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by

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**A Legal, Political, and Economic Analysis of Ban the Box Hiring Practices**

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by

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**Report**

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*To Holly, Baby Thomas, and My Prince(ss) on the way*

# **A Legal, Political, and Economic Analysis of Ban the Box Hiring Practices**

by

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The University of Texas at Austin, 2015

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## **ABSTRACT**

More than 70 million American adults have some sort of criminal record, and more than 600,000 people are released from incarceration each year. Because many employers harbor concerns regarding workplace safety, productivity, and exposure to liability, individuals who were formerly incarcerated experience great difficulty in securing employment after they are released from jail or prison. The accompanying decrease in wages has negative economic consequences for those individuals, their families, and the community at large. The disproportionate representation of men of color in the justice system implicates civil rights and social justice questions. What's more, because many employers over-estimate the risk of hiring individuals who were formerly incarcerated, businesses nationwide regularly fail to hire the most qualified candidates for job openings.

This report examines legal protections afforded to people released from incarceration and the current efforts of public employers, primarily at the city and county levels, to reform their hiring practices with the goal of employing a greater number of qualified people with criminal records. The report also includes a brief discussion of the role that prominent private employers have played in shaping this policy debate. An analysis of the impact of modifying hiring practices would have on individuals formerly incarcerated, private employers, tax collections, government spending, and quality of life indicators suggests positive but modest effects. These findings indicate that enacting Ban the Box and fair chance hiring practices would be beneficial to people formerly incarcerated and their families with no detrimental effect on the vast majority of public and private employers. Moreover, the community would benefit from the positive effects flowing from an expected decrease in recidivism.

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## I. INTRODUCTION

### A. Purpose of the Report

The economic struggles people who were formerly incarcerated, primarily working age men, are increasingly viewed as worthy of public attention and potential government assistance.<sup>1</sup> However, in a country dealing with a host of economic and social problems, policy initiatives targeting the well-being of former criminals have sometimes struggled to place themselves on the policy agenda. In recent years, however, coalitions that include civil rights groups, minority advocacy organizations, and fiscal conservatives have helped renew interest in the employment outcomes of this group.<sup>2</sup> The media, often described as the fourth branch of government, has also played an important role in elevating the importance of this issue.<sup>3</sup>

This report seeks to identify some of the ways in which the underemployment of the formerly incarcerated has wide-ranging effects for both the individual and the community. The report will undertake a discussion of the effect these depressed employment numbers have on local economies. An explanation of legal precedent and enforcement guidelines issued by the Equal Employment Opportunity Commission will

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<sup>1</sup> Greg Glod, *Strong Public Support for Expansion of Parole and Reentry Programs*, TOWNHALL.COM (March 24, 2015), <http://townhall.com/columnists/gregglod/2015/03/24/strong-public-support-for-expansion-of-parole-and-reentry-programs-n1975690/page/full>.

<sup>2</sup> Mel Evans, *An unlikely alliance forms between Koch brothers and liberal groups*, CBS NEWS (February 19, 2015, 11:57 AM), <http://www.cbsnews.com/news/koch-brothers-conservative-liberal-groups-unite-on-criminal-justice-reform/>.

<sup>3</sup> Timothy Williams and Tanzina Vega, *A Plan to Cut Costs and Crime: End Hurdle to Job After Prison*, NEW YORK TIMES (October 23, 2014), <http://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html>.

also inform the analysis. Additionally, the report will conduct a political analysis, using a well-known framework to better understand how and why this policy issue has gained the attention of policymakers in recent years. That framework sheds light on how both governmental and non-governmental actors outlined the technically feasible and politically viable solutions that provided the foundation for policy victories, especially at state and local levels of government.

Because the proposals outlined in this report have a substantial effect on the way in which employers conduct a key component of the hiring, retention, and promotion process, a detailed examination of these issues deserves scrutiny. Interestingly, city and county government employers are largely leading the way with respect to the implementation of reforms that modify the criminal background screening process. In addition, several large private companies have also changed their hiring practices in the last few years in order to give individuals with criminal records greater opportunity at securing employment.

It must be noted that Ban the Box and other fair chance hiring practices are merely components of a comprehensive public policy solution that will improve the employment prospects of individuals with criminal records. Several licensing restrictions on individuals with criminal records can dramatically limit post-release career opportunities. Some of these limitations are sensible policies that protect health and safety concerns of the community, but many others do not have a discernible nexus between the profession in question and the risk presented by an individual's past criminal

conduct. This report assesses the impact of enacting Ban the Box-style reforms, but the full scope of the problem obviously runs much deeper.

## B. Methods

This report relies primarily on qualitative research. A literature review of case studies, periodicals, and textbooks provided a more thorough understanding of the policy problem's history and background, proposed solutions, and the national trend toward fair-chance hiring practices. This approach was also used to examine legislation, agency regulations, and court decisions bearing on the issue. An examination of the economic benefits – but not a comprehensive cost-benefit analysis, which was beyond the scope of this report – was enabled by a review of available literature as well.

## II. OVERVIEW: THE NEED TO RE-EXAMINE TREATMENT OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS

### A. History and Background

Due to the mass jailing of millions of Americans over the past few decades, there exists in our country a sizeable population of people who have been incarcerated. More than 600,000 inmates were released from incarceration last year<sup>4</sup> and about 70 million Americans have some form of criminal record, almost one out of three Americans of working age.<sup>5</sup> This is particularly problematic for men, and even more so for men of color.<sup>6</sup> Many employers harbor legitimate concerns regarding the potential productivity, reliability, and litigation risks associated with hiring these individuals.<sup>7</sup> As a result, even after paying an initial debt to society by serving time in jail or prison and complying with probation or parole requirements, these individuals often must serve an *economic* sentence as well. This chronic underemployment has detrimental effects on those individuals and their families but also farther-reaching ramifications as well.

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<sup>4</sup> Peter Wagner and Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (March 12, 2014), <http://www.prisonpolicy.org/reports/pie.html>.

<sup>5</sup> Rebecca Vallas and Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CENTER FOR AMERICAN PROGRESS (December 2014), at 1, <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

<sup>6</sup> Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System*, CENTER FOR AMERICAN PROGRESS (March 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

<sup>7</sup> Harry J. Holzer, Steven Raphael, and Michael A. Stoll, *How willing are employers to hire ex-offenders?*, 23 FOCUS, NO. 2, SUMMER 2004, at 41.

Depressed career opportunities and the corresponding drop in income have the immediate effect of economic hardship, but additional challenges unfortunately often present themselves. The United States runs largely on an employer-sponsored healthcare, so failing to get a job that provides this benefit – let alone any job for someone who has spent time in jail or prison – often makes matters worse.<sup>8</sup> As employment is an integral component of social identity, there are often serious mental health implications brought on by extended periods of unemployment.<sup>9</sup> The cycle will begin anew for many of these individuals, because those who cannot secure employment are significantly more likely to recidivate than their counterparts who hold down steady jobs.<sup>10</sup>

Suboptimal job prospects for individuals who were formerly incarcerated has negative consequences for the community at large as well. Underemployment and lower income levels translate to less money spent at local businesses and depressed tax receipts at all levels of government.<sup>11</sup> This report will also discuss the opportunities missed by many employers who fail to hire the most qualified candidate for an open position. Many business owners engage in so-called statistical discrimination and assume – with varying

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<sup>8</sup> Peter Cunningham, Samantha Artiga, and Karyn Schwarz, *The Fraying Link between Work and Health Insurance: Trends in Employer-Sponsored Insurance for Employees, 2000-2007*, THE KAISER COMMISSION ON MEDICAID AND THE UNINSURED (November 2008), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7840.pdf>, at 2.

<sup>9</sup> Arthur Goldsmith and Timothy Diette, Exploring the Link between unemployment and mental health outcomes, AMERICAN PSYCHOLOGICAL ASSOCIATION: THE SES INDICATOR (April 2012), <http://www.apa.org/pi/ses/resources/indicator/2012/04/unemployment.aspx>.

<sup>10</sup> Richard B. Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.*, URBAN INSTITUTE REENTRY ROUNDTABLE (May 19-20, 2003) New York University Law School, at 12, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410857-Can-We-Close-the-Revolving-Door-.PDF>.

<sup>11</sup> Don Lee, *Millions can find only part-time or lower-paying jobs*, LOS ANGELES TIMES (September 7, 2010), <http://articles.latimes.com/2010/sep/07/business/la-fi-jobs-underemployed-20100907>.

degrees of accuracy – that individuals with criminal records pose a greater risk as employees.<sup>12</sup> Because those concerns are often overstated and employers miscalculate the actual magnitude of the risk involved, entrepreneurs across the country might do harm to their bottom line as a result of the inability to evaluate job candidates with an unbiased eye.

Also illustrating the desire for broad-based criminal justice reform is the recent spate of legislation that has been filed in Congress over the past few years. Members in both chambers and both political parties have advocated using a more fine-tuned approach to how the federal justice system punishes and rehabilitates people convicted of crimes. In 2014, Republican Senator Rand Paul filed the Record Expungement Designed to Enhance Employment (REDEEM) Act along with Democratic Senators Cory Booker and Kristen Gillibrand.<sup>13</sup> Republican Senator Chuck Grassley, chairman of the Judiciary Committee, filed the Sentencing Reform and Corrections Act of 2015.<sup>14</sup> The bill has 26 bipartisan co-sponsors and is steadily working its way through the legislative process, having been placed on the Senate Legislative Calendar on October 26. Its House companion was authored by Representative Bob Goodlatte, also chairman of the

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<sup>12</sup> John Schmitt and Kris Warner, *Ex-offenders and the Labor Market*, CENTER FOR ECONOMIC AND POLICY RESEARCH (November 2010), at 12, <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

<sup>13</sup> S. 2567, 113<sup>th</sup> Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2567>.

<sup>14</sup> S. 2123, 114<sup>th</sup> Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2123>.

Judiciary Committee, and enjoys the support of 36 co-sponsors from both parties.<sup>15</sup> That bill was reported out of committee on November 18.

In the executive branch, President Obama recently ordered the Office of Personnel Management – essentially the federal government’s human resources department – to ensure that no agencies are inquiring about criminal history on the job applications for federal positions.<sup>16</sup> This practice is already widespread, but the president issued this directive in order to make certain that the practice was universal. The announcement was largely well-received, but some advocates have called for an expansion of this practice to federal contractors as well.<sup>17</sup>

#### B. Title VII of the Civil Rights Act and Equal Employment Opportunity Commission Guidance

In 1964, Congress passed the Civil Rights Act. Title VII of the Act prohibits discrimination based on race, color, national origin, sex, or religion.<sup>18</sup> The U.S. Equal Employment Opportunity Commission is charged with enforcing Title VII at all phases of the employment process – screening applicants, ultimate hiring decisions, retention,

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<sup>15</sup> H.R. 3713, 114<sup>th</sup> Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3713>.

<sup>16</sup> The White House Office of the Press Secretary, *Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated* (November 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

<sup>17</sup> Gregory Korte, *Obama tells federal agencies to ‘ban the box’ on federal job applications*, USA TODAY (November 3, 2015, 6:59 AM), <http://www.usatoday.com/story/news/politics/2015/11/02/obama-tells-federal-agencies-ban-box-federal-job-applications/75050792/>.

<sup>18</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 – 2000e-17 (1964).

and promotion – for all entities covered by the Civil Rights Act.<sup>19</sup> This includes government employers at the federal, state, and local levels in addition to some private employers.<sup>20</sup>

### *1. Disparate Treatment Discrimination*

The original version of the law prohibited only *disparate treatment* discrimination, employment decisions motivated by animosity or hostility to a particular racial or ethnic group.<sup>21</sup> For example, a hiring manager describing a black applicant’s criminal record as a serious concern while dismissing a white applicant’s similar crime as a “youthful indiscretion” could be considered disparate treatment discrimination. Performing criminal background checks on certain racial or ethnic groups and failing to do so for others is similarly impermissible. Furthermore, disparate treatment theory recognizes that employment decisions informed by stereotyped thinking are harmful to an applicant’s or employee’s job prospects.<sup>22</sup> For these reasons, Title VII prohibits using negative racial stereotypes to drive hiring policies and decisions.<sup>23</sup>

Evidence of disparate treatment can be found in obvious examples such as an employer’s biased or derogatory statements with regard to a protected group.<sup>24</sup>

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> See 42 U.S.C. § 2000e-2(a).

<sup>22</sup> Race & Color Discrimination, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, § 15-V1.B.2 (April 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.pdf>.

<sup>23</sup> Id.

<sup>24</sup> EEOC Enforcement Guidance Number 915.002, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, § 4 (April 25, 2012), [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote56sym](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote56sym).

Alternatively, statistical evidence showing how often, for what reasons, and with what evaluation standards criminal background checks were conducted for different demographic groups could also provide evidence of disparate treatment.<sup>25</sup> “Similarly situated comparators,” applicants or employees from different groups but with relatively equal job qualifications, often provide a useful reference point in disparate treatment claims.<sup>26</sup>

## 2. *Disparate Impact Discrimination*

Title VII spawned a significant amount of employment discrimination litigation over the subsequent decades. In order to address a number of Supreme Court decisions regarding the scope of employment discrimination, Congress passed the Civil Rights Act of 1991.<sup>27</sup> Most importantly, the 1991 Act added a subsection to Title VII that finally codified the legal theory of *disparate impact* discrimination.<sup>28</sup> This doctrine holds that when an employer has a facially neutral employment practice, a Title VII violation may be found if that practice has the *effect* of disproportionately impacting a protected member of a racial, ethnic, sex, or religious group.<sup>29</sup>

Because Hispanics and African-Americans are arrested and incarcerated at inordinately high rates, all three branches of the federal government have in some way indicated Title VII covers practices that exclude applicants or employees on the basis of

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> 42 U.S.C. §§ 1981a—1981d.

<sup>28</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i)

<sup>29</sup> Id.

prior criminal conduct. Hiring, retention, and promotion policies that utilize criminal history information will disproportionately impact members of these protected classes in almost all instances, thus triggering a Title VII disparate impact analysis. A more detailed discussion follows.

The Supreme Court did not recognize a discrimination claim based on disparate impact until *Griggs v. Duke Power Company* in 1971.<sup>30</sup> In that case, an employer had operated a power plant for decades – before enactment of the Civil Rights Act – that restricted its black employees to only the lowest-paying positions as a matter of policy.<sup>31</sup> After passage of the landmark legislation, this openly racist practice was replaced by a requirement that employees in the company’s higher-paying jobs hold a high school diploma and achieve a minimum score on two aptitude tests.<sup>32</sup> The *Griggs* court held that “practices that are fair in form, but discriminatory in operation” were unlawful under Title VII.<sup>33</sup> Because the diploma and aptitude requirements were intended to restrict opportunities for black employees and not sufficiently related to the job duties performed, the practice was deemed a violation of the Civil Rights Act.<sup>34</sup> The aim of Title VII was to achieve equal employment opportunities for members of protected classes, and the decision in *Griggs* signaled a commitment to realizing that goal beyond banning only the most obvious instances of discrimination.

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<sup>30</sup> 401 U.S. 424 (1971).

<sup>31</sup> *Griggs* at 427.

<sup>32</sup> *Id.* at 428.

<sup>33</sup> *Id.* at 431.

<sup>34</sup> *Id.*

It should be noted that an employer can overcome a claim of disparate impact discrimination by demonstrating that the employment practice at issue is “job related for the position in question and consistent with business necessity.”<sup>35</sup> Meeting this standard requires that practice in question “bear a demonstrable relationship to successful performance of the jobs for which it was used” and “measure the person for the job and not the person in the abstract.”<sup>36</sup>

A number of cases following *Griggs* are instructive in further refining when employer practices will rise to the level of unlawful disparate impact discrimination. *Connecticut v. Teal* established that a workforce’s numerically balanced racial makeup is not by itself sufficient to prove false a disparate impact claim.<sup>37</sup> *Albemarle Paper Company v. Moody* clarified that a determination of business necessity must be a rigorous, fact-intensive inquiry.<sup>38</sup> *Dothard v. Rawlinson* signaled that both courts and the Equal Employment Opportunity Commission would use a wide variety of evidence such as an employer’s community reputation, individual testimony, applicant data, or any relevant source to make its findings.<sup>39</sup>

The question of how employers could permissibly look at employees’ and applicants’ criminal records was also addressed by in *Dothard*. The court held that the language of a criminal record exclusion policy must “be shown to be necessary to safe an

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<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> 457 U.S. 440, 442 (1977)

<sup>38</sup> 422 U.S. 405, 423-425 (1975).

<sup>39</sup> 433 U.S. 321, 325 (1977).

efficient job performance.”<sup>40</sup> *Green v. Missouri Pacific Railroad* specifically addressed the Title VII implications of criminal exclusions during the hiring process as well.<sup>41</sup> The defendant in *Green* had enacted a hiring policy that automatically disqualified any person who had ever been convicted of any offense other than a minor traffic violation.<sup>42</sup> The court held this practice was overly-broad and thus unlawfully discriminatory under Title VII.<sup>43</sup> In other words, because certain racial and ethnic groups are over-represented in the criminal justice system, a blanket exclusionary policy has an impermissible *effect* on the employment prospects for members of a protected class.

Importantly, *Green* established three factors that still guide the “consistent with business necessity” inquiry: the nature and gravity of the conduct; the time elapsed since the conduct occurred; and the nature of the job in question.<sup>44</sup> A conviction for conduct that was particularly severe or violent will factor into a hiring decision differently than most misdemeanor convictions. Similarly, if several years have passed since a criminal act occurred, an employer should consider this as indicative of rehabilitation. Finally, a nexus between the criminal conduct at issue and the position for which that person is being considered must be present to justify an exclusion. A conviction for misuse of funds, for example, would likely constitute grounds for excluding an applicant for a bookkeeping position but not necessarily a job as a welder or a secretary. These factors

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<sup>40</sup> *Id.*, at Footnote 14.

<sup>41</sup> 549 F.2d 1158 (8<sup>th</sup> Cir. 1977).

<sup>42</sup> *Id.* at 1160.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

provide additional guidance to courts in their attempts to assess whether an exclusionary hiring or retention policy is sufficiently job related for the position and thus compliant with Title VII.

*El v. Southeastern Pennsylvania Transportation Authority* further developed the “business necessity” analysis of disparate impact jurisprudence as applied to a criminal background fact pattern.<sup>45</sup> Acknowledging that “hiring policies...ultimately concern the management of risk,” the court required that the employer draw a coherent distinction between an applicant or employee who presented an excessive risk of danger and one who did not.<sup>46</sup> The criminal exclusion policy at issue concerned a blanket prohibition on hiring anyone convicted of a violent crime, regardless of when it was committed.<sup>47</sup> The court ruled for the defendant in that case, but also held that such across-the-board exclusions violated Title VII.<sup>48</sup>

The plaintiff-employee in *El* was 55 years old and had been convicted of second-degree murder 40 years prior.<sup>49</sup> His employer’s policy prohibited the hiring or retention of any employee with a violent crime conviction, regardless of when that crime occurred.<sup>50</sup> The Third Circuit affirmed the district court’s decision in favor of the defendant-employer, but interestingly noted that even though the employee had been excluded on the basis of having committed a very serious crime, second-degree murder,

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<sup>45</sup> 479 F.3d 232 (3<sup>rd</sup> Cir. 2007).

<sup>46</sup> *Id.* at 244.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 249.

<sup>49</sup> *Id.* at 236.

<sup>50</sup> *Id.* at 235.

the outcome could have been different.<sup>51</sup> The plaintiff's case failed largely because he did not present any evidence suggesting that he was unlikely to recidivate so many years after the crime.<sup>52</sup> That employees who had been convicted of murder were still owed an individualized assessment demonstrates the willingness of courts to broadly extend Title VII protection.

At the heart of establishing that an exclusion for criminal conduct is job related and consistent with business necessity (i.e. not a violation of Title VII) is demonstrating a nexus between the specific risk posed by criminal conduct and the most important responsibilities of the job in question.<sup>53</sup> An employer will likely make out a complete defense if the employer considers the three *Green* factors – nature of conduct, time elapsed, job duties – and then conducts a truly individualized assessment for each applicant or employee. An individualized assessment would first provide notice to the applicant or employee that an application was screened out due to a conviction.<sup>54</sup> The individual would then have an opportunity to respond, presenting evidence of mitigating circumstances that signify an application of a criminal exclusion is not warranted in the particular instance.<sup>55</sup> Finally, the employer would make a good faith consideration of the evidence offered and make a final determination regarding the criminal exclusion.<sup>56</sup>

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<sup>51</sup> Id. at 238.

<sup>52</sup> Id. at 245.

<sup>53</sup> EEOC Enforcement Guidance Number 915.002

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Id.

The EEOC guidelines are of immediate relevance to this report's primary issue because they establish a minimum standard for employers and their hiring professionals when evaluating certain prospective candidates and employees. Simply making employers aware of the law and providing guidance on how to comply is often instrumental in protecting the civil rights of people who have been convicted of crimes and serves to increase the number ultimately able to secure employment. Debate abounds regarding the merits of Title VII as a public policy, but the fact remains that it is the law and affords this population important, sometimes life-altering protections.

### *3. Fair Credit Reporting Act*

The Fair Credit Reporting Act, which regulates the publication and use of consumer reports, also factors into the analysis.<sup>57</sup> The law requires that consumer reporting agencies comply with several regulations aimed at improving the accuracy, fairness, and privacy of consumer information. While this law primarily governs reports pertaining to creditworthiness, rental history, and medical records, it also plays an important role in regulating the compilation and dissemination of criminal history information.<sup>58</sup> For example, employers who use consumer reporting agencies – rather than law enforcement or other government databases – for criminal history information must provide written notice to an applicant, receive written permission to conduct a

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<sup>57</sup> 15 U.S.C. § 1681 et seq.

<sup>58</sup> EEOC Enforcement Guidance Number 915.002

background check, and comply with other requirements.<sup>59</sup> The Federal Trade Commission enforces the Fair Credit Reporting Act and provides various civil remedies for individuals whose rights are violated during a hiring decision.<sup>60</sup>

### C. Theories of Punishment

Society punishes criminal wrongdoing for a variety of reasons. Often the objective is simply to achieve *retribution*; punishment is handed down in order to exact vengeance or to force atonement for a criminal act. Punishment is also understood as a prospective threat to *deter* the general population from committing crimes. *Incapacitation* is a more specific – and immediately effective – form of deterrence, in which an individual offender is removed from society in order to prevent the offender from committing future crimes. Or punishment can be viewed as a high-profile opportunity for a community to *expressively condemn* certain bad acts, thereby communicating its moral values and social norms regarding unacceptable behavior.<sup>61</sup>

A comparatively new theory contends that punishment should serve, at least in part, as an opportunity to *rehabilitate* an offender. Providing treatment, job training, or counseling attempts to equip that person with the skills and coping mechanisms to better function as a productive and law-abiding member of society. Punishment for its own sake

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<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Martha Grace Duncan, “Cradled on the Sea”: *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1201, 1239-1243 (1988).

can still have its place, but this more utilitarian approach seeks to reduce the likelihood that crime – and its concomitant harms – will occur again in the future.<sup>62</sup>

Proportionality is a key principle informing the retributive theory of punishment. To echo a familiar refrain: the punishment must fit the crime. While one tends to conceive of government-sanctioned punishment as jail time, imposition of fines, or probation terms, a less direct form of punishment looms large for individuals after they are released from incarceration. Because past criminal activity can remain on a background check for many years after an offense was committed, millions of Americans experience an additional *economic* punishment when a potential or current employer uses that information to their detriment. For some, that experience will recur long after serving and completing their original sentence, perhaps interminably.

The prevalence of non-violent drug offenders in the United States calls into question the efficacy of punishment as a deterrent for certain categories of criminal activity. Because so many low-level drug offenders are addicts, a disease prevents many from working through the rational calculus that criminals use when deciding whether to commit a crime. It follows that the prospect of criminal sanctions is a less potent deterrent for those addicted to drugs.

Many Americans, particularly conservatives, value limited and efficient government.<sup>63</sup> As such, a sizeable segment of the population might be frustrated to learn

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<sup>62</sup> Id.

that the resources and efforts dedicated to rehabilitating people who have been incarcerated are negated in part by employment screening practices that present obstacles to a post-offense career. Job training and education initiatives for these individuals aim to improve employment prospects, but too often that progress is offset by the stigma of a criminal record. As a result, finding a job remains a daunting task for those who have taken affirmative steps to enhance their employability.

In sum, there are a number of values at play when determining why we punish criminals and in weighing the efficacy of those strategies. With respect to non-violent offenders who have been convicted of misdemeanors and low-level felonies, a more nuanced discussion and a tailored approach to punishment is warranted. For many of these people, the most effective deterrent to recidivism is securing steady employment.<sup>64</sup> Moreover, the idea of punishment as a disincentive to commit crime becomes less compelling for those who are less secure economically, addicted to drugs, or both. Balancing these competing values is at the heart of making sound public policy. As such, this report will attempt to provide a comprehensive discussion of the legal, economic, political, and normative considerations that inform an increasingly important public policy issue.

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<sup>63</sup> Jeffrey M. Jones, *Americans Remain Divided on Role They Want Gov't to Play*, GALLUP (September 19, 2013), <http://www.gallup.com/poll/164444/americans-remain-divided-role-gov-play.aspx>.

<sup>64</sup> Freeman, *Can We Close the Revolving Door?*

### III. NATIONAL TREND TOWARD DELAYED CONSIDERATION OF CRIMINAL HISTORY IN THE HIRING PROCESS

#### A. Ban the Box and Fair Chance Hiring Policies

The number of U.S. adults with a criminal record has high as 70 million, representing almost one of three American adults.<sup>65</sup> Not surprisingly, those individuals experience greater difficulty securing and retaining employment, a problem that pervades all stages of the hiring process.<sup>66</sup> Those who indicate previous contact with the criminal justice system on a job application are less likely to receive a call back for an interview.<sup>67</sup> Those who do receive interviews but disclose a criminal record are less likely to ultimately receive an offer of employment.<sup>68</sup> Even the fortunate individuals who end up employed tend to face a more difficult time receiving a promotion or keeping their job.<sup>69</sup>

This problem is more pronounced for people of color. They are disproportionately represented in the legal system, as 49 percent of African-American males and 44 percent of Latino males have been arrested by age 23.<sup>70</sup> By comparison, 38 percent of Anglo-Americans are arrested by age 23.<sup>71</sup> Because a higher percentage of blacks and Latinos are represented in the legal system, they have a comparatively more difficult time

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<sup>65</sup> Vallas and Dietrich, *One Strike and You're Out*

<sup>66</sup> Id.

<sup>67</sup> Devah Pager, Bruce Western, and Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, AMER. SOCIOLOGICAL REVIEW (Oct 2009), 777—799.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> *Nearly Half of Black Males, 40 Percent of White Males Are Arrested by Age 23: Study*, THE HUFFINGTON POST (January 6, 2014), [http://www.huffingtonpost.com/2014/01/06/half-of-blacks-arrested-23\\_n\\_4549620.html](http://www.huffingtonpost.com/2014/01/06/half-of-blacks-arrested-23_n_4549620.html).

<sup>71</sup> Id.

obtaining and maintaining employment. Compounding this difficulty is the fact that, even when compared only to white people who have spent time in jail or prison, black and Latinos released from incarceration still face longer odds in getting a job. A noted study found that when answering a question affirmatively regarding previous criminal conduct on a job application, white applicants are four times as likely as black applicants to get invited back for a callback interview.<sup>72</sup>

The Ban the Box Movement traces its beginnings to 2004, when All of Us or None, a national coalition that advocates broadly for the civil and economic rights of people who have been incarcerated, decided to concentrate its efforts on removing criminal history inquiries from job applications.<sup>73</sup> Because such questions can discourage many from even filling out an application, leaders of the movement found this to be a prudent focal point. Ban the Box advocates point out that the most qualified applicant for a position is often not hired, due to the stigma and distraction that tend to accompany a criminal record.<sup>74</sup>

In addition to pushing for change on *when* background checks occur – namely delaying their use as late in the employment process as possible – Ban the Box advocates have also backed procedural safeguards to regulate *how* those checks are used to screen

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<sup>72</sup> Devah Pager, Bruce Western, and Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*.

<sup>73</sup> *About Us*, ALL OF US OR NONE (2008), [http://www.allofusornone.org/about\\_us](http://www.allofusornone.org/about_us).

<sup>74</sup> *Resource Guide*, NATIONAL EMPLOYMENT LAW PROJECT (July 2014), <http://nelp.org/content/uploads/2015/03/Bantheboxcurrent.pdf?nocdn=1>.

job applicants.<sup>75</sup> Most importantly, Ban the Box looks for ways to ensure that employers are basing their decisions on criminal records that are accurate and up-to-date.<sup>76</sup> For example, inaccurate reports can arise when criminal records have been expunged, an arrest fails to produce a prosecution or conviction, or even when an applicant has a common name.<sup>77</sup> Second, because criminal records can at times be laden with jargon and difficult to understand, a suggested best practice is that employers take affirmative steps to properly train hiring professionals in reading and using them.<sup>78</sup> A third recommendation flows from the previous one: limiting the number of people who have access to criminal history information, in order to minimize the potential for negative bias against the applicant. Finally, the applicant should have an opportunity to provide documentation or other proof of rehabilitation before an employer makes its final hiring decision.<sup>79</sup>

Similar to Ban the Box, “fair-chance” hiring practices recommend delaying criminal background checks as late as possible in the hiring process, usually until after a

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<sup>75</sup> *Support the Fairness & Accuracy in Employment Background Checks Act*, NATIONAL EMPLOYMENT LAW PROJECT (2010),

<http://www.nelp.org/content/uploads/2015/03/FBIBillFactSheet.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> National Employment Law Project, *The “Wild West” of Employment Background Checks: A Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age*, CENTER FOR COMMUNITY CHANGE (August 2014), <http://www.nelp.org/content/uploads/2015/03/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf>.

<sup>78</sup> Charles F. Walters, *New EEOC Enforcement Guidance on Use of Criminal Records in the Hiring Process*, HUMAN RESOURCE ASSOCIATION OF THE NATIONAL CAPITAL AREA (June 1, 2012), <http://www.hra-nca.org/new-eeoc-enforcement-guidance-use-criminal-records-hiring-process>.

<sup>79</sup> *Criminal Background Checks: A Best Practices Guide for Employers*, NATIONAL EMPLOYMENT LAW PROJECT, <http://www.nelp.org/content/uploads/2015/03/CriminalBackgroundChecksBestPracticesGuide.pdf>.

conditional offer of employment has been extended to the applicant.<sup>80</sup> The National Employment Law Project, an advocacy organization for low-wage workers, also urges employers to avoid using stigmatizing language on job applications and related literature.<sup>81</sup> In fact, the group encourages employers to reassess the need to even use a background check at all.<sup>82</sup> A number of positions, especially entry-level jobs with little access to customers or sensitive information, might not warrant screening for past criminal conduct.<sup>83</sup> Finally, the organization promotes employers using an “individualized assessment” of every applicant that considers job duties, evidence of criminal conduct, an applicant’s unique qualifications, and mitigating circumstances surrounding any potential arrest or conviction record.<sup>84</sup>

#### B. Durham, North Carolina as an Example of Local Governments Leading the Way

Durham, North Carolina provides a useful example of fair-chance hiring policies in practice.<sup>85</sup> Both the city and county governments in this community reformed their hiring guidelines in response to the advocacy of the Durham Second Chance Alliance. The group’s first request was to remove a question regarding criminal history from the

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<sup>80</sup> “Ban the Box” is a Fair Chance for Workers with Records, NATIONAL EMPLOYMENT LAW PROJECT (September 2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>.

<sup>81</sup> Michelle Natividad Rodriguez and Nayantara Mehta, A Key Fair-Chance Hiring Best Practice: Delaying Conviction Inquiries until the Conditional Job Offer, NATIONAL EMPLOYMENT LAW PROJECT (September 2015), <http://www.nelp.org/content/uploads/Fair-Chance-Conditional-Offer.pdf>.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Daryl V. Atkinson and Kathleen Lockwood, *The Benefits of Ban the Box: A Case Study of Durham, NC*, SOUTHERN COALITION FOR SOCIAL JUSTICE (2014), [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf).

preliminary stages of the hiring process.<sup>86</sup> A second demand concerned delaying that inquiry until after a conditional offer of employment has been extended to an otherwise qualified candidate.<sup>87</sup> Next, the city or county division making a hiring decision would forward along to the human resources department the name of the applicant to conduct a criminal history inquiry.<sup>88</sup> Only then would a hiring professional trained in reading records do a background check, with the candidate's written consent.<sup>89</sup> The candidate would also have the opportunity to review the record for accuracy.<sup>90</sup> If the screen revealed a past criminal conviction, then the human resources department would inform the applicant and provide seven days to respond with evidence of rehabilitation or mitigating factors. Finally, officials at the city or county office would conduct an individualized assessment that considers any relationship between the job's primary duties and the nature of the criminal offense and the amount of time elapsed since the criminal conduct occurred.<sup>91</sup>

Both the city and county reformed their hiring practices in 2011 and have realized notable shifts in the composition of their respective workforces.<sup>92</sup> The city has seen the percentage of employees it hires with a conviction history increase seven-fold, from 2.25% in 2011 to 15.5% in 2014.<sup>93</sup> Durham County hired only 35 employees with a

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<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Id.

criminal record in 2011, but that number increased to 52 in 2012 and 97 in 2013.<sup>94</sup> Also instructive was the data the county kept on every applicant who was recommended for hire by an individual department to the human resources department. Over the course of three years, the county recommended 184 individuals with a criminal record for hire as the most qualified candidate. Of those 184, only 6 were ultimately denied employment because the human resources department determined that the past conduct presented an unacceptable level of risk.<sup>95</sup> What's more, as of 2012, none of this group hired by Durham County had been fired due to illegal conduct.<sup>96</sup>

The city of Durham and Durham County provide strong anecdotal evidence that an individualized approach to hiring employees who have committed crimes can benefit applicants and employers alike. Moreover, their experience demonstrates that a careful application of well-developed hiring guidelines allows an employer to adequately balance *potential* public safety and internal risk concerns with hiring the most qualified candidate. While past criminal history is certainly a relevant factor when screening applicants, it is not dispositive of future job performance or level of risk. In this instance, fair-chance practices resulted in hiring a greater number of qualified and productive employees, in turn providing a boost to the employer's bottom line without any of the risk factors actually materializing.

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<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

### C. Private Employers Leading the Way

Several well-known companies have recently removed criminal history questions from their job applications. Koch Industries, Bed Bath & Beyond, Target, Wal-Mart, Home Depot, and Starbucks are among the large corporations that now take a more nuanced approach to finding new employees.<sup>97</sup> As stated by Koch Industries' general counsel Mark Holden: "(we) shouldn't be rejecting people at the very start of the hiring process who may otherwise be capable and qualified and want an opportunity to work hard."<sup>98</sup> Interestingly, Koch, a company that has announced plans to spend \$900 million in support of conservative candidates and causes during the 2016 election cycle, has partnered with liberal criminal justice reformers in advancing this issue.<sup>99</sup> Opponents of Ban the Box might argue that only companies of this size, with correspondingly large human resources departments, are capable of enacting a policy change in a cost-efficient manner. Regardless, that prominent private employers have chosen to voluntarily "ban the box" sends an important signal regarding the relative benefits and burdens of modifying this component of the hiring process.

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<sup>97</sup> Tessie Castillo, *Why Are Conservatives Signing On to Ban the Box?*, THE HUFFINGTON POST (May 14, 2015, 10:10 AM), [http://www.huffingtonpost.com/tessie-castillo/why-are-conservatives-sig\\_b\\_7283160.html](http://www.huffingtonpost.com/tessie-castillo/why-are-conservatives-sig_b_7283160.html).

<sup>98</sup> Marianne Levine, *Koch Industries to stop asking about job candidates' criminal history*, POLITICO (April 27, 2015), <http://www.politico.com/story/2015/04/koch-industries-brothers-criminal-history-job-applicants-ban-the-box-117382>.

<sup>99</sup> *Id.*

#### D. Political Analysis

John Kingdon's book *Agendas, Alternatives, and Public Policies* lays out a useful framework for determining a policy issue's likelihood of success.<sup>100</sup> Kingdon defines the public policy agenda as a list of subjects or problems that compete with one another for the attention of the public and policymakers.<sup>101</sup> A variety of participants – both inside and outside of government – work together and in competition to determine a particular issue's place on (or off) the agenda.<sup>102</sup>

In the case of Ban the Box and similar campaigns to reform the use of criminal background checks by employers, actors *outside* the government have played an important role in securing this issue's place on the policy agenda. To be sure, those outside actors almost always require substantial support of lawmakers at the state or local level in order to help their concern work its way through the political process. With respect to an issue as contentious as reforming criminal history employment screening, that legislative support often must come from both Republicans and Democrats.<sup>103</sup> This policy issue in particular has shown that grassroots advocacy – and the salient narratives of struggle, injustice, hope, and redemption – can play an important role in communicating the urgency of a situation.

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<sup>100</sup> John W. Kingdon; *Agendas, Alternatives, and Public Policies* (Leo A. Wiegman ed., 2d ed. 1995).

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *See supra.* Notes 12–15.

Kingdon labels the first “stream” of the policymaking process the problem stream.<sup>104</sup> While there are an innumerable number of circumstances and situations in American society, the challenge for policy advocates lies in convincing others that a mere “condition” has risen to the level of becoming a “problem.”<sup>105</sup> This is most commonly achieved when there exists a change in indicators – an easily-understood or well-measured signal of a problem’s severity, urgency, or worthiness of attention.<sup>106</sup> Sometimes a focusing event will provide a powerful context for the policy problem that motivates policymakers or other actors to advocate for change.<sup>107</sup> Comparisons between or among conditions can help crystallize more important ones as problems that should rise up the hierarchy of the policy agenda.<sup>108</sup> Also important to the definition of a problem is how it is framed, or perceived and communicated, for others to understand.<sup>109</sup> This strategy can help identify new problems or successfully re-define old problems as ones now worthy of attention.<sup>110</sup>

A July 2014 interview on MSNBC’s “The Cycle” with U.S. Senators Cory Booker and Rand Paul captures well the adaptable ways in which policy advocates can define a condition as a policy problem.<sup>111</sup> When asked if he viewed the enforcement of the War on Drugs as racist, Senator Paul explained, “I think it has a racial outcome, is a

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<sup>104</sup> Kingdon at 90.

<sup>105</sup> Id. at 91.

<sup>106</sup> Id.

<sup>107</sup> Id. at 95.

<sup>108</sup> Id. at 111.

<sup>109</sup> Id. at 114.

<sup>110</sup> Id.

<sup>111</sup> The Cycle (MSNBC television broadcast Jul. 30, 2014).

better way to put it. I think it's inadvertent, so I don't think everyone is plotting to make it that way. But you can't escape the fact that three out of four people in prison [for drug-related offenses] are black or brown." Senator Booker offered a compelling answer to the same question. "I think you're complicating this far more than it needs to be. Rand said it very simply: this has a profound racially disparate impact, and we need to solve it using means by which we just take a dumb, broken system, frankly, and just make it work for every American. It does not benefit Americans to spend a quarter of a trillion dollars locking up non-violent drug offenders the way that we do. So this system is broken, black or white. You don't need to call it racial intent [or] racial impact. You just gotta do something about it."

One could be forgiven for thinking that the Anglo Republican from Kentucky traded talking points with the African-American Democrat from New Jersey. Paul briefly and directly addressed the racial component of the policy issue in a way that acknowledges a straightforward reality. Importantly, he did not ascribe racism to the justice system nor run the risk of alienating law enforcement officers, a crucial constituency in criminal justice reform. Rather than delve into the racial morass of this policy problem, Booker instead chose to focus attention on the expensive price tag attached to a "dumb, broken system." The New Jersey senator embodies a race-neutral pragmatism key to catalyzing a complicated public policy problem with racial implications. Senators Paul and Booker define this policy problem with rhetoric that emphasizes the adverse economic consequences of staying the course. By consciously

focusing on fiscal efficiency rather than racial injustice, these legislators likely increased the likelihood that their initiative would rise to a more prominent position on the policy agenda.

The second stream of the policymaking process concerns potential solutions for policy problems.<sup>112</sup> These solutions – both new and old – compete with one another and sometimes combine into hybrid solutions.<sup>113</sup> In order for a solution to survive, it must be technically feasible, comport with acceptable values, and anticipate future constraints with respect to budgets or other limiting factors.<sup>114</sup> Different communities or groups within the policy arena specialize in particular fields and with different interests, strategically choosing when and how to cooperate to solve certain problems.<sup>115</sup> The relative closeness or fragmentation of those communities play an important role in the ability to successfully collaborate to solve a policy problem.<sup>116</sup>

Removing criminal history questions from job applications and requiring employers to guarantee individualized assessments in hiring decisions are feasible measures. Government employers and large private companies with sophisticated human resources departments should be especially capable of complying with these changes. These proposed policy solutions also align with a number of prevailing American values. Such reforms could bring about more efficient government spending and increase certain

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<sup>112</sup> Kingdon at 116.

<sup>113</sup> Id. at 117.

<sup>114</sup> Id. at 131-137

<sup>115</sup> Id. at 122.

<sup>116</sup> Id. at 118.

tax revenues. In addition, improving the employment prospects of people who were formerly incarcerated comports with social justice values such as redemption, hope, and opportunity. Racial and class equality might also be served by enacting Ban the Box-style solutions. With respect to future constraints, these policy proposals are unlikely to place any consequential strain on a government's budget. In fact, fair chance hiring policies have anecdotally been shown to produce modest fiscal savings in some instances.<sup>117</sup> In sum, this policy solution meets a number of criteria that suggest it could be both an effective and realistic method of increasing employment outcomes for the formerly incarcerated.

The political stream is a third consideration that primarily examines public forces outside the inner workings of government.<sup>118</sup> The national mood, vaguely characterized by public opinion trends, provides politicians with a sense that a significant faction of citizens are conceiving of policy issues in a discernible pattern.<sup>119</sup> Organized pressure from interest groups can also have a substantial effect on the political stream, especially when a consensus emerges among multiple groups.<sup>120</sup> Election results and the corresponding changes in the makeup of executive and legislative branch personnel

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<sup>117</sup> Michelle Natividad Rodriguez and Anastasia Christman, Fair Chance – Ban the Box Toolkit: Opening Job Opportunities for People with Records, NATIONAL EMPLOYMENT LAW PROJECT, at 18, <http://www.nelp.org/content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf>.

<sup>118</sup> Kingdon at 145.

<sup>119</sup> Id. at 146.

<sup>120</sup> Id. at 150.

strongly influence whether the proposed solutions to a policy problem will gain traction and ultimately become law.<sup>121</sup>

With respect to criminal justice reform, a growing interest in realizing cost savings has developed among fiscal conservatives in recent years.<sup>122</sup> This appears to have emboldened a critical mass of conservative elected officials to pursue public policies designed to reduce the significant amount of money spent on incarceration. Interest groups such as Right on Crime have outlined feasible and politically viable solutions aimed at curtailing expenditures in this area.<sup>123</sup> Various Ban the Box groups such as All of Us or None have taken similar steps, motivated instead by a mission of social justice.<sup>124</sup> The combination of these efforts has helped form a broad coalition of actors, bringing this movement to a tipping point.

A “policy window” indicates that an opportunity to advocate for a particular solution or definition of a policy problem has presented itself.<sup>125</sup> A policy window opens when a problem’s indicators seem particularly urgent or when political conditions have changed favorably.<sup>126</sup> Ready-to-mobilize solutions can then attach themselves to those problems or political circumstances.<sup>127</sup> Advocates must often move quickly and decisively, as their policy window could close if the problem is seemingly fixed, its worst

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<sup>121</sup> Id. at 153.

<sup>122</sup> *What Conservatives are Saying about Criminal Justice Reform & Right on Crime*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying/>.

<sup>123</sup> *Priority Issues*, RIGHT ON CRIME, <http://rightoncrime.com/priority-issues/>.

<sup>124</sup> About Us, ALL OF US OR NONE, [http://www.allofusornone.org/about\\_us](http://www.allofusornone.org/about_us).

<sup>125</sup> Kingdon at 165.

<sup>126</sup> Id. at 168.

<sup>127</sup> Id.

component resolved, or if the public's mood shifts noticeably.<sup>128</sup> The numerous Ban the Box and fair chance hiring policy campaigns nationwide provide an instructive illustration of John Kingdon's seminal theoretical framework.

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<sup>128</sup> Id. at 169.

## **IV. IMPACT OF MODIFYING THE TREATMENT OF CRIMINAL HISTORY INFORMATION DURING THE HIRING PROCESS**

### A. Potential Benefits to Employers

While most arguments in favor of fair-chance hiring policies tend to emphasize potential benefits to employees, the analysis would remain incomplete without discussing the ways in which reforming the inquiry of a candidate's conviction history can benefit employers as well. Although often viewed as forced compliance with yet another government-created regulation, a fair-chance hiring framework can in many instances help guide employers to make an optimal hiring decision. In other words, an upfront transaction cost stands a good chance of paying off in the long-run.

In order to ultimately hire the most qualified candidate, an employer should engage the process with an unbiased approach. Delaying criminal background checks until after a conditional offer of employment has been made serves to segregate two distinct components of the hiring calculus: assessing positive qualifications with an impartial eye and weighing those abilities against legitimate – not merely perceived – negative risk factors.<sup>129</sup> Without knowledge of any criminal history, the employer

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<sup>129</sup> Michelle Natividad and Nayantara Mehta, A Key Fair-Chance Hiring Best Practice: Delaying Conviction Inquiries until the Conditional Job Offer, NATIONAL EMPLOYMENT LAW PROJECT, at 3, [http://www.allofusornone.org/about\\_us](http://www.allofusornone.org/about_us).

increases the likelihood that only an individual's aptitude and competence will guide the former component of that determination.<sup>130</sup>

If it turns out that the applicant does in fact have a conviction history, then any potential risk posed by that prior conduct can be balanced with that person's status as the otherwise most qualified candidate.<sup>131</sup> When a background check performed early in the hiring process reveals a prior criminal act, it might become quite difficult for an employer to sort out positive qualifications from potential dangers presented by an applicant's status as someone with a criminal record.<sup>132</sup> Avoiding the uncertainty and ambiguity associated with early-stage background checks should benefit the employer's decision-making process.

Some companies have a policy of conducting criminal background checks, drug tests, or other screens at early stages of the hiring process, before making a decision on the most qualified candidate. Waiting to assess an applicant's conviction information until later in the process – for example, after a conditional offer of employment is made – can help some employers realize a modest cost savings.<sup>133</sup> This is achieved by avoiding unnecessary background checks on under-qualified applicants who are unlikely to be hired. Anecdotal evidence from the City of Minneapolis and Alameda County, California supports this proposition.<sup>134</sup> It should be noted, however, that a common argument

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<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> Id. at 2.

<sup>134</sup> Atkinson and Lockwood, at 7.

against Ban the Box and fair-chance initiatives is that employers actually expend *more* resources unknowingly interviewing applicants with criminal records whom they would presumably never hire, due to their conviction history. The question of cost savings can cut both ways and might not have a definitive answer, but the fact remains that a judicious use of conviction inquiries can benefit employers in some instances by preserving both time and financial resources.

### B. Opposition from Employers

Despite a diverse group of lawmakers, employee rights advocates, religious groups, and even employers in support of Ban the Box and other fair-chance hiring practices, a number of employers and business associations remain in opposition.<sup>135</sup> These groups cite serious and specific concerns regarding workplace violence, employee theft, and on-the-job drug use. In addition, more general apprehensions regarding productivity, performance, and reliability underlie this position.<sup>136</sup> Increased exposure to civil liability could also stem from negligent hiring, failure to supervise, or vicarious liability actions.<sup>137</sup> The National Federation of Independent Business has also conveyed the trepidation of some members regarding civil lawsuits or even criminal liability.<sup>138</sup> These business owners fear that complying with a new regime of regulations could prove

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<sup>135</sup> Chad Brooks, Growing 'Ban the Box' Movement Impacts Hiring Practices, FOX BUSINESS SMALL BUSINESS CENTER (August 14, 2014), <http://smallbusiness.foxbusiness.com/legal-hr/2014/08/14/growing-ban-box-movement-impacts-hiring-practices/>.

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Id.

costly and create employment discrimination liability where none existed previously.<sup>139</sup> Even businesses that have experienced success hiring convicted felons harbor anxiety that the risk of lawsuits would outweigh the potential benefits that would accompany a change in this area of law.<sup>140</sup> Finally, some employers oppose restrictions on the use of criminal background checks because it infringes on the freedom to manage a business in the manner its owner sees fit.<sup>141</sup>

In some jurisdictions, businesses opposed to Ban the Box and fair-chance legislation have worked with employee rights advocates and successfully crafted compromise proposals. House Bill 1188, passed by the 83<sup>rd</sup> Texas Legislature in 2013, is one such example.<sup>142</sup> Then-Governor Rick Perry signed this piece of legislation after legislators inserted a provision providing employers explicit protection from negligent hiring lawsuits. The relevant section states that: “A cause of action may not be brought against an employer, general contractor, premises owner, or other third party *solely* (emphasis added) for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of a criminal offense.”<sup>143</sup>

That exception, however, does not preclude all such lawsuits. It mentions specifically previous crimes committed while performing job duties substantially similar

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<sup>139</sup> Id.

<sup>140</sup> Id.

<sup>141</sup> Id.

<sup>142</sup> HB 1188, 83<sup>rd</sup> Leg. (Tex. 2013).

<sup>143</sup> Id. at Sec. 142.002 (a)

to or under similar conditions as the current position.<sup>144</sup> In other words, an employer is more likely to find itself liable if an employee has previously been convicted of violent crimes like murder, aggravated robbery, aggravated kidnapping, sexual assault, or child abuse. Additionally, employees previously convicted of crimes with an element of fraud, misuse of funds, or misuse of property could open the employer to liability, if it was foreseeable that the employee's current position would involve a fiduciary duty in managing funds or property.<sup>145</sup>

Many small businesses have ardently opposed new administrative burdens brought on by changes to local ordinances and state laws. They point specifically to the lack of human resources personnel and expertise needed to interpret and properly apply laws that deal with at times complex statutory and regulatory schemes.<sup>146</sup> In short, making nuanced and individualized hiring decisions can be quite difficult. Offering these reasons, the legislative advocacy arm of the National Federation of Independent Businesses helped kill a Louisiana fair-chance hiring bill.<sup>147</sup>

Many small- and mid-size businesses also cite a lack of liquidity or adequate insurance coverage that makes them more vulnerable to civil suits stemming from negligent hiring or failure-to-supervise claims.<sup>148</sup> Even the cost of merely defending a

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<sup>144</sup> Id. at Sec. 142.002 (b)(2)(A)

<sup>145</sup> Id. at Sec. 142.002 (b)(2)(C)

<sup>146</sup> Rhonda Smith, Employer Concerns About Liability Loom As Push for Ban-the-Box Policies Spreads, BLOOMBERG BNA HUMAN RESOURCES REPORT (August 4, 2014), <http://www.bna.com/employer-concerns-liability-n17179893943/>.

<sup>147</sup> Chad Brooks, FOX BUSINESS SMALL BUSINESS CENTER.

<sup>148</sup> Rhonda Smith, BLOOMBERG BNA.

lawsuit can tie up the limited assets necessary for a fledgling venture to expand and become profitable. Likewise, a financial loss arising from employee fraud or misuse of funds is more likely to do substantial harm to a small business. In sum, the vast majority of businesses in the United States are of a size that makes them less equipped to handle the risk of internal loss posed by certain categories of individuals with a criminal record.

The challenges listed in the preceding paragraphs signal opportunities for lawmakers, employee rights advocates, and business owners to seek out creative solutions that balance legitimate business dilemmas with the legal parameters that protect the right of employees to make a living. The National Association of Criminal Defense Lawyers published “Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime,” a report that outlines some helpful recommendations addressing these concerns.<sup>149</sup> Among these proposals is free or reduced-price bonding to provide insurance coverage that would protect employers who hire people who have been formerly incarcerated from the risk presented by dishonest employees.<sup>150</sup> Limited immunity from negligent hiring liability – as exemplified by the Texas statute discussed above – provides another incentive for employers to look beyond a criminal record and make truly individualized hiring decisions.<sup>151</sup>

### C. Economic Benefits of Optimizing Post-Release Employment

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<sup>149</sup> *Collateral Damage*, NACDL (May 2014) at 30-64, <http://webcache.googleusercontent.com/search?q=cache:ZK0CuMKb-B4J:www.nacdl.org/WorkArea/DownloadAsset.aspx%3Fid%3D33203+&cd=1&hl=en&ct=clnk&gl=us>.

<sup>150</sup> *Id.* at 52.

<sup>151</sup> *Id.*

Optimizing employment outcomes for people who have been incarcerated can have a positive effect on the economy in a number of ways. These advantages range from the very direct increased earning potential for this population to the less direct, difficult-to-measure quality of life improvements that typically accompany lower recidivism and crime rates. A clear understanding of these individual-level and community-wide benefits will empower business leaders, public officials, and other advocates to effect change in an optimally beneficial way.

It is important to note that the following discussion is not intended to be a comprehensive list of quantifiable benefits that could result from improving the employment outcomes of individuals after they are released from jail or prison. Neither is it meant to act as a cost-benefit tool, since an explanation of the costs associated with implementing employment programs or legislative changes is beyond the scope of this report and not undertaken. The economic benefits laid out in this section merely provide reasonable estimates of effects resulting from policy or programmatic changes aimed at bettering job prospects for the formerly incarcerated.

### *1. Increased Earnings for Individuals Who Were Formerly Incarcerated*

A 2011 study assessing the impact of re-entry initiatives found that finding consistent employment for a representative man with a criminal record in his late

twenties or early thirties would raise his lifetime earnings by over \$500,000<sup>152</sup>. This figure even accounts for the wage discount that offenders typically experience, relative to employees without a criminal record who hold comparable positions.<sup>153</sup>

## *2. Increased Revenue from Sales Tax and Income Tax Collections*

A case study from the city of Philadelphia is helpful in illustrating the positive impact that employing a greater proportion of individuals who were formerly incarcerated can have on income tax and sales tax revenues. Beginning with a wage estimate that accounts for the depressed salary rate that the average person with a criminal record faces in that labor market, the authors then estimate associated collections for the city's wage tax and sales tax.<sup>154</sup> The lifetime *city wage tax* impact (i.e. revenue added) per employee ranges from about \$13,000 for a formerly incarcerated high school dropout to over \$55,000 for a released inmate who holds a Bachelor's degree.<sup>155</sup> It follows, then, that *federal income tax* revenues would increase as well.

Data from the U.S. Bureau of Labor Statistics' 2010 Consumer Expenditure Survey helps assess the potential impact of increasing the employment rate of individuals

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<sup>152</sup> Economy League of Greater Philadelphia, *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia*, OFFICE OF DEPUTY MAYOR FOR PUBLIC SAFETY (September 2011) at 10, <http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 12.

with a criminal record could have on *sales tax* collections.<sup>156</sup> Simply multiplying a per capita consumer spending figure for employed members of this group by the sales tax rate yields an estimate for sales tax revenue per year and over one's lifetime.<sup>157</sup> Analyses reveal that finding jobs for a representative group of 100 people who were formerly incarcerated could bring about a \$19,000 increase in the city's portion of sales tax revenues per year and about \$770,000 over those workers' lifetimes after release.<sup>158</sup> These estimates suggest that the corresponding state share of sales tax collections would increase as well.

### *3. Savings from a Decrease in Recidivism*

Improving employment opportunities for individuals with a prior conviction should bring about a decrease in the number who commit a crime during the three years immediately following release.<sup>159</sup> And although a comprehensive discussion of that benefit is beyond the scope of this report, a few of those positive outcomes will be mentioned here. First, local and state governments can expect to realize modest cost savings on law enforcement agencies, court systems, jails and prisons, and supervision of

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<sup>156</sup> U.S. Department of Labor, *Consumer Expenditures in 2010: Lingering Effects of the Great Recession*, U.S. BUREAU OF LABOR STATISTICS (August 2012),

[http://www.bls.gov/opub/reports/cex/consumer\\_expenditures2010.pdf](http://www.bls.gov/opub/reports/cex/consumer_expenditures2010.pdf).

<sup>157</sup> Economy League of Greater Philadelphia, at 13.

<sup>158</sup> *Id.*

<sup>159</sup> National Institute of Justice, *Research on Reentry and Employment* (April 3, 2013),

<http://www.nij.gov/topics/corrections/reentry/pages/employment.aspx>.

probation and parole.<sup>160</sup> In theory, fewer arrests, a decrease in people processed through courthouses, a drop in incarceration rates, and fewer offenders supervised after release from jail or prison should lead to a decrease in spending on these services. Furthermore, many jurisdictions could expect to see a drop in outlays for healthcare and social services provided to ex-offenders.<sup>161</sup> For example, one study found that about 20 percent of heads of households who rely on Temporary Assistance for Needy Families (TANF) had a prior arrest or conviction record.<sup>162</sup> Accounting for the disqualification from TANF assistance that results from certain crimes, the actual financial destitution experienced by people who were formerly incarcerated and their families is likely much higher.

In addition to cost savings for government entities, reduced recidivism is also beneficial to a community's quality of life indicators. Fewer crime victims should translate to a corresponding drop in property damage and loss.<sup>163</sup> Healthcare costs for victims of violent crimes should decline as well.<sup>164</sup> Other, less tangible victim costs such as pain and suffering or lost workplace productivity could factor into the discussion as well.<sup>165</sup>

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<sup>160</sup> Justice Center, *Lessons from the States: Reducing Recidivism and Curbing Corrections Costs through Justice Reinvestment*, THE COUNCIL ON STATE GOVERNMENTS (April 2013), [https://csgjusticecenter.org/wp-content/uploads/2013/04/FINAL\\_State\\_Lessons\\_mbedit.pdf](https://csgjusticecenter.org/wp-content/uploads/2013/04/FINAL_State_Lessons_mbedit.pdf).

<sup>161</sup> Economy League of Greater Philadelphia, at 14.

<sup>162</sup> Gretchen Kirby, Thomas Fraker, LaDonna Pavetti, Martha Kovac, *Families on TANF in Illinois: Employment Assets and Liabilities*, DEPARTMENT OF HEALTH AND HUMAN SERVICES (June 10, 2003), <http://aspe.hhs.gov/sites/default/files/pdf/72616/report.pdf>.

<sup>163</sup> Economy League of Greater Philadelphia, at 14.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

It should be noted that, because the costs of dealing with offenders are distributed among several agency types, it might be challenging to accurately estimate the benefits that accrue to taxpayers as a result of cost savings. Additionally, these cost savings often do not convert into *actual* fiscal savings, as government budget writers tend to use savings in one area to plug holes in other areas. In sum, the economic impact of employment initiatives targeting people with criminal records is likely to be positive but modest.

#### *4. Other Long-Term Benefits*

The long-term sustainability of Social Security and the continued vitality of the American economy depend in part on young, productive workers replacing the Baby Boomer cohort that is rapidly aging out of the workforce.<sup>166</sup> This demographic trend is occurring while many regions of the country are growing younger and more diverse.<sup>167</sup> If young men of color continue to be disproportionately represented in the justice system, widespread and long-term negative consequence stemming from lower wages and a high recidivism rate will likely persist.

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<sup>166</sup> Stephen C. Goss, The Future Financial Status of the Social Security Program, SOCIAL SECURITY ADMINISTRATION (2010) at 1-3, <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.pdf>.

<sup>167</sup> Jens Manuel Krogstad and Richard Fry, Dept. of Ed. Projects public school will be ‘majority-minority’ this fall, PEW RESEARCH CENTER (August 18, 2014), <http://www.pewresearch.org/fact-tank/2014/08/18/u-s-public-schools-expected-to-be-majority-minority-starting-this-fall/>.

Improving employment outcomes for even a small number of formerly incarcerated individuals can result in noticeable economic benefits. The most impactful of those are realized by the person formerly incarcerated and his family, in the form of increased income. Local, state, and federal coffers should also experience a small boost as sales and income tax collections will rise when a subsection of the population earns and spends more money. Finally, the community benefits – albeit in a less palpable way – from a reduced recidivism rate among individuals after their release from incarceration.

## V. RECOMMENDATIONS AND CONCLUSION

### **A. Local and state governments should create incentives that encourage businesses to hire individuals with criminal records in jobs where they are likely to succeed.**

The Philadelphia Reentry Employment Program (PREP) Tax Credit<sup>168</sup> is a bold policy solution that takes a long-term investment approach to incentivizing the employment of people post-release. Providing sizeable business tax credits to proprietors who commit to hiring people who were formerly incarcerated at a minimum salary level should provide strong encouragement to businesses already considering hiring an individual in the process of reentry. While the political will to invest a substantial sum of money in a potentially controversial program is likely not present in many jurisdictions, the PREP tax credit illustrates a useful starting point for cities, counties, and states that decide to implement such a policy.

It should be noted, however, that while public support of initiatives that target people with criminal records has increased in recent years, ambitious incentives such as tax incentives could encounter serious opposition. People without criminal records who are also searching for jobs likely represent a more sympathetic constituency and lawmakers would almost certainly take their opposition into serious consideration. Fair chance hiring advocates could possibly find a way to broaden their coalition to include this group of job-seekers and outline policy solutions that assuage concerns that these tax credits amount to a zero-sum public policy.

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<sup>168</sup> *Tax Credits*, CITY OF PHILADELPHIA (October 15, 2015) at 97, <http://www.phila.gov/Revenue/Regulations/BIRT%20Regulations%20Compilation.pdf>.

A less bold but potentially effective and practical strategy is for employment advocates and private sector representatives to focus efforts on identifying job sectors and companies that are most likely to hire and retain people with criminal records. An additional approach likely to increase employment of these individuals is reduced price bonding that would help protect employers against the risk of hiring an employee who had spent time in jail or prison. The Federal Bonding Program sponsored by the U.S. Department of Labor<sup>169</sup> provides a model worthy of replication for issuing insurance policies that cover a financial loss resulting from employee dishonesty. Irrespective of the actual danger posed by people who were formerly incarcerated in the workplace, the perception of these workers being untrustworthy is quite real. Therefore, a policy solution aimed at addressing this particular disincentive to hiring is an important component in encouraging successful reintegration.

**B. Local and state governments should develop outreach programs that inform private employers of the potential benefits and minimal risks of hiring people who were formerly incarcerated.**

Many employers are likely unaware of the potential benefits associated with hiring someone with a criminal record. Moreover, potential risks are likely overblown. An educational outreach program that explains EEOC enforcement guidance could have the dual benefit of promoting compliance with the law – thereby minimizing lawsuits and protecting applicants’ civil rights – and matching employers with a greater number of qualified job candidates. The mechanics of such an outreach could take on a number of

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<sup>169</sup> *The Federal Bonding Program: A Unique Job Placement Tool for the At-Risk Job Seeker*, US DEPARTMENT OF LABOR, <http://www.bonds4jobs.com/>.

different forms: celebrity spokesperson, city employee designated to do outreach, newspaper ad campaign, television, etc. Empowering employers with knowledge of the potential benefits is preferable to creating a punitive regime that penalizes employers for failure to follow additional regulation. In addition to being less adversarial, outreach initiatives could also be a more efficient way to target efforts and stretch limited government resources.

**C. Local and state governments should take measures to limit unintended consequences and ensure that private employers are not exposed to unnecessary liability.**

Protecting employers against excessive liability for employment discrimination is a particularly important consequence to avoid when implementing a new regime aimed at protecting job opportunities for people with criminal records. Because many employers are initially reluctant to hire a formerly incarcerated applicant for legitimate business reasons, it is important that a new regulatory framework guard against unintended consequences. The steps Texas legislators have taken to indemnify employers for certain civil actions illustrate a well-reasoned approach. Absent gross negligence in hiring or specific intent to violate the employment rights of an individual with a prior conviction, private employers should not be held liable for employment discrimination against individuals with criminal records. Statutory reforms that impose *criminal* liability on private employers who fail to comply with fair chance hiring requirements are best avoided.

**D. Local and state governments should commit to tracking data and undertake program evaluation of re-entry and other programs targeting employment outcomes of individuals with prior convictions.**

Many programs geared toward helping people who have been incarcerated obtain and hold steady jobs have only recently been implemented in the past few years.

Accordingly, it is important to conduct rigorous program evaluations of the initiatives that are currently in place and that will come on line in the coming years. Compiling data on hiring rates of released prisoners, job performance measures, retention rates, and other relevant criteria would equip policymakers with valuable information on which to base future decisions.

**E. Congress should pass recent legislative proposals that embrace a comprehensive approach to criminal justice reform.**

The current legislative proposals working their way through Congress serve as an acknowledgement that sentencing reform, record expungement, and hiring practices are all integral to the successful rehabilitation and reintegration of individuals after their release from incarceration. This report has focused primarily on fair chance hiring policies, but finding flexible ways to assist a growing but often-neglected population requires a comprehensive approach. For example, a re-examination of the licensing restrictions that many states place on several professions can dramatically limit career opportunities for people with criminal records. In several instances, there is little if any relationship between the restricted profession and the risk presented by past criminal conduct. Ban the Box will surely help employment prospects for this group, but a

comprehensive solution that hopes to bring about significant change must address other obstacles to re-entering the workforce.

### Conclusion

This report rests on the belief that a criminal record should not consign an individual to a life sentence of poverty. It has outlined several of the ways in which a past criminal record can impede employment options and the benefits associated with re-integrating and empowering the formerly incarcerated as productive members of society. The various solutions assessed were informed by social justice values, the push for civil rights, and fiscal conservatism. Because reforms at all levels of government have occurred rapidly over the past few years, it is imperative that both governmental and non-governmental actors meticulously track the resulting changes. Armed with data that confirms a positive economic impact and decreased government spending on certain programs, advocates will be well-positioned to drum up the political will necessary to enact more robust public policies aimed at improving the employment prospects of ex-offenders.

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