

# Do Ban-the-Box Laws Really Work?

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*ABSTRACT: Ban-the-box laws, which delay an employer's inquiry into an applicant's criminal record until later in the hiring process, are gaining remarkable traction at the local, state, and even federal levels. But the assumption that employers will be more likely to hire ex-offenders if forced to evaluate their qualifications before discovering their criminal record has gone largely untested. Empirical uncertainty has given rise to various criticisms of ban-the-box laws, chiefly that they merely postpone the inevitable decision not to hire the ex-offender—often at considerable cost to both the employer and applicant—and, worse yet, that they may actually harm racial minorities by prompting employers to assume all minority applicants have a criminal record in light of their much higher arrest and incarceration rates, and eliminate them from consideration on that basis.*

*This Article reports the findings of a field experiment that tests both of these criticisms. The experiment entailed applying to food-service job openings in Chicago, which bans the box in private employment, and Dallas, which does not, using a fictitious ex-offender applicant profile. One-third of the applications in each city used a black-sounding name, one-third used a Latino-sounding name, and the other third used a white-sounding name. Each application was tracked to determine whether it elicited an employer callback (i.e., a request for an interview or additional information). Multiple regression modeling was then used to compare callback differentials between cities and across races. The results refute the contention that ban-the-box laws do not increase employment opportunities for ex-offenders, as applicants were 27% more likely to receive a callback in Chicago than in Dallas. The results likewise contradict the claim that banning the box harms racial minorities.*

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*All three races had higher callback rates when the box was banned, with the black applicant experiencing the largest increase. Still, the black applicant had much lower callback rates than the white and Latino applicants in both Chicago and Dallas, indicating race remains a formidable barrier to employment, regardless of whether an employer is aware of a candidate's criminal record.*

*In light of these findings that banning the box increases an ex-offender's odds of employment without harming racial minorities, this Article considers the potential costs and benefits of ban-the-box laws, both standing alone and as part of broader efforts to successfully reintegrate ex-offenders into society. Although banning the box may prove helpful in improving ex-offenders' job prospects, it is hardly sufficient; more is required to ensure that upon release, an ex-offender's prison sentence does not become a life sentence.*

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## I. INTRODUCTION

The United States' mass incarceration epidemic is well documented. In less than 50 years, the jail and prison population has grown more than tenfold

from approximately 200,000 in 1972<sup>1</sup> to over 1.5 million in 2015,<sup>2</sup> despite a decades-long decline in crime rates.<sup>3</sup> The nation's incarceration rate of 698 per 100,000 residents far outpaces second-place El Salvador (614), as well as countries such as Russia (413), Mexico (165), and China (118).<sup>4</sup> Yet, the incarceration rate tells only part of the story: In 2015, an additional 4.6 million Americans were under some form of community supervision, such as parole or probation.<sup>5</sup> In total, a staggering 65 million U.S. adults—one in four—have some type of criminal record.<sup>6</sup> These figures seem destined only to increase under the administration of President Donald Trump, who ran for office “on a platform of ‘law-and-order,’ claiming that crime was rising and there was a ‘war on our police.’”<sup>7</sup>

Having even a minor criminal record can present significant obstacles that often inhibit individuals from moving past their interactions with the criminal justice system.<sup>8</sup> This is especially true in the context of employment, where a criminal record can drastically reduce a person's odds of finding steady work.<sup>9</sup> The negative effect of a criminal record on employment is

1. BUREAU OF JUSTICE STATS.: U.S. DEP'T OF JUSTICE, PRISONERS 1925–81, at 2 tbl. 3 (1982), <http://www.bjs.gov/content/pub/pdf/p2581.pdf>.

2. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATS.: U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

3. See John Gramlich, 5 *Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 30, 2018), <http://www.pewresearch.org/fact-tank/2017/02/21/5-facts-about-crime-in-the-u-s> (citing data from the FBI and Bureau of Justice Statistics showing that between 1993 and 2016, violent crime fell between 48% and 74%, and property crime fell between 48% and 66%).

4. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

5. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATS.: U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

6. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

7. AMES C. GRAWERT & NATASHA CAMHI, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE IN PRESIDENT TRUMP'S FIRST 100 DAYS, at 4 (2017) (footnotes omitted), [https://www.brennancenter.org/sites/default/files/analysis/Criminal\\_Justice\\_in\\_President\\_Trumps\\_First\\_100\\_Days.pdf](https://www.brennancenter.org/sites/default/files/analysis/Criminal_Justice_in_President_Trumps_First_100_Days.pdf). Grawert and Camhi detect a number of key shifts that seem likely to eventually, if not immediately, increase the country's correctional population, including “push[ing] a false narrative about rising crime and call[ing] for urgent, drastic action[.]” hinting at a return to harsher federal charging policies; “[i]ncreas[ing] [i]mmigration [e]nforcement and [d]etention[.] . . . [d]ecreas[ing] [o]versight of [l]ocal [p]olice[.] . . . [and] [i]ncreas[ing] the [u]se of [p]rivate [p]risons.” *Id.* at 1–2.

8. SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 1 (2015), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (“Having even a minor criminal record, such as a misdemeanor or even an arrest without conviction, can create an array of lifelong barriers that stand in the way of successful re-entry.”).

9. See, e.g., Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL'Y & SOC. SCI. 195, 199 (2009) (finding that job applicants with a criminal record are about half as likely to receive a

particularly noteworthy in light of several studies showing unemployment to be among the strongest predictors of recidivism.<sup>10</sup> Thus, a grim situation has emerged in which the very people who most need to work—both for their own benefit and for the benefit of society as a whole—often experience tremendous difficulty finding gainful employment.

Despite the known link between unemployment and recidivism, surprisingly few legal protections exist to promote the employment of ex-offenders. Although tax breaks are sometimes available to employers that voluntarily hire ex-offenders,<sup>11</sup> there is no federal law that prohibits employers from discriminating against ex-offenders,<sup>12</sup> and only a handful of states and

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callback as non-offender applicants with comparable credentials); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955 (2003) [hereinafter Pager, *The Mark of a Criminal Record*] (finding the same); Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles* 7–8 (Nat'l Poverty Ctr., Working Paper No. 04-15, 2004) (finding that more than 40% of employers either definitely or probably would not hire an applicant with a criminal record, whereas only 20% either “definitely or probably would” consider hiring an ex-offender); Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* 6, 8 fig. 1 (Inst. for Research on Poverty, Discussion Paper No. 1243-02, 2002) [hereinafter Holzer et al., *Will Employers Hire Ex-Offenders?*] (detailing a study of over 3,000 employers in four metropolitan areas that found that nearly 20% of employers would “definitely not” and 42% would “probably not” hire an applicant with a criminal record).

10. See, e.g., Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 389–90, 397–98 (2011) (detailing a study of 401 parolees over 46 months that found that “employment had a significant, negative influence on recidivism,” with 42% of parolees surviving without an arrest 600 days after release, compared to just 24% of unemployed parolees); John M. Nally et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States*, 9 INT'L J. CRIM. JUST. SCI. 16, 19, 26–27 (2014) (detailing a study of over 6,500 ex-prisoners five years after release that found employment, along with education, to be the strongest predictors of recidivism, with employment lowering the odds of recidivism by 37.4%); Robert J. Sampson & John H. Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609, 617 (1990) (detailing a longitudinal analysis of juvenile delinquents that found job stability to be a significant deterrent to adult crime and deviance); Stephen J. Tripodi et al., *Is Employment Associated with Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 706, 713 (2010) (finding that ex-offenders who obtained employment upon release from prison averaged 31.4 months before being reincarcerated, compared to 17.3 months for ex-offenders who did not obtain employment); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 535–37 (2000) (finding that employment reduced the likelihood of recidivism by 24% in ex-offenders age 27 and older).

11. OFFICE OF WORKFORCE INVESTMENT: U.S. DEP'T OF LABOR, WORK OPPORTUNITY TAX CREDIT: FACT SHEET 1 [hereinafter OFFICE OF WORKFORCE INVESTMENT], [https://www.doleta.gov/business/incentives/opptax/docs/WOTC\\_Fact\\_Sheet.pdf](https://www.doleta.gov/business/incentives/opptax/docs/WOTC_Fact_Sheet.pdf) (last visited Oct. 30, 2018).

12. In theory, an ex-offender who suffers an adverse employment action because of her criminal record could bring a claim against the employer under Title VII of the Civil Rights Act of 1964, but could only prevail by proving the employer's practice of excluding ex-offenders from employment had a disparate impact based on race, color, religion, sex, or national origin. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 9 (2012) [hereinafter EEOC ENFORCEMENT GUIDANCE] (explaining that

cities have imposed such limitations, which often apply only to public-sector employment.<sup>13</sup> The dearth of legal protections for ex-offenders seeking employment is unfortunate but not surprising, given lawmakers' aversion to appearing soft on crime.<sup>14</sup> In reality, rather than facilitate the employment of ex-offenders, "the vast majority of laws . . . are *exclusionary* in nature, banning individuals with criminal records from entire industries, restricting licensing boards from granting occupational licenses to ex-offenders, and mandating that employers perform criminal background checks on applicants for certain types of jobs."<sup>15</sup> In essence, most laws pertaining to the employment of ex-

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Title VII employment discrimination claims relating to criminal history must be tied to a Title VII-protected trait). Prevailing under such a theory of discrimination has proven difficult, though not impossible. *Compare* EEOC v. Freeman, 778 F.3d 463, 468 (4th Cir. 2015) (affirming summary judgment for the employer against the EEOC's allegation that it had implemented a hiring policy based on criminal background and/or credit history checks that disparately impacted black and male applicants), *and* EEOC v. Freeman, 126 F. Supp. 3d 560, 584 (D. Md. 2015) (ordering the EEOC to reimburse the employer nearly \$1 million in attorneys' and expert fees), *with* EEOC v. BMW Mfg. Co., No. 7:13-1583-HMH, 2015 WL 5431118, at \*4 (D.S.C. July 30, 2015) (denying the employer's motion for summary judgment on EEOC's claim that its criminal background check policy disparately impacted blacks), *and* Press Release, U.S. Equal Emp't Opportunity Comm'n, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit (Sept. 8, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm> (noting that less than two months later, BMW agreed to settle the case for \$1.6 million).

13. *See* ARIZ. REV. STAT. ANN. § 13-904(E) (2010) (regarding public employment only); COLO. REV. STAT. ANN. § 24-5-101 (West 2015) (regarding public employment only); CONN. GEN. STAT. § 46a-80 (2017) (regarding public employment only); FLA. STAT. ANN. § 112.011 (West 2014) (regarding public employment only); HAW. REV. STAT. § 378-2.5 (2015) (regarding both public and private employment); KAN. STAT. ANN. § 22-4710 (West 2007) (regarding both public and private employment); KY. REV. STAT. ANN. § 335B.020 (West 2018) (regarding public employment only); LA. STAT. ANN. § 37:2950 (2018) (regarding public employment only); MINN. STAT. ANN. § 364.03 (West 2018) (regarding public employment only); N.M. STAT. ANN. §§ 28-2-3 to -6 (West 2011) (regarding public employment only); N.Y. CORRECT. LAW §§ 750-753 (Consol. 2018) (regarding both public and private employment); N.Y. EXEC. LAW § 296.15 (Consol. 1995) (regarding both public and private employment); 18 PA. STAT. AND CONS. STAT. ANN. §§ 9124-9125 (West 2015) (regarding both public and private employment); WASH. REV. CODE ANN. §§ 9.96A.020, 9.96A.030, 9.96A.060 (West 2018) (regarding public employment only); WIS. STAT. ANN. § 111.335 (West 2018) (regarding both public and private employment); *see also, e.g.*, BOS., MASS., MUN. CODE § 4-7 (2005) (regarding vendors to the City of Boston); S.F., CAL., POLICE CODE art. 49 (2014) (regarding, in part, public and private employment).

14. *See* Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High Ground in Criminal Justice Policy-Making*, 38 FORDHAM URB. L.J. 775, 808 (2011) ("Soft on Crime" rhetoric—and the attendant fear of being labeled as such—leads to a lack of support for constitutionally protective criminal laws and policies, and instead drives support for harsh laws and punishment. The charge of being 'soft on crime' is a frequent refrain during election campaigns and a common source of partisan bickering. For today's political figures, the suggestion that one is too friendly to criminals may be as damaging as allegations of Communist sympathies were during the Cold War." (footnotes omitted)).

15. Dallon F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 47-48 (2015); *see also* Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 263 (2014) (explaining that "tens of thousands of statutes nationwide" have created "a complex set

offenders work against, rather than for, a rapidly growing segment of the population for whom employment could mean the difference between a life of freedom and a life of imprisonment.

One of the few potential bright spots on the legislative front has been the rise of so-called “ban-the-box” laws, which generally prohibit employers from inquiring about a job applicant’s criminal record until later in the hiring process, such as after an initial interview or once a conditional employment offer is made.<sup>16</sup> The hope is that an employer will be more likely to hire an ex-offender if it evaluates a candidate’s qualifications for the position before discovering the applicant’s criminal record.<sup>17</sup> Spearheaded largely by grassroots organizations,<sup>18</sup> the number of states banning the box in one form or another has grown from just one in 2004<sup>19</sup> to thirty-three by 2018.<sup>20</sup> Additionally, more than 150 cities and counties have banned the box at the municipal level.<sup>21</sup> Today, an estimated 249 million Americans—approximately three-fourths of the population—live in a state or city with some kind of ban-the-box law.<sup>22</sup> Support for ban-the-box legislation reached new heights in late 2015 when President Barack Obama announced that the federal government, the nation’s largest employer, would remove criminal background questions from most of its job applications.<sup>23</sup>

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of barriers that will make reentry into the community and becoming a productive citizen difficult, if not impossible”).

16. See *infra* Part II.

17. See EEOC ENFORCEMENT GUIDANCE, *supra* note 12, at 13 (“The policy rationale [for banning the box] is that an employer is more likely to objectively assess the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience.”); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 774 (2011) (discussing how some states and municipalities have enacted ban-the-box laws “on the theory that rejection is harder once a personal relationship has been formed”).

18. See *Ban the Box Campaign*, LEGAL SERVS. FOR PRISONERS WITH CHILD., <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ban-the-box-campaign> (last visited Oct. 31, 2018) (“All of Us or None is recognized nationwide as the originator and the core of a Ban the Box movement that is sweeping the country.”).

19. See HAW. REV. STAT. § 378-2.5 (2015).

20. See BETH AVERY & PHIL HERNANDEZ, NAT’L EMP’T. LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 6–19 (2018), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-September.pdf> (compiling a list of states and municipalities that have enacted ban-the-box laws).

21. See *id.* at 1.

22. See *id.* at 2.

23. See Gregory Korte, *Obama Tells Federal Agencies to ‘Ban the Box’ on Federal Job Applications*, USA TODAY (Nov. 3, 2015, 6:59 AM), <https://www.usatoday.com/story/news/politics/2015/11/02/obama-tells-federal-agencies-ban-box-federal-job-applications/75050792>; see also Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 26,173 (May 2, 2016) (to be codified at 5 C.F.R. pts. 330, 731) (prohibiting federal agencies and contractors from inquiring about certain job applicants’ criminal background until after extending a conditional offer of employment to the applicant).

Even as governments and organizations around the nation continue to enact ban-the-box measures—often to great fanfare and acclamation<sup>24</sup>—a small but growing chorus of critics is raising concerns that these laws may not deliver on their promise of increased employment for ex-offenders.<sup>25</sup> Some commentators argue that banning the box merely delays an employer’s inevitable decision not to hire an ex-offender, often until after both the employer and applicant have heavily invested in the job-hiring process.<sup>26</sup> Other commentators argue that ban-the-box laws are not only ineffective, but may actually *harm* racial minorities.<sup>27</sup> They claim that denying employers access to criminal records at the outset of the hiring process encourages statistical discrimination, meaning employers will refuse to consider any applicant of color for employment because they will automatically assume such applicants have a criminal record in light of the enormous disparity in incarceration rates for racial minorities compared with whites.<sup>28</sup>

24. See, e.g., William G. Martin, *Did SUNY Ban the Box? Or Just Move It?: It Is Hard to Avoid the Conclusion That the Box Has Simply Been Moved Further Down the Line*, NATION (Oct. 25, 2016), <https://www.thenation.com/article/did-suny-ban-the-box-or-just-move-it> (reporting that “State University of New York Chancellor Nancy Zimpher announced to great fanfare” that the university system’s 64 campuses would ban the box).

25. See, e.g., Mercedes White, *Should We Make It Easier for People with Criminal Records to Find Work?*, DESERET NEWS (Aug. 23, 2015, 1:32 PM), <https://www.deseretnews.com/article/865635093/Should-we-make-it-easier-for-people-with-criminal-records-to-find-work.html> (quoting Eli Lehrer, president of R Street Institute, a libertarian think tank, who argues there is no evidence that banning the box actually leads to more hires, and that “we are still waiting for that gold standard study”).

26. See Flake, *supra* note 15, at 94 (explaining that “employers may be critical of ban-the-box laws . . . as unduly burdensome to the hiring process itself by requiring employers to spend valuable time and resources courting candidates they are otherwise entitled to exclude based on their criminal histories” (footnotes omitted)); Bryant Jackson-Green, *Expanding Record Sealing and Negligent-Hiring Protections Offer Ex-Offenders a Better Shot at a Second Chance Than “Ban the Box”*, ILL. POL’Y (Mar. 10, 2016), <https://www.illinoispolicy.org/expanding-record-sealing-and-negligent-hiring-protections-offer-ex-offenders-a-better-shot-at-a-second-chance-than-ban-the-box> (arguing that banning the box “does little but delay the inevitable”); *Ban the Box Laws Could Negatively Affect Small Businesses*, NAT’L FED’N INDEP. BUS. (Apr. 13, 2016), <http://www.nfib.com/content/news/staffing/ban-the-box-laws-could-negatively-affect-small-businesses> (claiming that ban-the-box laws could result in small businesses “spend[ing] a lengthy hiring process with a candidate ‘only to find a worker is unqualified at the last minute,’” losing time and income (quoting Juanita Duggan)).

27. See, e.g., Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-offenders and Non-offenders 1* (Nat’l Bureau of Econ. Research, Working Paper No. 13935, 2008) (“Employers have imperfect information about the criminal records of applicants, so rational employers may use observable correlates of criminality as proxies for criminality and statistically discriminate against groups with high rates of criminal activity or incarceration.”); Jennifer L. Doleac, *“Ban the Box” Does More Harm Than Good*, BROOKINGS (May 31, 2016), <https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/> (“[Banning the box] doesn’t help many ex-offenders, and actually decreases employment for black and Hispanic men who don’t have criminal records. This is a classic case of unintended consequences. We should repeal ‘ban the box’ and focus on better alternatives.”).

28. See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATS.: U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf> (finding that black men born in 2001 have a 32% chance of

Until recently, both proponents and critics of ban-the-box laws based their arguments largely on conjecture, as few studies examined how these laws play out in the real world. But even as researchers are slowly beginning to fill the empirical void, their inconsistent results seem to raise almost as many questions as they answer. For instance, some studies have found banning the box increases ex-offender employment,<sup>29</sup> whereas another reached the opposite conclusion.<sup>30</sup> Similarly, a pair of studies found that employers statistically discriminated against racial minorities after ban-the-box laws were implemented,<sup>31</sup> whereas three other studies did not detect any discriminatory impact.<sup>32</sup> Although these studies demonstrate an important and much needed empirical commitment to understanding the impact of ban-the-box laws, they have done little to quell the uncertainty surrounding both the intended and unintended consequences of these laws.

This Article adds to the small but burgeoning empirical literature on ban-the-box laws by reporting the results of a field experiment conducted during the summer of 2017. The experiment entailed applying to entry-level food-service positions, using a fictitious applicant profile, in Chicago, Illinois, which bans-the-box in private employment, and Dallas, Texas, which does not. One-third of the applications in each city used a black-sounding name, another third used a Latino-sounding name, and the other third used a white-sounding name. All other applicant characteristics, such as sex, job history, educational attainment, and aptitude, remained nearly constant. The experiment tracked each application for 90 days to determine whether it elicited a telephone call or email from the employer inviting the applicant to interview or requesting additional information. This experiment tests the aforementioned criticisms of ban-the-box laws by comparing overall callback

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imprisonment, compared to a 17% chance for Latino men and just a 6% chance for white men); *supra* note 27 and accompanying text.

29. See, e.g., Terry-Ann L. Craigie, *Ban the Box, Convictions, and Public Sector Employment* 14–15 (Sept. 22, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906893](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906893).

30. See Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts CORI Reform* 20–21 (Fed. Reserve Bank of Bos., Working Paper No. 16-30, 2017), <https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/wp1630.pdf>.

31. See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 16–19 (Univ. Mich. Law & Econ. Research Paper Series, Paper No. 16-012, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=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* 29–30 (Nat'l Bureau of Econ. Research, Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469.pdf>.

32. See Jackson & Zhao, *supra* note 30, at 27; Daniel Shoag & Stan Veuger, *"No Woman No Crime: Ban the Box, Employment, and Upskilling"* 24–25 (Harvard Kennedy Sch. Faculty Research Working Paper Series, Paper No. 16-015, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2782599](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782599); Craigie, *supra* note 29, at 16–18.

rates in Chicago and Dallas, as well as the callback rates of the different racial groups in each city.

Contrary to the argument that ban-the-box laws do not increase ex-offender employment, the applicants in this study had a moderately higher likelihood of receiving a callback in Chicago, where the box is banned. Moreover, no racial group in this study had a lower callback rate in the ban-the-box jurisdiction, and, in fact, the black applicant seemed to benefit the most from the law, thus refuting the notion that banning the box harms minorities. But while banning the box may have benefitted the black candidate, the study also found that racial discrimination continues to pose a major barrier to employment for black applicants, regardless of whether they have a criminal record. It is striking that the black applicant's callback rate in the ban-the-box jurisdiction was lower than the white applicant's callback rate in the non-ban-the-box jurisdiction. This means employers in this study would rather call back a white applicant with a known criminal record than a black applicant whose criminal record was unknown.

Although much more research is needed to fully comprehend the effects of banning the box, I argue in this Article that the results of this study suggest these laws may play an important role in helping ex-offenders find employment. Part II of this Article traces the history of the ban-the-box movement, explores how ban-the-box laws vary across jurisdictions, and considers why the movement has enjoyed more success than other efforts to promote ex-offender employment. Part III surveys the previous empirical work on ban-the-box laws, explains this study's design and methodology and reports its findings. Part IV weighs the potential costs and benefits of ban-the-box laws in light of these findings, suggests additional avenues for research, and considers how ban-the-box measures fit with broader efforts to promote ex-offender reentry and rehabilitation.

## II. THE BAN-THE-BOX MOVEMENT

It is hardly a recent revelation that ex-offenders often struggle to find work. Social scientists have confirmed this reality for more than five decades.<sup>33</sup> Despite this research, it was not until 1998 that a state legislature—Hawaii—first endeavored to facilitate ex-offender employment by enacting a law that removed criminal background questions from job applications.<sup>34</sup> To this day,

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33. In 1962, Richard Schwartz and Jerome Skolnick conducted the first empirical study on the relationship between a criminal record and employment, finding that the applicant without a criminal record generated interest from 36% of surveyed employers, whereas a similarly-qualified applicant with a criminal record generated interest from just 4% of employers. Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 134–37 (1962).

34. See H.B. 3528 (Haw. 1998) (codified as amended at HAW. REV. STAT. § 378-2.5 (2015)); Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 AM. J. CRIM. JUST. 336, 341 (2015) (“The first and probably the most stringent worker protection statute is Hawaii’s 1998 ban the box law.”).

Hawaii's law remains among the nation's most stringent by prohibiting both public and private employers from inquiring about an applicant's criminal record until after a conditional offer of employment is made and by further barring employers from withdrawing a conditional job offer unless "the conviction record bears a rational relationship to the duties and responsibilities of the position."<sup>35</sup>

Hawaii's groundbreaking law failed to gain traction on the mainland until 2003, when a group of ex-offenders and their families in Oakland, California, formed an organization for the express purpose of "ending all forms of discrimination based on conviction history."<sup>36</sup> The organization, "All of Us or None," initially focused its attention on persuading public employers to remove criminal background questions from job applications—an effort it referred to as a "Ban the Box Campaign."<sup>37</sup> It notched its first victory in 2005, when the City and County of San Francisco passed a resolution urging banning the box from most public employment applications.<sup>38</sup> Other major cities, including Boston, Chicago, and Minneapolis, soon followed.<sup>39</sup> In announcing Chicago's new hiring policy, Mayor Richard Daley declared: "Implementing this new policy won't be easy, but it's the right thing to do. . . . We cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches."<sup>40</sup>

When Minnesota became the second state to ban the box in 2009, this seemed to unleash a torrent of similar legislation at the state level. California, Connecticut, Massachusetts, and New Mexico banned the box in 2010; Colorado in 2012; Illinois, Maryland, and Rhode Island in 2013; Delaware, Nebraska, and New Jersey in 2014; Georgia, New York, Ohio, Oregon, Vermont, and Virginia in 2015; Louisiana, Missouri, Oklahoma, Tennessee, and Wisconsin in 2016; Indiana, Kentucky, Nevada, Pennsylvania, and Utah in 2017; and Kansas, Michigan, and Washington in 2018.<sup>41</sup> By 2018, 33 states, the District of Columbia, and over 150 cities and counties had banned the box in one form or another.<sup>42</sup> Although most of these laws apply only to public

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35. HAW. REV. STAT. § 378-2.5 (2015).

36. See ALL OF US OR NONE, BAN THE BOX TIMELINE 1 (2015) [hereinafter ALL OF US OR NONE], <http://www.prisonerswithchildren.org/wp-content/uploads/2015/08/BTB-timeline-final.pdf>.

37. See *About: The Ban the Box Campaign*, BANTHEBOXCAMPAIGN.ORG, <http://bantheboxcampaign.org/about> (last visited Nov. 1, 2018).

38. See ALL OF US OR NONE, *supra* note 36, at 1; S.F., Cal., Bd. of Supervisors Res. 764-05 (Oct. 11, 2005).

39. NAT'L EMP'T LAW PROJECT, MAJOR U.S. CITIES ADOPT NEW HIRING POLICIES REMOVING UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1-3 (2007).

40. Press Release, Mayor's Press Office, Mayoral Task Force Releases Recommendations on Prisoner Reentry (Jan. 24, 2006) (internal quotation marks omitted), <https://www.nelp.org/wp-content/uploads/2015/03/MayorDalysPressRelease.pdf>.

41. See AVERY & HERNANDEZ, *supra* note 20, at 1.

42. See *id.*

employers (and, in many cases, their vendors and contractors),<sup>43</sup> ten states have extended their ban-the-box laws to private-sector employers as well.<sup>44</sup>

Although uniform in purpose, ban-the-box laws differ widely from one jurisdiction to the next. One major difference is in how the laws define a covered employer. Whereas essentially every law covers public employers, just 14.1% apply to private employers as well.<sup>45</sup> But even when private employers are covered, the laws often apply only to employers with a certain number of employees. For example, California's law applies to private employers "with five or more employees,"<sup>46</sup> Washington D.C.'s ordinance covers only employers with more than ten employees,<sup>47</sup> and Austin's ordinance applies to employers with at least 15 employees.<sup>48</sup>

Ban-the-box laws also vary in how long they delay an employer's inquiry into an applicant's criminal background. Some laws set the point early on in the process. Connecticut's law, for example, prohibits criminal background questions only on the employment application itself,<sup>49</sup> conceivably leaving open the possibility that an employer could ask about an applicant's criminal record moments after she submits her application or even as a precondition to filling out an application. In Illinois, employers may inquire about an applicant's criminal record as soon as the applicant is selected for an interview.<sup>50</sup> Other laws delay the inquiry until later in the hiring process, such as after an initial interview,<sup>51</sup> at the close of the interview process,<sup>52</sup> once the candidate becomes a finalist,<sup>53</sup> or after a conditional job offer is extended.<sup>54</sup>

In addition to delaying the criminal record inquiry, many ban-the-box laws go further by limiting what an employer can do with criminal background information once it is obtained. Some laws prohibit employers from considering certain types of offenses, such as arrests not leading to

43. *See id.* at 19–20 (compiling a list of state ban-the-box laws and distinguishing between such laws that apply to public versus private employment).

44. The ten states that ban the box in private employment are California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont. *See id.*

45. *See id.* at 96–101.

46. CAL. GOV'T CODE § 12952 (West 2018).

47. D.C. CODE § 32-1341(6) (2014).

48. AUSTIN, TEX., CODE OF ORDINANCES § 4-15-2(F) (2016).

49. CONN. GEN. STAT. § 31-51(i) (2017).

50. 820 ILL. COMP. STAT. 75 / 15(a) (2018).

51. *See, e.g.*, DEL. CODE ANN. tit. 19, § 711(g)(1) (West 2018); LA. STAT. ANN. § 42:1701 (2018); MD. CODE ANN. § 2-203(C) (West 2017).

52. *See, e.g.*, Prince William Cty., Va., Res. No. 15-672 (Va. 2015).

53. *See, e.g.*, COLO. REV. STAT. ANN. § 24-5-101(3)(b) (West 2015); N.M. STAT. ANN. § 28-2-3(A) (West 2011); CITY OF PHX., ARIZ., ADMIN REG. § 2.81 (Apr. 18, 2016).

54. *See, e.g.*, HAW. REV. STAT. § 378-2.5(b) (2015); AUSTIN, TEX., CODE OF ORDINANCES § 4-15-4(C) (2016); BALT., MD., CITY CODE art. 11, § 15-6 (2014).

conviction,<sup>55</sup> misdemeanors,<sup>56</sup> and older convictions.<sup>57</sup> Others require employers to determine whether an applicant's criminal record sufficiently relates to the job in question before factoring the conviction into an employment decision. For example, in Colorado, an employer can consider an applicant's criminal record only if "there is a direct relationship between the conviction and the [job]."<sup>58</sup> In Hawaii, the conviction must "bear[] a rational relationship to the . . . position."<sup>59</sup> Tennessee's law requires employers to consider "[t]he specific duties and responsibilities of the position" in question.<sup>60</sup> Laws that not only ban the box but also restrict what employers can do with criminal record information once it is obtained may at least partially alleviate the concern that banning the box merely delays an employer's inevitable decision to reject an applicant because of his criminal record.

A final way in which ban-the-box laws often vary is whether they provide applicants with any right to be apprised of, and potentially challenge, an employer's use of criminal records in making employment decisions. Several laws require employers to supply applicants with a copy of their criminal record,<sup>61</sup> presumably so they can correct any errors or inaccuracies within the report itself.<sup>62</sup> Some go further by obligating employers to provide written notice to an applicant of their reason for not hiring the applicant if the decision was based at least in part on the applicant's criminal record.<sup>63</sup> Many ban-the-box laws likewise create a mechanism for appealing adverse employment decisions based on a criminal record, typically by allowing the applicant to present information or provide an explanation regarding a past offense.<sup>64</sup>

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55. See, e.g., HARTFORD, CONN., MUN. CODE § 2-385(a) (2018); Kan. City, Mo., Ordinance 130230 (Apr. 4, 2013).

56. See, e.g., MINN. STAT. ANN. § 364.04(3) (West 2018); N.M. STAT. ANN. § 28-2-3(B)(2) (West 2017).

57. See, e.g., HAW. REV. STAT. § 378-2.5(c) (2015) (prohibiting employers from considering convictions more than ten years old); CITY OF PHILA., PA., CITY CODE § 9-3504(3) (2016) (prohibiting the consideration of convictions more than seven years old).

58. COLO. REV. STAT. ANN. § 24-5-101(1)(b)(VII)(4)(b) (West 2015).

59. HAW. REV. STAT. § 378-2.5(a) (2015).

60. TENN. CODE ANN. § 8-50-112(c)(1) (West 2016).

61. See, e.g., MASS. GEN. LAWS ANN. ch. 6, § 171A (West 2016); N.Y.C. ADMIN. CODE § 8-107(11-a)(b)(i) (2017); CITY OF PHILA., PA., CITY CODE § 9-3504a (2016).

62. See Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 907 (2014) (citing studies in support of argument that "criminal history reports are riddled with errors and frequently contain significant inaccuracies, including false positive identifications, sealed or expunged information, misleading information, and missing case disposition or resolution information").

63. See, e.g., N.M. STAT. ANN. § 28-2-4(B) (West 2011); L.A., CAL., MUN. CODE ch. XVIII, art. 9, § 189.03(B) (2017).

64. See, e.g., MEMPHIS, TENN., MUN. CODE § 3-4-4(D)(2) (2018); Seattle, Wash., Human Rights Rule 80-120 (2013).

The widespread popularity of the ban-the-box movement is remarkable in its own right, but is particularly impressive given the paucity of other laws promoting ex-offender employment. Indeed, the movement has become so powerful that several high-profile companies, including Walmart, Target, Starbucks, and Home Depot, have voluntarily removed criminal background questions from their job applications, even in jurisdictions where they are not legally required to do so.<sup>65</sup>

Why has the ban-the-box movement succeeded when so many other legislative efforts to help ex-offenders reintegrate have failed? A number of factors may be at play. First, societal attitudes toward ex-offenders may be softening. Americans have long felt conflicted over how to treat ex-offenders, as “[p]ublic fear of crime coexists alongside broad support for basic civil liberties, democracy, and a right to due process for those accused of crimes.”<sup>66</sup> Although negative stereotypes and stigmas persist, there is also evidence that public attitudes toward ex-offenders are becoming more favorable.<sup>67</sup> This may be especially true of the workplace, as a 2018 national study co-sponsored by the Society for Human Resource Management (“SHRM”) and the Charles Koch Institute found that 55% of managers, 51% of non-managers, and 47% of human resource professionals indicated their willingness to work with individuals with criminal records.<sup>68</sup> This softening of public attitudes may be attributable, at least in part, to the sheer size of today’s ex-offender population<sup>69</sup>: As non-offenders have more frequent interactions with ex-offenders, whether in their neighborhoods, at work, at church, or within their own families, their feelings toward ex-offenders are likely to improve.<sup>70</sup>

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65. See C.W. Von Bergen & Martin S. Bressler, “*Ban the Box*” Gives Ex-Offenders a Fresh Start in Securing Employment, 67 LAB. L.J. 383, 393 (2016) (“State and local entities have led the way [in banning the box] followed by private companies such as Walmart, Target, Starbucks, and Home Depot.”).

66. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 276 (2004).

67. Brett Garland et al., *Value Conflict and Public Opinion Toward Prison Reentry Initiatives*, 24 CRIM. JUST. POL’Y REV. 27, 28–29 (2013) (summarizing studies showing widespread public support for prisoner reentry programs). See generally Lior Gideon & Natalie Loveland, *Public Attitudes Toward Rehabilitation and Reintegration: How Supportive Are People of Getting-Tough-on-Crime Policies and the Second Chance Act?*, in RETHINKING CORRECTIONS: REHABILITATION, REENTRY, AND REINTEGRATION 19–36 (Lior Gideon & Hung-En Sung eds., 2011) (showing attitudes toward ex-offenders are gradually becoming more positive); Paul J. Hirschfield & Alex R. Piquero, *Normalization and Legitimation: Modeling Stigmatizing Attitudes Toward Ex-Offenders*, 48 CRIMINOLOGY 27 (2010) (finding that a person’s attitude toward ex-offenders may soften with personal familiarity).

68. SOC’Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST., WORKERS WITH CRIMINAL RECORDS: A SURVEY BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE CHARLES KOCH INSTITUTE 1, 3–4 (2018) [hereinafter SHRM/KOCH STUDY], <http://2cb9tr19pjj62du5qu4dwatawpeengine.netdna-ssl.com/wp-content/uploads/2018/05/CKI-SHRM-Report.pdf>.

69. According to conservative estimates, 65 million Americans—over one in four U.S. adults—have a criminal history and thus constitute “ex-offenders,” regardless of whether they served time in jail or prison. See RODRIGUEZ & Emsellem, *supra* note 6, at 1–4.

70. See Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2256–57 (2017) (“Not surprisingly, once people feel connected, both racial anxiety and bias

Furthermore, more humanizing depictions of ex-offenders in movies such as *The Shawshank Redemption* and television series such as *Orange is the New Black* and *The Last O.G.* may also be helping to change public sentiment.<sup>71</sup>

In addition to shifting societal attitudes, the success of the ban-the-box movement may also be attributable to these laws tending to be far less aggressive than other measures, such as making an ex-offender's criminal history a protected characteristic. In truth, most ban-the-box laws require very little; employers remain free to discriminate against ex-offenders—just not right away. In this sense, banning the box helps to satisfy the public's "desire to extend civil rights and liberties to all citizens," while preserving social and political ordering that continues to elevate non-offenders above ex-offenders.<sup>72</sup> A law prohibiting an employer from dismissing an ex-offender out of hand is much less of a leap, both symbolically and practically, than a law requiring an employer to altogether disregard an ex-offender's criminal record.

The ban-the-box movement may also be benefiting from key backing from the federal government. The first significant manifestation of federal support occurred in 2012, when the U.S. Equal Employment Opportunity Commission issued a Guidance on the use of criminal records in employment decisions.<sup>73</sup> The Guidance acknowledges that some states have passed ban-the-box laws, explains the rationale behind such laws, and recommends "[a]s a best practice . . . that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."<sup>74</sup> Four years later, the Obama administration's announcement that it was banning the box on most federal job applications marked a sea change in the federal government's own commitment to ex-offender employment, which previously

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tend to decrease. Robust intergroup interactions and friendships translate into more positive attitudes and enhanced likelihood of positive cross-group interactions." See generally Thomas F. Pettigrew & Linda R. Tropp, *How Does Intergroup Contact Reduce Prejudice? Meta-Analytic Tests of Three Mediators*, 38 EUR. J. SOC. PSYCHOL. 922 (2008) (finding through a meta-analysis of over 500 studies that interpersonal contact can reduce prejudices of many kinds through increasing knowledge about the outgroup, reducing anxiety about intergroup contact, and encouraging more empathy and time spent taking perspective).

71. See generally DAWN K. CECIL, *PRISON LIFE IN POPULAR CULTURE: FROM THE BIG HOUSE TO ORANGE IS THE NEW BLACK* (2015) (tracing how depictions of prisons and prisoners in mass media have changed over time).

72. See Manza et al., *supra* note 66, at 276 (arguing "that conflicts over felon disenfranchisement reflect an enduring tension . . . between the desire to maintain social and political order versus the desire to extend civil rights and liberties to all citizens").

73. See generally EEOC ENFORCEMENT GUIDANCE, *supra* note 12 (providing guidance on making informed employment decisions based on criminal records).

74. *Id.* at 13–14.

had been confined mainly to incentivizing employers other than itself to hire ex-offenders.<sup>75</sup>

Regardless of whether banning the box actually increases ex-offender employment, the movement itself has been extraordinarily successful in the sheer number of municipal, state, and federal measures removing criminal background questions from employment applications. From its humble beginnings just two decades ago, the ban-the-box movement has swelled into a national phenomenon that is showing no signs of slowing down. In this regard, the movement serves as a rare but important model of success that lawmakers and activists alike can draw upon in future ex-offender rehabilitation endeavors.

### III. EMPIRICALLY TESTING BAN-THE-BOX LAWS

#### A. PRIOR STUDIES

Until recently, there were no studies that empirically tested the efficacy of banning the box. However, as ban-the-box laws have become more widespread, researchers have taken note and are starting to investigate both the intended and unintended consequences of these laws. By the end of 2018, five different studies examined the relationship between ban-the-box laws and ex-offender employment. A brief summary of each is provided to establish the context in which the present study developed.

Osborne Jackson and Bo Zhao measured the effect of Massachusetts' ban-the-box law on ex-offender employment in that state by linking criminal records to unemployment insurance wage records.<sup>76</sup> They then compared ex-offender unemployment rates from the nine months prior to the law's enactment in 2010 to the rates in the 18 months that followed.<sup>77</sup> The authors found that the gap between ex-offender and non-offender unemployment grew by 2.4% after Massachusetts banned the box, an increase that was consistent across races.<sup>78</sup> Although data limitations prevented the authors from determining why ex-offender employment declined, they posited that it could be a labor supply response to banning the box, insofar as ex-offenders may have become more likely to hold out for better working conditions or higher wages after the law went into effect.<sup>79</sup>

Terry-Ann Craigie undertook a nationwide study of how ban-the-box laws impact public-sector employment.<sup>80</sup> Merging criminal record and

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75. See, e.g., OFFICE OF WORKFORCE INVESTMENT, *supra* note 11, at 1 (explaining that employers are eligible for a tax credit for hiring any person with a felony conviction who “[h]as a hiring date that is not more than 1 year after the conviction or release from prison”).

76. Jackson & Zhao, *supra* note 30, at 4.

77. *Id.* at 15–17.

78. *Id.* at 27, 38.

79. *Id.* at 26–31, 39.

80. Craigie, *supra* note 29, at 3.

employment data from the National Longitudinal Survey of Youth (1997 cohort) with National Employment Law Project data on public-sector ban-the-box laws, Craigie employed difference-in-difference modeling<sup>81</sup> to compare outcome gaps between ex-offender employment rates in counties with and without ban-the-box laws.<sup>82</sup> Her analysis showed that banning the box increased ex-offender employment in the public sector by nearly 5%.<sup>83</sup> Like Jackson and Zhao, Craigie found no evidence that ban-the-box laws caused employers to statistically discriminate against low-skilled black or Latino males, relative to their white counterparts.<sup>84</sup>

Jennifer Doleac and Benjamin Hansen studied the national impact of ban-the-box laws on low-skilled, non-college-educated men between the ages of 25 and 34.<sup>85</sup> The dataset they used, the Current Population Survey (2004–2014), did not contain criminal record information, so the authors used a combination of race, sex, educational attainment, and age as proxies for having a criminal record.<sup>86</sup> Comparing employment rates in ban-the-box and non-ban-the-box jurisdictions, Doleac and Hansen concluded that banning the box “reduce[d] the probability of employment for young black men without a college degree by 3.4 percentage points . . . , and for young Hispanic men without a college degree by 2.3 percentage points.”<sup>87</sup> They theorized that these lower employment rates stemmed from employers assuming, in the absence of criminal record information, that all young, low-skilled black and Latino men had a criminal record.<sup>88</sup>

Daniel Shoag and Stan Veuger tested the efficacy of ban-the-box laws by comparing the employment rates of residents of high-crime and low-crime neighborhoods before and after implementation of ban-the-box policies.<sup>89</sup> Their data did not allow them to identify which individuals were ex-offenders, so they relied on residency in a high-crime neighborhood, as determined by National Neighborhood Crime Study data on murders and assaults between 1999 and 2001, as a proxy for having a criminal record.<sup>90</sup> Using aggregated employment data from the Longitudinal Employer Household Dynamics dataset, their analysis showed that employment rates for residents of high-crime neighborhoods increased by up to 4% following the implementation of

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81. See generally Michael Lechner, *The Estimation of Causal Effects by Difference-in-Difference Methods* (Universität St. Gallen, Discussion Paper No. 2010-28, 2011), <http://ux-tauri.unisg.ch/RePEc/usg/dp2010/DP-1028-Le.pdf> (explaining how researchers use the difference-in-difference estimation strategy to compare observed changes between treatment and control groups).

82. Craigie, *supra* note 29, at 3, 10–12.

83. *Id.* at 14–15.

84. *Id.* at 16–18.

85. Doleac & Hansen, *supra* note 31, at 13.

86. *Id.* at 12–13.

87. *Id.* at 24.

88. *Id.*

89. Shoag & Veuger, *supra* note 32, at 10–12.

90. *Id.* at 8.

ban-the-box laws.<sup>91</sup> They further found that black men in particular benefited from the laws, as their employment increased by approximately 3%.<sup>92</sup> This improvement appeared to come at the expense of black women, whose employment decreased by 2% in the post-ban-the-box period.<sup>93</sup> However, as Doleac and Hansen point out, the authors were unable to control for residents' demographic characteristics or for changes in the compositions of the neighborhoods.<sup>94</sup> Consequently, the residents of high and low-crime neighborhoods may have changed over time due to social conditions such as economic downturns, the housing bubble, and the housing crash, which may at least partially explain the differences in employment rates before and after ban-the-box laws were implemented.<sup>95</sup>

Amanda Agan and Sonja Starr are the only researchers other than myself to conduct an experiment, rather than analyze employment data, to measure ban-the-box outcomes. They submitted approximately 15,000 fictitious online job applications to employers in a variety of industries in New Jersey and New York City before and after each jurisdiction's implementation of ban-the-box measures.<sup>96</sup> The authors varied several applicant characteristics, including race, education level, neighborhood dwelling, employment gaps, and the type of crime committed.<sup>97</sup> Their study found that although both black and white ex-offenders received more callbacks after the jurisdictions banned the box, the black-white gap grew from 7% to 45% after the laws were implemented.<sup>98</sup> Like Doleac and Hansen, Agan and Starr theorize that this increase may be due to employers assuming all black candidates have a criminal record in the absence of any evidence to the contrary.<sup>99</sup>

### B. THIS STUDY

This study makes an important contribution to the empirical literature through its unique design. Unlike most of the other studies, which were forced because of data constraints to use characteristics such as race, education, and neighborhood dwelling as proxies for criminal record, this study is able to directly test how banning the box affects ex-offenders at the individual level. And while this study's design is patterned after Agan and Starr's in some respects, it differs by comparing callback rates between a ban-the-box and a non-ban-the-box jurisdiction simultaneously. Moreover, this study is even more controlled than Agan and Starr's, as the only variables that

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91. *Id.* at 2.

92. *Id.* at 17, 33 tbl. 8.

93. *Id.* at 17, 34 tbl. 9.

94. Doleac & Hansen, *supra* note 31, at 7–8.

95. *Id.* at 15, 17.

96. Agan & Starr, *supra* note 31, at 2–3.

97. *Id.* at 3, 11–15.

98. *Id.* at 4.

99. *Id.*

substantially vary are the employer's awareness of the applicant's criminal record and the applicant's race. All other variables, including sex, socioeconomic status, educational attainment, crime committed, job history, industry type, and aptitude, were nearly identical. By testing ban-the-box laws from this different angle, this study adds to a growing body of empirical work that is vital to understanding whether banning the box is a rehabilitative strategy worth pursuing further.

### 1. Design

To investigate the relationship between ban-the-box laws and ex-offender employment, I submitted job applications on behalf of a fictitious ex-offender in Chicago, a ban-the-box jurisdiction, and Dallas, a non-ban-the-box jurisdiction, and then compared the employer callback rates between the two cities. Social scientists routinely use this approach,<sup>100</sup> commonly referred to as “auditing,” to study discrimination because of its ability “to provide much more direct evidence on discrimination than is provided by other empirical methods.”<sup>101</sup> Studies that simply compare differences in employment rates before and after implementation of ban-the-box laws run the risk of drawing conclusions that fail to account for unobserved differences in the applicants' characteristics.<sup>102</sup> By contrast, an audit study allows unobservable differences between applicants to be eliminated, at least in principle, because the researcher is able to “randomly vary [only] the characteristics of interest about a person with whom a subject interacts.”<sup>103</sup> Moreover, auditing also provides stronger external validity than lab experiments because it tests real employer reactions rather than how a respondent (typically a college student who is being paid to knowingly participate in an experiment) responds to a hypothetical situation.<sup>104</sup>

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100. See, e.g., *id.* at 9–10; David J. Deming et al., *The Value of Postsecondary Credentials in the Labor Market: An Experimental Study*, 106 AM. ECON. REV. 778, 779 (2016); Henry S. Farber et al., *Factors Determining Callbacks to Job Applications by the Unemployed: An Audit Study* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 21689, 2015); David Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment* 4–8 (Nat'l Bureau of Econ. Research, Working Paper No. 21669, 2017).

101. David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915, 917 (1996).

102. See *id.* (explaining that “inferences regarding sex discrimination in hiring are sometimes drawn from an estimated sex difference in employment rates controlling for the sex composition and other observed characteristics of the applicant pool,” but such conclusions may be incorrect “if there are differences between men and women that are unobserved by the econometrician”).

103. Agan & Starr, *supra* note 31, at 8. “Auditing can provide a stronger basis for causal inference than observational methods, because only the variables of interest are varied.” *Id.* at 9.

104. *Id.* (“[C]ompared to lab experiments, audit studies provide stronger external validity, since they test real employer reactions.”).

## 2. Cities

I selected the Chicago and Dallas metropolitan areas as the experimental and control groups, respectively, in part because the former bans the box in private employment whereas the latter does not.<sup>105</sup> Since 2015, Illinois has prohibited all employers with 15 or more employees from inquiring into an applicant's criminal record until after the applicant has been selected for an interview or until after a conditional job offer is made.<sup>106</sup> Moreover, Chicago has its own ban-the-box law, which extends the prohibitions of the Illinois law to all employers, regardless of size.<sup>107</sup> Thus, all food-service employers in Chicago are subject to either the state or city ban-the-box measure, and often both. By contrast, neither Texas nor any of the municipalities comprising the Dallas metropolitan area restricts private employers' ability to ask about an applicant's criminal history at any point in the hiring process, including on the application itself.<sup>108</sup>

I also selected Chicago and Dallas for observation because the cities are similar in several important ways that facilitate cross-regional analysis. Comparing callback rates across regions is notoriously difficult, and indeed this is the first ban-the-box field experiment that even attempts to do so. Cross-regional comparisons of any type must be closely scrutinized because no two areas are identical; cultural, demographic, economic, political, and social differences at the regional level can limit the utility of comparative research, and this study certainly is not exempt from that concern. Although it would be impossible to control for every conceivable difference between Chicago and Dallas that might affect callback rates, I strategically selected these cities because they are similar in their racial composition, unemployment rates, and concentration of food-service jobs—the three extraneous factors perhaps most likely to influence callback rates in this study.

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105. For purposes of this study, the Chicago and Dallas metropolitan areas consisted of the core-based statistical areas ("CBSAs") for each locale, as determined by the Office of Management and Budget. See 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 Fed. Reg. 37,245 (proposed Jun. 28, 2010). The Chicago CBSA includes portions of Indiana and Wisconsin, both of which ban the box in public but not private employment. See WIS. STAT. ANN. § 230.16 (West 2018); State of Ind. Exec. Order No. 17-15 (June 29, 2017). Thus, applications submitted to Chicago metropolitan area employers were limited to jobs located within Illinois to ensure each employer was subject to the ban-the-box law.

106. 820 ILL. COMP. STAT. 75 / 15(a) (2018).

107. CHI., ILL., MUN. CODE § 2-160-054 (2018).

108. In 2015, Dallas County adopted a ban-the-box policy that applies only to public employment within the County. See *Guidelines for Hiring Applicants with Records (Ex-Offenders)*, NAT'L EMP'T LAW PROJECT, <https://www.nelp.org/wp-content/uploads/Guidelines-for-Hiring-Appllicants-with-Records-1.pdf> (last visited Nov. 1, 2018).

According to 2016 U.S. Census data, the Chicago metropolitan area population was 53% white, 22% Hispanic, and 16% black,<sup>109</sup> whereas the Dallas metropolitan area population was 47% white, 29% Hispanic, and 15% black.<sup>110</sup> Thus, both cities are approximately half white, while housing substantial Hispanic and black populations as well. In terms of employment, Bureau of Labor Statistics data show that in May 2017, the month before the applications for this experiment were submitted, the unemployment rates in Chicago and Dallas were fairly comparable at 4.5%<sup>111</sup> and 3.6%,<sup>112</sup> respectively. During the June to August 2017 submission period, Chicago's unemployment rate averaged 5.4%,<sup>113</sup> whereas Dallas' unemployment rate averaged 3.9%.<sup>114</sup> Additionally, food-service jobs abound in both cities. As of May 2017, the concentration of food preparation and serving-related occupations in Chicago was 85.138 per 1,000 jobs, and in Dallas the rate was 92.439 per 1,000 jobs.<sup>115</sup> Although by no means identical, these racial composition, unemployment, and food-service job concentration figures were easily the most similar of any two major metropolitan areas where one banned the box and the other did not.

### 3. Job Postings

All applications were submitted in response to postings for entry-level food-service jobs (e.g., line cook, hostess, dishwasher, and delivery driver). I targeted these positions because they are the type of jobs ex-offenders are

109. *Chicago-Naperville-Elgin, IL-IN-WI Metro Area*, CENSUS REP. [hereinafter CENSUS REPORTER—*Chicago*], <https://censusreporter.org/profiles/31000US16980-chicago-naperville-elgin-il-in-wi-metro-area> (last visited Nov. 1, 2018).

110. *Dallas-Fort Worth-Arlington, TX Metro Area*, CENSUS REP. [hereinafter CENSUS REPORTER—*Dallas*], <https://censusreporter.org/profiles/31000US19100-dallas-fort-worth-arlington-tx-metro-area> (last visited Nov. 1, 2018).

111. *Local Area Unemployment Statistics: Chicago-Naperville-Arlington Heights, IL Metropolitan Division*, BUREAU LAB. STATS. [hereinafter *Unemployment Statistics: Chicago-Naperville-Arlington Heights*], <https://data.bls.gov/timeseries/LAUDV171697400000003> (last visited Nov. 1, 2018).

112. *Local Area Unemployment Statistics: Dallas-Fort Worth-Arlington, TX Metropolitan Statistical Area*, BUREAU LAB. STATS. [hereinafter *Unemployment Statistics: Dallas-Fort Worth-Arlington*], <https://data.bls.gov/timeseries/LAUMT481910000000003> (last visited Nov. 1, 2018). For context, in May 2017, the unemployment rate in the 388 metropolitan areas the Bureau of Labor tracks ranged from 1.9% to 20.5%, and the national unemployment rate that month was 4.1%. *See 194 of 388 Metropolitan Areas Had Unemployment Rates Below U.S. Rate of 4.1 Percent in May 2017*, BUREAU LAB. STATS., <https://www.bls.gov/opub/ted/2017/194-of-388-metropolitan-areas-had-unemployment-rates-below-us-rate-of-4-point-1-percent-in-may-2017.htm> (last visited Nov. 1, 2018).

113. *See Unemployment Statistics: Chicago-Naperville-Arlington Heights*, *supra* note 111.

114. *See Unemployment Statistics: Dallas-Fort Worth-Arlington*, *supra* note 112.

115. *See Data Tools, Customized Tables*, BUREAU LAB. STATS., <https://data.bls.gov/oes/#/home> (last visited Nov. 1, 2018) (customizable statistics were generated by selecting the following drop-down menu options: “One occupation for multiple geographical areas,” “Food Preparation and Serving Related Occupations,” “Metropolitan or Non Metropolitan Area,” “Chicago-Naperville-Elgin, IL-IN-WT” and “Dallas-Fort Worth-Arlington, TX,” “Employment per 1,000 Jobs,” and May 2017).

often encouraged to pursue,<sup>116</sup> in part because they tend to not require high levels of education or specialized skillsets<sup>117</sup>—two attributes where ex-offenders often lag behind their non-offender counterparts.<sup>118</sup> Although ex-offenders certainly can and do find employment in other fields, I limited this experiment to food-service positions to control for possible differences in the effects of ban-the-box laws in different industries.<sup>119</sup>

I applied only to job openings that were posted on the internet, either via an employer's website or through online job boards such as Indeed.com and Snagajob.com. Within these postings, I applied only to those that allowed online application submissions; postings that required the applicant to apply in person were disregarded. Nearly all of the employers I encountered that both posted their job openings on the internet and accepted online applications were large, well-established restaurant chains such as McDonald's, Starbucks, and Taco Bell. Consequently, whether the results of this study can be generalized to the food-service industry as a whole is uncertain; it is possible that employers that require in-person applications differ from employers that allow online submissions in ways that could affect how each respond to ban-the-box laws.

#### 4. Applicant Profile

Because the application process varied from employer to employer, it was not possible to submit the exact same application materials to each employer. Instead, similar to Agan and Starr, I developed a single applicant profile and used it to answer each question on an application.<sup>120</sup> Consequently, although I had no control over the types of questions employers asked, I was able to ensure every answer provided was consistent with the single applicant profile.

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116. See, e.g., *Jobs for Felons, Felon Friendly Employment*, EXOFFENDERS, <https://exoffenders.net/employment-jobs-for-felons> (last visited Nov. 1, 2018) (listing several fast food restaurants as “felon friendly employer[s]”); see also *Common Jobs for Newly Released*, STEP AHEAD, <https://careerwise.minnstate.edu/exoffenders/find-job/common-jobs.html> (last visited Nov. 1, 2018) (encouraging ex-offenders to apply for entry-level restaurant and food-service positions).

117. See SCOTT H. DECKER ET AL., CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT 54 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (explaining that the food-service industry is “one of the job sectors targeted most heavily by returning offenders who are limited by their low skill sets and education,” partially because many of those jobs “are located in the ‘back of the house’” and also because “a large number of prisons offer employment and training in ‘culinary arts,’ jobs that should transition to food service industry employment on the outside”).

118. See CHRISTY VISHER ET AL., URBAN INST., RETURNING HOME: UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY 34–59 (2004), [https://www.urban.org/research/publication/returning-home-understanding-challenges-prisoner-reentry/view/full\\_report](https://www.urban.org/research/publication/returning-home-understanding-challenges-prisoner-reentry/view/full_report) (finding that many ex-offenders have significant educational and employment deficits that contribute to their difficulty in obtaining employment).

119. See *infra* Section IV.A.

120. See Agan & Starr, *supra* note 31, at 11–13.

*Sex.* I used only male-sounding names for the applicant to control for any potential sex-based differences in how having a criminal record affects male versus female ex-offenders. As the number of female offenders continues to rise,<sup>121</sup> future studies should explore whether ban-the-box laws affect male and female ex-offenders differently.

*Race.* Although many applications allowed the applicant to voluntarily disclose his race, I needed an additional method to communicate the applicant's race in the event the employer did not request it. One effective method researchers have used is to select applicant names that can serve as a proxy for race.<sup>122</sup> I used a combination of data sources to select applicant names that employers would likely perceive as black, Latino, or white. The names generated by this data were DeShawn Washington for the black applicant,<sup>123</sup> José Vazquez for the Latino applicant,<sup>124</sup> and Connor Meyer for the white applicant.<sup>125</sup> To verify that employers would be likely to associate

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121. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2015), <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (finding that “[b]etween 1980 and 2014, the number of incarcerated women [in the United States] increased by more than 700%”).

122. See, e.g., Agan & Starr, *supra* note 31, at 12–14; 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, 991–93 (2004); see also Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1297–308 (summarizing and analyzing studies that use names as a proxy for race).

123. “DeShawn” was selected as the black applicant’s first name based on four decades of data from California showing that 403 of 405 children named DeShawn were black. See Colin Holbrook et al., *Looming Large in Others’ Eyes: Racial Stereotypes Illuminate Dual Adaptations for Representing Threat Versus Prestige as Physical Size*, 37 EVOLUTION & HUM. BEHAV. 67, 70 (2016) (using the name “DeShawn” as a proxy for a black man in a study of perceived physical threats); see also Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON. 767, 770 & n.3 (2004) (noting that studies show the name DeShawn is “quite popular among Blacks, but virtually unheard of for Whites”). “Washington” was selected as the black applicant’s last name based on 2010 U.S. Census data showing that 87.5% of Americans with the last name “Washington” are black—making it the blackest of the thousand most common surnames in the United States. See JOSHUA COMENETZ, U.S. CENSUS BUREAU, FREQUENTLY OCCURRING SURNAMES IN THE 2010 CENSUS 4 (2016), <https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf>.

124. “José” was selected as the Latino applicant’s first name, given that it has long been one of the most common names for Latino males. See Sam Roberts, *Top Hispanic Name Loses Ground, Even as Birthrates Stay High*, N.Y. TIMES (May 17, 2011), <http://www.nytimes.com/2011/05/18/us/18jose.html> (noting that José has been one of the 50 most common names in the United States every year except one between 1972 and 2010, and speculating that fewer parents are naming their sons José because the name “has been overused over the last 20 years or so, and there are too many Josés”). The last name “Vazquez” was selected based on 2010 U.S. Census data showing that 95.8% of Americans with that surname identified as Hispanic or Latino. See COMENETZ, *supra* note 123, at 5 tbl. 2.

125. “Connor” was selected as the white applicant’s first name based on Fryer and Levitt’s classification of “Connor” as a “distinctively White name[]” because less than two percent of the approximately 2,000 individuals in their study with that name were black. Fryer & Levitt, *supra* note 123, at 770. “Meyer” was selected as the last name based on 2010 U.S. Census data showing that

these names with their intended race, I surveyed 20 restaurant managers about which race they most closely associated with each name. Eighty percent of managers associated DeShawn Washington with a black individual, 90% associated Conner Meyer with a white individual, and 100% associated José Vazquez with a Latino individual. Additionally, the fact that several of the callbacks for the applicant named José were communicated in Spanish provides at least anecdotal evidence that this method accurately communicated the applicant's race, at least for the Latino candidate. I used random selection to determine which name to list on each application.

*Criminal record.* The applicant's criminal record consisted of a felony drug conviction for possession with intent to distribute cocaine and 18 months of served prison time. A drug conviction was chosen because of its prevalence and connection to racial disparities in incarceration.<sup>126</sup> Because not every Dallas employer asked about the applicant's criminal record, it was also communicated indirectly by listing a parole officer as a reference and by including a stint as a laborer in a prison industry enhancement program as part of the applicant's job history on Dallas applications.

To be sure, this technique could potentially affect the results—and indeed they must be interpreted with this in mind. I took this calculated risk, however, based on two stark realities. First, as Agan and Starr point out, in non-ban-the-box jurisdictions, even when employers do not ask about an applicant's criminal record on the application itself, “they are free (absent [a ban-the-box law]) to ask about records at an interview and to check records at any time.”<sup>127</sup> Although it is certainly possible that employers that include a criminal background question on job applications feel more negatively toward ex-offenders than do employers that do not ask the question on job applications, it is equally plausible that employers that do not ask about an applicant's criminal background on the application simply prefer to do so in person. Thus, it is impossible to determine how much an employer cares about an applicant's criminal record based merely on the presence or absence of such questions on a job application. Second, even if the box is banned, ex-offenders may still have to disclose their incarceration, whether to explain gaps in their employment, to communicate skills or work experience gained in prison, or because a parole officer is perhaps the only person in their lives who they feel can serve as a reference.

*Local Resident.* It was important that the applicant appear to be from the same metropolitan area as where he was applying for jobs, to signal to

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94.8% of Americans with that surname identified as white. See *Most Common White Last Names (Non-Hispanic)*, MONGABAY.COM, <https://names.mongabay.com/race/2010/population-white.html> (last visited Nov. 1, 2018).

126. See Pager, *The Mark of a Criminal Record*, *supra* note 9, at 949 (including as part of tester profiles a “felony drug conviction [for] possession with intent to distribute cocaine and 18 months of served prison time”).

127. Agan & Starr, *supra* note 31, at 31–32.

potential employers that he was readily available and had ties to the area that would make him more likely to remain with the employer if hired. On Chicago applications, I listed a Chicago home address and telephone number for the applicant's contact information, a Chicago high school for the applicant's education history, Chicago employers for the applicant's job history, and references with Chicago-based telephone numbers. On applications submitted to Dallas employers, I used Dallas-based contact information, education history, work history, and references. The Chicago and Dallas home addresses were in comparably racially diverse, lower-to-middle-class neighborhoods, and the high schools and work histories of the applicant in each city were designed to have similar connotations.

*Educational attainment.* The applicant graduated from a public high school with a 3.0 grade point average. Although many ex-offenders do not obtain a high school diploma or perform particularly well in school,<sup>128</sup> I deliberately made the applicant highly competitive for entry-level jobs to more starkly contrast the experimental group (Chicago employers) and the control group (Dallas employers). When asked, the applicant listed his graduation date as May 2013, making him approximately 22 years old at the time the applications were submitted.

*Work experience.* The applicant had 34 months of work experience: 18 months as a crew team member at Pollo Campero, a fast-food restaurant with locations in both Chicago and Dallas; ten months as a delivery driver for Domino's Pizza, which also operates in both Chicago and Dallas; and six months as a laborer performing landscaping-related tasks such as aeration, laying sod, and planting trees. The landscaping work in Chicago was performed for a fictitious company, whereas in Dallas it was performed as part of a prison labor program. Again, while this distinction could potentially affect the results, I determined this was a risk worth taking in order to indirectly communicate the applicant's criminal history to Dallas employers that did not ask about it as part of the job application. The applicant's position and wage rate for each job were identical in both cities. The reasons for leaving each job were neutral, including "found a better job" and "looking for a better schedule." For the landscaping position in Dallas, the reason given for leaving was "sentence served," as an additional way to signal to potential employers that the applicant had a criminal record.

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128. See BILL DEBAUN & MARTENS ROC, ALL. FOR EXCELLENT EDUC., SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNINGS 2 (2013), <https://all4ed.org/wp-content/uploads/2013/09/SavingFutures.pdf> (noting "that 67% of inmates in America's state prisons, 56% of federal inmates, and 69% of inmates in local jails did not complete high school"). See generally Regina M. Foley, *Academic Characteristics of Incarcerated Youth and Correctional Educational Programs: A Literature Review*, 9 J. EMOTIONAL & BEHAV. DISORDERS 248 (2001) (concluding, based on a review of the literature, that people who have been incarcerated tended to have below average intelligence and struggle in school).

*Aptitude.* In addition to standard demographic, education, job history, and employment reference questions, a sizeable portion of the applications included an aptitude component. Sometimes employers asked open-ended questions, such as “Why do you want to work here?,” “What makes you a good candidate?,” and in one memorable case, “If you were a type of food, what would you be and why?” But more often, aptitudinal information was gathered through a series of questions that required the applicant to self-assess various competencies, such as his ability to get along with co-workers, his level of comfort with serving customers, and his willingness to follow supervisors’ instructions. To ensure consistency in how aptitudinal questions were answered, only two people—myself and a research assistant—filled out and submitted the applications. I provided extensive training to my research assistant on how to answer aptitudinal questions in a way that made the applicant appear to be highly, but not overly, qualified for the position. My research assistant and I communicated almost daily throughout the application submission period to ensure consistency in how we answered these aptitudinal questions.

#### 5. Callbacks

Applications were submitted between June and August 2017. This narrow timeframe was selected to limit the likelihood of changing economic conditions impacting the results, and indeed neither city’s unemployment rate changed significantly during the submission period.<sup>129</sup> Each application listed a real telephone number and email address for the applicant. Corresponding voicemail and email inboxes were set up and monitored for 90 days following the submission of each application to track whether the application elicited an employer callback.

I defined a callback as any interview offer or request from an employer for additional information or that the applicant call the employer back. Occasionally, an employer would leave a message that was somewhat ambiguous, such as “This is the manager at Dairy Queen, please give me a call back.” Institutional review board constraints prohibited any communication with the employer beyond the initial application, so I was unable to return such messages for further clarification. Ambiguous messages were also coded as callbacks based on the assumption that an employer would only reach out if there was interest in pursuing the applicant.

Like Agan and Starr, I did not track whether an employer attempted to contact the applicant by mail, even though I provided a home address on each application.<sup>130</sup> I made this decision because the home address was fictitious

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129. The unemployment rate in the Chicago metropolitan area varied only 0.32% between June and August 2017. See *Unemployment Statistics: Chicago-Naperville-Arlington Heights*, *supra* note 111. The unemployment rate in the Dallas metropolitan area varied just 0.1% during this same period. *Unemployment Statistics: Dallas-Fort Worth-Arlington*, *supra* note 112.

130. See Agan & Starr, *supra* note 31, at 15.

(i.e., it was based on an actual street but a fake house number) and because it seemed highly unlikely that an employer would attempt to contact the applicant by mail but not telephone or email.

Because I could have no further communication with employers, all callbacks went unanswered. Consequently, one limitation of this study is that it tests only the relationship between ban-the-box laws and employer callbacks; it does not measure whether such laws impact an ex-offender's chances of actually becoming employed. Still, the relationship between receiving a callback and becoming employed is obvious, thus allowing inferences to be drawn from this study about how ban-the-box laws impact an ex-offender's likelihood of becoming employed more generally.<sup>131</sup>

### C. RESULTS

Table 1 presents descriptive statistics on the sample. A total of 2,006 applications were submitted, with approximately one-half going to each city. Roughly one-third of the applications in each city bore the white-sounding name, another third bore the black-sounding name, and the other third bore the Latino-sounding name. As expected, almost no Chicago applications (2.9%) included a question about the candidate's criminal record. The few employers in Chicago that did inquire about the applicant's criminal history either were in violation of the city or state ban-the-box law or possibly were exempt from the law if they employed fewer than 15 employees and operated their restaurant outside Chicago city limits. Interestingly, one tactic Chicago employers occasionally used, possibly to end run the ban-the-box prohibition, was to include a question on the application such as, "As a condition of employment you may be required to undergo a criminal background screening. Would you feel comfortable with such a screening?" Applications that included this and similar questions were coded as not containing a criminal history question, since technically such questions do not ask about the applicant's criminal record.<sup>132</sup> Whether a court would consider these questions to be in compliance with Illinois' ban-the-box law remains to be seen.

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131. See *infra* Section IV.A.

132. Similarly, a substantial portion of prospective employers in both Chicago and Dallas who did not inquire about the applicant's criminal record on the application itself nonetheless included as part of the application process a separate questionnaire administered by a third-party website that required the applicant to answer questions from which the employer could determine whether it would be eligible for a tax credit for hiring the applicant. This questionnaire inquired about the applicant's criminal background, receipt of welfare benefits, and periods of unemployment, among other topics. Presumably, a third party administered the questionnaire so it could report to the employer whether a tax break was available for hiring the applicant without disclosing to the employer whether the applicant had a criminal record. Applications that included this questionnaire were coded as not containing a criminal background question.

Table 1. Descriptive Statistics: Applications and Callbacks

	<i>Dallas</i>	<i>Chicago</i>	<i>Total</i>
Applications submitted			
White	343 (33.9%)	346 (34.8%)	689 (34.3%)
Black	335 (33.1%)	318 (32.0%)	653 (32.6%)
Latino	333 (32.9%)	331 (33.3%)	664 (33.1%)
<b>Total</b>	1,011 (50.4%)	995 (49.6%)	2,006 (100%)
Applications containing criminal history question	267 (26.6%)	29 (2.9%)	298 (14.9%)
Callbacks			
White	80 (23.3%)	84 (24.3%)	164 (23.8%)
Black	32 (9.6%)	53 (16.7%)	85 (13.0%)
Latino	105 (31.5%)	120 (36.4%)	225 (33.9%)
<b>Total</b>	217 (21.5%)	257 (25.9%)	474 (23.6%)

Employers in Dallas were more likely to include a criminal background question on job applications, but even then, the proportion of applications containing such a question was surprisingly low at just 26.6%.<sup>133</sup> That just over a quarter of Dallas employers asked about the applicant's criminal background despite no legal limitation on their right to do so may indicate the ban-the-box movement is having a normative impact, such that some employers are voluntarily removing the box because they believe it is the right thing to do.<sup>134</sup> Other employers may voluntarily remove the box if they operate in multiple states and wish to maintain a uniform job application rather than create different applications for ban-the-box and non-ban-the-box jurisdictions.<sup>135</sup> More likely still, it may be that some food-service employers

133. By contrast, a study of more than 500 U.S. employers that conduct pre-employment background checks found that 48% of those employers still include a question on their applications about the candidate's criminal history. See STERLING TALENT SOLS., BACKGROUND SCREENING TRENDS & BEST PRACTICES REPORT 2017-2018, at 19 (2017), <https://2umyw52ipfpv4vdgm3yy2uq1-wpengine.netdna-ssl.com/wp-content/uploads/2017/05/1103-st-us-rpt-2017-background-screening-trends.pdf>.

134. See, e.g., Claire Zillman, *Koch Industries Stops Asking Job Candidates About Their Criminal Records*, FORTUNE (Apr. 27, 2015), <http://fortune.com/2015/04/27/koch-industries-stops-asking-job-candidates-about-their-criminal-records> (reporting that Koch Industries voluntarily removed the box from its employment applications because, as the company's general counsel, Mark Holden, explained, "[a]s a large United States-based manufacturing company that employs 60,000 American workers we shouldn't be rejecting people at the very start of the hiring process who may otherwise be capable and qualified, and want an opportunity to work hard").

135. See, e.g., Janet Moore, *Target to Ban Criminal History Box on Job Applications*, STAR TRIB. (Oct. 26, 2013, 9:37 AM), <http://www.startribune.com/target-to-ban-criminal-history-box-on-job-applications/229310141> ("Since changes to Target's application process were necessary to comply with the new Minnesota [ban-the-box] law, [Target Vice President and General Counsel

so often find themselves in need of entry-level workers, particularly in a strong economy, that they do not have the luxury of screening out applicants with a criminal record, at least at the initial application stage, and so they consider the box unnecessary.<sup>136</sup>

The descriptive statistics further show that the applicant's callback rate was 4.4% higher in Chicago than in Dallas, indicating that the ex-offender applicant had an easier time getting a callback (and presumably a job) in the jurisdiction that banned the box. When the callback rate is broken down by the applicant's race, several patterns emerge. In both cities, racial discrimination very clearly persists, as the black applicant's callback rate was 7.6% lower in Chicago and 13.7% lower in Dallas than the white applicant's rate. Somewhat surprisingly, the Latino applicant did not appear to be subjected to discrimination and, in fact, had the highest callback rates of the three races in both cities, with 36.4% of Latino applications generating a callback in Chicago and 31.5% in Dallas.

In comparing racial differences in callback rates between cities, the raw data show that all three races had higher rates in Chicago than in Dallas. Although regression modeling indicates these increases are not statistically significant for all races, at a minimum the descriptive statistics demonstrate that no race fared worse by banning the box. This is striking because some commentators have argued that ban-the-box laws actually lower a minority's chances of finding work.<sup>137</sup> The increases in callback rates for the white and Latino applicants in Chicago compared with Dallas were relatively modest—1% and 4.9%, respectively. By contrast, the black applicant performed markedly better, jumping 7.1% in Chicago—nearly a 74% increase over his performance in Dallas.

Despite the black applicant's stronger showing in Chicago than in Dallas, the seeming benefit of banning the box for the black applicant hardly offsets the continuing deleterious effect of racial discrimination. Not only is the black applicant's callback rate in Chicago still much lower than the white applicant's rate in Chicago (16.7% to 24.3%), but it also lags 6.6% behind the white applicant's callback rate in Dallas. This means the black applicant, who did not disclose to Chicago employers whether he had a criminal record, was substantially less likely to receive a callback than the white applicant, who communicated that he had a criminal record to all Dallas employers. Though

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Jim] Rowader said it made sense to craft a uniform and consistent process nationwide, 'given the number of people we interview and hire across the country.'").

136. See NAT'L RESTAURANT ASS'N, 2017 NATIONAL RESTAURANT ASSOCIATION RESTAURANT INDUSTRY OUTLOOK 2 (2017), [https://www.restaurant.org/Downloads/PDFs/News-Research/2017\\_Restaurant\\_outlook\\_summary-FINAL.pdf](https://www.restaurant.org/Downloads/PDFs/News-Research/2017_Restaurant_outlook_summary-FINAL.pdf) ("Recruitment and retention of employees continues to strengthen as a top challenge for restaurant operators in 2017. As the economy keeps improving and employment levels rise, there is more competition for qualified employees to fill vacant restaurant positions.").

137. See, e.g., Agan & Starr, *supra* note 31, at 4; Doleac & Hansen, *supra* note 31, at 16, 29–30.

disheartening, this result is not necessarily surprising: Devah Pager's study of ex-offender employment in Milwaukee similarly found that white ex-offenders were more likely than black non-offenders to receive a callback (17% to 14%).<sup>138</sup>

Although the descriptive statistics are useful in summarizing the sample, logistic regression modeling was necessary to determine whether the relationships between the variables that were observed in the raw data have inferential power beyond the sample itself. Because the dependent variable (i.e., whether an application elicited a callback) is binary, logistic regression is the most appropriate method of analysis. The equations express the log odds of receiving a callback as a linear function of a set of explanatory variables, including the metropolitan area to which the application was submitted and the applicant's race. The models' coefficients represent the increase or decrease in the likelihood of a callback with a category change in an independent variable.

Table 2 reports the odds of receiving a callback based on three different regression models. Model 1 simply examines the relationship between the city to which the application was submitted and the likelihood of a callback. This model shows the applicant was approximately 27% ( $p < .05$ ) more likely to receive a callback in Chicago than in Dallas, thus confirming that the 4.4% increase in callbacks in Chicago is, in fact, statistically significant. Model 2 holds applicant race constant to determine whether the metropolitan effect observed in Model 1 operates independently of the applicant's race. The coefficient remained virtually unchanged (1.274 versus 1.278), signifying that the increased likelihood of a callback in Chicago is a function of something other than race. Given the demographic and employment similarities between Chicago and Dallas,<sup>139</sup> Chicago's ban-the-box law may be at least partially responsible for the applicant's improved odds of a callback in that city. But again, care should be taken to not overstate the magnitude of this finding in light of the myriad other differences between Chicago and Dallas that also may have contributed to the higher callback rate in Chicago.<sup>140</sup>

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138. See Pager, *The Mark of a Criminal Record*, *supra* note 9, at 955–58.

139. See *supra* Section III.B.2.

140. See *supra* Section III.B.2.

Table 2. Odds Ratios for the Likelihood of Receiving a Callback

	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>
City			
Dallas	1.000	1.000	1.000
Chicago	1.274*	1.278*	1.054
Applicant Race			
White		1.000	1.000
Black		.480***	.347***
Latino		1.649***	1.514***
Interactions			
Chicago x White			1.000
Chicago x Black			1.797*
Chicago x Latino			1.177
-2 Log likelihood	2188.330	2105.526	2101.574
Chi-square	5.299	87.564	91.515
<i>df</i>	1	3	5
<i>N</i>	2,006	2,006	2,006

Note: Reference categories are represented with odds ratios of 1.000.

\* $p < .05$ . \*\* $p < .01$ . \*\*\* $p < .001$ .

Model 2 also examines the relationship between the applicant's race and the likelihood of a callback, independent of whether the application was submitted in Chicago or Dallas. The regression confirms that race has a profound impact on the likelihood of a callback. Overall, the black applicant was 52% ( $p < .001$ ) less likely than the white applicant to receive a callback, whereas the Latino applicant was 65% ( $p < .001$ ) more likely than the white applicant to receive a callback. Racial differences in callback rates between Chicago and Dallas were further analyzed in subsequent regression models, as discussed below.

Model 3 measures the interactive effect of race and city on the likelihood of a callback. The inclusion of these interactions in this model was necessary to test whether the increases in callback rates for the black and Latino applicants in Chicago over Dallas were statistically significant in comparison to the callback differential for the white applicant in Chicago versus Dallas. The Latino applicant's improvement in Chicago relative to the white applicant's improvement was not statistically significant, indicating his odds of a callback were essentially the same in both cities, such that banning the box seemed to have little, if any, impact on the likelihood of a Latino receiving a callback. By contrast, the black applicant's improvement in Chicago was borderline significant; the  $p$  value was exactly 0.05, which is widely accepted

as the cutoff for statistical significance.<sup>141</sup> Because the black applicant received a total of only 85 callbacks, the sample size probably was not large enough to be able to definitively conclude whether the black applicant's improvement in Chicago relative to the white applicant's improvement is real or merely an artifact of the data. Perhaps stronger statistical significance would be reached if the sample size were larger.<sup>142</sup> If the relationship is, in fact, significant, the robust coefficient indicates the black applicant is nearly 80% more likely to receive a callback in Chicago than in Dallas, relative to the white applicant, meaning the black applicant benefits much more than the white applicant from banning the box. This would be a remarkable finding in light of the concerns that overall, black applicants have greater difficulty finding employment when the box is banned, regardless of whether they have a criminal record.

Table 3. Odds Ratios for the Likelihood of Receiving a Callback by Race

Applicant Race	Dallas	Chicago	Overall
White	1.000	1.000	1.000
Black	.347***	.624*	.479***
Latino	1.514*	1.782***	1.644***
-2 Log likelihood	998.854	1102.721	2110.732
Chi-square	52.664	33.493	82.358
Df	2	2	2
N	1,011	995	2,006

Note: Reference categories are represented with odds ratios of 1.000.

\* $p < .05$ . \*\* $p < .01$ . \*\*\* $p < .001$ .

Table 3 compares the likelihood of a callback in Chicago versus Dallas based on the applicant's race. The regression models verify that the patterns of inequality in the raw data are statistically significant. In both cities, the Latino applicant fared better than the white applicant, whereas the black applicant fared worse. Callback differentials for minority candidates show that both the black and Latino applicants had substantially better odds of a callback in Chicago than in Dallas. In Chicago, the black applicant was 38% ( $p < .05$ ) less likely than the white applicant to receive a callback, compared

141. See Ivar Vermeulen et al., *Blinded by the Light: How a Focus on Statistical "Significance" May Cause p-Value Misreporting and an Excess of p-Values Just Below .05 in Communication Science*, 9 COMM. METHODS & MEASURES 253, 253-54 (2015) ("Social science scholarly journals have been shown to be heavily biased towards publishing empirical studies that 'worked', that is, that provided evidence for statistical relationships at the  $p < .05$  (significance) level." (citation omitted)).

142. See Mingfeng Lin et al., *Research Commentary—Too Big to Fail: Large Samples and the p-Value Problem*, 24 INFO. SYS. RESEARCH 906, 906 (2013) (explaining that "[i]n very large samples,  $p$ -values go quickly to zero").

to a 65% ( $p < .001$ ) decreased likelihood for the black applicant in Dallas. The Latino applicant was more likely to receive a callback relative to the white applicant in Chicago than in Dallas, 78 to 51% (Chicago  $p < .001$  and Dallas  $p < .05$ ). These findings indicate that despite legal prohibitions against racial discrimination in employment that now date back more than five decades,<sup>143</sup> race continues to play a major role in hiring decisions, independent of whether the box is banned.

Table 4. Odds Ratios for the Likelihood of Receiving a Callback if the Application Contained a Criminal History Question

	<i>Model 1</i>	<i>Model 2</i>
Criminal history question present	.564***	.749
Applicant Race		
White		1.000
Black		.485***
Latino		1.579***
-2 Log likelihood	2168.722	2096.938
Chi-square	12.662	84.446
<i>Df</i>	1	3
<i>N</i>	1,992	1,992

Note: Reference categories are represented with odds ratios of 1.000.

\* $p < .05$ . \*\* $p < .01$ . \*\*\* $p < .001$ .

Table 4 provides insight into how employers that include a criminal record question on their job applications treat ex-offenders' applications. The first model shows that when an employer inquires about a candidate's criminal history on a job application, an ex-offender is about 44% less likely to receive a callback ( $p < .001$ ). This would seem to suggest employers who include criminal background questions on job applications may be more opposed to hiring an ex-offender than those who do not. However, when race is included as a variable in the second model, the relationship between the box and receiving a callback becomes statistically insignificant. Race, on the other hand, has a strong effect in this model, as the black applicant was 51% ( $p < .001$ ) less likely than the white applicant to receive a callback, and the Latino applicant was 58% ( $p < .001$ ) more likely than the white applicant to receive a callback, independent of whether the employer included the box on the job application. This finding suggests employers that inquire about a candidate's criminal background on a job application actually care more

143. See, e.g., 42 U.S.C. § 2000e-2 (2012).

about the applicant's race than his criminal record in making callback decisions. In essence, these two models indicate the applicant's race, not his criminal record, drives callback decisions for employers. Because all Dallas employers were made aware of the applicant's criminal record regardless of whether they asked about it on the job application, these models show that when an employer knows about an ex-offender's criminal record, the employer treats the applicant the same in terms of callback likelihood, whether such information was compelled (via the box) or voluntarily surrendered.

#### IV. DISCUSSION

##### A. MAKING SENSE OF THE DATA

This study set out to investigate whether banning the box increases an ex-offender's likelihood of employment and if so, whether the effect of banning the box differs based on an ex-offender's race. The results suggest ban-the-box laws may indeed improve ex-offenders' chances of employment, at least for those seeking entry-level food-service positions. Although the comparative nature of this study necessitates caution in interpreting the results and extrapolating them beyond the cities tested, this finding is consistent with other studies that have similarly found a positive relationship between banning the box and ex-offender employment.<sup>144</sup>

Although the applicant's callback likelihood was undoubtedly higher in Chicago than in Dallas, the amount of improvement in the ban-the-box jurisdiction was fairly modest. Moreover, because this study measures only the likelihood of a callback, as opposed to actual employment outcomes, it is certainly possible that the small advantage the ex-offender enjoyed at the initial application stage would be diminished, if not altogether eliminated, if

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144. See, e.g., DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM 6–7 (2014), [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf) (finding that in Durham County, North Carolina, the number of ex-offender applicants recommended for hire nearly tripled in the two years following implementation of its ban-the-box policy, with 96% of such applicants ultimately getting the job); OFFICE OF THE D.C. AUDITOR, THE IMPACT OF “BAN THE BOX” IN THE DISTRICT OF COLUMBIA 15–16 (2016), [http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report\\_0.pdf](http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf) (finding that after Washington, D.C., adopted a fair-chance hiring law, there was a 33% increase in the number of ex-offenders hired, which resulted in 21% of all new hires in the District being people with criminal records); S. COAL. FOR SOC. JUSTICE, CITY OF MINNEAPOLIS CONVICTION INFORMATION SUMMARY 2004–2008YTD 1 (2008), <http://www.southerncoalition.org/wp-content/uploads/2013/07/City-of-Minneapolis-Conviction-Summary.pdf> (showing that Minneapolis hired fewer than 6% of applicants with criminal records prior to implementing a ban-the-box policy in 2006, compared to over 57% of such applicants after the policy was enacted); Shoag & Veuger, *supra* note 32, at 2 (finding that banning the box increased employment of residents in high-crime neighborhoods by up to 4%); Craigie, *supra* note 29, at 14–18, 21 (finding that ban-the-box laws increased the probability of public employment by approximately 40%).

the employer were to discover the candidate's criminal record at a later stage in the hiring process and remove him from consideration on that basis.

For this reason, future research should explore how banning the box affects employment decisions beyond the callback stage. Are employers more likely to inquire about an applicant's criminal record at a later phase of the hiring process if they are prohibited from obtaining such information via a job application? Or does knowing an applicant's criminal history become less important once an employer interviews a candidate or makes a job offer? This could be the case because the employer was sufficiently impressed with the candidate's qualifications. Or perhaps the employer has invested so much by that point in the hiring process that it would rather not know if the candidate has a criminal record than face the prospect of having to restart the process with another candidate, who could also have a disqualifying criminal record. Furthermore, if an employer does ultimately inquire about an applicant's criminal history, what effect does a criminal record have on the employer's hiring decision? Is an employer more likely to be forgiving of the applicant's criminal background at that point, or does banning the box merely delay the employer's decision to refuse to hire the ex-offender, as some commentators contend?<sup>145</sup>

The relatively small benefit of banning the box may be further eroded by the fact that many ex-offenders already find themselves at a considerable disadvantage in obtaining employment for reasons not directly related to their criminal record. Many ex-offenders have low educational attainment,<sup>146</sup> poor job skills,<sup>147</sup> and gaps in their employment history,<sup>148</sup> all of which place them at such a competitive disadvantage that the modest benefit they gain from banning the box does little to improve their overall chances of finding work. In this study, the applicant's odds of a callback improved in the ban-the-box jurisdiction—but only compared to applicants with his same credentials,

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145. See *supra* note 26 and accompanying text.

146. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATS.: U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), [www.bjs.gov/content/pub/pdf/ecp.pdf](http://www.bjs.gov/content/pub/pdf/ecp.pdf) (reporting that 41.3% of inmates had completed "[s]ome high school or less" and that 68% of state prisoners did not obtain a high school diploma).

147. See Michael G. Anderson, *If You've Got the Money, I've Got the Time: The Benefits of Incentive Contracts with Private Prisons*, 34 BUFF. PUB. INT. L.J. 43, 90 (2016) ("Even when a prisoner has a formal education, they may lack necessary job skills that will translate to a long-term job."); Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 384 (2014) ("Of course, the most substantial barrier to employment for ex-convicts is that they tend to lack education, job skills, and general preparedness for the workplace."). See generally James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORRECTIONAL EDUC. 297 (2004) (discussing how a disproportionate number of ex-offenders are unemployed because they are illiterate and lack vocational skills).

148. See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 27 (2013) (arguing that "[e]x-offenders usually have poor educational backgrounds, gaps in their employment histories, and fractured social networks").

which, for purposes of this study, were intentionally set high so as to expose callback differentials between the experimental and control groups. If the applicant's credentials had been more like the typical ex-offender's, such that he was less qualified for the position relative to the applicant pool, the applicant's chances of a callback (to say nothing of actual employment) may have been even further reduced. Thus, banning the box could give a competitive applicant who has a criminal record the boost he needs to be selected for employment, but for many ex-offenders the unfortunate reality is that they are so much less qualified for employment independent of their criminal record that banning the box may be about as effective in helping them find employment as using a water pistol to fight a forest fire.

Although the ban-the-box effect in this study was perhaps not as robust as proponents of these laws would hope, this finding does not preclude the possibility that banning the box has a stronger effect in other settings. It may be that food-service employers simply care less about an applicant's criminal record than employers do in other industries. The fact that just over one-fourth of the applications in Dallas, a non-ban-the-box jurisdiction, included a criminal background question provides some support for this possibility. Because the restaurant industry struggles to attract and retain entry-level employees,<sup>149</sup> food-service employers may be more willing to excuse an applicant's criminal record than are employers in industries with less turnover. Food-service employers may also care less about an applicant's criminal record because many entry-level positions in that industry might not require as high of a level of trustworthiness as in other industries. Positions such as dishwasher, busser, line cook, porter, and host tend to be highly supervised and are unlikely to involve significant financial transactions. Therefore, the risk of an employee in such a position committing an assault or theft would seem lower than, for example, a hotel housekeeper with unfettered access to guest rooms, a daycare worker surrounded by children, or an accountant with intimate knowledge of a client's financial information. Additionally, because there may already be a sizeable concentration of ex-offenders in the food-service industry,<sup>150</sup> these employers might feel more

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149. See Bruce Grindy, *Hospitality Employee Turnover Rose Slightly in 2013*, NAT'L REST. ASS'N (Mar. 20, 2014), <https://wahospitality.org/blog/hospitality-employee-turnover-rose-slightly-in-2013> (reporting that "[t]he turnover rate for employees in the restaurants-and-accommodations sector was 62.6% in 2013" compared to a 42.2% turnover rate in the overall private sector); Leslie Patton, *The Job Market Is Heating Up for Fast-Food Workers*, BLOOMBERG (Jan. 11, 2017, 12:51 PM), <https://www.bloomberg.com/news/articles/2017-01-11/headhunters-throwing-cash-at-people-who-know-how-to-flip-burgers> ("In today's tight labor market, restaurants are embroiled in a full-on food fight over workers. The rank-and-file is winning referral bonuses, free meals and days off, and the scarcity of candidates may be raising the minimum wage without help from lawmakers.").

150. See SENGSOUVANH (SUKEY) LESHNICK ET AL., SOC. POL'Y RES. ASSOCS., EVALUATION OF THE RE-INTEGRATION OF EX-OFFENDERS (REXO) PROGRAM: INTERIM REPORT, at II-12 (2012), [https://wdr.doleta.gov/research/Fulltext\\_Documents/ETAOP\\_2012\\_09.pdf](https://wdr.doleta.gov/research/Fulltext_Documents/ETAOP_2012_09.pdf) (finding that the food-service industry was one of the most common places ex-offenders secured employment

comfortable hiring ex-offenders because they do not possess the same prejudices and fears about such individuals as do employers in industries with lower numbers of ex-offenders.<sup>151</sup> At any rate, future research should examine whether the impact of banning the box differs depending on the industry, the type of job at issue, or the concentration of ex-offenders already employed in a particular setting.

The second major question this study attempted to answer is whether banning the box impacts different races differently. The data tell an important story in this regard. Each race performed better in the ban-the-box jurisdiction, but the increase was much higher for the black applicant than for either the white or Latino applicant. Regression modeling showed that the callback differentials between Chicago and Dallas were not statistically significant for the Latino candidate compared to the white candidate. This means employers were just as likely to call back the Latino applicant, regardless of whether they were aware of his criminal record. By contrast, the black applicant's improvement in Chicago compared to Dallas is more likely to be a true effect, but the *P* value is just on the verge of statistical significance, evading a definitive conclusion. Ideally, each race would benefit equally from banning the box. But the fact that the black applicant seemed to benefit the most may be less objectionable, given that black men are more likely to be arrested and incarcerated than are white or Latino men.<sup>152</sup>

Just as important as who benefits from banning the box is the question of who is harmed by doing so. In this study, the answer appears to be nobody. Across the board, the black, white, and Latino applicants all fared better in the ban-the-box jurisdiction. This cuts against the argument that racial minorities are more susceptible to discrimination when the box is banned because employers will automatically assume black and Latino candidates have a criminal record and dismiss their applications on that basis.<sup>153</sup> This

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following release); Monica Burton, *Restaurants Can Be a Lifeline for the Formerly Incarcerated—and Vice Versa*, EATER (June 23, 2017, 12:31 PM), <https://www.eater.com/2017/6/23/15771762/recidivism-restaurants-hiring-practices> (detailing various programs designed to help ex-offenders find employment in restaurants and explaining why the food-service industry is an ideal place for ex-offenders to work).

151. See *supra* notes 68–71 and accompanying text (explaining how interpersonal interactions help reduce prejudices and stereotypes).

152. E. ANN CARSON, BUREAU OF JUSTICE STATS.: U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 15 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> ("Imprisonment rates for black males were 3.8 to 10.5 times greater at each age group than white males and 1.4 to 3.1 times greater than rates for Hispanic males."); JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS 10, 17–19 (2015), <https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf> (summarizing various studies finding racial disparities in arrest rates); Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 476–78 (2014) (finding that by age 23, about 49% of black males have been arrested, compared to 44% of Hispanic males and 38% of white males).

153. See *supra* notes 27–28 and accompanying text.

finding is consistent with studies by Craigie<sup>154</sup> and Shoag and Veuger,<sup>155</sup> but runs counter to studies by Agan and Starr<sup>156</sup> and Doleac and Hansen.<sup>157</sup> Moreover, the fact that it contradicts Agan and Starr's study is particularly noteworthy, given that it is the only other study to measure the effect of ban-the-box laws on callbacks rather than employment rates.<sup>158</sup> This study is by no means intended to be the final word on whether banning the box adversely affects racial minorities. Here, it did not; but that hardly forecloses the possibility of it having a negative impact in other settings or using different methodologies. If anything, this study highlights the pressing need for additional empirical work in this area, as the question of whether banning the box adversely impacts certain minority groups is crucial to determining whether such laws can continue to be justified. Future research should include other groups susceptible to discrimination, including women, older workers, and other racial and ethnic groups.

Although this study set out to investigate the relationship between ban-the-box laws and ex-offender employment, what it reveals about race discrimination in job hiring more generally—independent of banning the box—is perhaps just as noteworthy. Whereas the black applicant seemed to benefit the most from banning the box, his overall callback rate lagged far behind both the white and Latino applicants' rates in both Chicago and Dallas. Even though his performance improved almost 74% in the ban-the-box jurisdiction, the black applicant's callback rate in Chicago, where employers were unaware of his criminal record, was still lower than the white applicant's callback rate in Dallas, where employers knew the applicant was an ex-offender. That food-service employers, who struggle to staff their workplaces, would be more likely to call back a white applicant with a known criminal record than a black applicant whose criminal history is unknown, is a powerful reminder that blacks' struggle for racial equality in employment persists, even in some of America's most racially diverse metropolitan areas.<sup>159</sup>

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154. Craigie, *supra* note 29, at 14–18.

155. Shoag & Veuger, *supra* note 32, at 24–25.

156. Agan & Starr, *supra* note 31, at 33–40.

157. Doleac & Hansen, *supra* note 31, at 16–20.

158. The inconsistent findings between this study and Agan and Starr's may be due, at least in part, to key design differences. This study simultaneously compares callback rates in a ban-the-box jurisdiction and a non-ban-the-box jurisdiction, whereas Agan and Starr compared callback rates in New York City and New Jersey from before and after each jurisdiction adopted its ban-the-box law. See Agan & Starr, *supra* note 31, at 9. Additionally, Agan and Starr targeted a variety of industries as part of their study, see *id.* at 10, while this experiment focused solely on the food-service industry.

159. See BARRETT A. LEE ET AL., PA. STATE UNIV.: DEP'T OF SOC. & POPULATION RES. INST., RACIAL AND ETHNIC DIVERSITY GOES LOCAL 13 (2012), <https://www.russellsage.org/research/reports/racial-ethnic-diversity> (calculating that Dallas and Chicago are the 14th and 20th most diverse U.S. metropolitan areas, respectively, based on 2010 U.S. Census and American Community Survey data).

The complexity of racial discrimination in employment is further evidenced by the fact that the Latino applicant not only fared better than the black applicant, but also outperformed the white applicant in both cities by an average of more than 10%.<sup>160</sup> A number of factors may help explain the Latino applicant's strong performance. Both Chicago and Dallas have substantial Latino populations,<sup>161</sup> so a Latino applicant may be attractive to food-service employers that seek employees who can communicate easily with both co-workers and customers.<sup>162</sup> In fact, many of the applications in this study requested that the applicant list any additional languages spoken, thus signaling the desirability of bilingualism. It may also be that a disproportionate percentage of managers who reviewed applications were themselves Latino, which could predispose them to hire other Latino employees based on in-group biases.<sup>163</sup> No data was collected regarding the race of the managers who made callback decisions. But anecdotally, many supervisors who provided their names in voicemail and email messages appeared to have Latino-sounding first or last names. Additionally, several of the voicemails seemed to be from Spanish speakers, either because of the speaker's accent or because the message itself was communicated in Spanish (if the callback was for the Latino applicant). Additionally, the Latino applicant may have benefited from "model minority" status, a cultural expectation placed on a minority group that each member of the group will excel in a particular field of study or aspect of behavior.<sup>164</sup> Although this term

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160. One reason racial discrimination in employment can be so complicated is because it can be both industry and location dependent, meaning members of a particular race may be discriminated against more in one type of job or in one geographic location than another. See Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 733 (2007) (finding "that markets that are very competitive and have high proportions of nonwhite workers have lower rates of discrimination than those that are very competitive and have a low percentage of nonwhites or have a high percentage of nonwhite and are very uncompetitive").

161. See CENSUS REPORTER—*Chicago*, *supra* note 109 (reporting that the population of the Chicago metropolitan area is 22% Hispanic); CENSUS REPORTER—*Dallas*, *supra* note 110 (reporting that the population of the Dallas metropolitan area is 29% Hispanic).

162. See Joseph P. Robinson-Cimpian, *Labor Market Differences Between Bilingual and Monolingual Hispanics*, in *THE BILINGUAL ADVANTAGE: LANGUAGE, LITERACY AND THE US LABOR MARKET* 79, 80 (Rebecca M. Callahan & Patricia C. Gándara eds., 2014) (explaining that bilingualism may be attractive to employers, particularly in an increasingly globalized economy, such that "employers may be willing to pay a premium for employees with these skills").

163. See Amy C. Lewis & Steven J. Sherman, *Hiring You Makes Me Look Bad: Social-Identity Based Reversals of the Ingroup Favoritism Effect*, 90 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 262, 262 (2003) ("Ingroup favoritism has been a well-documented and well-studied phenomenon wherein members of one's own group receive preferential treatment. . . . Ingroup favoritism is found in a wide variety of situations," including within organizational settings.); Donald Tomaskovic-Devey & Kevin Stainback, *Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces Since the Civil Rights Act*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 55 (2007) (explaining that in-group biases influence hiring and promotion decisions).

164. See JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 101 (2006) (defining "model minority" as "a group lacking the negative social and cultural traits associated with other non-white minorities in the United States, especially blacks"); Daina C. Chiu,

typically is reserved for Asian Americans,<sup>165</sup> it may apply to Latinos in manual labor-intensive jobs like entry-level food-service positions based on the stereotypical assumption that Latinos are hardworking and motivated.<sup>166</sup> Of course, the fact that the Latino applicant happened to fare relatively well does not mean Latinos in general are immune from employment discrimination; studies consistently show this group faces widespread and persistent discrimination across a variety of industries and locations.<sup>167</sup>

### B. FUTURE IMPLICATIONS

Ban-the-box laws have the potential to increase an ex-offender's chances for employment, which not only benefits the ex-offender himself, but also his family, community, and the nation at large.<sup>168</sup> At the same time, these laws could be harmful to minority groups and may impose on employers

*The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1080 (1994) (defining “model minority” rhetoric as explaining why “a group that is racially different from whites succeeds on white terms”).

165. See Hyung Chol Yoo et al., *Validation of the Internalization of the Model Minority Myth Measure (IM-4) and Its Link to Academic Performance and Psychological Adjustment Among Asian American Adolescents*, 21 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 237, 237 (2015) (citing various studies in support of the proposition that “[t]he assertion of Asian Americans as the model minority appears frequently in both popular press . . . and scholarly literature . . . [as] [t]here is an overrepresentation of successful Asian American students as valedictorians, violin prodigies, and computer geniuses” (citations omitted)).

166. See LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 132–34 (2012) (explaining that in the service industry, interracial conflict between Latinos and blacks can arise when Latinos are depicted “as the ‘model minority’ of the working poor[] [by] putting family first[] [and] working hard,” whereas impoverished black men are stereotyped “as wayward, unmotivated drifters” who rely on governmental assistance); Carlos Hiraldo, *Arroz Frito with Salsa: Asian Latinos and the Future of the United States*, 15 ASIAN AM. L.J. 47, 51 (2008) (arguing that Latino immigrants are stereotyped as hardworking and “willing to work for lower wages”); Laura López-Sanders, *Trapped at the Bottom: Racialized and Gendered Labor Queues in New Immigrant Destinations* 15 (Ctr. for Comparative Immigration Studies, Working Paper No. 176, 2009), [https://ccis.ucsd.edu/\\_files/wp176.pdf](https://ccis.ucsd.edu/_files/wp176.pdf) (quoting a manufacturing plant’s Hispanic recruiter who explained that “[t]he company really likes hiring Hispanics. They know that our people are here to work hard . . . they like that Hispanics are always on time for work and that they are rarely absent . . . Hispanics are dependable and reliable and the company likes that.” (first omission in original)).

167. See, e.g., Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 PROC. NAT’L ACAD. SCI. 10870, 10870–75 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5642692/pdf/pnas.201706255.pdf> (analyzing every available field experiment of hiring discrimination against blacks and Latinos in the United States since 1989 and finding that “whites receive on average 36% more callbacks than African Americans, and 24% more callbacks than Latinos”); see also Jens Manuel Krogstad & Gustavo López, *Roughly Half of Hispanics Have Experienced Discrimination*, PEW RES. CTR. (June 29, 2016), <http://www.pewresearch.org/fact-tank/2016/06/29/roughly-half-of-hispanics-have-experienced-discrimination> (reporting that 52% of Hispanics in the United States “say they have experienced discrimination or have been treated unfairly because of their race or ethnicity,” compared to only 30% of non-Hispanic whites who “say they have ever experienced discrimination or unfair treatment”).

168. See Flake, *supra* note 15, at 64–67 (summarizing various studies finding that incarceration has negative consequences at the individual, family, community, and national levels).

significant burdens that could hamper productivity and economic growth. With so much at stake, it is vital that empirical work in this area continues, so as to better understand how banning the box affects various stakeholders. This study provides important insights into ban-the-box laws through its finding that regardless of race, an ex-offender is more likely to receive an employer callback in a ban-the-box jurisdiction. However, this study focuses on just two cities and one type of employment. As such, it constitutes just one drop—albeit an important one—in a nearly empty bucket of knowledge that must be filled to responsibly assess whether banning the box is a movement worth pursuing further.

Questions persist regarding the two aspects of ban-the-box laws most often studied: whether the laws increase ex-offender employment, and whether they harm racial minorities. But in addition to these two important questions, many others abound for which little, if any, empirical work has been conducted. Does banning the box impact men differently than women? Are some types of ban-the-box laws more effective than others? How does banning the box affect racial minorities other than blacks and Latinos? Does the impact of a ban-the-box law change the longer it is in place? Does the law's effect depend on the type of industry or job? Is banning the box more effective in urban centers or rural areas? Public or private-sector employment? Strong or weak economies? Unionized or non-unionized workplaces? What impact, if any, has banning the box had on employers' business operations? Have ban-the-box laws had any normative effect on how employers or the public at large feel about the presence of ex-offenders in the workplace? These are just a few of the questions that future empirical work should seek to answer.

If ban-the-box laws ultimately are found to increase ex-offender employment but harm certain minority groups, lawmakers should look for ways to modify such laws to reduce their negative impact before discarding them entirely. One possibility would be to insert into ban-the-box legislation language that explicitly warns employers against making any assumptions about whether an applicant has a criminal record based on the applicant's race. This would be a relatively simple remedy because it would not necessitate any substantive change in the law, as Title VII already clearly prohibits racial stereotype-based discrimination.<sup>169</sup> A second possibility would be to integrate ban-the-box laws into existing antidiscrimination statutes. Too often, ban-the-

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169. See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) (“The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases . . .”); Dawn D. Bennett-Alexander & Linda F. Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women As Racial Stereotyping in Violation of Title VII*, 22 *CARDOZO J.L. & GENDER* 437, 452 (2016) (“Title VII’s prohibition of workplace discrimination also prohibits discrimination based on subjecting the employee to stereotypes about a group to which the employee belongs and thereby making decisions based on those stereotypes that operate to disadvantage the employee.”).

box laws seem to operate in a vacuum, focusing solely on removing criminal history questions from job applications without regard for how this could impact an employer's propensity for race-based discrimination. Explicitly referencing antidiscrimination laws in ban-the-box statutes or, better yet, directly inserting ban-the-box provisions into existing antidiscrimination statutes could reinforce to employers that drawing inferences about an applicant's criminal record because of his race is a prohibited form of discrimination. One other possible way to safeguard against statistical discrimination in the absence of criminal record information is for enforcement agencies to make this form of discrimination a top priority—and to make employers aware of that fact.<sup>170</sup> Indeed, a few sizeable jury awards or publicly disclosed settlements may prove the strongest deterrent of all.<sup>171</sup>

If ban-the-box laws are shown to not harm minorities, as this study concludes, or if the negative impact can be successfully mitigated through legislative and enforcement efforts, the other major issue to consider is how much of a hardship banning the box imposes on employers. Antidiscrimination law often shows sensitivity toward how burdensome an employer may find a particular measure. For instance, the Family and Medical Leave Act applies only to employers with 50 or more employees;<sup>172</sup> the Americans with Disabilities Act obligates employers to provide only accommodations that do not cause undue hardship;<sup>173</sup> and Title VII includes a number of hardship-based exceptions to its proscriptions against discrimination, such as if an otherwise protected characteristic is a bona fide occupational qualification,<sup>174</sup> or, in the case of disparate impact, if the discriminatory practice at issue is job related and consistent with business

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170. See, e.g., Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Updates Strategic Enforcement Plan (Oct. 17, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm> (publicizing the Agency's priorities for enforcement of antidiscrimination laws as part of its strategic enforcement plan).

171. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 469 (1992) ("An important measure of a remedy is its effectiveness in deterring conduct which the law considers wrongful. Large jury verdicts, particularly when widely publicized, certainly serve the useful purpose of deterring some employers from discharging employees except for good and demonstrable cause. Even though the large verdicts are few and random, their notoriety gives them substantial impact. Many companies have improved their internal procedures and monitor discharges more carefully . . . ." (footnote omitted)).

172. 29 U.S.C. § 2611(4)(A)(i) (2012) (defining a covered employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees").

173. 42 U.S.C. § 12112(b)(5)(A) (requiring a covered employer to reasonably accommodate a disabled employee, unless "the accommodation would impose an undue hardship on the operation of the business of such covered entity").

174. 42 U.S.C. § 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees[] . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .").

necessity.<sup>175</sup> Although critics of ban-the-box laws argue that these laws unduly burden employers, there is almost no empirical data either to support or disprove this claim.<sup>176</sup> Future research efforts should include both quantitative and qualitative assessments of hardship across a variety of different employer types<sup>177</sup> and in response to an assortment of ban-the-box laws.<sup>178</sup>

In weighing the costs of banning the box against the benefits of doing so, lawmakers should look beyond simply whether these laws have an immediate, direct impact on ex-offender employment. Although that is certainly an important result, there are other possible outcomes that likewise warrant inclusion in any cost-benefit analysis. Apart from employment gains ex-offenders may experience by banning the box, these laws may carry tremendous symbolic value in their ability to persuade employers and the public alike that ex-offenders are indeed worthy of a second chance.<sup>179</sup> Not only does the United States lock up more of its citizens than any other nation,<sup>180</sup> it also imposes collateral consequences that are harsher and more permanent than those in other developed countries.<sup>181</sup> “These ‘collateral

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175. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (enabling an employer to defeat a disparate impact claim by “demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity”).

176. Indeed, as of the end of 2018, there were no published studies finding that ban-the-box laws imposed any hardship on employers. The only evidence that ban-the-box laws are beneficial to employers is a letter from a Minneapolis city councilmember to a Minnesota state senator, in which the councilmember reported that banning the box at the city-level “ha[d] decreased the amount of transactional work for staff” and “[t]he hiring process ha[d] not slowed down.” Letter from Elizabeth Glidden, Minneapolis Councilmember, Eighth Ward, to Mee Moua, Minn. Senator (Mar. 16, 2009), <http://www.nelp.org/content/uploads/Glidden-Ltr-Minneapolis2004-2008.pdf>. However, the councilmember did not provide in the letter clear details explaining how she arrived at her conclusion. *Id.*

177. For example, is the burden greater for larger employers that are continually hiring new employees? If so, how much of that burden is offset when an employer houses a sophisticated human resources department that is able to streamline job-hiring processes?

178. For example, how, if at all, does the employer’s hardship differ when a ban-the-box law allows an employer to inquire about an applicant’s criminal history after the initial job application is submitted, as opposed to after the applicant receives a conditional offer of employment?

179. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 398 (1997) (“[L]aw also expresses normative principles and symbolizes societal values, and these moralizing features may affect behavior.”); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 93 (2011) (“Symbolically, law and how it is implemented send messages about who counts as equal members of the political community and what fundamental moral principles define that community.”). See generally KENNETH L. KARST, *LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993) (arguing that law has both instrumental and symbolic value).

180. See Wagner & Sawyer, *supra* note 4.

181. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 465, 501 (2010) (arguing “that the United States imposes collateral consequences that are harsher and more pervasive than those in [other developed

consequences' [which] are often more onerous than the sentence itself. . . . are . . . increasing [both] in number and complexity."<sup>182</sup> Because the American workplace can be especially inhospitable toward ex-offenders,<sup>183</sup> banning the box may prove particularly effective in transforming employers' attitudes. Even though ban-the-box laws stop well short of prohibiting discrimination against ex-offenders, the central message these laws convey, that an employer should at least consider an applicant's qualifications before disqualifying him because of his criminal record, is a significant value judgment pronouncement made all the more meaningful because it is backed by the government—the very institution that had adjudged the individual worthy of incarceration in the first place.

Aside from their potential normative impact, ban-the-box laws may carry the added benefit of pressuring employers to articulate and communicate clearly defined policies regarding the employment of ex-offenders. One of the most striking findings from the aforementioned SHRM/Koch Institute study is how few employers maintain formal policies, whether positive or negative, regarding hiring workers with criminal records.<sup>184</sup> According to the study, "[j]ust 19% of HR professionals at companies with fewer than 100 employees [reported] their company has a formal policy, compared with 36% at companies with 100-499 employees and 50% at companies with 500 or more employees."<sup>185</sup> Moreover, "[a] majority of HR professionals (54%) and non-managers (61%) sa[id] their organization's . . . policy, approach, or perspective on [hiring ex-offenders was] unclear."<sup>186</sup> Widespread implementation of ban-the-box laws would eliminate much of this ambiguity and confusion. Employers would be forced to assess their views toward ex-

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countries]," such "that both criminal convictions and their long-reaching effects are more permanent in the United States").

182. Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. PUB. INT. L.J. 1, 4-5 (2016) (footnote omitted).

183. See Joseph Graffam et al., *The Perceived Employability of Ex-Prisoners and Offenders*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 673, 673-82 (2008) (demonstrating that individuals "with a criminal background are perceived as being less likely than people with other conditions of disadvantage to obtain and maintain employment," rating higher only than those with intellectual or psychiatric disabilities); see also Holzer et al., *Will Employers Hire Ex-Offenders?*, *supra* note 9, at 8-10 (finding that nearly two-thirds of employers would "definitely not" or "probably not" hire an ex-offender, compared to 7.8% who reported they definitely or probably would not hire a welfare recipient, 3.6% who would definitely or probably not hire a person with a GED, 41% who would definitely or probably not hire a person with a spotty work history, and 17.3% who would definitely or probably not hire someone who had been unemployed for more than one year); Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, YALE L. & POL'Y REV. INTER ALIA (Nov. 7, 2016, 10:15 AM), [https://ylpr.yale.edu/inter\\_alia/effectiveness-certificates-relief-collateral-consequence-relief-mechanisms-experimental](https://ylpr.yale.edu/inter_alia/effectiveness-certificates-relief-collateral-consequence-relief-mechanisms-experimental) ("One of the most punitive collateral consequences of conviction is the impact of a criminal record on the likelihood of securing employment.").

184. SHRM/KOCH STUDY, *supra* note 68, at 8-11.

185. *Id.* at 9.

186. *Id.* at 8.

offenders, articulate policies that comport with the applicable ban-the-box laws, and broadcast such policies throughout their organizations. For employers that are open to hiring ex-offenders but are straddled with inadequate policies and poor communication in this area, ban-the-box laws may provide the incentive necessary for them to prioritize hiring practices that welcome ex-offenders.

### C. THE BIG PICTURE

Even if the benefits of banning the box ultimately outweigh the costs, it would be a mistake to believe these laws alone suffice to ensure the fair treatment of ex-offenders in the workplace. Not even the most stringent ban-the-box law can prevent employers from drawing inferences about whether an applicant possesses a criminal record based on other characteristics and then relying on these inferences to make employment decisions. Sometimes employers' efforts to circumvent ban-the-box laws are blatant, like the Chicago employers in this study that included on their job applications a question about whether the applicant would "feel comfortable" undergoing a criminal background screening as part of the hiring process. Other attempts to evade the law are less obvious, such as using the applicant's race as a proxy for a criminal record. Although drawing assumptions about an applicant's criminal record based on race clearly violates antidiscrimination law, inferences based on other information contained in a job application, such as the applicant's work history or education level, are perfectly legal.<sup>187</sup> An easy solution to this problem might be to ban employers from drawing any inference about an applicant's criminal record based on *any* information in the application. But even though this may help to curb an employer's conscious discrimination in some situations, it would do little, if anything, to prevent an employer from unconsciously concluding the applicant has a criminal record and then unintentionally eliminating the applicant from consideration on that basis.<sup>188</sup>

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187. See Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 471–73 (2006) (explaining that employers in many low-wage occupations read gaps in employment history as signs of unreported spells of incarceration).

188. See Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 85 (2008) (arguing that "much discrimination may be the result of implicit or unconscious stereotypes"); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005) ("Extensive social psychological literature documents the ways in which unconscious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking."); Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1188 (2008) (claiming that most contemporary discrimination results from unconscious cognitive psychological processes, "rather than motivational, psychological processes"); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999) (explaining that "unconscious' discrimination has become the most pervasive and important form of bias operating in society today").

The other major limitation of ban-the-box laws is, ironically enough, perhaps the reason they are so popular in the first place: They do not prohibit an employer from discriminating against an ex-offender, but merely delay the point at which such discrimination can take place. In this regard, many ban-the-box laws are somewhat toothless because they operate on the hope that employers will be merciful to ex-offenders if forced to evaluate their job qualifications prior to discovering their criminal record. Some states and municipalities have attempted to give their ban-the-box laws more force by including provisions that limit how an employer can use an applicant's criminal record information once it is obtained.<sup>189</sup> While such measures are undoubtedly more controversial, and therefore more difficult to enact, they would need to be implemented more broadly to help safeguard ex-offenders from discrimination beyond the initial employment application stage.

Perhaps the most important contribution ban-the-box laws can make to the struggle to increase ex-offender employment is to facilitate the implementation of more forceful protections. As I have argued elsewhere, the most needed change is to amend Title VII to include persons with "nondisqualifying criminal records" as a protected class.<sup>190</sup> Under my proposal, a criminal record would be "nondisqualifying unless there is a direct relationship between a previous criminal offense and the job in question, such that employing the individual would impose an unreasonable risk to property or to the safety of specific individuals or the general public."<sup>191</sup> To offset the burden this could impose on employers by way of increased exposure to negligent hiring claims, I urge that Title VII be further "amended to establish a federal cause of action for negligent hiring," along with a rebuttable presumption that an ex-offender's criminal record "should be excluded from evidence in a negligent hiring case" in certain instances.<sup>192</sup> Admittedly, both of these proposals are long shots, given the current political climate.<sup>193</sup> But if banning the box engenders normative changes in how employers and the public feel about ex-offenders, there is no reason why today's dream cannot become tomorrow's reality.

To be sure, the fate of ex-offender employment reform does not depend solely on the success or failure of ban-the-box laws. The ban-the-box movement has achieved more widespread support than perhaps any other legislative effort to rehabilitate ex-offenders,<sup>194</sup> but there are other legal changes afoot that are also proving effective in helping ex-offenders find

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189. See *supra* Part II.

190. See Flake, *supra* note 15, at 85–92.

191. *Id.* at 88.

192. *Id.* at 95.

193. See GRAWERT & CAMHI, *supra* note 7, at 5.

194. 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, 227 (2014) (noting that "[t]he ban the box movement has been extraordinarily successful"); *supra* Part II.

work. Perhaps the most promising development is the expansion of certificate-of-employability laws, which generally allow ex-offenders to present a court-issued document to prospective employers certifying that they have met certain requirements to demonstrate they have been sufficiently rehabilitated.<sup>195</sup> Some of these laws also create protections for employers that rely on the certificates in defending against claims of negligent hiring or retention under certain circumstances.<sup>196</sup> By the end of 2017, ten states had enacted certificate laws, with eight of those laws passing within the last six years.<sup>197</sup> Initial empirical testing of certificate laws suggests they may be effective in helping some ex-offenders find work.<sup>198</sup> But like ban-the-box laws, certificates of employability have their own limitations. Not every ex-offender can meet the requirements to obtain the certificate, and those who do often must wait several months or even years after their release—arguably when they are most susceptible to recidivism<sup>199</sup>—before becoming eligible for the certification.<sup>200</sup> Given these limitations, certificate laws may prove most

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195. See, e.g., MICH. COMP. LAWS § 791.234d(2)(a)–(c) (2018) (allowing the Department of Corrections to issue a certificate of employability if a “prisoner successfully completed a career and technical education course” and if “[t]he prisoner received no major misconducts” and “no more than 3 minor misconducts during the 2 years” prior to release); TENN. CODE ANN. § 40-29-107(i) (West 2016) (providing that a court may issue a certificate of employability if it finds “[t]he petitioner has sustained the character of a person of honesty, respectability, and veracity and is generally esteemed as such by the petitioner’s neighbors;” “[g]ranting the petition will materially assist the person in obtaining employment . . . ;” the petitioner “has a substantial need for the relief requested in order to live a law-abiding life;” and the petitioner “would not pose an unreasonable risk to the safety of the public or any individual”); see also Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1375 (2017) (“The certificate seeks to act as the state’s stamp of approval that these individuals have a low-risk of reoffending.”).

196. See, e.g., TENN. CODE ANN. § 40-29-107(n)(2) (“In any proceeding on a claim against an employer for negligent hiring, a certificate of employability issued to a person pursuant to this section shall provide immunity for the employer with respect to the claim if the employer knew of the certificate at the time of the alleged negligence.”).

197. See Garretson, *supra* note 182, at 12–23 (summarizing the certificate laws in each state where they have been acted, including Colorado, Connecticut, Georgia, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, and Vermont).

198. See *id.* at 36–38 (analyzing interview data on New York’s certificate law showing that “[n]early all respondents stated that certificates are invaluable in obtaining an occupational license”); see also Leasure & Andersen, *supra* note 183 (finding that Ohio’s certificate program increased a certificate holder’s likelihood of receiving an employer callback more than threefold, such that certificate holders and non-offenders were nearly equally likely to receive an interview invitation or job offer).

199. See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATS.: U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005, at 7 (2014), <http://www.bjs.gov/content/pub/pdf/rprtso5po510.pdf> (reporting that 43.4% of ex-offenders were rearrested within one year after release from state prison, and that “[m]ore than a third (36.8%) of all released prisoners who were arrested within 5 years of release were arrested within the first 6 months, with more than half (56.7%) arrested by the end of the first year”).

200. See, e.g., CAL. PENAL CODE § 4852.03 (West 2011) (an ex-offender cannot become eligible to seek a certificate until five years after release from imprisonment or parole); OHIO REV. CODE ANN. § 2953.25(B)(4)(a)(i)–(ii) (West 2018) (authorizing an ex-offender to apply

effective when paired with ban-the-box laws, as the weaknesses of the former seem to be the strengths of the latter.<sup>201</sup> Thus, certificates of employability might best be considered a complement, but not an alternative, to banning the box.

Of course, any meaningful improvement in ex-offender employment cannot rely on changes to the law alone. Apart from having a criminal record, many ex-offenders suffer from other conditions that may disqualify them from employment, such as drug and alcohol addiction, poor mental health, low educational attainment, or substandard skills and training.<sup>202</sup> Because the law is ill-equipped to address these issues, comprehensive rehabilitation programs are crucial to providing criminal offenders with the education, skills training, and health services needed to bring them to a point where ban-the-box laws and other legal protections might actually make a difference.<sup>203</sup> Perhaps the greatest challenge in this regard is less the creation of such programs (the basic infrastructure seems to be in place) than finding ways to ensure more

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for a certificate six months after release for a misdemeanor and one year after release for a felony); see also MARGARET LOVE & APRIL FRAZIER, ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 3-4 (2006), [www.reentry.net/library/attachment.149426](http://www.reentry.net/library/attachment.149426) (finding that the process for obtaining a certificate in New York could take up to one year to complete and only about half of the applications considered by the New York Parole Board were granted); Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L. L. REV. 249, 297-301 (2016) (providing a comprehensive critique of state certificate laws).

201. For example, an ex-offender may have to wait months or years before obtaining a certificate of employability but can immediately avoid disclosing her criminal record pursuant to a ban-the-box law. Also, ban-the-box laws tend to cover all ex-offenders, regardless of crime, while some certificate laws limit eligibility to certain types of offenses. See, e.g., 730 ILL. COMP. STAT. 5 / 5-5 (2018) (explaining that an ex-offender who is eligible for a certificate of employability does not include any person who is convicted of an offense that requires the person to register with certain state registries, or who is convicted of arson, kidnapping, aggravated driving under the influence, or aggravated domestic battery).

202. See Flake, *supra* note 15, at 101 ("For many ex-offenders, if their criminal records do not disqualify them from employment, other factors such as low education, poor skills and training, and drug and alcohol addiction will."); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 49-50 (Jeremy Travis & Michelle Waul eds., 2003) ("The strains of postprison adjustment and the lack of available community-based treatment programs and social services . . . increase the likelihood that recently released prisoners will turn to drugs or alcohol as a form of self-medication and, as a result, severely compromise their successful reintegration into society."); Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56, 64-65 (2008) (finding that individuals with a history of incarceration are consistently more likely to be afflicted with infectious diseases and other stress-related illnesses).

203. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 270 (2008) ("There is a compelling need to establish rehabilitation programs that prepare offenders for law-abiding lives. We must reinvest in prison work, education, and substance abuse programs. We cannot reduce recidivism unless programs are funded that open up opportunities for ex-convicts to create alternatives to a criminal lifestyle.").

offenders participate in these programs both during incarceration and following release.<sup>204</sup> Indeed, several studies have found that only a small percentage of offenders participate in rehabilitation programs.<sup>205</sup>

Finally, neither legal nor rehabilitative efforts to increase ex-offender employment will change the reality that employers continue to discriminate against applicants on the basis of race—as this study so starkly confirms. Racial discrimination is especially problematic in the context of ex-offender employment because of the vast disparity in incarceration rates for certain racial minorities compared to whites.<sup>206</sup> But this is also an issue that extends beyond the ex-offender population to communities of color more broadly. While a full critique of discriminatory hiring laws is beyond this Article's scope, this is an aspect of employment law in need of an overhaul. Proving an applicant was denied employment because of a protected characteristic is among the most difficult types of discrimination claims to establish under currently applicable legal frameworks.<sup>207</sup> In the end, if a black ex-offender completes a rehabilitation program to become job competitive, is able to avoid disclosing his criminal history on job applications, presents a certificate of employability to potential employers upon disclosure of his criminal record, and yet is still rejected by an employer because of his race, have we really solved anything? An unemployed ex-offender seems just as likely to revert to criminal activity, regardless of whether it was his criminal record or his race that prevented him from working.

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204. See Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517, 526–27 (2015) (citing studies in support of the proposition that despite an abundance of rehabilitation programs available to criminal offenders, participation rates remain low).

205. See JAMES P. LYNCH & WILLIAM J. SABOL, URBAN INST., PRISONER REENTRY IN PERSPECTIVE 11 (2001), [https://www.urban.org/sites/default/files/publication/71306/410213\\_reentry.PDF](https://www.urban.org/sites/default/files/publication/71306/410213_reentry.PDF) (finding that the proportion of soon-to-be-released inmates who participated in treatment was only 27% for vocational programs, 35% for educational programs, and 13% for prerelease programs); Faye S. Taxman et al., *Justice Reinvestment in the United States: An Empirical Assessment of the Potential Impact of Increased Correctional Programming on Recidivism*, 9 VICTIMS & OFFENDERS 50, 56–71 (2014) (finding that although the prevalence of treatment services in prisons is high, the proportion of inmates participating in such programs is low); Faye S. Taxman et al., *The Plight of Providing Appropriate Substance Abuse Treatment Services to Offenders: Modeling the Gaps in Service Delivery*, 8 VICTIMS & OFFENDERS 70, 85 (2013) (finding that although most prisons offer educational and vocational training programs, less than 10% of the adult inmate population is involved in such treatment).

206. See *supra* note 28 and accompanying text.

207. See *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 815–17 (5th Cir. 1982) (acknowledging the difficulty of proving a discriminatory hiring claim under a disparate treatment theory of discrimination); see also Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 952 (2017) (“As a general matter, hiring discrimination claims tend to be particularly hard for plaintiffs to win. This is because plaintiffs who are in the position of a rejected applicant may lack evidence about why they were rejected (other than their own suspicions of discrimination) and must wait until discovery to amass the statistics or other proof supporting their claim.”); Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 469 (1995) (arguing that discriminatory hiring “is often impossible to detect, let alone prove in court”).

## V. CONCLUSION

As the ban-the-box movement continues to sweep the nation, important questions persist regarding both the effectiveness of these laws in helping ex-offenders find work and their impact on racial minorities. This study's empirical investigation of these questions shows that, at least for entry-level food-service workers in Chicago, banning the box increases employment opportunities for ex-offenders without harming racial minorities. Although banning the box seemed to benefit the black applicant the most, the predominant driver of whether an applicant received a callback was his race—not whether he disclosed his criminal record on a job application.

This study highlights the importance of additional empirical testing to better understand both the costs and benefits of banning the box. If the costs ultimately outweigh the benefits, ban-the-box laws should be modified to try to eliminate any negative impact on racial minorities or employers. Conversely, if the benefits of banning the box outweigh the costs, as this study found, these laws may provide the momentum necessary for lawmakers to enact even more impactful rehabilitative measures. Regardless of whether ban-the-box laws ultimately prove successful in increasing ex-offender employment, if nothing else, the unprecedented growth of the movement is indicative of a broader recognition that ex-offenders need to be employed and of lawmakers' willingness to finally use the law to facilitate that effort. That alone is a monumental achievement that is likely to pay dividends in the future, not only for ex-offenders but for society as a whole.