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# Erasing the Mark of Cain—An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records

Lucy Gubernick

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**ERASING THE MARK OF CAIN:\* AN  
EMPIRICAL ANALYSIS OF THE EFFECT OF  
BAN-THE-BOX LEGISLATION ON THE  
EMPLOYMENT OUTCOMES OF PEOPLE OF  
COLOR WITH CRIMINAL RECORDS**

*Lucy Gubernick\*\**

*“Criminals, it turns out, are the one social group in America we  
have permission to hate.”*

*– Michelle Alexander<sup>1</sup>*

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\* As Webster Hubbell, the former U.S. Associate Attorney General convicted of mail fraud and tax evasion, wrote, “[i]n the prison reform movement, it’s called the ‘mark of Cain,’ but contrary to the biblical injunction, God’s mercy isn’t attached. Rather, it shackles former offenders like me with restrictions barring us—often permanently—from the means to live a normal life. Legally, these restrictions are called ‘civil disabilities.’ More realistically, they are called ‘civil death,’ a condition that, for many of us, offers little option but to return whence we came: to prison.” Webb Hubbell, *The Mark of Cain*, SFGATE (June 10, 2001, 4:00 AM), <http://www.sfgate.com/opinion/article/The-mark-of-Cain-2910287.php> [https://perma.cc/A7GL-EPXX].

\*\* Fordham University School of Law, J.D., 2017. I am very grateful to Professor Olivier Sylvain for advising me in my contribution as the George J. McMahon Fellow for the *Fordham Urban Law Journal* and Feerick Center for Social Justice.

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## INTRODUCTION

In May of 2015, Judge John Gleeson of the Eastern District of New York expunged the conviction of Jane Doe,<sup>2</sup> a low-income mother of four, who had been sentenced to five years of probation more than a decade earlier for her involvement in an insurance fraud scheme.<sup>3</sup> At the time of her conviction Doe was working as a home health aide. Her criminal record had since made it impossible to find new work in

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2. A pseudonym.

3. *See Doe v. United States*, 110 F. Supp. 3d 448, 449 (E.D.N.Y. 2015); *see also* Ronald F. Day, *Crime and Incarceration: A Future Fraught With Uncertainty*, in IMPACT: COLLECTED ESSAYS ON THE THREAT OF ECONOMIC INEQUALITY 1, 36 (July 2015), [http://www.nyls.edu/impact-center-for-public-interest-law/publications/\[https://perma.cc/34TN-5XHV\]](http://www.nyls.edu/impact-center-for-public-interest-law/publications/[https://perma.cc/34TN-5XHV]).

her field.<sup>4</sup> In his decision, Judge Gleeson wrote, “I sentenced her to five years of probation supervision, not to a lifetime of unemployment.”<sup>5</sup> In order to make the punishment fit the crime, the judge felt it necessary to erase the record of the crime ever happening.

There are over seventy million people in the U.S. with a criminal record on file.<sup>6</sup> Prison reformers have dubbed the criminal record “the mark of Cain” because of its indelible nature and its role as a justification for perpetual punishment—namely, exclusion from the economic and social spheres of American life.<sup>7</sup> This punishment is exacerbated by racial prejudice and the real and perceived connections between race and criminal justice involvement in this country.<sup>8</sup> Jane Doe is black and, in the decision, Judge Gleeson acknowledged her race as “even more of an impediment to her

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4. *See Doe*, 110 F. Supp. 3d at 449-52. The order was vacated and remanded by the Court of Appeals due to lack of jurisdiction. *Doe v. United States*, 833 F.3d 192 (2016), *cert. denied*, No. 16-876, 2017 WL 120912 (May 22, 2017).

5. *See Doe*, 110 F. Supp. 3d at 457.

6. According to a 2012 Department of Justice report, 100.5 million Americans have state criminal history records on file. The National Employment Law Project (“NELP”), an advocacy group, has been skeptical of the DOJ’s statistics in the past, contending that they are likely an overestimate because they may not account for individuals who have records in multiple states. Thus, NELP has suggested reducing the DOJ figures by a generous thirty percent, which—while almost certainly leading to an underestimate—still yields a count of 70.3 million individuals with criminal records. For the DOJ data, see U.S. DEP’T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2012 (Jan. 2014), <http://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/3J2V-4FAT>]. For a discussion of NELP’s methodology that yields a more conservative estimate using 2008 data, see MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP. LAW PROJECT, 65 MILLION ‘NEED NOT APPLY:’ THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011), [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/DMF8-PRX5>]. It is important to note that a conviction is not a criminal record prerequisite. A record is created upon arrest, regardless of the ultimate disposition. *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 1 (2015).

7. *See* Webb Hubbell, *The Mark of Cain*, SFGATE (June 10, 2001 4:00 AM), <http://sfgate.com/opinion/article/The-mark-of-Cain-2910287.php> [<https://perma.cc/A7GL-EPXX>]. For a comprehensive study of collateral consequences, see generally JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

8. *See infra* Parts I-II; *see also* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 86-100 (2007) [hereinafter MARKED]; Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control,”* PBS: FRONTLINE (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<https://perma.cc/3PM8-LWX7>].

employment prospects than her conviction.”<sup>9</sup> In the U.S. job market, race has effectively become a proxy for criminality.<sup>10</sup>

Sociologists have begun to draw attention to the racial disparities in both the population “marked” by a criminal record and the civic penalties inflicted on that population upon reentry into society.<sup>11</sup> Studies show that the criminal justice system acts as a manufacturer of inequality in the labor market.<sup>12</sup> The system disproportionately convicts and incarcerates people of color and then tracks them for further disparate treatment by potential employers, frequently driving these individuals to abandon the prospect of a legal job altogether.<sup>13</sup> This authorized cycle of discrimination has, in turn, engendered and solidified social biases about what criminality looks like.<sup>14</sup> Today, the unemployment rate of people with criminal records generally is dangerously high,<sup>15</sup> but specific attention needs to be paid to the unmeasured group of unemployed people of color with criminal records.

As the successful reintegration of the ex-offender population becomes an increasingly urgent policy concern, more and more states, cities, and counties are implementing “ban-the-box” hiring laws to improve the employment outcomes of people with criminal records.<sup>16</sup> Ban-the-box laws aim to provide job candidates with the opportunity to put forward their qualifications initially without the stigma of a criminal record by prohibiting the conviction history question on preliminary job application materials and to delay the moment at which an employer can perform a criminal background check.<sup>17</sup> Ban-the-box legislation is important because it addresses the issue of discrimination based on criminal background.<sup>18</sup> However, given the concerns over the specific and intensified discrimination faced by unemployed people of color with criminal records, more targeted legislation is needed. Otherwise, the question of how effective ban-

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9. *See Doe*, 110 F. Supp. 3d at 452.

10. *See* MARKED, *supra* note 7, at 95; *see also infra* Part I.

11. *See infra* Part I.

12. *See Pager*, *infra* note 29.

13. *See infra* notes 47-51 and accompanying text.

14. *See infra* Part I.

15. *See infra* Part I.

16. *See* Michelle N. Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NELP (Apr. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/6PY6-C9YH>].

17. *Id.*

18. *Id.*

the-box legislation is in terms of benefitting minority groups who are most disenfranchised by the criminal justice system and its collateral consequences remains.<sup>19</sup> This Note argues that there have been insufficient data collection efforts to establish and ensure that ban-the-box legislation will specifically improve the employment outcomes of people of color with criminal records. Further, the laws should be written with the explicit purpose of ameliorating the collateral consequences of conviction for minorities in order to distinguish the future of ban-the-box legislation from past failures in antidiscrimination jurisprudence.<sup>20</sup>

Part I of this Note explains how criminal records currently operate to exclude people—particularly people of color—from the labor market. Part II catalogs the history of laws aimed to remedy the unequal impact of criminal record discrimination on people of color and the context that led to the ban-the-box movement. Part II also outlines competing sociological theories about whether or not ban-the-box laws will increase employment outcomes for people of color with criminal records, framed by a critical race theory analysis of the civil rights law tradition. Part III presents the limited existing data about the effects of ban-the-box legislation and suggests a more robust legislative model that will guide and enforce future, useful data collection.

## I. WHY ARE GOVERNMENTS BANNING THE BOX?

### A. Criminal Records in the Labor Market

Over the past few decades there has been a deliberate “redrawing” of American social inequality, influenced and characterized by the dramatic rise in the prison and jail populations.<sup>21</sup> Sociologists Bruce Western and Becky Pettit explain that, although the increase in the penal confinement rate is in itself a significant and sinister social phenomenon, “the scale of punishment today gains its social force from its unequal distribution.”<sup>22</sup> People of color—particularly young

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19. *See infra* Part III.

20. *See infra* Part II.

21. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 *DAEDALUS* 8, 16 (2010), [http://www.mitpressjournals.org/doi/pdf/10.1162/DAED\\_a\\_00019](http://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019) [<https://perma.cc/T3NZ-R8ME>].

22. *Id.* at 8-9. The intensity and scope of the inequality in the criminal justice system cannot be overstated. Western and Pettit argue that this inequality is at once “invisible,” “cumulative,” and “intergenerational.” It is invisible because it operates on populations that typically lie outside official accounts of economic well being, like census data. It is cumulative because the collateral consequences of incarceration are “accrued” by those who are already on the lowest rungs of the opportunity structure.

black men—make up a disproportionate share of the Americans behind bars.<sup>23</sup> Black people constitute just thirteen percent of the overall population but forty percent of the prison population.<sup>24</sup> Latinos constitute sixteen percent of the American population, relative to nineteen percent of the prison population.<sup>25</sup> Alarming,

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Finally, it is intergenerational because it impacts not just incarcerated or previously incarcerated people but also their families and communities. *Id.* at 8, 12-14.

23. According to a 2014 Bureau of Justice Statistics Report:

black males had higher imprisonment rates than prisoners of other races or Hispanic origin within every age group. Imprisonment rates for black males were 3.8 to 10.5 times greater at each age group than white males and 1.4 to 3.1 times greater than rates for Hispanic males. The largest disparity between white and black male prisoners occurred among incarcerated people ages 18 to 19. Black males (1,072 prisoners per 100,000 black male residents ages 18 to 19) were more than 10 times more likely to be in state or federal prison than whites (102 per 100,000).

E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRISONERS IN 2014, 15 (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/6R8F-U6JF>]. The Bureau of Justice Statistics (“BJS”) uses race and “Hispanic origin” distributions from its 2004 Survey of Inmates in State and Federal Correctional Facilities to adjust the administrative data from National Prisoner Statistics to reflect self-identification of race and “Hispanic origin.” *See id.* BJS uses the ethnonym “Hispanic” (rather than “Latino,” used in this paper) to refer to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race. *See id.* Further, black people constitute thirty percent of arrestees and forty-five percent of persons convicted of crimes. *See* SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 22 (2008), [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf) [<https://perma.cc/QK4H-7A7J>]. While the population of incarcerated blacks is overwhelmingly male (over ninety percent) black women are also incarcerated at a higher rate than their white counterparts. For more information about the racial makeup of women behind bars, see MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION 1 (Feb. 2013), <http://www.sentencingproject.org/publications/the-changing-racial-dynamics-of-womens-incarceration/> [<https://perma.cc/KUT8-XCTG>]. Black transgender people and gender non-conforming people are incarcerated at the highest rate of all. *See* NAT’L CTR. FOR TRANSGENDER EQUAL., A BLUEPRINT FOR EQUALITY: PRISON AND DETENTION REFORM (2012), [http://www.transequality.org/sites/default/files/docs/resources/NCTE\\_Blueprint\\_for\\_Equality2012\\_Prison\\_Reform.pdf](http://www.transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_for_Equality2012_Prison_Reform.pdf) [<https://perma.cc/UX22-5C46>]. Nearly forty-seven percent of black transgender people are incarcerated at some point during their lifetime. *See id.*

24. LEAH SAKALA, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATE RATES BY RACE/ETHNICITY (May 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/32LR-A46V>] (using 2010 Census data); *see also* U.S. CENSUS BUREAU, QUICKFACTS: UNITED STATES (2010), <https://www.census.gov/quickfacts/table/PST045214/00> [<https://perma.cc/WS3Z-ME26>] (corresponding census data). More up to date federal prison race and ethnicity statistics are available at FED. BUREAU OF PRISONS, *Inmate Statistics* (Mar. 2017), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) [<https://perma.cc/SZU6-8TH7>].

25. *See* SAKALA *supra* note 24; *see also* U.S. CENSUS BUREAU *supra* note 24.

the Justice Department has estimated that one third of black men and nearly a fifth of Latino men born in 2001 will go to prison in their lifetime.<sup>26</sup> Prejudiced criminal justice policies and racial profiling, not disproportionate minority crime rates, account for the high numbers of blacks and Latinos locked up.<sup>27</sup> Only very recently have researchers begun to take stock of the impact of the intense racial disparities in the incarcerated population on the myriad collateral consequences that population suffers upon release.<sup>28</sup> According to Sociologist Devah Pager, who implemented an experiment in 2003 to test the role of criminal records in hiring discrimination, “the connections are in thinking about the criminal justice system as an increasingly important mechanism for generating racial inequality in the labor market.”<sup>29</sup> Pager’s experiment highlighted the correlation

26. Thomas P. Bonczar, *Prevalence of Imprisonment in the US Population, 1974-2001*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (2003), <http://www.bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/A7ZH-BH6Y>].

27. See Johnathan J. 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, 199 (2014). This point is best demonstrated through the disparate treatment of people of color in the war on drugs. A June 2013 report by the American Civil Liberties Union (“ACLU”) found that although white and black Americans use marijuana at similar rates, a black person was nearly four times more likely to be arrested for marijuana possession than a white person across all states (in the states with the worst disparities, blacks were on average over six times more likely to be arrested for marijuana possession than whites). See ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 9, 17, 21 (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> [<https://perma.cc/4WB4-G3TW>]; see also NAZGOL GHANDNOOSH, *SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> [<https://perma.cc/YNT9-EBYS>] (explaining how the war on drugs and overt racial bias in policing leads to disproportionate arrests and convictions of people of color). For a detailed explanation of how the real and perceived intersections between race and criminality in the U.S. developed, see generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* (2011).

28. Michelle Alexander is famous for describing this phenomenon as the “new Jim Crow” in her 2010 book. See generally ALEXANDER, *supra* note 1.

29. Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed For Life*, NATION (Nov. 6, 2013), <https://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/> [<https://perma.cc/67BV-PPA9>] (quoting Devah Pager). Pager writes in her study, “No longer a peripheral institution, the criminal justice system has become a dominant presence in the lives of young disadvantaged men, playing a key role in the sorting and stratifying of labor market opportunities.” Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 962 (Mar. 2003), [http://web.stanford.edu/group/scspi/\\_media/pdf/Reference%20Media/Pager\\_2003\\_Crime%20and%20the%20Legal%20System.pdf](http://web.stanford.edu/group/scspi/_media/pdf/Reference%20Media/Pager_2003_Crime%20and%20the%20Legal%20System.pdf) [<https://perma.cc/QT4M-KZ2D>]. Bruce Western and Kathryn Beckett have also called the criminal justice system a “labor market



between the disparate treatment of race by the criminal justice system and the later disparate treatment of race by employers evaluating job applicants with records.<sup>30</sup>

Pager refers to a person's criminal record as a "negative credential" because of the extremely high barrier it poses to employment.<sup>31</sup> Her study used an experimental audit approach based on "matched pairs" of specially trained black and white men who applied for hundreds of entry-level, low-wage jobs in Milwaukee in the summer of 2001.<sup>32</sup> The applicants were randomly assigned resumes that showed identical work experience and education, but one of the two indicated recent employment in prison and listed a parole officer as a reference.<sup>33</sup> Pager recorded whether employers called back to offer a job or schedule a second-round interview. The study's aim was to determine the extent to which a criminal record (in the absence of other disqualifying characteristics) serves as an obstacle to employment. Out of the pool of subjects, thirty-four percent of white applicants without a criminal record were given a callback compared to seventeen percent of white applicants with a criminal record.<sup>34</sup> That is, having a criminal record reduced a white job applicant's success by half.<sup>35</sup> Even more alarming, was that the seventeen percent of white applicants with criminal records given callbacks was still higher than the fourteen percent of black applicants *without* criminal records who were given callbacks.<sup>36</sup> And only a meager five percent of black applicants with criminal records were given callbacks.<sup>37</sup> Therefore, the study revealed even greater racial discrimination in hiring

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institution." See Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1052 (Jan. 1999), <http://politics.as.nyu.edu/docs/IO/4756/western.pdf> [<https://perma.cc/5LJG-PFY7>].

30. Pager, *supra* note 29, at 956.

31. *Id.* at 942. Pager identifies the "credentialing" power of the criminal justice system, which operates by institutionally branding a particular class of individuals "with implications for their perceived place in the stratification order." *Id.*

32. *Id.* at 945-46.

33. All the applicants were twenty-three-year-old college students who were matched on the basis of physical appearance and general style of self-presentation. *Id.* at 947. The applicant posing as a previously incarcerated person disclosed in the interview that he had served an eighteen-month prison term for a drug crime. *Id.* at 959.

34. *Id.* at 955.

35. *Id.*

36. *Id.* at 958.

37. *Id.* Pager's study shows that a criminal record halved a white applicant's chances, but reduced a black applicant's chance by two-thirds. In other words, criminal records hurt black candidates more than white candidates.

practices than conviction-based discrimination. Responding to Pager's findings, Ta-Nehisi Coates wrote: "Effectively, the job market in America regards black men who have never been criminals as though they were."<sup>38</sup> This pervasive prejudice among hiring authorities is tied up in stereotypes of criminality that assume<sup>39</sup>—and ultimately, contribute to<sup>40</sup>—links between race and ex-offender status.

In most jurisdictions the social stigma associated with a criminal record is compounded by legally mandated discrimination based on that criminal record.<sup>41</sup> People with certain past criminal justice involvement are excluded by law—temporarily or permanently—from a variety of jobs in the public and private sectors, running the gamut from ambulance drivers to septic tank cleaners.<sup>42</sup> Further, even when discrimination is not legally required, most states allow employers and occupational licensing agencies to obtain the full criminal records of job applicants and to use that information in hiring at their discretion.<sup>43</sup>

Pager explains that the criminal record as a source of labor market inequality is so nefarious because it is a mechanism of discrimination and social exclusion that is sanctioned and designed by the state.<sup>44</sup> Employment satisfies a basic and fundamental need for a human to

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38. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [https://perma.cc/Y488-5ANC].

39. See GHANDNOOSH, *supra* note 27, at 3 ("White Americans overestimate the proportion of crime committed by people of color, and associate people of color with criminality. For example, white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug sales, and juvenile crime committed by African Americans by 20-30%. In addition, implicit bias research has uncovered widespread and deep-seated tendencies among whites—including criminal justice practitioners—to associate blacks and Latinos with criminality.").

40. See *infra* note 48.

41. See *infra* Section II.A.2.

42. See *infra* Section II.A.2; see also Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 190 (1995).

43. See *infra* Section II.A.3.

44. Pager, *supra* note 29, at 942 ("The 'negative credential' associated with a criminal record represents a unique mechanism of stratification, in that it is the state that certifies particular individuals in ways that qualify them for discrimination or social exclusion. It is this official status of the negative credential that differentiates it from other sources of social stigma, offering greater legitimacy to its use as the basis for differentiation.").

be self-sufficient and contribute to society at large.<sup>45</sup> For that reason, it has been shown to be a person's primary concern upon release from incarceration.<sup>46</sup> But time behind bars impedes the accumulation of work experience, prevents the maintenance of social networks that aid in job searches, and tends to lead to the erosion of marketable skills, on top of qualifying individuals for discrimination and social exclusion.<sup>47</sup> The significant barrier to the legal labor market posed by a criminal record frequently pushes previously convicted people to find alternative sources of income, often outside of the law.<sup>48</sup> These alternative income sources include a shadow economy of part time labor—similar to the one that exploits undocumented workers—that provides low wages with little if any benefits, putting strain on laborers and the families they support.<sup>49</sup> Pager writes “in our frenzy of locking people up, our ‘crime control’ policies may in fact exacerbate the very conditions that led to crime in the first place.”<sup>50</sup> Unsurprisingly, deprivation of stable work is one of the strongest predictors of recidivism.<sup>51</sup>

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45. ALEXANDER, *supra* note 1, at 148. Inability to find work can lead to behavioral and mental health effects like depression and proclivity for violence, particularly among men. *Id.* at 149.

46. MARTA NELSON, PERRY DEESS & CHARLOTTE ALLEN, VERA INST., THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 13 (Sept. 1999), [http://www.vera.org/sites/default/files/resources/downloads/first\\_month\\_out.pdf](http://www.vera.org/sites/default/files/resources/downloads/first_month_out.pdf) [<https://perma.cc/NRM6-2B67>].

47. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 4, 22-23 (2003).

48. This is partially due to the fact that a criminal record often adds to the already “problematic profile” of an applicant who has little or no preparation for the workforce. *See* ALEXANDER, *supra* note 1, at 150. Poverty, limited education, mental illness, and addiction are all factors that increase a person's risk of ending up behind bars. *See id.* According to one study, nearly half of the offender and ex-offender populations are functionally illiterate. *See id.* (citing JEREMY TRAVIS, AMY SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (2001)).

49. *See generally* MERCER L. SULLIVAN, “GETTING PAID:” YOUTH CRIME AND WORK IN THE INNER CITY (1989); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (Aug. 2002); *see also* Wright, *supra* note 29. A 2010 Pew Charitable Trust study found that for men, having been incarcerated reduces hourly wages by eleven percent and reduces annual earnings by forty percent. *See* PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/collateral-costs> [<https://perma.cc/NJ2Y-EU4Q>].

50. Pager, *supra* note 29, at 961.

51. *Id.* at 939; *see* Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 398 (Apr. 2011), <http://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf> [<https://perma.cc/9TMZ-DZ5C>] (showing that two years after release ex-offenders who were employed were nearly half as likely to face arrest or

Hiring discrimination against people with criminal records, concentrated in minority communities, has led to rampant joblessness with profound effects on the U.S. economy and social welfare. Neither the Federal Bureau of Prisons, nor the Department of Labor, nor any state or federal prison tracks the unemployment rate of ex-offenders, but studies have estimated that it is between twenty-five and forty percent.<sup>52</sup> Estimates of lost productivity due to joblessness and the post-conviction, secondary labor market total as much as sixty-five billion dollars per year in terms of gross domestic product (not including the high costs of incarceration and recidivism).<sup>53</sup> Today, we are more aware of the dismal racial disparities in American employment: the joblessness rate is just over thirteen percent for blacks—nearly double that of white workers, and comparable to the national rate during the Great Depression—and just below ten percent for Latinos.<sup>54</sup> But, traditionally, the criminal justice system has served to efface the real effect of race on employment and poverty statistics by omitting incarcerated populations from census counts.<sup>55</sup> Even now there is still no official

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conviction); *see also* Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, 5 CORR. MGMT. Q. 1, 14 (2001), [http://users.soc.umn.edu/~uggen/Uggen\\_Staff\\_CMQ\\_01.pdf](http://users.soc.umn.edu/~uggen/Uggen_Staff_CMQ_01.pdf) [<https://perma.cc/BKT2-8SRK>] (claiming that “employment remains a viable avenue for reducing crime and recidivism” and finding strong correlations between increased employment and reduced recidivism, particularly for older ex-offenders).

52. *See* PETERSILIA, *supra* note 47, at 119. The unemployment rates of ex-offenders are particularly high within the first few years out. In California, for example, it is estimated that as many as eighty percent of ex-offenders remain jobless a year after being released from prison. *See id.*

53. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL’Y RES., EX-OFFENDERS AND THE LABOR MARKET (2010), <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf> [<https://perma.cc/97BB-862M>]. In 2008 the Center for Economic Policy and Research calculated that the population of people with felony convictions lowered the official employment rate among all men as much as 1.7 percentage points. *See id.* at 1.

54. *See* Wright, *supra* note 29.

55. “The idea of “invisible inequality” is explained in the work Bruce Western and Becky Petit. *See* Western & Petit, *supra* note 21. Their study shows that unemployment rates—as they are conventionally measured by the Current Population Survey, the large monthly labor force survey conducted by the Census Bureau—do not measure the incarcerated population and, thus, drastically underestimate the rate of unemployment, especially of young black men. This is because the current Population Survey is drawn on a sample of households, so those who are institutionalized are not included in the survey-based description of the population. *See id.* at 12. When Western recalculated the employment rates for young black men without a high school diploma in 2008, he found that the percent of such individuals with jobs dropped from forty to twenty-five percent. *See id.* According to Ta-Nehisi Coates, “[t]he illusion of wage and employment progress

comprehensive data collected about the unemployment rates of ex-offenders, let alone specific data about racial minorities with records.<sup>56</sup> This perpetuated political legacy of invisibility reflects the entrenched and calculated connections between race and criminality in this country's opportunity structure.

## II. THE NEGATIVE CREDENTIAL AND RACE

### A. The Legal History That Gave Rise to the Need for States to Ban-the-Box

This Part describes the legal history and context that produced the need for ban-the-box legislation to protect people of color with criminal records. Section 1 shows the chronology of Title VII disparate-impact litigation and judicial interpretation. Section 2 explains the legally mandated employment discrimination against people with records. Section 3 details the rise of the criminal background check industry, its regulation by the Fair Credit Reporting Act ("FCRA"), and how the industry has exploited racial biases shared by many employers about ex-offenders in the labor market. Each of these individual narratives—along with political context—contributed to a systemic failure by the legal apparatus to protect the groups most vulnerable to criminal record discrimination. The ban-the-box movement, as the product of these narratives, is introduced in Section 4. There, this Note explores how the motivating historical forces behind the ban-the-box laws signal potential issues in their designs.

#### 1. *History of Federal Court Treatment of Disparate Impact Challenges to Employers' Criminal Record Policies*

Federal civil rights law was the first legal measure used to attempt to counteract the structural racism inherent in hiring discrimination against people with criminal records. This measure plays out through an ironic logic: because the criminal justice system is proven to disproportionately convict and incarcerate people of color, certain forms of discrimination by employers against job applicants with criminal records are prohibited under the disparate impact provision of Title VII of the 1964 Civil Rights Act.<sup>57</sup> While in the 1970s and

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among African American males was made possible only through the erasure of the most vulnerable among them from the official statistics." See Coates, *supra* note 38.

56. See PETERSILIA, *supra* note 47, at 119.

57. See Michael Connitt, Comment, *Employer Discrimination against Individuals with A Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1010 (2011). While Title VII "does not prohibit

early 1980s Title VII suits involving employers' consideration of arrest and conviction records had "mixed results," over time, the success rate for plaintiffs in such suits has plummeted.<sup>58</sup>

Title VII makes it unlawful for an employer to fail or refuse to hire an individual because of their "race, color, religion, sex, or national origin."<sup>59</sup> An employer does not need to intentionally discriminate to violate the law.<sup>60</sup> Even a policy that is neutral on its face will run afoul of Title VII if the negative consequences fall too harshly on a protected class and the policy is not related to the job at issue or consistent with "business necessity."<sup>61</sup> The disparate impact theory was first adopted by the U.S. Supreme Court in *Griggs v. Duke Power Co.*, where the Court found that an employer's requirements that applicants possess a high school diploma and pass a general intelligence test were not permissible under Title VII.<sup>62</sup> There, the Court held that "any [hiring] tests used must measure the person for the job and not the person in the abstract."<sup>63</sup> Thus, the Court established an important antidiscrimination safeguard by interpreting Title VII to require employers who use a hiring method with a

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discrimination on the basis of criminal history per se," people who have been rejected for jobs or fired because of their criminal records have pursued discrimination claims indirectly by alleging that facially neutral inquiries about criminal records disproportionately disadvantage black and Latino applicants. See Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 5 (2012).

58. Harwin, *supra* note 57, at 5. Harwin notes that while in the 1970s and early 1980s disparate impact claims were "among the most successful Title VII suits brought by ex-offenders," in no case since the late 1980s has a plaintiff won after a trial on the merits. *Id.* at 6 n.59.

59. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, codified at 42 U.S.C. § 2000e-2(a)(1) (2000).

60. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

61. *Id.* at 430-31. Title VII targets two different types of discrimination: "disparate treatment," which includes employer practices that are motivated in whole or in part by intentional discrimination against a protected class, and "disparate impact," which includes facially neutral employer practices that disproportionately harm members of a protected class. See Harwin, *supra* note 57 at 5. In *Griggs* the Court tangentially defined "business necessity" as an employment practice that can "be shown to be related to job performance." *Griggs*, 401 U.S. at 431.

62. In *Griggs*, the NAACP's Legal Defense and Education Fund ("LDF") represented a group of thirteen black Duke Power Co. employees. The company had a long history of segregating employees by race, relegating black employees to the "labor department," with the lowest paid jobs. Shortly after Congress passed Title VII, Duke Power Co. stopped expressly restricting black employees to the labor department. Instead, the company implemented IQ tests and required a high school diploma for non-labor department jobs, despite the fact that it had never imposed any such employment criteria previously. *Griggs*, 401 U.S. at 426-27.

63. *Id.* at 436.

discriminatory impact to shoulder the burden of proving that the method fulfills a genuine business need and is a valid measure of an applicant's ability to learn or perform the job in question.

Today, disparate impact claims are analyzed under a three step, burden-shifting framework codified in the Civil Rights Act of 1991.<sup>64</sup> First, the plaintiff must establish that the employer's facially neutral employment practice has a significantly adverse impact on a protected class.<sup>65</sup> Second, if the plaintiff establishes a prima facie case of discrimination, the burden of persuasion shifts to the employer to demonstrate that the challenged policy was a business necessity.<sup>66</sup> Third, the plaintiff can still prevail by demonstrating that the reason offered by the defendant is a pretext.<sup>67</sup> The plaintiff typically proves this by showing that there is an alternative policy that avoids the disproportionately harsh negative impacts on the protected class.<sup>68</sup>

In order to allege that an employer's hiring policy discriminates on the basis of applicants' criminal histories, the injured party must begin by filing a claim with the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing the dictates of Title VII.<sup>69</sup> If the EEOC determines that there is "reasonable cause" that the claimant suffered actionable discrimination, then the agency will see the case through mediation,

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64. 42 U.S.C. § 2000e-2. The three-part burden-shifting framework was originally adopted in *McDonnell Douglas Corp. v. Green* before it was later codified in the Civil Rights Act. See 411 U.S. 792, 802 (1973).

65. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

66. *Id.* In *Griggs*, the Court emphasized that the employer is required to demonstrate that "any given [employment] requirement must have a manifest relationship to the employment in question" or have a "demonstrable relationship to successful performance of the jobs for which [the practice is] used." *Griggs*, 401 U.S. at 431-32. The meaning of business necessity has changed dramatically over the years in Supreme Court opinions. See generally, Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1478 (1995) (discussing the meaning of business necessity and how the Supreme Court has altered the burden on employers to demonstrate business necessity over time); Kelsey Sullivan, *Risky Business: Determining the Business Necessity of Criminal Background Checks* 24 U. CHI. LEGAL F. 501 (2014) (examining what has constituted a business necessity defense for employers who use background checks in a way that has a disparate impact on minorities).

67. 42 U.S.C. § 2000e-2(b)(k)(1)(A)(ii).

68. *Id.*

69. Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize A New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2810 (2015).

arbitration, or litigation.<sup>70</sup> If the EEOC does not take the case, the claimant is issued a Notice of Right-to-Sue, which grants them permission to file a lawsuit themselves.<sup>71</sup>

In the 1970s and early 1980s, before Congress codified the three part framework, disparate impact claims brought by people with criminal records found moderate success in the federal courts with the help of the EEOC.<sup>72</sup> Many of these claims succeeded because federal courts were fairly flexible in the type and quantity of statistical evidence they accepted as sufficient to meet a prima facie case of adverse impact on a protected class and judges looked skeptically upon employers' defenses about business necessity and job-relatedness.<sup>73</sup>

The favorable treatment of such cases stemmed from a 1975 Eighth Circuit decision, *Green v. Missouri Pacific Railroad Co.*<sup>74</sup> There, Buck Green, a black job applicant, brought a Title VII claim against the Missouri Pacific Railroad Company ("MoPac") for refusing to hire any person who had been convicted of a criminal offense other

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70. *Id.* The EEOC also issues guidance on federal employment law to enforce Title VII. *See, e.g.*, OFF. OF LEGAL COUNSEL, U.S. EEOC, EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [<https://perma.cc/PXZ8-LSJR>] [hereinafter EEOC ENFORCEMENT GUIDANCE NO. 915.002].

71. O'Connell, *supra* note 69, at 2810.

72. Harwin, *supra* note 57, at 6.

73. *Id.* For example, in *Gregory v. Litton Systems, Inc.*, the court was satisfied with general population statistics showing proportionally higher rates of arrests and convictions of racial minorities. 316 F. Supp. 401, 403 (C.D. Cal. 1970). Still, at that time, the majority of successful claims involved challenging automatic and absolute bans to employment based on criminal records and, even then, plaintiffs lost more frequently than they won. Harwin, *supra* note 57, at 5, 10. For another "golden age," plaintiff-friendly case, see, e.g., *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 965 (D.D.C. 1980) (invalidating the use of arrest records as "knock-out" criteria). For an unfavorable plaintiff outcome, see, e.g., *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1301 (S.D.N.Y. 1981) (finding that the plaintiff's failure to produce applicant flow data—statistics comparing the racial composition of the employer's employees to its applicants—was fatal to his claim that the Postal Service's refusal to hire people with criminal convictions disparately impacted minority applicants). In particular, the courts struck down most challenges to employers' discretionary use of conviction records (as opposed to a blanket exclusion). *See* Harwin, *supra* note 57, at 9. Another source of discrepancy in the outcomes of the cases revolved around the use of arrest records—which the courts reviewed more critically—as opposed to conviction records. *See id.*

74. 523 F.2d 1290 (8th Cir. 1975); *see* O'Connell, *supra* note 69, at 2810.



than a minor traffic violation.<sup>75</sup> Green argued that the absolute bar in MoPac's employment policy had a disparate impact on blacks and did not relate to job performance.<sup>76</sup> MoPac countered that the policy was a business necessity because of concerns about theft, negligent liability, and employment disruption.<sup>77</sup> The Eighth Circuit upheld Green's Title VII claim, overruling the district court.<sup>78</sup> The Eighth Circuit first found that Green had established a prima facie case of adverse impact based on general statistics including national data on black and white conviction rates, in addition to the company's applicant flow data.<sup>79</sup> Second, the court held that MoPac did not meet the burden for the business necessity defense because it had failed to provide any empirical validation to justify its job requirements.<sup>80</sup> On remand, the district court entered an injunction, subsequently affirmed by the Eighth Circuit, stating that, in terms of business necessity, the employer could consider an applicant's criminal history in the screening process *only* "so long as the defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."<sup>81</sup> In other words, the court enforced a strict business necessity requirement in regards to employer consideration of applicants' conviction records.

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75. *Green*, 523 F.2d at 1292. Green filed the suit on November 7, 1972 after already filing discrimination charges with the EEOC. The EEOC also filed suit against the defendant on April 5, 1973, on the basis of the plaintiff's charges. The court dismissed the EEOC's suit because of the plaintiff's previous filing pursuant to an EEOC Right-to-Sue Notice, thus relegating the EEOC to permissive intervention in the original suit. *See EEOC v. Mo. Pac. R.R.*, 493 F.2d 71 (8th Cir. 1974).

76. *Green*, 523 F.2d at 1292-93.

77. *See O'Connell*, *supra* note 69, at 2811 (citing *Green*, 523 F.2d at 1298).

78. *Green*, 523 F.2d at 1299.

79. In *Green*, the court recognized statistical data and treatises offered into evidence by the plaintiff which indicated that, at that time, blacks were convicted of crimes "at a rate at least two to three times greater than the percentage of blacks in the populations of certain geographical areas." *Id.* at 1294. The court also relied on the testimony of an expert witness for the plaintiff, Dr. Ronald Christensen, who concluded that, at the time, it was "between 2.2 and 6.7 times as likely that a black person will have a criminal conviction record during his lifetime than that a white person will have such a record." *Id.*; *see also Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1301 (S.D.N.Y. 1981) (defining applicant flow data).

80. *See O'Connell*, *supra* note 69, at 2811 (citing *Green*, 523 F.2d at 1298).

81. *See Smith*, *supra* note 27, at 204 (quoting *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977)). These three factors—(1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought—have become known as the "Green Factors." *See EEOC ENFORCEMENT GUIDANCE NO. 915.002*, *supra* note 70.

The relative frequency of successful cases like *Green* during early disparate impact litigation can be at least partially attributed to the efforts of the EEOC. In the 1970s, the EEOC was involved in many authoritative cases contesting employers' use of arrest and conviction records—often carrying the suit by itself on behalf of an impacted person.<sup>82</sup> During the 1980s, the EEOC looked to the established plaintiff-friendly disparate impact jurisprudence while developing its official stance on the issues arising in these cases, including the types of statistical proof required to demonstrate disparate impact and the appropriate business necessity analysis.<sup>83</sup> The agency issued a myriad of enforcement guidelines, policy interpretations, and compliance manuals firmly establishing the argument that job applicants of color are adversely and disproportionately impacted by employers' use of arrest and conviction records—and prohibiting any such conduct without business necessity as a categorical rule.<sup>84</sup> The EEOC also recognized a rebuttable presumption of the discriminatory impact of such policies, therefore relieving job applicants of the legal and financial burdens of producing their own statistical proof when they filed claims with the agency.<sup>85</sup> While the EEOC possesses only the

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82. See, e.g., *EEOC v. Guar. Sav. & Loan Ass'n*, 561 F.2d 1135 (5th Cir. 1977); *EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974); *EEOC v. Riss Int'l Corp.*, 525 F. Supp. 1094 (W.D. Mo. 1981); *EEOC v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975). The EEOC lacked litigation authority prior to the Equal Employment Opportunity Act of 1972. See Harwin, *supra* note 57, at n.41.

83. Harwin, *supra* note 57, at 9-10. For cases where business necessity is at issue, the EEOC has employed an analysis that is particularly favorable to plaintiffs. This analysis (which was originally even more plaintiff-friendly) was amended in 1985 to “require employers to engage in a holistic inquiry about the nature and gravity of the offense, the time since conviction or completion of the sentence, and the nature of the job.” *Id.* at 11. In instances where the plaintiff challenges policies based on arrest records (as opposed to conviction records), the EEOC advantages plaintiffs by calling on employers to “assess the likelihood that a candidate had actually committed the crime for which he had been arrested, by ‘examin[ing] the surrounding circumstances, offer[ing] the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, mak[ing] the follow-up inquiries necessary to evaluate his/her credibility.’” *Id.* (quoting EEOC, NOTICE 915.061 (Sept. 7, 1990), [https://www.eeoc.gov/policy/docs/arrest\\_records.html](https://www.eeoc.gov/policy/docs/arrest_records.html) [<https://perma.cc/78PN-KNQA>]).

84. Harwin, *supra* note 57, at 10. See, e.g., U.S. EEOC, CONVICTION RECORDS (Feb. 4, 1987), <https://www.eeoc.gov/policy/docs/convict1.html> [<https://perma.cc/P9HQ-ZR9A>] [hereinafter EEOC CONVICTION RECORDS].

85. “[T]he Commission’s underlying position [is] that an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.” See EEOC CONVICTION RECORDS, *supra* note 84. This presumption leaves it up to the employer “to present more narrow local, regional, or

limited power to persuade federal court decisions, in the 1970s and the early 1980s the judiciary repeatedly deferred to the agency's interpretation of Title VII, leading to plaintiffs' success in multiple cases.<sup>86</sup>

Apart from the contributions of the EEOC, the "golden age" of criminal history disparate impact litigation was also the result of initial, progressive judicial interpretation of the legislative intent of Title VII. The early decisions reflected the then-dominant belief that Title VII is a broad-based prophylactic measure<sup>87</sup> 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."<sup>88</sup> During that time, federal judges played an inflated role in determining the scope of disparate impact liability, implementing ambiguous standards, later codified by Congress, that afforded them considerable discretion—remaining to this day—in assessing whether parties have met their individual burdens.<sup>89</sup> Because of this discretion, when the Civil Rights Movement waned and the ideology of the judiciary became increasingly conservative, the federal courts began to uniformly reject plaintiffs' challenges to employers' criminal records policies.<sup>90</sup>

Since the 1980s plaintiffs have lost almost every disparate impact case about the consideration of criminal records in hiring practices,

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applicant flow data, showing that the policy probably will not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool." Harwin, *supra* note 57, at 10.

86. *See, e.g.*, *Davis v. City of Dallas*, 777 F.2d 205, 209 (5th Cir. 1985); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 1607.4(c)). The federal courts have the final word in interpreting the meaning of Title VII, and courts defer to the EEOC's decisions only insofar as they are persuasive. *See* Harwin, *supra* note 57, at 11. As the Supreme Court explained in *Gilbert v. General Electric Co.*, "[t]he weight [accorded to the EEOC's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 429 U.S. 125, 140-42 (1976).

87. *Connecticut v. Teal*, 457 U.S. 440, 449 (1982).

88. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

89. Smith, *supra* note 27, at 204-05 (citing Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 268-70 (2005)). In particular, the Court developed arbitrary and convoluted tests for distinguishing between disparate impact and disparate treatment. When the political leaning of the judiciary changed, these standards made it difficult for plaintiffs to demonstrate discrimination that is not intentional on its face. *Id.* at 205.

90. *Id.*; *see also* Harwin, *supra* note 57, at 12.

“with judges frequently awarding summary judgment to employers.”<sup>91</sup> The federal courts have made Title VII claims harder to bring by increasing the plaintiff’s burden for establishing a prima facie case and have radically relaxed the standards for employers to prove business necessity and job-relatedness.<sup>92</sup> In fact, judicial opinions have expressed particular hostility toward disparate impact claims brought by plaintiffs with criminal records.<sup>93</sup> One Florida court even held that such a claim went against the very purpose of Title VII by arguing that denying employers the ability to discriminate based on criminal records works to “stigmatize minorities by saying, in effect, your group is not as honest as other groups.”<sup>94</sup> The court went on to advise, “[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft...then they should stop

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91. Harwin, *supra* note 57, at 12 (citing *Caston v. Methodist Med. Ctr. of Ill.*, 215 F. Supp. 2d 1002 (C.D. Ill. 2002); *McCraven v. City of Chicago*, 18 F. Supp. 2d 877 (N.D. Ill. 1998); and *Brown v. City of New York*, 869 F. Supp. 158 (S.D.N.Y. 1994), in which none of the plaintiffs won after a trial on the merits). In part, the high loss rate reflected the fact that over fifty percent of the cases were brought *pro se*. *See id.* at 12. In not one case did a *pro se* litigant survive a motion to dismiss or for summary judgment; procedural defects were generally to blame. *See id.* (citing Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006)).

92. *See* Harwin, *supra* note 57, at 14; *see also* Smith, *supra* note 27, at 205-12. It was in the Court’s decision *Wards Cove Packing Co. v. Antonio* that the disparate impact doctrine was most severely limited. 490 U.S. 642 (1989); *see also infra* note 102. In general, courts have increased the plaintiff’s evidentiary burden by rejecting the argument that a policy of not hiring persons with criminal backgrounds is racially discriminatory given the disproportionate representation of minorities in the prison population. *See* O’Connell, *supra* note 69, at 2811-12; *see, e.g.*, *EEOC v. Freeman*, 961 F. Supp. 2d 783, 798 (D. Md. 2013) (holding that for a plaintiff to meet its prima facie showing of disparate impact, the statistics used “must be representative of the relevant applicant pool” and not the population at large, as the EEOC had done in that case and in the past). In conjunction with courts’ increased requirements from plaintiffs since the 1980s, employers’ business necessity defenses have been viewed with less and less scrutiny. *See* Harwin, *supra* note 57, at 14-15; *see, e.g.*, *Williams v. Scott*, 1992 WL 229849 at \*2 (ND. Ill. Sept. 9, 1992) (disavowing any scrutiny of the business necessity defense, claiming, “[i]t really requires nothing more than the statement of [the employer’s] policy to explain its business justification.”). Additionally, where courts had once taken particular care to distinguish between arrests and convictions in hiring policies, after the 1980s, “they had no qualms about upholding employer policies that disqualified applicants or employees based on arrests that had never resulted in convictions.” Harwin, *supra* note 57 (citing *Ramos v. EquiServe, Inc.*, 146 F. App’x 565 (3d Cir. 2005)).

93. Harwin, *supra* note 57, at 13.

94. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989).

stealing.”<sup>95</sup> Needless to say, federal courts have ceased finding the EEOC’s guidelines persuasive.<sup>96</sup>

The story of the shift in the federal courts’ treatment of criminal history disparate impact cases tracks a change in federal courts’ attitude toward Title VII generally, and further, a larger judicial and political trend to look skeptically on the idea that racial discrimination is a systematic generator of social and economic disadvantage, instead choosing to view it as a characterization of isolated incidents of animus on the part of bad actors.<sup>97</sup> Originally, in *Griggs* and other early Title VII disparate impact cases, the Supreme Court established precedent that, at least in theory,<sup>98</sup> presumed discrimination absent another compelling explanation for employer conduct.<sup>99</sup> But, over time, this presumption disappeared entirely.<sup>100</sup>

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95. *Id.* This assertion by the court flies in the face of the multiple sources of data that suggest that disproportionate representation of minorities in prisons is due to over policing and discriminatory sentencing policies and not higher instances of crime.

96. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1959 (2006).

97. See generally Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J., 279 (1997). This trend can be tracked along equal protection case law and antidiscrimination litigation generally, spanning legal issues from the death penalty, to criminal law, affirmative action, and voting rights. For example, the Court’s treatment of the death penalty reflects a similar trajectory of dismantling antidiscrimination protections to reject the concept of structural racism. In *Furman v. Georgia* the Court held that the death penalty was unconstitutional with concurring justices citing racial discrimination as a justification for ending the penalty. 408 U.S. 238, 239-40 (1972). Justice Marshall, citing statistics evincing racial discrimination, argued that capital punishment is imposed discriminatorily against certain identifiable classes of people. *Id.* at 364. (Marshall, J., concurring, “[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb.”) (quoting politician Michael DiSalle). Then, in *Gregg v. Georgia* the death penalty was reinstated, and in *McCleskey v. Kemp*, the Court flatly rejected the constitutional challenge to disparate impact in the death penalty’s application. 428 U.S. 153, 206-07 (1976); 481 U.S. 279 (1987). In *McClesky* the court held that only proof of purposeful discrimination against a particular capital defendant would suffice to establish racial bias in capital sentencing, effectively barring a petitioner’s ability to prove systemic racism in capital punishment. See *McClesky*, 481 U.S. at 292-93.

98. See generally Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823 (2008) (arguing that *Brown v. Board of Education* was the last attempt by the Court to eliminate the present effects of past racial oppression).

99. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Griggs*, *McDonnell Douglas*, and *Teamsters*, the Court acknowledged that even absent evidence of actual bad acts or words evincing intent to discriminate, discrimination can still occur. With this

The Court became increasingly reluctant to support measures designed to encourage employers to comply with Title VII due to an unfounded fear that these measures might eventually or effectively impose quotas.<sup>101</sup> In a 1989 case, *Wards Cove Packing Co. v. Antonio*, the Court fundamentally altered its disparate impact analysis, making it harder for plaintiffs to prove their case by undermining the presumption of discrimination that previously accompanied a showing of impact.<sup>102</sup> In *Wards Cove*, the Court made plaintiffs “responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”<sup>103</sup> The dissenters criticized the majority for its radical shift in analysis. Justice Blackmun lamented, “[s]adly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society,

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understanding, the Court showed a willingness to infer discrimination in a variety of circumstances, reflecting an appreciation for societal discrimination.

100. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 575 (2001).

101. See *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 993-98 (1988). Justice O’Connor feared that applying disparate impact analysis and broad use of statistics to subjective and discretionary employment criteria might lead to the use of quotas. Plaintiffs must identify the specific practices alleged to cause the disparity and explain the causation. According to one scholar:

Justice O’Connor misreads the purpose and the structure of Title VII; she assumes that in prohibiting preferential treatment, Congress meant that any provision that imposed a duty on employers to take seriously the requirement that blacks be hired and promoted, as well as paid equal wages, violates that restriction. It does not. The plurality opinion, like much of the discussion of Title VII by economists, misreads the statute and its purpose.

Jerome McCristal Culp, Jr. *Neutrality, The Race Question, and the 1991 Civil Rights Act: The “Impossibility” of Permanent Reform*, 45 RUTGERS L. REV. 965, 1001 (1993).

102. 490 U.S. 642 (1989). In *Wards Cove*, the Court made several significant changes to disparate impact jurisprudence. First, it did not permit the plaintiffs to compare the racial composition of two different work areas—salmon cannery workers and non-cannery workers—arguing that essentially this would be like comparing apples to oranges. Thus, the plaintiffs could not even raise a prima facie case of disparate impact. Second, the Court required the plaintiffs to identify the specific employment practice that had caused the impact. Third, the Court no longer shifted the burden of proof to the employer once the employees raised a prima facie case of disparate impact discrimination. Instead, the Court imposed on the employer a lesser burden of production. Finally, the Court shifted the employer’s defensive showing from the *Griggs* standard—requiring a practice to be job-related and consistent with business necessity—to a lighter standard requiring only a “business justification.” *Id.* at 657-59; see Sullivan, *supra* note 66, at 511-13.

103. *Wards Cove*, 490 U.S. at 656 (quoting *Watson*, 487 U.S. at 994).

or even remembers that it ever was.”<sup>104</sup> The decision sparked Congress to pass the 1991 Civil Rights Act to revert back to *Griggs*-era burden shifting.<sup>105</sup> Yet, while the Act partially restored the earlier, plaintiff-friendly analysis, its ambiguous language further complicated the state of disparate impact law by granting courts the discretion to alter the substance of the procedural burdens.<sup>106</sup> Since then, courts have continued to demand exacting prima facie cases from plaintiffs while maintaining relaxed standards for defendants.<sup>107</sup> The trajectory of Title VII’s larger legal narrative demonstrates how the Court has come to view the persistence of race discrimination with deep skepticism.<sup>108</sup> This position profoundly affects how lower courts adjudicate and how the country at large understands the problem of racism.

Still, despite this contemporary judicial disbelief about racial disparate impact, the EEOC has continued to articulate the viewpoint that criminal history discrimination disproportionately harms people of color. In 2012, the agency issued revised enforcement guidance, intended to “consolidate and update” its positions on employers’ consideration of applicants’ criminal records.<sup>109</sup> The guidance dedicates considerable attention to the intersections of race, national origin, and criminal records in the context of employment

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104. *Id.* at 662 (Blackmun, J., dissenting). Justice Stevens ended his dissent by noting that the reasons for the majority’s shift were “a mystery” to him. *Id.* at 671-72. (Stevens, J., dissenting). He further explained, “I cannot join this latest sojourn into judicial activism.” *Id.*

105. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2004); *see also* Sullivan, *supra* note 66, at 512. Senator Kennedy introduced an amendment to Title VII “to restore and strengthen civil rights laws that ban discrimination in employment.” S. 2104, 101st Cong. (1990); *see also* Linda Lye, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and The Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 334 (1998).

106. Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 501 (2003). The Civil Rights Act of 1991:

requires plaintiffs to prove causation and identification in order to establish a prima facie case; only if ‘the complaining party can demonstrate to the court that the elements of a respondent’s decision-making process are not capable of separation for analysis’ can the complainant proceed without specifying the employment practice to which the disparate impact may be attributed. Conspicuously absent from the Act is a discussion of the type of statistical evidence necessary to establish a prima facie case.

*Id.* at 502 (quoting the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2004)).

107. *See id.* at 506-07 (discussing the hurdles plaintiffs face today in using statistics to establish a prima facie case).

108. Selmi, *supra* note 100, at 562-63.

109. *See* EEOC ENFORCEMENT GUIDANCE NO. 915.002, *supra* note 70.

discrimination.<sup>110</sup> It states explicitly that employers' use of criminal records to exclude people with criminal histories from employment has disproportionately impacted blacks and Latinos because of their overrepresentation in the criminal justice system.<sup>111</sup> Using hypothetical legal scenarios, the guidance outlines the principles applicable to relying on criminal records in employment decisions and the appropriate disparate treatment analysis for assessing Title VII claims.<sup>112</sup> The guidance has received considerable attention,<sup>113</sup> and the agency has in turn taken an aggressive posture in litigation.<sup>114</sup> Overall, however, the guidance has not had a significant impact on case outcomes.<sup>115</sup> This history shows that while disparate impact litigation at one point made it unnecessary to enact laws targeting discrimination based on race and criminal records, the contemporary legal climate requires an alternative avenue to combat such discrimination.

## 2. *Legally-Mandated Discrimination*

The limits to Title VII protection for people with past criminal justice involvement are not purely a matter of judicial interpretation; discrimination against ex-offenders is also mandated by thousands of

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110. *Id.*; see Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. OF LEG. & PUB. POL'Y, 963, 983 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2383456](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383456) [<https://perma.cc/3GCV-5TVQ>].

111. EEOC ENFORCEMENT GUIDANCE NO. 915.002, *supra* note 70, at 9-10 (“African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population . . . National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin.”).

112. *See generally id.*

113. *See* Pinard, *supra* note 110, at 983.

114. *See* Smith, *supra* note 27, at 224-25. In particular, two recent cases litigated by the EEOC resulted in settlements for the plaintiffs. *See* Verdict and Settlement Summary, EEOC v. BMW Mfg. Co., 2015 WL 5719928 (D.S.C. Sept. 8, 2015); Verdict and Settlement Summary, EEOC v. Dolgencorp, 2013 WL 6155464 (S.D. Ind. Oct. 3, 2013).

115. Despite the successful outcomes mentioned above, other claims by the EEOC have hit significant roadblocks. *Compare supra* note 114 (listing successful cases), *with, e.g.*, EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. 2013) (granting summary judgment to the defendant and finding that the EEOC, in order to prevail, needed to identify a more specific practice than the use of credit history and criminal background checks, and prove the disparate impact of that practice); EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014) (affirming, in a credit history disparate impact case, summary judgment for the defendant and finding that the district court properly excluded the EEOC's expert testimony regarding the impact on the grounds that the expert did not have a reliable method of determining individuals' races).



federal and state laws.<sup>116</sup> With the rise of tough-on-crime politics in the late 1980s came a torrent of new laws placing restrictions on the employment prospects of people with criminal records.<sup>117</sup> Today, every state has laws that put some degree of criminal record restrictions on employment.<sup>118</sup> Certain convictions now disqualify a person from holding appointed offices and civil service positions;<sup>119</sup> serving in the military; working in some private sector industries, agencies, and positions; and obtaining or retaining occupational licenses.<sup>120</sup> The restricted jobs range from nursing home aid, to real estate agent, to pest control technician.<sup>121</sup> Former felons are now categorically barred from working in more than eight hundred occupations because of laws and licensing rules.<sup>122</sup>

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116. See Jessica H. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIM. & PUB. POL'Y, 755, 755-56 (2007), <http://www.nelp.org/content/uploads/2015/03/Henry-Jacobs.BantheBox.article.Oct-07.pdf> [<https://perma.cc/S2ZK-TYLL>]; see also Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 UNIV. PA. J. LAW & SOC. CHANGE 159, 171 (2011).

117. See Segall, *supra* note 116, at 171; see also INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15 (Marc Mauer & Meda Chesney-Lind eds., 2002) (summarizing research on consequences of incarceration).

118. See Segall, *supra* note 116, at 171.

119. See JACOBS, *supra* note 6:

A felony conviction is a permanent bar to public employment in seven states. Many other states also disqualify felons from public employment but allow for restoration of eligibility. Disqualifications can apply to all or some felony convictions . . . . Federal hiring policy provides for discretion with respect to excluding those with a criminal record from civil service jobs . . . . The federal Office of Personnel Management (OPM) imposes 'suitability requirements' for federal civil service jobs based on subjective criteria . . . . In 2013 the House of Representatives approved a bill that prohibits public schools from employing teachers and other personnel with certain criminal convictions.

*Id.* at 261-62.

120. See *id.* at 261.

121. See *id.* at 262-64; see also Darren Wheelock et al., *Employment Restrictions for Individuals with Felon Status and Racial Inequality in the Labor Market*, in GLOBAL PERSPECTIVES ON RE-ENTRY 278, 284 (Ikponwosa O. Ekunwe & Richard S. Jones eds., 2011), [http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1044&context=socs\\_fac](http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1044&context=socs_fac) [<https://perma.cc/4MTJ-YRA2>] (listing, for example, Florida statutes that limit the employment of ex-offenders).

122. See Wright, *supra* note 29. The American Bar Association identified over 38,000 statutes that attached collateral consequences to individuals convicted of offenses, over eighty percent of which related to employment. See Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT. INST. JUST. J. 42, 44 (2012), <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf> [<https://perma.cc/3L3X-UM47>]; see also *National Inventory of the Collateral Consequences of Conviction*, JUST. CTR., <http://www.abacollateralconsequences.org/> [<https://perma.cc/WM74-9MF6>].

These laws are premised on the assumption that certain occupations in the private and public sectors pose so much risk to the public that the government must ensure that they operate safely and honestly.<sup>123</sup> To be sure, some of these bars to employment, such as banning a person convicted of money laundering from working in a bank, seem reasonable. However, many of these rules and regulations tend to be highly over-inclusive, often disqualifying ex-offenders from jobs and occupational licenses unrelated to their convictions.<sup>124</sup> This is because many of the bans apply to all convictions or to all felonies and do not take into consideration the time that has passed since the offense.<sup>125</sup> For example, Pennsylvania bars all ex-offenders from working in health care jobs, which ultimately means that a person convicted of shoplifting could not be hired to work as a janitor in a hospital.<sup>126</sup> Even in states where a ban affects only felons who have committed certain crimes, the category of disqualifying crimes can be extremely broad.<sup>127</sup> Additionally, there is a mismatch in the intent and timing for laws that ban felons from certain jobs and the types of felonies that actually exist.<sup>128</sup> As the list of federal felonies continues to increase, older, general laws barring all felons—that were created when the term “felony” applied to fewer, more serious crimes—are now more punitive than they were intended to be.<sup>129</sup> Further, laws that place restrictions on the public sector pose particular disadvantages for black people who, compared to people of other races, tend to be hired in the public sector more frequently than in the private sector.<sup>130</sup> In this way, lawmakers may be viewed as those most responsible for undermining the EEOC’s guidance.

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123. See JACOBS, *supra* note 6, at 264-65.

124. See Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1617 (2004) (surveying various laws restricting the employment of ex-offenders in public and private employment).

125. See JACOBS, *supra* note 6, at 269; Saxonhouse, *supra* note 124, at 1612.

126. See Saxonhouse, *supra* note 124, at 1612.

127. “In Delaware, for example, persons convicted of ‘an infamous crime’ are barred from public employment, and in Georgia the ban applies to those convicted of a felony involving ‘moral turpitude.’” *Id.* (referencing DEL. CODE ANN. tit. 11, § 4364, and GA. CONST. art. II, § 2, para. III).

128. JEFF MANZA & CHRISTOPHER UGGEN, *FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 8 (2006).

129. *Id.*

130. See Segall, *supra* note 116, at 174.

### 3. *The Rise of the Criminal Background Check Industry*

Still, many employers who use criminal records to make hiring decisions are not required to do so by law. Computers and the information technology revolution have made criminal records more publicly accessible than ever before, sparking a new industry that controls and exploits the dissemination of conviction and arrest information.<sup>131</sup> Today, employers' use of criminal background checks is ubiquitous. In a 2009 survey, ninety-two percent of employers reported electively conducting criminal background checks in their standard hiring practices.<sup>132</sup> These practices inhibit the reentry prospects of applicants with criminal histories due to insufficient regulation and misguided employer biases.<sup>133</sup>

The majority of hiring employers purchase applicants' criminal records cheaply and easily from private companies.<sup>134</sup> The larger of these companies copy publicly accessible court and other criminal records into their own proprietary databases, while the smaller

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131. For a comprehensive explanation of our nation's criminal background check databases, the policies that regulate them, and the privatized industry that has capitalized on and problematized these policies, see generally JACOBS, *supra* note 6. Court records are open to the public and increasingly accessible online. Some state corrections departments (e.g., New Jersey) post online the names, photos, and convictions of incarcerated people. In a few states, even prisoners' disciplinary records are publicly accessible. *See id.* at 7. What information gets included in a criminal record depends on various, distinct government and state policies. *See id.* "For example, states differ with respect to whether RAP sheets include juvenile arrests and adjudications; whether they contain arrests and convictions for minor offenses; whether summonses are recorded; whether arrests that do not result in convictions are reported to non-criminal justice requesters; and which, if any, arrests and convictions can be sealed or expunged." *Id.* at 6-7. Additionally, local police departments and prosecutors' offices have their own policies on what information they disseminate in response to requests for criminal record information from people and entities who lack statutory designations. *See id.* at 7.

132. *See* SOC'Y FOR HUM. RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (Jan. 22, 2010), <https://www.slideshare.net/shrm/background-check-criminal> [<https://perma.cc/US5Y-8EZT>]. The ninety-two percent refers to background checks conducted by employers on applicants for some or all of the employer's available positions. Seventy-three percent required criminal background checks for all hires. *Id.* These checks occur in varying stages of the hiring process. Nearly seventy-five percent of employment applications inquire at the start into an applicant's criminal background. *See* Pager, *supra* note 29, at 955.

133. For a counter-argument, see Michael Stoll, *Ex-Offenders, Criminal Background Checks, and Consequences in the Labor Market*, 1 U. CHI. LEGAL F. 381, 383 (2009) (arguing that most of the negative effects of record consideration are driven by state statutes (rather than individual employer determinations), regardless of whether or not the record is consulted).

134. JACOBS, *supra* note 6, at 70, 150.

operations scour the Internet upon request.<sup>135</sup> These companies advertise their services as a means for employers to ensure they hire reliable employees, while stoking demand by exaggerating the potential legal and financial ramifications of hiring people with criminal records.<sup>136</sup>

There are many policy issues with the booming background check industry. Most troubling is that a staggering proportion of the records retrieved in both commercial and government searches are erroneous, typically due to failures in recording arrests' dispositions, frequent misattributions of criminal histories, multiple entries of the same arrest or conviction, and mistaken names, among other clerical errors.<sup>137</sup> According to a National Employment Law Project ("NELP") report, out of an estimated 14.4 million FBI background checks conducted for employment purposes (including those checks that turned up no record), 1.8 million were based on erroneous or incomplete information.<sup>138</sup> Further, even valid RAP sheets are virtually inscrutable to non-justice system personnel, and non-experts frequently misinterpret their content.<sup>139</sup>

Congress enacted the FCRA of 1970, enforced by the Federal Trade Commission ("FTC"), to, in part, protect consumers from the abusive practices of companies engaged in selling criminal background checks, known as consumer reporting agencies

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135. *Id.* at 71.

136. *Id.* at 72, 88.

137. *Id.* at 133-39; *see also* CRAIG WINSTON, NAT'L ASS'N OF PROF'L BACKGROUND SCREENERS, THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION 6-7 (Aug. 2005), <http://www.reentry.net/search/attachment.74268> [<https://perma.cc/U682-66XX>] ("[O]f the 174 million arrest cycles on file only 45% have dispositions."). Because many people who are arrested are never charged or convicted, a high percentage of state police and the FBI's records incorrectly indicate a subject's involvement in crime.

138. MADELINE NEIGHLY & MAURICE Emsellem, NELP, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 1 (July 2013), <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf> [<https://perma.cc/7KYN-UGGW>]. This data actually reflects that fifty percent of records have failures, because the 18.8 million includes felony background checks that resulted in a finding of no conviction. Another study conducted by the Bronx Defenders in 2007 found that sixty-two percent of a random sample of New York State RAP sheets contained at least one significant error and thirty-two percent contained multiple errors. The number of errors ranged from one to nine, with a median of two. *See* LEGAL ACTION CTR., THE PROBLEM OF RAP SHEET ERRORS: AN ANALYSIS BY THE LEGAL ACTION CENTER 1 (2013), [https://lac.org/wp-content/uploads/2014/07/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](https://lac.org/wp-content/uploads/2014/07/LAC_rap_sheet_report_final_2013.pdf) [<https://perma.cc/R4PL-N9JD>].

139. JACOBS, *supra* note 6, at 46.

(“CRAs”).<sup>140</sup> In theory, the FCRA aims to balance the interests of employers in making well-informed decisions with protecting applicants from the dissemination of inaccurate, misleading, or outdated information.<sup>141</sup> It imposes obligations on CRAs to “adopt reasonable procedures . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of [consumer reports].”<sup>142</sup> While the statutory language of the FCRA has the potential to afford job applicants the opportunity to challenge a misleading or inaccurate report and to discuss a criminal history with an employer, the outcomes of these cases have been pitiful for plaintiffs. This is because courts have adopted high standards for finding CRAs liable and the FTC has provided little guidance on the interpretation of the FCRA’s provisions.<sup>143</sup>

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140. See Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 234 (2012). CRAs produce consumer reports, which contain specific background information about a person’s criminal background and/or credit.

The FCRA gives the FTC power to issue ‘procedural’ rules enforcing the requirements of the FCRA. However, the FTC does not have the authority to issue rules with the force of law. As with the EEOC’s guidelines for enforcing Title VII, any procedural rules issued by the FTC to administer the FCRA will be examined by the court based on their ‘power to persuade.’

O’Connell, *supra* note 69, at 2812-13.

In 2010, the authority to publish FCRA rules and guidelines was given to the Consumer Financial Protection Bureau (“CFPB”). *Id.* at n.93 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5581(5) (2010)). About half the states also have their own fair credit reporting laws. SEARCH, NAT’L CONSORTIUM FOR JUST. INFO. & STAT., REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 60 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf> [<https://perma.cc/ZD4S-LHB9>].

141. 15 U.S.C. § 1681 (2006).

142. *Id.* at § 1681(b). If a consumer reporting agency does not adhere to the law they can be sued for damages. “Notwithstanding its focus on consumer report accuracy, the FCRA prohibits CRAs from reporting arrests more than seven years old. However, as of 1998, the FCRA no longer provides such an exception for records of convictions.” JACOBS, *supra* note 6, at 78 (citing 15 U.S.C. § 1681c(a)(2)(5)). Thus, an employer may procure a prospective employee’s consumer report with a criminal conviction that occurred decades before the date of the report. See Concepción, *supra* note 140, at 234. Official criminal justice databases are not governed by the FCRA because they are not defined as consumer reporting agencies. 15 U.S.C. § 1681. This limitation begs the question: is it better for the government to get its criminal record information from a private data provider who can be regulated by the FCRA or from official state criminal justice databases without regulation?

143. The FCRA offers a private cause of action against CRAs who violate the statute, but the plaintiff can only succeed if the CRA is found to have reported

Under the mandates of the FCRA, employers interested in procuring a consumer report for hiring consideration are required to provide notice and obtain written authorization from applicants.<sup>144</sup> If an employer decides to deny an applicant a position based on the findings of the CRA's report, then the employer must furnish the applicant with a copy of the report as well as a description of their rights.<sup>145</sup> Although an applicant must first consent to the procurement of a consumer report, employers are allowed to condition employment on such consent.<sup>146</sup> Therefore, as one legal scholar put it, "the current legal regime . . . has permitted the securing of criminal background checks to develop into the widespread practice it has become."<sup>147</sup> The FCRA seems to have evolved into another enabling mechanism of the proliferating background check industry.

The prevalence of criminal background checks in hiring decisions across industries is also a reflection of employer biases that have developed as a result of misconceptions about what it means to have a criminal record. One study found that two-thirds of employers surveyed in four major U.S. cities would not knowingly hire a person with a criminal record, regardless of the offense.<sup>148</sup> Proponents of these background checks assume that screening applicants for past criminal behavior will eliminate problem employees and protect against negligent hiring liability,<sup>149</sup> regardless of whether the past

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inaccuracies due to "negligent or willful noncompliance." O'Connell, *supra* note 69, at 2813.

144. 15 U.S.C. § 1681b(b)(2)(B)(i).

145. *Id.* at § 1681b(b)(3)(A)(ii).

146. Concepción, *supra* note 140, at 235.

147. *Id.*

148. HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996). The survey was administered to over 3000 employers in Atlanta, Boston, Detroit, and Los Angeles.

149. From the viewpoint of employers, a criminal record may signal an untrustworthy or otherwise problematic employee due to a perceived increased propensity to break rules, steal, or harm customers, or because the employer fears negligent hiring lawsuits.

Under the theory of negligent hiring, employers may be liable for the risk created by exposing the public and their employees to potentially dangerous individuals. That is, 'employers who know, or should have known, that an employee has had a history of criminal activity may be liable for the employee's criminal or tortious acts.' Thus, employers may be exposed to punitive damages as well as liability for loss, pain, and suffering as a result of negligent hiring.

Stoll, *supra* note 133, at 388 (citing Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 277 (2004)).

crime is correlated to the job in question. This position is based on the assumption that once a person has committed a crime, they will likely commit crimes again in the future, even though numerous studies have shown this theory to be flawed.<sup>150</sup> In fact, the risk of recidivism has been proven to decrease as time since last criminal justice contact increases.<sup>151</sup> Therefore, the likelihood that an applicant with a criminal record will partake in future crime compared to another similarly situated applicant without a record is extremely dependent on the time that has passed since the offense.<sup>152</sup> Further, stability factors—like employment—play a powerful role in reducing that likelihood. Additionally, according to a 2007 study measuring the relationship between criminal history and work

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150. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009). There are three leading lines of research explaining the factors that break recidivism. The first argues that “changes in the life course of offenders,” like marriage and employment for example, are the primary predictor for risk of future involvement in crime. *Id.* (citing Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301 (2003); Robert J. Sampson, John H. Laub & Christopher Wimer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 CRIMINOLOGY 465 (2006); Christopher Uggen, *Ex-Offenders and the Conformist Alternative: A Job Quality Model of Work and Crime*, 46 SOC. PROBS. 127 (1999); Joel Wallman & Alfred Blumstein, *After the Crime Drop*, in THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2006); Mark Warr, *Life-Course Transitions and Desistance From Crime*, 36 CRIMINOLOGY 183 (1998)). The second line of research shows that there is a “steady decline in criminal activity after a peak in the late teens and young-adult period, and [that] aging is one of the most powerful explanations of desistance.” *Id.* (citing David P. Farrington, *Age and Crime*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, vol. 7 (Michael H. Tonry & Norval Morris eds., 1986); Travis Hirschi & Michael R. Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983)). Finally, the third line argues that “time clean since the last offense strongly affects the relationship between past and future offending behavior.” *Id.* (citing MICHAEL MALTZ, *RECIDIVISM* (1984); PETER SCHMIDT & ANN D. WITTE, *PREDICTING RECIDIVISM USING SURVIVAL MODELS* (1988); Christy Visher, Pamela K. Lattimore & Richard L. Linster, *Predicting the Recidivism of Serious Youthful Offenders Using Survival Models*, 29 CRIMINOLOGY 329 (1991)). However, contrary research argues that there is a strong correlation between past and future offending. *Id.* (citing Alfred Blumstein, David P. Farrington & Soumyo Moitra, *Delinquency Careers: Innocents, Desisters, and Persisters* in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, vol. 6 (Michael H. Tonry & Norval Morris eds., 1985); Robert Brame, Shawn D. Bushway & Raymond Paternoster, *Examining the Prevalence of Criminal Desistance*, 41 CRIMINOLOGY 423 (2003); David Farrington, *Predicting Individual Crime Rates*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, vol. 9 (Don M. Gottfredson & Michael H. Tonry eds., 1987); ALEX PIQUERO, DAVID P. FARRINGTON & ALFRED BLUMSTEIN, *KEY ISSUES IN CRIMINAL CAREER RESEARCH: NEW ANALYSES OF THE CAMBRIDGE STUDY IN DELINQUENT DEVELOPMENT* (2007)).

151. *Id.* at 332.

152. *Id.*; see also *supra* note 150 (citing additional sources).

productivity (the only study so far to do so), criminal convictions in adolescents do not predict counterproductive work behaviors in early adulthood.<sup>153</sup> These findings suggest that the hostile contemporary climate surrounding the employment of people with records is created by socially produced, subjective prejudice, explaining and facilitating its correlation with prevalent racial biases.<sup>154</sup> Because this prejudice has yet to be diminished by mounting evidence that it is unfounded, people with records and advocacy groups have been forced to find creative solutions to address it.

#### 4. Enter Ban-the-Box Laws

The above context, bolstered by judicial conservatism and social biases, has necessitated a new legislative protection for people with past criminal justice involvement: the “ban-the-box” law. More than one hundred states, cities, and counties have adopted ban-the-box initiatives to ameliorate private and public sector discrimination against job applicants with criminal records.<sup>155</sup> At a minimum, these laws mandate the removal of the “box” on an employment application form that must be checked if the applicant has ever been convicted of (and sometimes arrested for) a crime.<sup>156</sup> The strategy behind these laws is, on the one hand, to prevent employers from stereotyping applicants with criminal records as less desirable employees before individually assessing their skills and, on the other hand, to counteract the deterrent effect that the box often has on individuals with criminal records.<sup>157</sup> These laws do not work to entirely preclude employers’ consideration of criminal history but, rather, to defer this consideration until later on in the hiring process.<sup>158</sup> So far, ban-the-box laws have been largely race-neutral,

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153. See Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1434 (2007).

154. A series of studies relying on surveys and in-depth interviews found that firms are reluctant to hire young minority men—especially blacks—because they are seen as unreliable, dishonest, or lacking in social or cognitive skills. Devah Pager, Bruce Western & Bart Bonikowski, *Race at Work: A Field Experiment of Discrimination in Low-Wage Labor Markets*, 74 AM. SOC. REV. 777 (2009) (citing, e.g., ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* (2003)).

155. MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NELP, *BAN THE BOX FAIR CHANCE STATE AND LOCAL GUIDE* (2017), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/35XX-WZUC>] [hereinafter NELP GUIDE].

156. See *id.*

157. See Henry & Jacobs, *supra* note 116, at 757.

158. See *id.*



focusing on the status of the applicant as a person with a previous criminal record and not on the particular direct and collateral consequences that criminal records have on people of color.

A San Francisco-based ex-offender group, All of Us or None (“AUN”), led the ban-the-box movement in 2004, persuading the San Francisco Board of Supervisors to pass a resolution calling on the city and county to eliminate the criminal record question from public job application forms, except in instances where state or local law expressly barred certain ex-offenders from a particular job.<sup>159</sup> Under this resolution, an employer can consider an applicant’s criminal background only once they have been selected as a finalist for the position.<sup>160</sup> At that point, a criminal record would only be relevant if it created an unacceptable risk that the applicant could not fulfill the job’s requirements.<sup>161</sup> Since AUN’s initial efforts, the movement has consistently gained momentum, demonstrating enormous organizing power with support from communities of color.<sup>162</sup> At least twenty-one state governments have adopted ban-the-box policies.<sup>163</sup> Seven states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island—have even removed the conviction history question on job applications for private employers.<sup>164</sup>

While all ban-the-box laws delay the moment in the hiring process when an employer can ask an applicant about his or her criminal history, the laws vary substantially by jurisdiction.<sup>165</sup> First, the laws differ in form, ranging from executive orders, to resolutions, to civil

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159. See JACOBS, *supra* note 6, at 271 (citing S.F., Cal., Resolution No. 764-05 (Oct. 11, 2005), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0764-05.pdf> [<https://perma.cc/MG6F-68JC>]).

160. See *id.*

161. See Henry & Jacobs, *supra* note 116, at 757.

162. See, e.g., Executives’ Alliance, *Executives’ Alliance Foundation Leaders “Ban the Box, Issue Call to Action for All U.S. Philanthropic Institutions to Adopt Fair Chance Hiring Measures*, PR NEWSWIRE (Feb. 29, 2016), <http://www.prnewswire.com/news-releases/executives-alliance-foundation-leaders-ban-the-box-issue-call-to-action-for-all-us-philanthropic-institutions-to-adopt-fair-chance-hiring-measures-300227780.html> [<https://perma.cc/AG9V-ZN76>] (showing how AUN and the California’s Alliance for Boys and Men of Color worked together to advance ban-the-box legislation). Successful advocacy like this is due in large measure to mobilization efforts by individuals with criminal records, organizations formed by and working with those individuals, as well as networks of policy and legal organizations.

163. See NELP GUIDE, *supra* note 155.

164. *Id.*

165. Adriel Garcia, Note, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP. L. REV. 921, 927-29 (2013).

rights statutes. In terms of their content, there are six areas of the laws, in particular, where differences arise:<sup>166</sup> (1) whether the law covers public or private employers, or both;<sup>167</sup> (2) the stage in the hiring process at which criminal history information can be considered;<sup>168</sup> (3) the types of criminal history information that can be considered;<sup>169</sup> (4) the factors an employer must use to evaluate the criminal history information;<sup>170</sup> (5) the disclosure obligations for an

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166. For a detailed layout of these six variations among ban-the-box laws, see O'Connell, *supra* note 69, at 2818-28.

167. The majority of ban-the-box laws apply to public employers only. These laws typically cover state, city, and district jobs, but the scope of what constitutes a public employer is also defined by these statutes. For example, Connecticut's public-employer statute only applies to jobs at the state level. *Id.* at 2821 (citing CONN. GEN. STAT. § 46a-80(a): "a person shall not be disqualified from employment by the state [of Connecticut] or any of its agencies . . ."). Still, while most ban-the-box laws apply to public employers only, there are a number of jurisdictions that regulate the hiring policies of private companies as well, and some that regulate both. *See, e.g.*, NELP GUIDE, *supra* note 155. The Hawaii statute, for example, affects public and private employers. *See* HAW. REV. STAT. § 378-2.5(a) (West 2013).

168. The time at which an employer can—under a ban-the-box law—conduct a criminal background check on an applicant (if at all) spans a significant range. *See* O'Connell, *supra* note 69, at 2822. Some statutes designate this point at the time an applicant is offered an interview. *See* MINN. STAT. ANN. § 364.021(a) (West 2013) (stating that a public employer in Minnesota may not inquire into the criminal background of an applicant until the applicant has been selected for an interview). Others designate the point at the time an applicant is determined to be qualified for the position. *See* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2013) (stating that employers in Connecticut cannot even inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position). Still others require the employer to wait until a conditional offer is made. *See* HAW. REV. STAT. § 378-2.5(b) (West 2013) (stating that Hawaiian employers may only consider an applicant's criminal background after extending a conditional offer of employment to the applicant). This variation in timeframe is due to legislators' desire to balance "both the applicant's interest in demonstrating his or her qualifications to an employer with the employer's interest in using its time productively." O'Connell, *supra* note 69, at 2821-22.

169. Several ban-the-box statutes limit the consideration employers can give to an applicant's record to specific offenses and time periods, while others make no such limitations. *See* O'Connell, *supra* note 69, at 2822. For example, a law might limit an employer's ability to consider a prospective employee's arrest or misdemeanor record. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-80(e); HAW. REV. STAT. § 378-2.5(c) (limiting Hawaiian employers from considering convictions more than ten years old from the period of incarceration). Other statutes, however, like that in Minnesota, impose no limitation on what employers can consider. *See* MINN. STAT. ANN. § 364.021(a) (making no explicit limitation on the information available to employers in Minnesota).

170. Many of the laws present criteria for how an employer should weigh an applicant's specific criminal history. "Typical factors include: the seriousness of the conviction, the crime's relationship to the job, the time elapsed since arrest or conviction, and the applicant's rehabilitation efforts." O'Connell, *supra* note 69, at 2824.

employer after conducting a background check;<sup>171</sup> and (6) the entity responsible for enforcing the laws.<sup>172</sup> These differences make it difficult to analyze the impact of ban-the-box legislation as a whole because there are a variety of factors to independently isolate and measure.<sup>173</sup>

Despite these difficulties, ban-the-box legislation has been widely celebrated for improving the employment outcomes of people with criminal records.<sup>174</sup> But when the data about those employment outcomes is scrutinized, crucial information is missing: there has been no measurement of the laws' impact on the specific population of people of color with records. The main reason for this failure is likely a contemporary political resistance to citing racial disparities as a

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171. Some statutes require an employer to disclose to an applicant once it has conducted a criminal background check. Laws with this provision further mandate that the employer disclose to the applicant what the check revealed and, if the criminal history precludes the applicant from the position, explain the reasons why. This variation in the laws also generally provides an opportunity for the applicant to challenge any inaccuracies in the background check.

172. The agencies and state departments that have been designated as enforcers of ban-the-box laws vary from jurisdiction to jurisdiction. For example, Delaware and Illinois both place their Departments of Labor in charge of regulating unlawful discrimination on the basis of a background check, while San Francisco has tasked its Office of Labor Standards Enforcement with enforcing the city's Fair Chance Ordinance (creating preemption concerns, because San Francisco's fair chance initiative is much stricter than California's ban-the-box law). But many state ban-the-box statutes do not name an enforcement agency or lay out what remedies are available to plaintiffs. California, Colorado, Connecticut, Hawaii, Maryland, Nebraska, and New Mexico do not expressly charge any state government agency with enforcement responsibilities. Massachusetts and Rhode Island handle enforcement through special commissions created and tasked to investigate ban-the-box violations. Minnesota places public employers in charge of their own compliance with the ban-the-box legislation and instructs government agencies to follow the adjudication procedures set forth in the state's Administrative Procedure Act. For private employers, the state's Commissioner of Human Rights conducts investigations of alleged violations and imposes monetary penalties. *See* O'Connell, *supra* note 69, at 2826-28. The laws also show a wide variance in penalties on noncomplying employers: Massachusetts' criminal review board has the power to impose fines up to \$5000 for each violation. In contrast, Rhode Island allows for monetary fines, backpay, and other compensatory awards upon a finding of intentional discrimination. *See id.* at 2828.

173. Even the forms of these laws vary. For example, executive orders and administrative policies are not voted on by representatives because the sole decision is made by the executive branch—therefore they are less susceptible to public scrutiny and do not have the same level of public transparency. Municipal ordinances (a more permanent policy solution) are passed through a public process where members of the city or county government vote on the record, which gives the community the ability to hold elected representatives accountable for their voting record.

174. *See infra* Part III.

justification for increasing protections for people with criminal records in hiring practices.<sup>175</sup>

While nearly half of the ban-the-box laws implemented so far comply with the 2012 EEOC guidance,<sup>176</sup> which is informed by disparate impact theory,<sup>177</sup> their formal legislative intents are, for the most part, silent as to any anti-racial discrimination motivations.<sup>178</sup> San Francisco's 2014 Fair Chance Ordinance is a good example of the dissonance between the advocacy that originally drove the implementation of these laws and the legal orientations of their final products in regards to considerations of race.<sup>179</sup> The AUN campaign, which spearheaded both the city's original 2004 resolution for public employers and the newer ordinance—applying to private employers as well—has always remained vocal about the connections between criminal record employment discrimination and race.<sup>180</sup> Yet, the

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175. “Advocates and sponsors of these laws have argued, primarily, that the practices these laws target amount to pervasive, and growing, barriers to employment—barriers that make it very difficult for large numbers of people, of all races, to find a job.” Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1442 (2014).

176. See NELP GUIDE, *supra* note 155.

177. See EEOC ENFORCEMENT GUIDANCE NO. 915.002, *supra* note 70.

178. Indeed, in some legislative debates, the issue of racial disparate impact does not appear to have been discussed at all. See, e.g., Hearing on S.B. 4 Before the S. Fin. Comm., 2013 Leg., 433rd Sess. (Md. 2013). At the Finance Committee hearing about Maryland's ban-the-box bill, speakers made a variety of arguments but race and disparate impact were not mentioned. *Id.*; see also Fishkin, *supra* note 175, at 1442 (“[I]n state legislatures . . . the racial disparate impact story, while present to some degree, has not been the primary justification legislators have offered for enacting these laws”). For examples of laws that *do* expressly mention discriminatory impact in their purpose and/or legislative histories, see PHILA. CITY COUNCIL, § 9-3501-1(e) (Mar. 14, 2016), <http://www.phila.gov/HumanRelations/PDF/BanTheBoxOrdinance.pdf> [<https://perma.cc/YPC8-S8CX>]; N.Y. COMM. ON CIV. RTS., REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION 4 (June 9, 2015), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1739365&GUID=EF70B69C-074A-4B8E-9D36-187C76BB1098> [<https://perma.cc/U8CW-XFVM>]. These examples of legislation that effectively incorporate the importance of combating disparate impact on racial minorities reveal the extent of the limitations of other comparable laws that do not incorporate this intent in their express purposes.

179. Bd. of Supervisors, *File No. 131192*, NELP (Jan. 27, 2014), [http://www.nelp.org/content/uploads/2015/03/San\\_Francisco\\_Fair\\_Chance\\_Ordinance\\_2014.pdf](http://www.nelp.org/content/uploads/2015/03/San_Francisco_Fair_Chance_Ordinance_2014.pdf) [<https://perma.cc/KQ6M-AYD7>].

180. See *Ban the Box*, LEGAL SERV. FOR PRISONERS WITH CHILD.: ALL OF US OR NONE, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/ban-the-box-campaign/> [<https://perma.cc/AA47-L75E>]; see also Dorsey Nunn, *Ban the Box Keeps Families and Communities Together*, N.Y. TIMES (Apr. 13, 2016 3:21 AM), <http://www.nytimes.com/roomfordebate/2016/04/13/should-a-jail-record-be-an-employers-first-impression/ban-the-box-keeps-families-and-communities-together> [<https://perma.cc/Q38N-VNBL>] (“The American criminal justice system has been and continues to be fraught by racism. People of color in general and black people in

“Findings” section of the new law, which lists its purposes and intent, performs rhetorical gymnastics to avoid mentioning race at all:

A major rationale for this movement is the growing awareness that incarceration has devastating socioeconomic consequences. Researchers have found that more incarceration has the perverse effect of increasing the crime rate in some communities. Children suffer academically and socially, and have decreased economic mobility, after the incarceration of a parent. Incarceration is also linked to homelessness, impacting public health and safety. Twenty-six percent of homeless people surveyed in San Francisco had been incarcerated within the previous twelve months and an estimated thirty to fifty percent of parolees in San Francisco are homeless.<sup>181</sup>

The language of the Act goes on to identify “criminal justice costs” as the primary incentive for implementing the legislation, so that taxpayers will save money.<sup>182</sup>

San Francisco’s story of de-racialized legislative intent is not unique. In New Jersey the advocacy group New Jersey Institute for Social Justice (“NJISJ”)—which aims to “ensure the civil rights and other equal opportunities of minorities and low-income individuals”<sup>183</sup>—spearheaded the state’s ban-the-box movement by engaging the local private employer community through “business roundtables.”<sup>184</sup> NJISJ’s advocacy kept racial impact at the center of the discussions about the law. In a 2013 press release signaling the upcoming ban-the-box legislation, NJISJ stated, “[a] majority of the nation’s 65 million people with criminal records are people of color, and these communities are among those most impacted by these practices.”<sup>185</sup> Yet, while the coalition-building efforts of the NJISJ were motivated by antidiscrimination language, the intent of the law was memorialized in race-neutral terms. The statute begins with a section entitled: “findings and declarations regarding employment of

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particular are being stopped, detained, questioned, arrested, convicted, and sentenced more often than whites. Black men are six times as likely as white men to be incarcerated during their lifetime. This means that we are unable to fairly compete for employment because of a conviction history or the assumption of having one, based on race.”).

181. NELP, *supra* note 179, at 3.

182. *Id.*

183. *About NJISJ*, N.J. INST. FOR SOC. JUST., <http://www.njisj.org/about/> [<https://perma.cc/R6PB-ZZYE>].

184. NELP GUIDE, *supra* note 155, at 18.

185. *NJISJ Press Release: New Legislation Opens Opportunity to Compete for Employment*, N.J. INST. FOR SOC. JUST. (Feb. 6, 2013), [http://www.njisj.org/njisj\\_press\\_release\\_new\\_legislation\\_opens\\_opportunity\\_to\\_compete\\_for\\_employment](http://www.njisj.org/njisj_press_release_new_legislation_opens_opportunity_to_compete_for_employment) [<https://perma.cc/4687-33AE>].

persons with criminal records,” and, like the San Francisco ordinance, the statute does not mention combating disparate impact on racial minorities. Instead, the law openly states, “[i]t is the intent and purpose of ‘The Opportunity to Compete Act’ to improve the economic viability, health, and security of New Jersey communities.”<sup>186</sup> One wonders why race is erased from the language of these laws, enacted after being led by very race-conscious movements.<sup>187</sup>

The jettisoning of race from the language of the ban-the-box laws has led to the complete failure to measure the impact of the laws on minority groups.<sup>188</sup> In order to take stock of what these laws can truly accomplish, it is necessary both to enforce data collection, where it has already been implemented, that specifically measures the employment of black and Latino people with past criminal justice involvement and to build this data mandate into legislation going forward. In the wake of the Obama Administration’s consideration of a federal ban-the-box law,<sup>189</sup> a moment of self-awareness is called for to recognize the history behind these laws and to consider to whom they should apply.

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186. N.J. STAT. ANN. § 34:6B-12 (2014).

187. Potentially, a reason for this erasure is the fact that race is a suspect classification and would be subject to strict scrutiny and more likely to be invalidated, even if the statute purports to be racially beneficial; the legislative gymnastics may ensure that the statute, if challenged, would presumably only be subject to rational basis review.

188. See *infra* Part III.

189. See Dave Boyer, *Obama Finalizes Regulation to ‘Ban the Box’ on Hiring Job Applicants With Criminal Records*, WASH. TIMES (Nov. 30, 2016), <http://www.washingtontimes.com/news/2016/nov/30/obama-finalizes-regulation-ban-box-job-applicants/> [<https://perma.cc/Y9NQ-2KBX>]; *Fact Sheet: White House Launches the Fair Chance Business Pledge*, WHITE HOUSE (Apr. 11, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge> [<https://perma.cc/7CFQ-7L2V>]. Following on the heels of President Obama’s endorsement of the ban-the-box movement in 2015, Attorney General Loretta Lynch hosted officials of nineteen companies to create a founding business pledge to implement federal fair chance hiring policies. NELP believes that a federal ban-the-box law is on the horizon. *On the President’s Announcement on ‘Ban the Box’ Hiring*, NELP (Nov. 2, 2015), <http://www.nelp.org/news-releases/on-the-presidents-announcement-on-ban-the-box-hiring/> [<https://perma.cc/ZS8U-5MNL>]. See also Reuters, *Obama Calls to “Ban the Box.”* N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/video/multimedia/10000004014582/obama-calls-to-ban-the-box.html> [<https://perma.cc/9Y86-D2X4>].

## B. Reconsidering and Repositioning Ban-the-Box in Light of Sociological Studies and Their Political-Historical Context

The absence of race conscious language from the ban-the-box legislation is problematic because it obfuscates not only the source of the momentum behind these laws but also the possibility that employers will manipulate them by making assumptions about criminal history based on racial prejudice. This Note identifies these issues to strengthen the legislation going forward and to advocate for reinforcing the visibility of race in efforts to ameliorate the collateral consequences of having a criminal record.

### 1. *Sociological Study on Race, Criminality, and Employment*

First, it is important to acknowledge that, even though racial impact was the original driving force behind ban-the-box legislation (and remains so among many advocacy groups),<sup>190</sup> empirical research on the hiring practices around criminal records has not shown that removing the box will necessarily improve employment outcomes for people of color with records. Devah Pager's 2003 study remains so crucial because it demonstrates that, among the Milwaukee employers observed, overt racial discrimination and its links to perceived criminality were even more prevalent than discrimination based on the records themselves.<sup>191</sup> Therefore, even in the absence of criminal background checks, employers often use race or racial indicators (such as education levels) to make assumptions about criminality and unsuitability for jobs.<sup>192</sup>

In fact, some sociologists argue that removing the box could have an *adverse* impact on the employment of people of color with records

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190. See, e.g., Cornell William Brooks, *Ban the Box*, BRENNAN CTR. (Apr. 27, 2015), <https://www.brennancenter.org/analysis/ban-box> [https://perma.cc/4E7M-7QRB] (showing that increased employment outcomes for people of color with records specifically remains a central policy concern for the NAACP).

191. See PAGER, *supra* note 8.

192. *Id.* at 93. There are two central findings of Pager's study in respect to the specific hardship of ex-offender status for people of color. First, the criminal record stigma effect is larger for blacks (given the sixty-five percent reduction in the callback rates for black ex-offenders, relative to the fifty percent reduction for whites). Second, animus-based racial discrimination against blacks is more important than record-based discrimination in explaining the inferior employment outcomes of black men (given the finding that black non-offenders receive fewer callbacks than white ex-offenders). Interestingly, although race emerged as a key theme in Pager's findings, the topic of racial discrimination was not the central focus of the original research. In fact, the research design yielded only indirect evidence of racial discrimination because black and white testers did not apply to the same employers. See PAGER, *supra* note 8.

because of the insidious racial biases surrounding criminality in America. Public policy professors Harry Holzer, Steven Raphael, and Michael Stoll conducted multi-city, survey-based research in 2006 that revealed that employers are actually more likely to hire black Americans if they check criminal records, particularly employers who report being generally averse to hiring ex-offenders.<sup>193</sup> In other words, confirming Pager's findings, when criminal records were not consulted, black people were assumed to have them. Holzer, Raphael, and Stoll identify this phenomenon as "statistical discrimination," meaning that employers who look unfavorably on applicants with criminal histories systematically overestimate the correlation between race and criminality.<sup>194</sup> Their analysis even suggests that this statistical discrimination is significant enough to undermine any negative effects of criminal background checks on black hiring rates by detrimentally affecting the job prospects of individuals with clean histories who belong to demographic groups that have high conviction rates.<sup>195</sup> Michael Stoll updated the study in 2009, relying on new data, and confirmed the results of the earlier research.<sup>196</sup>

Also in 2009, Bruce Western, Bart Bonikowski, and Devah Pager published an extension of Pager's 2003 study, investigating statistical discrimination more closely.<sup>197</sup> They had created matched teams of white, black, and Latino testers who had applied to 340 real, entry-level jobs in New York City in 2004.<sup>198</sup> Their work confirmed the

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193. Harry Holzer, Steven Raphael & Michael Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. L. & ECON. 451 (2006).

194. *Id.* at 452 (borrowing from economic theory).

195. *See id.*; *see also* Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders? Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 205, 236 (Mary Pattillo, David Weiman & Bruce Western eds., 2004).

196. *See generally* Stoll, *supra* note 133. Stoll's work also showed that legally-mandated discrimination was the main source of the negative impact of background checks on employers' hiring decisions, and that for those employers who were not required to check criminal history, the check itself was neither the rate-determining-factor nor the source of discrimination. *Id.* at 407.

197. Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment* 74 AM. SOC. REV. 777 (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2915472/#APP1> [<https://perma.cc/T5MJ-ST69>].

198. *Id.* The testers were selected for specific qualities: they were well-spoken, clean-cut young men, ages twenty-two to twenty-six. Most of them were college-educated, between five feet ten inches and six feet in height, and recruited in and around New York City.



earlier determination of intense contemporary racial attitudes. The new study found that employer prejudice fell into three categories of behavior: (1) “categorical exclusion,” characterized by an immediate rejection of the black candidate in favor of a white applicant; (2) “shifting standards,” reflecting actively shaped decisions made through a racial lens that considers black applicants more critically than whites;<sup>199</sup> and (3) “race-based job channeling,” resulting in steering black applicants toward particular job types usually with greater physical demands and reduced customer contact.<sup>200</sup> Together, these categories “illustrate how racial disadvantage is dynamically constructed and reinforced, with the assessment of applicant qualifications and suitability subject to interpretation and bias.”<sup>201</sup> The arbitrary nature of statistical discrimination likely makes it difficult to approach legislatively. Indeed, Western has questioned whether limiting criminal background information will have the desired effect for minority ex-offenders.<sup>202</sup>

However, Pager, Western, and Bonikowski’s report indicated an intervention point for ban-the-box laws and their potential to have a real impact on increasing employment outcomes of people of color with records.<sup>203</sup> Black applicants who met face-to-face with hiring authorities were found to fare better than those who did not,<sup>204</sup>

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199. *Id.* The researchers provided an example of shifting standards prejudice they observed in the field:

In one case, Joe, a black tester, was not allowed to apply for a sales position due to his lack of direct experience. He reported, “[the employer] handed me back my résumé and told me they didn’t have any positions to offer me . . . that I needed a couple years of experience.’ The employer voiced similar concerns with Josue and Kevin, Joe’s Latino and white partners. Josue wrote, ‘After a few minutes of waiting . . . I met with [the employer] who looked over my résumé. He said that he was a little worried that I would not be able to do the work.’ Kevin reported an even stronger reaction: ‘[The employer] looked at my résumé and said, ‘There is absolutely nothing here that qualifies you for this position.’ Yet, despite their evident lack of qualifications, Kevin and Josue were offered the sales job and asked to come back the next morning. In interactions with all three testers, the employer clearly expressed his concern over the applicants’ lack of relevant work experience. This lack of experience was not grounds for disqualification for the white and Latino candidates, whereas the black applicant was readily dismissed.

*Id.*

200. *Id.*

201. *Id.*

202. Bruce Western, *Criminal Background Checks and Employment Among Workers with Criminal Records*, 7 CRIM. & PUB. POL’Y 413, 413 (2008).

203. Pager, Western & Bonikowski, *supra* note 197.

204. *Id.*

suggesting that in-person contact has the power to replace broad generalizations based on group membership with more nuanced information about an applicant's individual qualities.<sup>205</sup> Christopher Uggen and others' later study on applicants with past low-level convictions came to the same conclusion.<sup>206</sup> Referring to the efficacy of in-person contact for applicants with records generally, he noted, "[j]obseekers who make direct contact are thus much more likely to be called back by employers who may wish to provide a 'second chance' to an otherwise promising applicant."<sup>207</sup> But in instances where employers use categorical exclusion and shifting standards to make decisions about applicants of color, even in-person interviews are unlikely to have a significant affect. Further, black applicants generally have far less access to face-time with hiring authorities than whites.<sup>208</sup>

The sociological research conducted on this issue up until now is far from complete or definitive in regards to its reflection on ban-the-box legislation specifically. But the empirical data gathered so far makes clear the necessity to allocate attention and resources to monitor how ban-the-box laws will impact people of color with records in particular. The research shows that race remains highly salient in employers' evaluations of workers, consistently expressed through a conflation of race and criminality in hiring decisions.<sup>209</sup> Therefore, failing to remain race-conscious in this new legal arena could come at the expense of those who fought to have these laws enacted to protect them.

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205. *See id.* at App. Table A1; *see infra* App. A. Still, this research was not definitive and, further, the recorded advantage of personal contact for blacks was not as significant as that of whites.

206. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 *CRIMINOLOGY* 627, 643 (2014) ("personal contact is an especially powerful [hiring] predictor for African American applicants").

207. *Id.* at 631 (citing Pager, Western & Bonikowski, *supra* note 197).

208. *Id.* Because black applicants receive call backs thirty percent less frequently than whites, they more rarely make it to the stages in hiring when they can speak to an employer face to face. *Id.* at 631.

209. This theory is challenged by a study of the Hawaii ban-the-box law in 2014. Although the study was not specifically measuring the effect of the ban-the-box law on the employment prospects of black job applicants, the results showed that "repeat offending dropped precipitously among both blacks and non-blacks following the implementation of Hawaii's ban the box law," and concluded that "the negative impact of the law on the employment prospects of black job applicants would probably be minimal at best." Stewart J. D'Alessio, Lisa Stolzenberg & Jamie L. Flexon, *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 *AM. J. CRIM. JUST.* 336, 349 (2014).

Another sociological framework that can be used to consider how ban-the-box laws will impact racial minorities is an established theory behind organizations' responses to employment discrimination legislation. According to a seminal article in this field by Lauren Edelman, because equal employment opportunity laws tend to set forth broad and ambiguous principles, organizations (or employers) receive and manipulate wide latitude to construct the meaning of compliance in ways that meet legal demands but preserve managerial interests.<sup>210</sup> In particular, Edelman identifies ambiguity in respect to compliance with equal employment opportunity laws as a source of their vulnerability to manipulation.<sup>211</sup> In response to pressure to ameliorate discrimination, organizations take advantage of these areas of vulnerability by creating formal structures that act as visible symbols of their attention to the law, while preserving their managerial discretion.<sup>212</sup> In light of this tendency, ban-the-box laws are particularly at risk of manipulation, especially because of their varied and broad language.<sup>213</sup> Thus, identifying the racial considerations motivating enforcement will aid in ensuring that organizations do not engage in purely cosmetic structural reorientation in order to appear to be less discriminatory, while still making criminal history prejudice-based decisions.

Using Edelman's institutional theory, Christopher Uggen, Sarah E. Lageson, and Mike Vuolo conducted a recent study using field data to examine how employers navigate legal ambiguity and construct compliance in making decisions about applicants with low-level criminal histories in the rapidly changing legal environment.<sup>214</sup> They found that applicants with low-level criminal histories were more

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210. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531-32 (1992). Using previous sociological research, Edelman argues that those responsible for formulating, interpreting, and enforcing social reform laws are part of the dominant class, and use their authority to construct law in a way that preserves the status quo while giving the appearance of change. Pointing to failures in equal employment opportunity law specifically, she argues that organizations, rather than resist law overtly, are motivated by weaknesses and the mechanics of the legal process to construct law in a manner that is minimally disruptive to the status quo and to create institutional forms of compliance that maximize their own interests.

211. *Id.* at 1536. Edelman also identifies courts' standard interpretation that the laws constrain organizational procedures more than the outcomes of those procedures and weak enforcement measures as the two other main areas of vulnerability in equal employment opportunity laws. *Id.* at 1538-41.

212. *Id.* at 1542.

213. *See supra* Section II.A.4.

214. Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175 (2015).

likely to find employment in a workplace that has formally assessed the risks and legalities associated with hiring an applicant with a record, as opposed to a firm where hiring managers make largely subjective hiring decisions and personally carry the burden of liability.<sup>215</sup> Therefore, when allowed high levels of discretion, most employers used that discretionary power to protect themselves in their hiring decisions.<sup>216</sup> In their assessment, Uggen, Lageson, and Vuolo evaluated the formal requirements and limitations of the 2012 EEOC enforcement guidance,<sup>217</sup> but their determination is also applicable to ban-the-box legislation—in order to increase enforcement, specificity in procedural compliance is essential.

Outcome-based sociological studies show that, although the ban-the-box movement and legislation is the next step in protecting persons with criminal records, and particularly persons of color with criminal records, the history and context of how the laws were made may make them insufficient to solve the problem of race and criminal record-based discrimination or may actually exacerbate such discrimination. The studies suggest that the laws can be improved by specifying race conscious compliance measures that do not categorically exclude criminal background checks, but that mandate the employer to use them specifically to dissipate hardened race-based perceptions of color and criminality.

## 2. *Using Critical Race Theory and Critical Legal Theory to Consider Ban-the-Box Law*

The studies conducted by Pager, Western, Uggen, and others can be situated within a tradition of civil rights law criticism that is particularly pertinent to the issue in question. Failures in civil rights law, crystallized in the troubling legacy of *Brown v. Board of Education*,<sup>218</sup> have led legal scholars to reconsider the efficacy of certain forms of the liberal legal model,<sup>219</sup> particularly in response to a conservative judicial trend to look more and more skeptically on

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215. *Id.* at 196.

216. *Id.* Notably, this seems to contradict the findings of Stoll. See Stoll, *supra* note 133.

217. Lageson, Vuolo & Uggen, *supra* note 214, at 197.

218. The public school system is more segregated today than it was at the time of the decision. See Emily Richmond, *Schools are More Segregated Today Than During the Late 1960s*, ATLANTIC (June 11, 2012), <http://www.theatlantic.com/national/archive/2012/06/schools-are-more-segregated-today-than-during-the-late-1960s/258348/> [<https://perma.cc/NW8L-RB6W>].

219. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

disparate impact's founding principles.<sup>220</sup> Contemporary work in this canon recognizes that future legislation must respond to the political context and the demonstrated social resistance to legal remedies for discrimination.<sup>221</sup> Progressive critics of civil rights legislation have advocated for creative models that address structural racism by challenging the conventional ways that laws create and solidify patterns of meaning.<sup>222</sup> These models reject an understanding of civil rights law as solely a removal of state-sanctioned barriers to an individual's mobility—which leaves any remaining inequality a result of the individual's personal failure—and, instead, advocate for the dismantling of the structures that create those barriers to begin with.<sup>223</sup>

Against this backdrop, the ban-the-box movement marks a break from traditional civil rights law because it operates on the assumption that the criminal justice system manufacturers disadvantage. In this way, protecting the category of people with records, rather than minorities with records exclusively, aligns with the powerful transition in critical legal theory that destabilizes the fixed idea of race as a biological category and instead links race to ideas about the way power structures define relationships and allocate resources.<sup>224</sup> However, the critical race model does not preclude race visibility.<sup>225</sup> Indeed, acknowledging that the population of people with records does not comprise a category determined by skin color is not the same thing as ignoring criminal records' unequal impact on racial minorities.

There are liberals who believe that the advancement of minority groups comes only through social programs with “universal appeal”

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220. In *Ricci v. DeStefano*, Justice Scalia argued that disparate impact law is in deep tension with the Equal Protection Clause. In a concurrence that attracted wide attention, he asserted that because “Title VII’s disparate-impact provisions place a racial thumb on the scales [raising equal protection concerns] . . . the war between disparate impact and equal protection will be waged sooner or later.” 557 U.S. 557, 594-97 (2009). For further discussion on this trend, see William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 531 (2007); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734 (2006); Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 257-59 (2005).

221. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* (2002).

222. *Id.* at 35.

223. *Id.*

224. *Id.* at 35, 74 (citing Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* in CRITICAL RACE THEORY 260 (Kimberlé Crenshaw et al., eds., 1995)).

225. GUINIER & TORRES, *supra* note 221, at 14-32.

that minimize or eliminate overt discussion of race. These civil rights theorists argue that, so long as social programs and laws present as government aid to blacks and other communities of color, popular support for them will decline.<sup>226</sup> Additionally, they claim that making race a central issue compounds stereotypes and makes populations particularly vulnerable to negative attention.<sup>227</sup> Thus, according to this vision of liberal integration, racial silence in political and legal discourse is deemed necessary.<sup>228</sup> This viewpoint adheres partially to the rejection of biological essentialism by allowing individuals who share political sympathies with the struggles of racialized groups (regardless of whether they fall into the same diagnostic category) to organize with minorities in support of reform.<sup>229</sup> But removing race from legislative language couples with the American social governance practice of systematically hiding the minority experience from view, exemplified by the Census' flagrant tradition of underreporting employment and poverty data for people of color by erasing incarcerated populations from the data pool.<sup>230</sup> Further, it deprives communities of color of crucial ammunition for ensuring that these laws do, in fact, help them.

Perhaps the most troubling aspect of the race neutrality of the ban-the-box laws is that it reflects an amnesia on the part of legislators about the origins of the remedy—as a reaction to failures in the implementation of Title VII. Since its passage, the Supreme Court has undermined the color-conscious premise of Title VII's antidiscrimination principle<sup>231</sup> by systematically rejecting the existence of structural racism.<sup>232</sup> Formally, this has meant that the federal courts have read societal race-neutrality not only as a social goal, but also as a premise of the legislation.<sup>233</sup> In an attempt to move beyond the “issue” of race, the Court has put forward the belief that Title VII is meant to protect against the racial animus of individual

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226. *Id.* at 39-41.

227. *Id.* at 39.

228. *Id.* at 40.

229. *Id.* at 293 (“[O]ne of the pernicious effects of racism is that it often disables those whose interests do converge with people of color from fighting the structure that disempowers them too.”).

230. See Jerome McCristal Culp, Jr., *Colorblind Remedies and The Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994).

231. The antidiscrimination principle has traditionally been interpreted to mean that laws are designed to eliminate social and economic group privilege.

232. See *supra* Section II.A.1.

233. Culp, *supra* note 230.

employers operating within a just, un-stratified society, a fallacy that is not just legally impotent but also harmful.<sup>234</sup> Indeed, if nothing else, the work of sociologists like Pager shows us that being marked with a criminal record while black is fundamentally different from being marked with a criminal record while white. The federal courts' "mythologies" of colorblindness work to maintain the status quo rather than implement change.<sup>235</sup> Therefore, supplementing this legacy with race-neutral policy is to surrender to its assumptions and, ultimately, to the impossibility of the law's capacity to improve the social and economic condition of racial minorities. We need an effective ban-the-box program that ensures and promotes race conscious policy.

This last point is fundamentally political and informed by the work of Harvard law professors Lani Guinier and Gerald Torres in *The Miner's Canary*.<sup>236</sup> The book is at the nexus of critical race theory and critical legal study, explaining how patterns that converge around race are often markers of systemic injustice that affects the underclass.<sup>237</sup> According to the authors, race is a miner's canary—this metaphor refers to an old miner's practice of carrying canaries with them into the mines because the birds' more fragile respiratory systems would cause their lungs to collapse from toxic gases before they affected humans, signaling danger.<sup>238</sup> Guinier and Torres call for a "political race project,"<sup>239</sup> to create an activist agenda founded on the principle of visibility.<sup>240</sup> They argue that a colorblind approach to deeply entrenched social problems does not work; it only inhibits democratic engagement and reinforces existing power structures by managing the appearance of formal equality without considering the

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234. See *supra* Section II.A.1.

235. See Culp, *supra* note 230, at 176, 180 (premised on the confusion between colorblindness and the antidiscrimination principle). See also Jerome McCristal Culp Jr., *Neutrality, The Race Question and the 1991 Civil Rights Act: The Impossibility of Permanent Reform*, 45 RUTGERS L. REV. 965, 978 (1993) ("Title VII can be effective in altering the economic position of black Americans, but its effectiveness is tied to the interpretation of that law by federal judges.").

236. While I support the arguments of this work and feel that they map on to my discussion of ban-the-box legislation, Guinier and Torres are themselves extremely wary of investing energy in law reform and actively aware of its limitations. See GUINIER & TORRES, *supra* note 221, at 17.

237. See *id.*

238. *Id.* at 11.

239. The "political race project" is a term developed by Guinier and Torres, informed by the visionary powers of magical realism. It is used in their work to "change the framework of the conversation about race by naming relationships to power within the context of our racial and political history." *Id.* at 15.

240. *Id.* at 14-32.

consequences of real-world inequity and how the distribution of resources in society is racialized.<sup>241</sup> Guinier and Torres show that this effort is distinct from past models—where conventional ideas of race were deliberately tied to issues of social policy “in order to make programs of general concern sound like special pleading”—instead, their movement encourages recognition of racialization as a source of power.<sup>242</sup>

The political race project encourages legislators to acknowledge that the destructive market forces created by unemployment that rally political will for new ban-the-box laws are not set in motion by criminal record employment discrimination generally. Rather, they are specifically brought about by racialized criminal record employment discrimination and the breakdown it points to in the country’s social fabric. Political race project methodology is conducted in a two-step process.<sup>243</sup> The first step—and the one called for in this Note to assess the impact of ban-the-box laws—is an engagement with the racial alert signal that emerges from a social problem.<sup>244</sup> Only in the second step do advocates move beyond the diagnostic tool of the canary.<sup>245</sup> There, the problem is considered in context, with an “expansive interpretation” based on more than racial factors and more than just the costs and benefits of a given social program.<sup>246</sup> For ban-the-box, this means using the political energy focused on ending criminal record discrimination as an advancement of the racial civil rights agenda to eventually spark new conversations about the injustices in the so-called criminal justice system. In this way, Guinier and Torres offer a sound structural solution to a structural problem.<sup>247</sup> While the writers do not argue for a legislative application of their methodology, in regards to ban-the-box laws, the two steps could connect the prejudice felt by people of color with records to the language of a societal remedy with the power to recharacterize criminality generally and address its role in democratic and economic failures that affect all Americans.<sup>248</sup> The potential uses for these politics are profound—like using ban-the-box legislation to

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241. *Id.* at 38.

242. *Id.* at 302.

243. *Id.* at 274.

244. *Id.* at 274-75. For Guinier and Torres this engagement is not a legislative one, but one of grassroots organizing.

245. *Id.* at 276.

246. *Id.*

247. *Id.* Guinier and Torres also outline a third step—action. *See id.* at 280.

248. *Id.* at 280.



marshal resistance to building new prisons, connecting attempts to reduce collateral and direct consequences to their source.

In sum, the ban-the-box movement demonstrates why criminal record discrimination is not incidentally race-related but, rather, situated within societal structures that reinforce oppression on the front and back end of criminal justice involvement. At this relatively nascent stage of the laws, it is necessary to consider who is being erased by their language and how we might better orient these laws with a successful political tradition, if not a successful legislative one. The field of sociology lends important theories and strategies to approach this question by pointing to the signals of compounded racial and criminal history bias. As the success of the laws is assessed going forward, race consciousness is necessary for the political and legal efficacy of reentry.

### III. THE FAILURES OF EXISTING DATA ON BAN-THE-BOX

This Part presents the empirical evaluations of the ban-the-box laws that government bodies and interested advocacy groups have conducted so far. Half of the data is the result of Freedom of Information Law/Act (“FOIL” and “FOIA”) requests, while the rest have been published. These studies are insufficient in both content and scope, and very little can be drawn from their conclusions beyond the necessity for more information. This Part concludes by proposing that future ban-the-box laws promote data-collection systems modeled after the one used in San Francisco. It also suggests ways in which the ban-the-box laws can be written to be more race conscious by incorporating “Purpose” sections into the laws.

#### A. Ban-the-Box Data from Minneapolis, Durham, San Francisco, and New York City

To date, the findings drawn from the assessments of ban-the-box laws have been extremely positive. While these studies are encouraging, their results must be couched in a recognition of the limitations of this data collection so far and, specifically, of what has yet to be measured. No evaluation was working with baseline data to demonstrate the climate of ex-offender hiring locally before the relevant ban-the-box law was implemented, and few measured changes over time, so it is impossible to determine from the research alone the impact of the legislation. Further, only the 2011 New York City executive order, which is no longer in effect, implemented race data collection to monitor the effect of the law on people of color

with records.<sup>249</sup> The studies raise questions about collection enforcement, the biased interests of the collectors themselves, and hidden or unmeasured variables. Findings from studies conducted in Minneapolis, Durham, San Francisco, and New York City are presented below, in one place, to begin to look critically at what (and how much) is missing and to scrutinize the information that has been collected so far. Each of the studies below have components that could inform a more effective future law that would impose stricter and more rigorous data collection for successful monitoring.

### 1. *Minneapolis, MN*

Minneapolis implemented its ban-the-box legislation, the Fair Hiring Practices Resolution, in December of 2006 for public employers and in compliance with the EEOC's recommended criteria.<sup>250</sup> The scope of this resolution expanded in stages. In 2007 the city removed the box on employment application materials asking about criminal history and then, in January of 2008, a revised background check policy went into effect. The revision included stricter criteria for which positions required a background check and also mandated that the check be conducted only after a conditional offer was made.<sup>251</sup> In July of 2008, the city's Human Resources Department conducted a study measuring changes in background check practices following the implementation of the legislation.

The findings of this study were presented in a public letter from City Council Member Elizabeth Glidden, who co-authored the resolution. Glidden wrote in the letter: "Today I confirm that, based on two years of results, this decision [to ban the box] has benefitted city government and residents with a criminal background."<sup>252</sup> The report shows that the number of background checks conducted

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249. *See infra* Section III.A.4.

250. Glidden & Samuels, *Resolution of the City of Minneapolis*, NELP (2006), [http://nelp.3cdn.net/0444827b7bdf6acb2\\_o5m6bxsl0.pdf](http://nelp.3cdn.net/0444827b7bdf6acb2_o5m6bxsl0.pdf) [<https://perma.cc/985E-8X65>]. Interestingly, Minneapolis is one of the only ban-the-box legislations to mention in its actual language the disproportionate impact of criminal record discrimination on people of color: "WHEREAS people of color are arrested, convicted, and incarcerated in numbers disproportionate to their representation in the population, which disproportionately impacts their families and communities." *Id.* It is also important to recognize that a resolution, unlike an ordinance, is not binding law. Instead, resolutions are generally used to provide policy direction, to set or amend operating policies and procedures, and to memorialize administrative actions.

251. NELP GUIDE, *supra* note 155, at 19.

252. Letter from Elizabeth Glidden, City Council Member, to Mee Moua, St. Senator (Mar. 16, 2009), <http://www.nelp.org/content/uploads/Glidden-Ltr-Minneapolis2004-2008.pdf> [<https://perma.cc/ZBH8-SH63>].

compared to the total number of applications dropped by only 1.5 percent but that the number of applicants with past convictions hired compared to the total number of applicants who were flagged to have criminal histories or “concerns” increased by more than fifty percent.<sup>253</sup> However, although the fraction of reviewed criminal histories leading to jobs increased since the resolution was passed, the number of people who were hired after their criminal histories were reviewed (“# of Applicants with Concerns Hired”) compared to the total number of applications (“Applications Received”) actually decreased from 0.3 percent to 0.2 percent.<sup>254</sup> It is possible that this difference is due to the fact that fewer applicants had records, but that would seem unlikely given the increased incentive to apply provided by the new ban-the-box policy. Therefore, the resolution seems to effectively restrict how public employers analyze criminal background checks but, ultimately, people with criminal records appear to have still faced discrimination by other, unmeasured means.

## 2. *Durham City and County, NC*

In 2014 the Southern Coalition for Social Justice, a nonprofit that aims to dismantle structural racism and oppression, published a report of a case study of Durham City and County’s ban-the-box legislations.<sup>255</sup> In 2011 and 2012, respectively, Durham City<sup>256</sup> and Durham County<sup>257</sup> passed administrative policies that, like Minneapolis, applied to public employment and require both that the question about criminal history be removed from initial stages of the employment process and that the record check occur only after a conditional offer is made.<sup>258</sup> The administrative policies also restrict which individuals in the City and County’s human resources departments can conduct a background check, in order to limit the number of people who come in contact with an individual’s record.<sup>259</sup>

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253. *See infra* App. B.

254. *See infra* App. B.

255. S. COAL. FOR SOC. JUST., THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf) [<https://perma.cc/4MUT-SG4D>].

256. ALETHEA BELL, CITY OF DURHAM, N.C., BACKGROUND INVESTIGATIONS POLICY (Apr. 18, 2011), [http://nelp.3cdn.net/2d995ad9f9d9a25923\\_wam6i22rt.pdf](http://nelp.3cdn.net/2d995ad9f9d9a25923_wam6i22rt.pdf) [<https://perma.cc/S69V-Y7Z8>].

257. CITY OF DURHAM, ADMINISTRATIVE PROCEDURE: CONDUCTING CRIMINAL BACKGROUND INVESTIGATIONS IN THE RECRUITMENT AND SELECTION PROCESS (2012), [http://nelp.3cdn.net/b1b8b051fc035c4153\\_3qm6b5isg.pdf](http://nelp.3cdn.net/b1b8b051fc035c4153_3qm6b5isg.pdf) [<https://perma.cc/8L68-BDMZ>].

258. NELP GUIDE, *supra* note 155, at 31, 39.

259. *Id.*

Applicants who are found to have records with a potential for adverse employment action are given seven days to challenge the record or present evidence of rehabilitation, and employers must use a balancing test—which takes into account the nature of the offense, time passed, and the relationship between the offense and the prospective job—in order to make a final decision.<sup>260</sup>

According to the report, since the ban-the-box initiative began in 2011, the overall proportion of people with criminal records hired by the City of Durham increased by nearly sevenfold.<sup>261</sup> In Durham County ninety-six percent of the applicants with criminal records who were recommended for hire prior to the background check were ultimately hired.<sup>262</sup> Further, at the time the report was published, none of the people with criminal records who were hired by the county had since been recorded as terminated because of illegal conduct.<sup>263</sup>

The Durham data is interesting compared to that of Minneapolis because, while the requirements of the laws are nearly identical,<sup>264</sup> where Durham saw an increase in hires of people with records, Minneapolis saw only a reduction in discrimination based on the outcome of the criminal background checks. This may be due to distinctions in geographic bias, but it could also be due to variance in advocacy and awareness efforts. Again, further details and data are necessary to draw a firm conclusion from this discrepancy.

### 3. *San Francisco, CA*

As noted above, in 2014 San Francisco passed the Fair Chance Ordinance (“FCO”), which applies to both public and private employers.<sup>265</sup> The FCO prohibits employers from asking about an applicant’s criminal history until after the first in-person interview. Its language incorporates the EEOC criteria about individualized assessment and provides a right for applicants to receive a copy of any background report and to appeal denial of employment.<sup>266</sup> The

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260. *Id.*

261. *See infra* App. C; *see also* S. COAL. FOR SOC. JUST., *supra* note 255, at 6.

262. *See infra* App. C.

263. *See infra* App. C. Problematically, the collection means and source of this data are not specified in the study.

264. Except that the Minneapolis law evolved in stages, unlike the Durham law. This could potentially also influence the different impacts of the laws.

265. *See* NELP GUIDE, *supra* note 155, at 16-17.

266. S.F. POLICE CODE, ARTICLE 49: PROCEDURES FOR CONSIDERING ARRESTS AND CONVICTION INFORMATION IN EMPLOYMENT AND HOUSING DECISIONS (July 11,

ordinance also includes a specific provision regarding applications for affordable housing.<sup>267</sup> San Francisco charges the Office of Labor Standards Enforcement (“OLSE”) with surveying San Francisco employers and, significantly, the FCO specifically mandates annual data collection by the OLSE to ensure compliance.<sup>268</sup>

The OLSE collected ban-the-box data in 2015 in an annual survey that was originally designed to monitor the city’s Health Care Security Ordinance because the laws cover nearly identical employer populations.<sup>269</sup> The survey designated six questions to determine the impact of the FCO during the period between August 13 and December 31 of 2014, addressing number of total hires, content of job applications, background checks, prohibited topics, changes made for compliance, and total hires with conviction histories.<sup>270</sup> During 2014, private employers in San Francisco were under an implementation or “education period” when the OLSE was not authorized to impose any penalties for failure to comply, so the employers had little incentive to provide inaccurate information.<sup>271</sup>

The survey recorded responses from 4732 employers ranging from local, small businesses with twenty employees to very large companies with over 500 employees (representing twenty-eight percent of the responses), from non-profit organizations (352 employers) to for-profit businesses. In total, the reporting employers recorded hiring 68,667 employees during the measured period. Nearly eighteen percent of respondents reported violating the requirement about removing the conviction question from application materials and

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2014), [http://sf-hrc.org/sites/default/files/ARTICLE%2049\\_%20Final.pdf](http://sf-hrc.org/sites/default/files/ARTICLE%2049_%20Final.pdf) [https://perma.cc/X2M3-TWME].

267. *Id.*

268. *Id.*

(a) An Employer shall retain records of employment, application forms, and other pertinent data and records required under this Article, for a period of three years, and shall allow the OLSE access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Article.

(b) An Employer shall provide information to the OLSE, or the OLSE’s designee, on an annual basis as may be required to verify the Employer’s compliance with this Article.

*Id.*

269. REP. TO THE BD. OF SUPERVISORS, FAIR CHANCE HIRING IN SAN FRANCISCO: YEAR ONE OF THE SAN FRANCISCO FAIR CHANCE ORDINANCE (Jan. 29 2016), <http://sfgov.org/olse/sites/default/files/FCO%20First%20Year%20Report.pdf> [https://perma.cc/5W7V-84Q6].

270. *Id.*

271. *Id.*

communications before the in-person interview, although some may have been in “exempt” industries, and seven percent did not respond.<sup>272</sup> In contrast, almost ninety percent of the survey respondents reported not conducting a background check until after an in-person interview with almost identical results for the question asking about whether the employer avoided prohibited topics including arrests, expunged convictions, outdated convictions, etc.<sup>273</sup> Another question asked respondents whether they had changed their job application materials and process to comply with the FCO. About eighteen percent (851) of employers said that they changed their application process, while over fifty-one percent recorded already being in compliance and over fifteen percent claimed never to have checked conviction history.<sup>274</sup> Finally, only three percent of employers recorded hiring anyone with a conviction history in 2014, with thirty-eight percent definitively answering that they had not hired any people with past convictions and fifty-three percent reporting that they did not know.<sup>275</sup> Of the 398 employees with conviction histories hired, 345 were hired by for-profit companies and fifty-three were hired by nonprofit organizations.

Looking more closely at those employers who hired workers with conviction histories, most reported hiring only one such employee.<sup>276</sup> Goodwill Industries was the highest employer of people with records at forty-one employees (out of 1999 total hires).<sup>277</sup> Target and Cor-O-Van Moving had the second highest employment counts for people with records at fifteen and sixteen people, respectively.<sup>278</sup>

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272. *Id.*

273. *Id.*

274. *Id.* See also *infra* App. D. The answers to this question are influenced by employers’ confusion about how to respond if other laws preempted them from removing conviction questions from their materials. The FCO contains a preemption clause and the OLSE reported that during survey process several employers called to report that because of “preemption issues” they had not changed their application or background check process. OLSE advised those callers to respond that their application was compliant. However, because the survey did not offer guidance about how to answer the question in regards to preemption, “it cannot be determined what option other employers with preemption issues chose for their response.” The OLSE plans to change this question to ask about preemption specifically in future surveys.

275. See *infra* App. E. The response “I don’t know” may indicate that the employer did not inquire into conviction histories at all and therefore was not able to answer the question. REP. TO THE BD. OF SUPERVISORS, *supra* note 269.

276. S.F. Off. of Lab. Standards Enf’t, Fair Chance Act Data 2005 (unpublished report) (on file with author).

277. *Id.*

278. *Id.*

Interestingly, the majority of businesses that recorded hiring more than two people with criminal records (including the three employers hiring the largest number of ex-offenders) were also those who had reported changing their practices to comply with the law.<sup>279</sup> This suggests that the act of engaging with the language of the law might have an impact on how it is implemented by employers.

#### 4. *New York, NY*

Before New York City implemented the Fair Chance Act in June of 2015, which applies to public and private employers, the city's first ban-the-box law was Executive Order 151, passed in 2011 by then-Mayor Michael Bloomberg. The order was part of Bloomberg's Young Men's Initiative ("YMI"), a campaign to "improve the lives of young black and Latino men in New York City."<sup>280</sup> Executive Order 151 covered only public employers and served as a supplement to the failed enforcement of Article 23-A of New York Corrections Law.<sup>281</sup> Under 23-A, a candidate may only be denied employment if the conviction history is directly related to the job or poses an unreasonable risk based on certain factors, such as the time passed since the offense, or its severity.<sup>282</sup> Beyond executing the provisions of 23-A, Executive Order 151 prohibited employers from asking applicants about conviction histories on any preliminary employment application documents and before or during the first job interview. While the remodeled Fair Chance Act of 2015 has no provision for data collection,<sup>283</sup> the Executive Order charged the NYC Department of Citywide Administrative Services' ("DCAS") Human Capital Division with monitoring the effects of the law for two years and conducting "periodic operational reviews of agency practices."<sup>284</sup> The data that DCAS collected was never published.<sup>285</sup>

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279. *Id.*

280. N.Y.C. Dep't of Citywide Admin. Servs., Executive Order 151 Data 2012 (unpublished report) (on file with author) [hereinafter 2012 Executive Order 151 Data].

281. Michael R. Bloomberg, *Executive Order 151, Consideration of Criminal Convictions in Hiring*, NELP (Aug. 4, 2011), <http://www.nelp.org/content/uploads/2015/03/NewYorkExecutiveOrder151.pdf> [<https://perma.cc/RCP2-N7P8>].

282. N.Y. CORRECT. LAW § 753 (McKinney 2007) (listing eight statutory factors for employers to consider regarding an applicant's conviction history).

283. See N.Y.C. Council, *New York City Fair Chance Act Int. No. 318-A*, NELP (June 10, 2015), <http://www.nelp.org/content/uploads/Fair-Chance-Act-NYC.pdf> [<https://perma.cc/B7NU-BN5U>].

284. See Bloomberg, *supra* note 281.

285. 2012 Executive Order 151 Data, *supra* note 280.

During the two-year monitoring period (2012 and 2013) an average of 51.9 percent of the thirty reporting New York City agencies (out of thirty-six total) hired people with criminal records.<sup>286</sup> In 2012, 49.1 percent of the thirty agencies hired ex-offenders, while the number jumped to 55.2 percent in 2013.<sup>287</sup> Of those agencies that recorded hiring ex-offenders, people with records made up twelve percent of total hires in 2012 and twenty-four percent of total hires in 2014.<sup>288</sup> Although not mentioned in the report, these numbers may be high due to jobs added in public “non-competitive” fields in conjunction with the YMI that were, on the one hand, particularly suited to individuals with limited employment experience and skills and, on the other hand, nonpermanent. The job titles with the highest hiring rates of individuals included “per diem job training participants” (59.4 percent of the total hires for 2012 and 64.3 percent of the total hires for 2013)<sup>289</sup> and “lifeguard” (2.0 percent of total hires in 2012 and 2.1 percent in 2013).<sup>290</sup> While these positions may be easier to get with minimal qualifications, they also appear to be temporary or seasonal. Other seemingly nonpermanent jobs with high hiring rates included “city seasonal worker” and “city seasonal aide.”<sup>291</sup>

The data from the New York City Executive Order 151 is unique because it did measure race and ethnic composition of the hired individuals with records.<sup>292</sup> In 2012 60.4 percent of total hires with records were reported to be black and 15.7 percent were Hispanic; in 2013, 67.7 percent of total hires with records were black and 17.6 percent were Hispanic.<sup>293</sup> These numbers are so high, and so dramatically inconsistent with studies like Pager’s, that the reporting measures and data variables used must be called into question. However, the study’s outlier findings may be due to the particular orientation of Executive Order 151 and its specific goal to improve lives of black and Latino men. Still, it is also necessary to position

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286. *Id.*

287. *Id.*

288. *Id.*

289. Problematically, “per diem job training participant” is not defined in any of the City’s materials and is nowhere listed as a New York City job.

290. 2012 Executive Order 151 Data, *supra* note 280.

291. *Id.*

292. The New York law is one of the laws that has expressly designated racial discrimination as a purpose for implementing the ban-the-box law. This factor makes the new law extremely viable and useful for determining whether race consciousness can affect the racial makeup of employees with records who are hired as a result of the law. *See* discussion, *supra* note 178.

293. *See infra* App. F.



Executive Order 151 within a criminal justice regime under Mayor Michael Bloomberg that boasted some of the city's highest recidivism rates in history and such flagrant racial profiling in policing practices that they were found to violate the constitutional rights of New Yorkers of color.<sup>294</sup> As the data stands—with insufficient background information and in a particularly racially hostile political context—it is difficult to give it much credence. In particular, in order to analyze the study more effectively, it would be necessary to have additional details about who was getting allocated “temporary” or “provisional” positions versus permanent employment. It is important to note that the New York City Fair Chance Act of 2015 is more substantive, lasting, and enforceable than Executive Order 151, as well as also applying to private employers; on top of that, its explicit purpose includes ameliorating the racial disparity in criminal record hiring discrimination.<sup>295</sup>

### 5. Summary

Together, these data collection efforts demonstrate that a wide span of information about the effects of ban-the-box laws can be collected through simple surveys of employers about their hiring practices. While these efforts are insufficient individually, each study provides useful material for considering the importance of data collection and what still needs to be measured. Even the uncertainty reflected in employers' responses to the San Francisco survey questions is helpful, by signaling the need for improvement in outreach and awareness campaigns to better prepare the labor market when rolling out new legislation. Further, the studies reflect a malleability in employer hiring practices that challenges the underlying principle of stasis in the sociological theory about organizations' responses to employment discrimination legislation. Each study revealed different degrees of willingness by employers to adjust their hiring procedures to meet the requirements of ban-the-box legislation. The New York data even raises the potential that

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294. See Adam Peck, *Mayor Bloomberg: NYPD 'Stops Whites Too Much and Minorities Too Little,'* THINK PROGRESS (June 28, 2013), <http://thinkprogress.org/justice/2013/06/28/2231761/mayor-bloomberg-nypd-stop-whites-too-much-and-minorities-too-little/> [<https://perma.cc/67L7-TP9C>]; see also *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that the NYPD's practices violated New Yorkers' Fourth Amendment right to be free from unreasonable searches and seizures and also finding that the practices were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment). To remedy the widespread constitutional violations, the judge ordered a court-appointed monitor to oversee a series of reforms to NYPD policing practices.

295. See discussion, *supra* note 292.

legislation could be race specific. What's more, the findings of the San Francisco survey suggest that the process of reconsidering hiring practices through engagement with legislation can itself be a powerful motivating factor in implementing change. That said, there are already signs of cosmetic compliance—for instance, in New York agencies' relegation of ex-offenders to temporary labor positions. It is clear that additional and more comprehensive data collection is essential to determining the real sources of change in employer hiring in order to better direct that change with future legislation.

In total, these data collection efforts are conspicuously limited and infrequent. All the studies show the potential for the laws to have a real impact on the hiring practices of employers in their consideration of applicants' criminal histories, but none have taken the further step of exploring the nature of this impact and identifying the individuals that benefit from it. In particular, the data is subject to the empirical pitfall of "omitted variable bias" because it fails to determine the experience of people of color with records in the new hiring arena (with the exception of the unreliable New York data) and how that invisible factor changes the results of the laws' implementations.<sup>296</sup> Going forward, the laws should mandate data collection (like in San Francisco) by an equipped government body and measure not only the hiring rates of people with records generally, but, rather, the specific demographic makeup of those hires.

### B. A Proposal

First, it is important to note that calling for race data collection is a policy not free from its own problematic context. Such data collection has been viewed in multiple instances as a suspect practice, in violation of the antidiscrimination principle.<sup>297</sup> Most recently, the contemporary civil rights movement has called attention to the use of race data to enforce criminal justice policies (e.g., "driving while

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296. ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 324-25 (2010) ("Omitted variable bias arises when there is an explanatory or independent variable that has an influence on the dependent variable but has not been explicitly included as an independent variable *and* that is correlated with one or more of the independent variables that is or are included. When it occurs, the estimates for the patterns of the included variables that are correlated with the omitted variable *may be biased*. . . . [Omitted variable bias could] cause an included variable to be credited with an effect that actually is caused by the excluded variable." (emphasis added)). Even carefully designed studies suffer from omitted variable bias, but this particular omitted variable is especially at risk of having serious consequences on the conclusions of the studies.

297. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 941-42 (2006).

black” or “flying while brown”), as well as its use by the Census Bureau.<sup>298</sup> In light of that critique, the mode of data collection called for in this Note is intended to fit the category of research that measures a racial phenomenon, rather than constructing one. Second, empirical data alone cannot provide a complete picture of the impact of ban-the-box legislation on racial minorities with records. Understanding how employers make decisions and participate in the construction of prejudice requires qualitative and theoretical study, too. Still, empirics are useful for the overall analysis of this Note, because they encourage visibility by measuring the links between social phenomena that, while structurally present, are often hidden.

Additional questions about potential issues with the implementation of data collection still remain. Who is best positioned to collect the data? Who will enforce that collection? Also, the most effective use of this data by claimants and courts remains to be determined.

This Note proposes that future ban-the-box laws require data collection, following in the model of the San Francisco FCO.<sup>299</sup> The data should directly address the races of ex-offenders who are hired in order to determine if minorities are benefiting from the implementation of ban-the-box laws. This collection should be at least annual and conducted by a relevant and competent government office or agency, either in conjunction with an enforcement body or with the power to enforce the laws itself. The purpose of this data collection should be transparently conveyed in order to reinforce to employers the goals of the laws and how assessments relate to those goals. In order to facilitate and regulate the retrieval and measurement of empirical material by a variety of officials across the country, the EEOC should issue guidance recommending and demonstrating successful data collection.<sup>300</sup> Finally, and perhaps most

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298. *Id.* at 942.

299. The relevant section of the San Francisco ordinance reads as follows:

Pursuant to its rulemaking authority under this Article, the OLSE shall adopt rules that establish procedures for Employers to maintain and retain accurate records and to provide annual reporting of compliance to OLSE in a manner that does not require disclosure of any information that would violate State or Federal privacy laws.

S.F. POLICE CODE, *supra* note 266.

300. The EEOC could also collect the data itself. Recently, the EEOC issued a proposal to amend the Employer Information Report (“EEO-1”) for all employers with more than one hundred employees to “include collecting pay data from employers.” U.S. EEOC, Press Release, EEOC Announces Proposed Addition of Pay Data to Annual EE-1 Reports (Jan. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm> [<https://perma.cc/K6H4-43LK>]. EEO-1 data

importantly, ban-the-box laws should be written to be more race conscious by incorporating “Purpose” sections that address the disparate treatment of people of color by the criminal justice system and then by employers post-conviction. This will guide employers to conceive of compliance with ban-the-box laws in a way that reflects the true purpose of the legislation: ameliorating structural inequality and prejudice in the labor market.

### CONCLUSION

The racially discriminatory practices of the criminal justice system have facilitated structural inequality in the labor market through the negative credential of the criminal record. Thus far, efforts to use Title VII to ameliorate this problem have been disempowered by the federal courts’ skepticism of the persistence of race as source of social and economic disadvantage in America. This legislative and judicial failure, the rise of the criminal background check industry, and compounded racial prejudice about criminality have led to a national effort to advance ban-the-box laws. As the country rallies behind these new laws, it is necessary to improve their efficacy by considering their legal legacy and implementing race-conscious legislation.

The laws going forward should mandate data collection about the race of hires with criminal histories. They should also include “Purpose” sections that address the issue of employers’ disparate treatment of racial minorities with records as a result of structural inequality perpetuated by the criminal justice system. Ban-the-box laws are the product of a movement that has seen the miner’s canary struggling to breathe; now is not the time to shut our eyes.

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provides the federal government with workforce profiles from private sector federal employers by race, ethnicity, sex, and job category. The January 2016 proposal, while specifically addressing wages, signifies the EEOC’s recognition of empirical data as a successful means to spot “trends” in discrimination. If the EEOC measured the hiring rates of ex-offenders and their races it would create a substantial amount of data for activists and legislators working on ban-the-box laws.

APPENDIX A<sup>301</sup>

Subsample (N)	White felon (Wf)	Latino (L)	Black (B)	Race Differences <sup>a</sup>		
				Wf/L	Wf/B	L/B
Total (169)	17.2	15.4	13.0	1.1 (.25)	1.3 (.08)	1.2 (.17)
Date <sup>b</sup>						
March 2 to April 13 (83)	16.9	13.3	10.8	1.3 (.16)	1.6 (.06)	1.2 (.21)
April 14 to Aug. 6 (82)	17.1	17.1	15.9	1.0 (.43)	1.1 (.35)	1.1 (.34)
Location <sup>c</sup>						
Below 34th St. (51)	9.8	7.8	3.9	1.3 (.30)	2.5 (.05)	2.0 (.00)
34th St. to 72nd St. (46)	13.0	17.4	13.0	.8 (.74)	1.0 (.42)	1.3 (.14)
Above 72nd St. (7)	0	0	0			
Other (62)	29.0	21.0	21.0	1.4 (.08)	1.4 (.09)	1.0 (.46)
Race of First Tester						
White (53)	20.8	18.9	13.2	1.1 (.34)	1.6 (.13)	1.4 (.15)
Black (59)	18.6	15.3	15.3	1.2 (.20)	1.2 (.15)	1.0 (.39)
Latino (52)	11.5	11.5	11.5	1.0 (.44)	1.0 (.42)	1.0 (.41)
Type of Positive Response <sup>d</sup>						
Callback (169)	11.2	9.5	5.3	1.2 (.23)	2.1 (.01)	1.8 (.02)
Job offer (169)	5.9	6.5	7.7	.9 (.58)	.8 (.77)	.8 (.65)
Personal Contact <sup>e</sup>						
No personal contact (75)	8.0	8.0	4.0	1.0 (.45)	2.0 (.09)	2.0 (.04)
Personal contact (39)	35.9	28.2	30.8	1.3 (.12)	1.2 (.24)	.9 (.58)

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301. Pager, Western & Bonikowski, *supra* note 197.

APPENDIX B<sup>302</sup>

<i>Applicant Summary</i>	<i>2004-2006</i>	<i>2007-July 3, 2008</i>
Applications Received-City Positions Only	18,842	12,911
# of Background Checks Conducted <sup>303</sup>	996 (5.3% of total applications)	494 (3.8% of total applications)
# of Background Checks with Convictions Concerns	N/A	47
% of Applicants with Conviction Concerns <sup>304</sup>		9.5%
# of Applicants with Concerns Hired	57 (5.7%) <sup>305</sup>	27 (57.4%)
# of Applications Rejected Prior to an Eligible List Being Established	51 (5.1%)	None <sup>306</sup>
# of Applicants Rejected for not responding to a convictions letter	41 (4.1%)	1 (2.1%)
# of Applicants rejected due to the nature of the conviction (post-certification) <sup>307</sup>	2 (0.2%)	13 (27.7%)

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302. City of Durham, *supra* note 257.

303. "2004-2006 reflects the number of applicant-disclosed convictions for permanent hires, not the number of background checks conducted through a third-party vendor. 2007-2008 reflects the number of background checks conducted through a third-party vendor for all applicable details, temporary and permanent hires." Letter from Elisabeth Glidden, *supra* note 252, at 3 n.1.

304. "For 2004-2006, all disclosed conviction information was reviewed. There is no specific data available for how many of those disclosures had 'concerns.'" *Id.* at 3 n.2.

305. "Percentages are the ratio of applicant status to the number of background checks conducted (2004-2007), or the number of checks with concerns (2007-2008)." *Id.* at 3 n.3.

306. "As of 1/30/07, background checks [were] only conducted after a conditional job offer had been made." *Id.* at 3 n.4.

307. "2004-2006 numbers are lower as rejections were typically done prior to certification. 2007-2008 rejection percentages are higher as it is compared only to the number of checks with a concern (47)." *Id.* at 3 n.5.

APPENDIX C<sup>308</sup>APPENDIX D<sup>309</sup>

<i>Did you change your job application process to comply with the FCO? (Multiple options)</i>	<i>Number of Responses</i>	<i>Percentage</i>
Yes, we changed our application and /or background check process	845	17.9%
No our existing application and/or background check process was already compliant with the law	2,432	51.4%
No, we never considered arrest records or convictions, and we still do not	728	15.4%
No, we have not yet changed out process to comply with the law	99	2.0%
Total:	4,104*	

*Note: Due to a technical problem, 628 online surveys had no usable data in response to Question 5.*

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308. S. COAL. FOR SOC. JUST., *supra* note 255.

309. REP. TO THE BD. OF SUPERVISORS, *supra* note 269.

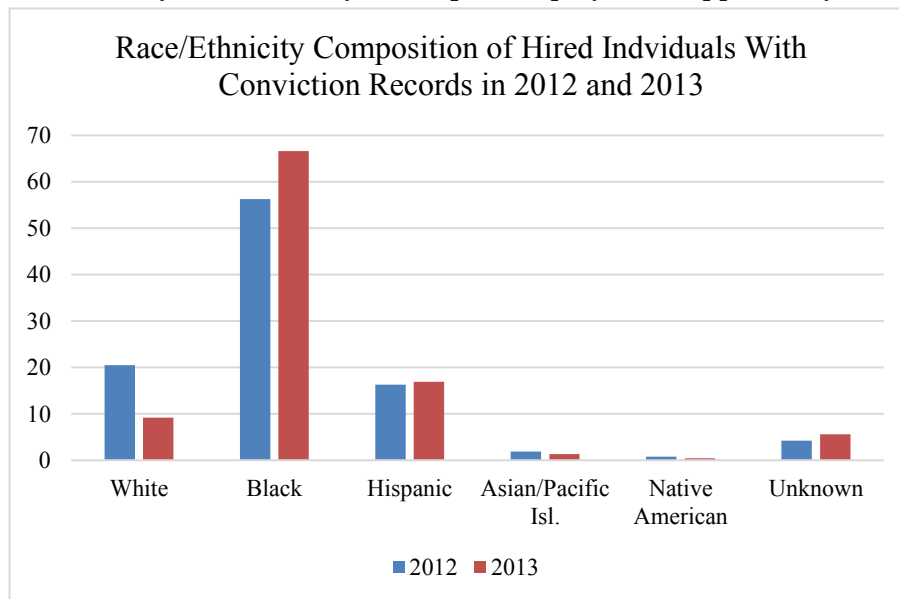
APPENDIX E<sup>310</sup>

*Did you hire anyone with a conviction history between August 13, 2014 and December 31, 2014?*

Yes	135	3%
No	1,776	38%
Don't know	2,490	53%
No response	331	7%
Total:	4,732	

APPENDIX F<sup>311</sup>

Recorded in the Citywide Administrative Services Report on Citywide Diversity and Equal Employment Opportunity



310. *Id.*

311. N.Y.C. Dep't of Citywide Admin. Servs., *supra* note 280.