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Shawn Anderson

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Ban The Box: Mediation's Place in Criminal Reentry and Employment Rights

Shawn Anderson*

I. INTRODUCTION

On January 1, 2018, California became the newest state jurisdiction to implement a Ban the Box ordinance.¹ More formally known as Assembly Bill 1008, this new law prohibits employers from asking about any applicant's criminal background prior to granting the applicant a conditional offer of employment.² This statewide ordinance is part of a growing nation-wide recognition of the importance of persons with convictions' civil rights and the United States' need for a reentry program that helps those leaving the criminal justice system to become rehabilitated citizens.³

However, despite this general shift toward more holistic criminal reentry policies, jurisdictions have been inconsistent in their implementation of these ordinances' details.⁴ Given that many new jurisdictions are considering adoption of Ban the Box ordinances of their own, now is the time to settle on a particular solution to one such inconsistent policy within Ban the Box ordinances: method of enforcement. When an employer fails to comply with the ordinance, many jurisdictions have an independent government agency conduct an investigation, some jurisdictions do not even specify a method of enforcement,⁵ and a few jurisdictions offer some form of mediation between the applicant and the employer.⁶ This note will provide general insight into a

* B.A., University of Oregon, 2012; J.D. Candidate, Pepperdine University School of Law, 2019.

¹ NELP, *California Governor Brown Signs Fair Chance Act, Extending 'Ban the Box' to Private Employers*, NAT'L EMP. L. PROJECT (Oct. 15, 2017), <http://www.nelp.org/news-releases/california-governor-brown-signs-fair-chance-act-extending-ban-the-box-to-private-employers/>.

² Legis. Counsel, Assemb. B. 1008, § 2(a)–(b) (Ca. 2017).

³ Beth Avery & Phil Hernandez, *Ban The Box: US Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT, (Aug. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (noting that over 150 counties and cities have adopted Ban the Box).

⁴ Rebecca J. Wolfe, *The Safest Port in the Storm: The Case for a Ban the Box Law in South Carolina*, 9 CHARLESTON L. REV. 503, 525 (2015).

⁵ Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize A New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2826 (2015).

⁶ KATHLEEN PATTERSON, *The Impact of "Ban the Box" in the District of Columbia*, OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR 7 (June 10, 2016), <http://zd4l62ki6k620lqb52h9ldm1.wpengine.netdna-cdn.com/wp-content/uploads/2018/07/FCRSA->

growing civil rights movement through discussion of Ban the Box, then make the case for mediation as the best alternative for providing a remedy to applicants whose rights have been violated. Mediation can more effectively achieve the goals of Ban the Box by incentivizing applicants to report instances of nonconformity with the law, empowering the applicants to engage in honest discourse with their prospective employers, and combatting the negative stigma surrounding persons with criminal records that often keeps employers from hiring the qualified employees that they need.

II. CIRCUMSTANCES GIVING RISE TO THE NEED FOR BAN THE BOX

A. *United States Incarceration*

As of 2017, the United States held over 2.3 million people in confinement: more people per capita than any other nation.⁷ This includes those incarcerated in federal prisons, state prisons, local jails, Indian Country jails, juvenile detention centers, prisons in U.S. territories, military prisons, civil commitment centers, and immigration detention facilities.⁸ These figures do not include the people who are sent to jail each year, around 11 million, and who may be released within a short period of time.⁹ As recently as 2011, the National Employment Law Project estimated that 65 million adults in the United States have criminal records; that is over one-in-four adults in the United States.¹⁰

Upon release, this portion of the population is subject to a host of negative stereotypes and crippling roadblocks as they take steps toward reintegrating into society.¹¹ The stigma attached to people with convictions can last decades despite the fact that, after six or seven years of abiding by the law, people with criminal records are roughly as likely to commit a new offense as those who have no criminal record.¹²

Ban-the-Box-Report_0.pdf; *Mediation*, NYC HUMAN RIGHTS (Dec. 31, 2017, 10:06 AM), <http://www1.nyc.gov/site/cchr/enforcement/mediation.page>; JOHN L. REAMER, JR., *Bureau of Contract Administration – Los Angeles Fair Chance Initiative for Hiring (Ban the Box) Ordinance Recommendations* (Council File 14-0746) (June 9, 2016), http://clkrep.lacity.org/onlinedocs/2014/14-0746_rpt_BCA_06-09-2016.pdf (including San Francisco, Seattle, and Philadelphia among jurisdictions that offer some form of mediation).

⁷ Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POL'Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Michelle Natividad Rodrigues & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT (March 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

¹¹ E.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> (including applications for higher education, housing, and employment on the list of situations in which a criminal background check is often required).

¹² Megan C. Kurlychek et al, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5(3) CRIMINOLOGY & PUB. POL'Y 483, 499 (2006), http://www.albany.edu/bushway_research/publications/Kurlychek_et_al_2006.pdf.

B. *Employment is the Greatest Factor in Determining Whether Reentry is Successful*

One critical roadblock that impedes those formerly incarcerated from reentry into society is finding employment.¹³ As of 2004, more than 80% of employers in the United States said that they conducted criminal background checks on applicants.¹⁴ More recent figures fall closer to 90%.¹⁵ Indeed, given the accessibility of criminal background checks, many employers have come to feel that it is negligent not to perform a background check.¹⁶ Furthermore, in a survey of roughly 600 employers conducted as recently as 2001, only 40% of employers said that they would “definitely” or “probably” hire an applicant with a criminal record.¹⁷ Similarly, applicants who have felony convictions on their records are around 62% less likely to receive a call back than those without felonies.¹⁸ However, one study involving 59,000 workers found that felonies appearing on criminal background checks were incorrect at least 42% of the time.¹⁹

Given that the government spends roughly \$80 billion a year on corrections, the United States has a significant interest in facilitating reentry and preventing recidivism among the formerly incarcerated.²⁰ Importantly, several studies have concluded that employment is the most significant factor in determining the likelihood of recidivism among people who have criminal records.²¹ One study conducted in Illinois found that of the former inmates

¹³ Appelbaum, *supra* note 11.

¹⁴ Alfred Blumstein & Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, 263 NAT’L INST. JUSTICE J. 10, 10 (2006).

¹⁵ Appelbaum, *supra* note 11.

¹⁶ *Id.*

¹⁷ Harry J. Holzer, *Collateral Costs: The Effects of Incarceration on the Employment and Earnings of Young Workers*, GEORGETOWN UNIV., URBAN INSTITUTE AND IZA, DP NO. 3118, 11, 14 (Oct. 2007), <http://ftp.iza.org/dp3118.pdf>.

¹⁸ Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, U. OF MICH. L. & ECON RES. PAPER NO. 16-012, at 3 (June 14, 2016), <https://poseidon01.ssrn.com/delivery.php?ID=171094066115020090124117099010127096025047071016027028067090071098013016005028074102030099002020054112125067116075083115097118038073039053068115004084071115070109024058060020002097092023028005023065023004086122082120086113020074087016027080073003118&EXT=pdf>. It should also be noted that a misdemeanor conviction on a person’s criminal record can be for something as simple and harmless as driving without a license. CAL. VEH. CODE § 12500(a) (2008).

¹⁹ Appelbaum, *supra* note 11.

²⁰ *Does the U.S. Spend 80 Billion Dollars a Year on Incarceration?*, COMMITTEE FOR A RESPONSIBLE FED. BUDGET (Dec. 23, 2015), <http://www.crfb.org/blogs/us-spends-80-billion-year-incarceration>.

²¹ John M. Nally et al., *Post-Release Recidivism and Employment among Different Types of Released Offenders*, INT’L J. OF CRIM. JUSTICE SCIENCES, VOL. 9 (1): 16, 29 January – June 2014 <http://www.sascv.org/ijcjs/pdfs/nallyetalijcjs2014vol9issue1.pdf>.

who found employment within three years of release, only 18% committed another crime—in contrast to Illinois’ usual 52.3% recidivism rate.²²

The United States Government also has an interest in maintaining a high labor force participation rate (“LFPR”) among people of working age.²³ This ensures that employers have a substantial pool of qualified workers from which to hire new employees. However, the LFPR has been in steady decline since the early 2000s, which correlates directly with the increased popularity and availability of criminal background checks.²⁴ This shrinking LFPR comes at a time when the Bureau of Labor Statistics has found an unemployment rate of less than 4% for nearly one third of the metropolitan areas that it tracks.²⁵ In 2017, the Bureau of Labor Statistics further concluded “that the United States will need 3 million more workers in the next ten years to fill low-skilled jobs so that the country will achieve economic growth.”²⁶ However, the United States can only expect 1.7 million people to enter the labor force in that time.²⁷ In sum, the data suggests that criminal background checks have contributed to a labor shortage that will likely continue to have a far-reaching negative impact on the United States economy.²⁸ Luckily, a number of civil rights groups have successfully advocated for legislation that requires more inclusive hiring practices.²⁹ These ordinances are commonly referred to as “Ban the Box.”

²² *Safer Foundation Three-Year Recidivism Study 2008*, SAFER FOUNDATION (2008), <http://saferfoundation.jellcreative.com/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf>.

²³ Shane Ferro, *Criminal Records Could Be Having A Huge Impact On Labor-Force Participation*, BUS. INSIDER (Jan. 5, 2015, 2:44pm), <http://www.businessinsider.com/criminal-records-impact-on-labor-force-participation-rate-2015-1>.

²⁴ *Id.*

²⁵ Binyamin Appelbaum, *Lack of Workers, Not Work, Weighs on the Nation’s Economy*, THE N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/21/us/politics/utah-economy-jobs.html>.

²⁶ Arthur Guarino, *Labor Shortage in the United States Becoming an Increasingly Dire Issue*, GLOBAL RISK INSIGHTS (Sept. 1, 2017), <http://globalriskinsights.com/2017/09/labor-shortage-united-states-dire-issue/>.

²⁷ *Id.*

²⁸ There is also statistical evidence that suggests workers with criminal records may be more productive than workers without criminal records. Vivian Giang, *Why Criminals Might Make Better Employees*, BUS. INSIDER (Dec. 4, 2012), <http://www.businessinsider.com/a-criminal-record-might-increase-productivity-2012-12>; but see Marina Duane et al, *Criminal Background Checks: Impact on Employment and Recidivism*, URBAN INSTITUTE 11 (Mar. 2017), <https://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf> (noting that more empirical evidence is needed to assess whether prior convictions have a significant impact on job performance).

²⁹ See, e.g., NATIONAL EMPLOYMENT LAW PROJECT, <http://www.nelp.org/>; ALL OF US OR NONE, <http://www.anewwayoflife.org/all-of-us-or-none/>; LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/>.

III. BAN THE BOX

A. *A Brief History, and How It Works*

Ban the Box gets its name from the oft-used employment application box that asks: “Have you ever been convicted of a crime?”³⁰ It began in 2003 when “All of Us or None,” a grass roots organization composed primarily of formerly incarcerated organizers, began discussing “voting rights, employment rights, and a variety of issues affecting people in prison and after their release.”³¹ Since its inception, the Ban the Box movement has expanded to include ordinances in several states, with California being the 10th and most recent state to adopt a Ban the Box law that is applicable to public *and* private employers; California’s law was enacted on October 14, 2017 and it took effect on January 1, 2018.³²

Most Ban the Box laws consist of a series of regulatory measures that prohibit employers from attempting to obtain information concerning applicants’ criminal backgrounds until later in the application process; this usually means after a “conditional offer of employment” is extended to the applicant.³³ This is meant to ensure that an employer first considers the applicant’s character and ability to perform the work before any bias derived from knowledge of the applicant’s criminal history might affect the employer’s decision.³⁴ Once the conditional offer of employment has been extended to the applicant, the employer may run a criminal background check.³⁵ If the employer decides not to hire the applicant based on the results of the background check, many jurisdictions require that the employer complete a written “Individualized Assessment” in which the employer outlines in detail the risks that may be amplified by the applicant’s specific past conduct.³⁶ Depending on the jurisdiction, the employer may be required to consider specific factors when determining whether to withdraw the conditional job offer, such as: “the nature and gravity of the offense,” time elapsed since the offense, whether the employer is only considering convictions as opposed to arrests, or “the nature of the job and responsibilities.”³⁷

³⁰ See Editorial Board, *To Help Ex-cons, Ban the Box*, L.A. TIMES, July 3, 2013, <http://articles.latimes.com/2013/jul/03/opinion/la-ed-ban-the-box-employment-ex-felons-20130703>.

³¹ *Ban the Box Timeline*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN 1, 1 <http://www.prisonerswithchildren.org/wp-content/uploads/2015/08/BTB-timeline-final.pdf>.

³² *California Governor Brown Signs Fair Chance Act, Extending ‘Ban the Box’ to Private Employers*, *supra* note 1.

³³ *E.g.*, L.A. MUN. CODE § 189.02(A), (B) (2016).

³⁴ *See* Avery, *supra* note 3.

³⁵ L.A. MUN. CODE § 189.03(A) (2016).

³⁶ *Id.*

³⁷ *Rules and Regulations: Implementing the Fair Chance Initiative for Hiring Ordinance*, CITY OF LOS ANGELES DEPARTMENT OF PUBLIC WORKS: BUREAU OF CONTRACT ADMINISTRATION 6 (Jan. 22, 2017), <https://bca.lacity.org/Uploads/fciho/Fair%20Chance%20Ordinance%20Rules%20and%20Regulations%20Final.pdf>. A person convicted of embezzlement who applies for a job involving handling

If the employer decides to withdraw the offer, many jurisdictions require that they notify the applicant in writing, send the applicant any information that the employer used to come to their decision, and record the date that they notified the applicant.³⁸ Applicants may then make the case that their criminal background should not preclude them from getting the position.³⁹ Applicants can argue their case by explaining the circumstances surrounding the conduct that led to their conviction, providing letters of recommendation, character references, evidence of rehabilitation efforts, or through any other relevant evidence.⁴⁰

B. *Brief Discussion of Ban the Box Controversy*

Ban the Box laws are controversial, which warrants a brief discussion despite this controversy not being the focus of this note. First, there are always employers who do not want to hire ex-offenders.⁴¹ Understandably, employers argue that ex-offenders are more likely to be violent, irresponsible, or unprepared to be employees; thus, they maintain that it is the employer's prerogative to discriminate against people with criminal records when selecting candidates for employment.⁴²

This leads to the more discussed controversy surrounding Ban the Box: there is evidence that jurisdictions in which Ban the Box laws are passed see a rise in racial discrimination against black and Hispanic men because men in this demographic are statistically more likely to have been incarcerated in the past.⁴³ If an employer cannot know with certainty whether an applicant has a criminal record, they are more likely to discard an application based on race.⁴⁴ However, proponents of Ban the Box reform argue that this evidence highlights problems with racial discrimination in the United States, not problems with Ban the Box.⁴⁵ Thus, if anything, the evidence calls for

money, or a person with a recent DUI conviction applying for a job as a driver, are two easy examples of when the nature of the offense would be relevant in an employer's determination that the applicant is unfit for the particular job. *Fair Chance Initiative for Hiring Ordinance: Guideline for Employers*, CITY OF LOS ANGELES DEPARTMENT OF PUBLIC WORKS: BUREAU OF CONTRACT ADMINISTRATION (last visited Nov. 13, 2017), <https://bca.lacity.org/Uploads/feiho/Fair%20Chance%20Initiative%20for%20Hiring%20Ordinance%20Guideline%20for%20Employers%20%28Short%20Form%29.pdf>.

³⁸ *E.g., id.*

³⁹ *E.g.*, L.A. MUN. CODE § 189.03(B) (2016).

⁴⁰ *Rules and Regulations: Implementing the Fair Chance Initiative for Hiring Ordinance*, *supra* note 37, at 7.

⁴¹ 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/>.

⁴² Doleac, *supra* note 41.

⁴³ Maurice Emsellem & Beth Avery, *Racial Profiling in Hiring: A Critique of New "Ban the Box" Studies*, NAT'L EMP. L. PROJECT 2 (Aug. 11, 2016), <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf>.

⁴⁴ Doleac, *supra* note 41.

⁴⁵ Emsellem, *supra* note 43, at 6.

reforms to reduce race discrimination in hiring, not to repeal Ban the Box laws.⁴⁶

The Ban the Box process gives the formerly incarcerated the chance to be considered based on their merits on equal footing with other applicants, and it gives them the chance to advocate for their own value as an employee if the employer attempts to withdraw their offer.⁴⁷ Furthermore, there is ample evidence showing that Ban the Box works: in the District of Columbia, 33% more people with criminal records were hired after the law took effect; North Carolina saw a seven-fold increase after its Ban the Box policy was enacted; and “[a]s a result of its ban-the-box policy, 10 percent of Atlanta’s new public hires between March and October 2013 had records.”⁴⁸

C. *Inconsistencies in Ban the Box Implementation, and Why They Matter*

Despite all of the progress made through enacting Ban the Box laws, their enforcement and the remedies prescribed in the event of employers’ failure to conform to the laws remains inconsistent.⁴⁹ For example, an alleged violation in the State of Illinois results in an investigation by the Illinois Department of Labor; the employer may be issued a fine of up to \$1,500 for each repeated violation, but applicants themselves may not sue.⁵⁰ Similarly, an alleged violation in Minnesota results in an investigation by the Minnesota Department of Human Rights; if the employer fails to heed the commissioner’s warning, then the employer is fined an amount based on its number of employees and the number of violations within a calendar month.⁵¹ However, many states’ laws do not even designate a specific agency to enforce their version of Ban the Box.⁵² Additionally, states that do designate an agency for enforcement often only fine the employer without providing any remedy to the wronged applicant.⁵³

⁴⁶ *Id.*

⁴⁷ *See, e.g.*, Legis. Counsel, Assemb. B. 1008, § 2(a)–(c) (Ca. 2017).

⁴⁸ Emsellem, *supra* note 43, at 4.

⁴⁹ Wolfe, *supra* note 4, at 525.

⁵⁰ Jim Burns, *Illinois Joins ‘Ban The Box’ Bandwagon by Limiting When Employers Can Ask For or Use Criminal History*, FORBES (Jul. 28, 2014), <https://www.forbes.com/sites/theemploymentbeat/2014/07/28/illinois-joins-ban-the-box-bandwagon-by-limiting-when-employers-can-ask-for-or-use-criminal-history/#627b0cb9b14d>; 820 ILL. COMP. STAT. 75/20(a)–(b) <http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3564&ChapterID=68>.

⁵¹ *Minnesota’s Ban the Box Law: How Does it Effect the Employee Application Process?* JUX LAW FIRM, <https://jux.law/ban-the-box-law/> (last visited Jan. 7, 2019).

⁵² O’Connell, *supra* note 5, at 2826. These states include California, Colorado, Connecticut, Hawaii, Maryland, Nebraska, and New Mexico. *Id.*

⁵³ *See, e.g.*, N.J. STAT. ANN § 34:6B-9 and 6B-18 (West 2013) (stating explicitly that a fine imposed by the designated agency is the only remedy and that aggrieved parties do not have access to any other remedies including causes of action).

While some states' laws preclude bringing any civil action against an employer, Illinois law expressly authorizes its enforcement agency to do so,⁵⁴ while New York law grants its commission the ability to recover "compensatory and punitive damages."⁵⁵ In a recent example of New York City enforcing its law, the New York Commission and a non-profit called Pibly Residential Programs "entered into an agreement requiring the company to bring its employment policies into compliance with the [Fair Chance Act], train its employees on the law, and pay the complainant \$4,650 in back[]pay and \$10,000 in emotional distress damages."⁵⁶ This \$14,650 award stands in stark contrast to the maximum \$500 to \$1,500 fine that many jurisdictions authorize their enforcement agencies to impose.⁵⁷

The inconsistencies in Ban the Box laws and their enforcement give rise to several issues that may affect the success of implementing the laws.⁵⁸ One problem is employer compliance: many employers operate in different states, hire out of different cities, or hire employees who must work in multiple jurisdictions: each jurisdiction with its own version of Ban the Box.⁵⁹ Given that each jurisdiction's Ban the Box standards of compliance do not always overlap, this could create undue hardship on many employers.⁶⁰ Another issue arises out of conflicting state and municipal laws; whether the state law preempts the city law may not even be clear to the legislators who drafted them.⁶¹

The difficulties in enforcing inconsistent state and municipal laws have led some scholars to advocate for a blanket federal rule that would simplify employer compliance and offer employment opportunities to the formerly incarcerated nationwide.⁶² Steps toward a Federal Rule have already begun with President Obama "directing federal agencies to delay inquiries into job applicants' records until later in the hiring process," although an expansion of this policy in the near future seems unlikely.⁶³ Until a federal law can be implemented, it is important for jurisdictions that are considering adoption of their own version of Ban the Box to consider which practices are most likely to produce positive results for applicants with criminal records and ensure

⁵⁴ O'Connell, *supra* note 5, at 2827; 820 ILL. COMP. STAT. 75/20(b) (2015) ("Penalties under this Section may be assessed by the Department and recovered in a civil action brought by the Department in any circuit court or in any administrative adjudicative proceeding under this Act.").

⁵⁵ Bill de Blasio & Carmelyn P. Malalis, *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63*, NYC COMMISSION ON HUMAN RIGHTS (2015), <https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-112015.pdf>.

⁵⁶ *Settlements*, NYC HUMAN RIGHTS (Aug. 2017), <http://www1.nyc.gov/site/cchr/enforcement/2017-settlements.page>.

⁵⁷ *See, e.g., Minnesota's Ban the Box Law*, *supra* note 51 (imposing a maximum fine of \$500 for each violation, which cannot exceed \$2,000 in any given month for a single employer).

⁵⁸ O'Connell, *supra* note 5, at 2803.

⁵⁹ *Id.* at 2803.

⁶⁰ *See id.*

⁶¹ *See id.* at 2819.

⁶² *See e.g., id.*

⁶³ Avery, *supra* note 3.

compliance on the part of employers. Mediation between non-compliant employers and wronged applicants is a solution that is likely to achieve these goals.

IV. MEDIATION

A. *A Brief History, and How It Works*

In the 1970s and early 1980s, the contemporary mediation movement gained popularity: its principle goal being self-determination of the parties in dispute.⁶⁴ Mediation was originally treated by the American Bar Association as a solution to minor disputes and pedestrian issues.⁶⁵ In its early days, mediation was a voluntary alternative to litigation in which the disputants worked to resolve their issues with one another, and the mediator's primary function was facilitating cooperation, understanding, and creative problem solving through communication.⁶⁶ Many courts found this method of dispute resolution to be economical and produce high rates of satisfaction among parties who attempted to mediate their disputes.⁶⁷ This increase in popularity led many courts to require that parties attempt to resolve their disputes through mediation, which led to higher settlement rates among litigants.⁶⁸

Now, mediation leading to settlement is the most frequently used method for resolving civil cases.⁶⁹ In these "evaluative mediation" cases, lawyers typically represent the party on each side, and there is often an expectation that there will be a binding outcome.⁷⁰ This type of mediation is particularly useful when the resolution involves complex legal issues or monetary damages.⁷¹ However, in keeping with the legislative intent of Ban the Box laws, the core goals of "transformative mediation" make it the overall best approach.

⁶⁴ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3 (2001).

⁶⁵ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 31 (1982) (referring to a national conference on minor dispute resolution that took place in 1977 and was sponsored by the ABA).

⁶⁶ Welsh, *supra* note 64, at 18–20; *see also* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 471 (1991).

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

⁶⁹ Myles P. Hassett, *Mediation is the New Trial*, 54 ARIZ. ATT'Y 38 (2017).

⁷⁰ Bobby M. Harges, *Avoiding Impasse and Reaching Agreements in Mediations*, 65 LA. B.J. 166, 167 (Oct./Nov. 2017); Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, *MEDIATE*, <http://www.mediate.com/articles/zumeta.cfm> (last visited Dec. 31, 2017).

⁷¹ *See* Zumeta, *supra* note 70 (stating that the mediator in evaluative mediation has substantive expertise or legal expertise in the area of the disputes).

B. *Transformative Mediation*

Transformative mediation was first proposed by Robert A. Baruch Bush and Joseph P. Folger as an approach to conflict resolution that emphasizes empowering the parties to the dispute and facilitating mutual understanding.⁷² Mediators who operate from the transformative view approach their work with the understanding that the most disturbing thing about conflict is not each party's inability to reach a desirable outcome, but instead, the "crisis of deterioration in human interaction."⁷³ Indeed, studies show that the two most universally described qualities of conflict between parties are powerlessness and alienation.⁷⁴ This leads the parties in conflict to feel disregarded and victimized, which leads most parties to become more self-absorbed and hostile toward the opposing party, and makes meaningful communication between parties difficult to attain.⁷⁵ Thus, transformative mediators are asked to practice "with a *microfocus on communication*, identifying opportunities for *empowerment and recognition* as those opportunities appear in the parties' own conversations."⁷⁶ More specifically, each party develops confidence in their own personal strengths and interests, while simultaneously cultivating an understanding and appreciation of the opposing party's motivations and needs.⁷⁷ This form of mediation puts the goal of improved relations between parties ahead of achieving a favorable substantive outcome.⁷⁸

Before any remedy for a Ban the Box law violation is required, many people with criminal records already feel powerless, victimized by the criminal justice system, and more skeptical toward authority figures as a result of being incarcerated.⁷⁹ These feelings of powerlessness can stem from an inability to find a job or housing, reliance on others for support without being able to reciprocate the support that is being offered, or continued efforts to stay sober.⁸⁰ It is also understandable that many offenders feel victimized by the criminal justice system because in many states over half of all offenders who return to jail or prison do so as a result of a technical parole or probation

⁷² TRANSFORMATIVE MEDIATION INSTITUTE, <http://www.transformative-mediation.com> (last visited Nov. 17, 2017). Transformative Mediation started with Bush and Folger's book, "The Promise of Mediation," which was first published in 1994. Zumeta, *supra* note 70.

⁷³ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 46 (rev. ed. 2005).

⁷⁴ *Id.* at 48.

⁷⁵ *Id.* at 49–51.

⁷⁶ TRANSFORMATIVE MEDIATION INSTITUTE, <http://www.transformative-mediation.com/training/page/view.php?id=6> (last visited Nov. 17, 2017).

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See* Terrance Stewart, *A Lifetime of Punishment Doesn't Fit the Crime*, THE PRESS-ENTERPRISE (Oct. 9, 2017), <https://www.pe.com/2017/10/09/a-lifetime-of-punishment-doesnt-fit-the-crime/> (discussing the challenges people with criminal records face).

⁸⁰ *See The Challenges of Prisoner Reentry: Facts and Figures*, THE URBAN INSTITUTE (May 2008), <https://www.urban.org/sites/default/files/publication/31786/411683-The-Challenges-of-Prisoner-Reentry-Facts-and-Figures.PDF>.

violation, as opposed to the commission of a new crime.⁸¹ In the event of a Ban the Box law violation, a remedy based in transformative mediation could directly address many of these issues facing people in reentry through facilitating self-awareness and constructive communication with employers.⁸²

Using transformative mediation as a vehicle for a remedy would also benefit the employer because employers have an interest in hiring the most qualified applicants, and biases may prevent employers from doing so. Not surprisingly, in states such as California, the legislative intent of Ban the Box expressly includes combating “the negative stigma of a conviction” that affects the decision-making of many employers.⁸³ California’s law goes on to reference studies showing that personal contact between employers and potential employees is a positive way to facilitate reassessment of employers’ preconceived notions of applicants.⁸⁴ Ban the Box laws are already designed to achieve these goals by postponing criminal background checks until after the offer of employment, which often means an interview where employers can become acquainted with prospective employees without the burden of stigma concerning the formerly incarcerated.⁸⁵ However, few states offer a mechanism for challenging the preconceived notions of employers who fail to conform to the law, which are often the employers whose views most need to be challenged.⁸⁶

Given that a major objective of Ban the Box is combating the “lifelong discrimination and exclusion” that affects people with criminal records, Ban the Box enforcement methods that leave the complainants and employers out of the resolution process miss an opportunity to further achieve Ban the Box’s goals of empowering applicants and combating employer biases.⁸⁷ Transformative mediation as part of an institutional remedy would offer an additional means to empower the applicants who are likely to most need empowering. This process would show applicants with criminal records that participating in government systems can be rewarding and work in their favor, especially because mediation offers the prospect of settlement, if not an

⁸¹ See *State of Recidivism: The Revolving Door of America’s Prisons*, THE PEW CENTER ON THE STATES 14 (Apr. 2011), <http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencingandcorrections/staterecidivismrevolvingdooramericaprison20pdf.pdf>.

⁸² BUSH & FOLGER, *supra* note 73, at 52–53.

⁸³ Legis. Counsel, Assemb. B. 1008, § 1(h) (Cal. 2017).

⁸⁴ *Id.*

⁸⁵ *Id.* at § 2(a)(1–2) (Cal. 2017).

⁸⁶ See Reamer, *supra* note 6 (showing that only a handful of jurisdictions out of many more in the United States use mediation as a form of Ban the Box enforcement).

⁸⁷ See *Ban the Box Campaign*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ban-the-box-campaign/> (last visited Nov. 17, 2017). In the legislative intent written into California’s Ban the Box law, the state government stated: “[to the formerly incarcerated] a job develops prosocial behavior, strengthens community ties, enhances self-esteem, and improves mental health, all of which reduce recidivism.” Legis. Counsel Assemb. B. No. 1008 § 1(g) (Cal. 2017) https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1008.

amicable mutual resolution.⁸⁸ Furthermore, given that the employers in mediation would all have failed to conform to hiring standards, mediation as a remedy would challenge the biases of the employers who are likely to most benefit from it. Thus, by requiring transformative mediation between applicants and employers upon a finding of nonconformity with Ban the Box provisions, the means of attaining the goals of Ban the Box would be expanded to include measures that address the applicants and employers who could benefit most from intervention, and it would provide greater incentives for wronged applicants to file complaints against employers who fail to conform to the law.⁸⁹

D. *Mandatory Mediation in Washington D.C.*

The city of Washington D.C. offers an example of how mediation as a means of Ban the Box enforcement can help meet the underlying goals of Ban the Box and ensure conformity with the law.⁹⁰ In Washington D.C., an applicant may file a complaint with the Office of Human Rights (“OHR”) if the complainant believes there has been a violation of the law.⁹¹ After an intake interview to finalize the complaint, the complainant and the employer are required to attempt to resolve their dispute through mandatory mediation.⁹² If unresolved after the mediation, OHR further investigates the claim “to make a probable cause determination” and resolve the dispute.⁹³

Washington D.C.’s OHR has achieved notable results in Ban the Box enforcement since the law took effect.⁹⁴ A study conducted by the Office of the District of Columbia Auditor found that 417 complaints were filed against employers within the first nine months of the law: 71 of which resulted in settlements, with an average monetary rate of \$1,217.⁹⁵ The OHR closed 157 of the complainants’ files because the complaints were resolved through investigation, mediation, or claim withdrawal.⁹⁶ The study attributed the high number of complaints to successful community outreach and enforcement practices that made filing complaints easy for applicants.⁹⁷

⁸⁸ See Rachel Sadon, *More Than 350 Washingtonians Filed ‘Ban The Box’ Cases In The Law’s First Year*, DCIST (Feb. 17, 2016), http://dcist.com/2016/02/nearly_500_people_filed_ban_the_box.php.

⁸⁹ See PATTERSON, *supra* note 6, at 11–12.

⁹⁰ *Id.* at 11–12. Washington D.C. is also one of the few jurisdictions to offer research results on the effects of Ban the Box laws on applicants and employers. *Id.* at 5.

⁹¹ D.C. OFFICE OF HUMAN RIGHTS, “BAN THE BOX”: FAIR CRIMINAL RECORD SCREENING ACT, OHR Guidance No. 16-02- (2016), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHRGuidance16-02_FCRSA_FINAL.pdf.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See PATTERSON, *supra* note 6, at 11–12.

⁹⁵ *Id.*

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 11–12.

Effective enforcement policies were an important factor in the successful implementation of Washington D.C.'s fair-chance hiring law.⁹⁸ Washington D.C. saw a 33% increase in the number of applicants with criminal records hired after the law took effect, with 21% of all new employees in the area having criminal records.⁹⁹ Furthermore, despite strict enforcement of the law, 45% of employers surveyed in the area said that the new law did not affect their hiring process at all, with only 11% noting a change that significantly affected them.¹⁰⁰ Thus, the vast majority of employers had little trouble conforming to the new law, while the area saw a significant increase in the number and percentage of new hires with records.¹⁰¹

As of June 10, 2016, none of the claims in Washington D.C. resulted in fines imposed by the OHR, despite the fact that the OHR reserves the right to impose fines for violations of the law.¹⁰² This is likely because the viable claims were first resolved through other means, such as mediation.¹⁰³ The monetary outcome of each mediation varied: from the lowest being \$100 to a high of \$2,500.¹⁰⁴ This leaves open the question of whether inconsistent outcomes is likely to be a serious flaw in transformative mediation, which could necessitate incorporating elements of evaluative mediation into the dispute resolution process. However, it is more likely that these varied outcomes are simply the product of a diverse range of offenses stemming from relatively new laws that offer little guiding jurisprudence. This is discussed in the next section.

V. POTENTIAL OBJECTIONS TO MEDIATION AS A REMEDY

Mediation empowers parties to take on an active role in resolving their own disputes, and using mediation as part of the remedy process for Ban the Box law violations would show persons with criminal records that participating in government systems can be rewarding and work in their favor.¹⁰⁵ However, there are several potential downsides to mediation as a Ban the Box enforcement tool. These potential downsides warrant discussion.

⁹⁸ *Id.* at 11–14.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.* at 16, 19.

¹⁰² *Id.* at 11.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *See* Dr. Iur. Ulrich Boettger, *Efficiency Versus Party Empowerment—Against A Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 5 (2004) (concluding that the mediator's role is to facilitate communication between the mediation participants, who actively and directly participate in the mediation process).

A. *Inconsistent Outcomes*

Many jurisdictions have an enforcement agency investigate alleged Ban the Box violations, and then issue fines that are higher or lower based on a rubric that considers factors such as the severity of the violation, the size or income of the employer, and whether this is the employer's first violation.¹⁰⁶ These versions of the laws offer more consistent outcomes than mediation because each monetary level of recompense is listed based on easily identifiable factors.¹⁰⁷ However, while consistency in monetary fines may be desirable, it comes at the risk of producing bad or unfair outcomes for parties that may benefit from more creative or desirable solutions to their disputes. As a form of redress, a rubric of fine amounts that are based on only a few factors does not address the need to reduce employment discrimination against applicants with criminal records.¹⁰⁸ This remedy will often fail to provide adequate redress in situations where parties would be better served by a more holistic consideration of the dispute. Additionally, disputes that are settled with little or no input from the parties to the dispute are more likely to produce unsatisfactory results for both parties.¹⁰⁹ Thus, these methods are likely to produce superficially consistent monetary results but are also more likely to be substantively inconsistent in regards to producing desirable outcomes for the parties.

A possible solution to address any perceived need to achieve more consistent monetary outcomes is incorporating aspects of evaluative mediation into the transformative mediation process. As more disputes arising out of Ban the Box violations are settled, it will become easier to quickly assess the potential monetary worth of each claim based on factors prescribed by law, such as the size of the organization, its income, and the degree of discriminatory conduct.¹¹⁰ However, any attempts to incorporate evaluative mediation principles into transformative mediation would detract

¹⁰⁶ See, e.g., 820 ILL. COMP. STAT. 75 / 20(a)–(b), <http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3564&ChapterID=68> (issuing fines of up to \$1,500 depending largely on whether the fine is for a subsequent violation by the same employer); de Blasio & Malalis, *supra* note 55, at 12–13 (considering the severity of the violation, whether there were previous violations, and whether the employer should have known about the law); *Minnesota's Ban the Box Law: How Does it Effect the Employee Application Process?*, *supra* note 51 (issuing fines of \$100 to \$2,000 depending on the number of employees that the employer has); Stefanie Riehl, *Criminal Convictions and Hiring in New Jersey ("Ban the Box")*, N.J. BUS. & INDUSTRY ASS'N (July 28, 2016), <https://www.njbia.org/criminal-convictions-hiring-new-jersey-ban-box/> (basing the amounts of fines largely on whether there were multiple violations occurring after the employer was notified of the law) (last updated June 21, 2018).

¹⁰⁷ See, e.g., 820 ILL. COMP. STAT. 75 / 20(a)–(b), <http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3564&ChapterID=68>.

¹⁰⁸ See Legis. Counsel, Assemb. B. 1008, § 1(h) (Cal. 2017).

¹⁰⁹ See DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 103 (2006). Eighty-one percent of corporate respondents find mediation to be “a more satisfying process than litigation,” with 67% saying that it provides “more satisfactory settlements” than other means of claim resolution. *Id.* at 102–03. Notably, 82% of corporate respondents in the survey said that they used mediation because it allowed them to resolve the disputes themselves. *Id.*

¹¹⁰ See de Blasio & Malalis, *supra* note 55, at 12–13.

from the goals of strengthening party relationships and addressing their underlying issues; all while missing an opportunity to more directly address the stigma that originally necessitated Ban the Box laws.¹¹¹ Additionally, the original proponents of transformative mediation insist that other types of mediation cannot be combined with transformative mediation.¹¹² Thus, the transformative mediation process as a remedy for Ban the Box enforcement is best left unaltered.

The method of enforcement that uses fines based on factors is most effective if it is only used after attempted resolution through mediation—or for technical violations of the laws, such as failure to post notice of the law in a visible area.¹¹³ For example, Washington, D.C. already requires mediation and New York City offers mediation as a remedy for those who request it.¹¹⁴ Mediation does not always work, which is why agencies responsible for enforcing Ban the Box laws need to have a mechanism in place to decide outcomes if mediation fails.¹¹⁵ As previously discussed, this mechanism should produce consistent results based on relevant factors so that any outcome imposed by a third party after mediation fails will still be perceived as a fair one, if not a desirable one. However, this also ensures that the primary goals of Ban the Box are addressed, prior to the imposition of any fine by a third-party bureaucracy, by giving wronged applicants the chance to address their specific needs and by giving employers the chance to work with the applicant on finding a resolution. Thus, the primary purpose of Ban the Box is best first addressed through mediation, while fines based on relevant factors remain available to provide more standardized outcomes in the event that mediation falls short.

B. *Resolutions Through Mediation Take Longer*

While mediation is far more cost-effective than litigation, it still requires more time between filing complaints and finding resolutions than the more straightforward fine-based systems of redress that many jurisdictions employ.¹¹⁶ There is some evidence to suggest that the longer wait times for a resolution through mediation lead some complainants to withdraw their complaint.¹¹⁷ Indeed, one of the downsides of Washington, D.C.'s law was that applicants had to wait an average of 171 days for their chance to mediate

¹¹¹ See Zumeta, *supra* note 70 (highlighting the fundamentally different approaches to various types of mediation).

¹¹² BUSH, *supra* note 73, at 45.

¹¹³ L.A. MUN. CODE § 189.04(B).

¹¹⁴ PATTERSON, *supra* note 6, at 11; *Mediation*, NYC HUMAN RIGHTS (Dec. 31, 2017, 10:06 AM), <http://www1.nyc.gov/site/cchr/enforcement/mediation.page>.

¹¹⁵ See PATTERSON, *supra* note 6, at 11. As of June 10, 2016, Washington, D.C. had still never needed to exercise its ability to impose fines because all claims were resolved by mediation or other means. *Id.*

¹¹⁶ See *id.* at 13–14 (finding an average of 196 days before resolution of complaints in Washington D.C. to be a greater period of time than estimated).

¹¹⁷ *Id.* at 14.

their claim.¹¹⁸ However, this was due to the overwhelming popularity of the program, which incentivized applicants to file more complaints, and the logistical difficulty of scheduling multiple parties to meet.¹¹⁹ Furthermore, the New York City Office of Human Rights has found that resolution through mediation is still more cost-effective than conducting an independent investigation through a designated enforcement agency.¹²⁰ Thus, although mediation requires a little more time, it is more cost-effective and produces more satisfying outcomes for the parties involved.¹²¹

C. Power Imbalance Leading to Unjust Outcomes

Critics of mediation in general are quick to point out that power imbalances between parties can lead to unjust outcomes.¹²² Indeed, there are circumstances where mediation may be very inappropriate, such as cases involving domestic violence between parties.¹²³ In the context of Ban the Box mediation, employers would almost invariably have more power: just as they typically have more power in their relationships with their employees. Furthermore, because of the statistical realities associated with complainants of Ban the Box violations, employers are especially likely to have higher degrees of formal education and come from more fortunate socio-economic circumstances, while being far less likely to have suffered from the stigma associated with incarceration.¹²⁴ This imbalance of power risks creating situations in which complainants can be taken advantage of as they are coerced into agreeing to inequitable outcomes.¹²⁵

However, the issue of power imbalance between the formerly incarcerated and their employers is one of the reasons that mediation as a remedy is so critical. Transformative mediation gives the parties the ability to communicate in a way that is constructive and safe.¹²⁶ Having a professional facilitator in the room can help ensure the parties are focused on the issues, being respectful, and comfortably expressing themselves in front of one another.¹²⁷ Honest discourse between disputants in mediation can

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.* at 14.

¹²⁰ *Mediation*, NYC HUMAN RIGHTS (Jan. 29, 2018), <http://www1.nyc.gov/site/cchr/enforcement/mediation.page>.

¹²¹ See GOLANN, *supra* note 108, at 102–03.

¹²² Carolyn Manning, *Power Imbalance in Mediation*, DIAL M FOR MEDIATION 2, <http://www.dialmformediation.com.au/Power%20Imbalance%20in%20Mediation.pdf> (last visited Jan. 7, 2019).

¹²³ *Id.* at 3.

¹²⁴ Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, in DAEDALUS J. AM. ACAD. ARTS & SCI. 8 (Summer 2010).

¹²⁵ Manning, *supra* note 121, at 3–4.

¹²⁶ See TRANSFORMATIVE MEDIATION INSTITUTE, <https://www.transformative-mediation.com/training/page/view.php?id=5> (last visited Jan. 28, 2018).

¹²⁷ *Id.*

combat issues of power imbalance by being empowering.¹²⁸ In some cases, mediation is even likely to repair the damaged relationships of the parties, if the parties are able to develop the habit of communicating with mutual respect.¹²⁹

Additionally, power imbalance in the context of Ban the Box is likely to be less of an issue than in many other types of mediation scenarios because the formerly incarcerated party would always be the one who is bringing the claim based on employer misconduct. This means that prior to every mediation the claimant would have already required the employer to be at an unfamiliar place as a result of the employer's violation of the law.¹³⁰ Thus, some of the issues of power imbalance would be offset by an immediate perception that the claimant has the moral high ground, while any remaining imbalance would be tempered by the mediator's facilitation of respectful discourse.¹³¹ Finally, given that power imbalance in hiring practices is one of the issues that Ban the Box laws are designed to address, involving the disputants in an empowering process that combats the negative stigma of incarceration is the best way to ensure that the law's method of enforcement is consistent with its goals.¹³²

VI. CONCLUSION

The majority of jurisdictions have enacted versions of Ban the Box with vague, or underwhelming, methods of enforcement.¹³³ Enforcement processes in these jurisdictions provide little incentive for applicants whose rights have been violated to file a complaint. Indeed, for most Ban the Box laws as they stand, aggrieved persons' only motivation for reporting a violation of the law is a sense of civic duty; applicants stand to gain little else.¹³⁴

More jurisdictions adopt their own versions of Ban the Box every year.¹³⁵ These laws continue to yield results in the social advancement of formerly incarcerated individuals and the availability of an expanded labor force for employers. However, each new jurisdiction comes with a new set of enforcement methods that are often not in keeping with the social goals and legislative intent of Ban the Box laws.¹³⁶ Additionally, the varied legal requirements and consequences of different Ban the Box laws have the

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See* PATTERSON, *supra* note 6, at 12 (noting that employers are required to attend mediation with complainants).

¹³¹ *See* GOLANN, *supra* note 108, at 141 (describing transformative mediation techniques).

¹³² Assemb. B. No. 1008 § 1(h) (Ca. 2017).

¹³³ *See generally* Avery, *supra* note 3 (noting that over 150 counties and cities have adopted Ban the Box).

¹³⁴ *See, e.g.*, N.J. STAT. ANN § 34:6B-9 and 6B-18.

¹³⁵ Avery, *supra* note 3 (noting that over 150 counties and cities have adopted Ban the Box, which shows the increasing prevalence of Banning the Box across the world).

¹³⁶ *See* O'Connell, *supra* note 5.

potential to burden employers that operate in multiple jurisdictions with complex legal issues. Thus, more consistent laws and methods of enforcement should be the goal going forward as additional jurisdictions adopt their own versions of these laws.

Washington D.C. offers an example of what mediation as a remedy for Ban the Box violations could mean for formerly incarcerated applicants whose rights have been violated.¹³⁷ Mediation can play a critical role in a robust enforcement system that incentivizes wronged applicants to come forward.¹³⁸ It can empower a historically disenfranchised group of people, encourage employers to reconsider their preconceived notions of the formerly incarcerated, and facilitate honest communication leading to better understanding between employers and their employees. In this way, mediation offers the next solution in criminal reentry and employment rights.

¹³⁷ See PATTERSON, *supra* note 6, at 13–14.

¹³⁸ See TRANSFORMATIVE MEDIATION INSTITUTE, *supra* note 126.