

# Assimilation: Removing the Scarlet Letter

Caleb David

This essay analyzes the treacherous road ex-offenders face upon release, the laws helping and hurting their chances, and in-prison and reentry programs designed to reduce recidivism. This paper will also offer reforms in all areas discussed, focusing on West Virginia and Pennsylvania.

Meet Sam. Sam is a fictitious 26 year-old Pittsburgh, Pennsylvania native, who is unemployed but looking. After growing up in a broken home, Sam dropped out of high school at age seventeen and has worked minimum wage jobs for the last nine years. He lives in a public housing project and collects welfare and food stamps. Sam has two kids with an ex-girlfriend. He raises his son, but his ex-girlfriend refuses his calls and attempts to visit his daughter. One night, Sam tried to visit his daughter and was denied. Understandably angry and depressed, he gave in to temptation; he bought a gram of crack from a dealer who hangs out around his housing project. Sam was no stranger to crack and was trying to stay clean. After smoking, Sam crashed out of euphoria and craved more. He took to the streets to find the dealer again. Unfortunately for Sam, a police officer witnessed his next purchase, and he was caught with two grams in his possession. Sam was arrested and convicted of possession with intent to sell under Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act: "The following acts are prohibited: Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act ..."<sup>1</sup>

Pennsylvania law also imposes a mandatory minimum sentence:

A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance or a mixture containing it is classified in Schedule I or Schedule II under section 4 of that act and is a narcotic drug shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:

(i) when the aggregate weight of the compound or mixture containing the substance involved is at least 2.0 grams and less than ten grams; two years in prison and a fine of \$5,000...<sup>2</sup>

Throughout his first twenty-three months in jail, Sam attended a few substance abuse classes but stopped going because they were impersonal and too formal. He did, however, work

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<sup>1</sup> 35 Pa. Cons. Stat. Ann. § 780-113(a)(30) (West 2014).

<sup>2</sup> 18 Pa. Cons. Stat. Ann. §7508(a)(2)(i) (West 2013).

for Pennsylvania Correctional Industries, sewing shirts and pants for sale to the public. One month prior to release, he started a reentry program. He created his own reentry plan to follow after release: find a job, stay clean, and spend time with his kids.

Upon release, Sam was handed a bus ticket, two hundred dollars, and a directory full of phone numbers and addresses of resources. While incarcerated, Sam learned he had been evicted from public housing, so he looked up the address for a homeless shelter and used his bus ticket to get there. Once there, Sam found out that, because of his drug felony and his loss of custody over his son, he was no longer eligible for welfare or food stamps. The next day, he met with his parole officer and attended an employment assistance seminar as part of his reentry program. At the seminar, Sam received help creating a resume and applied for ten jobs. On each application, however, Sam had to check the box asking if he had a criminal history and had to give the homeless shelter's phone number. He was denied for each job. The next week, Sam applied for ten more jobs, but, again, every employer rejected him. Sam began to understand that he was carrying a social stigma: "criminal."

Distraught, Sam decided to seek more help. Using the directory given to him by the prison, he contacted a nonprofit organization in the Pittsburgh area, which provides employment assistance to ex-offenders. Despite their help, Sam still couldn't find employment. A month after release, Sam still lived at the shelter. The prison's reentry program had ended. Sam turned to panhandling during the day and getting in line for the shelter every afternoon. Two weeks later, Sam was arrested for crack possession again; this time, the mandatory minimum sentence was three years.<sup>3</sup>

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<sup>3</sup> 18 Pa. Cons. Stat. Ann. §7508(a)(2)(i) (West 2013).

Recently, the problem of over-criminalization has become a hot topic in academia and in Congress.<sup>4</sup> Unfortunately, while academia remains interested, prisoner reentry has not been debated in Congress in any constructive manner in the last six years. This essay analyzes the treacherous road ex-offenders face upon release, the laws helping and hurting their chances, and in-prison and reentry programs designed to reduce recidivism. This paper also offers reforms in all areas discussed, focusing on West Virginia and Pennsylvania. Many argue that poverty causes crime; this essay argues that incarceration, and its adscititious effects, perpetuates poverty, especially when reentry programs fail. This vicious cycle of poverty-incarceration-poverty can be broken. Of course, reforms to the criminal code are imperative, but removing the Scarlet Letter of “criminal” and allowing released prisoners an opportunity for rehabilitation and redemption is also essential.

In his 2004 State of the Union Address, President Bush explained the problem faced by many people, like Sam, perfectly: ““We know from long experience that if [ex-offenders] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison ... America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.””<sup>5</sup> Recently, the satirical magazine *The Onion* also pointed out the absurdity of the reentry problem in America with its own mordant prose, writing that a

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<sup>4</sup> See Stephanie Wilkinson, *Too Much & Too Many*, Washington & Lee University School of Law Alumni Magazine, 12, Summer Issue (2013); see also Press Release, United States House of Representatives Judiciary Committee, House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014).

<sup>5</sup> *Make Ex-Offender Community Reentry a Success: Addressing Access to Alcohol*, International Institute for Alcohol Awareness, at 2, <http://www.nafj.org/pdfs/policybriefreentryweb.pdf> (quoting President George W. Bush, 2004 State of the Union Address (Jan. 20, 2004)).

fictitious warden was “confused” that a released prisoner recidivated after spending fifteen years of isolation in a “dehumanizing environment” and was further confused “at how the man’s criminal record and the social stigma of his prison sentence had somehow failed to land him a steady job immediately upon release.”<sup>6</sup> Although stated in different manners, President Bush and *The Onion* eloquently express the problems facing ex-offenders upon release. Furthermore, bipartisan support is growing to resolve criminal justice issues. Recently, Republican Senator Rand Paul and Democratic Attorney General Eric Holder discussed, in agreement, criminal sentencing and restoration of rights for ex-felons as part of a larger plan to reform the criminal justice system.<sup>7</sup> Fortunately, lawmakers are realizing the scope of the incarceration problem, and the situation is dire.

According to the Bureau of Justice Statistics, in 2012, nearly 1.6 million Americans were incarcerated.<sup>8</sup> In 2012, American prisons released 637,400 inmates,<sup>9</sup> but, within three years, more than forty percent—250,000—of those released will recidivate.<sup>10</sup> In Pennsylvania and West

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<sup>6</sup> *15 Years in Environment of Constant Fear Somehow Fails to Rehabilitate Prisoner*, *The Onion* (Mar. 4, 2014), <http://www.theonion.com/articles/15-years-in-environment-of-constant-fear-somehow-f,35434/?ref=auto>.

<sup>7</sup> *Eric Holder, Rand Paul Discuss Changes to Criminal Justice System*, Associated Press, Huffington Post (Feb. 12, 2014), [http://www.huffingtonpost.com/2014/02/12/eric-holder-rand-paul\\_n\\_4776592.html](http://www.huffingtonpost.com/2014/02/12/eric-holder-rand-paul_n_4776592.html).

<sup>8</sup> E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012*, Bureau of Justice Statistics (December 2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *State of Recidivism: The Revolving Door of America’s Prisons*, The Pew Center on the States (April 2011), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/Pew\\_State\\_of\\_Recidivism.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf). This study found that 43.3% of prisoners released in 2004 were incarcerated again by 2007. Earlier studies

Virginia, the recidivism rates are 43%<sup>11</sup> and 26.8%<sup>12</sup>, respectively. After being punished and incarcerated, why would an American commit another offense? What measures have lawmakers taken thus far to solve this problem? What can lawmakers do differently now to lower the recidivism rate and help ex-offenders assimilate? This essay compares and contrasts reentry programs and recidivism rates to discover which programs are best and what is recidivism's main cause. Analysis of in-prison programs, which are the starting points of reentry programs, is also necessary. Because rehabilitation is one of the goals of prisons,<sup>13</sup> reentry begins once an inmate is incarcerated; in-prison programs are important for effective reentry.

Poverty makes prisoner reentry more difficult, thrusting Americans into difficult situations and instigating recidivism. Incarceration, and the Scarlet Letter it carries, however, ensures that most poor people convicted of crimes will remain poor. Congressional findings show that “between fifteen and twenty-seven percent of prisoners expect to go to homeless

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based on arrests suggest the recidivism rate is closer to two-thirds. *See generally* Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, Bureau of Justice Statistics (2002), <http://www.bjs.gov/content/pub/pdf/reentry.pdf>.

<sup>11</sup> Tom Corbett & John Wetzel, *Recidivism Report 2013*, Penn. Department of Corrections, 7 (2013) [http://www.cor.state.pa.us/portal/server.pt/community/research\\_\\_\\_statistics/10669/reports/1069947](http://www.cor.state.pa.us/portal/server.pt/community/research___statistics/10669/reports/1069947).

<sup>12</sup> Press Release, West Virginia Department of Military Affairs and Public Safety, *Inmate Recidivism Rate in West Virginia Fourth Lowest in the Country* (citing *State of Recidivism, supra n. 10*, at 11).

<sup>13</sup> *See* Fox Butterfield, *Inmate Rehabilitation Returns as Prison Goal*, *The New York Times* (May 20, 2001), <http://www.nytimes.com/2001/05/20/us/inmate-rehabilitation-returns-as-prison-goal.html>; *see also* Daron Hall, *Jails vs. Prisons*, American Correctional Association, [https://www.aca.org/fileupload/177/prasannak/1\\_1\\_1\\_Commentary\\_web.pdf](https://www.aca.org/fileupload/177/prasannak/1_1_1_Commentary_web.pdf).

shelters upon release from prison.”<sup>14</sup> Released prisoners also struggle to find employment and acceptance in communities and families. This dejection and solitude disincentivizes any behavioral reforms. With proper rehabilitation, reentry programs, and statutory reform, however, impoverished ex-offenders can leave prison with plans of action and have real opportunities to achieve their goals.

More reform is needed; more help is needed. This paper analyzes the problems of employment, housing, and assimilation back into a community. It calls for reforms to employment laws, such as pre-employment criminal background checks and ex-offender prohibitions, and to assistance programs, such as public housing, Temporary Assistance for Needy Families, and Supplemental Nutrition Assistance Program. Without major modification in these areas, the criminal justice system will simply continue to be a revolving door with a literal jail cell on one side and a metaphorical one on the other. This essay focuses specifically on the reentry issues facing Pennsylvania and West Virginia, the steps each state has taken to resolve the problem, and necessary reforms. Each reform is designed to remove the stigma associated with incarceration and to achieve the ultimate goal: alleviation and eradication of poverty.

## **Employment**

Each year, prisons and jails in the United States release between 600,000 and 700,000 inmates.<sup>15</sup> In January 2014, roughly 10,236,000 Americans were unemployed, and another

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<sup>14</sup> Second Chance Act of 2007: Community Safety through Recidivism Prevention, 42 U.S.C. § 17501(b)(9), Pub. L. No. 110-199 (2008).

<sup>15</sup> Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility*, The Pew Charitable Trusts, 3 (2010), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Collateral\\_Costs\(1\).pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs(1).pdf).

6,348,000 were considered discouraged workers.<sup>16</sup> These numbers imply a buyer's market for labor. In such a flooded market, how can ex-offenders find work? In addition to the poor economy, ex-offenders face numerous other barriers: a gap in employment experience, deficit of skills, loss of skills, criminal background checks, employment prohibitions in certain fields, and, most importantly, the stigma of a criminal. Pennsylvania's unemployment rate for January was 6.4%,<sup>17</sup> compared to West Virginia's 5.9% rate.<sup>18</sup> A study in 1997 showed that the national unemployment rate for pre-incarcerated adults was near 33%.<sup>19</sup> Nationally, "post-incarceration, employment rates only get worse—unemployment among ex-offenders has been estimated at between 25 and 40 percent."<sup>20</sup> A National Institute of Justice study found the unemployment rate

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<sup>16</sup> Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, U.S. Dept. of Labor (March 5, 2014) <http://bls.gov/web/empsit/cpseea03.htm>. These numbers do not include incarcerated persons.

<sup>17</sup> *Pa. unemployment rate drops to 6.4% in January*, Abington Journal (Mar. 7, 2014) <http://theabingtonjournal.com/news/local-news-news/1241578/Pa.-unemployment-rate-drops-to-6.4--in-January>.

<sup>18</sup> *West Virginia Unemployment Rate Drops Slightly in January*, Associated Press, WSAZ (Mar. 6, 2014) <http://www.wsaz.com/news/charlestonnews/headlines/West-Virginia-Unemployment-Rate-Drops-Slightly-in-January-248746631.html>.

<sup>19</sup> *Notice of Availability of Funds and Solicitation for Grant Applications for Reintegration of Ex-Offenders – Adult Program Grants*, Department of Labor, at 2 (Oct. 10, 2011) <http://www.doleta.gov/grants/pdf/sga-dfa-py-10-10-2011.pdf>.

<sup>20</sup> *Id.*



for ex-offenders one year after release to be around sixty percent.<sup>21</sup> An NBC News article stated that, during the Great Recession, the unemployment rate for ex-felons was as high as seventy-five percent.<sup>22</sup>

### *Problems – Supply Side*

Upon release from prison, ex-offenders suffer from numerous practical problems. They often have less to offer to employers than their competitors. “The (often multiple) periods of time they have spent incarcerated have impeded them from gaining additional private sector experience, and no doubt help erode whatever job skills, positive work habits or connections to employers they might have had beforehand.”<sup>23</sup> Many ex-offenders lacked the education and skills necessary to obtain employment prior to their incarceration: seventy percent of incarcerated persons are high school dropouts,<sup>24</sup> and about half are “functionally illiterate.”<sup>25</sup> Furthermore, seventy-five percent of ex-offenders have a substance abuse problem.<sup>26</sup>

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<sup>21</sup> *Research on Reentry and Employment*, National Institute of Justice (last updated Apr. 3, 2013), <http://www.nij.gov/topics/corrections/reentry/Pages/employment.aspx#note1> (citing Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003); Jeremy Travis, *But They All Come Back, Facing the Challenges of Prisoner Reentry* (2005)).

<sup>22</sup> *Ex-cons face tough path back into work force*, NBC News, Associated Press (Jul. 30, 2009), <http://www.nbcnews.com/id/32208419/ns/business-careers/t/ex-cons-face-tough-path-back-work-force/#.U0M01cY1X4Q>.

<sup>23</sup> Harry J. Holzer, *Employment Barriers Facing Ex-Offenders*, Urban Institute Reentry Roundtable, at 5 (May 2003) [http://www.urban.org/UploadedPDF/410855\\_holzer.pdf](http://www.urban.org/UploadedPDF/410855_holzer.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing Hirsch, Amy, Sharon Dietrich, Rue Landau, Peter Schneider, Irv Ackelsberg, Judith Bernstein-Baker, and Joseph Hohenstein, *Every Door Closed: Barriers Facing Parents With Criminal*

The most significant supply-side problem facing ex-offenders is the stigma carried with them—the Scarlet Letter of “criminal.” Most ex-offenders lack perceived job readiness, which “involves the employer’s expectation that the worker will show up every day and on time, will work hard and take some responsibility, will be generally trustworthy, etc.”<sup>27</sup> Estimates suggest that, after release, ex-offenders see their wages fall by eleven percent (from \$16.33/hr. to \$14.57/hr.), their annual employment cut by nine weeks, (from 48 weeks to 39 weeks) and their yearly earnings tumble forty percent (from \$39,100 to \$23,500).<sup>28</sup> A study found that, when number of years of work experience is controlled, these statistics do not change, which implies that the stigma of incarceration affects employment prospects more than the loss of work experience.<sup>29</sup> When coupled, significant demand-side barriers exacerbate the Scarlet Letter stigma.

#### *Problems – Demand Side*

Criminal background checks and criminal history “boxes” on applications weed out ex-offenders—and even some applicants who were arrested but not convicted—who are often otherwise qualified. A study by Harry Holzer found that “only about 40% [of employers] are willing to consider [hiring] an ex-offender.”<sup>30</sup> Unfortunately, criminal background checks are notoriously inaccurate and incomplete. An Equal Employment Opportunity Commission report

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*Records*, Center for Law and Social Policy & Community Legal Services (2002)).

<sup>26</sup> *Make Ex-Offender Community Reentry a Success: Addressing Access to Alcohol*, *supra* n. 5, at 2.

<sup>27</sup> Holzer, *supra* n. 23, at 7.

<sup>28</sup> Western & Petit, *supra* n. 15, at 11.

<sup>29</sup> *Id.*

<sup>30</sup> Holzer, *supra* n. 23, at 11.

found that “criminal background checks may produce inaccurate results because criminal records may lack ‘unique’ information or because of ‘misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities.”<sup>31</sup> The report also found that 92% of employers subject some or all job candidates to criminal background checks.<sup>32</sup>

Employers must take some precautions when screening applicants for criminal history. In *Green v. Missouri Pacific Railroad*, the Eight Circuit held that a “policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense” was discriminatory under Title VII of the Civil Rights Act of 1964 because of its disparate impact on racial minorities.<sup>33</sup> The court described three factors, now known as the *Green* test or analysis, for consideration in whether a criminal background check is discriminatory: “the nature and seriousness of the crime,” “the time elapsing since the conviction,” and the nature of the job sought.<sup>34</sup>

The EEOC has adopted this decision and has suggested that employers consider these factors when formulating their own policies.<sup>35</sup> The Guidelines give further help to employers to understand when a criminal background check may be a business necessity: “The fact of an arrest does not establish that criminal conduct has occurred... An exclusion based on an arrest, in

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<sup>31</sup> *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC, at 5 (Apr. 2012)  
[http://eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1293 (8th Cir. 1975).

<sup>34</sup> *Id.* at 1297.

<sup>35</sup> *EEOC Enforcement Guidance*, *supra* n. 31, at 14.

itself, is not job related and consistent with business necessity... By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct... However, there may be evidence of error in the record.”<sup>36</sup> Therefore, while Title VII does not protect ex-offenders per se, blanket bans on hiring ex-offenders are discouraged because they often involve disparate impact discrimination of minorities, who are incarcerated at much higher rates than white Americans.<sup>37</sup> The EEOC has struggled in the judicial system recently,<sup>38</sup> losing cases in which they claimed employers were unlawfully denying work to applicants based on credit and background checks, which has raised questions of its enforcement abilities going forward. Notwithstanding the EEOC’s recent problems, the Guidelines are designed to protect prospective and current employees and suggest protection against criminal background checkboxes and criminal arrest checks.

Despite the aspirations of the Guidelines, ex-offenders are immediately disqualified from many jobs by law. “Federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener ... There are equivalent requirements for federal law enforcement officers, child care workers in federal agencies or facilities, bank employees, and port workers, among other positions.”<sup>39</sup> West Virginia has no laws protecting ex-offenders, but the state has issued a “Pre-employment Inquiries Technical

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<sup>36</sup> *Id.* at 12, 13.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> See *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 10-CV-2882, 2013 WL 322116 (Jan. 28, 2013); see also *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013); see also *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013).

<sup>39</sup> *Id.* at 20-21.

Assistance Guide,” which suggests employers follow the *Green* test for job-relatedness.<sup>40</sup>

Pennsylvania, on the other hand, provides some protection while barring employment in some specified occupations. A study by Community Legal Services, Inc. found that, while Pennsylvania prohibits employers from denying jobs to applicants based on arrests or on convictions not resulting in a misdemeanor or felony record, the Commonwealth forbids employment of ex-offenders—for various offenses and lengths of time elapsed since the offense—for at least fifty-five occupations, ranging from auctioneer to geologist to veterinarian.<sup>41</sup>

All of these barriers combined have a drastic effect on ex-offenders post-release. Nationwide, ex-offenders are offered about half as many job positions as candidates without criminal records.<sup>42</sup> The situation is grim, and, while paved with good intentions, the current legal road has done little to help.

#### *Where We Are – Current Laws*

These reentry and recidivism problems have not gone unnoticed. Most recently, the issue was addressed at the federal level in 2008. The Second Chance Act of 2007 (officially enacted in April 2008) created a federal grant scheme to fund state and local reentry programs across the

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<sup>40</sup> *Pre-employment Inquiries Technical Assistance Guide*, Work Force West Virginia, [http://www.wvcommerce.org/App\\_Media/assets/pdf/workforce/WFWV\\_Afirmative\\_Action\\_Pre-employment\\_Inquiries.pdf](http://www.wvcommerce.org/App_Media/assets/pdf/workforce/WFWV_Afirmative_Action_Pre-employment_Inquiries.pdf).

<sup>41</sup> *Legal Remedies and Limitations on the Employment of People with Criminal Records in Pennsylvania*, Community Legal Services, Inc. (Sept. 2011) [http://realcostofprisons.org/materials/PA\\_employment\\_of\\_people\\_with\\_criminal\\_records.pdf](http://realcostofprisons.org/materials/PA_employment_of_people_with_criminal_records.pdf).

<sup>42</sup> Western & Petit, *supra* n. 15, at 22.

country.<sup>43</sup> One of the listed purposes of the statute succinctly stated the goal of all reentry programs: “to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services...”<sup>44</sup> The Act measures the effectiveness of programs by recidivism rates. “To be eligible to receive a grant ... the grantee shall submit to the Attorney General such information as is necessary to demonstrate that ... the reentry plan of the grantee includes performance measures to assess the progress of the grantee toward a 10 percent reduction in the rate of recidivism over a 2-year period...”<sup>45</sup> The National Institute of Justice has awarded six nonprofit organizations research grants to evaluate different aspects of the Second Chance Act,<sup>46</sup> so, in the near future, comprehensive analysis should be available. The Act already had detractors. Before the Senate Judiciary Committee, David Muhlhausen of the Heritage Foundation criticized the lack of significant evaluation of effectiveness in the Second Chance Act.<sup>47</sup> While he did not state opposition to reentry programs or the Act itself, Muhlhausen expressed concern that the inadequacy of reporting and evaluation requirements may lead to wasting funds without determining what aspects of the law effectively reduce recidivism.<sup>48</sup>

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<sup>43</sup> 42 U.S.C. § 17501.

<sup>44</sup> 42 U.S.C. § 17501(a)(5).

<sup>45</sup> 42 U.S.C. §3797w(1)(2).

<sup>46</sup> *Evaluation of Second Chance Act Demonstration Projects*, National Institute of Justice (Apr. 2, 2013) <http://www.nij.gov/topics/corrections/reentry/Pages/evaluation-second-chance.aspx>.

<sup>47</sup> *The First Line of Defense: Reducing Recidivism at the Local Level: Hearing Before the Comm. on the Judiciary*, 111th Cong. 8 (2010) (statement of David Muhlhausen, The Heritage Foundation), *available at* <http://www.judiciary.senate.gov/pdf/09-11-05Muhlhausen'sTestimony.pdf>.

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

On a different front, at the state and local level, a wave of legislation known as “ban-the-box” has begun to reform employment law to the benefit of ex-offenders. “Ban-the-box” laws “typically remove the question on the job application about an individual’s conviction history and delay the background check inquiry until later in the hiring process.”<sup>49</sup> As of January 2014, ten states<sup>50</sup> and fifty-six localities<sup>51</sup> have enacted varying versions of ban-the-box legislation. West Virginia has not adopted any ban-the-box legislation, nor have any of its cities.<sup>52</sup> Pennsylvania also has not adopted statewide legislation, but its two largest cities, Philadelphia and Pittsburgh, have enacted their own ordinances.<sup>53</sup> Pittsburgh’s ordinances apply to city employment and to contractors doing business with the city, and the ordinances allow background checks only for “otherwise qualified candidates.”<sup>54</sup> Philadelphia, on the other hand, has banned the box from applications for all employers, public and private, and allows background checks only after an employee has completed the first interview.<sup>55</sup>

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<sup>49</sup> *Statewide Ban the Box: Reducing Unfair Barriers to Employment of People with Criminal Records*, National Employment Law Project, at 2 (Nov. 2013)

[http://nelp.3cdn.net/3c0ae798a3c30d354e\\_jgm6beq1q.pdf](http://nelp.3cdn.net/3c0ae798a3c30d354e_jgm6beq1q.pdf).

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

<sup>51</sup> *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*, National Employment Law Project, at 1 (Jan. 2014)

<http://www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf?nocdn=1>.

<sup>52</sup> *See id.*; *see also Statewide Ban the Box*, *supra* n. 49.

<sup>53</sup> *Ban the Box*, *supra* n. 51, at 20.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 14.

For good reason, employers are wary about hiring ex-offenders. Every state has negligent hiring laws, which, in general, hold an employer liable for a wrong committed by an ex-offender employee “if it knew or should have known that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee’s conduct would harm a third person.”<sup>56</sup> Pennsylvania has adopted this legislative standard for negligent hiring.<sup>57</sup> West Virginia, on the other hand, has adopted the following test: “When the employee was hired, did the employer conduct a reasonable investigation into the employee’s background vis-à-vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct on an unfit employee? Should the employer have reasonably foreseen the risk caused by hiring an unfit person?”<sup>58</sup> This test, and the standard adopted by Pennsylvania, encourages employers to complete background checks and counsels in favor of denying employment to ex-offenders. Further encouragement to inquire about criminal history is provided because “[e]mployers have lost 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million.”<sup>59</sup> As a result, the “criminal” stigma also carries a

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<sup>56</sup> Nesheba M. Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis*, American Bar Association 23 (Nov. 6. 2010)

[http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/087.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087.authcheckdam.pdf) (quoting *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36 (Pa. Super. Court 2000)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 28 (citing *State ex rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, n. 7 (W. Va. 1997)).

<sup>59</sup> Holzer, *supra* n. 23, at 8.



heavy burden for employers who give ex-offenders second chances and recidivism occurs on the job. Because of this stigma, employers are checking criminal records more often.<sup>60</sup>

Employers are also concerned that ex-offenders may steal from or defraud them. To combat this concern, the federal government instituted the Federal Bonding Program, which provides a \$5,000 bond to be paid to an employer who hires an ex-offender if the ex-offender steals money from or damages the property of the employer.<sup>61</sup> This program has a 99% success rate, meaning that only 1% of bonded employees committed acts of “employee dishonesty” after hiring.<sup>62</sup>

#### *Where We Are – In-prison Programs*

Legal reforms must be complemented by reforms to rehabilitation efforts, which begin in prison. In-prison work programs are ubiquitous.<sup>63</sup> Nearly every prison in America has some sort of prison work system. In Pennsylvania, the Department of Corrections oversees Pennsylvania Correctional Industries (PCI). PCI is an inmate work program that provides vocational work training while “teaching inmates to work.”<sup>64</sup> While the Department of Corrections website does

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<sup>60</sup> *Id.*

<sup>61</sup> Federal Bonding Program Background Page, <http://www.bonds4jobs.com/program-background.html> (last visited Mar. 15, 2014).

<sup>62</sup> *Id.*

<sup>63</sup> Shawn Bushway, *Employment Dimensions of Reentry: Understanding the Nexus between Prisoner Reentry and Work*, Urban Institute, 3 (May 2003)

[http://www.urban.org/UploadedPDF/410853\\_bushway.pdf](http://www.urban.org/UploadedPDF/410853_bushway.pdf).

<sup>64</sup> Pennsylvania Correctional Industries Home Page, [http://www.pci.state.pa.us/portal/server.pt/community/pennsylvania\\_correctional\\_industries/14822](http://www.pci.state.pa.us/portal/server.pt/community/pennsylvania_correctional_industries/14822) (last visited Mar. 11, 2014).

not show any statewide education, employment assistance, or substance abuse programs, a study of the Allegheny County Department of Human Services (ACDHS) found these service available in the Pittsburgh area.<sup>65</sup> ACDHS, a Second Chance Act grantee, provides cognitive-behavioral therapy and mental health services, GED classes, life skills and job readiness classes, parenting classes, and substance abuse treatment.<sup>66</sup> All of these programs are voluntary, and, if they want to join, inmates must enroll themselves.<sup>67</sup>

West Virginia's in-prison programs are standardized statewide and include vocational education, drug and alcohol abuse treatment, anger management, crime victim awareness, domestic violence awareness, and a sex offender program.<sup>68</sup> Like Pennsylvania, West Virginia has its own prison work program, known as West Virginia Correctional Industries.<sup>69</sup>

Unfortunately, studies have not yet established which in-prison programs work best in Pennsylvania and West Virginia. A recent analysis by Christy Visher and Jeremy Travis suggests that individualized programs focused on criminogenic needs have the most significant impacts

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<sup>65</sup> Ron D'Amico, et al., *Evaluation of the Second Chance Act (SCA) Adult Demonstration 2009 Grantees, Interim Report*, A-3 (Aug. 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/243294.pdf>.

<sup>66</sup> *Id.* at A-3, A-4.

<sup>67</sup> *Id.*

<sup>68</sup> West Virginia Division of Corrections Offender Programs Page, <http://www.wvdoc.com/wvdoc/OffenderPrograms/tabid/121/Default.aspx> (last visited Mar. 11, 2014).

<sup>69</sup> West Virginia Correctional Industries Home Page, <http://wvcorrectionalindustries.com> (last visited Mar. 11, 2014).

on recidivism.<sup>70</sup> Criminogenic risk factors include anti-social personality and values, anti-social associates, family dysfunction, poor self-control, substance abuse, and lack of employment skills.<sup>71</sup> Because of the importance of these factors, Visher and Travis advocate for *mandatory* treatment programs that begin in prison and transition into the community post-release.<sup>72</sup> Travis backs up his suggestions with a compilation of studies performed by Steve Aos of the Washington State Institute for Public Policy. Aos's work produced significant findings:

In-prison drug treatment programs ... especially those with a community component, can reduce recidivism by about 6.9%; drug treatment in jail can reduce recidivism by 6%; drug treatment in the community can reduce recidivism by 12.4%; cognitive behavioral therapy can reduce recidivism by 8.2%; correctional industry programs can reduce recidivism by 7.8%; vocational education and training programs can reduce recidivism by 12.6%; employment training and job assistance in the community can reduce recidivism by 4.8%; adult basic education may (weak findings) reduce recidivism by 5.1%; [and] intensive supervision based on treatment program can reduce recidivism by 21.9%.<sup>73</sup>

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<sup>70</sup> Christy A. Visher & Jeremy Travis, *Life on the Outside: Returning Home After Incarceration*, 91 *The Prison Journal* 102S, 112S (2011), *available at*

[http://www.jjay.cuny.edu/web\\_images/president/Prison\\_J\\_Life\\_on\\_the\\_Outside.pdf](http://www.jjay.cuny.edu/web_images/president/Prison_J_Life_on_the_Outside.pdf).

<sup>71</sup> Ohio Department of Rehabilitation and Correction IPP-Criminogenic Needs Page, [http://www.drc.ohio.gov/web/ipp\\_criminogenic.htm](http://www.drc.ohio.gov/web/ipp_criminogenic.htm) (last updated March 16, 2006).

<sup>72</sup> Visher & Travis, *supra* n. 70, at 12S.

<sup>73</sup> "What Works" for Successful Prisoner Reentry: Hearing Before the Subcomm. On Commerce, Justice, Science, and Related Agencies of the Comm. on Appropriations, 111th Cong. 5 (2009) (statement of Jeremy Travis, President of John Jay College of Criminal Justice), *available at* [http://www.jjay.cuny.edu/Travis\\_Congressional\\_Testimony.pdf](http://www.jjay.cuny.edu/Travis_Congressional_Testimony.pdf) (citing Steve Aos, et al., *Evidence-Based Adult Corrections Programs: What Works and What Does Not*, Olympia: Washington State Institute for Public Policy (2006), *available at* <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf>).

Furthermore, Travis has found that, while intensive supervision is the most successful program, the supervision aspect is not significant. “Supervision itself does not reduce recidivism: individuals placed on parole supervision after prison are no less likely to be rearrested than individuals released with no supervision.”<sup>74</sup> Here, intensive supervision is not of the parole variety, where an ex-offender is required to meet with an officer weekly or monthly. Intensive supervision provides a community aspect in which a mentor—which could be a parole officer—helps an ex-offender develop a routine to complete daily tasks. This evidence suggests the community facets of rehabilitation and reentry are just as important, if not more important, than what occurs inside the prison. Again, this is only one study, and more empirical analysis is needed.

#### *Where We Are - Reentry Programs*

Following in-prison programs, reentry scholars and thinkers unanimously espouse for programs that transcend prison gates. In practice, however, correctional facilities do not always follow their guidance. The Pennsylvania Department of Corrections implements a two-phase program called Community Orientation Reintegration (COR).<sup>75</sup> The first phase begins a month prior to release with general refresher courses focusing on what was learned in in-prison programs and the development of personal release plans for each inmate.<sup>76</sup> Phase two takes place

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<sup>74</sup> *Id.* at 6.

<sup>75</sup> Nancy G. Lavigne, et al., *Process Evaluation of the Pennsylvania Community Orientation and Reintegration (COR) Program*, Urban Institute (Sept. 2002)

[http://www.urban.org/UploadedPDF/311023\\_COR\\_Program.pdf](http://www.urban.org/UploadedPDF/311023_COR_Program.pdf).

<sup>76</sup> *Id.* at I-14.

for the month following release and focuses on job searching, life skills, and family counseling.<sup>77</sup> Additionally, the Department of Corrections provides ex-offenders with a “Successful Transition Booklet,” which is a directory of organizations that will provide services.<sup>78</sup> The Allegheny County Department of Human Services also provides post-release services. These services, however are very similar to those provided in prison: GED preparation, limited vocational training, job readiness training, family counseling, substance abuse treatment, and support for clothing, groceries, and transportation.<sup>79</sup> All of these programs are voluntary. Participation rates in voluntary programs declined between 1991 and 2004.<sup>80</sup> In 1991, 31.2% of state correctional inmates participated in vocational education programs.<sup>81</sup> By 2004, participation dropped to 27%.<sup>82</sup> Unfortunately, drops have also occurred in GED and college courses.<sup>83</sup> Participation in substance abuse treatment programs, however, rose from 1996 to 2002, but it remains low at 20%.<sup>84</sup> The reasons for low participation rates are unclear. Perhaps, trust of correctional officers

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<sup>77</sup> *Id.*

<sup>78</sup> Pennsylvania Department of Corrections Reentry and Community Transition Page, [http://www.portal.state.pa.us/portal/server.pt/community/reentry\\_\\_\\_community\\_transition/17857](http://www.portal.state.pa.us/portal/server.pt/community/reentry___community_transition/17857) (last visited Mar. 11, 2014).

<sup>79</sup> D’Amico, *supra* n. 65, at A-4.

<sup>80</sup> Anna Crayton & Suzanne Rebecca Neusteter, *The Current State of Correctional Education*, The Urban Institute, 10 (2008) <http://www.urban.org/projects/reentry-roundtable/upload/Crayton.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Jennifer C. Karberg & Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, Bureau of Justice Statistics (2005) <http://www.bjs.gov/content/pub/ascii/sdatji02.txt>.

plays a role. Maybe, classes are too formalistic, like a school setting. The only certainty is that voluntary programs do not reach most of the prison population.

In addition to government-run programs, many nonprofit organizations have taken up reentry as their main purpose. The Philadelphia-based Pennsylvania Prison Society, an advocacy group, provides workshops and transportation services, while serving mainly as a platform for ex-offenders to get help from agencies.<sup>85</sup> The Southwestern Pennsylvania Reentry Coalition (SPARC) provides mainly employment services to ex-offenders.<sup>86</sup> SPARC, like the Pennsylvania Prison Society, also addresses policy issues by advocating for reforms.<sup>87</sup>

The West Virginia Department of Corrections implements a very similar program to the two-phase system utilized by Pennsylvania, but West Virginia's plan adds a third phase. Phase I consists of normal in-prison programs such as substance abuse treatment and adult education, and, during this phase, inmates create their own reentry plans.<sup>88</sup> Phase II of the Offender Reentry Initiative (ORI) begins six months prior to release and includes developing an aftercare plan, a parole orientation course, and serves as a link to vocational training programs, employment

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<sup>85</sup> Pennsylvania Prison Society Reentry Page, <http://www.prisonersociety.org/#!reentry/cd2y> (last visited Mar. 11, 2014).

<sup>86</sup> Mon Valley Initiative SPARC Page, <http://www.monvalleyinitiative.com/main.asp?page={0592F63D-96EE-4FCE-9618-36CC880E52E3}> (last visited Mar. 11, 2014).

<sup>87</sup> *Id.*

<sup>88</sup> Stephen M. Haas, Cynthia A. Hamilton & Dena Hanley, *Preparing Prisoners for Returning Home: A Process Evaluation of West Virginia's Offender Reentry Initiative*, Mountain State Criminal Justice Research Services, 14 (Dec. 2007), available at <https://www.bja.gov/evaluation/program-corrections/haas-offender-reentry-initiative.pdf>.

services, and substance abuse treatment.<sup>89</sup> The aftercare plan is a schedule of what the inmate will need to accomplish post-release and is supplemented with a directory of resources and services that may be useful after release, such as the DMV, doctors, and employment services.<sup>90</sup> West Virginia sets itself apart from Pennsylvania in Phase III. Phase III is a parole program which begins at the same time as Phase II. Inmates meet with parole officers to establish relationships.<sup>91</sup> Upon release, parole officers monitor ex-offenders to ensure they are adhering to the reentry plans they created in Phase I and the aftercare plans they created in Phase II.<sup>92</sup> Six months after release, the ex-offenders' cases are reviewed and their progress is assessed.<sup>93</sup> At this point, changes to an ex-offender's programs are made if necessary, based on risk and need.<sup>94</sup>

West Virginia has only one significant private reentry program. Kanawha Institute for Social Research & Action, Inc. (KISRA) is a faith-based nonprofit located in the Charleston suburb of Dunbar.<sup>95</sup> KISRA serves West Virginians in the Charleston area by providing educational, behavioral, and employment programs to people of all walks of life.<sup>96</sup> Of most relevance to this discussion is the Second Chance Mentoring Program. The Mentoring Program is available for nonviolent offenders and offers “mentoring, cognitive behavioral therapy,

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<sup>89</sup> *Id.* at 15.

<sup>90</sup> *Id.* at 15-16.

<sup>91</sup> *Id.* at 17.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> KISRA Home Page, <http://www.kisra.org/index.html> (last visited Mar. 15, 2014).

<sup>96</sup> *Id.*

responsible parenting, workforce readiness, financial fitness, and job placement.”<sup>97</sup> Mentors ride the bus with their mentees and spend time with them to help alleviate stress and encourage transition.<sup>98</sup> The program lasts six months to one year, and mentors spend at least an hour each week with their mentees.<sup>99</sup> According to KISRA’s website, Mentoring Program participants “were twice as likely to find a job; took less time to find their first job; were more likely to remain employed for at least 3 months; [and] were less likely to commit additional crimes within a year of release.”<sup>100</sup> KISRA’s Second Chance Mentoring Program is partially funded through the Second Chance Act, which allows nonprofit organizations to receive grants for “mentoring adult and juvenile offenders during incarceration, through transition back to the community, and post-release; traditional services to services to assist in the reintegration of offenders into the community; and training regarding offender and victims issues.”<sup>101</sup>

### *Reforms Needed*

The problems and the current laws and correctional efforts that have been described leave much work to be accomplished before ex-offenders truly have opportunities to assimilate back into society. Research has shown that “employment is a protective factor against future

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<sup>97</sup> KISRA Second Chance Mentoring Page,

[http://www.kisra.org/programs/employment/Second\\_Chance/index.html](http://www.kisra.org/programs/employment/Second_Chance/index.html) (last visited Mar. 15, 2014).

<sup>98</sup> *Id.*

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

<sup>100</sup> *Id.*

<sup>101</sup> 42 U.S.C. § 17531(b)(1)-(3).



offending.”<sup>102</sup> The odds of securing employment are, however, heavily against ex-offenders. In-prison and reentry programs have come a long way in helping ex-offenders assimilate back into society, but much work still needs to be done. Most ex-offenders still lack the skills necessary to compete in a demand-heavy labor market. Even if an ex-offender acquires skills, he or she may be required, while on parole, to live in the same community from which he or she came.<sup>103</sup> This often creates a “spatial mismatch” in which an ex-offender seeking a job is forced to live in an area without jobs to offer.<sup>104</sup> Furthermore, “certain occupations are legally closed to individuals with felony convictions under state and, in some cases, federal law.”<sup>105</sup> Employers who take a chance and hire ex-offenders risk costly negligent hiring suits if an ex-offender recidivates while on the job; therefore, employers insistently check criminal backgrounds before hiring. Most of these issues are created by a stigma—a Scarlet Letter—of a “criminal,” a person not worthy of a second chance. Without significant reforms, ex-offenders will continuously be denied opportunities, and, as President Bush and *The Onion* illustrated, they will recidivate. Those who are concerned with public safety and recidivism and those who are concerned with rehabilitation and second chances are fighting the same battle with different rhetoric: both sides want ex-offenders to stay out of prison and contribute to society, but, for them to succeed, they need

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<sup>102</sup> Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, National Criminal Justice Reference Service (Aug. 2004)  
<https://www.ncjrs.gov/App/publications/abstract.aspx?ID=206236>.

<sup>103</sup> Holzer, *supra* n. 23, at 7.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 8.

opportunities. For ex-offenders to have opportunities, employment law, in-prison programs, and reentry programs need to be reformed.

First, the Second Chance Act needs, as Heritage's David Muhlhausen suggested, embedded evaluation procedures. The Act presents an opportunity to study what programs really work and which should be abandoned. Additionally, Second Chance Act funds should be made available to non-state organizations for all facets of reentry programs, not just for mentoring services. If a nonprofit organization is successfully providing ex-offenders with opportunities to assimilate from prison into society, then the government should apportion funds to it instead of to an unproven or ineffective program. Unfortunately, data concerning effectiveness in Pennsylvania programs are unavailable, but West Virginia's KISRA organization has a proven record. With more funding, it is possible that mentoring roles could be complemented with job training and substance abuse programs. Because studies show intense supervision is extremely effective,<sup>106</sup> further supervision and counseling through a variety of programs would only increase the effectiveness of programs like KISRA. To be clear, a block grant program specifically designed for NPOs is unnecessary, however, more effective allocation of available resources, and possibly greater allocation of resources, is necessary.

Reforms to employment laws should be modeled after Title VII of the Civil Rights Act.<sup>107</sup> Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,

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<sup>106</sup> *What Works*, *supra* n. 73, at 5.

<sup>107</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

sex, or national origin.”<sup>108</sup> Title VII also provides an exception: “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>109</sup> Concerning ex-offenders, employment laws should follow this system: it should be unlawful for an employer to refuse to hire an employee because of past criminal acts except when that criminal act jeopardizes a bona fide occupational qualification. For example, elementary schools require child safety. A past child molestation conviction would jeopardize that bona fide occupational qualification; therefore, an employer could refuse to hire an ex-offender on that basis. But, in the case of Sam, the character from the opening, no bona fide occupational qualification would have come into play when he applied for numerous minimum wage and low-skill jobs.

Ban-the-box legislation is essential to execute these employment law reforms and should be adopted in every state. Pennsylvania and West Virginia should use Philadelphia’s current law as a model: complete elimination of the criminal history question on applications and criminal background checks only after the first interview.<sup>110</sup> This legislation would ensure that ex-offenders are judged by their qualifications, not past mistakes, while still providing employers with an opportunity to protect themselves from negligent hiring laws through the bona fide occupational qualification exception.

This system would provide employers more protection from negligent hiring laws. Because employers can only deny employment based on bona fide occupational qualifications, they can only be negligent in hiring if they ignore a conviction that would risk one of those

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<sup>108</sup> *Id.* § 2000e-2(a)(1) (2012).

<sup>109</sup> *Id.* § 2000e-2(e)(1) (2012).

<sup>110</sup> *Ban the Box, supra* n. 51, at 14.

qualifications. Each industry would be different: in fast food, bona fide occupational qualifications are rare; in elementary education, they are apparent. Again, this system would essentially prohibit those convicted of child molestation from working in elementary schools, but it would also prohibit McDonald's from refusing to hire an otherwise qualified applicant because of a past marijuana possession conviction. If an employee brought marijuana to work, or came to work under the influence, McDonald's could fire that employee. The purpose is not to place a shield around ex-offenders or others who break the law while employed; the purpose is to remove the "criminal" stigma from those who made mistakes in the past and are trying to assimilate back into society.

To provide further means toward that end, nonprofit organizations need to work closely with departments of corrections, and vice versa. The goals of these relationships will be to close the spatial mismatch identified by Holzer, to correct mistakes in criminal records, and to make ex-offenders employable. First, ex-offenders need to be made aware of employment opportunities that may be available to them upon release to close the spatial mismatch. Some of these opportunities may be in a nearby town or city or, for skilled workers, may be further away. Nonprofit organizations are better suited to locate these jobs than departments of corrections. Communication and organization can put NPOs into contact with ex-offenders months before release, explaining to them where jobs are, what transportation is available to get there, what skills are required, and if an employer could refuse to hire them based on a bona fide occupational qualification. Once employment opportunities are identified, partnerships between NPOs and DOCs can provide smooth transitions from prison to employment.

The West Virginia and Pennsylvania prisoner reentry programs both require inmates to create reentry plans.<sup>111112</sup> With help from NPOs, inmates could add specific jobs to their reentry programs. Additionally, for those employers who welcome ex-offenders, a DOC-NPO partnership could help link employers to ex-offenders while they are still incarcerated. If an employer decides to hire an inmate, the inmate could begin work through a work-release program while still incarcerated. This would also help the transition process upon release. Also, those inmates incarcerated for drug offenses could submit to voluntary weekly or bi-weekly drug testing. If an employer is concerned about hiring an inmate with a possible addiction, a certificate showing negative drug tests and progress in a substance abuse program could lessen that worry.

Finally, NPOs that have built rapport with employers can explain the federal bonding program and the Work Opportunity Tax Credit to them. As previously mentioned, at no cost, the federal bonding program provides \$5,000 of insurance coverage to employers for liabilities caused by ex-offenders they hired.<sup>113</sup> Despite this security, “[e]mployer interest in the ‘take up’ of the bonds is very limited—indeed, purchases of bonds have actually declined over the past few decades, despite the enormous increase in the number of ex-offenders in the population.”<sup>114</sup> With NPOs guiding the process, more employers would likely “take up” the bonds and hire more ex-offenders. At the same time, NPOs can also inform employers about the Work Opportunity Tax Credit (WOTC). The WOTC “is a Federal tax credit available to employers who hire

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<sup>111</sup> Haas, *supra* n. 88, at 14.

<sup>112</sup> Lavigne, *supra* n. 75, at I-14.

<sup>113</sup> Federal Bonding Program Background Page, *supra* n. 61.

<sup>114</sup> Holzer, *supra* n. 23, at 17.

individuals from eligible target groups with significant barriers to employment.”<sup>115</sup> “Ex-felons” are one of the target groups.<sup>116</sup> Using the WOTC, an employer’s tax liability will be reduced between \$1,200 and \$9,600 per eligible employee hired for an unlimited number of employees.<sup>117</sup> Employers reduce tax liabilities by more than \$1 billion each year under the WOTC.<sup>118</sup>

Comprehensive reform to employment law and prisoner reentry is necessary. In-prison and reentry programs should be modeled after West Virginia. Pennsylvania runs a very similar system, but lacks the intensive parole program implemented by West Virginia as Phase III. The effectiveness of West Virginia’s program can be illustrated statistically: West Virginia’s recidivism rate is 26.8%;<sup>119</sup> Pennsylvania’s is 43%.<sup>120</sup> These statistics, along with the aforementioned research by Steve Aos<sup>121</sup> and the success of KISRA’s Second Chance Mentoring Program, tend to show that intensive supervision with a familiar supervisor is imperative. Holistic reforms to employment law would further lower recidivism in West Virginia and would provide more opportunities to ex-offenders in Pennsylvania. Pennsylvania’s COR program, however, needs improvement before ex-offenders will be able to take full advantage of employment law modifications.

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<sup>115</sup> Work Opportunity Tax Credit Brochure, Department of Labor, *available at*

[http://www.doleta.gov/business/incentives/opptax/PDF/employers\\_wotc\\_program\\_brochure\\_5\\_24\\_12.pdf](http://www.doleta.gov/business/incentives/opptax/PDF/employers_wotc_program_brochure_5_24_12.pdf)

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *State of Recidivism*, *supra* n. 10, at 11.

<sup>120</sup> Corbett & Wetzel, *supra* n. 11, at 7.

<sup>121</sup> “*What Works*”, *supra* n. 73, at 5.

## Assistance Programs

Reform is also needed in the area of assistance programs. Upon release, many offenders lack the resources to survive, let alone secure employment. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>122</sup> “adopted the notion that only ‘deserving’ individuals should benefit from public largesse.”<sup>123</sup> Ex-offenders have been labeled “undeserving” in America, and the federal welfare reform legislation, and subsequent state policies, “viewed [them] more easily as having forfeited the right to receive social assistance.”<sup>124</sup> Unfortunately, “[c]utting welfare benefits to the ‘undeserving’ ... appeared to affirm the U.S. value system.”<sup>125</sup> Sam, from the opening vignette, lost his welfare, food stamps, and housing benefits after his conviction, becoming yet another of the “undeserving.” His story illustrates the issue of automatic loss of public benefits and its collateral effects.

### *Problem – Automatic Loss*

Public benefits legislation has reinforced the “criminal” stigma found in the labor market. Ex-offenders often lose public assistance once convicted. This section analyzes the law in three areas: housing, welfare, and food stamps.

### *Housing*

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<sup>122</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>123</sup> Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153, 159 (1999).

<sup>124</sup> *Id.*

<sup>125</sup> Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 Geo. Immigr. L.J. 35, 48 (1997).

As part of the War on Drugs, Congress and President Reagan enacted the Anti-Drug Abuse Act of 1988 (ADAA).<sup>126</sup> The ADAA amended the United States Housing Act of 1937<sup>127</sup>, directing public housing agencies to use leases which “provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.”<sup>128</sup>

In 1996, President Clinton doubled down on this policy: “If you break the law, you no longer have a home in public housing, one strike and you’re out. That should be the law everywhere in America.”<sup>129</sup> In response to this declaration, Congress passed, and President Clinton signed, the Housing Opportunity Program Extension Act of 1996 (HOPE Act),<sup>130</sup> which amended the United States Housing Act of 1937 by directing the National Crime Information Center and law enforcement agencies to “provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants of, public housing for

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<sup>126</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>127</sup> United States Housing Act of 1937, 42 U.S.C. 1437, 50 Stat. 888 (1937).

<sup>128</sup> 42 U.S.C. 1437(d)(1)(6) (2012). The original amendment was to 42 U.S.C. 1437(d)(1)(5), however, the law has been further amended.

<sup>129</sup> *No Second Chance: People with Criminal Records Denied Access to Public Housing*, Human Rights Watch, 11 (2004) available at <http://www.hrw.org/sites/default/files/reports/usa1104.pdf> (citing President Bill Clinton, State of the Union Address, Jan. 23, 1996, available at <http://www.c-span.org/executive/stateoftheunion.asp>).

<sup>130</sup> Housing Opportunity Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).



purposes of applicant screening, lease enforcement, and eviction.”<sup>131</sup> The HOPE Act further amended the Housing Act by creating a three-year ineligibility period for any “tenant evicted from housing ... by reason of drug-related criminal activity ... unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency.”<sup>132</sup> Additionally, the HOPE Act directs public housing agencies to establish standards prohibiting public housing assistance—through applicant denial or eviction—to any the PHA determines to be using a controlled substance, the PHA determines it has “reasonable cause to believe” the person’s illegal drug use will interfere with other tenants’ health and safety.<sup>133</sup>

Public housing agencies in Pennsylvania and West Virginia have instituted their standards. The Housing Authority of the City of Pittsburgh utilizes a point system: each point equals one year of ineligibility.<sup>134</sup> A misdemeanor conviction garners four points, while a felony conviction racks up seven.<sup>135</sup>

West Virginia’s PHAs lack bright-line rules. The Huntington Public Housing Authority’s online application asks, “Have you or any member of the household ever engaged in drug-related criminal activity or violet (sic) criminal activity or other criminal activity?”<sup>136</sup> The Charleston-Kanawha Housing Authority lists “Criminal Record” as a reason for denial.<sup>137</sup>

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<sup>131</sup> 42 U.S.C. 1437(d)(q)(1)(A) (1937), *amended by* Pub. L. No. 104-120 § 9(b) (1996).

<sup>132</sup> 42 U.S.C. 1437(d)(r) (1937), *amended by* Pub. L. No. 104-120 § 9(b) (1996).

<sup>133</sup> 42 U.S.C. 1437(d)(n) (1937), *amended by* Pub. L. No. 104-120 § 9(e) (1996).

<sup>134</sup> *Admissions and Continued Occupancy Policy*, Housing Authority of the City of Pittsburgh (2012) available at <http://www.hacp.org/public-information>.

<sup>135</sup> *Id.*

<sup>136</sup> The Huntington West Virginia Housing Authority Apply Online Page, <https://www.huntingtonhousing.com/apply.shtml> (last visited Mar. 24, 2014).

As aforementioned, the effect of these laws and policies is astounding: “between fifteen and twenty-seven percent of prisoners expect to go to homeless shelters upon release from prison.”<sup>137</sup> Without a physical, consistent address, ex-offenders struggle to find stability. Moving from shelter to shelter and homelessness may lead to more drug use and to recidivism.

#### *Temporary Assistance for Needy Families*

In 1996, in addition to the HOPE Act, Congress and President Clinton enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), also known as the Welfare Reform Act.<sup>138</sup> PRWORA declares that any person convicted of a felony under state or federal law “which has as an element the possession, use, or distribution of a controlled substance ... shall not be eligible for— (1) assistance under any State program funded under part A of title IV of the Social Security Act, or (2) benefits under the food stamp program ... or any State program carried out under the Food Stamp Act of 1977.”<sup>140</sup> Part A of title IV of the Social Security Act is commonly known as Temporary Assistance for Needy Families (TANF), a block grant program providing funds for states to appropriate cash assistance to needy families.<sup>141</sup>

States that opt in have broad authority in the implementation of TANF programs, including deciding whether to opt into the federal ban for drug felons or to pass legislation

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<sup>137</sup> The Charleston-Kanawha Housing Authority Public Housing Application Process Page, <http://www.charlestonhousing.com/publicapp.htm> (last visited Mar. 24, 2014).

<sup>138</sup> 42 U.S.C. § 17501(b)(9) (2008).

<sup>139</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996).

<sup>140</sup> Pub. L. No. 104–193 § 115(a)(1)-(2).

<sup>141</sup> Pub. L. No. 104-193 § 402(b)(3)(A).

modifying or eliminating it.<sup>142</sup> West Virginia opted in and has adopted the federal policy: “The State assents to the purposes of federal-state assistance and federal assistance, accepts federal appropriations and other forms of assistance made under or pursuant thereto, and authorizes the receipt of such ... in accordance with the provisions of this chapter and the conditions imposed by applicable federal laws, rules and regulations.”<sup>143</sup> Therefore, those convicted of drug felonies in West Virginia are denied TANF benefits for life, which would have included Sam had he lived in West Virginia.

Pennsylvania, on the other hand, has modified the federal ban, or opted out. “Assistance may not be granted to any person who has been sentenced for a felony or misdemeanor offense and who has not otherwise satisfied the penalty imposed on that person by law... As used in this clause, ‘satisfied the penalty’ means completed the period of incarceration or extension thereof and paid all fines, costs and restitution.”<sup>144</sup> Therefore, after release and possibly parole and fines, an ex-offender in Pennsylvania is again eligible for cash assistance. Without receiving cash assistance, or food stamps, however, it is often difficult for ex-offenders struggling to find employment to pay fines.

#### *Supplemental Nutrition Assistance Program*

The Supplemental Nutrition Assistance Program (SNAP), also known as food stamps, provides money for food for those whose gross monthly income is 130% of the federal poverty

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<sup>142</sup> *Opting out of Federal Ban on Food Stamps and TANF*, Legal Action Center (last visited Mar. 31, 2014) <http://www.lac.org/toolkits/TANF/TANF.htm>.

<sup>143</sup> W. Va. Code § 9-2-3 (2014).

<sup>144</sup> 62 Pa. Stat. Ann. § 432(9) (West).

line or less.<sup>145</sup> Eligibility for SNAP benefits was also amended under PRWORA; therefore, the same federal bans that apply to TANF apply to SNAP, and states decide whether to opt in or out.<sup>146</sup> The recently enacted Agricultural Act of 2014,<sup>147</sup> however, added more eligibility disqualifications to the program. The Agricultural Act amended the Food and Nutrition Act of 2008: “An individual shall not be eligible for benefits under this Act if the individual is convicted of aggravated sexual abuse ... murder ... an offense under chapter 110 of title 18, United States Code,<sup>148</sup> a Federal or State offense involving sexual assault ... or an offense under State law determined by the Attorney General to be substantially similar to an offense described...”<sup>149</sup> Therefore, SNAP benefits may be denied for conviction of any of these crimes in addition to the drug-felony ban discussed in the TANF section.

### *Reforms Needed*

Restoration of rights is necessary. Ex-offenders cannot be expected to walk out of prison with a bus ticket and \$200 and lead the life of a model citizen. Without housing, shelter, or cash assistance for other necessities, ex-offenders are pushed from prison to the streets.

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<sup>145</sup> United States Department of Agriculture SNAP Page,

<http://www.fns.usda.gov/snap/eligibility#Income> (last visited Mar. 25, 2014).

<sup>146</sup> See Pub. L. No. 104–193 § 115(a)(1)-(2); see also W. Va. Code § 9-2-3 (2014); see also 62 Pa. Stat. Ann. § 432(9) (West).

<sup>147</sup> Agricultural Act of 2014, Pub. L. No 113-79, 128 Stat. 649 (2014).

<sup>148</sup> 18 U.S.C. §§ 2251 – 2260a (2012). This chapter of the code refers to sexual exploitation or other abuse of children.

<sup>149</sup> Food and Nutrition Act of 2008, 7 U.S.C. § 2015(r)(1)(A)(i)-(v) (2008), amended by Pub. L. No. 113-79 (2014).

Pennsylvania's approach should be adopted, tweaked, and duplicated for all federal and state assistance.

As discussed previously, Pennsylvania law denies assistance to any person convicted of a felony or misdemeanor who has not "satisfied the penalty," meaning has not completed the requirements of sentencing, including incarceration time, parole, and paying any fines or restitution.<sup>150</sup> The law should be modified to restore these benefits upon release and reducing them only for parole violations. The law must provide incentive to avoid further criminal activity while also providing the opportunity to assimilate and continue to rehabilitate. This modification ensures that ex-offenders have consequences for their actions and also ensures they will not be living in extreme poverty upon release, providing needed sustenance. This modified version of the Pennsylvania law should be adopted in West Virginia and other states and duplicated for all state and federal assistance programs.

## **Conclusion**

"Virtually every felony conviction carries with it a life sentence."<sup>151</sup> Ex-offenders no longer pay their debts to society and move on; they, instead, wear the Scarlet Letter indefinitely. The effect is perpetual poverty and re-incarceration. West Virginia's in-prison and reentry programs have proven to be among the most successful in the country in limiting recidivism.<sup>152</sup> The state is still, however, mired in poverty: West Virginia's poverty rate is 17.6%, well above

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<sup>150</sup> 62 Pa. Stat. Ann. § 432(9) (West).

<sup>151</sup> Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. Rev. L. & Soc. Change 527 (2006).

<sup>152</sup> *State of Recidivism*, *supra* n. 10, at 11.

the national average of 14.9%.<sup>153</sup> Pennsylvania, on the other hand, suffers with a recidivism rate of 43%,<sup>154</sup> while the poverty rate is below average at 13.1%.<sup>155</sup> Philadelphia's poverty rate, however, is 26.2%.<sup>156</sup> These numbers suggest that urban poverty may have different effects than rural poverty. Charleston, West Virginia's largest city, has an estimated population of 51,018,<sup>157</sup> compared to Philadelphia's—Pennsylvania's largest city—1.5 million.<sup>158</sup> Unfortunately, not many empirical analyses have been conducted in these areas. Hopefully, more information will be available as studies authorized by the Second Chance Act conclude.

Cost is always a question when reforms are proposed. These reforms, however, are cost-effective. A study done by the Washington State Institute for Public Policy found that in-prison and reentry programs actually saved money for taxpayers: "In-prison vocational programs produced net benefits of \$13,738 per offender (a return of \$12.62 for every dollar invested, and adult general education produced net benefits of \$10,669 per offender (or \$12.09 per dollar invested). Employment and job training services for offenders in the community yielded \$4,359

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<sup>153</sup> U.S. Census Bureau State & County QuickFacts West Virginia Page, <http://quickfacts.census.gov/qfd/states/54000.html> (last visited Mar. 10, 2014).

<sup>154</sup> Corbett & Wetzel, *supra* n. 11, at 7.

<sup>155</sup> U.S. Census Bureau State & County QuickFacts Pennsylvania Page, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited Mar. 10, 2014).

<sup>156</sup> U.S. Census Bureau State & County Quickfacts Philadelphia Page, <http://quickfacts.census.gov/qfd/states/42/4260000.html> (last visited Apr. 7, 2014).

<sup>157</sup> U.S. Census Bureau State & County QuickFacts Charleston, West Virginia Page, <http://quickfacts.census.gov/qfd/states/54/5414600.html> (last visited Apr. 7, 2014).

<sup>158</sup> U.S. Census Bureau State & County Quickfacts Philadelphia Page, <http://quickfacts.census.gov/qfd/states/42/4260000.html> (last visited Apr. 7, 2014).

per offender, the equivalent of \$11.90 per dollar invested.”<sup>159</sup> While this study does not cover every reform proposed, it does suggest that programs which lower recidivism are cost-effective.

Reforms must be holistic. Sam’s story could have been different. He could have received mandatory substance abuse treatment, employment assistance, and a mentor upon release. He could have walked out of the prison gates assured that he had public housing in which to live, food stamps to purchase food, and welfare benefits for other necessities. He could have been afforded the opportunity to interview for a job, instead of being cast aside after marking a criminal record checkbox. He could have been provided with a mentor to help him get to work and find a hobby. Sam should have been treated like other citizens. Sam should have had his rights restored. Sam served his time; he paid his debt. But, under the laws and programs implemented today, the Scarlet Letter is forever affixed.

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<sup>159</sup> Western & Pettit, *supra* n. 15, at 23.

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