

Thinking Outside of the Box: Ethical Implications of the Unforeseen Backfire of Ban the Box Policies

KIMBERLY SALTZ*

INTRODUCTION

As early as the 1990s, criminal justice reform advocates have called for “banning the box” in reference to the check box on most job applications asking applicants if they have a criminal history.¹ Having a criminal history greatly decreases the number of interviews and job offers a candidate receives.² This reduces their ability to find employment, rejoin their communities, and potentially escape the revolving door of recidivism.³ In just two decades, Ban the Box has quickly become a national campaign that includes legislation in a majority of states, pledges by private corporations, and support from the White House. As campaigns go, it would appear that Ban the Box has reached its zenith.

However, research into the impacts of the campaign show that Ban the Box policies may actually be backfiring.⁴ Researchers found that passing Ban the Box legislation did increase the number of responses applicants with criminal histories received to their applications; however, the racial disparity between Caucasian and Black or Hispanic applicants increased.⁵ Caucasian applicants with criminal histories saw better results, while Black and Hispanic applicants received fewer responses.⁶ Since the criminal justice system already disproportionately impacts communities of color,⁷ the backfiring of Ban the Box policies should concern legal practitioners and criminal justice reform advocates.

* J.D., Georgetown University Law Center (expected May 2022); B.A., Brown University (2017). © 2021, Kimberly Saltz.

1. Ban the Box Fact Sheet, NATIONAL EMPLOYMENT LAW PROJECT (August 2017), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf> [<https://perma.cc/RAD9-ZLD6>].

2. See Mark T. Berg & Beth M. Huebner, Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism, 28 JUST. Q. 382, 387 (2011), <https://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf> [<https://perma.cc/XGD6-9KM4>].

3. See *id.* at 389 (finding that two years after releasing ex-offenders who were employed were half as likely to face arrest or conviction).

4. See Amanda Agan & Sonja Starr, Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment, U OF MICHIGAN LAW & ECON, No. 16-012, 1 (June 14, 2016), <https://poseidon01.ssm.com/delivery.php?ID> [<https://perma.cc/DS7X-CWGQ>].

5. See *id.*

6. See *id.* at 44.

7. See Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System, THE SENTENCING PROJECT (August 31, 2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/> [<https://perma.cc/9GU7-HZWC>].

This research also comes at a time when activists, politicians, and legal thinkers are grappling with their roles in perpetuating racism in the United States, especially with regards to the criminal justice system. As lawyers and lawmakers seek justice for this discrimination, one has to consider what to do when a supposed solution ends up creating more problems. Ban the Box policies were supposed to help communities of color who had been disproportionately impacted by the criminal justice system,⁸ but now it seems the policies themselves are causing harm. With documented negative outcomes, can lawyers ethically support Ban the Box policies that could hurt their clients' ability to rejoin society?

This Note examines the rise of the Ban the Box Campaign, the nature of its failures, and discusses what this means for lawyers in the criminal justice system. Part I of this Note provides context through the history of the Ban the Box campaign. Part II looks at the series of recent studies that show a growing racial disparity in post-conviction employment following the passage of Ban the Box policies. Part III discusses the ethical implications for lawyers who may agree with the policy, but find it actually places their clients at a disadvantage. Finally, Part IV looks at what solutions lawyers might offer.

I. BIRTH OF A MOVEMENT: THE RISE OF BAN THE BOX

Decades of the “tough on crime” approach to the criminal justice system have left over seventy million Americans with some form of criminal history.⁹ When these individuals are released from incarceration, they face many barriers to reintegrating into society.¹⁰ One of these is a check box on job applications that asks applicants if they have a criminal history. This box has a two-fold effect. First, it discourages individuals with prior criminal history from applying to jobs.¹¹ Second, it artificially narrows the applicant pool to exclude individuals with a criminal history regardless of their skills or willingness for the job.¹² As a result, criminal convictions pose a steep barrier to employment and reintegration into one's community.¹³

Before the catchy “Ban the Box” phrase was adopted, several states made efforts to decrease the role of a criminal conviction in the hiring process.¹⁴ The first was Hawaii, which enacted legislation in 1998 that prohibited public and private employers from asking about criminal history until the employer had made a

8. See FAQ, BAN THE BOX, http://bantheboxcampaign.org/faq/#.X-0_DC2cZp8 [<https://perma.cc/CK37-KFNX>] (last visited April 11, 2021).

9. See Ban the Box Fact Sheet, *supra* note 1.

10. See Mark T. Berg & Beth M. Huebner, Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism, 28 JUST. Q. 382, 384 (2011), <https://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf> [<https://perma.cc/K265-JEEZ>].

11. See Ban the Box Fact Sheet, *supra* note 1.

12. See *id.*

13. See *id.*

14. See Hawaii Fair Chance Law, VERIFY PROJECT, <https://www.verifyprotect.com/ban-the-box/hawaii/> [<https://perma.cc/Y6XT-JV95>] (last visited April 11, 2021).

conditional offer.¹⁵ The intent was to give applicants a chance to demonstrate their skill through the interview process and earn the job while balancing employers' liability concerns by allowing them to conduct a criminal background check as the final step in the process.¹⁶ Several years later, the nonprofit organization All of Us or None coined the term "Ban the Box" as part of their campaign to pass similar legislation in California.¹⁷ The phrase caught on as the call for a national movement "to end structural discrimination against people with conviction and incarceration histories."¹⁸ Today, thirty six states, the District of Columbia and over 150 cities and counties have adopted some form of Ban the Box legislation.¹⁹ Fourteen states and twenty cities have gone as far as to extend these policies to private employers.²⁰ As a result, nearly three-quarters of Americans currently live in a jurisdiction that has banned the box.²¹

This campaign is unique to modern politics in that it enjoys popularity across the aisle. In 2015, the Obama Administration authorized a Ban the Box policy for federal government employers.²² This was followed by a rollout of the "Fair Chance Pledge," which called on the private sector to adopt their own Ban the Box policies.²³ High-profile companies such as Facebook, Koch Industries, Starbucks, and Uber joined as early signatories.²⁴ This trend was carried forward into the Trump Administration with the passage of the Fair Chance Act in 2019.²⁵ This law formally prohibited federal agencies and contractors from requesting criminal background information prior to extending an offer.²⁶

Another great victory for the Ban the Box Campaign was the changes to the U.S. Equal Employment Opportunity Commission (EEOC) Guidelines. In 2012, the EEOC released the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights

15. See HAW. REV. STAT. §378-2.5(b).

16. See HAW. REV. STAT. §378-2.5(d).

17. See *About: Ban the Box Campaign*, BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/about> [<https://perma.cc/Y6XT-JV95>].

18. See *id.*

19. See Beth Avery and Han Lu, *Ban The Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NATIONAL EMPLOYMENT LAW PROJECT (September 30, 2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> [<https://perma.cc/BUS2-8WCK>].

20. See *id.*

21. See *id.*

22. See Dave Boyer, *Obama finalizes regulation to 'ban the box' on hiring job applicants with criminal records*, WASHINGTON TIMES (November 30, 2016), <https://www.washingtontimes.com/news/2016/nov/30/obama-finalizes-regulation-ban-box-job-applicants/> [<https://perma.cc/57LP-4URD>].

23. See *FACT SHEET: White House Launches the Fair Chance Business Pledge*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (April 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office> [<https://perma.cc/D4QB-YBLK>].

24. See *id.*

25. See *Fair Chance Act of 2019 (S.387/H.R.1076) Frequently Asked Questions*, NATIONAL EMPLOYMENT LAW PROJECT, <https://docs.house.gov/meetings/> [<https://perma.cc/3234-6S8X>] (last visited April 11, 2021).

26. See *id.*

Act.²⁷ This updated guidance explicitly states that “employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.”²⁸ Title VII prohibits employment discrimination based on race, religion, sex or nation of origin.²⁹ The updated 2012 EEOC guidelines provide two ways in which including criminal history on a job application could violate Title VII. The first is when an employer treats information about criminal histories differently based on the applicants race or nation of origin, known as *disparate treatment liability*.³⁰ The second, *disparate impact liability*, is when an employer’s neutral policy may disproportionately impact certain individuals protected under Title VII.³¹ The EEOC guidelines note that national data supports the finding that exclusions due to criminal records have a disparate based on race and nation of origin.³² Therefore, adopting a blanket policy, such as standardized job application form that asks an out criminal history, could be a Title VII violation.³³

The changes to the EEOC have resulted in major legal victories. In November 2019, EEOC settled a discrimination lawsuit with Dollar General, the largest small-box discount retailer in the United States.³⁴ The EEOC claimed that Dollar General violated Title VII in their hiring processes when using the selection criteria of criminal conviction history, a criterion that had a disparate impact on African Americans, was not job-related, and was not a business necessity.³⁵ As part of the settlement, Dollar General agreed to pay \$6 million into a settlement fund for African Americans who lost their chance at employment with the company between 2005 and 2019.³⁶ Dollar General also agreed that if the company continued to use criminal background checks during the three-year consent decree, they would hire a criminology consultant to develop a new criminal background check based on time since conviction, number of offenses, nature and

27. See *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (April 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance> [<https://perma.cc/4CJ9-VREN>].

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*

34. See Thomas Ahern, *EEOC Announces \$6 Million Settlement in Criminal Background Check Discrimination Lawsuit*, EMPLOYMENT SCREENING RESOURCES (November 21, 2019), <https://www.esrcheck.com/wordpress/2019/11/21/eeoc-6-million-discrimination-settlement/> [<https://perma.cc/LB6Z-JF6U>].

35. See Consent Decree, *U.S. Equal Emp’t Opportunity Comm’n v. Dolgencorp, LLC*, No. 13-cv-04307 (N.D. Ill. Jul. 29, 2014), <https://www.courtlistener.com/recap/gov.uscourts.ilnd.284465/gov.uscourts.ilnd.284465.454.1.pdf> [<https://perma.cc/45V9-ZGMP>] [*hereinafter* Consent Decree].

36. See Ahern, *supra* note 34.

gravity of the offense, and risk of recidivism.³⁷ When asked for comments, EEOC Chicago District Director Julianna Bowman noted, “because of the racial disparities in the American criminal justice system, use of criminal background checks often has a disparate impact on African Americans. This consent decree reminds employers that criminal background checks must have some demonstrable business necessity and connection to the job at issue.”³⁸ This case and the language used by EEOC officials demonstrate just how much the concept of “Ban the Box” has integrated itself into the institutional fabric of America.

II. BACKFIRE: THE UNLIKELY SIDE EFFECTS OF A WELL-INTENTIONED POLICY

In two decades, Ban the Box has gone from an activist dream to an institutional policy, but recent studies have given academics cause for concern. This section reviews the critiques of Ban the Box policies and explains how these well-intentioned practices may be hurting the very populations they seek to serve.

Several studies have suggested that Ban the Box policies increase racial disparities in employment opportunities. In one study, researchers sent 15,000 fictitious applications to employers in New Jersey and New York through online job portals.³⁹ These applications randomly assigned race and criminal history. They sent the applications in waves before and after each state passed Ban the Box legislation to see how the change in employment policy would impact various groups.⁴⁰ The researchers found that prior to implementation of Ban the Box policies, white applicants received 23% more callbacks than black applicants of similar qualifications.⁴¹ They also found that when an employer asked about criminal history before Ban the Box was in place, an applicant was 62% more likely to receive a callback if they did not have a criminal history.⁴² Most concerning, however, was the finding that Ban the Box policies substantially increased racial disparities in employee callbacks.⁴³ Prior to Ban the Box policies, the researchers found that white applicants for an employer who would be affected by Ban the Box were 7% more likely to get a callback than their similar black counterparts.⁴⁴ However, after passing Ban the Box legislation, that gap grew to 45% more

37. *See id.* (finding that a ruling in *Green v. Missouri Pacific Railroad* held that in cases involving a criminal history exclusion the three “Green factors” relevant to assessing whether an exclusion was job-related and consistent with business necessity were the nature and gravity of the offense, the time passed since the offense or completion of the sentence, and the nature of the job held or sought).

38. *See id.*

39. *See* Agan & Starr, *supra* note 4.

40. *See id.* at 1.

41. *See id.* at 3.

42. *See id.*

43. *See id.* at 33.

44. *See id.*

likely.⁴⁵ This suggests that rather than Ban the Box policies being the tide that lifts all boats, this approach only exacerbates existing discrepancies.

Another study specifically focuses on the impact of Ban the Box policies on low-skilled, young men of color. The researchers culled through individual-level data from 2004 to 2014 in the Current Population Survey focusing on young men ages 25-34 with no college degree, as they are statistically the ones most likely to have been recently incarcerated.⁴⁶ The research team hypothesized that this cohort on which Ban the Box policies would have the most impact.⁴⁷ The study found that Ban the Box policies have net negative effects on employment for the selected cohort. Even when controlling for many factors, young, low-skilled black men were 3.4% less likely to be employed than before, while young low-skilled Hispanic men were 2.3% less than to be employed than before Ban the Box policies came into play.⁴⁸ The study suggests that some underlying phenomenon is resulting in Ban the Box policies hurting the very populations lawmakers and activists sought to help.

Many researchers attribute the pitfalls of Ban the Box policies to an overlap of two systems plagued by discrimination: the labor market and the criminal justice system.⁴⁹ In the labor market, numerous studies have provided evidence that racial discrimination in hiring results in African American and Latino applicants receiving fewer offers.⁵⁰ A resume with a White-sounding name may receive 50% more callbacks for interviews than the same resume with an African-American sounding name.⁵¹ Another study in which a Caucasian, Hispanic, and Black testers of comparable work experience, education, and physical attributes applied for the same series of positions resulted in the white tester receiving a callback or job offer 31% of the time, compared with 25.2% for the Hispanic tester and 15.2% for the Black tester.⁵² Even with Title VII and decades of liberalization of attitudes towards racial justice, the stain of discrimination is prevalent in the labor market.

45. *See id.*

46. *See* Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of 'Ban the Box': Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, U. CHI. 38 J. LABOR ECON. 321, 336 (2020), <https://www.journals.uchicago.edu/doi/pdf/10.1086/705880> [<https://perma.cc/RD7E-HENB>].

47. *See id.*

48. *See id.* at 336.

49. *See* Mychan Cohen & Christina Stacy, *Ban the Box and Racial Discrimination, A Review of the Evidence and Policy Recommendations*, URBAN INSTITUTE (2017), https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf [<https://perma.cc/7HQ6-J5V6>].

50. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AMERICAN ECON. REV. 991, 992 (2004), <https://www.jstor.org/stable/3592802?seq=1> [<https://perma.cc/982S-P2VE>].

51. *See id.*

52. *See* Bart Bonikowski, Devah Pager & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AMERICAN SOCIOLOGICAL REV. 777, 784 (October 2009), <https://scholar.harvard.edu/files/bonikowski/files/> [<https://perma.cc/59D3-ZZRG>].

Racial disparities also permeate the criminal justice system at every step. In 2011, Black Americans constituted 30% of arrests for property offenses and 38% of arrests for violent offenses, despite only making up 12% of the American population.⁵³ Some scholarship reflects the notion that some of the racial disparity in arrests can be attributed to implicit bias, or stereotypes.⁵⁴ Researchers have found that when individuals face quick decision making, such as an arrest, and have imperfect information, they rely on biases, regardless of accuracy, to make a decision.⁵⁵ In these instances, a majority of Americans of all races implicitly associated Black Americans with descriptors such as “dangerous,” “aggressive,” “violent,” and “criminal.”⁵⁶ Since law enforcement officers often find themselves making quick decisions, these stereotypes play a factor.⁵⁷ In both the labor market and the criminal justice system, there is a racial disparity that cannot be explained away by other factors.

Several academics have posited that this may be a case of implicit bias filling in information that otherwise would be answered in a job application.⁵⁸ Employers who have previously included questions about criminal history are likely seeking to screen out applicants who have a criminal record. Whether this is an issue of liability, or concerns about an employee’s character and dependability, the issue of a criminal record has a priority for this employer’s decision-making process. But now, due to Ban the Box policies and legislation, that same employer is no longer permitted to seek information on that applicant’s criminal history until much further into the job-seeking process.⁵⁹ So, what happens? Implicit bias provides the missing information, and the missing information comes in the form of negative stereotypes, specifically about younger, low-skilled men of color.⁶⁰ This is only bolstered by the well-documented evidence that this cohort is statically more likely to have interactions with the criminal justice system.⁶¹ So, whether it be a conscious or uncurious effort, the employers are avoiding job applicants they assume are likely to have a criminal history. This is why young, low-skilled men of color have dramatically worse outcomes than their white counterparts. The young men of color from this cohort who do have a criminal history are no better off than before Ban the Box policies came into play.⁶² In addition, young men of color who do not have criminal histories, and previously

53. See *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System*, THE SENTENCING PROJECT (August 31, 2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/> [https://perma.cc/SJA7-QM3L].

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See Stacy & Cohen, *supra* note 49.

59. See *id.*

60. See *id.*

61. See *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System*, *supra* note 53.

62. See Stacy & Cohen, *supra* note 49.

would have been able to provide that information from the outset on their job application, shoulder the burden of the employers' implicit biases.⁶³

Advocates for Ban the Box policies set out with the best intentions of helping post-conviction community members overcome the stigma of a criminal record. In theory, these policies would help citizens rejoin their communities, and reduce the impacts of a racially biased criminal justice system on communities of color.⁶⁴ Unfortunately, two decades later, there is strong reason to believe that the policies as they stand did not eliminate discrimination, but merely reallocated it.⁶⁵ Lawmakers hoped that without access to criminal history information, employers would turn away from their biases about job applicant with criminal records and focus on an applicant's merit.⁶⁶ Instead, research suggest that employers swapped one set of implicit biases and stereotypes for another, and communities of color suffer from the impacts.⁶⁷

III. WHERE ARE THE (ETHICAL) LAWYERS?

Creators of Ban the Box policies attempted to address systemic racism within the criminal justice system and labor market by allowing job applicants to remove the stigma of having a criminal history. It would seem, however, that while these policies removed the Box itself, they failed to address the underlying discrimination. So, who bears the burden of ensuring these policies actually help communities of color? A growing number of scholars in the legal profession believes it is the lawyers themselves. As the cogs who grind the criminal justice machine, lawyers play a critical role in shaping our nation's response to the system's injustices. One of these injustices very well may be the unintended consequences of Ban the Box policies. This section outlines why the legal community bears the responsibility of addressing the racial disparities perpetuated by the justice system.

The rise of the Black Lives Matter movement has forced all facets of society to address racial inequality, and the legal profession is no different. Over the summer of 2020, the death of George Floyd at the hands of the Minneapolis Police Department, and the subsequent global protests, have increased the pressure on lawmakers and lawyers⁶⁸ to address systemic racism in America with more than just words.⁶⁹ American Bar Association President Judy Perry Martinez

63. *See id.*

64. *See* FAQ, BAN THE BOX, *supra* note 8.

65. *See* Agan & Starr, *supra* note 4.

66. *See* FAQ, BAN THE BOX, *supra* note 8.

67. *See* Stacy & Mychal Cohen, *supra* note 49.

68. *See A National Conversation on Racism: the Legal Profession's Role in Driving Equality*, LAW.COM (June 1, 2020), <https://www.law.com/americanlawyer/2020/06/01/from-big-law-to-boutiques-floyds-death-prompts-outrage-some-action-from-law-firm-leaders/> [<https://perma.cc/5U7Q-WP9F>] (last visited April 11, 2021).

69. *See, e.g., Liberty and Justice... for All? Confronting Systemic Racism and Addressing Civil Unrest—A Call to Action for Young Lawyers*, American Bar Association (July 8, 2020), https://www.americanbar.org/groups/young_lawyers/resources/webinars/liberty-and-justice-for-all-confronting-systemic-racism/ [<https://perma.cc/SF6V-QKKL>] (last visited April 11, 2021).

asserted that lawyers have “a special responsibility to address . . . persisting injustices, including violence and racism that exists . . . through laws that unjustly and disproportionately impact people of color.”⁷⁰ Even as these statements hold great power of persuasion, there is also a growing framework within the Model Rules of Professional Conduct that compel lawyers to take action.

The concept of the legal profession combating bias as a requisite for seeking justice is a newer innovation. It is a departure from the *Model Rules of Professional Conduct*'s core curriculum of client confidentiality, courtroom decorum, and law firm etiquette. In 2015, the American Bar Association updated its *Standards for Criminal Justice: Prosecutorial Function and Defense Function* to add anti-bias provisions for both prosecutors and defense counsel.⁷¹ The Prosecution Standard 3-1.6 specifies that “a prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor’s authority . . . [and] A prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.”⁷² The Defense Provision mirrors this in directing that “defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in *all of counsel’s work* . . . [and] a public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office’s jurisdiction, and eliminate those impacts that cannot be properly justified.”⁷³ These revised standards explicitly call for the legal profession to be its own watchdog for racial discrimination within its body of work.

Stronger evidence that the legal community is beginning to hold itself accountable is the introduction of Rule 8.4(g) to the *Model Rules of Professional Conduct*.⁷⁴ Drafted in 2016, Rule 8.4(g) states:

70. See Amanda Robert, *ABA president says ‘our hearts are aching,’ calls for action in wake of George Floyd’s death*, ABA JOURNAL (June 8, 2020), <https://www.abajournal.com/news/article/aba-president-calls-for-action-in-wake-of-george-floyds-death> [<https://perma.cc/4GGH-58ZF>].

71. See ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 493 (2020) [hereinafter Formal Op. 493].

72. See Criminal Justice Standards for the Prosecution Function, Std. 3-1.6(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [<https://perma.cc/9PZW-3RYB>].

73. See Criminal Justice Standards for the Defense Function, Std. 4-1.6(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/HFN5-JSFR>] (emphasis added).

74. See Abudulai, Chan, Smith & Solebo, *Anti-Racist Speech and Action: Where Does the Legal Profession and Model Rule 8.4(g) Go from Here?*, ABA BUSINESS LAW SECTION (October 8, 2020), <https://businesslawtoday.org/2020/10/anti-racist-speech-action-legal-profession-model-rule-8-4g-go/> [<https://perma.cc/2GWL-JSN6>].

[I]t is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.⁷⁵

The spirit of this amendment was already found in comment 3 of Rule 8.4, but this change not only prioritized the rule's importance by moving the language to the main text of the rule, but expanded on its scope.⁷⁶ These changes included "add[ing] a knowledge component by prohibiting conduct that a lawyer 'knows or reasonably should know' is harassment or discrimination" as defined in Model Rule 1.0 (f), (h), and (j).⁷⁷ The amended rule also "applies broadly to lawyers' 'conduct related to practice of law,' rather than the original Rule's focus on conduct related to the 'administration of justice.'"⁷⁸ The comments further elaborate that conduct related to the practice of law includes interacting with clients, witnesses, court personnel, and others engaged in the practice of law as well as participating in bar association activities.⁷⁹ While some in the legal community have rejected Rule 8.4(g) as an infringement on lawyers' First Amendment rights,⁸⁰ many states have adopted some form of anti-discrimination rule into Code of Conduct, and some have adopted Rule 8.4(g) in its entirety.⁸¹

The 'know or should have known' component of this rule is where we find the challenge of reckoning with the outcomes of Ban the Box policies. The legal community knows of the systemic discrimination within the criminal justice system and that lawyers must play a role in addressing the problem.⁸² But as more data emerges validating the unfortunate reality that Ban the Box policies may actually be hurting communities of color, this knowledge this creates a similar obligation. The aforementioned studies suggest that employers are relying on implicit bias and assuming black and brown applicants are more likely to have a criminal history.⁸³ The result is that discrimination based on race is now baked into the legal system under the guise of reform. As the knowledge of this problem accumulates, it crosses the threshold into something a lawyer would know or should have known.

75. See MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016) [hereinafter MODEL RULES].

76. See Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AMERICAN BAR ASSOCIATION (March 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [<https://perma.cc/6YHW-2TCS>].

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

82. See Robert, *supra* note 70.

83. See Agan & Starr, *supra* note 4.

One possible counter to this argument is that the language of Rule 8.4(g) states is it misconduct for a lawyer to “engage in conduct . . . related to the practice of law,”⁸⁴ which we see from the Rule’s comments includes a wide range of daily practices for lawyers.⁸⁵ The use of ‘engage’ suggests active conduct is the target of the rule. However, this view fails to address the spirit of rule 8.4(g), which is to “[maintain] the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole.”⁸⁶ How can lawyers instill confidence in their profession if the legal community sits idly by as a reform-minded policy wreaks havoc on the very people it was designed to help? More recently, the legal community’s response to this question is that silence is complicity, and complicity is unacceptable.⁸⁷

The protests following the death of George Floyd represented a turning point in the legal profession accepting its own culpability in America’s legacy of discrimination.⁸⁸ After years of protests led by the Black Lives Matter movement over the devaluation of communities of color, leaders in the legal profession have finally stepped forward.⁸⁹ The Washington Supreme Court directly to the professional culpability of the legal community in writing,

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it. . . As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must also recognize that this is not how a *justice* system must operate. . . The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.⁹⁰

Statements from this court, and many others, laid bare the reality that the legal system, and the lawyers within it, have upheld and perpetuated racial inequality in the United States and that this runs contrary to the profession’s commitment to justice.⁹¹

Notions of justice were likely the end goal of activists, lawyers, and lawmakers who shaped and passed Ban the Box legislation. Their policies were going to put the guidelines of the ABA for the legal community “to be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to

84. See MODEL RULES R. 8.4(g).

85. See MODEL RULES R. 8.4(g) cmt. 4.

86. See Formal Op. 493, *supra* note 71.

87. See Robert, *supra* note 70.

88. See *id.*

89. See *id.*

90. See *Letter to Members of the Judiciary and the Legal Community*, WASHINGTON STATE SUPREME COURT (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> [<https://perma.cc/8B8E-RRSD>].

91. See *id.*

historically persistent biases like race, in all of its work”⁹² into practice. But two decades after its inception, the data show that Ban the Box may be doing just the opposite.⁹³ This brings the legal profession to an uncomfortable question—what now? If the data shows that Ban the Box policies are perpetuating implicit biases, and the standard bearers of legal ethics are calling upon lawyers to seek out and eliminate improper biases in *all of counsels’ work*, it seems that the natural conclusion is that it is a profession-wide responsibility of the legal profession to right the unforeseen wrongs of Ban the Box policies. If legal ethics is going to incorporate the responsibility of lawyers to investigate and eliminate implicit bias that alters the course of justice, then that must include the crossroads of employment law and the criminal justice system that is Ban the Box.

IV. LOOKING FOR SOLUTIONS

The ethical obligation of the legal profession to mitigate the damage of Ban the Box policies can take many forms. The researchers in the aforementioned studies have not called for undoing.⁹⁴ Ban the Box policies, nor does this Note. However, there are many avenues where the legal profession can assist. The section explores some of these options.

Even as Ban the Box took to the national stage, experts offered the alternative model of an “employability certificate” issued by local courts.⁹⁵ In this model, a judge would assess a candidate’s actions since his or her conviction and issue the certificate if the judge believe this person has been rehabilitated.⁹⁶ Advocates of this concept hoped that these certificates would convince employers to give job applicants with a criminal history assurance about the applicant’s trustworthiness.⁹⁷ Early research found that having an employability certificate dramatically improves a job applicant’s chances at receiving a call back.⁹⁸ This option could allow judges to fulfill their ethical obligation by lending their own credibility to a job applicant with this certificate. However, this model runs the risk of placing too much weight on the perceptions of judges to define how and when a person is rehabilitated. This could result in dramatic differences across jurisdictions. Judges themselves might be too conservative in their assessments out of fear that a person they deem ‘rehabilitated’ would offend again and place the judge’s judgement in question. Despite these concerns, some form of affirmative

92. See Criminal Justice Standards for The Prosecution Function, Std. 3-1.6(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [<https://perma.cc/2E75-E7G5>].

93. See Agan & Starr, *supra* note 4.

94. See *id.* at 40.

95. See Jennifer Doleac, *Forget “ban the box” and Give Ex-Prisoners Employability Certificates*, BROOKINGS INSTITUTE (December 15, 2016), <https://www.brookings.edu/opinions/forget-ban-the-box-and-give-ex-prisoners-employability-certificates/> [<https://perma.cc/TR5T-WDDR>].

96. See *id.*

97. See *id.*

98. See *id.*

certificate would allow individuals with criminal history to prove their rehabilitated status while allowing for more transparency.

Another avenue for remedies includes expungement or sealing criminal records. If the purpose of Ban the Box is to help returning citizens continue life after incarceration, clearing or sealing their criminal records would allow them to enter the workforce without the additional burden of past actions.⁹⁹ This option would likely be limited in scope due to public discomfort with expunging certain kinds of offenses.¹⁰⁰ There is also the difficulty with fully wiping the slate clean in the age of the internet and big data.¹⁰¹ However, expungement and sealing records is relatively low-cost and noncomplex means of undoing the some of the damage to communities of color.¹⁰² This option also helps individuals with criminal histories in navigating the housing and education markets, which also tend to factor in the criminal history of an applicant.¹⁰³ While this option may offer some promise, it still does not fully get to the problem at hand, which is the assumption of criminal record due to race.

Perhaps the most effective remedy is greater enforcement of equal employment legislation. The Urban Institute has suggested that “employers who have government contracts should be held to standards of nondiscrimination, and these guidelines should be updated to be more pertinent to current economic situations and labor force demographics.”¹⁰⁴ They have also called for increased use of government testers and systemic reviews of employer data.¹⁰⁵ Lawyers can help increase enforcement by strategically litigating against companies who fail to follow the EEOC 2012 updated guidelines and violate Title VII in the process.¹⁰⁶ As was the case with the suit of Dollar General,¹⁰⁷ bringing suits against larger companies enforces and spreads awareness of the regulations in place to protect individuals with criminal records and communities of color. Lawyers can also help craft policies that promote diversity in hiring to counteract the implicit bias phenomenon. This would allow lawyers to get in front of the problem, rather than seeking compensation for an employer’s past wrongs.

While these ideas offer concrete solutions grounded in the legal profession, they still fall short of truly addressing the underlying problem. Lawyers, law makers, and advocates wanted to believe that Ban the Box policies would combat bias and stereotypes, but it seems they have trades one set for another. Instead of stereotyping job applicants with criminal histories, employers are now

99. See Stacy & Cohen, *supra* note 49, at 18.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at 21.

104. See Stacy & Cohen, *supra* note 49, at 15.

105. *See id.*

106. See Stacy & Cohen, *supra* note 49, at 15; *see, e.g.*, Consent Decree, *supra* note 35.

107. See Ahern, *supra* note 34.

stereotyping applicants of color. For the legal profession to truly commit to its standards of justice, it will have to tirelessly commit to anti-bias, anti-racist action.

CONCLUSION

This Note has examined the evolution of the Ban the Box movement from its inception, to its flourish, to its flaws. The campaign to aid returning citizens in their reentry process has gone from a noble goal of activists to the policies and procedures of the White House. It represents a shift in the United States punitive view of the criminal justice system by seeking to help those who have served time rejoin society. However, lifting the burden of implicit bias for those with criminal histories was not entirely the net gain activists and lawmakers hoped it would be. Instead, research suggests that the burden of discrimination has fallen on the shoulders of young men of color, which is already the cohort most actively impacted by the implicit bias within the criminal justice system.

As leaders of the legal profession call for lawyers to not only acknowledge but be accountable for the role they have played in perpetuating systemic racism, it is clear that lawyers must step in to prevent further damage. This Note has argued that taking action to prevent side-effects of Ban the Box policies is not just a question of moral inclination. There is a professional ethical duty of lawyers and judges who operate within the criminal justice system to ensure that they are not perpetuating injustice in the name of seeking it.