

Reducing Employment Barriers for People with Criminal Records

Samuel K. Baier

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I. INTRODUCTION

People with criminal records are often productive, valuable employees. Nevertheless, employers continue to undervalue applicants with criminal records. This Note argues (1) this disconnect is largely caused by background psychological tendencies valuing more immediate and more certain rewards over temporally distant and less certain rewards, and (2) low-cost or cost-neutral alterations to the policies that already provide benefits to employers who hire people with criminal records would result in reduced employment barriers for those people. Such alterations should take the form of (1) replacing future, less-certain financial and risk-mitigation policies with a more certain advance tax credit of an equivalent present value, and (2) expanding existing certificate of eligibility, occupational license reform, and decarceration policies.

This Note begins by discussing why employers shy away from applicants with criminal records and the negative effects on the public when people with criminal records face employment barriers. It then discusses the financial and risk-mitigation benefits available to employers that hire people with criminal records. Next, it details the non-financial policies designed to reduce employment barriers for people with criminal records: ban-the-box statutes, certificates of employability, occupational license reform, and decarceration. After an overview of various organizational and psychological factors that influence employers' willingness to consider applicants with criminal records, it analyzes the shortcomings of existing barrier-reduction policies. It concludes by recommending that (1) existing financial and risk-mitigation policies be replaced with an advance tax credit of equivalent value and (2) existing non-financial policies be expanded.

II. BACKGROUND

People with criminal records face significant difficulties in obtaining employment.¹ Some employers have blanket policies against hiring people with any sort of criminal record.² Even among employers willing to consider hiring people with criminal records, candidates with criminal records are less likely to progress through the application process—an effect present for both felony and misdemeanor records, which persists across

1. For the purposes of this Note, the terms “criminal record” and “criminal history” are used interchangeably and refer to any documented involvement with the criminal legal system that might influence a company’s hiring practices. In addition to criminal convictions, this definition includes arrests, charges that were ultimately not prosecuted, deferred dispositions (e.g., deferred judgments, adjudications, or prosecutions), “no contest” or “nolo contendere” pleas, both misdemeanor and felony convictions, and even expunged or sealed records in cases where information about the incident is available online or through a private commercial database. See Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), <https://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all> [https://perma.cc/684U-KQUM] (describing how court records are “routinely digitized and sold in bulk” by private companies); *Expunged Records: Why They May Still Show Up in Your Background Check Report*, ACCURATE INFO. SYS., LLC (Oct. 6, 2017), <https://accinfosys.com/expunged-records-background-check-report/> [https://perma.cc/A9X3-PZYM] (describing from the perspective of a background checking company how expunged or sealed records may still be available from numerous sources).

2. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSSELLEM, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT NAT’L EMP. L. PROJECT 1 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/TV45-3M8K].

racial lines.³ A 2017 study of employers found 78% used applications asking about a candidate's criminal record.⁴ A 2018 survey of 2,280 full-time employees found 73% of Human Resources ("HR") professionals—from a sample population of 1,228—reported their companies conduct criminal background checks for candidates, while "nearly all [non-HR] workers report[ed] that their company conducts some sort of pre-hire screening."⁵ On the same survey, 54% of HR professionals reported applicants who fail pre-employment screening are dropped from the applicant pool.⁶ A significant minority of HR professionals suggested a pre-employment flag did not prompt their company to verify the accuracy of the results (21%) or allow the candidate to provide an explanation (26%).⁷ Such conditions create barriers to economic opportunity that can manifest themselves even years after a person has concluded his or her involvement with the criminal legal system—e.g., a pre-employment question that asks whether an applicant has "ever" been convicted of a crime, or a background check that reveals a years-old arrest that never resulted in charges brought.⁸ These barriers are even higher for people of color.⁹

A. *Why Employers Disfavor Applicants with Criminal Records*

There are numerous reasons why employers disfavor applicants with criminal records.¹⁰ First, the public has a generally negative view of people with criminal records¹¹

3. Mike Vuolo et al., *Criminal Record Questions in the Era of "Ban the Box"*, 16 CRIMINOLOGY & PUB. POL'Y 139, 140–41 (2017). A survey of 540 managers, 512 non-managers, and 1,228 Human Resources professionals found that about half of each group was "willing to work with individuals with criminal records," with the remainder largely expressing neither willingness nor unwillingness. *Workers with Criminal Records*, SOC'Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST. 2–3 (2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-CKI%20Workers%20with%20Criminal%20Records%20Issue%20Brief%202018-05-17.pdf> [<https://perma.cc/2W39-EYDL>]. Note that "self-reports are often discrepant with reality," which may help explain any disconnect between employment outcomes for people with criminal records and employers' self-reported attitudes on such applicants. Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 144 (1992).

4. Vuolo et al., *supra* note 3, at 146.

5. *Workers with Criminal Records*, *supra* note 3, at 6.

6. *Id.*

7. *Id.*

8. Anecdotes about the far-reaching effects of even minor brushes with the law are common in criminal justice reform literature. See, e.g., Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2822–24 (2018) (recounting the story of Frank Jackson, whose employment applications were repeatedly rejected because of a fifty-year-old misdemeanor assault conviction that led to a fine, but no jail time).

9. 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, 1156 (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 148–50 (2010).

10. See generally Ashley B. Batastini et al., *Attitudes Toward Hiring Applicants with Mental Illness and Criminal Justice Involvement: The Impact of Education and Experience*, 37 INT'L J.L. & PSYCHIATRY 524 (2014) (providing empirical data to suggest a link between stigmas that employers associate with mental illness and involvement in the criminal legal system). See also Joseph Graffam et al., *The Perceived Employability of Ex-Prisoners and Offenders*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 673, 675, 682 (2007) (reporting that a survey pool of 50.4% employers, 19.8% employment service workers, 14.9% corrections workers, and 14.8% prisoners and offenders responded that "people with a criminal background are perceived as being less likely than people with other conditions of disadvantage to obtain and maintain employment").

11. Candalyn B. Rade & Amanda Gold, *One Piece of the Puzzle: Publicly Held Stereotypes about People with a History of Criminal Justice Involvement*, 52 CMTY. PSYCH. 32, 32 (2019).

and often supports harsher sentences than judges.¹² Second, employers may have concerns about employees with criminal records bringing “counterproductive” behavior into the workplace.¹³ This attitude persists despite research suggesting “former criminal convictions are *not* a valid predictor of counterproductive work behavior.”¹⁴ Third, employers are increasingly concerned about negligent hiring claims because technology makes it easier to find and validate information about candidates’ criminal records.¹⁵ This concern is growing despite no corresponding increase in negligent hiring cases; in fact, research suggests that “the risk an employer will be successfully sued for negligent hiring in any given year [is] no more than a fraction of 1%.”¹⁶ Fourth, employers in certain industries must comply with regulatory requirements that presumptively bar candidates with even minor criminal records.¹⁷ Finally, risk aversion likely leads employers to disfavor candidates with criminal records even when incentives are given to hire such candidates.¹⁸ When a hiring manager is making the decision not to hire a person with a criminal record, they have no shortage of arguments to justify that decision—an observation that is consistent with reduced employment outcomes for people with criminal records.¹⁹

12. Roberts, *supra* note 3, at 147.

13. Examples of such behaviors are “theft, white[-]collar crime, absenteeism, tardiness, drug and alcohol abuse, disciplinary problems, accidents, sabotage, sexual harassment, and violence.” Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 231 n.4 (2012) (citing D.S. Ones, *Introduction to the Special Issue on Counterproductive Work Behaviors at Work*, 10 INT’L J. SELECTION & ASSESSMENT 1 (2002)).

14. *Id.* at 233; HELEN GAEBLER, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 18 (2013), https://www.reentryroundtable.org/wp-content/uploads/2013/10/criminalrecords_report1.pdf [<https://perma.cc/YQ9D-URPZ>].

15. See Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 201 (2013) (noting that employer concerns over negligent hiring claims have grown as technology has made it easier to obtain criminal records). A key question in negligent hiring actions (as well as negligent retention or supervision actions) is whether an employer knew or should have known about an employee’s past conduct. RESTATEMENT (THIRD) OF EMP. L. § 4.04 (AM. L. INST. 2015). As technology makes criminal records more available it becomes easier for plaintiff’s attorneys to successfully argue that an employer should have known about an employee’s past criminal conduct.

16. GAEBLER, *supra* note 14, at 17–18.

17. See, e.g., 12 U.S.C. § 1829 (2020) (FDIC-insured depository institutions are presumptively kept from employing “any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense . . .”). For example, Nikita Dasilva had a 2008 job offer “put on hold” until 2009 because of a 1997 interaction with the criminal legal system that started when he rode a subway home from New York University without paying the \$1.25 fare. *In re Dasilva*, 2009 FDIC Enf. Dec. LEXIS 652. Many employers will move on to the next candidate if such an applicant cannot begin work for a year. Although Mr. Dasilva’s case may have developed differently today—the FDIC relaxed its handling of minor offenses in 2018—the specter of regulatory penalties remains an issue for applicants with criminal records. Jonathan Shapiro & Sean Malley, *FDIC Loosens Restrictions on Hiring Bank Personnel with Criminal Histories*, LITTLER (Sept. 5, 2018), <https://www.littler.com/publication-press/publication/fdic-loosens-restrictions-hiring-bank-personnel-criminal-histories> [<https://perma.cc/RLL8-Y6Z9>].

18. MARTIN PETERSON, NON-BAYESIAN DECISION THEORY: BELIEFS AND DESIRES AS REASONS FOR ACTION 127 (2008). The hallmark of risk aversion is preferring a certain outcome over an outcome that involves risk, even when the latter outcome has the greatest expected utility. *Id.*

19. *Workers with Criminal Records*, *supra* note 3, at 2.

B. *Employment Barriers' Negative Effects on the Public*

Employment barriers for people with criminal records produce a number of negative effects on the public.²⁰ First, some criminal background checks contain errors, which may result in applicants losing out on a job over a crime they did not commit.²¹ A 1999 study of the FBI's Interstate Identification Index found that 5.5% of applicants failed a "name check"²²—a type of background check that includes "not only a person's name, but also . . . other personal identifiers such as sex, race, date of birth and Social Security Number"—despite having no FBI criminal record (i.e., these individuals were false positives).²³ Among all applicants who failed the name check (both false positives and true positives), 32.6% did not have an FBI criminal record.²⁴ The private sector struggles with errors as well. According to the National Consumer Law Center, private background check companies "routinely" make a variety of mistakes leading to misidentification.²⁵ This scenario is common enough that the Federal Trade Commission, Consumer Finance Protection Bureau, and various state agencies all address the question of what an applicant can do if he or she suspects an error on a background check.²⁶

20. Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. U. L. REV. 1, 10–11 (2014).

21. *Background Checks*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0157-background-checks#negative> [<https://perma.cc/XV4E-QJAS>].

22. REP. OF THE NAT'L TASK FORCE TO THE U.S. ATT'Y GEN., INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY 48 (1999), http://www.search.org/files/pdf/III_Name_Check.pdf [<https://perma.cc/YV6U-V7XG>].

23. *Id.* at 21. None of these identifiers are unique to individuals. While "Social Security Numbers are supposed to be unique to individuals . . . mistakes do occur in their issuance . . . [and] it is not difficult for individuals to obtain Social Security Numbers fraudulently." *Id.* at 21 n.2.

24. *Id.* at 48. An example of how these percentages apply is instructive. Imagine a large company conducts background checks on 1,000 applicants. Of these 1,000 applicants, 100 have criminal records, and the remaining 900 do not have criminal records. However, when the background checks are completed, the results indicate that 150 applicants have criminal records. Assume there are no completed background checks indicating an applicant does not have a criminal record when the applicant actually does have a criminal record (i.e., assume there are no false negatives). This means that of the 150 applicants who returned a "positive" background check, only the 100 with actual criminal records are true positives, and the remaining 50 must be false positives. The 5.5% figure is this 50 divided by 900, or the percentage of the 900 applicants without criminal records who were mistakenly identified as applicants with criminal records. The 32.6% figure is (roughly) those 50 false positives divided by the total of 150 positive background checks. In short, an applicant without a criminal record has a low chance of the background check returning a false positive (5.5%), but each positive background check result has a significant chance of being a false positive (32.6%). *See also id.* at 30–34 (elaborating on possible outcomes of background checks).

25. PERSIS S. YU & SHARON M. DIETRICH, BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES, NAT'L CONSUMER L. CTR. 15 (2019), <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> [<https://perma.cc/9HL3-228P>]. Precise measurements of the scope of the problem are difficult to obtain due to the unregulated nature of the background check industry. *Id.* at 35–36. One industry firm estimated a 41% error rate in a review of national crime databases, but it did not make its methodology public. Bob Sullivan, *Criminal Background Checks Incomplete*, NBCNEWS (Apr. 12, 2005, 6:26 PM), <http://www.nbcnews.com/id/7467732/#.Xkb3wGhKixGB3wGhKixG> [<https://perma.cc/8QFJ-K4YW>].

26. YU & DIETRICH, *supra* note 25, at 6; *Background Checks*, *supra* note 21; Mary Griffin & John McNamara, *Applying for a Job? It's Important to Know What Goes Into Your Background Screening Reports*, CONSUMER FIN. PROT. BUREAU (Oct. 3, 2019), <https://www.consumerfinance.gov/about-us/blog/applying-job-important-know-what-goes-your-background-screening-reports/> [<https://perma.cc/G3HF-D3FE>]; *see, e.g.*,

Second, an individual's interaction with the criminal legal system can lead to collateral consequences even if that individual is innocent of any crime. For instance, although some employers require applicants to disclose arrests, not every arrest is indicative of underlying criminal conduct.²⁷ Almost one-third of arrests result in charges that are dismissed, and some reasons for dismissal (e.g., mistaken identity or a false report) largely foreclose the possibility of an actual criminal being released on legal or technical grounds.²⁸ Factually innocent defendants may also have strong legal and economic incentives to plead guilty.²⁹ From a legal standpoint, taking a criminal case to trial has become a "roll [of] the dice" where defendants either win or face a significantly steeper penalty than what is offered in a plea bargain.³⁰ From an economic standpoint, an innocent defendant must consider the expense of a trial, and often the expense of posting bail or the economic consequences (e.g., losing one's job) of remaining in jail if they do not (or cannot) post bail.³¹ The prospect of accepting a plea bargain that involves immediate release is particularly strong in cases where bail is a factor; a 2011 study from Harris County, Texas reported that 46% of misdemeanor defendants and 69% of felony defendants were unable to post bail.³² Plea bargains may also take the form of a deferred disposition, which allows a defendant to avoid most punishment upon completion of probation; such a deal can be too good to refuse, even for an innocent defendant.³³ Further, false confessions are shockingly easy to elicit.³⁴ Police interrogators can use false evidence

Criminal History Record Check Request Form, IOWA DIV. OF CRIM. INVESTIGATION 2 (June 26, 2018), <https://dhs.iowa.gov/sites/default/files/DCI-77.pdf?051920201016> [<https://perma.cc/N7DZ-YBFM>] (describing the procedure for challenging erroneous background check information under Iowa law). Under federal law, the Fair Credit Reporting Act provides authority for challenges to the accuracy of background checks. 15 U.S.C. § 1681e(b) (2020).

27. GAEBLER, *supra* note 14, at 19.

28. *Id.*

29. As to why a factually innocent person would be a criminal defendant in the first place:

A grand jury presentation can consist entirely of information that would be inadmissible at trial. A prosecutor may knowingly use illegally-obtained evidence to obtain an indictment, and if she has evidence in her possession that substantially exculpates the target, she may withhold it from the grand jury. The presentation need only establish probable cause to believe the target committed the crime. If 11 of the 23 grand jurors are unconvinced that even that low threshold has been met, an indictment can still be obtained. And of course it's all *ex parte*, so no one is even there to question the prosecutor's presentation.

NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 3 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/RNP3-F7RU>]. In the more succinct words of former New York Court of Appeals Chief Judge Solomon Wachtler, a prosecutor can convince a grand jury to "indict a ham sandwich." Marcia Kramer & Frank Lombardi, *New Top State Judge: Abolish Grand Juries & Let Us Decide*, N.Y. DAILY NEWS, Jan. 31, 1985, at 3. Charges that can be brought without an indictment are subject to an even lower evidentiary bar as prosecutors are not even required to present them to a grand jury. *See State v. Berg*, 21 N.W.2d 777, 778–79 (Iowa 1946) (describing nonindictable offenses as "minor offenses or petty offenses").

30. NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 29, at 3.

31. GAEBLER, *supra* note 14, at 19.

32. *Id.*

33. *The Dreaded Deferred Judgment*, CRIM. DEF. & DUI LAW. RICHARD B. HUTTNER (Nov. 16, 2016), <https://criminallawyerdenver.com/the-dreaded-deferred-judgment/> [<https://perma.cc/H2Z5-YN95>].

34. *See* Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES & POL'Y REV. 25, 34 (2015) (detailing an experiment that showed the prevalence and ease of obtaining false confessions). *See generally*

to extract confessions;³⁵ this interrogation method is “permissible, recommended under certain circumstances, and frequently used;”³⁶ and multiple studies using false evidence manipulation have led upwards of 90% of participants to confess to something they did not do.³⁷ False confessions have been documented outside of the laboratory, too. For example, at least 200 people “volunteered false confessions to the 1932 kidnapping of Charles Lindbergh’s baby son,” and “[i]n nearly 30% of [DNA exoneration] cases, false confessions were a contributing factor.”³⁸ Employment barriers for people with criminal records do not only punish those who have actually committed a crime.

Third, research links employment with reductions in recidivism, which is a significant driver of the overall cost of crime in the United States.³⁹ Including direct spending on the criminal legal system, damage to victims, and lost value to communities (e.g., reduced business investment), crime costs the public around \$500 billion annually—2.9% of the national GDP.⁴⁰ A material reduction in recidivism would lower this cost, as over 75% of prisoners released from state facilities are re-arrested within five years and 50% of prisoners released from federal facilities are re-arrested within ten years.⁴¹ Removing employment barriers for people with criminal records would also make more efficient use of money spent on in-prison work and training programs.⁴² For example, each year California employs over 2,000 inmates as firefighters to combat the state’s frequent wildfires.⁴³ Despite their experience, the resources invested in training these individuals often goes to waste as their records bar them from working as firefighters once released.⁴⁴ These types of training programs cannot reduce recidivism if they do not provide a path to employment.

Fourth, incarceration creates compounding negative effects, especially on minority communities.⁴⁵ An example of a compounding negative effect is a probation or parole

Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (examining why and how people confess to crimes they did not commit).

35. Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1282 (2007); see, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (reasoning that police use of false evidence was “relevant, [but] insufficient in our view to make this otherwise voluntary confession inadmissible”).

36. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 221 (2005) (citations omitted).

37. Kassin, *supra* note 34. Kassin reviews several false confession studies and specifically notes two methodologically distinct studies that resulted in 94% and 100% of participants falsely confessing. *Id.*

38. *Id.* at 27.

39. Vuolo et al., *supra* note 3, at 140.

40. THE COUNCIL OF ECON. ADVISERS, RETURNS ON INVESTMENTS IN RECIDIVISM-REDUCING PROGRAMS 3 (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/05>Returns-on-Investments-in-Recidivism-Reducing-Programs.pdf> [<https://perma.cc/X3TR-RJ94>].

41. *Id.*

42. If a formerly-incarcerated person is permanently barred from using the skills he learned in prison, “the effort made to reform him would be so much trouble and expense lost by society.” MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 107 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

43. Ryan Sabalow, *These California Inmates Risked Death to Fight Wildfires. After Prison, They’re Left Behind*, SACRAMENTO BEE (July 23, 2020, 5:00 AM), <https://www.sacbee.com/news/california/fires/article244286777.html>.

44. *Id.*

45. Vuolo et al., *supra* note 3, at 141; Shristi Devu, Comment, *Trapped in the Shackles of America’s Criminal Justice System*, 20 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 217, 225–39 (2018); see also Gubernick, *supra* note 9, at 1163 (discussing hiring discrimination in minority communities leading to “rampant joblessness”).

condition requiring a person find and maintain gainful employment. If a person's continued freedom is conditioned on holding a job, and the very fact that said person is on probation or parole makes it harder to meet the conditions of his or her release, more people violate probation or parole and continue their involvement with the criminal legal system.⁴⁶ African American men in particular face decreased employment prospects due to racial discrimination, face higher rates of incarceration for the same crimes, and then face relatively more negative treatment from employers as they seek jobs after leaving the criminal legal system.⁴⁷

Finally, employment barriers for people with criminal records strain the notion that the government reflects the consent of the governed. Both the public⁴⁸ and criminal defendants lack a solid understanding of the extent to which criminal convictions produce long-term collateral consequences.⁴⁹ If a government's legitimacy rests on the consent of the governed,⁵⁰ and if "consent" must include at least some understanding of the issue at hand,⁵¹ then criminal laws which produce largely-unknown collateral consequences reduce governmental legitimacy. Similar issues arise when criminal punishments expand beyond their legislatively-mandated boundaries and become "lifetime" impediments,⁵² and when court orders to expunge a criminal record are undermined by that record remaining available on a private website⁵³ or in a public record outside of the court's purview.⁵⁴ Limiting or removing the long-term employment effects of criminal records would not only produce positive individual results, but it would also bring the government's actions more closely in line with the legislatively-expressed consent of the governed.

C. Financial Benefits to Employers That Hire People with Criminal Records

Hiring employees with criminal records is not necessarily a charitable or selfless

46. See Vuolo et al, *supra* note 3, at 141 (explaining that many jobs ask about criminal records, and that answering affirmatively decreases employment prospects).

47. *Id.*

48. See Roberts, *supra* note 3, at 100–02 (discussing the disconnect between the reality of criminal sentencing and public knowledge of the same). If the public generally does not fully understand how the criminal legal system works in practice, it follows that public knowledge about the collateral effects of a criminal record would be similarly limited, if not more so.

49. NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 29, at 19. The collateral consequences of deferred dispositions can be particularly opaque. GAEBLER, *supra* note 14; see also James A. Shapiro, *Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences*, 41 AKRON L. REV. 231, 231–35 (2008) (describing how diversionary dispositions may or may not be considered convictions, and may or may not contain a finding of guilt).

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192–93 (1990).

51. See Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2235–36 (2020) (noting that consent "must be given knowingly, competently, and freely" if it is to be a meaningful expression of autonomy).

52. *Doe v. United States*, 110 F. Supp. 3d 448, 457 (E.D.N.Y. 2015).

53. See YU & DIETRICH, *supra* note 25, at 11 (describing the increasing availability of criminal records on private websites).

54. Two common examples of public records outside the purview of an expungement order are arrest reports maintained by police departments and inmate rosters maintained by county jails. Sarah Esther Lageson, *There's No Such Thing as Expunging a Criminal Record Anymore*, SLATE (Jan. 7, 2019, 2:44 PM), <https://slate.com/technology/2019/01/criminal-record-expungement-internet-due-process.html> [<https://perma.cc/KLN2-KLZQ>].

gesture; such employees also provide numerous financial benefits to employers. For example, federal Work Opportunity Tax Credits (“WOTC”) are available for employers who hire “qualified ex-felon[s]”—a person hired within a year of a felony conviction or within a year of being released from prison after a felony conviction.⁵⁵ Benefits from WOTCs may rise as high as \$2,400 per qualifying employee.⁵⁶ To collect this credit, “an employer must have the employee certified as eligible by the appropriate state workforce agency,” must “submit[] a form to the state agency within 28 days of hiring the WOTC-eligible worker,” and the state agency must review the form and certify the application.⁵⁷ Various states offer similar tax credits.⁵⁸

Re-entry programs that help people with criminal records find employment also act as a pre-screening tool that can reduce hiring costs. Developers of such programs consciously focus on “reducing the costs, both tangible and intangible, absorbed by employers hiring former prisoners[,]” a screening process that involves far more contact and evaluation than a standard interview process.⁵⁹ Often these search campaigns cost thousands of dollars per hire, even for low-complexity positions.⁶⁰ Re-entry programs simplify the search process and lower hiring costs. Further, employees with criminal records have lower turnover rates than employees without criminal records.⁶¹ Reduced turnover means less hiring is needed in the first place.

D. Risk-Mitigation Benefits for Employers That Hire People with Criminal Records

There are also programs that mitigate any risk employers assume by hiring people with criminal records. One such program is the Federal Bonding Program. The Federal Bonding Program “protect[s] the employer against losses caused by the fraudulent or

55. *Work Opportunity Tax Credit*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> [<https://perma.cc/Y43D-FG7H>].

56. CONG. RSCH. SERV., *THE WORK OPPORTUNITY TAX CREDIT 1* (2018), <https://fas.org/sgp/crs/misc/R43729.pdf> [<https://perma.cc/X4PF-2P9X>] (stating the \$2,400 figure is a statutory maximum and employers are eligible for WOTCs only in the first year of a qualified employee’s tenure).

57. *Id.*

58. For instance, Iowa offers a state tax credit of up to \$20,000 per qualifying employee. *Ex-Offender Initiative*, IOWA WORKFORCE DEV., <https://www.iowaworkforcedevelopment.gov/ex-offender-initiative> [<https://perma.cc/2RJE-DEEJ>].

59. AMY L. SOLOMON ET AL., *FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY* 21–22, URB. INST. (2004), <https://www.urban.org/sites/default/files/publication/58126/411097-From-Prison-to-Work.PDF> [<https://perma.cc/EVJ3-XDLY>]. The Tarrant County Reentry Coalition (Texas) is an example of one such program. TARRANT CNTY. REENTRY COAL., <http://www.tcreentry.org/> [<https://perma.cc/AJ9X-W9K5>].

60. See J. Bruce Tracey & Timothy R. Hinkin, *The Costs of Employee Turnover: When the Devil Is in the Details*, 6 CORNELL HOSP. REP. 4, 8–9 (2006), https://ecommons.cornell.edu/bitstream/handle/1813/71149/Tracey_202006_20The_20cost_20of_20employee_20turnover.pdf?sequence=1&isAllowed=y [<https://perma.cc/K6R4-NA2G>] (analyzing turnover costs for employers in the hospitality industry).

61. Dylan Minor et al., *Criminal Background and Job Performance*, 7 IZA J. LAB. POL’Y 1, 22 (2018), <https://izajolp.springeropen.com/track/pdf/10.1186/s40173-018-0101-0> [<https://perma.cc/XHN6-TG9Q>]. See also James W. Hesford et al., *Turnover and Unit-Level Financial Performance: An Analysis of the Costs and Benefits of Voluntary and Involuntary Turnover in Unskilled Jobs*, in *ADVANCES IN MANAGEMENT ACCOUNTING* 35, 37 (Marc J. Epstein & Mary A. Malina eds., 2016) (suggesting high turnover reduces performance (e.g., lower service quality, lower sales, lower efficiency) and increases accident rates); *Id.* at 61 (“[I]nvoluntary terminations are highly disruptive and very costly.”).

dishonest acts of the bonded employee . . . [including] theft, forgery, larceny, and embezzlement.”⁶² Each bond has a \$5,000 limit.⁶³ This program squarely addresses employer concerns about counterproductive behavior, is free of charge, and does not require employers to fill out any paperwork prior to a potential claim.⁶⁴

Another type of risk-mitigation program is limiting employer liability in negligent hiring claims. Despite the rarity of such claims,⁶⁵ they remain a significant concern for employers. There are several variations of liability limitation programs,⁶⁶ but all provide employers with at least some guidance regarding the level of pre-hire care they must exercise to avoid negligence.⁶⁷ These variations limit negligent hiring liability when: the employee’s criminal records were expunged, the employee had received a certificate of employability, the employer performed a pre-hire background check, the claim stems from an employee’s activity on a non-public social media account, or when the employee’s involvement with the criminal legal system did not result in a conviction.⁶⁸ Other states bar negligent hiring claims, with only narrow exceptions.⁶⁹ These liability limitations are often included in “ban-the-box” legislation, and may also provide an administrative process to handle claims that an employer made an improper inquiry about an applicant’s criminal record.⁷⁰

Further, hiring people with criminal records mitigates the risk of engaging in discriminatory employment practices prohibited under Title VII of the Civil Rights Act of 1964.⁷¹ Employers that consider criminal records during the hiring process may violate Title VII if they “treat[] criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability)” or if a facially-neutral policy “disproportionately impact[s] some individuals protected under Title VII,” provided that policy is “not job[-]related and consistent with business necessity (disparate impact liability).”⁷² Employers that do not consider criminal records during the hiring process eliminate the possibility of these types of Title VII violations. While a hiring

62. *About the FBP*, FED. BONDING PROGRAM, <http://bonds4jobs.com/about-us> (last visited Feb. 9, 2020).

63. *Id.*

64. *Id.*

65. *See supra* note 16 and accompanying text (describing the rarity of negligent hiring claims).

66. GEN. INFO. SERVS., STATUTORY DEFENSES TO NEGLIGENT HIRING CLAIMS BASED ON USE OF A BACKGROUND CHECK (2017), <http://www.geninfo.com/docs/Statutory-Defenses-to-Negligent-Hiring-claims-based-on-use-of-a-Background-Check.pdf?v=00000084> [<https://perma.cc/CYA8-TUHE>].

67. *See* Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1004–06 (2011) (discussing employers’ desire for greater guidance regarding what types of pre-hire background checks are sufficient to defeat negligent hiring claims).

68. GEN. INFO. SERVS., *supra* note 66, at 1–2. For more detail on liability limitations tied to certificates of employability, see *infra* note 92 and accompanying text.

69. GEN. INFO. SERVS., *supra* note 66, at 2.

70. Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1309–10 (2002); Concepción, *supra* note 13, at 248–53; *see, e.g.*, D.C. CODE ANN. § 32–1343(b) (West 2015) (establishing that an administrative complaint under Washington, D.C.’s ban-the-box statute is the exclusive remedy for applicants who believe an employer made a prohibited inquiry, and eliminating private actions for such complaints).

71. Civil Rights Act of 1964 (Title VII) 42 U.S.C. §§ 2000e-17 (2020); U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012) [hereinafter EEOC GUIDANCE].

72. EEOC GUIDANCE, *supra* note 71.

process that does not include a criminal background check theoretically increases the risk of negligent hiring claims, in practice such claims are rare.⁷³ An additional consideration for employers attempting to weigh the risk of negligent hiring liability against the risk of Title VII liability is that—in contrast to negligent hiring claims, which are generally brought by individual plaintiffs—Title VII claims are often pursued by the Equal Employment Opportunity Commission.⁷⁴ Few private plaintiffs can muster the legal resources of a federal agency.

E. Existing Non-Financial Policies Designed to Reduce Employment Barriers for People with Criminal Records

1. Ban-the-Box Statutes

Perhaps the most common policy to improve employment outcomes for people with criminal records (that does not provide financial assistance or risk-mitigation benefits to employers who hire such applicants) is “ban-the-box” legislation. Variants of ban-the-box policies are increasingly popular as they speak directly to the argument that people with criminal records are not receiving fair consideration from employers.⁷⁵ The word “box” in a ban-the-box statute refers to the box (or numerous boxes) on an application that job-seekers are asked to check if they have been convicted of a crime, pleaded guilty to a crime, pleaded “nolo contendere” or “no contest” to a crime, or if they have merely been arrested.⁷⁶ A typical ban-the-box statute prohibits employers from asking about applicants’ criminal records, or at least requires employers to delay the question until applicants have passed an initial hiring threshold.⁷⁷ If an employer wishes to reject an applicant due to their criminal history, this decision must be made for legitimate business reasons, and the employer may be required to communicate such reasons to the applicant.⁷⁸

For example, Washington, D.C.’s ban-the-box statute flatly prohibits employers from inquiring about or requiring the disclosure of arrests, criminal accusations that are not currently pending, and criminal accusations that did not result in a conviction.⁷⁹ Employers are prohibited from inquiring about or requiring the disclosure of criminal convictions until

73. See GAEBLER, *supra* note 14, at 17–18 (describing the rarity of negligent hiring claims).

74. See HICKOX, *supra* note 67, at 1002–03 (describing the dilemma employers face when attempting to limit liability under both negligent hiring doctrine and Title VII). For an example of an EEOC complaint alleging disparate impact on the basis of a hiring process involving criminal background checks, see *EEOC v. Freeman*, 961 F. Supp. 2d 783, 789–91 (D. Md. 2013).

75. Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (Sept. 30, 2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [https://perma.cc/57QP-APZN]. Ban-the-box legislation has been passed in “36 states and over 150 cities and counties.” *Id.* In 2016, the U.S. Office of Personnel Management finalized a rule that made one version of ban-the-box (prohibiting background checks until a conditional offer is made—this variant is also referred to as a “fair chance” rule) part of federal hiring practice. 5 C.F.R. § 330.1300 (2020); 5 C.F.R. § 731.103 (2020); see, e.g., AUSTIN, TEX., CODE OF ORDINANCES § 4-15-1 (2020) (finding that “denying an employment opportunity to an otherwise qualified person based on the person’s criminal history that is not relevant to the job under consideration . . . is unjust”).

76. Concepción, *supra* note 13, at 249 n.150.

77. *Id.*

78. *Id.*; EEOC GUIDANCE, *supra* note 71.

79. D.C. CODE § 32-1342(a) (2014).

they have made “a conditional offer of employment.”⁸⁰ If an employer makes a conditional offer and wishes to withdraw the offer after viewing the applicant’s criminal history, the employer may only do so for a “legitimate business reason,” and is obligated to consider a number of statutorily-established factors.⁸¹ Exemptions are built in for positions where knowledge of an applicant’s criminal record is particularly relevant—e.g. jobs involving “direct care to minors or vulnerable adults.”⁸² Applicants with terminated conditional offers may request a copy of “all records procured by the employer in consideration of the applicant” and information regarding the applicant’s ability to file an administrative complaint.⁸³ Some ban-the-box statutes go a step farther, requiring employers that reject an applicant due to their criminal history to “inform the individual in writing that the adverse action was based on the individual’s criminal history.”⁸⁴ A few states have broad, default prohibitions on discrimination on the basis of criminal records that are limited only by statutory exceptions.⁸⁵ In sum, variations on ban-the-box statutes limit what type of background questions an employer can ask, restrict how employers can use this information in hiring decisions, and require employers to notify an applicant if their criminal background had a negative effect on the application process.

2. Certificates of Employability

A second non-financial policy to improve employment outcomes for people with criminal records is providing certificates of employability to former prisoners who the state considers sufficiently rehabilitated.⁸⁶ As of 2019, at least fifteen states have passed versions of certificate legislation.⁸⁷ A certificate of employability does not expunge or seal a person’s criminal record, but it signals to employers the person has completed statutory requirements going above and beyond merely completing his or her sentence.⁸⁸ For example, California’s certificate statute requires petitioners to undergo a five-year “period

80. § 32-1342 (b).

81. § 32-1342 (d). The decision must be “reasonable in light of” the “duties and responsibilities necessarily related to the employment,” the bearing the offense would have on the applicant’s fitness for the job, how long ago the offense occurred, the age of the applicant at the time of the offense, the “frequency and seriousness” of the offense, and information regarding “rehabilitation and good conduct.” *Id.*

82. § 32-1342 (c).

83. § 32-1342(e).

84. AUSTIN, TEX., CODE OF ORDINANCES, § 4-15-4(F) (2019).

85. See, e.g., WIS. STAT. § 111.321 (2020) (listing “arrest record” and “conviction record” among prohibited bases of discrimination and then defining limited exceptions); HAW. REV. STAT. § 378-1 (2020) (listing “any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority” among prohibited bases of discrimination and then defining limited exceptions).

86. Flake, *infra* note 144, at 1124.

87. See Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. PUB. INT. L.J. 1, 12–18 (2016) (listing and describing the statutes of twelve states: Colorado, Connecticut, Georgia, Illinois, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, and Vermont). The other states are California (CAL. PENAL CODE § 4852.03 (2019)), Iowa (IOWA CODE § 906.19 (2019)), and Washington (WASH. REV. CODE § 9.97.020 (2019)).

88. Jennifer L. Doleac, *Forget “Ban the Box” and Give Ex-Prisoners Employability Certificates*, BROOKINGS (Dec. 15, 2016), <https://www.brookings.edu/opinions/forget-ban-the-box-and-give-ex-prisoners-employability-certificates/> [https://perma.cc/P9AV-CF5D].

of rehabilitation” beginning “upon the discharge of the petitioner from custody . . . or upon his or her release on parole, postrelease [sic] community supervision, mandatory supervision, or probation, whichever is sooner.”⁸⁹ Additionally, the petitioner must remain within the state for the duration of those five years, complete additional years of rehabilitation for certain crimes, and have their petition approved by a trial court.⁹⁰ During the period of rehabilitation, the petitioner must “live an honest and upright life . . . conduct himself or herself with sobriety and industry . . . exhibit a good moral character, and . . . conform to and obey the laws of the land.”⁹¹ The trial court with the power to approve the petition can request a wide variety of testimony and documents about the petitioner⁹² and request the district attorney conduct an investigation of the petitioner.⁹³ The district attorney may independently file a petition to rescind certificates even after they have been granted.⁹⁴ Some state certificate statutes also provide liability limitations for employers that hire applicants who have successfully obtained such a certificate.⁹⁵ Research suggests certificates of employability are highly valued by potential employers.⁹⁶

3. *Occupational License Reform*

A third non-financial policy to reduce employment barriers for people with criminal records is occupational license reform. Over 25% of U.S. workers are required to obtain state licenses to perform their jobs.⁹⁷ Jobs that require licenses are often a pathway out of low-wage work, especially for people with limited formal education—a group that is disproportionately overrepresented in the population of people with criminal records.⁹⁸ In some cases, certain jobs that require licenses allow people with criminal records to avoid questions from employers altogether: in 2019, for example, 70% of barbers working in the United States were self-employed.⁹⁹

Many licensing statutes include broad prohibitions that unnecessarily bar qualified

89. CAL. PENAL CODE § 4852.03 (2019).

90. *Id.*

91. § 4852.05 (2019).

92. § 4852.1 (2019).

93. § 4852.12 (2019).

94. CAL. PENAL CODE § 4852.13 (2019).

95. *See, e.g.*, WASH. REV. CODE § 9.97.020(3) (2019) (providing that “evidence of the crime for which a certificate of restoration of opportunity has been issued may not be introduced as evidence of negligence or intentionally tortious conduct on the part of the employer”).

96. Priscillia Hunt et al., *Incentivizing Employers to Hire Ex-Offenders: What Policies Are Most Effective?*, RAND CORP. (Feb. 8, 2018), https://www.rand.org/pubs/research_briefs/RB10003.html [<https://perma.cc/R7D9-MCWL>]. In the RAND study, a “post-conviction certificate verifying work performance history” was one of the policies employers valued most when considering hiring applicants with criminal records. *Id.*

97. MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS I (2016), <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/> [<https://perma.cc/BSP7-2RPN>].

98. STEPHEN SLIVINSKI, CTR. FOR THE STUDY OF ECON. LIBERTY AT ARIZ. ST. UNIV., TURNING SHACKLES INTO BOOTSTRAPS: WHY OCCUPATIONAL LICENSING REFORM IS THE MISSING PIECE OF CRIMINAL JUSTICE REFORM 3–4 (2016).

99. *Barbers, Hairstylists, and Cosmetologists*, BUREAU OF LAB. STAT. OCCUPATIONAL OUTLOOK HANDBOOK, (Sept. 1, 2020), <https://www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm#tab-3> [<https://perma.cc/P28G-4878>]. Similarly, the 2019 self-employment rate among hairdressers, hairstylists, and cosmetologists was 49%. *Id.*

candidates from licensure.¹⁰⁰ For example, a juvenile conviction might prevent an adult from obtaining a license decades later, an applicant might be denied a license for a conviction that has no bearing on her suitability for employment, and mandatory disqualification language might keep a licensing board from exercising sensible discretion.¹⁰¹ Vague statutory language (e.g., what constitutes a “violent offense” or “good character”) also creates difficulties for applicants, especially when licensing boards are tasked with classifying out-of-state adjudications.¹⁰²

While occupational licensing as a whole can serve important policy objectives—it often “maintains public safety, increases practitioner wages, and accords respect to a profession”—there is a growing, bipartisan consensus that many states’ licensing regimes go too far in restricting applicants with criminal records.¹⁰³ Multiple states and the District of Columbia have passed, or are considering, legislation to reduce these barriers.¹⁰⁴ As guidance, the National Employment Law Project has produced a Model State Law on occupational license reform.¹⁰⁵

4. Decarceration

This Note would be incomplete without at least a brief discussion of a nascent policy that would preempt any difficulties faced by people with criminal records: giving fewer people criminal records in the first place. The term “decarceration” broadly refers to a number of strategies that would move away from “prison as the dominant mode of punishment”¹⁰⁶ and towards “imprisonment . . . only as a last resort.”¹⁰⁷ Many of these strategies are designed to reduce the severity and frequency of interactions with the criminal legal system—the types of interactions that produce criminal records. Examples of such strategies include declining prosecution of low-level offenses,¹⁰⁸ employing pre-arraignment diversion programs,¹⁰⁹ funding social programs that address the economic

100. RODRIGUEZ & AVERY, *supra* note 97, at 10–13.

101. *Id.*

102. *Id.*

103. *Id.* at 6–7.

104. *E.g.*, Press Release, Florida Governor’s Off., Governor Ron DeSantis Signs “The Occupational Freedom and Opportunity Act” to Remove Unnecessary Barriers to Employment, (June 30, 2020), <https://www.flgov.com/2020/06/30/governor-ron-desantis-signs-the-occupational-freedom-and-opportunity-act-to-remove-unnecessary-barriers-to-employment/> [<https://perma.cc/YK4H-N74W>]; O. Kay Henderson, *Governor Approves Reform of Iowa’s Professional Licensing Agencies*, RADIO IOWA (June 25, 2020), <https://www.radioiowa.com/2020/06/25/governor-approves-reform-of-iowas-professional-licensing-agencies/> [<https://perma.cc/94QJ-M6UC>]; Yesim Sayin Taylor, Exec. Dir., D.C. Pol’y Ctr., Testimony on the “Removing Barriers to Occupational Licensing for Returning Citizens Amendment Act of 2019,” (Jan. 29, 2020), <https://www.dcpolicycenter.org/publications/occupational-licensing-returning-citizens-b23-0440/> [<https://perma.cc/4ECU-AW3S>]. Occupational license reform is also included in some ban-the-box statutes, for example, 47 RULES OF THE CITY OF N.Y. § 2-04(h).

105. RODRIGUEZ & AVERY, *supra* note 97, at 31–34.

106. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 110 (2003).

107. U.N. OFF. ON DRUGS & CRIME, HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT, at 4, U.N. SALES NO. E.07.XI.2 (2007).

108. Rachael Rollins, Suffolk Cnty. Dist. Att’y, THE RACHAEL ROLLINS POLICY MEMO C1–C9 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>; *see also id.* at A1–A3 (listing “[e]fforts . . . being made across the country to increasingly develop and follow evidence-based policies that move resources away from the arrest and prosecution of low-level, nonviolent offenses”).

109. Daniel F. Conley et al., *Successful Alternatives: Juvenile Diversion and Restorative Justice in Suffolk*

drivers of crime,¹¹⁰ improving access to mental health resources,¹¹¹ and decriminalizing or legalizing non-pharmaceutical drugs.¹¹² Not only do these strategies decrease the number of people with criminal records (and the number of people in carceral custody), but there is a growing body of evidence that they do so without compromising public safety.¹¹³ Wholesale reimagining of carceral institutions is outside the scope of this Note, but it is worth considering whether poor employment outlooks for people with criminal records is best addressed as a distinct issue or as one symptom of a deeper problem.

F. Organizational Silos' Influence on Employers' Willingness to Consider Applicants with Criminal Records

The concept of “silos” in organizational behavior research dates back to at least 1987, although the practice of different parts of a business not communicating with one another

County, BOS. BAR J. (Oct. 4, 2018), <https://bostonbarjournal.com/2018/10/04/successful-alternatives-juvenile-diversion-and-restorative-justice-in-suffolk-county/> [<https://perma.cc/SB6L-SDPS>].

110. Examples of social programs that address the economic drivers of crime include zero-fare public transit, expanded educational opportunities, increased access to housing, and other forms of public assistance designed to cover basic needs. Zero-fare public transit would eliminate arrests for fare evasion, a low-level offense that is often criminalized (“in contrast to the civil penalties enacted against drivers for speeding and parking infractions”) and that often results in police arresting people of color at a disproportionately high rate. Amy Crawford, *Here's What Happens When Public Transit is Free*, HUFFPOST (Feb. 22, 2020), https://www.huffpost.com/entry/free-public-transit-kansas-city-estonia_n_5e4f9b49c5b6b82aa651191e [<https://perma.cc/3WSJ-NL5M>]. Expanded educational opportunities—in particular, early-childhood education programs—“can be an effective tool in the fight against crime by not only increasing educational attainment but also by addressing deficits in non-cognitive skills that are correlated with criminal activity.” Arthur J. Reynolds et al., *Preschool Education, Educational Attainment, and Crime Prevention: Contributions of Cognitive and Non-Cognitive Skills*, 32 CHILD. & YOUTH SERVS. REV. 1054, 1062 (2010). Housing instability by itself can lead to a variety of potentially criminal behaviors (e.g., landlord-tenant disputes, conflicts with neighboring tenants, drug use) and homelessness results in more interaction with law enforcement, more arrests, and more convictions. Caroline Palmer et al., *Does Emergency Financial Assistance Reduce Crime?*, 169 J. PUB. ECON. 34, 35 (2019). Studies on public assistance programs suggest property crime increases as monthly allocations of these programs run short. *Id.*

111. The reduction in state mental health resources that began in the 1960s has led to police arresting an increasing number of people with mental illness, often for nonviolent, petty offenses. Noman Ghiasi et al., *Psychiatric Illness and Criminality*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (June 23, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK537064/> [<https://www.ncbi.nlm.nih.gov/books/NBK537064/>]. Despite popular narratives that mental illness is a significant driver of crime, “there is scant evidence to suggest that mental illness can independently predict criminal behavior.” *Id.*

112. In 2018, one out of every six arrests reported to the FBI involved a drug crime as the most serious offense, and 40% of those drug arrests were over marijuana. CRIM. JUST. INFO. SERVS. DIV., *Crime in the United States: Persons Arrested*, FBI (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/persons-arrested> [<https://perma.cc/62Z9-NBZM>]; see also FBI, UNIFORM CRIME REPORTING HANDBOOK 97–98 (2004), https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf [<https://perma.cc/58XF-WV9Y>] (detailing how arrests involving multiple offenses are classified and scored). In 2001, Portugal “decriminalize[d] drug use by repealing all of its criminal offenses for the personal use of illicit drugs, including cannabis, heroin, cocaine, and amphetamines.” Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 U. D.C. L. REV. 1, 5 (2011). Instead of carceral responses to drug use, Portugal “treats illicit drug use strictly as a matter of public health” and requires drug users “to meet with specialized administrative committees that can impose various non-criminal sanctions in order to induce users into treatment.” *Id.* Studies on the results of this policy suggest predominantly positive results in terms of public health and safety outcomes. *Id.* at 19–25.

113. Rollins, *supra* note 108, at 4–9; Mirko Bagaric & Daniel McCord, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227, 243–46 (2019).

stretches back much further.¹¹⁴ Silos are “not really physically present in organisations [sic],” but instead exist as practical and psychological barriers to intrafirm communication and coordination.¹¹⁵ Because of these barriers, silo mentality “has consequences for work performance on the personal, group and/or team and organisational [sic] levels.”¹¹⁶ For the purposes of this Note, the relevant silos to consider are the organizational divisions between applicants’ eventual day-to-day managers—who often have input into or control over the hiring process—and the department or individuals who process the financial costs and benefits of hiring people with criminal records. If front-line managers are “siloeed” away from the part of the organization that processes the financial benefits of hiring people with criminal records, the managers are less likely to accurately weigh the full costs and benefits of selecting such applicants.

A brief example is instructive. XYZ Company is a small business that cleans windows on skyscrapers. Tina is a front-line manager who hires, trains, and supervises new employees. Bob works in the office on administrative tasks. Tina and Bob are siloeed off from one another. There are practical barriers: Tina spends almost every day on jobsites, not in the office with Bob, and the nature of her work makes it dangerous for her to check her phone or email during work hours. There are psychological barriers, too: it never occurs to Bob to talk to Tina about hiring new employees, because he has only superficial involvement with those employees while Tina works with them every day in a dangerous work environment. If Bob learns about financial incentives for hiring people with criminal records, that information may not reach Tina due to these barriers. Without that information, Tina cannot accurately weigh the full costs and benefits of selecting such applicants. An employee with a criminal record who would be hired after a comprehensive interview process may not be hired because organizational siloeing has left Tina with incomplete information.

G. Psychological Tendencies Influencing Employers’ Willingness to Consider Applicants with Criminal Records

While businesses create strong financial incentives to guide employee actions,¹¹⁷ individual employees are human beings and are subject to human psychological tendencies. Because hiring decisions are ultimately made by human employees, it is necessary to examine these individual-level psychological tendencies in addition to company-level incentives. For the purposes of this Note, the three most relevant psychological tendencies

114. Frans Cilliers & Henk Greyvenstein, *The Impact of Silo Mentality on Team Identity: An Organisational Case Study*, SA J. INDUS. PSYCH. 1, 2 (Mar. 22, 2012), <http://uir.unisa.ac.za/bitstream/handle/10500/14592/The%20impact%20of%20silo%20mentality%20on%20team%20identity.%20An%20organisation%20case%20study.pdf?sequence=1&isAllowed=y>.

115. *Id.* at 3. An example of a practical barrier would be the marketing department residing in a different building (or state, or country) than the engineering department, and the two departments suffering from worse communication than if they were located closer together. An example of a psychological barrier would be the engineering department not thinking to update the marketing department on its projects (or providing updates only in formal, high-level meetings), producing situations where one part of the organization is operating on missing or dated information.

116. *Id.*

117. See, e.g., Alexander Kempf et al., *Employment Risk, Compensation Incentives, and Managerial Risk Taking: Evidence from the Mutual Fund Industry*, 92 J. FIN. ECON. 92, 93 (2009) (examining the tension between the incentive to maximize one’s compensation and the incentive to maintain one’s employment).

are the tendency to prefer immediate incentives over temporally distant incentives, the tendency to prefer more certain incentives over incentives that are less certain, and the endowment effect. These tendencies inform how employers view incentives for hiring people with criminal records.

1. *Preference for More Immediate Incentives*

Research suggests people have a broad preference for temporally immediate incentives relative to temporally distant incentives.¹¹⁸ This phenomenon is known as time preference¹¹⁹ or present bias.¹²⁰ A familiar example of this preference is the concept of present value, which recognizes that a cash flow today is considered more valuable than an equivalent cash flow in the future.¹²¹ While the relationship between the strength of the preference and the immediacy of the incentive is not absolute and linear,¹²² it is such a noticeable, significant, and universal tendency that it is considered “one of the most fundamental concepts in economics.”¹²³ Additionally, part of this tendency is to hyperbolically discount the value of future incentives: “[t]he discount rate for one year is much higher than the discount rate for ten years,” meaning that people tend to prefer a smaller incentive that arrives sooner over a larger incentive that arrives later.¹²⁴ For the purposes of this Note, the important points are (1) there is a psychological preference for immediate incentives over future incentives and (2) this preference holds even when the immediate incentive has a lower value. This preference suggests employers will place a greater value on a hiring incentive if it arrives sooner rather than later, even if the later incentive is expected to be larger.

2. *Preference for More Certain Incentives*

Research also suggests that people have a preference for more certain incentives as opposed to more risky incentives, even when the more risky incentive has a greater expected utility.¹²⁵ This behavior is known as risk aversion, and it has been observed in contexts as varied as farming, auction bidding, and lotteries.¹²⁶ Some dynamics of risk aversion are not intuitive. Risk aversion is difficult to overcome even with larger incentive amounts; in fact, research suggests risk aversion increases in such scenarios.¹²⁷ People

118. John R. Doyle, *Survey of Time Preference, Delay Discounting Models*, 8 JUDGMENT & DECISION MAKING 116, 117 (2013), <http://journal.sjdm.org/12/12309/jdm12309.pdf> [<https://perma.cc/GR4R-QZT4>].

119. *Id.* at 116.

120. Jess Benhabib et al., *Present-Bias, Quasi-Hyperbolic Discounting, and Fixed Costs*, 69 GAMES & ECON. BEHAV. 205, 205 (2010).

121. Amy Gallo, *A Refresher on Net Present Value*, HARV. BUS. REV., (Nov. 19, 2014), <https://hbr.org/2014/11/a-refresher-on-net-present-value> [<https://perma.cc/QUC8-7HF9>].

122. Benhabib et al., *supra* note 120, at 205 (describing the phenomenon of “reversal of preferences,” when “a subject prefers \$10 now rather than \$12 in a day, but he/she prefers \$12 in a year plus a day rather than \$10 in a year”).

123. Mei Wang et al., *How Time Preferences Differ: Evidence from 53 Countries*, 52 J. ECON. PSYCH. 115, 115–17 (2016). Time preference is so fundamental to human behavior that it has been measured in at least fifty-three countries and across a broad range of cultures. *Id.*

124. *Id.* at 116.

125. PETERSON, *supra* note 18, at 127.

126. See generally Charles A. Holt & Susan K. Laury, *Risk Aversion and Incentive Effects*, 92 AM. ECON. REV. 1644 (2002) (studying risk aversion through high-risk activities).

127. *Id.* at 1653.

associate high-risk activities with low benefits even though high-risk activities are empirically correlated with higher benefits.¹²⁸ While events tend to be less certain the further they are in the future, the preference for more certain incentives is not the same as the preference for more immediate incentives.¹²⁹ For the purposes of this Note, the preference for more certain incentives is important because it suggests employers prefer hiring incentives that are highly likely to materialize as opposed to hiring incentives that will materialize only if some condition occurs or if further steps are taken.

3. Endowment Effect

The endowment effect is the long-recognized “tendency for people who own a good to value it more than people who do not.”¹³⁰ This remains true even when the compared goods are of the same value and in the same condition, and it is a strong enough tendency to override theoretically rational exchanges, even when real-world financial stakes are involved.¹³¹ Quasi-experiments studying real-world phenomena have documented the endowment effect when the item to be exchanged is “time, intellectual property, public land,” or various regulations.¹³² For the purposes of this Note, the endowment effect is important in how it can cause employees with criminal records (and the financial incentives tied to them) to “stick” once a business decides to bring them on board. In other words, it informs the likelihood that a business will attempt to game any given set of incentives by hiring an employee to take advantage of the associated benefits and then terminating the employee once the benefits run.¹³³

H. Advance Tax Credits Compared to Existing Policies Designed to Reduce Employment Barriers for People with Criminal Records

The most well-known example of an advance tax credit is the Affordable Care Act’s (“ACA”) Premium Tax Credit.¹³⁴ Qualifying individuals are eligible to have advance

128. Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIRECTIONS PSYCH. SCI. 322, 323 (2006).

129. For example, treasury bonds offer near-certain returns despite maturing a decade or more in the future. In contrast, gambling in a card game offers immediate returns (for someone), but those returns are far from certain. The preference for more immediate rewards and the preference for more certain rewards are not the same, despite significant overlap in certain situations.

130. Carey K. Morewedge & Colleen E. Giblein, *Explanations of the Endowment Effect: An Integrative Review*, 19 TRENDS COGNITIVE SCI. 339, 339 (2015).

131. *Id.*

132. *Id.* An illustration of the endowment effect can be seen in the results of a study where the experimenters set up a market for common items. One group of participants were given real-life coffee mugs. They were then asked to set a price at which they would sell their personal mugs. A second group of participants were asked to set a price at which they would buy one of the mugs. The median selling price was significantly higher than the median buying price, suggesting that the group that owned the mugs valued them more highly than the group without mugs. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330–32 (1990).

133. In addition to the underlying psychological tendency to add subjective value to what one already possesses, businesses are increasingly aware of the financial costs associated with employee turnover. See Gary Ballinger et al., *A Stitch in Time Saves Nine: Leveraging Networks to Reduce the Cost of Turnover*, 53 CAL. MGMT. REV. 111, 111 (2011) (describing various estimates of the cost of employee turnover, which range up to 500% of an employee’s salary).

134. *The Premium Tax Credit—The Basics*, IRS (Feb. 18, 2020), <https://www.irs.gov/affordable-care->

credit payments made on their behalf to their insurance company to lower the out-of-pocket cost of their health insurance premiums.¹³⁵ This type of “advance” payment differs from state and federal Work Opportunity Tax Credits, the Federal Bonding Program, and state limitations on hiring liability in one important way: the Premium Tax Credit arrives at the time the associated cost (insurance premium payments) is incurred, not months later.¹³⁶ Other advance tax credits offer the same advantage.¹³⁷ This payment structure is an established, proven model that can be used to improve current incentives for hiring applicants with criminal records.

III. ANALYSIS

A. *Shortcomings of Ban-the-Box*

While ban-the-box legislation is increasingly popular and has reduced employment barriers for people with criminal records, the benefits of ban-the-box do not come without shortcomings.

First—as with any law—a ban-the-box statute is only effective to the extent both its letter and spirit are followed. New York City’s Fair Chance Act is an instructive example.¹³⁸ This statute bars employers from inquiring about applicants’ criminal records until a job offer is made.¹³⁹ If an employer revokes an offer after inquiring about an applicant’s record and performing a background check, the employer must explain its decision using a Fair Chance Notice, which must expand on why the applicant’s particular criminal history might affect their performance of duties specific to the position.¹⁴⁰ This is how the statute works on paper, but it is not necessarily how the statute works in practice. For instance, an employer that seeks to superficially comply with the Fair Chance Act—but also illegally weigh applicants’ criminal backgrounds against them—could remove written questions about criminal history from application forms and job postings, but still ask such questions in verbal interviews.¹⁴¹ If an applicant filed a complaint about this under

act/individuals-and-families/the-premium-tax-credit-the-basics [https://perma.cc/F6DK-V3GF].

135. *Id.*

136. *Id.*

137. There are numerous other examples of advance tax credits. Recently, the Families First Coronavirus Response Act included an advance payment option for situations in which an employer is entitled to an employee retention credit in excess of what the employer is required to deposit in regularly withheld employment taxes. *Instructions for Form 7200 (03/2020)*, IRS (Apr. 1, 2020), <https://www.irs.gov/instructions/i7200> [https://perma.cc/ZP9E-5ETF]. Another example is the Earned Income Credit, which can be advanced for qualifying employees of tax-exempt organizations. *Earned Income Credit*, IRS (Feb. 13, 2020), <https://www.irs.gov/charities-non-profits/earned-income-credit> [https://perma.cc/KG5G-3EUY]. The Child Tax Credit has also been advanced in the past. Media Rel. Off., *Advance Child Tax Credit Payments*, IRS (May 2003), <https://www.irs.gov/pub/irs-news/fs-03-13.pdf> [https://perma.cc/G35A-PE52].

138. 47 RULES OF THE CITY OF N.Y. § 2-04 (2019).

139. *Id.*

140. *Id.*

141. See, e.g., PHILA. COMM’N ON HUM. RELS., *Filing a Ban the Box Complaint*, CITY OF PHILA., <https://www.phila.gov/HumanRelations/DiscriminationAndEnforcement/Pages/FilingABanTheBoxComplaint.aspx> [https://perma.cc/MKG3-J7TJ] (noting that complaints based on unlawful application questions require no further participation from complainants, while complaints based on unlawful interview questions require the complainant to testify and provide further evidence at a hearing). See also Margaret Barthel, *Employers Are Still Avoiding Former Inmates*, THE ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/11/are-states-complying-ban-box-laws/601240/>

the ban-the-box statute, the difficulty of producing evidence of a violation would reduce the chances that the employer would see repercussions.¹⁴² This likely discourages reporting even by applicants who are aware of the Fair Chance Act and know when it has been violated, as they may reasonably believe that their recollection of the interview will not by itself be enough to have their claim taken seriously.¹⁴³ More subtle employers might ask questions that skirt an obvious violation of the law, but that effectively prompt a candidate to offer information about criminal history.¹⁴⁴ Employers can also broadly interpret the relationship between an applicant's criminal history and the duties of a given job as a way of justifying questions or actions that would otherwise violate a ban-the-box statute.¹⁴⁵ Employers in jurisdictions with more limited ban-the-box statutes—such as Illinois, where in many situations employers are allowed to inquire about criminal history once an applicant “has been determined qualified for the position and *notified* that the applicant has been selected for an interview” (emphasis added)—might rush candidates to whatever initial hiring threshold is set by statute with the intention of skipping any substantive consideration of the applicant until it is legal to ask about candidates' criminal histories.¹⁴⁶

[<https://perma.cc/2FB4-6ATG>] (citing an interview with Mónica Palacio, director of Washington, D.C.'s Office of Human Rights, in which Palacio described how verbal violations during interviews are more difficult to prove).

142. Barthel, *supra* note 141.

143. See Jeffrey Anderson, *Repeat Job Seekers with Arrest Records Find Holes in D.C.'s "Ban the Box" Law*, WASH. CITY PAPER (Oct. 19, 2017), <https://www.washingtoncitypaper.com/news/loose-lips/article/20979818/repeat-job-seekers-with-arrest-records-find-holes-in-dcs-ban-the-box-law> [<https://perma.cc/278C-TUBR>] (describing how sluggish or absent enforcement—even in cases with clear-cut violations on written job applications—can be “frustrating” to complainants); see also Audrey McGlinchy, *Austin Law Requires Jobseekers With Criminal Pasts Get a Fair Shot. But It's Not Being Enforced*, KUT (Mar. 8, 2018), <https://www.kut.org/post/austin-law-requires-jobseekers-criminal-pasts-get-fair-shot-its-not-being-enforced> [<https://perma.cc/N9NU-GXAA>] (describing a lack of enforcement in another ban-the-box jurisdiction).

144. One documented example is: “As a condition of employment you may be required to undergo a criminal background screening. Would you be comfortable with such a screening?” Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1104 (2019). A creative interviewer could ask a variety of similar questions, such as: “Is there any reason I should not hire you?” or “If I Google your name, what will I find?” Close attention to dates of past employment and pointed questions about employment gaps could also be designed to elicit information about an applicant's criminal record. Such questions are arguably in violation of at least some ban-the-box statutes, but that ambiguity can be used to an unscrupulous employer's advantage. See, e.g., “*Ban the Box*”: *Fair Criminal Record Screening Act*, D.C. OFF. HUM. RTS. 1, 2–3 (2016) https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHRGuidance16-02_FCRSA_FINAL.pdf (providing “interpretation guidance” that includes examples of questions that do not directly ask about an applicant's criminal history but may nonetheless be in violation of D.C.'s ban-the-box statute).

145. 47 RULES OF THE CITY OF N.Y. § 2-04(e)(1)(i)(B)–(C). If an employer makes a conditional offer of employment, then wishes to withdraw that offer after learning of the applicant's criminal history, the employer must first consider, inter alia, “[t]he specific duties and responsibilities necessarily related to the prospective job,” and “[t]he bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities.” *Id.* One situation in which an employer can revoke the conditional offer is when it determines a “‘direct relationship’ between the applicant's or employee's conviction history and the prospective or current job.” *Id.* § 2-04(e)(1)(iv)–(v). A related provision of the statute contemplates employers attempting to game this “direct relationship” rule: “[a]n employer . . . may not change the duties and responsibilities of a position because it learned of an applicant's or employee's conviction history.” *Id.* § 2-04(e)(1)(iii).

146. Job Opportunities for Qualified Applicants Act, 820 ILL. COMP. STAT. 75/15 (2020). Compliance with this statute could conceivably be achieved with (1) only a cursory, easily-automated screening of applications using the broadest plausible definition of “qualified for the position” (e.g., perhaps any applicant who completes the entire application and checks a box indicating the minimum allowable level of education is “qualified”) followed by (2) an invitation to an interview that the employer only attends to honor if the applicant lacks any

Unscrupulous employers in jurisdictions with any type of ban-the-box legislation can obscure discriminatory intent while feigning compliance with the law by hiring workers with criminal records with the intent of quickly finding some trivial reason to fire them. While ban-the-box statutes have produced some positive results, such statutes do not address the fundamental problem of employers believing that the costs of hiring workers with criminal backgrounds outweigh the benefits.¹⁴⁷

Ban-the-box statutes also have questionable effectiveness in small business environments. Small businesses—defined by the Small Business Administration as firms with fewer than 500 employees—account for 64% of net new private-sector jobs and 49% of private-sector employment.¹⁴⁸ Small businesses do not hire as frequently as larger firms, do not have as deep of applicant pools as larger firms, and keep relatively unsophisticated personnel records relative to larger firms—all factors that might increase the difficulty of enforcing ban-the-box statutes.¹⁴⁹ Aggrieved applicants might be discouraged from filing complaints against small businesses because the prospect of receiving significant financial compensation is reduced.¹⁵⁰ Further, the type of multi-stage hiring process envisioned by more limited ban-the-box statutes is less likely to exist in a small business.¹⁵¹ The most extreme example of this is employers willing to hire applicants on the spot.¹⁵² Despite the fact small business jobs represent a significant percentage of overall employment numbers, small businesses do not fit neatly into the hiring environment envisioned by ban-the-box legislation.

Finally, employers faced with ban-the-box legislation may create assumptions about

sort of criminal history.

147. See Flake, *supra* note 144, at 1093–96, 1111–14. Professor Flake’s empirical study suggests that ban-the-box policies have statistically significant positive effects for applicants with criminal records. *Id.* at 1107. His review of prior ban-the-box literature discusses studies that found similarly positive outcomes as well as studies that found no effect or even negative effects. *Id.* at 1093–96.

148. FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESSES, SMALL BUS. ADMIN. 1, 1 (2012), https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf [<https://perma.cc/78F2-GZPZ>].

149. See ADP, INSIGHTS AND SOLUTIONS FOR MOVING BEYOND RISKY AD HOC HR MANAGEMENT 2 (2019), https://www.adp.com/-/media/adp/resourcehub/pdf/ahrm_action_paper.ashx [<https://perma.cc/9J2K-MUPB>] (summarizing a 2016 study of 1,054 businesses with 5–49 employees, indicating that 70% of such companies employ “ad hoc” human resources practices). With respect to the sophistication of personnel records, larger firms are more likely to produce detailed documentation of interviews and hiring decisions and are more likely to have multiple current employees involved in the hiring process. Large firms are also more likely to formalize discipline and termination actions.

150. Stephen G. Giles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006).

151. ADP, *supra* note 149. For example, a small, single-location restaurant is not likely to have a formalized multi-round interview process; it may even make job offers on the spot. If that restaurant is in a state where a ban-the-box statute bars criminal history questions until a candidate is a finalist for an open position, that statute could not be sensibly applied to the restaurant’s ad hoc hiring process.

152. See, e.g., *Career Fair to Feature On-the-Spot Hiring Decisions*, NOTRE DAME NEWS (Mar. 15, 2019), <https://news.nd.edu/news/career-fair-to-feature-on-the-spot-hiring-decisions/> [<https://perma.cc/2DV8-2ED5>] (advertising a local career fair, primarily featuring service industry positions, where hiring decisions were made on the spot). On-the-spot hiring is not limited to small businesses. See, e.g., Rebecca Hennes, *UPS Hiring Thousands on the Spot in Texas, Including Houston*, HOUS. CHRON. (Oct. 30, 2019, 1:39 PM), <https://www.chron.com/neighborhood/article/UPS-hiring-thousands-on-the-spot-in-Texas-14574735.php> [<https://perma.cc/9HLC-JP62>] (reporting that UPS intended to hire 9,600 seasonal workers across the United States in on-the-spot hiring events). Note that while on-the-spot offers may superficially appear to reduce the chances of employers discriminating against applicants with criminal records, an informal, quick-hire, high-turnover environment offers a multitude of opportunities to conceal suspect hiring practices.

the likelihood of a candidate having a criminal history and import these assumptions into the hiring process.¹⁵³ Such assumptions are a predictable consequence of a hiring market distorted by imperfect information.¹⁵⁴ No small part of the policy rationale behind ban-the-box statutes is the idea that—if a person’s criminal record is truly the difference between them securing a given job or not—removing that information from the hiring process would resolve the issue.¹⁵⁵ The very premise of ban-the-box legislation—withholding information employers care about—will likely produce unintended effects and inefficient results. An improved policy would be transparent about the costs and benefits of hiring people with criminal records but would structure the benefits such that employers would choose to hire applicants with criminal records even with full knowledge of their backgrounds.

B. Shortcomings of Existing Financial and Risk-Mitigation Policies

Policies like federal and state work opportunity tax credits, the Federal Bonding Program, and limitations on liability for hiring people with criminal records have similar shortcomings. These shortcomings broadly fall into two categories. First, there is a temporal distance between hiring an employee with a criminal record and receiving any of the associated benefits.¹⁵⁶ Second, the financial benefits of hiring an employee with a criminal record are less certain to a hiring manager than the immediate, perceived costs. These shortcomings hamstring policies offering thousands of dollars in benefits to employers who hire workers with criminal records.

The delay between hiring a worker with a criminal record and receiving the most commonly-used type of benefit—WOTCs—can be over a year.¹⁵⁷ This conflicts with the psychological preference for immediate incentives over incentives that are equal on paper

153. See Flake, *supra* note 144, at 1093–96.

154. See Bruce C. Greenwald & Joseph E. Stiglitz, *Externalities in Economies with Imperfect Information and Incomplete Markets*, 101 Q.J. ECON. 229, 230, 239 n.13 (1986) (noting that “for practical purposes, all economies” include imperfect information, and noting that ignorance—in this case, ignorance of the likelihood of a candidate having a criminal history—is a synonym for imperfect information).

155. See, e.g., N.Y.C. COMM’N ON HUM. RTS., LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT, LOCAL LAW NO. 63 1 (May 24, 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-Interpretive-Guide-052419.pdf> (“The [ban-the-box statute] is intended to level the playing field so that New Yorkers . . . who have been arrested or convicted of a crime ‘can be considered for a position among other equally qualified candidates,’ and ‘not overlooked during the hiring process simply because they have to check a box.’”). Implicit in this rationale is the sentiment that—in a jurisdiction with a ban-the-box statute, where employers supposedly cannot consider an applicant’s criminal record—an applicant with a criminal record who fails to secure a job failed on his or her own merits, not because of his or her criminal record. While this sentiment is persuasive on the surface, it fails to account for employers who indirectly obtain information about an applicant’s criminal record, employers who create assumptions about an applicant’s criminal record, or structural reasons why an applicant with a criminal record may suffer reduced employment outcomes. See Concepción, *supra* note 13, at 231.

156. To claim a WOTC, an employer must send the state WOTC coordinator a completed version of IRS Form 8850 and must send the Employment and Training Administration (an agency in the Department of Labor) a completed version of Form 9061 within 28 days of when an eligible new hire starts working. CONG. RSCH. SERV., *supra* note 56, at 4. After the state certifies that the employee is eligible, the employer can claim WOTCs on its annual income tax return via the General Business Credit. *Id.* If the business has no tax liability the year the WOTC-eligible worker was hired, and had no tax liability the year before, the business must carry the credit forward to a future year to claim it. *Id.*

157. *Id.*

but will occur in the future.¹⁵⁸ The underlying pre-rational preference for immediate incentives may be exacerbated by the more rational financial concerns of a small business. A small business is often not in a financial position to realistically plan even one year in advance and may have immediate cashflow needs that do not allow such businesses to maximize long-term incentives.¹⁵⁹

The certainty of the perceived problems of hiring a worker with a criminal record is often greater than the certainty of perceived future benefits. A hiring manager may view an applicant with a criminal record as someone with an increased risk of lateness or absence from work, or with a potential to cause problems with other employees.¹⁶⁰ Regardless of the likelihood of these concerns manifesting into actual employment issues, these problems are often at the forefront of a hiring manager's thoughts. If there is any issue with the employee, it is certain that the manager will need to address it. Benefits that may never be realized are not among the first few things a hiring manager will consider when faced with an applicant with a criminal record. This distinction is increased by the tendency of many firms to have one employee handle new applicants and make hiring decisions and another employee—often siloed away in a different department—process the benefits of hiring a person with a criminal record.¹⁶¹

IV. RECOMMENDATION

To reduce the employment barriers faced by people with criminal records, this Note's primary recommendation is to replace the aforementioned state and federal financial and risk-mitigation policies with financially equivalent advance tax credits. This Note's secondary recommendation is expanding existing certificate of employability, occupational license reform, and decarceration policies.

A. *Transitioning to an Advance Tax Credit Model*

Replacing the aforementioned state and federal financial and risk-mitigation incentives with financially equivalent advance tax credits is theoretically simple: calculate the present value of those incentives, then use an advance tax credit model to (a) put that value in the pockets of employers more quickly and (b) reduce existing uncertainty about whether employers will ever see the value of those programs. For example, the Federal Bonding Program has an average per-employer payout and an average time-to-payout. Well-established actuarial and time-discounting techniques could be used to convert those figures into an equivalent, present-day dollar value. That value would then be paid (via an advance tax credit) to an employer that would have been previously eligible for the Federal Bonding Program.¹⁶² Because of the preference for smaller incentives that arrive sooner

158. Doyle, *supra* note 118.

159. The precarious financial footing of small firms sometimes produces decisions that are sub-optimal in the short term. For example: a small firm may elect to complete a current project at break-even or loss because the reputational harm from not completing the project could destroy the business. A larger firm with a more established position and more stable reputation might elect to delay the project to maintain profitability, or simply decline to complete the project altogether.

160. Concepción, *supra* note 13, at 231.

161. See *supra* Section II.E (describing current non-financial policies aimed at removing barriers for people with criminal records).

162. A similar procedure could be readily applied to WOTCs, as they are as straightforward as a fixed

over larger incentives that arrive later, employers would likely prefer this policy over existing programs.¹⁶³ This difference between advance tax credits and existing policies like WOTCs, the Federal Bonding Program, and liability limitations would address the major shortcomings of the policies an advance tax credit would replace: the temporal distance between hiring an employee with a criminal record and receiving any of the associated benefits, and the perceived certainty of the relative costs and benefits of hiring an employee with a criminal record.

The very nature of an *advance* tax credit would mean employers would more quickly realize the financial impact these programs are designed to create. An advance tax credit could be applied to offset payroll taxes, a benefit that would manifest in a matter of weeks.¹⁶⁴ Further, the full amount could be credited to the business as soon as the next payroll tax deposit is due, which would offset more than just the newly-hired employee's payroll tax liability.¹⁶⁵ Small businesses—which account for 64% of net new private-sector jobs and 49% of private-sector employment—have less cash flow flexibility than their larger competitors and would be especially sensitive to a program that could impact their immediate cash flow situation.¹⁶⁶

Additionally, an advance tax credit would also be a more certain benefit to front-line hiring managers, which might cut through the intra-firm siloing between the party that would manage an employee with a criminal record on a daily basis and the party that would collect any benefits attached to hiring that employee.¹⁶⁷ This siloing could be addressed from several angles. A front-line hiring manager who is aware of an advance tax credit may use that program as part of their justification—to other internal firm parties, e.g. Human Resources or the supervisor to whom the hiring manager reports—for hiring an employee with a criminal record. The internal firm party that would process the more immediate financial benefit from an advance tax credit may reach out to the front-line hiring managers to make them aware of the program, especially if, as with the ACA's

cashflow at a fixed point in time. Calculating the present value of liability limitations would be more labor-intensive, but lawsuit valuation is far from a novel problem. *E.g.*, Spurgeon L. Smithson, *Odds-Valuation of a Lawsuit*, 1959 *INS. L.J.* 629, 629 (1959).

163. See Wang et al., *supra* note 123 and accompanying text (describing the preference for hyperbolic discounting).

164. Payroll taxes are deposited monthly or semiweekly, and are an ongoing, significant cost that would be reduced with an advance tax credit. See IRS, PUBLICATION 15 (2020), (CIRCULAR E), EMPLOYER'S TAX GUIDE (2020), https://www.irs.gov/publications/p15#en_US_2020_publink1000202457 (providing examples of monthly and semiweekly payroll tax deposit schedules in "Example of Monthly and Semiweekly Schedules").

165. For example, if hiring an eligible employee earns the business a \$2000 advance tax credit, that entire amount could be applied to the business's next payroll tax deposit, even though the eligible employee's share of that deposit is less than \$2000.

166. FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESSES, *supra* note 148, at 1. Small businesses in particularly fragile financial positions may not even consider tax credits that will not manifest for several months, much less longer-term programs that promise liability limitations or effective insurance for issues that might arise from hiring an employee with a criminal record. If a business is concerned with how it will cover payroll for the remainder of the month, its weighting of temporally distant benefits will be compromised by its immediate financial constraints.

167. An advance tax credit would be realized in a few weeks, while existing incentives might be realized in over a year (WOTC) or not at all (liability limitations). If a front-line manager hires an employee with a criminal record today, the manager might be in a different department (or a different company) by the time the business receives the employee's WOTC. An advance tax credit is an immediate, certain benefit the manager can point to within weeks of his or her hiring decision.

Premium Tax Credit, an advance tax credit for hiring employees with criminal records is largely processed outside of the payee organization. Finally, an applicant with a criminal record may bring the advance tax credit to the hiring manager's attention. Much of the interview process involves applicants emphasizing reasons why the employer should hire them. An applicant who could tell a hiring manager that their hiring would result in the employer receiving an advance tax credit might stand out from the competition.¹⁶⁸

Further, an advance tax credit could also sidestep some of the shortcomings of ban-the-box statutes.¹⁶⁹ The common thread of those shortcomings is ban-the-box statutes conceal—at least temporarily, and at least in part—information employers want to know. Concealing (by statute) presumably negative information may be viewed by employers more negatively than concealing neutral or positive information, and the concealment itself may create a presumption that negative information exists.¹⁷⁰ An advance tax credit would reduce the perceived negativity of an applicant disclosing a criminal record because disclosure would be offset with a positive financial benefit certain enough and immediate enough to be considered by nearly all employers. An advance tax credit might allow employers to have more complete information about applicants with criminal records without that information greatly reducing an applicant's employment prospects.

Finally, an advance tax credit program could cost the public no more than current Work Opportunity Tax Credit, bonding, and liability limitation programs if the amount of the advance tax credit is equivalent to the present value of those existing programs.¹⁷¹ The cost implication is most easily visualized with a comparison to the current Federal Work Opportunity Tax Credit program. Benefits from this program may rise as high as \$2,400 per qualifying employee.¹⁷² However, these benefits might not be realized until more than a year after the employee is hired.¹⁷³ Paying employers advance tax credits equivalent to the present value of the WOTC—but credited to offset monthly or semiweekly payroll taxes, instead of credited months or years in the future—will not cost the public any more than paying employers for the WOTC as-is. What it *will* do is provide a stronger incentive for businesses to hire applicants with criminal records.

While there is potential for abuse of an advance tax credit program,¹⁷⁴ that potential can be mitigated by the structure of the program itself as well as the endowment effect. First, an advance tax credit program for hiring people with criminal records could be structured like the ACA's Premium Tax Credit, which assesses tax liability at the end of the year if an applicant declares they are eligible for advance tax credit payments but ends up not actually eligible for those payments.¹⁷⁵ If the employer dismissed the employee too

168. If nothing else, a more immediate, certain advance tax credit would give applicants a ready-made, positive response whenever the interview turns to the subject of criminal records.

169. *Supra* Section III.A and associated text.

170. Vuolo et al., *supra* note 3, at 152–53. Further, when criminal records are concealed by statute, the presumption that negative information exists in the form of an applicant having a criminal record disproportionately affects members of minority communities. *Id.*

171. See Gallo, *supra* note 121 and accompanying text (describing net present value as a tool for equating current cash flows with future cash flows).

172. CONG. RSCH. SERV., *supra* note 56, at 1. *Ex-Offender Initiative*, *supra* note 58 (stating that similar state WOTC programs offer employers significantly more in some cases).

173. See *supra* text accompanying note 156.

174. For example, an employer might hire an eligible employee to take advantage of the advance tax credit, then fire them as soon as the business has received the full benefit.

175. *Advance Premium Tax Credit (APTC)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/>

soon after their hire date, a portion of the tax credit received would be assessed at the end of the year. Second, the endowment effect (and potentially the employer's awareness of turnover costs) would cause the employer to subjectively value the employee more highly once he or she is in the door.¹⁷⁶ This would help employees stick with a business once they received an opportunity even if the employer did not initially place high value on them.¹⁷⁷

B. Expanding Existing Certificate of Employability, Occupational License Reform, and Decarceration Policies

This Note's secondary recommendation is expanding existing certificate of employability, occupational license reform, and decarceration policies. Each policy is developed to the point where it has real-world traction, and the employment barriers for people with criminal records are pervasive enough that any single policy is unlikely to produce a comprehensive solution.

Certificates of employability are highly valued by prospective employers of people with criminal records, but they are not as easily monetizable as WOTCs, the Federal Bonding Program, or liability limitations.¹⁷⁸ While they are not cost free, they operate through existing judicial or administrative resources; they directly require no new agencies or state employees.¹⁷⁹ More states and political subdivisions should adopt certificate of employability statutes, with a focus on rehabilitation standards emphasizing good work conduct. These statutes have been thoroughly piloted in over one dozen states, and there are consequently multiple templates to serve as a model for future statutes.¹⁸⁰ Certificates of employability are another way to provide transparency about the full costs and benefits of hiring an employee with a criminal record while enhancing the benefits to the point where employers choose to hire such employees even knowing about their background.

Occupational license reform should likewise be expanded. A full one-quarter of U.S. jobs require a license; many of those jobs offer a path out of low-wage work, and occupational licenses can be particularly valuable to people who lack formal education.¹⁸¹ Many states currently have licensing regimes that impose overly-broad prohibitions on a wide variety of conduct and licensing statutes that turn on vague, subjective language (e.g., "good character").¹⁸² There is significant room for improving state licensing rules without compromising the core policy goals of licensure, and multiple states have already enacted such reforms. This trend should continue.

Finally, the most comprehensive way to remove employment barriers for people with

advanced-premium-tax-credit/ [https://perma.cc/MGM8-EZ8K].

176. See *supra* Section II.F.3.

177. *Id.*

178. Hunt et al., *supra* note 96. With regards to monetization, certificates of employability are distinct from WOTCs, the Federal Bonding Program, and liability limitations in that they are not associated with every person who has a criminal record. They are a mark of distinction and a pre-screening tool. The central purpose is to demonstrate that a given *individual* can be relied on as an employee. Any method of converting this into payments attached to *every* person with a criminal record would defeat that purpose. For this reason, this Note does not recommend that they be folded into the advance tax credit model outlined above.

179. See CAL. PENAL CODE § 4852.03 (2019) (creating a certificate of employability program that uses existing judicial resources).

180. Garretson, *supra* note 87, at 12–18.

181. See RODRIGUEZ & AVERY, *supra* note 97 and accompanying text (elaborating on the motivations for occupational license reform).

182. *Id.*

criminal records is to reduce the number of people who are given criminal records in the first place. At bottom, the goal of decarceration is to move away from prison as the dominant mode of punishment and toward imprisonment only as a last resort.¹⁸³ Decarceration strategies include declining prosecution for low-level offenses, pre-arraignment diversion programs, shifting funding away from the carceral state and towards programs that address the economic drivers of crime, expanding access to mental healthcare, and decriminalizing or legalizing non-pharmaceutical drugs.¹⁸⁴ Decarceration projects in the United States and around the world have demonstrated that these strategies can work without compromising public safety, and there is a growing wealth of compelling literature detailing the depth and breadth of the damage mass incarceration is doing to American communities.¹⁸⁵ Decarceration is an essential component of reducing employment barriers for people with criminal records and for creating a just society.

V. CONCLUSION

This Note has shown that employment barriers for people with criminal records have a multitude of negative effects on the public and that employers' reluctance to consider applicants with criminal records persists despite several policies designed to reduce those barriers. It described how this disconnect stems from background psychological tendencies valuing more immediate and more certain rewards over temporally distant and less certain rewards. After analyzing the shortcomings of existing barrier-reduction policies, this Note's primary recommendation is to replace future, less-certain financial and risk-mitigation policies with a more certain advance tax credit of an equivalent present value. This advance tax credit would directly address the psychological tendencies at issue while also addressing a common organizational problem that can obfuscate the value of existing policies. This Note's secondary recommendation is to expand existing certificate of eligibility, occupational license reform, and decarceration policies. Both recommendations would reduce employment barriers to people with criminal records, alleviate the negative effects on the public caused by those barriers, and move us closer to a just society.

183. See DAVIS, *supra* note 106, at 105–15 and accompanying text (describing the aims of decarceration, decarceration strategies, and successful decarceration experiments).

184. *Id.*

185. The brunt of this damage is endured by people of color, low-income communities, and other vulnerable groups. Gubernick, *supra* note 9, at 1156.