



RESEARCH REPORT

Ban the Box and Racial Discrimination

A Review of the Evidence and Policy Recommendations

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Ban the Box and Racial Discrimination

Ban-the-box policies, for which employers remove questions about criminal history from applications and delay background checks until later in the hiring process, have gained popularity in recent years. These policies are intended to give people with criminal histories the opportunity to display their qualifications in the hiring process before being assessed—and potentially rejected—based on this history.

Over 150 cities and counties and 34 states and Washington, DC, have adopted ban-the-box policies (Doleac and Hansen 2016; Rodriguez and Avery 2016). Many private employers have also voluntarily adopted ban-the-box-hiring policies, including Walmart, Target, the Home Depot, Bed Bath & Beyond, and Koch Industries Inc.¹ These policies are also being applied outside the workforce context. Some universities have adopted a ban-the-box approach to school applications, and the District of Columbia's City Council recently approved a law banning the box from housing applications.² Even some hospitals have voluntarily adopted ban-the-box laws (Thill, Abare, and Fox 2014).

Research on ban the box has shown that it increases callback rates for people with criminal records (Agan and Starr 2016). Agan and Starr (2016) find that ban-the-box policies “effectively eliminate” the effect of having a criminal record on receiving a callback. Case studies from specific cities support these results, showing that hiring rates for people with criminal records increased after ban the box was implemented (Atkinson and Lockwood 2014; Berracasa et al. 2016). Additionally, ban the box as a social movement has drawn attention to the plight of people with criminal records and has increased awareness of the challenges they face beyond employment.

But recent research has concluded that ban the box also reduces the likelihood that employers call back or hire young black and Latino men (Agan and Starr 2016; Doleac and Hansen 2016). These findings suggest that when information about a person's criminal history is not present, employers may make hiring decisions based on their perception of the likelihood that the applicant has a criminal history. Racism, harmful stereotypes, and disparities in contact with the justice system may heavily skew perceptions against young men of color.

These results do not necessarily mean that ban the box should be eliminated. Additional policies, regulations, and alterations can ensure that ban the box improves employment outcomes for people with criminal histories without causing negative effects on people of color. In this report, we review the

evidence on job access for people with criminal records, racial discrimination in the job market and justice system, and the history of ban the box. We also propose policy additions and alterations that may help eliminate the unintended consequences of ban the box on young black and Latino men while maintaining or improving the benefits for people with criminal records.

Job Access for People with a Criminal Record

Nearly one in three American adults have a criminal record (Goggins and DeBacco 2015). Bias, stigma, and a network of laws that limit the rights and privileges of people with criminal records (Travis 2002) mean that having such a record affects people long after they have served their sentence. With these collateral consequences, even a minor criminal history produces lifelong barriers that can block successful reentry and participation in society.

The expansion of online, state-level databases in the late 1990s increased the convenience and scope of background checks, making it increasingly difficult to escape the effects of a criminal history (Finlay 2008). This is especially true in the labor market, where it is common practice to access an applicant's criminal history before reviewing application materials.

Employer Behavior

Unlike racial bias in hiring, employer preferences for applicants without criminal backgrounds generally do not violate federal law.³ And studies confirm that having a criminal background is a significant barrier to employment (Decker, Spohn, and Ortiz 2013; Holzer, Raphael, and Stoll 2004; Pager, Western, and Sugie 2009). In Holzer, Raphael, and Stoll's (2004) survey of employers' reaction to stigmatized applicant characteristics, only about 40 percent of employers suggested they would "definitely" or "probably" hire an "ex-offender," compared with roughly 90 percent who said they would hire applicants with other characteristics, such as lack of employment experience. A more recent survey of employers in the fast food industry confirmed that employers have a strong negative association with criminal histories. On a scale of 1 (definitely would hire) to 4 (definitely would not hire), the median response for various indicators of criminal background ranged from 2.3 to 2.8, significantly higher than non-criminal justice employment barriers (Decker, Spohn, and Ortiz 2013).

Pager, Western, and Sugie's (2009) and Pager, Western, and Bonikowski's (2009) studies using employer response rates to artificial job applicants confirms employers' bias against applicants with

criminal records. The authors conducted a field experiment in New York City where teams of black, white, and Latino men applied for low-wage jobs, presenting equivalent résumés, differing only in their race and criminal background. Pager, Western, and Sugie (2009) found that having a criminal record reduced the likelihood of a callback by almost half, from 28 percent for applicants without a criminal record to 15 percent for those with one. The likelihood of a callback was even lower for black testers with a criminal record (10 percent) compared with whites with a criminal record (22 percent). The authors found that personal contact with a potential employer reduced the effects of a criminal record 15 percent, but black applicants were much less likely to be offered personal contact with an employer (through an interview), with 43 percent receiving personal contact compared with 60 percent for white applicants. This is especially relevant for ban the box, because evidence suggests the policy reduces the impact of a criminal history on initial callbacks, which is often the final step before an in-person interview. Pager, Western, and Bonikowski (2009) also looked at Latino applicants and found that Black and Latino applicants with clean backgrounds fared no better than white applicants just released from prison.

Finlay (2008) also examined employer responses to applicants with criminal histories and found that labor market outcomes became worse for people with criminal histories once state criminal history records became available over the Internet. But Finlay found that people without records from highly offending groups did not have significantly better labor market outcomes after the records were more readily available. Stoll and Bushway (2008) similarly find that employer-initiated criminal background checks are negatively related to hiring people with criminal records. But some employers are legally required to check backgrounds, and the authors find that although the effect is strongly negative for these employers, checking appeared to have no effect on hiring rates for people with criminal records for employers who are not legally required to check backgrounds.

Evidence for On-the-Job Performance

People with criminal histories are disadvantaged in the labor market despite an absence of evidence that they perform worse on the job or are more likely to commit workplace crimes. A recent paper by Lundquist, Pager, and Strader (forthcoming) found the opposite. They studied the performance of military enlistees with criminal records who joined the service via a waiver program and found no substantial difference in the likelihood of early discharge for poor performance of enlistees with felony records compared with enlistees with similar characteristics. The authors instead found that people

with felony-level criminal backgrounds were promoted more quickly and to higher ranks than other enlistees.

A few issues qualify these findings, such as the unique, heavily regulated structure of the military and that people with misdemeanor offenses were somewhat more likely to be discharged. Nonetheless, this study counters the prevailing narrative of risks associated with hiring formerly incarcerated people. Additional evidence on productivity rates and on-the-job crime for employees with criminal records is needed.

Racial Discrimination in the Labor Market and Justice System

The stigma of a criminal record in the labor market is more pronounced for people of color, who already face massive disparities compared with whites in employment and wages. Racial disparities in policing (Goff et al. 2016) exacerbate any racism job applicants of color face, forcing more and more people to cope with the stigma associated with a criminal record and discrimination based on skin color.

Racial Disparities and Discrimination in the Workforce

Racial disparities in US unemployment and wages are large, particularly for young black men. Black men ages 16 to 19 faced a 29.4 percent unemployment rate in the fourth quarter of 2016 (Q4 2016) compared with 15.6 percent for white men of the same age. For black men ages 20 to 24, the unemployment rate was 15.3 percent compared with 7.9 percent for their white counterparts.⁴ Even among the working population, massive wage disparities exist. The median weekly earnings of full-time wage and salary workers in Q3 2016 was \$448 for black men ages 16 to 24, compared with \$517 for white men in the same age group.⁵

Hispanic or Latino people face disparities in the labor market as well, although they are generally not as pronounced as those faced by black people. The unemployment rate for Latinos in Q4 2016 was 5.6 percent compared with 4 percent for whites and 7.9 percent for blacks. And Latino men ages 16 to 19 faced a 22.7 percent unemployment rate in Q4 2016 compared with the 15.6 percent for white men and 29.4 percent for black men.⁶

Asian Americans as a whole generally do not face these disparities and often show better employment outcomes than whites. But disparities within the group are often masked by overall averages. For instance, unemployment rates by Asian subpopulations are not available, but there are data on wealth differences for these groups. While the average and median wealth of Asian Americans has become comparable to whites', wealth inequality among Asian Americans is greater than it is among whites. Asian Americans at the bottom of the income distribution have less wealth than whites at the bottom (Weller and Thompson 2016). These differences may be partially explained by variations between Asian American ethnic groups. For instance, the poverty rate for South Asians in 2014 was 9.7 percent, the poverty rate for East Asians was 13.8 percent, and the poverty rate for Pacific Islanders was 20.4 percent.⁷

DISCRIMINATION

Racial discrimination in hiring has been shown to contribute to racial disparities in labor outcomes, as evidenced by empirical studies of gaps in earnings by race (Grodsky and Pager 2001; Waters and Eschbach 1995), randomized controlled trials of matched pair jobseekers and résumé studies (Bendick, Jackson, and Reinoso 1994; Bertrand and Mullainathan 2002; Fix, Galster, and Struck 1993; Pager, Western, and Sugie 2009), and litigation in which employers were found guilty of direct racial discrimination (Darity and Mason 1998). In wage gap studies, wage differences between races have been found to be only partially explained by observable characteristics, with much of the earnings variation unexplained by human capital, marital, or regional characteristics. In matched pair tests and résumé studies, black men or men with black-sounding names have been found to be less likely to receive an interview or a job offer. For example, in a matched pair study conducted by the Urban Institute, black men were three times more likely to be refused a job compared with white men with the same résumé (Fix, Galster, and Struck 1993).

Latinos have also been found to face discrimination in the labor market. Pager, Western, and Sugie (2009) found that in applications to 171 employers, Latino testers received a positive response rate of 25.2 percent, compared with 31.0 percent for whites and 15.2 percent for blacks. Less often studied are labor outcome disparities between Asian and American Indians and Alaska Natives and other racial groups. Kim and Sakamoto (2010) found that native-born Asian American men had 8 percent lower earnings than did measurably comparable white men, and Asian American men who were schooled entirely overseas had even more substantial earnings disadvantages. Asian American men who obtained their highest degree in the United States but completed high school overseas had an intermediate earnings disadvantage compared with native-born and foreign-schooled ones. But to our knowledge, no experimental tests have examined discrimination for Asian Americans in the labor

market. More research should be undertaken to examine disparate employment outcomes for Asian Americans, particularly by subpopulation.

Racial Disparities in the Justice System

Discrimination in hiring is linked to and perpetuated by the high rates of arrest and incarceration of people of color. In 2012, the arrest rate for whites was 3,392 per 100,000 people, while the arrest rate for blacks was 7,920 per 100,000.⁸ And even though black youth are only 16 percent of the youth population, they represent 28 percent of juvenile arrests, 37 percent of the detained population, 38 percent of those in residential treatment, and 58 percent of youth committed to state adult prison (Hartney and Silva 2007). These disparities are also reflected in incarceration rates. While people of color make up about 37 percent of the US population, they account for 67 percent of those imprisoned. Black men are six times as likely to be incarcerated as white men, and Hispanic men are more than twice as likely to be incarcerated as non-Hispanic white men.⁹

Researchers have found disparities in how black and Latino people are policed, which may contribute to these disparities in their arrests and incarceration. A joint analysis by the Urban Institute and the Center for Policing Equity of stops, searches, and use of force in Austin, Texas, found a higher rate of vehicle stops and use of force with black drivers (Goff et al. 2016). The authors aggregated data on police use-of-force incidents to the tract level and found that a 1 point rise in the percentage of black residents increased expected use of force by 2.6 percent. The rise of stop-and-frisk policies in high-crime communities and urban areas has also called into question racial fairness in policing, because law enforcement often concentrates stop-and-frisk efforts in communities of color (La Vigne et al. 2014).

Another body of research attempts to examine disparities in policing further by isolating the effect of statistical discrimination from individual and institutional preference-based racism. A study on the rates at which police officers stop and search cars found that police officers were more likely to search motorists whose race differed from the officer's own (Antonovics and Knight 2009). Other studies of police stops have shown mixed findings: some have found no evidence of bias in stops but bias in poststop actions (Alpert, Dunham, and Smith 2007), others have found individual and institutional bias in stops (Close and Mason 2007), and others have found no bias in searches (Pickerill, Mosher, and Pratt 2009).

Other fields of study have examined the implicit biases (i.e., unconscious prejudices in judgement or behavior) that people of color face in the justice system and beyond. Goff, Steele, and Davies (2008)

undertook a series of laboratory studies that revealed that study participants implicitly associated black people with apes and that this association influenced their basic cognitive processes and significantly altered their judgements in criminal justice contexts. Levinson (2007) undertook an empirical study in which participants were asked to recall facts of stories that they had read only minutes earlier, where they remembered and misremembered legally relevant facts in racially biased ways. The author suggests that these findings imply that judges and jurors also unknowingly misremember case facts in racially biased ways.

Again understudied is how Asians and American Indians and Alaska Natives fit into this picture. Johnson and Betsinger (2009) found that Asian Americans are punished more similarly to white people with records compared with black and Latino people with records, and Hartney and Vuong (2009) found that Asian Americans and Pacific Islanders were the only racial group underrepresented in the justice system compared with whites. But neither study broke Asian Americans down into different ethnic groups, which other research suggests will produce heterogeneous results. Other studies, such as that of Ahuja and Chlala (2013), find that in communities with larger concentrations of Pacific Islander and Southeast Asian youth, young men and boys are routinely stopped and searched by police in their cars and on foot and questioned in public places. Indigenous populations also face disparities in interaction with the criminal justice system. American Indian youth are three times as likely as white youth to be held in a juvenile detention facility,¹⁰ and they are most likely to be killed by law enforcement.¹¹ While American Indians and Alaska Natives compose 0.8 percent of the population, they compose 1.9 percent of police killings. But it is difficult to find research on discrimination in the justice system that adequately measures outcomes for Asian Americans (particularly Asian American subpopulations) or American Indians and Alaska Natives. More research is needed to explore the discrimination faced by these groups and how various policies and programs affect them.

Regardless of the underlying motivations for racial disparities in the justice system, evidence shows that many points in the system entail some degree of racial bias, unjustified by underlying rates of criminality. This suggests that people of color are disproportionately and unfairly more likely to suffer the negative consequences of having a criminal record.

How Discrimination in the Labor Market and the Justice System Interact

Racial discrimination in the labor market and in the justice system combine to create a cycle that is difficult to break. 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. Raphael and Winter-Ebner (2001) found significantly positive effects of unemployment on property crime rates.

For people of color in the labor market with a criminal record, these effects are exacerbated. Lyons and Pettit (2011) found that black people face disparities compared with whites in wage growth following release from prison, even though they showed no evidence of racial divergence before incarceration. After release, wages grew 21 percent slower for formerly incarcerated blacks compared with formerly incarcerated whites.

Some people argue that biases in the labor market are caused by statistical discrimination, or employers' rational and nonprejudiced beliefs based on the statistical likelihood that someone has committed a crime (Agan and Starr 2016; Holzer, Raphael, and Stoll 2006; Stoll 2009). But even if these decisions are rational and nonprejudiced, which the evidence suggests is not always true, this statistical likelihood is still based on prejudice and bias within the justice system.

Ban the Box

Ban-the-box policies were created to level the playing field and reduce biases faced by people with criminal records in the labor market. Ban-the-box policies restrict an employer from asking questions about criminal history on job applications and force them to delay background checks until later in the hiring process. Some employers voluntarily adopt ban the box, while others are forced to through local, state, or federal legislation.

All of Us or None, a national civil rights movement of formerly incarcerated people, their families, and allies, is largely credited with originating the ban-the-box campaign in 2004.¹² But the history of state legislation banning the box stretches back to 1998, when Hawaii became the first state to institute a policy banning public and private employers from inquiring about an applicant's criminal background until a conditional offer of employment has been made.¹³

Ban-the-box laws vary in scope (which employers are covered, employer exemptions) and time (length into the hiring process that background checks are delayed) (Doleac and Hansen 2016). Some ban-the-box laws allow the employer to ask about criminal history any time after the first interview, and

others do not allow it until after a conditional job offer is made (Rodriguez and Avery 2016). Some ban-the-box laws apply to both public and private employers and others only to public.

Effects on Employers

Some critics of ban the box argue that the policy increases the costs of doing business by opening up the business to litigation and theft and by increasing the costs of hiring new employees.¹⁴ Critics argue that the costs of hiring are greater because applicants may make it all the way to the background check stage and then be rejected because of their criminal record, which could have occurred earlier in the hiring process, saving the applicant and the employer time and money. But a study in Washington, DC, found that most employers reported that ban the box had minimal impact on their hiring processes (Berracasa et al. 2016).

Other critics argue that ban the box increases the likelihood of crimes against clients and coworkers, causing safety concerns.¹⁵ But ban the box does not restrict an employer from conducting a background check altogether—it only delays it until later in the hiring process. Additionally, most organizations that work with vulnerable populations, such as day care centers and hospitals, are exempt from ban-the-box laws.

Effects on People with Criminal Records

To improve employment outcomes for people with criminal records, ban the box must cause changes at various points in the hiring process (figure 1). First, ban-the-box policies must cause employers to remove criminal history questions from their applications and delay questions about criminal history until later in the hiring process. This first step must occur for ban the box to have its intended effects.

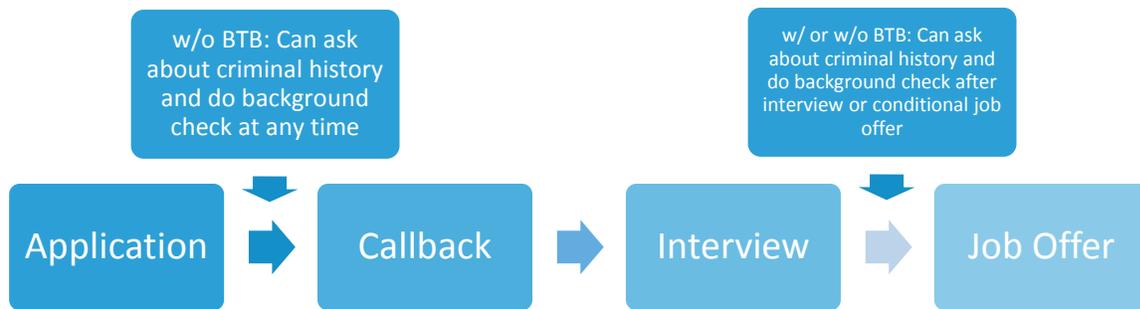
Second, people with criminal histories must receive more initial callbacks than they would have without ban the box. Much of the dialogue around ban the box is about allowing people with criminal histories to “get their foot in the door.” Is this happening?

Third, job offers and employment rates must increase for people with criminal histories because of the policy. Because no current ban-the-box policies bar employers from accessing an applicant’s criminal history, employers might still not hire people with criminal records at higher rates, even if they call them back at higher rates. Therefore it is not enough for people with criminal records to get more callbacks. They must also get more job offers because of those callbacks.

Fourth, ban the box must not negatively affect hiring rates for people of color, with and without criminal histories. Because much of the momentum around ban-the-box policies has been their potential to address racial disparities in the justice system and hiring, we must evaluate whether ban-the-box policies have positive or negative consequences for people of color, particularly black and Latino men.

And finally, the original motivation for the ban-the-box campaign was to end “all forms of discrimination against people with criminal records” (AOUON 2015). This larger, more aspirational framing of the goal speaks to its origin, not simply as an economic intervention, but as a civil and human rights issue. These larger benefits are difficult to quantify, but ban-the-box policies likely remove some of the stigma attached to a criminal record, and removing this stigma may carry social and psychological benefits beyond increased employment rates.

FIGURE 1
Hiring Process with and without Ban the Box



Note: BTB = ban the box.

REMOVAL OF CRIMINAL HISTORY QUESTIONS FROM JOB APPLICATIONS

Ban-the-box policies delay employers from inquiring about a job candidate’s criminal history until later in the hiring process, whether via application, verbally, or through a background check. Getting employers to delay background checks and refrain from asking about criminal background on applications are the first steps to achieving the goals of ban the box.

There is mixed evidence as to whether ban the box achieves this narrowly defined goal. Agan and Starr (2016) confirm that ban-the-box policies in New York City and New Jersey made employers remove the box in the initial phase of the hiring process. Less than 5 percent of the employers in the study retained the question in the post-ban-the-box period, indicating that employers are banning the box from written applications. This does not mean that employers refrain from asking about candidates’

criminal histories in interviews, however, nor does it speak to whether employers posed questions about criminal history to some applicants and not others in racially biased ways.

Additionally, Berracasa and coauthors (2016) found that many Washington, DC, businesses were unfamiliar with the law after it was passed. They also found that within the first nine months of the law's implementation, over 400 complaints were filed against employers, suggesting that some employers either were unaware of or chose not to follow the law. Finally, the authors found that the law likely does not apply to many District businesses; only 25 percent of the businesses surveyed reported being subject to the law's effects. The others either had 10 or fewer employees or worked with minors or vulnerable adults and were therefore exempt.

More research is needed to determine whether employers are complying with the most basic aspects of ban the box: removing the check box from applications and delaying questions about criminal history until later in the hiring process. Additionally, more information is needed about how many employers are exempt from ban-the-box laws and whether these exemptions reduce the law's potential benefits.

INCREASE IN CALLBACK RATES

If ban the box is working properly, people with criminal records should see an increase in the relative callback rates for jobs. This stage is of particular importance to ban-the-box policies, as it is the part of the hiring process where much discrimination occurs (Bendick, Brown, and Wall 1999). In her tests of employer callbacks, Pager (2003) found a significantly lower rate of callbacks for people who indicate a criminal history on an initial interview.

The evidence on ban the box suggests that it increases callback rates for people with criminal records. Agan and Starr (2016) evaluated the effects of ban the box on employer callback rates after an initial job application. They sent roughly 15,000 fictitious applications, randomized across several characteristics, with a 50 percent split between white and black "applicants" to employers in New York City and New Jersey before and after each jurisdiction adopted a ban-the-box policy. Narrowly considering the effect of a criminal record alone, Agan and Starr found that ban-the-box policies "effectively eliminate" the effect of having a criminal record on receiving a callback. The model does not reveal whether this effect continues through the employment process, and, as will be addressed later, the interaction of race and criminal history tells a more complex story about the effect of ban the box on callbacks.

INCREASE IN JOB OFFERS

Although some evidence suggests that ban the box increases callback rates for people with criminal records, little evidence reveals the effect of ban-the-box policies on actual job offers for people with criminal records. A recent study by Shoag and Veuger (2016a) uses a proxy of employment in high-crime areas to estimate the effect of ban the box on people with criminal records. The authors look at employment outcomes in high-crime neighborhoods after ban-the-box legislation using Longitudinal Employer-Household Dynamics Origin-Destination Employment Statistics data from 2002 to 2013. Compared with high-crime census tracts (the 25 percent most violent tracts in a city) without ban-the-box policies, the census tracts that experienced bans had on average a 3.5 percent higher employment rate. Shoag and Veuger could not control for tract-level changes in demographics (though they did control for population growth), so it is unclear which demographic groups drive the employment increases.

Few case studies of specific cities descriptively show that hiring rates for people with criminal records increased after ban the box was implemented. Berracasa and coauthors (2016) found that in Washington, DC, the number of returning-citizen hires increased both numerically and as a percentage of all hires after ban the box took effect. But they point out that factors beyond the law could explain this outcome, such as Mayor Bowser taking office just a month after the law took effect (and who made it a priority of her administration to hire returning citizens) and that the District may have posted a greater number of positions suited for returning citizens during this period. Atkinson and Lockwood (2014) also found that in Durham, North Carolina, the percentage of people with records hired by the City of Durham increased since instituting ban the box. But the authors do not provide counterfactual information about the number or percentage of people without criminal records who applied and were hired pre- and post-ban the box or the number of people with records who applied before and after the law went into effect.

Effects on Racial Discrimination

The literature on restricting employer access to information about potential applicants suggests potential unintended negative effects on marginalized populations (Bushway 2004; Finlay 2008; Holzer, Raphael, and Stoll 2006; Stoll 2009). As information about potential job applicants is restricted, employers may shift their decisionmaking cues to other sources. Sometimes, this is relatively benign, such as other listed or observed characteristics. But this can also take the form of relying on racist stereotypes, a form of illegal discrimination.

Two recent studies find that ban-the-box policies can cause unintended negative effects for people of color by reducing initial callback rates for black applicants (Agan and Starr 2016) and by reducing employment rates for young men of color (Doleac and Hansen 2016). Preliminary results from a working paper by Starr (2015) also suggest that ban the box can reduce public employment for black men ages 18 to 64. Again, missing from these analyses is how Asian and American Indians and Alaska Natives are affected by ban the box. More research is needed to determine how ban the box affects these groups.

Agan and Starr (2016) found that after ban-the-box implementation in New York City and New Jersey, the disparities in callbacks between black and white applicants jumped from white applicants receiving 7 percent more callbacks than black applicants to 45 percent more. The authors posit that the increased racial disparity is likely because of employers racially discriminating against black applicants who can no longer prove their lack of a criminal record, as well as allowing white applicants with records to benefit from the favored status enjoyed by white job applicants more generally.

Doleac and Hansen (2016) analyzed employment outcomes for black and Latino young, low-skilled men in jurisdictions that have and have not passed ban-the-box legislation and found similar unintended negative effects. They estimated that ban-the-box policies reduce employment likelihood 14.9 percentage points for black men and 9.5 percentage points for Latino men, as opposed to white men who saw a positive (yet insignificant) change in employment after ban the box was implemented. The authors also found that employers may respond to ban the box by shifting preference toward applicants who are less likely to have had contact with the justice system, such as women and older men of color.

Some people have criticized the validity of these papers. One line of argument is that in the Agan and Starr paper, callback rates for black men increased following ban-the-box implementation and that this shows the law did not reduce employment outcomes for black men (Emsellem and Avery 2016). But in the triple difference-in-difference model utilized by Agan and Starr, the outcome of interest is the disparity in callback rates pre- and post-ban the box for white and black applicants. It is difficult to argue that an increase in the gap between white and black callbacks of 38 percentage points is an acceptable amount.

Another criticism of the Agan and Starr paper is that in New York City, the study did not find a statistically significant difference between the callback rates of white versus black applicants because of ban the box. This could imply that some policy or characteristic of New York City is tempering the unintended effects in that area and that, as the authors suggest, racial discrimination in hiring may be avoidable.

There are also concerns about the validity of Doleac and Hansen’s paper, namely that their geographic area of focus (the metropolitan statistical area) does not always match with the area in which the policy was implemented (the city or state) and that the policy often only applies to public employees, whereas their data look at both public and private employees. Doleac and Hansen do, however, run a robustness check on public-sector jobs only and find no effect for Latinos or whites, but the effect on black men remains. An additional robustness check of running the analysis at the jurisdictional level at which the policies are implemented might help confirm their findings.

Critics also point to the assertion in Doleac and Hansen’s paper that ban-the-box policies do more harm than good and that they should be repealed. There are several reasons to question this conclusion. First, although Doleac and Hansen found negative effects for black men with no college degree ages 25 to 34, they found positive effects for black men ages 35 to 64 with no college degree and black women ages 25 to 34 with a college degree, who together make up a larger share of the black population (Emsellem and Avery 2016). Similarly, Shoag and Veuger (2016b) found that on net, black men benefited from ban the box. And if ban-the-box policies improve employment outcomes for people with criminal records, they may carry both individual and societal benefits. Employment is a significant factor in preventing recidivism (Laub and Sampson 2003; Schnepel, forthcoming; Uggen, Wakefield, and Western 2005; Yang 2016), and reductions in recidivism mean fewer victimizations and greater public safety. A study of Hawaii’s ban-the-box law on repeat offending showed that criminal defendants prosecuted in Honolulu for a felony crime were 57 percent less likely to have a prior criminal conviction after the implementation of ban the box (D’Alessio, Stolzenburg, and Flexon 2015).

Finally, as we discuss in the policy alternatives section, several interventions might work with ban-the-box policies to achieve the desired outcome for people with criminal records *and* reduce (or at least not increase) discrimination based on race.

Potential Additions to Ban the Box

Although Agan and Starr (2016) and Doleac and Hansen (2016) have shown that ban the box can have negative consequences for people of color, the studies do not mean that ban-the-box policies should be repealed. Additional policies and programs should ensure the continued benefits of ban the box for people with criminal records, while eliminating the unintended consequences on people of color. Table 1 presents alterations and additions that should be explored to improve ban-the-box policies and create a better context for them to be effective.

Improving Equal Employment Legislation and Enforcement

Ban-the-box policies should be combined with improved equal employment laws, regulations, and enforcement. In their paper on expanding opportunity for young men and boys of color, Spaulding and coauthors (2015) emphasize the need for more direct enforcement and improvement of antidiscrimination laws. Employers who have government contracts should be held to standards of nondiscrimination, and these guidelines should be updated to be more pertinent to current economic situations and labor force demographics. For nongovernment contractors, the authors suggest increased use of government testers and more systematic reviews of data from employers.

Better laws and increased enforcement can help combat discrimination against people with criminal records. Rodriguez and Avery (2016) contend that employers should follow the best practices laid out by the 2012 US Equal Employment Opportunity Commission guidance on the use of arrest and conviction records in employment decisions. Rodriguez (2016) suggests that the most effective way to improve outcomes for people with criminal records is to remove the box and ensure that conviction information is used fairly. This can be done through individualized assessments instead of blanket exclusions by considering the age of the most recent offense and its relevance to the job before making a hiring decision and by letting candidates review background-check results to ensure they are correct. These and other practices surrounding fair use of conviction information should be mandatory.

Equal employment laws are, however, difficult to enforce, particularly for small businesses. And proving discrimination is difficult. In 2014, the Equal Employment Opportunity Commission dismissed 71.4 percent of charges alleging race-based discrimination because of a lack of reasonable cause.¹⁶ But even though these laws are challenging to enforce and prove, they could improve ban-the-box policies and reduce discrimination in hiring. Increased legislation and enforcement should be combined with other policies and programs to engender a larger impact.

Providing Training for Employers and Outreach to People with Criminal Records

Another set of programs that could enhance the benefits of ban the box while reducing the negative effects on people of color include increased training for employers and outreach to people with criminal records about ban-the-box laws. Training for employers could entail making them aware of the law's potential to increase discrimination against people of color and assistance in developing safeguards for assuring that that does not happen. Training could also involve educating employers about equal employment opportunity laws and best practices and encouraging employers to use them.

Increased outreach to people with criminal records could help them know their rights under laws related to criminal histories and racial discrimination in hiring. In their evaluation of the DC ban-the-box law, Berracasa and coauthors (2016) found few people who submitted complaints to the city because of the law, suggesting that many people with records are not aware of their rights. Increased awareness of rights would empower job applicants to ensure their rights are respected.

Improving Accuracy of Criminal Background Checks

Another change that would likely improve hiring outcomes for people with criminal records, and for people of color in particular, would be to improve the accuracy of criminal background check information because it is often incomplete or inaccurate.

Employers obtain criminal background information in two ways. The first is through the Federal Bureau of Investigation (FBI), which facilitates the interstate sharing of state criminal history records. States collect criminal history information from law enforcement, courts, and other agencies and submit these records to the FBI (GAO 2015). These records are based on fingerprint matches and generally contain an accurate match to a person. Because the data are collected across states, the data often follow a person's complete history.

But even though federal regulation 28 C.F.R. § 20.32(a) states the FBI database is meant to only reflect serious felony offenses,¹⁷ data issues cause background checks to routinely turn up minor offenses, arrests without charges, and charges that did not lead to convictions (Neighly and Emsellem 2013). According to Neighly and Emsellem (2013), 50 percent of the time, arrest information in the FBI database fails to include any indication of a case's outcome, or disposition. Additionally, FBI audits of state use of criminal history records conducted from 2011 through 2013 show that 31 of 44 states audited (about 70 percent) had at least one state agency out of compliance with federal regulations related to a person's rights to challenge and correct their criminal history records (GAO 2015).

The second way employers can obtain criminal background information is through private companies that compile their data from several sources. These data might be more likely to have disposition information, but may not contain comprehensive information and can miss important conviction information. Additionally, these data files often contain information for people who share the same name as the person being investigated, because a fingerprint is not required to create the match.

A GAO report indicates that between fiscal years 2009 and 2014, Federal Trade Commission (FTC) officials settled 16 complaints against private background screening companies and employers for alleged violations, such as not following reasonable procedures when providing information to employers or not providing proper notice to employees on how the information would be used. In one complaint, the FTC alleged that a private background company failed to follow reasonable procedures to prevent the company from including the same criminal offense information in a consumer report multiple times, failed to follow reasonable procedures to prevent the company from providing obviously inaccurate consumer report information to employers, and provided the records of the wrong person to employers (GAO 2015).

People of color are especially harmed by inaccuracies in criminal record data, because they represent a disproportionate share of the nation's arrests and are therefore more likely to have missing dispositions. For instance, when the Transportation Security Administration screened two million workers to work at US ports, black port workers challenged the accuracy of the FBI records more than four times as often as white port workers (Neighly and Emsellem 2013).

Data accuracy should be improved so that with or without ban the box, people are judged on accurate information. This can be accomplished through increased regulation and enforcement for FBI and private background check data. The FTC, the Consumer Financial Protection Bureau (CFPB), and the Equal Employment Opportunity Commission can regulate private background check companies or the employers that conduct these checks (GAO 2015). But the CFPB reported that it has not received many consumer complaints regarding the use of criminal history records, nor had they, as of October 2014, brought any enforcement actions against private companies related to criminal history information in employment checks. The bureau thinks this is because consumers may not think to contact the CFPB with such complaints (GAO 2015). Increased awareness about the CFPB's role in background check enforcement is a first step toward improving accuracy.

Additionally, laws pertaining to criminal history records do not require private criminal background check companies to submit to federal audits or provide disclosure statements on their activities (GAO 2015). Requiring such audits and disclosures is a clear step toward improving the system. And Murray (2016) suggests that to improve these data, laws should require data agencies to update their records frequently, and these laws must be diligently enforced.

Although the improvements to FBI background information likely need to be made at the law enforcement level, the FBI is best positioned to correct the problem with the help of Congress and the executive branch (Neighly and Emsellem 2013). Neighly and Emsellem (2013) call for federal legislation

requiring the FBI to obtain missing disposition information before sending background checks for employment and licensing. They also call for the FBI to create processes to accept missing disposition information from multiple sources or flag missing disposition information in background reports. Finally, they assert that all federal and state employment and licensing background checks that require FBI records should provide the affected person an automatic right to a copy of the rap sheet and a robust appeals process and that the FBI should enforce the law regulating criminal background checks for employment and licensing.

Finally, applicants should be given automatic rights to a copy of their criminal records and a robust process for appeals for incorrect information (Neighly and Emsellem 2013). This would help people advocate for themselves and to see their criminal record. But by the time an applicant goes through the appeals process, the job to which they were applying will likely be filled. Therefore, this is only a partial answer to the problem and must be combined with other policies and programs.

Expunging Criminal History Information

Expungement is another potential avenue for reducing criminal records' impact on employment. Expungement is the erasure or elimination of criminal record history information by rendering the information inaccessible because it has been destroyed or sealed from view. Expungement places responsibility on the applicant, rather than having the government enact further restrictions on business, which some see as a benefit,¹⁸ but others see as an extra burden on the applicant.

Several states have enacted laws providing expungement or sealing remedies, and some members of Congress have proposed legislation that would allow expungement of federal conviction information under certain circumstances (Murray 2016). For instance, Texas recently passed legislation that allows people convicted of their first offense to receive orders of nondisclosure, as long as their offenses did not involve sex crimes, domestic abuse, or other serious violence.¹⁹ But jurisdictions generally remain conservative when determining which types of information should be eligible for expungement. And expungement may be difficult in the information age, when removing information from the Internet is nearly impossible. But if background check information is more properly regulated and expunged cases are not included in the reports, outcomes for justice-involved people may improve. And because people of color more frequently encounter the justice system, expungement may disproportionately help people of color.

Increasing Employment Services for People with Criminal Records

Increased employment services (e.g., job training, coaching, apprenticeships, and job placement) for people with criminal records and incarcerated people might also increase their employment opportunities. These policies would help address the qualification gap between people with and without criminal records and may put them in contact with potential employers through internships and apprenticeships. This could mitigate the impacts of having a criminal history by allowing the person to make contact with the employer before being judged on their criminal history. This might especially help people of color, because black applicants are less likely to have personal contact with an employer than white applicants (Pager, Western, and Sugie 2009). But increased job services for people with criminal records will not address the biases employers have against these applicants. This needs to be addressed through more direct means that target the employer rather than the applicant.

Local, state, and federal governments might find that investing in employment services for people with a criminal record saves them money by reducing recidivism, victim assistance, and other social costs. A social impact bond, or pay for success program, in New York undertaken by the Center for Employment Opportunities is providing employment services to people with criminal records, and this is being funded by investors who will recoup their money (with a profit) from the state of New York if the services reduce prison recidivism.²⁰ Other social impact bonds should be implemented to create new and innovative ways of financing such services.

Reducing Racially Identifying Information in Applications

Another policy to reduce ban the box's unintended consequences on people of color is to make job applicant names and addresses blind and to remove questions about criminal history (Agan and Starr 2016). This would reduce employers' ability to identify an applicant's race based on name or address, bringing the applicant one step closer to getting his or her foot in the door without being discriminated against based on race or criminal history. This method would only reduce the discrimination between application and interview and could not control for all application contexts (e.g., jobs in which it is common to fill out an application on-site), but it is an additional step in the right direction.

Requiring the Box

Some authors have suggested that instead of banning the box, the information available to employers should be increased (i.e., requiring the box), so that the playing field is level between people of different races.²¹ But because employer discrimination does not appear to be completely rational (e.g., in Agan and Starr [2016], employers discriminated based on race but not on GED status, which is a better predictor of a criminal record) and because discrimination exists in the criminal justice system, which leads to higher rates of criminal records for people of color, this approach would not necessarily improve outcomes for people of color, and it would eliminate the benefits of ban the box on people with criminal records. Therefore, we do not see this as a viable alternative.

TABLE 1

Policy Alternatives and Additions to Ban the Box

Policy	Benefits	Challenges
Increased regulation against equal employment violators and improved laws	Would primarily require increased enforcement of current laws	Small businesses are hard to regulate, and it is difficult to prove discrimination in hiring for any firm, but especially small firms
Training for employers and outreach to people with records about ban the box and proper use of criminal records	Will raise awareness about potential unintended consequences and empower applicants to improve their own outcomes	Can only educate but not enforce compliance by employers, and outreach to people with records puts the onus of enforcement on the person rather than on the government or employer
Improved quality of background check data	Both FBI and private background check information involve many data errors, so improvements to this information would affect many people	Improvement to FBI data requires laws and enforcement from the FBI, Congress, and the executive branch and would not improve outcomes for people with accurate records; improvements to private company criminal history data would require enforcement mechanisms from the FTC and the CFPB
Expungement (the erasure or elimination of criminal record history information)	Helps the person in the labor market and potentially in the housing and education markets	May be difficult in the digital age when information exists indefinitely on the Internet, but could be possible if combined with improved background check data quality
Expanded job training and employment services for justice-involved people	Expansion of current programs	Would not address discrimination directly, but would reduce differences in qualifications and could reduce disparities in outcomes
Require job applications to be name and address blind	Would likely reduce racial discrimination between application and interview	Does not address discrimination during or after the initial interview
Require the box (not a recommended option)	Essentially mandates usual practice, which employers would likely prefer	Would not fully improve outcomes for people of color, and would eliminate the benefits of ban the box on people with criminal records

Notes: CFPB = Consumer Financial Protection Bureau; FBI = Federal Bureau of Investigation; FTC = Federal Trade Commission.

These suggested changes have advantages and disadvantages, but some combination of them could even the playing field for people with criminal records without exacerbating racial biases. That said, larger frameworks and institutions need to be changed to fully address the root causes of inequality in hiring. Discrimination in the criminal justice system, the effect of racial stereotypes on hiring decisions, and deeper societal racism are all factors underlying why ban the box harms young men of color. Justice involvement and employment work together in a circular manner, by which discrimination in the labor market locks people of color out of legal employment opportunities, and higher rates of people of color in the justice system increases discrimination in the labor market. Disrupting this cycle calls for multiple interventions throughout the system, and the solutions proposed in this report should be viewed as only a first step toward breaking the link between racial discrimination, criminal histories, and employment. Ban the box can improve outcomes in employment, education, housing, and recidivism. But the evidence

surrounding its unintended consequences on young men of color highlights the need for ban the box to work with other policies and programs.

Notes

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