

The Next Best Thing to Zihuatanejo¹: A Primer for Defense Counsel to Help Clients Find the Best Place to Live After a Conviction

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“You know what the Mexicans say about the Pacific? . . . They say it has no memory. That’s where I want to live the rest of my life. A warm place with no memory.”²

I. Introduction

You are serving as a Trial Defense Service (TDS) attorney and a month before the court-martial, your client asks you the following question: “Ma’am, if I get convicted, where should I live that will give me the best chance to put my life back together?” Just as Andy Dufresne yearned for Zihuatanejo in *The Shawshank Redemption*,³ your client seeks a place where he can get a fresh start at life. But you have no idea how to answer him, even though his question is applicable to everyone facing general⁴ court-martial for an

offense that is not “military unique.”⁵ Questions fill your head. What factors matter for offenders reentering society? What laws impact those factors the most? And does the analysis change if your client is convicted of an offense requiring sex offender registration?

Not wanting to give incorrect advice, you end up saying something nonresponsive about how the laws of each state differ and how his personal circumstances will ultimately dictate the best location. While these caveats are important when providing any advice to a client about laws that may rapidly change,⁶ your advice should consist of more than a mere caveat. As one judge advocate noted, “[M]ilitary clients deserve the best advice from their trial defense counsel, not just the bare minimum standard required by the [Court of Appeals for the Armed Forces].”⁷

¹ THE SHAWSHANK REDEMPTION, *infra* note 2 and accompanying text.

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² THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994) (discussing Zihuatanejo, a city in Mexico on the Pacific Ocean where protagonist Andy Dufresne wants to live, if he ever gets out of prison, that symbolizes a fresh start where no one knows of the horrible crime he was convicted of).

³ *Id.*

⁴ The Federal Government does not consider a special court-martial conviction a felony. See 18 U.S.C.S. § 3559(a)(6)–(9) (LexisNexis 2015) (defining a misdemeanor as an offense for which “the maximum term of imprisonment authorized is . . . one year or less . . . but more than five days”); see also 18 U.S.C.S. § 922(g) (LexisNexis 2015) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); 27 C.F.R. § 478.11 (2014) (clarifying that 18 U.S.C.S. § 922(g) only applies to general court-martial convictions). Additionally, while more study is needed, it is likely that states do not consider special court-martial convictions as felonies. See Christopher R. Pieper, *Military Discipline and Criminal Justice: Prior Military Convictions as Predicate Felonies Under Missouri’s Recidivism Statute*, 70 MO. L. REV. 219, 241

(2005) (discussing how the Missouri Supreme Court’s decision in *State v. Grubb*, 120 S.W.3d 737 (Mo. 2003), implied that special court-martial convictions are not considered felonies under Missouri’s “recidivism statute”); Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT’G. REP. 220 (2003) (concluding that special court-martial convictions “should be treated as the equivalent of a misdemeanor, not a felony, for purposes of federal and state sentencing”). Moreover, one state—New Mexico—does not consider any type of court-martial conviction as a felony for purposes of its “habitual offenders” statute. N.M. STAT. ANN. § 31-18-17 (LexisNexis 2015). Thus, while the information in this article is still useful for servicemembers convicted at special court-martial due to employers’ use of computerized background checks, they will likely not be considered felons regardless of where they live. As a final note, sex offender residency restrictions will still be applicable to clients convicted of qualifying offenses at special court-martial because all states require registration for individuals convicted of qualifying offenses at any courts-martial. Major Andrew D. Flor, *Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer*, ARMY LAW., Aug. 2009, at 1, 4.

⁵ See Major Michael J. Hargis, *Three Strikes and You Are Out – The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 7–11 (providing a detailed discussion of the court-martial conviction reporting process and noting that “military unique” offenses are not reported to the Federal Bureau of Investigation for entry into the national database) (citing U.S. DEP’T OF ARMY REG. 190-47, ARMY CORRECTIONS SYSTEM para. 10-2(b) (17 June 1994)). While the current version of U.S. DEP’T OF ARMY REG. 190-47, ARMY CORRECTIONS SYSTEM (15 June 2006) still contains this rule, more study is needed to determine if modern, electronic background checks will reveal “military unique” offenses nonetheless. This is relevant for the reasons discussed *infra* Section IV.

⁶ See U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-5-23 (10 Sept. 2014) (noting that “[sex offender registration] requirements may differ between jurisdictions” and that “specific requirements are not necessarily predictable”).

⁷ Flor, *supra* note 4, at 14.

This article seeks to educate defense counsel on what they need to discuss with their clients in order to determine where it would be most advantageous for them to live after a conviction. It begins by informing defense counsel of the challenges their clients face following a conviction and argues why it is important to discuss a reentry plan with them at the earliest stages of representation. Section III explains why a client's family relationships drive the initial discussion about where he should live following confinement. Section IV covers the crucial role employment plays in the reentry process and explains why "ban-the-box" ⁸ laws boost your client's chances of securing meaningful employment following a conviction. It concludes by comparing and contrasting the laws of the thirteen states that currently have ban-the-box legislation, as well as the laws of three other states that offer employment protections for offenders. Part V discusses the importance of housing for offenders during the reentry process and how sex offender residency restrictions make it difficult for offenders to find adequate housing. The section will then examine the sex offender residency restrictions in states with ban-the-box or other employment protections for offenders and highlight several states your client should be aware of when deciding where to live. The article concludes by enumerating which states have the most reasonable sets of laws to enable successful reentry. Finally, it reminds TDS attorneys about their important role in the reentry process.

II. Why It's Worthwhile to Counsel Clients About Where to Live

Although a client convicted at a general court-martial will likely reenter society long after his attorney-client relationship with his TDS counsel has terminated, ⁹ the pretrial conversation regarding where he will live after confinement can impact his life as much as anything the attorney does in the courtroom. Research indicates that during the reentry process, offenders "face serious obstacles, especially in the realms of education, work, housing, and substance abuse."¹⁰ Many of these difficulties arise from the

⁸ *Ban the Box: A Fair Chance for a Stronger Economy*, NAT'L EMP'T LAW PROJECT, <http://www.nelp.org/page/content/banthebox/> (last visited November 15, 2014) (noting that the term "[ban-the-box] refers to the policy of removing the check-box that asks about criminal history from job applications").

⁹ Policy Memorandum 2014-02, United States Army Trial Defense Service, subject: Detailing of Defense Counsel and Formation of Attorney-Client Relationships Within the Trial Defense Service (TDS) (10 Dec. 2014) (listing "events [that] terminate an attorney-client relationship with a court-martial client," all of which are likely to take place within six months of the conclusion of trial).

¹⁰ Matthew Makarios, Benjamin Steiner, & Lawrence F. Travis III, *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 CRIMINAL JUSTICE AND BEHAVIOR 1377, 1378 (2010) (discussing Joan Petersilia's research, among others, that supports this proposition); Cynthia L. Conley & Susan Sawning, *Designing Programming and Interventions for Women in the Criminal Justice System*, 38 AM. J. CRIM. JUST. 27, 35 (2013) (finding that those on probation or parole identified "barriers to employment[,] the need for safe, affordable

"collateral consequence[s]" associated with a felony conviction, which "amplify punishment beyond the sanctions imposed by the criminal justice system."¹¹ And unlike the "place with no memory" of which Andy Dufresne spoke,¹² society never forgets a felony conviction. Instead, it places a "scarlet letter"¹³ on offenders that hinders virtually every important aspect of their lives, to include employment, housing, and even contact with family members.¹⁴ Overcoming the label of "felon" has become even more difficult with the "increased use" of computerized background checks by employers¹⁵ and landlords.¹⁶ Helping clients select a location that can mitigate this label will improve the chances that they will return "to [the] useful and constructive place in society" envisioned by the military justice system.¹⁷

A successful reentry plan not only benefits offenders, but also benefits society. Currently, approximately two-thirds of offenders in the United States¹⁸ are "arrested within 3 years of release, and 76.6% [are] arrested within 5 years of release."¹⁹ These subsequent crimes impact society from

housing[,] and the pervasive influence of substance abuse" as key areas that impacted their ability to participate in reentry programs).

¹¹ Megan C. Kurlycheck, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY AND PUBLIC POLICY 483, 484 (2006). See also *U.S. v. Talkington*, 73 M.J. 212, 218 (C.A.A.F. 2014) (Baker C.J., concurring) (noting that sex offender registration "may be the most significantly stigmatizing and longest lasting effect arising from [a] conviction").

¹² THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

¹³ Daniel S. Murphy, Brian Fuleihan, Stephen C. Richards & Richard S. Jones, *The Electronic "Scarlet Letter": Criminal Backgrounding and a Perpetual Spoiled Identity*, 50 JOURNAL OF OFFENDER REHABILITATION 101, 102 (2013).

¹⁴ See *National Inventory of the Collateral Consequences of Conviction, Choose a Jurisdiction*, AMERICAN BAR ASSOCIATION, <http://www.aba.collateralconsequences.org/map/> (click on any state for a list of collateral consequences) (last visited May 13, 2015).

¹⁵ Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *The Effect of an Applicant's Criminal History on Employment Hiring Decisions and Screening Practices: Evidence from Los Angeles, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 117, 131 (Shawn Bushway, Michael A. Stoll & David F. Weiman eds., 2007).

¹⁶ See Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 153-56 (2003) (noting that "[m]ore and more frequently," landlords use background checks when determining whether to rent to a particular applicant and often "find local or state legislative support for denying an individual housing based entirely on a past offense").

¹⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (2012).

¹⁸ While no data exists on recidivism rates for military offenders specifically, there are reasons to believe their rates are lower than the civilian population. See *infra* Section IV.

¹⁹ MATTHEW R. DUROSE, ALEXIA D. COOPER, PH.D., & HOWARD N. SNYDER, PH.D., U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS

both a “public safety” and financial standpoint.²⁰ One study showed that “[in] 2001, prisoners released in the three preceding years accounted for approximately 30 percent of the arrests for violent crime, 18 percent of the arrests for property crime, and 20 percent of the arrests for drug offenses.”²¹ Moreover, in 2013 the average nationwide cost of keeping one person in prison for a year was over \$31,000, while the cost in the most expensive state averaged \$60,000 a year.²² Thus, when an attorney spends time with her client developing a plan for reentry, the potential return on investment adds up into the tens of thousands of dollars in both taxpayer costs and psychological costs to the victims of those new crimes.²³

In developing a plan for her client’s successful reentry, there are three basic factors an attorney should discuss—“family ties,”²⁴ “ban-the-box”²⁵ employment laws, and sex offender residency restrictions.²⁶ Other factors a client may want to consider when deciding where he should live after his release include: the availability of mental health treatment,²⁷ the availability of drug and alcohol treatment,²⁸

RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, N.C.J. 244205 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

²⁰ JEREMY TRAVIS, AMY L. SOLOMON, & MICHELLE WAUL, WASHINGTON DC: URBAN INSTITUTE JUSTICE POLICY CENTER, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY, N.C.J. 190429 1 (2001), available at http://www.urban.org/UploadedPDF/190429_1.pdf.

²¹ JEREMY TRAVIS, BUT THEY ALL COME BACK 98 (2005).

²² Marc Santora, *City’s Annual Cost Per Inmate is \$168,000, Study Finds*, N.Y. TIMES, Aug. 24, 2013, at A16.

²³ See Angela Browne & David Finkelhor, *Initial and Long-Term Effects: A Review of the Research*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE 143, 145–46, 152, 162 (David Finkelhor ed. 1986) (synthesizing the results from twenty-eight studies and noting that a significant percentage of sexual abuse victims had “reactions of fear, anxiety, depression, anger and hostility, and inappropriate sexual behavior” in the short-term, and “depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse” in the long-term); see also Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834, 871 (2007) (discussing Browne and Finkelhor’s article).

²⁴ Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism* 28 JUSTICE QUARTERLY 382, 384 (2011).

²⁵ NAT’L EMP’T LAW PROJECT, *supra* note 8.

²⁶ The term “residency restrictions” refers to laws that prevent registered sex offenders from living within a certain distance of a school, park, or other area where children are likely to be present. See *infra* Section V.

²⁷ See Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case, & Steven Samuels, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764 (2009) (finding that an average of 14.5% of male inmates and 31% of female inmates had a “serious mental illness”).

²⁸ See CHRISTOPHER MUMOLA & JENNIFER C. KARBERG, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF

the presence of community support groups,²⁹ state procedures impacting ex-offenders’ parental rights,³⁰ whether a state has “opt[ed] out” of the ban on the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) for drug-offenders,³¹ and whether a state provides ex-offenders with voting rights.³² Information on whether many of these factors exist or their quality at a given location is problematic to obtain³³ and generally falls outside the expertise of a trial defense attorney. Conversely, the three factors addressed in this primer are easily applied, as the laws are statutory in nature and a client is likely to have a good idea of his family situation. Additionally, these factors cover a client’s most basic, human needs of shelter and a means of financial support upon his release from confinement.

III. Family Relationships

As a starting point for the conversation with a client on where he will live following a conviction, a trial defense attorney should ask where the client has positive family relationships. Family relationships have been shown to

JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, NCJ 213530 6 (2006), available at <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf> (finding in 2004, “53% of State and 45% of Federal prisoners met criteria for drug dependence or abuse”).

²⁹ See Kathryn J. Fox, *Second Chances: A Comparison of Civic Engagement in Offender Reentry Programs*, 35 CRIM. JUST. REV. 335, 340–48 (2010) (discussing several models of community-based reentry programs in Vermont, each with varying degrees of effectiveness depending upon factors such as how formalized the program was or the type of support offenders received).

³⁰ See, e.g., 42 U.S.C.S. § 675(5) (LexisNexis 2015) (requiring states to have “a procedure for assuring that . . . in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child’s parents. . . unless” another family member is caring for the child, the state determines termination “would not be in the best interests of the child,” or the state has failed to provide “services” to the family on time).

³¹ 21 U.S.C.S. § 862a (LexisNexis 2015) states that anyone convicted of felony “possession, use, or distribution of a controlled substance” is ineligible for the “supplemental nutrition assistance program” (SNAP) and “temporary assistance for needy families” (TANF) but allows states to “opt out” and “exempt any or all individuals domiciled in the State” from the law.

³² JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014), available at http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

³³ See TRAVIS, *supra* note 21, at 72 (“Tracking the consequences of statutes that disqualify criminals from education loans, public housing, welfare benefits, or parental rights would be extraordinarily difficult. Agencies administering these sanctions are far flung, have little or no connection with the criminal justice system, may or may not keep records of their decisions, and have no incentive to report on these low-priority exercises of discretion.”).

provide offenders with “psychological, material, and financial support.”³⁴ This support also includes providing offenders with a place to live and helping them find meaningful employment.³⁵ Family members are able to do this because they are better able to look past the offender’s conviction and connect the offender with potential employers³⁶ by acting as an “intermediar[y] [who] can help to reduce employers’ concerns about hiring [offenders] by vouching for the individual in question.”³⁷ Family relationships are also a fruitful area of discussion because clients should make contact with their relatives prior to trial, which will potentially provide TDS attorneys with material for sentencing and clemency matters.³⁸

It is important that an attorney conducts discussions about where a client has family relationships in the shadow of the other information in this article. Although family members can increase an offender’s odds of obtaining employment, the employment protection laws of some states discussed below will almost certainly make the job application process easier.³⁹ Additionally, for clients required to register as sex offenders, residency restrictions may make it impossible for an offender to live with or near his family, negating some of the benefits family members can provide.⁴⁰ The following sections give an attorney the tools needed to incorporate these factors when speaking with a client.

IV. Employment and Ban-the-Box Laws

A. The Employment Challenges Offenders Face

“Employment is widely considered a centerpiece of the reentry process . . .”⁴¹ “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.”⁴² Numerous studies support this truism and show

³⁴ Berg & Huebner, *supra* note 24, at 384.

³⁵ *Id.* at 384, 402.

³⁶ Berg & Huebner, *supra* note 24, at 384, 386.

³⁷ See Devah Pager, *Evidence-Based Policy for Successful Prisoner Reentry*, 5 CRIMINOLOGY & PUBLIC POLICY 505, 510 (2006) (discussing how “intermediaries” work, in general).

³⁸ U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGES’ BENCHMARK para. 2-5-23 (10 Sept. 2014), recognizes “rehabilitative potential” as a relevant sentencing factor. The presence of involved family members with a plan for the servicemember upon his release is certainly relevant to whether the servicemember will be able to rehabilitate and the finder of fact may give a lower period of confinement in lieu of this.

³⁹ See *infra* Section IV.

⁴⁰ See *infra* Section V.

⁴¹ Pager, *supra* note 37, at 505.

⁴² Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUBLIC POLICY 755, 755 (2007).

that a lack of “future employment opportunities and earnings potential . . . are among the strongest predictors of recidivism.”⁴³

However, while society generally supports the idea of rehabilitating offenders,⁴⁴ employers are considerably less willing to hire them than applicants with no convictions.⁴⁵ Employers often do not hire offenders out of a desire to avoid negligent hiring lawsuits.⁴⁶ Additionally, there are laws forbidding offenders from working in certain jobs.⁴⁷ In many instances employer reluctance to hire offenders is compounded by racial biases, particularly against African Americans.⁴⁸ Moreover, the majority of offender applicants will undergo computer background checks that will reveal their criminal history.⁴⁹ Consequently, an offender is often ruled out as a viable job candidate at the “initial stage” of the application process.⁵⁰

B. Ban-the-Box Laws and Other Employment Protections for Offenders

Several states have enacted “ban-the-box” legislation to keep offenders from being ruled out at the initial stages of the job application process.⁵¹ Ban-the-box laws protect

⁴³ Devah Pager, *The Mark of a Criminal Record*, 108 AMERICAN JOURNAL OF SOCIOLOGY 937, 939 (2003).

⁴⁴ Brett Garland, Eric Wodahl & Robert Schuhmann, *Value Conflict and Public Opinion Toward Prisoner Reentry Initiatives*, 24 CRIM. JUST. POLICY REV. 27, 41 (2013).

⁴⁵ Henry & Jacobs, *supra* note 42, at 756.

⁴⁶ Timothy Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 184 (2007). “Under [the] tort [of negligent hiring], courts can hold employers liable for the harm their employees inflict on third parties if the employer knew or should have known of an employee’s potential risk, or if ‘the risk would have been discovered by a reasonable investigation.’” *Id.*

⁴⁷ See Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUBLIC POLICY 371, 372–73 (2008) (noting that offenders are “legally” prohibited from doing some jobs, “includ[ing] jobs that require contact with children, certain health-services occupations, and employment with firms that provide security services”).

⁴⁸ Pager, *supra* note 43, at 958 (finding that employers were more willing to call back white job applicants with a criminal record than African American applicants *without* a criminal record; African American applicants with a criminal record fared even worse).

⁴⁹ See Stoll & Bushway, *supra* note 47, at 378 (finding that “[a]bout half of the employers in [the study] routinely check for criminal backgrounds, and another 20% check sometimes”).

⁵⁰ Pager, *supra* note 43, at 954–56 (2003) (studying the way 350 employers handled job applicants with a criminal record and finding that “[a] criminal record . . . reduces the likelihood of a callback by 50%” and “employers’ levels of responsiveness change[d] dramatically once they had glanced down at the criminal record question”).

⁵¹ *Ban the Box*, ALL OF US OR NONE, <http://www.allofusornone.org/newsite/campaigns/ban-the-box> (last visited Jan. 7, 2015). Scholars credit the

offenders by preventing employers from asking whether an applicant has been convicted of a crime or performing a criminal background check at the initial stage of the application process.⁵² Under many of these laws, an employer can only perform a background check after an applicant comes in for an interview or receives a conditional offer of employment.⁵³ The New Mexico Legislature succinctly summarizes the rationale of these laws: “[T]he public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.”⁵⁴ In keeping with motivations to protect the public, ban-the-box laws do not apply to jobs that require background checks for public safety reasons, such as prison guards,⁵⁵ or those involving “vulnerable” members of society, such as teachers.⁵⁶

These laws have gained increasing political traction in recent years⁵⁷ and evidence suggests they are effective at helping offenders gain employment.⁵⁸ To date, fifteen states

group, All of Us or None, with coining the term “ban-the-box.” Henry & Jacobs, *supra* note 42, at 757.

⁵² See, e.g., DEL. CODE TIT. 19, § 711(g)(1) (2015) (“It shall be an unlawful employment practice for any public employer to inquire into or consider the criminal record, criminal history, credit history, or credit score of an applicant for employment during the initial application process, up to and including the first interview.”)

⁵³ See, e.g., 820 ILL. COMP. STAT. ANN. 75/15(a) (LexisNexis 2015) (“An employer or employment agency may not inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency or, if there is not an interview, until after a conditional offer of employment is made to the applicant by the employer or employment agency.”)

⁵⁴ N.M. STAT. ANN. § 28-2-2 (LexisNexis 2015).

⁵⁵ See, e.g., MINN. STAT. § 364.021 (2015) (stating that the ban-the-box provision “does not apply to the Department of Corrections or to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee’s criminal history during the hiring process”).

⁵⁶ See, e.g., COLO. REV. STAT. § 24-5-101(1)(b) (2015) (stating that the ban-the-box provision “shall not apply to . . . [t]he employment of personnel in positions involving direct contact with vulnerable persons . . .”).

⁵⁷ See Yvonne Wenger, ‘Ban the Box’ Bill Advances Over Opposition From Businesses, BALTIMORE SUN (April 7, 2014) http://articles.baltimoresun.com/2014-04-07/news/bs-md-ci-ban-the-box-update-20140407_1_bill-advances-mosby-city-leaders (discussing the ability of the Baltimore City Council to bring a ban-the-box bill forward despite concerns from some leaders).

⁵⁸ See NAT’L LEAGUE OF CITIES INST. FOR YOUTH, EDUC. AND FAMILIES & NAT’L EMP’T LAW PROJECT, CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS 5 (2009), available at <http://www.nelp.org/page/-/SCLP/2010/CitiesPaveTheWay.pdf?nocdn=1> (hereinafter NAT’L LEAGUE OF CITIES) (discussing how Minneapolis’s ban-the-box policy has led to the hiring of “nearly 60 percent of the applicants for whom the background check raised a potential concern,” whereas before the ban-the-box policy only 5.7 percent of such applicants were eventually hired).

have some form of statewide ban-the-box legislation—California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Rhode Island, and Virginia.⁵⁹ Additionally, three states—New York, Pennsylvania, and Wisconsin—have other laws protecting offenders from employment discrimination.⁶⁰

The key difference between true ban-the-box laws and the other laws is that while the other laws forbid an employer from using a criminal conviction to rule out an applicant for a job unless there is a nexus between the type of conviction and the job,⁶¹ employers still get to immediately see that the applicant has a criminal conviction.⁶² This difference matters because employers who see a conviction on the job application frequently rule out a candidate before contacting references or otherwise inquiring further.⁶³ Nonetheless, like ban-the-box laws, there is evidence these laws help offenders obtain employment.⁶⁴

Evidence suggests that ban-the-box laws and other employment protections may be more effective at helping military offenders obtain employment than their civilian counterparts. One reason for this is that military offenders are likely to have job skills from their military training.⁶⁵

⁵⁹ See *infra* Appendix.

⁶⁰ See *infra* Appendix.

⁶¹ See, e.g., N.Y. CORRECT. LAW § 752 (Consol. 2015) (“No application for any license or employment . . . shall be denied or acted upon adversely . . . unless . . . there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual . . .”).

⁶² See, e.g., 18 PA. CONS. STAT. § 9124 (2015) (“Except as provided by this chapter, a board, commission or department of the Commonwealth, when determining eligibility for licensing, certification, registration or permission to engage in a trade, profession or occupation, may consider convictions of the applicant of crimes but the convictions shall not preclude the issuance of a license, certificate, registration or permit.”) (emphasis added).

⁶³ Pager, *supra* note 43, at 954–55 (studying the way 350 employers handled job applicants with a criminal record and finding that almost all employers eliminated from “consideration” individuals who self-reported convictions on their job application before the employers contacted references or made efforts “to solicit nuanced information about applicants”).

⁶⁴ See *Matter of Acosta v. N.Y.C. Dep’t of Educ.*, 16 N.Y.3d 309, 320 (N.Y. 2011) (holding that the Department of Education violated New York’s employment protection statute when it conducted a “pro forma denial” of an application for employment based on a thirteen year old conviction for first degree robbery without properly considering the factors outlined in the law as well as matters submitted by the applicant).

⁶⁵ See, e.g., *Ordnance Mechanical Maintenance School: Helping the Army Stay at the Ready*, U.S. ARMY, <http://www.goarmy.com/soldier-life/becoming-a-soldier/advanced-individual-training/ordnance-mechanical.html> (last visited Feb. 27, 2015) (“Ordnance Soldiers have the opportunity to obtain certification with national technical accrediting agencies, such as the American Welding Society (AWS), the National Institute of Metalworking Skills (NIMS), and the Automotive Society of Excellence (ASE).”).

Also, the minimum educational requirements for military service make military offenders generally more educated than civilian offenders.⁶⁶ These skills and education may make it more likely that a military offender will be regarded as qualified for a position, which in many ban-the-box states is the threshold determination an employer must make prior to conducting a background check.⁶⁷ This implies it is more likely military offenders will get an opportunity to explain themselves before the employer has a chance to rule them out. Further, studies have shown that job skills and education make it more likely employers will look past a conviction.⁶⁸ Additionally, employers will logically be more likely to look past a conviction if it is someone's first offense; due to the background checks required for admission into the armed forces, military offenders are likely first time offenders.⁶⁹ Individual characteristics aside, some employers may be more willing to hire a military offender simply because he served in the armed forces.⁷⁰ Thus, while nothing is guaranteed, military offenders may benefit considerably from ban-the-box laws.

While each state's ban-the-box law limits an employer's knowledge of a criminal conviction at the early stages of the job application process, not all ban-the-box laws are created equal. In some states the law applies to only government employers. Some laws prevent employers from performing background checks until a certain point in the application process, while others merely prohibit employers from asking about conviction records.⁷¹ Additionally, not all ban-the-

box laws require a nexus between the criminal offense and the job in order to deny someone employment.⁷² Other differences a client should consider when determining which state may be most beneficial to him are whether the law gives protections for state licensing, contains a "sunset" provision preventing the use of convictions past a certain timeframe, or requires the employer to provide notice to the applicant if it uses a conviction to deny him employment.⁷³

Based on these criteria, one state stands out among the rest as being particularly favorable for offenders—Hawaii. Hawaii is one of only six states whose law applies to both government and private employers.⁷⁴ Hawaii also prevents background checks until "after . . . a conditional offer of employment" and requires a nexus between the criminal offense and the job in order to deny someone employment.⁷⁵ Additionally, Hawaii has a "sunset" provision, forbidding the use of convictions more than ten years old, "excluding periods of incarceration."⁷⁶ The other states with ban-the-box laws that apply to private employers are Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island.⁷⁷ Ban-the-box laws that apply to private employers may provide offenders with more options than laws that only apply to government employers because roughly eighty-five percent of all jobs in the United States are in the private sector.⁷⁸

Among the states whose laws only apply to government jobs, two merit special mention—New Mexico and Colorado. New Mexico's law stands out because it offers numerous additional protections for offenders.⁷⁹ Like Hawaii, New Mexico's law prevents background checks at the initial stages of the application process.⁸⁰ But on top of that, New Mexico requires either a nexus between the conviction and the job or that the employer makes a determination "that the person so convicted has not been sufficiently rehabilitated to warrant the public trust" before

⁶⁶ See U.S. DEP'T OF ARMY REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 2-7 (12 Mar. 2013) (requiring applicants to "meet trainability and education requirements"); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS, NCJ 195670 1 (Jan. 2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf> (finding that approximately forty-one percent of state prison inmates do not have a high school diploma or GED).

⁶⁷ See, e.g., 820 ILL. COMP. STAT. ANN. 75/15(a) (LexisNexis 2015).

⁶⁸ See Cheryl G. Swanson, Courtney W. Schnippert, and Amanda L. Tryling, *Reentry and Employment: Employers' Willingness to Hire Formerly Convicted Felons in Northwest Florida*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE 203, 213 (Matthew S. Crow & John Ortiz Smykla eds., 2014) (finding that almost four in ten employers would be "more willing to hire a formerly convicted felon who has adequate formal education or training").

⁶⁹ See U.S. DEP'T OF ARMY REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 2-11 (12 Mar. 2013) (requiring police and court records checks for all Army applicants).

⁷⁰ See Swanson et al., *supra* note 68 (finding that 15.9% of employers would be "more willing to hire a [felon] who is a veteran").

⁷¹ When analyzing this, the author looked at whether the statute specifically mentioned the job application and limited its applicability to the job application. This is in contrast to broad words such as "consider" or "inquire," which imply an employer cannot run a criminal background check because, logically, an employer would be incapable of ignoring the information once he or she obtained it. In support of this logic, see Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 HAWAII L. REV. 709, 721 (2000) (analyzing Hawaii's ban-the-box law, which uses the language

"inquiry into and consideration of conviction records," and concluding that an employer would "violate[] the law by performing a criminal background check before making a job offer").

⁷² See *infra* Appendix.

⁷³ See *infra* Appendix.

⁷⁴ See *infra* Appendix.

⁷⁵ HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2015).

⁷⁶ *Id.*

⁷⁷ See *infra* Appendix.

⁷⁸ EMP'T PROJECTIONS PROGRAM, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Employment by Major Industry Sector* (last modified Dec. 19, 2013), http://www.bls.gov/emp/ep_table_201.htm.

⁷⁹ See *infra* Appendix.

⁸⁰ N.M. STAT. ANN. §§ 28-2-3, 28-2-4 (LexisNexis 2015) (stating that the "[employer] shall only take into consideration a conviction after the applicant has been selected as a finalist for the position").

denying them employment.⁸¹ Further, New Mexico mandates a “presumption of sufficient rehabilitation” once an offender has gone three years without a conviction after being released from confinement.⁸² It also requires a government agency to make written documentation of their reason for not hiring someone if that decision is based in any way on the existence of a conviction.⁸³ Additionally, New Mexico is one of only three states whose ban-the-box law also covers state licensure.⁸⁴

Similar to New Mexico, Colorado’s ban-the-box law contains additional protections not found in most states. Colorado prohibits background checks until “an applicant is a finalist or [the employer] makes a conditional offer of employment.”⁸⁵ It also covers applications for state licensure.⁸⁶ Additionally, Colorado requires an employer to analyze the totality of the circumstances surrounding the conviction, to include “[a]ny information produced by the applicant . . . regarding his or her rehabilitation and good conduct,” in determining whether the conviction disqualifies them from employment.⁸⁷

The laws of the other seven ban-the-box states offer progressively fewer protections than those mentioned above, with California’s and Nebraska’s laws offering the least protection. These laws only apply to government employers and only prevent them from asking about convictions on the application or directly to the applicant “until [the employer determines] the applicant meets the minimum employment qualifications.”⁸⁸ The Appendix outlines all state-level ban-the-box laws.

In addition to state-level laws, some individual cities may offer favorable employment protections for offenders. For example, although Pennsylvania is not a ban-the-box state, the city of Philadelphia has a ban-the-box law that prohibits city or private employers from “mak[ing] any inquiry regarding or . . . requir[ing] any person to disclose or reveal any criminal convictions during the application process” until after the first interview.⁸⁹ Cities may also have laws or policies to help offenders that are not ban-the-box laws, but rather provide incentives for employers to hire

individuals with convictions.⁹⁰ Although a review of employment protections in every major city is beyond the scope of this article, the National Employment Law Project keeps updated information online about these laws.⁹¹

Beyond state and city employment laws, federal law contains additional legislation to help offenders.⁹² Two examples of this legislation are the Second Chance Act and Work Opportunity Tax Credit.⁹³ The Second Chance Act provides federal funds to states that develop measures to help offenders reintegrate into society.⁹⁴ The Work Opportunity Tax Credit also provides a financial incentive, in the form of a tax break, to businesses who hire offenders.⁹⁵ Additionally, the federal government has “bonding programs” that serve as a kind of insurance for employers, covering them financially for the actions of offenders they hire in the event of a negligent hiring lawsuit.⁹⁶ Further, the Equal Opportunity Employment Commission (EEOC) issued guidance stating that because the employer practice of excluding offenders from consideration for positions has a “disparate impact” on racial minorities, using a criminal conviction against someone violates Title VII of the 1964 Civil Rights Act unless the conviction is “job related and consistent with business necessity.”⁹⁷ Because these are all federal measures, a client can take advantage of them in any state.

C. Discussing Employment Protections with a Client

A TDS attorney can use the information from this section to counsel clients about how to take advantage of

⁸¹ *Id.* §28-2-4 (clarifying that protections do not apply to jobs involving children).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See infra* Appendix.

⁸⁵ COLO. REV. STAT. § 24-5-101 (2015).

⁸⁶ *See infra* Appendix.

⁸⁷ COLO. REV. STAT. § 24-5-101 (2015).

⁸⁸ CAL. LAB. CODE § 432.9(a) (Deering 2015); *accord* NEB. REV. STAT. ANN. § 48-202(1) (LexisNexis 2015).

⁸⁹ PHILA. CODE. § 9-3504 (2015).

⁹⁰ For example, the city of Indianapolis has “a bid incentive program” that “directs the city’s purchasing division to give preference to vendors who train or employ people with criminal records.” NAT’L LEAGUE OF CITIES, *supra* note 58, at 8.

⁹¹ NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2014), *available at* <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1>.

⁹² *See also* Swanson et al., *supra* note 68, at 207.

⁹³ *See also Id.*

⁹⁴ *Second Chance Act (SCA)*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=90 (last visited May 13, 2015) (click on “read more”).

⁹⁵ *Work Opportunity Tax Credit*, U.S. DEP’T OF LABOR (last updated Apr. 30, 2015), <http://www.doleta.gov/business/incentives/opptax/>.

⁹⁶ U.S. DEP’T OF LABOR, FEDERAL BONDING PROGRAM: UNIQUE JOB PLACEMENT TOOL 3 (n.d.), *available at* <http://www.doleta.gov/usworkforce/onestop/FBP.pdf>.

⁹⁷ EQUAL EMP’T OPPORTUNITY COMM’N, EEOC GUIDANCE NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, 1 (2012).

state, local, and federal employment laws to find the best place for them to live. First, a TDS attorney should educate clients on employment protection laws. Next, an attorney should determine if he has any family or friends in one of the eighteen states with employment protections for offenders.⁹⁸ If he has multiple options among those states, “ban-the-box states” are preferred, with Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Rhode Island, New Mexico, and Colorado offering the most robust protections.⁹⁹ Also, an attorney should check the National Employment Law website and see if the client has family in one of the cities offering some form of employment protection to offenders.¹⁰⁰ And even if the state or city where the client has family does not have employment protection laws for offenders, staying with family may still be the client’s best means to secure employment.

Additionally, the attorney should ask him about his job skills and determine if he is more likely to apply for government or private employment. For example, if he has driver training, he may be able to secure employment as part of a public transportation fleet and would benefit from a state with a ban-the-box law that only applies to government employers. Conversely, if he has training as a mechanic and will likely apply to auto body shops, it may be best to seek out one of the six states with laws that apply to private employers. As a final note, TDS attorneys should ask a client if his occupation will require licensing.¹⁰¹ If it does, he should consider the benefits of living in one of the three states that protects licensure.¹⁰²

V. Sex Offender Residency Restrictions

A. The Unique Housing Challenges Sex Offenders Face

Commentators note that finding housing is “one of the most daunting issues [offenders] face during the reentry process.”¹⁰³ “Parole officials say finding housing for parolees is by far their biggest challenge, even more difficult

and important than finding a job.”¹⁰⁴ And as with the lack of a job, offenders who lack housing are more likely to return to confinement.¹⁰⁵ Compounding this issue are federal laws that prohibit many offenders from living in public housing,¹⁰⁶ to include sex offenders.¹⁰⁷ Roughly ten percent of offenders end up homeless¹⁰⁸ and a far greater percentage of sex offenders suffer this indignity.¹⁰⁹

In addition to the regular challenges in finding housing, sex offenders face unique obstacles stemming from legislation that has become increasingly harsh since the mid-1990s.¹¹⁰ Although sex offender registration laws began as merely a requirement that law enforcement monitor where sex offenders live,¹¹¹ they have now “spiraled out of control” into what one commentator has dubbed “super-registration schemes.”¹¹² While federal law contemplates “tiers” of offenders who face different levels of restriction,¹¹³ state laws often equally restrict all sex offenders, regardless of the

¹⁰⁴ Joan Petersilia, *Hard Time, Ex-Offenders Returning Home After Prison*, 64 CORRECTIONS TODAY 66, 69 (2005).

¹⁰⁵ See Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUBLIC POLICY 139, 140 (2004) (discussing the various ways homeless individuals have “an increased risk for imprisonment”).

¹⁰⁶ See 42 U.S.C.S. § 13661(b)-(c) (LexisNexis 2015) (requiring landlords to deny public housing to drug users and allowing landlords to deny public housing to individuals who “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment . . . by other residents”).

¹⁰⁷ 42 U.S.C.S. § 13663(a) (LexisNexis 2015) (“Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.”).

¹⁰⁸ See Metraux & Culhane, *supra* note 105, at 150 (finding that of those released from New York State prisons who went to live in New York City, 11.4% stayed at a homeless shelter “within two years”); Curtin, *supra* note 103, at 112 (noting that “experts estimate that approximately 10% of returning offenders are ‘homeless’ . . .”).

¹⁰⁹ See John Simerman, *Sex Offender Agency Faults Megan’s Law Drawbacks*, CONTRA COSTA TIMES (February 16, 2010, 4:57 PM), http://www.contracostatimes.com/top-stories/ci_14412670 (noting that because of the 2,000 foot residency restriction in California, an estimated “84% of paroled sex offenders [in San Francisco] are homeless”).

¹¹⁰ Elizabeth Ehrhardt Mustaine, *Sex Offender Residency Restrictions, Successful Integration or Exclusion?*, 13 CRIMINOLOGY & PUBLIC POLICY 169, 169-70 (2014) (discussing the “explosion of federal legislation” dealing with sex offenders enacted between 1994 and 2006).

¹¹¹ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101(a)(1), 108 Stat. 1796, 2038 (1994); see also Mustaine, *supra* note 110, at 169-70.

¹¹² Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1073 (2012).

¹¹³ 42 U.S.C.S. §§ 16911, 16915-16 (LexisNexis 2015) (defining “Tier I,” “Tier II,” and “Tier III” sex offenders based on the severity of their crimes and basing the length of registration and frequency of in-person verifications with law enforcement on the tier level).

⁹⁸ See *infra* Appendix.

⁹⁹ See *infra* Appendix.

¹⁰⁰ NAT’L EMP’T LAW PROJECT, *supra* note 91.

¹⁰¹ See DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON, & JOHN K. ROSS, INSTITUTE FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING, Table 1 (May 2012), available at <http://licensetowork.ij.org/report/1> (listing “102 Lower-income [sic] Occupations” that require licensure, to include various labor contractors, cosmetologists, barbers, and equipment installers).

¹⁰² See *infra* Appendix (noting that Colorado, Connecticut, and New Mexico protect licensure).

¹⁰³ Elizabeth Curtin, *Home Sweet Home for Ex-Offenders*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 111, 111 (Christopher Mele & Teresa A. Miller eds., 2005).

actual risk a particular offender poses.¹¹⁴ Under a typical registration scheme, a sex offender must provide to law enforcement his name, address, name and address of any school he attends, name and address of his employer, license plate number, vehicle description, photograph, and criminal history, among other identifying information.¹¹⁵ Most of this litany of identifying information is available online for ordinary citizens, which can lead to “public shaming” and even violence against sex offenders.¹¹⁶

Despite the shame and risk of violence for sex offenders, the most devastating sanctions for sex offenders are the residency restrictions in many states, counties, and cities. Residency restrictions make it illegal for sex offenders to reside within a certain distance of “child congregation locations,” such as “schools, parks, [and] daycare centers.”¹¹⁷ In many cases, these laws apply to sex offenders even if their offenses did not involve a child.¹¹⁸ Enacted as a means to keep children safe,¹¹⁹ residency restrictions often have the practical effect of denying offenders the ability to live at the residence they had prior to their conviction, forcing offenders to move away from family members.¹²⁰ Quantifying the effect of these laws, one study of two New York counties using geospatial analysis showed that residency restrictions of 1000–2000 feet eliminated 73–89 percent of all available housing for sex offenders.¹²¹ Because of these laws, sex offenders are often only able to find housing in “socially downtrodden and disorganized neighborhoods.”¹²² Consequently, sex

¹¹⁴ See Carpenter & Beverlin, *supra* note 112, at 1078–80 (noting the “elimination of individualized assessment” for sex offenders).

¹¹⁵ See, e.g., CODE OF ALA. § 15-20A-7(a) (LexisNexis 2015), DEL. CODE ANN. tit. 11, § 4120 (2015), GA. CODE ANN. § 42-1-12 (2015) (LexisNexis), and HAW. REV. STAT. ANN. § 846E-2 (LexisNexis 2015) (requiring all of these items); 730 ILL. COMP. STAT. ANN. 150/3 (LexisNexis 2015) (requiring all of these items except for the vehicle description); MINN. STAT. § 243.166 (2015) (requiring all of these items except a criminal history); R.I. GEN. LAWS § 11-37.1-5 (2015) (requiring all of these items except for the license plate number and vehicle description).

¹¹⁶ Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 AM. J. CRIM. L. 263, 271–74 (2011); *but see* Colo. Rev. Stat. § 16-13-901 (2015) (declaring that because of the “high potential for vigilantism that often results from community notification[,] . . . notification should only occur in cases involving a high degree of risk to the community”).

¹¹⁷ Mustaine, *supra* note 110, at 170.

¹¹⁸ See, e.g., GA. CODE ANN. § 42-1-15(b) (2015) (LexisNexis) (“[No sex offender] shall reside within 1,000 feet of any child care facility, church, school, or area where minors congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008.”); *see also* Wagner, *supra* note 116, at 268.

¹¹⁹ Carpenter & Beverlin, *supra* note 112, at 1073.

¹²⁰ Wagner, *supra* note 116, at 268.

¹²¹ Jacqueline A. Berenson & Paul S. Appelbaum, *A Geospatial Analysis of the Impact of Sex Offender Residency Restrictions in Two New York Counties*, 35 LAW & HUMAN BEHAVIOR 235, 238, 241 (2011).

¹²² Mustaine, *supra* note 110, at 172.

offender residency restrictions have the ability to eclipse the potential advantages of a particular location in terms of family relationships and pro-employment legislation for offenders.

The impact of sex offender residency restrictions on otherwise favorable locations is particularly relevant for military practitioners. A staggering 46.6% of completed Army courts-martial in 2014 involved at least one rape, sexual assault, or forcible sodomy charge.¹²³ Although comparable data is not available for state prosecutions, statistics on the percentage of state prisoners serving sentences for sex crimes (12.2%)¹²⁴ and the percentage of registered sex offenders out of the total felon population (approximately 6%)¹²⁵ strongly indicate that the crime for which military offenders are tried is more likely to be a sex offense than their civilian counterparts. This disparity is unlikely to taper off given Congress’s interest in curbing sexual assaults in the military.¹²⁶

The dialogue with military clients about sex offender residency restrictions is further necessitated by the fact that these laws are unlikely to go away soon. Since their inception, academics have criticized sex offender residency restrictions as unconstitutional,¹²⁷ “ineffective,”¹²⁸

¹²³ E-mail from Malcom Squires, Clerk of Court, Army Court of Criminal Appeals, to author (Feb. 24, 2015, 15:07 EST) (on file with author). The percentage of completed courts-martial involving at least one rape, sexual assault, or forcible sodomy charge has risen over the last several years in the Army. *Id.* In 2012, 2013, and 2014, the ratios climbed from 28.5%, to 36.5%, and finally 46.6%, respectively. *Id.* During the same three year span, the ratio of rape, sexual assault, or sodomy convictions relative to the total number of convictions ballooned from 21.2%, to 26.2%, and eventually to 37.1% in 2014. *Id.* Further, this data actually understates the percentage of clients facing sex offender registration because it does not include other offenses requiring registration, such as indecent exposure or possession of child pornography. *Id.*

¹²⁴ E. ANN CARSON, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, NCJ 247282 15 (Sep. 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

¹²⁵ See TRAVIS, *supra* note 21, at 71 (estimating there were thirteen million felons in the United States in 2005); NAT’L CTR. FOR MISSING AND EXPLOITED CHILDREN, REGISTERED SEX OFFENDERS IN THE UNITED STATES AND ITS TERRITORIES PER 100,000 POPULATION 1 (Dec. 15, 2014), available at http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf (tracking 819,218 registered sex offenders in the United States at the end of 2014).

¹²⁶ RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 55 (2014) (“Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel . . . ‘to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.’”); *see also* Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, USA Today (Dec. 10, 2013, 2:23 PM), <http://www.usatoday.com/story/news/nation/2013/12/10/military-sexual-assault-congress/3953705/>.

¹²⁷ See Jacob Salsburg, *The Constitutionality of Iowa’s Sex Offender Residency Restriction*, 64 MIAMI L. REV. 1091, 1102–15 (2010) (discussing

politically driven,¹²⁹ “de facto banishment,”¹³⁰ having no scientific basis,¹³¹ potentially responsible for offenders committing more crimes,¹³² and unfairly aimed at a population with “universally lower [recidivism rates] than other criminal offenders.”¹³³ In spite of these criticisms, the public strongly approves of these measures¹³⁴ and they are unlikely to disappear without action from the judiciary.¹³⁵ Perhaps the only silver lining to these laws for offenders is that many states do not have statewide sex offender residency restrictions. While there are still hundreds, and likely over a thousand, counties and other local municipalities with these laws,¹³⁶ the absence of statewide

the many ways Iowa’s sex offender residency restrictions may violate an offender’s constitutional rights, to include procedural due process, substantive due process, the “right to travel,” “the right to live where you want,” the Ex Post Facto clause, and the right against self-incrimination).

¹²⁸ See Kelly M. Socia, *Residence Restrictions are Ineffective, Inefficient, and Inadequate: So Now What?*, 13 CRIMINOLOGY & PUBLIC POLICY 179, 179 (2014) (“[S]tudy after study has suggested that these policies are ineffective and may be resulting in collateral consequences for both registered sex offenders (RSOs) and community members.”).

¹²⁹ Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339 (2007) (noting that for politicians, “the political risk is too great not to allow their constituents’ passions to overrun their own common sense”).

¹³⁰ Ryan Hawkins, *Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331, 340 (2007).

¹³¹ See Love, *supra* note 23, at 868–70 (reviewing studies from four states which did not show any link between a sex offender living near a school and committing a new sex offense against children).

¹³² Michelle L. Meloy, Susan L. Miller, & Kristin M. Curtis, *Making Sense Out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, 33 AM. J. CRIM. JUST. 209, 212–13 (2008).

¹³³ Mark Kielsingard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 256–57 (2014) citing PATRICK A. LANGAN, ERICA L. SCHMITT, & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, NCJ 198281 1 (Nov. 2003), available at <http://bjs.gov/content/pub/pdf/rsorp94.pdf> (finding that “[r]eleased sex offenders with 1 prior arrest . . . had the lowest rearrest rate for a sex crime [at] about 3%” and only 3.3% “of released child molesters were rearrested for another sex crime against a child” within 3 years).

¹³⁴ CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUST., OFC. OF JUST. PROGRAMS, EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL 4 (2010), available at <http://www.csom.org/pubs/CSOMExploring%20Public%20Awareness.pdf>.

¹³⁵ See Socia, *supra* note 128, at 182 (noting that politicians are unlikely to eliminate these laws due to the risk of being “labeled as ‘soft on crime’” and discussing how courts have struck down some of these laws).

¹³⁶ See COUNCIL OF STATE GOV’TS, ZONED OUT: STATES CONSIDER RESIDENCY RESTRICTIONS FOR SEX OFFENDERS 2 (2008), available at <http://www.csg.org/knowledgecenter/docs/pubsafety/ZonedOut.pdf> (noting that “96 local jurisdictions in Florida established additional restriction zones by local ordinance”). Other sources estimate “hundreds” of residency restriction laws at the municipal level. Carrie F. Mulford, Ronald E. Wilson, & Angela Moore Parmley, *Geographic Aspects of Sex Offender Residency Restrictions*, 20 CRIM. JUST. POLICY REV. 3, 3 (2009). Thus,

residency restrictions provides the offender with at least some opportunity to find viable housing within a given state.

B. Sex Offender Residency Restrictions in States with Employment Protections

Of the eighteen states with employment protections discussed above, only six have statewide residency restrictions for sex offenders—Illinois, Virginia, Delaware, Rhode Island, California, and Georgia. Illinois has a tolerable restriction, forbidding only “child sex offender[s]” from living within 500 feet of a school or other child congregation area.¹³⁷ Virginia’s law is similarly tolerable, as it only restricts offenders who committed crimes against minors from living within 500 feet of a school or day care.¹³⁸ And while Rhode Island and Delaware also have residency restrictions prohibiting offenders from living within 300 and 500 feet of a school, respectively, their laws apply to all sex offenders,¹³⁹ making them slightly harsher than Illinois and Virginia.

Conversely, the restrictions in California and Georgia are among the harshest in the nation. California forbids all sex offenders from living “within 2000 feet of [schools] or park[s] where children regularly gather.”¹⁴⁰ And while Georgia only has a 1000 foot residency restriction, in practice it may be more onerous than California’s 2000 foot restriction. In Georgia, sex offenders cannot live within 1000 feet of a “child care facility, church, school, or [all public and private recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools].”¹⁴¹ Sex offenders in Georgia also cannot work or volunteer within 1000 feet of “a child care facility, a school, or a church.”¹⁴² Moreover, sex offenders in Georgia caught knowingly living, working, or volunteering in a restricted area face a mandatory minimum of ten years in prison.¹⁴³

In addition to these two states, TDS attorneys must also be aware of four other states with severe residency restrictions—Alabama, Arkansas, Iowa, and Oklahoma.

although no comprehensive tally exists, it is likely that there are over a thousand such laws in the United States.

¹³⁷ 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-10) (LexisNexis 2015).

¹³⁸ VA. CODE ANN. § 18.2-370.3 (2014).

¹³⁹ R.I. GEN. LAWS § 11-37.1-10(c) (2015) and DEL. CODE ANN. tit. 11, § 1112 (2015).

¹⁴⁰ CAL. PENAL CODE § 3003.5(b) (Deering 2015).

¹⁴¹ GA. CODE ANN. § 42-1-15 and § 42-1-16 (2015) (LexisNexis) (defining “[a]rea where minors congregate”).

¹⁴² GA. CODE ANN. § 42-1-15(c)(1) (2015) (LexisNexis).

¹⁴³ GA. CODE ANN. § 42-1-15(g) (2015) (LexisNexis).

Each of these four states forbids sex offenders from living within 2000 feet of many child congregation areas,¹⁴⁴ leaving clients with grim prospects for housing. Thus, while there are other factors to consider, it may be best to advise clients facing sex offender registration to avoid Alabama, Arkansas, California, Georgia, Iowa, and Oklahoma altogether.

On the other end of the spectrum, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, and Wisconsin do not have any¹⁴⁵ statewide residency restrictions for sex offenders. One important caveat is that even though a state may not have enacted a statewide sex offender residency restriction, many towns or counties within that state have likely done so.¹⁴⁶ Consequently, Kansas, Nebraska, and New Mexico take on a unique importance, as they are the only states with laws preventing or restricting counties and local municipalities from enacting sex offender residency restrictions.¹⁴⁷ Kansas and New Mexico forbid counties and local municipalities from enacting sex offender residency restriction laws,¹⁴⁸ while Nebraska limits restrictions to only 500 feet and only for “sexual predators,” rather than all sex offenders.¹⁴⁹

C. Discussing Sex Offender Residency Restrictions with a Client

When counseling a client facing sex offender registration on where to live, a TDS attorney must carefully incorporate the information from this section into the larger

discussion.¹⁵⁰ Although the discussion still begins with where the client has family or friends, the attorney now needs to weigh the benefits of staying with family and having employment protections against the pitfalls of potential residency restrictions. This balancing act is imperative not merely because it helps the client determine the best place to live after a conviction, but also because it may inform his decision on how to plead at court-martial.¹⁵¹

Once the client outlines prospective housing options, his TDS attorney can walk him through the legal environment at those locations. While there are no statewide residency restrictions in most states with employment protections for offenders—Illinois, Virginia, Delaware, Rhode Island, California, and Georgia have them—many cities and counties have enacted residency restrictions.¹⁵² Thus, after the client makes contact with a family member or friend willing to help him out after confinement, the client should contact the local sheriff’s department where he is considering living and ensure there are no residency restrictions, or the restrictions are tolerable and will not inhibit his ability to find housing. Also, an attorney must ensure the client knows that Alabama, Arkansas, California, Georgia, Iowa, and Oklahoma have draconian, statewide residency restrictions and should recommend that he avoids living in those states absent a compelling reason to do so.

Additionally, regardless if a client has any ties to Kansas, New Mexico, or Nebraska, these states merit special consideration because they are the only three states that ban or limit sex offender residency restriction laws within the entire state, to include counties and local municipalities.¹⁵³ If a client has no family or friends willing to help him out, these states will likely give him the best chance to rehabilitate, particularly New Mexico and Nebraska, which also have ban-the-box laws. Lastly, residency restrictions are only one of many sanctions a sex offender will face. The client will want to look at all of the requirements where he intends to live and ensure there is not a different law he will

¹⁴⁴ ALA. CODE § 15-20A-11 (LexisNexis 2015); ARK. CODE ANN. § 5-14-128 (2015) (LexisNexis) (applies to “Level 3 or Level 4 offender[s]”); IOWA CODE § 692A.114 (2013) (applies to those “convicted of an aggravated offense against a minor”); and OKLA. STAT. tit. 57, § 590 (2015).

¹⁴⁵ Although parole boards in several states can limit where sex offenders can live and some states require schools to be notified of where sex offenders live, these provisions were not considered as “residency restrictions” for purposes of this tally. *But see* MARCUS NIETO & DAVID JUNG, CAL. RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 17 (Aug. 2006) (counting these rules as residency restrictions).

¹⁴⁶ *See* COUNCIL OF STATE GOV’TS, *supra* note 136 and Mulford et al., *supra* note 136.

¹⁴⁷ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); NEB. REV. STAT. ANN. § 29-4017 (LexisNexis 2015); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015).

¹⁴⁸ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015) (asserting “supremacy” over the state for sex offender laws but permitting ordinances enacted before Jan. 19, 2005 to remain in effect).

¹⁴⁹ NEB. REV. STAT. ANN. § 29-4016 (LexisNexis 2015). Nebraska defines “sexual predator” as someone “who has committed an aggravated offense . . . [against] a person eighteen years of age or younger.” *Id.* § 4017.

¹⁵⁰ The larger discussion should always include U.S. ARMY DEFENSE COUNSEL ASSISTANCE PROGRAM FORM 1, SEX OFFENDER REGISTRATION ADVICE (1 Dec. 2009), which notifies clients that they are accused of an offense requiring sex offender registration, and that state registration requirements vary and are subject to change.

¹⁵¹ *See* United States v. Miller, 63 M.J. 452, 459 (C.A.A.F. 2006) (discussing how a requirement that defense counsel discuss sex offender registration with their clients “address[es] a legal issue about which an accused may be uninformed” and “foster[s] an accused’s proper consideration of this unique collateral circumstance that may affect the plea decision[.] . . .”).

¹⁵² *See* COUNCIL OF STATE GOV’TS, *supra* note 136 and Mulford et al., *supra* note 136.

¹⁵³ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); NEB. REV. STAT. ANN. § 29-4017 (LexisNexis 2015); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015).

find equally unpalatable, such as a requirement to have “SEXUAL PREDATOR” printed on his driver’s license.¹⁵⁴

VI. Conclusion

Andy Dufresne was on to something when he yearned to live by the Pacific Ocean.¹⁵⁵ Hawaii, surrounded by the Pacific Ocean, is the state that forgets someone’s past transgressions most readily. It has the most robust employment protections for offenders and lacks statewide sex offender residency restrictions. It even forbids employers from considering convictions over ten years old¹⁵⁶ and gives some sex offenders the opportunity to apply for removal from registration lists after a reasonable period of time.¹⁵⁷ And while Hawaii may be difficult to relocate to, there are a number of other states where military offenders can go in order to maximize their chances of successful reentry.

Because TDS attorneys speak with military offenders before they are even convicted, these attorneys are at the tip of the spear for the reentry process. Attorneys can make a tremendous difference in the lives of their clients by simply being proactive and opening up a dialogue about a post-confinement plan. This dialogue starts with a client’s family support network and incorporates the laws discussed in this article. Trial Defense Service attorneys should see if their clients’ circumstances enable them to take advantage of favorable employment legislation, while avoiding hostile residency restrictions for those who face sex offender registration. Attorneys must also instruct their clients facing sex offender registration to make contact with local law enforcement and determine what restrictions the client will likely face upon release. Although the discussion about where to live after confinement may not be a comfortable one because it presumes a conviction, with a little effort, TDS attorneys can help each client find his own Zihuatanejo.¹⁵⁸

¹⁵⁴ FLA. STAT. ANN. § 322.141(3) (LexisNexis 2015). *See also* Wagner, *supra* note 116, at 272.

¹⁵⁵ THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

¹⁵⁶ HAW. REV. STAT. ANN. § 378-2.5(c) (LexisNexis 2015).

¹⁵⁷ HAW. REV. STAT. ANN. § 846E-10 (LexisNexis 2015) (permits “Tier 1” offenders to petition for removal from registration requirements after 10 years and “Tier 2” offenders to petition for removal after 25 years).

¹⁵⁸ THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

Appendix - Ban-the-Box Laws

State	Employers	Protects Licensure?	Timing of Background Check	Requires Nexus to Deny Employment?	Sunset Provision?
California CAL. LAB. CODE § 432.9	Only Government	No	Anytime	No	No
Colorado COLO. REV. STAT. § 24-5-101	Only Government	Yes	When applicant is a finalist or employer makes conditional offer of employment	Yes	Yes; must weigh age of conviction*
Connecticut CONN. GEN. STAT. § 46a-80	Only Government	Yes	After determination that applicant has desired qualifications	Yes; employer must consider whether nexus exists	Yes; must weigh age of conviction*
Delaware DEL. CODE ANN. tit. 19, § 711(g)	Only Government	No	After first interview	Yes	Yes; must weigh age of conviction*
Georgia Governor's Executive Order (Feb. 23, 2015)	Only Government	No	Anytime	Yes; employer must permit applicant to provide evidence of rehabilitation and contest "relevance of a criminal record"	No
Hawaii HAW. REV. STAT. ANN. § 378-2.5	Both Private and Government	No	After conditional offer of employment	Yes	Yes; ten years
Illinois 820 ILL. COMP. STAT. ANN. 75/15 & Gov's Admin. Order No. 1 (Oct. 3, 2013)	Both Private and Government (does not cover local governments)	No	When invited for an interview or given a conditional offer of employment	Yes (only for state agencies)	Yes; state agencies must weigh age of conviction*
Maryland MD. CODE ANN., STATE PERS. & PENS. § 2-203	Only Government (does not cover local governments)	No	After the first interview	No	No
Massachusetts MASS. ANN. LAWS ch. 151B, §4(9.5)	Both Private and Government	No	Anytime	No	Yes; ten years (if sealed)
Minnesota MINN. STAT. § 364.021 (2015)	Both Private and Government	No	Invited for interview or given a conditional offer of employment	No	No
Nebraska NEB. REV. STAT. ANN. § 48-202	Only Government	No	After determination that employee has desired qualifications	No	No
New Jersey N.J. STAT. ANN. § 34:6B-14	Both Private and Government	No	After initial application process	No	No

State	Employers	Protects Licensure?	Timing of Background Check	Requires Nexus to Deny Employment?	Sunset Provision?
New Mexico N.M. STAT. ANN. §§ 28-2-3, 28-2-4	Only Government	Yes	"[A]fter the applicant has been selected as a finalist"	Yes; employer must show nexus or "[insufficient rehabilitation]"	Yes; three years (presumed rehabilit'n)
Rhode Island R.I. GEN. LAWS § 28-5-7	Both Private and Government	No	Anytime	No	No
Virginia Governor's Executive Order No. 41 (Apr. 3, 2015)	Only Government	No	"[A]fter a candidate has . . . been found otherwise eligible . . . [and] is being considered for a specific position"	Yes	No
OTHER EMPLOYMENT PROTECTIONS					
New York N.Y. CORRECT. LAW § 752, 753	Both Private and Government	Yes	Anytime	Yes; requires "direct relationship" or "unreasonable risk to property or [public safety]"	Yes; must weigh age of conviction*
Pennsylvania 18 PA. CONS. STAT. §§ 9124, 9125	Only Private Employers and State Licensing Agencies	Yes	Anytime	Yes (licensure), but only for misdemeanors; Yes (employment); must "relate to the applicant's suitability"	No
Wisconsin WIS. STAT. §§ 111.321, 111.335	Both Private and Government	Yes	Anytime	Yes; "circumstances of [offense must] substantially relate to the circumstances of the particular job or licensed activity."	No

* The age of the conviction is one of several factors states require employers to consider. Others include "[t]he nature and gravity of the offense," "[t]he nature of the job held or sought,"¹⁵⁹ and "information pertaining to the degree of rehabilitation of the convicted person."¹⁶⁰

** This is intended as a tool for attorneys. This does not constitute legal advice nor is it a substitute for competent legal research. The laws cited here are current as of the date of final editing for publication; however, attorneys should always conduct their own research to ensure the law has not changed.

¹⁵⁹ See, e.g., DEL. CODE ANN. tit. 19, § 711(g)(3).

¹⁶⁰ See, e.g., CONN. GEN. STAT. § 46a-80(c).