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The Limits of Ban-the-Box Legislation



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Introduction

Nationwide, 36 states and over 150 cities and counties have adopted what is widely known as “Ban the Box” (BtB) (NELP 2020). These policies require employers to remove conviction and arrest history questions from job applications and delay background checks until after a conditional offer has been made.¹ The policy is designed to encourage employers to consider a job candidate’s qualifications first – without the stigma of a criminal record – in the hopes of reducing barriers to employment that justice-involved individuals face.

We imagine two ways that BtB might work. The first is by changing employers’ hiring practices. Existing research on the former indicates the policy does increase callback and hiring rates for people with criminal records (Agan and Starr 2016; Atkinson and Lockwood 2014; Berracasa et al. 2016; Shoag and Veuger 2016), but effects appear highly contingent on the race of the job seeker and on the employment sector.² The second way that BtB might reduce barriers to employment is by altering whether and how individuals with criminal records search for work. No research to date, however, has examined whether individuals with criminal records know about BtB, their perception of how efficacious it is, and what impacts the policy’s implementation has had on justice-involved individuals’ job search patterns.

To address the latter shortcoming, we surveyed 351 probationers in the San Francisco Bay Area and conducted in-depth interviews with a subset of 43. We learned that three major barriers continue to limit individuals’ ability to benefit from the policy. First, few of our survey respondents knew about BtB at all, much less that it had been implemented. Second, whether they knew about BtB or not, the majority perceived that they had recently been discriminated against because they had criminal records, with a significant minority to a majority reporting discrimination at each stage of the hiring process. Third, our Black respondents also perceived that employers continue to discriminate against Black applicants, making finding and keeping work extremely difficult.

In this brief, we elaborate on these three points in the hopes that our findings will inform the development not only of fair chance policies aimed at increasing employment opportunities for justice-involved individuals, but also of a broader set of policies on employment and re-entry.

¹ In 14 states, the policy applies to both the public and private sector. In 22 states the policy applies only to public sector jobs and government contractors. Three-fourths of the US population live in a jurisdiction that has banned the box (NELP 2020).

² In the private sector, for instance, BtB reduces the likelihood that employers will call back or hire young Black and Latinx men (Agan and Starr 2016; Doleac and Hansen 2016; see Holzer et al. 2007, for a pre-BtB discussion about how access to information about individuals’ criminal records shaped employers’ hiring patterns differently by race).

Few Jobseekers with Criminal Records Know about Ban-the-Box

BtB policies vary by state and municipality. In California, BtB was implemented statewide in 2018. Before this, the law covered different types of jobs in San Francisco and Oakland.³ The statewide policy applies to both public and private sector employers and restricts them from (a) including questions about criminal records on applications; (b) asking about criminal records in job interviews; (c) limiting their consideration of records to only convictions, not arrests, within the past seven years; and (d) running criminal background checks only after a conditional offer is made. If an employer decides to withdraw a conditional offer after a background check, they must provide the background check to the

applicant to verify its accuracy and to explain why the offense(s) for which they have been convicted conflict with the position. Certain professions and positions are exempt.

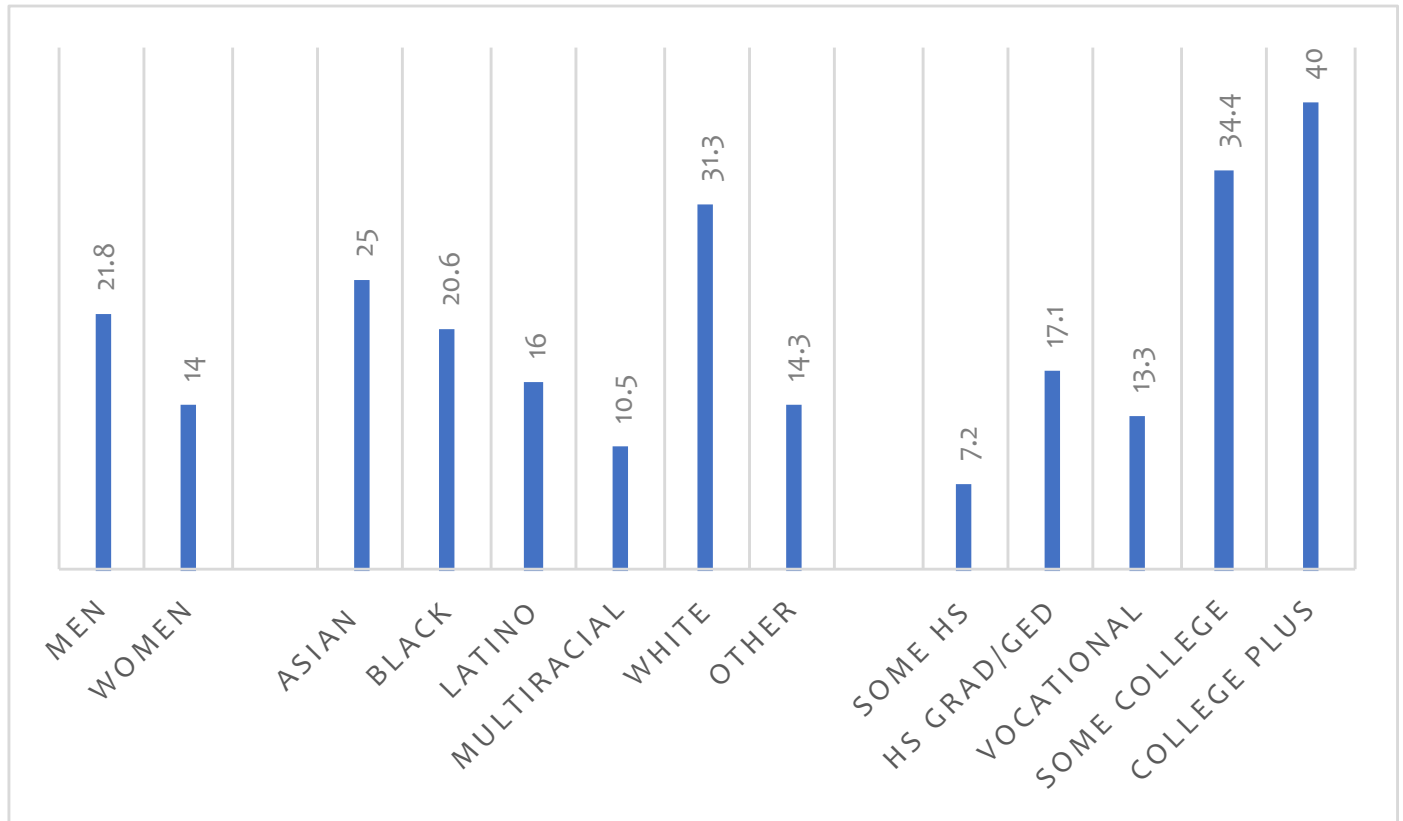
Among our survey respondents, relatively few knew about BtB. Just twenty percent of those surveyed claimed any knowledge. Among those with any knowledge, over half (58 percent) knew that BtB had been implemented in San Francisco and Oakland ten years prior; over half knew that BtB had recently been implemented statewide (59 percent); 85 percent knew that employers could do a criminal background check only after making a conditional offer; and 38 percent knew that prospective employers were required to give them a copy of the background check report if they withdrew the conditional offer. Just seven percent of respondents knew all four points.

Figure 1. Among Those with Any BtB Knowledge, Percentage of Respondents Who Knew about Different Aspects of the Policy (N=71)



³ In 2005 and 2007, San Francisco and Oakland, respectively, passed BtB policies that applied to government agencies but not private employers. In 2014, San Francisco extended their policy to both private and public sector employers.

Figure 2. Percentage of Respondents Who Knew about BtB, by Sample Characteristics (N=351)



Who knew what varied by race, gender, and educational attainment (see Figure 2). A higher percentage of White (31 percent) and Asian respondents (25 percent) reported knowledge of BtB than did respondents who self-identified as Black (21 percent), Latinx (16 percent), and multiracial (11 percent). A higher percentage of men than women knew (22 vs 14 percent). And individuals with a higher level of education reported knowing about the policy more than did the lesser-educated. Whereas 40 percent of those with college degrees or more knew about BtB, 34 percent of those with some college, 17 percent of high school graduates or equivalents, and just seven percent of high school non-completers reported knowledge of the policy.

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Although one might benefit from BtB without knowledge of the policy’s existence, lacking such knowledge can hinder job market success. Several recent

studies have found that after penal system contact, people are less likely to search for work at all, and those who do search tend to do so less effectively.⁴ This is in part due to experiences of frustration with actual or perceived discrimination against people with criminal records.⁵ People who have come across the box on applications in the past may assume that discrimination persists, deterring them from applying. Knowledge about BtB might mitigate some of these concerns. We found that it did. Twenty-one percent of those who were aware of BtB at the time of the survey reported having devoted more energy to job searches after learning about the

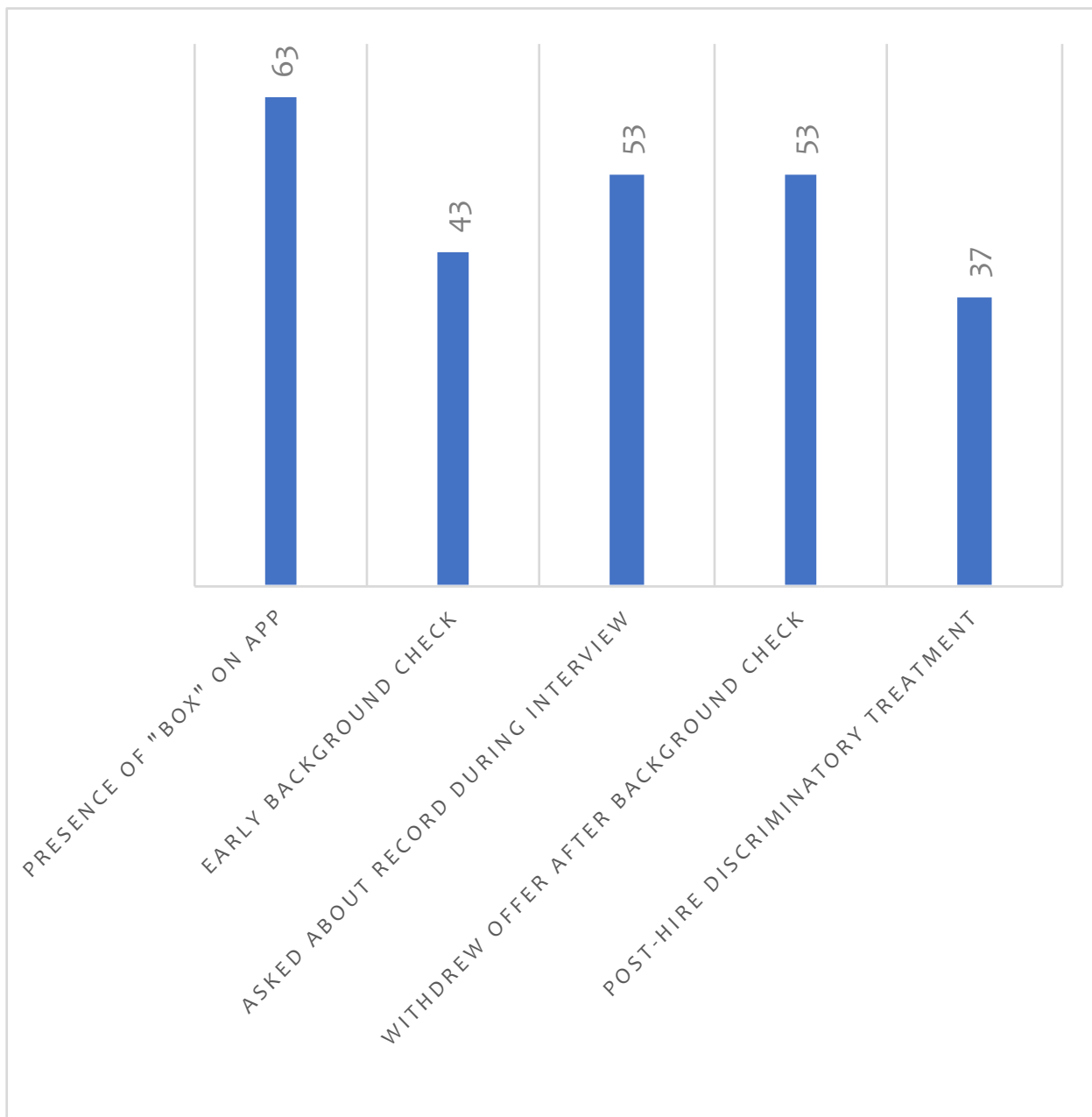
⁴ Smith and Broege (2019) found that a significant proportion of those who had searched for work prior to penal contact, arrest, conviction, or incarceration were less likely to search for work after and those who did search tended to use fewer and less effective methods.

⁵ Sugie (2018) reports that immediately after release from prison, the formerly incarcerated overwhelmingly searched for work, but within one month their search efforts plummeted, likely the result of frustration and discouragement. See also Apel and Sweeten (2010) and Visser and O’Connell (2012).

policy. Among survey participants who learned about the policy for the first-time while taking the survey, 47 percent reported that they would likely devote more energy to searching because of the policy. As will be discussed in subsequent sections, many of those who initially increased their job search engagement after learning about the policy subsequently reduced that engagement after experiencing continued discrimination by employers despite the policy.

Among survey participants who learned about the policy for the first-time while taking the survey, 47 percent reported that they would likely devote more energy to searching because of the policy.

Figure 3. Percentage of Respondents Who Perceived Discrimination, by Stage in the Hiring Process (N=282)



Perceptions of Employer Discrimination against Individuals with Criminal Records Persist

Recently, researchers have examined the effects of BtB on employers' behavior, comparing the callback and hiring rates for applicants with criminal records before and after the policies' implementation. Findings generally indicate that with policy implementation, callback and hiring rates increase for people with criminal records (Agan and Starr 2016; Atkinson and Lockwood 2014; Berracasa et al. 2016; Shoag and Veuger 2016). Among our survey participants, however, the general perception was that, despite BtB, employers continue to discriminate against individuals with criminal records at every stage of the hiring process. Indeed, among survey respondents who had applied for jobs in the past five years, 57 percent perceived discrimination at one or more stages in the hiring process (see Figure 3).

Job Ads

Although employers in most industries can no longer use job ads to explicitly discriminate against those with records, several of those interviewed described seeing with increased frequency job advertisements that require a driver's license and a good driving record, even when the job did not involve driving. Jimmy Brewster⁶ was one such respondent. His driver's license had been suspended several times due to warrants and criminal violations. As he explained, these ads discouraged him from even applying:

For one, a lot of jobs now are requiring driver's licenses and good driving records even though the job does not require a driver's license or doing any driving or transportation. But a lot of them are requiring that and then it's just, I don't even try now because once you see my driving record, I look like a whole another person.

This was one of a few strategies that job seekers believed employers used as effective workarounds, to avoid hiring justice-involved individuals.

Banning the Box?

⁶ All names are pseudonyms.

Sixty-three percent of survey participants had recently come across the box when applying for jobs. Although discrimination was most frequently experienced by respondents in this way, rarely was it the only form of discrimination they experienced during the hiring process. Indeed, 95 percent of respondents who experienced discrimination faced it beyond the initial job application. Specifically, 43 percent reported that employers performed background checks before interviewing them; and 53 percent reported that, during their interviews, employers asked them if they had a criminal record. Although these are now all violations of BtB, several of those interviewed also reported experiencing illegal forms of discrimination in their recent job searches. Howard Benson both came across the box and was questioned during an initial interview about his record since the passage of BtB in California. About this experience, he reported the following:

When I first got out seven months ago, the place I went to was Target, and right on the application, it even still had the box there, and I even asked them during the interview why that was still on the application. They said they were old applications. I said, "I did check the box there, and I want to tell you what I went to prison for, and I'm wanting you to know this so that you can see that I'm being honest, and I want to change my life, but I need a job to do that." I was really good at telling them, and they said, "Oh, Oh, no, no, no. No, no. Okay. I think we're going to have to end the interview now." They ended the interview after I told them that.

Others described feeling stuck when asked about their criminal records prior to a conditional offer. Although they had the right not to disclose their record before a conditional offer was made, they also knew that once a post-offer background check was conducted, their record would be revealed, and the employer would consider their earlier response deceitful.

Deciding if and to what degree to reveal about one's criminal record was especially challenging for two categories of job seekers – individuals with convictions beyond seven years and individuals with arrests that did not result in a conviction. Although BtB prohibits employers from discriminating against applicants for any arrests that did not result in convictions and for any convictions older than seven years, several study participants reported ongoing discrimination for these reasons. Importantly, one-third of felony arrests do not result in conviction, and many others are reduced to

misdemeanors, but screening companies still provide employers with records of arrests while failing to include information on the final dispositions of cases (NELP 2013).

Many study participants, however, believed these distinctions – arrest vs conviction, for instance – made little difference to employers. Knowledge of an arrest, any arrest, was all employers needed to eliminate applicants from further consideration. This was Jerome Williams’ perception. He perceived that he had been discriminated against consistently for a drug-related arrest that he had not been convicted for.

I don't think that [the employer is] even concerned if you've ever been convicted or found guilty or not. Like the fact that you've been arrested at all kind of proves your guilt in a way. Because it's like, okay, you've been arrested so you did something wrong, even if you didn't serve time, or even if you've never been so-called convicted. . . . It doesn't really matter if you go to trial and a jury or a judge found you innocent. It's like the mere fact that you had handcuffs placed on you, you were put in the back a police car, you were booked, and you were placed in a jail cell, you know it kind of like, it's ... I don't know. It's like it's still a strike. You're still being condemned in a way because you've had contact with police.

This perception is supported by prior research. For instance, Boshier and Johnson (1974) and Schwartz and Skolnick (1964) both show that employers are less inclined to make job offers to candidates who have been arrested, even if arrests did not result in convictions. Indeed, in some cases employers perceived job seekers who had only been arrested as badly as job seekers who had been convicted of crime.⁷

The Conditional Offer

Having a conditional offer withdrawn after a criminal background check was performed was far and away the form of discrimination experienced most transparently by those we interviewed. Under BtB legislation, if employers decide to withdraw a conditional offer, they are required by law to provide the applicant with a copy of the background check

⁸ In general, several studies have found a strong link between arrest (and no conviction) and employment problems (Thornberry and Christenson 1984; Grogger 1992; Bushway 1998).

report, to specify why the applicant’s conviction disqualified them for the job, and to give applicants an opportunity to correct any misinformation on their record that led to the offer withdrawal.

Fifty-three percent of survey participants who applied for jobs in the past five years reported having an offer withdrawn after employers conducted the criminal background check. Furthermore, employers did not offer them a copy of the report, inform them about why their offense disqualified them, or give them a chance to correct the record. Many study participants reported being told by employers directly that it was because of their background checks that the offer was being withdrawn. Others, however, were told the offer was being withdrawn for different reasons – “We can’t hire you at this time.” “We decided to go a different direction.” Or, “We’ve decided not to hire for this position.” There is no way to know how many of these withdrawn offers were due to criminal records or a change in employers’ circumstances, but of those who had their offers withdrawn, all perceived that they had lost the job because of their criminal record. In their minds, employers’ explanations were post-offer workarounds to BtB, allowing them to discriminate against justice-involved job seekers without experiencing the negative consequences of having done so.

Many also felt that employers’ ability to run background checks after a conditional offer made BtB pointless or even counterproductive. This was at least in part because, some argued, the law was unenforceable. Who would they inform that their rights had been violated? What, if anything, would be done? One study participant, David Walker, described his reaction when an employer told him over the phone that they would not be hiring him because of his record, without also offering a copy of the report, a chance to contest, or an explanation.

I tried to tell her that was illegal, but I told her I didn't care, but I'm just letting you know. And she didn't seem to give a hoot either. I wish there was some way ... Because that fair ordinance stuff? That's a great law or whatever. But does it really matter? There's nobody enforcing it. No one is going to come and ... I guess you can get a public defender or a lawyer to call and tell them. But then, no one is going to actually physically enforce it, or give them any fines--so it kind of sucks.

Others in David’s situation did not confront employers as David had. Rather, embarrassed and/or angry, they simply walked away. The following two excerpts are illustrative of this point.

For me, my experience, BtB didn’t make a difference. In fact, it was kind of like opposite . . . I did a lot of paperwork. I spent a lot of time talking to the interviewer and the coordinators just to be told at the end “Oh, you have a record.” It’s like, well that was a waste of your time, my time, and the rest of the world’s time if based on my record alone you were going to deny me. I’d rather they know from the start. Personally, myself. I would rather you tell me “I’m not going to hire you” before we go through an extensive interview and waste lots of my time. Especially when my money is low and I need this time to go network and do something else. . . You have to understand that that time is valuable and I’ve been through that three times. — Andrew Martell

It doesn’t do anything for the person with the record. I think that it is just a bullshit thing that they conjured up to make it look like they’re trying to help people with their criminal records without doing anything. . . It’s fucking a bunch of propaganda. — Brian Carver

After gaining new hope that BtB might unlock new opportunities, it was not uncommon for those who continued to experience discrimination to return to applying exclusively for jobs where employers do not conduct background checks. Others have decided that, rather than waiting to be asked, they would instead volunteer information about their criminal records early in the process, knowing that they might not have a chance to explain themselves later and preferring not to waste their time and efforts on employers who were simply unwilling to hire job seekers with criminal records. Both outcomes are unintended consequences of the policy.

“It doesn’t really matter if you go to trial and a jury or a judge found you innocent. It’s like the mere fact that you had handcuffs placed on you, you were put in the back a police car, you were booked, and you were placed in a jail cell . . . I don’t know. It’s like it’s still a strike. You’re still being condemned in a way because you’ve had contact with police.”

Discrimination Post-Hire

Finally, even those who managed to get hired perceived that, because of their criminal record, discrimination continued. Thirty-seven percent reported that, once hired, they were discriminated against in different ways – wage-theft, limited promotion opportunities, high risk of termination, and otherwise poor treatment.

Race, Ethnicity, and the Perceived Impact of Ban-the-Box

Although recent research finds that BtB policy implementation is associated with callback and hiring rates increases for people with criminal records (Agan and Starr 2016; Atkinson and Lockwood 2014; Berracasa et al. 2016; Shoag and Veuger 2016), effects appear highly contingent on the race of the job seeker and on the employment sector. In the private sector, for instance, BtB reduces the likelihood that employers will call back or hire young Black and Latinx men (Agan and Starr 2016; Doleac and Hansen 2016; see Holzer et al. 2007, for a pre-BtB discussion about how access to information about individuals’ criminal records shaped employers’ hiring patterns differently by race).

Furthermore, after the implementation of BtB, recent audit studies have found increased racial disparities in employer callbacks between Black and White job applicants. For instance, Agan and Starr (2016) found that after BtB implementation in New York City and New Jersey, racial disparities in callbacks jumped from a seven percent White advantage to a 45 percent White advantage.⁸ The researchers offer two speculations for this – that the growing disparity is attributable to employers’ disinclination to hire Black and Latino applicants who, because of BtB, can no longer prove they have clean records; and that growing disparities are attributable to employers’ desire to allow White applicants with records to benefit from the favored status that White job applicants without criminal records enjoy.

Consistent with findings from prior research, we identified several ways that Black job applicants with

⁹ In a national study Doleac and Hansen (2020) found BtB decreased the probability of employment by 3.4 percentage points (5.1%) for young, low-skilled Black men and by 2.3 percentage points (2.9%) for young, low-skilled Hispanic men.

criminal records were not positioned as well as their White counterparts to benefit from the policy. Above and beyond the fact that a lower percentage of Black and Latinx respondents knew of BtB's implementation in California, we also found that Blacks perceived discrimination at higher rates at each stage in the hiring process – having background checks done before their interviews (51% vs. 41%), having conditional offers withdrawn after background checks were done (57% vs. 44%), and being discriminated against based on their record after being hired (42% vs. 22%). Although some of these reports of discrimination include instances occurring prior to BtB, there is no reason to believe that BtB would mitigate the uneven mark of a criminal record. Considering strong evidence that in some contexts race might increasingly be used as a proxy for a criminal record, disparities might even be exacerbated.

Indeed, in our sample, many job seekers with criminal records felt that, once employers could no longer inquire about criminal records, race and ethnicity had become a primary proxy for a criminal record. Black and Latinx study participants drew from personal experiences and perspectives to illustrate this point.

Janelle Watkins described how she felt employers looked at hiring people like her. Janelle was a practicing Muslim, and she believed that she continued to face discrimination since BtB because of her record.

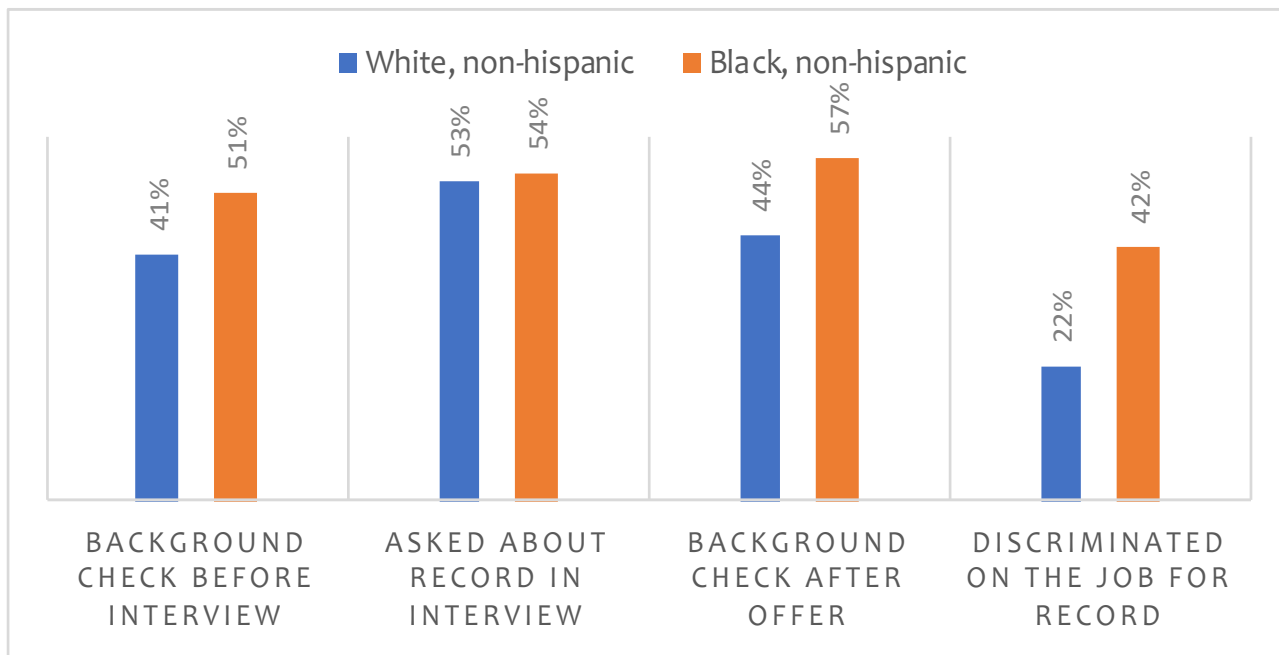
So, if I don't get to know if you have a criminal background, I'm just only going to hire White people. If I don't get to screen them out, then I'm not even going to look a Muslim's way. . . It makes them have a reason to be more narrow, I think. But [BtB] does make them go around the system differently. It's not going to force anybody to be good or be moral or be legal.

During the interview stage of the hiring process, Black and Latinx applicants also felt that, compared to White applicants, they experienced more suspicion and scrutiny. One Black study participant, Curtis Jackson, shared that, compared to the scrutiny he faced, his White acquaintances with criminal records were given passes.

I know plenty of people who have records that are White, and they don't even ask them about it. They say, "Oh, okay. We're not tripping over that." They don't even do anything about it. And I don't think that's fair. And my White friends, they know that's not fair, but it's a lie that they're being given ... you know? I mean, this is just what it is.

Finally, a common sentiment among those interviewed was that once records were revealed, White job applicants had a distinct advantage over Black applicants in building rapport, gaining trust, and ultimately being

Figure 4. Rates of Post-Application Discrimination, by Race (N=282)



redeemed and hired by the employer. When asked about the benefits of BtB, one Black respondent said, “I’ve seen it only give passes to the White boy who has a record, and (employers) say, ‘Okay, well, he can clean up their act.’” Another offered this profound observation, “So, if [a White person] have a criminal record, something must have gone wrong; there is a story there. And you hear the story, and then you humanize. And once you humanize, you are more willing to employ.” Pager et al. (2009) similarly found that building rapport with employers during the job interview increased the likelihood that men with criminal records would get hired, but rapport-building only benefited White job seekers; in this situation, too, Black job seekers were disadvantaged.

Conclusion: Strengthening Fair Chance Policies and Alternatives

The research findings presented here point to several policy recommendations. Few knew about BtB and the few who did didn’t know much. This lack of knowledge limits the justice-involved job search and contributes to poorer employment outcomes. The public needs to be educated about the policy, about their rights, and what this means in terms of what they should expect from employers. Probation offices, jails/prisons, local news outlets, community organizations and other places that the justice-involved typically travel should increase outreach and communication about the legislation. Employers should also be educated, assuming this has not already happened.

BtB legislation can be strengthened. Other states with BtB policies do not apply to private sector jobs, do not limit background checks to only after the conditional offer, do not require notices of denial, and do not have any restrictions on professional licensing agencies from discriminating those with records. And while California’s BtB legislation is already considered among the most comprehensive, it could be strengthened as well. By expanding blanket ban prohibitions to all occupations, prohibiting consideration of dismissed convictions or convictions under certificates of rehabilitation, and prohibiting consideration of certain record information (e.g., arrests, lesser offenses) for professional licenses, employment outcomes for justice-involved job seekers in California can be substantially improved.⁹

⁹ <https://www.nelp.org/publication/unlicensed-untapped-re->

Robust enforcement is also sorely lacking. Even if the policy is strengthened, it would likely not make much of a difference unless the enforcement apparatus is significantly strengthened as well and considered at every stage of the hiring process, from job ads to post-hire experiences. Resources need to be funneled into identifying, investigating, and sanctioning employers who are not in compliance.

Regardless of how strongly BtB is expanded and enforced, however, our findings point to the need of more comprehensive fair chance policies. Many study participants felt that what was most needed to prevent employer discrimination was the expungement or sealing of criminal records to prevent employers from seeing criminal records in the first place. Some states, including California in 2019, have passed Clean Slate legislation that automatically seals certain convictions and arrests. Under California’s law, starting in 2021 relief will be automatically granted for many arrests not resulting in conviction, for infraction and misdemeanor convictions, and for some less serious felony convictions. Still a significant set of felony arrests not leading to conviction are excluded and the law does not yet provide any relief for arrests or convictions before 2021.¹⁰

Yet, our findings that Black and Latinx applicants with records felt that their race was increasingly being used as a proxy for criminal records now that employers could not explicitly ask, a finding supported by audit studies. This suggests that legislation aimed at further record concealment, such as BtB and Clean Slate legislation, might provide only limited relief for non-White justice-involved individuals. Study participants described how employer incentives such as subsidies and tax credits, proactive job-training and “felon-friendly” hiring programs, and job referral programs through probation departments improved their employment prospects.¹¹ In general, our findings also suggest that affirmative steps need to be taken to benefit Black job seekers specifically, including interventions that give them an extra hand because, through no fault of their own, they have higher barriers to overcome.

[moving-barriers-state-occupational-licenses/](https://www.nelp.org/publication/unlicensed-untapped-re-moving-barriers-state-occupational-licenses/)

¹⁰ https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=2019202000AB1076

¹¹ Several studies have found evidence that when information on criminal records is available, firms are more likely to hire low-skilled Black men (Bushway 2004; Holzer, Raphael, and Stoll 2006; Finlay 2009; Stoll 2009).

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About IRLE

The Institute for Research on Labor and Employment is an interdisciplinary institute at the University of California, Berkeley that connects world-class research with policy to improve workers' lives, communities, and society. IRLE promotes better understanding of the conditions, policies, and institutions that affect the well-being of workers and their families and communities by informing public debate with hard evidence about inequality, the economy, and the nature of work.

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