

## COMMENTARY

# To Refuse the Mark: Racial Criminalization and Twenty Years of Struggle to Ban the Box

Melissa Burch\*

“DO YOU WANT TO WRAP IT UP PLEASE?” REQUESTED THE SUPERVISOR, his tone flat. The little red light was blinking. Her two minutes were up. An ankle-length, gold and black leopard-print dress, her hair wrapped in a matching piece of fabric—together with the V-shaped choker—conjured the image of a powerful African queen. Carved woodcuts of the continent, painted black, dangled from her earlobes as she spoke. Susan Burton was almost shouting now: “Two years ago, one of my nephews was in the Department of Children and Family Services’ care. Because of my criminal record—because of what I did 15 years ago—I could not get my nephew out of the system.”

Two minutes were hardly enough time to explain the impact of fifteen years spent in prison and the lifelong barriers that had resulted from the mark of a criminal record. “Since then, I’ve went back to college. I’ve gotten a Certificate of Rehabilitation. I’ve helped two hundred women transition out of prison. I’ve worked really hard, incredibly hard, to be accountable and in good standing. So I would implore you to support and vote ‘yes’ for the resolution to reposition the box.” This time, the audience complied with the

---

\* MELISSA BURCH (mlburch@umich.edu) is an anthropologist whose research and community work focus on the experiences of people with criminal convictions in the United States and how social hierarchies and inequalities are reproduced through processes of criminalization and punishment. Her writing has been featured in journals and magazines, including *American Anthropologist*, *History and Anthropology*, *Critical Criminology*, *Z Magazine*, *Dark Night Field Notes* and in the anthologies *Abolition Now! Ten Years of Strategy and Struggle Against the Prison Industrial Complex* and *Interrupted Life: Experiences of Incarcerated Women in the United States*. Her forthcoming book explores the discriminatory use of criminal records in the southern California job market. Burch is a member of Critical Resistance’s Abolitionist Educators work group and directs the Afterlives of Conviction Project, which aims to deepen understanding of the lived experiences of criminalization and make scholarship available to organizers, educators, and policymakers in engaging and useful ways.

supervisor's rule: "No applause," he had instructed them earlier, slamming the gavel three times, "if you want to express yourself, just wave your hands."

Susan was one of the area's leaders for the national Ban the Box reform movement, an initiative seeking to remove barriers to employment, housing, education, and social services for people with criminal records. Seated behind her were nearly two hundred other supporters who had shown up to be counted that November morning in 2006 at the Los Angeles County Board of Supervisors' weekly meeting. Most of them had a criminal record. Many were unemployed, some had jobs, and some, like Susan, had gotten around the discrimination by finding ways to employ themselves. There to bolster their cause were also dozens of advocates from prominent nonprofits, several state representatives, one member of Congress, one city councilor, and a handful of other leaders of All of Us or None, the former prisoner-led political organization that had initiated the Ban the Box movement. They wanted the question "Have you ever been convicted of a felony or misdemeanor?" removed from County of Los Angeles employment applications.

Ban the Box was conceived in 2003 by All of Us or None members in California who had convened at the Center for Third World Organizing in Oakland, and later with members from across the United States who participated in Critical Resistance South, Beyond the Prison Industrial Complex, a conference of nearly 2,000 activists, scholars, and community members coming together to strategize an end to the use of policing and prisons as a response to social problems. Collectively, All of Us or None had decided that among the many barriers they faced as formerly incarcerated people, the first issue to be tackled was employment discrimination. They would begin their campaign in Oakland, where many of their members were concentrated.

At the time, elected officials across California were concerned about what they called a reentry crisis, the challenge to successfully reintegrate the 45,000 people who were returning home from state prisons each year. Nearly 70 percent of people released from California prisons were being sent back within eighteen months. The Ban the Box reform appealed to many elected officials because it was modest, specific, and nearly cost-free—it was a win-win, as San Francisco's human resources director had said when the city passed the measure in July 2006. Ban the Box quickly gained steam across the United States and by early 2006, when southern California members of All of Us or None had persuaded Supervisor Yvonne Brathwaite Burke to sponsor a resolution to Ban the Box for employees of the County of Los Angeles, thirty-odd municipalities nationally had already enacted the reform.

Because hiring processes vary widely across institutions, the details of the reform also varied. Some cities essentially repositioned the box—they removed the question “have you ever been convicted” from their initial applications, but added it to a subsequent form for applicants who made it to the next stage of the hiring process. Others decided never to ask applicants to disclose their criminal history, but simply implemented background checks on all new hires. From All of Us or None’s perspective, the best policy at the time had been implemented in Boston. There, the city not only removed the conviction question from its application, but decided that no background check would be necessary for a majority of jobs. Criminal history was not relevant to one’s employment, Boston decided, unless the new hire would be working in unsupervised situations with vulnerable populations, such as children, the elderly, or the disabled.

The hope within the movement was that elected officials in other cities would reach Boston’s conclusion that a criminal record was irrelevant to most jobs but also that government had a responsibility to support the reintegration of formerly incarcerated people. But in most places at the time, elected bodies would only consider arguments to reposition the box. Thus, the most basic demand was that cities and counties follow a similar logic to the American Disabilities Act, which prohibits employers from asking if an applicant is disabled. This model reasons that if an employer has disability information, or, in this case, information about criminal history, they are likely to use it against the applicant, even if unconsciously. Not asking the question up front, organizers reasoned, would help employers avoid wrongful discrimination.

The increased use of background checks during the past thirty years meant that the box now appeared on virtually every application for employment throughout the country. People with criminal records had come to believe that if they checked the box, their applications would be discarded. Their instincts were correct. A study of Los Angeles employers had found that only 20 percent were willing to hire someone with a criminal record (Holzer et al. 2003), despite the fact that blanket exclusions on the basis of a criminal record are illegal under Title VII of the Civil Rights Act of 1964, which protects Black and Latine workers from race-based employment discrimination, including discrimination on the basis of criminal conviction that leads to discrimination against people who are part of a protected class. Given that the criminal legal system disproportionately impacts Black and Latinx people,<sup>1</sup> reasoned the EEOC, employers discriminating on the basis of past convictions would likely be guilty of race-based discrimination. Therefore, to

deny a job or promotion on the basis of a past conviction, employers must demonstrate a so-called business necessity for doing so. At minimum, this justification requires a direct relationship between the conviction and the job sought (i.e., theft conviction/cashier). Additionally, an employer must consider extenuating circumstances, the amount of time passed since the conviction, evidence of rehabilitation, and other factors.<sup>2</sup>

As one of few laws protecting people with criminal records from discrimination at the time, the EEOC policy was regarded as highly significant. But there were two big problems with it. One was that hardly anyone knew about it—not employers, and not job seekers. And two, as with race discrimination generally, criminal record discrimination was extremely difficult to isolate and enforce. If applicants were denied a job, how could they prove it was because of their criminal conviction? Organizers believed the Ban the Box reform would help. If considered at all, conviction history would be reviewed at the end of the hiring process—after experience, education, and other qualifications were all considered—and ideally, after an interview. This way, candidates who met all of the other standards and were still denied the job would better know that their conviction was the reason for denial.

Unfortunately, compliance with the law did not seem to be a compelling argument for LA County elected officials who may have sensed that the threat of a lawsuit rang hollow, as civil rights lawyers were not yet prepared to prove unlawful criminal records discrimination under Title VII. Despite the lists of high-profile supporters and of cities and counties that had already led the way, the LA Board of Supervisors seemed skeptical that Ban the Box would be a win-win for Los Angeles. People working in human resources worried that not asking the question up front would prolong the hiring process. Attorney's worried about liability if the wrong person were to, as some put it, slip through, into a job. Conservatives said their constituents would not support anything that smelled like affirmative action for lawbreakers. Justifications to not Ban the Box seemed endless.

Still, the chambers were filled that morning with anxious but confident Ban the Box supporters who had cleared the metal detectors at the entrance and waited in line for the security guards to search their handbags for firearms and cameras. They had been directed to place food and drink on a five-by-eight table set against the wall and to proceed through the heavy, soundproof doors and down the two sloped, carpeted aisles. The room was impressive, intimidating even, in its formal elegance. The plush velour seats folded down as in a movie theater, and the incline guaranteed an unobstructed view of the stage where dozens of decisions were made

every Tuesday morning at this hour. Some decisions were big and some were small. This week, for example, right after Ban the Box, a motion to minimize death by smoke inhalation within the Los Angeles County Fire Department followed, whereas just before our resolution, Supervisor Michael D. Antonovich held up Mr. Cooper, the puppy dog of the week, in hopes that someone in the audience (or watching the proceedings on television), would agree to adopt him.

The LA County Board of Supervisors was the first body in southern California to consider this reform. You could feel the energy begin to collect in the room when Congresswoman Maxine Waters, the first to testify, opened her remarks with, "I think we are embarking upon perhaps one of the most important possibilities of our time." As people began to speak, underneath the details of their lives and between the lines of the testimonies that would be recorded in all capital letters by the stenographer, was a sense of something far bigger than a policy proposal. It was conveyed in Susan's apparel of power and pride. It was apparent in the fact that all of the elected officials who voiced their support were Black or Latine. It was felt in the presence of Council Member Chuck Turner, who had flown to LA all the way from Boston to declare, "From my perspective, I think one of the most serious civil rights issues that we have in this country is the question of the treatment of people who have been arrested as well as incarcerated." And it was in the prophetic testimony of Dorsey Nunn, one of All of Us or None's charismatic cofounders, who warned, "Our numbers are not getting any smaller. You've got a chance today to be more than politicians, you get a chance to be leaders; so I'm asking you to lead."

Former prisoners were there that day with an aim greater than the proposed reform at hand: to refuse the mark of a criminal record.<sup>3</sup> They demanded to no longer be seen as ex-cons, ex-offenders, felons, or parolees, but as people. If US society was not ready to let go of the idea that a past conviction should be forever relevant, then let this at least be the last consideration, they argued, not the first. "We need to stop demonizing people who did the time, who paid the price. They've done their time, they've paid their debt and now it should be over," said Dr. Marilyn Montenegro, a respected social worker who specialized in assisting women who were coming home from prison. Frank Tamborello, a longtime homeless advocate, highlighted the need for hope: "We know that Ban the Box is not going to be a guarantee that everyone who comes up and applies is going to get a job, but at least it will give people that feeling that they have a chance to get back into society."

Maxine Waters spoke to the role of policy in affecting public perception and individuals' sense of self:

We're sick and tired of people who get discouraged and give up and think there's no chance for them to have a decent life in our community. If we want to move our communities forward, if we want to make these safe and secure places, and places of opportunity, we've got to step outside of this box and do something innovative and creative and join with some of the other jurisdictions that have already started to do this.

Supervisor Burke nodded in agreement. Sitting left of Antonovich both physically and metaphorically in a shiny light-pink silk suit, she had been the first African American woman elected to Congress in California and the first to chair the LA County Board of Supervisors. As a progressive representative of the Black and Latine majority second district, Burke understood the stakes.

Los Angeles County was southern California's largest employer, so banning the box here would theoretically open the door to nearly 100,000 jobs, a major material victory. Of even greater importance, however, would be the symbolic significance of a victory in Los Angeles, a municipality known to be far more politically conservative than the Bay Area where Ban the Box got its start and a region much larger than any of the others where the reform had already passed. Organizers believed that if they could Ban the Box in Los Angeles, the sky was the limit. Other major cities and counties would follow, then states, and perhaps leading someday to a federal ban. However, any proposal in LA County needs three votes out of five votes to pass. Two other supervisors would need to stand with Supervisor Burke.

Five supervisors govern Los Angeles County, each representing more than two million residents. This ratio of governed to governors is perhaps unparalleled anywhere else in the United States, hence the nickname five little kings. Together they make decisions of major impact on issues related to health, education, transportation, public safety, and more. Prior to this effort to Ban the Box, those working to pass the resolution had never been part of an effort involving this kind of close, sustained interaction with the Board. In order to make up for the lack of experience, many hours were spent strategizing in consultation with more savvy advocates about how to secure the needed votes.

Supervisor Antonovich was then chair. Organizers had never spoken to him personally, nor to his staffers. In all fairness to the supervisor, they had not even tried. For thirty years, he had represented conservative, mostly

white voters in the massive northwest area of Los Angeles County referred to as the Valley. He was recognized for his commitment to public safety, a well-known euphemism for prisons and police. Presidents Ronald Reagan and George Bush had appointed him to numerous commissions. It was understood he would not be sympathetic.

To his immediate right was Supervisor Don Knabe (pronounced ka-nabi). Knabe was a moderate Republican member of the pro-life and anti-death penalty Reformed Church of America. Organizers had met with his justice deputy months ago, but had no way of knowing what he was thinking coming into the hearing. This was typical of the interactions with all the supervisors. Most elected officials relied heavily on carefully appointed staffers who knew them well enough to weigh the details of policy proposals and anticipate their position. The protocol, organizers came to learn, went like this: call their office and set up a meeting with the appropriate deputy. Take a small and articulate delegation, ideally from the supervisor's district, which could represent key stakeholders. State concerns, explain the proposal, and present any available empirical data. Then go away, cordially agreeing to follow up a few weeks later, by which time the deputy would ostensibly have spoken with the supervisor and garnered his or her opinion.

Knabe's deputy had been polite but unenthusiastic, so when repeated followup yielded no conclusive response, organizers determined it was best to move on. As with Antonovich, they had been advised by more experienced advocates that Knabe's conservatism made him an unlikely ally and that efforts to win him over might be wasted time. That left Zev Yaroslavsky, or Zev as everyone preferred to call him, and Gloria Molina. Without support from both of them, the resolution would sink.

Organizers had begun to get a true sense of what we were up against in our meetings with the deputies for Supervisors Yaroslavsky and Molina. The most extensive discussions took place with Zev's justice deputy, a no-holds-barred prosecutor by training. Zev had a somewhat liberal reputation that dated back to his college years, when he had been an activist for the movement to free Soviet Jews. He had also cofounded the Los Angeles County Young Democrats and represented the wealthy Westside communities of Santa Monica, West Hollywood, and the San Fernando Valley. However, it became evident quickly that it was not Zev but his deputy that would need convincing. Like a good prosecutor, the deputy found all the holes in the arguments in favor of banning the box, which at the time were more anecdotal than empirical. For example, one of the main arguments was that the box had a chilling effect that discouraged qualified applicants from

applying for jobs with the county. The deputy wanted proof. How many people are not applying because they feel discouraged, he wondered. The mere recounting of lived experiences did not satisfy him. Another question he wanted answered empirically was whether or not the county was in fact violating Title VII law and unfairly discriminating—and he was not alone in his desire to know this. In fact, back in May 2006, when the Ban the Box resolution was first introduced, the Board had instructed the human resources department to conduct a study of the county's 38 departments to determine whether applicants were being inappropriately disqualified due to prior convictions and to examine the potential implications of banning the box.

Having completed the study just in time for the hearing, Michael Henry, director of personnel, had been first to speak. Mr. Henry reported that the county was doing a fair and adequate job in assessing the criminal records of new applicants. In response to a written survey, thirty of the 38 departments claimed to have never disqualified an applicant due to criminal history. Given that an estimated one in five Americans had a criminal record, this did not sound right, even to the supervisors. It either meant that applicants were not disclosing their convictions, or that departments were not checking. Meanwhile, criminal record-based exclusions that did occur were appropriate, Mr. Henry reported. For example, an applicant for custodian had been denied the job because of a conviction for drug possession, while one who had applied to be a grounds maintenance laborer was turned away for having been convicted of domestic violence. While from our perspective such denials were definitively not in keeping with the EEOC's definition of nexus, what seemed to unsettle the supervisors most was the lack of uniformity across the county. Half of the departments reported they had no policies or procedures to consider criminal background information during the hiring process. How could the county determine if their process was fair and adequate if half the departments had their own policies and procedures and the other half had none at all? Despite the fact that his study raised more questions than it provided answers, the personnel director felt strongly that the county's hiring process should stay as it was. Although the supervisors' body language betrayed their dissatisfaction with the study's findings, it mattered a great deal to them that their own human resources department was not in favor of banning the box.

The democratic process was performed and administered on a stage framed by floor-length dark velvet curtains. Spanning from center stage in either direction was a heavy wooden semi-circular desk anchored to the



floor with a seat for each supervisor. Partitioned areas for deputies, clerks, transcribers, and other staff sat to each side. Directly in front of the semicircle was a table with three microphones and chairs, where those addressing the supervisors were summoned to speak. In this way, speakers could make eye contact with the supervisors at a distance of no more than twenty feet. The audience had to rely on the flat-screen monitors mounted on either side of the stage to see the speakers' facial expressions and to read the simultaneous transcription when they were difficult to hear.

In the name of efficiency, the hearing proceeded like an assembly line. Each time a speaker completed their testimony, Supervisor Antonovich called the next name. That way, while one person was speaking, another was standing by and yet another was making her way to the stage. It caused some confusion. For instance, one moment he thanked Alex Sanchez and then said, "Fabian Montes, Fabian Montes," before turning his attention to Donna Ann Smith-Marshall, who was next up. All of the elected officials had been invited to speak first, and the floor was open for others. Each employed their own narrative strategies. Smith-Marshall appealed to a universal sense of humanity when she claimed, "We've all done something wrong that we want to be forgiven for." Her polished appearance and mention of her status as an author and publisher aimed to disrupt common assumptions about people who have criminal records. Similarly, Patricia Sheppard began her narrative by claiming her right to speak as "a property owner, a mother and a citizen of this community for most of my life." Despite her best efforts as a parent, Patricia explained, her son had gotten into trouble and paid a hefty price. "My son had experience in clerical and maintenance employment," she said, "but when he returned from prison ... he would not get an interview, a call back."

Michelle Jones had only recently been released from prison, and had never spoken in public before. Yet when Supervisor Antonovich gave her the floor, she turned boldly to all those assembled and said, "All of those that's for this resolution, please stand." Two hundred people rose from their seats. She went on, "Upon my transitioning coming from prison, I have tried a multiple of times at McDonald's, El Loco, trying to receive a job because I wanted to change from being who I was. But if we ain't allotted the opportunity or the chance to prove who we are, they'll never know." Similar displays of boldness sprinkled the proceedings. Kim Carter, a fierce All of Us or None leader, cut right to the irony she saw in the county's reluctance to hire workers with criminal records:

I'd like to call the supervisors' attention to what's written on the wall behind you, and it says this country is founded on free enterprise, cherish and preserve it. Well, I look at the free enterprise, and, at that time, that was slave labor. If I look at the prison industrial complex today, what they use in prison is slave labor because, see, when we go to prison, we get a job immediately.

Most speakers, however, told stories of opportunity denied, dreams thwarted. A thirty-seven-year-old professional expressed her frustration at being stuck in a dead end job: "I'm a person that got a felony at an early age, at around eighteen years old, and it's followed me all my life. I've rehabilitated myself, I educated myself and, right now, I work at a job beneath my level because I'm not given the opportunity to excel." A young woman who had been locked up in youth prison, said,

I want to be a probation officer so I can work in juvenile hall and work with the young people because I have a story to tell, and a testimony, and I want to influence these young girls that they can make it in life. But I can't get a job with the probation department because I have a crime when I was eighteen that got dismissed, but is still being held against me.

Some of the speakers sounded outright defeated. "I can wear a long sleeved shirt and nice tie and everything—I could look like a couple of you gentlemen here, you know what I mean—and go out and present myself," said the next speaker. "And once in a while, someone said, 'well, we'll look into it.' But you know what? When I walk away, deep inside, I say, yeah, right. You ain't going to hire me." For more than two hours, these compelling themes—redemption, legitimacy, injustice, opportunity denied—were rearticulated by dozens of formerly incarcerated people and their allies, allaying every possible doubt. The question was, were the supervisors really listening?

One person who unfortunately was not listening to the impassioned testimony that day was Supervisor Molina, who was conspicuously absent. This did not concern organizers too much at first because they had been informed by Molina's staff on the day before the hearing, that, despite some reservations, Molina planned to support the resolution.

Molina had been a tough one to figure out. Her background suggested she could be an ally. She had been raised one of ten kids in a working-class Mexican and Mexican-American family and represented some of Los Angeles's most marginal residents. Yet her relationship to social causes was

manifested in complex ways. For example, she had made her first significant political mark organizing to stop the construction of a prison in the Chicano neighborhood of East Los Angeles. However, this was understood as a “not in my backyard” attempt to keep so-called criminals out of her district. Still, meetings with Molina’s staffer had been encouragingly open and direct. Molina’s main concern with the resolution, as organizers understood it, was that it might instill false hope. If applicants did not see the question on the application, they might imagine that their criminal history would not be reviewed. Molina believed it was better to have the rules of the game clearly spelled out from the get-go. There was a room full of people who believed it absolutely mattered *when* an employer found out about their criminal history, but she was not there to hear them out. Besides, Dorsey Nunn had said, “False hope, is better than no hope at all.”

By 1 pm, the hearing had reached its crescendo and even the most enthusiastic among us was beginning to feel tired and hungry. Many of the speakers had shifted away from narratives of personal responsibility, deservedness, and opportunity, toward subtle—and then not so subtle—forms of social critique. For example, from Senator Gloria Romero’s opening question, “Do we believe in rehabilitation?,” to organizer Mattie Smith’s, “I’d like to explain that in the continental United States, there’s no climate that can support a poppy or the coca tree, so how are the drugs getting to our country and to our community for us to use?” And Dwayne Dixon said, “I got pulled over due to me being in a Mercedes Benz; you’re familiar with the driving-while-Black issue.”

The testifiers were angry about the systems and conditions that had rendered their communities vulnerable to criminalization in the first place and they were growing weary of being cast as those needing forgiveness. Even the law recognized the disproportionate impact of the punishment system on Black and Latine peoples, and yet somehow this systemic discrimination was not part of the discussion.

At this point, it was also becoming clear that no number of speeches could resolve the deeper dilemmas. For one, the nagging question of whether the county was in fact discriminating illegally, which organizers strongly suspected, but could not prove. Furthermore, the verbs “ban” and “reposition” were being used interchangeably, as if there was no meaningful difference. This sloppiness belied deeper contradictions. The potentially liberatory power within the ban the box concept was the idea that the past should not forever define a person. Yet the resolution, as written, would not fully embrace this belief. Once dropped into the political cauldron, the question of whether a

criminal record should be forever relevant seemed to have been reduced to an administrative discussion of when and how and by whom this information should be used. After three hours of pleas and many months of organizing, organizers were beginning to sense a dead end.

The discord, they came to realize, lay in the gulf between what they really wanted and what they felt they could ask for. They wanted power holders to see people who had been criminalized as worthy and capable and to stop treating them as suspect. They wanted them to acknowledge publicly that the odds of a good life had been deliberately stacked against some and for others—to give this tiny nod toward correcting persistent social inequalities, to take some responsibility to help make it right.

I suppose it should have occurred to the organizers earlier that Molina's absence would be critical. Then again, perhaps it was better that they had not known the day's outcome was already decided, as this would have made it hard to speak with the same sense of purpose and conviction. They were proud of their performance.

When the last speaker had finished, Supervisor Antonovich gave the floor to Supervisor Burke. "I believe that we can continue to look at this," she began hastily, "and come up with some approach that can reposition the box and also address some of the issues that are bothering some people." Then she dealt the blow: "I can count. I know that today is not the appropriate time to call for a vote on this item."

But what had she meant by "I can count?" Had the votes been predetermined? Had there been no chance that supervisors Knabe or Antonovich would be persuaded? And what about Yaroslavsky? After two hours of public testimony, none of the supervisors except for Burke had said a word. How was anyone supposed to know what they thought? As the reality of the stalemate settled in, Burke elaborated on some of the questions that were still unresolved from the Board's perspective. What about people who had been convicted as juveniles? What about companies that contracted with the county? What about departments like public safety where it was legally necessary to exclude people with certain convictions? She finished with some comments she hoped would inspire: "In California, we always are at the front, not the back, of any kind of reform. Out of our 80,000 employees, I think we have room for people who have rehabilitated." Then, assuring organizers that the resolution would be back on the agenda for discussion in sixty days, she said, "I thank everyone who has appeared, but unfortunately, we don't have a full Board today."

Two more months were spent working diligently to strengthen the resolution's position. Organizers returned to the Board on January 30, 2007, feeling confident that the support of both Supervisors Molina and Yaroslavsky had been secured. But moments before the item was up for discussion, Burke's staff rushed over to inform them that there were again not enough votes to Ban the Box. This meant either Supervisor Molina or Supervisor Yaroslavsky had reneged their support, and the other would not want to be counted as a yes vote on a resolution that was not going to pass. The best thing to do, it was determined, was to take the resolution off the agenda, in order to avoid a record of it voted down. The organizers filed out of the chambers, disheartened, but determined not to let the loss take the momentum from the national movement, which was turning attention to other municipalities in California and beyond.

### **Postscript**

In 2010, Governor Arnold Schwarzenegger enacted a policy removing questions about convictions from state job applications and in 2013, Governor Jerry Brown signed a statewide law requiring all government employers to ban the box on job applications and delay background checks until an applicant was determined to have met the minimum qualifications for the position. In 2017, Brown authorized the California Fair Chance Act, which requires public and private-sector employers with five or more employees to delay questions about convictions and background checks until a conditional offer of employment has been made. This Act has been described as the "strongest such state law applicable to private-sector employment" (Avery & Lu 2021). And yet many California employers continue to exclude people with criminal convictions and violations of the law are common (Oselin et al. 2023).

As of this writing, organizers in California and beyond are drafting more robust Fair Chance employment policies and a Fair Chance ordinance for Los Angeles County is finally underway. However, a true solution to criminal record discrimination will not only be procedural, administrative, or regulatory. As twenty years of struggle to Ban the Box have made plain, substantive change will also require addressing the underlying material and ideological drivers of discrimination. This will include vigorous contestation of the idea that criminal records are relevant to employment, or even legitimate markers within a fundamentally unjust criminal legal system.

NOTES

- 1. Despite their gross overrepresentation in the criminal legal system, American Indian peoples are not protected under the EEOC’s criminal record guidance.
- 2. For more detail, visit <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.
- 3. The phrasing, a “mark of a criminal record,” was first coined by sociologist Devah Pager (2007) in her groundbreaking work called *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*.

REFERENCES

Avery, Beth, and Han Lu  
 2021 “Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies.” National Employment Law Project, October. At <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

Holzer, Harry J., Steven Raphael, and Michael A. Stoll  
 2003 “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles.” Washington, DC: Urban Institute. At <https://www.urban.org/research/publication/employer-demand-ex-offenders>.

Oselin, S., J. Ross, Q. Wang, and Wei Kang  
 2023 “The CA Fair Chance Act: Summary Findings on Compliance & Efficacy in the Inland Empire.” Working Paper, UC Riverside Presley Center of Crime & Justice Studies.

Pager, Devah  
 2007 *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago: University of Chicago Press.