The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy

Steven D. Bell
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INTRODUCTION

Two hundred years ago, attorney Francis Scott Key described America as "the Land of the free." He would find it difficult to pen those words today, when America imprisons more than two million people. Although home to only about five percent of our world’s population, America accounts for about twenty-five percent of all prisoners. Today, roughly 65 million Americans – one in four adults – have criminal records. In California, approximately 7 million people have criminal records.

"Every week more than 10,000 ex-prisoners [sic] are released from U.S. prisons . . . about 650,000 each year." However, even after completing their sentences ex-prisoners face enormous obstacles to employment, housing, and civic participation based on “[f]ears, myths . . . stereotypes and biases against those with criminal records.” “[I]n 2010 5.5 million voting-age citizens were disenfranchised because of their criminal records . . . 11 states (six in the South) ban[ ] ex-felons from voting even after they have completed prison and probation or parole.” “[T]wo-thirds of employers surveyed in five major U.S. cities would not knowingly hire a person with a criminal record, regardless of the offense.”

The collateral consequences of a criminal conviction, the “long shadow” cast by prison walls over former prisoners even after full payment for their crimes, threaten to permanently marginalize a significant segment of our population. Such a marginalized, chronically unemployed population represents a material threat to public safety. “We know from long experience that if [former prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”

1. Francis Scott Key, Defence of Fort McHenry (popularly known as The Star-Spangled Banner), 1814.
6. “Ex-prisoners” do not get released; prisoners get released and thereby become ex-prisoners.
7. Preeti Vissa, President Bush Was Right, HUFFINGTON POST (Feb. 27, 2014), http://www.huffingtonpost.com/preeti-vissa/president-bush-was-right_b_4863511.html.
10. See Fair Chance Ordinance, supra note 6, at 4.
11. Id.
Because "almost all convicted persons eventually rejoin society,"\(^{13}\) this article proposes that decreasing barriers to employment, housing, and civic participation for these people will advance public safety and strengthen the economy. Part I provides an overview of the direct and collateral consequences of a criminal conviction. Part II considers how several factors – recent technological advances, effects of "get tough on crime" policies, and post-9/11 anxieties – have aggravated the collateral consequences crisis. Part III examines the emergence of a national "Ban the Box" movement, which seeks to remove obstacles to employment, housing, and civic participation for former prisoners, and the burgeoning body of law that this movement has triggered. Part IV proposes language for a new California statute aimed at eliminating blanket employment discrimination against former prisoners while safeguarding legitimate employer concerns. Finally, Part V concludes that when considering public safety, economic impact, and fundamental fairness, the time is long overdue for California to eliminate many of the collateral consequences faced by former prisoners.

I. CONSEQUENCES OF A CRIMINAL CONVICTION

A. Direct Consequences

Although "[t]here is some disagreement among the courts over how to distinguish between direct and collateral consequences,"\(^{14}\) for the purposes of this article direct consequences will be defined as those sanctions imposed upon an individual by the judiciary as the result of a criminal conviction. Such sanctions generally fall into four broad categories: incarceration, probation and parole, fines and restitution, and registration.

1. Incarceration

When most people consider the direct consequences of a criminal conviction, they usually think of the offender’s physical confinement in a jail or prison. In reality, most convictions do not result in such incarceration.\(^{15}\) See 2. Probation and Parole, infra. In California, as in most jurisdictions, "the purpose of imprisonment for crime is punishment."\(^{16}\)

A jail is "[a] local government’s detention center where persons awaiting trial or those convicted of misdemeanors are confined."\(^{17}\) Historically, jails have been operated by counties and were used to house those sentenced to confinement for a year or less, usually for misdemeanor convictions.\(^{18}\) Prisons, on the other hand, generally have been operated by the state and house those sentenced to more than a year, usually

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13. Chin, supra note 3, at 1790.
15. See Chin, supra note 3, at 1804.
17. BLACK'S LAW DICTIONARY 409 (9th ed. 2009).
18. CAL. PENAL CODE § 18(b) (West 2014).
felony convictions. Recently in California, however, these traditional distinctions have become blurred through the state’s so-called “corrections realignment” process discussed in Section I.A.6. A Note about California’s Realignment, infra.

Whether post-conviction incarceration is accomplished through jail or prison, its purpose remains the same: to confine convicted criminals.

2. Probation and Parole

Despite America’s unequaled incarceration rate, the prison population is “dwarfed by the six-and-a-half million or so on probation or parole.” The vast majority of people who have been convicted of crimes are not currently in prison.

While the terms often are used interchangeably, probation and parole are distinctly different types of criminal sanctions. Probation is a “criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison.” That is, probation is an alternative punishment to incarceration. Parole, on the other hand, is the “conditional release of a prisoner from imprisonment before the full sentence has been served.” Unlike probation, parole in itself is not punishment but rather a supervised transitional period that follows release from punitive incarceration.

Probation may be either unsupervised (for minor offenses) or supervised (for more serious crimes) by correctional officials; parole is nearly always supervised. Historically, in California probationers were supervised by county probation officers, while parolees were supervised by state parole agents. As with incarceration, however, this distinction also has become blurred pursuant to California’s correctional realignment. See Section I.A.6. A Note about California’s Realignment, infra.

Whether probation or parole, the court or correctional officials impose behavioral conditions upon a convicted person, the violation of which typically results in incarceration. Such conditions vary widely but normally include requirements to work, to obey the law, to submit to searches of person and property, to regularly report to the supervising officer or agent, to submit to drug or alcohol testing, and restrictions on travel and possession of weapons. A so-called “technical violation” of a condition of parole or probation involves misbehavior, which cannot be prosecuted as a crime, such as failing to meet with the supervising officer or agent, refusing to attend

21. Id.
22. Id.
24. Id. at 554.
26. See Fazzi, supra note 21, at 427.
substance abuse meetings, or not performing required community service.\textsuperscript{28} Violations of behavioral conditions involving new crimes committed by the probationer or parolee are addressed in Section I.A.5. Recidivism, \textit{infra}.

Because both probation and parole impose significant restrictions on a person’s liberty, a probationer or parolee is considered to be legally “in custody” despite living in free society.\textsuperscript{29}

3. \textit{Fines and Restitution}

Both fines and restitution involve financial penalties paid by the convicted person. A fine is a “pecuniary criminal punishment . . . payable to the public treasury.”\textsuperscript{30} Restitution, on the other hand, is not considered punishment but rather payment of compensation or reparation to those harmed by the criminal offense. Typically all fines and restitutions must be paid before a convicted person may be released from probation or discharged from parole.

4. \textit{Registration}

Convictions for certain criminal acts, generally sex offenses, require the offender to register with authorities even after completion of incarceration, probation, parole, or other court-imposed sanctions.\textsuperscript{31} Registration has been promoted as “protecting public safety . . . an easy way for police to keep tabs on potentially dangerous persons.”\textsuperscript{32}

5. \textit{Recidivism}

Recidivism is “[t]he behavior of a repeat or habitual criminal”\textsuperscript{33} who commits a crime after completion of a previous sentence, usually incarceration. Most jurisdictions “impose harsher sentences on habitual offenders” and “[a]t least thirty states have instituted some form of ‘three strikes’ criminal legislation, mandating progressively harsher sentences for adults convicted of multiple serious crimes and typically culminating in a life sentence after the third such ‘strike.’”\textsuperscript{34}

\begin{thebibliography}{99}
\bibitem{28} \textsc{Alison Lawrence}, \textit{Probation and Parole Violations: State Responses}, \textsc{National Conference of State Legislatures} 4 (2008), \textit{available at} \url{http://www.ncsl.org/print/cj/violations report.pdf}.
\bibitem{29} \textsc{Jones v. Cunningham}, 371 U.S. 236, 243 (1963).
\bibitem{30} \textsc{Black’s Law Dictionary} 313 (9th ed. 2009).
\bibitem{31} \textsc{See Chin, supra note 3, at 1801}.
\bibitem{32} \textit{Sex Offenses Definition}, \url{http://legal-dictionary.thefreedictionary.com/Sex+Offenses} (last visited Dec. 29, 2014).
\bibitem{34} Steven D. Bell, \textit{A Corrupt Bargain}, p.8, \textit{available at} \url{https://drive.google.com/file/d/0B9ruoZZ_u3H mQTYyNUJlQWphU0/edit?usp=sharing}.
\end{thebibliography}
6. A Note about California’s Realignment

Beginning in 2011, California changed many of the historical characteristics of incarceration, probation, and parole discussed *supra*. Faced with a “monumental budget deficit” and a federal court order to reduce prison overcrowding, the California Legislature passed the Prisoner Realignment Bill (also known as Assembly Bill 109, hereinafter referred to as “realignment”). Under realignment, the State relinquished its responsibility for incarcerating and supervising certain felony offenders, transferring this responsibility to county governments. “At its core, corrections realignment is about defining which level of government is responsible for managing California’s felons – the state or the counties.”

California’s twin goals in implementing realignment were (1) to help balance the state budget by reducing prison costs and (2) to comply with the federal court order by reducing the state prison population. Until realignment, convicted felons sentenced to more than one year of incarceration were confined in state prisons at state expense. Now, convicted felons sentenced to confinement for up to three years remain incarcerated in county jails rather than being transferred to state prisons. Thus “felons whose crimes are the most serious are treated as the least amenable to county control and left predominantly to state control, while felons whose crimes are less serious are considered more manageable and placed under significant (or complete) county control.” In addition, the State also transferred to the counties the responsibility for virtually all parole violations, technical or not, “requiring county jails, rather than State prisons, to incarcerate most parole violators.”

However, some of the most significant changes wrought by realignment concerned parole and probation. First, as with incarceration, the State transferred to the counties responsibility for the supervision of significantly more released offenders, usually low-level nonviolent felons. Next, as noted *supra*, the State also transferred to the counties the responsibility for virtually all parole violators. Third, realignment also created two brand new types of noncustodial supervision in addition to parole and probation: mandatory supervision and post-release community supervision (commonly known as “PRCS”).

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35. See Fazzi, *supra* note 21, at 425.
38. Id. at 425.
39. Id. at 427.
41. Fazzi, *supra* note 21, at 428.
42. Id. at 430.
43. Id. at 429.
44. Id. at 430.
Mandatory Supervision. The Realignment Act states that defendants without prior or current felony convictions for serious, violent, or sex related crimes are sentenced to county jail rather than to state prison. (Penal Code 1170(h).) Under Penal Code 1170(h)(5)(B), the court may suspend the term and release the defendant to Mandatory Supervision, “during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation.” A person on Mandatory Supervision is serving their felony sentence under the supervision of a county probation officer instead of in a county jail.\(^4^6\)

Post-Release Community Supervision ("PRCS"). The Postrelease Community Supervision Act states that defendants without prior or current felony convictions for serious, violent, or sex related crimes will, upon release from state prison, “be subject to community supervision provided by a county agency.” (Penal Code 3451(a).) A person on PRCS is serving their mandatory period of supervision following release under the supervision of a county agency instead of the state Department of Corrections and Rehabilitation.\(^4^7\)

Finally, county supervision of released offenders differs significantly from state parole in the range of sanctions and programs available for violations. “Instead of relying primarily on one sanction – return to prison – to punish parole violations, counties deploy a range of options, and harsh sanctions need approval from a court-appointed hearing officer.”\(^4^8\)

However, as discussed infra, California’s corrections realignment scheme has had some unintended collateral consequences.

B. Collateral Consequences

Not all sanctions for a criminal conviction are direct in the sense of being imposed by a sentencing court. These secondary or collateral consequences include civil and social sanctions that attach to the individual as the result of a conviction. “For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.”\(^4^9\)

Some collateral consequences are mandated by statute, such as disenfranchisement, or by civil regulations, such as “professional licensing schemes.”\(^5^0\)

Others have evolved into common community practices, such as the check box on

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\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Fazzi, supra note 21, at 479 (citation omitted) (internal quotation marks omitted).

\(^{49}\) Chin, supra note 3, at 1791.

employment or housing applications which generally reads something like this: “Have you ever been convicted of a crime?”

1. Disenfranchisement

Disenfranchisement involves taking away the right to vote in public elections from a citizen or class of citizens.51 Because each state determines by statute the qualifications required for its citizens to vote,52 each state likewise determines the voting effect of a criminal conviction. This has resulted in “[a] patchwork of state felony disfranchisement laws, varying in severity from state to state, prevent[ing] approximately 5.85 million Americans with felony (and in several states misdemeanor) convictions from voting.”53

In at least three states – Iowa, Kentucky, and Florida54 – all persons convicted of a felony “are barred from the polls for life unless they receive clemency from the governor.”55 Many other states are almost as severe: “[i]n Mississippi, passing a $100 bad check carries a lifetime ban from voting.”56 At the opposite end of the spectrum, two states – Maine and Vermont – “allow all persons with felony convictions to vote, even while incarcerated.”57

California falls in the middle, disenfranchising felons only during the time they are imprisoned or on parole; those on probation do not lose their right to vote.58 However, as noted supra, California’s recent corrections realignment scheme created two new types of noncustodial supervision (i.e., mandatory supervision and PRCS) without considering how this would affect voting rights.59 Despite the Legislature’s silence on this issue, in December 2011, the California Secretary of State nonetheless sought to deny voting rights to approximately 42,000 persons60 on mandatory supervision or PRCS because these were the “functional equivalent” of parole.61 Because the state’s “functional equivalent” argument already had been rejected by

51. BLACK’S LAW DICTIONARY 237 (9th ed. 2009).
54. Id.
56. Id.
61. Scott, slip op. at 5.
three California appellate courts in different contexts, on April 2, 2014, the Alameda County Superior Court held that those on mandatory supervision or PRCS retained their right to vote:

In short: (1) the plain language of Elections Code 2101 states that United States citizens who are residents of California and “not in prison or on parole for the conviction of a felony” are entitled to register to vote; (2) Cruz, Fandinola, and Isaac each hold that Mandatory Supervision and PRCS are not “parole,” so (3) persons on Mandatory Supervision and PRCS are entitled to register to vote.63

“State disenfranchisement laws disproportionately impact racial and ethnic minorities,” who are “disproportionately over-represented in the criminal justice system.”65 “Nationwide one in 13 African Americans of voting age have lost the right to vote – a rate four times the national average.”66

2. Other Civil Restrictions

The patchwork of state disenfranchisement laws pales in comparison to number and complexity of other statutory and regulatory restrictions faced by former prisoners. In response, in 2011 the American Bar Association (“ABA”) created an online “database identifying more than 38,000 punitive provisions that apply to people convicted of crimes, pertaining to everything from public housing to welfare assistance to occupational licenses. More than two-thirds of the states allow hiring and professional-licensing decisions to be made on the basis of an arrest alone.”67 Federal law prohibits anyone “who has been convicted of a felony” from enlisting in the armed forces.68

According to the ABA database, California imposes 1,739 civil restrictions on former prisoners in employment, housing, and public assistance; the number of restrictions increases to 2,804 when including corresponding federal consequences.69 Examples of California’s civil restrictions include: (1) mandatory prohibitions against operating or working at hospitals, daycare centers, and elder care facilities (even if unrelated to the nature of the prior offense), (2) ineligibility to become a certified domestic violence counselor (but not a certified substance abuse counselor), and (3)

63. Scott, slip op. at 9.
66. Id.
discretionary ineligibility or mandatory revocations of licenses in virtually every regulated occupation or profession, from barbers to nurses to attorneys.70

3. Employment

By far the most serious and pervasive collateral consequence faced by former prisoners is employment discrimination. While the Civil Rights Act of 1964 and its progeny banned employment discrimination on the basis of “race, color, religion, sex or national origin,”71 no such protection was afforded former prisoners.

A felony conviction, no matter how long in the past, carries a stigma that makes job-hunting exceedingly difficult. Employment forms often include a box that asks: “Have you ever been convicted of a crime?” Check the box, and the application most likely goes to the bottom of the stack or into the trash. In large companies or public institutions, those applicants are generally blocked by lowest-level bureaucrats or by human resources software before they can even make their case to decision makers, who can put any criminal history in its proper perspective.72

Studies have shown that job applicants with criminal records are fifty percent less likely to receive a job callback.73 A former offender without some type of employment “is three times more likely to recommit” a crime.74 These findings are “even more pronounced for African American men than for white men.”75 Recently released prisoners face unemployment levels between seventy and eighty percent.76

Unemployment is a major cause of recidivism. “The most telling predictor of whether an ex-offender will reenter the community as a law-abiding and productive member, or whether instead he or she will return to jail or prison, is employment.”77 “[O]ne study of 1,600 individuals recently released from prison in Illinois found that only eight percent of those who were employed for a year committed another crime, compared to the state’s average recidivism rate of fifty-four percent.”78 “Providing

70. Id.
75. Pager et al., supra note 75.
77. Editorial, supra note 73.
78. Fair Chance Ordinance, supra note 6.
individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.  

4. Housing

Next to employment, the second most important factor affecting recidivism is stable housing. A "study in New York reported that a person without stable housing was seven times more likely to re-offend after returning from prison." Often even a misdemeanor conviction is sufficient for someone to "lose or be unable to get public housing and benefits."

II. Worsening Conditions

While former prisoners have faced collateral consequences for centuries, changing conditions over the past few decades have significantly worsened the problem. The most significant of these have been: (1) America’s “get tough on crime” policies, (2) technological advances, particularly the Internet, and (3) the upsurge of background checks in the wake of 9/11.

Today, this unprecedented combination of circumstances – record numbers of former prisoners reentering society, more personal information inexpensively and readily available on-line, and an upsurge in employers and landlords conducting background checks on applicants – has created a “perfect storm” of collateral consequences, negatively affecting our economy and public safety.

A. Getting Tough on Crime

Beginning in the late 1980s, jurisdictions across America began implementing “get tough on crime” legislation which imposed increasingly severe, mandatory penalties on people convicted of crimes, especially those “committing violent crimes, those using guns in the commission of their offenses, habitual or repeat offenders, and high-profile drug traffickers.” As part of this movement, in 1994 California implemented its “Three Strikes” law mandating harsher penalties for repeat offenders; “[a]t least thirty states have instituted some form of ‘three strikes’ criminal legislation."
As a result of these policies, America’s prison population exploded, “growing by over 700%” from 1970 to 2007. According to the Equal Employment Opportunity Commission (“EEOC”),

[In 1991, only 1.8% of the adult population had served time in prison. After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults). By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail. The Department of Justice’s Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.]

From 1980 to 2006, California’s state prison population increased 600%, “growing from 27,916 to 161,000.”

One of the problems with these “get tough on crime” policies, and the resulting prison population boom, was that no one considered the back-end of the process. Because “[t]he vast majority of prisoners get out eventually,” the explosion of prison inmates resulted in a corresponding explosion of parolees returning to society. “Every week more than 10,000 ex-prisoners [sic] are released from U.S. prisons . . . about 650,000 each year. That’s more people than the entire population of Boston – or Seattle or Denver or Washington, D.C.”

Large populations of unemployed former prisoners are a drag on the economy. “[I]n 2008, the United States had between 12 and 14 million formerly incarcerated people and people with felonies of working age.” Given “this population’s greatly reduced job prospects . . . the cost to the U.S. economy was between $57 and $65 billion in lost output.” Permanent unemployment for such a large population negatively impacts the overall economy for everyone. The “lowered job prospects of . . . formerly incarcerated people cost the U.S. economy between $57 and $65 billion in lost output. Not to mention that serving time reduces annual earnings for men by 40 percent, meaning their families too often fall into a poverty trap.”

Chronic unemployment among the formerly incarcerated also threatens public safety. “Lack of employment and housing are significant causes of recidivism;
people who are employed and have stable housing are significantly less likely to be re-arrested. 95

B. Technological Advances

Since 1994, the Internet has “expanded to serve millions of users and a multitude of purposes . . . [and] has changed forever the way we do business and the way we communicate . . . . Internet has become the universal source of information for millions of people, at home, at school, and at work.” 96

One of the fastest growing internet businesses “[i]n today’s digital age . . . has been widespread proliferation in the use of criminal background checks, with hundreds of companies offering over the internet low-cost criminal background checks.” 97 In recent years, the criminal background check industry has grown exponentially. 98 On April 26, 2014, a Google search by the author for “criminal background checks” returned over 99 million hits (compared to a mere 5.85 million hits for “Kardashians”).

Commercial background companies glean information from state and local law enforcement agencies then re-package it for sale to employers. Disturbingly, commercially prepared background checks have been found to be riddled with inaccuracies, including criminal records being wrongly attributed to innocent individuals, multiple reporting of the identical incidents, and uncorrected identity theft. 99

C. Increased Use of Background Checks

Employer nervousness following 9/11 together with “the growing problem of workplace violence” has dramatically increased the demand for applicant background checks. 100 “Increased access to criminal records coincides with a recent, and exponential, growth in the collateral consequences of criminal convictions.” 101 The demand for “security checks are now greater than ever.” 102 “[T]he background check industry has expanded and overall, more employers are now using background checks

95. Id.
97. Fair Chance Ordinance, supra note 6.
102. Appleyard, supra note 101.
as an employment screen than ever before."  

"The ubiquity of criminal-background checks and the efficiency of information technology in maintaining those records and making them widely available, have meant that millions of Americans — even those who served probation or parole but were never incarcerated — continue to pay a price long after the crime."  

"The result is that employers and landlords can now quickly search criminal records, so that even when there is no legal barrier to housing or employment for the individual, there is an effective bar."  

Under federal law, commercial providers of criminal histories are subject to the provisions of the Fair Credit Reporting Act ("FCRA") and "generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago. However, they may report convictions indefinitely." Nonetheless, a survey of fifty randomly-selected on-line providers of criminal history records found that despite these federal regulations, enforcement of FCRA's protections "appears spotty at best." Not surprisingly, such lax enforcement results in criminal history reports which are "not particularly comprehensive or accurate." In addition, despite specific FCRA provisions to the contrary, 76.7% of the on-line providers surveyed report arrests not resulting in a conviction and 57.1% report information more than seven years old. Worse, "there is no mechanism for correcting or altering" incorrect information reported by on-line providers.  

Even if such background reports were accurate, the corresponding "assumption that the existence of a criminal record accurately predicts negative work behavior is subject to some debate; one limited study questions whether the two are, in fact, empirically related."  

In addition to being inaccurate and unreasonable, these background checks "can also be illegal under civil rights laws. Employers that adopt these and other
blanket exclusions fail to take into account critical information, including the nature of
an offense, the age of the offense, or even its relationship to the job.”\textsuperscript{114}

Because “[a]rrest and incarceration rates are particularly high for African
American and Hispanic men,” the EEOC has found that blanket hiring denials based
on criminal records violates antidiscrimination laws.\textsuperscript{115}

Confirming the racial bias associated with a criminal record, an intriguing
recent study dispatched testers to apply for actual jobs in a big city. Each tester “had
identical credentials other than race and criminal record.”\textsuperscript{116} The results were startling:
“the white non-offender tester received callbacks 34% of the time he applied; [the] white offender received callbacks for 17% of applications; and the black offender
tester callback ratio plummeted to 5%.”\textsuperscript{117}

In 2012, the EEOC issued new federal guidelines to employers concerning the
legal use of criminal background checks.\textsuperscript{118} The new guidelines do not prohibit the
use of criminal record background checks, but rather recommends, \textit{inter alia}, that employers “wait until the final stages of the hiring process to conduct a criminal
background check. This sends the message to applicants that they will be evaluated
based on their qualifications for the job, rather than being segregated before they have
a fair chance to establish their credentials.”\textsuperscript{119} Under the EEOC’s framework, “[a]n employer’s consideration of criminal records may pass muster under Title VII if an
individualized assessment is made taking into account: (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.”\textsuperscript{120}


\textsuperscript{115} See Equal Employment Opportunity Comm’n, supra note 88.


\textsuperscript{117} Id.

\textsuperscript{118} See Equal Employment Opportunity Comm’n, supra note 88.


III. "BAN THE Box" MOVEMENT

"Ban the Box" began in 2004 as a campaign by the civil rights organization "All of Us or None"[121] to "open up opportunities for people with past convictions in our workplace."[122] The campaign derived its name from its goal to remove from employment applications the box that asks: "Have you ever been convicted of a crime?" In subsequent years, the campaign expanded to include efforts to ban housing discrimination and other collateral consequences of criminal convictions. "All of Us or None" sets forth the following goals on its website:

- To win full restoration of our civil and human rights after release from prison or jail;
- To eliminate all forms of discrimination based on arrest or conviction records;
- To institute fair hiring practices concerning past convictions; and
- To eliminate any restrictions on membership, volunteer or Board participation that may exclude people with arrest or conviction history.[123]

The movement is not without its critics, who fear that "banning the box" could jeopardize workplace safety. "[Ban the Box] may be giving those with a criminal record a better chance of getting a job, but employers and businesses no longer have a clear warning for who they are hiring."[124] "Employers ... need to know who they hire to avoid unqualified or dishonest job candidates but, at the same time, must be sure to follow proper legal [EEOC] procedures."[125]

The EEOC's new regime leaves businesses in a Catch-22. As Todd McCracken of the National Small Business Association recently warned: "State and federal courts will allow potentially devastating tort lawsuits against businesses that hire felons who commit crimes at the workplace or in customers' homes. Yet the EEOC is threatening to launch lawsuits if they do not hire those same felons" . . . . [T]he EEOC is practically rewriting the law to add "criminal offender" to the list of protected groups under civil-rights statutes.[126]

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[121] All of Us or None is "a grassroots civil rights organization fighting for the rights of formerly- and currently-incarcerated people and [their] families." See http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ (last visited Dec. 29, 2014).
[123] Id.
Discussed infra are some of the legal successes of the "Ban the Box" movement.

A. Disenfranchisement

The "Ban the Box" movement seems to have garnered some powerful support in Washington, D.C., especially in the area of voting rights. In a speech at Georgetown University on February 11, 2014, Attorney General Eric Holder "called for the repeal of laws that prohibit millions of felons from voting."\(^{127}\)

Recently the U.S. Congress has begun taking some action on disenfranchisement, at least so far as federal elections are concerned. On April 10, 2014, Senator Ben Cardin (D-MD) and Representative John Conyers (D-MI) introduced Senate Bill 2235, entitled the "Democracy Restoration Act of 2014."\(^{128}\) In this bill, Congress explicitly finds that the widely varying "discrepancies in State laws regarding criminal convictions lead to unfairness in Federal elections."\(^{129}\) Under its broad authority to regulate federal elections,\(^{130}\) the provisions of this pending legislation would restore "Federal voting rights of persons when released from incarceration."\(^{131}\) As of the writing of this article, this Bill is under consideration by the Senate Judiciary Committee.\(^{132}\)

However, while this Bill is a step in the right direction it remains to be seen whether it would have any effect on state restrictions aimed at former prisoners' voting rights in state and local elections. "Congress lacks the power to directly set qualifications for voters in federal elections by virtue of the Qualifications Clauses of Article I and the Seventeenth Amendment"\(^{133}\) and under Section 2 of the Fourteenth Amendment which provides, in relevant part:

> [W]hen the right to vote at any election for the choice of electors ... is denied to any of the male inhabitants of such State ... or in any way abridged, except for participation in rebellion, or other crime.\(^{134}\)

(emphasis added)

Citing this section, the Supreme Court has previously upheld California's disenfranchisement law.\(^{135}\) However, the Supreme Court later distinguished a challenge to another state disenfranchisement law, finding it unconstitutional where it...
promoted "purposeful racial discrimination" based on prior criminal convictions.\textsuperscript{136} As noted \textit{supra}, because Congress has explicitly found that "disenfranchisement laws disproportionately impact racial and ethnic minorities,"\textsuperscript{137} it is possible, perhaps even likely, that the Democracy Restoration Act, if enacted, would withstand judicial review.\textsuperscript{138}

\textbf{B. Employment}

As of 2014, more than "45 cities and counties, including New York City, Boston, Philadelphia, Atlanta, Chicago, Detroit, Seattle, and San Francisco have removed the question regarding conviction history from their employment applications."\textsuperscript{139} Seven states, Hawai‘i, California, Colorado, New Mexico, Minnesota, Massachusetts, and Connecticut, have changed their hiring practices in public employment to reduce discrimination based on arrest or conviction records."\textsuperscript{140} Hawaii, Massachusetts, Minnesota and Rhode Island "have applied [ban-the-box] policies to private employers."\textsuperscript{141} "There are ban-the-box bills pending in five states – Delaware, Nebraska, New Hampshire, New Jersey, and Virginia. Governor Jack Markell of Delaware even endorsed the policy in his state-of-the-state address, declaring that ‘we should ban the box for state government hires this year . . . because marginalizing [people with records] helps none of us.’"\textsuperscript{142}

\textit{1. Minnesota}

In 2009, Minnesota Statute section 364.021 banned the box from public employment applications, requiring state and local public employers “to wait until a job applicant has been selected for an interview before asking about criminal records or conducting a criminal record check.”\textsuperscript{143} It also “made it illegal for public employers to disqualify a person from employment or to deny them a license because of their criminal background unless it is directly related to the position.”\textsuperscript{144} Exceptions were made for peace officers and certain other positions as required by existing law.\textsuperscript{145}

Effective January 1, 2014, Minnesota Statute section 364.02 expanded this prohibition, banning the box for all private employers in the state regardless of size. "[P]rivate employers may not inquire into an applicant’s criminal history until after the

\textsuperscript{138} Id.
at 4.
\textsuperscript{139} See National League of Cities & NELP, \textit{supra} note 120.
\textsuperscript{140} Id.
\textsuperscript{141} See Fair Chance Ordinance, \textit{supra} note 6.
\textsuperscript{142} See Rodriguez, \textit{supra} note 94.
\textsuperscript{144} Id.
applicant has been selected for an interview or before a conditional offer of employment.”

Fines for non-compliance begin at $100 per occurrence for companies with fewer than ten employees and at $500 for larger employers. It is important to note that “[e]mployers may still conduct a criminal background check on an applicant before hiring an applicant. The Ban the Box law merely moves the inquiry into criminal history from the initial point of contact with the applicant until after the point in time in which the employer has decided to interview or extend a conditional job offer.”

2. Massachusetts

Effective on November 4, 2010, Massachusetts Statute G.L. c. 151B, section 4(9½) prohibited all employers with more than six employees “from seeking disclosure of job applicants’ criminal record information prior to the interview stage of the hiring process.” The statute further prohibited all employer inquiries concerning “a prior first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace” and limited “employers’ access to information about convictions to 5 years for misdemeanors and 10 years for felonies.” The law also provided protection for employers “from due-diligence liability suits if someone they hire in accord with these restrictions commits a further offense.”

3. California

Section 432.7(a) of the California Labor Code has long prohibited “a public or private employer from asking a job applicant to disclose an arrest or detention that did not result in ‘conviction,’ or seeking or utilizing such failed arrest or detention as a factor ‘in determining any condition of employment including hiring, promotion,[and] termination.’”

Then in October 2013, Governor Brown signed Assembly Bill 218 which will “Ban the Box” for all public employment in the state effective July 1, 2014.
The Legislature finds and declares that reducing barriers to employment for people who have previously offended, and decreasing unemployment in communities with concentrated numbers of people who have previously offended, are matters of statewide concern. Therefore, this act shall apply to state agencies, all cities and counties, including charter cities and charter counties, and special districts. The Legislature further finds and declares that, consistent with the 2011 Realignment Legislation addressing public safety, increasing employment opportunities for people who have previously offended will reduce recidivism and improve economic stability in our communities.\textsuperscript{154}

The Bill modified section 432.9 of the California Labor Code to prohibit public employers from making any inquiry into an applicant’s criminal history “until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.”\textsuperscript{155} Exceptions were made for “position[s] for which a state or local agency is otherwise required by law to conduct a conviction history . . . [including] within a criminal justice agency.”\textsuperscript{156}

4. San Francisco

San Francisco’s “Fair Chance” Ordinance – arguably the most comprehensive such measure in the country – was enacted on January 27, 2014, with the stated purpose “to enhance public health and safety by reducing recidivism and its associated criminal justice costs and societal costs, and facilitating the successful reintegration into society of persons with arrest and conviction records.”\textsuperscript{157}

The ordinance, which applies to all employers and landlords, is careful not “to limit an employer or a housing provider’s ability to choose the most qualified and appropriate candidate from applicants for employment or housing.”\textsuperscript{158} However, prior to a “live interview” or “conditional offer” it absolutely bans “at any time or by any means” employer and landlord inquiries into (1) any “arrest not leading to a conviction,” (2) participation in “a diversion or deferral of judgment program,” (3) convictions that were “dismissed, expunged, voided, [or] invalidated,” (4) juvenile adjudications, (5) any conviction “more than seven years old,” and (6) any offense “other than a felony or misdemeanor, such as an infraction.”\textsuperscript{159}

On January 30, 2014, the author spoke by telephone with Jim Lazarus, Senior Vice President of Public Policy at the San Francisco Chamber of Commerce who indicated that he knew of no opposition in the business community to the Fair Chance

\textsuperscript{154} Id.
\textsuperscript{155} A.B. 218, § 2.
\textsuperscript{156} Id.
\textsuperscript{157} Fair Chance Ordinance, supra note 6.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
On February 12, 2014, the author exchanged a series of e-mails with Ivy Lee, Legislative Aide to San Francisco Supervisor Jane Kim, author of the Fair Chance Ordinance, who flatly stated: “There was zero opposition to our ordinance.”

5. National Employers

Several national employers have voluntarily adopted “Ban the Box” policies, the largest being Target Corporation. Additional national employers may follow suit rather than adopt a patchwork employment application process for each state or city in which it conducts business.

6. Federal Lawsuits

The EEOC has recognized that employer reliance criminal background checks as “proxies for race . . . [is] an important civil rights issue.” “People convicted of crimes don’t get special protections under civil-rights laws, but the EEOC can sue if it believes information about prior convictions is being used to discriminate against a racial or ethnic group.”

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, gender, national origin, and other protected categories. Enforced by the EEOC, Title VII has long been recognized as prohibiting not only overt, intentional discrimination, but also disallowing those facially neutral policies and practices that have a disproportionate impact on certain groups. Using arrest and conviction records to screen for employment is an example of the kind of “neutral” selection criteria that invites Title VII scrutiny.

Because the arrest rate for “African Americans . . . is more than double their share of the population,” culling “job applicants with criminal records . . . has a ‘disparate impact’ on African Americans (and Latinos).” This has led to several pending lawsuits, including EEOC v. Dollar General and EEOC v. BMW, in

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160. Telephone Interview with Jim Lazarus, Senior Vice President Public Policy, San Francisco Chamber of Commerce (Jan. 30, 2014).
161. E-mail from Ivy Lee, Legislative Aide to San Francisco Supervisor Jane Kim, to author (Feb. 12, 2014) (on file with author).
165. Rodriguez & Emsellem, supra note 115, at 5.
which the employers’ alleged policies of blanket denials to all applicants with criminal backgrounds had a disparate impact on minority applicants. In response, Dollar General states that it “prohibits discrimination in its hiring and employment practices,” claiming that its “criminal background checks are ‘structured to foster a safe and healthy environment for its employees, its customers, and to protect its assets in a lawful, reasonable and nondiscriminatory manner.’”

IV. PROPOSAL

Since at least ten states, and many additional localities, have implemented some form of “Ban the Box” legislation, California has several successful models to guide its enactment of similar reforms. While there is considerable diversity among the various states’ programs, each generally seeks to prohibit across-the-board discrimination against former prisoners by: (1) eliminating “the Box” from employment and housing applications, (2) postponing disclosure and consideration of criminal records until later in the application process, usually after the first interview, and (3) limiting the use of irrelevant information, such as arrests not resulting in a conviction, convictions unrelated to the purpose of the application, and convictions rendered stale by the passage of time.

These statutes typically balance these reforms with safeguards for employers and landlords, including: (4) exceptions for small businesses and home-based housing, (5) exceptions for critical public safety and criminal justice agencies, and (6) exceptions for certain offenses requiring lifetime registration, such as sex crimes. It is important to note these statutes do not prohibit employers and landlords from conducting appropriate background checks to ensure safety and security, they merely postpone such checks until after an applicant is determined to be otherwise qualified.

Existing California law already prohibits both private and public employers from asking or seeking to obtain information about a job applicant’s arrests, which did not result in conviction, referrals to diversion programs, or convictions that have been dismissed or sealed. Even where the employer has come into such information, existing law prohibits its use “as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment.” Additionally, no employer may consider convictions for the personal possession and use of marijuana “two years from the date of such a conviction.” These existing provisions meet most, but not all, of factor (3) supra.

Further, as noted supra, as of July 1, 2014, California Assembly Bill 218 prohibits public agencies from asking or seeking to obtain “information regarding a

170. Thurm, supra note 165.
171. See NAT’L EMPLOYMENT LAW PROJECT, supra note 5, at 1.
172. CAL. LAB. CODE § 432.7(a) (West 2014) (effective Jan. 1, 2014).
173. Id.
174. Id. § 432.8 (West 2014).
criminal conviction, except as specified, until the agency has determined the applicant meets the minimum employment qualifications for the position." This prohibition meets factors (2) and (5) supra for public employers but has no effect on private employers.

In order to address all six factors supra for private employers, California Labor Code section 432.7 should be modified as follows (proposed new language shown in *italics*):

(a) No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.45, and 1210.1 of the Penal Code, or any conviction or adjudication in the juvenile justice system, or any misdemeanor conviction or infraction, or any conviction more than seven (7) years old, excepting those convictions requiring lifetime registration pursuant to Sections 290 to 290.023 of the Penal Code, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.45, and 1210.1 of the Penal Code, or any conviction or adjudication in the juvenile justice system, or any misdemeanor conviction or infraction, or any conviction more than seven (7) years old, excepting those convictions requiring lifetime registration pursuant to Sections 290 to 290.023 of the Penal Code, until after either the first live, in-person interview with the applicant or the making of a conditional offer of employment. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.

* * *

(e) Persons seeking employment or persons already employed in home-based businesses, or in businesses having fewer than five (5) full-time employees, or as peace officers or persons seeking employment for positions in the Department of Justice or other criminal justice agencies as defined in Section 13101 of the Penal Code are not covered by this section.

* * *

(m) Subdivision (a) does not require an employer to hire any applicant with a criminal background nor prohibit an employer from asking an applicant about a criminal conviction of, seeking from any source information regarding a criminal conviction of, utilizing as a factor in determining any condition of employment of, or entry into a pretrial diversion or similar program by, the applicant if either the employer shows by a preponderance of evidence that the applicant’s conviction directly relates to the specific business of the employer or, pursuant to Section 1829 of Title 12 of the United States Code or any other state or federal law, any of the following apply:

1. The employer is required by law to obtain information regarding a conviction of an applicant.
2. The applicant would be required to possess or use a firearm in the course of his or her employment.
3. An individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
4. The employer is prohibited by law from hiring an applicant who has been convicted of a crime.

Similar language should be inserted into section 432.9 of the California Labor Code covering public employers.

V. CONCLUSION

As a recent Los Angeles Times editorial so aptly observed:

It is time for California to join the [Ban the Box] movement, cautiously but deliberately. Cautiously, because employers have a right to know who their workers are and a duty to protect their businesses and workplaces; and deliberately, because we’re foolishly punishing ourselves by not welcoming safe and potentially productive people into the workplace.176

Banning the box on employment and housing applications also would improve public safety and help to remove the social stigma of a criminal conviction.177

The time is long overdue for California to embrace the maxim set forth by President George W. Bush in his 2004 State of the Union Address: “America is the land of the second chance, and when the gates of prison open, the path ahead should lead to a better life.”178

176. Editorial, supra note 73.
177. See, e.g., A.B. 218, § 1; Fair Chance Ordinance, supra note 6.
178. See Vissa, supra note 8.