Labor Redemption in Work Law

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People with criminal records must find and keep work to reintegrate into society. But private employers often categorically exclude candidates with criminal record histories, especially if the candidate is African American or Latinx. The conventional wisdom is that workplace laws offer little to address this problem. People with criminal records are not a protected class under Title VII, and many employers fear that hiring people with criminal records invites negligent hiring liability. Ban the Box privacy laws delay but may not deter overbroad criminal background checks.

This Article challenges this standard account by shifting focus to the state in imposing arbitrary barriers to work. I expose a dignity interest in the removal of these unnecessary barriers, or "labor redemption." I find foundations of labor redemption in successful constitutional challenges to denials of public employment and occupational licenses. Labor redemption is also, increasingly, a statutory right, in the automated sealing and expungement of old and minor criminal records, and issuance of state certifications of individuals as rehabilitated.

Reconceiving of these criminal justice reforms as work law protections can resolve structural limitations to Title VII and Ban the Box laws by providing evidence of rehabilitation, and permit courts to balance the redemption and security interests in negligent hiring claims. Labor redemption also offers a law reform approach to facilitate reintegration through work without imposing new legal obligations on private employers, or requiring an extension of existing employment laws. This Article's assessment offers lessons for other areas in which private decision makers exclude candidates because of state-imposed stigmas, especially the close analogy of housing discrimination.

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INTRODUCTION

The United States has the highest incarceration rate in the world, and the highest number and proportion of people with criminal records. There are over 100

million arrest records,[1] nearly twenty million people in the United States with a felony conviction, and an untold, but much larger number of people with misdemeanor convictions.[2] Intensive, disparate policing and prosecution of African American communities have racially skewed the proliferation of criminal records. One-third of Black men have a felony conviction, and the United States incarcerates Black women at a far higher rate than women of other races.[3]

The successful reintegration of individuals into society after incarceration requires people to find work after release. But work is elusive for people with a criminal record. Even a nonviolent criminal record reduces the chances of an employer interview or offer by about fifty percent.[4] Two-thirds of people are jobless a year after release from incarceration.[5]

The conventional wisdom is that workplace laws have failed to keep pace with the challenges of integrating people with criminal records in the workforce. This is for good reason: there is no federal right to be free from discrimination because of a criminal record.[6] Claims that criminal record checks violate Title VII of the Civil Rights Act of 1964[7] suffer a number of structural limitations, the most important of which is that the employer can often show that such checks are justified by business necessity.[8] State and local "Ban the Box" laws, which prohibit criminal record inquiries until the interview stage, delay but do not prohibit the exclusion of people with criminal records from the workforce. Private employers may legitimately fear that expanding opportunities for people with criminal records may invite negligent hiring liability. Even worse, employers may react to these protections by refusing to hire African Americans based on a stereotype that equates race and criminality. These structural limitations and perverse incentives seem to

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1. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, at 2 (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf [https://perma.cc/GUK9-U6EG].

2. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 41 (2018); *see infra* Section I.A and note 20.

3. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016, at 23 (2018) [hereinafter PROBATION AND PAROLE], https://www.bjs.gov/content/pub/pdf/ppus16.pdf [https://perma.cc/92DX-E8CZ].

4. *See infra* Section I.B.

5. *See infra* Section I.A.

6. *See* Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 47 (2015).

7. 42 U.S.C. §§ 2000e to 2000e-17. The Equal Employment Opportunity Commission (EEOC) has determined that criminal background checks have a disparate impact on African Americans and Latinxs and violate Title VII unless consistent with business necessity. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter EEOC GUIDANCE].

8. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 248 (3d Cir. 2007); Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831, 842–64 (2014); Tammy R. Pettinato, *Defying "Common Sense?": The Legitimacy of Applying Title VII to Employer Criminal Records Policies*, 14 NEV. L.J. 770 (2014).

compel the conclusion that work law plays a marginal—or even counterproductive—role in promoting reintegration.

The contribution of this Article is to show that people after incarceration have a dignitary interest in freedom from arbitrary barriers to work that prevent reintegration into society, or "labor redemption."[9] This Article argues that, contrary to the conventional view, labor redemption is immanent in constitutional, statutory, and common law governing the workplace. Labor redemption is a recognized dignitary interest in constitutional challenges to re-incarceration for failure to find work, and overbroad exclusions from occupational licenses and public employment.[10] The scholarship has largely ignored the vast array of policy tools enacted since the 2007 Second Chance Act,[11] which now entitle many people with criminal records to the sealing and expungement of old and minor criminal records, and certificates of relief to individuals whose criminal record history does not suggest future risk. Longstanding federal and state policies encourage hiring through tax credits, bonding and insurance. These second-chance reforms resolve structural limitations to Title VII and Ban the Box laws by disrupting the stigma of criminal records with evidence of rehabilitation and by shifting the costs of reintegration away from employers, consumers, and co-workers. They also add nuance to negligent hiring claims, permitting courts to balance labor redemption interests against the consumer interest in public safety.[12]

This Article, finally, offers labor redemption to guide work law reform in prioritizing removal of state-imposed stigmas that unnecessarily interfere with

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9. *See infra* Section II.A. Redemption is a criminology term, coined by Alfred Blumstein and Kiminori Nakamura, leading scholars on desistance, who use the term to refer to the period after which a person with a criminal conviction has no more risk of reoffending than the general public. *See* Alfred Blumstein & Kiminori Nakamura, Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences 8 (Oct. 2012) (unpublished manuscript), https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf [https://perma.cc/4W3T-33J5]. "Redemption" can be interpreted as a religious term, *see* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2555 n.238 (2020), but I do not mean redemption in this sense. I use the term redemption to mean a dignity interest in reintegration after incarceration as a full member of the community. This Article's concept of labor redemption is informed by the criminology scholarship of John Braithwaite, the reentry scholarship of Michael Pinard, and the moral philosophy of Jeremy Waldron. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 55 (1988) (cautioning that state-imposed stigmas can be criminogenic unless eventually retired); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) [hereinafter Pinard, *Collateral Consequences*] (proposing a dignity-based approach to reentry); Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1119–20 (2011) (theorizing that individuals have a dignity interest in fulfilling important state-assigned responsibilities without unnecessary interference by the state or third parties).

10. *See infra* Section III.A.

11. This assessment is aligned with calls to consider the state role in workplace protections. *See* Samuel Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 4 (2004) (arguing that the most important barriers preventing the work of people with disabilities are work disincentives in social welfare and insurance policies); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 9, 12–13 (2005) (assessing that state-funded family leave can be more effective than employer-required leave mandates).

12. *See infra* Section III.B–C.

work.[13] Expanding sealing and expungement, and other markers of rehabilitation, will reduce employer aversions, permit Title VII plaintiffs to produce evidence of rehabilitation, encourage a deliberative interview process in Ban the Box jurisdictions, and establish a presumption of rehabilitation in negligent hiring claims.

While work is at the core of scholarship about reintegration into society after incarceration,[14] this Article is the first to connect labor redemption to plausible litigation challenges to, and second-chance law reform measures limiting, arbitrary state-imposed barriers and overbroad criminal background checks.[15] The Article also contributes to employment law scholarship by demonstrating how second-chance reforms have reshaped employment law protections without imposing legal obligations on private employers or requiring an extension of employment laws. Redemption as a conceptual framework has important implications beyond work law, especially for housing discrimination,[16] and for other civil disabilities that may suggest future risk to employers, including credit history problems, past unemployment history or eviction, or receipt of public assistance.

This Article proceeds as follows. Part I begins with the staggering costs of mass incarceration and its reach into the lives of individuals, who are disproportionately African American and Latinx, and who must find work, either as an express term of supervised release or in order to reintegrate into society. It will then illuminate the ways that state-imposed stigmas impose arbitrary, impassible barriers to work. Part II will introduce reintegration through work, or "labor redemption," as a dignity interest, and will show how second chance initiatives provide legal entitlement to and incentives for labor redemption. Part III will demonstrate how existing employment laws protect labor redemption, particularly after second-chance reforms. Labor redemption permits a due process challenge to re-incarceration for failure to find work, and state denials of public employment and occupational licenses. Even better, second-chance reforms are a conceptual tool to resolve structural limitations in Title VII and Ban the Box laws, and enable courts to balance competing redemption and security interests in negligent hiring claims. Part IV offers labor redemption to guide future law reform. It argues, specifically,

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13. *See infra* Section IV.

14. *See* Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1349–50 (2017). The scholarship primarily discusses redemption in the context of clemency. *See* Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 3 (2015); ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS (2008). Benjamin Levin examines the impact of private employers in becoming "critical players in the contemporary criminal system," both as source of exclusion and support. Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2268 (2018).

15. Michael Pinard has previously critiqued the impact of a conviction on dignity interests and argued in favor of expanding expungement and sealing measures to protect them. *See* Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 989–96 (2013); Pinard, *Collateral Consequences*, *supra* note 9. This Article expands on these themes by identifying constitutional, statutory, and tort doctrines that recognize a dignitary interest in redemption and by showing how second-chance reforms strengthen them.

16. *See infra* Section IV.C.

that easing the availability of sealing and expungement and other markers of rehabilitation is a more plausible and effective pathway to facilitate successful reintegration through work than amending existing work law. Through an examination of the close analogy of housing discrimination, it demonstrates how its call to turn to the state role in imposing arbitrary barriers has implications beyond work law. The Article concludes that labor redemption offers a partial solution to the barriers that prevent successful reintegration through work, without expanding private employer legal obligations or requiring new employment laws.

I. LABOR REDEMPTION AS PRECONDITION FOR REINTEGRATION

Most individuals must work to successfully reintegrate into society after incarceration. After release from incarceration, the state requires individuals to acquire and maintain work as a term of post-incarceration supervision, and to pay court-ordered fines and penalties, under threat of re-incarceration.[17] Behind these formal state mandates for work lies a broad assignment of the responsibility to find work as a central goal of reintegration into society. Reintegration requires the individual to find secure housing and health care, reconnect with family, and develop positive social networks, all of which can be contingent on a steady, meaningful job.

After briefly describing the centrality of work for reintegration, this Part will explore how state-imposed stigmas and barriers to work, especially the creation of a permanent, publicly accessible criminal record and occupational restrictions, can undermine reintegration.

A. The Centrality of Work for Reintegration

There is a well-developed body of scholarship about mass incarceration, especially its growth and impact on African Americans and the poor.[18] The shadow of the carceral state extends well beyond the 2.2 million incarcerated people in the United States[19] to include the additional 4.5 million adults on parole and probation[20] and the 19 million people, or eight percent of the adult population, in the United

17. Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 317–19 (2020).

18. *See, e.g.*, JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

19. *See* John Gramlich, *America's Incarceration Rate Is at a Two-Decade Low*, PEW RSCH. CTR. (May 2, 2018), https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/ [https://perma.cc/Z89V-P4EN]. This includes "1.5 million under the jurisdiction of federal and state prisons and roughly 741,000 in the custody of locally run jails." *Id.*

20. *See* PROBATION AND PAROLE, *supra* note 3, at 1.

States today with a felony conviction.[21] Even this fails to capture the 100 million people with arrest records and the explosion of misdemeanor prosecutions, estimated to be between 10 and 13 million per year.[22]

The criminal justice system is steeped in racial bias against and stigmatization of African Americans, from racial bias in police stops and arrests,[23] to racially disproportionate prosecutions and sentencing of African Americans.[24] As a result, "approximately one-third of the African American adult male population" has a felony conviction.[25]

Nearly all incarcerated individuals are eventually released,[26] just as most individuals placed on probation and parole successfully complete their supervision.[27] The successful reintegration of these released individuals into society is a high priority for the United States. In 2004, George W. Bush declared in his State of the Union Address that "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."[28] In 2007, the United States enacted the Second Chance Act,[29] authorizing grants to support comprehensive reentry programming. Barack Obama in 2011 established the Federal Interagency Reentry Council, coordinating twenty federal agencies to

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21. Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spacial Distribution of People with Felony Records in the United States , 1948–2010*, 54 DEMOGRAPHY 1795, 1806, 1814 (2017).

22. Alexandra Natapoff estimates that there are thirteen million misdemeanor case filings per year. NATAPOFF, *supra* note 2, at 41.

23. *See id.* at 10 (summarizing studies showing that, e.g., "Chicago police arrest African Americans for marijuana possession seven times more often than they arrest whites, even though whites and Blacks use marijuana at the same rates"); Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013) (describing evidence that stop-and-frisk practices in New York City stopped African Americans over five times as often as whites, despite the fact that police found weapons and contraband in a greater proportion of stopped whites).

24. African American men are six times more likely to be incarcerated than white males. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 239808, PRISONERS IN 2011, at 8 tbl.8 (2012). One in three African American men in their twenties are "either in prison or jail, on probation, or on parole." Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004). In many cities, including Washington, D.C. and Baltimore, more than half of young African American men are under criminal supervision. *Id.* Black women are incarcerated at twice the rate of Latinas and over three times the rate of white women. *Id.*

25. Shannon et al., *supra* note 21, at 12.

26. *See Reentry Trends in the U.S.*, BUREAU OF JUST. STAT., https://www.bjs.gov/content/reentry/reentry.cfm [https://perma.cc/8FQU-6NKX] (Nov. 2, 2020).

27. About fifteen percent of individuals on parole and probation are incarcerated per year. SUSAN K. URAHN & MICHAEL THOMPSON, THE PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 1–2 (2018) ("Each year almost 350,000 of those [2.3 million] individuals [who exit probation or parole] return to jail or prison, often because of rule violations rather than new crimes.").

28. *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUST., https://www.justice.gov/archive/fbci/progmenu_reentry.html [https://perma.cc/FAH5-M6ZL] (last visited Sept. 23, 2020).

29. 42 U.S.C. §§ 10631–10632.

improve reentry outcomes,[30] and Donald Trump in 2018 reauthorized both the Second Chance Act and reconvened the Reentry Council.[31]

The United States primarily addresses the reintegration of individuals after incarceration into society by affording them with conditional benefits while subjecting them to punitive restrictions.[32] Reducing recidivism through work is a central goal of reentry policy. The U.S. Department of Justice reports that of the 650,000 people annually released from prison, "two-thirds will likely be rearrested within three years of release."[33] Criminologists have found that stable, meaningful work is a powerful predictor of desistance,[34] and for over a decade, the United States has adopted an official position in favor of employment after incarceration to encourage rehabilitation.[35]

Meaningful, steady work can also improve the emotional and material welfare of individuals after release. One longitudinal study of individuals in their first year after release from prison reports that "regular skilled work [is] a source of structure and pride, capable of repudiating the stigma of incarceration and making one's livelihood a positive source of identity, not just the basis of material well-being."[36] Even a low-wage job can provide previously incarcerated individuals with material and emotional stability, health insurance, a productive routine, and a social role associated with maturation and desistance.[37]

But reentry work requirements are intended to do more than improve the welfare of people after incarceration. They are also a debt to fulfill, backed by the threat of reincarceration for failure to work.[38] As Noah Zatz, Tia Koonse, Theresa

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30. *Federal Interagency Reentry Council*, NAT'L REENTRY RES. CTR., http://csgjusticecenter.org/nrrc/projects/firc/ [https://perma.cc/4XHN-2FXM] (last visited Sept. 23, 2020).

31. *President Trump Signs First Step Act into Law, Reauthorizing Second Chance Act*, COUNCIL OF ST. GOV'TS JUSTICE CTR. (Dec. 21, 2018), https://csgjusticecenter.org/jc/president-trump-signs-first-step-act-into-law-reauthorizing-second-chance-act/ [https://perma.cc/N7EY-JG4A].

32. Reuben Jonathan Miller & Forrest Stuart, *Carceral Citizenship: Race, Rights and Responsibility in the Age of Mass Supervision*, 21 THEORETICAL CRIMINOLOGY 532 (2017). State reentry programs often condition benefits, including subsidized housing, job assistance, and drug treatment programs, on payment of fees and fines and compliance with various restrictions, including work requirements. *Id.* at 541–43.

33. *Prisoners and Prisoner Re-Entry*, *supra* note 28.

34. ALFRED BLUMSTEIN & KIMINORI NAKAMURA, REDEMPTION FOR REINTEGRATING PRISONERS IN THE ERA OF WIDESPREAD BACKGROUND CHECKS 10 (2014).

35. According to the U.S. Department of Justice, "[a]ssisting ex-prisoners in finding and keeping employment," is a "key element[] . . . of successful re-entry into our community." *Prisoners and Prisoner Re-Entry*, *supra* note 28, at 1.

36. BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON 84 (2018).

37. *Id.* at 87–90.

38. According to Susila Gurusami's ethnography of work required of formerly incarcerated Black women, "the state demands [B]lack women exchange their carceral histories for redemptive employment to demonstrate their commitment to criminal rehabilitation." Susila Gurusami, *Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market*, 31 GENDER & SOC'Y 433, 450 (2017). Rehabilitation work is "payment for their carceral histories beyond the time their prison sentences end, specifically through their employment." *Id.*

Zhen, Lucero Herrera, Han Lu, Steven Shafer, and Blake Valenta explain, the nearly five million people released on parole and probation must pursue and maintain employment, and may be incarcerated "for refusing certain kinds of work, for quitting, and even for being fired."[39] Work is also necessary for people on probation and parole to pay state-ordered debt. The United States incarcerates hundreds of thousands of people on probation and parole per year for failing to repay on time.[40] The logic of carceral citizenship, then, requires sufficiently remunerative work as a continuing expression of rehabilitation in order for the individual to receive redemption.

B. Barriers to Labor Redemption Undermine Reintegration

The state requirement that individuals after release find work often ignores the individuals' limited employment prospects, the employer's aversion to hiring people with criminal records, and the state's role in foreclosing meaningful employment opportunities. People with criminal record histories have poor employment outcomes[41] for many reasons, beginning with a bleak labor market at the bottom of the income scale.[42] Most incarcerated individuals lack a high school degree, and many struggle with drug addiction, physical disabilities, and mental illness.[43] Many individuals with criminal records lack sufficient education to qualify for meaningful, stable jobs.[44] The disproportionate number of people who have been previously incarcerated and who are African American and Latinx must also contend with race discrimination by employers.[45]

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39. NOAH ZATZ, TIA KOONSE, THERESA ZHEN, LUCERO HERRERA, HAN LU, STEVEN SHAFER & BLAKE VALENTA, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT 5 (2016) (reporting that every day "about 9,000 people are incarcerated for violating a probation or parole requirement to hold a job").

40. Two-thirds of people incarcerated for failure to pay state fines and fees "reported full-time work in the month before incarceration—but mostly with earnings below $1,000 per month." *Id.* Professor Gurusami similarly found that the state mandate for "full-time work with health benefits" can lead parole and probation officers to threaten supervised individuals with reincarceration for taking "temporary, contract-based, or otherwise . . . insecure or precarious work." Gurusami, *supra* note 38, at 443.

41. Most people leaving jail or prison have no job, and sixty to seventy percent of formerly incarcerated people are unemployed a year after their release. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003). Professor Western, controlling for other factors, found that "[m]en with prison records are estimated to earn 30 to 40 percent less each year." WESTERN, *supra* note 18, at 120.

42. LAWRENCE MISHEL, JARED BERNSTEIN & HEIDI SHIERHOLZ, THE STATE OF WORKING AMERICA 2008/2009, at 16–22, 76–94 (2012).

43. WESTERN, *supra* note 36, at 83.

44. Most people who have been incarcerated lack a high school degree, "score low on cognitive tests," and return to neighborhoods with little opportunity for less-skilled individuals. WESTERN, *supra* note 18, at 110.

45. *See* PAGER, *supra* note 18, at 86–99. Professor Western found that those individuals who found steady, well-paying work were primarily white, older men with connections to unions in the skilled trades. African American men fared among the most poorly in the study, despite their relative youth and good health. WESTERN, *supra* note 36, at 90–94, 98–99. According to Professor Gurusami, her study showed the interplay of class, gender, and race in the reentry goals of parole and probation

But, separate from these barriers, the carceral state uniquely restricts employment opportunities, both indirectly and directly. Incarceration erodes social networks often necessary for referral and hiring, and requires behavioral adaptations ill-suited for work.[46] As a result, while people previously incarcerated can find precarious work in the cash economy, "they are short on the trust, skills, and social contacts that open doors to primary sector jobs."[47]

The carceral state also imposes collateral consequences that sharply restrict employment opportunity.[48] The government imposes myriad collateral consequences on individuals with criminal records, including "over 48,000 laws, regulations and administrative penalties that constrain the mobility of people with criminal records."[49] About three-fourths of collateral consequences are employment related,[50] and many of these restrict occupational licenses and disqualify private sector employers from hiring people who have a criminal record.[51] Most of these restrictions apply notwithstanding the severity of the conviction or how long ago it occurred.[52]

The state also directly restricts employment opportunity by creating and disseminating publicly accessible records that employers assume is a signal of the individual's future risk. Criminal record histories are examples of what Devah Pager has called negative credentials, or "official markers that restrict access and opportunity rather than enabling them."[53] Criminal records trigger "social stigma and generalized assumptions of untrustworthiness or undesirability."[54] Applicants with a marker of risk are often greeted with distrust, rooted in a fear that these

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officers and nonprofit caseworkers, who channeled poor, Black women away from jobs they deemed dangerous or immoral, and those requiring additional education, and into the female-dominated field of social services. Gurusami, *supra* note 38, at 443–51.

46. WESTERN, *supra* note 36, at 113, 122–23.

47. *Id.* at 122.

48. As Michael Pinard explains, "the United States has a uniquely extensive and debilitating web of collateral consequences that continue to punish and stigmatize individuals with criminal records long after the completion of their sentences. These consequences stifle reintegration by making it difficult, if not impossible, for individuals to move past their criminal records and for families to reunite and thrive." Pinard, *Collateral Consequences*, *supra* note 9, at 524.

49. Miller & Stuart, *supra* note 32, at 534. This includes ineligibility for welfare and public housing and disqualification from voting, juries, and many types of private- and public-sector employment. For a description of these collateral consequences, see JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 246–69 (2015).

50. Jamila Jefferson-Jones, *Extending "Dignity Takings": Re-Conceptualizing the Damage Caused by Criminal History and Ex-Offender Status*, 62 ST. LOUIS U. L.J. 863, 882 (2018) (including employment, business license, government contracting, occupational and professional license, and certification restrictions).

51. JACOBS, *supra* note 49, at 262–63.

52. Relatively few people who have been incarcerated have been convicted of homicide or rape. NATAPOFF, *supra* note 2, at 40 ("Homicide and rape—the most serious state crimes—comprise less than 4 percent of felonies.").

53. PAGER, *supra* note 18, at 32.

54. *Id.* at 33.

candidates will harm others in the workplace.[55] Criminal records can also trigger "confirmation bias" in conjunction with race, confirming negative stereotypes that associate African American men with risk.[56]

Employers almost always consider an applicant's criminal record before making a hiring decision.[57] The ubiquity of background checks are driven by the digital, public availability of criminal records. Federal, state, and local agencies collect criminal records and provide them to private credit reporting agencies, which integrate them into digital hiring processes for employers.[58]

The integration of big data in hiring has accelerated this trend and made it difficult to circumvent.[59] Gaps in resumes often cannot be easily explained, and with the rise of algorithmic hiring, data mining permits employers to use proxies for hidden variables, such as criminal records, when they are difficult to find.[60]

A criminal record is a powerful stigma for employers. Most employers report that they would not hire an applicant with a criminal record.[61] Many field experiments conclude that employers are far less likely to offer an interview or job to a person who discloses a criminal record, especially if the applicant is Black.[62] Employers have an inflated sense of the risk of a candidate with a criminal record

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55. While people with recent criminal record histories are at a higher risk of offending than people with no criminal record history, the risk differential diminishes rapidly over time. Megan C. Kurlycheck, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 583, 498–500 (2006).

56. PAGER, *supra* note 18, at 71.

57. One report found that ninety-six percent of surveyed employers indicate that they use one or more type of employment background screening. HR.COM, VIEW OF HUMAN RESOURCES PROFESSIONALS ON BACKGROUND SCREENING METHODS AND EFFECTIVENESS (2017), http://www.napbs.com/NAPBS/assets/File/NAPBS_Survey.pdf [https://perma.cc/Y8E2-83NH].

58. *See* JACOBS, *supra* note 49, at 32–90.

59. *Id.* at 88–90.

60. *See* Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 874–83 (2017).

61. *See* Naomi F. Sugie, Noah D. Zatz & Dallas Augustine, *Employer Aversion to Criminal Records: An Experimental Study of Mechanisms*, 58 CRIMINOLOGY 5, 5 (2019); Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006) (finding that over sixty percent of employers express an aversion to hiring people with criminal records).

62. The most comprehensive of these experiments, by Devah Pager, found that the disclosure of a criminal record reduces the likelihood of an employer callback by one-half to two-thirds. She additionally found that Black testers who disclose a criminal record are far less likely to be considered than comparable white testers reporting the same criminal record. PAGER, *supra* note 18, at 71; *see also* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2018) (finding that when employers asked about criminal history, those reporting no history received nearly two-thirds more callbacks than applicants who reported a criminal record); Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560–64 (2017) (finding that "employers were 60 percent more likely to call back applicants" that do not have a felony conviction); Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. INTER ALIA 11, 19 (2016) (reporting that fewer than ten percent of applicants reporting a minor criminal record, but nearly thirty percent of applicants reporting no criminal record, received an offer or interview appointment).

compared with other signals of undesirable behavior. The aversion appears, instead, to be status linked, a cognitive bias that channels people with criminal records, especially racial minorities, into "bad" jobs associated with low social status regardless of qualifications or actual risk.[63]

Criminologists have expressed alarm that the growing and permanent stigma of a criminal record has disrupted the "traditional models of shaming, reintegration, and desistance from crime."[64] Restorative justice proponents argue that state-imposed stigmas must be eased over time to avoid "the criminogenic consequences of assignment to a deviant master status," in which people with a criminal record are marked as outcasts who are beyond redemption.[65] For many criminologists, "stigma erosion" is essential for individuals to "transition away from social identities and roles as deviants into upstanding citizens," through meaningful, well-paid work.[66] Simone Ispa-Landa and Charles Loeffler, summarizing their study of individuals after release, cast doubt on whether this transition is possible because the ongoing stigma of a criminal record makes "a stable job in the formal economy . . . a desirable but elusive goal."[67] Extending labeling theory to the digital footprint of a criminal record, Sarah Lageson and Shadd Maruna theorize that the Internet has become a "digital prison" for people with a criminal record, which "could artificially extend criminal involvements by leading the person to a sense of hopelessness or defiance (the so-called self-fulfilling prophecy)."[68] Whether or not a permanent, publicly available criminal record becomes a self-fulfilling prophesy as labeling theory suggests,[69] there is little doubt that it is criminogenic, in disrupting the role of meaningful work in fostering desistance.[70]

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63. Sugie et al., *supra* note 61, at 19–20, 24.

64. Sarah Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 PUNISHMENT & SOC'Y 113, 115 (2018).

65. BRAITHWAITE, *supra* note 9, at 54–55.

66. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387, 388–89 (2016).

67. *Id.* at 399. While interview subjects all expressed a desire for jobs that offered regular hours and benefits, many reported that when they sought formal employment, they failed employer background checks, even when the charge was dismissed or if the previous conviction was over a decade old. *Id.* at 398–401.

68. Lageson & Maruna, *supra* note 64, at 126 (explaining that labeling theory predicts that mugshots, arrest records, and criminal dispositions, after being widely shared, searched, and linked to other biographical information on the internet, can become a "sticky," criminogenic label).

69. Whether a criminal sanction deters or causes crime has been the subject of scholarly debate since the 1970s. *See* Prescott & Starr, *supra* note 9, at 2521 & n.251. Some labeling theorists have proposed that the stigma of labeling people as criminals is self-fulfilling, causing internalization of a criminal identity as a way of life. Professor Braithwaite's theory of reintegrative shaming, while accepting that stigmatizing forms of shaming can be criminogenic, argues that shaming can deter criminal conduct and promote reintegration if it is applied while maintaining bonds of respect, directed at the conduct and in the context of societal approval of the person, and terminated with forgiveness. BRAITHWAITE, *supra* note 9, at 100–01.

70. As Professors Prescott and Starr explain, "[t]o the extent that criminal records limit access to quality housing, student loans, satisfying employment, and decent wages, [removing the stigma of

II. DIGNITY, REDEMPTION, AND WORK

The previous Part reconceptualized work as a responsibility assigned by the state to individuals with criminal records to reintegrate into society. It also identified the state as a source of barriers to work that sharply limit employment opportunity, especially for African Americans, Latinxs, and the poor. This Part will introduce labor redemption as a dignity interest in removal of unnecessary state-imposed barriers that interfere with the responsibility to find and keep work. Increasingly, the state has recognized this interest in "second chance" legislation, which permits individuals to seal or expunge old or minor records and provides markers of rehabilitation to the previously incarcerated. These reforms, alongside longstanding financial incentives to encourage hiring, have elevated labor redemption to an important right in work law, as explained in the next Part.

A. Labor Redemption as a Dignitary Interest

Labor redemption is rooted in dignity, a foundational idea in human rights discourse.[71] While dignity has old roots,[72] dignity as an individual right to respect and duty to respect others[73] is reflected in the Enlightenment revolution in the United States. Thomas Paine called for recognition of the "natural dignity of man" as a status for all people,[74] a concept of dignity also expressed in the *Federalist Papers* by Alexander Hamilton and in the correspondence of Thomas Jefferson.[75] In this modern version of dignity, as explained by Ronald Dworkin, dignity requires recognition that treating people as less than a "full member of the human community" is both unjust and a denial of "political equality."[76] According to Jeremy Waldron, this more egalitarian version of dignity did not displace its

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criminal records] should reduce recidivism by mitigating each of these socioeconomic contributors to criminal behavior." Prescott & Starr, *supra* note 9, at 2521.

71. MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012); Arthur Chaskalson, *Human Dignity as a Constitutional Value*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 133, 134 (David Kretzmer & Eckart Klein eds., 2002).

72. Plato describes dignity as a reference to a person's rank (adopted by the Romans), and early Christian theologians invoked dignity to distinguish humans from animals. Joern Eckert, *Legal Roots of Human Dignity in German Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 41, 43 (David Kretzmer & Eckart Klein eds., 2002).

73. This expression of dignity is most associated with Immanuel Kant, who wrote that human dignity is expressed in the human capacity for "moral autonomy and individuality." *Id.* at 46.

74. THOMAS PAINE, RIGHTS OF MAN 55 (1791).

75. Michael J. Meyer, *Introduction* to THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 1, 5–6 (Michael J. Meyer & William A. Parent eds., 1992); William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 69–70 (Michael J. Meyer & William A. Parent eds., 1992) (quoting Hamilton in the *Federalist Papers* exhorting the adoption of the Constitution "for your liberty, your dignity, and your happiness").

76. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–99 (1977).

traditional association with a person's role in society.[77] Instead, "[h]igh rank was generalized rather than being simply repudiated."[78] In this formulation, "the modern notion of human dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility."[79]

While dignity is an undervalued interest in the United States as compared to Europe,[80] it is constitutionally recognized. Dignity is protected in the First Amendment, which prohibits regulation of hateful speech, yet permits libel and defamation actions "to protect the dignity and reputation of the persons themselves, not to impose an aura of untouchability around their convictions."[81] The Thirteenth Amendment expresses a protection of the dignity interests of African Americans to be free from slavery.[82] Chief Justice Warren invoked Paine's words in announcing in *Trop v. Dulles*[83] that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[84] Dignity is a substantive due process right in the privacy cases of *Whalen v. Roe*[85] and *Nixon v. Administrator of General Services*,[86] and especially in *Obergefell v. Hodges*,[87] which insists that the right to marriage is fundamental to plaintiffs' "equal dignity."[88]

Redemption, or the restoration of legal rights and removal of state-imposed stigmas, is reflected in the United States in bankruptcy law to forgive financial debts[89] and in criminal law, for juveniles and through executive clemency. While the

77. JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 13–27, 34–36 (2012); Waldron, *supra* note 9, at 1118–19. Kant described the dignity of an individual in pre-modern society as a function of the rank of the individual, whether a duke, ambassador, judge, or bishop. *Id.* at 1119.

78. Waldron, *supra* note 9, at 1119.

79. *Id.* at 1120 (emphasis omitted).

80. Pinard, *Collateral Consequences*, *supra* note 9, at 519.

81. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1613 (2010); Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L.J. 1201 (2011).

82. Parent, *supra* note 75, at 69.

83. 356 U.S. 86 (1958).

84. *Id.* at 100.

85. 429 U.S. 589, 599–600 (1977) (finding a substantive due process privacy "interest in avoiding disclosure of personal matters").

86. 433 U.S. 425, 457 (1977); *cf.* NASA v. Nelson, 562 U.S. 134, 138 (2011) (assuming, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*, but holding that interest is outweighed by government's interest as an employer and statutory privacy protections satisfy this privacy right).

87. 576 U.S. 644 (2015). Kenji Yoshino argues that the right to marry is a responsibility-right. KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 97 (2015).

88. *Id.* at 681 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right."); *see* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 27–32 (2015) (arguing that Justice Kennedy's majority opinion engaged in the "creative intertwining of the Equal Protection and Due Process Clauses into a principle of equal dignity"); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162–63, 169 (2015) (charting the right to equal dignity in *Obergefell* as a "substantive due process" right that "is not reducible to any formula, but is left instead to a common law methodology").

89. Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 731 (2018).

United States does not guarantee a general right to redemption in criminal law, the Eighth Amendment protection of juvenile offenders includes a right "to be forgiven."[90] This precludes the death penalty for juvenile offenders and requires individualized sentencing that takes account of the prospects for redemption, sharply limiting life sentences for juveniles.[91] Some states have extended this right by banning the sentence of life without parole for juveniles.[92] The U.S. Constitution also recognizes the executive power of clemency as a tool of corrective justice and to mitigate the undue severity of criminal sentences.[93]

Individuals with a criminal record have a significant dignity interest in labor redemption, or the disruption of state-imposed barriers that unnecessarily interfere with the individual's right to find and keep work after a criminal conviction. Criminal record history is a permanent status of inferiority, not unlike the ancient notion of dignity as rank. This inferior status interferes with its bearer's ability to obtain material support and to gain acceptance and reintegration in the community after the sentence is complete. This interest justifies disruption of the stigma of a criminal record, particularly when the state requires work, and after the point at which the individual's criminal record history does not suggest a significantly greater risk of future criminal activity than the general public.

Labor redemption as a conceptual framework draws from the moral philosophy of Jeremy Waldron, especially his theory of responsibility-rights, and Michael Pinard's human rights, dignity-based approach to reintegration. For Professor Waldron, some responsibilities have a "dual character" of rights, or responsibility-rights.[94] Jury service, for example, is a responsibility required by the Seventh Amendment, in order to restrict judges with popular sovereignty, and compelled by threat of legal sanction.[95] Jury service is also a right, entrusting ordinary individuals with legal decisionmaking in civil and criminal matters and is a measure of equal citizenship, as shown by successful campaigns by women for inclusion in jury service.[96] Parents, too, have a legal obligation to care for their

90. *See* Roper v. Simmons, 543 U.S. 551, 553 (2005).

91. Miller v. Alabama, 567 U.S. 460 (2012); *see also* Landrum v. State, 192 So. 3d 459, 464 (Fla. 2016) (quoting *Miller*, 567 U.S. at 471) (explaining that *Roper* and *Miller* require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's "diminished culpability and greater prospects for reform" when aggregate sentences are the functional equivalent of life without parole); Katherine Hunt Federle, *Exploring the Parameters of a Child's Right to Redemption: Some Thoughts*, 68 S.C. L. REV. 487, 489–91 (2017).

92. *See, e.g.*, State v. Bassett, 394 P.3d 430, 446 (Wash. Ct. App. 2017), *aff'd*, 428 P.3d 343 (Wash. 2018) (finding that statute permitting juvenile sentence of "a life without parole or early release sentence is unconstitutional under article I, section 14 of our state constitution").

93. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572–88 (2001).

94. Waldron, *supra* note 9, at 1116.

95. Robert P. Burns, *The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument*, 43 ARIZ. ST. L.J. 1147, 1154 (2011).

96. Waldron, *supra* note 9, at 1124–25.

children. But parenting "is not just a matter of submitting to a set of rules."[97] A parent must engage in "continual and active exercise of intelligence and choice; and these are her choices to make, her intelligence to exercise. She is privileged," to make these choices, subject to limits imposed by the state.[98] There is also an "outward-looking aspect" to this right.[99] If a bystander disciplines another parent's unruly child, the parent's objection that discipline is her responsibility "is something like a right that she holds, but it is a right that is kind of synonymous with a responsibility."[100]

For Professor Waldron, jury service and parenting show the "dual character of right and responsibility." A responsibility-right entails state "designation of an important task," which is assigned to someone with a particular interest in it, and "the protection of their decision-making pursuant to this responsibility against interference by others and even by the state (except in extreme cases)."[101]

Finding and keeping work after incarceration as a condition of release or in order to pay fines and penalties is a similar sort of responsibility. Release from incarceration is an upward equalization of rank, affording to the individual, after release, conditions that are denied in prison and jail. This includes the right, when employed after incarceration, to work in conditions that do not violate the Thirteenth Amendment—which expressly exempts prisoners[102]—as well as other employment rights that courts often find inapplicable to prison laborers.[103] This transformation fits naturally with "the idea of role-based dignity and the idea of responsibility rights . . . ."[104] The ability to find and keep work is itself an important right, as shown by the state requirement that individuals after incarceration obtain work as a condition of supervised release. Like jury service, the state entrusts the individual to select a range of work, but with state supervision to ensure that it comports with the requirements of supervised release. Finding and keeping work is also important for the individual as a means of material support and community reintegration, and for society as a marker of desistance. Given its importance and the state requirement to find and keep work as a condition of release, it is perverse for the state to simultaneously impose stigmas that unnecessarily reduce the capacity of individuals to find work.[105] The role of the state in both requiring and prohibiting

97. *Id.* at 1115–56 (discussing a parental legal right and responsibility to care for one's children, and the legal right and responsibility to serve on a jury).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1116.

102. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.") (emphasis added).

103. *See generally* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 870 (2008).

104. Waldron, *supra* note 9, at 1121.

105. As Ben Laurence explains, there is a connection between responsibility-rights and capacity because assigning responsibilities to individuals who lack the capacity to perform them faces "a

work as a condition of release justifies a correlative right to be free from arbitrary state-imposed barriers to work.

A human rights model of dignity also justifies the removal of state-imposed barriers that unnecessarily interfere with the individual's ability to find and keep work after release from incarceration. Even after work is no longer a state requirement, it often remains essential for survival and community reintegration. Individuals with old or irrelevant criminal records maintain a dignity interest in relief from the stigma of these convictions in order to restore their dignity and reintegrate into the community. As Michael Pinard explains, in a human rights model, dignity is "the starting point for interpretation" of rights, instead of "an end point" rooted in a specific constitutional protection.[106] It would seek to elevate the status of people after leaving incarceration "as much as possible, to their prior status, rather than impose broad legal restrictions that serve to degrade and marginalize them."[107] As Professor Pinard argues, a dignity-based approach would remove collateral consequences that are not proportionate to the offense and that deepen racial disparities, and would also provide for mechanisms for relief to disrupt their lifetime stigma.[108] While Professor Pinard identifies this dignity-based approach in other countries,[109] as I will demonstrate in the next Section, recent second-chance reforms are an important step toward labor redemption as a right in the United States.

In making the claim that there is a dignity interest in labor redemption, I do not contend that this dignity interest trumps all other interests or that weighing this interest against others poses no risks. Dignity interests can conflict with liberty and equality interests[110] and can be balanced against these other values. Balancing these interests risks minimizing one or more of them, and private employers and courts are often ill suited for the task. Even worse, as some human rights scholars insist, dignity claims can conflate a humanist dignity principle with an older, status-based understanding of dignity as consonant with one's rank in society.[111] This status-based understanding of dignity can lead private employers and courts to

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powerful prima facie objection on the grounds of its apparent perversity." Ben Laurence, *The Responsibility-Form of Rights and Practical Capacities*, 43 ARIZ. ST. L.J. 1223, 1224–25 (2011)

106. Pinard, *Collateral Consequences*, *supra* note 9, at 521.

107. *Id.* at 526–27.

108. *Id.* at 524–33.

109. Professor Pinard locates this model in the conception of dignity rights of Canada, South Africa, and the European Court of Human Rights, which have struck down disenfranchisement policies on dignity grounds. *Id.* at 464, 521.

110. As Martha Minow cautions, promoting legal forgiveness "may jeopardize the predictability, reliability, and equal treatment sought by the rule of law." MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 146 (2019).

111. Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 550–51 (2010); Stéphanie Hennette-Vauchez, *A Human* Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT'L J. CONST. L. 32, 53–56 (2011) (arguing that "dignitarian" prohibitions on conduct, such as prostitution and dwarf-throwing, on the ground that it demeans the self, owe more to the Roman concept of "*dignitas*" as respect afforded to individuals based on rank than the modern version of "human dignity for everybody").

relegate people (and especially racial minorities) with criminal records to permanent second-class citizenship. I will discuss these risks, which justify state involvement to disrupt the stigma of criminal records, in Sections III.B–C.

While the state may interfere with the dignity interests of individuals convicted of a crime,[112] dignity requires that shaming must have a legitimate purpose. Once a record no longer indicates a heightened risk, there is little justification for making it available to employers. The only criminology theory that would make criminal records available to employers is general deterrence theory, on the ground that people who know they will be subject to an employer aversion will be less likely to engage in crime.[113] This is a contestable claim, however, and must be weighed against the stigma of a criminal record, its magnification of racial bias, and its criminogenic effect. And it is no justification at all once the individual has rehabilitated.

This insistence that the dignity interest of individuals released from incarceration requires freedom from arbitrary state-imposed barriers is aligned with the "crucial distinction" made by John Braithwaite in *Crime, Shame and Reintegration* between "shaming that is reintegrative and shaming that is disintegrative (stigmatization)."[114] Reintegrative shaming does not offend dignity because its intent is to reaccept the individual into society, while disintegrative shaming violates dignity in both its expression of contempt and in undermining the individual's capacity for dignity.[115] Permanent stigmas that mark people with criminal records as inferior also impedes the equal citizenship of African Americans, Latinxs, and the poor, who disproportionately must find work in the shadow of the carceral state.

B. Labor Redemption as a Right to Removal of Arbitrary Barriers to Work

This Part has so far traced the dignity interest in labor redemption and argued that individuals with a criminal record have an interest in the disruption of stigmas that unnecessarily prevent work that is required for reintegration. This Section identifies in recent reentry reforms a series of rights with important implications for work law.

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112. ROSEN, *supra* note 7171, at 113 ("Dignity can be forfeited as a consequence of criminal actions.").

113. As Professor Jacobs explains, "[g]eneral deterrence is the only punishment theory that requires criminal records to be public." JACOBS, *supra* note 49, at 222.

114. BRAITHWAITE, *supra* note 9, at 55.

115. *Id.* This is aligned with Professor Waldron's view that dignity does not require allowing "people to evade legal coercion and punishment when that is appropriate; they just coerce and punish in what is ultimately a more respectful way." WALDRON, *supra* note 77, at 146; *see also* Don Herzog, *Aristocratic Dignity?*, *in* DIGNITY, RANK, AND RIGHTS 99, 110 (Meir Dan-Cohen ed., 2012) ("[A]t stake in Waldron's concern with how we treat criminals is that you can't forfeit this kind of dignity . . . . [C]riminals still have claims on how we may and may not treat them . . . . [Otherwise we express] a kind of aristocratic contempt for the underlings.").

Compared with other industrialized nations, labor redemption is a new topic in the United States and lacks federal elaboration.[116] In contrast, redemption is an express right in most of Europe, requiring the removal of most unnecessary state-imposed barriers to work.[117] In the United Kingdom, for example, completion of a "rehabilitation period" after committing some crimes entitles the individual to be "treated as a rehabilitated person . . . and that conviction for those purposes [will] be treated as spent [or expunged]."[118] Employers in Germany, like other European countries, generally do not have access to criminal record history and may only ask about convictions if they are incompatible with a position.[119] While recent federal bills, especially the REDEEM Act,[120] have proposed reforms along these lines, there is no analogous federal right to redemption in the United States.

Yet, the emerging trend in the United States, especially since the 2007 Second Chance Act, is for states to expand labor redemption rights through a vast array of policy innovations to encourage reintegration.[121] Beginning with drug courts in the 1990s, the United States has developed "a range of problem-solving courts serving low-level offenders in areas such as mental health, veteran's affairs, and community reentry for formerly incarcerated citizens."[122] States have increasingly adopted rehabilitation programming as resources for these courts, including "post-incarceration mental health services, drug treatment programs, housing assistance, and job search help."[123]

While spanning a broad range of barriers to reintegration, easing the stigma of a criminal record as a marker of risk in employment figures prominently in second-chance legislative reforms. These reforms collectively establish a tripartite

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116. Pinard, *Collateral Consequences*, *supra* note 9, at 502–06.

117. The European Convention "prohibits treating inmates as if they are beyond redemption," Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 14 U.C. DAVIS L. REV. 111, 161 (2007), and "[i]nternational law has found that barriers to a prisoner's successful reintegration violate his fundamental dignity rights," *id.* at 166. "Outside of the United States, access to criminal records is far more limited and closely guarded." Christopher Uggen & Robert Stewart, *Piling on: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1911 (2015). Most European countries automatically expunge convictions after a period of time. *Id.*; *see also* JACOBS, *supra* note 49, at 276.

118. Rehabilitation of Offenders Act 1974, c. 53 (Eng.).

119. JACOBS, *supra* note 49, at 276.

120. H.R. 2410, 116th Cong. (2019) (proposing to seal or expunge federal nonviolent criminal offenses).

121. The U.S. Bureau of Justice Assistance has provided 900 grants to non-profit organizations, most often to provide employment-related reentry services to people who have a criminal record. *See* NAT'L REENTRY RES. CTR. & COUNCIL OF STATE GOV'TS JUST. CTR., REENTRY MATTERS: STRATEGIES AND SUCCESSES OF SECOND CHANCE ACT GRANTEES 1 (2018), https://nationalreentryresourcecenter.org/wp-content/uploads/2018/11/Reentry-Matters-2018.pdf [https://perma.cc/AE5V-UQPA].

122. Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1581 (2018); *see, e.g.*, THOMPSON, *supra* note 14, at 154–75 (2008) (criticizing the administrative design of reentry courts as too disconnected from "[t]he system of corrections[, which] is the primary body responsible for providing education and vocational training for inmates").

123. Radice, *supra* note 14, at 1357.

set of labor redemption rights: (1) to remove old and minor convictions from access by employers; (2) to provide markers of rehabilitation for the recently incarcerated for use in employment; and (3) to offer employers incentives to hire people with criminal records.

1. Removal of Markers of Risk from Employment Consideration

Over the past two years, twenty states have "created or broadened" access to sealing and expungement of minor convictions.[124] These "clean slate" innovations remove the criminal record from consideration for employment purposes, either by deleting the record or restricting public access to it.[125] While most of these require the person with a conviction to petition for relief, a number of states have sought to expand their use by automating sealing procedures. Pennsylvania in 2018 enacted the Clean Slate Act, becoming the first state to automatically seal convictions, in that instance of most misdemeanor convictions after 10 years without a subsequent conviction.[126] One year after taking effect, Pennsylvania reported having removed about 35 million misdemeanor convictions from public view.[127] Since then, Michigan, Utah, New Jersey, and California have also enacted their own clean slate legislation.[128] Michigan's 2020 legislation automatically expunges most felony convictions after ten years and misdemeanors after seven years.[129] California requires the automatic expungement of low-level marijuana convictions[130] and, effective 2021, most misdemeanor convictions after one year.[131] Some states expressly link clean slate innovations to reentry programing, as in New Jersey, which provides for presumptive, automatic expungement of minor crimes for individuals who complete that state's drug court program.[132]

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124. Alan Blinder, *Convicts Seeking to Clear Their Records Find More Prosecutors Willing to Help*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/us/expungement-criminal-justice.html [https://perma.cc/NK7S-8ANS].

125. *Id.* The terms "sealing" and "expungement" are technical and differ by state. Generally, expunging refers to the deletion of a criminal record from official repositories, except for the official court record, while sealing merely prevents access to records by third parties, such as employers. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 324 (2015).

126. 18 PA. CONS. STAT. § 9122.2 (2018).

127. Laurie Mason Schroeder, *In One Year, Pa.'s Clean Slate Law Has Erased 35 Million Crimes. What's Next?*, MORNING CALL (June 30, 2020, 5:59 PM), https://www.mcall.com/news/breaking/mc-nws-pennsylvania-clean-slate-law-one-year-20200630-ges77qb3ffahhiznbjzjtelq7q-story.html [https://perma.cc/2GJA-N9CG].

128. UTAH CODE ANN. § 77-40-102(5)(a)(iii)(A) (West 2020) (establishing automatic expungement of misdemeanor convictions after five to seven years); N.J. STAT. ANN. §§ 2C:52-5.3 to -5.4 (West 2020) (establishing task force to develop automated expungement process).

129. Beth LeBlanc, *Whitmer Signs 'Clean Slate' Legislation Aiming to Expand Expungement Opportunities*, DET. NEWS (Oct. 12, 2020, 3:03 PM), https://www.detroitnews.com/story/news/local/michigan/2020/10/12/whitmer-clean-slate-legislation-expanding-expungement/5966512002/ [https://perma.cc/K3GF-4LD4].

130. Assemb. B. 1793, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

131. Assemb. B. 1076, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

132. N.J. STAT. ANN. § 2C:35-14 (West 2019).

2. Providing Markers of Rehabilitation for Employers

Fourteen states additionally issue certificates of relief, which typically signal to the employer that the criminal record does not indicate a heightened risk in the workplace.[133] Markers of rehabilitation are particularly important for individuals with more serious convictions that cannot be expunged or sealed. New York, for example, offers a Certificate of Relief from Disabilities as a form of sentencing relief, and a Certificate of Good Conduct after a waiting period at the discretion of sentencing judges or parole boards.[134] Both create a rebuttable presumption of rehabilitation for future employment or occupational licensing requirements.[135] This requires evidence of a direct relationship between the job qualification and the conviction to support the denial.[136]

3. Offering State Incentives for Hire

The federal government for decades has provided bonding and insurance for employers who hire people with criminal records. The Federal Bonding Program insures employers in case of workplace theft by employees with a recent criminal record.[137] Since 2015, the federal government has offered private employers a Work Opportunity Tax Credit who hire people with felony convictions.[138] Six states provide analogous tax and bonding incentives for employers that hire people with recent convictions.[139]

Taken together, labor redemption is legal entitlement to removal of a state-imposed stigma unrelated to actual risk to employers, co-workers, or customers. Imposing these legal obligations on the state is justified as a precondition for individuals to comply with the state requirement to find and keep work after release from incarceration. Reconceiving of employment rights for people with criminal records in this way expands employment protections without requiring new employment laws or imposing additional legal obligations on private

133. *See, e.g.*, 730 ILL. COMP. STAT. 5 / 5-5.5-15(f) (2010); N.C. GEN. STAT. § 15A-173.2 (2019); OHIO REV. CODE ANN. § 2953.25-G(2) (West 2020); VT. STAT. ANN. tit. 13, § 8014 (2016); COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 3 (2019), http://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf [https://perma.cc/B9N2-WBQY]. Colorado permits petitioning for an "order of collateral relief" for almost all crimes as early as sentencing. COLO. REV. STAT. § 18-1.3-107 (2018).

134. Radice, *supra* note 14, at 1367.

135. *Id.*

136. *Id.*

137. *About the FBP*, FED. BONDING PROGRAM, http://www.bonds4jobs.com/program-background.html [https://perma.cc/2NLG-3KPB] (last visited Nov. 13, 2020).

138. *See Work Opportunity Tax Credit*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit [https://perma.cc/2T4F-YV6H] (Sept. 22, 2020) (describing $2,500 tax credit per hired individual with a criminal record).

139. Those states are California, Illinois, Iowa, Louisiana, Maryland, and Texas. *See* CAL. REV. & TAX CODE § 17053.34 (West 2019); LA. STAT. ANN. § 47:287.752 (2017); MD. CODE ANN., LAB. & EMPL. § 11-702 (West 2016); TEX. TAX CODE ANN. § 171.654 (West 2014); IOWA CODE § 422.35 (2019).

employers. Further elaboration of labor redemption to counteract employer aversions based on factors other than bona fide risk are detailed in Part IV.

III. ASSESSING LABOR REDEMPTION IN WORK LAW

The previous Part argued that individuals have a dignity interest in labor redemption and reconceived recent second-chance reforms as a right to the state removal of unnecessary barriers to work necessary for reintegration.

This Part will assess labor redemption in constitutional, statutory, and common law claims in the workplace. Labor redemption offers a stable constitutional ground for challenges to re-incarceration for failure to find work and denials of public employment and occupational licenses. Second-chance reforms resolve the structural weaknesses in Title VII and Ban the Box laws by providing plaintiffs with evidence of rehabilitation and shifting the costs of reintegration away from employers and to the state. They also permit courts to balance labor redemption against the security interests of customers and other third parties in negligent hiring claims.

A. Constitutional Right to Challenge Re-Incarceration for Failure to Find Work, and State Denial of Public Employment and Occupational Licenses

Constitutional recognition of redemption has historically been limited by the traditional distinction between the sentence imposed by a conviction and "collateral" consequences that result from a criminal conviction but are not a part of the sentence. Designation of state-imposed work barriers as "collateral" can place them beyond the reach of the Sixth and Eighth Amendments.[140] Despite Sixth Amendment challenges to collateral consequences and theorization of further cracks in the formal division between direct and collateral consequences,[141]

140. Courts have generally held that state denials of employment and occupational licenses are "collateral" consequences insufficiently connected to the criminal proceeding to implicate the Eighth Amendment. *See* Pinard, *Collateral Consequences*, *supra* note 9, at 521; Rasky v. Dep't of Registration & Educ., 410 N.E.2d 69, 79 (Ill. App. Ct. 1980) (finding that "revocation of a professional license is not a criminal sanction and the [E]ighth [A]mendment has no application here"); Booker v. City of New York, 14 Civ. 9801 (PAC) (HBP), 2017 WL 151625, at *6 n.7 (S.D.N.Y. Jan. 13, 2017) (denying Eighth Amendment claim based on denial of employment because denial was not a part of a sentence and was unconnected to a criminal proceeding).

141. The Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), found that removal proceedings for noncitizen offenders implicate the Sixth Amendment right to effective assistance of counsel "because of its close connection to the criminal process," its severe consequences for noncitizen offers, and the recent near-automatic removal requirements under immigration law. *Id.* at 365–66. Courts have relied on *Padilla* to find a Sixth Amendment right to be advised that a guilty plea will result in sex offender registration and civil commitment. *See* Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105–09 (2011). Paul Crane proposes to extend the reasoning of *Padilla* to require a jury trial under the Sixth Amendment for similarly severe collateral consequences, such as sex offender registration and extended firearm prohibitions. Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 29-42 (2019). Jack Chin draws on the Supreme Court's designation of civil death as a punishment that implicates Eighth Amendment scrutiny to argue that the

extending criminal procedure challenges to state-imposed barriers to work seems implausible in the short term.[142]

Labor redemption, nonetheless, provides a stable ground for due process and equal protection challenges to incarceration for violating work mandates, and denials of public employment and occupational licenses because of criminal records. The necessity of labor redemption in order to secure the dignity of people with criminal records, and to comply with state work requirements, suggests an important due process right. Federal policy in the past three administrations encourages the reintegration of individuals into society after incarceration through work. Disrupting state-imposed stigmas that unnecessarily consign people with criminal records to a subclass of unemployable people is necessary to a well-ordered society in which eight percent of adults and one-third of African American adult males have a felony conviction.[143] Permanent stigmatization of this population without an opportunity to show rehabilitation denies equal dignity to millions of members of racial minorities whose criminal records have relegated them to permanent second-class status. Reintegrating this population into the formal labor market requires the opportunity for people with criminal records to demonstrate rehabilitation.

The most direct constitutional application of labor redemption is to the re-incarceration of individuals for failure to pay fines or penalties because of inability to find work. The Supreme Court in *Bearden v. Georgia*[144] held that revoking probation for failure to pay a fine violates due process and equal protection unless the government "determin[es] that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist."[145] *Bearden* requires that the government, before re-incarcerating individuals for failure to obtain work or to pay fines or penalties, provide individuals with an opportunity to show that their joblessness is a result of barriers, and not unwillingness, to work.[146]

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entire network of collateral consequences taken together can comprise a "new civil death." Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1825–26 (2012). Beth Colgan argues for Eighth Amendment scrutiny of suspension of public benefits, food stamps, and public housing as a violation of the Excessive Fines Clause of the Eighth Amendment, akin to the abuse of civil forfeiture disapproved of in *Timbs v. Indiana*, 139 S. Ct. 682 (2019). Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 U.C.L.A. L. REV. 2, 16 (2018).

142. As Professor Crane explains, collateral consequences are "varied and messy," leaving "courts . . . understandably and predictably hesitant to widen those cracks given the incommensurability issues and line-drawing problems associated with incorporating collateral consequences." Crane, *supra* note 141, at 28.

143. Shannon et al., *supra* note 21, at 13.

144. 461 U.S. 660 (1983).

145. *Id.* at 661–62.

146. *See, e.g.*, Brown v. McNeil, 591 F. Supp. 2d 1245, 1260–61 (M.D. Fla. 2008) (finding that revocation of conditional release for failure to pay fees despite testimony that petitioner had insufficient income to pay at the time violated due process); Johnson v. State, 707 S.E.2d 373, 375 (Ga. Ct. App. 2011) (holding that revocation of probation for failure to pay fees violated due process

Labor redemption can also provide stable footing for due process challenges to denials of public employment and occupational licenses. While a criminal record harms reputation,[147] the Supreme Court in *Paul v. Davis*[148] held that reputational harm by itself is not a constitutional injury.[149] Nor does reputational harm and a diffuse burdening of another interest, such as a "general fear of harm to . . . employment prospects" caused by an accurate but incomplete conviction history.[150] Most courts of appeals have declined to recognize a federal constitutional right to privacy in government records suggesting criminal conduct.[151] Reputational harm is insufficient on its own to create legal entitlement to redemption in most jurisdictions.

Paul, nevertheless, declined to overrule precedent finding that state stigmatization of individuals with no notice or hearing violates due process[152] and allowed that state-imposed stigmas can violate due process if they harm reputation and "more tangible interests."[153] Courts have since found the *Paul* stigma-plus test satisfied in cases in which allegations of criminal conduct causes harm to reputation

because the state failed to consider testimony that petitioner diligently looked for but could not find work and had no family resources).

147. Extending Bernadette Atuahene's theory of a "dignity taking," Jamila Jefferson-Jones argues that a criminal record's "ongoing damage to [the] reputation" of a person with a conviction can constitute a dignity taking that frustrates the individual's "investment-backed expectations" to reintegrate into society. Jefferson-Jones, *supra* note 50, at 868 (discussing Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 799 (2016)). But Professor Jefferson-Jones rightly does not argue that reputation alone can establish a due process entitlement under the U.S. Constitution. *See id.* at 870–74 (analogizing the previously incarcerated individual's "investment-backed expectations" in rehabilitation with those of real property owners).

148. 424 U.S. 693 (1976).

149. *See id.* at 712 (finding that publication of plaintiff's name as an "active shoplifter" by police after arrest did not violate due process because "the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law").

150. Filteau v. Prudenti, 161 F. Supp. 3d 284, 295 (S.D.N.Y. 2016).

151. Nunez v. Pachman, 578 F.3d 228, 231 (3d Cir. 2009) (finding no privacy interest in expunged criminal record); Willan v. Columbia Cnty., 280 F.3d 1160, 1162 (7th Cir. 2002); Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) (rejecting claim that individual has a protected interest against disclosure of expunged criminal record).

152. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (labeling of individual as alcoholic and posting of person's name in all liquor outlets prohibiting sale to individual by state without notice or hearing violates due process).

153. *Paul*, 424 U.S. at 701–02.

and the loss of public-sector employment,[154] denial or revocation of an occupational license,[155] state assignment of sex offender status,[156] and denial of parole.[157]

Labor redemption can form a basis for a constitutional challenge to denial of public employment and state occupational licensing restrictions, under the stigma-plus standard. In these instances, due process requires, at minimum, a nexus between the conviction and the qualifications for the position.[158] Categorical hiring and licensing bans for people with felony convictions fail to meet this nexus requirement and do not survive equal protection rational basis review.[159] Mississippi in *Chunn v. State ex rel. Mississippi Department of Insurance*[160] is emblematic of this widely held view. That case involved a denied application to renew a bail-agent license by an individual who previously held a license as a bail agent in the state for twenty years, because of a new state law imposing a lifetime bar for applicants with felony convictions.[161] The individual had been convicted of marijuana possession thirty years before.[162] Reasoning that rational basis review requires a showing of a "rational relation to some legitimate end" or a "legitimate government interest," the

154. *See, e.g.*, Horner v. Cnty. Bd., 828 F. Supp. 604, 608–10 (C.D. Ill. 1993) (dismissing public-sector employee and falsely accusing employee of fraud satisfies stigma plus requirement).

155. *See, e.g.*, Burns v. Alexander, 776 F. Supp. 2d 57, 80–83 (W.D. Pa. 2011) (finding that the public accusation of child abuse that resulted in loss of license to operate child care facility satisfies stigma plus standard).

156. *See* Chambers v. Colo. Dep't of Corr., 205 F.3d 1237, 1242–43 (10th Cir. 2000); Lindsey Webb, *The Procedural Due Process Rights of the Stigmatized Prisoner*, 15 U. PA. J. CONST. L. 1055, 1075–79 (2013). In these cases, designation of sex offender status interferes with reputation and liberty interests.

157. A denial of parole based, in part, on an erroneous notation of a murder conviction in a pre-sentence report satisfies stigma-plus because it is a "material state-imposed burden or state-imposed alteration of plaintiff's status or rights." Hall v. Marshall, 479 F. Supp. 2d 304, 314 (E.D.N.Y. 2007).

158. I have previously argued in favor of a "nexus" requirement, which would require an employer to conclude that a criminal record is directly related to a job responsibility before taking adverse action. Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991, 1030–34 (2015).

159. *See, e.g.*, Barletta v. Rilling, 973 F. Supp. 2d 132, 138–39 (D. Conn. 2013) (finding that a refusal to grant a license to trade in precious metals to any applicant "convicted of any felony" violates equal protection because there is no rational basis for a categorical disqualification); Furst v. N.Y.C. Transit Auth., 631 F. Supp. 1331, 1336–38 (E.D.N.Y. 1986) ("[A] municipal employer[, to survive rational basis review,] must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job."); Kindem v. City of Alameda, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980) (finding that a ban on hiring any individual with a felony conviction "is not rationally related to any legitimate state interests"); Butts v. Nichols, 381 F. Supp. 573, 574 (S.D. Iowa 1974) ("[A]n across-the-board prohibition against the employment of felons in civil service positions" fails rational basis review.); Smith v. Fussenich, 440 F. Supp. 1077, 1082 (D. Conn. 1977) (holding that automatic disqualification of any applicant convicted of a felony for a private investigator and security guard license violates equal protection because there was no rational basis).

160. 156 So. 3d 884 (Miss. 2015).

161. *Id.* at 884.

162. *Id.* at 885.

Mississippi Supreme Court held that a flat ban fails even the "lenient" rational basis test.[163]

Labor redemption further requires an individualized risk assessment before denial of public employment and occupational licenses.[164] Pennsylvania, which constitutionally protects reputation,[165] shows how labor redemption can ground this due process challenge. While Pennsylvania finds that reputation as a substantive due process right is not fundamental, the deprivation "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained."[166] Pennsylvania has relied on the right to reputation to constitutionally protect the right to expungement of arrest records following acquittal,[167] to reverse denials of public employment based on a flat ban on hiring people with criminal record histories[168] or a lifetime ban for felony convictions,[169] to strike down a lifetime juvenile sex registration provision,[170] and to protect the "right to engage in any of the common occupations of life."[171] Applying its version of a rational basis test, a Pennsylvania court, for example, found a ten-year felony conviction ban as applied to a groundskeeper to a school violated due process because there was no evidence that the employee's seven-year-old conviction for lying on an application for a firearm directly related to his ability to "diligently, faithfully, and honestly mow lawns and trim bushes at [employer's] behest."[172] Consistent with this approach,

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163. *Id.* at 886.

164. Thompson v. Gallagher, 489 F.2d 443, 449 (5th Cir. 1973) (striking down on equal protection grounds an "ordinance which bars that class of persons from city employment, without any consideration of the merits of each individual case"). This point is similar to Miriam Aukerman's argument that the irrebuttable presumption doctrine applies to occupational license restrictions. *See* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 76 (2005).

165. Article I, Section 1 of the Pennsylvania Constitution guarantees "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation." PA. CONST. art. I, § 1.

166. Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954).

167. Commonwealth v. D.M., 695 A.2d 770 (Pa. 1997).

168. Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973) (finding that "a blanket prohibition barring anyone who has been convicted of a crime of moral turpitude without regard to the remoteness of those convictions or the individual's subsequent performance would be unreasonable").

169. *See, e.g.*, Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. Ct. 2012) (finding that a lifetime ban on employees with felony convictions in public schools violates due process); Croll v. Harrisburg Sch. Dist., No. 210 M.D. 2012, 2012 WL 8668130, at *7 (Pa. Commw. Ct. Dec. 13, 2012) (finding that a lifetime ban violates due process because there is "no temporal proximity to his present ability to perform the duties of [plaintiff's] position, and . . . does not bear a real and substantial relationship to the" position).

170. *In re* J.B., 107 A.3d 1, 16–17 (Pa. 2014).

171. *Johnson*, 59 A.3d at 20.

172. Megraw v. Sch. Dist. of Cheltenham Twp., No. 577 C.D. 2017, 2018 WL 2012130, at *9 (Pa. Commw. Ct. May 1, 2018).

labor redemption requires a name-clearing hearing for permanent occupational bars and categorical denial of public employment.[173]

B. Removal of Structural Limitations of Title VII and Ban the Box Laws

The United States primarily regulates employer rejections of people with criminal records under the equality protection of Title VII disparate impact theory, and, to a lesser extent, state and local "Ban the Box" privacy restrictions. Title VII does not consider people with criminal records to be a protected class, but the EEOC in 2012 issued guidance instructing employers of its view that background checks have a disparate impact on African Americans and Latinxs.[174] Automatically excluding individuals because of a criminal record, accordingly, "would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."[175] Second, thirty-five states and 150 local governments have enacted "Ban the Box" laws, regulating the timing of when an employer may ask about a criminal record, typically until the interview stage. While most of Ban the Box laws regulate public employment, twelve states extend this protection to private-sector employers as well.[176]

Title VII and Ban the Box laws, however, provide little protection against the broad exclusion of people with criminal records from the workforce. This Section will first explain how structural limitations blunt the effectiveness of these laws and then show how labor redemption as reflected in clean slate reforms resolves these structural limitations.

1. People with Criminal Records Are Not a Protected Class Under Title VII, and Employers Often Prevail in Showing a Business Necessity for Background Checks in Title VII Disparate Impact Claims

People with criminal records have a limited claim to equality in the United States, which is often outweighed by the employer's interest in public safety. Federal equality protections, reflected in Title VII, seek to minimize the role of morally arbitrary factors in employment[177] and dismantle the long-term consequences of

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173. *See, e.g.*, Segal v. City of New York, 459 F.3d 207, 214 (2d Cir. 2006) (finding that "an adequate, reasonably prompt, post-termination name-clearing hearing" satisfies the procedural requirement of a stigma-plus claim by individual terminated from public-sector, at-will employment).

174. EEOC GUIDANCE, *supra* note 7.

175. *Id.*

176. *See* BETH AVERY, NAT'L EMPLOYMENT LAW PROJECT, BAN THE BOX 1 (2019), https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-April19.pdf [https://perma.cc/BB6E-FFPD].

177. Liberal egalitarianism seeks to avoid harm for morally arbitrary reasons and prohibits discrimination against an employee "for the morally arbitrary reason that she belongs to a protected group." Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 27. Fair equality of opportunity, according to John Rawls, justifies dismantling inherited social advantages, including on the basis of race, sex and class, on the ground that people with the same talent and willingness should have the same prospects. JOHN RAWLS, A THEORY OF JUSTICE 72–73 (1971).

entrenched group-based inequalities.[178] But Title VII leaves in place other employer decisions, even if grounded in group-based assumptions, so long as those assumptions do not cause "greater harm to the groups that are on the 'wrong' side of society's stereotypical judgments."[179] This equality protection "concerns itself only with those kinds of stigma that are plainly unjustified,"[180] while permitting others, such as stigmas imposed by the state for criminal conduct.[181]

Limiting employment discrimination protections to groups on the wrong side of stereotypical judgments rests on contestable claims about who is deserving of protections.[182] Jessica Clarke criticizes this limitation, which "focuses attention on the victims of discrimination and their blameworthy or costly choices, rather than the systemic effects of biases that are not required for the workplace to function," and "reinforces stereotypes of the sort that antidiscrimination law is intended to disrupt."[183] To address this limitation, Joseph Fishkin offers an "opportunity pluralism" theory of equal opportunity, which would justify restrictions on any employer policy that constricts opportunity structures whether or not they burden a particular protected class.[184] While offering an important critique of stigma theory, however, opportunity pluralism does not provide an answer to conflicting rights, in this case between people with markers of risk seeking employment, and employers, consumers, and co-workers seeking workplaces free of violence and theft.[185] Perhaps for this reason, while Australia and some states in the United States consider people with criminal records a protected class,[186] similar extension of Title VII seems implausible.

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178. SAMUEL R. BAGENSTOS, THE LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 62 (2009) [hereinafter BAGENSTOS, DISABILITY RIGHTS MOVEMENT]; Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839–45 (2003) [hereinafter Bagenstos, *Rational Discrimination*].

179. BAGENSTOS, DISABILITY RIGHTS MOVEMENT, *supra* note 178, at 62.

180. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 72 (1996).

181. John Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 141 (1981) (describing stigmas for criminal conduct as an example of those that are "permissible or even desirable").

182. Jessica Clarke characterizes this dividing line as the "new immutability" that defines protected characteristics as those essential to personal identity, to separate characteristics such as disability from other forms of discrimination, such as "obesity, pregnancy, and criminal records." Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 10 (2015). Joseph Fishkin argues that viewing moral arbitrariness as solely a function of advantages from birth ignores the problem of "bleak opportunities" that are the result of a person's past failures. JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 239–53 (2014).

183. Clarke, *supra* note 182, at 11–12.

184. For Professor Fishkin, restrictions on employer inquiries about height, weight, receipt of public assistance, place of birth, or criminal records are all justified on opportunity pluralism grounds. FISHKIN, *supra* note 182, at 239–53.

185. *See, e.g.*, Jack N. Kondrasuk, Herff L. Moore & Hua Wang, *Negligent Hiring: The Emergent Contributor to Workplace Violence in the Public Sector*, 30 PUB. PERS. MGMT. 185, 187 (2001).

186. Elena Larrauri Pijoan, *Legal Protections Against Criminal Background Checks in Europe*, 16 PUNISHMENT & SOC'Y 50, 57 (2014) (using Australia as an example); NAT'L CONF. STATE LEGISLATURES, STATE EMPLOYMENT-RELATED DISCRIMINATION STATUTES 3–13 (2015), https://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf [https://perma.cc/XB9J-JVJC].

Criminal background checks can nonetheless violate Title VII under a disparate treatment[187] or a disparate impact theory.[188] Courts, however, are reluctant to extend equality protections to people with criminal records, unless the employer's background check is facially overbroad, applied in an obviously discriminatory fashion, or the candidate can demonstrate her own rehabilitation.

A disparate treatment claim must overcome the employer's defense that the criminal record is a legitimate nondiscriminatory reason for nonhire with evidence creating an inference of discriminatory animus,[189] typically through comparator evidence. But courts can structure the similarly situated evidence requirement[190] in ways that can be impossible to obtain. In *Rogers v. Pearland Independent School District*,[191] for example, the Fifth Circuit rejected a Title VII disparate treatment claim based on evidence that the plaintiff, who is Black, was not hired because he failed to disclose drug-related convictions despite the employer's hiring of a white candidate who also failed to disclose a drug-related conviction. Affirming the trial court, the appellate court found that the white applicant was not a "legitimate comparator" because the Black candidate had three drug-related convictions while the white candidate had only one.[192] This proof structure requires plaintiffs to show identical reasons for nonhire *and* an identical criminal record, a heightened burden that often cannot be met, particularly in smaller workplaces.[193] As the partial dissent in *Rogers* noted, requiring both identical reasons for the employment action and identical underlying circumstances "effectively immunizes employers from

187. Under a disparate treatment theory, employers may violate Title VII in rejecting applicants with a criminal record if the rejection is because of race or national origin, as shown by the employer's preferential treatment of white applicants with similar criminal record histories. 42 U.S.C. § 2000e-2(b). As the EEOC Guidance notes, Pager's findings of racial disparities in how employers perceive the risk of equivalent criminal records reported by in-person applicants suggests that rejections because of criminal record history can be because of race or national origin discrimination. *See* EEOC GUIDANCE, *supra* note 7, at 34–35 n.55.

188. In a Title VII disparate impact theory, an employer's criminal background check policy may be unlawful even without evidence of unlawful intent, if the policy adversely impacts racial minorities without sufficient employer justification. 42 U.S.C. § 2000e-2(k).

189. *See, e.g.*, Williams v. Atl. Health Sys., No. 15-cv-06366, 2017 WL 1900725, at *6 (D.N.J. May 8, 2017) (dismissing Title VII disparate treatment claim because criminal record was a legitimate, nondiscriminatory reason for revocation of hire).

190. A prima facie case of disparate treatment under Title VII can require a showing that the plaintiff was treated differently from a "similarly situated" individual outside the protected class. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258–59 (1981).

191. 827 F.3d 403 (5th Cir. 2016).

192. *Id.* at 410. The Fifth Circuit "nearly identical" requirement for comparators has been criticized by the Eleventh Circuit as unnecessarily rigid. Lewis v. City of Union City, 918 F.3d 1213, 1224 (11th Cir. 2019); *see also* Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (permitting use of comparator evidence to show intent if "the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless" (internal quotations and citation omitted)).

193. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 764 (2011) (critiquing similarly situated requirement for limiting intersectional claims).

disparate treatment claims unless the plaintiff is able to show that he shares identical traits with the alleged comparator."[194]

Because disparate impact requires no evidence of discriminatory intent, Title VII disparate impact litigation has had more success in challenging criminal record prohibitions.[195] This requires an initial showing that the employment practice has a disparate impact on a protected class, after which the burden of production shifts to the employer to show that the policy is job related and consistent with business necessity.[196] The EEOC Guidance has persuaded some courts to deny employer motions to dismiss these complaints based on data showing national arrest and conviction disparities by race and national origin.[197] But here too, courts often impose heightened proof structures that limit the reach of these disparate impact challenges. Courts often reject the use of national data to show a disparity and express skepticism about the accuracy of plaintiff's statistical analysis of employer data.[198]

The most important structural limitation to Title VII is a broad construction of the employer's defense that the criminal record exclusion is job related and consistent with business necessity. The business necessity defense requires courts to balance the equality interests of applicants with criminal records against the risk

194. 827 F.3d at 410 (Graves, J., concurring in part and dissenting in part). Suzanne Goldberg argues that the similarly situated requirement forces plaintiffs to identify a "coworker who not only has comparable job responsibilities and lacks the same protected trait but also has the same unprotected attribute," a heightened burden that often cannot be met, particularly in smaller workplaces. Goldberg, *supra* note 193.

195. *See, e.g.*, Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Settlement Class, Appointment of Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement, Fortune Soc'y, Inc. et al. v. Macy's, Inc., 19-cv-05961 (S.D.N.Y. Sept. 4, 2020), ECF No. 105 (approving class settlement of Title VII disparate impact challenge to criminal background check in hiring); Times v. Target Corp., No. 18 Civ. 02993, 2019 WL 5616867, at *2 (S.D.N.Y. Oct. 29, 2019) (approving class settlement of claim); Little v. Wash. Metro. Area Transit Auth., 313 F. Supp. 3d 27, 32 (D.D.C. 2018), *appeal dismissed*, No. 18-7071, 2018 WL 4600770 (D.C. Cir. Sept. 11, 2018) (same).

196. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

197. *See, e.g.*, Lee v. Hertz Corp., 330 F.R.D. 557, 561 (N.D. Cal. 2019) (denying motion to dismiss disparate impact challenge by Latinx candidate of employer ban on hiring anyone with a criminal record because of general disparities in criminal record histories); Williams v. Compassionate Care Hospice, No. 16-2095, 2016 WL 4149987, at *5 (D.N.J. Aug. 3, 2016) (adopting EEOC Guidance position that national racial disparities in criminal record histories suffice to survive motion to dismiss); McCain v. United States, No. 2:14-cv-92, 2015 WL 1221257, at *17 (D. Vt. Mar. 17, 2015) (same).

198. *See* Manley v. Lyondell Chem. Co., No. H-19-4987, 2020 WL 3038132, at *6 (S.D. Tex. May 10, 2020), *report and recommendation adopted by* No. H-19-4987, 2020 WL 3036308 (S.D. Tex. June 5, 2020) (granting motion to dismiss, rejecting general statistics showing conviction disparities by race); Mandala v. NTT Data, Inc., 18-CV-6591, 2019 WL 3237361, at *4 (W.D.N.Y. July 18, 2019) (same); *see also* Elmore, *supra* note 158, at 1016–20 (discussing EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. 2013); EEOC v. Kaplan Higher Learning Educ. Corp., No. 1:10 CV 2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013)). The Fifth Circuit held that the EEOC Guidance is not enforceable and enjoined its enforcement in Texas. *See* Texas v. EEOC, 933 F.3d 433, 451 (5th Cir. 2019) (finding that EEOC Guidance is not enforceable because the EEOC "lacks authority to promulgate substantive rules implementing Title VII").

signaled by a criminal record.[199] But courts often lack sufficient information to assess the bona fide risk of a criminal record.[200] At times courts have reacted to this tension in ways that minimize equality interests in Title VII disparate impact claims or adopt a status-based, racialized view of dignity.[201]

Even for more reasoned attempts to grapple with this tension, the conflicting rights at stake place important limitations on the reach of Title VII disparate impact analysis. These courts recognize that Title VII prohibits employer criminal background checks that would create a subclass of unemployable individuals. But courts often reject these Title VII claims so long as the employer's criminal background check is facially reasonable. In those cases, courts impose a heightened requirement on plaintiffs to show their rehabilitation. This proof structure greatly limits the reach of Title VII disparate impact claims in this area.

The two leading Title VII disparate impact cases challenging background checks, *Green v. Missouri Pacific Railroad*[202] and *El v. Southeastern Pennsylvania Transportation Authority*,[203] demonstrate how Title VII recognizes labor redemption and equality as independent, important interests, even as structural limitations in Title VII disparate impact theory narrow its reach. In *Green*, the Eighth Circuit considered whether an employer's practice of excluding from employment all individuals with a criminal conviction, except minor traffic offenses, was justified by business necessity.[204] The Eighth Circuit first analyzed the comparable interests of the parties, finding that the employer had a low interest in the policy, having failed to validate it or show that a less restrictive test would not suffice.[205] It then found that the policy burdens the labor redemption interests of people with criminal records, who would be automatically placed "in the permanent ranks of the unemployed."[206] Lastly, it found that this policy separately interferes with the equality interests of "blacks who have suffered and still suffer from the burdens of

199. Courts can sometimes avoid this confrontation by relying on an employer's obvious failure to consider the qualifications of candidates with criminal records. *See* Guerrero v. Cal. Dep't of Corr. & Rehab., 119 F. Supp. 3d 1065, 1080 (N.D. Cal. 2015), *aff'd in part*, *rev'd in part and remanded*, 701 F. App'x 613 (9th Cir. 2017) (finding EEOC Guidance persuasive, and holding that employer's "lip service" about the risk of applicant based on criminal record history was insufficient to show a business necessity). A balancing of interests is also unnecessary if the background check policy is legally required. *See* Williams v. Wells Fargo Bank, N.A., 901 F.3d 1036, 1041 (8th Cir. 2018) (affirming dismissal of disparate impact claim because statute prohibited hire).

200. FISHKIN, *supra* note 182, at 232–34, 252; Elmore, *supra* note 158, at 1020–29.

201. One court, in dismissing a Title VII disparate impact claim, admonished that "[i]f Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing." EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989).

202. 523 F.2d 1290 (8th Cir. 1975).

203. 479 F.3d 232 (3d Cir. 2007).

204. 523 F.2d at 1296.

205. *Id.* at 1298.

206. *Id.* at 1299.

discrimination in our society."[207] It found that this "unnecessarily harsh and unjust burden" violated Title VII.[208]

While *Green* established limitations on the categorical exclusion of people with criminal records under Title VII, the Third Circuit in *El* clarified that in cases where employer background checks are facially reasonable, they do not violate Title VII unless the plaintiff can demonstrate individualized rehabilitation.[209] The plaintiff in *El* had a forty-year-old conviction for second-degree murder when he was 15.[210] He sought and was rejected for a position as a paratransit bus driver under the employer's criminal record policy, which excluded any individual with "any crime of moral turpitude or of violence."[211] The Third Circuit held that to establish a business necessity defense under Title VII the employer need only show that the check can "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[212] In light of the position, which required the employee to be alone with and in "close proximity to vulnerable members of society,"[213] evidence that even a forty-year-old record presents a heightened risk was sufficient to dismiss the Title VII claim.[214] While the court acknowledged the harshness of a lifetime ban for criminal convictions, it held that the risk of harm to paratransit passengers with physical or mental disabilities, who are often the targets of "sexual and violent criminals,"[215] justifies a lifetime ban if it decreases the risk of harm.

Trial courts since *El* have generally followed this pattern, permitting Title VII claims alleging that a background check has a disparate impact in instances in which the plaintiff can demonstrate rehabilitation, while rejecting challenges to facially reasonable background checks on public safety grounds.[216]

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207. *Id.*

208. *Id.*

209. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242–45 (3d Cir. 2007).

210. *Id.*

211. *Id.* at 236.

212. *Id.* at 245.

213. *Id.* at 243.

214. In *El*, the plaintiff did not challenge SEPTA's expert testimony about recidivism rates or put forward his own experts to create a factual question for the jury, and "suffere[d] pre-trial judgment for it." *Id.* at 247.

215. *Id.* at 245.

216. Title VII disparate impact claims are most often successful if the plaintiff already has a positive work history for the employer before being fired by the employer because of a background check. *See, e.g.*, Waldon v. Cincinnati Pub. Schs., 941 F. Supp. 2d 884, 888–92 (S.D. Ohio 2013) (finding that plaintiffs, employed by the defendant and then terminated because of the results of a background check, "posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance"). Otherwise, these claims typically fail. *See, e.g.*, Foxworth v. Pa. State Police, 402 F. Supp. 2d 523, 535–36 (E.D. Pa. 2005), *aff'd*, 228 F. App'x 151 (3d Cir. 2007) (finding automatic criminal record disqualification for police officers justified by business necessity); Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028, 1031 (W.D. Mo. 2008) (rejecting Title VII disparate impact claim for denial of employment in law office for nearly thirty-year-old rape conviction on public safety grounds).

El v. SEPTA illuminates the structural limitation of Title VII disparate impact challenges of employer criminal background checks. Courts respond to the uncertainty and complexity of individualized risk assessments by deferring to an employer's facially reasonable background check, without requiring the employer to assess the individual's rehabilitation. Courts instead place the burden on plaintiffs to show their rehabilitation, which plaintiffs are ill equipped to meet.[217]

A reexamination of *El v. SEPTA* shows how this limitation in the Title VII disparate impact proof structure can systematically bias disparate impact claims by people with criminal records. The Third Circuit's holding hinged on expert testimony that "former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act."[218] But, taking account of the age of the applicant and the time elapsed after the conviction, the plaintiff in *El* would have been a *less* risky hire than a person from the general population, by virtue of his advanced age and forty-year clean record.[219] This is because, generally, "older people who have served substantial sentences recidivate infrequently."[220]

This is not to suggest that the Third Circuit incorrectly applied Title VII or unreasonably denied El's claim. Instead, *El* demonstrates how judicial skepticism of Title VII disparate impact theory[221] can manifest in proof structures that are difficult, or impossible, for people with criminal records to meet. In light of the contestable nature of the equality claim of people with criminal records, along with legitimate public safety objections, extension of Title VII to address these structural limitations is implausible.

2. Ban the Box Laws Delay but Do Not Prohibit Criminal Background Checks, and May Increase Employer Disparate Treatment of African Americans

The most important limitation to Ban the Box laws is that they do not limit employer consideration of a criminal record history past the interview stage. This limited privacy protection furthers the purpose of Ban the Box laws to encourage employers to engage in a deliberative process with applicants. Prohibiting employers

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217. In *El*, the Third Circuit granted summary judgment to the employer because the plaintiff did not, or could not afford to, produce a conflicting expert report to create a triable issue for the jury. *El*, 479 F.3d at 276.

218. *Id.* at 246–47.

219. Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 5 CRIMINOLOGY 27, 28–30, 52 (2011).

220. J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1695 (2020). In a large, recent sample of individuals incarcerated for murder or non-negligent manslaughter, J.J. Prescott, Benjamin Pyle, and Sonja Starr found that *none* of the individuals released at age fifty-five or older recidivate. *Id.* at 1696.

221. The rejection of the need for an individualized assessment in the Title VII business necessity defense, in particular, may in part stem from a growing judicial resistance to disparate impact theory. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 714–16 (2006).

from preemptively and categorically excluding applicants with criminal histories affords applicants an opportunity to first impress upon employers their interests and qualifications for the position. This permits employers, in theory, to consider the applicant's criminal record history in context. But without a baseline protection against overbroad background checks later in the hiring process, it is unclear whether Ban the Box laws reduce employer aversions to people with criminal records.[222]

A separate obstacle to extending privacy protections is that employers may respond to Ban the Box laws by discriminating against individuals based on stereotypes that associate racial minorities with workplace risk, sometimes referred to as statistical discrimination.[223] Amanda Agan and Sonja Starr found that in states that enacted Ban the Box, these laws improved the job prospects of people with criminal records but substantially increased the Black-white gap in people who were called back for interviews.[224] They conclude that Ban the Box laws may substantially increase the employment gap between whites and African Americans.[225]

To be sure, the conclusions and policy implications of this study are contested.[226] Even if there is a loss in employment from privacy protections, further study will be necessary to assess whether it is temporary or more entrenched. But it seems plausible that pre-hiring inquiry restrictions may trigger employer stereotyping of protected classes,[227] causing at least a short-term dip in employment or wages. Employment discrimination law prohibits statistical discrimination,[228] and

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222. *See* Elmore, *supra* note 158, at 1014–15.

223. Harry Holzer, Steven Raphael, and Michael Stoll found that employers who conduct background checks are more likely to hire African Americans, especially if the employer reports an aversion to criminal records. They hypothesize that employers engage in hiring discrimination against African Americans as a form of "statistical discrimination," to screen out candidates who they assume have criminal records. Harry J. Holzer, Steven Raphael & Michael Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 463, 473 (2006); *see* Elmore, *supra* note 158, at 1035-36; Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 364–65 (2008) (describing difficulties African Americans face in obtaining employment or services, concluding "[r]acial animus explains some of this behavior, but in the standard narrative, statistical discrimination is doing most of the work").

224. Agan & Starr, *supra* note 62.

225. *Id.* at 229–30 (analyzing field study of 15,000 online job applications before and after enactment of Ban the Box laws).

226. Dallan Flake subsequently conducted an online field study of employer response to applications with criminal records in jurisdictions with and without Ban the Box laws in place, finding an increase in "employment opportunities for ex-offenders without harming racial minorities." Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1127 (2019).

227. Joni Hersch and Jennifer Bennett Shinall argue that pre-hire inquiry prohibitions can trigger an ambiguity aversion, which may lead employers to choose applicants who disclose and explain a negative credential over applicants whose negative credentials are assumed but not explained. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 87–88 (2016).

228. *See* Int'l Union v. Johnson Controls, 499 U.S. 187, 210 (1991) ("The extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."); BAGENSTOS, DISABILITY RIGHTS

Agan and Starr's finding suggests that robust enforcement of antidiscrimination protections is in order. The possibility of privacy protections triggering statistical discrimination, however, has led numerous scholars to question the wisdom of antidiscrimination protections that impose costs on employers that may increase statistical discrimination.[229] One might reasonably argue that whatever benefit Ban the Box laws confer to people with a criminal conviction is outweighed by their intensification of entrenched discrimination against African Americans.[230]

These structural limitations and objections to Title VII and Ban the Box laws should not be overstated. Title VII remains a vital protection against overbroad background checks, and Ban the Box laws encourage employers to engage in a more deliberative process about whether a qualified applicant's criminal record should be disqualifying. But this analysis suggests that these protections are stunted by deep structural—and often state-imposed—barriers that people with criminal records face.

3. Labor Redemption as a Conceptual Tool to Resolve Structural Limitations to Title VII and Ban the Box Laws

Labor redemption, as expressed in recent criminal justice reforms, can resolve these structural limitations by limiting the availability of irrelevant criminal records to employers and making available state-issued evidence of rehabilitation. Clean slate reforms reduce the impact of an overbroad criminal background check by removing old and minor criminal records from consideration without directly regulating the employer's inquiries. For individuals whose criminal records suggest a plausible risk, certificates of relief provide candidates with evidence of redemption to persuade employers that the record should be ignored. Certificates of relief further the goal of a deliberative process in Ban the Box laws, by counteracting the stigma of a criminal record with a state marker of rehabilitation. They can also be powerful evidence in Title VII claims that an employer's criminal background check that would exclude those candidates are not justified by business necessity. Courts appear more willing to scrutinize an employer's rejection of an applicant if the applicant has a certificate from the state signaling her redemption.[231]

MOVEMENT, *supra* note 178, at 60; Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 621 (2004).

229. Strahilevitz, *supra* note 223, at 364 (arguing that employers react to restrictions on inquiries about criminal record histories by relying on "racial and gender proxies" to weed out applicants with criminal record histories). Professors Hersch and Shinall argue against flat inquiry prohibitions but in favor of permitting inquiries at the interview stage. Hersch & Shinall, *supra* note 227, at 67–68, 88 ("Instead of remaining shrouded in taboo and concerns about potential illegality, personal history and family matters should be something to talk about during the interview, something to deepen both the employer's and the applicant's understanding of each other's wants and needs.").

230. Strahilevitz, *supra* note 223, at 364.

231. *See, e.g.*, Brown v. City of New York, 869 F. Supp. 158, 175–76 (S.D.N.Y. 1994) (denying summary judgment to employer on Title VII claim because of evidence of pretext, including because state certificate of relief from disabilities established presumption of rehabilitation); Meth v. Manhattan & Bronx Surface Transit Operating Auth., 134 A.D.2d 431, 431 (N.Y. App. Div. 1987) (finding that

State markers of redemption are also less likely to encourage statistical discrimination than Ban the Box laws alone because they would only retire records of or certify as redeemed those individuals who present no heightened risk to the workplace. They would not prohibit employer use of criminal records that show a bona fide risk. Concerns that employers will unfairly bear the costs of reintegration, finally, are addressed by tax credits, insurance, and bonding programs.

This analysis suggests that encouraging the hiring of people with criminal records will require expanding second-chance reforms, which is a more plausible pathway to improving outcomes than directly extending the protections of Title VII. Its call to turn to the state removal of barriers is aligned with other critical assessments of civil rights law reform efforts. Disability law offers the closest analogy.[232] Samuel Bagenstos, after uncovering structural limitations in the Americans with Disabilities Act that prevent it from significantly improving the workforce participation of people with disabilities, finds that "far and away the most significant barrier to employment for people with disabilities is the current structure of our health insurance system."[233] Social Security Disability Insurance and Medicaid contain work disincentives and other barriers that "operate to keep many people with disabilities out of the workforce well before any individual employer has an opportunity to discriminate against them."[234] Professor Bagenstos concludes that "the future of disability law lies as much in social welfare law as in antidiscrimination law."[235]

Gillian Lester offers a similar analysis of unpaid parental leave requirements in the Family and Medical Leave Act, which have not led substantial numbers of private-sector employers to offer paid leave for new parents.[236] This is because there are structural limitations to employer-provided leave, including the possibility that employers will discriminate against women of childbearing age as a result and moral hazards that act as disincentives for private insurers to cover family leave. Professor Lester concludes that normative values of gender equality and increasing women's labor market participation may be best achieved by state-subsidized family leave policies instead of shifting costs to employers and insurers.[237]

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denial of public employment to applicant with certificate of relief requires finding of nexus between conviction and qualifications for position and showing that hire "would pose an unreasonable risk to the general public").

232. In making this analogy, I do not claim an equivalence in the equality claims of people with criminal records and those of people with a disability. People with a disability are members of a protected class and as a result have greater claim to anti-discrimination law protections.

233. Bagenstos, *supra* note 11, at 26.

234. *Id.* at 34.

235. *Id.* at 4.

236. Lester, *supra* note 11.

237. *Id.* at 12–15 (arguing that actuarial insurance is unsuited to parental leave because of "overwhelming problems of moral hazard").

This is not to suggest that imposing costs on employers is never justified.[238] Labor redemption resolves limitations to existing law but does not substitute for employer regulation. Instead, I argue that labor redemption is necessary to address the role of the state in simultaneously imposing work as a condition of post-incarceration release, yet limiting and foreclosing opportunities to work through arbitrary, state-imposed barriers. Attending to the role of the state is also a more promising route for future law reform than extensions to existing employment laws that impose additional legal obligations on private employers.

C. Dignity Interest to Balance Against Security Interests in Negligent Hiring Claims

Employer fear of negligent hiring claims has historically been "[o]ne of the most significant impediments for employers in the hiring" of people with criminal records.[239] To counteract this trend, law reform has sought to establish a rebuttable presumption against negligent hiring liability for employers who comply with Title VII in conducting a criminal background check. But employer fear of negligent hiring liability is misplaced. Courts reject a duty to inspect criminal record history in most instances. Negligent hiring case law is animated by an unmistakable deference to the employer's managerial prerogatives. Further limiting negligent hiring claims can, moreover, burden the interest of vulnerable consumers in safety and security. This Section argues that markers of rehabilitation issued by the state can more effectively balance labor redemption and security interests in negligent hiring claims.

Employers have a duty to exercise reasonable care in the hiring, training, supervision, and retention of employees,[240] which includes a duty to investigate known risks.[241] But courts generally reject a duty to inquire about criminal records.[242] Even in instances where an employer is aware of a criminal record, courts limit the employer's duty, requiring a tight nexus between the conviction and the harm.[243] Typically, this requires evidence of observed employee behavior suggesting

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238. As Noah Zatz argues in critiquing the debate about whether the minimum wage and earned income tax credit is a more targeted anti-poverty device for ignoring other values expressed in minimum wage requirements, the equality goal of antidiscrimination law justifies shifting costs to third parties. Zatz, *supra* note 177, at 23–27, 37–40 (arguing in favor of reconceiving the minimum wage as a civil right to improve the earning capacity of people at the bottom of the income scale, rather than as an antipoverty device).

239. THOMPSON, *supra* note 14, at 113.

240. RESTATEMENT (SECOND) OF TORTS § 319 (AM. L. INST. 1965).

241. *See, e.g.*, Anicich v. Home Depot USA, Inc., 852 F.3d 643, 654 (7th Cir. 2017), *as amended* (Apr. 13, 2017) (reversing a trial court's dismissal of a negligent hiring claim because of evidence of the supervisor's previous harassment of female subordinates, which created a question for the jury about whether his later murder of a female co-worker was foreseeable).

242. *See, e.g.*, Butler v. Harlbut, 826 S.W.2d 90, 93 (Mo. Ct. App. 1992) (acknowledging "some situations" may require employers to inquire about a past criminal conviction that "would necessitate a rejection of the applicant," but finding that "[r]equiring a duty upon an employer to search every job applicant's past criminal record, if one exists, who interacts with the public is not reasonable").

243. *See, e.g.*, Clark v. Aris, Inc., 890 N.E.2d 760, 765 n.1 (Ind. Ct. App. 2008) (finding that employer with knowledge of employee's previous burglary conviction did not have a duty of care to

the risk of future violence[244] or a showing that the work "involves a serious risk of harm."[245] As the Kansas Supreme Court explained in *Schmidt v. HTG, Inc.*,[246] deference to employer managerial prerogatives is justified by the difficulty in evaluating the risk signaled by a criminal record. In *HTG*, the court rejected a negligent hiring claim based on a previous criminal conviction of an otherwise competent employee because the employee displayed no ongoing negative behavior.[247] The court rejected as overly onerous an employer duty to "ascertain the detailed history of every employee, whether criminal or not, and terminate the employment of an individual who is performing acceptable services and is clearly not unfit or incompetent, but who does pose some degree of risk due to previous actions."[248]

While courts in rejecting these claims do not expressly consider labor redemption, a low duty for employers in negligent hiring claims effectively avoids imposing a legal obligation on employers that would make people with a criminal record unemployable.[249] But the heightened knowledge requirement imposed by courts in negligent hiring claims can burden the security interests of vulnerable consumers. As Catherine Sharkey observes, courts overwhelmingly dismiss negligent hiring claims, even against employers that "provide services to vulnerable populations . . . such as rehabilitation centers, schools, and churches—on the grounds that the employer lacked knowledge of the risk posed by the employee."[250]

Some clean slate reforms aiming to encourage the hiring of people with criminal records, moreover, can be in conflict with the safety interests protected by tort law. Louisiana and Texas impose an irrebuttable presumption that employers cannot be found negligent in hiring and supervising individuals solely because of an employee's prior criminal record in most instances.[251] Florida, Massachusetts, and

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family murdered in their home by employee, because, inter alia, conviction for robbery did not provide knowledge of risk of violence).

244. *Compare* Pagayon v. Exxon Mobil Corp., 536 S.W.3d 499, 506 (Tex. 2017) (finding that two previous complaints of minor harassment about co-worker were insufficient to provide the employer with knowledge that co-worker presented a risk of violence), *with* Doe YZ v. Shattuck-St. Mary's Sch., 214 F. Supp. 3d 763, 786–88 (D. Minn. 2016) (finding that specific reports of sexual contact between students and teacher "are objectively reasonable indicators of a potentially inappropriate relationship with students").

245. Cramer v. Hous. Opportunities Comm'n, 501 A.2d 35, 40 (Md. Ct. App. 1985) ("[W]here the work involves a serious risk of harm if the employee is unfit . . . there is no presumption of competence and there may well exist a duty to conduct a criminal record investigation.").

246. 961 P.2d 677 (Kan. 1998).

247. *Id.*

248. *Id.* at 695.

249. This also theoretically avoids imposing conflicting obligations on employers hiring individuals with criminal records under Title VII and tort law, although, as discussed in the previous section, Title VII does not require the hiring of individuals with known, significant safety risks. *See supra* Section III.B.1.

250. Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 1, 18 (2018).

251. LA. STAT. ANN. § 23:291.1 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 142.002 (West 2019).

New York establish a rebuttable presumption that employers are not liable for negligent hiring if they comply with state law in conducting a criminal background check.[252] Minnesota limits the use of criminal background checks in negligent hiring trials unless the hiring increased the risk to the public.[253] While these measures can advance the redemption of people with criminal records through work, there is a further need in these measures to preserve claims by vulnerable customers harmed by good faith, but unreasonable, employer assessments of risk.

This Article argues that labor redemption addresses this structural limitation to negligent hiring claims by balancing the security interests of customers against the state's interest in rehabilitation. Courts already balance dignity and security interests in failure to warn claims against the state for reintegrating incarcerated individuals into society. While generally, state officers are immune from tort liability for discretionary acts,[254] some courts have found that parole officers take charge of parolees sufficiently to have a duty to exercise reasonable care.[255] The California Supreme Court rejected this principle in *Thompson v. County of Alameda*,[256] concluding that there is no duty to warn about the release of an inmate with a violent history who makes nonspecific threats.[257] The Court reasoned that the precaution of a warning about nonspecific threats would have little beneficial value and may "negate the rehabilitative purposes of the parole and probation system by stigmatizing the released offender in the public's eye."[258]

The rejection in *Thompson* of claims that conflict with the state duty to rehabilitate an individual after release, while permitting claims that establish a specific risk, is also reflected in state determinations to seal and expunge records

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252. New York State adopted the first version, providing for a "rebuttable presumption" that an employer who makes a reasonable and good faith determination to hire a person with a criminal record in compliance with state corrections law does not violate state anti-discrimination laws. N.Y. EXEC. LAW § 296.15 (McKinney 2019); *see also* FLA. STAT. § 768.096 (2019); MASS. GEN. LAWS ch. 6, § 172(e) (2019).

253. MINN. STAT. § 181.981(1) (2019). Dallan Flake offers a similar proposal that Title VII incorporate "a rebuttable presumption that an offending employee's criminal history should be excluded from evidence in a negligent hiring case if the employer hired the individual after engaging in" a deliberative hiring process. *See* Flake, *supra* note 6, at 95.

254. Section 319 of the Restatement (Second) of Torts provides that an individual who takes charge of another person "whom he knows or should know to be likely to cause bodily harm to others if not controlled" has a duty to exercise reasonable care to prevent the person "from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (AM. LAW INST. 1965); *see, e.g.*, CAL. GOV'T CODE § 820.2 (West 2020) ("Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.").

255. Taggart v. State, 822 P.2d 243, 255 (Wash. 1992) ("When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm.").

256. 614 P.2d 728 (Cal. 1980).

257. In *Thompson*, a local government released a young person committed to a juvenile facility after he had allegedly expressed an intention to kill someone, and later murdered a child. *Id.* at 730.

258. *Id.* at 736.

and issue certificates of relief. These markers of redemption can encourage courts to balance the labor redemption and security interests in negligent hiring claims. This is shown in negligent hiring claims in which courts consider evidence that the state found the individual to be rehabilitated. In *O'Connor v. Corbett Lumber Corp.*,[259] a North Carolina appeals court found that employers have no duty to protect customers from the criminal acts of work release inmates. As the court explained, no independent employer duty to inquire was necessary where the state "approved and recommended [the employee] for work release," the employee "was psychologically tested and cleared as posing no danger to society," and the state instructed employers "to treat work release inmates the same as they treat non-inmate employees with respect to the duties given to them."[260]

Thompson and *O'Connor* suggest that state-issued markers of rehabilitation can effectively balance the dignity and safety interests in negligent tort claims. Six states establish a presumption that employers who knowingly hire people with state-issued markers of redemption satisfy their duty of care.[261] New York case law demonstrates how state-issued certificates of relief can encourage courts in these states to meaningfully balance redemption and security interests.[262] New York provides certificates of relief, which create a rebuttable presumption of rehabilitation, and require that employers demonstrate a direct relationship between the conviction and the position sought to justify a denial.[263] But the case law in these instances do not always favor the applicant, particularly those seeking positions that require direct contact with vulnerable people, such as children in schools. In *Boone v. New York City Department of Education*,[264] for example, a trial court rejected a school's determination that a petit larceny conviction suggested a direct risk of stealing confidential information from students as a school bus attendant. In *Boone*, the applicant had a certificate of relief and the conviction did not involve theft of confidential information.[265] But the New York Court of Appeals, in contrast, upheld the same agency's determination not to hire an individual as a school bus driver in *In re Dempsey v. New York City Department of Education*.[266] In that case, the applicant had five convictions, two of which were drug-related felonies, for which the applicant received certificates of relief from the state.[267] The court, nonetheless,

259. 352 S.E.2d 267 (N.C. Ct. App. 1987).

260. *Id.* at 273.

261. Those states are Georgia, Illinois, North Carolina, Ohio, Tennessee, and Wisconsin. GA. CODE ANN. § 51-1-54 (2019); 730 ILL. COMP. STAT. ANN. 5 / 5-5.5-25 (2020); N.C. GEN. STAT. ANN. § 15A-173.5 (West 2019); OHIO REV. CODE ANN. § 2953.25(g)(2) (West 2020); TENN. CODE ANN. § 40-29-107(n)(1) (2019); WIS. STAT. ANN. § 895.492 (West 2020).

262. *See, e.g.*, Boone v N.Y.C. Dep't of Educ., 38 N.Y.S.3d 711 (N.Y. Sup. Ct. 2016).

263. *Id.*

264. *Id.*

265. *Id.* at 721.

266. 33 N.E.3d 485 (N.Y. 2015).

267. *Id.* at 491–92.

held that the agency appropriately rejected the candidate because the convictions directly related to the risk of distributing controlled substances to students.[268]

This analysis suggests that courts can more meaningfully balance the redemption and security interests in a negligent hiring claim in states that provide access to markers of rehabilitation. State-provided bonding and insurance programs can additionally shift the costs of hiring individuals with markers of risk to the state by compensating injured plaintiffs. Labor redemption may also be used defensively by the state, relying on the reasoning in *Thompson*, to avoid liability for unforeseeable harm caused by expansion of reentry programs.

The aim of this Part is not to describe all possible applications of labor redemption but to show its broad doctrinal significance. Practitioners, administrative agencies, courts, and states may elaborate on labor redemption as a right and interest. Practitioners may challenge state re-incarceration for failure to find work, and arbitrary denials of occupational licenses and public employment, as deprivations of due process, and assert the significance of certificates of relief in Title VII and negligent hiring suits. Courts and the EEOC can broadly consider comparator and statistical evidence and reject employer business necessity defenses that do not account for state-issued markers of redemption. Courts considering negligent hiring claims can infer that an applicant with a certificate of relief is rehabilitated. Generally, states recognizing labor redemption in reentry policies can require that post-release work requirements have a rehabilitative purpose[269] and that occupational license restrictions consider the applicant's rehabilitation.[270]

Labor redemption can also guide future law reform, as I argue in the next Part.

IV. LABOR REDEMPTION AS GUIDE FOR LAW REFORM

Labor redemption as an interest and a right can guide future law reform. Labor redemption, specifically, justifies automatically expunging and sealing criminal records or granting certificates of relief, after the period in which the criminal records suggest no greater risk than the general population. It would, likewise, justify a process for recently released individuals to obtain markers of redemption to signal desistance to employers. These reforms have normative implications for other areas,

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268. *Id.*

269. New York requires that conditions of post-release supervision must have a rehabilitative purpose. *See* People v. Letterlough, 655 N.E.2d 146, 150 (N.Y. 1995) ("The punitive and deterrent nature" of requiring an individual convicted of driving while intoxicated to affix "CONVICTED DWI" to his license plate as a term of probation "overshadow[ed] any possible rehabilitative potential" of the probationary conditions.); People v. McNair, 665 N.E.2d 167, 171 (N.Y. 1996) ("The general rule to be drawn from *Letterlough* is that a court may not create its own probationary condition which is predominantly punitive in the sense that its punitive elements overshadow its rehabilitative components.").

270. New York State requires its occupational licenses and public and private employers to consider the applicant's rehabilitation, among other factors. N.Y. CORRECT. LAW § 753(g) (McKinney 2019).

especially housing discrimination, in which private decision makers exclude candidates because of state-imposed stigmas.

A. Automating Sealing, Expungement, and Certifications of Relief

Despite state expansion of sealing, expungement, and certificates of relief, expanding their reach will require further legislative change. There is no constitutional right to sealing and expungement. States have been found to violate the due process rights of arrestees for public shaming,[271] but the same protections do not apply to individuals who have been convicted of a crime. Constitutional challenges to the public availability of criminal records are further limited by the state action requirement.[272] Criminal records are not typically published to employers by the state, but rather by credit reporting agencies (CRAs), which are private actors. While the state does make criminal records publicly available to CRAs, state action exceptions are narrowly construed by the Supreme Court,[273] and CRAs are unlikely to be considered agents of the state.[274]

Yet, as explained in Section II.A, people with criminal records have a significant dignity interest in mechanisms to remove criminal records from use by employers. This interest should prevail for criminal records that do not suggest a significantly heightened risk for employers. Expungement and certificates of relief, moreover, are attractive subjects of legislative reform, particularly if automated,[275] because they are effective, do not increase workplace risk, and are virtually costless. Recent empirical evidence strongly supports the claim that disrupting unnecessary stigmas has a positive effect on employment. J.J. Prescott and Sonja Starr examined expungement practices in Michigan, finding that recipients were thirteen percent

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271. *See* Demery v. Arpaio, 378 F.3d 1020, 1024, 1033 (9th Cir. 2004) (finding that sheriff's use of webcam to post video of pre-trial arrestees "being photographed, fingerprinted, and booked" on the internet without legitimate public interest violated due process); *see also* Bursac v. Suozzi, 868 N.Y.S.2d 470, 481 (Sup. Ct. 2008) (holding that the state's "actions, in publishing and maintaining the petitioner's name, picture and identifying information embedded in a press release on the County's Internet Web site, which results in limitless and eternal notoriety, without any controls," supplies the additional harm that satisfies the stigma-plus standard).

272. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

273. A CRA's conduct satisfies this requirement only if it fulfills a public function, or if the state's involvement with the CRA is so entangled that the private actor's conduct is no longer private. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982); Burton v. Wilmington Parking Auth., 365 U.S. 715, 716, 721–22 (1961).

274. Government contractors and public utilities generally do not meet this standard. *Rendell-Baker*, 457 U.S. at 840–41; Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 52 (1999).

275. While many states permit individuals to petition for expungement, they can be administratively complex and burdensome for petitioners. Few eligible individuals are aware of petition-based expungement, and those who are rarely use it. *See* Colleen V. Chien, *The Second Chance Gap*, 119 MICH. L. REV. (forthcoming 2020) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265335 [https://perma.cc/8J62-PUR2] (finding in empirical analysis that only about three percent of eligible individuals obtain expungement in petition-based jurisdictions). Few individuals, similarly, receive petition-based certificates of rehabilitation. New York State, the first state to offer these markers of redemption, "grants only about 3,000 of them per year." Elmore, *supra* note 158, at 1013.

more likely to be hired and that their wages increased around twenty-five percent.[276] These findings are consistent with those of Peter Leasure and Tia Stevens Andersen, who assessed the effectiveness of certificates of relief issued in Ohio. Professors Leasure and Andersen found that a certificate of relief effectively erased the stigma of the criminal record.[277] While fewer than ten percent of applicants who reported a conviction without a certificate of relief received a callback, over twenty-five percent of those who reported a conviction with a certificate of relief did, nearly as high as those who reported no conviction at all.[278]

Nor would sealing, expungement, and issuing certificates of rehabilitation necessarily increase workplace risk. Professors Prescott and Starr found that individuals whose records were expunged in Michigan "pose a lower crime risk than the general population of Michigan as a whole."[279] The likelihood of a person convicted of a violent crime committing a future violent crime is very low, particularly older individuals who have been incarcerated for a period of time.[280] This suggests that widespread adoption of labor redemption reforms by automating markers of redemption would significantly improve the employment outcomes of people with a criminal record without increasing workplace risk.[281]

To be sure, the effectiveness of automating sealing, expungement, and certifications of relief will depend on how employers respond. Employers may react to automated sealing and expungement of criminal records and certifications of relief by engaging in statistical discrimination against African Americans or by searching for negative credentials on the Internet. These concerns merit further study. But as Prescott and Starr explain, automating markers of redemption seems likely to reduce these risks, especially compared with Ban the Box measures forbidding all criminal record inquiries. Current measures automating the sealing and expungement of criminal records and certificates of relief target only old or minor criminal records. To the extent that employers will continue to have access to criminal records that signal a bona fide risk, it is unclear why sealing and expunging old and minor records would increase statistical discrimination.[282] And while it is possible that employers will obtain negative credentials on the Internet, this has not emerged as a significant problem in the states that have automatic sealing and expungement policies.[283] This may be because most employers use

276. Prescott & Starr, *supra* note 9, at 2527–32, 2551.

277. Leasure & Andersen, *supra* note 62.

278. *Id.* at 19–20 n.44.

279. Prescott & Starr, *supra* note 9259, at 2514.

280. *Id.* at 2513–16.

281. *Id.* at 2518 (concluding that automatic sealing and expungement provisions "with comparable requirements and waiting periods [as Michigan] are unlikely to deny [employers] access to information that they need to protect themselves or their employees," or customers).

282. Prescott & Starr, *supra* note 9259, at 2548-50.

283. *Id.* at 2541-42. Some scholars have expressed concern that the private availability of criminal record histories makes reducing access through official channels futile. JACOBS, *supra* note 49, at 120–21.

CRAs to conduct background checks, which are required to retire sealed and expunged records from their databases by the Fair Credit Reporting Act.[284] The availability of certificates of relief should also resolve any concern about the First Amendment implications of restricting access to criminal records,[285] since certificates of relief can be used for any record that would otherwise require disclosure under freedom of information laws.[286]

Sealing, expungement, certificates of relief, and removal of occupational license restrictions for criminal records that suggest no future risk are cost effective.[287] The administrative costs and uncertainty of risk assessments can be minimized by reference to general statistics instead of engaging in individualized determinations. Criminologists Alfred Blumstein and Kiminori Nakamura propose a general risk assessment of individuals with criminal records, which they call "redemption studies," by comparing their criminal record history with arrest frequencies in the general population.[288] Professors Blumstein and Nakamura have found that individuals with one to two convictions stand no greater risk of an arrest than the general population after five years without an arrest, and thirteen years for individuals with six to ten convictions.[289] Professors Prescott and Starr, after reviewing Blumstein and Nakamura's and other extant redemption studies, conclude that they reflect a redemption period "usually in the range of four to ten years."[290] Redemption may occur earlier for some offenses and for older individuals.[291]

As with Michigan and Pennsylvania, states can protect the societal interest in labor redemption without incurring significant administrative costs by removing

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284. 15 U.S.C. §§ 1681–1681c (2012); *see* Elmore, *supra* note 158, at 1013.

285. *See* JACOBS, *supra* note 49, at 176–79 (concluding that the First Amendment right to public access to criminal records "remains unresolved"); Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337, 372–74 (2018) (arguing that "as long as the United States treats criminal history records as public records, regulating the use of these records will be unconstitutional").

286. The First Amendment prohibits limiting disclosure of information already released to the public, and access to open court records. The state may, however, restrict access to validly sealed records and some underlying information retained by law enforcement agencies. The Freedom of Information Act (FOIA) permits law enforcement to withhold disclosure of information that would constitute an unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(7)(C). While restricting access to irrelevant records burdens the First Amendment right to disclosure, FOIA exempts from disclosure government records about private citizens that can "reasonably be expected to invade that citizen's privacy," including contents of a rap sheet and mug shots. U.S. Dep't of Just. v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 777 n.22 (1989) (rap sheet); Times Picayune Publ'g Corp. v. U.S. Dep't of Just., 37 F. Supp. 2d 472, 479 (E.D. La. 1999) (mug shot).

287. Prescott & Starr, *supra* note 9, at 2551–52 (finding that expungement "compares very favorably to job training in terms of both effectiveness and cost-effectiveness").

288. BLUMSTEIN & NAKAMURA, *supra* note 34.

289. *Id.* at 22.

290. Prescott & Starr, *supra* note 9, at 2519.

291. A follow-up study by Prescott, Starr, and Pyle found that redemption occurs earlier for older individuals, and that people convicted of violent offenses, who are often left out of expungement policies, are the least likely to recidivate among people who are incarcerated. Prescott et al., *supra* note 220, at 1688, 1696–97.

state-imposed work barriers within a similar timeline, or earlier upon completion of a reentry program that demonstrates rehabilitation.

B. Ease Availability of Other Markers of Rehabilitation for the Recently Incarcerated

While automating markers of redemption can improve labor market outcomes for people with old or minor records, sealing, expungement, and certificates of rehabilitation are often unavailable for people with recent, serious criminal convictions. The dignity interest in removal of collateral consequences for these individuals can be outweighed by the security interests of employers, employees, and consumers, since recent, serious criminal convictions can suggest future risk. Employer aversions can even be necessary in workplaces with vulnerable employees and consumers. Instead, the dignity interests of these individuals can be effectively addressed through reentry programming, such as drug treatment and work programs, that can demonstrate rehabilitation. Work programs, for example, can certify the candidate's performance history and provide access to employer references. These markers of rehabilitation can overcome employer aversions to even significant criminal record histories.[292] In contrast to sealing and expunging old or minor convictions, however, these markers can impose large costs on the state, requiring further justification.

That justification lies in the state duty to provide markers of redemption that are necessary for recently released individuals to comply with work mandates and to pay penalties and fees in order to avoid re-incarceration. These individuals have a significant dignity interest in markers necessary to comply with these state mandates, which would demonstrate their rehabilitation to employers. In addition to addressing the perversity of state mandates that individuals cannot comply with, labor redemption for this group also advances important societal interests. Criminologists insist on the public value of reintegration of this group.[293] Recidivism rates are highest for people with multiple convictions and in the year after incarceration.[294] Steady, meaningful work is most likely to have a desistance effect for this group. Shifting the costs of reintegration of recently incarcerated individuals onto private employers, moreover, is implausible. Employers often may (in some cases, *must*) lawfully discriminate against recently incarcerated individuals.

The state assignment to find and keep work as a condition of supervised release to avoid re-incarceration implies an affirmative duty of reintegration on the state beyond removal of arbitrary barriers. Labor redemption for these individuals requires attending to drivers of chronic unemployment among people with criminal records, especially the lack of education and job skills, and high rates of substance abuse and mental illness. State requirements that the recently incarcerated find and

292. *See, e.g.*, Megan Denver, *Criminal Records, Positive Credentials and Recidivism: Incorporating Evidence of Rehabilitation into Criminal Background Check Employment Decisions*, 66 CRIME & DELINQ. 194, 211–12 (2020).

293. *See, e.g.*, BLUMSTEIN & NAKAMURA, *supra* note 34.

294. *Prisoners and Prisoner Re-Entry*, *supra* note 28.

keep work imply a duty to provide a process by which recently incarcerated individuals can obtain markers to demonstrate their rehabilitation to employers.

C. Expand Redemption Beyond Work Law: The Housing Analogy

Labor redemption has implications beyond work law, to other areas, especially housing discrimination, in which private decision makers have an aversion to unnecessary, state-imposed stigmas. In these cases, the expanding use of criminal background checks is most effectively addressed by shifting attention to the state and its imposition of arbitrary barriers that private decision makers rely on to make overbroad, but legally defensible, exclusions.

Housing is the closest parallel to the legal protections available to, and roles of the state and private actors in the employment of, people with criminal records. Like employment, housing is necessary for successful reintegration into society. Successful transition from prison to affordable housing improves welfare and reduces recidivism.[295] But private landlords have a strong aversion to people with criminal records and often will not lease an apartment to individuals with a criminal record history. Many local governments restrict public housing based on criminal record history.[296] Thousands of cities have additionally enacted "crime free" neighborhood ordinances that encourage landlords to conduct background checks and refuse leases to individuals with a criminal record history.[297] Overbroad background checks by private landlords, encouraged by local government, deepen and racialize housing segregation with a "prison to homelessness" pipeline that disparately impacts African American and Latinx communities.[298]

The Fair Housing Act (FHA), like Title VII, prohibits housing discrimination by private landlords. While people with criminal records are not a protected class under the FHA, it does permit challenges to overbroad landlord background checks based on a disparate impact theory.[299] The United States Department of Housing and Urban Development (HUD) in 2016 issued guidance that overbroad background checks can have an unlawful "discriminatory effect" on race and national origin.[300] But FHA disparate impact analysis suffers from the same structural limitations as Title VII. Prior to October 26, 2020, landlords could defeat

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295. Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 432–33 (2018).

296. *Id.* at 450–51.

297. *Id.*

298. *Id.* at 434; Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 193–95 (2019). On the impact of private landlord discrimination on residential racial segregation and plausible systemic legal challenges to it, see Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629, 666–67 (2019).

299. The Supreme Court in 2015 upheld the availability of disparate impact challenges under the FHA in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

300. 24 C.F.R. § 100.500 (2017).

a disparate impact challenge by showing that a background check is "necessary to achieve a substantial, legitimate, nondiscriminatory interest."[301] This standard is "essentially equivalent"[302] to the Title VII business justification defense, prohibiting broad exclusion of a prospective tenant based on arrest records or "bald assertions," while permitting landlords to conduct facially reasonable background checks.[303] HUD replaced this standard with a new rule, effective October 26, 2020, loosening the business justification requirement to merely require the landlord to show that the background check "advances a valid interest (or interests) and is therefore not arbitrary, artificial, and unnecessary."[304]

As Valerie Schneider and Deborah Archer separately propose, overbroad private landlord exclusions and municipal "crime free" ordinances raise plausible FHA disparate impact challenges.[305] But, whether HUD's new rule remains in place or HUD reverts to the previous rule, it is uncertain how these challenges will fare against the landlord business necessity defense. It seems likely that a court would express similar skepticism to background check challenges under the FHA as the Third Circuit expressed in *El* to that Title VII challenge. Courts following *El* would permit exclusion of candidates whose criminal record indicates a heightened risk, especially in dwellings that include vulnerable tenants and in which the candidate cannot demonstrate rehabilitation. As in employment, absent evidence of candidate rehabilitation, these checks appear likely to survive FHA challenge, and privacy protections such as Ban the Box would delay, but not deter, overbroad checks.[306]

My assessment that state-issued markers of redemption can resolve structural limitations to Title VII applies to the close parallel of housing discrimination against people with criminal records. Second-chance reforms can reduce the effect of landlord aversions to criminal records by removing old and minor criminal records from consideration and expanding access to certificates of relief, transitional housing, and references from previous landlords. These markers of rehabilitation can cast doubt on the landlord's business justification defense in FHA disparate impact challenges. Tax incentives, bonding, and insurance can further reduce the private landlord aversion by shifting the costs of reintegration to the state.

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301. *Id.* § 100.500(c)(2).

302. Schneider, *supra* note 295, at 443.

303. A landlord may defeat a prima facie FHA disparate impact claim by showing a business necessity for the rule. 24 C.F.R. § 100.500(c)(2); OFF. OF GEN. COUNSEL, U.S. DEP'T OF HOUS. & URB. DEV., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 4–5 (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf [https://perma.cc/UP28-D5CU].

304. 24 C.F.R. § 100.500(c)(2) (2020).

305. Archer, *supra* note 298, at 223–31; Schneider, *supra* note 295, at 451–52.

306. This analysis is aligned with Professor Schneider's call for judicial attention to mitigating evidence of rehabilitation by tenants and for expansion of Ban the Box laws to landlords. Schneider, *supra* note 295, at 451–52. As indicated in *El*, the difficulty lies in the lack of available evidence of rehabilitation that courts may rely on in making this determination.

In conclusion, labor redemption offers a conceptual framework to guide second-chance reforms to strengthen the employment protections of people with criminal records. Reentry reforms, in particular, should focus on expanding the removal of state-imposed barriers to work and increasing access to rehabilitation programming that offers markers of redemption for people with recent criminal convictions. Expansion of these reforms will strengthen existing employment law protections, without imposing legal obligations on private employers and the need to amend employment laws. Reconceiving employment rights as a state obligation to remove unnecessary barriers has implications beyond employment, especially in housing discrimination law, in which private decision makers exclude candidates because of an aversion to arbitrary state-imposed barriers.

CONCLUSION: LABOR REDEMPTION AS A PARTIAL SOLUTION TO BARRIERS TO WORK CREATED BY MASS INCARCERATION

This Article argues that improving reentry outcomes in employment will require disrupting the stigma of a criminal record and other unnecessary state-imposed barriers to work. Second-chance reforms of sealing, expungement, certificates of relief, and financial incentives to hire strengthen and shape existing employment protections for people with criminal records, without the need to amend existing employment law. This new body of work law responds to the era of mass incarceration by recognizing the dignity interest and rights of workers who labor in the shadow of the carceral state.

While labor redemption is an important, emerging area with implications beyond work law, a caveat is in order: it is an incomplete vision of reentry policy. Redemption premised on the opportunity to seek work in the formal economy has little value to individuals working in secondary labor markets because of race, sex, class, and other stigmas. It has no value at all to the many individuals in the carceral state who cannot work because of a disability.[307]

Successful reintegration into society requires state attention to a complicated web of social problems inadequately addressed after the demise of welfare as a meaningful safety net and magnified by tough-on-crime criminal justice policies. The criminal justice system has not yet come to grips with, and has indeed contributed to, the high rates of substance abuse and mental illness, lack of education and job skills, and chronic unemployment in poor communities. State and local governments continue to allocate scarce resources to policing and incarceration while starving social programs better equipped to attend to these drivers of violence and social disorder.[308] These problems place insurmountable

307. One-quarter of Professor Western's sample of individuals released from state prison were jobless during the entire year after leaving prison. WESTERN, *supra* note 36, at 97–98. Professor Western reports that many of these individuals live with chronic pain, serious mental illness and a drug addition, so "cannot work and face the deepest poverty as a result." *Id.* at 98.

308. Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 451–52 (2018) ("Policing and imprisonment become 'catch all' responses to social problems like homelessness, mental

burdens on people leaving incarceration and continue the cycle of incarceration for many. Attending to these problems will require a broader national commitment to reintegration and to reinvesting in communities where people with criminal records come from, and where they return to.[309]

The role of labor redemption in promoting reintegration through work described here should be understood as fitting within this larger project. The racism and structural violence of the criminal justice system require disrupting the stigma of a criminal record for employers. A discouraging number of people after incarceration remain jobless, particularly members of racial minorities. Current equality and privacy protections undermine reentry policy because they do not attend to the role of the state in the problem; instead, they impose costs on employers that they are resistant to accept and that courts are reluctant to impose. This Article turns attention to the state and proposes labor redemption as a dignity interest that flows from the state assignment of the responsibility to the individual to reintegrate into society through work. Labor redemption entitles these individuals to protection from unnecessary interference with that responsibility. This Article proposes labor redemption as a conceptual framework to dismantle unnecessary barriers to reintegration through work and to advance the rehabilitative goals of reentry policy.

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health crises, drug use, and unemployment, from which the state has otherwise disinvested."); WESTERN, *supra* note 36, at 188 ("Under the harsh conditions of American poverty, the antidote to violence is not more punishment but restoring the institutions, social bonds, and well-being that enable order and predictability in daily life.").

309. *See* WESTERN, *supra* note 36, at 182–84 (assessing that the "thick public safety" of "families, work, and other social supports" gives people released from prison not only physical security, but security "in their housing, intimate relationships, and livelihoods," but that these social supports depend on public supports, including transitional support for individuals the year after release, continuity of medical and mental health care, and secure housing).