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Jessica Chinnadurai

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NOTE

Banning the Box in Missouri: A Statewide Step in the Right Direction

Jessica Chinnadurai*

I. INTRODUCTION

Seventy million. That is a rough estimate of the number of people in the United States who have some sort of criminal record.¹ Further, it is well evidenced that some demographic groups have higher criminal record rates than the general population.²

FBI statistics reveal that African Americans accounted for more than three million arrests in 2009 (28.3% of total arrests), even though they represented around 13% of the total population in the past decade; whites, who have made up around 72% of the population in the past decade, accounted for fewer than 7.4 million arrests (69.1% of total arrests).³

What is the significance of these numbers? Nearly 700,000 prisoners return to their communities every year,⁴ and these former convicts are facing more and more challenges when reintroduced to society.⁵ As portrayed by the above numbers, protected race classes are oftentimes affected the most.⁶ With these racial disparities in mind, employers' consideration of criminal histories "raises concerns under Title VII of the Civil Rights Act of 1964, the landmark

*B.A., Loyola University Chicago, December 2012; J.D. Candidate, University of Missouri School of Law, 2018; Associate Editor in Chief, *Missouri Law Review*, 2017–2018. I would like to extend my deepest gratitude to Associate Dean Rafael Gely for his guidance during the writing process, to the *Missouri Law Review* for editorial assistance, and to my family and friends for their continued support.

1. *Ban the Box Facts*, VERIFYPROTECT.COM, <https://www.verifyprotect.com/ban-the-box/facts/> (last visited Sept. 6, 2017).

2. 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, 198 (2014).

3. *Id.* at 198–99.

4. *Ban the Box Facts*, *supra* note 1.

5. See generally Simmons Staff, *The Challenges of Prisoner Re-Entry into Society*, SIMMONS SCH. SOC. WORK (July 12, 2016), <https://socialwork.simmons.edu/blog/Prisoner-Reentry/>.

6. Smith, *supra* note 2, at 198–99.

federal legislation that prohibits employment discrimination on the basis of, inter alia, race and color.”⁷

Missouri, like many other states, has evaluated and decided to address employment discrimination that occurs as a result of requiring people with a criminal history to disclose that information during the initial phases of the hiring process.⁸ Efforts to eliminate bias have been seen through the “Ban the Box” movement. The movement generally advocates removing the box applicants check if they have a criminal history, opting instead to delay this question for later in the employment process.⁹ This Note analyzes the advantages and disadvantages of adopting this legislation and evaluates whether doing so leads to a lower risk of employment discrimination.

II. LEGAL BACKGROUND

The use of criminal background information by employers is concerning because it potentially violates Title VII’s intentional discrimination provisions. These provisions “invalidate[] an employer’s facially neutral policy if it has a disproportionate impact on a protected group and is not related to the job at issue or consistent with business necessity.”¹⁰ The doctrine of disparate impact allows courts to strike down employment practices “not because they were implemented with the intent to discriminate against a protected class, but because [they carry] a disproportionate discriminatory effect on those protected classes.”¹¹

A. Title VII and Related Case Law

The Supreme Court first defined disparate impact in 1971 in *Griggs v. Duke Power Co.*¹² In this case, the Court held that requiring employees to hold a high school diploma or pass general intelligence tests was not a permissible employment practice under Title VII.¹³ The action was brought by a group of

7. *Id.* at 199 (footnote omitted); see also *Pre 1965: Events Leading to the Creation of EEOC*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Sept. 12, 2017) (“Perhaps the most serious compromise occurred in the employment section of the proposed Civil Rights Act, a section that became known simply as Title VII, that prohibited discrimination based on race, color, national origin, sex, religion, and retaliation.”).

8. See, e.g., *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1292 (8th Cir. 1975).

9. See generally BETH AVERY & PHIL HERNANDEZ, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES (2017), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

10. Smith, *supra* note 2, at 199–200.

11. Rebecca J. Wolfe, Comment, *The Safest Port in the Storm: The Case for a Ban the Box Law in South Carolina*, 9 CHARLESTON L. REV. 503, 509 (2015).

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. *Id.* at 431–32, 436; see also Smith, *supra* note 2, at 200–01.

black employees who were employed in the labor department at the power plant, which was the lowest paying of the five departments.¹⁴ The company instituted a new policy requiring employees to have a high school education in order to transfer out of the labor department.¹⁵ However, after Title VII was enacted in 1965, the company started to allow incumbent employees with no high school education to transfer out of the labor department if they passed two tests – the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.¹⁶ The Supreme Court started its analysis in this case by recognizing that the purpose of Title VII is to “remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”¹⁷ This means that overt employment discrimination is prohibited in addition to employment “practices that are fair in form, but discriminatory in operation” or “neutral on their face.”¹⁸ Employers can claim a defense of “business necessity” where an employment practice that operates to exclude a protected class can be shown to relate to job performance and is thereby non-discriminatory.¹⁹ Over the years, courts have continually made conclusions based on progressive interpretations of the purpose and mission of Title VII.²⁰

Besides having a checkable box on an application, employers can and often do use background checks to discover an applicant’s criminal history information in greater detail.²¹ The Eighth Circuit case *Green v. Missouri Pacific Railroad Company* (“MoPac”) is at the forefront of articulating the factors employers may use to justify criminal background screenings: (1) the nature of the underlying crime, (2) the nature of the position sought, and (3) the time elapsed since conviction.²² The plaintiff in *Green* challenged the railroad’s “absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense.”²³ Using the three factors, the court found that there was no business necessity in dismissing every single prospective employee ever convicted of an offense.²⁴ First, as defined in *Griggs*, business necessity is proven by showing how an employment practice that operates to exclude a protected class relates to job performance; if it does not relate, then the practice is prohibited.²⁵ However, in many employment

14. See *Griggs*, 401 U.S. at 426–27.

15. See *id.* at 427.

16. See *id.* at 428 (stating that the Wonderlic test “purports to measure general intelligence” while the Bennett test, as its name suggests, measures mechanical comprehension abilities).

17. *Id.* at 429–30.

18. *Id.* at 430–31.

19. *Id.* at 431.

20. See Smith, *supra* note 2, at 203–04.

21. See *id.* at 198.

22. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975).

23. *Id.* at 1292.

24. *Id.* at 1298; see also Smith, *supra* note 2, at 204.

25. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

discrimination cases, various courts have admitted that “a past criminal conviction does not mean that a person will commit a crime in the future.”²⁶ They have also concluded that “such individuals are more likely to commit a crime than those with no record,” and therefore, a business necessity is adequately shown.²⁷ This latter reasoning, as opposed to the reasoning in *Green*, eventually led Congress to codify disparate impact under the Civil Rights Act of 1991, due to the over-willingness of courts to accept employers’ justifications.²⁸

B. *Equal Employment Opportunity Commission (“EEOC”) Guidelines*

Aside from case law on this matter, the Equal Employment Opportunity Commission (“EEOC”) developed guidelines to ensure the use of non-discriminatory employment practices.²⁹ Title VII was enacted in 1964, and the EEOC was created in 1965 by Congress to receive charges of employment discrimination and further investigate them.³⁰ However, while the EEOC was given authority to enforce Title VII by allowing claimants to bring actions in federal courts, Congress did not grant rulemaking authority to the agency.³¹ Thus, the EEOC simply issues guidelines when a specific area of law needs clarification, but these guidelines are not binding.³² Revisions to the EEOC’s Enforcement Guidelines in 1970 “further defined the types of proof necessary to validate any screening test under Title VII to assure that [they] accurately predict job performance or relate to actual skills required by the jobs.”³³ Overall, the EEOC “encourage[s] employers to use more of an ‘individualized assessment’ of an applicant before making a hiring decision. In lieu of such an assessment, the EEOC recommends that employers avoid inquiring at all about convictions on job applications to avoid Title VII liability”³⁴

26. Smith, *supra* note 2, at 209.

27. *Id.*

28. *Id.* at 201; *see also The Civil Rights Act of 1991*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited Sept. 6, 2017).

29. *See* Aaron F. Nadich, Comment, *Ban the Box: An Employer’s Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 785 (2014).

30. *See id.*

31. *See id.*

32. *See id.*

33. *Shaping Employment Discrimination Law*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited Sept. 6, 2017).

34. Wolfe, *supra* note 11, at 512–13.

C. *The Most Serious Risk Employers Run by Not Inquiring into Criminal History*

More recently, federal legislators have found that the EEOC's 2012 Enforcement Guidelines have gone beyond suggesting that an inquiry into criminal history is not necessary. The Guidelines now explicitly encourage employers to not conduct a background check unless absolutely necessary.³⁵ The EEOC seems to be urging "employers to act contrary to Federal, State, and local laws that require employers to conduct criminal background checks for certain positions, such as public safety officers, teachers, and daycare providers."³⁶ For this reason, the 2012 EEOC Guidelines were unsuccessful and were largely accompanied by court criticisms.³⁷ In 2013, the U.S. District Court for the District of Maryland declared, "Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States."³⁸ The court further noted that the EEOC itself chooses to conduct criminal background checks as a condition of employment within the agency.³⁹

Employers have expressed a more specific concern with the EEOC's discouragement of unnecessary background checks (i.e., if the check involves "unsupervised access to sensitive populations or handling sensitive information").⁴⁰ Their argument focuses on employers' liability in the context of negligent hiring actions.⁴¹ In particular, employers are asking themselves if they will be held liable, and to what extent, if they decide not to conduct a criminal background check on an applicant who is hired and later ends up harming someone else while on the job.⁴² In these situations, courts consider whether they should "uphold precedent that maintains an employer need not conduct a criminal background check to satisfy its duty to reasonably investigate a prospective employee's background."⁴³

For example, in the Fourth Circuit case *Blair v. Defender Services, Inc.*, the plaintiff was a young college freshman at Virginia Tech and was attacked

35. *See id.* at 512–13.

36. *Id.* at 531 (internal quotation marks omitted).

37. *See* Nadich, *supra* note 29, at 788.

38. *Id.* (quoting EEOC v. Freeman, 961 F. Supp. 2d 783, 786 (D. Md. 2013)).

39. *Id.* (quoting Freeman, 961 F. Supp. 2d at 786).

40. *Top 10 Best Practices for Fair Chance Policies*, VERIFYPROTECT.COM, <http://www.verifyprotect.com/ban-the-box/best-practices/> (last visited Sept. 6, 2017); *see* Isaac Sturgill, Note, *Don't Worry About the Check - Why the Fourth Circuit's Opinion in Blair v. Defender Services, Inc. Should Not Deter North Carolina Employees from Embracing Forthcoming "Ban the Box" Legislation*, 3 CHARLOTTE L. REV. 503, 504 (2012).

41. *See* Sturgill, *supra* note 40, at 503.

42. *See id.* at 504.

43. *Id.* at 503.

in a classroom by Harris, a janitor who was employed by a company contracting with the school.⁴⁴ Harris had a recent protective order issued against him after a woman filed a criminal complaint that he attacked her at a restaurant.⁴⁵ In addition to Harris denying having a criminal background on the job application, the contractor never performed a background check and was therefore unaware of the protective order.⁴⁶ Prior Virginia case law determined that the employer did not have a duty outside of reasonable care in the hiring of employees, but there was a question about whether “Harris’s dangerous propensities should have been discovered . . . prior to Harris’s employment.”⁴⁷ In this case, however, the Fourth Circuit focused on “the foreseeability of the offense, not the extent to which the employer upheld its duty to conduct a reasonable investigation.”⁴⁸ The court vacated the trial court’s granting of summary judgment to the plaintiff, noting that Harris lied on his job application, which reduced the reasonable foreseeability that he would commit a criminal offense.⁴⁹

Not all jurisdictions focus on the foreseeability of the offense, however, so the argument remains that the duty to reasonably investigate an applicant’s background places a burden on employers and therefore places them at greater risk of incurring liability if they do not conduct a background check.⁵⁰ Moreover, employers argue that there are not many ways to infer an applicant’s dangerous propensities besides running a criminal background check.⁵¹ Possible alternative means include providing evidence of an applicant’s positive prior work history, such as if he or she had a known history of top performance and strong work habits.⁵² However, even that information alone cannot reasonably indicate whether or not an individual has a criminal history; it simply speaks to his or her reliability.⁵³ In *Blair*, if Harris had not lied about his criminal history, the employer might have considered his dangerous propensities and may not have hired him in order to avoid putting students at risk.⁵⁴ Ex-offenders are fully aware that employers will likely react this way, which leads them to lie on applications out of fear that they will not progress to additional stages

44. See *Blair v. Def. Servs., Inc.*, 386 F.3d 623, 625–26 (4th Cir. 2004).

45. *Id.* at 626.

46. *Id.*

47. See Sturgill, *supra* note 40, at 509.

48. *Id.* at 511.

49. *Id.* at 509–10.

50. *Id.* at 505 (stating that employers ask themselves, “If I am trying to protect myself from negligent-hiring actions, is not conducting a criminal background check on an employee going to make my investigation into the employee’s background unreasonable, therefore subjecting me to liability?”).

51. See *id.* at 513.

52. See *id.*

53. See *id.*

54. *Id.* at 508–10.

of the hiring process.⁵⁵ An applicant lying can be an even bigger issue if he or she has only been involved in minor infractions or non-arrests. This sort of omission of fact can, by itself, be the reason an employer does not hire an applicant.

III. RECENT DEVELOPMENTS

Concerns over employment practices that have disparate impact outcomes existed even before Title VII was passed, and efforts to reduce barriers to equal opportunity employment for people with conviction histories continue across the country.⁵⁶ As of May 2017, over 150 cities and counties and twenty-seven states have passed what is known as “Ban the Box” legislation, which “prohibit[s] employers from asking about criminal history on the initial job application” or delays these questions for a later stage in the hiring process.⁵⁷ The box is the place on the employment application where applicants must check “yes” or “no” to having a criminal history.⁵⁸

A. *History of Banning the Box Across the United States*

The Ban the Box initiative was first promulgated in 2004 by the “All of Us or None” grassroots civil rights movement.⁵⁹ This human rights organization focuses on several other initiatives, which all relate to the common theme of fighting for the rights of individuals who are currently or were formerly incarcerated.⁶⁰ For example, the organization also has a “Voting Rights for All” campaign and a “Clean Slate” campaign, the latter of which aims to help people with certain convictions get their records dismissed, apply for pardons, and obtain certificates of rehabilitation.⁶¹

Historically, there have been two major purposes behind Ban the Box legislation: (1) to force “employers to evaluate the skills of the applicant before having an opportunity to make a stereotypical judgment about ex-offenders,” and (2) to minimize “the deterrent effect that questions about criminal history

55. Seth Ferranti, *Why is Getting a Job After Prison Still Such a Nightmare for Ex-Cons?*, VICE (Apr. 30, 2015, 9:34 AM), https://www.vice.com/en_us/article/exqd4e/why-is-getting-a-job-after-prison-still-such-a-nightmare-429.

56. *About: The Ban the Box Campaign*, BAN BOX CAMPAIGN, <http://banthebox-campaign.org/about/#> (last visited Sept. 6, 2017).

57. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment 2* (U. Michigan Law & Econ. Research Paper, No. 16-012, 2016), <http://ssrn.com/abstract=2795795>; see also AVERY & HERNANDEZ, *supra* note 9, at 1.

58. Agan & Starr, *supra* note 57, at 5.

59. Wolfe, *supra* note 11, at 522.

60. *All of Us or None*, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/> (last visited Sept. 6, 2017).

61. *Id.*

on an application can have on applicants with criminal records.”⁶² Similarly, the laws help reduce “collateral consequences” that ex-offenders experience as a result of a “felony conviction [that] carries with it a life sentence.”⁶³ The consequences are collateral because the same individuals who have problems obtaining employment are also frequently subject to issues involving housing and reintegration into their communities, long after their release.⁶⁴

Ban the Box legislation varies across the United States in terms of what employer actions are prohibited.⁶⁵ For example, Hawaii was the first state to Ban the Box in 1998, in both private and public employment, by “prohibit[ing] employers from inquiring into an applicant’s criminal history until after a conditional offer of employment has been made.”⁶⁶ A conditional job offer is an offer in which “employment is contingent upon the results of a criminal background check, much in the same way that a drug test works.”⁶⁷ All of Us or None was also a co-sponsor of California’s 2013 state-wide legislation, “which would apply Ban the Box provisions to [every] city and county hiring in California.”⁶⁸ California Governor Jerry Brown signed the Fair Chance Act in 2014.⁶⁹ This bill prohibited “a state or local agency from asking an applicant to disclose information regarding a criminal conviction, except as specified, until the agency ha[d] determined the applicant [met] the minimum employment qualifications for the position.”⁷⁰ Also in 2014, the San Francisco Board of Supervisors unanimously passed the Fair Chance Ordinance, which expands policies to cover private employers with twenty or more employees and also bans the box on affordable housing applications.⁷¹ At a basic level, the city’s ordinance prohibits employers and housing providers from making any inquiry into criminal history on a job or housing application and mandates that employers and housing providers refrain from otherwise inquiring about criminal

62. Wolfe, *supra* note 11, at 522 (internal quotation marks omitted).

63. *Id.* at 523.

64. *Id.*

65. *Id.* at 525.

66. *Hawaii’s Fair Chance Law*, VERIFYPROTECT.COM, <https://www.verifyprotect.com/ban-the-box/hawaii/> (last visited Sept. 6, 2017).

67. “*Ban the Box*” *Frequently Asked Questions*, CITY COLUMBIA MO., http://www.como.gov/law/human-rights/ban-the-box/ban-the-box-faq/?doing_wp_cron=1474247626.8397469520568847656250 (last visited Sept. 6, 2017).

68. ALL OF US OR NONE, *BAN THE BOX TIMELINE 3* (2015), <http://www.prisonerswithchildren.org/wp-content/uploads/2015/08/BTB-timeline-final.pdf>.

69. *Id.* at 4.

70. *California’s Fair Chance Law*, VERIFYPROTECT.COM, <https://www.verifyprotect.com/ban-the-box/california/> (last visited Sept. 6, 2017).

71. ALL OF US OR NONE, *supra* note 68, at 4.

history at the beginning of the hiring or housing process.⁷² Since prior legislation across the country had exclusively focused on public employment discrimination, this was considered model legislation.⁷³

In November of 2015, President Barack Obama formally announced he would instruct federal employers to ban the box in an effort to promote reintegration of former convicts.⁷⁴ In the official fact sheet provided by the White House, the President directed the Office of Personnel Management (“OPM”) “to take action where it can by modifying its rules to delay inquiries into criminal history until later in the hiring process.”⁷⁵ The President’s entire announcement focused on various ways to promote rehabilitation and reintegration for the formerly incarcerated. He stated that banning the box in federal employment “will better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal employment.”⁷⁶

B. Banning the Box in Missouri

Following in stride, former Missouri Governor Jay Nixon signed an executive order in April of 2016, which still allows public employers to request information about an applicant’s criminal history but not until later in the application process.⁷⁷ Various press releases stated that “[f]ull implementation of the order was required within 90 days.”⁷⁸ The order was executed at a time when the unemployment rate for Missourians on parole was around forty-four percent.⁷⁹

72. CITY & COUNTY OF S.F., LEGISLATIVE DIGEST (REVISED) 1 (2014), <http://sfgov.org/olse/sites/default/files/FileCenter/Documents/11597-FCO%20legislative%20digest.pdf>.

73. See ALL OF US OR NONE, *supra* note 68, at 4.

74. Sarah Lazare, *Collective Victory Declared as Obama Takes Small Step to ‘Ban the Box’*, COMMON DREAMS (Nov. 2, 2015), <http://www.commondreams.org/news/2015/11/02/collective-victory-declared-obama-takes-small-step-ban-box>; see also Press Release, WHITE HOUSE OFFICE OF PRESS SEC’Y, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

75. Press Release, WHITE HOUSE OFFICE OF PRESS SEC’Y, *supra* note 74.

76. *Id.*

77. Jason Rosenbaum, *Nixon ‘Bans the Box’ from Most Missouri Government Employee Applications*, ST. LOUIS PUB. RADIO (Apr. 11, 2016), <http://news.stlpublicradio.org/post/nixon-bans-box-most-missouri-government-employee-applications#stream/0>.

78. AVERY & HERNANDEZ, *supra* note 9, at 11.

79. Stephen Ganey, *Gov. Nixon Signs Executive Order to “Ban the Box” in State Employment*, FOX4 KC (Apr. 11, 2016, 3:42 PM), <http://fox4kc.com/2016/04/11/gov-nixon-signs-executive-order-to-ban-the-box-in-state-employment/> (as shown by 2015 data from the Missouri Department of Corrections).

Prior to this statewide recent development, only three cities in Missouri had some form of Ban the Box legislation. The city of St. Louis enacted an administrative policy that applies to city jobs. As of March 2013, the policy no longer automatically disqualified applicants if they had committed prior felonies and it “removed all questions about conviction history from its job application” later in October of 2014.⁸⁰ Kansas City followed suit in April of 2013 by requiring background checks to be used for otherwise qualified candidates only after an interview was conducted.⁸¹ The city also chose to implement EEOC criteria in individualized assessments: “Interestingly, the ordinance prohibits the City from using or accessing the following criminal records information: records of arrests not followed by valid conviction; convictions which have been annulled or expunged; pleas of guilty without conviction; and misdemeanor convictions for which no jail sentence can be imposed.”⁸² The ordinance’s scope is limited to public city hiring, but private employers are encouraged to adopt similar practices.⁸³ Lastly, in November of 2014, Columbia’s “city council unanimously approved a fair-chance ordinance that prohibits employers from inquiring into an applicant’s criminal history until after a conditional offer of employment.”⁸⁴ This ordinance applies to all employers in the city.⁸⁵ Overall, most jurisdictions that have Ban the Box laws in place encourage employers to consider “the nature of the offense, the time since the offense, and any rehabilitation measures taken since the offense.”⁸⁶

C. Policy Justifications Behind Banning the Box

Every city and state where this legislation exists in some form lists a few reasons why they ultimately chose to ban the box.⁸⁷ The most popular justification is that full-time employment, as a successful predictor that an offender will not reoffend, leads to lower recidivism rates.⁸⁸ Recent data suggests that approximately two thirds of those released will be re-arrested within three years.⁸⁹ A 2011 study found that “two years after release nearly twice as many

80. AVERY & HERNANDEZ, *supra* note 9, at 63.

81. *Missouri’s Fair Chance Law*, VERIFYPROTECT.COM, <https://www.verifyprotect.com/ban-the-box/missouri/> (last visited Sept. 6, 2017).

82. *Id.*

83. *Id.*

84. AVERY & HERNANDEZ, *supra* note 9, at 67.

85. *Id.* at 66.

86. *Id.* at 67.

87. *See id.* at 1.

88. *See Wolfe, supra* note 11, at 532.

89. JENNIFER L. DOLEAC & BENJAMIN HANSEN, DOES “BAN THE BOX” HELP OR HURT LOW-SKILLED WORKERS? STATISTICAL DISCRIMINATION AND EMPLOYMENT OUTCOMES WHEN CRIMINAL HISTORIES ARE HIDDEN 3 (2017), http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf (citing A. D. Cooper et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from*

employed people with records had avoided another brush with the law than their unemployed counterparts.”⁹⁰ Therefore, the initiative can “increase public safety by narrowing the scope under which ex-offenders’ criminal histories can be considered during the hiring process.”⁹¹ Former Missouri Governor Jay Nixon stated, “It’s simple: People who are working are less likely to commit crimes. They’re less likely to return to prison. And they’re more likely to become productive contributing members of societies.”⁹²

The Ban the Box movement highlights other reasons why helping recently released individuals return to work improves society overall. In addition to improving public safety, communities are strengthened because families will no longer have to support the recently released person if he or she is self-sufficient.⁹³ These numbers are significant, as evidenced by “[o]ne study of women with felonies [which] found that 65 percent relied on a family member or spouse for financial support.”⁹⁴ Another “survey of family members of the formerly incarcerated found that 68 percent said those who were parents were having trouble paying child support . . . and 26 percent experienced trouble rebuilding relationships with family.”⁹⁵ Additionally, Ban the Box legislation is gaining momentum by boosting the economy.⁹⁶ During the economic crisis, “[e]conomists estimated that because people with felony records and the formerly incarcerated have poor prospects in the labor market, the nation’s gross domestic product in 2008 was reduced by \$57 to \$65 billion.”⁹⁷ Further, “lower incarceration rates reduce the grave economic impact that prison operations have on the state.”⁹⁸ It is clear that there are many advantages that accompany Ban the Box legislation because of its direct positive impact on an ex-offender’s life after being released from prison. However, employers also assume a few risks in the hiring space.⁹⁹

IV. DISCUSSION

While Missouri has joined several states by banning the box on a statewide level, it is important to note that a majority of American workers do not live in jurisdictions with Ban the Box protection.¹⁰⁰ Of the states that do,

2005 to 2010 – Update, BUREAU JUST. STATS. (Apr. 22, 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>).

90. *Ban the Box Facts*, *supra* note 1.

91. *See* Sturgill, *supra* note 40, at 504.

92. Rosenbaum, *supra* note 77.

93. *Id.*

94. *Ban the Box Facts*, *supra* note 1.

95. *Id.*

96. *See* Rosenbaum, *supra* note 77.

97. *Ban the Box Facts*, *supra* note 1.

98. Nadich, *supra* note 29, at 773.

99. *See* Sturgill, *supra* note 40, at 504–06.

100. Smith, *supra* note 2, at 216; *see also* AVERY & HERNANDEZ, *supra* note 9, at 1 (“A total of 29 states, representing nearly every region of the country, have adopted

Ban the Box laws vary in terms of what employer actions are prohibited.¹⁰¹ Since “a check box on a job application does not accurately determine the point at which the applicant is no longer a risk to the employer, employees, and customers,” each state must determine its willingness to place a burden upon employers with the criminal investigation process of their prospective employees – a burden that is much more significant than one simple inquiry on a job application.¹⁰²

A. Costs for Employers and How to Ensure Ban the Box Legislation Is Effective

In order to be most effective, Ban the Box legislation must be appropriate in terms of inclusiveness and robustness, since the mere presence of a policy “does not guarantee that employers will consider criminal background information in a manner that complies with Title VII.”¹⁰³ A policy is not appropriately inclusive if it states that some employers are not required to follow Ban the Box laws with regards to their job applications. These employers “remain free to adopt whatever criminal record policies they choose, even if they are overly broad and unnecessarily restrictive.”¹⁰⁴ Legislation that applies to both public and private employers is most inclusive. Aside from prohibiting or delaying any inquiry into criminal history during the application phase, a policy is appropriately robust if it provides instruction on how to evaluate a criminal background later in the process, thereby ensuring employers are compliant with antidiscrimination laws.¹⁰⁵ For example, a policy that does not allow an employer to run a criminal background check until a conditional offer for employment is extended is strongly preferred¹⁰⁶ because if the employer ultimately rejects the applicant, clearly the decision will not be based on any initial bias against him or her.

However, these policies come with an obvious cost to employers in terms of increased obligations.¹⁰⁷ In some states, these obligations take the form of

statewide policies – California (2013, 2010), Colorado (2012), Connecticut (2010, 2016), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Indiana (2017), Kentucky (2017), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Missouri (2016), Nebraska (2014), Nevada (2017), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Pennsylvania (2017), Rhode Island (2013), Tennessee (2016), Utah (2017), Vermont (2015, 2016), Virginia (2015), and Wisconsin (2016).”).

101. Smith, *supra* note 2, at 213–15.

102. Nadich, *supra* note 29, at 793.

103. Smith, *supra* note 2, at 216.

104. *Id.* at 217.

105. *See id.* at 217–18.

106. *Top 10 Best Practices for Fair Chance Policies*, *supra* note 40 (“The most effective policy is to delay all the conviction inquiries, oral or written, until after a conditional offer of employment.”).

107. Nadich, *supra* note 29, at 793.

extra provisions, stating, for example, that an employer may deny an application only if it can show “a direct relationship between one or more of the previous criminal offenses and the employment sought” or that “granting of the employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals, employees or the general public.”¹⁰⁸ Additionally, employers argue that although delaying any inquiry into an applicant’s criminal history weeds out ex-offenders after the interview process, it is costlier.¹⁰⁹ The counter-argument is that a properly conducted interview can result in benefits to the employer that may significantly mitigate any additional burden incurred by delaying the inquiry into the applicant’s criminal history.¹¹⁰ An interview can give an applicant the chance to explain (in-person) the circumstances surrounding his or her conviction, express sincerity regarding his or her rehabilitation, and fuse a meaningful connection with the employer.¹¹¹ Of course, there is no definitive proof that the employer will not still dismiss the applicant. Nonetheless, the employer might be more inclined to overlook the conviction.¹¹²

Where banning the box completely prohibits any inquiry into a criminal history or running a background check unless absolutely necessary, the biggest cost for employers could be liability under a negligent hiring theory.¹¹³ This is exactly why running a background check is still considered a worthwhile employment practice, as long as it is conducted appropriately.¹¹⁴ Steps to ensuring an appropriate background check occurs include: using a credible, qualified reporting agency to conduct the check;¹¹⁵ providing the applicant with a copy of the report; informing the applicant if he or she is rejected because of a record, which includes giving “written notice of the specific item in the background check report that is considered job-related”;¹¹⁶ giving the applicant the chance to verify or challenge the information (because reports can be factually inaccurate); “provid[ing] the applicant the right and sufficient time to submit evidence of mitigation or rehabilitation when a record is considered in hiring [–] [e]vidence may include letters of recommendation from community members and certificates from programs or education”; and holding the position open until

108. *Id.* at 793–94 (internal quotation marks omitted) (quoting H.R. 5507, 2013 Leg., Jan. Sess. (R.I. 2013)).

109. See DOLEAC & HANSEN, *supra* note 89, at 4.

110. Nadich, *supra* note 29, at 771.

111. *Id.* at 774.

112. *Id.*

113. See *supra* notes 36–39.

114. Nadich, *supra* note 29, at 778.

115. See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, LEGAL ACTION CTR. & NAT’L WORKRIGHTS INST., BEST PRACTICE STANDARDS: THE PROPER USE OF CRIMINAL RECORDS IN HIRING 2 (2013), <https://lawyerscommittee.org/wp-content/uploads/2015/07/Best-Practices-Standards-The-Propor-Use-of-Criminal-Records-in-Hiring.pdf>.

116. *Top 10 Best Practices for Fair Chance Policies*, *supra* note 40.

the review is complete.¹¹⁷ Most importantly, “if a background check is [absolutely] necessary, only consider those convictions with a direct relationship to job duties and responsibilities and consider the length of time since the offense.”¹¹⁸ Following steps like these to “[c]onduct[] criminal-record checks in a more focused and nuanced manner . . . will help employers avoid making the problem worse by screening out applicants who would have been good employees.”¹¹⁹

B. Considering the Unintended Consequences of Banning the Box

It has recently been discovered that, aside from liability for negligent hiring, employers could also be at risk for inadvertently discriminating against racially protected candidates, such as African Americans and Hispanics.¹²⁰ This theory has been supported by a large-scale study conducted in June of 2015 by researchers at the University of Michigan and Princeton University, which found that Ban the Box laws may be “effective in removing the disadvantage of having a criminal record, but they may have unintended consequences.”¹²¹ The most important conclusion drawn was that “[i]n the absence of individual information about which applicants have criminal convictions, employers might statistically discriminate against applicants with characteristics correlated with criminal records, such as race.”¹²² In the study, almost 15,000 fake online job applications were submitted before and after Ban the Box legislation went into effect.¹²³ Resumes submitted were identical, but in order to make race the primary variable, first and last names were used to denote whites and blacks (for example, “Cody Schmidt” for white males and “Jamal Jackson” for black males).¹²⁴ The researchers chose to focus solely on white and black men in order to keep statistical challenges low.¹²⁵

The study then looked at whether employer callbacks for interviews varied due to the applicant’s race and prior criminal history status, particularly based on whether the availability of the latter information changed the racial

117. *Id.*

118. *Id.*

119. Lewis Maltby, *How to Fairly Hire Applicants with Criminal Records*, DIVERSITYINC (Aug. 24, 2011), <http://www.diversityinc.com/legal-issues/how-to-fairly-hire-applicants-with-criminal-records/>.

120. Alexia Elejalde-Ruiz, *Ban-the-Box Laws May Worsen Racial Bias Against Black Job Candidates, Study Says*, CHI. TRIBUNE (July 20, 2016, 9:03 AM), <http://www.chicagotribune.com/business/ct-ban-the-box-racial-bias-0720-biz-20160719-story.html>.

121. *Id.*

122. Agan & Starr, *supra* note 57, at 2.

123. *Id.* at 2–3.

124. *Id.* at 2, 56.

125. *Id.* at 40.

gap in callback rates.¹²⁶ The results showed that overall, white applicants received about twenty-three percent more callbacks compared to similar black applicants. Further, applicants without a felony conviction were sixty-two percent more likely to be called back than those with a conviction.¹²⁷ The study did a cross-comparison of many factors¹²⁸ and was quantitatively robust in terms of the analysis applied, but generally, the racial gap of callback rates implies that Ban the Box substantially increases racial disparities.¹²⁹ This conclusion was drawn by noting that white applicants to Ban the Box-affected jobs received seven percent more callbacks than similar black applicants before the legislation's enactment and forty-five percent more callbacks after.¹³⁰

To further portray how an employer may form assumptions about an applicant's race, the study also examined location as shown by an applicant's address.¹³¹ Employers often employ people who will appeal to customers in a specific neighborhood, or "pick applicants who 'fit in' based on the racial composition of current staff."¹³² Hiring managers who are of different races themselves and living in various neighborhoods might be influenced in their perceptions of applicants.¹³³ The point is, if an employer does not know which applicants have criminal records at the outset, "they may use observable characteristics . . . to infer the probability an applicant has a criminal history, and this may trigger discriminatory treatment."¹³⁴ In the context of this study, "young black men without criminal records could be hurt by [Ban the Box] if employers assume that they are likely to have a record, based on assumptions about young black men generally."¹³⁵

Perhaps the bigger problem is that these assumptions are inaccurate.¹³⁶ The study found that a clear predictor of whether someone had a criminal record was if they had a GED rather than a high school diploma, but even then, employers did not place significant weight on this factor.¹³⁷ In a similar study released in July of 2016 by the University of Virginia and the University of Oregon, researchers considered the factor of education amongst black and Hispanic men between the ages of twenty-five and thirty-four who were labeled

126. *Id.* at 3.

127. *Id.*

128. *Id.* at 3, 11 (factors included whether the applicant had an employment gap, whether the applicant had received a high school diploma, and if the conviction in question was for a property crime or a drug crime).

129. *Id.* at 4.

130. *Id.*

131. *Id.* at 20.

132. *Id.*

133. *Id.*

134. *Id.* at 7.

135. *Id.*

136. See Elejalde-Ruiz, *supra* note 120.

137. Agan & Starr, *supra* note 57, at 38.

“low-skilled” because they did not have a college degree.¹³⁸ The researchers also examined the same demographic of individuals without a high school diploma or GED, as a recent incarceration is more likely for these particular individuals.¹³⁹ While the University of Michigan-Princeton University study¹⁴⁰ only looked at whether individuals received a callback for an interview, this study went a step further by showing that “changes in callback rates do result in changes in hiring, with a net negative effect on employment for young, low-skilled black men.”¹⁴¹ The basic premise of these studies is that individuals from certain racial groups will likely “lose opportunities with employers who are worried these applicants have a record but are forbidden from asking.”¹⁴²

C. Determining If the Advantages of Banning the Box Outweigh the Possible Disadvantages

In terms of analyzing Ban the Box’s effectiveness in society, it is important to remember the legislation’s prominent purposes: to help people with criminal records gain employment and to achieve racial equality in the workplace.¹⁴³ The recent studies discussed uncover new evidence that may prove the latter purpose is impossible to achieve without a simultaneously negative discriminatory effect on protected racial classes.¹⁴⁴ Advocates of the legislation, including the National Employment Law Project (“NELP”),¹⁴⁵ have “pushed back against the new studies and suggest[ed] that efforts to give ex-offenders a fair chance in hiring may do more harm than good.”¹⁴⁶ According to NELP, the underlying issue of racism will not be solved by rolling back the new laws.¹⁴⁷ As a NELP staff attorney reiterated, not having the laws in place at all could also be construed as “validating the approach that it’s [okay] to assume that people of color have a record until they prove otherwise.”¹⁴⁸

138. DOLEAC & HANSEN, *supra* note 89, at 4–5; *see also* Ben Leubsdorf, ‘Ban the Box’ Laws May Worsen Hiring Discrimination, *New Research Finds*, WALL ST. J. (Oct. 3, 2016, 3:25 PM), <http://www.wsj.com/articles/ban-the-box-laws-may-worsen-hiring-discrimination-new-research-finds-1475520896?mod=e2tw>.

139. DOLEAC & HANSEN, *supra* note 89, at 5 (because they are considered the “least skilled”). The authors also assert that “[f]ifty-two percent of those released from state prison between 2000 and 2013 had less than a high school degree.” *Id.* at 13 n.18.

140. *See supra* notes 120–35.

141. DOLEAC & HANSEN, *supra* note 89, at 5 (“Young, low-skilled black men are 3.4 percentage points (5.1%) less likely to be employed after BTB than before.”).

142. *Id.* at 4.

143. Elejalde-Ruiz, *supra* note 120.

144. *Id.*

145. *About NELP*, NAT’L EMP. L. PROJECT, <http://www.nelp.org/about-us/> (last visited Sept. 6, 2017) (NELP is a national advocacy organization for employment rights of lower-wage workers.).

146. Leubsdorf, *supra* note 138.

147. *Id.*

148. *Id.*

While unintentional racial discrimination is not a desirable consequence of banning the box, intentionally discriminating against those with criminal backgrounds is seemingly more concerning. After all considerations have been made, Missouri should continue on the progressive path of enacting Ban the Box legislation. An executive order is just the first step. However, Missouri, along with all other states, should make sure its laws are properly inclusive and robust and also carefully analyze and consider adopting ways that Ban the Box advocates have discovered that reduce potential racial consequences. For example, at a basic level, “policymakers might consider restricting employers’ access to names or addresses so they can’t even subconsciously guess at a person’s race.”¹⁴⁹ More complex techniques have also been recognized, including creating a hiring matrix that determines which convictions a company considers relevant, utilizing an outside firm to help create the “relevance matrix,” and looking at the results for implementation purposes.¹⁵⁰ This does not necessarily require employers to reinvent the wheel, as there are organizations such as the National Workrights Institute¹⁵¹ that “have created template matrixes for most jobs and will work with an employer’s [human resources] and legal teams to tailor the matrixes to the specific needs of the company.”¹⁵² Just as Ban the Box advocates argue in the context of background checks, however, this mechanism should not be utilized in a determinative way. Lastly, data will be key for effective enforcement of this legislation in the future, so “[a]t a minimum, a government agency should have the infrastructure to process complaints and to audit compliance.”¹⁵³ Data collection showing that Ban the Box policies are truly providing job opportunities for people with criminal records will ultimately help support enforcement of these provisions.¹⁵⁴

V. CONCLUSION

Missouri is at the forefront of ensuring that individuals with a criminal history have a fair chance of obtaining employment after they are released from prison. However, banning the box is barely the majority rule across the country, due to employers’ continued risk analysis when hiring ex-offenders and the potential consequences of Ban the Box. While there are other hiring techniques and employment practices available to employers, a standard criminal background check is arguably the easiest way to filter out individuals with prior convictions. However, if these convictions are not relevant to the job at hand

149. Elejalde-Ruiz, *supra* note 120.

150. Maltby, *supra* note 119.

151. The Institute was founded in January of 2000 and its “goal is to improve the legal protection of human rights in the workplace.” *About NWI*, NAT’L WORKRIGHTS INST., <http://workrights.us/> (last visited Sept. 6, 2017). Its fundamental belief is that “the core problem is not that workplace rights laws are inadequately enforced, but that these laws, even on paper, are grossly inadequate.” *Id.*

152. Maltby, *supra* note 119.

153. *Top 10 Best Practices for Fair Chance Policies*, *supra* note 40.

154. *Id.*

or are not that serious in nature, employers will likely lose the opportunity to hire ex-offenders because of an implicit bias against them. If one of the goals of our prison system is to provide a rehabilitative environment for convicts but society still treats them as convicts upon release, what hope do they have in finding normalcy in their lives? Employers should remember that these individuals can and do turn their lives around and return to the community as productive members of society. By banning the box, employers will want to avoid the newly-discovered risk of unintentional discrimination against those protected classes. That will be the key to this legislation moving forward.