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USING PSYCHOLOGY TO IMPROVE EMPLOYMENT PROSPECTS FOR THE FORMERLY INCARCERATED

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INTRODUCTION

Ninety-five percent of those who are currently incarcerated will one day be released. This means the vast majority of incarcerated individuals will reenter society and attempt to rebuild a life. Study after study reveals the difficulties awaiting them: from acquiring employment and government benefits to obtaining housing and education—not to mention, the general stigma that will follow them.

As understanding of this stigma and its negative consequences has increased, federal and state government entities have enacted laws to help reduce it. One example is the “ban the box” policy, which delays an employer’s knowledge of the criminal record until after the initial hiring stages. At least

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to some extent, early reports reveal that it may be working.¹ However, ban the box is not the only mechanism to relieve collateral consequences for the many Americans who have a criminal record.

Others include certificates of rehabilitation, expungements and state laws that limit consideration of certain offenses. Each of these remedies fits roughly into one of four categories: they either delay, limit, explain or erase the criminal record. Despite the best intentions of lawmakers, however, some of these mechanisms fall short of their intended purpose because they do not take into consideration basic human cognitive biases.

In fact, to date, no policy study has explored all four methodologies in order to evaluate their potential efficacy in light of what human psychology tells us about hiring biases. Certainly, there is no silver bullet to address human bias. However, an exploration of cognitive mechanisms clearly suggests that erasing the information through expungement is likely the strongest approach. Pragmatically speaking, however, different strategies will need to be employed at different stages to truly reintegrate the formerly incarcerated back into society.

1. See, e.g., Terry-Ann Craigie, “Ban the Box, Convictions, and Public Sector Employment,” Jan. 27, 2017. <http://dx.doi.org/10.2139/ssrn.2906893>; Osborne Jackson and Bo Zharo, “The Effect of Changing Employers’ Access to Criminal Histories on Ex-Offenders’ Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts CORI Reform,” Federal Reserve Bank of Boston, February 2017. <https://www.boston-fed.org/publications/research-department-working-paper/2016/the-effect-of-changing-employers-access-to-criminal-histories-on-ex-offenders-labor-market-outcomes.aspx>; Alana Semuels, “When Banning One Kind of Discrimination Results in Another,” *The Atlantic*, Aug. 4, 2016. <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435>.

BACKGROUND

The United States has the highest number of prisoners in the world; a statistic made even bleaker considering that China, Brazil and Russia rank behind us.² Close to seven million people are incarcerated every year but that fact alone does not come close to capturing America's criminal justice problem, which continues long after incarceration has ended.³ Even when people are released from prison, they continue to face collateral consequences due to their criminal record. And, the FBI reports that almost 74 million people—or nearly one-third of American adults—have one.⁴ What's more, many of these are of a minor nature and may include just a single arrest or misdemeanor charge.

Often despite their actual severity, criminal records create a particularly harmful effect on employment outcomes, even if individuals have paid their dues to society and have the right qualifications for the job. Everlasting criminal records—which lead to employment barriers that last for a lifetime—are a uniquely American problem. In contrast, European countries generally only make conviction records available to judicial authorities, police and other public authorities. They almost never release records to other private individuals and entities like employers.⁵

In the United States, hiring discrimination against people with criminal records is rampant, as most business owners do not want to hire the formerly incarcerated. This is because they often believe those with a criminal history are more likely to commit future crimes on the job or simply to be bad employees.

The United States has been lauded as “the land of second chances,” with an origin story built upon redemption. Indeed, in various speeches, the last three presidents have all affirmed second chances, with President Trump most recently hosting a prison reform summit and supporting the First Step Act, which seeks to provide more reentry services to the incarcerated.⁶ Still, the reality is that convincing

people to hire and work next to a person with a criminal history is incredibly difficult because of deeply held stigma. It is perhaps not surprising, then, that a report from the National Employment Law Project found widespread use of blanket no-hire policies for those with criminal records in major corporations.⁷ And yet, such policies are decidedly counterproductive because the ability to quickly obtain post-release employment is one of the most important factors in reducing the chance that people will reoffend.

Additionally, there are deep racial disparities with respect to which individuals get arrested and processed through the criminal justice system. Such disparities continue upon reentry and thus when a person is a minority and has a criminal record, they are doubly harmed. One large-scale study showed the disproportionate negative effect of a criminal record on African Americans, who even without a criminal record, were twice as likely to be passed over for an entry-level callback or job offer as compared to white men with a criminal record.⁸

Numerous laws and regulations have been created to address the problem of unemployment for those who have records. As an initial matter, there are two broad umbrellas under which approaches might fall—those focused on *reducing stigma* and those for *promoting hiring* of individuals with criminal records. The distinction is artificial (and can be blurred), but laws focused on promoting hiring attempt to make society and employers more receptive to hiring those with a criminal record, while those laws focused on reducing stigma try to alter the individual's position, by shielding, delaying or explaining information about their record.

While the present study focuses on the reduction of stigma, it should be noted that a robust reentry effort would also include programs or strategies to promote hiring, such as specific grants or incentives, or efforts to make individuals more “hireable” through education and vocational training. An example of an initiative that promotes hiring from the employer's side is the Work Opportunity Tax Credit, which provides a federal tax benefit for employers who hire workers

2. Institute for Criminal Policy Research, “Highest to Lowest Prison Population Tool,” *World Prison Brief*, 2018. http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.

3. Danielle Kaeble et al., “Correctional Populations in the United States,” Bureau of Justice Statistics, Jan. 21, 2016, p. 1. <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

4. “Next Generation Identification Monthly Fact Sheet,” Federal Bureau of Investigation, June 2018. <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view>.

5. James B. Jacobs and Dimitra Blitsa, “Sharing Criminal Records: The United States, the European Union and Interpol Compared,” *Loyola of Los Angeles International and Comparative Law Review* 30:2 (2008), p. 142. <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1631&context=ilr>.

6. President George W. Bush, “State of the Union Address,” Jan. 20, 2004. http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html; President Barack Obama, “Remarks at a Town Hall Meeting,” Jan. 22, 2010. <https://www.c-span.org/video/?291557-1/presidential-town-hall-meeting-economy-jobs&desktop->; President Donald Trump, “Remarks by President Trump at White House Prison Reform Summit,” May 18, 2018. <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-white-house-prison-reform-summit>.

7. Michelle N. Rodriguez and Maurice Emsellem, “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment,” National Employment Law Project, March 2011. http://www.nelp.org/content/uploads/2015/03/65-Million_Need_Not_Apply.pdf?nocdn=1.

8. Devah Pager et al., “Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records,” *The Annals of the American Academy of Political and Social Science* 623:1 (2009), pp. 195–213. <http://doi.org/10.1177/0002716208330793>.

who have a felony.⁹ Some states (like Iowa and Illinois) and localities (like Philadelphia) offer similar incentives.¹⁰

With respect to reducing stigma, however, mechanisms fit into four categories: those meant to delay, limit, explain and erase criminal record information. The sections that follow will outline each of these, highlighting popular strategies within each that are currently in use and will then evaluate those strategies in terms of their overall efficacy through the lens of cognitive biases in hiring.

STRATEGIES TO DELAY

Ban the Box

As the saying goes, first impressions matter—and they matter a lot. This sentiment is, of course, rooted in the science of human psychology and the associated knowledge of how people first form their beliefs and then have a tendency to confirm them. And indeed, from an evolutionary perspective, making first impressions quickly has served us well.¹¹ After all, purely from a survival standpoint, speedy decision-making minimizes risks to bodily harm and allows us to use past experiences to help mitigate the perceived risk of present and future ones. But because of the speed at which we often make decisions, we can use selective data and jump to conclusions that may be wrong.

In the hiring arena, the first impression is likely in the form of an application. If the application looks promising, candidates successfully pass through the initial stage and may be asked for an in-person interview to get to know them and their particular skills better. However, for many people with a criminal record, making it past the application—irrespective of their qualifications—is impossible. This is because many hiring materials have traditionally required applicants to indicate—sometimes merely by checking a box—whether or not they have ever been convicted of a crime. Such a requirement, however, can unfairly prejudice employers against applicants before they even get a chance to explain or to otherwise make a case for their qualifications.

It is for this reason that perhaps the most well-known and widespread method to increase employment for those with criminal records has been “ban-the-box” initiatives, which

seek to remove the box from the application and thus to allow employees to be evaluated, at least initially, on an equal playing field with other applicants.

Such a strategy is predicated on the psychological mechanism of “delay,” which seeks to allow employers to see convictions but only later in the process. The goal is to ameliorate the often complete discrimination and disinclination to hire those with a record by giving employers the chance to receive some information about the individual, perhaps meet them in person and hopefully to form a positive first impression that will at least balance out any later information that may be learned about their past.

In this way, ban the box harnesses the rush to judgment aspect of human cognition and tries to change it into a positive attribute by forcing the first real impression to be an in-person one. Studies suggest that individuals decide within mere seconds if an individual is competent, trustworthy or likeable.¹² Indeed, trustworthiness, in particular, is the trait determined quickest (within 100 milliseconds) and even when given more time, people generally do not revise their beliefs.¹³ This certainly suggests that if a formerly incarcerated person is given the chance to make a good impression, later negative information may not be valued as highly.

Background Checks

Even when the box is banned, other early-stage hiring practices can be unfairly discriminatory against those who have criminal records. Most notably, a majority of employers have utilized criminal background checks as an integral part of their hiring processes because they can promote safety in the workplace and allow employers to exclude individuals who have an offense history that makes them a danger.¹⁴ However, like the conviction box on an application, these checks are often used too early in the process and/or are used arbitrarily to deny *any* type of employment—irrespective of whether the crime is relevant to the job being sought. This is not only unreasonable, but it can also be illegal under civil rights laws and unconstitutional under the fourteenth amendment.¹⁵

For these reasons, ban-the-box policies should be extended to delay not only the disclosure of a criminal record on

9. Employment and Training Administration, “Work Opportunity Tax Credit: Employers,” U.S. Dept. of Labor, March 22, 2018. <https://www.doleta.gov/business/incentives/opptax/wotcemployers.cfm>.

10. See, e.g., Mathew Swinburne, “Tax Incentives as a Public Health Tool,” Network for Public Health Law, November 2017. https://www.networkforphl.org/_asset/nr8gvm/Tax-Incentives-Ex-Offenders---Policy-Brief.pdf; Lauren Cox, “City of Philadelphia Launches Fair Chance Hiring Initiative,” Office of the Mayor, June 21, 2017. <https://beta.phila.gov/press-releases/mayor/city-of-philadelphia-launches-fair-chance-hiring-initiative>.

11. Mark Schaller, “Evolutionary Bases of First Impressions,” in *First Impressions*, ed. N. Ambady and J. J. Skowronski (Guilford Press: 2008), pp. 15-24.

12. Nicholas Rule and Nalini Ambady, “First impressions of the face: Predicting success and behavior,” *Social and Personality Psychology Compass* 4 (2010), pp. 506-16. [http://www.psych.utoronto.ca/users/rule/pubs/2010/Rule&Ambady\(2010_SPPC\).pdf](http://www.psych.utoronto.ca/users/rule/pubs/2010/Rule&Ambady(2010_SPPC).pdf).

13. Shankar Vedantam, “Researchers Examine Whether First Impressions Are Lasting,” *NPR*, Dec. 22, 2016. <https://www.npr.org/2016/12/22/506550304/researchers-examine-whether-first-impressions-are-lasting>.

14. *Ibid.*

15. Office of Legal Counsel, “U.S. Equal Emp’t Opportunity Comm’n, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,” Equal Employment Opportunity Agency, April 25, 2012. https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

the application but also any associated background check. Indeed, ideally any investigation of an applicant's background would not occur until after the interview or even better, as they very last step before an offer is made.

This is because to delay the background check allows individuals who make an otherwise favorable first impression to have a better interview. In the context of hiring, researchers have studied how first impressions formed from various information included as part of the application can actually change the way the individual is eventually interviewed. For example, individuals tend to use “confirmatory questioning strategies,” asking introverts more “introverted” questions or asking those perceived to be poorly qualified harder and less positive questions.¹⁶ Evidence also suggests that interviewers spend more time talking with applicants they already view favorably. In these cases, they are more likely to spend that time “selling” the company and the job, as opposed to attempting to vet candidates through rigorous examination.¹⁷ All of this means that the final decisions made by interviewers will be determined quite a bit by their first in-person impression, which is why delaying practices that unfairly thwart the opportunity to get to this stage are necessary to increase employment prospects for those who have already paid their debt to society.

Efficacy

Since ban-the-box and delayed-background-check policies are relatively new, evidence in support of their use is still emerging. However, initial studies are positive. In Minneapolis, for example, prior to the 2006, less than 6 percent of applicants whose background checks raised concerns were hired by the city. After that year's decision to adopt a version of the policy to delay them, that number jumped to 57.4 percent.¹⁸ Further, in 2011, the city of Durham, North Carolina enacted ban-the-box legislation.¹⁹ Between 2011 and 2014, the percentage of people with criminal records hired by the city and county of Durham increased from only 2.25 percent of hires in 2011 to 15.53 percent in 2014.²⁰

While it is true that these studies are too new to definitively show that hiring rates for people with criminal records

increased after ban the box, even if more returning citizens felt empowered to apply by these policies, this in and of itself would constitute a benefit. Moreover, studies that do exist have mostly focused on government employers rather than private ones and thus the actual benefit may be far more significant if they two were separately assessed.²¹

It seems clear that delaying employer access to criminal record information gives applicants a shot at getting their foot in the door. However, just because employers do not have criminal record information early on, does not mean they do not *want* the information early on. Psychologically, employers are in a situation characterized by uncertainty and laden with perceived risk. Thus, in the absence of definitive information, they tend to use other “signals” to identify employees they think will be problematic. Because of this phenomenon, known as statistical discrimination, ban the box has created potential unintended negative effects on marginalized populations overall. Two studies, for example, have indicated that ban the box has reduced the callback rate for young black men and the hire rate for young men of color who do not have criminal records.²² This is likely because when employers are denied information about criminal records, they use other information—in this case people's names and addresses—as a proxy to guess their race, and then stereotypically conclude that they might have a record.

Accordingly, some have suggested getting rid of ban the box overall because of statistical discrimination.²³ However, as Kathleen Lockwood, an attorney for the Clean Slate Project has pointed out, these studies have been useful to expose discrimination that was previously hidden and thus we should view this as an opportunity to address the fundamental problem: “the claim that we should accept an illegal act as the basis for eliminating a successful program is ridiculous.”²⁴

Instead, there are a number of mechanisms that could reduce racial discrimination, including extending a ban-the-box-like policy to names and addresses. Such a strategy, which is already being used by some companies, makes job applicants' names and addresses blind initially and could help reduce

16. Thomas Dougherty et al., “Confirming first impressions in the employment interview: A field study of interviewer behavior,” *Journal of Applied Psychology* 79:5 (1994), pp. 659-65. <http://dx.doi.org/10.1037/0021-9010.79.5.659>.

17. *Ibid.*, pp. 661-63.

18. “City of Minneapolis Conviction Information Summary,” Southern Coalition for Social Justice, 2008. www.southerncoalition.org/wp-content/uploads/2014/10/City-of-Minneapolis-Conviction-Summary.pdf.

19. Daryl V. Atkinson and Kathleen Lockwood, “The Benefits of Ban the Box: A Case Study of Durham, NC,” Southern Coalition for Social Justice, October 2014. https://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf.

20. *Ibid.*, p. 6.

21. In the interest of full disclosure, R Street Institute practices ban the box as a policy.

22. Jennifer Doleac and Benjamin Hansen, “The Unintended Consequences of ‘Ban the Box’: Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden,” *Journal of Labor Economics* (Jan. 1, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812811; Amanda Agan and Sonja Starr, “Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment,” *The Quarterly Journal of Economics* 133:1 (Feb. 1, 2018), pp. 191-235. <http://bit.ly/2vF15Ve>.

23. Jennifer Doleac, “‘Ban the Box’ does more harm than good,” *Brookings Institute*, May 31, 2016. <https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/>; Roy Maurer, “Ban the Box: Fix It or Start Over?,” *Society for Human Resource Management*, March 16, 2017. <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/ban-the-box-fix-it-start-over.aspx>.

24. Kathleen Lockwood, “Systemic racism, not ban the box, is the problem,” *The News & Observer*, Sept. 12, 2016. <http://www.newsobserver.com/opinion/op-ed/article101426852.html>.

discrimination.²⁵ Another strategy would be to improve laws regarding equal employment, though these can be difficult to enforce and discrimination can be hard to prove, especially as it pertains to small business.²⁶ Along with delaying race-based information and enforcing laws to promote hiring, companies are also finding that, when done correctly, internal training can combat bias and increase the hiring of minorities.²⁷ All of these strategies can and should be used in tandem.

STRATEGIES TO LIMIT

State Regulations

Another school of thought to improve employment outcomes for the formerly incarcerated is to give employers and boards conviction information, but to limit them from considering it. Such a strategy applies when comprehensive background checks produce a large swath of information but laws and regulations prevent individuals from considering certain kinds of information. For example, under the Fair Credit Reporting Act, background check companies are free to report to employers any applicant's arrest, regardless of disposition, within the past seven years.²⁸ However, there is a great difference (unfortunately, not always appreciated by employers) between an arrest and a conviction.

Because arrests are not indicative of confirmed bad acts, some state and federal laws specifically limit the ability of employers to consider this information. Indeed, the Equal Employment Opportunity Commission (EEOC) prohibits an employer from using an arrest record to deny employment because an arrest does not demonstrate clear forbidden conduct.²⁹ The EEOC also instructs employers that the use of arrest records can have a disparate impact on protected classes, as we know that young Black and Latino men are disproportionately arrested in the criminal justice system.³⁰

One example of this kind of regulation at the state level is California's law, which instructs employers not to consider

arrests, minor marijuana cases that are over two years old or cases that end in diversion.³¹ The California Labor Code clearly forbids employers from explicitly asking about these pieces of information, however, it is unclear how the employer is supposed to "unsee" the information if it is revealed as the product of a routine background check.

Another example of state regulations that employ "limiting" as a mechanism include laws that apply to occupational licensing boards. A license is a credential that the government requires a worker to hold in order to practice in a given occupation. And, nearly thirty percent of jobs now require a license.³² In some states, however, irrespective of what information a background check reveals, boards can only consider those convictions that have a direct and substantial link to the prospective job.³³ However, such a strategy essentially tells employers: "We know you saw it, but pretend you didn't," and then trusts that they will abide by the law on their honor, without any real way of ensuring that they have done so.

Efficacy

It should perhaps go without saying that once a person has seen information, he or she cannot un-see it. Indeed, there are a number of psychological theories that explain the human inability to disregard information. First, individuals may be instructed to ignore it, but simply may not want to—a theory based on motivation.³⁴ Second, a person may *want* to ignore information but might find it even more difficult not to think about it simply because they have been instructed not to (this is known as the "ironic process theory" a.k.a. "don't think about the pink elephant").³⁵ It is also possible that people are able to ignore the information but it somehow ultimately colors their judgment anyway (this is what psychologists call "mental contamination").³⁶ What makes mental contamination so powerful is that it can operate outside of conscious thought, and thus people may not even realize its influence.

25. Erin Engstrom, "6 Ways to Remove Hiring Bias from the Recruitment Process," *Recruiterbox*, March 17, 2016. <https://recruiterbox.com/blog/remove-hiring-bias-from-recruitment-process>.

26. Christina Stacy and Mychal Cohen, "Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations," Urban Institute, February 2017, p. 15. https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf.

27. Jessica Nordell, "Is This How Discrimination Ends?," *The Atlantic*, May 7, 2017. <https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-train-ing/525405>.

28. Megan Deitz, "A Crime Remembered: The Possible Impact of the 'Right to Be Forgotten' in the United States for Crime Victims, Criminal Defendants, and the Convicted," *Alabama Civil Rights and Civil Liberties Law Review* 9:1 (2018), p. 208. <https://www.law.ua.edu/acrc/archives/volume-9>.

29. Office of Legal Counsel. https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

30. *Ibid.*

31. Cal. Lab. Code § 432.7 (West). http://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=432.7&lawCode=LAB.

32. Brad Hershbein et al., "Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices," *Brookings Institute*, Jan. 27, 2015. <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices>.

33. Restoration of Rights Project, "50-State Comparison: Consideration of Criminal Records in Licensing and Employment," Collateral Consequences Resource Center, October 2017. <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment>.

34. Andrew J. Wistrich et al., "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding," *University of Pennsylvania Law Review* 153:4 (2005), p. 1260. <https://www.pennlawreview.com/print/?id=72>.

35. *Ibid.*

36. *Ibid.*

Such problems are well known and established in the court system where an attorney may, in the course of speaking, utter information to the jury that is ultimately deemed inadmissible. Despite the ruling of the judge to ignore it, the human mind is unable to fully discount it. Indeed, famed jurist, Judge Learned Hand argued that when judges attempt to “unring the bell” by telling jurors to limit their use of evidence or to ignore it entirely, they recommend a: “mental gymnastic which is beyond, not only their powers, but anybody else[’s].”³⁷ In fact, some studies have revealed that such limiting instructions to jurors actually have the opposite effect, actually drawing attention to the issue and making it harder to forget.³⁸

In the context of hiring, to give an employer a full background check and then to expect them not to consider certain offenses, arrests or dismissals is essentially impossible. Even well-intentioned employers who want to follow the law and limit what they have seen, will be hard pressed to do so, simply because of the way cognitive processing works. Moreover, the vagueness of some regulations, combined with the opacity of the hiring process makes it difficult to police employers that violate such regulations and thus they are ultimately ineffective.

As long as background checks continue to show arrests, dismissals and other information that should not be considered, the best practice for businesses and licensing boards would be to have a third-party—perhaps the background check company itself—redact any information to which they should not be privy. Asking organizations to self-regulate is simply bad policy.

STRATEGIES TO EXPLAIN

Certificates of Rehabilitation

Rather than to hide or attempt to limit information about a criminal past, another approach is to allow individuals to explain the circumstances of their past in more depth. This allows employers to have access to a fuller picture of the facts and therefore to make a more individualized assessment of whether someone has rehabilitated themselves. Such a model uses certificates of rehabilitation (also called certificates of employability and certificates of relief), pardons,³⁹ as well as a job-screening device called “comments for context,” which

allows applicants to add comments directly to their criminal record that employers can see and evaluate.⁴⁰

Certificates of rehabilitation, employability or relief are likely the most well-known and accessible of these approaches. A certificate of rehabilitation is meant to demonstrate that an individual has been rehabilitated but does not seal the individual’s record. These follow statutory guidelines, such as waiting periods or other individual requirements (e.g. to establish residency or to demonstrate that one is not on probation). Some certificates also protect employers from liability, which would be a provision in the law that promotes hiring (rather than just preventing stigma). In an effort to increase job prospects for the formerly incarcerated, at least 20 states have authorized certificates of employability.⁴¹

An approach that emphasizes explanations originates in the belief that the more information employers have, the better it will ultimately be for everyone involved in the employment process. Those who favor these explanation methods argue that, given the aforementioned limitations of strategies that attempt to delay or limit criminal record information, a better strategy is simply to expand the access to information and to allow the job seeker to provide context to create a more accurate overall picture.

Efficacy

In an ideal world, employers would readily understand and forgive an individual’s past criminal conduct and accept certificates of rehabilitation. And there are employers—particularly those who have had a personal experience with the criminal justice system—who are more sympathetic. The single empirical study on certificates of rehabilitation shows promise, finding that a one-year-old drug felony without a “Certificate of Qualification for Employment” in Ohio resulted in a relatively low positive response rate from employers (a response for an interview or a job offer) at 9.8 percent.⁴² By contrast, the study found that a certificate raised the positive response rate to 25.5 percent, which was not statistically significant from the response rate for those with no criminal record disclosed (29 percent).⁴³

The study’s results are limited, however, most of all because of its artificial nature. An individual in Ohio would be very

37. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

38. Dennis J. Devine et al., “Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,” *Psychology, Public Policy & Law* 7:3 (2001) p. 666. <https://pdfs.semanticscholar.org/5cf0/c05cf4cf27e3912ecaeddac03d71b01d4532.pdf>.

39. Pardons are generally issued by the executive branch and may relieve individuals of some of the collateral consequences of convictions by demonstrating rehabilitation. However, for political reasons, pardons rarely occur and for that reason, they are not explicitly discussed herein. See Maggie Clark, “Governors’ Pardons Are Becoming a Rarity,” *Governing the States and Localities*, Feb. 8, 2013. <http://www.governing.com/news/state/sl-governors-balance-politics-with-pardons.html>.

40. Max Wesman, “Comments For Context: Toppling Barriers To Fair Chance Hiring,” *Goodhire Blog*, April 19, 2016. <https://www.goodhire.com/blog/comments-for-context-for-fair-hiring>.

41. “Criminal Records and Employment: Legislative Trends,” National Conference of State Legislatures, August 2016. https://comm.ncsl.org/productfiles/83136608/second_chance_handout.pdf.

42. Peter Leasure and Tia Stevens Andersen, “The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study,” *Yale Law & Policy Review Inter Alia* (Fall 2016). https://lpr.yale.edu/inter_alia/effectiveness-certificates-relief-collateral-consequence-relief-mechanisms-experimental.

43. *Ibid.*

unlikely to even have a certificate one year after a felony conviction, for example, since the waiting period even to apply is one year after final discharge. Further, if the individual received any jail, prison time or probation, the one year would be calculated from the date of sentence completion.⁴⁴ Moreover, even after an individual applies, the process likely takes at least a few months—from the Justice Reinvestment Officer reviewing the application, to a court investigation, to a possible court hearing.⁴⁵ Additionally, Ohio is one of the few states where a certificate limits employer liability for a negligent hiring claim, which also makes hiring more appealing. Whether the results of such a study would remain valid in a state without employer protections is difficult to predict.

The reality is that the effectiveness of certificates of rehabilitation are limited. In order for employers to properly weigh benefits and risk, they have to be aware of and accept certificates of rehabilitation as meaningful documents. One of the main limitations of certificates of rehabilitation is the lack of widespread knowledge of them. An empirical study of New York City (a state that has offered certificates for fifty years) revealed a gap between the use of a certificate for gaining employment and an employer who knows what a certificate is.⁴⁶ Because employers were not familiar with certificates or what they stood for, applicants found they had limited value.

Cognitive mechanisms also suggest limitations. No matter how worthy and extensive an individual's efforts at rehabilitation, those efforts are unlikely to equal the original criminal conduct because of the cognitive mechanism of risk aversion. By nature, people are risk averse and have a bias toward valuing potential costs higher than benefits.⁴⁷ This property is called "loss aversion" and researchers have demonstrated that losses generally loom larger than corresponding gains.⁴⁸ In economic terms, a loss of \$X weighs more heavily on the mind than a gain of \$X. Or, put differently, when offered a bet with equal probability to win or to lose, the average person requires a gain twice the value of the potential loss before the bet is accepted.⁴⁹ Our negativity bias promotes risk averse behaviors, leading us to prefer the status quo even when change would be in our interest.

44. "CQE Workbook: A step-by-step guide to applying for a Certificate of Qualification for Employment," Ohio Justice and Policy Center, Feb. 17, 2015. <http://bit.ly/OJPC-CQEworkbook>.

45. *Ibid.*

46. Joy Radice, "Administering Justice: Removing Statutory Barriers to Reentry," *University of Colorado Law Review* 83:3 (2012), p. 770. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864917.

47. Daniel J. Levitin, *Foundations of Cognitive Psychology* (MIT Press: 2002), p. 601. <http://www.umpalangkaraya.ac.id/dosen/dwisariusop/wp-content/uploads/2016/11/COGNITIVE-PSYCHOLOGY.pdf#page=618>.

48. *Ibid.*

49. Daniel Kahneman and Amos Tversky, "Choices, Values, and Frames," *American Psychologist* 39:4 (April 1984), pp. 341-50. <http://web.missouri.edu/~segerti/capstone/choicesvalues.pdf>.

POLICY RECOMMENDATIONS

In light of all the limitations associated with strategies meant to delay, limit and explain, the most powerful remedy is to address criminal record stigma at the source—through expungement, as it has the unique ability not only to restore a person's ability to obtain employment but can have positive effects in realms such as housing, education and the exercise of civil liberties.⁵⁰ This "erasure" school of thought functions under the notion that little-to-no information about a criminal past will lead to better job outcomes.

Expungement can apply both to non-convictions and convictions, as well as both misdemeanors and felonies. However, this remedy is generally only available to people with records of arrest for relatively minor infractions, misdemeanors and low-level felonies. It also often requires that individuals wait a number of years before seeking expungement to ensure that they do not reoffend.⁵¹ The most common form of expungement law allows for the sealing of expunged records, which means that some parties, such as law enforcement, may still have access to the information.⁵² Still, expungement is one of the few remedies that can practically equate to the erasure of a conviction for the purposes of hiring.⁵³

In a unique retrospective timeframe study of clients who received legal assistance from the East Bay Community Law Center's Clean Slate Clinic in Oakland, California (an organization that assists the formerly incarcerated with the expungement process), researchers compared a treatment group (those who received the record clearing intervention) and control groups (those who had yet to receive the intervention) to demonstrate that average employment rates grew in the years after the intervention.⁵⁴ Additionally, individuals made more money after their records were cleared: one-third more after three years, as compared to their total average earnings.⁵⁵ Moreover, the costs associated with expungement were outweighed by the benefits by around \$5,800 per person. These benefits included increased income, tax revenues for society and reductions in dependence on government assistance. After the first years, there is no further cost to the government for expungement but the benefits continue

50. Expungements generally favor the deletion of criminal records altogether, whereas sealing records (a mechanism often used for juvenile cases) means they cannot be accessed without a court order.

51. Margaret Love, "Restrictions on Access to Criminal Records: A National Survey," Collateral Consequences Resource Center, March 9, 2017. <http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey>.

52. Mackenzie J. Yee, "Expungement Law: An Extraordinary Remedy for an Extraordinary Harm," *Georgetown Journal on Poverty Law and Policy* 25:1 (2017), p.182. <https://www.law.georgetown.edu/poverty-journal/in-print/volume-25-issue-1-fall-2017/expungement-law-an-extraordinary-remedy-for-an-extraordinary-harm>.

53. Pardons also can have this effect but are much less likely to be obtained.

54. Jeffrey Selbin et al., "Unmarked? Criminal Record Clearing and Employment Outcomes," *Journal of Criminal Law and Criminology* 108:1 (2018), p. 8. <https://scholarly-commons.law.northwestern.edu/jclc/vol108/iss1/1>.

55. *Ibid.*

to accrue. Indeed, the benefits also continue for the formerly incarcerated individual, as it restores dignity to those who have experienced the mark of having a criminal record. The same study found that those who had their records cleared felt a sense of accomplishment and hope for the future.⁵⁶

Put simply, expungement is the most effective strategy because it is the only one that can work around the deep nature of human cognitive bias. Unfortunately, people have deeply held stigma toward those with a criminal record and while it is readily acknowledged, it is nevertheless difficult to eradicate when employers are privy to criminal record information. In fact, a three-year study on the impact of having a criminal record on employment-related outcomes found that of all “stigmatized job applicants” (such as those on welfare, those facing short-term unemployment or those with only a short-term work history), those with criminal records fared the worst.⁵⁷ Not only were they the least likely to be hired but it was also found that employers often associate them automatically with absenteeism and tardiness, drug and alcohol issues and with poor overall relationships.⁵⁸

While educating the public about bias and discouraging them from being biased is a noble goal, it may not be fruitful if they believe that returning citizens are worse employees. For example, if an employer believes that those with a criminal record are more likely to commit crime, it may be hard to convince them otherwise—even though studies show that, at some point, the recidivism rate becomes equivalent between the formerly incarcerated and the general population,⁵⁹ and that returning citizens might actually be actually be *better* employees.⁶⁰ Even when presented with such data, false impressions and beliefs are remarkably persistent and difficult to combat.⁶¹ This is why erasing this information is the most effective solution.

While there is no silver bullet when it comes to addressing a person’s past, expungement is the closest thing we have and

56. Jenny Roberts, “Expunging America’s Rap Sheet in the Information Age,” *Wisconsin Law Review* 2 (2015), p. 334. <http://wisconsinlawreview.org/wp-content/uploads/2015/05/Roberts-Final.pdf>.

57. Scott Decker et al., “Researchers Examine Effects of a Criminal Record on Prospects for Employment,” The Council of State Governments, Aug. 20, 2014. <https://csgjusticecenter.org/reentry/posts/researchers-examine-effects-of-a-criminal-record-on-prospects-for-employment>.

58. *Ibid.*

59. Alfred Blumstein and Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences,” National Institute of Justice, 2012. <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

60. Jennifer Hickey Lundquist et al., “Does a Criminal Past Predict Worker Performance?: Evidence from One of America’s Largest Employers,” *Social Forces* 96:3 (2018), pp. 1039-68. <http://muse.jhu.edu/article/689340>; Vivian Giang, “Criminal Record Might Make Better Employees,” *Business Insider*, Dec. 4, 2012. <http://www.businessinsider.com/a-criminal-record-might-increase-productivity-2012-12>.

61. Elizabeth Kolbert, “Why Facts Don’t Change Our Minds: New discoveries about the human mind show the limitations of reason,” *The New Yorker*, Feb. 27, 2017. <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

thus it should be the number one vehicle for reform. This is not to say, however, that efforts to delay, limit and explain are not also useful in conjunction with it because politically and pragmatically speaking, erasure will never be a complete solution. Accordingly, the following sections discuss the four major obstacles to its exclusive adoption and suggest potential remedies that can help to widen its use, as well as opportunities to enhance existing policies.

Increase user access and reduce cost

In too many jurisdictions, bureaucratic complications and high fees can prevent eligible individuals from expunging their records. While court clerks are often well informed about the forms, many refuse to help pro se clients complete them because of a fear they will be accused of practicing law. Legal aid and public defenders’ offices have increasingly started clean slate programs and expungement clinics but lacking resources often limit the number of clients they can assist. Expungements are also very expensive. While most jurisdictions charge \$150 or less, prices can vary widely. Tennessee, for example, has a \$450 fee, Louisiana a \$550 one and Kentucky charges \$500 to clear a record.⁶²

The easiest policy to make expungements more accessible is to make them automatic. If you eliminate the cost, court time, forms and bureaucracy, those who are eligible for mandatory relief provisions will simply receive the relief. Right now, however, states that offer any form of automatic expungement are in the minority. Eight states appear to have automatic expungement policies, though these are usually restricted to outcomes that are favorable to the defendant (such as arrests with no charges, dismissals and dispositions of not guilty).⁶³ Even in these cases, there can often be a waiting period to qualify.

For those expungements that continue to be discretionary, individuals should be notified of the procedure at the time of disposition. In situations where there is a waiting period, the court should send a follow-up notice when they are eligible. Further, the process should be streamlined so that forms are easy to read and judges should be receptive and kind to pro se individuals during any required court process. Put simply, truly meaningful access means that the average individual involved with the criminal justice system can understand the rules governing expungement and obtain one if they are eligible.

62. Maura Ewing, “Want to Clear Your Record? It’ll Cost You \$450,” The Marshall Project, May 31, 2016. <https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450>.

63. “Consideration of Criminal Records in Licensing an Employment,” Restoration of Rights Project, October 2017. <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment>.

Reduce and clarify time length to qualify

When individuals are first released, their potential for recidivism is the highest and for this reason, it is the most crucial time to help them obtain employment.⁶⁴ As it currently stands, expungement is seen as something that must be earned by a lengthy time period without involvement in the criminal justice system. In some states, the waiting period can be as long as ten years.⁶⁵ Perhaps worst of all, the cost of applying at the wrong time can be much higher than just the expensive expungement fee. For example, in some states, you can only apply once in your lifetime.⁶⁶

One recommendation then is for states to adjust waiting periods based on the available data regarding re-offense, instead of setting arbitrarily high waiting periods, or relatedly, never allowing expungement at all. The first-ever empirical study on “redemption” was recently completed and was designed to determine when a returning citizen has been crime-free long enough to have the same chance of committing a crime as someone in the general population.⁶⁷ As a result, we now know that depending on the crime, a person is “redeemed” between three to eight years after the conviction took place, which is to say that by that point, they are no more likely than anyone else to commit a crime.

Include more offenses under the expungable umbrella

Another subset of states allow expungements for cases that receive a “deferred adjudication,” which may be called different names in different jurisdictions.⁶⁸ Irrespective of the terminology, a deferred adjudication is one in which the individual pleads guilty, is given conditions like probation and treatment and as long as he or she completes the conditions, they can avoid a formal conviction. However, many states do not allow expungements for anything other than arrests, dismissals and dispositions of not guilty.⁶⁹

64. Aaron Yelowitz and Christopher Bolinger, “Prison-To-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates,” Manhattan Institute, March 26, 2015. <https://www.manhattan-institute.org/html/prison-work-5876.html>.

65. “Consideration of Criminal Records in Licensing an Employment.” <http://ccre-sourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment>.

66. A petitioner may only file for expungement once in their lifetime in Indiana, Florida and North Carolina. See, e.g., Jeffrey S. Wiese and Elizabeth Daulton, “Expungement I.C. 35-38-9 Digest for Judges,” Dec. 20, 2017. <https://www.in.gov/judiciary/iocs/files/courtmgmt-expungement-digest-for-judges.pdf>;

N.C. Gen. Stat. Ann. § 15A-145.5. https://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_15A/Article_5.pdf; 94 Fla. Stat. Ann. § 943.0585 (West). http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0900-0999/0943/Sections/0943.0585.html.

67. Blumstein and Nakamura. <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

68. Ibid.

69. “Consideration of Criminal Records in Licensing an Employment.” <http://ccre-sourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment>.

While expungements of non-conviction records are valuable, our vision as a society that encourages redemption and forgiveness must grow to include those who have had convictions on their records. Even those who have made a mistake in life, or a number of mistakes, should at least have a chance at demonstrating rehabilitation to a judge and should be allowed a clean slate. In this regard, Illinois is one of the most inclusive states, as with the exception of only a number of serious offenses, sealing for most misdemeanors and felonies is available after a three-year waiting period.⁷⁰

Improve background checks

Another critique is that expungement laws are ineffective in our current information-filled environment. There are a number of unofficial sources that keep convictions, even after they have been expunged—including for-profit background companies, websites that collect mug shots, police blotters, news media accounts and law enforcement agencies outside the jurisdiction where the expungement occurred. While an expunged conviction will not show up in an official court database, a for-profit background company may have gathered the information before the expungement and failed to update it. An employer finding expunged information is particularly problematic when it occurs after an applicant has denied the existence of the offense (since once expunged, the person may fairly deny the existence of the arrest or conviction). In light of the (incorrect) information, the applicant is seen as a liar.

The problem is not completely avoided when employers rely upon more “official” means like the FBI’s database. Unfortunately, although it is the most relied upon database (used for almost 17 million employment and licensing background checks in 2012), it is terribly inaccurate.⁷¹ Available public data indicates there is a one in two chance that arrest information in the FBI’s database will fail to include any indication of the disposition of the case. This results in over 600,000 people potentially being prejudiced in job searches.⁷²

Solutions for these problems are complicated in an age where information is so readily available and employers have every reason to search for prospective employees on the internet. With regard to the FBI’s database, the problems are well known and there have been proposed federal bills to

70. 20 Ill. Comp. Stat. Ann. 2630/5.2.

71. Madeline Neighly and Maurice Emsellem, “Wanted: Accurate FBI Background Checks For Employment,” The National Employment Law Project, 2013, pp. 5-7. <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

72. Ibid.

address these issues.⁷³ Since background checks now affect so many areas of life—from employment, to gun purchases, to housing and education—Congress should make passing these bills a priority.

In addition, private data collection companies qualify as consumer reporting agencies and are regulated by the Fair Credit Reporting Act (FCRA). One provision of the FCRA is that consumer reporting agencies are to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁷⁴ These procedures include notice that records are being pulled and an opportunity to contest information that is found after an adverse action notice. When private data collection companies report inaccurate information, they should be held accountable.

Expand the role for other strategies

As long as waiting periods exist and not all offenses are expungable, there will be a place for other employment-enhancing strategies. Both delay and explain strategies have a clear place in policy. Strategies that delay stigmatizing information from employers are effective, as they allow individuals to make a positive first impression. Furthermore, there is anecdotal evidence that jurisdictions that have passed ban-the-box legislation have experienced a culture shift in hiring. Ban the box does not keep employers from background information, nor does it require the hiring of those with records. However, it has been fueling conversations about giving people second chances. In Minnesota, for example, the commissioner of the Minnesota Department of Human Rights has noted that more employers have opened up to hire the formerly incarcerated because of these policies.⁷⁵

Once employers have been delayed from doing a background check, explaining can be effective. The main reason an explanation, by itself, is unlikely to suffice is because it may not respond to the number one reported reason for not hiring those with a criminal record: the fear of liability.⁷⁶ A powerful policy to promote hiring, then, would be to reform negli-

gent hiring laws, perhaps through certificates of rehabilitation that include related protections. Right now, to the risk averse employer, the costs of potential liability outweigh the benefits. However, in twelve states, certificates of rehabilitation also include policies to protect employers from suits alleging negligent hiring or failure to protect because of the employee’s criminal conviction.⁷⁷ Such an approach should be expanded to other states to encourage the adoption and use of these hiring tools.

CONCLUSION

Over the past few years, a tough-on-crime politics has shifted to one that is smart on crime, one that recognizes that we need to give individuals an opportunity to be employed. The question remains, however, as to which policies are best to help individuals reenter society. In asking this question, legislators would be remiss not to consider how the human mind works, at both its best and its worst.

The good news is, some of the most recent survey data suggests that managers and human resource representatives are increasingly open to hiring someone with a criminal record.⁷⁸ But even well-meaning individuals can’t un-see criminal record information and it is difficult not to take into account, even when it is delayed or explained. If we are serious about reintegrating justice-involved individuals into society, then a robust expungement policy—one that reduces costs and wait times, and increases access and eligible offenses—is our best bet.

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73. See, e.g., Fairness and Accuracy in Employment Background Checks Act of 2013, H.R. 2865, 113th Cong. (1st Sess. 2013). <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2865ih/pdf/BILLS-113hr2865ih.pdf>; ABC Act of 2013, H.R. 2999, 113th Cong. (1st Sess. 2013). <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2999ih/pdf/BILLS-113hr2999ih.pdf>.

74. 15 U.S. Code § 1681e, “Compliance procedures.” <https://www.law.cornell.edu/uscode/text/15/1681e>.

75. Ibrahim Hirs, “How ‘Ban the Box’ has affected attitudes towards employing ex-offenders in Minnesota,” *Minnpost*, Dec. 22, 2017. <https://www.minnpost.com/good-jobs/2017/12/how-ban-the-box-has-affected-attitudes-towards-employing-ex-offenders-minnesota>.

76. Kenneth I. Sondik, “Don’t ‘Ban The Box’: Inquiring About Criminal Convictions On Job Applications,” *Forbes*, Nov. 11, 2014. <https://www.forbes.com/sites/real-spin/2014/11/11/dont-ban-the-box-inquiring-about-criminal-convictions-on-job-applications/2/#4751f8006d08>.

77. “Criminal Records and Employment: Legislative Trends.” https://comm.ncsl.org/productfiles/B3136608/second_chance_handout.pdf.

78. “NEW SURVEY: Managers, Employees, and HR Professionals are Willing and Open to Hiring and Working Alongside Individuals with a Criminal Record,” Charles Koch Institute and Society for Human Resource Management, May 17, 2018. <https://www.charleskochinstitute.org/news/shrm-second-chances-survey>.