct evidence of discrimination, causation, and intent. Although the applicability of this reasoning to Title VII remains to be seen, *Griggs*'s theory of disparate impact continues its decline into obscurity, ignoring discriminatory effects and the pretextual policies that entrench the racial imbalance.

Despite the uncertainty surrounding disparate impact's meaning, Congress resurrected the business necessity defense in the Civil Rights Act of 1991, repudiating *Wards Cove* and explicitly affirming the *Griggs* standard.[99] Title VII now clearly places the burden on the employer to show that "the challenged practice is job related for the position in question and consistent with business necessity."[100] The problem is that the textual codification of business *necessity* implies indispensable or essential practices, whereas "consistent with business necessity" paradoxically diminishes the requisite criterion. Although business necessity has never been clear, the *Griggs* standard should be treated as an interpretive floor or baseline—consonant with Congress's broad remedial objective under the Civil Rights Act of 1964. Indeed, the "primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees."[101] At the very least, then, an employer must show that a business necessity has a demonstrable relationship to job performance. *Griggs* and Title VII argua-

96. 135 S. Ct. 2507, 2523 (2015) (quoting *Wards Cove*, 490 U.S. at 653) ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create. . . . Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise.") (internal citation omitted).

97. *Id.* at 2524.

98. *Id.* at 2523-24.

99. *See* 137 CONG. REC. 28,680 (1991).

100. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

101. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977).

bly require even more—both contemplate the tailoring of exclusionary policies through meaningful study to justify a business necessity.

Courts should not dilute the business necessity standard beyond this baseline. The Third Circuit's opinion in *El*, for example, is contradictory insofar as it acknowledges that *Griggs* requires "some level of empirical proof that challenged hiring criteria accurately predicted job performance," yet it goes on to say that Title VII does not "measure care in formulating hiring policies."[102] Empirically based hiring policies appear, *a fortiori*, to require a degree of care. According to the *Griggs* Court, the challenged objective employment practice must not only "be related to job performance," but it must also be "demonstrably a reasonable measure of job performance" and "must measure the person for the job and not the person in the abstract."[103] But, how does a court apply this standard in the context of criminal recidivism? Replace job performance, as broadly defined, with risk of criminal recidivism, broadly defined, and we reach the same determination that a challenged policy must demonstrate a reasonable measure of risk for a particular ex-offender. The *El* court defied this logic when it allowed SEPTA to escape liability without having measured risk as applied to specific applicants and their offenses. The *Griggs* baseline can be restored, however, by incorporating risk management into the business necessity defense.

In light of the disparate impact framework, risk management does not require an insurmountable doctrinal extrapolation. Exclusionary hiring practices should be tailored to particular crimes and ex-offenders, accounting for obvious differences between violent and nonviolent crimes. The Third Circuit acknowledged as much in *El* when it said "we deal with the risk that an applicant will endanger the employer's patrons" and Title VII requires "that the policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[104] The court goes on to say that "[i]f someone with a violent conviction presents a materially higher risk . . . then SEPTA is justified in not considering people with those convictions."[105] Fair enough, but such reasoning entails figuring out what constitutes "materially higher risk" and whether it relates to the employment and is consistent with business necessity. As a conceptual model, then, risk management lays the groundwork for a business necessity standard that aligns with *Griggs*. Otherwise, an ill-defined standard could incentivize employers to craft deliberately vague policies, forcing judicial deference to practices that forsake the level of care and thought contemplated by *Griggs*.[106]

102. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240, 248 (3d Cir. 2007).

103. Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971).

104. *El*, 479 F.3d at 244-45.

105. *Id.* at 245-46.

106. *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 1009-10 (1988) (Blackmun, J., concurring in part and concurring in the judgment) ("It would make no sense to establish a general rule whereby an employer could more easily establish business necessity for an employment practice, which left the assessment of a list of general

Curiously, this is precisely what happened in *El*. The court noted that "it is striking that not one of the witnesses that SEPTA named was able to explain—beyond a general concern for passenger safety—why this particular policy was chosen from among myriad possibilities."[107] This vagueness is particularly troubling because SEPTA arbitrarily distinguished certain crimes, promulgating a categorical ban for some offenses and a seven-year ban for others. SEPTA never revealed how exactly a black male with a forty-year-old homicide conviction posed an unacceptable risk that warranted a life ban. What if the crime were a forty-year old robbery conviction? Would that pose an unacceptable risk related to the job and consistent with business necessity? Ultimately, the court did not follow its own reasoning about rationally managing risk. But its hands may have been proverbially tied by the procedural disposition of the case. After the plaintiff failed to offer *any* evidence to rebut the business necessity, the court had little choice but to find that a reasonable juror could believe SEPTA's testimony about the unsubstantiated risk of recidivism.[108]

Nevertheless, the concept of risk management as business necessity is also present other important cases involving criminal history discrimination and disparate impact. In *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit interpreted business necessity to mean that "[t]he system in question must not only *foster* safety and efficiency, but must be *essential* to that goal."[109] The importance of workplace safety and efficiency imply that an exclusionary system must be not only accurately tailored to risk, but also job related. The defendant failed to ensure that the system was so related, instead proffering a number of vague reasons for excluding ex-convicts, including the fear of theft, the possibility of negligent hiring liability, and even a lack of individual morality.[110] The *Green* court rebuked these justifications, noting that the company "has not *empirically validated* its policy with respect to conviction records. . . ."[111] Rational

character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications.").

107. *El*, 479 F.3d at 247-48.

108. *Id.* at 247 ("Had El produced evidence rebutting SEPTA's experts, this would be a different case. Had he, for example, 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.").

109. 523 F.2d 1290, 1298 (8th Cir. 1975) (quoting United States v. St. Louis-S.F. Ry. Co., 464 F.2d 301, 308 (8th Cir. 1972)). In *Green*, the appellant applied to be an office clerk for the Missouri Pacific Railroad Company, which had a policy of categorically refusing to hire anyone with a criminal conviction. The challenged policy automatically barred 5.3% of the 3,282 black applicants, but only 2.23% of the 5,206 white applicants. The court found this sufficient to establish prima facie evidence of a disparate impact.

110. *Id.*

111. *Id.* (emphasis added).

risk management, moreover, coheres with the three factors which have come to be known as the *Green* balancing test: (a) nature and seriousness of the offense; (b) the time passed since conviction; (c) and the nature of the job sought.[112] These factors move beyond a baseline risk of recidivism, requiring an exclusionary policy to adjust to an individual's specific risk. Notably, the *Green* factors were later officially adopted by the Equal Employment Opportunity Commission (EEOC) and are entitled to *Skidmore* deference, meaning that the EEOC's guidelines serve as a persuasive authority to courts depending on the cogency of the guidelines' research and reasoning.[113] This is, unfortunately, a somewhat self-defeating proposition since guidelines are just that—guidelines—and generally do not entail rigorous scientific analysis. Regardless, *Green* stands for the idea that prior misconduct, "which may be remote in time or does not significantly bear upon the particular job requirements," cannot and should not prevent meaningful opportunities for gainful employment.[114] *Green* empirically reasoned through individualized factors of risk and workplace safety, thus bolstering the notion of business necessity as risk management.

112. *Id*. at 1297 (quoting Butts v. Nichols, 381 F. Supp. 573, 580-81 (S.D. Iowa 1974)); *see also* Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 889 (S.D. Ohio 2013) (denying defendant's motion to dismiss a disparate impact claim because the plaintiffs' prior offenses were both remote in time and insubstantial, and because both plaintiffs had demonstrated decades of good performance before mandatory background checks revealed their criminal histories). *But see* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989) (criticizing *Green* and holding that the business necessity defense does not require proof that exclusionary policies are effective); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971) (concluding convictions for theft and receipt of stolen goods were sufficiently job-related to justify refusing employment to a black applicant seeking work as a bellman), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972).

113. *See* U.S. EEOC, COMPLIANCE MANUAL § 15 (2006); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). In 2012, the EEOC issued new enforcement guidelines. *See* U.S. EEOC, NOTICE 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. These new guidelines offer two safe harbors for employers seeking a business necessity defense. First, an employer can empirically validate a criminal records screening policy using the Uniform Guidelines on Employee Procedures under the parameters of 29 C.F.R. § 1607 (2009). But even the EEOC admits that "social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications . . . are rare." *Id.* at 15. Second, an employer can use a targeted screen, but must conduct an individualized assessment using the *Green* factors for any ex-offenders excluded by the initial targeted screen. For a discussion of these guidelines and their ramifications, see Nichols, *supra* note 33, at 608-10.

114. *Green*, 523 F.2d at 1298.

The disparate impact doctrine ultimately reveals that a sweeping disqualification of job applicants based on criminal history, absent any business necessity, violates Title VII. In light of *Griggs* and its subsequent congressional approbation, business necessity must be an affirmative burden, entailing the rational tailoring of a discriminatory practice to job performance. Risk management offers a way to perform this tailoring in an objective and empirical way. The risk of recidivism, the amount of time passed since an arrest or conviction, the nature of the underlying offense, and the type of job sought all inform how relevant past unlawful behavior is to creating a safe employment environment. Ultimately, risk management's compatibility with disparate impact doctrine allows for a proper burden-shifting evidentiary framework—a framework that coheres with the remedial objectives of Title VII. A criminal history should not impede equality of opportunity in employment unless justified by business necessity.

B. Risk Management in Disability Rights Law

Beyond Title VII disparate impact liability, risk management resonates in other areas of the antidiscrimination law canon. Disability rights law, in particular, further substantiates the notion of business necessity as risk management. Although disability discrimination falls under the purview of the Americans with Disabilities Act (ADA) and not Title VII, the doctrinal framework is ostensibly similar. In the context of hiring, for example, the ADA prevents employers from finding out about an applicant's disability prior to making a job offer—only when an offer is made may an employer ask questions related to an applicant's disability.[115] If an applicant is "denied a job because these questions reveal a disability, then, as under Title VII, the employer must demonstrate that the exclusionary criteria are job-related and consistent with business necessity."[116] Since the ADA was modeled after Title VII, the doctrine closely tracks the disparate impact framework and, arguably, goes even further in its mandate of employer accommodation.

In contemplating the risk of hiring a disabled worker, Congress codified in the ADA the "direct threat" doctrine, defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[117] The doctrine was first laid out in *School Board of Nassau County v. Arline*[118] and requires an employer to conduct "an individualized inquiry into the plaintiff's unique abilities, to determine whether it would be unsafe to hire *her*."[119] The goal is to

115. Paul-Emile, *supra* note 8, at 936-37.

116. *Id.* at 937 (citing 42 U.S.C. §§ 12112(d)(4)(A), 12113(a) (2012)).

117. *See* 42 U.S.C. §§ 12113(b), 12182(b)(3) (2012).

118. 480 U.S. 273 (1987).

119. Bagenstos, *supra* note 69, at 1490.

protect "handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[120] But the mere existence of a direct threat risk is not sufficient to avoid liability. An employer must also make a "reasonable accommodation" if it would substantially reduce a given risk.[121]

The reasonable accommodation standard effectively tells employers what they can and cannot do and, more importantly, *how* they should do it—thus imposing a substantial obligation on businesses engaging in risk-based discrimination.[122] Since irrational perceptions of risk only reinforce the stigmatization and stereotyping that disability rights law seeks to ameliorate, accommodations must be based on objective, scientific evidence. The doctrine mandates a proportionality approach in assessing the nature, duration, severity, and probability of the risk materializing. The business receives little deference and must call upon expert opinions in the public health field to speak to the reasonableness of the employer's actions.[123] Here, the concept of risk management in disability law deviates from disparate impact doctrine insofar as a prevailing scientific consensus, rather than meaningful study, is needed to determine what constitutes a significant risk.

Admittedly, this scientific inquiry is much more difficult to do in the context of criminal history. In the *El* case, for example, one of SEPTA's expert criminologists testified that however small the probability that someone with an old conviction and someone without a conviction will commit a future crime, "making such predictions of comparable low-probability events is extremely

120. *Arline*, 480 U.S. at 287.

121. *Id*. at 287 nn.16 & 17.

122. In this sense, second-generation civil rights statutes like the ADA and Title VII effectively impart a regulatory burden on litigants. Although the statutes govern the adjudication of legal claims, the procedural mechanisms regulate how employers must conduct their business to obtain safe harbor from liability. Indeed, civil rights statutes have been upheld based on Congress's power to *regulate* interstate commerce. *See* U.S. CONST. art. I, § 8, cl. 3; EEOC v. Wyoming, 460 U.S. 226 (1983) (extending the Age Discrimination in Employment Act as applied to state and local governments as a valid exercise of Commerce Clause authority); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 as applied to restaurants as a valid exercise of Commerce Clause authority); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as applied to public accommodations as a valid exercise of Commerce Clause authority).

123. *See* Bragdon v. Abbott, 524 U.S. 624, 649-50 (1998) (declaring that the petitioner, as a healthcare professional, must "assess the risk of infection based on the objective, scientific information available to him and others" and that "[i]n assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority").

difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct."[124] An assessment of risk through rates of recidivism in the context of criminal history may not be nearly as accurate as an assessment of risk through medical evidence in the context of disability. But since the types of risks are effectively the same—threats to workplace safety—institutional decision makers (i.e., judges, juries, and even businesses) weighing a business necessity defense need information to decide what risks in a given situation are verifiably dangerous. Just as we would not want to allow a blind person to operate a forklift in a warehouse, we would not want to employ a convicted fraudster in an accounting office.[125] The risk may simply be too high—but the doctrinal framework necessitates empirical confirmation.

To be unequivocally clear, however, a traditional cost-benefit analysis cannot, as a matter of law, underpin risk management. In both employment discrimination and disability rights law, the doctrine espouses some empirical method of evaluating risk—within reasonable particularity—but it does not countenance a rigidly technocratic cost-benefit analysis. In defining a reasonable accommodation, for example, Judge Richard Posner endorses the view that the law only requires a careful consideration of costs and benefits:

> It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit. . . . So it seems that costs enter at two points in the analysis of claims to an accommodation to a disability. The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to the costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.[126]

124. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 246 (3d Cir. 2007).

125. *See* Field v. Orkin Exterminating Co., No. Civ.A. 00-5913, 2001 WL 34368768, at *2-3 (E.D. Pa. Oct. 30, 2001) ("It is, in short, the general policy of Title VII to require employers to make hiring and retention decisions on the basis of job-related factors. A blanket policy to refuse employment to persons with recent criminal records would not violate Title VII if the criminal conviction involved conduct which demonstrates a person's lack of qualification for the job—e.g., a bank would not be required to hire, or retain in employment, a teller previously convicted of embezzlement.").

126. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995). Indeed, Judge Posner would probably argue that if the benefits are truly greater than the costs in the marketplace, then no law would be necessary to enforce disability rights in the first place because the disabled would be hired. "Unfortunately, there are many obstacles to this happy story of self-correcting markets, not least because

For Judge Posner, generally weighing costs and benefits in broad strokes is far preferable to an interpretation of the ADA that would impose stringent cost-benefit regulations on all compliant employers. But even the more substantive component of reasonableness, as Judge Posner points out, alludes to the duty of reasonable care in tort law, which, according to Judge Hand's famous formulation,[127] explicitly considers the increased costs of care.[128] Thus, the doctrine makes clear that costs and benefits should, at the very least, be positioned on different sides of the liability calculus. The doctrine then determines the proportionality of these costs and benefits, arriving at a decision as to whether an employer should accommodate a given risk in the workplace. In short, the reasonable accommodation standard legally mandates a procedure in which institutions must think carefully about risk.

Similarly, Judge Guido Calabresi does not believe that "employers, in attempting to meet their burden of persuasion on the reasonableness of the proposed accommodation and in making out an affirmative defense of undue hardship, must analyze the costs and benefits of proposed accommodations with mathematical precision."[129] The reasonable accommodation standard encompasses sufficient leeway to make more of a "common-sense balancing of the costs and benefits."[130] Doctrinally, then, business necessity as risk management does not force courts to conduct a cost-benefit analysis. Rather, institutions must engage in the exercise of determining whether the benefits of hiring an ex-offender are *reasonably proportional* to the costs.[131] This notion of reasonableness also implies a substantive component in the larger procedural framework of risk management. To the extent that the inquiry turns on the reasonableness of accommodating an ex-offender's risk, factfinders can balance their own understanding of the risk with the value their community places on fair opportunity in the labor market.

of prejudice on the part of employers, employees, and customers alike." Sunstein, *supra* note 62, at 1907 (citing Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22 (1991)).

127. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).

128. *See Vande Zande*, 44 F.3d at 542.

129. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 139 (2d Cir. 1995). The Second Circuit does require some degree of an empirical analysis: "The burden on the employer, then, is to perform a cost/benefit analysis. In a sense, of course, that is what the plaintiff also had to do to meet her burden of making a prima facie case that reasonable accommodation existed. But while the plaintiff could meet her burden of production by identifying an accommodation that facially achieves a rough proportionality between costs and benefits, an employer seeking to meet its burden of persuasion on reasonable accommodation and undue hardship must undertake a more refined analysis." *Id*.

130. *Id.* at 140.

131. *See id.* at 138 ("In short, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits it will produce.").

Granted, this Note is not suggesting that the reasonable accommodation standard is incorporated into Title VII.[132] For the purposes of risk management, the focus is less on substantive law and more on analytic process. This Note *does* suggest that the business necessity and the reasonable accommodation standards are analytically similar insofar as both objectively measure risk in determining whether an employer can safely and cost-effectively take on that risk in the workplace. Ultimately, if the ADA and Title VII frameworks are cognizant of risk management, then risk management serves to efficiently and equitably distribute risk in the labor market. Put another way, risk management attempts to provide an elusive reconciliation between the technocratic regulation of risk and the substantive equality embodied by civil rights law.

According to Professor Linda Krieger, however, the ADA and its concomitant legal doctrine "incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII of the Civil Rights Act of 1964."[133] Krieger is right that the ADA, unlike Title VII, requires an employer to engage "in a good faith interactive process" to find a reasonable accommodation for a disabled worker.[134] But Krieger also proves too much in her attempt to distinguish the substantive equality underlying the ADA from the supposedly formalistic equality underlying Title VII. In a similar vein, Professor Kimani Paul-Emile overstates her argument, arguing for a comprehensive overhaul of Title VII rather than drawing the already extant doctrinal connection between disparate impact liability and the disability rights framework.[135] The theory and practice of disparate impact are, logically, difficult to distinguish from the ADA's reasonable accommodation standard.

In theory, both countenance the status of a historically disadvantaged class, seeking a *positive* affirmation of a protected class member's equal worth and dignity. To make this abstraction a reality, both doctrines, in practice, reform employment procedures in a nondiscriminatory way and, more importantly, challenge "the way in which the job is defined or structured in addition to the way in which candidates are selected for positions."[136] Granted, reasonable accommodation does this in a very literal sense, challenging "the *elements of the job itself* as currently configured."[137] Liability under the ADA, for example, may require an employer to affirmatively aid a disabled employee by building a

132. The reasonable accommodation standard does apply to religion under Title VII. *See* 42 U.S.C. § 2000e(j) (2012).

133. Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3 (2000).

134. *Id.* at 4.

135. Paul-Emile, *supra* note 8, at 935.

136. Jolls, *supra* note 1, at 669.

137. *Id.* (quoting Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 n.34 (1996)).

wheelchair ramp. Disparate impact obviously operates in different contexts. But, as Professor Christine Jolls convincingly argues, disparate impact and accommodation are in fact equivalent.[138] For one, "disparate impact liability requires employers to incur special costs in response to the distinctive needs (measured against existing market structures) of a particular group of employees."[139] Jolls traces how disparate impact substantively overlaps with accommodation in terms of employment grooming rules, language requirements, selection procedures, and pregnancy leave.[140]

It is difficult to see how striking down a no-beard rule or a hiring policy that categorically excludes ex-offenders does not, in fact, change a job in a material sense. Both get rid of a functional inequity as it relates to a discriminatory effect, as does a reasonable accommodation. Any distinction between disparate impact and reasonable accommodation does not withstand critical scrutiny and proves to be "an untenable mechanism for limiting the scope of disparate impact liability, as well as a restriction that lacks support in existing doctrine."[141] Acknowledging this crucial fact allows us to see that both disparate impact and reasonable accommodation work against structural subordination—expressly regulating the provision of job functionings to better achieve equal opportunity. This places disparate impact well within an operative, albeit controversial, norm of employment discrimination law—forcing an employer to bear the burden of providing fair opportunity through accommodation.

Ultimately, business necessity as risk management coheres with a doctrinal understanding of the ADA's right to a reasonable accommodation in the workplace. Employment decisions must account for an objective, scientific assessment of the risk associated with hiring someone with a disability. This defensive burden, in turn, substantiates the *Griggs* threshold for business necessity, requiring a discriminatory practice to be rationally tailored and job related. However, risk management's mere doctrinal compatibility with antidiscrimination law may not be enough to enforce the civil rights of a discrete and insular minority. The efficacy of the ADA, like that of disparate impact, remains doubtful. In the late 1990s, defendants prevailed in approximately 92.7% of ADA Title I cases.[142] Professor Krieger generalizes that the practical failures of the ADA can be attributed to the problem of "the role of law in effecting social change" and whether "formal legal rules and constructs on the one hand" can conform to

138. *Id*. at 645 ("[A]ntidiscrimination law fairly obviously operates to require employers to incur undeniable financial costs associated with employing the disfavored group of employees—and thus in a real sense to 'accommodate' these employees.").

139. *Id*. at 655.

140. *Id*. at 653-65.

141. *Id*. at 670.

142. Krieger, *supra* note 133, at 8.

"informal social norms and institutions on the other."[143] Indeed, as long as political communities remain skeptical of this more affirmative civil rights paradigm, judges may narrowly or reductively interpret antidiscrimination law. The efficacy of disparate impact liability is similarly impeded when social norms on the ground do not accord with the doctrine's cultural understanding of historical discrimination. As a normative matter, then, the business necessity doctrine must be reconciled with public value judgments of risk and equity.

Conclusion

Risk management can be more than just a slogan in today's data-driven world. By distinguishing between a cost-effective business necessity and mere pretext for discrimination, risk management can be an analytic construct that restores Title VII to its proper scope. Although weary of seemingly limitless liability and so-called reverse discrimination, courts, which have long have sought to narrow disparate impact, must face the natural import of Title VII. The statute logically authorizes accommodation, effectively operating in a regulatory capacity to remedy structural, adverse effects in the marketplace. Risk management, however, might plausibly be a rational, limiting principle derived from the doctrine.

On one hand, employers must tailor a discriminatory hiring practice to a job-related risk, making sure to proportionally weigh the costs and benefits of accommodating that risk. Recidivism rates, the amount of time since an arrest or conviction, the nature of the underlying offense, and the type of job sought inform this calculus. The normative dimension, on the other hand, allows the factfinder to make value judgments, weighing expressive considerations of risk and equity. My hope is that risk management will move us closer to reconciling an affirmative civil rights paradigm with the realities of managing risk in the workplace. The resulting synthesis might allow us to reduce the stigma of a criminal record and, in turn, realize equality of opportunity in the labor market.

143. *Id.* at 18.