

# Overlooked and Undervalued: Ex-Offenders in the Employment Market

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## Introduction

Let's think about a hypothetical for a moment: Joe is a thirty-five-year-old man with a finance degree looking for work. Unfortunately, Joe is having trouble finding employment because he has a felony conviction. When Joe was twenty-eight, he accidentally hit and killed a small child after the child ran out from behind a truck and into the street. Joe pled guilty to involuntary manslaughter and was sentenced to three years in prison. Joe has been out of custody for almost five years now, six months of which has been completely free of supervision. During his time on supervision, Joe was never cited for a parole violation. Although this conviction is the only mark on Joe's record, he has found it difficult to find gainful employment. Based on an amalgamation of real-life situations,<sup>1</sup> Joe's story will be used to show the hurdles that ex-offenders face when looking for employment.

The stark reality is that individuals with criminal records are disproportionately rejected from the employment market due to the lack of state-level legal protections preventing employers from discriminating against applicants based on their prior criminal convictions. The stigma surrounding a criminal conviction leads to disproportionate unemployment rates for those with criminal convictions, especially applicants of color. Even with common legislation in place, like the so-called "Ban-the-Box" legislation, research shows that when minority applicants do not disclose their conviction status, they are being rejected at least in part because of race-based assumptions about

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1. Charis Jones, "You Just Want to . . . Have a Chance": *Ex-Offenders Struggle to Find Jobs Amid COVID-19*, USA TODAY (Feb. 3, 2021, 3:53 PM), <https://www.usatoday.com/story/money/2021/02/03/unemployment-ex-offenders-among-many-struggling-find-work/6656724002> [perma.cc/35E8-NHMV]; Les Lovoy, *Life After Prison: Ex-Felons Often Struggle to Find a Job*, WBHM (June 24, 2014), <https://wbhm.org/2014/life-after-prison-ex-felons-often-struggle-to-find-a-job> [perma.cc/6MHS-M6Z8].

their criminal conviction status.<sup>2</sup> Ex-offenders are faced with numerous obstacles during their employment search, and state legislatures are contributing to the hardships that these individuals face through strict licensing limitations, ineffective Ban-the-Box statutes, and their failure to protect ex-offenders from discrimination in the employment market. This lack of protection results in higher recidivism rates, lower economic production, both individually and nationally, and has long-lasting effects. And this is unfortunate because hiring ex-offenders not only benefits those with convictions, but employers and society as a whole. Employers that hire ex-offenders actually experience less turnover in their staff and are able to take advantage of tax credits for hiring qualified ex-offenders.<sup>3</sup>

Meanwhile, state legislatures have been experimenting with different statutory solutions to the problems ex-offenders experience in the employment market. The most popular legislative solution is Ban-the-Box, which limits an employer's ability to ask about an applicant's conviction or arrest history during the hiring process. States have also begun to experiment with automatic record clearing laws and training judges and prosecutors about the collateral consequences that accompany a criminal conviction, presumably to shape solutions in individual cases to avoid convictions if possible. Some states have gone so far as to explicitly prohibit discrimination against ex-offenders, treating them as a protected class, similar to those classes protected by Title VII of the Civil Rights Act of 1964.<sup>4</sup> Several of these solutions have some promise, but to best encourage change in the employment market and improve the treatment of ex-offenders after release, state legislatures should pass "Fair Chance Laws" to mitigate the negative effects of a criminal conviction. Fair Chance Laws delay when an employer can ask about convictions until later in the hiring process, require employers to consider the time passed since a conviction, whether the offense is relevant to the job position, and evidence that the applicant is rehabilitated.<sup>5</sup> They also adopt standards to strengthen the reliability of background checks.<sup>6</sup> Because of their comprehensive design, these laws could also mitigate the adverse effects of Ban-the-Box legislation and other discriminatory practices in the employment market. This paper will discuss the prominence and scope of the problems faced by those with criminal records, the relevant state practices in place that perpetuate these problems, the policies that states are implementing to

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2. *See infra* notes 37–45.

3. *See infra* notes 170–74.

4. *See infra* notes 146–56.

5. NAT'L EMP. L. POL'Y, FACT SHEET: "BAN THE BOX" IS A FAIR CHANCE FOR WORKERS WITH RECORDS 2 (2017), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf> [<https://perma.cc/D8XB-DTDM>].

6. *Id.*

attempt to address these issues, and which practices are most likely to help those with convictions who are trying to enter the employment market.

## I. Background

### A. The Problem

Based on data collected in 2018, the incarceration rate in the United States has increased almost threefold since 1980.<sup>7</sup> The current incarceration rate is about 698 per 100,000, or slightly less than one percent of the population.<sup>8</sup> At any given time, there are about 6.9 million people in jail, prison, or under supervision in the United States.<sup>9</sup> Even though the incarceration rate has fallen slightly since 2005,<sup>10</sup> about 600,000 individuals are released from state and federal prisons each year.<sup>11</sup> In total, about seventy million people living in the United States have criminal records.<sup>12</sup>

The employability of these seventy million people is greatly affected by their criminal records. According to research, individuals with criminal records are fifty percent less likely to receive a callback from a potential employer.<sup>13</sup> When surveyed, about sixty percent of employers said they “probably wouldn’t” or “definitely wouldn’t” hire someone

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7. *Is the Criminal Justice System Working? Is the Country Getting Safer?*, USA FACTS, <https://usafacts.org/state-of-the-union/crime> [<https://perma.cc/PJN2-B296>].

8. Peter Wagner & Wanda Bertram, “What Percent of the U.S. Is Incarcerated?” (*And Other Ways to Measure Mass Incarceration*), PRISON POL’Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated> [<https://perma.cc/NZA2-BVGH>].

9. *Incarceration & Reentry*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> [<https://perma.cc/3AXE-QYJG>].

10. Steven Raphael, *The Employment Prospects of Ex-Offenders*, FOCUS, Winter 2007–08, at 21, 21.

11. *Incarceration & Reentry*, *supra* note 9.

12. Michael Smallberg, “Ban the Box” on Criminal History Records: BGOV Closer Look, BLOOMBERG L. (Dec. 18, 2019, 1:26 PM), <https://news.bloomberglaw.com/daily-labor-report/ban-the-box-on-criminal-history-records-bgov-closer-look> [<https://perma.cc/UW6R-MQSC>]; Sheena Meade & Jabari Paul, Opinion, *Americans with Criminal Records Will Be Left out of Recovery If We Don’t Fix these Policies*, CNN (Oct. 9, 2020, 11:23 AM EDT), <https://www.cnn.com/2020/10/09/perspectives/criminal-records-covid-economic-recovery/index.html> [<https://perma.cc/YQ3E-QR2B>].

13. LUCIUS COULOUTE & DANIEL KOPF, PRISON POL’Y INITIATIVE, *OUT OF PRISON & OUT OF WORK: UNEMPLOYMENT AMONG FORMERLY INCARCERATED PEOPLE* (2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/C8PN-9WMF>]; CHRISTINA STACY & MYCHAL COHEN, URBAN INST., *BAN THE BOX AND RACIAL DISCRIMINATION: A REVIEW OF THE EVIDENCE AND POLICY RECOMMENDATIONS* 1, 3 (2017), [https://urban.org/sites/default/files/publication/88366/ban\\_the\\_box\\_and\\_racial\\_discrimination.pdf](https://urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf) [<https://perma.cc/8X7H-YDKN>]; Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991, 1005 (2015); Raphael, *supra* note 10; ADAM LOONEY & NICHOLAS TURNER, URBAN INST., *WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION* 1, 4 (2018), [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [<https://perma.cc/8RS4-Q9LZ>].

with a criminal record.<sup>14</sup> These discriminatory practices in hiring have resulted in an unemployment rate for ex-offenders that is almost five times higher than that of the general population.<sup>15</sup> The unemployment rate for individuals with criminal records is about twenty-seven percent, compared to just over five percent for the general population.<sup>16</sup> Over sixty percent of people who have previously been incarcerated are still unemployed a year after being released.<sup>17</sup> Among thirty-year-old men who are not working, thirty-three percent are in jail, are in prison, or have a criminal record.<sup>18</sup> Additionally, researchers have been able to separate the effects of having a criminal record from other factors that have been shown to affect someone's chances of being hired, like race and gender, which suggests that the applicant's criminal record acts as an independent reason for denial.<sup>19</sup>

Despite what might be assumed, individuals with criminal records are looking for jobs at rates higher than the general population. Among twenty-five to forty-four-year-olds, over ninety-three percent of those with criminal records are employed or actively looking for employment, compared to almost eighty-four percent of those in the general population.<sup>20</sup> Additionally, the number of open jobs has been trending upward for the last eight years, and predictions show a continued upward trend through 2022.<sup>21</sup> As the number of individuals being released from custody continues to increase, the number of individuals in search of jobs will also increase to fill the growing number of jobs available. These facts show that the disproportionate unemployment rate is not caused by job availability or ex-offenders being unwilling to work; they are just being systematically excluded from the employment market.

### *B. Why Does This Problem Matter?*

Remedying this inequity will have benefits, like lowering offender recidivism rates, giving a greater number of people the ability to contribute to the economy, and preventing the problem from worsening

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14. Raphael, *supra* note 10.

15. COULOUTE & KOPF, *supra* note 13.

16. *Id.*

17. Lottie Joiner & Nat'l J., *How Families Pay the Never-Ending Price of a Criminal Record*, ATLANTIC (Dec. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641> [<https://perma.cc/5T2E-YYNG>]; AM. BAR ASS'N CRIM. JUST. SECTION, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK, THE NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS 2, 4–5 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/Z82R-BVMS>].

18. ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1, 2 (2018), [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [<https://perma.cc/8RS4-Q9LZ>].

19. COULOUTE & KOPF, *supra* note 13.

20. *Id.*

21. *United States Job Openings: 2000-2020 Data*, TRADING ECONS., <https://tradingeconomics.com> [<https://perma.cc/3LCD-DGKT>].

with the increased availability of criminal record information through technological advances.

Recidivism refers to the likelihood or tendency to relapse back into a particular behavior, especially criminal activity.<sup>22</sup> Numerous studies have found a negative correlation between employment and recidivism.<sup>23</sup> While recidivism rates can be linked to multiple factors,<sup>24</sup> the lack of stable employment is a sizeable factor connected to an increase in recidivism.<sup>25</sup> Giving ex-offenders access to employment has been found to have a positive effect on recidivism rates and the long-term success of those individuals.<sup>26</sup> One theory for this effect is that the lack of financial resources due to unemployment increases the likelihood that the individual will turn back to crime because they are desperate and perceive crime to be a necessity.<sup>27</sup> Employment provides greater economic stability, which lessens an offender's desperation and perception that crime is necessary to make a living.<sup>28</sup> Further, research has found that having only a short-term job does not have a positive effect on recidivism rates; only employment longer than six months has been found to impact an offender's chances.<sup>29</sup> For example, a study done on a program called Exodus Transitional Community, an organization in East Harlem, New York, that offers employment training and support for ex-offenders, found that seventy-eight percent of the participants were able to secure employment at the end of the program.<sup>30</sup> Even more impressive, the recidivism rate of those that finished the program was only four percent.<sup>31</sup> This low rate becomes even more impressive when it is compared to the national recidivism rate, which is sixty-eight percent within three years of release, seventy-nine percent within six years, and eighty-three percent within nine years.<sup>32</sup> Similar success has been seen at Concordance Academy in St. Louis, Missouri.<sup>33</sup> Concordance

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22. *Recidivism*, BLACK'S L. DICTIONARY (11th ed. 2011).

23. ADIAH PRICE-TUCKER, AMY ZHOU, ANDREW CHARROUX, CHOETSOW TENZIN, EMMA ROBERTSON, HODA ABDALLA, JEFFREY GU, JORDAN BARTON, MARIA KESELJ, OWEN BERNSTEIN, PAUL ALEXIS, SETHU ODAYAPPAN & TABITHA ESCALANTE, HARV. UNIV. INST. OF POL., SUCCESSFUL REENTRY: A COMMUNITY-LEVEL ANALYSIS 1, 8–9 (2019), [https://iop.harvard.edu/sites/default/files/sources/program/IOP\\_Policy\\_Program\\_2019\\_Reentry\\_Policy.pdf](https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf) [perma.cc/P34D-5L7R]; *Recidivism: The Ultimate Guide*, PRISON INSIGHT (2021), <https://prisoninsight.com/recidivism-the-ultimate-guide> [perma.cc/E9VX-H5W3]; Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 TEMP. L. REV. 921, 921–22 (2013).

24. *Recidivism: The Ultimate Guide*, *supra* note 23.

25. *Id.*

26. PRICE-TUCKER ET AL., *supra* note 23, at 1, 4.

27. *Recidivism: The Ultimate Guide*, *supra* note 23.

28. PRICE-TUCKER ET AL., *supra* note 23, at 10.

29. *Id.* at 9.

30. *Id.*

31. *Id.*

32. *Recidivism: The Ultimate Guide*, *supra* note 23.

33. Bureau of Justice Assistance, *Concordance Academy of Leadership—Wholistic Substance Use Treatment Service for Justice-Involved Adults Pre- and Post-Release*,

Academy provides a whole host of services to its participants, including mental health treatment, substance use training, education and job readiness training, and more, all with the goal of placing participants in full time employment and reducing recidivism in St. Louis.<sup>34</sup> Since its inception in 2015, Concordance boasts that recidivism rates among its participants have been reduced by fifty-six percent.<sup>35</sup> Studies have found that other factors, such as education level, the job local market, and the community, impact someone's ability to obtain gainful employment after release, which, in turn, directly impacts recidivism.<sup>36</sup> A study done in Honolulu, Hawaii, found a "sharp reduction" in recidivism, which showed that alleviating some of the social stigmas associated with a criminal record successfully reduced the chance of an ex-offender recidivating.<sup>37</sup>

### C. *The Exaggerated Impact on Minority Applicants*

Although Ban-the-Box laws have been viewed as a good way to increase employment of Black applicants who may be more likely than white applicants to have criminal records because of racial disparities in the criminal justice system, research suggests that policies like Ban-the-Box may increase racial discrimination against minority applicants.<sup>38</sup> There is a large disparity in the employment rates between white men and men of other races, which is worsened when Ban-the-Box policies are implemented.<sup>39</sup> While the unemployment rate of white men between sixteen and nineteen years old was only 15.6% in the fourth quarter of 2016, the unemployment rate was 29.4% for black men and 22.7% for Hispanic and Latino men in the same age group.<sup>40</sup> Unfortunately, this disparity does not disappear as the sample ages. For white men between twenty and twenty-four, the unemployment rate was 7.9%, compared to 15.3% for Black men in the same age range.<sup>41</sup> Studies have shown that Ban-the-Box laws actually make minority applicants less likely to be hired.<sup>42</sup> Researchers speculate that this decrease in hiring

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BUREAU JUST. ASSISTANCE (Dec. 7, 2021), <https://bja.ojp.gov/funding/awards/15pbja-21-gg-04046-scax> [<https://perma.cc/9QPR-WQ6N>].

34. *Our Re-Entry Model*, CONCORDANCE, <https://concordance.org/our-program> [<https://perma.cc/M79Y-NCUW>].

35. *Id.*

36. PRICE-TUCKER ET AL., *supra* note 23, at 9–10.

37. STACY & COHEN, *supra* note 13, at 14.

38. *Id.* at 12–13.

39. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 1 (U. Mich. L. & Econ. Res. Paper Series, June 2016).

40. STACY & COHEN, *supra* note 13, at 4.

41. *Id.*

42. See Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 321 (2020); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004).

is a result of potential employers “guessing” who the ex-offenders are, based, at least in part, on racial stereotypes.<sup>43</sup> In a study done by Marianne Bertrand and Sendhil Mullainathan, fictitious applicants were given “distinctly black and distinctly white” names, which resulted in a discrepancy in the callback rates.<sup>44</sup> In that study, white-sounding applicants only had to send out ten applications to receive a call back, but black-sounding applicants had to send out fifteen applications to receive the same result.<sup>45</sup> A study done by Amanda Agan and Sonja Starr found that white-sounding applicants were forty-seven percent more likely than minority applicants to receive a callback after Ban-the-Box legislation was implemented, compared to only seven percent before the policy.<sup>46</sup> Agan and Starr’s study concluded that Ban-the-Box policies “encourage racial discrimination” in employment and hiring.<sup>47</sup> This type of racial discrimination in the hiring process is directly contrary to the main goal of Ban-the-Box policies, which is to provide a more even playing field for those with criminal records trying to find employment.<sup>48</sup>

#### D. Economic Consequences

Individuals with criminal records are severely hindered from contributing to the economy long after they are released. Because employers are less likely to hire people with criminal records, those individuals are frequently unable to successfully reenter the job market, creating a significant wealth gap. According to research by Stephen Raphael, professor of public policy at the University of California, Berkeley, the employment rate of twenty-three-year-olds does not recover to pre-incarceration rates until five years after release.<sup>49</sup> Additionally, those that had been incarcerated before turning twenty-three years old earned approximately one-and-a-half times less than those who had not been incarcerated.<sup>50</sup> This results in ex-offenders losing on average approximately \$179,000 in wages by the time they are forty-eight years old.<sup>51</sup> In addition, researchers estimate that the economy lost between 1.5 and 1.9 million workers in 2008 because employers were unwilling to hire applicants with criminal records.<sup>52</sup> Another study estimates that those who have been incarcerated or convicted of a crime

43. Doleac & Hansen, *supra* note 42, at 323.

44. Bertrand & Mullainathan, *supra* note 42, at 992.

45. *Id.* at 998.

46. Agan & Starr, *supra* note 39.

47. *Id.* at 33.

48. STACY & COHEN, *supra* note 13, at 10.

49. Raphael, *supra* note 10, at 23.

50. *Id.*

51. AM. BAR ASS’N CRIM. JUST. SECTION, *supra* note 17, at 2, 5.

52. John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 14 WORKINGUSA 1, 1 (2010); see also NICK SIBILLA, INST. FOR JUSTICE BARRED FROM WORK: A NATIONWIDE STUDY OF OCCUPATIONAL LICENSING BARRIERS FOR EX-OFFENDERS (2020), <https://ij.org/wp-content>

lose approximately \$372.3 billion per year as a group.<sup>53</sup> There is a significant gap in earnings between those that have been convicted of a crime and spent time in prison and those who did not. And individuals who have spent time in prison lost about \$55.2 billion more per year compared to those that have a conviction but didn't serve any prison time.<sup>54</sup> This amounts to a decrease of over fifty-one percent in earnings after someone has spent time in prison.<sup>55</sup> The effects are felt even more harshly in Black and Latino communities.<sup>56</sup> Whites with conviction records suffered an average lifetime earnings loss of \$267,000, while Blacks suffered an average loss of \$358,900, and Latinos suffered an average loss of \$511,500 over their lifetimes.<sup>57</sup> Researchers have found these inequities to be persistent throughout the lives of ex-offenders, which is one of the factors contributing to inter-generational poverty and inequality.<sup>58</sup>

Almost fifty percent of children in the United States have at least one parent with a criminal record,<sup>59</sup> which can lead to disruptions in the child's education and housing stability and have a long-term negative impact on the child's success.<sup>60</sup> Studies have found that growing up in poverty increases the chance that a child will experience poverty as an adult.<sup>61</sup> For children that experienced poverty for eight to fourteen years of their childhood, forty-six percent of them were poor at twenty years old, and forty percent were poor at twenty-five.<sup>62</sup> Those rates are especially shocking considering that only five percent of adults that never experienced poverty as a child were poor at twenty and twenty-five years old.<sup>63</sup> Additionally, children that grow up in poverty are less likely to finish high school and go on to obtain a postsecondary education.<sup>64</sup> Evidence suggests that education reduces the likelihood of criminal activity, but debate exists about whether that correlation is

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/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf [https://perma.cc/JN8V-7C2D].

53. Andrea Cipriano, *Criminal Justice System Deepens Economic Inequality: Study*, CRIME REP. (Sept. 16, 2020), <https://thecrimereport.org/2020/09/16/criminal-justice-system-deepens-economic-inequality-study> [https://perma.cc/4H4C-28P4].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Sheena Meade & Jabari Paul, *Americans with Criminal Records Will Be Left out of Recovery If We Don't Fix These Policies*, CNN BUS. (Oct. 9, 2020, 11:23 AM), <https://www.cnn.com/2020/10/09/perspectives/criminal-records-covid-economic-recovery/index.html> [https://perma.cc/XJ7P-LDGS].

60. Joiner & Nat'l J., *supra* note 17; *see also* Meade & Paul, *supra* note 59.

61. Priyanka Boghani, *How Poverty Can Follow Children into Adulthood*, PBS (Nov. 22, 2017), <https://www.pbs.org/wgbh/frontline/article/how-poverty-can-follow-children-into-adulthood> [https://perma.cc/B22S-PBD7].

62. *Id.*

63. *Id.*

64. *Id.*



a result of the other benefits of education, like higher wages or less time to commit crime.<sup>65</sup> The apparent connection between poverty and education and between education and crime suggests an indirect correlation between poverty and crime rates. The research indicates that children that grow up in poverty are less likely to complete high school or postsecondary education and as a result, may be more likely to be incarcerated.<sup>66</sup> As a result of their incarceration, and lack of education, they will likely have a much harder time finding gainful employment after release.<sup>67</sup>

### *E. The Consequences of Technological Advances*

As technology continues to develop and improve, the problems that previously incarcerated individuals face will persist, if not worsen.<sup>68</sup> Studies have found that labor market outcomes have gotten worse for individuals with criminal histories since records have become publicly available on the Internet.<sup>69</sup> As of 2018, eighty-seven percent of employers conduct background checks at some point in their hiring process.<sup>70</sup> When looking at clerical, sales, or service positions, ninety percent of employers conduct a background check before hiring a candidate.<sup>71</sup> Besides the number of background checks increasing, private companies, like ClearChecks and Identogo, have made a business out of collecting, aggregating, and forwarding personal information, including criminal records, about candidates to potential employers.<sup>72</sup> Some of these screening companies claim to have access to ninety million criminal records.<sup>73</sup> One company claimed to have done over 3.3 million background checks between 2002 and 2015, almost all of which included a criminal history check.<sup>74</sup> As criminal record information becomes more public, and screening companies continue to profit from employer background checks, the negative effects on ex-offenders will only increase.

## **II. Why Are Ex-Offenders Not Being Hired?**

### *A. The Stigma Associated with Criminal Convictions*

One of the largest reasons employers shy away from hiring applicants with a history of convictions stems from social stigma. Stigma is “the general labeling, stereotyping, separation, status loss, and discrimination”

65. See generally Lance Lochner, *Education and Crime*, in THE ECONOMICS OF EDUCATION 109 (Steve Bradley & Colin Green eds., 2d ed. 2020).

66. *Id.*; see also Boghani, *supra* note 61.

67. See *supra* notes 13–19

68. Elmore, *supra* note 13, at 1003.

69. STACY & COHEN, *supra* note 13, at 3.

70. AM. BAR ASS'N CRIM. JUST. INST., *supra* note 17, at 4.

71. Elmore, *supra* note 13, at 1002.

72. CLEARCHECKS, ClearChecks.com [<https://perma.cc/QQP2-SQVA>]; IDENTOGO, identogo.com [<https://perma.cc/GQ79-669E>].

73. Elmore, *supra* note 13, at 1004.

74. *Id.*

that comes along with having a criminal record.<sup>75</sup> According to Dallas Augustine's research at the University of California-Irvine, the negative characteristics that are typically associated with a criminal record tend to be very broad, which leads employers to associate those characteristics with all ex-offenders, even if the characteristic is not applicable to a particular person or situation.<sup>76</sup> A study done at University of California-Los Angeles examined whether employers were more influenced by the reputational risk that came with hiring an ex-offender, or if their aversion was driven more by stigmas.<sup>77</sup> Their first main finding was that employers were less likely to hire someone with a drug conviction than someone who had posted on social media about drug use.<sup>78</sup> This finding suggests that employers were not worried about the reputational risk of hiring someone that may use drugs. Rather, it suggests that employers were influenced more by the conviction itself and the accompanying stigma.<sup>79</sup> The study also found that employers were less likely to hire those with criminal convictions to positions in customer service or office work.<sup>80</sup> The team's second test looked at employers' expectations for future employees based on whether they had a conviction or just showed drug activity on social media. Similar to their first finding, the researchers found that the employers expected more negative outcomes and behaviors from those with convictions, which suggests that criminal convictions are more highly associated with negative expectations than just engaging in an illegal activity on social media.<sup>81</sup> Finally, the researchers found that the fear of a negligent hiring lawsuit did not explain the aversion to hiring those with criminal convictions because an employer is less likely to hire an ex-offender in both customer service and office positions, which present different levels of risk to negligent hiring suits.<sup>82</sup> After their tests, the researchers concluded that the stigma surrounding a criminal conviction plays an important role in an employer's decision or willingness to hire someone with a criminal conviction.<sup>83</sup>

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75. DALLAS AUGUSTINE, NOAH ZATZ & NAOMI SUGIE, UCLA INST. FOR RSCH. ON LAB. & EMP., WHY DO EMPLOYERS DISCRIMINATE AGAINST PEOPLE WITH RECORDS? STIGMA AND THE CASE FOR BAN THE BOX 3 (2020), <https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf> [<https://perma.cc/N83V-892J>].

76. *Id.*

77. *Id.* at 4.

78. *Id.* at 5.

79. *Id.*

80. *Id.* at 6.

81. *Id.* at 5.

82. *Id.* at 7. Augustine, Zatz, and Sugie explain that if employers were worried about negligent hiring liability, they would discriminate against applicants with criminal histories at different rates depending on the position. Since customer service workers have more contact with the public, employees in those positions present a higher risk to the employer.

83. *Id.*

### *B. The Risk of Negligent Hiring Liability*

So what role does the possibility of a negligent hiring lawsuit play in an employer's willingness to hire an ex-offender? In a tort action for negligent hiring, an individual seeks to place legal liability upon an employer for the actions of an employee.<sup>84</sup> An employer can be held liable if the employer "knew or should have known of the employee's potential risk to cause harm, or if the risk would have been discovered by a reasonable investigation."<sup>85</sup> When a plaintiff files a negligent hiring suit, the employee's criminal history becomes relevant evidence for the purpose of proving that the employer did not exercise proper care in hiring the ex-offender.<sup>86</sup> This possibility exposes the employer to the risk of being required to pay punitive damages, which could cost the employer millions of dollars.<sup>87</sup> With the possible legal liability and the stigma surrounding those with prior convictions, it is no wonder why ex-offenders struggle to find employment. Ironically, however, employers can be held liable for negligent hiring for anything that should have alerted them to an elevated risk of wrongdoing by an employee, not just criminal records.<sup>88</sup>

## **III. Hurdles to the Employment of Ex-Offenders**

Ex-offenders face many obstacles when they are attempting to find employment after release. As if the stigma alone wasn't enough of a hurdle for these individuals, many states have placed legal barriers between an ex-offender and employment opportunities. These legal barriers include the lack of, and the resulting negative effects of, Ban-the-Box statutes, licensing restrictions that prevent ex-offenders from becoming licensed in certain fields, and a lack of statutory protections against discrimination based on a prior criminal conviction.

### *A. Ban-the-Box*

Ban-the-Box is a movement pushing for the removal of criminal history questions on job applications, as a way to encourage employers to look at an applicant's qualifications without the stigma that accompanies having a criminal record.<sup>89</sup> Ban-the-Box statutes are aimed at

84. Margaret M. Clark, *How to Address Negligent Hiring Concerns: Exercise Due Diligence to Avoid Negligent Hiring Nightmares*, SHRM (Feb. 27, 2019), <https://shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx> [https://perma.cc/XU5Y-G6BE].

85. *Id.*

86. Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 507 (1988).

87. See *Corona v. Orange Unified Sch. District*, 2020 LEXISNEXIS 198; *Willis v. Short*, 17 KY. TRIAL CT. REV. 8 (2013).

88. AUGUSTINE, ZATZ & SUGIE ET AL., *supra* note 75.

89. Elizabeth McLean, *Ban the Box*, GOODHIRE (Aug. 28, 2020), <https://goodhire.com/blog/ban-the-box> [perma.cc/77VP-D8F5].

preventing discrimination and increasing employment opportunities for ex-offenders after release.<sup>90</sup> The movement began after state and local legislatures were unsatisfied with the protections for ex-offenders offered under the Civil Rights Act of 1964.<sup>91</sup> The first statute was passed in Hawaii in 1998, and the statute limited an employer's ability to inquire into applicants' criminal histories.<sup>92</sup> Since then, thirty-five other states, and many more cities, have implemented some type of Ban-the-Box legislation.<sup>93</sup> As this movement gained popularity among state legislatures, changes were made at the federal level, too. In 2016, under the direction of President Obama, the Office of Personnel Management proposed and finalized a policy prohibiting federal agencies from inquiring into applicants' criminal backgrounds until a conditional offer had been made.<sup>94</sup> While this movement may seem very beneficial on its face, there are quite a few problems with the statutes states have enacted across the country, including very narrow protections, if any at all, and statistical discrimination that results.

To get an idea of how state statutes compare to each other, I compiled a number of articles, allocated points to state statutes based on the language contained in the statute, and placed statutes into one of three categories:<sup>95</sup> highly protective (9+), moderately protective (4–8), and low-protective states (<4). Points were allocated as follows:

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90. Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current Ban the Box Legislation*, 85 TEMP. L. REV. 921, 924 (2013).

91. *Id.*

92. McLean, *supra* note 89; James McWilliams, *How Ban the Box Can Lead to Even More Racial Discrimination by Employers*, PAC. STANDARD (Mar. 11, 2019), <https://psmag.com/social-justice/how-ban-the-box-can-lead-to-even-more-racial-discrimination-by-employers>.

93. McLean, *supra* note 89.

94. Angela Hanks, *Ban the Box and Beyond: Ensuring Individuals with a Criminal Record Have Access to the Labor Market*, CTR. FOR AM. PROGRESS (July 27, 2017, 9:03 AM), <https://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond> [<https://perma.cc/3A7E-AEHQ>].

95. McLean, *supra* note 89; *List of States and Municipalities with Ban the Box Laws*, ACCUSOURCE, <https://accusource-online.com/list-of-states-and-municipalities-with-ban-the-box-laws> [<https://perma.cc/TC9G-H8M2>].

| Restrictions on the Timing of Inquiries:<br>No inquiries...   | Applicable Employers  |
|---|---|
| <ul style="list-style-type: none"> <li>• On initial application (1 pt)</li> <li>• Until after initial interview offer (2 pts)</li> <li>• Before initial interview (3 pts)</li> <li>• Until after initial interview (4 pts)</li> <li>• Until after conditional offer if there is no interview (5 pts)</li> <li>• Until applicant has been deemed qualified (6 pts)</li> <li>• Until a conditional offer after an interview (7 pts)</li> <li>• Never w/ exceptions (8 pts)</li> <li>• Never (10 pts)</li> </ul> | <ul style="list-style-type: none"> <li>• Less than all public (1 pt)</li> <li>• Less than all private (1 pt)</li> <li>• Less than all (no distinction) (2 pts)</li> <li>• All public (2 pts)</li> <li>• All private (2 pts)</li> <li>• All employers (4 pts)</li> </ul> |
| Other Protections   | Exclusions/Exceptions   |
| <ul style="list-style-type: none"> <li>• Criminal record is not an automatic bar to an interview (1 pt)</li> <li>• Criminal record is not an automatic bar to employment (2 pts)</li> <li>• No questions about certain crimes ever (1 pt/crime)</li> </ul>  | <ul style="list-style-type: none"> <li>• Employers may ask if the crime is an automatic bar to employment (-2 pts)</li> <li>• “Unless permitted by state law” (-3 pts)</li> <li>• Specific fields are excluded from the ban (-1 pt/field)</li> </ul>                    |

In the “highly protective” category, there were eight states, and Hawaii (eleven points) was the highest ranked state. Hawaii’s statute is the only one that applies to all employers and prohibits criminal history questions until after a conditional offer is made.<sup>96</sup> Of the states that ranked in the highest category, five out of eight states’ statutes applied to all employers in the state. These eight states consistently showed prohibitions against asking about criminal records until after the initial interview, but a majority of the states extended that prohibition until the applicant was either deemed qualified, made a finalist, or extended a conditional offer.<sup>97</sup> Under Hawaii’s statute, all employers, public and private, are prohibited from inquiring into an applicant’s criminal history until the applicant has been given a conditional offer, unless the conviction record “bears a rational relationship to the duties and responsibilities of the position.”<sup>98</sup> Under Hawaii’s statute, employers are not able to consider felony convictions more than seven years old or misdemeanors from more than five years ago, but there are exceptions.<sup>99</sup>

When applying Hawaii’s statute to Joe’s situation from the introduction, Joe would likely face few issues when applying to jobs. It is true

96. HAW. REV. STAT. § 378-2.5(b) (2022).

97. McLean, *supra* note 89.

98. HAW. REV. STAT. § 378-2.5.

99. *Id.*

that, under Hawaii's statute, employers that are hiring for a position at a federally insured financial institution are not limited by the time restrictions on how far back an employer can consider a conviction.<sup>100</sup> Notwithstanding this exception to the time limits, Joe's employer would still only be able to ask about convictions that are rationally related to the job's duties and responsibilities, and Joe's conviction for involuntary manslaughter would likely not qualify.<sup>101</sup> Additionally, Joe's potential employer would not be able to ask about any conviction record until after Joe had been given a conditional job offer,<sup>102</sup> which means Joe would have already been deemed qualified for the position. Under Hawaii's current statute, Joe's conviction record would be unlikely to affect his employment prospects in a significant way.

Almost forty percent of states fall into the "moderately protective" category. Three states—Illinois, Nebraska, and Wisconsin—fall right at the top of the group with eight points. The key reason that these three states fall into the moderate group instead of the high group was their lack of universal protection. All three states limit their statutes to cover only a portion of employers. States in this category also tend to allow employers to ask criminal history questions earlier in the hiring process. The most common timing restrictions found in the statutes prohibited asking criminal history questions before the initial interview or simply prohibited the inquiry during the initial application.

If Joe from the introduction were to apply for a job in Illinois, he would likely face at least a few more issues during the application process than if he were to apply in Hawaii. Illinois's statute prohibits employers from inquiring into an applicant's criminal history until either (1) the applicant has been deemed qualified and offered an interview or (2) if there is no interview, the applicant has been given a conditional offer of employment.<sup>103</sup> Under Illinois law, "employer" refers to any person or entity that employs more than fifteen people.<sup>104</sup> Although Illinois does not require that the conviction be related to the position, this would not necessarily be a hurdle for Joe. He would likely not be asked about his conviction until later in the process. With the possibility of employers falling under a different combination of the statutes, though, Joe's situation is very dependent on each employer. On one end of the spectrum, the employer could be very small and not covered by the statutes at all. But any business with over fifteen employees would have to wait to ask about a conviction record until he had been deemed qualified or given a conditional offer. Applying to a larger employer, Joe would likely have an easier time getting a job than if he were to apply

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100. *Id.* § 378-2.5(d)(9).

101. *Id.* § 378-2.5(a).

102. *Id.* § 378-2.5(b).

103. 820 ILL. COMP. STAT. 75/15 (2015).

104. *Id.* § 10.

to a smaller employer, because the larger employer would have to focus solely on his qualifications until later in the process.

At the low end of the moderately protective group are states like Arizona. Arizona's Ban-the-Box law comes from an executive order signed by the governor in 2017. Under Arizona law, state agencies are prohibited from asking about an applicant's prior convictions during the initial application process.<sup>105</sup> While the order does encourage other employers to provide the same protections to applicants, compliance is only required by state agencies.<sup>106</sup> The precise application of Arizona's executive order to state agencies is also unclear, though. One section prohibits state agencies from disqualifying an applicant due to a criminal record, but that statement is contradicted two paragraphs later when the order states that particular crimes may automatically preclude an applicant from employment.<sup>107</sup>

When applying Arizona's statute to Joe's situation, it quickly becomes clear that he may face some significant issues when applying for jobs in the state. If Joe doesn't apply for a job at a state agency,<sup>108</sup> nothing prevents a potential employer from asking about his felony conviction on the initial application and then throwing Joe's application in the trash. Under this law, Joe's qualifications and the circumstances of his conviction may never be considered because employers are not required to provide applicants with the opportunity to explain themselves during an interview. Joe may find a private employer that doesn't ask about conviction history right away, or he may be applying for a job that is covered by the statute, but more likely than not, Joe will probably have some challenges finding a job in Arizona.

Finally, the last group of states, the "low-protective" category, contains twenty-three states. Of those twenty-three states, fourteen received zero points, because none of those states has a statute. The states in this category that do have statutes seem to have early-process restrictions similar to the "moderately protective" group, but these states tend to cover fewer employers under their statutes. These states also have more exclusions than higher ranking states. For example, Maryland excludes employers with less than fifteen employees, and its statute does not apply if the employer is permitted to inquire into an applicant's background by another statute.<sup>109</sup> Maryland's restrictions also don't apply to applicants for positions that involve work with children or vulnerable adults.<sup>110</sup> Kansas is in the group of low-protective states because its law, created through Executive Order, like in Arizona,

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105. Ariz. Exec. Ord. 2017-07 (Nov. 6, 2017).

106. *Id.*; ARIZ. REV. STAT. § 41-741(15) (2022).

107. Ariz. Exec. Ord. 2017-07 (Nov. 6, 2017).

108. ARIZ. REV. STAT. § 41-741(15).

109. MD. CODE ANN., LAB. & EMPL. §§ 3-1502–1503 (West 2022).

110. *Id.* § 3-1502.

is narrow and only covers a very select group of employers. Under Kansas's Executive Order, an employer is prohibited from asking about an applicant's criminal record on the initial application.<sup>111</sup> The order also prohibits applicants from being automatically denied an interview because of a criminal history.<sup>112</sup> While those prohibitions seem fairly protective, the order contains some very large exceptions and narrow clauses, which is why Kansas falls under the low-protective category. Kansas's Ban-the-Box Executive Order only applies to positions in the executive branch of the state government.<sup>113</sup> Additionally, the employer is allowed to inquire about convictions that would automatically bar the applicant from employment.<sup>114</sup> The order is also clear that the language is not meant to limit the employer's ability to conduct a background check or inquire into an applicant's criminal record after the initial application.<sup>115</sup>

In Joe's case, if he were applying for jobs in states that are in the low-protective category, unless he was applying to a covered position in the state government, his potential employer would likely ask about his conviction history on the initial application or during the initial interview. Under Kansas law, Joe would likely face significant hardships during his employment search. Even more problems would come for Joe in any of the fourteen states that do not have a Ban-the-Box law or executive order on the books. In a state like Iowa, nothing prevents an employer from asking about an applicant's criminal history on the initial application and subsequently refusing to call the applicant back for an interview. In Iowa and the other thirteen states, applicants with criminal histories are significantly disadvantaged in the hiring process because they are likely to face judgment from the beginning of the process.

The Ban-the-Box movement took off quickly, and, on its face, it seemed promising to protect individuals with criminal histories from employment discrimination. However, the lack of uniformity in these statutes and varying levels of protection mean that some ex-offenders will find protection lacking, especially in low-protective states. Individuals in low-protective states are more likely to see their rejection only delayed until later in the hiring process, and not prevented.<sup>116</sup> Additionally, research suggests that Ban-the-Box statutes may actually increase discrimination based on race, or other class associated with stereotypes of criminality.<sup>117</sup> It is clear that Ban-the-Box statutes,

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111. Kan. Exec. Ord. 18-12 (May 2, 2018).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Hanks, *supra* note 94.

117. *See supra* notes 37-43.



especially low-ranking ones, are likely doing more harm than good. These statutes are either simply delaying an employer's discriminatory decision based on the applicant's conviction status, or worse, causing an increase in racially motivated hiring decisions based on assumptions about applicants that don't provide their criminal history.

### *B. Licensing Restrictions*

One of the clearest barriers to employment for ex-offenders is state statutes that completely bar employment in certain fields through licensing restrictions. Almost twenty percent of working Americans need a professional license to work,<sup>118</sup> which often means that ex-offenders are excluded from many fields of work. Additionally, the average license in the United States requires almost a year of education, passing an exam, and paying close to \$300 in fees, which is nearly impossible for some ex-offenders.<sup>119</sup> States also do not treat ex-offenders uniformly; there is a wide variety of laws across the country relating to occupational licensing restrictions for ex-offenders.<sup>120</sup>

Nick Sibilla, a legal analyst for the Institute for Justice, studied the effects of these licensing laws, using ten different criteria to grade and organize states based on their professional licensing limitations on ex-offenders.<sup>121</sup> Under Sibilla's criteria, Indiana ranked the most protective of ex-offenders at an "A."<sup>122</sup> Indiana's statute ranked so highly because its law governing licensure for ex-offenders is fairly narrow, requires a specific and direct relationship between the crime and the job, has mandatory factors for consideration so each case is evaluated separately, and includes a strict review process similar to that of a criminal appeal.<sup>123</sup> However, Indiana's statute does not apply to jobs in law enforcement, the probation office, or the community corrections department.<sup>124</sup> Indiana law also prohibits licensing boards from using general or vague language, such as "moral turpitude," in their disqualifications.<sup>125</sup> Even if the applicant is deemed to be disqualified under the licensing requirements for a particular field, the reviewing board is required to consider certain factors when making a final decision.<sup>126</sup> Finally, with specific exceptions, applicants cannot be barred from obtaining a license for longer than five years after their release or conviction, whichever is later.<sup>127</sup>

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118. SIBILLA, *supra* note 52, at 3.

119. *Id.*

120. *See id.*

121. *See id.* at 5–7.

122. *Id.* at 39–40.

123. *Id.*; IND. CODE § 35-38-9-10 (2022); *id.* § 36-1-26-4; *id.* § 36-1-26-5.

124. IND. CODE § 35-38-9-10(a).

125. *Id.* § 36-1-26-4(a).

126. *Id.* § 36-1-26-4(c).

127. *Id.* § 36-1-26-4(d).

In Indiana, Joe would likely be able to get a license in most fields because the decision maker would be required to consider the nature of his crime, the relationship between his crime and the job for which he is applying, and evidence of his rehabilitation.<sup>128</sup> Additionally, since Joe was released from prison almost five years ago, his crime is almost out of the time limitations placed on which crimes can be considered.<sup>129</sup> Even if Joe were to apply within five years after his release, the review board must consider how long it has been since his conviction.<sup>130</sup> Indiana also requires that the applicant's position be "specifically and directly related" to the occupation or profession the applicant is applying for or holds a license for,<sup>131</sup> which is unlikely to be the case in Joe's situation.

The average score for states in the Sibilla study was a dismal "C-," and includes Nebraska, New Jersey, Wyoming, and five other states.<sup>132</sup> Nebraska ranked lower because it has very few exclusions in its application for specific offenses, but the law does include some factors that must be considered during the review and appeal process should the applicant be denied.<sup>133</sup> New Jersey's ranking resulted mostly because the statute only required that the crime be adversely related to the job in order to be considered, which provides the licensing board with excessive discretion.<sup>134</sup> Additionally, the New Jersey statute has an extremely weak review and appeal process.<sup>135</sup>

Joe would likely have a more difficult time getting an occupational license in a state like Nebraska. Nebraska does not have a time limitation on what crimes can be considered, but the licensing board is required to consider the time that has passed since the conviction, rehabilitation, employment history, and testimonials.<sup>136</sup> Nebraska's statute also allows for the applicant to appeal an adverse decision by the board, so in the unlikely event that Joe's application were denied, he could get a second review after a denial.<sup>137</sup> Like in Nebraska, Joe's situation would be more difficult in New Jersey but for different reasons. New Jersey's statute requires only that the applicant's criminal history "relate adversely" to the job or occupation for which the applicant is applying.<sup>138</sup> New Jersey's statutes also allow for the board to refuse to issue a license for crimes involving "moral turpitude."<sup>139</sup> This

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128. *Id.* § 36-1-26-4(c).

129. *Id.* § 36-1-26-4(d).

130. *Id.* § 36-1-26-4(c).

131. *Id.* § 36-1-26-4(b).

132. SIBILLA, *supra* note 52, at 9.

133. *Id.* at 65-66; NEB. REV. STAT. § 84-947 (2021).

134. SIBILLA, *supra* note 52, at 71-72.

135. *Id.*

136. NEB. REV. STAT. § 84-947(2)(b).

137. *Id.* § 84-947(5).

138. N.J. STAT. ANN. § 2A:168A-1 (West 2022).

139. N.J. STAT. ANN. § 45:1-21(f).

vague language can result in arbitrary decisions and qualified applicants being denied a license for crimes that aren't closely related to their prospective employment field. New Jersey's statute also does not provide for the right to an appeal, so applicants have no way to get their decisions reviewed should their license be denied.<sup>140</sup>

Seven states, including Alabama and Alaska, received an "F," and six of those seven states received zero points.<sup>141</sup> Sibilla's research found that Alabama and Alaska both "generally lacked protections for ex-offenders seeking licenses to work."<sup>142</sup> Massachusetts was given an "F," but scored some points.<sup>143</sup> Massachusetts's statute includes a ban on considering dismissed or sealed records<sup>144</sup> and includes the right to appeal the denial and written notice,<sup>145</sup> but there are virtually no other protections for ex-offenders applying for occupational licenses in the state.<sup>146</sup>

Finally, if Joe were to apply for an occupational license in Massachusetts, he would likely have a difficult time getting that license approved. Unlike the states mentioned earlier, Massachusetts does not have an overarching state law regulating the admission or denial of occupational licenses. Rather, each agency gets to set its own regulations.<sup>147</sup> Additionally, there are no mandatory factors to consider when reviewing a case, and there are very few due process protections. In a state like Massachusetts, Joe's chances of obtaining a professional license are left completely up to the discretion of the professional board to which he is applying. And, in states like Alabama and Alaska, Joe's application process has no oversight from the state legislature. The vast differences in the statutes throughout the country create uncertainty and inconsistency in the experiences of ex-offenders trying to get professional licenses after release.

### C. Fair Chance Laws

In April 2012, the Equal Employment Opportunity Commission (EEOC or Commission) issued *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, which is designed to provide covered employers with information about the possibility of liability under Title VII for discriminating against protected classes of people through

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140. *See id.*

141. SIBILLA, *supra* note 52, at 9–10.

142. *Id.* at 11–14.

143. *Id.* at 53–54.

144. MASS. GEN. LAWS ch. 127 § 152 (2022); MASS. GEN. LAWS ch. 276 § 100C.

145. MASS. GEN. LAWS ch. 6 § 171A.

146. SIBILLA, *supra* note 52, at 53–54.

147. MASS. GEN. LAWS ANN. ch. 6 § 172N.

hiring practices involving arrest and conviction records.<sup>148</sup> While the EEOC does not have the power to prevent employers from obtaining arrest and conviction records, the Commission can hold employers accountable for using the information in a discriminatory way.<sup>149</sup> The EEOC's guidance, along with the Obama administration's "Fair Chance Pledge," is aimed at getting ex-offenders back into the workforce after they are released.<sup>150</sup> While these actions are nonbinding, a number of states have introduced binding legislation that protects applicants with criminal records by limiting the ways an employer can consider an applicant's arrest and conviction records during the hiring process. To analyze the state statutes, I assigned each state statute points based on the following criteria:

| Connection to employment     | Bans                              | Time Limits              |
|------------------------------|-----------------------------------|--------------------------|
| "Job related"- 1             | Questions about arrest- 1         | Nothing over 10 years- 1 |
| "Reasonable relationship"- 2 | expunged/sealed/pardons- 1 (each) | Nothing over 5 years- 2  |
| "Objectively unfit"-3        |                                   |                          |
| "Direct relationship"-4      |                                   |                          |
| Public jobs- 2               |                                   |                          |

| Considerations                        | Other   |
|---------------------------------------|---|
| Mandatory considerations (<5)- 1      | Encouraged to hire ex-offenders- 1              |
| Mandatory considerations (= or >5)- 2 | Requires consent by applicant- 1                |
|                                       | Written notice of denial based on conviction- 1 |
|                                       | Written explanation- 1                          |
|                                       | Not an absolute bar- 1                          |

After the points were assigned, the states were classified as "highly protective" (6+), "moderately protective" (2–5), or "low-protective" (<2). Five states fell in the highly protective group, and the highest-ranking state was Wisconsin. The moderately protective group had fifteen

148. EEOC, EEOC-CVG-2-12-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

149. *Id.*

150. *Id.*; TAKE THE FAIR CHANCE PLEDGE, OBAMA WHITE HOUSE ARCHIVES, <https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge> (last visited Jan. 29, 2023).

states in it, and Pennsylvania ranked the highest with five points. The lowest category had the last thirty states in it, and twenty-two of those states had no legislation relating to the use of an applicant's criminal history during the hiring process.

Wisconsin ranked the highest because it is the only state that expressly includes those with arrests and convictions in its discrimination statute.<sup>151</sup> Along with sex, religion, race, and other protected classes, Wisconsin includes those with criminal convictions in its statute.<sup>152</sup> Under Wisconsin's prohibited discriminatory actions, an employer may not refuse to hire or promote someone on the basis of their conviction or arrest record.<sup>153</sup> The state legislature did provide for some exceptions in certain occupations or with certain convictions.<sup>154</sup> Under Wisconsin law, an employer may refuse to hire an applicant because of their criminal or arrest record if the record is substantially related to the job for which the applicant is applying.<sup>155</sup> Not only does Wisconsin provide clear legal coverage, wronged individuals have clear redress through the court system to prevent the discrimination from continuing and to hold employers accountable because it is a part of the state's anti-discrimination law.

New York has a similar statute, but individuals with criminal records are not protected under the state's overarching discrimination statute. New York law states that no applicant should be denied employment for the sole reason of having a conviction, unless there is a direct relationship between the conviction and the job or if hiring the applicant would bring about unreasonable risk to members of the public or property.<sup>156</sup> Additionally, New York doesn't allow employers to deny employment based on a "lack of good moral character," which prevents a more subjective application of the statute.<sup>157</sup> Just like Wisconsin, New York provides applicants with a clear way to seek redress in the case of discrimination.<sup>158</sup>

When applying Joe's situation to Wisconsin and New York, Joe would likely face very few problems. Joe's involuntary manslaughter charge is unlikely to be sufficiently related to any job in finance to warrant disqualification based solely on his conviction. Similarly, in New York, Joe's conviction would likely not be deemed directly related to the job for which he is applying, which means a potential employer could not refuse to hire him based solely on his criminal record. Joe would be protected by strong language and clear standards in both

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151. WIS. STAT. § 111.321 (2022).

152. *Id.*

153. *Id.*, § 111.322.

154. *Id.*, § 111.335.

155. *Id.*, § 111.335(3)(a)(1).

156. N.Y. CORRECT. LAW § 752 (McKinney 2007).

157. *Id.*

158. *Id.*, § 755.

states. Additionally, Joe would be able to sue a potential employer if he thought he was denied employment on the basis of his criminal history.

Pennsylvania ranked the highest in the moderately protective group with five points. While Pennsylvania does not consider ex-offenders a protected class like Wisconsin, the state still offers fairly strong protections for individuals with convictions during the hiring process. Pennsylvania's statute provides that an applicant's convictions can be considered only to the extent that they relate to the applicant's suitability for the job for which they applied.<sup>159</sup> Covered employers are also not permitted to consider records that have been properly expunged under state law, which, considering Pennsylvania's new Clean Slate law, applies to a much larger number of people.<sup>160</sup>

When applying Joe's situation to the Pennsylvania statutes, he is still pretty well covered. However, the phrase "relate to the applicant's suitability" is fairly subjective and could lead to arbitrary decisions by employers during the hiring process. It is possible that an employer would consider Joe's conduct sufficiently related to the position to disqualify Joe, especially if the position involves frequent contact with the public. In my opinion, however, it is unlikely that Joe's conviction from five years ago would be sufficiently related to his job to warrant consideration or denial, especially if the employer took the time to ask questions about the circumstances of his conviction.

Delaware is one of thirty states that fell into the low-protective category, but one of only eight in that category that scored any points. Under Delaware law, employers are permitted to disqualify an applicant if their criminal history is "job related" and "consistent with business necessity."<sup>161</sup> A previous section the state's code defines the phrase "business necessity" as "render[ing] the individual unable to perform the essential functions of the position."<sup>162</sup> The statute also expressly includes situations in which the applicant is perceived to be a threat to health or safety in the workplace, which would allow employers to deny an applicant under situations in which public safety is a concern.<sup>163</sup> The subjectiveness of the language included in Delaware's statute allows a great deal of discretion in employers' decisions during the hiring process.

Under Delaware law, Joe would likely have a harder time getting a job. Even though the employer is required to consider the type of offense, the time that has passed since, and the job being sought,<sup>164</sup> if the employer does not ask the right questions about Joe's situation, it

159. 18 PA. CONS. STAT. § 9125(b) (2022); *infra* notes 177–88.

160. *Id.* §§ 9122–9122.2, 9122.5(b).

161. DEL. CODE ANN. tit. 19, § 711(g)(3) (2022).

162. *Id.* § 710(12).

163. *Id.*

164. *Id.* § 711(g)(3)(a–c).

would be easy for the employer to disqualify Joe based on his felony conviction. If the employer did not ask about or consider the circumstances that led to Joe's conviction, which they are not required to do, Joe's felony conviction for involuntary manslaughter carries enough weight that it might lead an employer to believe he would be a danger to those around him.

The other twenty-two states in the low-protective category received zero points because they have no statute limiting the use of criminal conviction or arrest information during the hiring process. Alabama is one of the states that falls into this category. Because Alabama does not have any regulations about the use of conviction records in hiring decisions, any Alabama employer would be free to consider an arrest or conviction in any way that they felt appropriate, even if that meant automatically disqualifying any person that has ever been arrested or convicted of a crime.

For Joe, this will likely not bode well. Most likely, Joe will be asked about his conviction, or it will come up in a background check later in the process, and his application will be thrown out. As mentioned above, over sixty percent of employers say they would "probably not" or "definitely not" hire someone that had a criminal conviction on their record.<sup>165</sup> Statistically, Joe will have a much harder time finding gainful employment in a state like Alabama that doesn't have any limitation on how employers can consider an applicant's criminal convictions during the hiring process.

As we have seen, Joe's outcomes differ significantly depending on where he is looking for employment, what type of position he is applying for, and the employer reviewing his application. Additionally, Joe's chances of getting a job are affected by the state's Ban-the-Box policy. Ten states across the country, including Alabama, do not have a Ban-the-Box statute or a statute regarding the use of criminal conviction or arrest information. In these states, applicants with convictions are especially likely to struggle because employers will probably ask them on the initial application whether they have a conviction, and then these employers have no limitations on how that information is considered if the applicant answers "yes." Because no statute prohibits them from doing so, employers in these states likely disqualify potential employees by throwing out any applications that mark "yes" on their criminal conviction questions. These applicants do not get a second chance, they are judged based on the box they are mandated to check, and they have no redress.

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165. Raphael, *supra* note 10.

#### IV. Why Should Employers Hire Ex-Offenders?

##### A. Avoiding Liability under Discrimination Statutes

Even though ex-offenders are not officially included under Title VII of the Civil Rights Act, there are ways in which an employer could be found liable under Title VII if they refuse to hire people with criminal records. The EEOC has recognized the possibility that an employer could be held liable for racial discrimination under a disparate impact theory if an employer's refusal to hire applicants with criminal histories has a statistically significant negative impact on racial minorities.<sup>166</sup> Under a disparate impact cause of action, an employer would be liable if the plaintiff could demonstrate that the facially neutral policy—the employer's refusal to hire applicants with criminal histories—disproportionately excludes a protected class, such as members of a particular race or national origin.<sup>167</sup> Minority populations, especially African-American men, are disproportionately impacted by the criminal justice system. Studies have found that Black Americans are over five times more likely to be incarcerated than their white counterparts.<sup>168</sup> Latinos are incarcerated at almost one-and-a-half times the rate of whites.<sup>169</sup> These racial disparities in the criminal justice system make it more likely that applicants with criminal histories will also be racial minorities. These racial inequities create the possibility that facially neutral hiring policies that prohibit the hiring of ex-offenders will create a disparate impact on minority applicants.

To avoid this liability, the EEOC recommends that employers consider the nature of each applicant's offense, the time that has elapsed since the conviction, and how each conviction relates to the specific job the applicant applied for.<sup>170</sup> Additionally, employers could provide a denied applicant with an opportunity to explain why they do not think denial is appropriate.<sup>171</sup> However, with generalized policies that do not provide for individual decisions or a rebuttal opportunity for the applicant, employers run the risk that their hiring policies will disproportionately affect minority applicants, which will expose them to liability under Title VII. Implementing laws regarding the use and consideration of convictions records during the hiring process could help employers avoid creating a disparate impact on minority applicants.

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166. EEOC, *supra* note 148.

167. *Id.*

168. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, SENTENCING PROJECT 1, 3 (June 14, 2016), <https://www.sentencingproject.org> [<https://perma.cc/VKS7-FKLN>].

169. *Id.*

170. EEOC, *supra* note 148.

171. *Id.*



### B. Ex-Offenders Tend to Be Better Employees

Even if the law does not require it, employers should hire ex-offenders because it makes good business sense to do so. Hiring individuals with convictions has more advantages than just avoiding legal liability. Research done at John Hopkins University found that employees with criminal records had a lower rate of turnover than those without.<sup>172</sup> Contributing to that finding, the researchers found that workers with criminal records are less likely to quit.<sup>173</sup> Workers with criminal records have been found to get promoted more quickly and to higher positions than their coworkers without criminal records.<sup>174</sup> Additionally, research done on military enlistees has shown that soldiers with criminal records are “no more likely to be discharged for negative reasons.”<sup>175</sup> Finally, researchers at Harvard University have found that employees with criminal records are more productive at work than their co-workers without criminal histories.<sup>176</sup> All of this research suggests that employees with criminal records tend to be better and more loyal employees compared to those without convictions. If an employer is looking to decrease turnover or increase productivity, this research shows that hiring this group may provide an advantage.

### C. Tax Incentives

Additional incentives exist, as well. Few employers know that the federal government offers tax benefits to businesses that hire qualified ex-offenders. The Work Opportunity Tax Credit provides employers with up to \$9,600 in credit for each ex-felon that is hired, and there is no limit on the number of credits an employer can receive.<sup>177</sup> While this can be a good incentive to encourage employers to hire ex-offenders, employers do not seem to be taking advantage of the credit. Between 2009 and 2013, only 5.8% of ex-offenders who were working were claimed by their employers for this credit.<sup>178</sup> The credit applies equally to employers that hire felons on parole and those that were convicted but sentenced to other punishments, which actually suggests that employees are claiming a mere three percent of eligible ex-felons.<sup>179</sup> These tax breaks do not just help the employers; research has shown that ex-felons certified under the Work Opportunity Tax Credit make

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172. COULOUTE & KOPF, *supra* note 13.

173. *Id.*

174. *Id.*; STACY & COHEN, *supra* note 13.

175. Kali Holloway, *Employees with Criminal Records May Be Better Employees*, ALTERNET (May 16, 2016), <https://www.alternet.org/perma.cc/HT3J-Y65E>.

176. *Id.*

177. *Id.*

178. ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., *WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 3* (2018), [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [<https://perma.cc/GZ29-LVSW>].

179. *Id.*

ten percent more than those that are not.<sup>180</sup> The economic benefits that are passed on to the employees provide additional economic stability and can contribute to a reduction in recidivism rates.<sup>181</sup>

## V. Solutions

There are a number of policy changes that states can make to help eliminate, or at least reduce, the struggle to find employment for those with convictions. As thirty-six states have already, passing strong Ban-the-Box laws, like Hawaii<sup>182</sup> could lessen the effect of criminal convictions during the hiring process. At a minimum, Ban-the-Box laws like Hawaii's prevent employers from immediately screening out applicants with conviction histories by requiring that the applicant be given a conditional offer of employment prior to disclosing any information about their conviction or arrest record.<sup>183</sup> However, these Ban-the-Box laws provide little protection if there is no accompanying statute that explicitly limits the ways in which employers can use and consider an applicant's conviction history.<sup>184</sup>

It is my belief that the best way to combat this issue is to pass anti-discrimination laws that include those with conviction and arrest records. Wisconsin would be the model state for this approach because it explicitly protects those with prior convictions and arrests in the same ways as those of different races, sexes, or religions.<sup>185</sup> The state also provides a clear remedy for those that are a victim of discriminatory practices when trying to gain employment. Even without a strong Ban-the-Box statute, Wisconsin provides extremely strong protections for those trying to get back into the labor market after a conviction or arrest. States have been experimenting with other forms of legislation to encourage employers to hire ex-offenders, such as Clean Slate laws and training programs about the collateral consequences of convictions. These solutions, for various reasons, however, do not adequately address the needs of ex-offenders in the employment market.

### A. Clean Slate Laws

Many states have statutes and procedures that allow certain offenders to petition for expungement or sealing of certain records, but this petition-based system leaves some number of people out.<sup>186</sup> This realization has led to what are now called "Clean Slate Laws," which began

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180. *Id.*

181. *See supra* notes 22–33.

182. *Supra* notes 94–96.

183. *Id.*

184. *See Hanks, supra* note 94.

185. WIS. STAT. § 111.321 (2022).

186. *Clean Slate Toolkit: Unlocking Opportunity Through Automated Record-Clearing*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/issues/poverty/reports/2018/11/15/460907/clean-slate-toolkit> [perma.cc/AB8Y-2LRN].

in Pennsylvania.<sup>187</sup> In 2018, Pennsylvania's state legislature passed Act 56, which streamlined and automated the process of expunging and sealing the criminal records of almost thirty million people in that state.<sup>188</sup> This collection of statutes lays out numerous offenses and types of offenders that are automatically entitled to expungement and sealing if their case meets certain criteria under the statute.<sup>189</sup> For example, under the statute, a person whose case has not reached a disposition within eighteen months of arrest shall have their record expunged of that case if the proper court certifies that no disposition is available and no action is pending.<sup>190</sup> Additionally, persons are entitled an expungement if they have been completely acquitted at trial of all charges based on the same conduct or criminal incident.<sup>191</sup> While some offenses do not fall under this statute,<sup>192</sup> more situations are covered by limitations on what police can disseminate to noncriminal justice organizations and people upon request.<sup>193</sup> Under Pennsylvania's statute, a police agency must redact any indications of an arrest, indictment, or other information if (1) the arrest was three or more years ago, (2) no disposition is included in the record, and (3) nothing on the record indicates that a proceeding is still pending on the charge.<sup>194</sup> There are sometimes requirements that must be fulfilled before a record is sealed, like having all fines paid, but Pennsylvania's legislation is expected to seal or expunge over half of the charges in the courts' databases.<sup>195</sup> These efforts will prevent sealed records from appearing on employee background checks and allow applicants to tell employers that they do not have a criminal record at all.<sup>196</sup> Research suggests that one year after a criminal record is cleared, affected people are eleven percent more likely to have a job and earn twenty-two percent more than those without cleared records.<sup>197</sup> While these Clean Slate laws have only been passed in a few states, legislation has been introduced at the federal level and is predicted to increase in popularity over the coming years.<sup>198</sup>

While initial statistics and research show Clean Slate laws are promising, these laws also come with challenges. Most of these laws

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187. Faith Karimi, *Pennsylvania Is Sealing 30 Million Criminal Records as Part of Clean Slate Law*, CNN, (June 28, 2019, 4:46 AM EDT), <https://www.cnn.com/2019/06/28/us/pennsylvania-clean-slate-law-trnd/index.html> [perma.cc/U5CT-C62D]; 18 PA. CONS. STAT. §§ 9121–9122.3 (2022).

188. Karimi, *supra* note 187; 18 PA. CONS. STAT. §§ 9121–9122.3.

189. 18 PA. CONS. STAT. ANN. §§ 9121–9122.3.

190. *Id.* § 9122(a)(1).

191. *Id.* § 9122(a)(4).

192. *Id.* § 9122(b.1).

193. *Id.* § 9121(b).

194. *Id.* § 9121(b)(2)(i).

195. Karimi, *supra* note 187.

196. *Id.*

197. *Clean Slate Toolkit*, *supra* note 186.

198. *Id.*

are fairly narrow, so they will not have an impact on that many people. Additionally, the statutory language used by some states is confusing, so it can be difficult to understand when the statute applies to specific people and offenses. This strategy might also create issues similar to Ban-the-Box laws. If Clean Slate laws become more mainstream, employers may start to make assumptions about the applicant's criminal history based on protected characteristics, such as race. If the employer is aware that the applicant could have had their record erased, they may be less likely to hire someone of a minority race because stereotypes and statistics would suggest that the applicant is more likely to have a record that was subsequently expunged. Still, these laws seem like a good starting point because they are at least better than the status quo of having an official criminal record attached to the job applicant's name.

### *B. Collateral Consequence Training*

In addition to formal legislation, judges and members of the courts have begun to emphasize the importance of considering the collateral consequences that accompany a criminal conviction when sentencing someone.<sup>199</sup> Collateral consequences are “legal disabilities imposed by law as a result of a criminal conviction regardless of whether a convicted individual serves any time incarcerated.”<sup>200</sup> These consequences create barriers for convicted individuals who are trying to reenter society by restricting their access to benefits or opportunities that would otherwise be available.<sup>201</sup> Collateral consequences can affect housing, employment, immigration, and many other things.<sup>202</sup> Although these collateral consequences can severely impact someone's life, courts are not required to warn defendants about any consequences other than possible immigration consequences, when they are accepting a plea or after a conviction.<sup>203</sup> The American Bar Association has encouraged prosecutors, defense attorneys, and judges to consider collateral consequences at various stages during a prosecution in order to make sure that the defendant is fully aware of all the possible consequences of having a conviction on their record.<sup>204</sup> Actively considering and discussing collateral consequences could also result in an outcome that does not punish the offender for the rest of their life for a minor crime.<sup>205</sup> If they were to consider all the possible collateral consequences, prosecutors and judges may be more likely to reduce charges or work out some other arrangement like those in diversion courts so that the

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199. See AM. BAR ASS'N CRIM. JUST. SECTION, *supra* note 51.

200. *Id.* at 4.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 8–10.

205. *Id.* at 9.

punishment is more proportional to the crime being charged.<sup>206</sup> To help solve this issue and assist the legal community in this endeavor, the American Bar Association encourages its members to use the National Inventory of Collateral Consequences of Conviction (NICCC), which provides access to all the sanctions, disqualifications, and other consequences of a criminal conviction that don't appear in the actual judgment filed after a criminal case is disposed of.<sup>207</sup> Education can be a great tool to effect change, but, just like Clean Slate laws, strictly relying on educating members of the criminal justice system about collateral consequences comes with challenges that would make it less effective in practice.

Relying on education about collateral consequences presents three main issues. First, there is no guarantee that judges or prosecutors would take this education seriously or apply it in a meaningful way. Simply providing the courts with information about possible collateral consequences does not mean that those consequences would be changed or avoided when the charge is brought, or the sentence is imposed. Second, there are many situations in which the collateral consequences are built into the penal code or other state legislation. Specifically regarding licensing restrictions, there is nothing a judge or prosecutor can do if a conviction would automatically exclude the offender from getting licensed in certain fields. The only hope for the offender would be for the prosecutor to find a different offense to charge that would not result in such harsh consequences, but that option is not always available or appropriate. Lastly, acknowledging the collateral consequences that accompany certain convictions does not prevent employers from discriminating against the ex-offender based simply on their conviction status. Even if certain restrictions or consequences are avoided, the offender still has a conviction on their record, which greatly affects their employment prospects, regardless of whether other potential consequences were avoided. Educating members of the criminal justice system about the challenges that offenders face after release is important and could definitely help put things into perspective, but this approach isn't going to prevent employers from discriminating against ex-offenders.

### C. Fair Chance Laws

As mentioned above, Fair Chance laws limit the ways in which employers can consider an applicant's criminal history during the hiring process.<sup>208</sup> These laws prevent, or at least limit, the discriminatory effects that come with having a criminal background.<sup>209</sup> By limiting the ways

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206. *Id.*

207. *Id.* at 2.

208. NAT'L EMP. L. POL'Y, FACT SHEET, *supra* note 5, at 2.

209. EEOC, *supra* note 148.

in which employers can use criminal record information, there would be little need to enact laws that automate expungements or require the members of the court to delve deeply into the possible collateral consequences of each case they deal with.

By treating those with criminal convictions as a class protected under Title VII<sup>210</sup> or other similar state legislation, many of the problems that accompany other possible solutions can be avoided. Unlike Ban-the-Box or Clean Slate laws, Fair Chance laws would prohibit employers from refusing to hire those with convictions based on their conviction status alone. Fair Chance laws would also avoid the confusion and complications involved in Clean Slate laws because the effects of the legislation would cover all ex-offenders equally, and coverage would happen automatically; there would be no need to opt in or file a petition. Perhaps most importantly, including individuals with conviction records within legislation like Title VII<sup>211</sup> would provide individuals with remedies when they are discriminated against. Including these protections under a structure similar to Title VII would mean causes of action for discriminatory employment practices that could provide the plaintiff with remedies like damages, specific performance, injunctive relief, or other court ordered remedies. Adding individuals with criminal convictions to the list of protected classes would be the most effective way to bring about meaningful change in the employment market and ensure that employers are providing ex-offenders with the opportunity to paid employment.

### Conclusion

Individuals with criminal records face many challenges when applying for employment after their conviction. To alleviate some of the lifelong negative consequences associated with having criminal convictions, a number of solutions have been proposed. As the country begins to acknowledge the struggles that these individuals face in the job market and work to help them effectively reintegrate into society, the most popular policies have not necessarily had the effects that they were intended to have.<sup>212</sup> Ban-the-Box policies, which were intended to alleviate some of the negative consequences that come with having to divulge a criminal arrest or conviction early in the hiring process, have led to greater possibilities of racial profiling in employment,<sup>213</sup> or simply pushing the discrimination later into the hiring process.<sup>214</sup> While Clean Slate laws and training members of the criminal justice system about collateral consequences present some benefits, those solutions

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210. 42 U.S.C. § 2000e-2.

211. *Id.*.

212. *Supra* notes 37–64.

213. *Supra* notes 37–45.

214. Hanks, *supra* note 94.

are not likely to be completely effective in alleviating the issues that ex-offenders are facing. Fair Chance laws present the best protection against discrimination in the employment market. Expressly prohibiting employers from denying employment based on an applicant's criminal history almost completely eliminates the need for supplemental policies. With strong limitations on how employers can use and consider criminal records, it does not matter when in the hiring processes the record is disclosed or discovered. Additionally, the need to expunge or seal low-level offenses becomes less prominent if employers cannot legally discriminate against the applicant. While these additional policies provide extra support for applicants during the hiring process, strong Fair Chance laws have the ability to carry most of the burden in protecting individuals with criminal histories. Implementing strong Fair Chance legislation is the best way for applicants like Joe to be able access the labor market.

