

BAN THE BLACK BOX: CRIMINAL BACKGROUND SCREENING AND THE INFORMATION-WITHHOLDING PROBLEM

INTRODUCTION

Beverly Harrison worked for the city of Dallas, Texas, for twenty-eight years before she retired to devote more time to her grandchildren and her church.¹ In 2013, Harrison took a job as a crossing guard for Dallas County Schools to supplement her retirement income.² Eight days into her new role, Harrison was terminated.³ The cause? A nearly forty-year-old assault conviction on her background check, stemming from an altercation when Harrison was just eighteen.⁴ Although Harrison's criminal record had not barred her from a long career in public service or several years as a home health aide, she was dismissed from her new role without discussion.⁵

With an increasing number of employers performing background checks on potential employees,⁶ stories like Harrison's are all too common. When a candidate fills out a job application, often one of the questions she will encounter is, "Have you ever been convicted of a crime?"⁷ A "yes" may spell the end of her candidacy.⁸ Even when a candidate makes it through the selection process, like Harrison, she may find that a criminal record stands in the way of continued employment.

An inability to obtain employment is one of the collateral consequences that affects an individual's ability to reintegrate into society following criminal conviction.⁹ As in Harrison's case, the barrier to employment can persist for years or even decades. This is a problem for a large and still-growing segment of the population,¹⁰ as a result of the "tough-on-crime"

1. Beverly Harrison, *A Decades-Old Conviction Cost Me My Post-Retirement Job*, THE MARSHALL PROJECT (Sept. 10, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/09/10/a-decades-old-conviction-cost-me-my-post-retirement-job> [<https://perma.cc/5CC8-WUT2>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. According to one survey, eighty-nine percent of employers conduct background checks on prospective employees. STERLING TALENT SOLS., *BACKGROUND SCREENING TRENDS & BEST PRACTICES REPORT 2017–2018*, at 10 (2017).

7. *See id.* at 19.

8. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006).

9. *See infra* notes 29–35 and accompanying text.

10. As of 2010, an estimated nineteen million U.S. citizens had felony convictions. Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806 (2017).

policies prevalent in the 1980s and 1990s.¹¹ These policies have disproportionately affected racial minorities—particularly black and Hispanic men—exacerbating the challenges they already face in obtaining employment.¹² Legislators have responded to these interlinking problems with laws to remove “the box,” the criminal-record question on job application forms.¹³ The fundamental theory of “Ban the Box” (BTB) laws is that if a candidate with a criminal record¹⁴ is considered on his own merits before his criminal history is revealed, the employer will be more willing to hear him explain the circumstances of the offense and provide evidence of rehabilitation.¹⁵

BTB laws exist within a larger framework of employment laws designed to inhibit the flow of sensitive information that employers receive about potential employees.¹⁶ Like criminal records, some information that employers receive during the candidate selection process may disproportionately disadvantage minorities who already face obstacles to employment. As more of these types of laws are enacted, studies indicate that they may have the opposite of the intended effect.¹⁷ Recent research indicates that BTB laws may worsen employment outcomes for young black and Hispanic men.¹⁸ These studies conclude that, in the absence of concrete information, employers assume that minority candidates are more likely to have criminal records and decline to hire them.¹⁹ These findings have generated much discussion about the value of BTB laws.²⁰ Reports suggest

11. See *infra* notes 23–28 and accompanying text.

12. See *infra* notes 41–46 and accompanying text.

13. See *infra* notes 47–90 and accompanying text.

14. Consistent with scholarship on the stigma of criminal records, this Note uses “person-first” language (“individuals with criminal records”) instead of the more common “crime-first” language (“ex-offenders”) to deemphasize the stigma of criminal records. Megan Denver et al., *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664 (2017). See also Elizabeth P. Weissert, Comment, *Get out of Jail Free: Preventing Employment Discrimination Against People with Criminal Records Using Ban the Box Laws*, 164 U. PA. L. REV. 1529, 1530 n.1 (2016).

15. See *infra* notes 36–40 and accompanying text.

16. Examples include bans on pre-employment credit checks, see *infra* notes 130–134 and accompanying text, and limitations on questions about marital status to female job applicants, see *infra* notes 142–152 and accompanying text.

17. See *infra* notes 126–152 and accompanying text.

18. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 16-012, 2016), <https://ssrn.com/abstract=2795795>; Jennifer L. Doleac & Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden* (Nat’l Bureau of Econ. Research, Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469> [<https://perma.cc/8894-GW3M>].

19. See *infra* notes 91–125 and accompanying text.

20. Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, THE ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435> [<https://perma.cc/ET9R-VM49>]; “Ban The Box” Laws, Do They Help Job Applicants with Criminal Histories?, NAT’L PUB. RADIO (July 19, 2016), <http://www.npr.org/2016/07/19/4865716>

that they may hamper further BTB legislation.²¹ Some legal commentators have responded with calls to repeal BTB laws and pursue alternative means of redressing criminal-record discrimination.²²

This Note examines the implications of these recent studies in the context of BTB's goals. Part I traces the development of the BTB movement and surveys current political responses to the call to delay criminal-record inquiries. Part II examines recent research suggesting that BTB laws lead to an increase in race discrimination in hiring. Part III contextualizes this research within a broader theme of negative effects produced by withholding key information during the candidate selection process. This information-withholding problem surfaces on both sides, with employers and candidates alike relying on guesswork to find the right fit. Part IV recommends breaking through the mystification from the candidate's side. By increasing the information available to the candidate, candidates can make more informed decisions about which jobs to seek, and employers will see the benefit of a stronger candidate pool.

I. THE HISTORY OF BAN-THE-BOX

A. *Development of the Ban-the-Box Movement*

BTB laws are a product of efforts to address the aftermath of increased rates of criminal convictions in the past several decades.²³ “Tough-on-crime” policies enacted since the 1970s have caused arrest and incarceration rates to soar.²⁴ Approximately one and a half million individuals are currently in state or federal prison, a fivefold increase since 1980.²⁵ As these

33/are-ban-the-box-laws-helping-job-applicants-with-criminal-histories [https://perma.cc/S7BA-RZT9].

21. See Jeff Parrott, *Indiana First State to Scrap Local “Ban the Box” Laws*, SOUTH BEND TRIB. (July 2, 2017), https://www.southbendtribune.com/news/local/indiana-first-state-to-scrap-local-ban-the-box-laws/article_c1a31101-db3e-5d10-aae1-407396f1948e.html [https://perma.cc/ZU52-RMPN] (describing a local city council member's proposed ordinance giving employers tax abatements for removing “the box,” now on hold in light of the recent studies).

22. See, e.g., Jacqueline G. Kelley, *Rehabilitate, Don't Recidivate: A Reframing of the Ban the Box Debate*, 22 ROGER WILLIAMS U. L. REV. 590 (2017) (recommending rehabilitative measures over BTB laws to reduce recidivism).

23. Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 52–55 (2015).

24. *Id.* at 54–55; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3* (Jeremy Travis et al. eds., 2014) [hereinafter *GROWTH OF INCARCERATION*], <http://nap.edu/18613>. These policies include mandatory-minimum and “three-strikes” sentencing laws and escalated enforcement of drug laws. *Id.* at 70, 118.

25. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2016 1* (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [https://perma.cc/B39W-3BXC].

policies have fallen out of favor in recent years, incarceration rates have started to decline,²⁶ but the criminal records remain. A recent study estimates that nineteen million U.S. citizens have been convicted of a felony.²⁷ This constitutes eight percent of the adult population, up from three percent in 1980.²⁸

The BTB movement grew out of a grassroots campaign, All of Us or None, by organizers at Legal Services for Prisoners with Children.²⁹ The campaign's goal has been to fight the barriers, such as housing discrimination and voting restrictions, that confront individuals attempting to reintegrate into society following criminal conviction.³⁰ The "collateral consequences" of conviction persist long after the individual has supposedly paid his debt to society.³¹ The result is an aggravation of the conditions that breed crime, such as poverty and societal alienation.³² As collateral consequences accumulate, the risk of recidivism increases.³³

One of the strongest and most consistent predictors of recidivism is the inability to obtain long-term employment.³⁴ The increased availability and use of criminal background checks by employers has exacerbated the difficulties of finding employment for individuals with criminal records.³⁵ Recognizing unemployment as the most damaging and persistent barrier to reentry, All of Us or None focused its earliest efforts on the first obstacle that individuals with criminal records encounter when seeking a job—the "box" on an application form that asks whether the applicant has ever been convicted of a crime.³⁶ When an applicant checks "yes," it often means the

26. Adam Gelb & Phillip Stevenson, *U.S. Adult Incarceration Rate Declines 13% in 8 Years*, PEW CHARITABLE TRS. (Jan. 12, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/01/12/us-adult-incarceration-rate-declines-13-percent-in-8-years> [<https://perma.cc/PA6R-G56V>]. In 2015, incarceration rates dropped from their peak in 2007 to levels not seen since 1998. *Id.*

27. Shannon et al., *supra* note 10, at 1806. This comprises individuals currently in prison or on probation as well as individuals with past convictions.

28. *Id.* at 1808.

29. LINDA EVANS, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY 10 (2016), <http://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf> [<https://perm.cc/6QMY-3U3S>].

30. *Id.*

31. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010). These consequences encompass permanent exclusions, such as ineligibility for welfare benefits and jury service, and minor penalties that aggregate, such as unpaid court fees that lead to civil judgments and wage garnishments. *Id.* at 459–60.

32. *Id.* at 461–469.

33. *Id.* at 467. See also Luke Caselman, Comment, *Permissive Discrimination: How Committing a Crime Makes You a Criminal in Georgia*, 65 MERCER L. REV. 759, 760–61 (2014).

34. Flake, *supra* note 23, at 62–63.

35. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328 (2009); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1 (2016).

36. EVANS, *supra* note 29, at 10.

end of the applicant's candidacy.³⁷ However, if the question is postponed until later in the process, applicants with criminal records can get a "foot in the door."³⁸ As the theory goes, once an employer has invested a certain amount of time in recruiting an applicant, it will be more willing to hear the applicant explain the circumstances of the conviction and demonstrate rehabilitation.³⁹ The employer may thus be more willing to discount the criminal record and hire the applicant.⁴⁰

The goals of BTB extend beyond improving the lives of individuals with criminal records and decreasing the risk of recidivism. BTB laws also seek to combat race discrimination.⁴¹ The policy changes that caused rising incarceration rates over the last forty years have affected minorities at much higher rates than whites.⁴² Drug law enforcement efforts, in particular, have disproportionately targeted black communities.⁴³ Disproportionate policing of black and Hispanic individuals has driven up conviction rates among this group.⁴⁴ Black men are particularly overrepresented in the criminal justice system—approximately one in three adult black men in the United States has a felony conviction.⁴⁵ Young black men are particularly likely to have criminal convictions, and they often experience the collateral consequences of conviction most acutely, exacerbating existing challenges within their communities, including poverty and unemployment.⁴⁶

B. Current Legislation

In 1998, Hawaii became the first state to ban inquiries into criminal records on applications by public and private employers.⁴⁷ Since then,

37. See Holzer et al., *supra* note 8, at 453.

38. Agan & Starr, *supra* note 18, at 6.

39. *Id.*

40. See Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009) (finding increased callback rates for candidates with criminal records who had an opportunity to discuss the record with the employer).

41. EVANS, *supra* note 29, at 16.

42. GROWTH OF INCARCERATION, *supra* note 24, at 56.

43. *Id.* at 60. In the 1980s, drug arrest rates were six times higher among blacks than whites. *Id.* In more recent years, drug arrest rates have been three to four times higher among blacks. *Id.* This is despite evidence from longitudinal surveys that blacks engage in no more drug crimes (use and dealing) than whites. *Id.* at 50.

44. Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL'Y 231, 237–38 (2012).

45. Shannon et al., *supra* note 10, at 1808.

46. Pinard, *supra* note 31, at 470; see also Devah Pager et al., *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEGAL F. 317 (2009) (examining worsening employment outcomes for black men among low-wage workers).

47. HAW. REV. STAT. § 378-2.5 (2016); BETH AVERY & PHIL HERNANDEZ, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO

twenty other states have enacted legislation applying to public employers.⁴⁸ These laws vary in scope, with some applying only to state employers⁴⁹ and others applying to city and county employers as well.⁵⁰ In the absence of legislative action, governors in several states have issued orders banning the criminal-record question from applications for state employment.⁵¹

BTB laws vary in terms of when during the candidate selection process employers can ask about criminal history. Some allow questions after an initial screening for minimum qualifications⁵² or during an interview,⁵³ while others allow questions only upon a “conditional offer of employment.”⁵⁴ Many states authorize exceptions for positions in law enforcement or corrections,⁵⁵ positions working with vulnerable populations (such as children or individuals with mental or physical disabilities),⁵⁶ or positions with screening requirements mandated by other laws or regulations.⁵⁷ No state wholly prohibits criminal screening for employment purposes.⁵⁸

Ten states currently have legislation applying to private employers.⁵⁹ Most recently, California expanded its BTB law to include private

ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 9 (2018), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/F48P-BTBQ>].

48. AVERY & HERNANDEZ, *supra* note 47, at 19–20.

49. *E.g.*, LA. STAT. ANN. § 42:1701 (2017); TENN. CODE ANN. § 8-50-112(f)(2) (2017).

50. *E.g.*, COLO. REV. STAT. § 24-5-101 (2017); NEB. REV. STAT. § 48-202 (2017); N.M. STAT. § 28-2-3 (2017); OHIO REV. CODE ANN. § 9.73 (LexisNexis 2016); UTAH CODE ANN. § 34-52-102 (LexisNexis 2017).

51. Georgia, Indiana, Kentucky, New York, Oklahoma, Pennsylvania, and Virginia currently have executive orders in effect. AVERY & HERNANDEZ, *supra* note 47, at 19–20.

52. *E.g.*, NEB. REV. STAT. § 48-202.

53. *E.g.*, MD. CODE ANN., STATE PERS. & PENS. § 2-203 (LexisNexis 2017).

54. HAW. REV. STAT. § 378-2.5 (2016); CAL. GOV'T CODE § 12952 (West 2017).

55. *E.g.*, DEL. CODE ANN. tit. 19, § 711(g)(4) (2017); OR. REV. STAT. § 659A.360 (2017).

56. *E.g.*, COLO. REV. STAT. § 24-5-101(1)(b) (2017).

57. *See, e.g.*, VT. STAT. ANN. tit. 21, § 495j(b)(1)(A) (2017) (allowing criminal-record inquiries for positions “for which any federal or State law or regulation creates a mandatory or presumptive disqualification based on a conviction”).

58. Indeed, no state could enact such a law without conflicting with a plethora of laws barring individuals with criminal records from employment in certain positions. *See, e.g.*, 15 U.S.C. § 80a-9 (2018) (barring investment companies from employing individuals convicted of securities law violations); 12 U.S.C. § 1829 (2018) (barring FDIC-insured banks from employing individuals convicted of crimes of dishonesty or money laundering); 49 U.S.C. § 31310 (2018) (setting forth various convictions disqualifying employment as a commercial motor vehicle operator). For a thorough inventory of federal and state statutes and regulations imposing employment restrictions, among other collateral consequences of criminal convictions, see *National Inventory of Collateral Consequences of Conviction*, COUNCIL OF STATE GOV'TS JUSTICE CTR., <https://niccc.csgjusticecenter.org/map/> (last visited Oct. 14, 2018).

59. CAL. GOV'T CODE § 12952; CONN. GEN. STAT. § 31-51i (2017); HAW. REV. STAT. § 378-1 (2016); 820 ILL. COMP. STAT. § 75/15 (2017); MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2017); MINN. STAT. § 364.021 (2017); N.J. STAT. ANN. §§ 34:6B-11 to -19 (West 2017); OR. REV. STAT. § 659A.360; R.I. GEN. LAWS § 28-5-7(7) (2017); VT. STAT. ANN. tit. 21, § 495j.

employers with five or more employees.⁶⁰ Other jurisdictions, however, have resisted extending BTB to private employers.⁶¹ Tennessee and Indiana have passed laws limiting the ability of local governments to enact BTB laws against private employers, even as they took action to ban criminal-record inquiries in state employment.⁶²

C. Giving Offenders a “Fair Chance”

In addition to BTB, some jurisdictions have enacted laws that require employers to engage in individualized assessments before making an adverse decision based on criminal records.⁶³ This type of law arose in the context of an employment discrimination case.⁶⁴ In *Green v. Missouri Pacific Railroad Co.*,⁶⁵ a rejected applicant brought a discrimination claim under Title VII of the Civil Rights Act⁶⁶ against a potential employer that refused to consider any applicant with a criminal record.⁶⁷ Citing evidence of the disproportionate rate of conviction among black men, the plaintiff argued that using criminal history as a basis for hiring decisions has a disparate impact on minorities.⁶⁸

The Eighth Circuit agreed, noting that the defendant employer’s blanket ban had the effect of disqualifying black applicants at more than twice the rate of white applicants.⁶⁹ The court also found that the blanket ban was not justified by business necessity because no consideration was given to different types of criminal records.⁷⁰ In arriving at this holding, the court

60. Assemb. B. 1008, 2017 Leg. (Cal. 2017) (repealing CAL. LAB. CODE § 432.9 and replacing it with CAL. GOV’T CODE § 12952). The new law went into effect January 1, 2018. See JONES DAY, 2018 CALIFORNIA EMPLOYMENT LEGISLATION AND REGULATORY UPDATE 2 (Feb. 2018), https://www.jonesday.com/files/Publication/1732d2ed-0be9-45e7-85de-18d6d0956535/Presentation/PublicationAttachment/f58bb754-00c2-4db6-82bb-1baf8636a831/2018_California_Employment_Legislation_r2.pdf.

61. IND. CODE § 22-2-17 (2017) (prohibiting local governments from limiting private employers’ inquiries into an applicant’s criminal history); TENN. CODE ANN. § 7-51-1802(d) (2017) (prohibiting local governments from limiting private employers’ ability to request “any information on an application”).

62. Ind. Exec. Order No. 17-15 (June 29, 2017), <http://www.in.gov/gov/files/Executive-Order-17-15-Fair-Chance-Hiring.pdf> [<https://perma.cc/ED3R-X3TA>] (banning criminal-record inquiries in applications to the state’s executive branch); TENN. CODE ANN. § 8-50-112 (2017) (banning criminal-record inquiries in state employment applications).

63. E.g., DEL. CODE ANN. tit. 19, § 711(g) (2017); COLO. REV. STAT. § 24-5-101 (2017); LA. STAT. ANN. § 42:1701 (2017).

64. See generally Flake, *supra* note 23, at 72–81.

65. 523 F.2d 1290 (8th Cir. 1975).

66. 42 U.S.C. § 2000e-2 (2016).

67. 523 F.2d at 1292 (the employer refused to consider anyone with a criminal record other than a “minor traffic offense”).

68. *Id.* at 1294–95.

69. *Id.* at 1295.

70. *Id.* at 1298.

identified factors to consider when assessing applicants' criminal records.⁷¹ In addition to "the nature and seriousness of the crime in relation to the job sought," employers might consider the "time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed."⁷²

In 2012, the Equal Employment Opportunity Commission (EEOC), the agency tasked with enforcing Title VII, issued interpretive guidance on the use of criminal records in hiring decisions.⁷³ Applying the factors from *Green*, the EEOC advises employers to consider "at least the nature of the crime, the time elapsed, and the nature of the job."⁷⁴ The EEOC further advises employers to perform an "individualized assessment" on applicants with criminal records, consisting of notice of the potential disqualification and an opportunity for the applicant to supply mitigating information to overcome the disqualification.⁷⁵ Relevant information may include an explanation of the circumstances leading to the offense, employer or character references, and evidence of rehabilitation.⁷⁶

The EEOC's guidance is not without its detractors.⁷⁷ In 2013, the State of Texas sued the EEOC, challenging the guidance as an overreach of the EEOC's authority under the Administrative Procedure Act (APA).⁷⁸ Even though the EEOC's substantive interpretations of Title VII are not binding,⁷⁹ and even though the EEOC has no enforcement authority against state employers,⁸⁰ Texas asserted that the guidance imposed mandatory standards on all employers' hiring policies, overriding the State's own determination of acceptable screening standards.⁸¹ Following an extended dispute over whether the EEOC's guidance constitutes a "final agency action" under the APA,⁸² the case was ultimately disposed on summary judgment.⁸³ The District Court enjoined the EEOC and the U.S. Attorney General from

71. *Id.* at 1297.

72. *Id.*

73. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter EEOC GUIDANCE].

74. *Id.* at 14.

75. *Id.*

76. *Id.* at 18.

77. See Flake, *supra* note 23, at 80–81.

78. Texas v. EEOC, 827 F.3d 372, 377 (5th Cir.), vacated, 838 F.3d 511 (5th Cir. 2016).

79. *Id.* at 376; see 42 U.S.C. § 2000e-12(a) (2018).

80. 827 F.3d at 375. Only the Attorney General may bring actions against a State under Title VII. 42 U.S.C. § 2000e-5(f)(1) (2018).

81. 827 F.3d at 378.

82. Texas v. EEOC, No. 5:13-CV-255-C, 2014 WL 4782992, at *4 (N.D. Tex. Aug. 20, 2014) (dismissing the case for lack of subject-matter jurisdiction); 827 F.3d at 388 (reversing the District Court's dismissal); 838 F.3d at 511 (vacating the prior reversal and remanding in light of recent Supreme Court precedent on the APA).

83. Texas v. EEOC, No. 5:13-CV-255-C, 2018 WL 1087654 (N.D. Tex. Feb. 1, 2018).

enforcing the guidance against Texas but dismissed the other claims for relief.⁸⁴ Cross-appeals are pending in the Fifth Circuit.⁸⁵

Other states have embraced the EEOC's guidance, incorporating the *Green* factors or similar criteria into their BTB laws.⁸⁶ These types of statutes, commonly dubbed "Fair Chance" laws,⁸⁷ have proven particularly popular at the local level, with nearly eighty cities and counties requiring some form of individualized assessment.⁸⁸ Jurisdictions with Fair Chance laws have recognized that merely delaying inquiries cannot ensure that applicants with criminal records receive fair consideration so long as the stigma against criminal records persists.⁸⁹

II. RESEARCH INTO THE EFFECTS OF BAN-THE-BOX

A. At the Preliminary Stage

While BTB laws continue to expand and develop, recent research suggests that they may have the opposite of the intended effect, resulting in increases in race discrimination in hiring.⁹⁰ The first significant research into the effects of BTB looked at callback rates for applicants before and

84. *Id.* Texas also sought a declaration of its right to "absolutely bar" individuals with felony convictions from state employment and an injunction against the EEOC from issuing right-to-sue letters to any individual who files a complaint against a state agency on the basis of criminal history. 2014 WL 4782992, at *1.

85. See Erin Mulvaney, *US Justice Department Opens New Front Against EEOC*, NAT'L L.J. (Sept. 6, 2018, 10:45 AM), <https://www.law.com/nationallawjournal/2018/09/06/us-justice-department-opens-new-front-against-eecoc/?slreturn=20180928001414>. Although joining the EEOC in the appeal, the U.S. Department of Justice distanced itself from the EEOC's position, expressly disagreeing with the guidance and disclaiming any intent to pursue enforcement actions based on criminal-record policies. *Id.* This move was not unexpected by civil rights groups involved in the case. See Braden Campbell, *Texas Judge Denies NAACP Bid to Intervene in EEOC Case*, LAW360 (Aug. 24, 2017, 4:45 PM), <https://www.law360.com/articles/957375/texas-judge-denies-naacp-bid-to-intervene-in-eecoc-case> [http://perma.cc/5YH7-29CL]. Amicus briefs in support of the EEOC have been filed by the NAACP, the National Employment Law Project, and Beverly Harrison. Mulvaney, *supra*.

86. CAL. GOV'T CODE § 12952(c)(1)(A) (West 2017); COLO. REV. STAT. § 24-5-101(4) (2017); DEL. CODE ANN. tit. 19, § 711(g)(3) (2017); LA. REV. STAT. ANN. § 42:1701(B) (2017); MINN. STAT. § 364.032 (2017); TENN. CODE ANN. § 8-50-112(c) (2018).

87. AVERY & HERNANDEZ, *supra* note 47, at 1.

88. *Id.* at 96–101. More than 150 cities have BTB ordinances of some kind. *Id.* Large metropolitan cities have led the way on BTB legislation, including extending Fair Chance laws to private employers. See, e.g., S.F., CAL., POLICE CODE art. 49 (2014); N.Y.C., N.Y., ADMIN. CODE § 8-107(10) (2018).

89. See, e.g., N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT, LOCAL LAW NO. 63, AT 1–2 (2015), <https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-112015.pdf> (finding that discrimination still occurred where employers were not required to consider any particular factors when assessing criminal records); see also Pager et al., *supra* note 40, at 200–01 (finding that employers who did not inquire into a candidate's criminal history were less likely to proceed with those candidates, compared to employers who engaged in conversation).

90. Agan & Starr, *supra* note 18; Doleac & Hansen, *supra* note 18.

after BTB laws applying to private employers went into effect.⁹¹ This study, by Amanda Agan and Sonja Starr, looked at two jurisdictions—the State of New Jersey and New York City.⁹² The study used an “audit” methodology, a format for testing employer attitudes by submitting fictitious applications to job postings and tracking employer responses.⁹³ Research assistants submitted applications in pairs consisting of one white and one black applicant, coded as such by first and last names distinctly associated with each race.⁹⁴ The fictitious applicants were all men in their early twenties with similar work histories.⁹⁵ The researchers assigned randomized variables to each applicant: one with a felony conviction and one without, one with a one-year employment gap and one without, and one with a GED and one with a high school diploma.⁹⁶

Research assistants submitted 15,220 fictitious applications during two periods—once a few months before and once a few months after BTB went into effect.⁹⁷ They searched for jobs exclusively from private employers and chiefly from large chain businesses.⁹⁸ They applied to jobs requiring little to no work experience, no postsecondary education, and no specialized skills.⁹⁹ When an employer was hiring during both the pre- and post-BTB periods, they submitted applications both times, using different paired applicants.¹⁰⁰ Each applicant supplied a unique email address and phone number.¹⁰¹ For eight weeks following the submission of applications, the researchers tracked callbacks through voicemails or emails from the employer requesting a return call or an interview.¹⁰²

The study found that in the pre-BTB period, employers that asked about criminal records called black and white applicants at roughly the same

91. Agan & Starr, *supra* note 18, at 1.

92. *Id.* at 9.

93. *Id.* at 9–10. Auditing studies have been a popular means of testing implicit bias in hiring. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

94. Agan & Starr, *supra* note 18, at 12–13. The researchers obtained names from birth certificate data and excluded names that were uncommon, to avoid bias from perceived socioeconomic status associated with unique names or spellings. *Id.* The resulting names (e.g., “Scott Weber” and “Terrell Washington”) were generic enough to be unexceptionable while still signaling race. *Id.* at 56.

95. *Id.* at 11.

96. *Id.* The latter two factors were chosen for their potential to signal criminal history on a job application.

97. *Id.* at 9, 15.

98. *Id.* at 10. Chain businesses were chosen due to the likelihood of an online application process and the certainty that the number of employees was in scope for the applicable BTB law. *Id.*

99. *Id.*

100. *Id.* at 14.

101. *Id.* at 12.

102. *Id.* at 15.

rates.¹⁰³ Employers that did not have the box slightly favored white applicants.¹⁰⁴ Among employers that did, applicants without records received sixty-one percent more callbacks.¹⁰⁵ In the post-BTB period, among employers who had previously asked about criminal records, white applicants received thirty-six percent more callbacks than black applicants.¹⁰⁶ Agan and Starr conclude that, in the absence of concrete information, employers rely on guesswork about which candidates might have criminal records.¹⁰⁷ Since black men are more likely to have a criminal record, they are therefore more likely to be rejected, a process known as “statistical discrimination.”¹⁰⁸

B. Overall Employment Outcomes

Agan and Starr’s work provides critical research into the effect of BTB on the very first stage of the candidate selection process, but the implication for overall employment outcomes is necessarily limited.¹⁰⁹ The next notable research paper on BTB picks up where Agan and Starr’s work ends.¹¹⁰ Relying on data from the Current Population Survey (CPS), Jennifer Doleac and Benjamin Hansen compared employment rates before and after enactment of BTB laws and between BTB and non-BTB jurisdictions.¹¹¹ Whereas Agan and Starr focused on two jurisdictions with BTB laws covering private employers, Doleac and Hansen looked at all jurisdictions with BTB laws applied to at least public employers.¹¹² Similar to Agan and Starr, they focused on employment rates among young black and Hispanic men (ages twenty-five to thirty-four), the group most likely to be affected by both BTB policies and statistical discrimination based on conviction rates.¹¹³

103. *Id.* at 17. Callback rates for white and black applicants were 11.1% and 10.9%, respectively.

104. *Id.* Callback rates were 12.5% for white applicants and 9.4% for black applicants. *Id.*

105. *Id.* at 31.

106. *Id.* at 26. Whites received callbacks 15% of the time, while blacks received callbacks 11% of the time. *Id.*

107. *Id.* at 37.

108. *Id.*

109. *See id.* at 31 (pointing out that the study is limited to initial employer responses and does not address whether BTB actually affects employment rates).

110. Doleac & Hansen, *supra* note 18.

111. *Id.* at 4.

112. *Id.* at 11. Doleac and Hansen argue that enactment of public BTB laws influences the private labor market enough to draw conclusions from overall employment rates, pointing to the heavily publicized campaigns by organizations like All of Us or None that often precede legislation and the increasing adoption of internal BTB policies by large employers such as Wal-Mart and Target. *Id.*

113. *Id.* at 4.

This study found that young black and Hispanic men were, respectively, 5.1% and 2.9% less likely to be employed after enactment of BTB.¹¹⁴ Where other factors affected overall employment rates, differences between whites and minorities confirmed the detrimental impact of BTB on minorities.¹¹⁵ For example, in times of high unemployment overall, the negative impact of BTB on minorities increased, while employment among white men remained relatively stable.¹¹⁶ In regions where the low-skilled labor market is dominated by minorities (i.e., the South for blacks and the West for Hispanics), the negative effects of BTB were virtually nonexistent, suggesting that employers are less likely to engage in statistical discrimination where it is simply infeasible to do so.¹¹⁷ These results suggest that where there are more candidates to choose from and more white candidates in the pool, employers are more likely to discriminate against blacks and Hispanics in BTB jurisdictions.¹¹⁸

The results were not all negative for minority candidates. First, older black men (aged thirty-five to sixty-four) and college-educated black women saw rising employment rates as a result of BTB.¹¹⁹ Doleac and Hansen minimize these results on the basis that these groups are not the intended beneficiaries of BTB laws.¹²⁰ However, by focusing only on young black and Hispanic men, Doleac and Hansen define the goals of BTB more narrowly than legislators and activists intended.¹²¹ As the story of Beverly Harrison makes clear, criminal records cast a long shadow on an individual's employment prospects, and the effect is felt by all those who have entered the criminal justice system.¹²² Second, Doleac and Hansen found that the negative effects of BTB leveled off among young Hispanic men within three years of enactment of BTB.¹²³ Doleac and Hansen theorize that these men "adapt to the policy over time, perhaps by using their networks to find jobs and signal their job-readiness to employers."¹²⁴

114. *Id.* at 17.

115. *Id.* at 19–24.

116. *Id.* at 20.

117. *Id.* at 19. The negative effect on black men in the South was statistically insignificant, and the effect on Hispanic men in the West was near zero. *Id.*

118. *Id.* at 19–20.

119. *Id.* at 21–22. Doleac and Hansen theorize that the positive effects of BTB on women is due to "intrahousehold substitution of labor," suggesting that these women only entered the workforce because their partners were unable to find jobs (as a result of BTB). *Id.* at 22.

120. *Id.* at 4–5.

121. See Gov. Brown Signs AB1008 the Ban the Box / Fair Chance Hiring Act!, LEGAL SERVS. FOR PRISONERS WITH CHILDREN (Oct. 14, 2017), <http://www.prisonerswithchildren.org/2017/10/gov-brown-signs-ab1008-the-ban-the-box-fair-chance-hiring-act> [<https://perma.cc/4S7G-H3VA>].

122. See Harrison, *supra* note 1.

123. Doleac & Hansen, *supra* note 18, at 22–23.

124. *Id.* at 23. Doleac and Hansen do not linger on the significance of this "adaptive" response, but it suggests a path to combating the apparent negative effects of BTB. Personal networks are a common means of finding work, by no means singular to low-skilled Hispanic men. Instead of asking

Notwithstanding these positive to neutral effects, the negative effects on young minority men evidenced by this and Agan and Starr's study cannot be ignored if the goals of BTB are to be fully realized.

III. THE INFORMATION-WITHHOLDING PROBLEM

A. *Other Research on the Candidate Selection Process*

The studies previously discussed are consistent with other research on the candidate selection process. BTB laws are not the only attempt by legislators to restrict the information available to employers as a solution to discrimination in hiring. Like BTB, other information-withholding laws seem to lead to the exact forms of discrimination they seek to eradicate.

In 2006, Harry J. Holzer and his colleagues anticipated the negative effects of BTB.¹²⁵ In a survey of employer practices, they found that employers that performed criminal background screenings were more likely to have placed a black applicant in their most recently filled position than those who did not.¹²⁶ This likelihood increased if the employer expressed a strong aversion to hiring individuals with criminal records.¹²⁷ Holzer and his colleagues theorize that the increased likelihood is due to those employers correcting their initial overestimations of the likelihood of a criminal conviction among black applicants, supporting the theory that statistical discrimination is at the root of preferences against black applicants.¹²⁸

A study on bans on pre-employment credit reports found similar negative effects for black individuals.¹²⁹ Eleven states and a few localities, including New York City, have banned the use of credit reports as a basis for hiring decisions.¹³⁰ The rationale for banning credit reports is similar to BTB: minorities are more likely to have poor credit and therefore more likely to be adversely affected by pre-employment credit checks.¹³¹ Using data from the CPS and state unemployment records, Bartik and Nelson examined the

why that group has been able to adapt, the better question might be why low-skilled black men have not. *See, e.g.,* Pager et al., *supra* note 40, at 201–02 (finding that employers are less likely to engage black applicants in conversation and that less engagement translates to less job offers).

125. Holzer et al., *supra* note 8.

126. *Id.* at 465.

127. *Id.*

128. *Id.* at 471.

129. Alexander W. Bartik & Scott T. Nelson, *Credit Reports as Résumés: The Incidence of Pre-Employment Credit Screening* (MIT Dep't of Econ., Paper No. 16-01, 2016).

130. *Id.* at 1. Most jurisdictions with bans exempt job positions with access to finances or other private and sensitive information. *Id.* at 5. Management positions and jobs in finance and law enforcement are the most common exemptions. *See id.* at 41.

131. *Id.*

flow of employment in states with credit check bans, comparing job-finding rates against jurisdictions without bans as well as within jurisdictions before and after bans went into effect.¹³² They found that enactment of credit-check bans reduced the probability of job-finding among black job seekers.¹³³ The researchers concluded that statistical discrimination was responsible for this effect.¹³⁴

Another study examined the effects of differing drug testing policies.¹³⁵ Abigail Wozniak used data from the CPS to track employment rates across a twelve-year period during and after which employers instituted drug testing policies and states passed laws either incentivizing or limiting drug testing.¹³⁶ The results demonstrated an increase in employment among blacks relative to whites in states with pro-testing policies.¹³⁷ The opposite effect was observed in states with anti-testing policies, although to a lesser degree.¹³⁸

Wozniak's study is particularly illuminating because the prevalence of illegal drug use is roughly equal among blacks and whites.¹³⁹ While discrimination based on presumed criminal and credit history has a statistical foundation (hence the ascription of "statistical discrimination"), discrimination based on presumed drug use is purely prejudicial.¹⁴⁰ Wozniak concludes that the increased employment of blacks in pro-testing states, relative to employment of whites, was a correction of employers' initial overestimate of drug use by black candidates.¹⁴¹

Finally, a study on disclosure of marital/family status took a different approach but drew similar conclusions.¹⁴² Joni Hersch and Jennifer Bennett Shinall's study was designed to test the effect of perceived prohibitions on asking about a candidate's marital status or family in job interviews.¹⁴³

132. *Id.* at 8, 13–15.

133. *Id.* at 26–27. The results were inconsistent and inconclusive as to white and Hispanic job seekers but suggested a negligible or positive effect. *Id.*

134. *Id.* at 27.

135. Abigail Wozniak, *Discrimination and the Effects of Drug Testing on Black Employment*, 97 *REV. ECON. & STAT.* 548 (2015).

136. *Id.* at 548, 550–51.

137. *Id.* at 557. Employment of blacks increased by seven to ten percent relative to all other states and thirty percent relative to anti-testing states. *Id.* at 564.

138. *Id.* at 557–58.

139. *Id.* at 551 (citing surveys of the National Survey on Drug Use and Health from 1990 to 2006 indicating that thirteen percent of whites and twelve percent of blacks reported recent drug use).

140. *Id.* (citing studies showing widespread misperceptions of disproportionate drug use among blacks).

141. *Id.* at 564.

142. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 *U. PA. L. REV.* 49 (2016).

143. *Id.* Although there are no laws at the federal, state, or local level prohibiting such questions, there is a strong perception among the general population that they are illegal. *See id.* at 52–53 n.12. The perceived illegality of family-status questions also leads applicants to refrain from broaching the subject.

Operating on a theory of “ambiguity aversion,”¹⁴⁴ Hersch and Shinall conducted a vignette study to investigate attitudes toward disclosure of marital/family status.¹⁴⁵ The study presented a hypothetical situation of two candidates, both women, with similar educational and work histories and a similar ten-year employment gap.¹⁴⁶ The scenario varied as to whether the candidate supplied a reason for the gap and, if so, whether the gap was due to children being in school or financial necessity due to divorce.¹⁴⁷ Participants in the study were then asked to pick a candidate to hire.¹⁴⁸

In scenarios where the candidates supplied differing reasons, participants were most likely to select the divorced candidate, suggesting a preference against the candidate with children.¹⁴⁹ In scenarios where one candidate supplied a reason and one did not, participants were most likely to select the candidate who supplied a reason, no matter what it was.¹⁵⁰ Hersch and Shinall conclude that prohibiting conversations about marital/family status only makes it more difficult for women who left their careers to have children to reenter the workforce later.¹⁵¹ Instead, they recommend moving “from information-stifling to information-promoting” and encouraging employers to engage candidates in open conversation to determine and respond to their need for work-life balance.¹⁵²

Taken together, these studies show that individuals prefer more information over less when it comes to making decisions. Laws designed to inhibit the flow of information to employers only limit their ability to make

See id. at 54 n.16. The perception is based in part on the EEOC’s guidance cautioning employers against such questions, due to the risk of applying the question in a discriminatory manner (i.e., by asking only women or by treating only women adversely because of their answers). *Id.* at 52.

144. Ambiguity aversion is a theory of behavioral economics that “individuals prefer known risks over unknown risks.” *Id.* at 55.

145. *Id.*

146. *Id.* The study varied the candidates’ educational information slightly as a potential indicator of work performance. One candidate, Lisa, attended an “elite” university and one, Jessica, attended a public college. *Id.* at 76. The results show a consistent but slight preference for Lisa across all metrics. *Id.* at 80. The addition of this variable means that each test scenario, as discussed below, produces two results—one where Lisa is the favored candidate and one where Jessica is the favored candidate. *Id.* In each case, the higher percentage relates to Lisa. *Id.*

147. *Id.* at 78.

148. *Id.* at 79.

149. *Id.* at 83–84. Between sixty-four and seventy-four percent of participants chose the divorced candidate. *Id.* Hersch and Shinall suggest that the preference for the divorced candidate is based on the expressed financial need, making the divorced candidate more likely to be dedicated and hard-working. *Id.* at 79.

150. *Id.* at 81–82. Between eighty-one and eighty-nine percent of participants chose the candidate who supplied a reason. *Id.* The favorability of the candidate who supplied a reason varied by one to three percent according to the reason. *Id.* at 82.

151. *Id.* at 86.

152. *Id.* at 87–89.

informed hiring decisions, leaving the door open for increased discrimination.

B. The Candidate's Experience

The information-withholding problem works both ways. From the candidate's perspective, the background screening process is a black box. The candidate supplies her basic information, typically to a third-party screening vendor.¹⁵³ After some time, a report is produced and sent to the employer. If the employer wishes to revoke an offer or terminate an applicant's candidacy based on information in the screening, it must provide the applicant with a copy of the screening report, but no further communication or explanation by the employer is required.¹⁵⁴

The screening form itself is often a puzzle. Noting the "gatekeeping function" that applications serve, Mike Vuolo and his colleagues conducted a survey of job applications for entry-level positions across a variety of industries in the private sector to determine how employers ask about criminal history in a non-BTB jurisdiction.¹⁵⁵ Testers posing as entry-level candidates collected application forms from 416 employers.¹⁵⁶ Among the 323 employers that asked about criminal records, the question was formulated in thirty-four substantially different ways, ranging from highly specific ("Have you ever been convicted of offenses such as homicide, crimes against the person, crimes of compulsion, sex crimes, incest, theft, and [sic] burglary, arson, obscene phone calls, assault, possession or use of narcotics?") to extremely broad ("Have you been convicted or charged of a crime?").¹⁵⁷ The most common questions were "Have you been convicted of a felony?" and "Have you been convicted of a crime?"¹⁵⁸

These questions, as Vuolo and his colleagues point out, are unlimited in temporal scope, potentially requiring a candidate to disclose juvenile

153. Background screening vendors are regulated under the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681 (2016). Among other things, the FCRA regulates the use of screening reports by employers and disclosures of screening reports to applicants. § 1681b(a)(3)(B), (b)(3)(A).

154. Providing a copy of the report that prompted an "adverse action" is one of the few obligations placed on employers by the FCRA. § 1681b(b)(3)(A). The employer's obligation terminates at providing the report and contact information for the screening vendor. § 1681m(a). If the candidate wishes to dispute the accuracy of the adverse information, she must do so directly with the screening vendor. § 1681m(a)(4)(B). The employer may reject the candidate based on the screening report even if it is erroneous or misleading. *See generally* Noam Weiss, Note, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271 (2012).

155. Mike Vuolo et al., *Criminal Record Questions in the Era of "Ban the Box"*, 16 CRIMINOLOGY & PUB. POL'Y 139, 140 (2017).

156. *Id.* at 148.

157. *Id.* at 147-48.

158. *Id.*

records or older convictions.¹⁵⁹ These types of records are subject to restricted public access in many states, including Minnesota, where the study was conducted.¹⁶⁰ Unclear criminal-record questions put candidates to the test of either disclosing privileged information or not disclosing it and risking negative consequences if the employer discovers it another way.

C. Difficulties in the Antidiscrimination Response

The lack of information on the candidate's side is a problem for reasons other than the candidate's own interest. Title VII guarantees all citizens the right to seek employment undeterred by discrimination.¹⁶¹ But without information about the decisions that go into hiring, a rejected candidate often has no way of knowing whether she was a victim of discrimination.¹⁶² Rejecting candidates on the basis of racial stereotypes is flatly illegal, but proving such discrimination is another matter.¹⁶³

Title VII offers two models of proof for an employment discrimination claim: disparate treatment and disparate impact.¹⁶⁴ Under a disparate treatment claim, a rejected applicant must show that the employer intentionally discriminated against the applicant "because of" the applicant's race.¹⁶⁵ A disparate impact claim requires showing that a facially neutral hiring practice or policy has a discriminatory effect.¹⁶⁶ Both types of claims present difficulties for candidates seeking to prove discrimination in hiring.

A rejected applicant would face substantial obstacles in bringing a disparate treatment claim. First, employers are not required to collect demographic information about candidates before hiring them.¹⁶⁷ An

159. *Id.* at 146.

160. *Id.* Minnesota prohibits public access to juvenile records. MINN. STAT. §§ 13.82, 260B.171 (2018). It also limits public disclosures of adult convictions to fifteen years following discharge. MINN. STAT. § 13.87(1)(b) (2018).

161. 42 U.S.C. § 2000e-2 (2016).

162. See Nina Kucharczyk, Note, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, 85 *FORDHAM L. REV.* 2803, 2829–30 (2017).

163. See Flake, *supra* note 23, at 80 (summarizing the EEOC's efforts to litigate claims based on criminal-record policies).

164. See Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 *WM. & MARY L. REV.* 857, 902–03 (2017).

165. 42 U.S.C. § 2000e-2(a)(1).

166. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

167. Employers with 100 or more employees are required to submit annual reports to the EEOC of the race and gender of their employees, but they are not required to collect this information from applicants. 29 C.F.R. § 1602.7 (2017). Subject to a public hearing, the EEOC has the authority to expand its reporting requirements as it deems necessary. 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.11. However, efforts to do so face significant opposition from employers, who find the requirements onerous. Most

employer may have names and resumes for applicants to a position, but it is not required to collect information about applicants' races.¹⁶⁸ A rejected candidate who suspects discrimination and files a charge with the EEOC would be stymied at the investigative stage, if there is no data to support disparate treatment of minority applicants. Second, even if an applicant is able to gather sufficient evidence that an employer rejected qualified minority candidates in favor of white candidates, the case doesn't end there. Under the burden-shifting framework established by the Supreme Court for employment discrimination cases,¹⁶⁹ after the applicant establishes a prima facie case of discrimination, the burden shifts to the employer to present a "legitimate, nondiscriminatory reason" for the apparent discrimination.¹⁷⁰ In the context of background screening, the employer may assert that a minority candidate's criminal record raised a legitimate safety concern.¹⁷¹ Courts routinely defer to employers in these choices and easily find the employer has met its burden.¹⁷² The burden then returns to the applicant to adduce evidence that the employer's proffered reason was mere pretext for discrimination.¹⁷³ A disparate treatment claim, therefore, inevitably hinges on proof of the employer's intent, which is difficult to prove absent overt expressions of prejudice.¹⁷⁴

A disparate impact claim, on the other hand, needs no proof of the employer's intent.¹⁷⁵ Statistical evidence that a particular screening metric excludes minority candidates at disproportionate rates would be sufficient to show that the effect is discriminatory.¹⁷⁶ However, the employer will

recently, the EEOC's proposal to require salary data faced heavy criticism and was eventually suspended by the Trump Administration. Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (proposed Feb. 1, 2016); Allen Smith, *SHRM to Congress: EEO-1's Pay Reporting Will Be Misleading, Burdensome*, SOC'Y FOR HUMAN RES. MGMT. (May 30, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/shrm-eeo-1-pay-reporting.aspx> [<https://perma.cc/6S7Z-W2CM>]; Stephen Miller, *White House Suspends Pay-Data Reporting on Revised EEO-1 Form*, SOC'Y FOR HUMAN RES. MGMT. (Aug. 31, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/revised-eeo-1-form-suspended.aspx> [<https://perma.cc/ZA62-RGWN>]

168. Kucharczyk, *supra* note 162, at 2834–35. *See also* *Matthews v. Waukesha Cty.*, 759 F.3d 821, 824 (7th Cir. 2014) (employees involved in the hiring process did not receive race information while reviewing resumes).

169. The seminal case establishing the burden-shifting framework is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

170. *Id.* at 802.

171. *See* Flake, *supra* note 23, at 81–84 (discussing employers' concerns about negligent hiring liability).

172. *Id.* at 74; Kucharczyk, *supra* note 162, at 2829–30.

173. *McDonnell Douglas*, 411 U.S. at 804.

174. *See, e.g.*, Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 924–25 (2014).

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

176. *Id.* at 430 (noting the historically inferior education of black people when assessing employer's high-school graduation requirement); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1290–95

overcome a disparate impact claim if it can show that its screening practices were “job related” and “consistent with business necessity.”¹⁷⁷ Courts, again, defer to employers in these decisions.¹⁷⁸ The applicant may still prevail if he can show that there were less discriminatory alternatives available, but it is unclear what that would look like in the context of hiring decisions.¹⁷⁹

While the unintended discriminatory effects of BTB laws seem to demand an antidiscrimination response, there are practical obstacles to enforcement under Title VII. Employers’ hiring decisions, though restricted on the front end by BTB and similar laws, are given significant deference upon review. Limitations on information-sharing impact not just employers but also candidates and the EEOC when they seek proof of discrimination.

IV. BAN THE BLACK BOX

The candidate selection process suffers from a dearth of information on all sides. Employers consistently prefer more information over less when it comes to making hiring decisions, but it is not clear how this preference can best meet BTB’s antidiscrimination goal. Some commentators have called for reopening the door and making information about criminal records even more easily accessible.¹⁸⁰ This would seem to address the basic problem of statistical discrimination in hiring, but it disregards the more deeply rooted discrimination that leads to disproportionate policing and sentencing of black and Hispanic men.¹⁸¹ Stereotypes about criminality are thus undisturbed and even reinforced, as easier access to criminal records might only confirm a link between race and criminality.¹⁸² Furthermore, repealing BTB laws would detract from the goal of improving the lives of individuals

(8th Cir. 1975) (blanket criminal-record ban affects black applicants at much higher rate than whites, establishing prima facie case of race discrimination).

177. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2016); *Griggs*, 401 U.S. at 424.

178. See *EI v. SEPTA*, 479 F.3d 232, 244–45 (3d Cir. 2007) (noting that criminal-record policies “ultimately concern the management of risk” and holding that disqualification of applicants convicted of violent crimes was justified for a position as a paratransit driver).

179. Scholars have pointed out the difficulties of applying the disparate impact theory to any context except a single screening tool. See Kim, *supra* note 164, at 906–07. Ironically, the EEOC’s efforts may have contributed to the difficulties. With more employers engaging in individualized assessments in line with the EEOC’s guidance, it would be difficult for applicants to establish the background check itself as the source of the discriminatory policy. See, e.g., *STERLING TALENT SOLS.*, *supra* note 6, at 23 (reporting that fifty-seven percent of employers conduct individualized assessments). Thus, a court may find that a particular screening tool is unlawful, see *Griggs*, 401 U.S. at 424, but it would be less likely to find disparate impact within a holistic hiring process.

180. Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 363 (2008).

181. See *supra* notes 41–46 and accompanying text.

182. See Paul-Emile, *supra* note 174, at 897–98.

with criminal records and reducing the risk of recidivism.¹⁸³ The apparent negative effects of BTB call for a solution, but it must do more than weigh two forms of racial discrimination to identify the lesser of two evils. The solution must hold employers accountable for their discriminatory conduct. If a lack of information is the problem, then the burden should fall to employers to start sharing.

Employers, before they even begin to review applications, should notify any and all potential applicants of what to expect. Job postings should delineate what will and will not be included in a background check and what factors will be used to assess each element.¹⁸⁴ Minimum required elements should include: at what stage of the application process a background check will be initiated and evaluated, what types of checks will be performed (not just criminal records, but also credit checks, verifications of licenses/certifications, etc.), and the scope of the check (e.g., how many years, which jurisdictions). Beyond these basic details, employers should provide some idea of what kinds of records constitute a disqualification. It would not be necessary for employers to contemplate every felony or misdemeanor in existence, but it would be necessary to consider the categories of offenses they might encounter.¹⁸⁵ The EEOC's guidance, which many employers already follow,¹⁸⁶ would be instrumental in helping employers set the parameters in close cases.¹⁸⁷

Requiring employers to set firm and consistent screening policies in advance might seem to run counter to the EEOC's emphasis on individualized assessments and to scholars' recommendations of an interactive information-gathering process modeled on the reasonable accommodation requirements of the ADA.¹⁸⁸ However, requiring employers to apply consistent standards is necessary to ensure

183. See *supra* notes 23–40 and accompanying text. Discrimination against individuals with criminal records is a concern in itself for BTB activists, distinct from the discriminatory effect on racial minorities. See EVANS, *supra* note 29, at 8.

184. This is not a radical departure from the requirements of many current public-employment BTB laws. See, e.g., TENN. CODE ANN. § 8-50-112(a) (2017) (requiring job postings to include a notice that information about criminal history will be requested).

185. Employers that hire at high volumes often already have predetermined standards for evaluating criminal records, including categories of offenses that are of “particular concern” and procedures for escalating adverse decisions to senior officers. See, e.g., EEOC v. Freeman, 961 F. Supp. 2d 783, 788 (D. Md. 2013) (detailing defendant employer’s “multi-step evaluation process” for reviewing candidate background checks).

186. One survey shows that fifty-seven percent of employers currently perform individualized assessment of criminal records, in line with the EEOC’s guidance. STERLING TALENT SOLS., *supra* note 6, at 23.

187. For example, an employer might give some thought to how multiple offenses or very recent offenses affect the severity of a candidate’s criminal record. See EEOC GUIDANCE, *supra* note 73, at 14.

188. Hersch & Shinall, *supra* note 142, at 87–90; Paul-Emile, *supra* note 174, at 935–37.

nondiscriminatory practices.¹⁸⁹ If employers rely on racial stereotypes to determine whether a potential employee is likely to commit criminal acts in the workplace, then allowing employers to assess criminal history on an ad hoc basis will do nothing to prevent discriminatory decisions. Between two candidates with similar criminal records, an employer without consistent standards may very well hire the white candidate and reject the black candidate on the basis of an “intuition” of each candidate’s likelihood of reoffending.¹⁹⁰

For this strategy to be effective, employers would need to be held to the standards they declare in their job postings and penalized for deviations. The enforcement procedures of Title VII offer a solution, and greater transparency by employers would resolve some of the challenges of antidiscrimination litigation.¹⁹¹ If an employer declares a specific policy with regard to criminal checks but disregards that policy to reject a minority applicant, such conduct would constitute a clear case of disparate treatment.¹⁹² Additionally, if an employer’s stated policy fails to relate to the job in question or to fulfill any business necessity, then any discriminatory effect of the policy could form the basis of a valid disparate impact claim.¹⁹³

Even in the absence of legislative action, employers should consider instituting these policies for their own benefit. By publicizing their background screening policies, employers can demonstrate that they have put thought into their hiring decisions, which may cut short potential litigation by rejected applicants.¹⁹⁴ Moreover, if applicants who are sure to be rejected know this fact in advance, they will be less likely to apply. Employers could rely on this dissuasive effect to trust that their candidate pool has been filtered of applicants that do not meet their requirements. With fewer ineligible applicants to wade through, the candidate selection process will become more efficient.

The process would also be more efficient for applicants with criminal records. They would be able to focus their job search on employers willing

189. See Pager et al., *supra* note 46, at 322, 334–36 (finding that when screening standards are particularly subjective, non-white applicants are more likely to be rejected for perceived personality traits or not being the right “fit”).

190. Cf. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 957–58 (2003) (finding that white individuals *with* criminal records fare slightly better in the job market than black individuals *without* criminal records).

191. See *supra* notes 161–167 and accompanying text.

192. See *supra* notes 168–173 and accompanying text.

193. See *supra* notes 174–178 and accompanying text.

194. Considering the courts’ consistent deference to employers’ business decisions, see *supra* notes 172 & 178 and accompanying text, employers would have little cause to fear a substantial increase in litigation costs arising from well-reasoned background screening policies.

to hire them.¹⁹⁵ A clear policy announced in advance may even embolden an individual to apply for a position he might otherwise disregard.¹⁹⁶ The ambiguities of the job application process will become a little clearer, allowing individuals to respond to criminal-record inquiries with confidence.¹⁹⁷ Knowing the factors that will be taken into consideration would allow applicants time to collect documents and prepare statements they may need to attest to their rehabilitation.¹⁹⁸

Finally, more transparency by employers during the candidate selection process would help to fully realize the goals of BTB. It would resolve a common complaint about BTB—that it merely delays inevitable rejections.¹⁹⁹ It would also help to remove the stigma around criminal records. Instead of something to avoid or dread, addressing criminal records would become simply another step in the process.²⁰⁰

CONCLUSION

Ban-the-Box (BTB) laws delay employer inquiries into job applicants' criminal histories and thereby seek to improve the lives of individuals with criminal records, reduce the risk of recidivism as a result of unemployment, and redress the harms of race discrimination in the criminal justice system and in employment. As more jurisdictions enact BTB and similar laws, study after study shows that withholding information during the hiring process does not help disadvantaged candidates and may in fact harm them. However, rolling back BTB laws only reinstates the status quo: automatic rejections for anyone who answers “yes” to the criminal-record question. If a lack of information is the problem, the solution may lie in increasing information to the candidate.²⁰¹ Instead of being left in the dark about the

195. See *supra* note 124 and accompanying text.

196. For the same reasons that employers prefer to make hiring decisions on the basis of more information rather than less, it seems reasonable to assume that candidates prefer to apply to jobs about which they have more information rather than less. And in the absence of more complete information, candidates with criminal records may make assumptions about the kinds of jobs that are available to them and shut themselves out of jobs with better career prospects.

197. See *supra* notes 153–160 and accompanying text.

198. Requirements regarding documentation and statements should also be explicated during the application process. Here, again, employers may rely on language from the EEOC GUIDANCE, *supra* note 73, at 18, to indicate possible means of proving rehabilitation.

199. See Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 216 (2014); STERLING TALENT SOLS., *supra* note 6, at 20.

200. See Pager et al., *supra* note 40, at 204–08 (finding increased callback rates when the employer invited early conversation about criminal records).

201. Because the information-withholding problem appears likely to surface in multiple areas of the candidate selection process, the solution presented here may have equal value elsewhere. Bans on employer inquiries into compensation history are gaining in popularity in several localities, as a measure designed to combat the gender wage gap. See, e.g., *San Francisco Says No to Salary History Inquiries*,

employer's selection criteria, candidates might act as the first filter, selecting themselves out of jobs for which they are not qualified and into those that can provide real opportunities.

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Daily Lab. Rep. (BNA), No. 139 (July 21, 2017). If it is true that in the absence of actual information, employers rely on stereotypes to make guesses about someone's history, then one might expect employers to consistently undervalue female candidates. Greater transparency by employers (about the wages they are willing to pay for a given position) may be necessary to prevent the wage gap from widening due to discriminatory assumptions.

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