

## BAN THE BOX TO PROMOTE EX-OFFENDER EMPLOYMENT

JESSICA S. HENRY  
Montclair State University

JAMES B. JACOBS  
New York University

It is close to a criminological truism that the lack of a legitimate job fosters criminality and, conversely, that holding a legitimate job diminishes criminal conduct. Consequently, many criminologists and social reformers have long advocated programs to expand employment opportunities for ex-offenders, particularly for those who have served prison time. Strategies for improving employability of ex-offenders include providing ex-offenders with basic education and job-specific training, assisting in identifying potential employment opportunities, interceding on the job seeker's behalf with prospective employers, and eliminating *de jure* and *de facto* employment discrimination against ex-offenders.

Many federal and state laws make ex-offenders, or at least certain categories of ex-offenders, ineligible to obtain employment licenses or to work in organizations serving children, the elderly, and other vulnerable populations (Love, 2006). In fact, such laws have proliferated during the past two decades on account of tough-on-crime politics and heightened post-9/11 security concerns. The reentry movement has cast a bright light on these collateral consequences of conviction and has urged a wholesale review and reform of them (American Bar Association, 2004; Travis, 2005). We agree with reentry proponents that *de jure* prohibitions on ex-offender employment are far too overbroad and that many should be repealed. In this article, however, we focus on *de facto* discrimination to highlight a recent trend for cities to voluntarily stop asking for criminal background information from applicants seeking city employment and, in some instances, employment with vendors who contract with the city (National Employment Law Project (NELP), 2007).

By recognizing that society has much to lose by excluding ex-offenders from legitimate employment opportunities, several cities such as Boston, San Francisco, and Minneapolis have agreed to "ban the box" on initial job applications that ask applicants about past criminal convictions. These cities have committed themselves not to discriminate against ex-offenders and not to consider an applicant's prior criminal record unless it is clearly related to the requirements of a particular position. This welcome step, if successful, might persuade other public and private employers to stop discriminating against job applicants with a criminal record.

## *DE FACTO DISCRIMINATION AGAINST EX-OFFENDERS IN HIRING*

Criminologists have long recognized that a criminal conviction has a significant negative effect on employment. In the early 1960s, Richard Schwartz and Jerome Skolnick (1962) sought to determine how much of a disadvantage a criminal record is when obtaining employment. In their study, fictitious job seekers applied through the mail for employment positions. The job seekers had nearly identical curricula vitae (c.v.), with criminal histories of varying severity. Although 36% of employers expressed an interest in employing an individual with no criminal record, only 4% of employers expressed interest in the same applicant when an assault conviction was added to his c.v. Indeed, even the existence of an assault acquittal reduced employers' interest to 12%. Studies that followed consistently found the same negative relationship between criminal record and future employability (Finn and Fontaine, 1985; Sampson and Laub, 1993, Uggen et al., 2006; Western, 2006).

Nearly 40 years after the Schwartz and Skolnick study, Devah Pager (2003) carried out a sophisticated field experiment confirming the adverse effect of criminal history on employment. She sent to employers several student job applicants who were matched on all attributes except criminal record; one member of the pair had on his c.v. an 18-month prison term for a drug felony. She found that of the matched white "job seekers," applicants without a criminal record received twice as many positive responses as the ex-offenders (34% vs. 17%). Among matched black "job seekers," employers showed interest in 14% of applicants without a criminal record compared with 5% of applicants with a criminal record. Pager's study provides powerful evidence that, holding everything else constant, a criminal record has a large negative effect on employment prospects. Strikingly, it shows that black job seekers without a criminal record fare worse than white job seekers with a criminal record. Evidently, criminal record discrimination amplifies racial discrimination in employment. The burgeoning proliferation of criminal records (Jacobs, 2006) and the *de jure* and *de facto* discrimination against ex-offenders (Henry, 2007; Love 2006) combine to create the prospect of a permanent underclass of ex-offenders who are excluded from the legitimate economy and are funneled into a cycle of additional criminality and imprisonment.

The obvious question is what to do to break that cycle. Is it possible to eliminate or to ameliorate the job-depressing impact of a criminal record? Neither Schwartz and Skolnick (1962) nor Pager (2003) addresses the policy implications of their findings, but reentry proponents and governmental actors have begun paying significant attention to policy. Here, we focus on one sensible and promising strategy: the movement to "ban the box."

## THE “BAN THE BOX” CAMPAIGN

In the last year or two (2006-2007), several major cities, including Boston, San Francisco, Chicago, Newark, Philadelphia, Los Angeles, Minneapolis, and St. Paul have begun initiatives to ameliorate public sector discrimination against job applicants with criminal records (NELP, 2007). In San Francisco, an ex-offender group, All of Us or None (AUN), led a “ban the box” campaign to end discrimination against ex-offenders applying for city and county jobs. The box refers to the question on the city’s employment application form that asks whether the job applicant has ever been convicted of a past crime. AUN argued that, in addition to promoting employment discrimination against ex-offenders, the question deters ex-offenders from even applying for city jobs. After several rallies and vigorous lobbying with the city’s Human Rights Commission and Department of Human Resources, AUN persuaded the San Francisco Board of Supervisors to pass a resolution calling on the city and county to eliminate the criminal record question from the job application form, except when state or local law expressly bars people with certain convictions from a particular job. The resolution would prohibit any criminal background check or inquiry until after a tentative offer of employment has been made. At that point in the hiring process, a criminal record would only be relevant if it created an unacceptable risk that the applicant could not fulfill the job’s requirements.

Boston has taken the “ban the box” initiative even further. Within city hiring, Boston requires background checks only for positions involving youth, the elderly, and the disabled, as well as for positions within the police department. Each posting on the Boston City employment website specifies whether a criminal background check will be required prior to an offer of employment. The background check, however, is not conducted until after an applicant initially applies for a position, is interviewed by the hiring department, and is selected as a finalist for the position. The department refers the finalists’ names to Human Resources, which conducts a background check. If a conviction is revealed that does not disqualify the applicant from the position, the department will be told that the applicant is cleared for the position. If a disqualifying conviction is revealed, the applicant has an opportunity to meet with the Human Resources Department to discuss any mitigating circumstances. The department head may ask for a formal review of the denial (W. Kessler, personal communication, April 3, 2007).

In addition to its own policy on hiring ex-offenders, Boston expanded its attack on reforming its *de facto* employment discrimination by applying the “ban the box” policy to the city’s 50,000 private contractors. Under a

2006 ordinance, these contractors will have to adopt a policy of nondiscrimination against ex-offenders to obtain and, in some instances, maintain city contracts. This ordinance enhances the employment prospects of thousands of ex-offender job seekers.

To date, no city has gone as far as Boston has, but other cities are moving in the same direction. For example, the mayor of Chicago announced wide-ranging reforms in how city agencies consider a job applicant's criminal record. First, the question about prior convictions will be removed from the initial employment application. Second, under new guidelines, even when a criminal record might be relevant to a particular job, before making a final hiring decision, city agencies must take into account the time elapsed since the prior criminal conviction, seriousness of the prior offense, evidence of rehabilitation, and other mitigating factors (NELP, 2007). Both the cities of St. Paul and Minneapolis have also banned the box at the initial stages of hiring. Minneapolis publicly encourages, but has not mandated, private vendors to follow the city's policy (E. Glidden, personal communication, April 4, 2007).

#### WILL "BAN THE BOX" MAKE A DIFFERENCE?

The "ban the box" initiative is a promising and constructive policy innovation that furthers the goals of the prisoner reentry movement. In voluntarily ignoring past criminal convictions for most public-sector jobs in the first instances, local governments can lead the way toward reducing job discrimination against ex-offenders. If cities successfully demonstrate that ex-offenders can be safely hired for most public-sector jobs, a strong argument will exist for repealing many *de jure* restrictions on ex-offender licensing and employment. Moreover, private employers' discrimination against ex-offenders could come to be viewed as invidious and unreasonable.

Although the "ban the box" campaign represents a major step toward regularizing the status of ex-offenders, it also illuminates the magnitude of ex-offender challenges to reentry. By definition, the "ban the box" movement only reaches those ex-offenders who are job ready and job capable. Banning the box will be of most assistance to ex-offenders with the most social capital, education, skills, competent presentation of self and, perhaps, only a single conviction for a nonviolent offense. It may be less helpful to ex-offenders who lack psychological and emotional stability, education, job skills, social skills and work experience, to those with an extensive record of recidivism, and to those with a conviction, or with multiple convictions, for a horrific or a violent crime.

Even for those ex-offenders in a position to benefit from the "ban the box" reforms, it is not yet clear how aggressively cities will implement and

administer these reforms. As with many social programs, the devil will be in the details. The cities that have committed themselves to banning the box have not said that a criminal record is irrelevant. They have said that ex-offenders should be encouraged to apply for public-sector jobs and that a criminal record will only be considered after the applicant passes initial competency screening. What happens at that point? Maybe, as in Boston, the human resources department will never tell the hiring officer about the applicant's prior conviction. But what happens in Minneapolis, which continues to require background checks on approximately two thirds of its applicants? Will ex-offenders be referred out for final hiring? If criminal history information is shared with the hiring officer, will that officer have formed a favorable view of the applicant's capabilities and be willing to look beyond a prior crime?

Many "ifs" remain. We do not yet know how liberally or restrictively various cities will administer their new or strengthened ex-offender employment policies. Several cities promise to promulgate guidelines on what offenses/records could support a department's refusal to hire. These guidelines may not be easy to construct. They will have to consider the relevance of all types of convictions and the length and quality of criminal careers to all sorts of jobs and employment settings. It is obvious that a person with a single car theft conviction from many years ago should not be disqualified from most city jobs, but what about a car theft plus a forgery conviction? Plus a domestic assault? How will the city react when, as current recidivism statistics suggest is likely, an ex-offender who was hired to work for a city position relapses into drug use and fails to attend work or commits a serious crime?

## CONCLUSION

To the extent that *de jure* and *de facto* employment discrimination against ex-offenders are permitted to flourish, the employment prospects of even the best qualified ex-offenders remain bleak. Under that scenario, society faces the prospect of an ever-expanding underclass of ex-offenders who are separated and alienated from the mainstream population. We have an enormous stake in successfully reintegrating ex-prisoners and, indeed, all convicted persons.

All reentry programs involve some risk of failure, but they also offer hope of large benefits. For every ex-offender who successfully reintegrates into the world of work, there is one less potential recidivist consuming expensive criminal justice and corrections resources. For this reason alone, the "ban the box" campaign is good news. In the best American tradition, it represents voluntary action at the grass roots level. It does not involve costly regulation and enforcement. It constitutes a creative experiment

that, if it works, will benefit ex-offenders, city governments, and society at large. Even more importantly, the “ban the box” movement may provide an important example that people can and do change, and that second (and even third) chances can be a smart societal investment.

## REFERENCES

- American Bar Association  
2004     Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons. Available online: <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>.
- Finn, R. H. and Patricia A. Fontaine  
1985     The association between selected characteristics and perceived employability of offenders. *Criminal Justice and Behavior* 12:353–365.
- Henry, Jessica S.  
2007     Closing the legal services gap in prisoner reentry programs. *Criminal Justice Studies: A Critical Journal of Crime, Law and Society*. In press.
- Jacobs, James B.  
2006     Mass incarceration and the proliferation of criminal records. *St. Thomas Law Review* 3:387–420.
- Love, Margaret Colgate.  
2006     Relief from the Collateral Consequences of Conviction: A State By State Resources Guide. Buffalo, N.Y.: William S. Hein, Inc.
- National Employment Law Project  
2007     Major U.S. Cities Adopt New Hiring Policies Removing Barriers to Employment of People with Criminal Records. Available online: [http://www.nelp.org/nwp/second\\_chance\\_labor\\_project/citypolicies.cfm](http://www.nelp.org/nwp/second_chance_labor_project/citypolicies.cfm).
- Pager, Devah  
2003     The mark of a criminal record. *American Journal of Sociology* 108:937–975.
- Sampson, Robert J. and John Laub  
1993     *Crime in the Making: Pathways and Turning Points through Life*. Cambridge, Mass.: Harvard University Press.
- Schwartz, Richard D. and J. Skolnick  
1962     Two studies of legal stigma. *Social Problems* 10:133.
- Travis, Jeremy  
2005     *But They All Come Back: Facing the Challenges of Prisoner Reentry*. Washington, D.C.: Urban Institute Press.
- Uggen, Christopher, Melissa Thompson and Jeff Manza  
2006     Crime, class, and reintegration: The socioeconomic, familial, and civic lives of offenders. *Annals of the American Academy of Political & Social Sciences* 605:281–310.
- Western, Bruce  
2006     *Punishment and Inequality in America*. New York: Russell Sage Foundation

## CRIMINOLOGY &amp; PUBLIC POLICY

761

Jessica S. Henry is an Assistant Professor at Montclair State University, where she teaches in the Department of Justice Studies. She received her Juris Doctorate from New York University School of Law in 1995. Her primary research areas include prisoner reentry, criminal law and procedure, and hate crime.

James B. Jacobs is the Warren E. Burger Professor of Law at NYU School of Law. His most recent book is *Mobsters, Unions & Feds: The Mafia and the American Labor Movement*.