

A ROADMAP FOR COMPREHENSIVE CRIMINAL JUSTICE REFORM TO EMPLOY EX-OFFENDERS: BEYOND TITLE VII AND BAN THE BOX

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ABSTRACT

This Note argues that the federal government needs to go beyond Ban the Box and Title VII in order to address one facet of America's mass incarceration by promoting employment of ex-offenders. While Title VII addresses racial employment discrimination against Black ex-offenders, Title VII is a patchwork solution to a larger problem. Though useful in eliminating conviction records as an initial barrier to employment, Ban the Box legislation does not address the issues raised by criminal history reporting. Ultimately, bipartisan, multifaceted federal criminal justice reform focused on expungement and sealing past records, fixing criminal background checks, and limiting the use of background checks in employment decisions will ameliorate America's prison problem.

This Note details the problems associated with and solutions for America's mass incarceration crisis through employment. Section I describes how the criminal justice system intersects with employment, identifies issues with criminal history accuracy, and argues for criminal history reform. Section II focuses on the current federal solution which uses Title VII to bring claims based on race to remedy employment discrimination involving criminal history. Section III discusses state and local Ban the Box efforts aimed at curbing employment discrimination against ex-offenders. Finally, Section IV explains why federal legislation aimed at both adequately expunging and sealing convictions and banning the box will help address America's prison problem and provides a roadmap for how to pass such legislation.

INTRODUCTION

This year, Georgetown Law gained an improbable tenure-track professor: a convicted bank robber.¹ Shon Hopwood turned his life around after serving eleven

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1. Susan Svrluga, *He Robbed Banks and Went to Prison. His Time There Put Him on Track for a New Job: Georgetown Law Professor*, THE WASHINGTON POST, Apr. 21, 2017, <https://www.washingtonpost.com/news/>

years for a felony conviction, but he is an outlier. He also has one advantage: he is White.²

America has a self-inflicted and self-perpetuating prison problem that disproportionately impacts minorities.³ Approximately 850 in 100,000 adults are incarcerated and one in thirty-eight are under some form of correctional control.⁴ Nearly one in three Black men will spend time in prison.⁵ While Black and Hispanic Americans make up thirty-two percent of the U.S. population, they comprised fifty-six percent of all prisoners in 2015.⁶ Black Americans are severely impacted by mass incarceration as they constitute thirty-four percent of the total prison population and are five times more likely to be imprisoned compared to White Americans.⁷

This national mass incarceration creates a conundrum: what opportunities should be afforded to ex-offenders? At least ninety-five percent of all state prisoners will eventually be released from prison and almost 600,000 people are released every year.⁸ In trying to re-enter society, these ex-offenders search for, and are

grade-point/wp/2017/04/21/bank-robber-turned-georgetown-law-professor-is-just-getting-started-on-his-goals/?utm_term=.9bb3b6f584e4.

2. This Note uses the terms “Black,” “White,” and “ex-offender” for clarity but recognizes that these labels are controversial. See Sarah Leitner, *Philly Mayor Deems “Ex-Offender” Too Harsh Name for Ex-Inmates*, MEDIATRACKERS, Oct. 28, 2013, <http://mediatrackers.org/2013/10/28/philly-mayor-deems-ex-offender-harsh-name-ex-inmates/>; John McWhorter, Commentary, *Why I’m Black, Not African-American*, L.A. TIMES, Sept. 8, 2004, <http://articles.latimes.com/2004/sep/08/news/0e-mcwhorter8>; Merrill Perlman, *Black and white: why capitalization matters*, COLUMBIA JOURNALISM REVIEW (Jun. 23, 2015), https://www.cjr.org/analysis/language_corner_1.php.

3. The phrase “prison problem” encompasses the high rates of incarceration and recidivism described in Sections I & II. This term also incorporates the “collateral consequences” of mass incarceration which affect a person’s employment and business opportunities in addition to other socioeconomic hardships. See Sarah B. Berson, *Beyond the Sentence - Understanding Collateral Consequences*, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE (May 2013), <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>. This Note does not distinguish between those in jail and those in prison.

4. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, (April 2018) <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>. See also *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Jan. 31, 2019). Even though the United States represents five percent of the world’s population, the United States incarcerates twenty-five percent of the world’s prison population. *Id.* Mass incarceration is a recent phenomenon. Since 1970, the prison population rose 700%. *Id.* This explosion in prison population escalated with the “War on Drugs” and continued as both Republicans and Democrats vowed to be “tough on crime.” MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 47–58 (2010). See also Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled A New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 3 (2013).

5. Devah Pager, *Blacklisted: Hiring Discrimination in an Era of Mass Incarceration*, in *AGAINST THE WALL: POOR, YOUNG, BLACK, AND MALE* 71, 72 (Elijah Anderson ed., Univ. Pa. Press, 2008).

6. *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Jan. 2, 2019).

7. *Id.*

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REENTRY TRENDS IN THE U.S. <https://www.bjs.gov/content/reentry/releases.cfm>. (last visited Jan. 2, 2019).

often denied, employment.⁹ Employers are reluctant to hire ex-offenders based on stereotypes and the fear of negligent hiring claims, which hold employers liable for negligently exposing employees to dangerous co-workers.¹⁰ Without jobs, many ex-offenders recidivate.¹¹ This cycle ensnares a staggeringly high number of ex-offenders, as seventy-seven percent of released prisoners re-offend and return to prison.¹² The recidivism rate is even higher for Black Americans; there is an eighty-one percent likelihood that Black ex-offenders will return to prison within five years.¹³

There are many approaches to helping to solve America's prison problem through employing ex-prisoners. On the federal level, advocates use Title VII of the Civil Rights Act of 1964 to address employment discrimination against ex-offenders by attacking the practice as employment discrimination based on race.¹⁴ State and local governments use an alternative method by adopting "Ban the Box" policies that delay the use of criminal history questions in the hiring process.¹⁵

This Note argues that to address America's prison problem through increasing employment opportunities for ex-offenders, the federal government needs to go beyond Ban the Box and Title VII.¹⁶ While Title VII addresses racial employment discrimination against Black ex-offenders, Title VII is a patch-work solution to a larger problem. Although useful in eliminating conviction records as an initial barrier to employment, Ban the Box legislation does not address the

9. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES, Feb. 28, 2015, https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0.

10. See *infra* Part I(A).

11. Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> (citing a study finding employment is "the single most important influence on decreasing recidivism"). Note that there are other factors that contribute to recidivism. See Bill Keller, *Seven Things to Know About Repeat Offenders*, THE MARSHALL PROJECT, Mar. 9, 2016, <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders>.

12. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (Apr. 2016), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

13. *Id.* at 13 (Black Americans had the highest recidivism rate at approximately eighty-one percent compared to Hispanic Americans with seventy-five percent and Whites at seventy-three percent).

14. Advocates also attack the practice as employment discrimination against Hispanic ex-offenders based on national origin, but this Note focuses on discrimination against Blacks based on race.

15. See *infra* Part III.

16. This Note focuses on criminal history based on criminal convictions rather than arrest history. An arrest does not establish that criminal conduct has occurred, while a conviction record may serve as sufficient evidence that a person engaged in criminal conduct. While employment decisions based on arrest history are highly problematic and unfortunately still widespread, employment decisions based on past convictions are more fundamental to the mass incarceration issue. See generally EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. (describing how employment decisions based on arrest history differ from employment decisions based on conviction records).

issues raised by criminal history reporting. Ultimately, bipartisan, multifaceted federal criminal justice reform focused on expungement and sealing past records, fixing criminal background checks, and limiting the use of background checks in employment decisions will ameliorate America's prison problem.¹⁷

This Note details the problems associated with and solutions for America's mass incarceration crisis through employment. Section I describes how the criminal justice system intersects with employment, identifies issues with criminal history accuracy, and argues for criminal history reform. Section II focuses on the current federal solution, which uses Title VII to bring claims based on race to remedy employment discrimination involving criminal history. Section III discusses state and local Ban the Box efforts aimed at curbing employment discrimination against ex-offenders. Finally, Section IV explains why federal legislation aimed at both adequately expunging and sealing convictions and banning the box will help address America's prison problem and provides a roadmap for how to pass such legislation.

I. A SELF-FULFILLING PROPHECY: THE STRONG LINK BETWEEN THE CRIMINAL JUSTICE SYSTEM, EMPLOYMENT, AND RECIDIVISM

This section explains how the criminal justice system intersects with employment by describing the link between employment and recidivism, detailing issues with criminal histories and how they act as barriers to employment for ex-offenders, and prescribing key aspects of criminal history reform. Reforming how criminal histories are reported, updated, and disseminated is a crucial piece of criminal justice reform that can improve reintegration through the employment of ex-offenders. Overall, reducing barriers to employment will ease released prisoners' reentry into the community.

A. *Employment, Recidivism, and Criminal Records*

Employment is the most important influence in decreasing recidivism.¹⁸ Recidivism rates drop by twenty percent when ex-offenders are employed after

17. Expungement refers to the legal process of removing or essentially erasing a criminal record, while sealing a criminal history closes off a criminal record but does not erase the record as the record could be accessed in special circumstances. See Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and An Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 21–25 (1992) (describing the difference between expungement and record sealing).

18. See Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 382–410 (2011); see also Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> (citing a study finding employment is “the single most important influence on decreasing recidivism”).

release from prison.¹⁹ Although employment is an important part of re-entry, employers are reluctant to hire ex-offenders because employers are disincentivized to employ ex-offenders based on negative stereotypes and the risk of negligent hiring claims.²⁰ Furthermore, many statutes bar ex-offenders from employment in certain sectors.²¹ Influenced by these stereotypes, the rise of negligent hiring claims, and statutory bans, ex-offenders are one-half to one-third as likely as non-offenders to be considered for employment.²²

Many employers use criminal history as an initial filter when evaluating a stack of applications.²³ Employers' use of criminal records as an initial screen further disadvantages ex-offenders as studies show that personal contact in the hiring process plays an important role in tempering the effects of criminal stigma in the hiring process.²⁴

19. Peter Cove & Lee Bowes, *Immediate Access to Employment Reduces Recidivism*, REALCLEAR POLITICS (Jun. 11, 2015), https://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html (citing the authors' study released by The Manhattan Institute).

20. See generally Stephen P. Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 151–63 (2011) (discussing the rise of negligent hiring liability and state inconsistencies in this common law cause of action).

21. See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 137–38 (2006) https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (listing twenty-two Federal statutes authorizing fingerprint checks for non-criminal justice purposes). See generally Eniola O. Akinrinade, *Caught Between A Rock, Negligence, Racism, and A Hard Place: Exploring the Balance Between the EEOC's Arrest and Conviction Investigation Guidelines and Society's Best Interest*, 2 TEX. A&M L. REV. 135 (2014); Dallan F. Flake, *When Any Sentence Is A Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U.L. REV. 45, 68–69 (2015) (citing *Crook v. El Paso Indep. Sch. District*, 277 F. App'x 477, 481 (5th Cir. 2008) (holding that a school's policy barring ex-felons from permanent teaching positions reflected "the legitimate interest of protecting children from both physical harm and corrupt influences"); *Hilliard v. Ferguson*, 30 F.3d 649, 652 (5th Cir. 1994) (same)).

22. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003); see Shepard, *supra* note 20, at 170 (describing the rise of negligent hiring claims and resistance to hire ex-offenders based on fears of negligent hiring claims). *But see* SEARCH (THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS), REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE REFORM INFORMATION 68 (Jan. 17, 2006), https://www.reentry.net/library/item.93793-Report_of_the_National_Task_Force_on_the_Commercial_Sale_of_Criminal_Justice (arguing that the proliferation of negligent hiring screens is overblown as "[m]ost successful negligent hiring claims involve employees with unsupervised access to vulnerable populations (children, the elderly) or sensitive venues. Even today, most employers are unlikely to ever be confronted with a negligent hiring judicial challenge.").

23. Although this practice is illegal under Title VII disparate impact analysis, see *infra* Part II(C), and Ban the Box Policies, see *infra* Part IV, many employers still use this tactic. Telephone Interview with P. David Lopez, Co-Dean, Professor of Law and Professor Alfred Solcum Scholar, Former General Counsel of the EEOC (Sept. 17, 2018).

24. See Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 63 ANNALS OF AM. ACAD. OF POL. AND SOC. SCI., 195, 200 (May 2009) (finding that prospective employees who interacted with employers are between four and six times more likely to receive a callback or job offer and personal contact reduces the effect of a criminal record by roughly fifteen percent); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956 (2003) ("Many employers seem to use the information as a screening mechanism, without attempting to probe deeper into the possible context or complexities of the situation."); see also Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 55 (2016) (finding that providing more information improved employment prospects which is consistent with the

B. *The Publicity and Inaccuracy of Criminal Records*

As a result of statutes barring ex-offenders from certain jobs, the rise of negligent hiring claims, and stigmas against persons with a criminal history, approximately ninety-two percent of employers subject all or some of their job candidates to criminal background checks.²⁵ Criminal history records are becoming more expansive—including more and new kinds of information than ever before.²⁶ They are also being accessed more often and by a wider audience.²⁷ As their scope and use are increasing, there is no single source that provides complete and up-to-date information about an individual's criminal history.²⁸ One study found that 5.5% of employment applicants were inaccurately flagged as having a criminal history, presumably because of identical or similar names or other identifiers to people with criminal histories.²⁹ The Government Accountability Office ("GAO") found that when the government checked for criminal history and the system identified a felon, the background check provided a false positive in at least forty-two percent of the cases.³⁰

Criminal records are often inaccurate for two reasons. First, criminal records can be wrong based on a misidentification of the person being searched or misidentification of a conviction.³¹ Second, criminal histories often divulge information that is sealed or expunged.³² Even if a person's criminal history has been sealed or

behavioral economics theory of "ambiguity aversion" which describes the behavior tendency to prefer known risks over unknown risks).

25. SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS, slide 3 (Jan. 22, 2010), https://www.slideshare.net/shrm/background-check-criminal?from=share_email. See also Barry A. Hartstein, *Written Testimony at the EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 26, 2011), <https://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm> (citing a recent survey that indicated background checks are conducted to reduce legal liability for negligent hiring in fifty-five percent of cases, reduce/prevent criminal activity in thirty-nine percent of cases, and comply with state law requiring background checks in twenty percent of cases [respondents were asked to select two options]).

26. See generally James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008); Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303, 307 (2016) (describing how Americans consider criminal records "public information infused with public interest").

27. See generally James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008); Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303, 307 (2016) (describing how Americans consider criminal records "public information infused with public interest").

28. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 6 (2006) https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

29. SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 7 (July 1999), www.search.org/files/pdf/III_Name_Check.pdf.

30. See Appelbaum, *supra* note 9.

31. SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 17 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

32. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 54 (2006) https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

expunged, private companies are under no obligation to update their records to reflect the expungement or seal.³³

There is a complex and incomplete framework that attempts to regulate criminal history reports. While the National Criminal History Improvement Program (“NCHIP”) works to improve the criminal background system, there are significant shortcomings in record completeness.³⁴ Even though businesses that sell criminal history information (known as “consumer reporting agencies” (“CRAs”)) are regulated under the Fair Credit Reporting Act (“FCRA”),³⁵ the FCRA’s retrospective approach fails to provide prospective employees the opportunity to identify mistakes in their records before they have been screened out for a job.³⁶ Even when someone catches an inaccuracy, it is often too burdensome and difficult to fix inaccuracies in their records.³⁷

C. Criminal History Reform

Expungement and criminal history reporting reforms are needed to address the current issues for those facing the stigma of a criminal history.³⁸ Currently, the Federal Government only allows for expungement of minor drug offenses pursuant to the Controlled Substances Act.³⁹ Many scholars call for revisions to expungement, considering the expansion of public data in the information age.⁴⁰ Expanded expungement may be ineffective unless issues with the inaccuracies of criminal background

33. SEARCH, *supra* note 31, at 83; see also Douglas Belkin, More Job Seekers Scramble to Erase Their Criminal Past, WALL ST. J., (Nov. 11, 2009), <http://online.wsj.com/article/SB125789494126242343.html?KEYWORDS=Douglas+Belkin> (“Arrests that have been legally expunged may remain on databases that data-harvesting companies offer to prospective employers; such background companies are under no legal obligation to erase them.”).

34. U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17–18 (2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

35. 15 U.S.C. § 1681 *et seq.* (2018) (FCRA). See generally U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS, *supra* note 32.

36. Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 275–76, 303 (2012) (explaining that “[w]hen a consumer is injured because of a flawed report. . . the FCRA provides little meaningful relief [because] [h]aving lost an opportunity for employment, the injured consumer must then engage in protracted litigation with a low chance for success”). But see SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 89–90 (2005), www.search.org/files/pdf/RNTFCSCJRI.pdf (explaining that while “the FCRA does not necessarily settle the accuracy and completeness issue . . . on the whole, there is not a substantial reliability issue with respect to commercial vendors because commercial vendors have a strong business interest in trying to produce reliable, accurate, and complete products”).

37. See Steven Melendez, *When Background Checks Go Wrong*, FAST COMPANY, Nov. 17, 2016, <https://www.fastcompany.com/3065577/when-background-checks-go-wrong>.

38. See Alexia Lindley Faraguna, *Wiping the Slate, Dirty: The Inadequacies of Expungement as a Solution to the Collateral Consequences of Federal Convictions*, 82 BROOK. L. REV. 961, 964–65 (2017); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963 (2013).

39. See Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records*, Seton Hall University Law School Student Scholarship, Paper 163, 1, 26 (May 1, 2013) http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1163&context=student_scholarship.

40. See Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 Temp. L. Rev. 403 (2015); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015);

searches are simultaneously addressed. States, on the other hand, have been far more progressive in expanding access to expungements and record sealing.⁴¹ For example, lower-level, nonviolent crimes in Pennsylvania will automatically be sealed after ten years if the defendant has gone a decade without a new conviction.⁴²

While many argue that expungement is not a viable option,⁴³ alternatives will not adequately address the stigma of conviction. Some argue that governments could issue certificates of relief to reduce the stigma against ex-offenders.⁴⁴ The National Institute of Justice calculated redemption points where the risk of re-offending subsides to the rate of the general population based on age of the offender at the time of the crime, the type of crime, and the length of time since the crime.⁴⁵ Governments can use these statistics to create individualized redemption points. When the ex-offender reaches the requisite redemption points, the government would add a certificate to the criminal history describing how the ex-offender met the requisite redemption points. These certificates, however, will not erase the stigma of conviction like a seal or expungement, but would paper over the issue with a certificate that could be largely ignored. Furthermore, the methods for creating redemption points are flawed and could perpetuate racial bias.⁴⁶

D. Incentives for Re-Entry Employers

Expungement and criminal history reforms address only a few of the issues that recently released prisoners face in obtaining employment. Some scholars argue for tax incentives for employers who hire those with criminal histories.⁴⁷ Tax

Chris Skall, *Journey Out of Neverland: COEI Reform, Commonwealth v. Peter Pon, and Massachusetts's Emergence as a National Exemplar for Criminal Record Sealing*, 57 B.C. L. REV. 337 (2016).

41. See, e.g., Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361 (2016); Margaret Lowe, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Mar. 9, 2017) <http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey/> (detailing how thirty-nine states plus the District of Columbia have some form of record-closing laws); see also Michael H. Jagunic, Note, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161 (2011); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361 (2016); Skall, *supra* note 40, at 337 (discussing Massachusetts' efforts to improve criminal records sealing).

42. Mark Scolforo, *Wolf Signs Bill Sealing Some Criminal Records after Decade*, ASSOCIATED PRESS, Jun. 28, 2018, <https://www.apnews.com/9fb7a96015944642bdf796c30cee35a5>.

43. Faraguna, *supra* note 38, at 964–65.

44. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. 11, 22 (2016); Faraguna, *supra* note 38, at 964–65.

45. Alfred Blumstein & Kiminori Nakamura, POTENTIAL OF REDEMPTION IN CRIMINAL BACKGROUND CHECKS: FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 5–8, 41–45 (Sept. 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232358.pdf>.

46. These calculations could be susceptible to the same racial bias as risk scores. See Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA, May 23, 2016, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

47. Faraguna, *supra* note 38, at 964–65.

incentives, however, would encourage employers to consider criminal history early in the employment process and would create confusing incentives for employers that still face the risk of negligent hiring claims. Other scholars propose curbing negligent hiring claims by imposing caps on negligent hiring damages or limiting liability for employers that perform individualized assessments of persons with criminal history.⁴⁸ Educating employers that individualized assessments of applicants with criminal histories assuage negligent hiring claims could promote employment of ex-offenders as it enables persons with criminal histories to overcome the initial screen.⁴⁹ Overall, a solution must include both expungement and criminal history reform, coupled with remedies aimed at employing ex-offenders.⁵⁰

II. THE FEDERAL SOLUTION TO EMPLOYING EX-OFFENDERS: EMPLOYING TITLE VII TO ADDRESS RACE, EMPLOYMENT DISCRIMINATION, AND CONVICTION HISTORY

Based on the links between employment, race, and recidivism, Title VII provides remedies to combat employment discrimination of ex-offenders through claims of employment discrimination based on race. This section details the remedies provided by Title VII, explains the EEOC's guidelines on criminal history based on Title VII, evaluates the usefulness of Title VII in remedying criminal history discrimination, and concludes that Title VII fails to provide an adequate remedy for ex-offenders. While Title VII is a useful tool to combat the problem of employment discrimination against ex-offenders, a more precise tool is needed to ensure more ex-offenders enter the workforce.

A. *Recidivism, Race, and Employment*

While minorities are disproportionately affected by mass incarceration, Black Americans are especially disadvantaged because the effect of a criminal record is

48. Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U.L. REV. 45, 95 (2015).

49. See Cornell William Brooks, Written Testimony at the EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, U.S. Equal Emp't Opportunity Comm'n (July 26, 2011), <https://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm> ("Where an employer is accused of negligent hiring in failing to deny employment on the basis of a criminal record, courts should rely on considerations closely similar to those used in evaluating business necessity. If an employer has evaluated factors like the relationship between job duties and the elements of conviction, or the time passed since conviction, these considerations should contribute to the employer's defense. The EEOC should advocate for a tort foreseeability analysis based on concrete, research-based factors that accurately reflect risk, rather than on the more nebulous 'totality of the circumstances.'").

50. Other countries have low rates of recidivism compared to the U.S., but their systems of criminal justice are fundamentally different as they focus on reintegrating ex-offenders rather than punishing them. See JUSTICE POLICY INSTITUTE, *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations* (Apr. 2011), <http://www.justicepolicy.org/research/2322>. This Note, however, advocates for criminal justice reform focused on employment of ex-offenders as it is a goal that can be achieved without overhauling the entire criminal justice system.

much larger for Black Americans than for White Americans⁵¹ As Devah Pager explains, “[w]hile the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1” and therefore “[t]he effect of a criminal record is thus forty percent larger for blacks than whites.”⁵² Because of the higher rates of incarceration among Black Americans, Black Americans are viewed as high-risk employees.⁵³

B. Title VII of the Civil Rights Act of 1964

Enacted in response to the Civil Rights Movement, the Civil Rights Act of 1964’s purpose “was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁵⁴ To achieve this purpose, Title VII prohibits employment discrimination based on race, color, sex, religion, and national origin and empowers the Equal Employment Opportunity Commission (EEOC) to issue guidance and pursue claims under this act.⁵⁵

There are two analytical frameworks under Title VII: disparate treatment and disparate impact. Under disparate treatment, an employee may sue an employer if the employer intentionally discriminated on the basis of one of the protected traits.⁵⁶ Under disparate impact, an employee may sue an employer for discriminatory employment practices even if the employer has no discriminatory intent.⁵⁷ Even if an employer successfully demonstrates that using criminal history is a business necessity, a plaintiff may still prevail by demonstrating that there is a less discriminatory alternative employment practice that serves the employer’s legitimate goals.⁵⁸

51. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959–60 (2003); see also Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

52. Pager, *The Mark of a Criminal Record*, *supra* note 51, at 959.

53. Pager, *supra* note 5, at 82. There is a double-problem here, because there is race discrimination which affects the ability of Black Americans to obtain jobs, plus the stigma of criminal history (and the fact that Black Americans are more likely to be convicted).

54. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

55. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

56. 42 U.S.C. § 2000 (2012).

57. In the landmark Supreme Court Case recognizing disparate impact claims, the Court explained that “[Title VII] proscribes . . . practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected trait] cannot be shown to be related to job performance, the practice is prohibited.” See *Griggs*, 401 U.S. at 431; ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY* 268–315 (2014); see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (Disparate impact analysis expanded to apply to subjective practices); In 1991, Congress amended Title VII to codify disparate impact analysis and the business necessity affirmative defense. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (“An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .”).

58. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C) (2012). See also *Watson*, 487 U.S. at 998.

*C. EEOC's Guidance on Criminal History*⁵⁹

In 2012, the EEOC updated its twenty-year old guidance on the consideration of arrest and conviction records under Title VII.⁶⁰ This guidance describes how a Title VII plaintiff could prevail on both the disparate treatment and disparate impact theories when employers use criminal records in employment decisions.⁶¹

The EEOC explained how disparate treatment discrimination occurs when employers use criminal history in employment decisions to discriminate against someone based on race (Black) or national origin (Hispanic).⁶² In these cases, the plaintiff must show that that an employer rejected a Black or Hispanic applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.⁶³ Because “Title VII prohibits . . . decisions infected by stereotyped thinking . . . an employer’s [discriminatory act] based on racial or

59. The Fifth Circuit is currently considering whether a district court erred in invalidating the Arrest and Conviction Guidance. *Texas v. EEOC*, No. 18-10638 (5th Cir. filed May 29, 2018).

60. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; see Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 4, 1987), <http://www.eeoc.gov/policy/docs/convict1.html>; EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 29, 1987), <http://www.eeoc.gov/policy/docs/convict2.html>; Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html; Compliance Manual Section 15: Race & Color Discrimination, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, § 15-VI.B.2 (April 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.pdf>; see also EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on “serious crimes”); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee’s discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

61. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Guidance distinguishes between arrest and conviction records, explaining that arrest records do not establish that criminal conduct has occurred while a conviction record serves as sufficient evidence that a person engaged in criminal conduct. Under the Guidance, while employment action based on an arrest is not job related and therefore cannot be invoked under the affirmative defense of business necessity, the underlying conduct of the arrest may render someone unfit for employment. *Id.*

62. *Id.*

63. *Id.* (citing to Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958, Figure 6 (2003) (finding that that White applicants with the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants.); see also Pager et al., *Sequencing Disadvantage*, supra note 51, at 199 (finding that among Black and White testers with similar backgrounds and criminal records, “the negative effect of a criminal conviction is substantially larger for Blacks than Whites . . . the magnitude of the criminal record penalty suffered by Black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)”)).

ethnic stereotypes about criminality – rather than qualifications and suitability for the position– is unlawful disparate treatment that violates Title VII.”⁶⁴

The EEOC guidance also explains how disparate impact analyses can combat the use of criminal records in employment decisions.⁶⁵ Building on previous guidance and precedent on the disparate impact on Black and Hispanic Americans of criminal history questions in hiring, the EEOC found that “criminal record exclusions have a disparate impact based on race and national origin.”⁶⁶ While criminal history is not a protected trait under Title VII, when an employer uses criminal history in employment decisions and that use disproportionately affects a Title VII-protected trait such as race or national origin (impacting Black or Hispanic Americans), and the employer does not demonstrate that the policy or practice is job related and consistent with business necessity, the practice is prohibited under the disparate impact theory of Title VII.⁶⁷

The EEOC lists two ways in which employers could claim the affirmative defense that their actions “meet the job related and consistent with business necessity defense[.]”⁶⁸ First, the employer could claim the defense when exclusion based on criminal conduct is related to subsequent work performance or behaviors based on an individualized assessment.⁶⁹ Second, the employer considers the *Green* factors: the nature of the crime, the time elapsed since the offense and/or the completion of the sentence, and the nature of the job.⁷⁰ Overall, the EEOC finds that absent a federal prohibition or state restriction on employing individuals with records of certain criminal conduct, per se restrictions on employing persons with criminal history is a violation of Title VII.⁷¹

D. Mixed Success in Title VII Cases Aimed at Discrimination Involving Ex-Offenders

Under the framework described in the EEOC’s guidance, Title VII cases related to criminal convictions and arrests provide mixed results.⁷² Courts agree that arrest

64. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (internal quotations omitted).

69. *Id.*

70. *Id.*; see *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (upholding the district court’s injunction prohibiting the employer from using an applicant’s conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions, as long as the employer took the nature of the crime, time elapsed, and nature of the job into account).

71. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

72. While the EEOC guidance was reissued in 2012, plaintiffs have brought cases under the general theories articulated in the guidance since the 1970s. See, e.g., Kevin McGowan, *Dollar General Can’t Shake Bias Suit*

and conviction histories cannot be an absolute bar to employment.⁷³ However, disparate impact and failure to hire cases are difficult to prove, which leads to many cases being dismissed.⁷⁴ Despite the mixed results, the EEOC and prominent plaintiff's firms have successfully settled claims against companies using criminal history screening in employment decisions.⁷⁵ Some argue that the focus on disparate impact is misplaced in light of the difficulties in proving its theoretical claim, arguing instead that plaintiffs should focus on bringing disparate treatment claims.⁷⁶

Over Background Checks, BNA's Emp't Discrimination Report (BNA) (Apr. 19, 2017) ("The EEOC has gotten mixed results when it has sued under Title VII of the 1964 Civil Rights Act alleging bias against black, Hispanic and male workers from employers' use of criminal and credit history screens.").

73. *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971) (agreeing that conviction history cannot per se constitute an absolute bar to employment); *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (holding that asking for arrest history barred employment to Black applicants disproportionately as compared to White applicants and therefore finding for the plaintiff under the theory of disparate impact because defendant failed to show a reasonable business purpose for asking prospective employees about their arrest record); *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975) (finding disparate impact on the basis of race when employer uses conviction history as an absolute bar to employment).

74. *See Rogers v. Pearland Indep.Sch. Dist.*, 827 F.3d 403, 407 (5th Cir. 2016) (finding plaintiff failed to establish disparate impact claim because no evidence of policy barring convicts from consideration of employment and plaintiff failed to state a claim of disparate treatment because other man hired with a criminal history was not a similarly situated comparator treated more favorably than the plaintiff under nearly identical circumstances)(quotations omitted); *EEOC v. Freeman*, 778 F.3d 463, 467-68 (4th Cir. 2015) (finding district court did not abuse discretion in finding EEOC's expert as unreliable, therefore granting summary judgment to employer); *El v. SEPTA*, 479 F.3d 232, 248 (3rd Cir. 2007) (finding summary judgment for employer when plaintiff failed to refute employer's business necessity).

75. Patrick Dorrian, *Census Bureau's \$15M Hiring Bias Settlement OK'd*, BNA's Labor & Emp't (BNA) (Sept. 23, 2016) (reporting that plaintiff's firm Outten & Golden LLP brought and settled a claim against the Census Bureau for discriminating against Black and Hispanic job seekers because of flawed criminal history screening procedures); Patrick Dorrian, *Macy's Hit With EEOC Charge Over Criminal-History Screening*, BNA's Emp't Discrimination Report (BNA) (May 24, 2017) (explaining how plaintiff's firm Outten & Golden LLP brought suit against Macy's for screening job applicants based on their criminal history); Kevin McGowan, *Dollar General Can't Shake Bias Suit Over Background Checks*, BNA's Emp't Discrimination Report (BNA) (Apr. 19, 2017) (describing how the EEOC brought suit against company that operates Dollar General for policy of denying employment to individuals with criminal histories); Press Release, EEOC, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit (Sep. 8, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm> (detailing how the EEOC brought and settled a race discrimination suit against BMW for failing to rehire anyone with a criminal record); Press Release, EEOC, Franke Foodservice Systems Settles EEOC Race Discrimination Lawsuit (Mar. 26, 2009) <https://www.eeoc.gov/eeoc/newsroom/release/archive/3-26-09c.html> (describing how the EEOC brought and settled a claim against Franke, Inc., for failing to hire a Black applicant with a felony conviction even though the company previously hired a White applicant with a felony conviction); Press Release, EEOC, J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records (Jun. 28, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm> (reporting that the EEOC brought and settled a race discrimination charge against J.B. Hunt for failing to hire a Black job candidate based on a criminal record); Press Release, EEOC, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan 11, 2012) <https://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm> (explaining how the EEOC brought and settled a claim against Pepsi for policy of using arrest and conviction history as a barrier to employment).

76. Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 5 (2012).

While there has been mixed success in bringing Title VII claims, “soft enforcement” of the guidance successfully nudges employers’ behavior to voluntarily comply with the EEOC guidance.⁷⁷ “Soft enforcement” generally entices employers to comply with the guidance voluntarily to avoid litigation and public relations issues. While this soft enforcement is laudable, federal legislation mandating compliance is preferable and attainable.⁷⁸

E. Shortcomings of Title VII

Although the federal nondiscrimination law can and should address discrimination in employment, the law attacks only one area of the prison problem that cycles ex-offenders back to prison or jail—racial discrimination in criminal justice and employment. While Title VII cannot fix the criminal justice issue, Title VII is an important tool in combating employment discrimination against Black ex-offenders. Recognizing Title VII’s importance, many scholars have proposed alternative approaches to strengthen Title VII cases in arrest and conviction suits.⁷⁹ However, Title VII is a patchwork solution to ameliorating the prison problem through employment, and more must be done.

Title VII falls short because while employment, race, and criminal justice are intrinsically linked, addressing employment discrimination against ex-offenders through race-based employment discrimination claims cannot address the wider criminal justice problem affecting all Americans. Focusing on racial discrimination to attack discrimination against ex-offenders stifles broad support for criminal justice reform.⁸⁰ By focusing on racial discrimination, the reformers risk criminal

77. See Press Release, The White House, Fact Sheet: White House Announces New Commitments to the Fair Chance Business Pledge and Actions to Improve the Criminal Justice System (Nov. 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments-fair-chance-business>; Press Release, The White House, Fact Sheet: White House Launches the Fair Chance Business Pledge (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

78. See *infra* Part IV.

79. See 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, 997 (2015) (proposing “a disability framework that would restrict employer access to long-ago and minor convictions that do not predict future behavior by sealing or expunging these records, while permitting employers to review the criminal records of conditional employees that may predict future behavior, and to reject those conditional employees who present a genuine risk that cannot be accommodated”); Nina Kucharczyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, 85 FORDHAM L. REV. 2803, 2831, 2834 (2017) (advocating for reforming discovery to help failure to hire claims and reforming the McDonnell Douglas burden shifting framework to strengthen Title VII claims); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 901 (2014) (suggesting the adoption of a Health Law Framework which is “a doctrinal scheme that regulates the flow of information that may form the basis of an adverse employment decision”); Jake Elijah Struebing, Note, *Reconsidering Disparate Impact Under Title VII: Business Necessity as Risk Management*, 34 YALE L. & POL’Y REV. 499 (arguing that courts should expand upon the Third Circuit’s notion of risk management as an analysis of business necessity, therefore requiring a sharper rationale to invoke the affirmative defense).

80. In Part IV, I argue that to garner Republican support, federal legislation should focus on employment of ex-offenders as a whole and link the benefits of such reform to core conservative principles.

justice reform being perceived as a strictly “minority issue,” rather than one that impacts a diverse population from an array of backgrounds. Furthermore, using Title VII to stop discrimination against ex-offenders ties criminality to race and thus reinforces stereotypes of criminality and deepens antipathy toward providing protection to ex-offenders.⁸¹ By focusing on broader criminal justice reform, this reform movement could benefit from support of a variety of Americans, not just racial minorities or those sympathetic to issues facing minority populations. The federal government should therefore supplement Title VII to adequately address the issue of criminal history discrimination.⁸²

III. STATE AND LOCAL APPROACHES TO EMPLOYING EX-OFFENDERS: BAN THE BOX POLICIES

To address the issue of employment discrimination against ex-offenders, many state and local governments use Ban the Box policies to delay when an employer can ask questions about criminal history and conduct background checks. This section describes the variety in Ban the Box policies and details the issues with relying solely on Ban the Box initiatives. Ban the Box legislation and executive actions in states are vital tools of criminal justice reform because most criminal justice is performed through states.⁸³ While Ban the Box policies are helpful, these policies are not uniform and fall short of addressing the pervasive issues involving criminal history. Therefore, these policies must be coupled with federal initiatives to get ex-offenders into the workplace.

A. *Ban the Box Generally*

To improve the employment outcomes of ex-offenders, the grassroots civil rights organization *All of Us or None* started campaigning for fair chance hiring or Ban the Box policies.⁸⁴ In the initial job application, asking an applicant to check a box indicating whether he has been arrested or convicted of a crime created barriers to employment by allowing employers to screen out ex-offenders and serve as a deterrent to ex-offenders applying for the job.⁸⁵ Ban the Box policies do not prevent employers from conducting criminal background checks. These policies delay the criminal background history inquiry until later in the hiring process, thereby allowing ex-offenders the opportunity to explain the circumstances of their

81. Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for A True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 281 (2014).

82. Part IV details the proposed federal legislative solution and a roadmap for passing the comprehensive reform.

83. Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, THE NEW YORKER, June 6, 2017, <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> (noting that federal inmates make up only 9% of prisoners).

84. Terry-Ann Craigie, *Ban the Box, Convictions, and Public Sector Employment* 2 (Jan. 27, 2017), <http://dx.doi.org/10.2139/ssrn.2906893>.

85. *Id.*

criminal history and isolating the reason the candidate is not selected.⁸⁶ Thus far, thirty-three states and 150 localities have adopted a Ban the Box policy, including nine states that have Ban the Box policies that apply to private employers.⁸⁷ Ban the Box policies diverge in six areas: (1) what type of employers are covered under the law; (2) at what point an employer may conduct a background check; (3) what type of information can be considered when evaluating a background check; (4) which factors an employer may use when making employment decisions; (5) disclosure obligations to an employee; and (6) enforcement provisions.⁸⁸

B. *Issues with Ban the Box*

Ban the Box policies have produced generally positive results. Studies show that Ban the Box policies increase the employment rate of convicted individuals in the public sector by nearly five percent.⁸⁹ However, many criticize Ban the Box policies because they differ from jurisdiction to jurisdiction and leave a patchwork of laws for employers to follow.⁹⁰ Scholars also argue that these policies have an inverse impact on racial minorities. By eliminating the box or asking about criminal history later in the hiring process, employers rely on proxies for criminal history such as race and age.⁹¹ The end result is more racial profiling in hiring.⁹² While racism in hiring is a problem, the policy response to this issue is not to reverse Ban the Box policies, but rather to work to eliminate the bias against convicts and young Black men and to bring Title VII claims to combat racism.⁹³

86. *Id.*

87. Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Sep. 2018), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-September.pdf>; NAACP Criminal Justice Dep't, *Fair Chance Hiring Factsheet: At the Intersection of Race, the Criminal Justice System, and Employment Criminal Justice*, NAACP (Apr. 2017), <http://www.naacp.org/wp-content/uploads/2017/06/FCH-Fact-sheet-rev.-5-5-17.pdf>.

88. Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2819–20 (2015).

89. CRAIGIE, *supra* note 84, at 21.

90. See O'Connell, *supra* note 88, at 2819–20.

91. Lucy Gubernick, *Erasing the Mark of Cain: An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 *FORDHAM URB. L.J.* 1153, 1157 (2017); Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (June 14, 2016), UNIV. OF MICH. LAW & ECONOMICS RESEARCH PAPER SERIES, PAPER NO. 16-012, 34–38, <https://ssrn.com/abstract=2795795> (finding that Black Americans are more likely to be discriminated against when there is no Ban the Box policy); Jennifer L. Doleac & Benjamin Hansen, *Does 'Ban the Box' Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (Jan. 1, 2017), <https://ssrn.com/abstract=2812811> (researching discrimination against Hispanic and Black men when criminal history is hidden).

92. Gubernick, *supra* note 91, at 1156.

93. Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair-Chance Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>; see also Nina Kucharzyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, 85 *FORDHAM L. REV.* 2803, 2831 (2017).

Finally, Ban the Box policies are procedurally deficient for reasons which are equally applicable to Title VII. First, Ban the Box litigation does not guarantee an ex-offender a job; relief comes in the form of compensation if an ex-offender prevails in his suit.⁹⁴ Second, many ex-offenders do not think that the time and energy put into litigation is worthwhile, as their number one priority is finding and keeping a job to earn a living.⁹⁵ Lastly, employers skirt Ban the Box by employing procedural barriers as workarounds.⁹⁶ These barriers include limiting the amount of time given to a candidate to provide a criminal record when asked, or refusing to hire a candidate because he failed to accurately state his criminal record when asked in confusing or misdirected ways.

IV. BEYOND TITLE VII AND BAN THE BOX: THE NEED FOR PROPOSED FEDERAL LEGISLATION

While Title VII and Ban the Box policies are useful tools in combating the issues of employment discrimination against ex-offenders, these policies only remedy the consequences of discrimination, rather than attacking the root cause of the issue. By addressing racial disparities in employment, Title VII works to attack the racial inequalities that result from mass incarceration. Title VII, however, is an ill-fitting workaround that addresses one of the symptoms of America's prison problem in a narrow fashion. Moreover, it is difficult to prove failure to hire claims under Title VII. Ban the Box policies similarly work to address the initial barrier to employment, but not the root cause of the issue. By pushing questions about criminal history towards the end of the application process, ex-offenders have a better chance of making it past the initial screen but still face the stigma of having a criminal history and the racial stereotyping that occurs throughout the process. Finally, neither Title VII nor Ban the Box legislation fixes the issues surrounding criminal history reporting errors.

Eliminating employment discrimination based on criminal history is best achieved through comprehensive federal criminal justice reform.⁹⁷ An approach that addresses both criminal histories and their deficiencies through expanding expungement and reforming criminal history reporting systems would allow ex-offenders to re-join society without the stigma of their offenses. Reform should

94. See O'Connell, *supra* note 88, at 2819–20. See generally OHR Guidance No. 16-02, “Ban the Box”: Fair Criminal Record Screening Act (2016), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHRGuidance16-02_FCRSA_FINAL.pdf.

95. See Panel, *Beyond the Sentence*, Georgetown Univ. Law. Ctr. (Nov. 15, 2017) (A woman speaking on personal experience as an ex-offender and current policy advisor for DOJ and volunteer with BOP).

96. This is a little researched topic that has yet to be widely litigated. Telephone Interview with P. David Lopez, Co-Dean, Professor of Law and Professor Alfred Solcum Scholar, Former General Counsel of the EEOC (Sept. 17, 2018).

97. See, e.g., Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL'Y REV. 123 (2016); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963 (2013).

also focus on immediately employing ex-offenders and should include a federal Ban the Box law to allow ex-offenders a fair chance to apply for jobs without their criminal histories clouding their applications early in the process. Currently, two bi-partisan bills in Congress would make this reform a reality.

A. *The REDEEM Act and The Fair Chance Act*⁹⁸

Based on the “clean slate” reforms, The Record Expungement Designed to Enhance Employment Act (REDEEM Act) expands the rights of juveniles and adults to seal and expunge their federal records.⁹⁹ The bill also requires the FBI to adopt protections ensuring the accuracy of criminal history records.¹⁰⁰ In the 115th Congress, the bi-partisan bill was co-sponsored by one Republican and one Democratic Senator and eight Democrats in the House.¹⁰¹ This act would adequately address the issues with criminal histories and provide a clean slate for some ex-offenders, enabling them to find employment.

Modeled on Ban the Box legislation, the Fair Chance to Compete for Jobs Act of 2017 (Fair Chance Act) prohibits the federal government and federal contractors from asking about criminal history before providing a conditional offer of employment.¹⁰² This bill also enjoyed bi-partisan support as it was co-sponsored by eighteen Democrats and one Republican in the House, and five Democrats and three Republicans in the Senate.¹⁰³ This bill would provide ex-offenders the chance to compete for jobs without the stigma of their offense and ensure that their offense is only used as a barrier when there is a legitimate business necessity.

Although Congress should go beyond the Fair Chance Act and apply this federal Ban the Box policy to private employers, these bills are a good first step. Passing this policy signals to the business community that Ban the Box is an appropriate mechanism in the hiring process. The message would be clear: if it is good enough for the federal government, it should be good enough for the private business community. While voluntary compliance is already significant, these bills could broaden the support for voluntary compliance.¹⁰⁴ Furthermore, states should

98. While these acts were introduced in the 115th Congress but ultimately failed, based on momentum from the First Step Act of 2018, many expect the bills like the REDEEM Act and Fair Chance Act to be reintroduced in subsequent legislative sessions. See Ames Grawert & Tim Lau, *How the FIRST-STEP Act Became Law—and What Happens Next*, BRENNAN CENTER FOR JUSTICE, Jan. 4, 2019, <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.

99. See Record Expungement Designed to Enhance Employment Act of 2017 (REDEEM Act), S. 827, 115th Cong. (2017); Record Expungement Designed to Enhance Employment Act of 2017 (REDEEM Act), H.R. 1906, 115th Cong. (2017). Under these acts, nonviolent, non-sex crimes would be eligible to be sealed and expunged.

100. S. 827; H.R.1906.

101. S. 827; H.R.1906.

102. Fair Chance to Compete for Jobs Act of 2017, S. 842, 115th Cong. (2017); Fair Chance Act, H.R. 1905, 115th Cong. (2017).

103. S. 842; H.R. 1905.

104. See Press Release, The White House, Fact Sheet: White House Announces New Commitments to the Fair Chance Business Pledge and Actions to Improve the Criminal Justice System (Nov. 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments->

continue to push for broader application of Ban the Box which will raise the floor for multi-state businesses.

B. The Roadmap for Passing the REDEEM Act and the Fair Chance Act

Learning from the recent success of the First Step Act of 2018 and stalled legislative efforts to pass reform in the past, advocates should build a bi-partisan coalition to pass these important criminal justice reforms.¹⁰⁵ Congress needs to enact this criminal justice reform as an effective, and long-lasting solution. Although the First Step Act of 2018 provided momentum for bi-partisan criminal justice reform, Congress must take the next step. Congressional action is vital based on the Trump administration's mixed messages on criminal justice reform which make executive action highly unlikely.¹⁰⁶ Although politicians on both sides of the aisle face political headwinds as no one wants to be pegged as "soft on crime," politicians can appeal to their base to pass these reforms.¹⁰⁷ Because most crimes are punished through state laws, federal criminal justice reform is aimed at typically "less menacing population[s.]"¹⁰⁸ Therefore, politicians will not be dealing with the most extreme crimes as federal crimes are typically non-violent.¹⁰⁹ Democrats should build support among their base by focusing on liberal ideals of racial equality and criminal justice reform generally.¹¹⁰ Republicans should support the bill by focusing on traditional Republican ideals: fiscal responsibility, small government, and Christian values.¹¹¹

fair-chance-business; Press Release, The White House, Fact Sheet: White House Launches the Fair Chance Business Pledge (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

105. First Step Act of 2018, Pub. L. No. 115-391 (2018). See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES, Dec. 18, 2018, <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>; Ames Grawert & Tim Lau, *How the FIRST-STEP Act Became Law — and What Happens Next*, BRENNAN CENTER FOR JUSTICE, Jan. 4, 2019, <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.

106. While executive action is a helpful tool to passing reform when the legislature is unwilling or unable, executive action is limited in scope and easily reversed. See Matt Ford, *Jeff Sessions Reinvigorates the Drug War*, THE ATLANTIC, May 12, 2017, <https://www.theatlantic.com/politics/archive/2017/05/sessions-sentencing-memo/526029/> (describing how Trump's administration has reversed many progressive Obama-era criminal justice policies). But see Press Release, The White House Office of the Press Secretary, Fact Sheet: President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/>; Gregory Korte, *Trump pushes for prison reform at White House summit. Will some reform lead to more?*, USA TODAY, May 19, 2018, <https://www.usatoday.com/story/news/politics/2018/05/18/prison-reform-trump-pushes-bipartisan-solution/621534002/>.

107. ALEXANDER, *supra* note 4, at 49–58; see also Newell, *supra* note 4, at 3.

108. See Keller, *supra* note 11.

109. See *id.*

110. George, *supra* note 83.

111. *Id.*

Congressionally-enacted criminal justice reform would provide a uniform and stable law. Enacting a federal statute would ensure uniformity for business practices, which is increasingly important in the modern economy.¹¹² Federal legislation is also preferable to executive orders, as executive orders are limited in scope and easily reversed by the next administration.¹¹³ This federal criminal justice reform should look to similar successful Ban the Box movements in the states that enacted it through legislation and/or executive action as a roadmap for enacting reform.¹¹⁴ States without a strong liberal identity issue Ban the Box policies through executive action.¹¹⁵ President Obama enacted a federal Ban the Box policy through executive action and a business pledge aimed at voluntary compliance.¹¹⁶ The Obama Administration also established a National Clean Slate Clearinghouse to provide technical assistance to local legal aid programs, public defender offices, and re-entry service providers to help with record-cleaning, expungement, and related civil legal services through a partnership with the Department of Labor and Department of Justice.¹¹⁷ The current administration is hostile to Obama-era reforms and has reversed many Obama-era policies aimed at criminal justice reform.¹¹⁸ Recent criminal justice reforms stalled because of a tense, complicated debate on the role of police and race which took place in light of rhetoric surrounding the 2016 Presidential election and Trump Presidency, backlash to Black Lives Matter, and an increase in the murder rate in certain major cities.¹¹⁹ Most recently, however, the 115th Congress enacted the First Step Act after the White House backed the bi-partisan prison reform bill.¹²⁰ This law provides some sentencing reform, mandates improved prison conditions, and requires federal prisons to offer

112. See O'Connell, *supra* note 88, at 2831–33.

113. See Darla Cameron, *What President Obama's Executive Actions Mean for President Trump*, THE WASHINGTON POST, Jan. 31, 2017, <https://www.washingtonpost.com/graphics/politics/executive-action/>.

114. Avery & Hernandez, *supra* note 87, at 18–19.

115. See *id.* (noting that some Republican governors enacted Ban the Box through executive action). Many “purple” states also issue Ban the Box policies through executive order; for example, Virginia enacted its Ban the Box policy through the executive order of Governor McAuliffe. Mollie Reilly, *Virginia Gov. Terry McAuliffe Signs ‘Ban the Box’ Order to Help Former Offenders Get Jobs*, HUFFINGTON POST, Apr. 3, 2015, https://www.huffingtonpost.com/2015/04/03/virginia-ban-the-box_n_7000264.html.

116. CONGRESSIONAL RESEARCH SERVICE, OBAMA ANNOUNCES EFFORT TO “BAN THE BOX” IN FEDERAL HIRING, CRS REPORTS & ANALYSIS, Nov. 18, 2015, <https://fas.org/sgp/crs/misc/banbox.pdf>.

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

118. Ford, *supra* note 106.

119. See Perry Bacon Jr., *Are Bipartisan Efforts on Criminal Justice Reform at an Impasse?*, NBC NEWS, June 6, 2016, <https://www.nbcnews.com/meet-the-press/are-bipartisan-efforts-criminal-justice-reform-impasse-n584921>; See also Richard Benjamin, *Trump's Prison-Reform Push has Divided Washington on a Rare Bipartisan Issue*, THE NEW YORKER, May 24, 2018, <https://www.newyorker.com/news/news-desk/trumps-prison-reform-push-has-divided-washington-on-a-rare-bipartisan-issue>.

120. First Step Act of 2018, Pub. L. No. 115-391 (2018); Press Release, The White House Office of the Press Secretary, Fact Sheet: President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer (Dec. 21, 2018), <https://www.whitehouse.gov/briefings->

programs to reduce recidivism by better preparing inmates to re-enter society through job-training programs.¹²¹ The First Step Act is an important initial part of prison reform, but Congress should still pass the REDEEM ACT and Fair Chance Act to help ensure ex-offenders can secure jobs.

To pass such legislation, Democrats need to convince their base that these reforms are important next steps in overall criminal justice reform. While some liberal members of the bi-partisan coalition argue that reforms failed in 2016 because obstructionist Republicans did not want to give President Obama a win on the verge of the election, some conservatives believe that Democrats chose not to compromise since they were confident that Hillary Clinton would become President.¹²² Since 2017, Democrats have become the party of resistance. Republicans criticize Democrats for (1) lacking a message and (2) making it difficult for conservatives to sign onto any reform by pushing a more liberal agenda instead of a moderate bi-partisan movement.¹²³ Democrats should therefore focus on a strong and clear message that the REDEEM Act and Fair Chance Act provide ex-offenders from all backgrounds a fair chance to secure a job.¹²⁴ Democrats should build on the momentum created by the First Step Act and continue to reach across the aisle to create common-sense reforms.

Republicans should support the bill based on their commitment to a strong economy, cutting costs, and shrinking government. Underemployment of persons with criminal history has significant consequences on the economy. Gross domestic product was reduced by \$78 to \$87 billion in 2014 because ex-offenders were unable to fully participate in the labor market.¹²⁵ America's prison problem costs an exorbitant amount: it costs taxpayers \$80 billion a year to incarcerate America's 2.4 million prisoners.¹²⁶ This staggeringly high price tag does not include the costs to families affected by the loss of income, payment associated with visiting and

statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/.

121. First Step Act of 2018, Pub. L. No. 115-391 (2018); Press Release, The White House Office of the Press Secretary, Fact Sheet: President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/>. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES, Dec. 18, 2018, <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>.; Ames Grawert & Tim Lau, *How the FIRST-STEP Act Became Law — and What Happens Next*, BRENNAN CENTER FOR JUSTICE, Jan. 4, 2019, <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.

122. George, *supra* note 83.

123. *Id.*

124. Press Release, U.S. Senator Tammy Baldwin, U.S. Senator Tammy Baldwin Introduces Bipartisan, Bicameral Legislation to “Ban the Box” for Federal Hiring (Apr. 5, 2017), <https://www.baldwin.senate.gov/press-releases/fair-chance-act>.

125. Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies*, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2016), <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

126. Alana Semuels, *What Incarceration Costs American Families*, THE ATLANTIC, Sep. 15, 2017, <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/>.

calling prisoners, and legal fees related to the offense.¹²⁷ By cutting costs through addressing the prison problem, Republicans can cut the deficit and lower taxes—a long-standing Republican policy goal. Senator Joni Ernst (R-Iowa) echoed these sentiments by explaining that this legislation “proactively works to reduce recidivism and protect tax dollars.”¹²⁸ Republicans can also rally the base by appealing to libertarian and small government values.¹²⁹ As Senator Ron Johnson (R-Wisconsin) explained, these common-sense reforms help people get back to work, improves safety, strengthens families, and reduces government dependence.¹³⁰

Republicans should also appeal to their religious base (specifically the Christian and Evangelical base) by focusing on themes of redemption and forgiveness. For example, Senator Rob Portman (R-Ohio) appealed to this group by saying that “The Fair Chance Act will help formerly incarcerated individuals live out their God-given potential.”¹³¹

The First Step Act demonstrates that bi-partisan criminal justice reform is possible. The bi-partisan nature of the reform helped each party sell the act as a productive compromise in an otherwise hyper-partisan Congress.¹³² Based on this momentum, Congress should take the next step.

CONCLUSION: COMPREHENSIVE CRIMINAL JUSTICE REFORM VIA THE REDEEM ACT AND THE FAIR CHANCE ACT

The American criminal justice system effectively spits out millions of prisoners, and when these individuals are unable to find jobs because of their criminal history, most ex-offenders re-offend and return to prison. This vicious cycle has enormous implications for society. To end the cycle, criminal justice reform should focus on enabling ex-offenders to secure employment. Currently, advocates use Title VII and a patchwork of state and local Ban the Box policies to implement this goal. While Title VII addresses racial and national origin employment discrimination against Black and Hispanic ex-offenders, ultimately Title VII can only address this issue by attacking the consequences of racial and national origin stereotyping, as opposed to the causes. Although useful in eliminating conviction records as an initial barrier to employment, Ban the Box legislation does not address the issues

127. *Id.*

128. Press Release, U.S. Senator Tammy Baldwin, U.S. Senator Tammy Baldwin Introduces Bipartisan, Bicameral Legislation to “Ban the Box” for Federal Hiring (Apr. 5, 2017), <https://www.baldwin.senate.gov/press-releases/fair-chance-act>.

129. See generally Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, THE ATLANTIC, Mar. 3, 2015, <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615>.

130. Press Release, Baldwin, *supra* note 124.

131. *Id.*

132. See generally John Wagner, *Trump Signs Bipartisan Criminal Justice Bill Amid Partisan Rancor Over Stopgap Spending Measure*, WASH. PO., Dec. 21, 2018, https://www.washingtonpost.com/politics/trump-to-sign-bipartisan-criminal-justice-bill-amid-partisan-rancor-over-stopgap-spending-measure/2018/12/21/234f9ffc-0510-11e9-b5df-5d3874f1ac36_story.html?noredirect=on&utm_term=.bf8d6598b971.

involved with criminal history reporting and only exists in certain jurisdictions. Ultimately, bipartisan, multifaceted federal criminal justice reform focused on expungement and sealing past records, fixing criminal background checks, and limiting the use of background checks in employment decisions will help ameliorate America's prison problem. Therefore, Congress should pass The REDEEM Act and Fair Chance Act so that coupled with Title VII, the federal government can provide a functional and multifaceted solution to this intricate national problem. This way, Shon Hopwood—convicted bank robber turned Georgetown Law professor—can be the rule, not the exception.