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THIRD TIME'S A CHARM: THE CASE FOR BAN THE BOX LEGISLATION IN IDAHO

Alaina Heuring

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THIRD TIME'S A CHARM: THE CASE FOR BAN THE BOX LEGISLATION IN IDAHO

ALAINA HEURING*

ABSTRACT

A growing chorus of legislative bodies have enacted legislation signaling an about-face to the nation's "tough on crime" criminal justice approach. Ban the box legislation, which prohibits employers' ability to inquire into a job applicant's criminal history, has found a home in the majority of U.S. states' laws today. The ban the box movement seeks to reduce imprisonment rates by connecting ex-offenders with more employment opportunities upon release from prison. The Idaho Legislature has twice turned down opportunities to join this growing majority, despite mounting pressure to correct Idaho's mass-incarceration crisis.

This Comment begins by analyzing the significance of a criminal conviction and the vicious cycle of unemployment and recidivism that often results upon a prisoner's release. With this in mind, this Comment addresses the judicial and legislative responses to discriminatory hiring practices observed by ex-offenders, focusing on Title VII and ban the box laws. This Comment then turns to Idaho and evaluates two recent bills proposed in the Idaho Legislature that sought to "ban the box." Finally, this Comment advocates for adoption of an aggressive ban the box law in Idaho to reduce the state's rising incarceration rate.

* J.D. Candidate, University of Idaho College of Law, 2022.

TABLE OF CONTENTS

I. INTRODUCTION	289
II. BACKGROUND	290
A. The Consequences of a Criminal Record	291
B. Title VII and Disparate Impact Liability	294
III. A LEGISLATIVE RESPONSE: BAN THE BOX LAWS.....	297
A. Varying Degrees of Protection: A Nationwide Overview of Fair Chance Laws	298
B. Idaho's Failed Fair Chance Bills: A Discussion of Senate Bills 1307 & 1318.	300
IV. BAN THE BOX LAWS AS A SOLUTION FOR RECIDIVISM	302
A. Rationale for Ban the Box Laws	303
B. Do Fair Chance Laws Work?	304
V. IDAHO EX-OFFENDERS NEED A FAIR CHANCE	307
A. Idaho's Mass Incarceration Problem	307
B. Current Protective Measures in Place for Idaho Ex-Offenders	310
C. The Need for Ban the Box Legislation in Idaho	313
VI. CONCLUSION	316

I. INTRODUCTION

Thirty-six states¹ and over 150 U.S. cities have adopted “ban the box” laws to provide ex-offenders a fair chance at employment.² Ban the box laws, otherwise known as fair chance laws, prohibit employers from asking job applicants about their criminal history on an initial job application.³ Indeed, the “box” in “ban the box” represents the blank field on many employment applications where applicants place a checkmark to indicate that they have been convicted of a crime.

1. BETH AVERY & HAN LU, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS, 2-3 (2020). A total of thirty-six states have adopted laws applicable to public-sector employment: Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. Some of these states have adopted policies that extend to private employers, too.

2. *Id.*

3. *Id.* at 3.

At its core, this movement seeks to ensure that employers judge candidates by their work qualifications rather than their past mistakes. Research demonstrates that ex-offenders desperately need such protection; in fact, an applicant's likelihood of receiving a mere *callback* is reduced by nearly fifty percent once the applicant discloses her criminal record.⁴ The practice of blanket rejecting all ex-offenders' detriments all participants in the hiring process: employers thus artificially narrow their applicant pool, while ex-offenders grow discouraged and tend to reoffend.⁵

Idaho has twice missed its chance to ban the box.⁶ Following the failure of Idaho's first fair chance bill in 2018, Idaho Senator Cherie Buckner-Webb (D-19) introduced a second fair chance bill in 2020.⁷ Senate Bill 1318 sought to curb Idaho's climbing incarceration rate, a figure undeterred by previous prison reform legislation.⁸ Treatment of Senate Bill 1318 was promising. Idaho's Senate Judiciary Committee unanimously endorsed the Bill, and it soon passed the Senate floor with bipartisan support.⁹ Ultimately, however, Senate Bill 1318 died in the House.¹⁰ This Comment recommends that Idaho legislators revisit fair chance policies for the third *and final* time—and ultimately join the growing majority¹¹ of ban the box jurisdictions.

This Comment proceeds in four parts. Part I explains the circumstances that have combined to create poor employment prospects for ex-offenders nationwide. Part I continues with a discussion of ex-offenders' attempts to challenge discriminatory hiring practices under Title VII, which serves as a backdrop to the ban the box movement. Part II surveys other states' fair chance laws and compares them against Idaho's two unenacted fair chance bills. Part III questions the rationale of ban the box legislation and discusses emerging studies attempting to test the efficacy of these laws. Finally, Part IV contemplates Idaho's mass incarceration crisis and concludes that ban the box would appropriately reduce the state's rising recidivism rates.

II. BACKGROUND

4. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

5. NAT'L EMP. L. PROJECT, FACT SHEET: "BAN THE BOX" IS A FAIR CHANCE FOR WORKERS WITH RECORDS 1 (2017), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>.

6. S. 1307, 64th Leg., 2d Reg. Sess. (Idaho 2018); S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

7. S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

8. See *infra* Part V(A) for a discussion about the failed Justice Reinvestment Initiative.

9. Betsy Z. Russell, *Senate Panel Unanimously Backs Sen. Buckner-Webb's 'Ban the Box' Bill*, IDAHO PRESS (Feb. 17, 2020), https://www.idahopress.com/news/local/senate-panel-unanimously-backs-sen-buckner-webbs-ban-the-box-bill/article_7b930a7b-1442-50ec-bc80-ce5aea39fcdf.html; S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

10. S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

11. AVERY & LU, *supra* note 1, at 2.

It is no secret that ex-offenders struggle to find work upon release from prison.¹² Indeed, unemployability is one of many consequences that plague prisoners long after they serve their sentences.¹³ Employers, for various reasons, have grown increasingly reluctant to hire ex-offenders.¹⁴ Though not a federally protected class, ex-offenders have challenged prospective employers' rejection of their application under Title VII of the Civil Rights Act.¹⁵ Yet this legal pathway rarely leads to victory.¹⁶ As a result, ex-offenders often find themselves unemployed and back in prison.

A. The Consequences of a Criminal Record

Aside from jail time, fines, and perhaps community service, a criminal conviction carries with it many "collateral consequences." Collateral consequences are the indirect legal and social penalties, disabilities, and disadvantages that flow from a criminal conviction,¹⁷ including loss of voting rights, restricted access to housing, social stigma, and, relevant here, limited employment prospects.¹⁸ Indeed, ex-offenders face tremendous difficulty securing employment after serving their sentences. A 2009 study found that job applicants with a criminal record are half as likely to receive a "callback" as those without a record.¹⁹ Many employers are reluctant to hire ex-offenders, blaming safety concerns and negligent hiring liability.²⁰ This reluctance has increased in the past several decades thanks to the digitalization of criminal records.²¹ In the internet era, performing a background

12. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 956 (2003).

13. See *infra* notes 17–19 and accompanying text.

14. See *infra* notes 20–21 and accompanying text.

15. See *infra* Part II(B).

16. See discussion *infra* Part II(B).

17. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7 n.2 (3d ed. 2004).

18. Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 2 (2014). The National Institute of the Justice's Inventory of the Collateral Consequences of Conviction ("NICCC") compiles collateral consequences from each state. The NICCC's database reports that Idahoans with a criminal conviction suffer from a total of 678 collateral consequences. See *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> (select "Idaho" under jurisdiction drop-down menu; then select "search") (last visited Mar. 25, 2022).

19. Pager et al., *supra* note 4, at 199.

20. Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1015–17 (2011).

21. Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 902 (2014).

check on a job applicant is increasingly convenient and inexpensive.²² Despite significant flaws associated with the for-profit background check system,²³ a 2018 study revealed that approximately 73% of employers perform criminal background checks on applicants.²⁴ Upon learning of an applicant's criminal history, over 60% of employers in a second study admitted that they would "probably not" or "definitely not" hire the applicant.²⁵ The same study found that only 12.5% "definitely would consider" hiring that same applicant.²⁶ Naturally, this growing trend has weakened employment prospects for ex-offenders, who constitute a large share of today's workforce.²⁷ An estimated one-third of working-age Americans today have a criminal record—whether it be an arrest or a conviction—that will show up on a background check.²⁸

This problem is exceptionally pronounced for people of color. Criminal records more often plague Black and Hispanic Americans because "they are arrested at rates greatly disproportionate to their share of the population and their level of actual crime activity."²⁹ This disparity is well-documented.³⁰ For example, Black Americans accounted for 21% of the nation's arrests in 2017, despite making up

22. Jonathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 198 (2014).

23. Paul-Emile, *supra* note 21, at 907–09. "Exacerbating the situation are for-profit websites and other background-check businesses that assemble publicly available arrest records, often including mug shots and charges. Many sites charge fees to remove a record, even an outdated or erroneous one." Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

24. SOC'Y FOR HUM. RES. MGMT. & CHARLES KOCH INST., *WORKERS WITH CRIMINAL RECORDS* 1, 2 (2018).

25. Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Checks, Background Checks, and Their Determinants* 8 (Berkeley Program on Hous. & Urban Pol'y, Working Paper No. W01-005, 2001), <https://escholarship.org/uc/item/3c6468h2>.

26. *Id.* (emphasis added).

27. The Prison Policy Initiative estimates that the unemployment rate amongst working-age ex-offenders is 27.3%, nearly five times the rate of their non-offender cohorts. LUCIUS COULOUTE & DANIEL KOPF, *OUT OF PRISON & OUT OF WORK: UNEMPLOYMENT AMONG FORMERLY INCARCERATED PEOPLE* (2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

28. Fields & Emshwiller, *supra* note 23, at 1.

29. Paul-Emile, *supra* note 21, at 896.

30. Paul-Emile, *supra* note 21, at 911. A 2018 report submitted to the United Nations found that "African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and [sic] they are more likely to experience lengthy prison sentences. . . . As of 2001, one of every three Black boys born in that year could expect to go to prison in his lifetime" THE SENT'G PROJECT, *REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* 1 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

only 13% of the general population.³¹ Contrary to empirical evidence demonstrating comparable rates of drug use between white, Black, and Hispanic people, the latter groups are more likely to be implicated in drug offenses than the former.³² Unsurprisingly, these racial inequities follow racial minorities in their job search too.³³ In the aforementioned 2009 study, the likelihood that an ex-offender received a callback was lower for Black applicants than it was for white applicants.³⁴ In fact, the study revealed that even white applicants *with a criminal record* were more likely to receive a callback (17%) than Black applicants *without a criminal record* (14%).³⁵

Without reliable work, ex-offenders tend to reoffend. Indeed, research suggests that unemployment is one of the strongest predictors of recidivism.³⁶ To recidivate is to return to criminal conduct.³⁷ In other words, recidivism occurs when a convicted criminal commits another crime after being released from a correctional facility. Recidivism rates often guide policymakers' decisions concerning their criminal justice and reform systems.³⁸ A high recidivism rate might indicate that one or more prongs in a jurisdiction's criminal justice system is dysfunctional; a low recidivism rate might indicate the opposite.³⁹

Today's nationwide recidivism rates are discouraging. Recent data suggests that roughly two-thirds of released prisoners will be arrested again within three

31. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISONER POLICY INITIATIVE (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

32. Paul-Emile, *supra* note 21, at 911.

33. Pager, *supra* note 12, at 958.

34. *Id.*

35. *Id.*

36. Jennifer Hickes Lundquist et al., *Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers*, 96 SOC. FORCES 1039, 1041 (2018); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOCIO. REV. 529, 542 (2000).

37. Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1000 (2019) (citing JOAN PETERSILIA, RECIDIVISM, ENCYCLOPEDIA OF AMERICAN PRISONS 382, 382 (Marilyn D. McShane & Frank P. Williams III eds., 1996)).

38. Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 788 (2014) (suggesting that some may view recidivism as "an existential test of the criminal justice system").

39. Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of Criminal Convictions: Is True Change in the Offing?*, 91 N.Y.U. L. REV. 150, 164 (2016) ("Recidivism has become the hallmark of release decisions and of judging the success of diversionary and treatment programs."); U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW *passim* (2016), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

years of release.⁴⁰ Moreover, 85% of the prisoners who recidivate are unemployed at the time they are re-arrested.⁴¹ Thus, unemployment and recidivism seem to go hand in hand. For people of color, racial discrimination in both the criminal justice system and the job market combine to create a vicious cycle:

Racial discrimination in the justice system makes people of color more likely to have a criminal history, which makes them less likely to have positive employment outcomes. Racial discrimination in the labor market (with or without a criminal record) makes it less likely that a person of color will have positive employment outcomes, potentially increasing their likelihood of committing a crime.⁴²

In sum, negative employment outcomes are one of many collateral consequences tacked on to a criminal conviction. Employers are reluctant to hire ex-offenders for various reasons, which prevents a substantial portion of America's workforce from entering the workforce. Inability to find work, amongst many other extraneous factors, feeds the vicious cycle of offend, release, repeat. Racial discrimination exacerbates each of these issues, leaving minorities particularly at risk of recidivism. In response, some ex-offenders have turned to the courts to find relief.

B. Title VII and Disparate Impact Liability

Traditionally, individuals experiencing discrimination in the employment context have sought relief under Title VII of the Civil Rights Act. Title VII was enacted in 1964 as a means to remove obstacles that prevent certain classes from receiving equal employment opportunities.⁴³ Under Title VII, employers may not discriminate against employees or job applicants on the basis of a person's protected class.⁴⁴ Protected classes under Title VII include race, color, religion, national origin, and sex.⁴⁵

Convicted persons are not a protected class under Title VII.⁴⁶ Still, ex-offenders belonging to a protected class are not completely without recourse under Title VII.

40. Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 322 (2020).

41. *Create a Culture of Employment Readiness and Retention for Incarcerated Individuals*, NAT'L INST. CORRECTIONS, <https://info.nicic.gov/cirs/node/39> (last visited Mar. 31, 2022) [hereinafter NICIC].

42. CHRISTINA STACY & MYCHAL COHEN, *BAN THE BOX AND RACIAL DISCRIMINATION: A REVIEW OF THE EVIDENCE AND POLICY RECOMMENDATIONS 7-8* (2017), https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf.

43. 42 U.S.C. § 2000e-2(a) (2018); Smith, *supra* note 22, at 202.

44. 42 U.S.C. § 2000e-2(a) (2018).

45. *Id.*

46. *See id.*

In the seminal case *Griggs v. Duke Power Co.*, the Supreme Court recognized a new avenue for claimants injured by discriminatory employment practices: disparate impact liability.⁴⁷ In *Griggs*, the Court announced that Title VII “proscribes not only overt discrimination but also practices that are *fair in form, but discriminatory in operation*.”⁴⁸ This differs from a disparate treatment claim, which holds employers liable for their *facially* discriminatory employment practices.⁴⁹ Under a disparate impact theory, a claimant may seek recourse where a facially neutral employment practice—such as an employer’s rejection of an applicant—has a disparate impact on a group protected by Title VII.⁵⁰ Therefore, the claimant need not prove that the employer had a discriminatory intent, unlike the disparate treatment theory.⁵¹ It thus follows that an ex-offender belonging to a protected class could seek recourse under Title VII if the employer’s facially neutral hiring decision disproportionately impacted others belonging to that same class.

At first glance, the disparate impact claim appears promising. Given the racially discriminatory practices observed in the justice system,⁵² the competing discrimination against ex-offenders in hiring practices surely causes a disparate impact on racial minorities in the job market. And with race being a protected class under Title VII,⁵³ one could conclude that the disparate impact claim could forge a legal pathway for racial minorities who disproportionately carry criminal records. For example, a person of color who was denied employment, presumably based on his criminal record, could bring suit against the employer on a disparate impact theory under the premise that the employer’s facially neutral hiring decision disproportionately impacted racial minorities. Yet, evidentiary burdens and growing reluctance towards disparate impact claims largely foreclose this avenue.⁵⁴

Courts employ a three-part burden-shifting standard in disparate impact claims.⁵⁵ Plaintiffs must first prove that the employer’s facially-neutral policy—or here, hiring decision—has an adverse impact on a protected class.⁵⁶ The burden then shifts to the employer to demonstrate that its hiring decision is “consistent

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

48. *Id.* (emphasis added).

49. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

50. *Griggs*, 401 U.S. at 430; 42 U.S.C. § 2000e-2(k) (2018).

51. Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 558 (2018).

52. Bornstein, *supra* note 51 *passim*.

53. Bornstein, *supra* note 51, at 523.

54. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–39 (2006).

55. 42 U.S.C. § 2000e-2(k) (2018). Each time the burden shifts, the party must overcome their burden by a preponderance of the evidence standard. Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model through New Lenses*, 74 N.C. L. REV. 325, 391 (1996).

56. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

with business necessity.”⁵⁷ If satisfied, the burden shifts back to the plaintiff, who may then only prevail by proving that less discriminatory alternatives exist.⁵⁸

Plaintiffs frequently fail in the first phase of their disparate impact claims.⁵⁹ In the first phase, disparate impact claimants must provide sufficient evidence demonstrating that the employer’s hiring practice disproportionately harms her protected class.⁶⁰ In practice, this evidentiary burden has proved troublesome.⁶¹ Claimants typically introduce general population statistics or relevant labor market statistics to demonstrate that the challenged action exerts a disproportionate impact on a protected class.⁶² For example, the plaintiffs in *Griggs* introduced general population data showing significantly lower high school graduation rates for Black students than white students.⁶³ The Court accepted this evidence as sufficient to demonstrate that the defendant’s requirement of a high school diploma for a low-skilled labor position disproportionately impacted Black applicants.⁶⁴ However, courts have increasingly deemed such statistical evidence insufficient to support the link between an employer’s hiring decision and its effects on a protected class.⁶⁵ In dismissing a claim that relied on disproportionate incarceration rates between Black and white Americans, the Second Circuit recently remarked, “[f]acts are stubborn things, but statistics are pliable.”⁶⁶ This sentiment captures the growing scrutiny towards plaintiffs’ use of statistical evidence in the first phase of a disparate impact action.⁶⁷ Apart from evidentiary scrutiny, some courts have demonstrated outright hostility towards ex-offenders’ use of the disparate impact theory in court. Perhaps the most recognizable instance of this hostility is found in a 1989 opinion, where a federal Florida judge remarked, “[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then they should stop stealing.”⁶⁸

The business necessity defense sounds the death knell for many disparate impact claims. If a claimant satisfies her initial burden, the burden then shifts to the employer.⁶⁹ Employers may then raise the business necessity defense, under which

57. *Id.*

58. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2018).

59. See Smith, *supra* note 22, at 207.

60. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

61. Smith, *supra* note 22, at 205; Connett, *supra* note 20, at 1026.

62. Connett, *supra* note 20, at 1019–27 (discussing methods by which disparate impact claimants have attempted to satisfy burden in first phase).

63. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 n.6 (1971).

64. *Id.* To be clear, the defendant’s graduation requirement ran afoul of Title VII because of its disparate impact on Black applicants *and* because the requirement lacked a “demonstrable relationship to successful performance of the jobs . . .” *Id.* at 430–32.

65. Smith, *supra* note 22, at 205. The historical treatment of disparate impact claims falls outside the scope of this paper. For a comprehensive analysis, see Connett, *supra* note 20.

66. *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 205 (2d Cir. 2020).

67. Connett, *supra* note 20, at 1030–31; Smith, *supra* note 22, at 206–07.

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

69. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

the employer must prove that its action—here, its hiring decision—was “consistent with business necessity.”⁷⁰ Title VII advises that the employer’s rejection of the applicant is consistent with business necessity if the reason for rejection is related to the job in question (e.g., the applicant’s armed robbery conviction poses a risk of theft if hired as a bank teller).⁷¹ In the absence of further instruction from Title VII, courts have accorded different levels of deference to the employer’s action or policy under this defense.⁷² For example, the Third Circuit determined that criminal background screening may be consistent with business necessity if the screening would accurately “distinguish between applicants that pose an unacceptable level of risk and those that do not.”⁷³ By contrast, employers challenged in the Eighth Circuit receive much less deference. In *Green v. Missouri Pacific Railroad*, the Eighth Circuit articulated the following factors “by which an employer may justify its use of criminal background screenings: (1) the nature of the underlying crime, (2) the time elapsed since conviction, (3) and the nature of the position sought.”⁷⁴ Under the *Green* factors, employers could lawfully reject very few job applicants based on their criminal background. Yet the *Green* factors have not gained traction in other circuits.⁷⁵ Increasingly, courts have embraced standards akin to the Third Circuit’s employer-deferential standard.⁷⁶ As a result, disparate impact claimants face not one, but two Goliaths once the burden shifts to the employer: the business necessity defense and the court’s deferential treatment of the same.⁷⁷

Disparate impact claimants today find themselves significantly disadvantaged at every turn. Evidentiary burdens and employer-favoring courts have thus foreclosed Title VII as an adequate vehicle for recourse in many contexts.⁷⁸ As for ex-offenders, these tendencies signal that Title VII’s protection has little practical effect on the discriminatory hiring practices observed by ex-offenders in their job search.

III. A LEGISLATIVE RESPONSE: BAN THE BOX LAWS

70. *Id.*

71. *Id.*

72. Rebecca Wolfe, *The Safest Port in the Storm: The Case for a Ban the Box Law in South Carolina*, 9 CHARLESTON L. REV. 503, 510 (2015); *El v. Se. Pa. Transp. Auth.* (“SEPTA”), 479 F.3d 232, 245 (3d Cir. 2007).

73. *El*, 479 F.3d at 245.

74. Wolfe, *supra* note 72, at 510; 523 F.2d 1290, 1297 (8th Cir. 1975). In 2012, the Equal Employment Opportunity Commission codified the *Green* factors in its guidelines on employers’ use of criminal background checks on job applicants. U.S. EQUAL EMP. OPPORTUNITY COMM’N, No. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012).

75. Smith, *supra* note 22, at 208.

76. *Id.*

77. Connett, *supra* note 20, at 1028.

78. Selmi, *supra* note 54, at 738–39.

A growing majority of U.S. states—thirty-six as of December 2020—have enacted ban the box legislation.⁷⁹ Twenty-three of these states joined the movement within the last five years.⁸⁰ All ban the box laws at the federal, state, and local level are uniform in purpose: eliminate barriers preventing ex-offenders from finding gainful employment. However, the means by which existing ban the box laws seek to achieve this objective vary greatly.

A. Varying Degrees of Protection: A Nationwide Overview of Fair Chance Laws

Over three-fourths of the American population today lives in a jurisdiction that has enacted a ban the box law.⁸¹ Yet the protections enjoyed by this sweeping majority are not uniform. First, most states that have enacted ban the box laws only extend those policies to public employers—not private employers.⁸² Moreover, states that do subject private employers to ban the box policies exclude certain employers from scrutiny based on their size. For example, California’s ban the box law only applies to private employers employing five or more people.⁸³ By contrast, Illinois’ ban the box law only applies to private employers with fifteen or more employees.⁸⁴ All private employers in Colorado—regardless of size—must comply with the state’s ban the box law.⁸⁵ As such, employer coverage fluctuates from state to state.

Ban the box laws also vary significantly in terms of timing: some states prohibit employers’ inquiry into an applicant’s criminal record until a conditional offer is made,⁸⁶ whereas others merely prohibit inquiry on the initial job application itself.⁸⁷ Between these two extremes, more variables exist. Some states delay inquiry until after a first interview,⁸⁸ after all interviews conclude,⁸⁹ or after the applicant

79. Avery & Lu, *supra* note 1, at 2.

80. Avery & Lu, *supra* note 1, at 2 (Arizona (2017), Georgia (2015), Indiana (2017), Kansas (2018), Kentucky (2017), Louisiana (2016), Maine (2019), Michigan (2018), Missouri (2016), Nevada (2017), New Hampshire (2020), New York (2015), North Dakota (2019), Ohio (2015), Oklahoma (2016), Oregon (2015), Pennsylvania (2017), Tennessee (2016), Utah (2017), Vermont (2016, 2015), Virginia (2020, 2015), Washington (2018), and Wisconsin (2016)).

81. Avery & Lu, *supra* note 1, at 3.

82. *Id.* Only fourteen of the thirty-six states that have enacted ban the box legislation cover both public and private employers: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

83. CAL. GOV’T CODE § 12952(a) (West 2019).

84. 820 ILL. COMP. STAT. 75/10 (2015).

85. 7 COLO. CODE REGS. § 1103-9-2 (2019); *see also* Avery & Lu, *supra* note 1, at 11.

86. HAW. REV. STAT. ANN. § 378-2.5(b) (West 2020).

87. CONN. GEN. STAT. ANN. § 31-51(i)(b) (West 2017).

88. DEL. CODE ANN. tit. 19, § 711(g)(1) (West 2016); LA. STAT. ANN. § 42:1701(A) (2016); MD. CODE ANN., STATE PERS. & PENS. § 2-203(c) (LexisNexis 2018).

89. Prince William County, Va., Res. No. 15-672 (Oct. 13, 2015).

becomes a finalist.⁹⁰ The earlier employers learn of an applicant's criminal history, the less likely the employer will engage in an independent assessment of the applicant's qualification.⁹¹ Therefore, ex-offenders derive more protection from ban the box policies that postpone inquiry until the final stages of the hiring process.

Other states and municipalities protect ex-offenders from disparate treatment by demanding transparency in hiring decisions. For example, an ordinance in Prince George's County, Maryland, requires employers to notify jobseekers when their applications are rejected based on their criminal record.⁹² The employer must promptly notify the applicant of its employment decision, provide the applicant with a copy of her criminal record report, and specify the information on which it based its decision.⁹³ Perhaps the strongest source of protection in fair chance laws is the applicant's ability to challenge a rejection. Some fair chance laws create formal or informal appeals processes by which an applicant can challenge a rejection.⁹⁴ For example, once a Californian employer has provided an applicant notice of intent to rescind an offer based on the applicant's criminal record, the applicant is given time to respond with evidence of inaccuracies in the criminal record, her rehabilitation, or mitigating circumstances.⁹⁵ Similarly, in Minnesota, employers cannot disqualify an applicant if she can provide "competent evidence of sufficient rehabilitation."⁹⁶ Sufficient rehabilitation can be demonstrated by proof that the applicant has been released from confinement for at least one year, that she has complied with parole or probation conditions, or that she has not been convicted of any crimes since her release.⁹⁷

Each of these variables fall somewhere on a spectrum of protection. Public-private employer coverage, delayed inquiry, notification requirements, and appeals processes all play a role in creating this spectrum. The most aggressive fair chance laws legislate these variables at their highest degree of protection. Hawaii's ban on the box law is illustrative.⁹⁸

In 1998, Hawaii became the first state to adopt a fair chance law.⁹⁹ Under Hawaii's ban the box law, public and private employers are prohibited from inquiring into an applicant's criminal history until after the employer has made a

90. COLO. REV. STAT. ANN. § 24-5-101(3)(b) (West 2021); N.M. STAT. ANN. § 28-2-3(A) (West 2021).

91. *See infra* note 123.

92. Prince George's County, Md., CODE OF ORDINANCES Subtit. 2, div. 12, Subdiv. 10, § 2-231.05(b) (2015).

93. *Id.* New Mexico's fair chance law also requires written notification of rejection if based in whole or in part on the applicant's criminal record. N.M. STAT. ANN. § 28-2-4(B) (West 2021).

94. *See* CAL. GOV'T CODE § 12952 (West 2019); MINN. STAT. ANN. § 364.03 (West 2013).

95. CAL. GOV'T CODE § 12952(c)(2)–(5) (West 2019).

96. MINN. STAT. ANN. § 364.03(3)(a) (West 2013).

97. *Id.* § 364.03(3)(a)(1)–(3).

98. *See* HAW. REV. STAT. ANN. § 378-2.5 (West 2020).

99. *Id.*

conditional offer.¹⁰⁰ Even then, the employer's hands are somewhat tied: the offer may only be withdrawn if the conviction bears a "rational relationship" to the duties and responsibilities associated with the offered position.¹⁰¹ Furthermore, Hawaiian employers are restricted in the type of convictions they may consider.¹⁰² Employers cannot consider felony convictions that occurred more than seven years ago, nor misdemeanor convictions that occurred more than five years ago.¹⁰³ Finally, individuals may challenge hiring decisions that run afoul of Hawaii's ban the box law in court.¹⁰⁴ If successful, courts may grant such aggrieved individuals backpay from the employer or other equitable relief, such as employment by the defendant.¹⁰⁵

The spectrum of fair chance laws is expanding rapidly. As more states enact ban the box laws, this spectrum evolves to create more dimensions of protection for ex-offenders. And if Hawaii occupies one end of the spectrum, signifying aggressive protection of a job applicant's criminal history, Idaho occupies the other: ex-offenders in Idaho receive no such protection under state law.

B. Idaho's Failed Fair Chance Bills: A Discussion of Senate Bills 1307 & 1318

Considering the wide range of protection conferred by other jurisdictions' ban the box laws, it is worthwhile to compare them against the fair chance bills previously introduced to the Idaho Legislature. The Idaho Legislature has twice considered ban the box bills: once in 2018, and again in 2020.¹⁰⁶ Despite tremendous efforts to legislate these bills, neither bill survived Idaho's legislative session.

Idaho Senator Cherie Buckner-Webb (D-19) sponsored the first fair chance bill in 2018.¹⁰⁷ Compared to the range of ban the box variables discussed in Part III(A), Senate Bill 1307 ("Bill 1307") contained highly protective measures akin to Hawaii's ban the box law.¹⁰⁸ Bill 1307 prohibited employers from conducting criminal

100. *Id.*

101. *Id.* § 378-2.5(b). Other fair chance laws employ similar requirements whereupon employers may rescind an offer or otherwise reject an application. CAL. GOV'T CODE § 12952(c)(1)(A) (West 2013) (if "direct and adverse relationship with the specific duties of the job" exists); COLO. REV. STAT. ANN. § 24-5-101(4)(b) (West 2021) (if there is a "direct relationship" between conviction and job); MINN. STAT. ANN. § 364.03(1) (West 2013) (if conviction "directly relates" to position); NEV. REV. STAT. ANN. §§ 284.281, 284.283 (West 2018) (if conviction "directly relates" to job responsibilities); 18 PA. STAT. AND CONS. STAT. ANN. § 9125 (West 1982) (limited to the "extent to which they relate to the applicant's suitability" for the job); VA. EXEC. ORDER NO. 41 (2015) (if conviction is "demonstrably job-related").

102. HAW. REV. STAT. ANN. § 378-2.5(c) (West 2020).

103. *Id.*

104. *Id.* § 378-4 (West 1989).

105. *Id.* § 378-5(a)-(b).

106. *See* S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020); S. 1307, 64th Leg., 2d Reg. Sess. (Idaho 2018).

107. *See* S. 1307, 64th Leg., 2d Reg. Sess. (Idaho 2018).

108. *See id.*

background checks on job applicants until a conditional offer had been made.¹⁰⁹ Even then, employers could not reject an applicant based on her criminal record without performing an assessment under which three factors—the *Green* factors—must be considered: “(i) the nature and gravity of the offense and conduct; (ii) the time that has passed since the offense or conduct and the completion of the sentence; and (iii) the nature of the job held or sought and its relevance to the conviction.”¹¹⁰ Further, if an employer were to reject an applicant based on her record, the employer was bound under Bill 1307 to provide the applicant with notice and reasoning for its rejection.¹¹¹ On February 12, 2018, Bill 1307 was introduced in the Senate.¹¹² The bill died on its second day in committee.¹¹³

The 2020 bill fared much better. Following the 2018 legislative session, Senator Buckner-Webb worked closely with the American Civil Liberties Union to revise Bill 1307 for proposal in 2020.¹¹⁴ Senate Bill 1318, the 2020 bill, embodied a less aggressive approach to fair chance policies compared to Bill 1307. As proposed, Senate Bill 1318 (“Bill 1318”) would have amended Title 44 of the Idaho Code by adding a new chapter 28.¹¹⁵ The purpose of Bill 1318 was threefold: “(1) Encourage the full participation of motivated and qualified persons with criminal histories in our state’s workforce; (2) Reduce recidivism; and (3) Assure public safety through furthering economic participation.”¹¹⁶

As first proposed, Bill 1318 reflected a moderately aggressive approach to ensure fair chance employment. First, both public and private employers were subjected to fair chance policies under Bill 1318.¹¹⁷ Second, Bill 1318 prohibited employers from asking for criminal history until the applicant had been notified that she had been selected for an interview.¹¹⁸ In the alternative, if no interview is required, employers could not inquire into the applicant’s criminal history until a conditional job offer was made.¹¹⁹ However, beyond that, the bill contained no further restrictions: employers could base their rejection in whole or in part on the applicant’s criminal history, and the employer was not required to provide formal notification if the applicant was rejected based on her record.¹²⁰ Furthermore, Bill

109. *Id.*

110. *Id.* at 2.

111. *Id.*

112. *Id.*

113. See S. 1307, 64th Leg., 2d Reg. Sess. (Idaho 2018).

114. *Sen. Buckner-Webb’s Fair Chance Employment Bill Printed*, KBOI-AM (Feb. 10, 2020), <https://www.kboi.com/2020/02/10/sen-buckner-webbs-fair-chance-employment-bill-printed/>.

115. S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See S. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020).

1318 exempted law enforcement agencies, criminal justice system employers, and employers seeking unpaid volunteers.¹²¹

Bill 1318 passed the Senate 21-13-1.¹²² Thereafter, legislators in the House Judiciary, Rules & Administration Committee expressed reservations about the burden Bill 1318 would impose on small business owners.¹²³ Two amendments were proposed.¹²⁴ The first amendment sought to exclude 501(c)(3) corporations and any employer seeking to fill a position dedicated to the keeping or storage of a safe.¹²⁵ The second proposed amendment, amongst other things, preempted other nondiscrimination laws, regulations, and ordinances.¹²⁶ Co-sponsors of the bill opposed the preemptive nature of the second amendment as threatening otherwise sound anti-discrimination law.¹²⁷ Illustratively, Representative Ilana Rubel (D-18) dubbed the amendment a “poison pill” that would “basically make [Bill 1318] worse than nothing.”¹²⁸

After the amendments were offered, Bill 1318 failed to garner a final vote on the floor.¹²⁹ Idaho’s 2020 legislative session thus concluded without enactment of a ban the box bill.

IV. BAN THE BOX LAWS AS A SOLUTION FOR RECIDIVISM

An estimated eighty-five percent of prisoners who reoffend are unemployed at the time of their rearrest.¹³⁰ As illustrated in Part III(A), many state and local jurisdictions have adopted ban the box laws for the purpose of reducing this figure. States that have yet to take this leap, including Idaho, may harbor reservations about this movement. Common questions amongst lawmakers and constituents alike are whether employment *should* be made more accessible to criminals and whether fair chance laws actually achieve their objective in increasing employment rates amongst ex-offenders.

121. *Id.*

122. S. Judiciary & Rules Comm., Bill Status of S.B. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020) <https://legislature.idaho.gov/sessioninfo/2020/legislation/S1318/>.

123. H. Judiciary, Rule & Admin. Comm. Minutes, 65th Leg., 2d Reg. Sess., at 4 (Idaho 2020).

124. H.R. Amend. to S.B. No. 1318: Amend. to Sec. 1, 65th Leg. 2d Reg. Sess. (Idaho 2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1318A1.pdf>; H.R. Amend. to S.B. No. 1318: Amend. to the Bill, 65th Leg., 2d Reg. Sess. (Idaho 2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1318A3.pdf>.

125. H.R. Amend. to S.B. No. 1318: Amend. to Sec. 1, 65th Leg., 2d Reg. Sess. (Idaho 2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1318A1.pdf>.

126. H.R. Amend. to S.B. No. 1318: Amend. to the Bill, 65th Leg., 2d Reg. Sess., (Idaho 2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1318A3.pdf>.

127. Video of Idaho Legislative Session 2020 Day 73, House Chambers, at 02:58:00 (Mar. 18, 2020), <https://insession.idaho.gov/HIS/2020/House/Chambers/HouseChambers03-18-2020.mp4>.

128. *Id.* at 02:59:00.

129. See S. Judiciary & Rules Comm., Bill Status of S.B. 1318, 65th Leg., 2d Reg. Sess. (Idaho 2020) <https://legislature.idaho.gov/sessioninfo/2020/legislation/S1318/>.

130. NICIC, *supra* note 41.

A. Rationale for Ban the Box Laws

At its core, the ban the box movement seeks to remove the barriers that prevent ex-offenders' reentry into society. As explained in Part II(A), unemployment is one of many lasting consequences of a criminal conviction. Further, employment status strongly predicts whether an ex-offender will reoffend.¹³¹ The idea behind banning the box is that employers can glean a more accurate representation of an applicant's qualification for a position before learning of his criminal record.

At a minimum, banning the box prevents employers from categorically rejecting all applications with a checkmark under criminal history. More profoundly, momentum behind fair chance laws is partially based on "their potential to address racial disparities in the justice system and labor market."¹³² Some commentators have gone so far as to suggest that employing criminals actually *improves* public safety.¹³³ Under this theory, commentators reason that stable employment reduces the likelihood that individuals will reoffend, which in turn lowers crime rates and increases public safety.¹³⁴

But the question must be asked: *Should* employers hire ex-offenders? Is it safe to place trust in individuals who have made frequent contact with the criminal justice system? A common theme behind blanket rejections is safety: employers worry that hiring an ex-offender may risk the safety of their employees, clients, and valuables in the workplace.¹³⁵ However, this fear is largely unfounded. Research indicates that ex-offenders make for reliable and competent employees.¹³⁶ One study following ex-offenders in post-release employment found that 80% of the employed participants reported that their employers knew of their criminal history, but nonetheless were satisfied with their work.¹³⁷ Another study performed on military enlistees with criminal records observed consistent performance levels between ex-offender enlistees and non-offender enlistees.¹³⁸ Perhaps more surprising was the researchers' second discovery: enlistees with felony-level convictions were promoted *more quickly* and to *higher ranks* than non-offender enlistees.¹³⁹

131. See Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1082 n.10 (2019) (listing studies that conclude unemployment is strongly linked with recidivism).

132. Stacy & Cohen, *supra* note 42, at 10.

133. Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

134. *Id.* at 3.

135. Holzer et al., *supra* note 25, at 1.

136. See Christy Visher et al., *Employment after Prison: A Longitudinal Study of Releasees in Three States*, WASHINGTON, D.C.: URB. INST. (2008).

137. *Id.*

138. Lundquist, et al., *supra* note 36, at 1050.

139. Lundquist, et al., *supra* note 36, at 1052.

Employers also harbor concerns about fair chance laws' administrative burden. By delaying inspection of an applicant's criminal history until an interview, some employers fear that ban the box laws waste valuable time and administrative expense if they discover a conflict with the applicant's criminal history.¹⁴⁰ A Minnesota study discounts this fear.¹⁴¹ There, the study surveyed human resource professionals and found that ban the box had little to no effect on applicant screening time or hiring costs.¹⁴²

B. Do Fair Chance Laws Work?

Given its recent surge in popularity, many ban the box laws are relatively new—and, as a result, largely untested. Increasingly in the past five years, researchers have begun to assess the efficacy of fair chance laws.¹⁴³

At the very least, fair chance laws have provided positive results in one important stage of the hiring process: callbacks. Studies have invariably concluded that fair chance laws have increased callback rates for ex-offenders.¹⁴⁴ A “callback” generally denotes an employer's request for an interview, information, or further contact in response to a job application.¹⁴⁵ The “callback stage” is particularly important in measuring ban the box efficacy because it is susceptible to

140. For instance, if the applicant's criminal record presents a risk to the position sought, thereby giving rise to a business necessity defense.

141. Laura S. Bogardus, *Impact of Ban the Box on Hiring Processes*, HEALTH EDUC. HUM. DEV. AWARDS (2015), https://tigerprints.clemson.edu/hehd_awards/10/.

142. *Id.*

143. For studies concluding overall positive impacts, see Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 AM. J. CRIM. JUST. 336 (2015); COLENN BERRACASA ET AL., THE IMPACT OF “BAN THE BOX” IN THE DISTRICT OF COLUMBIA (2016), <https://www.congress.gov/116/meeting/house/109189/documents/HMKP-116-GO00-20190326-SD011.pdf>; Terry-Ann L. Craigie, *Ban the Box, Convictions, and Public Employment* (Sept. 22, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906893; Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling* (Harvard Kennedy Sch., Working Paper No. 16-015, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795; Flake, *supra* note 131. For studies concluding overall negative impacts, see Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2017), <https://doi.org/10.1093/qje/qjx028>; 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* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469.pdf>; Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010-2012 Massachusetts CORI Reform* (Fed. Rsr. Bank of Bos., Working Paper No. 16-30, 2017), <https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/wp1630.pdf>.

144. Agan & Starr *supra* note 143, at 16; Flake, *supra* note 131, at 1106.

145. See, e.g., Agan & Starr *supra* note 143, at 15; Flake, *supra* note 131, at 1103.

discrimination.¹⁴⁶ As described in Part II(A), a criminal record decreases the likelihood of receiving a callback by 50%.¹⁴⁷ In response to these discouraging figures, a field experiment was conducted in 2019 to assess whether ban the box laws improved these callback rates.¹⁴⁸ The experiment compared callback rates for ex-offender-applicants between two cities: one with ban the box legislation (Chicago) and one without it (Dallas).¹⁴⁹ The researcher located entry-level food-service job listings, a common target for ex-offenders, and submitted nearly identical application materials for fictitious candidates supposedly belonging to three different races: Black, Latino, and white.¹⁵⁰ His results were promising. Applicants in the ban-the-box city, Chicago, were 27% more likely to receive a callback than in Dallas, where applicants were required to disclose their criminal record on initial applications.¹⁵¹ Further, all three participating races had higher callback rates in Chicago, particularly for Black applicants: Black applicants in the Chicago study received 7.1% more callbacks than their counterparts in the Dallas study.¹⁵²

Yet the ultimate goal of ban the box is to *employ* more ex-offenders, not just ensure they receive an initial callback. Specific case studies have shown increased employment rates in ex-offenders since passing ban the box legislation. In Washington, D.C., for example, the number of ex-offender hires increased by 33% after the District's ban the box law took effect.¹⁵³ In Durham County, North Carolina, the increase in employment rates was sevenfold.¹⁵⁴ Another study observed as much as a 14% increase in employment rates amongst residents of high-crime areas after enacting ban the box.¹⁵⁵ At least one ban the box jurisdiction has measured the efficacy of ban the box laws by tracking recidivism rates.¹⁵⁶ According to Hawaii's statewide recidivism rate, Hawaii's aggressive take on ban the box

146. Stacy & Cohen, *supra* note 42, at 11; see Marc Bendick, Lauren E. Brown & Kennington Wall, *No Foot in the Door: An Experimental Study of Employment Discrimination*, 10(4) J. AGING SOC. POL. 5 (1999).

147. Pager et al., *supra* note 4, at 199.

148. See Flake, *supra* note 131, at 1086–87.

149. Flake, *supra* note 131, at 1096–97.

150. Flake, *supra* note 131, at 1099–1101.

151. Flake, *supra* note 131, at 1107.

152. Flake, *supra* note 131, at 1106.

153. BERRACASA ET AL., *supra* note 143, at 16.

154. Daryl V. Atkinson & Kathleen Lockwood, *The Benefits of Ban the Box: A Case Study of Durham, N.C.*, S. COAL. FOR SOC. JUST. (2014), <https://docs.house.gov/meetings/GO/GO00/20190326/109189/HMKP-116-GO00-20190326-SD013.pdf>.

155. SHOAG & VEUGER, *supra* note 143, at 18.

156. D'Alessio et al., *supra* note 143, at 343, 347.

performed well.¹⁵⁷ A 2014 study concluded that recidivism rates dropped by 57% since Hawaii enacted its ban the box law in 1998.¹⁵⁸

While the thrust of ban the box is to increase ex-offenders' employment rates, some ban the box jurisdictions have observed economic fortune attendant to rising employment rates.¹⁵⁹ Prison operation expenditures place a grave economic impact on states with high incarceration rates.¹⁶⁰ Indeed, Idaho's expenditures on corrections totaled \$330 million in 2019.¹⁶¹ A Philadelphia study concluded that hiring just 100 ex-offenders could increase income tax contributions in Philadelphia by \$1.9 million, increase sales tax revenue by \$770,000, and save the city \$2 million each year in criminal justice costs.¹⁶²

However, two studies posit that fair chance laws harm, not help, employment prospects for Black and Hispanic ex-offenders.¹⁶³ These studies have spawned a "small but growing chorus of critics" who seek to repeal ban the box laws.¹⁶⁴ The first study, performed in New York City and New Jersey, observed an overall increase in callbacks made to ex-offenders but a larger disparity between callbacks made to white and Black applicants.¹⁶⁵ Researchers in the second study concluded that banning the box disadvantages young, low-skilled Black and Hispanic men, reducing employment outcomes by 5.1% and 2.9% respectively.¹⁶⁶ Both studies suggest that ban the box laws uncover employers' implicit bias.¹⁶⁷ Specifically, the studies posit that employers in ban the box jurisdictions are more inclined to blanket reject all applicants whose other qualities on the application—be it their name or zip code—indicate that they are Black or Hispanic.¹⁶⁸ Employers assume, the researchers suggest, that *all* Black and Hispanic individuals have a criminal record purely based on their race, and thus reject applicants they perceive as Black or Hispanic since the employer cannot verify whether their record is clean under the ban the box law.¹⁶⁹

157. D'Alessio et al., *supra* note 143, at 343, 347.

158. D'Alessio et al., *supra* note 143, at 347.

159. Atkinson & Lockwood, *supra* note 154.

160. Aaron F. Nadich, Comment, *Ban the Box: An Employer's Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 773 (2014).

161. NAT'L ASS'N OF STATE BUDGET OFFICERS, 2020 STATE EXPENDITURE REPORT 62 tbl.35 (2020).

162. *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia*, ECON. LEAGUE OF GREATER PHILA. (Sept. 2011), <https://economyleague.org/uploads/files/7211704136107834-economic-benefits-of-employing-formerly-incarcerated-executive-summary.pdf>.

163. Agan & Starr, *supra* note 143; Doleac & Hansen, *supra* note 143.

164. Flake, *supra* note 128, at 1085.

165. Agan & Starr, *supra* note 143, at 3.

166. Doleac & Hansen, *supra* note 143, at 17.

167. Agan & Starr, *supra* note 143, at 37; Doleac & Hansen, *supra* note 143, at 4, 17.

168. Agan & Starr, *supra* note 143, at 37; *see* Doleac & Hansen, *supra* note 143, at 4, 17.

169. *See* Doleac & Hansen, *supra* note 143, at 17.

These studies have received heavy criticism.¹⁷⁰ One concern is that the geographic scope of one of these studies captured statistics from areas not subject to any ban the box laws.¹⁷¹ Others argue that certain policies or characteristics specific to the test cities temper the effect of their ban the box laws, and thus their results do not bear on how other metropolitan areas will respond to ban the box legislation.¹⁷² Regardless of their accuracy, however, these critical studies bring to light a more sinister truth that ban the box legislation cannot cure. It is unclear whether employers in these studies consciously or subconsciously rejected minority applicants. In any event, ridding the nation of its deeply rooted implicit bias falls outside of ban the box legislation's ambit. As such, the results of these two studies should not be overstated.

A majority of U.S. states today have enacted ban the box legislation.¹⁷³ Lawmakers who now remain in the minority may question whether these laws pose safety risks to their community or whether they actually "work." The few comprehensive studies that have undertaken the latter question have arguably produced more debate than results. Although more research is needed to fully understand the effects of ban the box legislation, the results of the existing studies resoundingly reveal that ban the box laws do indeed improve employment prospects for ex-offenders.

V. IDAHO EX-OFFENDERS NEED A FAIR CHANCE

A. Idaho's Mass Incarceration Problem

In 2019, the nation's imprisonment rate fell for the eleventh consecutive year, hitting its lowest point since 1995.¹⁷⁴ Idaho hit its own milestone that year in imprisonment rates, a feat that passed without celebration: in 2019, Idaho's incarceration rate increased for its fourth consecutive year.¹⁷⁵

170. Stacy & Cohen, *supra* note 42, at 13–14 (summarizing criticisms of the Agan & Starr and Doleac & Hansen studies).

171. Stacy & Cohen, *supra* note 42, at 14.

172. Stacy & Cohen, *supra* note 42, at 13–14.

173. See AVERY & LU, *supra* note 1 and accompanying text.

174. E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2019 1 (2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf> [hereinafter CARSON 2019].

175. E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 4 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>; JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2017 4 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [hereinafter Bronson & Carson 2017]; E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2018 4 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf>; CARSON 2019, *supra* note 174, at 4 (showing an 8.9% increase in Idaho prison population between 2018 and 2019).

Idaho is no stranger to the nationwide mass incarceration crisis.¹⁷⁶ Despite having one of the lowest crime rates in the country, Idaho's imprisonment rate is tremendously high. Between 1980 and 2017, Idaho's prison population grew by 849%.¹⁷⁷ And Idaho's growing popularity¹⁷⁸ is not to blame; according to the Idaho Office of Performance Evaluations, Idaho's rising incarceration rates "dramatically outpace [] the state's population growth."¹⁷⁹ What's to blame, then?

Largely, recidivism. A substantial majority of Idaho prisoners are reincarcerated after unsuccessful reentry into society.¹⁸⁰ Many Idaho prison returns are borne out of community supervision violations.¹⁸¹ Such violations occur when the releasee either commits a new crime while on parole or probation, or when the releasee violates a technical term of her supervision.¹⁸² Overworked and understaffed parole and probation offices are, naturally, slow to respond to parole and probation violations.¹⁸³ Without a well-oiled supervisory system in place, violators are sent back to prison to await assessment from their parole or probation officers. These returnees make up 62% of Idaho's prison population today.¹⁸⁴

176. See Shannon Moudy, *Recidivism and the Revolving Door of the Idaho Judicial System*, KLEWTV (Jan. 4, 2018), <https://klewTV.com/news/local/recidivism-and-the-revolving-door-of-the-idaho-judicial-system>; Marty Trillhaase, *Idaho, the Prison State, May Reform its Ways*, LEWISTON TRIB. (Nov. 10, 2013), https://media.spokesman.com/documents/2013/11/3133_001.pdf.

177. BLUEPRINT FOR SMART JUSTICE: IDAHO, AM. CIV. LIBERTIES UNION 7 (2019), https://www.acluidaho.org/sites/default/files/field_documents/sj-blueprint-id.pdf [hereinafter BLUEPRINT FOR IDAHO].

178. Samantha Sharf, *Full List: America's Fastest-Growing Cities 2018*, FORBES (Feb. 28, 2018, 3:53 PM), <https://www.forbes.com/sites/samanthasharf/2018/02/28/full-list-americas-fastest-growing-cities-2018/?sh=607fd4ee7feb>. Idaho's capital, Boise, was named the fastest-growing city in the country in 2018. *Id.* Boise, Idaho was ranked the best place to live in 2019 and the best place in the country to buy a home. Winona Dimeo-Ediger, *2019 Top 100 Best Places to Live*, LIVABILITY.COM, <https://livability.com/best-places/top-100-best-places-to-live/2019>; Adam McCann, *Best Real-Estate Markets*, WALLETHUB (Aug. 24, 2020), <https://wallethub.com/edu/best-real-estate-markets/14889..>

179. Rebecca Boone, *Report: Idaho Could Save Money by Building a State Prison*, THE ASSOCIATED PRESS (Jan. 29, 2020), <https://apnews.com/article/3c9ce7281d834c9cf5d98081bec50d03>. Lance McCleve of Idaho's Office of Performance Evaluations explained to members of the state legislature's Joint Legislative Oversight Committee that Idaho's general population had increased six percent between 2016 and 2020, whereas its prison population grew approximately eighteen percent in the same time period. *Id.*

180. CARSON 2019, *supra* note 174, at 13. Post-release community supervision violations accounted for 62% of Idaho's prison admissions in 2019, compared to the nationwide 29%. CARSON 2019, *supra* note 174, at 13.

181. CARSON 2019, *supra* note 174, at 13.

182. CARSON 2019, *supra* note 174, at 13–14 tbl.8, n.c.

183. *Idaho's Justice Reinvestment Approach*, COUNCIL STATE GOV'T. JUST. CTR. 2 (Sept. 2014), <https://csgjusticecenter.org/wp-content/uploads/2020/01/Idaho-JR-Approach.pdf> [hereinafter CSG JUSTICE CENTER].

184. CARSON 2019, *supra* note 174, at 13.

Idaho lawmakers finally acknowledged the state's recidivism problem in 2014. In collaboration with The Council of State Governments ("CSG"), lawmakers promised to renovate the state's justice system.¹⁸⁵ The CSG conducted a review of Idaho's justice system and concluded that Idaho's existing system was not reducing recidivism.¹⁸⁶ Its research indicated that resources previously funding community-based programs for ex-offenders had been reallocated to prison-based treatment, which left newly released prisoners with little guidance after release.¹⁸⁷ Idaho lawmakers were eager to respond. In spring of 2014, the Idaho Legislature passed the Justice Reinvestment Initiative ("JRI").¹⁸⁸ The purpose of the JRI was to "reduce correctional spending and reinvest any potential cost avoidance/savings into strategies designed to reduce recidivism."¹⁸⁹ Policymakers set forth three objectives through which Idaho expected to achieve a 15% decrease in recidivism: (1) strengthen supervision practices and programs, (2) tailor sanctions and parole decision making, and (3) assess and track recidivism-reduction strategies.¹⁹⁰

The justice reinvestment plan, however, was a statistical failure. At the time that CSG conducted its review in 2014, Idaho prisons were projected to reach 9,408 population—a 16% increase—by 2019 if the legislature *did not* enact the JRI.¹⁹¹ Strikingly, Idaho's prison population reached 9,437 by December 2019 even after enacting the JRI in 2014.¹⁹² Save an initial decline in incarceration rates post-enactment, Idaho's imprisonment rate has grown each year since the JRI has gone into effect.¹⁹³ Prison facilities surged from 100% capacity in 2017 to 110% capacity in 2019.¹⁹⁴ Minority imprisonment rates have also climbed: despite constituting less than one percent of Idaho's general population in 2019, Black Idahoans made up three percent of Idaho's prison population.¹⁹⁵ In addition, the Black inmate

185. CSG JUSTICE CENTER, *supra* note 183, at 2.

186. CSG JUSTICE CENTER, *supra* note 183, at 2.

187. CSG JUSTICE CENTER, *supra* note 183, at 2.

188. S. 1357, 62d Leg., 2d Reg. Sess. (Idaho 2014).

189. IDAHO DEP'T OF CORR., JUSTICE REINVESTMENT IMPACT IN IDAHO: REPORT TO THE LEGISLATURE (Feb. 1, 2019), https://www.idoc.idaho.gov/content/document/2019_jri_impact_report_final [hereinafter "JRI IMPACT IN IDAHO"].

190. CSG JUSTICE CENTER, *supra* note 183, at 2–3. Increasing employment opportunities was not a focal point of the bill. Instead, the bill's strategy to reduce recidivism focused in part on developing the role of parole and probation officers. "The state increased training and funding for case officers, created a Limited Supervision Unit for people who were deemed likely to succeed with less supervision, and required reviews every 6 months to determine if someone should receive an early discharge." BLUEPRINT FOR IDAHO, *supra* note 177, at 12.

191. CSG JUSTICE CENTER, *supra* note 183, at 3.

192. CARSON 2019, *supra* note 174, at 4.

193. BLUEPRINT FOR IDAHO, *supra* note 177, at 5.

194. BRONSON & CARSON 2017, *supra* note 175, at 25; CARSON 2019, *supra* note 174, at 24.

195. U.S. CENSUS BUREAU, SC–EST2019–SR11H–16, POPULATION DIVISION, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR IDAHO: APRIL 1, 2010 TO JULY 1, 2019 (2020) [hereinafter U.S. CENSUS BUREAU Report]; CARSON 2019, *supra* note 174, at 36.

population increased by 13.77% between 2018 and 2019.¹⁹⁶ White Idahoans, on the other hand, were underrepresented in Idaho prison populations: whereas 93% of Idaho's general population in 2019 was white, only 74% of its prisoners were white.¹⁹⁷ Finally, the failure of the JRI affected those outside of prison's walls: taxpayers. In 2019, Idaho spent \$283 million of its general funding on corrections, the same amount the state spent in elementary and secondary education that year.¹⁹⁸ Accordingly, the JRI has come under much scrutiny by lawmakers and law enforcers.¹⁹⁹ While some defend the failure for lack of funding and implementation,²⁰⁰ others call for a complete repeal of the legislation.²⁰¹ One certainty remains: Idaho's mass incarceration problem is persistent and in desperate need of attention.

B. Current Protective Measures in Place for Idaho Ex-Offenders

Ninety-five percent of Idahoans serving prison sentences will eventually reenter society.²⁰² Those who are afforded a second chance may attempt to establish stability through meaningful employment.²⁰³ With this in mind, ex-offenders reentering society may wonder what, if any, protective measures Idaho law affords ex-offenders during their job search.

196. IDAHO DEP'T OF CORR., POPULATION REPORT FY 2019, 33 (2019), https://www.idoc.idaho.gov/content/document/fy_2019_population_full_report [hereinafter IDOC REPORT].

197. U.S. CENSUS BUREAU REPORT, *supra* note 195; IDOC REPORT, *supra* note 196, at 33.

198. NAT'L ASS'N STATE BUDGET OFFICERS, 2020 STATE EXPENDITURE REPORT 62, 23 (2020).

199. See Ruth Brown, *Newly Released Prisoners Put Strain on Counties; Inmates Released on Parole Cause Issues on County Level*, IDAHO PRESS (Jan. 14, 2017), https://www.idahopress.com/news/local/newly-released-prisoners-put-strain-on-counties/article_dc3638aa-57a1-5543-bb26-e0f2e487fc01.html (quoting a Canyon County sheriff as labeling the JRI a "failure across the board"); see also Cory Stambaugh & Joe Andreoli, *Opinion, Idaho's Early release of 'Nonviolent' Offenders*, IDAHO STATESMAN (Sept. 11, 2018), <https://www.idahostatesman.com/opinion/article218210750.html> (purporting that "JRI is responsible for 45 percent of the officer-involved fatal incidents in Ada County since 2016").

200. Betsy Z. Russell, *Lawmakers, Law Enforcements Spar over Justice Reinvestment Impacts*, IDAHO PRESS (Sept. 17, 2018), https://www.idahopress.com/news/local/lawmakers-law-enforcement-spar-over-justice-reinvestment-impacts/article_7d5609c0-e99c-53a5-a35b-1be879ec59b6.html (State senator Jim Rice said that Idaho hasn't yet felt the effects of the JRI because two key projects—hiring enough parole officer and increasing the amount of community treatment available post-release—have not yet been achieved).

201. Stambaugh & Andreoli, *supra* note 199 (describing the JRI as "an ill-conceived and poorly administered program").

202. *Support Fair Chance Employment Legislation*, ACLU OF IDAHO, https://www.acluidaho.org/sites/default/files/field_documents/fce_one-pager_2020.pdf (last visited Sept. 24, 2021).

203. *Id.*

If an Idaho employer chooses to purchase a report of an applicant's criminal history from a third-party provider, it must comply with the Fair Credit Reporting Act ("FCRA"). The FCRA, enacted in 1970, seeks to ensure accuracy, fairness, and privacy of consumer information maintained by consumer reporting agencies.²⁰⁴ The FCRA broadly defines a "consumer reporting agency" as any entity that, "for monetary fees, . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or *other information on consumers* for the purpose of furnishing consumer reports to third parties."²⁰⁵ This includes not only credit bureaus, such as Equifax and Experian, but also commercial entities offering criminal background reports.²⁰⁶ Therefore, employers who request criminal background reports on job applicants through a consumer reporting agency must be mindful of the FCRA.²⁰⁷

Idaho employers purchasing criminal background reports from consumer reporting agencies must comply with certain requirements designed to protect the applicant.²⁰⁸ First, employers must notify applicants of their intent to run a background check, obtain the applicant's consent of the same, and after receiving the report, provide the applicant with a copy of the same.²⁰⁹ Most notably, employers who reject an applicant based in whole or in part on information included in her criminal background report must notify her of the same and provide her with a copy of the report.²¹⁰

However, Idaho employers need not consult a consumer reporting agency to obtain an applicant's rap sheet. Detailed Idaho criminal records are accessible to

204. 15 U.S.C. § 1681(a)(4) (2010).

205. 15 U.S.C. § 1681a(f) (2010) (emphasis added).

206. *See id.* § 1681a(d)(1) (defining "consumer report"). A criminal background check qualifies as a "consumer report" under the FCRA because it is a written communication that bears on a consumer's character/general reputation/personal characteristics, and it is prepared for a permissible purpose: employment. *Id.*; *see also id.* § 1681b (listing permissible purposes of consumer reports); BJ Ard, *The Limits of Industry-Specific Privacy Law*, 51 IDAHO L. REV. 607, 616 (2015) (explaining that any person supplying reports for the purpose of evaluating an individual's employability must be "mindful of the FCRA"). A few federal circuits—including the Ninth Circuit—have been reluctant to acknowledge the breadth of this definition. Chi Chi Wu, *Data Gatherers Evading the FCRA May Find Themselves Still in Hot Water*, NAT'L CONSUMER L. CTR. (June 14, 2019), <https://library.nclc.org/data-gatherers-evading-fcra-may-find-themselves-still-hot-water>; *see also* Zabriskie v. Fed. Nat'l Mortgage Assoc., 912 F.3d 1192, 1199 (9th Cir. 2019).

207. Ard, *supra* note 206, at 616.

208. 15 U.S.C. §§ 1681–81t (2010).

209. *Id.*

210. *Id.* § 1681m.

anyone who can pass a *CAPTCHA*²¹¹ on the iCourt Portal.²¹² The iCourt Portal is an online judicial record database that publishes all Idaho public court records.²¹³ Members of the public can search for any public court records within seconds by entering a record number or an individual's first and last name into iCourt's "Smart Search" field.²¹⁴ The database is updated hourly, and searchers can find records dating back to 1995.²¹⁵ Importantly, it appears that the iCourt Portal does not qualify as a consumer reporting agency under the FCRA.²¹⁶ First, the Portal does not charge a monetary fee for its services.²¹⁷ The FCRA applies only to agencies that charge monetary fees in exchange for providing consumer reports.²¹⁸ The iCourt Portal's "Smart Search" function is free to the public.²¹⁹ Second, the Portal involves no "third party,"²²⁰ as required by the FCRA's language.²²¹ Whereas a FCRA acts as a messenger between the federal or state agency and the consumer, iCourt does away with the messenger by directly providing consumers with public court records.²²² Therefore, searches performed by employers within the iCourt Portal's system apparently do not fall within the FCRA's ambit. Idaho employers armed with an applicant's resume can therefore search for an applicant's criminal record by simply entering his first and last name in iCourt Portal's Smart Search bar.²²³ As such, Idaho employers can circumvent the FCRA's notification and consent requirements with ease by conducting their own search for an applicant's criminal record in the iCourt Portal.

If an Idaho employer discriminates against an applicant during the hiring process, the applicant may seek remedy in Idaho's courts. To do so, she must first file an administrative complaint with the Idaho Human Rights Commission

211. *Captcha*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/captcha> (last visited Sept. 16, 2021) (A *CAPTCHA* is "a test to prevent spamming software from accessing a website by requiring visitors to the site to solve a simple puzzle (typically by reading and transcribing a series of numbers or letters from a distorted image) in order to gain access.").

212. *See Smart Search*, ICOURT, <https://mycourts.idaho.gov/odysseyportal/Home/Dashboard/29#> (last visited Mar. 2, 2021).

213. *iCourt Portal Overview*, ICOURT, <https://icourt.idaho.gov/portaloverview> (last visited Mar. 2, 2021). The iCourt Portal replaced the Idaho Supreme Court Data Repository, Idaho's previous online judicial record system. *Id.* Starting in 2015, the state transitioned county by county to the modernized iCourt Portal, eventually completing the transition in 2018. *Id.*

214. *See Smart Search*, *supra* note 212.

215. *Public Record Search FAQs*, ICOURT, <https://icourt.idaho.gov/public> (last visited Mar. 2, 2021).

216. *See* 15 U.S.C. §§ 1681–81t (2010).

217. *See Public Record Search FAQs*, *supra* note 215.

218. 15 U.S.C. § 1681a(f) (2010).

219. *See Public Record Search FAQs*, *supra* note 215; *Smart Search*, *supra* note 212. Note that individuals must pay additional fees if they wish to view certain records. *Id.*

220. *See Public Record Search FAQs*, *supra* note 215.

221. 15 U.S.C. § 1681a(f) (2010).

222. *Compare* 15 U.S.C. §§ 1681–81t (2010), *with Public Record Search FAQs*, *supra* note 215.

223. *See Smart Search*, *supra* note 212.

("IHRC").²²⁴ The IHRC is the agency charged with enforcing Title VII claims in Idaho.²²⁵ Filing an administrative complaint with the IHRC is a prerequisite to filing a civil complaint for employment discrimination in the court.²²⁶ Further, individuals must file an administrative complaint within one year of the discriminatory act.²²⁷ Each administrative complaint is assigned an IHRC investigator who investigates the claim to determine if probable cause exists.²²⁸

Unfortunately, these prerequisite steps likely do little to advance ex-offenders' employment discrimination claims. In 2020, the IHRC made 2,080 "contacts" with Idahoans and fielded roughly 173 intake calls every month.²²⁹ Only 358 of these contacts materialized into administrative complaints.²³⁰ Moreover, the IHRC marked 84.9% of these 358 complaints as "resolved" for lack of probable cause.²³¹ Unless a prospective employer discloses that it rejected an applicant based on her criminal history, ex-offenders may never learn of the true reason for their rejection. And without this crucial information, IHRC investigators may struggle to find discriminatory behavior necessary to file a civil action. Thus, IHRC complainants likely face evidentiary battles similar those waged in disparate impact litigation.²³²

Under the current system, Idaho employers hold all the cards. Although employers may, out of convenience, request a background check from a consumer reporting agency—and thus provide certain disclosures and rights to the job applicant—other options exist. Idaho employers may simply perform an iCourt search to either intentionally or unintentionally circumvent the FCRA requirements. Moreover, recourse for applicants experiencing discrimination in the screening process presents its own evidentiary battle, one that typically begins and ends with an IHRC administrative complaint. Therefore, Idaho ex-offenders desperately need protection in the job search if the state seeks to break the cycle of recidivism.

C. The Need for Ban the Box Legislation in Idaho

224. IDAHO CODE § 67-5907 (2010).

225. *Id.* § 67-5901.

226. *Id.* § 67-5908(2).

227. *Id.* § 67-5907(1).

228. *Id.* § 67-5907(1)-(5).

229. *FY 2020 Statistic Measures*, IDAHO HUM. RTS. COMM'N 2 (2020), https://humanrights.idaho.gov/Portals/0/publications/FY2020_Statistic_Measures.pdf [hereinafter *IHRC Report*].

230. *Id.*

231. *Id.*

232. For a discussion of disparate impact evidentiary burdens, see *supra* Part II(B). Note that individuals who file administrative complaints with the IHRC must fall within a protected class under Idaho law. IDAHO CODE § 67-5901(2) (2021). Idaho's protected classes mirror those of Title VII: race, color, religion, sex, or national origin. *Id.*; 42 U.S.C. § 2000e-2(a)(1).

In light of Idaho's growing prison population, the state now stands at a crossroads: to revisit prison reform alternatives, including the JRI, or to build new prison facilities. And a permanent solution is long overdue. Idaho's short-term solution for overcrowding—transferring Idaho prisoners to out-of-state facilities²³³—has become unworkable. Hundreds of Idaho prisoners have been sent to private, out-of-state prisons in an effort to manage the shortage of beds in Idaho prisons.²³⁴ Housing inmates at these facilities comes at a high cost to taxpayers and poses safety risks to those transferred.²³⁵ In consideration of these mounting costs and the apparent failure of alternative reform initiatives, many lawmakers have pledged support to a \$500 million prison expansion package, which includes a new 1,510-bed state prison.²³⁶ As pressure mounts to solve prison overflow and recidivism rates, Idaho lawmakers should consider banning the box to reduce, rather than redirect, the number of Idahoans entering prison.

First, however, it is important to consider the limitations of ban the box legislation in Idaho. To begin, ban the box legislation alone will not cure Idaho's mass incarceration crisis. In fact, any visible change ban-the-box may make on Idaho imprisonment rates could take years to materialize. Further, the law itself cannot guarantee compliance. Even if Idaho were to enact a strict ban the box law, it remains unclear whether employers can circumvent both FCRA requirements *and* ban the box requirements by simply running their own search on the iCourt Portal.²³⁷ Ostensibly, performing such a search on iCourt would violate ban the box, but applicants may find trouble invoking the law if employers do not reveal that they performed an iCourt search on the applicant's criminal record. Thus, for the same reasons that the IHRC rejected 84.9% of the discrimination filings in 2020,²³⁸ ex-offenders may still lack "probable cause"—or rather, sufficient evidence—to bring suit against a prospective employer under a ban the box law.

Other considerations overcome these limitations. To be fair, building a new prison will surely cure an issue in desperate need of attention: prison overcrowding. Yet a new prison will do little to curb the state's growing imprisonment rates. Ban the box legislation would directly combat prisoner recidivism rather than redirect recidivists to a new facility. Furthermore, enacting a fair chance law would provide Idaho ex-offenders more meaningful opportunities in the job market. By extension,

233. BLUEPRINT FOR IDAHO, *supra* note 177, at 5.

234. BLUEPRINT FOR IDAHO, *supra* note 177, at 5.

235. BLUEPRINT FOR IDAHO, *supra* note 177, at 5. Idaho prisoners sent to Eagle Pass Correctional Facility in Eagle Pass, Texas, have reported "unsafe conditions and inadequate access to medical care and healthy food." BLUEPRINT FOR IDAHO, *supra* note 177, at 5.

236. Betsy Z. Russell, *Idaho Looks at Building New State Prison, Spending \$500 Million*, SPOKESMAN-REVIEW (June 12, 2018), <https://www.spokesman.com/stories/2018/jun/12/idaho-looks-at-building-new-state-prison-spending-/>.

237. Stacy & Cohen, *supra* note 42, at 11.

238. IHRC Report, *supra* note 229, at 2.

Idaho's minority population would likely benefit from ban the box legislation given Idaho's dramatically high imprisonment rate for people of color.²³⁹

A fair chance law would also alleviate the burden the JRI presently places on post-release operations.²⁴⁰ The JRI relied heavily on parole and probation officer oversight.²⁴¹ Many JRI initiatives required parole and probation officer training and individualized assessments for each releasee.²⁴² By contrast, ban the box laws function independently. A fair chance law requires no training of or oversight from already-overburdened probation and parole officers. Thus, concerns for administrative burden in this respect are not present. In fact, the hope is that Idaho parole and probation officers would also benefit from the ban the box law. Using Hawaii's rapidly decreasing recidivism rate as a model,²⁴³ Idaho parole and probation officers' caseloads may eventually lessen as Idaho's recidivism rate begins to fall.

Finally, Idaho's tax base arguably stands to benefit from ban the box legislation, too. If lower incarceration rates reduce state correctional spending²⁴⁴ and higher employment rates increase overall income tax contributions,²⁴⁵ the state stands to benefit financially from banning the box.

The Idaho Legislature should strongly consider enacting statewide ban the box legislation. While noting that the less-protective Bill 1318 outperformed its 2018 counterpart, Bill 1307, Idaho lawmakers should reconsider a more aggressive fair chance policy to garner the best possible results. As such, this Comment recommends that Idaho legislators use the foundations of Hawaii's successful ban the box law²⁴⁶ as a guide.

Several key modifications to Senate Bill 1318 deserve consideration. To begin, both public and private employers should be subject to any future ban the box law. Lawmakers should also consider delaying inquiry into an applicant's criminal record until an interview is scheduled. In the alternative, if no interview is required, employers should be prohibited from performing a background check until a conditional job offer has been made. At that time, employers should notify applicants of their intent to perform a criminal background check. The state should exempt certain records from consideration, such as arrests not resulting in a conviction, felonies occurring more than seven years prior, and any conviction that is unrelated to the position advertised. Applicants should then be afforded the opportunity to explain any remaining convictions before or during the interview.

239. ASHLEY NELLIS, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS*, SENT'G PROJECT 6 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

240. CSG JUSTICE CENTER, *supra* note 183, at 3.

241. CSG JUSTICE CENTER, *supra* note 183, note 185, at 3.

242. CSG JUSTICE CENTER, *supra* note 183, note 185, at 3.

243. *See* D'Alessio et al., *supra* note 143.

244. Nadich, *supra* note 160, at 773.

245. Atkinson & Lockwood, *supra* note 154, at 3.

246. *See* HAW. REV. STAT. § 378–2.5 (2020).

Further, any future Idaho ban the box law should codify the *Green* factors. Thus, if an Idaho employer performs a criminal background check on an applicant, the employer would be required to consider the nature of the non-exempt conviction, the time elapsed since the conviction, and the nature of the position advertised. Rejection based on criminal history is then conditioned on the employer's objectively reasonable determination that the applicant would pose a risk to the employer based on these three factors. Finally, Idaho legislators should consider creating disclosure requirements for employers that reject applicants based on their criminal record. Employers should be required to promptly notify the applicant of its employment decision, provide a copy of his or her criminal record, and specify the information on which it based its decision. This would afford applicants sufficient evidence to appeal the decision to a regulatory body, such as the IHRC, if discriminatory practice is at play.

The JRI's woeful failure likely creates pause for Idaho lawmakers considering alternative prison reform approaches. Yet legislators should not shy from future proposed fair chance laws. The state must break from its overreliance on prisons and consider alternative measures to disrupt the cycle of recidivism. Moreover, enacting ban the box would provide reentry services where overburdened parole officers cannot: in the job market. Idaho ex-offenders today are at a significant disadvantage at every step of the hiring process. Ban the box legislation would level the playing field by requiring Idaho employers to assess applicants based on their qualifications, not their criminal record. In turn, Idaho would likely observe recidivism rates decrease as more ex-offenders find stable employment.

VI. CONCLUSION

In the fifty years that have passed since *Griggs v. Duke Power Co.* was issued, the disparate impact theory has lost much of its force. Unequal access to evidence and courts' growing reluctance to grant relief under this theory have all but foreclosed this avenue for ex-offenders. In response, state legislatures have enacted fair chance policies in hopes of affording ex-offenders a fighting chance at reclaiming their lives after serving their sentences. Though more research is needed to fully examine the effects of ban the box, recent studies have found that ex-offenders are much more likely to find employment in ban the box jurisdictions than in non-ban the box jurisdictions.²⁴⁷

Idaho ex-offenders receive no comparable protections under state law. In fact, the current landscape of legal remedies available to Idaho ex-offenders experiencing hiring discrimination is bleak. The computerization of public court records and employer-favoring policies in Idaho leaves ex-offenders with slim chances of securing employment. Idaho's willingness to enact alternative prison reform legislation such as the JRI signifies that Idaho legislators are searching for a solution to the state's incarceration crisis. Ban the box alone cannot solve this problem. However, banning the box would likely reduce recidivism and

247. See BERRACASA ET AL., *supra* note 143, at 16.

imprisonment rates over time without placing administrative burden on public correctional employees.

To resist ban the box legislation is to ignore the vicious cycle of recidivism. Idaho legislators should consider enacting a fair chance law consistent with the approach proposed above. This approach would ensure that Idaho employers first consider applicants based on their qualifications and minimize the risk of unnecessarily rejecting all ex-offenders from consideration. By extension, the proposed approach will deepen applicant pools and provide ex-offenders a fair chance at employment—and life—after serving their sentences.