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Michael Sweig

Melissa McClure

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“MOVING THE BOX” BY EXECUTIVE ORDER IN ILLINOIS

BY MICHAEL SWEIG, JD* AND MELISSA MCCLURE**

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* Founder, The Institute for People with Criminal Records. Adjunct Legal Studies Professor, Heller College of Business, Roosevelt University (2003-2010), Staff Editor, Journal of Legal Studies Education, Reviewer, Journal of Legal Studies in Business; American Business Law Journal. JD, 1986; De Paul College of Law; Managing Editor of Lead Articles, De Paul Law Review, 1985-86, BA, Economics, 1980; University of California, Santa Cruz.

** Public Policy Liaison, The Institute for People with Criminal Records. M.A. and B.S., Criminal Justice, 2008, 2007, Loyola University of Chicago. Professor Andrew Dilts of the University of Chicago assisted in the early research for this article.

ABSTRACT

The Illinois Constitution authorizes and empowers the Governor to enter Executive Orders regarding, among other things, state personnel administration.

In twenty four localities and five states the inquiry regarding a person's felony convictions on employment applications has been moved from the initial application stage, to the points at which a job applicant has been selected for the candidate pool, and in some instances not until the candidate has been chosen as a finalist or even until after a conditional employment offer has been made.

The moving of the felony conviction inquiry is known nationally as "Ban-the-Box." Among other things, this article argues that a better term would be "Move-the-Box," because the inquiry is not removed or "banned" from the employment process. The inquiry is moved to level the playing field for people with criminal records, to prevent their employment applications from *per se* rejection due to disclosure of a felony conviction before the candidate would ever have the chance for an interview.

This article argues that the Illinois Governor should use the constitutional power of an Executive Order to institute a "Move-the-Box" hiring policy for employment of people with criminal records in the State of Illinois. The suggested policy would follow the recent lead of sister states that limit the felony conviction inquiry to the point at which an applicant has been given an interview, a conditional job offer or has been selected as a finalist for a given position. Illinois would not be alone should it implement a "Move-the-Box" employment policy. Using the Executive Order power would both effectuate an important social policy in state personnel administration, and would avoid extraneous politicization in the General Assembly.

I. INTRODUCTION

In Illinois, there are two non-judicial ways to make law: in the General Assembly (the legislature), or by Executive Order. If by Executive Order, there must be legal authority to do so to avoid a "separation of powers" conflict.¹ The Illinois Constitution says only that the Governor shall be responsible for faithful execution of the law, but does not expressly empower him to make law except in narrow circumstances.² There is, however, statutory authority in Illinois that empowers the Governor to act by Executive Order regarding state personnel administration.³

Executive orders function as legal, policy, and political tools that have been used frequently by governors dating back to the colonies,⁴ and there is definitive modern judicial recognition of executive orders as policy-making tools.⁵

¹ ILL. CONST. art. II, § 1 (stating that "[t]he legislative, executive and judicial branches are separate" and that "[n]o branch shall exercise powers properly belonging to another").

² ILL. CONST. art. V, § 8 (stating that "The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws"). Standing alone, this passage does not create a gubernatorial executive order power, because it does not say he shall have the power to create law. See *Id.* All it says is the Governor "shall have the responsibility for the faithful execution of the laws." *Id.* Thus, the Executive Order power, at least as to state personnel administration, must derive from a statute (i.e. a law, which the Governor can then "faithfully execute." *Id.*)

³ COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 170 (2007). 20 ILCS 415/2 (2008) (stating that "[t]he purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods"). For a discussion of exceptions to the jurisdiction of the Governor with respect to state personnel administration, See *infra* note 8.

⁴ Royal Governors wielded great power over legislation, appointments, and military affairs. See William Swindler, *Executive Power in State and Federal Constitutions*, 1 *HASTINGS CONST. L.Q.* 21 (1974); Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 *IOWA L. REV.* 78 (1964). See also Richard E. Favoriti, *Executive Orders: Has Illinois a Strong Governor Concept?*, 7 *LOY. U. CHI. L.J.* 295, 295-97 (1976).

⁵ E.g., Two New Jersey executive orders issued concerning "project labor agreements" and the court decisions that dealt with those orders. See *Build-*

Executive orders are both a strong and fragile Governor's tool. Like statutes, court decisions and regulations, executive orders are legally binding. But, so long as the Governor acts within his or her authority, an executive order may be issued or repealed without following any of the defined process required for legislation or compliance with administrative procedures for a rule or regulation.⁶ With Executive Orders, Governors are not bound by *stare decisis*⁷ as courts are.

By their nature, executive orders provide significant power to a single elected official, yet they are not as difficult to change or repeal as are other forms of law. Executive orders are always subject to rescission at any time by the authorizing Governor, by a future Governor, by the Legislature (assuming sufficient political will), or by a court.⁸ A new Governor on arrival in office could issue an executive order rescinding previous Governors' orders. An executive order can also be repealed by the executive who has issued it when conditions have changed or when expedient.⁹

ing Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993); George Harms Constr. Co. v. New Jersey Turnpike Auth., 14, 644 A.2d 76, 81 (1994).

⁶ ILL. CONST., Art. V, § 8.

⁷ "*Stare decisis*" literally means "stand by the decision." The term is the theoretical basis for all legal precedent in common law legal systems, although courts do not adhere to it with slavish rigidity. See H. Campbell Black, *The Principle of Stare Decisis*, 34 AM.L. REG, 745 (1886).

⁸ The only legal basis for a court to invalidate an executive order is to demonstrate that it is unconstitutional or without legal authority. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that President Truman had, in seizing most of the nation's steel mills to end a labor dispute stalemate, exceeded his Constitutional or statutory authority). At the state level, there appears to be no one set definition of an executive order, and possibly no difference between an executive order and a proclamation See, E. Lee Bernick & Charles W. Wiggins, *The Governor's Executive Order: An Unknown Power*, 16 ST. & LOC. GOV. REV. 3 (1984).

⁹ See, e.g., David Bresnahan, *Executive Order 13083 Replaced With New One: Federalism policy still broadens scope of Washington's power*, WORLDNETDAILY (Aug. 6, 1999, 1:00 AM), <http://www.wnd.com/?pageId=361> (discussing President Clinton's Executive Order 13083, in which he

The use of gubernatorial executive orders can sometimes have political implications, of course. This article, however, explains why use of an executive order for state personnel administration as a tool for making substantive employment policy is consistent with similar hiring policies that already have national recognition and success. The justification for its use (in the state personnel employment context) is simple: employing as many employable people as possible is the right thing to do, and therefore is sound public policy. Also, state legislatures nationwide traditionally defer to Governors on substantive policy matters.¹⁰

Accordingly, this article proceeds on the premise that the Illinois Governor has the constitutional and statutory power to issue an executive order to "Move-the-Box" on all State of Illinois employment applications. The article first makes the case for such an executive order on economic, public safety, and social justice grounds. It concludes with a review and analysis of existing "Move-the-Box" initiatives nationwide, demonstrating that the Illinois Governor would be in good company and would in no way be - as the saying goes - "a pioneer at risk of getting arrows in his back" for issuing an executive order to "Move-the-Box" on State of Illinois employment applications.¹¹ But even if entering a Move-the-Box executive order were a pioneering act, the sitting Illinois Governor has already shown his receptivity to backing social policy that is the right thing to do for people with

sought to establish nine principles of federalism to be followed by executive departments and agencies in justifying federal intervention or preemption of state or local authority).

¹⁰ There are obvious recent exceptions, such as budget and income tax debates.

¹¹ In the last two years, primarily, the moving of a criminal history inquiry box has been substantially legitimized, not only through legislative practice, but also with research by the National Employment Law Project (current as of June 2010). See NATIONAL EMPLOYMENT LAW PROJECT, MAJOR U.S. CITIES AND COUNTIES ADOPT HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2010), available at http://nelp.3cdn.net/3c69b698ea8acf6209_o0m6bh8f6.pdf.

criminal records,¹² and which policy already portends great progress in empowering those people with criminal records who can prove they deserve a second chance.¹³

¹² Governor Pat Quinn put Illinois on the map, and in a progressive class by itself, when he signed Senate Bill 1050. See S.B. 1050, 96th Gen. Assemb. (Ill 2009). See also, Michael Sweig, *Blueprint for Progress: How Illinois Empowers Rehabilitated People with Criminal Records*, in *ILLINOIS CRIMINAL RECORDS: EXPUNGEMENT AND OTHER RELIEF* 8.1 (2010).

By substantially expanding the range of felony convictions that are now eligible for Certificates of Rehabilitation for occupational licensing and substantive employment, Illinois also became the only state in America that gives employers immunity from liability arising from employing a person with a criminal record who has obtained a Certificate of Rehabilitation. Importantly, a Certificate of Rehabilitation is unlike a pardon, because the criminal record is not excused, forgiven, sealed or expunged, but in operation it can be almost as powerful and it is far easier to obtain. This significant advancement in the law emerged because Senate Bill 1050 removed the jurisdiction of the Illinois Prisoner Review Board to issue either class of Certificates of Rehabilitation: a Certificate of Relief from Disabilities to the formerly incarcerated, or a Certificate of Good Conduct to any applicant, including probationers. All Certificates of Rehabilitation now come from the Circuit Court.

As judgments with the force of law, the Circuit Court-issued certificates create a presumption of rehabilitation that should be very difficult to rebut or collaterally attack. Certificates of Good Conduct are issued specifically with “the force and effect of a final judgment on the merits,” which language upgrades the former legal status of a Certificate of Good Conduct from a public letter of reference to a final judgment that means the certificate holder is rehabilitated, i.e., trustworthy and not dangerous, as a matter of law. License issuers must now disprove rehabilitation or good moral character if they choose to deny employment to a certificate holder based on a criminal record. Except for a criminal record, and all other qualifications being equal, the holder of a Certificate of Rehabilitation now stands on as close to equal footing as possible to an occupational license or employment applicant who has no criminal record.

Finally, upon request by a person with a criminal record, Senate Bill 1050 also requires the Illinois Department of Financial and Professional Regulation, for free, and before the potential license applicant invests in education and testing, to provide a nonbinding, advisory opinion that informs the person if the criminal record is a dispositive obstacle to occupational licensing. This is a 180-degree reversal from past practice.

¹³ An emerging advantage of the new law, specifically regarding the subclass of Certificates of Good Conduct, is that the Circuit Court has already used a Certificate of Good Conduct to relieve what is otherwise an absolute

"Move-the-Box" derives from the current U.S. hiring policy trend commonly known principally among municipalities, but also in a few states as "Ban-the-Box."¹⁴ In operation, "Ban-the-Box" is a device that moves the criminal background inquiry from the initial employment application to the point in the application process where the applicant has already demonstrated that he or she is at least as qualified as other candidates. This approach "levels the playing field," because it allows people with criminal records to avoid having their employment applications in effect, thrown immediately into the garbage if they are truthful and check "the box" about having a felony conviction.¹⁵

Moving the box "bans" nothing. The "ban" in "Ban-the-Box" is an unfortunate misnomer and public relations blunder, because, at least in Illinois, the term appears to have mistakenly led legislators and policy makers to think that this policy hides the fact of a job applicant's criminal record when, in fact, it does no such thing. The most recent attempt to pass "Ban-the-Box" legislation in the Illinois General Assembly failed, likely due to a lack of sufficient education or overt and in some cases con-

statutory bar to employment for a person with a criminal record. See Dawn Trice, *CPS reverses itself, gives job candidate a 2nd chance*, CHI. TRIB. (Sep. 26, 2010), <http://www.chicagotribune.com/news/columnists/ct-met-trice-langdon-0926-20100926,0,6571937.column>.

¹⁴ The more apt term, "Move-the-Box," was brought to this author's attention by Ms. Kerry O'Donnell of the Falk Foundation, Pittsburgh. The "Move" or "Ban the Box" initiatives nationwide have early roots in the Bay Area. See J. Douglas Allen-Taylor, *Activists Push Dellumns to Fulfill 'Ban the Box' Promise*, BERKELEY DAILY PLANET (Apr. 1, 2008), <http://www.berkeleydailyplanet.com/issue/2008-04-01/article/29636?headline=activists-Push-Dellumns-to-Fulfill-Ban-the-Box-Promise>. Activists first began calling on Oakland to implement "ban the box" at a July 2004 Peace and Justice Community Summit, when California's newly elected Governor, Jerry Brown was then Mayor of Oakland. *Id.* Perhaps Illinois and California will be the first states to Move the Box by Executive Order.

¹⁵ Some employment applications also ask if the applicant has ever been arrested, without regard for whether the applicant was ever charged with a crime.

trived misunderstanding about the difference between moving and hiding “the box.”¹⁶

The overwhelming common theme among the objections from legislators during committee hearings was that this legislation proposed to *prevent* an employer from discovering a criminal record. This, of course, was an unfounded objection, but for legislators who are paranoid about the appearance of coddling criminals, or practiced in the politics of self-protection, this objection was simple and convenient, regardless of how undeserved or fallacious. The fact is, the policy moves the box and “bans” nothing. Former Governor Blagojevich vetoed “Ban-the-Box” legislation passed by the 95th General Assembly, possibly due to similar misunderstanding or similar concerns.¹⁷

II. THE CASE FOR “MOVING THE BOX”

Most people seem willing to accept that people can reform their character.¹⁸ Yet many of our laws and regulations suggest that historically policy makers have been reluctant to consider

¹⁶ H.B. 65, 96th Gen. Assemb. (Ill. 2009).

¹⁷ Shamontiel, *Ex-Convicts Get a Second Chance*, ASSOCIATED CONTENT (Apr. 19, 2008), http://www.associatedcontent.com/article/723393/exconvicts_get_a_second_chance.html?cat=17.

¹⁸ Redemption and reformation of character are core concepts in the Judeo-Christian tradition, but generally recognized as valid only outside of the context of criminal justice and employment. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the presence of widespread criminal background checks*, 47 CRIMINOLOGY 327 (2009); Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions*, 21 J. CONTEMP. CRIM. JUST. 6 (2005). This prejudice is amply demonstrated in some Illinois statutes that require “good moral character” for professions which pose absolute bans or discretionary bars for people with criminal records. See, e.g., Professional Boxing Act, 225 ILCS 105/11 (2008); Illinois Certified Shorthand Reporters Act of 1984, 225 ILCS 415/11 (2008); Illinois Professional Land Surveyor Act of 1989, 225 ILCS 330/12 (2008); Real Estate License Act of 2000, 225 ILCS 454/5-25 (2008); Water Well and Pump Installation Contractor’s License Act, 225 ILCS 345/9 (2008); Illinois Architecture Practice Act of 1989, 225 ILCS 305/13 (2008); Funeral Directors and Embalmers Licensing Code, 225 ILCS 41/12-10 (2008); Struc-

that even the twenty percent of the U.S. population who have criminal records can also reform *their* characters (nearly 20 million of whom are felons – and overall approximately 65 million Americans with over 700,000 more returning from prisons annually).¹⁹ Too often, employers and most laws that regulate substantive employment assume that a person with a criminal record²⁰ is always “bad”.²¹ And so it is that the infamy of felony haunts millions of people with criminal records once they satisfy the direct consequence of a criminal conviction: serving one’s sentence.²² Arguably, the most severe consequences come after a person has paid his or her dues and has served the sentence, whether incarceration or probation. These are the ubiquitous “collateral consequences” of conviction:²³ the voluminous fed-

tural Engineering Practice Act of 1989, 225 ILCS 340/11 (2008); Pharmacy Practice Act, 225 ILCS 85/9.5 (2008).

¹⁹ In America we have “A ‘felon class’ of more than 16 million felons and ex-felons, representing 7.5 percent of the adult population. . .” Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & Soc. Sci. 281 (2006).

²⁰ “Person with a criminal record” is neutral and more appropriate than terms like “ex-offender,” “ex-con,” or “felon,” because “person with a criminal record” first literally acknowledges and dignifies the person, and describes one of the person’s many attributes, i.e., “with a criminal record.” Whereas, “ex-offender,” “ex-con,” and “felon” operate as one-dimensional, societal cattle brands that define the person as bad rather than a person who committed a bad act.

²¹ When applying for employment in fields requiring state licensure, the “moral character” of people with criminal records can be a question of bureaucratic discretion. By requiring people to disclose any criminal history during the first phase of application, many people are deemed to have “bad moral character” based solely on the existence of such a record. As a result, many otherwise qualified applicants are unable to pursue the substantive employment for which they are qualified. *See supra* note 18 (listing professions with “good moral” requirements).

²² Infamy is even codified in the Catholic dogma. It is twofold in species: infamy of law (*infamia juris*) and infamy of fact (*infamia facti*). 8 Joseph Delany, *Infamy*, in THE CATHOLIC ENCYCLOPEDIA 1, 2 (Charles G. Herbermann et al., ed., 1910).

²³ *See* AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVIC-

eral and statutory bars to employment, housing and other sectors of life open to people who do not have a criminal record. Historically, and until recently there had been little effort to identify or index them. To an extent they are more quantifiable on a state-by-state basis, but that work is expensive and challenging given the fiscal crisis from which most states currently suffer.²⁴

TION IN FEDERAL LAWS AND REGULATIONS (2009), available at <http://www.abanet.org/cecs/internalexile.pdf>; Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind ed., 2002), available at http://www.urban.org/uploadedPDF/1000557_invisible_punishment.pdf; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); BUREAU OF JUSTICE STATISTICS, *U.S. Department of Justice, Use and Management of Criminal History Record Information: A Comprehensive Report* (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/umchri01.pdf>; Charles J. Hynes, *After release: The Challenge of Successful Reentry*, 24 CRIM JUST. 1 (2009).

²⁴ The Uniform Collateral Consequences of Conviction Act (UCCCA) passed by the Uniform Law Commission in July of 2009 contemplates such a state-by-state quantification of collateral consequences. *New Act Addresses Consequences of Criminal Sentencing*, UNIFORM LAW COMMISSION (Jul. 15, 2009), <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=217>.

Under the UCCCA, which to date has not been adopted anywhere and introduced in only one of the 50 states (Wisconsin), this information is to be presented to a convicted person upon arraignment and completion of sentence (mandated through the Court Security Improvement Act of 2007). This compilation was to be completed as of January, 2009, but to date has not been completed, leaving the claims and standards of the UCCCA as yet unfulfilled, and its efficacy to be delayed. The American Bar Association is directly involved in this collateral consequence research. Telephone interview with Christopher Gowen, American Bar Association Staff Attorney (Oct. 19, 2010). A similar mandate exists in Illinois. SB 2109, 96th Gen. Assemb. (Ill. 1999). This Bill creates a 'Task Force to Inventory Employment Barriers in the Illinois Criminal Justice Information Authority.' The money to do this sort of work in Illinois is simply unavailable in this economy. Thus, SB 2109, as signed by Governor Quinn, contemplates outside (i.e., private) resources to enable the Task Force to work. The Task Force will consist of 12 members outside of the Governor's Cabinet, plus a designee of each Executive Branch Agency. The Senate President appointed author Sweig to the Task Force in

The main problem with collateral consequences of conviction is that they are not only thoroughly endorsed socially and legally, but they tend to reinforce the "badness" of the person. They ignore the importance for a change in identity and in the healthy sense of self that persons with a criminal record must have to advance along the continuum of "successful" reentry and to avoid recidivism.²⁵

For reentry to succeed, and succeed without recidivism, the post-prison, post-probation world must support people with criminal records with the basics of life, primary among them a decent job, because with roadblocks to dignified employment, it can be nearly impossible for people with criminal records to construct a sense of who they can become.

Without proper employment, people with criminal records have severely depleted means for working to achieve a stable, productive future or a sustainable healthy "self." And in this context it is well to note in the most secular spirit possible that twice in the Bible we see admonitions against creating precisely the sort of barriers people with criminal records face:

"Before the blind, do not put an obstacle."²⁶ "Let. . .no man put a stumbling block or an occasion to fall in his brother's way."²⁷ For discussion's sake, the "blind" and "brother" here mean the disadvantaged who cannot adequately provide for themselves and their families. With great visceral sanctimony

September 2010. See Letter from John J. Cullerton, Senate President, State of Illinois, to Michael Sweig, (Sep. 15, 2010), available at http://www.sweig.net/PDFs/senate_letter.pdf. The Task Force as of publication of this article is not yet fully appointed.

²⁵ See Christy A. Visher & Jeremy Travis, *Transitions From Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89 (2003); SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM & REBUILD THEIR LIVES (2001); Stephen Farrell & Shadd Maruna, *Desistance From Crime: A Theoretical Reformulation*, 43 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE & SOZIALPSYCHOLOGIE 171 (2004); Stephen Farrall, *On the Existential Aspects of Avoiding Recidivism*, 28 SYMBOLIC INTERACTION 367 (2005).

²⁶ *Leviticus* 19:14.

²⁷ *Romans* 14:13.

most people would ask: “why would anyone do such a thing?” Why? Because until recently when the economic crises and the consequent multi-billion dollar state budget deficits made warehousing non-violent prisoners too expensive, most legislators’ traditional first instinct has been to run from the “soft on crime” label, and to dismiss social policies that prevented throwing obstacles in front of people with criminal records. But that’s changing.

For people with criminal records, the denial of access to employment, education, housing and other social and welfare benefits long after completion of their criminal sentences breeds recidivism. And on balance elected officials and other policy makers are now realizing that we cannot afford the collateral consequences of conviction that deprive those who most need jobs and services like education and housing, because these are the key opportunities that best provide the means for people with criminal records to reestablish themselves as honorable, law abiding, and tax-paying human beings.²⁸

Approximately 700,000 individuals are released from federal and state prisons annually²⁹ and as many as 9 million are released annually from local jails.³⁰ In 2005, Illinois released 42,000 prisoners back into its communities.³¹ A recent study in Chicago revealed a recidivism rate of three to one for people with criminal records who are unable to find employment versus

²⁸ See Fruqan Mouzon, *Forgive us our Trespass: The Need for Federal Ex-pungement Legislation*, 39 U. MEM. L. REV. 1 (2008).

²⁹ Michael Karpman, *Cities Adopt Hiring Policies to Facilitate Prisoner Re-entry*, NATION CITIES WEEKLY, May 22, 2006, at 6, available at <http://www.nlc.org/ASSETS/653B2A131C6F42288AF411CBC38B1337/ncw052206.pdf>.

³⁰ Allen J. Beck, Presentation at The Jail Reentry Roundtable of the Urban Institute (Jun. 27, 2006). The PowerPoint slides used at the presentation, entitled, collectively, “The Importance of Successful Reentry to Jail Population Growth,” are available at www.urban.org/projects/reentry-roundtable/upload/beck.ppt.

³¹ Press Release, City of Chicago, Mayoral Task Force Releases Recommendations on Prisoner Reentry (Jan. 24, 2006), available at <http://www.chicago-metropolis2020.org/documents/prisonerreentrypressrelease.pdf>.

those who gain steady jobs upon release from prison.³² Employment has long been the most powerful indicator of whether people with criminal records will remain out of the criminal justice system.³³

A. *Social and Fiscal Timeliness*

Illinois confronts the same problems all states face nationwide: "[t]he more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding."³⁴ In the present dire economic climate and increasingly over the last several years, state governments must question the economic burdens of unforgiving systems laden with so many people with criminal records.³⁵ These unforgiving systems include not only the justice system, but reactions of the employment and housing systems to a person once he or she is released from incarceration.

³² LEGAL ACTION NETWORK, NATIONAL BLUEPRINT FOR *Reentry*: Model policies to promote the successful reentry of individuals with criminal records through employment and education 13 (2008), available at http://www.hirenetwork.org/pdfs/National_Blueprint_For_Reentry_08.pdf.

³³ See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); JARED BERNSTEIN & ELLEN HOUSTON, ECONOMIC POLICY INSTITUTE, CRIME AND WORK: WHAT WE CAN LEARN FROM THE LOW-WAGE LABOR MARKET (2000); Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men's Employment*, 54 INDUS. & LAB. REL. REV. 3 (2000); Christopher Uggen, *Work As a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment and Recidivism*, 67 AM. SOC. REV. 529 (2000); ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993).

³⁴ Andrew Von Hirsch & Martin Wasik, *Civil Disqualification Attending Conviction: A Suggestion Conceptual Framework*, 56 CAMBRIDGE L. J. 599, 605 (1997). See also, Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003).

³⁵ See RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT (2002), available at http://sentencingproject.org/doc/publications/inc_statesentencingpolicy.pdf.

“Lock ‘em up” law enforcement policy in the 1980’s and 1990’s created a socioeconomic subclass of “internal exiles” who are hard pressed to participate or contribute to society.³⁶ As of 2000, “[a]n estimated 13 million Americans [were] either currently serving a sentence for a felony conviction or ha[d] been convicted of a felony in the past.”³⁷ As of 2002, “[m]ore than 47 million Americans (more than a quarter of the adult population) ha[d] criminal records on file with federal or state criminal justice agencies.”³⁸

A recent study in Illinois showed that while the majority of prisoners surveyed expressed little concern about their ability to keep a stable job, they also agreed that it would be difficult to find initial employment.³⁹ The presence of the criminal history question may dissuade otherwise qualified individuals from beginning the application process. People with criminal records are likely to assume that a prior conviction will either bar them from consideration or put them at too great of a disadvantage to contend for the position.⁴⁰

B. Safeguarding Public Welfare

“Move-the-Box” policy benefits the State welfare by improving productivity of State agencies, encouraging rehabilitation of people with criminal records, and boosting the public’s faith in the State’s ability to employ and apply rehabilitation as a model

³⁶ See INTERNAL EXILE, *supra* note 23; Travis, *supra* note 23; Demleitner, *supra* note 23.

³⁷ Christopher Uggen et al., *Crime Class and Reintegration: The Scope of Social Distribution of America’s Criminal Class* (paper presented at the American Society of Criminology meetings in S.F., Cal. (Nov. 18, 2000)).

³⁸ *Id.*

³⁹ VERA KACHNOWSKI, URBAN INSTITUTE, RETURNING HOME -ILLINOIS POLICY BRIEF: EMPLOYMENT AND REENTRY 2 (2005), available at http://www.urban.org/UploadedPDF/311215_employment.pdf.

⁴⁰ Jessica S. Henry & James B., *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL’Y 755, 755-56 (2007).

for the criminal justice system, rather than simply an expensive cycle of retributive "justice."

The notion that we live in a meritocracy need not be cast aside in state personnel administration. Allowing the State of Illinois the opportunity to employ the best qualified individuals for public services should lead to more productive State agencies for the benefit of Illinois, generally. While a criminal background check is a necessary step for public safety, "Move-the-Box" policy would in no way interfere with the State of Illinois (CMS,⁴¹ specifically) taking such precautions.

A "Move-the-Box" initiative merely postpones a criminal background check until an applicant has received fair consideration for employment. Further, the State may choose to exempt particularly sensitive state positions from the ban where there is a direct relationship between a criminal history and the responsibilities and duties of the position, e.g., law enforcement, judicial administration, child protective services, etc. However, even without such exemptions, no risk to public safety exists because under a "Move-the-Box" initiative the State may still and should conduct a background check before making an applicant a final offer of employment.⁴²

There is also potential for advancing the employment opportunities for people with criminal records even further while also increasing employer and agency protection. According to a study conducted by researchers from Carnegie Mellon University, it is proven that over time people with prior criminal

⁴¹ Civil Administrative Code of Illinois (Department of Central Management Services Law), 20 ILCS 405/405-5(b) (2008) (specifying that the term "Department of Central Management Services" does "not mean the judicial branch, including, without limitation, the several courts of the State, the offices of the clerk of the supreme court and the clerks of the appellate court, and the Administrative Office of the Illinois Courts, nor does it mean the legislature or its committees or commissions").

⁴² See Karpman, *supra* note 29, at 6.

records can return to the same level of risk of offense as people with no criminal history.⁴³

C. *Reducing Employment Discrimination*

Removal of the criminal conviction question from the State of Illinois employment applications will further assist qualified applicants in gaining employment by reducing employment discrimination.⁴⁴ Recent studies conducted in major U.S. cities have shown that a criminal record reduces the likelihood by half that an applicant will be offered a second interview or a job.⁴⁵ In a survey of 3,000 employers, two-thirds said they would be unlikely to consider hiring a person with a criminal record.⁴⁶

People with criminal records are too often perceived as untrustworthy, dangerous, or morally bankrupt, and are subconsciously or overtly relegated to a class of distinct “otherness.” People with criminal records face a difficult task of making a positive first impression during an initial job interview, regardless of whether they have paid their dues by serving and completing their sentences.⁴⁷

While many employers openly admit their opposition to hiring a person with a criminal record, many employers may sub-

⁴³ See *Redemption*, *supra* note 18, at 340-44. By distributing this information to employers in conjunction with a background check, employers would have the empirical evidence to determine whether an applicant with a criminal record is at risk to commit another crime. *Id.* at 331-32. This could be the groundwork for new a statute that would protect employers from potential liability lawsuits if they hire based on this risk assessment tool. *Id.* at 346-47.

⁴⁴ See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (chronicling a study of racial discrimination present in the hiring of those with criminal records).

⁴⁵ Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL & SOC. SCI. 195, 199 (2009).

⁴⁶ Kachnowski, *supra* note 39, at 1.

⁴⁷ See *Ex-Offenders Need Not Apply*, *supra* note 18, at 7 (discussing the use of an individuals “good moral character” as a hiring criterion).

consciously do the same. The infamous labels of "felon," "ex-offender," or "ex-con" connote certain negative stereotypes that are likely to place someone with a criminal record at a severe disadvantage during the initial job interview. Experimental evidence indicates that an interviewer may selectively detect and retain information about an interviewee that is consistent with a stereotype attributed to the interviewee, and ignore information that would contradict stereotypical expectations.⁴⁸

The Illinois Governor has a distinct opportunity to address this injustice and to benefit the State of Illinois generally by issuing an executive order to "Move the Box." Removing the criminal history question from State of Illinois employment applications would go a long way to remove the criminal record stigma,⁴⁹ and allow an employer within a given state agency or department to make his or her initial considerations based solely on an applicant's personal attributes, skills, experience and qualifications.⁵⁰

The aforementioned study conducted by Carnegie Mellon University also suggests that with the use of empirically based measurements, employers could determine the length of time at which the existence of a criminal record no longer poses a risk to the employer or agency.⁵¹ Optimally, if the law were more progressive, this would restrict employers' right to inquire about criminal records only regarding the relevant amount of time before the application that would be of potential risk. This limi-

⁴⁸ See *Sequencing Disadvantage*, *supra* note 45, at 197.

⁴⁹ See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); *THE SOCIAL PSYCHOLOGY OF STIGMA* (Todd F. Heatherton, Robert E. Klock, Michelle R. Hebl, & Jay G. Hull eds., 2000); Robert Kurzban & Mark R. Leary, *Evolutionary Origins of Stigmatization: The Functions of Social Exclusion*, 127 *PSYCHOL. BULL.* 187 (2001). See also, Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 *ANN. REV. SOCIOLOGY* 363, 363 (2001).

⁵⁰ *Ban the Box to Promote Ex-Offender Employment*, *supra* note 40, at 759 (discussing how criminal records are not considered until after applicant passes initial competency screening process).

⁵¹ See *Redemption*, *supra* note 18, at 346-47.

tation would give clear guidelines to employers and allow them to better understand the significance of a criminal record, and would give applicants the ability to exclude criminal histories that are no longer relevant.⁵² This is not yet the law but an aspiration. Thus, it is all the more reason for the Governor to implement a starting point for more progressive social policy in the form of an executive order to “Move-the-Box.”

D. Reducing Financial Costs

Generally, an employed individual is less costly to any State than an unemployed individual. Employed individuals are better equipped to care for their families and less likely to seek financial aid and social services from the state. Further, an employed person with a criminal record is less likely to reoffend than an unemployed person.⁵³ Illinois spends approximately \$1.3 billion annually on state prison operations.⁵⁴ Improving employment opportunities for people with criminal records, i.e., for those who can prove they deserve it, can assist in lowering such a great financial burden in several ways.

As Mayor Daley stated, “On average, two-thirds of those released from prison are arrested within three years, and half of them end up back in jail. Society is then forced to bear the financial and human cost of their crimes, as well as the cost of their apprehension, conviction and imprisonment.”⁵⁵ As dis-

⁵² *See Id.*

⁵³ S.J. Tripodi, J.S. Kim & K. Bender, *Is Employment Associated With Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 706, 708 (2010).

⁵⁴ MAYORAL POLICY CAUCUS ON PRISONER REENTRY, REBUILDING LIVES. STRENGTHENING HOPE. STRENGTHENING COMMUNITIES.: BREAKING THE CYCLE OF INCARCERATION AND BUILDING BRIGHTER FUTURES IN CHICAGO 4 (2006), available at http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/MPCFinalReport.pdf.

⁵⁵ Press release, *supra* note 31. *See also*, NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 3.

cussed above, employment directly impacts an individual's likelihood of re-offending. By implementing a "Move-the-Box" initiative, the State of Illinois can actively assist in reducing recidivism rates by reducing the employment barriers that confront people with criminal records.

By enacting "Move-the-Box" initiatives, the State of Illinois will enhance its chances to hire the most qualified candidates. Currently, one in five adults in the United States has a criminal record.⁵⁶ A criminal history box discourages that one-fifth of the population from applying for a job and thus curtails the pool of applicants available from which the state may choose to hire.

E. Move-the-Box in Chicago

Cities nationwide, including Chicago, and a few states are addressing these barriers by implementing Move-the-Box initiatives.⁵⁷ The removal of a criminal history question on an initial job application acts as a catalyst to "level the playing field" for people with criminal records, because it encourages them to enter the application process and reduces employment discrimination.

Mayor Daley stated when he announced the Chicago initiative: "[t]his change means that city hiring will be fairer and more common-sense. It means that former prisoners will have a chance to make their case and maybe land a city job. . . We simply have to break that cycle [of recidivism] if we expect the crime rate to continue to fall. And that means we have to help ex-offenders rebuild their lives, connect with their families, find

⁵⁶ Maurice Emsellem, National Employment Law Project, Presentation at the 7th Annual Conference of Mayors Faith-Based on Community Initiatives Task Force (Jun. 4, 2006), available at http://nelp.3cdn.net/6d85bfbc66cb1aa3_jdm6bntn7.pdf.

⁵⁷ Going forward in this Article, we no longer use the label "Ban-the-Box," even to discuss ordinances that used that label when enacted. Instead we use "Move-the-Box," because our focus is on the inaccuracies and misleading nature of the term "Ban-the-Box."

meaningful employment and become productive members of society.”⁵⁸

The impact of a criminal conviction is reviewed on a case-by-case basis, through a process designed to balance the city’s commitment to “help[ing] people with criminal convictions safely re-enter the workforce.”⁵⁹ Human Resource personnel for the City of Chicago have guidelines for evaluating an applicant’s criminal history. Factors to be considered are the nature and number of offense(s); the degree of relatedness between the offense(s) and the position; the amount of time since the last conviction(s); evidence of rehabilitation; and whether the individual has been “open, honest and cooperative” in the application process.⁶⁰ The State of Illinois can do the same.

The City of Chicago directive apparently gives broad discretion in permitting the exclusion of an applicant based on a prior conviction, as should a State of Illinois model. As such, like the City of Chicago, the State of Illinois could make a significant effort to standardize its hiring processes for people with criminal records. Removal of the criminal history box is consistent with and adds to some already existing Illinois social justice policy and commitment to rehabilitate and employ more people with criminal records.⁶¹

⁵⁸ Press release, *supra* note 31.

⁵⁹ MAYORS INNOVATION PROJECT, CITY OF CHICAGO INITIATIVES TARGETED TO INDIVIDUALS WITH CRIMINAL BACKGROUNDS 1 (2007), *available at* http://www.mayorsinnovation.org/pdf/Article8_HC.pdf.

⁶⁰ *See City of Chicago Hiring Guidelines*, EGOV.CITYOFCHICAGO.ORG, http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?contentOID=536951275&contentTypeName=COC_EDITORIAL&topChannelName=dept&blockName=mayors+Office%2FTest%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Mayors+Office&deptMainCategoryOID=-536882061 (last visited Nov. 8, 2010).

⁶¹ *See NATIONAL EMPLOYMENT LAW PROJECT, supra* note 11, at 3. *See generally*, Loss and Restoration of Rights, 730 ILCS 5/5 -5 -5 (2008) (explaining presumptions of rehabilitation for 27 professions regulated by the Illinois Department of Financial and Professional Regulation).

III. EVALUATION OF NATIONWIDE MOVE-THE-BOX INITIATIVES⁶²

Twenty-four localities and five states (California, Connecticut, Hawaii, Minnesota and New Mexico) currently have reforms in place that vary in application and scope.⁶³ The list seems to expand monthly around the country. As we demonstrate, the most common characteristics of these nationwide policies include and require on the part of the employer what are essentially forms of rational relationship analysis that integrate applicable guidelines from the Equal Employment Opportunity Commission ("EEOC"):⁶⁴ (1) the breadth of employers, i.e., vendors and

⁶² See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11. As of June 2010, this was the most complete resource the authors could locate, although it is no longer complete as additional policies have been adopted and continue to be adopted around the country, as noted in our discussion.

⁶³ Throughout the editing of this article, the adoption of Move-the-Box policies proliferated so quickly, and in concentrated bursts, that it became difficult, particularly as publication was imminent, to ensure absolute completeness. We believe we are complete in our discussion and the citations to various additional news sources.

⁶⁴ The versions of "rational relationship" analysis which inhere in Move-the-Box and fair hiring policies generally do not formally rise to the level commonly associated with Equal Protection analysis: that government actions which classify one group differently from another must pass minimal "rational relationship" scrutiny and there must be a logical relationship between the classification and the law's or practice's purpose, i.e., the government's interest in discriminating must be a legitimate one. While Move-the-Box policies are generally not so lofty, expressly, there is a hopeful, emerging trend in these ordinances that suggests almost the same level of mandated scrutiny by employers when assessing applications by people with criminal records. Good examples are in Kalamazoo and Battle Creek, Michigan, (see *infra*, n, 90), which in proscribing blanket bans on hiring felons require employers to follow Equal Employment Opportunity Commission ("EEOC") guidelines. While EEOC guidelines can be nuanced in application, Professor Stacey Hickox's recent law review article distills the gist as follows:

"If an employer's hiring practice or criteria has an adverse impact on members of a protected class, Title VII requires "some level of empirical proof that challenged hiring criteria accurately predicted job performance." [citation omitted]. The employer must present real evidence that the challenged criteria

contractors in the public sector, who are required to remove the criminal history box from job applications; (2) the time during the hiring process when a prior conviction may be considered; and (3) the factors which employers must evaluate when considering an applicant's criminal record. Some Move-the-Box policies expressly characterize the analysis as "rational relationship" analysis, and some do not.⁶⁵

California

Recently, having followed the lead and experience of a handful of its cities, the California State Personnel Board has now revised the State Examination/Employment Application to move its two previous questions asking about previous criminal

"measure[s] the person for the job and not the person in the abstract." [citation omitted]. Generally, employers must show that a discriminatory hiring policy accurately predicts an applicant's ability to perform successfully the job in question. [citation omitted]. Under this standard, Title VII still allows an employer to hire the applicant it predicts will be most successful in the position. [citation omitted]. EEOC regulations suggest limits on an employer's consideration of applicants' criminal records. [citation omitted]. The EEOC Compliance Manual states that consideration of applicants' conviction history has an adverse impact on applicants of color, based on statistics which establish that they are convicted at a rate disproportionately greater than their representation in the population. [citation omitted]. Without a justifying business necessity, a total ban on hiring any exoffenders is unlawful under Title VII. [citation omitted]. The EEOC Compliance Manual goes on to explain that an applicant may be disqualified from a job on the basis of a previous conviction, but only if the employer takes into account the following factors: 1. The nature and gravity of the offense or offenses; 2. The time that has passed since the conviction and/or completion of the sentence; and 3. The nature of the job held or sought."

Stacey Hickox, *Justifying Rejection of Applicants with Convictions*, 8 DARTMOUTH L.J. 39, 42 (2010).

⁶⁵ See, e.g., NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 14 (discussing Multnomah County, Oregon's policy).

convictions to a later date in the employment process.⁶⁶ The new employment application does not ask applicants to provide information on their conviction history.⁶⁷ Applicants who apply for a job "to which a criminal record is pertinent," must complete the Criminal Record Supplemental Questionnaire.

In October 2005, (effective June 2006) San Francisco became the first California city to move the criminal history box on job applications for city employment, except for positions where a state or local law expressly bars the employment of individuals with criminal convictions.⁶⁸ Under Resolution No. 764-05, an applicant's criminal history may only be considered after the applicant has been identified as a serious candidate for the position.⁶⁹ Initial job applications warn that a criminal background check may be conducted during a future point of the interviewing process.⁷⁰ However, if a candidate's criminal history is accessed, the San Francisco resolution requires an employer to consider the relationship of the crime to the specific position, the severity of the crime committed, and evidence of the candidate's rehabilitation.⁷¹

In October 2006 (effective April 2007), Alameda County moved the box when it instituted a pilot program prohibiting county employers from inquiring into an applicant's criminal

⁶⁶ Memorandum from Suzanne M. Ambrose, Executive Officer, California State Personnel Board to All State Personnel Officers (Jun. 25, 2010), *available at* <http://www.spb.ca.gov/WorkArea/showcontent.aspx?id=6050>.

⁶⁷ See STATE OF CALIFORNIA – STATE PERSONNEL BOARD, EXAMINATION/EMPLOYMENT APPLICATION (2010), *available at* <http://www.spb.ca.gov/std678.pdf>.

⁶⁸ See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 3-4; *Ban the Box to Promote Ex-Offender Employment*, *supra* note 40, at 757.

⁶⁹ San Francisco, Cal., Employment Policies and Procedures Regarding Criminal History – Resolution No. 764-05 (Oct. 21, 2005), *available at* <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0764-05.pdf>.

⁷⁰ *Id.*

⁷¹ See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 3-4.

history until a later time in the interview process.⁷² Employers also must consider any mitigating factors surrounding the commission of a crime and evidence of rehabilitation presented by an applicant when determining whether an applicant's criminal record has an effect on his or her ability to perform the job in question.⁷³

In October 2008, Berkeley moved the conviction history off city job applications.⁷⁴ The move applies to all but police department job applications.⁷⁵ For certain public safety, recreation, and finance related positions, Berkeley obtains conviction history from the California Department of Justice, but for all other positions relies on applicant self-disclosure.⁷⁶

Disclosure of conviction history is now required upon the applicant's selection for the position and upon receipt of a conditional employment offer. The Human Resources Department then reviews conviction history information, keeps it confidential and conducts "an assessment of the relationship between a conviction and the functions of the position; number of convictions; time elapsed since the conviction, evidence of rehabilitation, and any other mitigating circumstances."⁷⁷

Oakland moved the box and no longer requests information on the applicant's criminal history as of March 2010.⁷⁸ The application indicates that a Conviction History Packet may be required, and applicants must check whether they will disclose criminal history information if asked.⁷⁹ The consequence for

⁷² Alameda County, CA, Resolution No. 2006-389 (Oct. 3, 2006), *available at* <http://www.nelp.org/page/-/SCLP/AlamedaResolution.pdf>.

⁷³ *Id.*

⁷⁴ Memorandum from Phil Kamlarz, City Manager, to Honorable Mayor and Members of the City Council, City of Berkeley (Nov. 18, 2008), *available at* http://nelp.3cdn.net/aec246ba29b14a22f7_x1m6bhncq.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 12.

⁷⁹ *Id.*

non-disclosure is unaddressed. Oakland's website states that criminal records do not automatically disqualify an applicant; the City will consider each individual ad hoc to determine if convictions are related to the job sought and "any record of conviction(s) will be reviewed and may result in a request for additional information or termination if warranted."⁸⁰

Connecticut

Effective October 1, 2010, Connecticut became the fourth state nationwide to adopt a Move-the-Box law.⁸¹ In June 2010, Connecticut Governor Jodi Rell had vetoed a bill (HB4205)⁸² that would have moved the box and delayed criminal background checks until the person was offered a job, arguing partly that it was already illegal to discriminate in employment based on a felony, and partly that it would be a waste of state resources to interview applicants for "sensitive" jobs who don't qualify because of a criminal record, but the state legislature overrode that veto.⁸³ The origin of Connecticut's adoption of a statewide Move-the-Box law emerged from the Cities of Norwich and New Haven paving the road to state law.

In December 2008, the City of Norwich moved the box from the initial application for city jobs.⁸⁴ The Norwich ordinance allows background checks only if the City will make a binding employment offer. The applicant must provide conviction details

⁸⁰ *Id.* See also, *Employment Opportunities*, OAKLANDNET.COM, <http://www.oaklandnet.com/government/jobs/faq.asp> (last visited Nov. 8, 2010).

⁸¹ Gregory B. Hladky, "Ban The Box" Law Should Help People With Criminal Records Find Jobs, NEW HAVEN ADVOCATE (Jul 8, 2010, 7:00 AM), <http://www.newhavenadvocate.com/featured-news/ban-the-box-law-should-help-people-with-criminal-records-find-jobs>.

⁸² H.R. 5207, 2010 Gen. Assemb., Feb. Sess. (Conn. 2010).

⁸³ Steve Yoder, *The Job Trap for Ex-Prisoners: 'The Box'*, THE CRIME REPORT (Oct. 20, 2010, 8:38 PM), [http://thecrimereport.org/2010/10/20/the-job-trap-for-ex-prisoners-'the-box'/'](http://thecrimereport.org/2010/10/20/the-job-trap-for-ex-prisoners-'the-box'/).

⁸⁴ See Norwich, Conn., Ordinance 1604 (December 1, 2008), available at <http://www.nelp.org/page/-/SCLP/NorwichOrdinance16-11.pdf?nocdn=1>.

only after the City has determined that the applicant is a finalist for a position.⁸⁵

In February 2009, New Haven enacted a hiring policy protecting applicants from criminal background checks until after an employer has made the applicant a conditional offer.⁸⁶ Unlike California, New Haven's hiring policy applies to all city employers and any private vendors doing business with the City.⁸⁷ While the policy allows for a waiver under exigent circumstances, all other employers must assess a list of factors when considering an applicant's criminal history.⁸⁸ These factors include: the nature of the crime and its relationship to the job; evidence of rehabilitation; the time elapsed since conviction or release; the age of the applicant at the time of the offense; the gravity of the offense; and the public policy of the city to encourage employment of ex-offenders.⁸⁹

In May 2009, Hartford recognized that employment barriers for people with criminal records "creat[e] permanent members of an underclass that threatens the health of the community and undermines public safety."⁹⁰ The City Council passed an ordinance to change the City's hiring policy for employees and vendors, which prohibits considering arrests that did not lead to conviction; delaying and limiting background checks to specific

⁸⁵ See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 7.

⁸⁶ New Haven, Conn., Ordinance Amendment of the New Haven Board of Alderman Prohibiting Unfair Discrimination in City Hiring Policies Against Persons Previously Convicted (2007), *available at* <http://www.cityofnewhaven.com/CommunityServices/pdfs/Ban%20the%20Box%20FINAL%20VERSION.pdf>. See also, NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 8.

⁸⁷ Ordinance Amendment of the New Haven Board, *supra* note 86, at 3-4.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 4.

⁹⁰ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 9.

positions; and the opportunity to appeal adverse employment decisions.⁹¹

In October 2009, the City of Bridgeport modified its Civil Service Rules to allow a criminal history inquiry only after the applicant has been determined "otherwise eligible."⁹²

Florida

In 2008, Jacksonville adopted an ordinance reforming its hiring procedures and contractor bidding policies, and in July 2009, it released the revised Move-the-Box standard.⁹³ City department heads will now "not inquire about or consider criminal background check information in making a hiring decision."⁹⁴ Instead, "criminal information disclosure is required as part of the post-offer new hire process,"⁹⁵ but the criminal background check results are not shared with other agencies.⁹⁶ If a conviction is on the applicant's record, the city must consider the specific duties of the job, the age of the offense, and rehabilitation.⁹⁷

Hawaii

Under Hawaii law, no public or private employer may inquire into an applicant's criminal conviction record until after a condi-

⁹¹ *Id.* See also, Hartford, Conn., Ordinance Establishing a Policy for Criminal Record Check Screening Procedure (Apr. 13, 2009), available at <http://www.nelp.org/page/-/SCLP/HartfordVendorBantheBoxPolicy.pdf?nocdn=1>.

⁹² Bridgeport, Conn., Proposed Changes to Civil Service Rule II and III (Oct. 5, 2009), available at <http://d.yimg.com/kq/groups/1624843/220679056/name/resolution%20amending%20civil%20service%20rules%2010-5-09.pdf>.

⁹³ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 10. See also, Jacksonville, Fla. Ordinance 2008--911--E (Nov. 10, 2008), available at http://nelp.3cdn.net/875d685220c2b5cbd2_gcm6bn5wh.pdf.

⁹⁴ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 10.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 11.

tional offer has been made unless the employer is expressly permitted to do so by federal or state law.⁹⁸ The statute further dictates that an employer may only consider a conviction record where it bears a direct rational relationship to the duties of the applied for position.⁹⁹

Illinois

As discussed above, Mayor Daley announced the City of Chicago's Move-the-Box initiative in May 2004.¹⁰⁰ Under Chicago's hiring guidelines, the criminal history question has been removed from all City employment application.¹⁰¹ Disclosure of a criminal record is required after a conditional offer of employment has been made to an applicant.¹⁰² Once revealed, a criminal conviction alone does not automatically disqualify a candidate for a position with the City.¹⁰³ In describing the City's policy, Mayor Daley stated, "[t]he City will balance the nature and severity of the crime with other factors, such as the passage of time and evidence of rehabilitation."¹⁰⁴ The Mayor went on to explain that, "this change means that City hiring will be fairer and more common-sense. It means that former prisoners will have a chance to make their case and maybe land a City job."¹⁰⁵

The current parameters, subject to modification by the City, are taken into consideration as part of a case-by-case review: (1) the nature of the offense; (2) the nature of the sentencing; (3) the number of convictions; (4) the time elapsed since the conviction; (5) the relationship between the offense and the nature of

⁹⁸ HAW. REV. STAT § 378-2.5 (2006).

⁹⁹ *Id.*

¹⁰⁰ Press release, *supra* note 31. *See also*, NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 3.

¹⁰¹ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 3.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Press release, *supra* note 31.

¹⁰⁵ *Id.*

the position; (6) the age of the candidate at the time of the offense; (7) the extent to which the candidate has been open, honest and cooperative in the City's background examination; and (8) any other relevant information regarding the candidate's suitability.¹⁰⁶

Maryland

Baltimore moved the criminal history box from its employment applications in December of 2007.¹⁰⁷ Under Baltimore's hiring policy, an applicant's criminal history will be reviewed at the final stages of the hiring process.¹⁰⁸ The measure was approved unanimously by Baltimore's Board of Estimates and backed by Mayor Sheila Dixon.¹⁰⁹

Massachusetts

While Massachusetts as a state has not adopted a Move-the-Box policy, it has recently reformed employment related policies that involve criminal records.¹¹⁰ Boston has enacted a very

¹⁰⁶ *City of Chicago Hiring Guidelines*, *supra* note 60.

¹⁰⁷ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 6.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See NATIONAL EMPLOYMENT LAW PROJECT, NEW STATE INITIATIVES ADOPT MODEL HIRING POLICIES REDUCING BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1-2 (2010), available at <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1>. *Massachusetts* has reformed procedures relating to use of criminal records in employment decisions. The new law requires employers, volunteer coordinators, and professional licensing agencies to supply applicants with a copy of their criminal history report prior to questioning the applicant about his or her criminal history. *Id.* An applicant is entitled to a copy of his or her criminal history report if an employer, volunteer coordinator or licensing agency makes an adverse decision on the basis of that criminal record. *Id.* Criminal records may only contain information on (i) felony convictions for 10 years following their disposition, including termination of any term of incarceration or custody; (ii) misdemeanor convictions for 5 years following their disposition, including termination of any term of incarceration or custody; and (iii) pending

comprehensive Move-the-Box legislation. The ordinance, effective July 1, 2006, prohibits Boston employers and private vendors doing business with the City from conducting a criminal background check on an applicant, unless the check is required by law or the City has made a good faith determination that the relevant position is of such sensitivity that a criminal background report is warranted.¹¹¹ Where a criminal background check is required or warranted, the City may only conduct the check once it determines the applicant is otherwise qualified for the position.¹¹² The City then considers the following factors in making a final employment decision: (1) the seriousness of the crime; (2) the relevance of the crime; (3) the number of crimes; (4) the time elapsed since the crime was committed, and (5) the occurrences in the applicant's life since committing the crime.¹¹³ A waiver of Boston's policy may be granted by an Awarding Authority only under exigent circumstances.¹¹⁴

In April of 2008, Cambridge enacted a Move-the-Box ordinance similar to Boston's Move-the-Box legislation.¹¹⁵ Under the Cambridge ordinance, no public or private vendor doing business with the City may consider an applicant's criminal background until the candidate has been deemed otherwise qualified for the position - unless the background check is required by law.¹¹⁶ However, a private employer may be granted a waiver by the City Manager where the request for waiver is deemed objectively reasonable.¹¹⁷ Like Boston, Cambridge em-

criminal charges. *Id.* But prior misdemeanor and felony conviction records are available for the entire period that one's last conviction record is available.

¹¹¹ Boston, Mass., Ordinance Regarding CORI (Jul. 1, 2006), *available at* http://nelp.3cdn.net/dc937c758c0ad0c931_fem6bxk1e.pdf.

¹¹² NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 2.

¹¹³ Ordinance Regarding CORI, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 5.

¹¹⁶ *Id.*

¹¹⁷ Cambridge, Mass., Ordinance 1312 (Apr. 18, 2008), *available at* http://nelp.3cdn.net/57c94570f908e0e549_b5m6bh1p8.pdf.

ployers must consider certain factors including: (1) the relevance of the crime; (2) the nature of the work; (3) the time since the conviction; (4) the age of the candidate at the time of the offense; (5) the seriousness and specific circumstances of the offense; (6) the number of offenses; (7) pending charges against the applicant; (8) evidence of rehabilitation or lack thereof; and (9) any other relevant information.¹¹⁸

The City of Worcester followed Boston and Cambridge in 2009.¹¹⁹ The policy not only removes the criminal history inquiry box, but criminal background checks are not mandated unless the City determines the position applied for sufficiently sensitive.¹²⁰ The policy applies to vendors and contractors.¹²¹ Notably, (1) the person assessing the application of a person with a criminal record must be trained to do so; (2) the policy applies to vendors and contractors with the City; (3) EEOC language is incorporated into the selection criteria; (4) there is a right of appeal from a denial of employment.¹²²

Michigan

As of October 2010, Detroit became the most recent city¹²³ to implement a Move-the-Box ordinance, which forbids Detroit from asking an applicant about prior felony convictions on the initial employment application form.¹²⁴ Kalamazoo (January

¹¹⁸ *Id.*

¹¹⁹ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 10.

¹²⁰ Worcester, Mass., Ordinance Relative to Fair CORI Practices by City Vendors (Jun. 23, 2009), *available at* <http://www.nelp.org/page/-/SCLP/WorcesterCityOrdinance.pdf?nocdn=1>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Detroit City Council Adopts "Ban the Box" for Employment Applications*, DETROIT BUSINESS LAW (Oct. 5, 2010), <http://www.detroitbusinesslaw.com/2010/10/detroit-city-council-adopts-ban-the-box-for-employment-applications> (Detroit is the most recent city to adopt a Move-the-Box policy as of the publication of this Article).

¹²⁴ *Id.*

2010) and Battle Creek (June 2008) preceded Detroit.¹²⁵ Battle Creek's ordinance also requires a similar hiring practice of vendors who have city contracts; Battle Creek and Kalamazoo prohibit a blanket ban on hiring people with past felony convictions, which ensures adherence to federal Equal Employment Opportunity Commission guidelines.¹²⁶

Minnesota

Under Minnesota law, no public employer may inquire into an applicant's criminal history until the applicant has been selected for a job interview, unless the position applied for is with the Department of Corrections or the public employer has a statutory duty to conduct a criminal background check.¹²⁷ Minnesota's Move-the-Box statute was enacted by the legislature and signed into law by the Governor in May, 2009,¹²⁸ making Minnesota the first to pass a statewide Move-the-Box law.¹²⁹

Before this statewide enactment, St. Paul and Minneapolis had initiated their own efforts prohibiting the use of a criminal history box on initial applications for city employment.¹³⁰

In Minneapolis, it's illegal for a city employee to question a job applicant about their criminal history until after the applicant has been found otherwise qualified for the position.¹³¹

¹²⁵ Jason A. Smith, *Ban the Box, Hire Fairly: Job Application "Criminal Conviction Boxes" are Unfair Penalty*, ANN ARBOR CHRON. (Jan. 27, 2010), <http://annarborchronicle.com/2010/01/27/column-ban-the-box-hire-fairly>.

¹²⁶ Karpman, *supra* note 29, at 6. *See also, supra* note 64, for explanation of the EEOC guidelines.

¹²⁷ MINN. STAT. ANN. § 364.021 (2004).

¹²⁸ COUNCIL ON CRIME AND JUSTICE, MINN. STAT. 364.021 "BAN THE BOX" (2009), available at <http://www.crimeandjustice.org/pdfFiles/Ban%20the%20Box%20Explanation.pdf>.

¹²⁹ *Minnesota Becomes First State to "Ban of the Box,"* PARTNERSHIP FOR SAFETY AND JUSTICE, (Jun. 26, 2009), <http://www.safetyandjustice.org/news/1535>.

¹³⁰ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 4-5.

¹³¹ *Id.* at 5.

Under the St. Paul policy, a criminal background check may be conducted only after a conditional employment offer, unless the position sought requires working with children, directly handling money or significant authority in city funds transfers, or driving for the city or a police, fire, or water department.¹³² When a criminal background check is a factor in the a St. Paul employment decision, the City's move the box Resolution requires the City to consider: (1) the relationship of the crime to the purpose of regulating employment; (2) the nature and seriousness of the crime; (3) the relationship of the crime to the ability, capacity, and fitness required to perform the job.¹³³

New Mexico

On March 8, 2009, New Mexico became the second state to move the box (following Minnesota), when Governor Bill Richardson signed into law SB 254, the Consideration of Crime Convictions for Jobs bill.¹³⁴ The law removes the question from public job applications regarding a person's felony conviction record, leaving such questions for the interview stage of the hiring process.¹³⁵ The bill applies to application for state, local, or federal public jobs and does not apply to private sector employers.¹³⁶

¹³² St. Paul, Minn., Resolution Directing the Office of Human Resources to Conduct an Audit of the City's Hiring Practices (Dec. 2006), *available at* http://stpaul.granicus.com/MetaViewer.php?view_id=37&clip_id=308&meta_id=14447.

¹³³ *Id.*

¹³⁴ S.B. 254, 49 Leg., 2d Sess. (N.M. 2010).; *See also*, Patricia Sauthoff, "Ban the box" Moves Easily Through a Senate Vote, THE NEW MEXICO INDEPENDENT (Feb. 12, 2010, 5:55 PM), <http://newmexicoindependent.com/47363/ban-the-box-moves-easily-through-a-senate-vote>.

¹³⁵ *Ban the Box - Removing Barriers to Employment for People with Criminal Convictions*, DRUGPOLICY.ORG, <http://www.drugpolicy.org/about/state/offices/newmexico/nmbanbox.cfm> (last visited Nov. 10, 2010).

¹³⁶ *Id.*

The principal strength of the New Mexico law is that job applicants with criminal records have equal status with other job applicants and it is only during the final interview process that a criminal background check is performed - if it is relevant or required for the position.¹³⁷

Ohio

Cincinnati's Move-the-Box policy is a "Fair Hiring Policy," which is not called "Ban the Box."¹³⁸ The policy consists of rule changes to the City's hiring policies intended to inform the exercise of discretion in hiring, so people with criminal records get fair consideration based on their individual qualifications.¹³⁹ Under these rules, if someone with a criminal record poses too much perceived risk, the City can still reject them.¹⁴⁰ But if an otherwise qualified candidate demonstrates attenuation, i.e., that their criminal record is old or irrelevant to the job sought, the burden to justify rejecting the applicant shifts to the City's Human Resources department or the City's Civil Service Commission.¹⁴¹

Oregon

Multnomah County, which includes the City of Portland, moved the criminal history box from County employment applications in October 2007.¹⁴² According to the County's policy and as stated on County employment applications, an applicant's

¹³⁷ *Id.*

¹³⁸ See CNN Videos, *Easier for Ex-Offenders to Get a Job?*, CNN (Sep. 14, 2010), <http://www.cnn.com/video/#/video/living/2010/09/14/black.male.unemployment.cnn>.

¹³⁹ THE AMOS PROJECT, OHIO JUSTICE AND POLICY CENTER, *FAIR HIRING NOW: PROPOSED CHANGES TO THE CITY OF CINCINNATI HIRING POLICIES* (2010), available at <http://www.ohiojpc.org/text/home/rule%20changes.pdf>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 14.

criminal history may be considered at a later stage of the hiring process.¹⁴³ Except where a criminal record acts as an automatic bar, the County must conduct a case-by-case determination of whether the convictions rationally relates to the job sought, with consideration of these factors: (1) the nature of the offense committed; (2) the age of the applicant at the time of the offense; (3) the time elapsed since the commission of the offense; and (4) positive changes achieved by the applicant since the commission of the offense.¹⁴⁴

Rhode Island

In April 2009, Providence moved the criminal history inquiry from its paper and online applications.¹⁴⁵ The job applicant signs a criminal history inquiry waiver only if, and after, it's been determined that the applicant meets the minimum requirements for the specific position in question.¹⁴⁶

Tennessee

In Memphis, effective Fall 2010, a background check is still conducted but only after the interview and after the applicant has the opportunity to explain that conviction.¹⁴⁷ "Felony convictions can't be the sole purpose for disqualifying the applicant except when the crime is related to the job," according to Memphis City Councilwoman Janis Fullilove.¹⁴⁸ The box is not banned from applications for police officers or firefighters, how-

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.*

¹⁴⁷ Kevin Holmes, *Criminal History Question Eliminated From Memphis City Job Applications*, ABC 24 (June 22, 2010, 9:36 PM), <http://www.abc24.com/news/local/story/Criminal-History-Question-Eliminated-From-Memphis/vRcEKIfmU0CDDxX3KjKQBg.csp>.

¹⁴⁸ *Id.*

ever, and applicants for those departments must still answer the criminal background.¹⁴⁹

Texas

Since April 2008, Travis County has delayed requesting information regarding the criminal history of an applicant for County employment until after the applicant is selected for the position.¹⁵⁰ Positions which require a criminal background check are noted as such in the job posting announcement.¹⁵¹ Further, circumstances such as: (1) the time elapsed since the offense; (2) the seriousness of the offense; (3) the number of offenses and; (4) other mitigating factors may be considered.¹⁵²

Austin followed Travis County and moved the box in October 2008.¹⁵³ In Austin, employment applications for certain job positions within the city no longer require disclosure of past criminal history.¹⁵⁴ However, positions that involve working with vulnerable populations and safety sensitive jobs continue to require full criminal background investigations on job applicants.¹⁵⁵

Washington

Consistent with EEOC guidelines, Washington state law prohibits a public agency from refusing to hire or grant a license based *solely* on a person's criminal conviction.¹⁵⁶ However, the law does permit refusals of public employment or non-licensure based on a prior felony conviction directly related to the em-

¹⁴⁹ *Id.*

¹⁵⁰ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 14.

¹⁵¹ TRAVIS COUNTY, GUIDELINES FOR HIRING EX-OFFENDERS (2008), available at <http://www.nelp.org/page/-/SCLP/travis.guidelines.pdf>.

¹⁵² NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 14.

¹⁵³ *Id.* at 6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 8. See WASH. REV. CODE §§ 9.96A.020, 9.96A.060, & 9.96A.030 (2008).

ployment, but only if the conviction is less than 10 years old.¹⁵⁷ The background check does not consider arrests that did not result in conviction.¹⁵⁸

At the municipal level, in April 2009, Seattle implemented its Citywide Personnel Rule for Criminal Background Checks,¹⁵⁹ which does not ask job applicants about arrests or prior convictions on job applications, and only some jobs allow for pre-employment background checks.¹⁶⁰ Also, a person's conviction history is considered later in the hiring process, and only for specified jobs.¹⁶¹ Applications for jobs that do require a background check include a disclaimer expressly stating that a background check is required.¹⁶² Finally, Seattle's rules go on to say

¹⁵⁷ *Id.* In this area of law, the period of 10 years can be to public acceptance of rehabilitation as 7 years is to redemption in the Bible. The concept has important and similar application when it comes to the use of prior convictions for impeachment purposes, where courts' analyses resemble EEOC and rational relationship analysis for employment of people with felony convictions. *See e.g.*, *People v. Montgomery*, 47 Ill. 2d 510 (Ill. 1971) (adopting the 1971 proposed draft of Federal Rule of Evidence 609). Prior conviction evidence is admissible for impeachment purposes if (1) the witness' crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment; (2) the witness' conviction or release from confinement, whichever date is later, occurred less than 10 years from the date of trial; and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the conviction. *Id.* at 516. This final factor involves a balancing test that closely resembles rational relationship analysis in hiring people with felonies: probative value versus prejudicial effect; i.e., trial courts consider " 'the nature of the prior crimes, the length of the criminal record, the age and circumstances of the [witness], and the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.' " *Id.* at 518 (quoting *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965)).

¹⁵⁸ *Id.*

¹⁵⁹ *See* Memorandum from Mark M. McDermott, Director of the Personnel Department for the City of Seattle (Apr. 24, 2009), available at http://nel.p3cdn.net/1fdfe02dacb0bd0737_hnm6iiry4.pdf.

¹⁶⁰ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 8.

¹⁶¹ *Id.*

¹⁶² *Id.*

that if someone is not hired because of his or her conviction history, “the City provides the applicant with a copy of the background report, a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” and allows the applicant ten working days to respond to proposed non-hiring action.”¹⁶³

IV. RESULTS TO DATE

Minneapolis is an example where we have impressive statistics, though not verified directly from the city, and on balance the results we have are anecdotal. Minneapolis allows a background check only after a conditional job offer.¹⁶⁴ The City moved the box after it adopted its Fair Hiring Practices Resolution in December 2006.¹⁶⁵ Since then, one second hand source reports that nearly 60 percent of the Minneapolis applicants for whom the background check has raised a potential concern were hired, compared to 6 percent before moving the box.¹⁶⁶

We suspect it’s no surprise the bulk of our efforts yielded mostly anecdotal information, as explained possibly by Pulitzer Prize winning journalist Kenneth Cooper, who says “the three states with the new laws appear already to have achieved lower [recidivism] rates—40 percent in Massachusetts, 47 percent in New Mexico, and 56 percent in Connecticut—although those

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 5.

¹⁶⁵ *Id.*

¹⁶⁶ Kenneth J. Cooper, *CORI reform still allows private background checks*, THE BAY STATE BANNER (Oct. 7, 2010), <http://www.baystatebanner.com/local11-2010-10-07>. Minneapolis has also combined its’ Move-the-Box legislation with a broader 2006 project called “Close the Gap,” which is designed to address regional socioeconomic disparities, including fair hiring policies. See GLIDDEN & SAMUELS, RESOLUTION OF THE CITY OF MINNEAPOLIS (2006). Close the Gap began an organization that focuses on assistive technology for people with special needs. *About Closing the Gap*, CLOSINGTHEGAP.COM, http://www.closingthegap.com/about_us.lasso (last visited Nov. 12, 2010).

figures from different studies may not be directly comparable to each other or the national rate."¹⁶⁷

An impressive example of the commitment to Move-the-Box movement is New Haven, Connecticut, where the legislation was adopted in February 2009 and continues to progress.¹⁶⁸ The hiring policies enacted through this legislation protect applicants from criminal background checks until a provisional job offer is extended by the employer, at which point the background check is conducted and evaluated by the city's human resources department and the New Haven Corporation Counsel.¹⁶⁹ Through the leadership of the Mayor's Prisoner Reentry Initiative coordinator, Amy Meek, New Haven stands as a model for other cities enacting Move-the-Box legislation.

One of the most important advancements in any of the Move-the-Box policies is the requirement for all private vendors and city contractors to follow the new hiring policies.¹⁷⁰ Along with New Haven, Move-the-Box policies that have this characteristic appear in the policies of Boston¹⁷¹, Cambridge¹⁷², Hartford¹⁷³, and Worcester¹⁷⁴. While most jurisdictions have adopted Move-the-Box hiring policies which apply only to the city employers, New Haven and a handful of others have expanded the scope of

¹⁶⁷ Kenneth J. Cooper, *The "Ban The Box" Movement Scores Victories*, THE DEFENDERS ONLINE (Sep. 7, 2010), [http://www.thedefendersonline.com/2010/09/07/the-"ban-the-box"-movement-scores-victories/](http://www.thedefendersonline.com/2010/09/07/the-).

¹⁶⁸ See COMMUNITY SERVICES ADMINISTRATION, CITY OF NEW HAVEN, WHY "BAN THE BOX"? HOW INCREASING EMPLOYMENT OPPORTUNITIES REDUCES RECIDIVISM RATES (2010), available at <http://www.cityofnewhaven.com/CommunityServices/pdfs/Ban%20the%20Box%20fact%20sheet%20FINAL.pdf>.

¹⁶⁹ Telephone Interview with Amy Meek, Mayor's Prisoner Reentry Initiative Coordinator, City of New Haven (Sep. 3, 2010).

¹⁷⁰ Ordinance Amendment of the New Haven Board, *supra* note 86, at 1.

¹⁷¹ NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 11, at 2.

¹⁷² *Id.* at 5.

¹⁷³ *Id.* at 9.

¹⁷⁴ *Id.* at 10.

fair employment laws for people with criminal records, increasing the availability of legitimate employment opportunities.¹⁷⁵

While jurisdictions may hesitate to require vendors and contractors to follow these new hiring guidelines, Meek says that “overwhelmingly, the responses from vendors have been very positive.”¹⁷⁶ In fact, New Haven has over 115 vendors in contract with the city who have all complied with the Move-the-Box hiring standards, and as a result of this positive reaction, the city focuses its reentry efforts on new progress.¹⁷⁷

According to Meek, about 25 people return to the community from the correctional system each week and most are searching for employment.¹⁷⁸ With the passage of this Move-the-Box legislation, these people can confidently apply to jobs without fear of immediate disqualification. After the application is reviewed and selected for the position, a provisional job offer is offered pending a criminal background check.¹⁷⁹ If upon review, the background check reveals concerns regarding the person’s suitability for the position, a letter is sent to the applicant, along with a copy of the background check, clearly describing the reasons for revocation of the job offer.¹⁸⁰ Applicants then have 30 days to appeal the decision and provide proof of rehabilitation, including completion of treatment programs, letters of recommendation, and proof of other successful employment.¹⁸¹ According to Meek, the review process is standardized and applications are carefully reviewed to ensure equal opportunity for those with criminal records.¹⁸² While statistics of employment for people with criminal records are unavailable due to the recent passage of the law, Meeks is confident that this population is more aptly

¹⁷⁵ See generally, *Id.*

¹⁷⁶ Telephone Interview with Amy Meek, *supra* 169.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* See also, WHY “BAN THE BOX”?, *supra* note 168.

¹⁷⁹ Telephone Interview with Amy Meek, *supra* 169.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

represented in the work force due to the passage of Move-the-Box.¹⁸³

Evidence of the New Haven-type initiative's influence can be seen statewide in Connecticut as the state legislature recently overturned the veto of Move-the-Box and a version of the legislation (PA 10-142) became effective as of October 1, 2010.¹⁸⁴

Move-the-Box legislation has continued to grow nationally. While not many statistics regarding the results of their law have been collected, studies are being developed to collect such information. This information should be available within the next coming months, according to Pam Alexander, President of the Council on Crime and Justice, a non-profit organization focused on criminal justice issues related to prisoner reentry and successful integration.¹⁸⁵

In addition to the examples of Connecticut and Minnesota, many other jurisdictions that have adopted Move-the-Box legislation are gathering information and data on the results, successes, and areas for growth and opportunity of the legislation. To date, five states (California, Connecticut, Hawaii, New Mexico, and Minnesota) have adopted statewide Move-the-Box legislation and 24 municipalities and counties have enacted a version of this important policy.

The State of Illinois Governor, and others, should feel comfortable adopting a Move-the-Box hiring policy by Executive Order. An example follows:

V. A PROPOSED MOVE-THE-BOX EXECUTIVE ORDER FOR ILLINOIS

We propose the following Executive Order:

¹⁸³ *Id.*

¹⁸⁴ H.R. 5207, *supra* note 82.

¹⁸⁵ Telephone Interview with Pam Alexander, President of the Council on Crime and Justice (Aug. 13, 2010).

WHEREAS, IT IS THE PUBLIC POLICY OF THE STATE OF ILLINOIS TO PROMOTE EMPLOYMENT FOR APPROPRIATE PEOPLE WITH CRIMINAL RECORDS, AND IT IS HEREBY RECOGNIZED THAT THE LACK OF A CRIMINAL RECORD PROVES NOTHING ABOUT THE CHARACTER OR POTENTIAL OF A PERSON WHO DOES NOT HAVE A CRIMINAL RECORD.

WHEREAS, IT IS HEREBY ORDERED AS TO CONSIDERATION OF PEOPLE WITH CRIMINAL RECORDS WHO SEEK PUBLIC EMPLOYMENT, AND AS TO ASSESSMENT OF THEIR REHABILITATION:

(a) Neither the State of Illinois as a public employer, nor any state agency or branch of Illinois government as public employers, may at the initial employment application stage inquire into or consider the criminal record or criminal history of an applicant for public employment, and such record or history shall not be considered unless and until the applicant has been selected for an interview by the employer, and not until the interview occurs.

(b) This Order does not apply to the Illinois Department of Corrections, Illinois State Police, any agency relating to juvenile justice or law enforcement generally, or to other public employers within the Illinois State government which as of the effective date of this order already have or shall later have a statutory duty to conduct a criminal history background check or otherwise to consider a potential employee's criminal history at the preliminary, application stage of the hiring process.

(c) This Order does not prohibit a public employer from notifying applicants that existing law or that the employer's existing written policy may disqualify an individual with a particular criminal history background from employment in particular positions.

(d) This Order does not apply to private employers.

(e) This Order permits the public employer to ask about criminal history during the first interview or thereafter, but this Order also prohibits at any time public employers from considering

non-conviction records and expunged or sealed records, prohibits them from not hiring someone based on a record if the conviction does not directly relate to the position.

(f) This Order allows applicants with a criminal record to disclose for purposes of the employer's consideration in the assessment of his or her job application, and requires subject public employers to consider (1) the nature of an applicants' offenses for which they were convicted, (2) the seriousness of the offense (e.g., class or degree of felony), (3) the time elapsed since the commission of the offense and termination of the applicant's criminal sentence, and subsequent contact with the criminal justice system, if any, (4) the applicant's age at the time of the offense, and (5) evidence of rehabilitation, which for purposes of this Order is ultimately to focus upon what the applicant has done with his or her life after the termination of his or her criminal sentence, and whether the applicant is sufficiently rehabilitated for the job sought, i.e., that the applicant is trustworthy and not dangerous.

(g) Rehabilitation for the purpose of this Order may be proved by various and non-exclusive means; however, any applicant for public employment in the State of Illinois who has obtained a court ordered Certificate of Rehabilitation (e.g., either a Certificate of Relief from Disabilities or a Certificate of Good Conduct) shall be conclusively presumed to be rehabilitated, in which case such person shall stand on par as any applicant who has no criminal record, notwithstanding any permissible questioning by the employer about such person's criminal record for informational purposes.

(h) This Order does not apply to people convicted of (1) any felony that resulted in great bodily harm or permanent disability; (2) any conviction for aggravated DUI, aggravated drug related offenses, or aggravated domestic battery; or (3) any offense(s) that require(s) post-release registration (sex offenses, offenses against children, rape, arson, and the like).

VI. CONCLUSION

It is within the constitutional and statutory authority for the Illinois Governor to “Move-the-Box” on State of Illinois employment applications by Executive Order. Specifically, Illinois should follow the recent lead of sister states, and limit the criminal history conviction inquiry to the interview stage and the point at which an applicant has been selected for an interview. Doing so would include Illinois among many states and localities nationwide which have recognized that eliminating the criminal record inquiry at the initial job application stage, and moving it to the point at which a candidate has proved his or her qualifications, reflects public policy that combines social justice, sound economics, and promotes public safety. It’s the right thing to do.

There is no real financial cost to a “Move-the-Box” Executive Order, especially because under the proposed Executive Order, a background check would be conducted once the applicant is at the interview stage. That is still early enough in the employment process to avoid state hiring personnel from “spinning their wheels” on an applicant whose criminal background or personal circumstances portend too much risk for comfort. But importantly, the interview stage is late enough in the process for qualified applicants with criminal records to get their foot in the door rather than have their application simply thrown in the garbage.

And it is simply good public policy, because the effect of such a “move” can only be for the common good with no legal or financial prejudice to any stakeholder. Employment of employable people should not be a political issue. Moving the Box by Executive Order in Illinois would de-politicize the issue sufficiently to implement an already tested and successful social policy nationwide.