

EFFECTIVENESS OF BAN-THE-BOX LAWS: HAS THE LAW SUCCEEDED IN LIMITING DISCRIMINATION AGAINST PROSPECTIVE EMPLOYEES WITH A CRIMINAL RECORD? HOW CAN THE BAN-THE-BOX BE IMPROVED?

by Kelly Ha



Kelly Ha is a recent graduate of the Chapman University Dale E. Fowler School of Law. Prior to attending law school, she received a bachelor's degree in political science from UCLA. Kelly grew up in the predominantly low-income neighborhood of Lincoln Heights in Los Angeles, CA. She was inspired to pursue a law degree after weathering the obstacles of achieving higher education as a first-generation college graduate from a low socioeconomic background. She is committed to giving back to her community and to ensuring equal access to resources and opportunities to those who otherwise would not have such things as readily available to them.

Abstract

The ever-increasing incarceration rate of Americans engendered an important discussion regarding the reintegration of individuals with a criminal record into society. Reintegration into society involves providing these individuals with, among other things, educational and economic opportunities, so that they have the skills and money to become a contributing member of society. Researchers have found that providing these opportunities for the purpose of reintegration decreases the rate of recidivism, which is the tendency of a convicted criminal to reoffend. It helps these individuals gain the basic necessities for living and, thus, leads them away from turning to crime for money or other needs.

Ban-the-Box legislation was passed in several states and other jurisdictions to help with reducing recidivism by limiting the discrimination in the labor market against individuals with a criminal record. These laws differ in every jurisdiction, but they were all enacted to remove the check box that asks if applicants have a criminal record from hiring applications. The common purpose is to allow those with a criminal record to at least make it to the initial interview in the hiring process, so that they can display their qualifications before being asked about their criminal history.

This paper investigates the extent of the success of Ban-the-Box legislation in achieving its purpose in assisting ex-offenders to obtain employment opportunities by limiting the discrimination against individuals with a criminal record in the hiring process. Although Ban-the-Box legislation is an admirable step in the right direction towards assisting ex-offenders, research shows that the laws have been ineffective for several reasons. This paper focuses on two major, often-discussed reasons: statistical discrimination and the fact that Ban-the-Box laws merely delays access to criminal records. Section I describes Ban-the-Box laws, specifically the history and the purpose of the legislation, the similarity similarities and differences in the language of the

legislation in differing jurisdictions, and the exceptions to the laws. Section II discusses the ineffectiveness of Ban-the-Box legislation with a focus on statistical discrimination and the fact that the laws merely delay access to criminal records. Finally, Section III discusses legal and non-legal recommendations for improving Ban-the-Box legislation, as well as the approaches that other countries, like Australia and Canada, have adopted to address the issue of discrimination against individuals with a criminal record.

Introduction

America has a mass incarceration problem that is reflected by statistics from 2016 which show that “more than 2.2 million Americans are incarcerated—representing 24 percent of the world’s prison population.”[1] This problem has created another problem for the country: “what opportunities should be afforded to ex-offenders?”[2] Every year, almost 600,000 people are released from state prison.[3] Ex-offenders, after release, search for employment and are often denied based on stereotypes and the employers’ fear of negligent hiring claims, “which hold employers liable for negligently exposing employees to dangerous co-workers.”[4] Without gainful employment, “many ex-offenders recidivate.”[5] Statistically, “seventy-seven percent of released prisoners re-offend and return to prison.”[6] Advocates lobbied for Ban-the-Box legislation with these issues regarding the lack of opportunities, specifically those related to jobs and housing,[7] in mind because a criminal record marks individuals “in ways that qualify them for discrimination or social exclusion.”[8]

The questions asked by this paper are: 1) to what extent has Ban-the-Box legislation succeeded in limiting discrimination against prospective employees with a criminal record; and 2) how can Ban-the-Box laws be improved for further success? These are important questions to consider as part of a plan for comprehensive criminal justice reform.[9] Improving reintegration of

ex-offenders will ultimately reduce the rate of recidivism and lower the mass incarceration rate in America.

Current Ban-the-Box laws are ineffective in limiting discrimination against prospective employees with a criminal record and have fallen short in serving their purpose to provide more employment opportunities for these individuals for many reasons. The two major, often-discussed reasons are: 1) statistical discrimination, and 2) the fact that Ban-the-Box laws merely delay an employer's access to an applicants' criminal records. Statistical discrimination is a phenomenon that economists have identified where employers "systematically overestimate the correlation between race and criminality." [10] Statistical discrimination occurs when employers use certain characteristics, such as race or gender, to make assumptions "about group differences in productivity and other attributes" to make up for the lack of detailed information about applicants. [11] Under Ban-the-Box laws, employers lack information regarding an applicant's criminal history and instead rely on statistical discrimination to save themselves time and/or money that they would expend in interviewing applicants. [12] This does not limit discrimination against ex-offenders, rather it overcompensates for the lack of information and leads to increases in racial discrimination against certain minorities who make up a large percentage of individuals with a criminal record in the American criminal justice system. [13] Moreover, the fact that Ban-the-Box legislation merely delays an employer's access to applicants' criminal records does not remedy any issues of discrimination because the absence of information as to an applicant's criminal history is often what leads an employer to rely on generalizations and assumptions and, therefore, may be the cause for an increase in racial discrimination. Based on those two major reasons alone, Ban-the-Box legislation has not been very successful because it has led to a serious unintended consequence of increased racial discrimination, thereby failing to limit the discrimination of individuals, particularly people of color, with criminal records. [14]

I. What Are Ban-the-Box Laws?

History of Ban-the-Box

In 2004, All of Us or None, "a national civil rights movement of formerly-incarcerated people and [their] families," began the Ban-the-Box campaign "after a series of Peace and Justice Community Summits identified job and housing discrimination as huge barriers to" the successful reintegration of ex-offenders into their communities. [15] The campaign challenges the discrimination against individuals with criminal histories by asking employers to consider job applicants based on their skills and qualifications, rather than their past convictions. [16]

The first phase of the Ban-the-Box campaign initially focused on public employers, such as government agencies and their hiring practices. [17] The campaign demanded changes in public agencies "to educate public officials about the needs of the communities they were elected to serve." [18] Other advocates subsequently joined the campaign, "including formerly-incarcerated people, legal aid organizations, re-entry service providers, civil rights partners, and elected officials." [19] Advocates of the

campaign believe that Ban-the-Box legislation "is necessary because a growing number of Americans have criminal records due to tougher sentencing laws, particularly for drug crimes, and are having difficulty finding work because of high unemployment and a rise in background checks" following September 11, 2001. [20]

The Equal Employment Opportunity Commission (EEOC) in April 2012 provided an updated guideline to clarify and strengthen its guidance in support of the Ban-the-Box campaign. [21] Specifically, the EEOC updated its "Enforcement Guidance on Consideration of Arrest or Conviction Records in Employment Decisions." [22] The EEOC intended the Enforcement Guidance to be a reference "for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions." [23] The EEOC "recommends that employers do not ask about convictions on job applications and that" any inquiries regarding convictions be limited to those "for which exclusion would be job related for the position in question and consistent with business necessity." [24] The Commission then discusses how the federal government has come up with a suitability requirement in reviewing applications for individuals with criminal records, which the "Office of Personnel Management (OPM) defines... as 'determination based on a person's character or conduct that may have an impact on the integrity or efficiency of the service.'" [25] Federal agencies have discretion "to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position." [26]

Purpose of Ban-the-Box

Ban-the-Box legislation has one main purpose, which is to assist individuals with criminal records in gaining easier access to the labor market. [27] Within this main purpose, researchers have identified two other incidental purposes: (1) reducing recidivism, and (2) countering the deterrent effect of the box on the job application. [28] Reducing recidivism is an incidental purpose as it is likely a natural result of providing more labor market opportunities for those with criminal records because an increase in opportunities increases the likelihood of employment and, therefore, reduces the gains of criminal activity. [29] Moreover, the requirement on the initial application "asking an applicant to check a box indicating whether he has been arrested or convicted of a crime" creates a deterrent effect on prospective employees with criminal records because it is a common and reasonable belief that they will be screened out based on checking that box alone. [30] In that instance, individuals with criminal records will not apply to jobs that have applications with the check box because they believe it is pointless to apply for jobs that they know they will not get. [31]

Ban-the-Box Statutes in Different Jurisdictions

Currently, "over 45 cities and counties" have banned the box. [32] "Hawaii, California, Colorado, New Mexico, Minnesota, Massachusetts, and Connecticut have changed their hiring practices in public employment" in an effort to satisfy the purpose of Ban-the-Box legislation. [33] Massachusetts, along with some cities and counties, "have

also required their vendors and private employers to adopt these fair hiring policies.”[34] Most recently, Newark, New Jersey adopted an ordinance extending the policy behind Ban-the-Box to housing.[35] Ban-the-Box laws differ widely across jurisdictions, despite its uniform purpose.[36] There are six particular areas where the laws differ: “(1) what type of employers are covered under the law; (2) at what point an employer may conduct a background check; (3) what type of information can be considered when evaluating a background check; (4) which factors an employer may use when making employment decisions; (5) disclosure obligations to an employee; and (6) enforcement provisions.”[37]

Hawaii in 1998 implemented the first Ban-the-Box law,



which applied to both public and private employers.[38] In Hawaii, “employers are not permitted to inquire into any job applicant’s criminal history until a ‘conditional offer of employment’ [is] made.”[39] Hawaii’s statute further requires that employers show that the criminal conviction bear a “rational relationship to the duties and responsibilities of the position” if the employer wishes to rescind a conditional employment offer based on a criminal conviction that occurred “within the previous decade (or if incarceration occurred at any point).”[40] Hawaii’s Ban-the-Box law “remains among the nation’s most stringent” as other states, cities, and counties continue to adopt their own version of the law.[41]

In 2017, California passed the “California Fair Chance Act” requiring public and private “employers to delay any conviction background check as well as any questions about or consideration of a job applicant’s conviction history until after the employer extends a conditional offer of employment to the applicant.”[42] The law requires “individualized inquiry” when reviewing any conviction history by considering the factors identified and recommended by the EEOC, which at the very least include consideration of “the amount of time elapsed since

the conviction, the nature of the conviction, and whether the conviction is directly job related.”[43] If the employer intends to rescind the conditional job offer, they are required to send a written preliminary notice to the job applicant, provide “time for the applicant to respond with evidence of inaccuracies in the record, rehabilitation, or mitigating circumstances,” and give a “final written notice rescinding the job offer.”[44] These laws apply to “private and public employers with at least five employees.”[45]

Hawaii and California have similar Ban-the-Box laws that are among the most restrictive in terms of what type of employers are covered; at what point an employer may conduct a background check; what information can be considered in a background check; which factors an

employer may use when making employment decisions; and disclosure obligations to an employee.[46] Ban-the-Box legislation in the following states do not cover private employers: Arizona, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Virginia, and Wisconsin.[47] Connecticut’s law only prohibits criminal background questions on the employment application itself, “conceivably leaving open the possibility that an employer could ask about an applicant’s criminal record moments after” submitting an application “or even as a precondition to filling out an application.”[48] In contrast, Illinois law allows employers to “inquire about an applicant’s criminal record as soon as the applicant is selected for an

interview.”[49] Other states’ laws do not allow employers to consider “certain types of offenses, such as arrests not leading to conviction, misdemeanors, and older convictions.”[50] Furthermore, other states may also “require employers to determine whether an applicant’s criminal record sufficiently relates to the job in question before factoring the conviction into an employment decision.”[51] As to any notice or disclosure obligations, “[s]everal laws require employers to supply applicants with a copy of their criminal record . . . [s]ome go further by obligating employers to provide written notice to an applicant of their reason for not hiring the applicant if the decision was based at least in part on the applicant’s criminal record.”[52]

Exceptions/Exemptions to Ban-the-Box Laws

Within every statute, there are exceptions and exemptions to Ban-the-Box laws based on the number of employees, job position, and, most importantly, whether state or federal law would prohibit an individual from employment for a specific past crime. California’s law exempts public and private employers that have less than 5 employees.[53] Illinois’ and Maryland’s laws exempt public

and private employers that have less than 15 employees.[54] Other state statutes include expressly identified exceptions for employment concerning public safety or correction-related jobs, such as law enforcement positions, security personnel, criminal justice positions, tax commission, alcoholic beverage control employers, and jobs that involve providing services to minors or vulnerable adults, specifically school administration.[55] Practically all exceptions are “for positions for which the employer is prohibited by law from hiring someone with a specific conviction history or required by law to conduct a background check.”[56]

II. Are Ban-the-Box Laws Effective?

Statistical Discrimination

As Ban-the-Box legislation has gained popularity across the nation, there have been many sociological studies conducted to analyze the effects of the legislation, particularly the effects on people of color with criminal records.[57] Devah Pager demonstrated in a 2003 study that, “among the Milwaukee employers observed, overt racial discrimination and its links to perceived criminality were even more prevalent than discrimination based on the records themselves.”[58] In other words, Devah Pager found that “even in the absence of criminal background checks, employers often use race or racial indicators (such as education levels) to make assumptions about criminality and unsuitability for jobs.”[59] Some sociologists have found that banning the box would adversely impact “the employment of people of color with records because of the insidious racial biases surrounding criminality in America.”[60] Harry Holzer, Steven Raphael, and Michael Stoll found in their multi-city survey based research that employers were more likely to hire black Americans if they were allowed to check criminal records and, thus, confirmed Devah Pager’s findings that “when criminal records were not consulted, black people were assumed to have them.”[61] This phenomenon has been identified as “statistical discrimination.”[62]

“Bruce Western, Bart Bonikowski, and Devah Pager published an extension of Pager’s 2003 study” to investigate further into statistical discrimination.[63] They matched white, black, and Latino testers and applied them to “340 real, entry-level jobs in New York City in 2004.”[64] Their study “found that employer prejudice fell into three categories of behavior: (1) ‘categorical exclusion,’ characterized by an immediate rejection of the black candidate in favor of a white applicant; (2) ‘shifting standards,’ reflecting actively shaped decisions made through a racial lens that considers black applicants more critically than whites; and (3) ‘race-based job channeling,’ resulting in steering black applicants toward particular job types usually with greater physical demands and reduced consumer contact.”[65] However, their report found that Ban-the-Box laws could have a real positive impact on the employment outcomes of people of color with records as “[b]lack applicants who met face-to-face with hiring authorities were found to fare better than those who did not, suggesting that broad in-person contact has the power to replace broad generalizations on group membership with more nuanced information about an applicant’s individual qualities.”[66]

One of the most frequently discussed experiments investigating Ban-the-Box laws and the effects of statistical discrimination is that of Amanda Agan and Sonja Starr.[67] Their research discusses statistical discrimination as an unintended consequence of Ban-the-Box as “applicants with no criminal records who belong to groups with higher conviction rates, such as young black males, would be adversely affected by BTB policies.”[68] Agan and Starr conducted a field experiment, where they “submitted nearly 15,000 fictitious online job applications to entry-level positions before and after BTB laws went into effect in New Jersey (March 1, 2015) and New York City (October 27, 2015).”[69] One of their results supports the policy behind Ban-the-Box, which is that “when employers ask about criminal records, having a record poses an obstacle to employment.”[70] They also found a substantial increase in racial discrimination, which they believe could be explained by at least two mechanisms: (1) statistical discrimination, and (2) Ban-the-Box as a benefit for white applicants.[71] Absent individual information regarding any criminal history, statistical discrimination negatively effects the employment of black men without records because employers will treat them as if it is more likely than not that they have a criminal record.[72] With the similar lack of information under Ban-the-Box laws, there is an inverse presumption for white men, which results in employers treating white applicants with records more favorably because, absent evidence to the contrary, employers are more likely to assume that white applicants generally do not have criminal records.[73] The Agan and Starr study suggests that Ban-the-Box leads to an increase in racial discrimination against certain minorities by employers and, thus, results in the exclusion of people of color with or without criminal records from the labor market, despite their qualifications.[74]

“Race remains highly salient in employers’ evaluation of workers,” based on the research findings.[75] Although race-based discrimination is illegal under Title VII, “it is difficult to assess the rationality of employer decisions.”[76] Employers consider a number of factors when making hiring decisions, such as “the costs of interviewing an applicant who turns out to have a disqualifying criminal record” or “the costs of inadvertently failing to interview a candidate (due to assumptions about his record) who would have been the best choice, that are relatively unknown to anyone besides the employer.”[77]

Overt racism in the workplace is no longer tolerated, but “unconscious discrimination has become more common.”[78] Unconscious discrimination “is based on cultural or emotional factors that might be unknown to the person.”[79] So, in situations where employers lack information due to Ban-the-Box, employers will rely on “cognitive shortcuts to assume information” based on any generalizations or beliefs they may have regarding gender or race and conflate those assumptions with “an applicant’s productivity and employability.”[80] Thus, the emergence of statistical discrimination as an unintended consequence of Ban-the-Box is not surprising.

Because the increase in racial discrimination is likely due to unconscious bias that has presented itself in the form of statistical discrimination, “failing to remain race-conscious in this new legal arena could come at the expense of those who fought to have these laws enacted to

protect them.”[81] Removing race from the legislative language ignores the issue of systemic racism within the American criminal justice system, where people of color are more likely to be arrested for or convicted of crimes that whites would not be held liable for, such as non-violent drug offenses.[82] “[T]he work of sociologists like Pager shows us that being marked with a criminal record while black is fundamentally different from being marked with a criminal record while white,” and the failure of Ban-the-Box legislation to recognize those differences in its race-neutral laws renders it ineffective in implementing changes and protecting the people the laws were passed to protect.[83]

Mere Delay of Access to Criminal Records

All Ban-the-Box laws merely delay an employer’s access to criminal records; none of the laws preclude access to criminal records entirely.[84] Two theories posit why legislators believed the delay in Ban-the-Box legislation would be sufficient to combat the discrimination against individuals with a criminal record. One theory is that “an applicant’s criminal history [may] become less important once an employer interviews a candidate,” because they are impressed with the candidate’s qualifications.[85] Another theory is that by the time an employer is allowed access to an applicant’s criminal history, the employer will have already invested too much time into that individual and “would rather not know if the candidate has a criminal record than face the prospect of having to restart the process with another candidate, who could also have a disqualifying criminal record.”[86] However, these theories do not account for the concerns that employers have about hiring an ex-offender. One concern is the fear of negligent hiring as employers have a legal duty to exercise reasonable care in selecting an employee.[87] Additionally, employers have concerns regarding safety and costs, which not only include the financial costs in the pre-hiring phase but also costs of turnover, absenteeism, and administrative expenses associated with employing an ex-offender.[88] Finally, a social stigma associated with a criminal record contributes to an employer’s decision in hiring an ex-offender.[89] Given the totality of these concerns, employers are more likely to implicitly or unconsciously “use race as a proxy”[90] to fill-in any missing information to help gauge an applicant’s employability and to avoid the liabilities and costs that might arise as the employer’s concerns become more of a reality with the higher probability of hiring or investing too much into an ex-offender in the era of Ban-the-Box legislation.

One of the most important factors that influences an employer’s decision whether to hire an ex-offender is cost.[91] Employers during the pre-hiring phase may want to avoid any significant costs that are “associated with interviewing and making tentative offers to candidates that they fear will ultimately be disqualified after the background check.”[92] Other than the financial costs at the pre-hiring phase, additional financial costs include turnover and absenteeism that are associated with the employment of ex-offenders.[93] Absenteeism is identified as an “expense for businesses” that results in “significant losses in employee productivity that can damage the bottom line.”[94] Ex-offenders often have “irregular schedules due to not having adequate access to resources such as reliable transportation, consistent childcare, or a stable residence,” so the rate of turnover and absenteeism

may be higher for ex-offenders.[95] These costs can be significant and substantial for an employer. To avoid these costs, an employer will likely try to get information in any way that they can, including taking cognitive shortcuts as discussed with statistical discrimination,[96] to determine an applicant’s employability.

Assuming that an appropriate amount of time has passed and an employer is legally allowed to look into an applicant’s criminal records, Jakari N. Griffith’s study found that managers equated the introduction of Ban-the-Box laws with second chances and, thus, suggests that the mere delay in access to criminal records did not necessarily mean an applicant will immediately be disqualified once a criminal record is found.[97] Griffith’s study draws information “from interviews with 18 human resource (HR) professionals in Ban the Box states.”[98] The human



resource professionals, also referred to later as managers, “emphasized time, severity, and job-relatedness as important factors” in their evaluation of an applicant’s criminal history.[99] The study found that managers “placed less emphasis on crimes committed by younger persons, understanding that some behavior may stem from youthful indiscretion.”[100] With regards to severity of the offense, managers relied heavily upon what customers wanted or required, even if they may hold different beliefs.[101] As to job-relatedness, many managers “said that if the offense had no material bearing on the performance of the core duties, then they might discount the importance of this information.”[102] The study also found that managers looked for “evidence of applicant growth” by looking into whether an applicant had “regret or remorse,” “whether they accepted responsibility for their actions,” and whether they “had longstanding involvements in church, structured volunteering experiences, and other social organizations.”[103] However, all of these factors and considerations only come into play when sufficient time has passed and an applicant has at least made it past the initial application phase. The issue that arises with Ban-the-Box is that the lack of information will likely cause an employer to overcompensate for the missing information by conflating certain characteristics, such as race, with the employability of the individual to avoid wasting any time or costs or potentially subjecting themselves to liability, even when the characteristics are independent of each other.

An employer will likely find that it is not worth it to

invest the time and costs into allowing individuals that they believe are more likely to have a criminal record to move past the initial application process. In order to screen out these individuals, based entirely on the application itself, the employer may turn to generalizations about certain races or other characteristics that they assume make an individual more likely to have a criminal record, thereby increasing discrimination. Therefore, Ban-the-Box legislation has been ineffective because its delay of access to information may be too costly for an employer, leading to the use of stereotypes that will most likely increase racial discrimination and result in the exclusion of people of color with or without criminal records from the labor market, regardless of their qualifications.

III. Recommendations For Improving Ban-the-Box Laws and Furthering Its Purpose

Legal Approaches

The sociological studies, as discussed above, include suggestions on how to improve the effectiveness of Ban-the-Box legislation. Several propose legislative changes to better serve the purpose of limiting discrimination and providing more employment opportunities to individuals with criminal records. One proposal is that Ban-the-Box laws be written with explicit references to antidiscrimination laws or that existing antidiscrimination laws be amended with Ban-the-Box provisions to “reinforce to employers that drawing inferences about an applicant’s criminal record because of [their] race is a prohibited form of discrimination.”[104] Lucy Gubernick proposes that the laws incorporate a “‘Purpose’ section [] that address[es] the disparate treatment of people of color by the criminal justice system and then by employers post-conviction.”[105] Reforming Ban-the-Box legislation to include more race-conscious and anti-discrimination language is meant to remedy the issues of statistical and unconscious discrimination because specific language about race and discrimination will likely make employers more aware of any biases or assumptions that they may be implicitly making when reviewing hiring applications.[106]

Since many of these studies are subject to limitations based on their subjects and their methodology, Ban-the-Box laws “should mandate data collection . . . by an equipped government body and measure not only the hiring rates of people with records generally, but, rather, the specific demographic makeup of those hires.”[107] To determine whether minorities are affected by Ban-the-Box laws, “[t]he data should directly address the races of ex-offenders who are hired.”[108] The data should be collected at least annually “by a relevant and competent government office or agency, either in conjunction with an enforcement body or with the power to enforce the laws itself.”[109] Mandating data collection is essential to providing a more holistic and comprehensive understanding of how Ban-the-Box legislation, or possibly other sources, may institute change in employer hiring practices.[110] Furthermore, comprehensive data collection is needed to clear up the discrepancies between studies that have found Ban-the-Box legislation to be effective in increasing employment overall, as well as

increasing employment for African-American men.[111] Overall, mandating data collection will keep the public and future legislators better informed about the effectiveness of the current laws and what changes are needed for further success.[112]

To further the purpose of Ban-the-Box legislation, the EEOC recommends developing “a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.”[113] This process of creating a narrowly tailored written policy includes:

- 1) identifying “essential job requirements and the actual circumstances under which the jobs are performed;”
- 2) determining “the specific offenses that may demonstrate unfitness for performing such jobs” by using all available evidence;”
- 3) determining “the duration of exclusions for criminal conduct based on all available evidence” including “an individualized assessment;”
- 4) recording “the justification for the policy and procedures;” and
- 5) keeping “a record of consultations and research considered in crafting the policy and procedures.”[114]

Forcing the employer to focus on the essential, the actual, the specific, and the individual will likely keep the employer from straying into discriminatory territory in evaluating hiring applications.

Instead of relying entirely on banning the box and hoping that employers will change their hiring practices, employment discrimination lawsuits should be reevaluated and changed to become more of a viable option for plaintiffs to hold employers accountable.[115] Employers are required under §709 of Title VII “to keep records relevant to determinations of whether unlawful employment practices are occurring and make reports from these records.”[116] To comply with this mandate, employers must file an Equal Employment Opportunity Form (EEO-1), which “requires employers to indicate each employee’s job description, gender, and race.”[117] The EEO-1 form will “be a useful tool for advocates fighting against employment discrimination,” but only if the EEOC properly enforces the data collection that is required by the EEO-1 form.[118] The data collected by the EEOC can help bolster an employment discrimination lawsuit.[119] However, that is not enough to make employment discrimination suits more winnable because the current single-motive standard requires that plaintiffs prove the employer made their decision solely on an improper purpose, which is a difficult standard to meet due to the multifaceted nature of the decision-making process.[120] Therefore, the mixed-motive standard should be adopted for employment discrimination suits because it accurately reflects the many factors that are considered in the decision-making process, including factors that employers are not fully aware of, such as stereotypes.[121] Changing the standard for employment discrimination suits to mixed-motive and increasing enforcement by the EEOC will make plaintiffs more of a legal threat to employers.[122] Consequently, employers will more likely “become aware of the prevalence of implicit bias” and proceed to implement systems “to protect themselves against unconscious discrimination litigation.”[123]

Professor Dallan F. Flake proposes that Title VII be amended “to include persons with ‘nondisqualifying criminal records’ as a protected class.”[124] “[N]ondisqualifying criminal records” would be criminal records that do not have “a direct relationship between a previous criminal offense and the job in question, such that employing the individual would impose an unreasonable risk to property or to the safety of specific individuals or the general public.”[125] This amendment will further the purpose of Ban-the-Box by providing applicants with the ability to bring suit under Title VII to individuals who are discriminated against based on their criminal records and cannot prove discrimination based on other protected classes, such as race, color, religion, sex, and national origin.

Ban-the-Box legislation should be more effective in conjunction with certificate-of-employability laws.[126] Certificate-of-employability laws “generally allow ex-offenders to present a court-issued document to prospective employers certifying that they have met certain requirements to demonstrate they have been sufficiently rehabilitated.”[127] These laws would work in tandem. Initially, banning the box would presumably help an applicant move past the initial application phase to the interview phase where the employer might find out about the applicant’s criminal history, depending on the jurisdiction. Instead of disqualifying the candidate due to the employer’s fear of negligent hiring, having a certificate-of-employability will increase the candidate’s chances of getting hired because the certificate will help the employer defend against any potential claims of negligent hiring and, thus, relieve their fear of being subject to a lawsuit and the associated costs.[128] Combining these laws relieves some of the major concerns that an employer has with hiring an ex-offender, such as the fear of negligent hiring, the associated costs of defending a lawsuit, the costs of investing too much into a candidate that may later be



disqualified due to their criminal record, and the costs of finding a replacement for that candidate. However, this approach alone would not make Ban-the-Box more effective because it assumes that an applicant will make it past the initial application phase, but applicants are more likely to be screened out based on statistical discrimination before then, so this approach must be combined with one, or all, of the approaches discussed above to improve the effectiveness of Ban-the-Box.

Non-Legal Approaches

Another approach to improving the effectiveness of Ban-the-Box is “asking employers to blind themselves tonames (and other potentially racially identifying information unrelated to job qualifications, such as home addresses) in addition to [criminal] records.”[129] Furthermore, managers should go through training that would “help [] reduce prejudice and regulate personal motivation to respond without bias.”[130] Training managers in such a manner “could reinforce the importance of hiring without discrimination, which signals genuine commitment to being an equal opportunity employer.”[131] These approaches are meant to prevent statistical and unconscious discrimination by having employers focus on other more important job-related factors when evaluating a prospective employee’s application. These approaches also make an employer more aware of their motivations in their decision-making process and, thereby, shift employers away from making assumptions based on stereotypes.

Other non-legal approaches that will likely further the purpose of Ban-the-Box legislation include providing financial incentives for hiring ex-offenders by subsidizing their wages and encouraging ex-offenders to participate in comprehensive rehabilitation programs that will provide them with “the education, skills training, and health services,” particularly mental health counseling and programs for dealing with drug and alcohol addiction, required to reintegrate into society.[132] These programs and organizations will assist individuals with criminal records in obtaining easier access to the labor market by filling-in any knowledge or skills-related gaps that were created due to their convictions. Moreover, providing financial incentives to employers for hiring ex-offenders will likely provide ex-offenders with more employment opportunities because the subsidization of the wages will save the employer enough money to alleviate some of the employer’s concerns regarding costs to such an extent that the costs will not outweigh the benefits of hiring an ex-offender.

Approaches Adopted by Other Countries

Other countries, “such as Australia [and] Canada. . . have passed legislation prohibiting discrimination on the basis of criminal record[s].”[133] In Australia, discrimination based on one’s criminal record is forbidden “either through human rights legislation or spent convictions legislation.”[134] Similarly, in British Columbia, Canada, the Human Rights Code provides that “no one should be denied employment “because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.””[135] Proscribing discrimination based on criminal records in the human rights laws suggests that these countries recognize the right to employment or the right to make a living as a fundamental human right. This approach may be informative in improving Ban-the-Box as it may, similarly, be argued that gainful employment is part of the certain unalienable rights of life, liberty and the pursuit of happiness as identified in the Declaration of Independence and, therefore, discriminating on the basis of a criminal record without justification is a denial of a fundamental human right. This argument is not very strong, but, at the

very least, identifying employment as an essential element to an individual's life and pursuit of happiness will likely make an employer think twice before disqualifying a prospective employee based solely on the fact that they have a criminal record, rather than making their hiring decision based on a holistic, individualized assessment.

Conclusion

Based on the current sociological studies, Ban-the-Box legislation has not succeeded in limiting discrimination against prospective employees with a criminal record. When employers lack information due to the delay required by Ban-the-Box, they rely on statistical discrimination, which increases racial discrimination against certain minorities and, thus, excludes people of color with or without criminal records from access to employment opportunities.[136] However, these findings suggests that Ban-the-Box has only been ineffective in limiting the discrimination against people of color, specifically African American men, with or without records. One particular study, by Agan and Starr, suggests that Ban-the-Box actually benefits whites as employers will generally assume that whites are less likely to have criminal records, absent information to the contrary.[137] Overall, Ban-the-Box legislation alone, and as written, cannot effectively remedy the issue of discrimination based on criminal records because of the underlying issue of racial discrimination, which is caused by the disparity in the criminal justice system that subjects racial minorities to harsher punishments as compared to whites.[138]

[1] Joseph J. Sabia, Taylor Mackay, Thanh Tam Nguyen & Dhaval M. Dave, *Do Ban the Box Laws Increase Crime?*, 2018 NBER Working Paper No. 24381.1.

[2] Claire Ashley Saba, *A Roadmap for Comprehensive Criminal Justice Reform to Employ Ex-Offenders: Beyond Title VII and Ban the Box*, 56 Am. Crim. L. Rev. 547, 548 (2019).

[3] *Id.*

[4] *Id.* at 549.

[5] *Id.*

[6] *Id.*

[7] *About: The Ban the Box Campaign*, All of Us or None Campaign (April 28, 2021), <http://bantheboxcampaign.org/about/>.

[8] Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 942 (2003).

[9] Saba, *supra* note 2, at 550.

[10] Lucy Gubernick, *Erasing the Mark of Cain – An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 Fordham Urb. L. J. 1153, 1191 (2017).

[11] Mike Vuolo, Sarah Lageson & Christopher Uggen, *Criminal Record Questions in the Era of “Ban the Box”*, 16 Criminology & Pub. Pol'y. 139, 143 (2017).

[12] See 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*, 2016 NBER Working Paper No. 22469. 3, 6; see also Amanda Agan & Sonja Starr, *Ban the*

Box, Criminal Records, and Statistical Discrimination: A Field Experiment, 2016 Working Paper Series No. 2016-17. 2, 6–7.

[13] See Doleac & Hansen, *supra*, note 13 at 6; see also Agan & Starr, *supra*, note 13 at 321.

[14] Agan & Starr, *supra* note 13, at 321.

[15] *About: The Ban the Box Campaign*, All of Us or None Campaign, <http://bantheboxcampaign.org/about/> (last visited April 28, 2021).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Ban the Box*, Wikipedia The Free Encyclopedia, http://en.wikipedia.org/wiki/Ban_the_Box, (last visited April 28, 2021).

[21] U.S. Equal Employment Opportunity Commission, EEOC-CVG-2012-1, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, (2012).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] See *id*; *id* (providing that an individualized assessment of the applicant's background and allows consideration of the following factors: “(1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation efforts toward rehabilitation.”).

[27] Angela Hanks, *Ban the Box and Beyond Ensuring Individuals with a Criminal Record Have Access to the Labor Market*, Center for Am. Progress, (July 27, 2017), <http://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond/>.

[28] See Sabia et al., *supra* note 1, at 1; see also Nina Kucharczyk, *Thinking Outside the Box: Reforming Commercial Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, 85 Fordham L. Rev. 2803, 2808 (2017).

[29] Sabia et al., *supra* note 1, at 1–2.

[30] Saba, *supra* note 2, at 561.

[31] *Id.*

[32] *About: The Ban the Box Campaign*, All of Us or None Campaign, <http://bantheboxcampaign.org/about/> (last visited April 28, 2021).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 Iowa L. Rev. 1079, 1089 (2019).

[37] Saba, *supra* note 2, at 562.

- [38]Sabia et al., *supra* note 1, at 6.
- [39]*Id.*
- [40]*Id.*
- [41]Flake, *supra* note 38, at 1088.
- [42]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*, National Employment Law Project. 2, 9 (2020), <http://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf>.
- [43]*Id.*
- [44]*Id.*
- [45]*Id.*
- [46]*Id.* at 9–13.
- [47]*Id.* at 1, 12–15, 17–26.
- [48]Flake, *supra* note 38, at 1089.
- [49]*Id.*
- [50]*Id.* at 1089–90.
- [51]*Id.* at 1090.
- [52]*Id.*
- [53]Avery & Lu, *supra* note 44, at 9.
- [54]*Id.* at 13, 15.
- [55]*Id.* at 12, 14–16, 18–19, 22–24.
- [56]*Id.* at 10.
- [57]Gubernick, *supra* note 11, at 1190–1200.
- [58]*Id.* at 1190.
- [59]*Id.*
- [60]*Id.* at 1190–91.
- [61]*Id.* at 1191.
- [62]*Id.*
- [63]*Id.*
- [64]*Id.*
- [65]*Id.* at 1192.
- [66]*Id.* at 1192–93.
- [67]Agan & Starr, *supra* note 13.
- [68]*Id.* at 2.
- [69]*Id.* at 2–3. They also randomly varied whether the applicants had a felony conviction, whether the applicant has a GED, and whether the applicant has a one-year gap in employment.
- [70]*Id.* at 24.
- [71]*Id.* at 24–25. Before Ban-the-Box was implemented, white applicants were only 7% more likely to receive a callback as compared to similar black applicants. After Ban-the-Box was implemented, white applicants were 45% more likely to receive a callback as compared to similar black applicants.
- [72]*Id.* at 22.
- [73]*Id.* at 25.
- [74]*Id.* at 22.
- [75]Gubernick, *supra* note 11, at 1193.
- [76]Agan & Starr, *supra* note 13, at 35.
- [77]*Id.*
- [78]Kucharczyk, *supra* note 30, at 2815.
- [79]*Id.* at 2814–15
- [80]*Id.*
- [81]Gubernick, *supra* note 11, at 1193.
- [82]*Id.* at 1197.
- [83]*Id.* at 1198.
- [84]Agan & Starr, *supra* note 13, at 2.
- [85]Flake, *supra* note 38, at 1112.
- [86]*Id.*
- [87]Jacqueline G. Kelley, *Rehabilitate, Don't Recidivate: A Reframing of the Ban the Box Debate*, 22 Roger Williams U. L. Rev. 590, 594 (2017).
- [88]Jakari N. Griffith & Nicole C. Jones Young, *Hiring ex-offenders? The case of Ban the Box*, 36 Equality, Diversity and Inclusion: An Int'l J. 501, 508–09 (2017).
- [89]Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, Am. J. Crim. Just. 1, 8 (2014).
- [90]Kucharczyk, *supra* note 30, at 2813.
- [91]Griffith & Young, *supra* note 87, at 506.
- [92]See Agan & Starr, *supra* note 13, at 5–7.
- [93]Griffith & Young, *supra* note 87, at 508.
- [94]*Id.*
- [95]*Id.*
- [96]Kucharczyk, *supra* note 30, at 2815.
- [97]Griffith & Young, *supra* note 87, at 506.
- [98]*Id.* at 502.
- [99]*Id.* at 509.
- [100]*Id.*
- [101]*Id.* at 510.
- [102]*Id.*
- [103]*Id.* at 511–12.
- [104]Flake, *supra* note 38, at 1118–19.
- [105]Gubernick, *supra* note 11, at 1211.
- [106]Kucharczyk, *supra* note 30, at 2836.
- [107]Gubernick, *supra* note 11, at 1209.
- [108]*Id.* at 1210.
- [109]*Id.*
- [110]*Id.* at 1209.
- [111]See Maurice Emsellem & Beth Avery, *Racial Profiling in Hiring: A Critique of New "Ban the Box" Studies*, 2016 National Employment Law Project. 1, 6 (2016) (criticizing the conclusions of the Ban-the-Box studies, specifically, the studies conducted by Doleac/Hansen and Agan/Starr, as misplacing the issues of racial discrimination on Ban-the-Box laws instead of blaming the underlying, systemic racism of the nation).
- [112]See Gubernick, *supra* note 11, at 1209.

- [113]U.S. Equal Emp. Opportunity Comm'n., EEOC-CVG-2012-1, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, (2012).
- [114]*Id.*
- [115]Kucharczyk, *supra* note 30, at 2831–36.
- [116]*Id.* at 2834.
- [117]*Id.*
- [118]*Id.*
- [119]*Id.* at 2831.
- [120]*Id.* at 2831–32.
- [121]*Id.* at 2832.
- [122]*Id.* at 2833.
- [123]*Id.*
- [124]Flake, *supra* note 38, at 1123.
- [125]*Id.*
- [126]*Id.* at 1124–25.
- [127]*Id.* at 1124.
- [128]*Id.*
- [129]Agan & Starr, *supra* note 13, at 31.
- [130]Griffith & Young, *supra* note 87, at 515.
- [131]*Id.*
- [132]See Flake, *supra* note 38, at 1125; see also Services, Homeboy Industries, <http://homeboyindustries.org/services/> (last visited April 28, 2021) (illustrating an organization that was created to help rehabilitate and reintegrate ex-offenders into society by providing tattoo removal services, education, substance abuse support, and mental health and legal assistance, amongst other things).
- [133]Helen Lam & Mark Harcourt, *The Use of Criminal Record in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public*, 47J. Bus. Ethics 237 (2003).
- [134]*Id.* at 245.
- [135]*Id.* at 248.
- [136]See Doleac & Hansen, *supra* note 13, at 6; see also Agan & Starr, *supra* note 13, at 6–7.
- [137]Agan & Starr, *supra* note 13, at 348.
- [138]Flake, *supra* note 38, at 1126.