# Chapter 4
# A Critical Look at Ban-the-Box Policies and Their Unintended Consequences

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## ABSTRACT

*Ban-the-box policies were passed to help people with criminal backgrounds get jobs. These policies were developed after it became clear that large swaths of the population, primarily men of color, were being systematically disadvantaged and unable to obtain work. While initial research showed that these policies were successful, subsequent, more critical studies indicate that while ban-the-box policies help ex-felons obtain work generally, they may actually do more to hurt minority populations than they do to help. This happens because employers, lacking the information from "the box," may be using other information, including statistical discrimination to determine who to hire. This chapter discusses this unintended consequence including its link with the race-neutrality of the policy and suggestions to fix it.*

## INTRODUCTION

Even though it has been nearly 60 years since the passage of the major civil rights legislation packages meant to end de jure segregation and inequality in the United States, racial inequalities continue to plague our communities. Historically, though well-intentioned, civil rights laws consisted primarily of simply removing the official barriers to an individual's life, liberty, and pursuit of property. The drawback to this

approach is that it leaves any remaining inequalities as the fault of the individual experiencing them, when research and experience both tell us that that structures themselves that were created to uphold the old and unequal ways need to be taken apart and reconstructed.

It is in light of the understanding of the latter that ban-the-box policies appeared. These policies are somewhat unique in that they acknowledge that it is the system itself, the criminal justice system in this case, that creates disadvantage and because of that it there needs to be a systemic remedy. Ban-the-box policies don't work solely to protect the interests of minorities with criminal histories, but rather the more general group of people with criminal histories. Formulating the policy this way, acknowledging the link between race and the power structure but not limiting it to a fixed notion of race as a biological group links nicely with the focus on critical legal theory (Crenshaw, Gotanda, Peller and Thomas 1995) during the late 20th and early 21st centuries.

Further, there are a significant number of Americans who believe that policy should always, or at least usually, be race-neutral (e.g. DeSante 2013; Peffley and Hurwitz 2002; Rabinowitz, Sears, Sidanius, and Krosnick 2009). This includes progressives who posit that minority group advancement is more likely through social programs and policies that have universal appeal, minimizing talk of race. The argument is that when policies are presented so as to help Black people or other people of color, popular support for these policies will wane. There is reason to believe that legal support for disparate impact law is declining as well. In 2009, Supreme Court Justice Antonin Scalia said, "Title VII's disparate-impact provisions place a racial thumb on the scales [raising equal protection concerns] …the war between disparate impact and equal protection will be waged sooner or later." (Ricci v. DeStefano 55 U.S. 557, 594-97, 2009).

By scrubbing race from the language of race-neutral policies such as ban-the-box we risk concealing the specific minority experience. One example of how this plays out can been seen in how the Census Bureau reports data on incarcerated populations. By *not* including employment and poverty data for incarcerated populations as part of their reports, the Census Bureau is systematically inflating these numbers for communities of color (McCristal Culp Jr. 1994). Similarly there are issues with ban-the-box policies that are largely going unaddressed and there is growing evidence that due to the colorblind nature of the policies they are potentially harming the same communities that they are meant to help.

In this chapter the author will discuss the history of ban-the-box and how it developed from an understanding of the structural and systemic problems that the criminal history question on employment applications was causing for people of color, and most specifically Black men. The chapter then moves on to the research surrounding the successes of the ban-the-box policies and how that research propped

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