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## Thinking Outside the Box: Reforming Commercial Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation

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## THINKING OUTSIDE THE BOX: REFORMING EMPLOYMENT DISCRIMINATION DOCTRINE TO COMBAT THE NEGATIVE CONSEQUENCES OF BAN-THE-BOX LEGISLATION

*Nina Kucharczyk\**

*As part of the larger movement to reform the criminal justice system, legislation has recently been implemented to expand job opportunities for formerly incarcerated individuals as they exit the system. Specifically, “ban-the-box” laws were passed to reduce widespread employment discrimination that formerly incarcerated individuals encounter by limiting employers’ access to criminal records. While this legislation has increased job opportunities for formerly incarcerated individuals, it has had an impactful and unintended consequence in that employers use the applicant’s race in place of records to assume whether or not a criminal record may exist. Consequently, racial minorities without criminal records are facing heightened discrimination in jurisdictions with ban-the-box laws.*

*To make matters worse, current employment discrimination laws fail to provide relief for job applicants who suspect discrimination in the hiring process. As such, there is minimal legal recourse for racial minorities facing discrimination due to the ban-the-box laws and no incentive for employers to end discriminatory practices.*

*This Note suggests a new approach to address the unintended consequences of ban-the-box legislation. The solution to combat unconscious discrimination during the hiring process is not to eliminate ban-the-box laws entirely; instead, lawmakers must modernize and strengthen employment discrimination doctrine to empower racial minorities who suspect discrimination and to ensure employers are critically analyzing their hiring processes.*

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## INTRODUCTION

Collateral consequences, such as the loss of employment opportunities, punish formerly incarcerated individuals beyond their imprisonment.<sup>1</sup> Importantly, many of these collateral consequences increase recidivism, as individuals who cannot find employment and stable housing are more likely to return to prison.<sup>2</sup> Problematically, research overwhelmingly shows that formerly incarcerated individuals face significant employment discrimination.<sup>3</sup> The impact of this discrimination is extensive: as of July 2015, approximately seventy million Americans have criminal records—roughly the same number as Americans with degrees from four-year colleges.<sup>4</sup> Moreover, criminal-record rates are much higher in African American and Latino populations, resulting in an additional impediment for individuals who may also face racial discrimination.<sup>5</sup> To seriously reduce the current recidivism rate,<sup>6</sup> employment opportunities for formerly incarcerated individuals must increase.

Legislation has emerged in response to this dire problem. Specifically, many states have enacted “ban-the-box” legislation that prohibits certain employers from inquiring about a job applicant’s criminal record during the initial application process.<sup>7</sup> Unfortunately, while this legislation aimed to increase employment for formerly incarcerated individuals, there has been a negative unintended consequence for minorities without a criminal record:

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1. There are almost 50,000 federal and state statutes that impose penalties, disabilities, or disadvantages on convicted felons after they are released from prison. *See generally National Inventory of the Collateral Consequences of Conviction*, COUNCIL ST. GOVERNMENTS JUST. CTR., <https://niccc.csgjusticecenter.org/> (last visited Apr. 14, 2017) [<https://perma.cc/7XPQ-L6DV>].

2. *See* Joan Petersilia, *Community Corrections: Probation, Parole and Prisoner Reentry*, in *CRIME AND PUBLIC POLICY* 499, 519 (James Q. Wilson & Joan Petersilia eds., 2011) (noting that a meta-analysis of over 400 studies shows that employment was the single most effective factor in reducing reoffending rates); *see also* Thomas P. Lebel & Shadd Maruna, *Life on the Outside: Transitioning from Prison to the Community*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 657, 661–63 (Joan Petersilia & Kevin R. Reitz eds., 2012) (noting that finding employment and stable housing after release are among the strongest inhibitors of reincarceration).

3. *See* Lebel & Maruna, *supra* note 2, at 661–63; *see also* Petersilia, *supra* note 2, at 518–19.

4. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> [<https://perma.cc/K A9T-HK3Y>].

5. *See* THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 1 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/4MEQ-8T44>]. Approximately 5.9 percent of white men are expected to go to prison in their lifetimes, compared with 17.2 percent of Hispanic men and 32.2 percent of African American men. *See id.*

6. According to a recent study, roughly 68 percent of released prisoners are arrested within three years of release. *See* MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/2QTG-L5MT>].

7. *See infra* Part I.A.

employers unable to see criminal histories assume minority applicants have a criminal record and stop hiring minorities altogether.<sup>8</sup>

Now, lawmakers must balance the goals of ban-the-box legislation to increase employment opportunities for formerly incarcerated individuals with the reality that this legislation may unintentionally incentivize employers to discriminate more against minority men without criminal records. This balancing act is especially challenging because minority applicants without criminal records have dismal prospects of winning employment discrimination lawsuits and, therefore, have minimal access to legal relief.<sup>9</sup> However, if employment discrimination doctrine is strengthened and adapted to the current realities of discrimination, such as the prevalence of implicit bias, it may be possible to maintain ban-the-box laws and also provide legal remedies to minority job applicants who suspect they have been discriminated against.<sup>10</sup> Moreover, the threat of an effective lawsuit will force more employers to proactively consider how unconscious discrimination affects their hiring decisions and ultimately increase the number of minorities hired.<sup>11</sup>

Part I of this Note discusses ban-the-box laws that seek to reduce employment discrimination for formerly incarcerated individuals and the consequences of these laws on all minority job applicants. Then, Part I synthesizes the legal options for rejected job applicants who believe they were discriminated against in the hiring process. Next, Part II compares the two analytical frameworks used to evaluate evidence of bias in employment discrimination claims. While one framework has the potential to provide relief for plaintiffs alleging unconscious discrimination, the other leaves no room to consider the role of implicit bias, leading to vastly different outcomes. Finally, Part III argues that the solution to the increase in racial discrimination due to ban-the-box laws is not to remove this legislation. Rather, the unintended consequence of ban-the-box laws should motivate change to current employment discrimination doctrine. Specifically, courts should adopt the mixed-motive framework—a more lenient evidentiary analysis—and the government should strengthen its commitment to collecting employment data. Stronger employment discrimination laws will empower plaintiffs to bring lawsuits that have a higher chance of success and deter employers from discriminating against applicants based on unconscious stereotypes about the criminal propensities of racial minorities.

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8. See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records and Statistical Discrimination: A Field Experiment 2* (Univ. Mich. Law & Econ. Research, Paper No. 16-012, 2016), <https://ssrn.com/abstract=2795795> [<https://perma.cc/H7K9-Z6QZ>]; 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* 8 (Nat’l Bureau of Econ. Research, Working Paper No. 22469, 2016).

9. See *infra* Part II.A.

10. See *infra* Part III.A.

11. See *infra* Part III.B.2.

## I. BANNING THE BOX TO ADDRESS HIRING DISCRIMINATION

This part discusses the recent wave of ban-the-box legislation implemented to address the hiring discrimination of formerly incarcerated individuals. First, this part examines ban-the-box legislation, including its goals, its characteristics, and its variations from state to state. Next, this part outlines the positive and negative effects ban-the-box laws have on hiring discrimination, including studies that suggest these laws have decreased job opportunities for minority males without criminal histories. Lastly, this part details the basic judicial remedies available to job applicants that suspect an employer failed to hire them because of discrimination.

### A. *Ban-the-Box Legislation*

This section provides information about ban-the-box laws, including the background of ban the box, the legislative aims, the differences between states' laws, and the studied effects of the legislation.

#### 1. Background

The negative effects of a criminal conviction on employment opportunities have become increasingly severe.<sup>12</sup> More professions are requiring background checks and clean criminal records than ever before.<sup>13</sup> Additionally, technology has made it easier for employers to access criminal records.<sup>14</sup> This push to increase background checks has proven problematic for many formerly incarcerated individuals; a 2015 report noted men with criminal records account for 34 percent of unemployed men of prime working age.<sup>15</sup>

To address the debilitating effects of a criminal conviction, federal and state legislatures have enacted numerous policies to attempt to open the workplace to formerly incarcerated individuals.<sup>16</sup> Recently, a new category of employment discrimination legislation has become popular: ban-the-box laws.<sup>17</sup> Although the language varies, this legislation generally prohibits

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12. See Petersilia, *supra* note 2, at 518.

13. See *id.* To make matters worse, the industries that are expanding, such as health care, education, and security, are exactly the industries that prohibit the employment of formerly incarcerated individuals. *Id.*; see also U.S. BUREAU OF LABOR STATISTICS, CURRENT EMPLOYMENT STATISTICS HIGHLIGHTS (2017), <http://www.bls.gov/web/empsit/ceshighlights.pdf> (“Health care has added 374,000 jobs over the past 12 months.”) [<https://perma.cc/U8M7-3JUF>].

14. See Doleac & Hansen, *supra* note 8, at 8.

15. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, N.Y. TIMES (Feb. 28, 2015), [https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=1](https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=1) (“The reluctance of employers to hire people with criminal records . . . is preventing millions of American men from becoming, in that old phrase, productive members of society.”) [<https://perma.cc/88ZY-JHJN>].

16. See, e.g., HAW. REV. STAT. ANN. § 378-2.5 (West 1998); KY. REV. STAT. ANN. § 335B.020 (West 1978); N.Y. CORRECT. LAW § 752 (McKinney 2007).

17. See generally MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS (2017), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>

certain employers from asking applicants about their criminal history on their initial job application.<sup>18</sup> The “box” refers to the question on a job application that asks if the applicant has ever been convicted of a crime, which the applicant answers by checking either the “yes” or “no” box.<sup>19</sup>

Currently, a total of twenty-five states and the District of Columbia have adopted ban-the-box legislation.<sup>20</sup> Furthermore, more than 150 cities and counties have also banned the box, including populous cities such as New York City and San Francisco.<sup>21</sup>

## 2. The Goals of Ban-the-Box Legislation

Ban-the-box laws were passed to achieve two main goals.<sup>22</sup> First, these laws strive to increase employment outcomes for individuals with criminal histories.<sup>23</sup> The laws target the initial hiring process because criminal records have been shown to reduce the likelihood of a job applicant receiving an initial callback.<sup>24</sup> One study demonstrated that for white formerly incarcerated males, criminal records reduce their callback chances by about 50 percent.<sup>25</sup> The effect was more pronounced for black males. The study found that only 5 percent of formerly incarcerated African American males received callbacks, compared to 14 percent of their counterparts without criminal records.<sup>26</sup>

Advocates of ban-the-box legislation assert that if employers are forced to evaluate the employability of the applicant instead of making stereotypical judgments, formerly incarcerated individuals will be hired more often.<sup>27</sup> While announcing the executive branch’s ban-the-box policy, President Obama reiterated this principle to a group of prisoners, saying, “If [employers] have a chance to at least meet you, . . . you’re able to talk to them about your life, what you’ve done, maybe they give you a chance.”<sup>28</sup>

Second, these laws are intended to counter the deterrent effect of the box on a job application.<sup>29</sup> One formerly incarcerated individual said that when

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(outlining the states and cities that have recently passed ban-the-box legislation) [<https://perma.cc/PX65-HLHJ>].

18. See Doleac & Hansen, *supra* note 8, at 4.

19. See *id.* at 10.

20. See RODRIGUEZ & AVERY, *supra* note 17, at 1.

21. See *id.* at 2.

22. 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, 211 (2014) (analyzing how disparate impact doctrine has been ineffective in protecting individuals with criminal backgrounds in the job market).

23. See *id.*

24. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955 (2003) (finding that 34 percent of white males without criminal records received callbacks, compared to 17 percent of white males with criminal records).

25. See *id.*

26. *Id.* at 957–58 (“The effect of race in these findings is strikingly large.”).

27. See Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL’Y 755, 757 (2007).

28. Ari Melber, *Obama Bans the Box*, MSNBC (Nov. 2, 2015), <http://www.msnbc.com/msnbc/obama-bans-the-box> [<https://perma.cc/U9AH-HQZ9>].

29. See Henry & Jacobs, *supra* note 27, at 757.

she saw the “have you ever been convicted of a crime?” question on an application, she felt like the “air went out of [her] tires.”<sup>30</sup> She knew that checking “yes” would essentially disqualify her from the job.<sup>31</sup> Ban-the-box advocates hope that more formerly incarcerated individuals will submit job applications if the question is removed from the initial application, resulting in an increased employment rate for these applicants.<sup>32</sup>

### 3. Relevant Laws and Distinctions

Ban-the-box legislation varies notably from state to state in three main ways: (1) the types of employers and jobs covered, (2) the stage of the hiring process in which employers can inquire about criminal history, and (3) the existence of additional requirements on how criminal records can be used when making an employment decision.<sup>33</sup>

First, while some states have enacted legislation that covers both public and private employment,<sup>34</sup> other state laws address only public employment.<sup>35</sup> Out of the twenty-five states that have ban-the-box legislation, only nine states passed laws that apply to both public and private employers.<sup>36</sup> Most state laws cover only public employers, such as government agencies, but have no effect on private companies.<sup>37</sup>

Additionally, states have exemptions for certain jobs ranging from law enforcement officers to barbers. For instance, Louisiana’s legislation exempts any position where the law requires a background check<sup>38</sup> and restricts employment licenses for a wide range of fields.<sup>39</sup> Most commonly, states have restrictions on jobs that involve caring for children or the elderly.<sup>40</sup>

Second, states differ as to when an employer may ask a job applicant about his criminal record. For example, some states require that an employer wait until a conditional offer is made.<sup>41</sup> Then, the employer can withdraw the offer if a criminal record is uncovered.<sup>42</sup> In Rhode Island and Maryland,

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30. Lydia DePillis, *Millions of Ex-Cons Still Can’t Get Jobs. Here’s How the White House Could Help Fix That*, WASH. POST (Jan. 22, 2015), <https://www.washingtonpost.com/news/storyline/wp/2015/01/22/millions-of-ex-cons-still-cant-get-jobs-heres-how-the-white-house-could-help-fix-that/> [https://perma.cc/UN69-VWMQ].

31. *See id.*

32. *See* Smith, *supra* note 22, at 211.

33. For a more detailed discussion of the differences in ban-the-box legislation, see 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 (2015).

34. Public employment tends to cover state, city, and district jobs and may also include government agencies; private employment refers to private companies. *See id.* at 2820–21.

35. *See* RODRIGUEZ & AVERY, *supra* note 17, at 6–14.

36. *See id.* These states are Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont. *See id.*

37. *See id.*

38. *See* LA. STAT. ANN. § 42:1701 (2016).

39. *See id.* § 37:2950 (exempting licensing agencies for education, physical therapy, architects, funeral directors, and more).

40. *See* O’Connell, *supra* note 33, at 2807.

41. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2.5 (West 1998).

42. *Id.*

employers must wait until the first interview to inquire, either orally or in writing, whether the applicant has ever been arrested, charged with, or convicted of any crime.<sup>43</sup> However, some statutes give employers more flexibility about when they can request information about the applicant's criminal history.<sup>44</sup> For example, New Jersey's vague statute does not allow an employer to make any inquiries about the applicant's criminal record during the "initial employment application process."<sup>45</sup>

Finally, some states provide additional protection for convicted criminals and require that the conviction have a "direct" or "rational" relationship to the position applied for.<sup>46</sup> In Hawaii, for example, both public and private employers are prohibited from inquiring about criminal convictions until after a conditional offer has been extended.<sup>47</sup> Then, the offer can be rescinded only if the potential employee's conviction record "bears a rational relationship to the duties and responsibilities of the position."<sup>48</sup> Additionally, Virginia's executive order declares that state employment decisions cannot be based on criminal records unless those decisions are "demonstrably job-related and consistent with business necessity."<sup>49</sup> In contrast, other states have no relatedness requirement so it is entirely lawful for an employer to reject the applicant due to his criminal record, even when the applicant's conviction record has no bearing on his ability to do the job.<sup>50</sup>

#### 4. Effects of Ban-the-Box Legislation

Although ban-the-box laws are relatively new, some scholars have researched the effects of this legislation on various states and cities where the laws were enacted. This subsection outlines recent studies on the effectiveness and consequences of ban-the-box legislation.

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43. See MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); 28 R.I. GEN. LAWS ANN. § 28-5-7 (West 2013).

44. See, e.g., N.J. STAT. ANN. § 34:6B-14 (West 2014).

45. *Id.*

46. See, e.g., COLO. REV. STAT. ANN. § 24-5-101 (West 2012); HAW. REV. STAT. ANN. § 378-2.5; MINN. STAT. ANN. § 364.03 (West 2013). In addition to state laws, the Equal Employment Opportunity Commission (EEOC) has also recommended that inquiries about convictions be "limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 14 (2012).

47. See HAW. REV. STAT. ANN. § 378-2.5.

48. *Id.* Colorado requires a "direct relationship" between the conviction and the job. See COLO. REV. STAT. ANN. § 24-5-101.

49. 31 Va. Reg. Regs. 1451 (Apr. 20, 2015).

50. See RODRIGUEZ & AVERY, *supra* note 17, at 14–15 (outlining a complete list of states with ban-the-box laws and relatedness requirements).

*a. Positive Outcomes*

Ban-the-box laws have succeeded in increasing callback and employment rates for formerly incarcerated individuals in many places.<sup>51</sup> For example, since the start of the ban-the-box initiative, the number of formerly incarcerated individuals hired by the city of Durham in North Carolina has increased sevenfold, from 2.25 percent of city employees having criminal histories in 2011 to 15.53 percent in 2014.<sup>52</sup> In the District of Columbia, the number of applicants with records increased both numerically and as a percentage of all hires after the law took effect.<sup>53</sup> After the law, there was a 33 percent increase in the number of applicants with records hired, which resulted in 21 percent of all new hires in D.C. being people with criminal records.<sup>54</sup>

Furthermore, there is promising research demonstrating that an increase in employment opportunities for formerly incarcerated individuals has a positive effect on society as a whole. Economists believe that hiring individuals with criminal histories benefits the job market and the economy generally.<sup>55</sup> Employing formerly incarcerated individuals can also reduce costs for society because employment has been shown to reduce recidivism.<sup>56</sup>

*b. Inefficiencies*

Politicians and criminal justice reform advocates have largely lauded ban-the-box legislation and view these laws as an important step to aiding

51. For a summary of multiple studies on the effectiveness of ban-the-box laws, see ANASTASIA CHRISTMAN & MICHELLE N. RODRIGUEZ, NAT'L EMP'T LAW PROJECT, RESEARCH SUPPORTS FAIR-CHANCE POLICIES (2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> [<https://perma.cc/BLD5-HTZA>].

52. DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), <http://www.southerncoalition.org/program-areas/criminal-justice/ban-the-box-community-initiative-guide/benefits-ban-box/> [<https://perma.cc/77G6-CPLM>].

53. OFFICE OF THE D.C. AUDITOR, THE IMPACT OF "BAN THE BOX" IN THE DISTRICT OF COLUMBIA 17 (2016), [http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report\\_0.pdf](http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf) [<https://perma.cc/4C82-FKVD>].

54. *See id.* It is important to note that the District of Columbia enacted a comprehensive ban-the-box law that only permits an employer to reject a job applicant with a criminal record for a "legitimate business reason." D.C. CODE ANN. § 32-1342 (West 2014). The statute outlines six factors to consider including the specific duties of the employment, the fitness and ability of the applicant to perform those duties given the nature of the offense, the age of the applicant at the time of the offense, and the time elapsed since the occurrence of the offense. *See id.*

55. *See* ALAN BARBER & CHERRIE BUCKNOR, CTR. FOR ECON. & POLICY RESEARCH, THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 1 (2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5> ("In terms of the cost to the economy as a whole, [research] suggests a loss of about \$78 to \$87 billion in annual [gross domestic product].") [<https://perma.cc/XX37-8QEV>].

56. *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, 396–405 (2011).

prisoner reentry.<sup>57</sup> However, ban-the-box laws have also been criticized.<sup>58</sup> First, these laws are less effective on a national level because the current laws assist only a small number of people.<sup>59</sup> More than half of the states do not have any ban-the-box laws and, in the states that do have them, many employers are not required to follow them because of the numerous exceptions commonly laid out by state legislators.<sup>60</sup> Additionally, many critics of ban-the-box legislation feel that this legislation does not stop discrimination but instead just delays the hiring process.<sup>61</sup> After waiting to inquire about criminal history, many employers still do not end up hiring the applicant when his conviction record is exposed, which is inefficient and costly to the employer.<sup>62</sup>

These problems do not present a fatal flaw to ban-the-box legislation. If ban-the-box laws are continually praised by the executive branch, then other politicians, larger companies, and more employers who are not legally bound to eliminate the question on their job applications may choose to do so voluntarily.<sup>63</sup> Furthermore, while the laws may cause some delays and added costs in the hiring process, these limitations must be balanced with the strong interest in increasing employment for formerly incarcerated individuals.

### *c. Racial Discrimination*

Ban-the-box legislation, however, faces a more detrimental critique that undermines its very objective. While the purpose of ban-the-box laws is to expand access to employment for all formerly incarcerated individuals, recent studies have shown that these laws may in fact decrease employment access for black and Hispanic men.<sup>64</sup>

One recent study, conducted by Amanda Agan and Sonja Starr, found that ban-the-box legislation results in statistically significant racial discrimination against black males.<sup>65</sup> The researchers sent approximately 15,000 job

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57. President Obama was a tremendous advocate of ban-the-box legislation. *See* Melber, *supra* note 28.

58. *See* Smith, *supra* note 22, at 216–18.

59. *See id.* at 216.

60. *See id.*

61. *See* Juanita Duggan, Opinion, *Ban the Box Ignores Employers' Legitimate Concerns*, 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-ignores-employers-legitimate-concerns> (“An owner may spend weeks into the hiring process only to find a worker is disqualified because of his record. Lost time is lost income.”) [<https://perma.cc/6B6Y-4FQC>].

62. *See id.*

63. *See, e.g.*, Mark Holden, Opinion, *Employers Should Decide on Their Own to Ban the Box*, 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/employers-should-decide-on-their-own-to-ban-the-box> (noting the positive effects of banning the box on Koch Industries’s workforce and encouraging other employers to follow suit) [<https://perma.cc/DR86-HXH7>].

64. *See* Ben Leubsdorf, *‘Ban the Box’ Laws May Worsen Hiring Discrimination, New Research Finds*, WALL ST. J. (Oct. 3, 2016), <http://www.wsj.com/articles/ban-the-box-laws-may-worsen-hiring-discrimination-new-research-finds-1475520896> [<https://perma.cc/J5H4-JJB2>].

65. *See* Agan & Starr, *supra* note 8.

applications with “racially distinctive” names in New York and New Jersey before and after the implementation of the ban-the-box policy.<sup>66</sup> These applications were sent in pairs; the paired applicants had the same credentials and criminal records but different names—one with a typically white name and one with a typically black name.<sup>67</sup> The authors found that before the legislation was enacted and employers could freely ask about criminal records, the callback rate<sup>68</sup> for applicants with criminal records was essentially the same for both races: the white average was 11.1 percent and the black average was 10.9 percent.<sup>69</sup> However, the racial gap in callbacks increased drastically after ban-the-box legislation was passed.<sup>70</sup> After ban-the-box implementation, white applicants were 45 percent more likely than black applicants to receive a callback, compared to being just 7 percent more likely before the laws.<sup>71</sup> In sum, the racial gap in callback rates became six times larger after ban-the-box legislation went into effect.<sup>72</sup>

To account for this distinction, Agan and Starr propose two plausible, and not mutually exclusive, explanations.<sup>73</sup> First, “statistical discrimination” against black men could explain this result; employers treat all black men as if they have a high probability of possessing a criminal record.<sup>74</sup> Secondly, ban the box could increase benefits for white applicants based on the stereotype that white men are less likely to have criminal convictions.<sup>75</sup>

In another study, researchers tested the effect of ban-the-box policies on black and Hispanic men.<sup>76</sup> The study concluded that ban-the-box laws decrease the probability of being employed by 5.1 percent for young, low-skilled black men and 2.9 percent for young, low-skilled Hispanic men.<sup>77</sup> The authors hypothesized that when information on criminal records is available and used, employers are more likely to hire low-skilled black and Hispanic men without criminal records.<sup>78</sup> When criminal records are prohibited, however, employers use race as a proxy for criminal records.<sup>79</sup>

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66. *See id.* at 2–3, 12.

67. *See id.* at 11. To identify racially distinctive names, the authors used birth certificate data for babies born between 1989 and 1996, which encompasses the age group of the applicants. To qualify as a racially distinctive name, the name had to meet a threshold requirement for the percentage of babies given that name who were black or non-Hispanic white. *See id.* at 12–13.

68. A callback is defined as a voicemail or email from an employer requesting that the applicant contact the employer or requesting an interview. *Id.* at 15.

69. *See id.* at 17.

70. *See id.* at 33.

71. *See id.*

72. *See id.*

73. *See id.* at 34.

74. *See id.*

75. *See id.* at 34–35.

76. *See Doleac & Hansen, supra* note 8, at 4.

77. *Id.* at 26. The authors focused on low-skilled workers because, on average, ex-offenders have less education and job experience than nonoffenders. *See id.* at 3–4.

78. *See id.* at 26.

79. *See id.* at 8. The authors cite additional studies that found a similar effect with other employment information. For example, when employers mandated drug tests for employees, black employment rates increased by 7 to 30 percent. *See id.* at 9. Relatedly, another study concluded that bans on credit checks decreased job-finding rates for black applicants by 7 to

Minority applicants, therefore, are denied a chance to even get their foot in the door because employers assume that they have criminal records, even when they do not.

The outcomes of these studies are problematic: while they show that ban-the-box laws are helping formerly incarcerated individuals,<sup>80</sup> they also show that employers are discriminating against minority applicants by guessing the probability of the presence of a criminal record based on race.<sup>81</sup> If the goal of employment discrimination legislation is to increase opportunities not only for formerly incarcerated individuals but also for minorities without criminal records, then ban-the-box legislation undermines this goal.

*B. Employment Discrimination Doctrine  
in the Age of Unconscious Discrimination*

The decline in hiring people of color in jurisdictions that have implemented ban-the-box legislation is concerning. Agan and Starr have attributed the decline to unconscious discrimination: when criminal records are unavailable, employers implicitly use race as a proxy for whether an applicant may have a criminal record.<sup>82</sup> For this reason, it is imperative to understand the differences between conscious and unconscious discrimination and how unconscious discrimination flourishes in jurisdictions with ban-the-box laws.

1. Unconscious Discrimination  
in the Employment Realm

In the late 1980s, sociologists and legal scholars began studying discrimination, mainly focusing on the distinctions between conscious and unconscious discrimination.<sup>83</sup> Conscious discrimination is typically manifested through inappropriate remarks or outward biased treatment of a certain group.<sup>84</sup> Unconscious discrimination, however, is based on cultural or emotional factors that might be unknown to the person.<sup>85</sup>

More recently, scholars have proposed that there are two separate systems of cognitive operations that influence how individuals react to different proxies for race and gender.<sup>86</sup> In the system aligned with conscious discrimination, the deductions are “deliberative, calculative, [and] slower.”<sup>87</sup>

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16 percent. *See id.* Both of these studies support the idea that when employers have less information, they are more likely to make negative assumptions about black men. *See id.*

80. *See* Agan & Starr, *supra* note 8, at 32.

81. *See id.* at 33–38.

82. *See id.* at 37–38.

83. *See* Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 359 (2008) (citing Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987)).

84. *See id.*

85. *See id.*

86. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973–76 (2006).

87. *Id.* at 974.

Conversely, our unconscious system is rapid and error prone, where individuals make quick assumptions based on limited information.<sup>88</sup> Often, these assumptions are based on cognitive shortcuts that rely on stereotypes, and therefore, the deductions made under this system are often inaccurate.<sup>89</sup>

Moreover, researchers hypothesized factors that make unconscious discrimination more likely to occur. First, as the acceptance of overt racism in the workplace has decreased, unconscious discrimination has become more common than conscious discrimination.<sup>90</sup> Some researchers believe that employers are less likely to use race as a factor in their decisions when their decision could be seen as visibly racist.<sup>91</sup> For example, when participants in a study were asked to evaluate applicants, they chose the highly qualified black candidate 91 percent of the time over a clearly less qualified white candidate.<sup>92</sup> However, when the black candidate's qualifications were lowered but were still satisfactory, the black candidate was recommended only 45 percent of the time, while the white candidate with the same credentials was recommended 76 percent of the time.<sup>93</sup> According to the researchers of this study, decision makers are much more likely to discriminate where they have more discretion and can justify their behavior on the basis of something other than race, such as less-robust credentials.<sup>94</sup> That is, individuals are likely to select the black candidate when he is clearly the most qualified because the decision maker has less discretion. But as soon as the candidate's qualifications are lowered, individuals are much less likely to select the black candidate, even over the less qualified white candidate, because they can justify the decision on something other than race.

Additionally, studies show that when individuals have less information about a person, they are more likely to use cognitive shortcuts to assume information about that person.<sup>95</sup> When employers do not have access to information, they will rely on generalizations about gender or racial groups to make assumptions about an applicant's productivity and employability.<sup>96</sup> Thus, when a group is associated with higher productivity, an individual in that group is more likely to get the job based on these generalizations.<sup>97</sup>

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88. *See id.* at 974–75.

89. *See id.*

90. *See* Tolson, *supra* note 83, at 356–58.

91. *See* John F. Dovidio et al., *Why Can't We Just Get Along?: Interpersonal Biases and Interracial Distrust*, 8 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 88, 90–92 (2002).

92. *See id.* at 92.

93. *See id.*

94. *See id.* at 90; *see also* L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626, 2628 (2013) (noting that implicit biases are particularly influential where decision making is highly discretionary).

95. *See* Hanming Fang & Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey*, in *HANDBOOK OF SOCIAL ECONOMICS* 133, 137 (J. Benhabib et al. eds., 2011).

96. *See id.* at 135–40 (analyzing numerous studies and economic models to show how employers use assumptions about productivity and risk to hire applicants when there is limited information).

97. *See id.*

This theory applies to other contexts as well. For example, one study found that a ban on credit checks reduced employment rates for African American and young job applicants.<sup>98</sup> Conversely, legislation that enabled employers to conduct drug testing increased employment rates for blacks; the largest positive effect was seen with low-skilled black males.<sup>99</sup> Both of these studies further suggest that when employers have less information about job applicants, they are more likely to use racial assumptions in their hiring decisions.

## 2. Unconscious Discrimination and Ban-the-Box Laws

Postimplementation studies of ban-the-box laws suggest that unconscious discrimination is prevalent during the hiring process.<sup>100</sup> While some employers may intentionally use race to influence their hiring decisions, it is more likely that employers are unaware of their biases as they are sifting through job applications.<sup>101</sup> Analyses of implicit aptitude tests<sup>102</sup> (IATs) show that unconscious attitudes and stereotypes are widespread across demographic groups.<sup>103</sup> Furthermore, research has shown that the implicit association between African Americans and crime is particularly strong and influential on cognitive processing.<sup>104</sup>

Therefore, in Agan and Starr's ban-the-box study, employers were likely subconsciously using race as a proxy for criminal records when they are prohibited from accessing criminal information.<sup>105</sup> With limited information, employers rely on other implicit shortcuts, such as the names of the applicants, to predict criminality when making hiring decisions.<sup>106</sup>

Although this data demonstrates that extensive unconscious discrimination is harming minority job applicants without criminal records, it would be unwise to eliminate ban-the-box laws because research also establishes that the laws are indeed assisting formerly incarcerated individuals to reenter the job market.<sup>107</sup> However, legal scholars must ensure that there are sufficient

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98. See Robert Clifford & Daniel Shoag, "No More Credit Score": *Employment Credit Check Bans and Signal Substitution* 20 (Harvard Kennedy Sch., Working Paper No. RWP16-008, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2746642](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746642) [<https://perma.cc/VM2B-CYNN>].

99. See Abigail Wozniak, *Discrimination and the Effects of Drug Testing on Black Employment*, 98 REV. ECON. & STAT. 548, 557–65 (2015).

100. See Agan & Starr, *supra* note 8, at 38.

101. See *id.* ("Lab experiments on implicit biases have consistently found that most Americans make such assumptions subconsciously."); see also Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 2007 EUR. REV. SOC. PSYCHOL. 1, 40–43.

102. See Nosek et al., *supra* note 101, at 7–8.

103. See *id.* at 10–22.

104. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 889 (2004).

105. See Agan & Starr, *supra* note 8, at 34–35.

106. See *id.* at 37.

107. See *id.* at 37–40 (discussing how the policy implications associated with ban-the-box laws can be balanced to maximize interests).

legal remedies available for rejected job applicants who suspect unconscious racial discrimination in the hiring process.

### C. Current Title VII Employment Discrimination Remedies

One way to reduce discriminatory employment practices is to allow plaintiffs to bring lawsuits. Job applicants without criminal records who suspect they have been discriminated against based on race may file an employment discrimination lawsuit under Title VII of the Civil Rights Act of 1964. Title VII allows individuals to sue employers for discrimination on the basis of race, gender, religion, or national origin.<sup>108</sup> Section 703 of Title VII provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants from employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>109</sup>

Based on the Court's interpretation of this statute, there are two types of employment discrimination claims: (1) disparate impact and (2) disparate treatment.<sup>110</sup> Disparate impact applies to situations where an employment practice has a discriminatory effect on a certain group of applicants or employees.<sup>111</sup> Disparate treatment applies when an employer treats an individual differently because of his membership in a protected class.<sup>112</sup>

If rejected applicants can successfully sue employers, then employers will be forced to recognize their implicit racism and will be less likely to discriminate. Accordingly, the negative consequences of ban-the-box laws will be mitigated, and formerly incarcerated individuals will have greater chances of securing jobs without reducing employment opportunities for minorities without criminal records.

#### 1. Disparate Impact Claims

According to Title VII, it is unlawful to use an employment practice that has a discriminatory effect on individuals of a certain race, gender, or national origin.<sup>113</sup> Disparate impact claims are filed to challenge a seemingly neutral employment practice that has a significant negative impact on a protected

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108. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

109. *Id.*

110. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 750 (2005).

111. See *id.*

112. See *id.* at 750–51.

113. 42 U.S.C. § 2000e-2(a).

group.<sup>114</sup> While disparate impact claims could theoretically provide relief for minorities without criminal records, these claims are extremely hard to win for two reasons.

First, courts impose onerous evidentiary requirements on plaintiffs bringing disparate impact claims.<sup>115</sup> For example, courts have held that the disparate impact data must be from the precise geographical area in issue.<sup>116</sup> Furthermore, the data must demonstrate that the practice had a negative effect on the particular applicant pool in question, not simply a theoretical pool of applicants.<sup>117</sup> This evidence is typically very hard to obtain, especially for plaintiffs alleging unconscious discrimination.<sup>118</sup> These specific and extensive requirements have led one scholar to conclude that “the heightened standard courts are applying often serves as a death knell for disparate impact actions.”<sup>119</sup>

Second, there is apparent judicial resistance to recognizing subjective decision making, such as when employers choose to hire an applicant, as a challengeable employment practice.<sup>120</sup> Disparate impact claims typically challenge a seemingly objective policy, such as minimum height requirements<sup>121</sup> or arbitrary benchmarks for scores on intelligence tests.<sup>122</sup> A number of courts have held that subjective decision making itself cannot be considered a policy that discriminates.<sup>123</sup> Absent an employment practice that has a discriminatory effect, courts refuse to apply a disparate impact analysis.<sup>124</sup> Accordingly, disparate impact claims are unlikely to be a source of relief for a rejected applicant because the applicant would be challenging

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114. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (holding that the company’s employment practice of requiring high school completion and a satisfactory score on a general intelligence test was in violation of Title VII where the policy had no correlation with successful performance of the job and reduced promotions for African American employees).

115. See Hart, *supra* note 110, at 783–84.

116. See, e.g., *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1302–03 (S.D.N.Y. 1981) (holding that the plaintiff failed to meet the burden of proof because the proffered data did not cover the precise geographic area in issue).

117. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989) (holding that the EEOC’s statistical analysis comparing the expected and actual employment patterns for truck driver positions in the specific city of the discrimination was insufficient and that a successful claim includes data showing the national origin and race of the relevant labor market, as well as the specific applicant data that showed the exact number of Latino drivers who were precluded because of the employment practice).

118. See Smith, *supra* note 22, at 207. Even if plaintiffs can present this proof, employers can use the business necessity defense, which conditions that the employer’s hiring policy is valid if it is shown to be fundamental to securing appropriate employees for the business. Courts are very sympathetic to a company’s business necessity. See *Griggs*, 401 U.S. at 430 (concluding that Title VII did not purport to give employment without regard to qualifications).

119. Smith, *supra* note 22, at 207.

120. See Hart, *supra* note 110, at 783.

121. See *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

122. See *Griggs*, 401 U.S. at 431–32.

123. See Hart, *supra* note 110, at 783.

124. See *id.*

a subjective hiring decision.<sup>125</sup> Therefore, disparate impact lawsuits are not a practical option for individuals adversely affected by ban-the-box laws.

## 2. Disparate Treatment and the *McDonnell Douglas* Framework

Disparate treatment claims, the focus of this Note, are brought when there is alleged discrimination occurring in specific employment decisions.<sup>126</sup> Under Title VII, rejected job applicants can sue based on the belief that they were individually wronged when the employer refused to hire them because of their race, color, gender, religion, or national origin despite being qualified.<sup>127</sup> Most employment discrimination lawsuits are brought by individuals asserting disparate treatment claims.<sup>128</sup>

In a disparate treatment lawsuit, plaintiffs can present either direct or circumstantial evidence to prove the employment discrimination.<sup>129</sup> For example, if the employer states “only a man should be hired for this job,” a rejected female applicant would have direct evidence that she was not hired because of her gender. However, more frequently, the plaintiff must rely on circumstantial evidence to establish discrimination.<sup>130</sup>

In 1973, the U.S. Supreme Court developed a model for disparate treatment cases with circumstantial evidence that shifts evidentiary burdens from the applicant to the employer and then back again.<sup>131</sup> This method, first established in *McDonnell Douglas Corp. v. Green*,<sup>132</sup> is referred to as the *McDonnell Douglas* framework.<sup>133</sup>

According to the framework, the plaintiff must first establish the prima facie elements of the disparate treatment case.<sup>134</sup> The prima facie elements for failure to hire claims are that (1) the plaintiff falls within a protected class, (2) the plaintiff was qualified for the work for which he or she applied, (3) the plaintiff was not hired, and (4) the employer in question continued to look for others with the same qualifications or hired someone with the same or lesser qualifications who was not in the protected class.<sup>135</sup>

The burden on the plaintiff of establishing a prima facie disparate treatment case is not meant to be onerous.<sup>136</sup> The plaintiff merely has the

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125. *See id.* (“The judicially imposed standards for prevailing in a disparate impact case have become so onerous that plaintiffs may be making the extremely sensible judgment that they will be unable to prevail on these claims.”).

126. *See id.* at 750–51.

127. *See* Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

128. *See* Hart, *supra* note 110, at 750–71.

129. *See id.* at 750.

130. *See id.* at 751.

131. *See* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (“The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination.”).

132. 411 U.S. 792 (1973).

133. *See, e.g.,* *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (discussing the Court’s application of the *McDonnell Douglas* framework).

134. *See* *McDonnell Douglas*, 411 U.S. at 802.

135. *See id.*

136. *See* *Burdine*, 450 U.S. at 253.

initial burden of showing that it is more likely than not that the employer's actions were the result of discrimination.<sup>137</sup> Additionally, the *McDonnell Douglas* framework is intended to be flexible, as the facts of each disparate treatment claim will vary.<sup>138</sup> If the plaintiff meets the prima facie burden, this creates a presumption that the employer unlawfully discriminated against the employee or job applicant.<sup>139</sup>

Once the plaintiff establishes the prima facie case, the burden shifts to the employer to give a lawful reason for the rejection of the applicant.<sup>140</sup> This is a burden of production, not persuasion.<sup>141</sup> In *Texas Department of Community Affairs v. Burdine*,<sup>142</sup> the Supreme Court concluded that the employer's burden at this stage is to articulate a legitimate reason to create a triable issue of fact.<sup>143</sup> The employer does not need to prove by a preponderance of the evidence that the articulated reason was, in fact, the true motivation behind the decisions.<sup>144</sup> Therefore, if the employer articulates a legitimate nondiscriminatory explanation for not hiring the applicant, the burden shifts back to the plaintiff without further analysis.<sup>145</sup> In addition, if this happens, the original presumption of discrimination created by the successful prima facie case is rebutted.<sup>146</sup>

If the burden shifts back to the rejected job applicant to prove that the employer's articulated nondiscriminatory reasons are actually a pretext for discrimination, the factual inquiry moves to a higher level of specificity, forcing the plaintiff to produce additional information beyond the prima facie case.<sup>147</sup> To meet this higher standard, the plaintiff must present some evidence from which a fact-finder could reasonably ascertain that (1) the employer's proffered legitimate reason is false or (2) a discriminatory reason was "more likely than not a motivating or determinative cause of the employer's action."<sup>148</sup> The plaintiff may point to implausibility and inconsistencies in the employer's reasons.<sup>149</sup> Additionally, the plaintiff may use comparative evidence to show the discrepancies between the treatment of individuals within the protected class and those outside of that group.<sup>150</sup>

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137. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

138. See *id.* at 575 (explaining that *McDonnell Douglas* was not intended to establish an inflexible rule).

139. See *Burdine*, 450 U.S. at 254.

140. See *McDonnell Douglas*, 411 U.S. at 802.

141. See *Smith v. City of Allentown*, 589 F.3d 684, 690 (3d Cir. 2009).

142. 450 U.S. 248 (1981).

143. See *id.* at 257.

144. See *id.*

145. See *id.*

146. See *Craig Hunter King, Employment Discrimination: The Burden of Proof*, 13 S.U. L. REV. 91, 97 (1986) ("It is unfortunate for the plaintiff that a satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence.").

147. See *Burdine*, 450 U.S. at 255.

148. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

149. *Id.* at 765.

150. See *King*, *supra* note 146, at 98. For example, evidence showing that a similarly situated white employee was treated more favorably than an African American employee can be sufficient to establish pretext. See *id.*

This requirement to prove the true intent of the employer is often thought to be the largest barrier to proving discrimination.

As Part II demonstrates, the *McDonnell Douglas* framework is not as plaintiff friendly as it appears.<sup>151</sup> Over time, courts have manipulated it to such a degree that it has become increasingly easier for employers to escape liability and almost impossible for plaintiffs alleging hiring discrimination to gain relief.<sup>152</sup>

## II. IS THERE ANY RELIEF AVAILABLE?: UNWORKABLE OPTIONS UNDER TITLE VII

This part examines how the *McDonnell Douglas* framework provides an unbeatable obstacle for individuals who are alleging implicit discrimination in failure-to-hire claims, such as minorities without criminal records in ban-the-box jurisdictions. Some circuits have used an alternate scheme—a mixed-motive framework—that attempts to account for unconscious discrimination, but many other circuits have been reluctant to do so. This part compares the traditional *McDonnell Douglas* framework and the newer mixed-motive framework and shows how the widespread application of the mixed-motive framework may strengthen plaintiffs' success in employment discrimination claims.

However, this part also demonstrates that failure-to-hire claims are still virtually unwinnable by plaintiffs, despite the potential improvement of a mixed-motive framework. It describes additional obstacles confronting rejected job applicants who suspect that discrimination caused the adverse hiring decision.

This part conducts this analysis to unveil the deficiencies of employment discrimination claims, which are more problematic than ever because of ban-the-box legislation's unintended detrimental effect on minorities without criminal records. Without strong laws to protect individuals affected by unconscious discrimination, ban-the-box legislation is more harmful than productive.<sup>153</sup>

### A. *The McDonnell Douglas Single Motive Framework: The Death Knell of Failure-to-Hire Claims*

In *McDonnell Douglas*, the Supreme Court constructed an analytical framework for disparate treatment cases where the evidence is circumstantial.<sup>154</sup> Under this framework, plaintiffs have to prove that the discriminatory pretext is the employer's *only* motivation for the adverse hiring decision. The Supreme Court has continuously articulated the requirement of a singular explanation for the decision, concluding, "[T]he district court must decide which party's explanation of the employer's

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151. See *infra* Part II.A.

152. See Tolson, *supra* note 83, at 366–68.

153. See, e.g., Agan & Starr, *supra* note 8; Doleac & Hanson, *supra* note 8.

154. See *supra* Part I.C.2.

motivation it believes.”<sup>155</sup> There is no room for both explanations. Although an employer may be partially motivated by discrimination, as long as the employer also articulates a nondiscriminatory reason for the decision that persuades the fact-finder, the plaintiff cannot establish a pretext.<sup>156</sup> Accordingly, the *McDonnell Douglas* framework is known as the single-motive framework because the framework only permits one motivation for the employer’s alleged discrimination.<sup>157</sup>

Thus, the fact-finder must weigh the discriminatory reason against the proffered legitimate reason for the adverse employment action. Problematically, courts have seemingly put their thumb on the scale in favor of the employer and have gone to great lengths to ensure that the fact-finder discovers a plausible nondiscriminatory reason for the employment action. In *St. Mary’s Honor Center v. Hicks*,<sup>158</sup> the Supreme Court held that the fact-finder could continue to look for nondiscriminatory explanations for the employer’s actions even after the plaintiff had shown the employer’s original reason was pretextual.<sup>159</sup> In *Hicks*, a black plaintiff was being subjected to repeated and severe disciplinary actions under a new supervisor.<sup>160</sup> Subsequently, Hicks was fired after threatening his supervisor during an argument.<sup>161</sup> Hicks provided sufficient evidence to show that other employees did not receive the same disciplinary actions.<sup>162</sup> In fact, other employees who committed more serious violations were treated more leniently than Hicks.<sup>163</sup> Although the Court considered this evidence sufficient to prove pretext, the Court stated that the trier of fact was free to look for another nondiscriminatory reason to account for Hicks’s termination, such as the threat or the argument.<sup>164</sup> If the trier of fact believes that the employer was more likely motivated by a nondiscriminatory reason rather than a discriminatory one, the trier of fact could disregard the original evidence of pretext and find for the employer.

Legal scholars have interpreted the Court’s decision as a “pretext plus rule,” where the plaintiff has to prove that the original proffered reason was pretext and then subsequently discredit any additional nondiscriminatory motives for the adverse decision.<sup>165</sup> Later, in *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>166</sup> the Supreme Court stated that although the plaintiff’s evidence of a prima facie case and pretext is enough to support liability, this

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155. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

156. *See id.*

157. *See, e.g.*, Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 4 (2005).

158. 509 U.S. 502 (1993).

159. *Id.* at 511.

160. *Id.* at 504–05.

161. *Id.* at 504. The legitimate nondiscriminatory reason was the severity and the accumulation of Hicks’s rules violations. *See id.* at 507.

162. *See id.* at 508.

163. *See id.*

164. *See id.* at 511.

165. *See Tolson, supra* note 83, at 382.

166. 530 U.S. 133 (2000).

evidence does not mandate a victory for the plaintiff.<sup>167</sup> These judicial interpretations have essentially eliminated any likelihood of success for an employment discrimination plaintiff because an employer has multiple chances to refute a plaintiff's already demanding evidentiary burden.<sup>168</sup>

This single-motive framework and the pretext plus rule particularly harm plaintiffs alleging implicit bias. The framework fails to account for the fact that an employer motivated by discrimination will almost always have other reasons to explain the decision.<sup>169</sup> This is especially true for unconscious discrimination, which is more likely to occur where the decision maker can attribute her decision to some reason other than race.<sup>170</sup> Because many people do not want to admit that they harbor racial prejudices, individuals exercising implicit bias will rationalize their decision on the basis of another nondiscriminatory reason.<sup>171</sup> Therefore, an analytical framework that gives the court freedom to "discover" another decision-making factor protects employers who implicitly discriminate because it allows the employers to assert multiple reasons for the discriminatory decision.<sup>172</sup> Employers are let off the hook because the single-motive framework means that the fact-finder can pick just one of the many reasons as the true motivation.<sup>173</sup>

Furthermore, in unconscious discrimination cases, the employer's business decision almost always wins because the implicit bias is seen as less credible than the employer's proffered legitimate reason.<sup>174</sup> The single-motive framework does not provide much hope for plaintiffs asserting unconscious discrimination. Thus, rejected job applicants who suspect that discrimination played a role in their rejection cannot bring successful claims against the employer. Therefore, in ban-the-box jurisdictions that employ the single-motive framework, there is no incentive for employers to address implicit bias. Additionally, there is no legal relief for minorities who are experiencing heightened discrimination due to ban-the-box laws.

*B. The Mixed-Motive Framework:  
A Glimmer of Hope in a Few Jurisdictions*

Scholars argued that, as discrimination in the workplace changed, the *McDonnell Douglas* single-motive framework was insufficient to address unconscious decision making for the reasons suggested above.<sup>175</sup> In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*<sup>176</sup> recognized the possibility that an employer's actions may be motivated by multiple factors, concluding, "Title VII meant to condemn even those decisions based on a

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167. *See id.* at 146–48; *see also* Kaminshine, *supra* note 157, at 14.

168. *See* Kaminshine, *supra* note 157, at 14.

169. *See* Tolson, *supra* note 83, at 384.

170. *See* Dovidio et al., *supra* note 91, at 90–92; *see also* discussion *supra* Part I.B.1.

171. *See* Hart, *supra* note 110, at 747–48.

172. *See* Tolson, *supra* note 83, at 384.

173. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

174. *See* Tolson, *supra* note 83, at 385.

175. *See, e.g.,* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 776–78 (1987).

176. 490 U.S. 228 (1989).

mixture of legitimate and illegitimate considerations.”<sup>177</sup> The majority in *Price Waterhouse*, however, limited the “mixed-motive” analysis to cases with direct evidence,<sup>178</sup> drastically reducing the holding’s scope.<sup>179</sup> The *McDonnell Douglas* framework would still be applied to any case with circumstantial evidence.<sup>180</sup>

In response, Congress amended section 703 of Title VII in 1991 to read: “An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating* factor for any employment practice, even though other factors also motivated the practice.”<sup>181</sup> While some scholars and judges believed this amendment invalidated the legal distinction between circumstantial and direct evidence, many disagreed and much debate ensued over the interpretation of the amendment.<sup>182</sup>

### 1. The *Desert Palace* Doctrine

In 2003, the Supreme Court granted certiorari to decide whether the direct evidence requirement constructed in *Price Waterhouse* was permitted under the new statutory language.<sup>183</sup> The Court in *Desert Palace, Inc. v. Costa*<sup>184</sup> held that there was no direct evidence requirement within the statutory text and, therefore, direct evidence was not necessary for a mixed-motive jury instruction.<sup>185</sup>

In *Desert Palace*, a female employee sued her employer after being fired from her position as a warehouse worker.<sup>186</sup> Throughout her employment, Catharina Costa experienced a number of problems with the company’s management, resulting in escalating disciplinary actions.<sup>187</sup> Costa was fired after getting into a physical altercation with a male coworker.<sup>188</sup> The male coworker was not fired, according to the employer, because he had a clean disciplinary record.<sup>189</sup> At trial, Costa provided evidence that she was

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177. *Id.* at 241.

178. *Id.* For examples of what constitutes direct evidence, see *id.* at 272 (O’Connor, J., concurring), where the Court concluded that direct evidence was presented where an employer’s evaluations of the plaintiff overtly referred to her failure to conform to gender stereotypes as a reason for not allowing her to be partner, and *Taylor v. Runyon*, 175 F.3d 861, 866 (11th Cir. 1999), where the court found that an employer’s statement that a female plaintiff was not promoted because a male coworker needed the promotion more to support his wife and children constituted direct evidence.

179. See *Price Waterhouse*, 490 U.S. at 270–71 (O’Connor, J., concurring). Justice Sandra Day O’Connor’s concurrence was required to form a majority in this case, and it heavily influenced how lower courts applied this opinion. See Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 115 nn.77–78 (2010).

180. See Pedersen, *supra* note 179, at 115.

181. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

182. See Pedersen, *supra* note 179, at 116–17.

183. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

184. 539 U.S. 90 (2003).

185. See *id.* at 101–02.

186. See *id.* at 95–96.

187. *Id.* at 95.

188. *Id.*

189. *Id.* at 95–96.

continuously disciplined more harshly than her male coworkers.<sup>190</sup> The jury was given instructions based on the mixed-motive framework.<sup>191</sup> The instructions were as follows:

You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.<sup>192</sup>

The employer objected to this jury instruction because Costa had not provided direct evidence and, therefore, should only receive the single-motive framework.<sup>193</sup> The district court overruled this objection and the jury held in favor of Costa.<sup>194</sup>

The Supreme Court held that the district court correctly applied the statutory language.<sup>195</sup> According to the Court, the language unambiguously states that a plaintiff must demonstrate only that the employer unlawfully considered race, gender, or national origin in making an employment decision.<sup>196</sup> The Court held that the statute could not require a single-motive framework, because the statute did not distinguish between cases based on direct versus circumstantial evidence.<sup>197</sup>

This ruling appeared to be a remarkable triumph for employment discrimination plaintiffs.<sup>198</sup> On first impression, the decision allowed the mixed-motive framework to replace the *McDonnell Douglas* framework in disparate treatment cases with direct *or* circumstantial evidence.<sup>199</sup> Thus, this interpretation would render the *McDonnell Douglas* single-motive framework dead; the mixed-motive framework would be the only analysis allowed.<sup>200</sup> Instead, however, confusion and an apparent reluctance to apply this new standard followed, resulting in a split among circuit courts.<sup>201</sup>

## 2. The *Desert Palace* Split

The circuit courts have interpreted the *Desert Palace* holding in conflicting ways, leading to vastly different applications and results throughout the lower courts. The difference in interpretation is over when the mixed-motive framework applies.<sup>202</sup> Some circuits apply the mixed-motive framework to

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190. *Id.* at 96.

191. *Id.*

192. *Id.*

193. *Id.* at 97.

194. *Id.*

195. *See id.* at 101–02.

196. *See id.* at 98.

197. *See id.* at 98–99.

198. *See Pedersen, supra* note 179, at 116.

199. *See Desert Palace, Inc.*, 539 U.S. at 98–99.

200. *See id.*; *see also* Jeffrey A. Van Detta, “Le Roi Est Mort; Vive Le Roi!”: *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a “Mixed-Motives” Case*, 52 DRAKE L. REV. 71 (2003).

201. *See Pedersen, supra* note 179, at 117.

202. *See id.* at 122–25.

every stage of the case from summary judgment through jury instructions at trial.<sup>203</sup> By contrast, the Eighth Circuit interprets the *Desert Palace* holding to be limited to jury instructions.<sup>204</sup> Therefore, courts in the Eighth Circuit rejected the application of *Desert Palace* at the summary judgment stage and employed the *McDonnell Douglas* analysis instead.<sup>205</sup>

Summary judgment is a crucial stage for all litigants, but this phase is especially critical for employment discrimination plaintiffs.<sup>206</sup> Nearly three-quarters of all federal employment discrimination lawsuits are resolved in whole or in part on summary judgment, which is the highest summary judgment rate out of all litigation categories.<sup>207</sup> This elevated rate matters for a few important reasons. First, it means that most employment discrimination plaintiffs do not have an opportunity to present their story and to feel as if they have received fair judicial process.<sup>208</sup> Furthermore, summary judgment proceedings influence the amount and likelihood of a settlement offer.<sup>209</sup> Additionally, judges, not juries, rule on summary judgment and have been shown to defer to employers' business judgment at higher rates than juries.<sup>210</sup> As a result, this discrepancy has substantial effects on the outcomes of employment discrimination lawsuits.<sup>211</sup>

#### a. *The Eighth Circuit Approach*

The Eighth Circuit has held that *Desert Palace* has no effect on the *McDonnell Douglas* framework at the summary judgment phase.<sup>212</sup> Under this interpretation, the mixed-motive analysis is applied only during posttrial jury instruction.<sup>213</sup> Accordingly, the plaintiff can survive the summary judgment phase only if the plaintiff can show that race was the true motivating factor behind the employer's decision rather than the employer's legitimate business reason.<sup>214</sup> In *Griffith v. City of Des Moines*,<sup>215</sup> the court concluded that evidence of additional motives and their effect on the plaintiff's claim are trial issues.<sup>216</sup> At summary judgment, the only inquiry

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203. See, e.g., *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1122 (9th Cir. 2009).

204. See, e.g., *Sallis v. Univ. of Minn.*, 408 F.3d 470 (8th Cir. 2005); *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004).

205. See *id.*

206. See JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., ESTIMATES OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006, at 2 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) [<https://perma.cc/W7G2-Y7XB>].

207. See *id.* at 9–10.

208. See Pedersen, *supra* note 179, at 119–20.

209. See *id.* at 120; see also Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 715–16 (2007).

210. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 927 (2006) (summarizing scholarly works that critique judges' evaluative function in employment discrimination lawsuits).

211. See Pedersen, *supra* note 179, at 119.

212. See, e.g., *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004).

213. See *id.*

214. See Pedersen, *supra* note 179, at 123 (citing *Gilbert v. Des Moines Area Cmty. Coll.*, 495 F.3d 906 (8th Cir. 2007)).

215. 387 F.3d 733 (8th Cir. 2004).

216. See *id.* at 735.

is whether the plaintiff has adequate evidence to show that the employer was motivated by discriminatory factors and not a legitimate nondiscriminatory reason.<sup>217</sup>

Following this interpretation, the Eighth Circuit continues to use the single-motive framework in the summary judgment stage. In *Sallis v. University of Minnesota*,<sup>218</sup> the Eighth Circuit affirmed summary judgment for the employer, stating that the plaintiff's claim failed under *McDonnell Douglas* because he could not show that university's reason for not hiring him was pretextual.<sup>219</sup> The plaintiff, Sallis, alleged that he was denied a position at the university on the basis of race.<sup>220</sup> Sallis presented evidence that the supervisor used racial epithets and openly complained about employees of a certain national origin.<sup>221</sup> The court was unconvinced and noted that Sallis failed to show that "the actual motivating factor was race discrimination."<sup>222</sup> The Eighth Circuit was unwilling to consider the race-based comments as a possible motivating factor behind the decision not to hire the plaintiff. Therefore, the plaintiff's case was dismissed.<sup>223</sup>

*b. The Ninth Circuit Approach*

The Fourth, Fifth, Sixth, and Ninth Circuits have held that the *Desert Palace* framework applies at the summary judgment phase.<sup>224</sup> Consequently, plaintiffs will survive the summary judgment stage with evidence that race, gender, or national origin may have been a motivating factor in the employer's adverse action.

In a case with similar facts to *Sallis*, the Ninth Circuit reversed the district court's grant of summary judgment to the employer.<sup>225</sup> In this case, the female plaintiff was suspended from her position as a pilot and sued her employer alleging sex discrimination.<sup>226</sup> The plaintiff presented facts that other male pilots had made sex-related remarks and complained that the plaintiff had a "machismo attitude."<sup>227</sup> While the airline provided facts to show that there were sufficient concerns about the plaintiff's flying abilities,<sup>228</sup> there was also some evidence that male pilots with similar

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217. *Id.* at 736 ("Thus, we conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.").

218. 408 F.3d 470 (8th Cir. 2005).

219. *See id.* at 475–76.

220. *See id.* at 473.

221. *See id.*

222. *Id.* at 476.

223. *See id.*

224. *See, e.g.,* Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 649–51 (6th Cir. 2012); Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1120 (9th Cir. 2009); Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1031–34 (9th Cir. 2005) (reversing summary judgment for the employer where the female plaintiff was less qualified than the person eventually hired for the position, but the employer made remarks, such as "women should only be in subservient positions.").

225. *See Nicholson*, 580 F.3d at 1120.

226. *See id.*

227. *Id.*

228. *See id.* at 1121.

deficiencies in ability were given additional remedial training instead of being suspended.<sup>229</sup> The Ninth Circuit held that “very little evidence is necessary to raise a genuine issue of fact regarding an employer’s motive” because the ultimate question must be resolved through an in-depth inquiry conducted by the fact-finder with a full record.<sup>230</sup> Therefore, the district court’s grant of summary judgment to the employer was improper because the plaintiff alleged the minimal evidence necessary.<sup>231</sup>

In *Metoyer v. Chassman*,<sup>232</sup> the plaintiff sued her employer for race discrimination under Title VII after she was fired from her position at the Screen Actors Guild.<sup>233</sup> The plaintiff, Patricia Metoyer, alleged that many of her supervisors at the Screen Actors Guild had made blatantly racist comments.<sup>234</sup> Other minority employees had also complained about racial discrimination.<sup>235</sup> In response, the employer presented evidence that Metoyer inappropriately used grant funds of over \$30,000, which Metoyer admitted. Still, the court held that the district court erred in granting summary judgment for the employer because the plaintiff proffered evidence that race may have been a motivating factor in the employer’s decision in addition to the defendant’s legitimate reason for terminating her employment.<sup>236</sup> Thus, summary judgment was denied because the court could not rule out the possibility that race played a role in the decision.<sup>237</sup>

From these two cases, it is evident that the Ninth Circuit is using a mixed-motive framework at the summary judgment stage, allowing plaintiffs to proceed with the case where there is some evidence that race, gender, or national origin may be one possible motivating factor.<sup>238</sup> This approach is especially crucial for individuals alleging unconscious discrimination in the hiring process because it increases the detection of implicit bias.<sup>239</sup> For reasons stated above, unconscious discrimination typically occurs in contexts where the decision maker has another reason to justify the decision.<sup>240</sup> The Ninth Circuit approach allows this discrimination to factor into the legal outcome instead of being passed over in favor of the employer’s nondiscriminatory reason.<sup>241</sup> Thus, if courts are willing to consider evidence of possible discrimination, even where the employer states a legitimate

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229. *See id.* at 1122.

230. *Id.* at 1127–28.

231. *See id.* at 1128.

232. 504 F.3d 919 (9th Cir. 2007).

233. *Id.*

234. *See id.* at 925.

235. *See id.* at 924–25. For example, in response to complaints that African Americans were kept in the low-paying jobs, high-level employees stated that they needed to “keep an eye on them because black people like to party and eat and don’t do their work.” *Id.* at 925. Furthermore, the director of human resources explicitly told Metoyer that it is very unlikely that there will ever be a person of color on senior staff. *Id.* at 924.

236. *See id.* at 939.

237. *See id.* at 942.

238. *See id.* at 939–40; *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1042 (9th Cir. 2005).

239. *See Pedersen, supra* note 179, at 141.

240. *See Dovidio et al., supra* note 91, at 90–92; Hart, *supra* note 110, at 747.

241. *See, e.g., Metoyer*, 504 F.3d at 939–40.

business reason, plaintiffs alleging hiring discrimination have an opportunity to present their case.<sup>242</sup>

*C. The Additional Evidentiary Problems  
in Hiring Discrimination Claims*

In addition to the grueling task of proving unconscious discrimination, minorities who are discriminated against in the hiring phase encounter other evidentiary problems specific to failure-to-hire claims. First, a plaintiff alleging hiring discrimination rarely has much information about the employer because of the limited interactions between the employer and the rejected applicant.<sup>243</sup> In fact, the applicant may have never interacted with the employer beyond a brief interview. Therefore, it is more challenging—if not impossible—to prove that unlawful discrimination played a role in the hiring decision.

For example, imagine an African American man who applies for a job at a local store. He is qualified for the job with a high school diploma and previous work experience in the industry. He interviews with the manager but is not offered the job. The manager subsequently hires a white man for the position. The African American man believes he was not given the job because of his race; he says he knows because of the manager's tone and the way the other employees looked at him.<sup>244</sup> But he will not be able to prove it.<sup>245</sup> Under the single-motive framework, he can establish the prima facie case, but the employer needs only one legitimate reason why the applicant was not a good fit and the case is over.<sup>246</sup> Even under the mixed-motive framework, the likelihood of success is small without any more evidence of (even subtle) discrimination, such as the manager's racist remarks or differential treatment of the store's current employees based on race.<sup>247</sup> Although discrimination may be a motivating factor, this evidence is hard to acquire for failure-to-hire claims because there is little opportunity to observe this type of bias.<sup>248</sup> Thus, despite the mixed-motive analysis, this plaintiff is likely to lose.

Secondly, in addition to the lack of proof, plaintiffs alleging hiring discrimination are unlikely to prevail because courts are extremely

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242. See, e.g., *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1073 (9th Cir. 2003) (“Our opinion seeks only to allow [the plaintiff] the opportunity to prove [the employer’s] motivations for terminating her.”).

243. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1059–60 (2006) (listing judicially accepted evidence for proving hiring discrimination).

244. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1214–16 (1995) (describing many of her clients’ observable and subtle reasons that they believed they were discriminated against).

245. See *id.*

246. See *supra* Part II.A.

247. See, e.g., *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007); *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027 (9th Cir. 2005).

248. See Krieger, *supra* note 244, at 1162.

deferential to employers' hiring decisions.<sup>249</sup> For example, in *Wright v. Western Electric Co.*,<sup>250</sup> Curtis Wright, an African American man, applied for a job as an electronic technician and was rejected.<sup>251</sup> The court held that Wright was qualified for the position because he had two years of electronic technician education and eleven years of experience in the field.<sup>252</sup> In response, however, the employer stated that Wright's answers in his interviews showed an inadequate level of knowledge for the position.<sup>253</sup> The court, using the *McDonnell Douglas* framework, ruled in favor of the employer.<sup>254</sup> The court was entirely unwilling to consider that race motivated the hiring decisions, despite evidence that Wright was highly qualified for the job when compared to the applicants that were eventually hired.<sup>255</sup> Instead, the court relied on the employer's statement that the plaintiff appeared to have insufficient knowledge during the interview.<sup>256</sup> This decision suggests that the court would have decided similarly under the mixed-motive framework because of the court's extreme deference to the employer's reason.

Similarly, in *Kelley v. Goodyear Tire & Rubber Co.*,<sup>257</sup> the employer stated that the applicant had a very poor interview performance, which led to the decision to not hire him.<sup>258</sup> Although the employee argued that he performed well in the interview and that the reason was simply a pretext for discrimination, the court viewed the employer's assertion that the interview was poor as a fact.<sup>259</sup> While this deference to the employer is consistent with the reasonable belief that employers can evaluate and reject job applicants regardless of how the applicant evaluates his own employability, this concept makes these claims even harder to win.

### III. KEEPING THE BOX BANNED AND REVAMPING THE CURRENT DOCTRINE

Throughout the past few decades, legal scholars have noted a great deficiency in employment discrimination doctrine, especially concerning unconscious discrimination.<sup>260</sup> Now, postimplementation studies of ban-the-

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249. See, e.g., *Kelley v. Goodyear Tire & Rubber Co.*, 220 F.3d 1174, 1178 (10th Cir. 2000).

250. 664 F.2d 959 (5th Cir. 1981).

251. See *id.* at 961–62.

252. See *id.*

253. See *id.* at 964.

254. See *id.* at 965.

255. See *id.* Western Electric eventually hired six technicians, none of whom were African American, and required five of them to attend additional training to bring their performance up to the desired level. See *id.*

256. See *id.* at 964–65.

257. 220 F.3d 1174 (10th Cir. 2000).

258. See *id.* at 1178; see also *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) (“It is the manager’s perception of the employee’s performance that is relevant, not plaintiff’s subjective evaluation of his own relative performance.”).

259. See *Kelley*, 220 F.3d at 1178 (holding that the employee’s perception of the interview is completely irrelevant).

260. See *supra* Part II.A.

box laws have presented new data about the prevalence of unconscious discrimination in the hiring process, specifically toward minority males.<sup>261</sup> However, the studies also show that ban-the-box policies are valuable for formerly incarcerated individuals seeking employment.<sup>262</sup> While some advocates are calling for the removal of ban-the-box laws to eliminate the harmful effects on applicants without criminal histories,<sup>263</sup> the better solution is to use the unintended consequence of ban-the-box laws as motivation to finally reform hiring discrimination doctrine.

Lawmakers must provide a sufficient remedy to applicants who are discriminated against during the hiring process. Currently, the success rate for plaintiffs bringing disparate impact or disparate treatment claims is dismal.<sup>264</sup> One study shows that employment discrimination plaintiffs win about 15 percent of the time in federal court, compared to plaintiffs in all other civil cases whose win rate is about 51 percent.<sup>265</sup> Consequently, some plaintiffs' attorneys are hesitant to bring employment discrimination lawsuits because the chances of winning are so slim.<sup>266</sup>

If legislatures, legal scholars, and judges can make employment discrimination litigation a viable option for applicants, formerly incarcerated individuals and minority males without criminal records can be treated fairly in the hiring process. To mitigate the consequences of ban the box, the winnability of these lawsuits must be strengthened through (1) the application of that the mixed-motive framework to all stages of a lawsuit and (2) increased access to reliable information for plaintiffs alleging racial discrimination.

#### A. *Applying the Mixed-Motive Framework to All Phases of the Case*

As many scholars have argued, the mixed-motive framework should be applied to all stages of litigation.<sup>267</sup> Unlike the mixed-motive framework, the single-motive framework relies on two inaccurate assumptions about the way people make employment decisions: that decisions are based solely on

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261. See *supra* Part I.A.4.

262. See *supra* note 80 and accompanying text.

263. See, e.g., Jennifer L. Doleac, "Ban the Box" Does More Harm Than Good, BROOKINGS (May 31, 2016), <https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/> [<https://perma.cc/CR74-7KEN>].

264. See *supra* notes 206–07 and accompanying text; see also Tolson, *supra* note 83, at 366–69 (discussing evidence of a judicial bias against employment discrimination plaintiffs, including statistics that plaintiffs disproportionately lose more on appeal).

265. Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), <http://www.wsj.com/articles/SB123500883048618747> (summarizing studies of plaintiff success in civil cases from 1979 through 2006) [<https://perma.cc/U4PH-J5QW>].

266. See *id.* ("We will no longer take individual employment-discrimination cases, because there's such a high likelihood of losing," New York plaintiffs' attorney Joe Whatley Jr. says.').

267. See, e.g., Hart, *supra* note 110, at 762; Pedersen, *supra* note 179, at 141.

one factor and that people are aware of their decisions.<sup>268</sup> As such, the single-motive framework undermines important policy goals.<sup>269</sup>

The mixed-motive framework, however, accurately reflects our multifaceted decision-making processes.<sup>270</sup> Very few decisions are made based on a single reason; most decisions are derived from a variety of factors.<sup>271</sup> This is especially true when implicit bias is involved because decision makers justify their unconscious biases with other reasons.<sup>272</sup> Yet, the single-motive framework relies on monocausality, or the idea that people rely on one factor when making decisions.<sup>273</sup> This is reflected throughout the single-motive framework, including the requirement of identifying the “real reason” for the adverse decision in the pretext phase.<sup>274</sup> Where there is no room for another plausible explanation, the plaintiff is left to convince the fact-finder that the employer’s seemingly legitimate reason is actually a “sham” or “cover up” for the employer’s true discriminatory motive.<sup>275</sup> Employment discrimination attorney Linda Krieger puts it bluntly, explaining that to win she “would have to prove that the [employer] was a racist and a liar.”<sup>276</sup>

In actuality, the employer can truthfully articulate a nondiscriminatory reason for not hiring the plaintiff and still have an unconscious discriminatory motive.<sup>277</sup> The mixed motive accounts for this and enables the plaintiff to argue that, despite a well-intentioned decision-making process, the employer was partially motivated by an unconscious bias.<sup>278</sup> Accordingly, this framework not only reduces acrimony but also increases the potential that the fact-finder will recognize the role of implicit bias in the adverse decision.<sup>279</sup>

The mixed-motive framework also accounts for the likelihood that the employer is unaware of the underlying factors behind its decision.<sup>280</sup> There is substantial evidence that well-intentioned people categorize and stereotype through an automatic unconscious process.<sup>281</sup> Research shows that people are highly inaccurate when identifying the effects of certain factors, such as stereotypes, on their evaluations or choices.<sup>282</sup> Additionally, when people

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268. See Krieger, *supra* note 244, at 1214–16.

269. See *id.* at 1223–41.

270. See *id.*

271. See *id.*

272. See *id.*; see also *supra* notes 91–94 and accompanying text.

273. See Krieger, *supra* note 244, at 1223.

274. See *id.*

275. See, e.g., *Acrey v. Am. Sheep Indus. Ass’n*, 981 F.2d 1569, 1580–81 (10th Cir. 1992) (holding that the plaintiff did not prove that the employer’s reason was a pretext for discrimination); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 726 (8th Cir. 1992).

276. See Krieger, *supra* note 244, at 1163.

277. See *id.* at 1223.

278. See Pedersen, *supra* note 179, at 101–02.

279. See *id.* at 141.

280. See Krieger, *supra* note 244, at 1214–16.

281. See *id.*

282. Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233–48 (1977).

are asked to explain why they made a certain decision, they misattribute or fabricate the factors they based their decision on.<sup>283</sup>

The single-motive doctrine fails to recognize that decision makers most likely cannot accurately identify why they made a particular decision, especially if implicit bias is playing a role in the decision-making process.<sup>284</sup> Thus, an analysis that rests on the assumption that employers are rational actors who are aware of their unconscious motives is entirely ineffective.<sup>285</sup> Moreover, this framework distorts the truth and relies on information that we know to be unreliable, such as an employer's account of how he came to a certain hiring decision.<sup>286</sup> Although it retains some of these flaws, the mixed-motive framework more accurately accounts for the way people remember their decision-making processes by allowing the fact-finder to consider multiple reasons for a decision. In this way, the fact-finder can acknowledge that unconscious discrimination may play a role in an employer's cognitive processes, even where other motivating factors are involved.

Lastly, the mixed-motive framework better serves the policy goals behind employment discrimination law.<sup>287</sup> Laws are enacted to encourage socially desirable actions and curtail socially undesirable behaviors.<sup>288</sup> However, when a law is ineffective or unclear, individuals who are supposed to comply with the law cannot successfully do so.<sup>289</sup> Thus, if lawmakers want employers to curtail discrimination during the hiring process, the law must be interpreted and enforced in this manner.<sup>290</sup>

Moreover, the mixed-motive analysis must be applied at all stages if lawmakers want to reduce unconscious employment discrimination. Under the mixed-motive framework, plaintiffs have a stronger legal threat against employers.<sup>291</sup> As a result, employers may become aware of the prevalence of implicit bias and put systems in place to protect themselves against unconscious discrimination litigation.<sup>292</sup> Undoubtedly, this solution will not eliminate implicit racism and sexism in our society. However, unless the law targets and punishes those who unconsciously discriminate, the chances of reducing implicit bias is drastically minimized.

### *B. Increasing Information*

The analytical framework is only one part of the solution. Even where the mixed-motive framework is applied, plaintiffs asserting unconscious hiring discrimination often lack sufficient proof.<sup>293</sup> A large number of these cases

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283. *See id.* at 247–48 (finding that individuals tend to select an inaccurate but plausible explanation from memory rather than actually examining their cognitive process).

284. *See* Krieger, *supra* note 244, at 1167–69.

285. *See id.*

286. *See* Nisbett & Wilson, *supra* note 282, at 247–48.

287. *See* Krieger, *supra* note 244, at 1238–41.

288. *See id.* at 1239.

289. *See id.*

290. *See id.*

291. *See* Pedersen, *supra* note 179, at 101–02.

292. *See id.*

293. *See* King, *supra* note 146, at 101–02; *see also supra* Part II.C.

fail, or are never even filed, because the rejected applicant requires more information about the employer's hiring process and trends.<sup>294</sup> While the mixed-motive framework does help alleviate some of the evidentiary burdens,<sup>295</sup> increasing the availability of employment information will equip plaintiffs with more of the necessary evidence. Furthermore, if employers know this information is being collected and released, they may think more carefully about their employment decisions.<sup>296</sup>

One of the ways this can be done is through a stronger commitment to the collection of employment data and to regulatory oversight and enforcement. Currently, under section 709 of Title VII, employers are required to keep records relevant to determinations of whether unlawful employment practices are occurring and make reports from these records.<sup>297</sup> To comply with this mandate, the Equal Employment Opportunity Commission (EEOC) has established requirements for employers.<sup>298</sup> Each year, employers must file a form, known as the Equal Employment Opportunity Form (EEO-1).<sup>299</sup> Under its authority, the EEOC requires employers to indicate each employee's job description, gender, and race on the EEO-1 form.<sup>300</sup> Additionally, the EEOC mandates that employers keep records regarding hiring, promotion, demotion, termination, and compensation rates.<sup>301</sup> The EEOC also has the authority to require employers to keep records regarding the hiring process, including data regarding the race and gender of their applicants, when necessary to accomplish the goals of Title VII.<sup>302</sup>

In practice, the EEO-1 form appears to be a useful tool for advocates fighting against employment discrimination. The effectiveness of the EEO-1 data collection requires government enforcement.<sup>303</sup> While this process was successful in the early 1980s,<sup>304</sup> the government commitment to regulate

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294. See King, *supra* note 146, at 101–02.

295. See *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) (“This burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff’s claim.”).

296. See Pedersen, *supra* note 179, at 146–47.

297. Civil Rights Act of 1964 § 709(a), 42 U.S.C. § 2000e-8(c) (2012).

298. See 29 C.F.R. § 1602.1-14 (2016).

299. See *id.* § 1602.7.

300. See Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479, 45,479 (July 11, 2016); see also Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC to Collect Summary Pay Data (Sept. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm> (announcing the adoption of the revised EEO-1 form described in the final comment request) [<https://perma.cc/99EM-TYCF>].

301. See 29 C.F.R. § 1602.14.

302. See *id.* § 1602.19 (“The Commission reserves the right to require reports, other than that designated . . . whenever, in its judgment, special or supplemental reports are necessary to accomplish the purpose of title VII . . .”).

303. See generally Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855 (2006).

304. This data collection is a promising platform to build off of but does not currently do enough to provide information to rejected applicants. See *id.* at 883.

employers through this data has declined since the Reagan administration.<sup>305</sup> Without government commitment to audit employers and ensure compliance with the EEOC requirements, the EEO-1 forms will be ineffective.<sup>306</sup>

While data collection and the accompanying commitment to audit and analyze that data is a promising starting point, the current regulatory framework does not do enough to provide information to rejected applicants. An expansion of data collection and oversight would supply employment discrimination litigants with essential evidence and would serve as an incentive for employers to critically monitor their hiring decisions.

### 1. Evidence for Hiring Discrimination Plaintiffs

If employment discrimination plaintiffs have the opportunity to acquire and use reliable information to establish that discrimination was one of the motivating factors in the adverse employment decision, these individuals would have more success. EEO-1 forms could potentially provide plaintiffs with critical information to use as evidence when alleging hiring discrimination.<sup>307</sup> As such, the EEOC should require employers to do more. For example, the EEOC should use its authority to mandate that employers maintain data regarding the demographics of their job applicants and their hiring procedures, including how they reviewed each document and how they decided whether the applicant was a good fit.<sup>308</sup>

While this may appear to be an onerous burden, many employers likely already have some internal tracking system for applications that would make this fairly easy to do. For example, the company could click a box after the application was reviewed or an interview was conducted that would indicate why the applicant was not hired, such as insufficient work experience, unsatisfactory knowledge of the field, or incompatible attitude. This information, although it may be a valid reason for rejection, still provides additional knowledge about why the applicant was rejected. Furthermore, the EEOC can audit employers' data and discern, for example, whether applicants of certain races or genders are consistently rejected for insufficient work experience when other applicants are being hired with the same work experience. In this way, this information collected by the EEOC can arm employment discrimination plaintiffs with necessary evidence and increase their chances of winning unconscious discrimination claims.

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305. *See id.* at 863–65. The compliance reviews in the 1980s and beyond had less positive effects. *See id.* at 883.

306. *See id.*

307. It is important to note that while the EEOC is prohibited from making EEO-1 forms public, legal scholars have been able to access and study these documents. *See generally* ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, *THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999* (2002), [http://www.eeo1.com/1999\\_nr.htm](http://www.eeo1.com/1999_nr.htm) [<https://perma.cc/XG2K-R48E>].

308. *See* 29 C.F.R. § 1602.19 (2016).

## 2. Impetus for Employer Self-Regulation

In addition to creating evidence for employment discrimination plaintiffs, this data collection is essential to changing the way employers think about hiring discrimination. Some scholars suggest that this type of compliance oversight would more effectively alter employment practices than litigation itself.<sup>309</sup> If employers are aware that data are being collected, they will be more likely to think about the real reasons behind their hiring decisions.<sup>310</sup> As research shows, increased attention to decision-making processes can lead to greater recognition that stereotyping may be a reason for a decision.<sup>311</sup> Therefore, requiring employers to pay more attention to their motivations behind a hiring decision can lead to increased awareness of implicit bias, which is an essential step to eliminate bias.<sup>312</sup>

Ideally, this newfound awareness would mean that companies could, and would, self-regulate their unconscious discrimination and change their employment practices. Legal scholars believe that employers have a wide array of options to eliminate unconscious bias, including diversity hiring initiatives and gender or ethnicity sensitivity training.<sup>313</sup> Additionally, employers have the ability to consistently monitor and evaluate their workplace statistics and require their employees to appraise their implicit biases through the free IAT test.<sup>314</sup> In fact, many employers have started to use the insights from implicit bias tests to inform their hiring practices.<sup>315</sup> Employers committed to eliminating unconscious bias, as enforced by the threat of litigation and the EEOC's oversight, are well equipped and may be in the best position to reach this goal.

## CONCLUSION

With almost 700,000 Americans being released from prison every year, increasing employment opportunities for formerly incarcerated individuals is an essential piece of criminal justice reform.<sup>316</sup> In an attempt to combat hiring discrimination against formerly incarcerated individuals, many lawmakers have advocated and passed ban-the-box legislation.<sup>317</sup> Although postimplementation studies have found these laws are helping formerly incarcerated individuals, the legislation is increasing unconscious discrimination against minority males without criminal records.<sup>318</sup> Problematically, employment discrimination litigation currently does not

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309. See Tolson, *supra* note 83, at 396–413.

310. See Pedersen, *supra* note 179, at 101–02.

311. See *id.*

312. See *id.*

313. See Tolson, *supra* note 83, at 413, 417.

314. See *id.* at 419.

315. See Tanya Katerí Hernández, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 J.L. & INEQ. 309, 341–43 (2014).

316. See Petersilia, *supra* note 2, at 657.

317. See *supra* notes 4–6 and accompanying text.

318. See *supra* Part I.A.2.

adequately protect plaintiffs alleging unconscious discrimination, leaving minority males without criminal records with essentially no legal recourse against the documented discrimination they face. Accordingly, ban-the-box laws can only be justified if employment discrimination doctrine provides individuals adversely affected by the laws with relief.

Therefore, instead of eliminating ban-the-box legislation, lawmakers should use the negative unintended consequence of ban-the-box laws as motivation to strengthen employment discrimination doctrine through two main reforms. The application of the mixed-motive framework to all stages of litigation, along with an increase in oversight and data collection from the EEOC, will cause employers to become more aware of the prevalence of employment discrimination and work to combat unconscious bias in their hiring processes. Moreover, racial minorities will be able to successfully gain legal relief for the heightened racial discrimination in ban-the-box jurisdictions. In this way, the negative unintended consequence of ban-the-box laws can prompt tremendous and positive changes in the fight to reduce employment discrimination for both formerly incarcerated individuals and racial minorities.