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Angela Onwuachi-Willig
Boston University School of Law

Ifeoma Ajunwa

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COMBATING DISCRIMINATION AGAINST THE FORMERLY INCARCERATED IN THE LABOR MARKET

Ifeoma Ajunwa & Angela Onwuachi-Willig

ABSTRACT—Both discrimination by private employers and governmental restrictions in the form of statutes that prohibit professional licensing serve to exclude the formerly incarcerated from much of the labor market. This Essay explores and analyzes potential legislative and contractual means for removing these barriers to labor market participation by the formerly incarcerated. First, as a means of addressing discrimination by the state, Part I of this Essay explores the ways in which the adoption of racial impact statements—which mandate that legislators consider statistical analyses of the potential impact their proposed legislation may have on racial and ethnic groups prior to enacting such legislation—could help to reduce labor market discrimination against the formerly incarcerated. In so doing, this Part analyzes the influence of racial impact statements in the few states that have implemented them. Part II of this Essay examines the possibility of a contractual solution that could help to decrease discrimination against the formerly incarcerated in the private labor market, particularly by those employers who rely on the labor of imprisoned individuals. Specifically, this Part uses the fact that many private corporations rely on and profit from low-wage prison labor to argue that the state penal institutions that lease prisoners to such corporations should push for contractual agreements that stipulate that corporations relying on prison labor must revoke policies that bar employing the formerly incarcerated upon their release. In addition, this Part explicates how contractual stipulations may also provide for affirmative hiring policies for the formerly incarcerated. Finally, this Essay concludes by highlighting how failure to address continued labor market discrimination against the formerly incarcerated could render the formerly incarcerated a permanent economic underclass, thereby undermining notions of fairness and equality.

AUTHORS—Ifeoma Ajunwa, Assistant Professor, Cornell University Industrial and Labor Relations School; Faculty Associate member, Cornell Law School; and Faculty Associate, Berkman Klein Center at Harvard

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INTRODUCTION

Consider Shon Hopwood, a white man who robbed a bank at gunpoint in August of 1997, escaped with $50,000, and managed to perform four more robberies before the authorities eventually caught and arrested him.[1] Following Hopwood's capture, authorities brought him to justice for his robberies, and he ultimately served eleven years in federal prison.[2] While in prison, Hopwood worked at the prison law library and wrote briefs to appeal his case and the cases of other inmates; in fact, the third brief that Hopwood ever wrote was accepted as part of a petition to the U.S. Supreme Court, a

[1] *See* Susan Svrluga, *He Robbed Banks and Went to Prison. His Time There Put Him on Track for a New Job: Georgetown Law Professor.*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/21/bank-robber-turned-georgetown-law-professor-is-just-getting-started-on-his-goals [https://perma.cc/ACJ6-VFBG].

[2] *Id.*

truly remarkable feat of lawyering.[3] At the age of thirty-three, Hopwood walked out of prison a free man. Although Hopwood's first post-prison job was at a car wash, he was soon able to switch jobs and begin working at a family-run legal printing business.[4] Shortly thereafter, the *New York Times* ran a profile on Hopwood, and Hopwood not only began to field speaking invitations, but also negotiated a book deal.[5] When Hopwood decided to pursue a career as an attorney, he initially encountered some difficulty in earning admission to law school, but with time, he received both admission and a full scholarship from the University of Washington School of Law.[6] After graduating from law school, Hopwood obtained a prestigious federal clerkship as his first post-graduation job.[7] Later, he received an employment offer at a law firm with a salary of $400,000 a year, followed by employment in a coveted tenure-track faculty position at Georgetown University Law Center.[8]

Now compare Hopwood's remarkable story[9] and employment outcomes with those of Reginald "Dwayne" Betts, a black man who was convicted in 1996 for a carjacking he performed at the age of sixteen.[10] Following his conviction, Betts, who was once facing a possible life sentence, served eight years and three months in prison.[11] After Betts was released from prison, he earned a bachelor of arts degree from the University of Maryland, a masters of fine arts (MFA) in writing from Warren Wilson College, a Radcliffe Fellowship at Harvard University, and a law degree from Yale Law School.[12] Betts, a husband and father of two children, also published two critically acclaimed books of poetry and a memoir entitled *A*

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[3] *See* Adam Liptak, *A Mediocre Criminal, but an Unmatched Jailhouse Lawyer*, N.Y. TIMES (Feb. 8, 2010), https://nytimes.com/2010/02/09/us/09bar.html [https://perma.cc/JEH8-TAVY].

[4] *See* Svrluga, *supra* note 1.

[5] *See Author Q&A: Shon Hopwood*, WASH. INDEP. (Sept. 20, 2012), http://www.washingtonindependentreviewofbooks.com/features/author-qa-shon-hopwood [https://perma.cc/J37X-CSG7] (discussing Shon Hopwood's first book, *Law Man*).

[6] *See* Svrluga, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] The focus on Professor Hopwood's story is not to begrudge him his success; rather, it is to highlight that formerly incarcerated people are capable of great success when they are truly given the opportunity to reach their full potential. We find his story to be incredibly inspiring. He is due the highest praise, and we believe his story is great evidence of why labor market discrimination against the formerly incarcerated is so deeply problematic.

[10] Elisa Gonzalez, *A Decade After Prison, a Poet Studies for the Bar Exam*, NEW YORKER (June 30, 2016), https://www.newyorker.com/books/page-turner/a-decade-after-prison-a-poet-studies-for-the-bar-exam [https://perma.cc/W6MC-4N5N].

[11] *Id.*

[12] *Id.*

Question of Freedom.[13] Yet in February of 2017, after Betts had passed the Connecticut State Bar examination and accepted a position as a public defender in New Haven, the Bar Examining Committee for Connecticut denied him admission to the Connecticut Bar.[14] In its letter, the Bar Examining Committee explained its decision by stating that a "record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission."[15] In the end, Betts was able to receive certification of good moral character from the Committee and earn admission to the Connecticut Bar, but only after nationwide protest and numerous newspaper articles critiquing the Committee's initial decision to deny Betts admission.[16] Professor James Forman of Yale Law School noted that it was sad that Betts, more than twenty years after he committed a carjacking as a teenager and after two decades of compiling an incredibly impressive academic and professional record, was still being told: "We are always going to judge you differently."[17] In fact, Betts's story reveals not only how he, a former felon, may forever be treated differently because of this status, but also how black former prisoners frequently receive different treatment than white former prisoners upon their release, even when they share similar credentials.[18] Unlike Hopwood, who was given numerous prestigious opportunities after law school, Betts instead was initially cut off at the pass when the Connecticut Bar first denied him admission into the profession. Although the outcome for Betts ultimately turned out to be positive, the difficulties he faced in simply gaining admission to the Bar illustrate how the collateral consequences of criminal convictions may be enacted in racially disparate ways.

As the Betts example shows, the formerly incarcerated, particularly those of color, are quite vulnerable to rampant labor market discrimination

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[13] *Id.*

[14] *See* Bari Weiss, *Admit This Ex-Con to the Connecticut Bar*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/opinion/admit-this-ex-con-to-the-connecticut-bar.html [https://perma.cc/2GSN-MVK7].

[15] *Id.*

[16] *See* Vinny Vella, *State Bar Committee Approves Jail-to-Yale Lawyer*, HARTFORD COURANT (Sept. 29, 2017), http://www.courant.com/news/connecticut/hc-news-dwayne-betts-approved-20170929-story.html [https://perma.cc/4T3E-VB8D] (noting that Betts's case "drew national attention, including an editorial from *The New York Times* calling on the bar association to approve him"). Betts is now a student in the Ph.D. program at Yale Law School. YALE LAW SCH., *Studying Law at Yale*: *Dwayne Betts*, https://law.yale.edu/studying-law-yale/degree-programs/graduate-programs/phd-program/phd-candidate-profiles/dwayne-betts [https://perma.cc/R7AF-3VMB].

[17] Weiss, *supra* note 14.

[18] *See infra* notes 40–42 and accompanying text.

after their release from prison.[19] Indeed, a 2015 survey of formerly incarcerated individuals revealed that 76% of the respondents rated their experience in finding employment as very difficult or nearly impossible due to their past criminal convictions.[20]

This discrimination that the formerly incarcerated face in the labor market is extensive, occurring both as a result of governmental and private action. For instance, in many states and municipalities, the formerly incarcerated encounter significant difficulty in obtaining employment in licensed professions because government statutes either directly or indirectly prevent them from obtaining work licenses in a variety of fields, such as nursing, barbering, and education.[21] The formerly incarcerated also face

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[19] *See generally* Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 46–47 (2015); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. (forthcoming 2018) (noting that courts and legislatures discourage employers from hiring workers with criminal records and encourage employers to discipline workers for non-work-related criminal misconduct, effectively rendering private employers a de facto branch of the criminal justice system); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2013); Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL'Y 261, 269–70 (2006) (explaining how tort laws and pressure from private insurers discourage employers from hiring the formerly incarcerated); *see also* Stephenson v. United States, 139 F. Supp. 3d 566, 569 (E.D.N.Y. 2015) (noting how employers are discouraged from hiring the formerly incarcerated because of "potential negligent hiring liability," "strong societal stigma," and even insurance companies that refuse "to cover employees who are former felons"); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 275–300 (2015) (detailing how a criminal record can prevent the formerly incarcerated from finding employment).

[20] ELLA BAKER CTR. FOR HUMAN RIGHTS, *Who Pays? The True Cost of Incarceration on Families* (2015), http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf [https://perma.cc/F6W4-VDXC].

[21] *See, e.g.*, COLO. REV. STAT. ANN. § 24-5-101(1)(a) (West 2018) (forbidding persons convicted of a felony or other crimes involving moral turpitude from serving as peace officers, educators, positions involving direct contact with vulnerable persons, positions in public or private correctional facilities or juvenile facilities, various state offices, plus more); S.D. CODIFIED LAWS ANN. § 36-9-49(2) (2018) (allowing the state licensing board to deny a nursing license to any person "convicted of a felony"); *see also* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 597 (2006) (noting that the formerly incarcerated "are routinely excluded from many employment opportunities that require professional licenses"). These statutes prevent the formerly incarcerated from receiving professional licenses either directly through explicit exclusion or indirectly through "moral character" clauses. *See, e.g.*, N.Y. EDUC. LAW § 6905 (McKinney 2018) (noting that an applicant shall "be of good moral character as determined by the department" in order "[t]o qualify for a license as a registered professional nurse"); N.Y. COMP. CODES R. & REGS. tit. 8, § 64.3 (2018) ("A limited permit to practice as a registered professional nurse or licensed practical nurse may be issued after the applicant has met requirements of age, moral character, education and proficiency examination . . . ."); *see also* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995) ("In some states virtually the only 'profession' open to an ex-felon is that of burglar; the ex-felon is barred from other activities because she or he is presumed to be a person of bad moral character, regardless of the nature of the crime or its

serious discrimination within the private employment market, as many employers use the results from applicants' criminal background checks to deny them employment.[22] Furthermore, even after some formerly incarcerated people are able to find employment and are performing their jobs well, employers may still terminate those individuals once the employer discovers their criminal history.[23]

Not surprisingly, studies show that even after five years of release from prison, almost 67% of all formerly incarcerated individuals remain unemployed or underemployed.[24] Other studies have shown that labor market discrimination is particularly pernicious for ex-offenders who are racial minorities, especially if they are black.[25] For example, the research of sociologists Devah Pager, Bruce Western, and Naomi Sugie reveals not only that black job applicants with criminal records are less likely to obtain a job callback interview than white job applicants with criminal records, but also that black job applicants *without* a criminal record are less likely to receive a callback interview than white job applicants *with* a criminal record.[26]

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relevance to the intended occupation."). A number of real-life cases illustrate the hazards of state and municipal statutes that place barriers on the formerly incarcerated individual's ability to obtain professional licenses. *See, e.g.*, Barsky v. Bd. of Regents, 347 U.S. 442, 453 (1954) (holding that a doctor's state license to practice medicine could be suspended on the basis of a conviction without violating his due process rights because the state statute was "well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of health"); Standow v. City of Spokane, 564 P.2d 1145, 1152–53 (Wash. 1977) (finding that the denial of a formerly incarcerated applicant's request for a license to operate a vehicle for hire based on a city ordinance that permitted the denial of such license on the basis of his prior convictions was valid on the grounds that the applicant's previous driving infractions and felony convictions were reasonably related to his ability to drive a motor vehicle for hire), *overruled by* State v. Smith, 610 P.2d 869 (Wash. 1980).

[22] *See* Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 272 (2014) (pointing out survey results where 73% and 88% of employers indicated that they conducted criminal background checks for all applicants); Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 284 (2006) (highlighting a "survey of employers in four major metropolitan areas" where "only 12.5% of employers said that they would definitely accept an application from an individual with a criminal record, and 25.9% said that they probably would").

[23] *See, e.g.*, Cisco v. UPS, 476 A.2d 1340, 1343–44 (1984) (holding that criminal charges against an employee—even though the charges ultimately resulted in an acquittal—were sufficient grounds for termination and did not violate any public policy because the employer had a right to protect its reputation by discharging the individual).

[24] ELLA BAKER CTR. FOR HUMAN RIGHTS, *supra* note 20.

[25] *See, e.g.*, Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 195 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003); Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J. L. & SOC. CHANGE 159, 160 (2011).

[26] Pager, Western & Sugie, *supra* note 25, at 199–209; Pager, *supra* note 25, at 958.

The prospects for eliminating or even significantly reducing labor market discrimination against the formerly incarcerated are dim, both in the public and private realms. In the public realm, equal protection claims are unlikely to abrogate government statutes that prohibit the formerly incarcerated from obtaining the professional licenses required for certain jobs because any challenges to the use of a prisoner–nonprisoner classification in the statutes are likely to survive the low hurdle of rational basis review.[27] Additionally, the Supreme Court's decision in *McCleskey* forecloses any avenue for addressing this labor market discrimination against formerly incarcerated individuals who are racial minorities.[28] In *McCleskey*, the Court held that Georgia's application of the death penalty did not violate the Equal Protection Clause, despite its disparate effects based on the race of the defendant and the race of the victim.[29] Additionally, the Court held that proof of intent to discriminate is necessary if plaintiffs wish to prevail on race-based equal protection claims, which means that any formerly incarcerated plaintiffs who wish to prove that professional license-restricting statutes violate the Equal Protection Clause must prove unlawful intent by the respective legislatures in passing such statutes.[30] *McCleskey*, however, makes it clear that such formerly incarcerated plaintiffs would not be able to prove unlawful race discrimination in these cases because they could not show that the involved legislatures passed such statutes "in part 'because of,' not merely 'in spite of,' [their] adverse effects upon" Blacks.[31] Furthermore,

[27] *See infra* Part II.

[28] *Id.*

[29] McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987).

[30] *See id.*

[31] *See id.* at 298. Throughout this Essay, we capitalize the words "Black" and "White" when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Additionally, we find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4. Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that "Black" deserves capitalization because "Blacks, like *A*sians [and] *L*atinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Also, we generally prefer to use the term "Blacks" to the term "African Americans" because "Blacks" is more inclusive. For example, while the term "Blacks" encompasses black permanent residents or other black noncitizens in the United States, the term "African Americans" includes only those who are formally Americans, whether by birth or naturalization. That said, given the historical nature of several parts of this Essay, and in light of the fact that a large influx of black immigrants did not occur in the United States until the 1960s and 1970s, we sometimes use the term "African American" where the term "Black" is not needed for inclusivity reasons. *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49

equal protection jurisprudence in general makes it clear that formerly incarcerated plaintiffs cannot establish that these license-restricting statutes are grounded in a racial classification.[32] Even though African-Americans and Latinos are overrepresented in prisons in the United States[33]—and thus disproportionately affected by such state statutes—they would not be able to show that the felon or ex-offender "classification" in these statutes constitutes a racial classification.[34] Indeed, courts would be certain to highlight that Whites are actually the numerical majority in the nation's prisons, even though they are underrepresented in comparison to their representation in the national population.[35]

In the private realm, the formerly incarcerated would face equally formidable obstacles in proving unlawful discrimination. After all, there is no federal statute that prohibits employers from discriminating against the formerly incarcerated in hiring or promotion.[36] Although the "Ban the Box" movement is growing in the country, and a number of states have actually banned the boxes that ask about criminal history on applications, such actions reduce only the possibility that an employer will discriminate against the formerly incarcerated based on their former prisoner status; they do not make it unlawful for employers to actually discriminate against the formerly incarcerated on the basis of former prisoner status.[37] The only hope that formerly incarcerated plaintiffs have for combating discrimination in the private labor market comes from a nonbinding policy statement by the Equal

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UCLA L. REV. 1481, 1484 (2002) ("The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country.").

[32] *Cf.* David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1303 (1995) ("The Court has defined 'discriminatory purpose' to mean, in race cases, out-and-out racial animus—an affirmative desire to hurt blacks.").

[33] *See* GLENN C. LOURY, RACE, INCARCERATION AND AMERICAN VALUES 6 (2008) (comparing the United States' incarceration rate to that of other nations and detailing that the U.S. prison population is "vastly disproportionately black and brown").

[34] *Cf.* Sklansky, *supra* note 32, at 1304 (explaining that the race-based equal protection challenges to the crack–powder cocaine and essentially black–white disparity in sentencing repeatedly failed because "it is difficult if not impossible to prove, in part because hardly anyone admits to racism anymore, and in part because crack posed real dangers as well as symbolic ones, and much of what motivated Congress in 1986 appears to have been a well-founded fear of the drug's actual effects, on blacks as well as on whites").

[35] *See Statistics: Inmate Race,* FED. BUREAU OF PRISONS (Feb. 24, 2018), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/Y4B4-HVLQ] (indicating that Whites constitute 58.4% of all prisoners); *Quick Facts*, U.S. CENSUS BUREAU (July 1, 2016), https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/KPH5-WH44] (indicating that Whites constitute 76.9% of the United States population).

[36] *See* Mullings, *supra* note 22, at 272.

[37] *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [https://perma.cc/74J9-5EVV].

Employment Opportunity Commission (EEOC), which advises that an employer's use of criminal background checks can violate the law if it is used to intentionally discriminate against minorities or has a demonstrably adverse discriminatory impact on minorities in employment.[38] In summary, litigation alone is unlikely to eliminate or even reduce labor market discrimination against the formerly incarcerated, including its disparate racial effects.

Keeping in mind that litigation is inadequate[39] for fully addressing the problem of labor market discrimination against the formerly incarcerated, this Essay explores and analyzes potential legislative and contractual means for removing the expansive barriers to labor market participation by ex-offenders. First, as a means of addressing government-based discrimination, this Essay explores the potential effect that requiring racial impact statements—which mandate that legislators consider statistical analyses of the potential impact that legislation may have on racial and ethnic groups prior to passing any legislation—could have on employment discrimination against the formerly incarcerated. The Essay then moves on to consider a contractual solution that partially addresses discrimination by private firms, particularly those that rely on the labor of imprisoned individuals.

Part I of this Essay describes two different forms of labor market discrimination against the formerly incarcerated: (1) government-based discrimination in the form of laws that prohibit issuing professional licenses to the formerly incarcerated and (2) private discrimination in the form of corporate employers who use criminal records to deny or terminate employment. It also explores the negative effects on individuals and communities that arise from labor market discrimination against the formerly incarcerated. Part II examines one potential solution to government-based discrimination against the formerly incarcerated in work law: requiring all legislative bodies to produce, examine, and consider racial impact statements before enacting any legislation that will affect the formerly incarcerated. In so doing, Part II analyzes the influence of racial impact statements in the few states that have implemented them. Part III then discusses contractual stipulation as another innovative solution for addressing discrimination by private corporations against the formerly incarcerated. Part III begins by examining the phenomenon of prison labor to demonstrate the appropriateness of this Essay's proposed contractual solution. Recognizing that many individuals actually provide low-wage (in fact, nearly free) labor

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[38] *Id.*

[39] Reva Siegel makes this a central point in her Essay. *See* Reva Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—And Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

for private corporations while they are in prison, this Part argues that the state penal institutions that lease prisoners to such corporations should push for contractual agreements that stipulate that corporations relying on prison labor must revoke any and all policies that bar employing the formerly incarcerated upon their release. In addition, Part III explicates how contractual stipulations may also provide for affirmative hiring policies for the formerly incarcerated. Finally, this Essay concludes by highlighting how failing to address continued labor market discrimination against the formerly incarcerated could render the formerly incarcerated a permanent economic underclass and undermine the most fundamental democratic notions of fairness and equality.

I. LABOR MARKET DISCRIMINATION AGAINST THE FORMERLY INCARCERATED

The formerly incarcerated encounter numerous collateral consequences from their convictions, including loss of voting rights, restricted access to housing, and limited employment opportunities.[40] A collateral legal consequence of criminal conviction is defined as a legal "penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense [that] applies by operation of law whether or not the penalty, disability, or disadvantage is included in the judgment or sentence."[41] The collateral legal consequences of criminal convictions have also been referred to as "punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal

[40] *See* Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 2 (2014).

[41] *See* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 2(1), 5 (2010), http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf [https://perma.cc/GSJ7-KHJC]. In July of 2009, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved for the first time model legislation—the Uniform Collateral Consequences of Conviction Act (UCCCA)—designed to facilitate offender reentry throughout the United States. A revised Act was approved in July 2010 and published on January 6, 2011. Although such models of uniform legislation do not carry the force of law because the NCCUSL is an advisory organization only, they still hold meaningful authority. After all, uniform acts approved by the NCCUSL have been, and continue to be, a factor in shaping the development of law across the United States. The newly approved UCCCA has been enacted in North Carolina and has been introduced in Connecticut, Minnesota, New Mexico, New York, and Vermont. *See, e.g.*, S.B. 1063, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013); S.B. 292, 2017 Leg., Reg. Sess. (N.M. 2017); *see also* UNIF. LAW COMM'N, *Collateral Consequences of Conviction Act* (2010), http://uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act [https:perma.cc/54U2-Y7LH].

residency in the United States."[42] Although the problems associated with the collateral consequences of conviction[43] are legion and touch upon every aspect of life, this Part focuses solely on the collateral consequences of conviction on employment, including exclusion from the labor market as a result of intersectional discrimination on the basis of race and criminal status.[44] Specifically, this Part details the forms of discrimination faced by the formerly incarcerated in the public and private labor market, as well as the consequences of such discrimination for the formerly incarcerated, their families, and society in general. Section I.A. begins by describing state-sanctioned discrimination against the formerly incarcerated through restrictions or prohibitions in issuing professional licenses to former prisoners. Section I.B then details how private corporations discriminate against the formerly incarcerated. Finally, Section I.C explains why combating labor market discrimination against the formerly incarcerated is critical by detailing the harms of such discrimination, not only for formerly incarcerated individuals, but also for their families and greater society.

A. Government Discrimination: Professional Licensing Laws

As scholars like Devah Pager, Bruce Western, and Becky Pettit have long asserted, incarceration—or more accurately, the general stigma that attaches to incarceration—results in poor employment outcomes.[45] Indeed, Western and Pettit's analysis of data from the National Longitudinal Survey of Youth revealed that "serving time in prison was associated with a 40

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[42] *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion, in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[43] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 461 (2010). As one legal scholar has noted, "the problem of postconviction collateral consequences is rapidly becoming more severe for three interrelated reasons. First, collateral consequences have increased in number, scope, and severity since the 1980s. Second, record numbers of individuals are now exiting U.S. correctional facilities. Finally, collateral consequences hinder reentry and exacerbate the risks of recidivism; in fact, most individuals will be rearrested within three years of release." *Id.*

[44] *See* Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 13 (2010).

[45] *See id.* at 13–14 (detailing how incarceration limits work and economic opportunities). *Cf.* Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 222–23 (2011) (noting how the "stigma of a felony conviction follows prisoners long after release and imposes an enormous burden on minority populations"). *See generally* Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (discussing the legal implications of the author's audit study of employment prospects for formerly incarcerated men); Pager, *supra* note 25 (conducting an audit study by using male job applicants with criminal records and a control group and finding that those with criminal records were least likely to get callbacks and, further, that this effect was shaped by the race of the applicant, with black males with criminal records being the least likely to get a callback).

percent reduction in earnings and with reduced job tenure, reduced hourly wages, and higher unemployment."[46]

One of the reasons why the formerly incarcerated suffer reduced employment opportunities in the labor market is legislation—at both the state and local government level—that either outright prohibits issuing them professional licenses or provides the grounds for licensing boards to unfairly rely on stereotypes and biases against ex-offenders to deny the formerly incarcerated professional licenses. Even in the 1970s, before the phenomenon of mass incarceration emerged, there were "1,948 separate statutory provisions that affect[ed] the licensing of persons with an arrest or conviction record."[47]

Although a substantial number of states now have laws that prohibit licensing boards from denying the formerly incarcerated professional licenses based on past convictions that bear no relation to the work at issue,[48] many other states have maintained statutes that enable licensing boards to exclude the formerly incarcerated from work in certain fields simply because of a past felony conviction, even if that past conviction does not relate to the work at issue.[49] For instance, in South Dakota, nursing licensing boards may deny a license to any person with a felony conviction.[50] Indeed, as one scholar noted, "laws regulating public-employment hiring or licensing" bar ex-felons from obtaining licenses in at least 800 "discrete occupations."[51]

More so, courts have consistently upheld the application of such license-restricting statutes to former prisoners.[52] For example, in *Heller v. Ross*, a federal district court upheld a licensing board's decision to deny the plaintiff an insurance provider license based on a provision excluding all persons with felony convictions from obtaining such a license.[53] In so doing, the court reasoned that the challenged provision survived constitutional

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[46] Western & Pettit, *supra* note 44, at 13.

[47] May, *supra* note 21, at 193.

[48] *See, e.g.*, N.Y. EXEC. LAW § 296(15) (McKinney 2018); N.Y. CORRECT. LAW § 752 (McKinney 2018).

[49] May, *supra* note 21, at 193.

[50] *See* S.D. CODIFIED LAWS ANN. § 36-9-49(2) (2018).

[51] Segall, *supra* note 25, at 172.

[52] *See, e.g.*, Barsky v. Bd. of Regents, 347 U.S. 442 (1954) (holding that a doctor's state license to practice medicine could be suspended on the basis of a conviction); Heller v. Ross, 682 F. Supp. 2d 797 (E.D. Mich. 2010); Acosta v. N.Y.C. Dep't of Educ., 946 N.E.2d 731, 732–33 (N.Y. 2011) (holding that there are two significant exceptions to the state's prohibition that employers may not deny licenses "by reason of [an] individual's having been previously convicted of one or more criminal offenses"; specifically, the exceptions might apply if (1) "there is a direct relationship between one or more of the previous criminal offenses and the specific license" or if (2) granting the license "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public").

[53] 682 F. Supp. 2d at 807.

scrutiny because "it applies *only* to would-be resident producers within the insurance industry; that is, it 'only restricts felons from receiving one type of license,'" rather than restricting them from all licenses.[54]

In addition to blanket statutory exclusions from certain jobs, "moral character" provisions also provide a means for denying the formerly incarcerated certain professional licenses and excluding them from employment in those fields.[55] For instance, in *Wombles v. City of Mount Washington*, a federal district court upheld the denial of a business license to the plaintiff, noting that the challenged town ordinance "only restrict[ed] the granting of licenses based on . . . crimes of moral turpitude," even though the ordinance left the term "moral turpitude" undefined.[56]

B. Private Employers: Reliance on Criminal Records in Hiring and Firing

In addition to labor market discrimination through license-restricting statutes, research shows that private employers often use criminal records as a reason for denying the formerly incarcerated employment or for terminating them thereafter.[57] Indeed, one audit study by Devah Pager revealed that having a criminal record alone drastically reduced the chance of receiving a callback from an employer.[58] Specifically, the study showed that, regardless of the race of the offenders, criminal records decreased a formerly incarcerated applicant's likelihood of getting a callback by at least 50%.[59]

Pager's research further revealed that private labor market discrimination against the formerly incarcerated is much more severe for Blacks than it is for Whites.[60] For instance, Pager found that "even whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%)" when both groups were considered for callback interviews.[61] While the ratio of callbacks for white job applicants without criminal records to white job applicants with criminal records was two-to-one—with 34% of whites without a criminal record obtaining callback interviews, compared with 17% of those with criminal records—the

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[54] *Id.* at 805 (quoting Darks v. City of Cincinnati, 745 F.2d 1040, 1043 (6th Cir. 1984)).

[55] May, *supra* note 21, at 193.

[56] No. 3:15-CV-00856-TBR, 2017 WL 927238, at *6–7 (W.D. Ky. Mar. 8, 2017).

[57] *See, e.g.*, Pager, *supra* note 25 at 956–59.

[58] *Id.* at 959.

[59] *Id.* at 957–59.

[60] *Id.*

[61] *Id.* at 958.

comparable ratio for black job applicants was three-to-one, making the effect of a criminal record for Blacks 40% larger than it was for Whites.[62]

Additionally, it is important to note that the detrimental impact of a criminal record attaches *even when* a defendant has been acquitted of charges. In fact, *Cisco v. UPS* illustrates this reality. In *Cisco*, the Superior Court of Pennsylvania held that, absent any applicable statute, criminal charges against an employee were sufficient grounds for termination (and a refusal to rehire), even when the employee had ultimately been acquitted of the charges.[63] The court reasoned that the employer had not violated any public policy because the "employer was protecting its reputation by discharging" the individual.[64] The court explained:

> Thus, marriages crumble when one is adjudged guilty without ever being considered innocent and jobs are lost when the employer, for a legitimate business reason, cannot risk even someone under suspicion of having committed theft and trespass when the nature of its business is to enter onto the premises of others and to deliver parcels which belong to them.[65]

In essence, even as the court recognized the illogic and injustice of these discriminatory practices by a private employer, plus their substantial impact on individuals, families, and communities, it still chose to affirm an employer's right to engage in these damaging actions.

C. The Importance of Addressing the Effects of Public and Private Labor Market Discrimination Against the Formerly Incarcerated

Developing new approaches for addressing labor market discrimination against the formerly incarcerated is crucial because the consequences of this pervasive discrimination are severe, not only for formerly incarcerated individuals, but also for society more broadly. Recent studies examined the unemployment rate for formerly incarcerated adults and found that, of those interviewed one to three months after release, only 10% were employed full-time, and only 44% of those interviewed eight months after release said they had worked at least one week since their release.[66] Although 60% of all ex-prisoners are rearrested within three years, ex-prisoners who have stable employment are much less likely to recidivate and more likely to reintegrate

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[62] *Id.*

[63] 476 A.2d 1340, 1344 (1984).

[64] *Id.*

[65] *Id.*

[66] SHAWN BUSHWAY ET AL., BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 89 (2007) (examining the labor market for released prisoners in the post-industrial United States through employer surveys, interviews with former prisoners, and state data on prison employment programs and post-incarceration outcomes).

into society than those without steady employment or with no employment at all.[67] After all, steady jobs make it more likely that an ex-prisoner will be able to financially support himself or his family.[68]

Additionally, labor market discrimination against the formerly incarcerated negatively contributes to the national unemployment rate.[69] As Cherrie Bucknor and Alan Barber highlighted in a 2016 Center for Economic and Policy Research paper, formerly incarcerated men contribute 1.6 to 1.8 percentage points to the national male unemployment rate.[70] Additionally, overall employment rates are .09 to 1 percentage points lower as a result of the discrimination faced by the large population of former prisoners and people with felony convictions; this reduction in employment equals a reduction of nearly two million workers.[71] If one includes the currently incarcerated in these estimates, the impact is even greater, particularly for uneducated men of color.[72] For example, in 2008, data showed that approximately 60% of black men without a high school education were unemployed; however, when black male high school dropouts who were incarcerated were included, the percentage of unemployed men in that group increased to approximately 75%.[73] In other words, as Western and Pettit proclaimed, "by 2008 these men were more likely to be locked up than employed."[74]

Furthermore, as Western and Pettit highlighted in their National Longitudinal Survey of Youth analysis, the inequities that stem from incarceration are intergenerational. They not only negatively affect the incarcerated and the formerly incarcerated, they also harm their families,

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[67] *See* Pinard, *supra* note 43; *see also* Jennifer Lundquist, Devah Pager & Eiko Strader, *Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers*, 96 SOC. FORCES 1039, 1039 (2018).

[68] DIANA BRAZZELL ET AL., FROM THE CLASSROOM TO THE COMMUNITY: EXPLORING THE ROLE OF EDUCATION DURING INCARCERATION AND REENTRY 17 (July 31, 2009), http://www.urban.org/UploadedPDF/411963_classroom_community.pdf [https://perma.cc/33K9-TN79]; *see also* BUSHWAY ET AL., *supra* note 66.

[69] Note that the national unemployment rate shows the percentage of the labor force that is without a job. It defines unemployed people as those who are willing and able to work, and who have actively sought work within the past four weeks. As the rate increases, it is understood that more Americans are having trouble finding stable employment. *See Unemployment Rate*, INVESTOPEDIA, https://www.investopedia.com/terms/u/unemploymentrate.asp [https://perma.cc/C86X-2VAC].

[70] CHERRIE BUCKNOR & ALAN BARBER, THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 1 (2016), http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf [https://perma.cc/M4PZ-QKXD].

[71] *Id.*

[72] Western & Pettit, *supra* note 44, at 12.

[73] *Id.* at 12–13.

[74] *Id.* at 12.

including their partners, children, grandchildren, and other descendants.[75] Finally, labor market discrimination against the formerly incarcerated harms society's sense of fairness. No studies support the idea that formerly incarcerated individuals are poor workers or pose a greater security risk than workers who have not been convicted of a crime. Instead, as the work of sociologist Devah Pager shows, the formerly incarcerated pose no higher level of risk than their coworkers without criminal records.[76] In a compelling case study, Jennifer Lundquist, Devah Pager, and Eiko Strader focused on the largest employer in the United States: the U.S. military. In the absence of a mandatory draft, the military relies on recruiting individuals (including those with felonies) to serve.[77] The authors found that, even in the military, which mandates even stricter rules for conduct than civilian workplaces, workers with felony-level criminal records are no more likely to be discharged for the negative reasons employers assume (such as misconduct or poor work performance) than those with no criminal record.[78] Furthermore, they found that there was no evidence that individuals with serious criminal records showed elevated levels of early termination—a key finding, since data from the Bureau of Justice Statistics indicate that "the risk of recidivism falls steadily with time since arrest, with nearly 60 percent of recidivism occurring within the first year."[79] All in all, Lundquist et al.'s research seems to indicate that there is no greater risk in employing the formerly incarcerated than the never incarcerated, and that the risk is particularly lower for formerly incarcerated individuals who have been out of prison for some time.[80]

In all, reducing and ultimately eliminating labor market discrimination against the formerly incarcerated is crucial because unemployment makes successful reentry much more difficult for them. Studies have repeatedly demonstrated that employment serves to reduce recidivism among the

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[75] *Id.* at 8; *see also* London, *supra* note 45, at 222–23 ("High incarceration rates in some areas, particularly low-income African American neighborhoods, have considerable consequences for families and communities. High recidivism rates further disrupt families, resulting in a dangerous pattern of imprisonment. Harsh sentencing policies and lack of reentry support 'harm children and contribute to the intergenerational transmission of offending.' Children face a host of challenges stemming from parental imprisonment." (footnotes omitted)).

[76] Lundquist, Pager & Strader, *supra* note 67, at 1050.

[77] *Id.* at 1040.

[78] *Id.* at 1050.

[79] *Id.* at 1041.

[80] We understand that some might argue that the U.S. military, with its strict routines, protocols, and supervision, is too specialized an employer to be generalizable as a case study, and in that vein we urge private employers to allow the study of their formerly incarcerated employees for the benefit of societal edification.

formerly incarcerated.[81] Addressing discrimination must also include addressing wages because levels of compensation also influence reentry outcomes, as those making higher wages are less likely to recidivate.[82]

The next two Parts of this Essay offer a couple of suggestions for combating both public and private market discrimination against the formerly incarcerated. Part II of this Essay proposes a means by which legislatures can help to reduce state-sanctioned discrimination against the formerly incarcerated in the workplace, and Part III turns to a potential contractual remedy for some of the discrimination that the formerly incarcerated face in the private labor market.

II. GOVERNMENT DISCRIMINATION: TURNING TO LEGISLATURES INSTEAD OF LITIGATION

As noted earlier, litigation, particularly equal protection litigation, is unlikely to be an effective means for combating state-sanctioned labor market discrimination against the formerly incarcerated through license-restricting statutes for a variety of reasons. Those reasons include the low level of scrutiny—rational basis review—that would be applied to claims concerning a prisoner/non-prisoner classification and *McCleskey*'s requirement that plaintiffs in race-based equal protection lawsuits prove a legislature's intent to pass the challenged statute "'because of,' not merely 'in spite of,' its adverse effects upon" a racial group.[83] In light of the limited impact that litigation is likely to have on reducing state-sanctioned discrimination against the formerly incarcerated in the workplace, this Part proposes a means by which state legislatures can help to lessen the impact of this discrimination—in this instance, the discrimination that occurs through state statutes that prohibit licensing entities from granting certain professional licenses to the formerly incarcerated. Specifically, this Part of the Essay proposes that all legislative bodies should adopt a requirement for

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[81] *See* MILES HARER, FED. BUREAU OF PRISONS, OFFICE OF RESEARCH AND EVALUATION, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987, at 4–5 (1994), https://www.bop.gov/resources/research_projects/published_reports/recidivism/oreprrecid87.pdf [https://perma.cc/A55D-FVH8]; Robert J. Sampson & John H. Laub, *A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency*, *in* ADVANCES IN CRIMINOLOGICAL THEORY 21 (Terence P. Thornberry ed., 1997), https://scholar.harvard.edu/sampson/files/1997_act_laub.pdf [https://perma.cc/JEU3-CZGC]; Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529 (2000), http://users.soc.umn.edu/~uggen/Uggen_asr_00.pdf [https://perma.cc/37CF-LZNE].

[82] Christy Visher et al., *Employment After Prison: A Longitudinal Study of Releasees in Three States*, URBAN INST. JUST. POL'Y CTR. (Oct. 1, 2008), https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.pdf [https://perma.cc/T9PG-GGPB].

[83] *See supra* notes 29–39 and accompanying text.

"racial impact statements," which force legislators to engage in a statistical analysis about the disproportionate impact that any proposed legislation may have on racial and ethnic minorities before they pass the proposed legislation.[84]

The call for racial impact statements arose from a recognition of the devastating impact that the Anti-Drug Abuse Act of 1986, which provided mandatory minimum sentences for drug crimes, and other "War on Drugs" policies were having on communities of color, especially the black community.[85] That recognition involved not only an acknowledgment of mass incarceration as a pernicious social problem in the United States,[86] but also an understanding of mass incarceration as a social issue that has uniquely plagued black and brown communities.[87]

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[84] *See generally* London, *supra* note 45, at 212 (defining "racial impact statement [as] a predictive report summarizing the effects that legislation may have on minority groups").

[85] *See id.* at 211 (discussing how the Act's proposed sentences for crack-cocaine crimes had a damaging effect on black communities); *see also* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES 1 (1993) (explaining that sentencing during the "War on Drugs" was disproportionately slanted toward longer sentences for Blacks than Whites, even for similar crimes); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 20 (2008) (arguing that disproportionate minority confinement results from several factors, including sentencing policies that have a disparate impact on racial minorities).

[86] *See* Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009) ("United States imprisonment rates are now almost five times higher than the historical norm prevailing throughout most of the twentieth century, and they are three to five times higher than in other Western democracies."); *see also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1 ("The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners."). Recent studies show that nearly one in three Americans have been arrested by the time they are twenty-three years old and that, on any given day, one in every 100 adults is imprisoned. *See* Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT'L INST. JUST. (2012), http://www.nij.gov/journals/270/criminal-records.htm [https://perma.cc/V2LV-9SB7].

[87] *See* Jessica Erickson, Comment, *Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System*, 89 WASH. L. REV. 1425, 1425 (2014) (asserting that "African Americans and Latinos account for fifty-eight percent of the United States prison population—nearly twice their accumulated representation in the general population of thirty percent"); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010) ("[M]ass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 36–37 (2009) (examining the racially disparate effects of mass incarceration); Jonathan Simon, *A Radical Need for Criminology*, 40 SOC. JUST. 9, 9 (2014) (discussing "the damage done to future generations from incarcerating an unprecedented number of Americans, especially from communities already disadvantaged by economic marginalization and legacies of racial discrimination"); MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004) (explaining that the African-American population has been disproportionately harmed by the War on Drugs because "nearly one-tenth

As a result, racial impact statement requirements were designed to force lawmakers to consider the inequalities and complexities related to the overrepresentation of racial and ethnic minorities in U.S. prisons when they adopted or amended any legislation.[88] In this way, legislators would be pushed to consider the negative consequences that their proposed statutes and policies might have on people of color within the criminal justice system and in relation to the criminal justice system and, more so, would be pushed to "consider alternative approaches that [could avoid] exacerbat[ing] existing racial disparities."[89] The State of Minnesota's own racial impact statement requirement makes this purpose very clear. That statement provides in relevant part:

> [The Minnesota Sentencing Guidelines Commission] seeks to enrich the discussion on how minorities in Minnesota are affected by changes in sentencing policy. *If a significant racial disparity can be predicted before a bill is passed, it may be possible to consider alternatives that enhance public safety*

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of black males in their twenties already live in prison, and almost one out of three black males currently remains under criminal justice control"); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1279 (2004) (detailing the pernicious effects of the War on Drugs on African-American communities); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006) (documenting that mass incarceration has disrupted the administration of the criminal justice system); Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex [https://perma.cc/VF6P-WH5A] (arguing that mass incarceration, because of its disproportionate impact on black and Latino males in the United States, has a "strategic dependence on racist structures and ideologies"); *cf.* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 351–52 (2012) (asserting that criminal justice debt can serve as an "insurmountable obstacle" to the resumption of voting rights and broader participation in society); Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy,* 3 U. ST. THOMAS L.J. 462, 494 (2006) (arguing that poor women of color and their children are adversely affected by current drug sentencing policies because such policies are designed to relegate women of color and their children to what has been referred to as the perpetual "'pink hole' [that] engulfs the most vulnerable members of society").

[88] *See* Erickson, *supra* note 87, at 1426. The American Law Institute was among the first entities to propose the use of racial impact statements to address racial disparities in the criminal justice system. *See* London, *supra* note 45, at 31 (referencing MODEL PENAL CODE: SENTENCING § 1.02(2)(e) (Prelim. Draft No. 1, 2002)). In so doing, they drafted a Model Penal Code (MPC) provision that required sentencing commissions to generate "Demographic Impact Statements" that offered predictions of what the gender, racial, and ethnic patterns in sentencing would be under the legislation in question. MODEL PENAL CODE: SENTENCING § 6A.07 (2007). The revised MPC envisions a "correctional-population forecasting model" applicable to existing legislation as well as to newly introduced bills and amendments. *Id.*

[89] *See* London, *supra* note 45, at 227; *see also* Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 691–92 (2009). The projections in racial impact statements are designed to engage lawmakers in discussions concerning the potential impact of proposed legislation, thereby ensuring legislative accountability. *Id.*

> *without creating additional disparity in Minnesota's criminal justice system*. . . . [T]he agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.[90]

At the very least, racial impact statement requirements were expected to push legislators to justify any enacted laws or policies that worked to create, maintain, or increase racial and ethnic disparities by forcing the legislators to explain why they had chosen to pass the statutes despite their projected racially disparate effects. In this sense, racial impact statement requirements have the potential to provide a means by which plaintiffs can prove that any statute challenged in equal protection litigation was enacted "in part 'because of,' not merely 'in spite of,' its adverse effects upon" a racial group.[91]

Several states have passed legislation that requires the consideration of racial impact statements in their legislative processes.[92] Indeed, Connecticut, Iowa, Minnesota, New Jersey, and Oregon have each passed racial impact legislation, and many other states, including Arkansas, Kentucky, Maryland, Texas, and Wisconsin, have considered passing racial impact statement legislation.[93] For instance, since 2008, Iowa has mandated, through the Minority Impact Statement Bill, that its state legislative services agency not only prepare a correctional impact statement for proposed policy changes related to the criminal justice system, but also conduct a racial impact analysis that examines the impact of sentencing or parole changes on racial and ethnic minorities.[94] Iowa enacted these requirements in response to a

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[90] *See* London, *supra* note 45, at 228 (emphasis added) (citing MINN. SENTENCING GUIDELINES COMM'N, RACIAL IMPACT FOR H.F. 3175: ROBBERY – INCREASED PENALTIES (Feb. 29, 2008)).

[91] McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

[92] *See* Erickson, *supra* note 87, at 1426–27; *see also* Nicole D. Porter, *Racial Impact Statements*, SENT'G PROJECT (2014), https://www.sentencingproject.org/publications/racial-impact-statements [https://perma.cc/SV6M-3E24] (stating that Iowa, Connecticut, Oregon, and Minnesota all adopted racial impact statement preparation and consideration policies as of 2014, and that other states have started to introduce racial impact statement legislation).

[93] *See* Erickson, *supra* note 87, at 1426–27 (noting that Iowa, Oregon, and Connecticut have passed racial impact statement legislation and that "[s]even other states have attempted but failed to pass" such legislation); *see also* Porter, *supra* note 92 (stating that Minnesota adopted a racial impact statement requirement); Corinne Ramey, *State to Assess Racial Impact in Crime-Law Changes*, WALL ST. J., Jan. 17, 2018, at A10B (indicating that New Jersey now requires "an analysis of [criminal justice laws'] impact on racial and ethnic minorities, making the state among only a handful in the nation to do so").

[94] *See* IOWA IMPACT OF LEGISLATION AND STATE GRANTS ON MINORITIES — STATEMENTS, CH. 1095 H.F. 2393, § 2.56 (2008). In so doing, the Legislative Services Agency "may request the cooperation of any state department or agency or political subdivision in preparing [a statement]." IOWA CODE § 2.56 (2018).

study indicating that Iowa's prisons had the highest racial disparities in the nation with almost fourteen black prisoners for every one white prisoner.[95] Indeed, Chet Culver, then Iowa's governor, stated that the requirement would allow members of the General Assembly and executive branch to consider legislation with a "better understanding of the potential effects, both positive and negative, on Iowa's minority communities."[96] Since then, Iowa's Minority Impact Statement Bill has resulted in ten minority impact statements; these statements have shown great promise for setting a context in which racial disparities can be reduced in Iowa's criminal justice system.[97] For example, in one instance, Iowa lawmakers declined passing legislation after a racial impact statement revealed that the proposed statute "would increase penalties for cocaine offenses after a racial-impact statement showed the policy would disproportionately affect blacks."[98]

Much like Iowa, Oregon adopted a racial impact statement requirement in 2013 because of racial disproportionality in its prison system and its child welfare system.[99] Though not as stark as the disparities in Iowa, statistics in Oregon also exposed an overrepresentation of Blacks in its criminal justice system, with Blacks making up only 2% of the state population but 9% of the Oregon prison population.[100] Similarly, a letter from Democratic State Representative Joseph Gallegos, the sponsor of Oregon's racial impact statement bill, detailed racial disparities within Oregon's child welfare system, with both black and American Indian children each making up nearly 9% of the children in the child welfare system despite each comprising less than 2% of all children in Oregon.[101] Oregon's racial impact statement legislation requires the state sentencing commission or a legislative analyst to produce a statistical report if one member of each party requests such a

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[95] *See* Farai Chideya, *Iowa Considering Racial Impact in Sentencing Laws*, NPR (May 1, 2008, 9:00 AM), https://www.npr.org/templates/story/story.php?storyId=90102924 [https://perma.cc/3LZ4-EQZX] (reporting that while 2% of Iowa's population is black, 24% of the state's prison population is black).

[96] *Id.*

[97] *See* Ramey, *supra* note 93. In 2009 alone, Iowa issued ten minority impact statements during its state legislative session. London, *supra* note 45, at 229 (citing an e-mail from Beth Lenstra, Senior Analyst, Iowa Legislative Services Agency, to the author in October 2009).

[98] Ramey, *supra* note 93.

[99] Maggie Clark, *Should More States Require Racial Impact Statements for New Laws?*, PEW CHARITABLE TR. (July 30, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/07/30/should-more-states-require-racial-impact-statements-for-new-laws [https://perma.cc/EE3M-9LGR].

[100] *Id.*

[101] *Id.* (providing a link to the letter, https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/22286 [https://perma.cc/P6DL-4UUA]).

report.[102] It also requires the report to "show how [the] proposed law could have consequences for sentencing, probation or parole policies affecting minorities disproportionately . . . ."[103] Although Oregon's bill, unlike Iowa's, is relatively new and has not been utilized as much, lawmakers like Representative Gallegos believe that it will push legislators to use state resources more efficiently and effectively.[104]

Because Blacks and Latinos are overrepresented in the prison population in essentially every state in the United States, and because racial impact statement requirements in each state would require legislators to explicitly confront and interrogate the racial implications of professional license-restricting statutes before they were either created or amended, racial impact statements, which are "modeled on fiscal and environmental impact statements,"[105] have a very strong potential for helping to reduce labor market discrimination against the formerly incarcerated across the nation. They have the potential for doing so because they help to strip legislators of any claims of ignorance or lack of knowledge about the potentially dangerous outcomes of any enacted legislation on communities of color. More importantly, racial impact statement requirements may make social science knowledge of racially disparate effects—knowledge that the *McCleskey* Court found insufficient to prove intent to discriminate—a potential consideration for legislative bodies and, ultimately, courts in any future equal protection litigation.

III. A CONTRACTUAL SOLUTION TO PRIVATE EMPLOYER DISCRIMINATION AGAINST THE FORMERLY INCARCERATED

Although racial impact statement requirements have the potential for effectively combating the harmful effects of professional license-restricting statutes on the formerly incarcerated, additional action is needed to address private labor market discrimination against the formerly incarcerated. The use of low-paid prison labor by private corporations remains a widespread practice that calls into question the policies of those same corporations that prohibit employing the formerly incarcerated. In this Part, the Essay traces the rise of prison labor as a relic of slavery, and makes the argument that, to finally jettison prison labor practices as a particular remnant of racial slavery in the United States, prison labor cannot exist alongside private firm policies that compound the exclusion of the formerly incarcerated from the labor market.

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[102] Clark, *supra* note 99.

[103] *Id.*

[104] *Id.*

[105] London, *supra* note 45, at 227.

While the Thirteenth Amendment of the U.S. Constitution has been lauded by history books and legal scholars for abolishing slavery, the Amendment has also been read to uphold labor practices that in reality could amount to slavery for a certain segment of the American population—that is, those convicted of a crime.[106] The Thirteenth Amendment reads: "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."[107] Consider the case of *Morales v. Schmidt*, where the Seventh Circuit noted that "[t]he Thirteenth Amendment, if read literally, suggests that the States may treat their prisoners as slaves . . . ."[108] Indeed, this literal interpretation is evident in an earlier case, *Ruffin v. Commonwealth*, where the Virginia Supreme Court observed that a prisoner,

> during his term of service in the penitentiary, [] is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being *the slave* of the State.[109]

Some legal scholars have challenged this interpretation of the Thirteenth Amendment as denying any labor protection for *all* prisoners.[110] As Raja Raghunath explained,

> [r]eading the Thirteenth Amendment in a manner that is consistent with the weight of constitutional jurisprudence under the Eighth Amendment and the Fifth Amendment reveals that only those inmates who are forced to work because they have been so sentenced should be exempted from the general ban on involuntary servitude.[111]

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[106] Bailey v. Alabama, 219 U.S. 219, 241–42 (1911).

[107] U.S. CONST. amend. XIII, § 1 (emphasis added).

[108] 489 F.2d 1335, 1338 (7th Cir. 1973), *on reh'g*, 494 F.2d 85 (7th Cir. 1974).

[109] 62 Va. 790, 796 (1871) (emphasis added).

[110] *See, e.g.*, Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 872 (2012) (arguing that the Thirteenth Amendment allows for forced inmate labor only when the labor approximates the conditions of involuntary servitude, rather than slavery); Mary Rose Whitehouse, *Modern Prison Labor: A Reemergence of Convict Leasing Under the Guise of Rehabilitation and Private Enterprises,* 18 LOY. J. PUB. INT. L. 89, 106–07 (2017) (explaining four primary factors courts use to determine the economic reality of prison labor and thus prisoners' eligibility for labor protections: "(1) [w]hether the alleged employer ha[s] the power to hire and fire the employees; (2) [w]hether the alleged employer supervised and controlled employee work schedules or conditions of employment; (3) [w]hether the alleged employer determined the rate and method of payment; and (4) [w]hether the alleged employer maintained employment records").

[111] Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 398 (2009) (emphasis in original).

The legal rationale behind this assertion is that constitutional protections against unfair labor practices are "denied to prisoners *compelled to work* [as part of their penal punishment] because the beneficial value of the prisoners' labor was owned by the prison; i.e., they were enslaved by the state."[112] As Raghunath further explicated, even if a "plain reading of the Thirteenth Amendment would allow for the imposition of either involuntary servitude *or* slavery as punishment for crime," societal changes may indicate a different direction; given changing attitudes towards punishment and the fact that "we no longer view the infliction of pain—or rather, too *much* pain—as an acceptable form of punishment . . . presumably sentencing convicted criminals to slave-like conditions (or granting prison wardens the discretion to treat them as such) is not an acceptable policy option."[113]

Although there might seem to be a general consensus against the imposition of slave-like labor conditions as a form of punishment in theory, in practice, low-paid or unpaid prison labor has been a longstanding feature of prison life in the United States. The extraction of the labor of prisoners in the United States can be traced back to the first prisons built by European colonialists in the 1600s.[114] The first carceral systems in colonial America depended on prison labor for financial support.[115] The pecuniary costs of maintaining the penal system were directly transferred to the prisoners.[116] The prison administration accomplished this by renting out the labor of prisoners to private enterprises or by compelling inmates to produce goods for sale.[117] In this way, inmates were obliged "to pay for the expenses of staying in the prison, including all transactions between entry and discharge."[118] While many would argue that the original goal of prison labor in the United States was to promote an ascetic ideal of self-abnegation and

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[112] *Id.* at 399 (emphasis added) (footnote omitted).

[113] *Id.* at 405 (emphasis in original) (footnote omitted).

[114] *See* DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 19–26 (1995) (chronicling the development of American prison labor to sixteenth-century European "workhouses" in which "[l]abor was a major component of the confinement"); Timothy J. Flanagan, *Prison Labor and Industry*, *in* THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY 135, 139 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989) ("[W]ork has been a feature of American corrections here since institutions have been used as a mechanism for correcting offenders." (emphasis omitted)); Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 345–70 (1998) (discussing the development of modern prison labor starting from early years of the United States).

[115] Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 37, 50 (1921).

[116] SHICHOR, *supra* note 114, at 29.

[117] *Id.* at 28–30.

[118] Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2214 (1998).

discipline,[119] prison labor has taken on a more profit-driven capitalist tenor since the nineteenth century.[120] In what has been described as "the golden age" of the American penitentiary[121] following the American Civil War, the rise of public prisons run by private contractors foretold the expansion of prison labor.[122]

The Industrial Revolution in the nineteenth century was a major factor[123] that drove the expansion of prison labor under the "lease" system, [124] as states started to "lease" inmates to private companies as cheap labor.[125] Perhaps unsurprisingly, the lease system was most prevalent in the Southern states after the Civil War and the end of slavery.[126] Pursuant to the lease system, inmates worked for little or no pay on plantations, railroads, mines, and other business ventures that required inexpensive, unskilled labor,[127] with the goal of producing the maximum financial profit for the entrepreneurs who leased the labor.[128]

Prison labor as an industry declined in the early twentieth century due to various factors. First, it faced criticism regarding the subjection of leased

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[119] *See* SHICHOR, *supra* note 114, at 30 (arguing that prison work in early America was introduced primarily "for purposes of repentance and institutional discipline to control inmates"); Edward Dauber, HARVARD CTR. FOR CRIMINAL JUSTICE, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. CRIMINOLOGY & POL. SCI. 200, 221–22 (1972) (discussing the perception of prisoners' rights and the idea that judicial intervention in the prison discipline system was not thought necessary until the early 1970s); Vernon Fox, *Analysis of Prison Disciplinary Problems*, 49 J. CRIM. L., CRIMINOLOGY, & POL. SCI. 321, 322 (1958) (describing the primary techniques of the system of prison discipline).

[120] Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 451 (2005) ("[T]he history of nineteenth-century American prisons is a history of contracting between the state and private interests for the use of convict labor in efforts on both sides to achieve financial gain."); *see also* PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS (1991) (providing an in-depth analysis of the aftermath of the American Revolution and the subsequent expansion of the American penal system during the nineteenth century).

[121] *See* Flanagan, *supra* note 114, at 139–41.

[122] *Id.*

[123] *See* SHICHOR, *supra* note 114, at 26–28 (1995) ("The development of the penitentiary . . . was integrally related to rapid industrialization . . . . Because the modern prison was developed during a period of rapid industrial development in the Western world, it fit into the system of mass production.").

[124] Dolovich, *supra* note 120, at 450–51.

[125] *Id.*

[126] *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 185–222 (1984) (detailing the use of the lease system in Southern states during the Reconstruction era).

[127] MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN 18 (1989) ("Plantation owners, railway companies and mining corporations, all queued up to lease prisoners and work them more or less as slaves . . . .").

[128] *See* AYERS, *supra* note 126, at 193 ("The lease system was tailor-made for capitalists concerned only with making money fast.").

convicts to abusive conditions.[129] Second, prison labor faced attacks from labor unions because it had dampened the wages of all workers.[130] Yet, prison labor is once again flourishing today because such labor is viewed as the solution to the problems linked to the cost of incarceration.[131] One of the most visible proponents of prison labor, Chief Justice Warren Burger argued:

> Most prison inmates, by definition, are maladjusted people . . . . They do not share the work ethic concepts that made this country great. They were not taught at home—or in the schools—the moral values that lead people to have respect and concern for the rights of others. Place that person in a factory, . . . pay that person reasonable compensation, and charge something for "room and board and keep," and we will have a better chance to release from prison a person able to secure gainful employment. Added to that it will be a person whose self-esteem will at least have been improved so there is a better chance that he or she can live a normal life.[132]

The use of prison labor, while not universally embraced, still enjoys considerable support today,[133] particularly since it is seen as an efficient method for inmates to learn job skills and gain some income, all while contributing to their own upkeep.[134] Approximately 50% of the inmates housed in state or federal prisons work in some type of job assignment while

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[129] Dolovich, *supra* note 120, at 452.

[130] *See* RYAN & WARD, *supra* note 127, at 19 (arguing "the opposition of organized labour [in the early twentieth century] turned out to be decisive" for reducing use of prison labor in the United States); Garvey, *supra* note 114, at 358–370 (identifying opposition from labor organizations as cause of decline in prison labor during this period); *see also* Duitsman, *supra* note 118, at 2215–16 (attributing decline to human rights critiques, pressure from labor movement, and "desire to use prisons for reformatory purposes").

[131] *See* NAT'L CTR. FOR POLICY ANALYSIS, BRIEF ANALYSIS NO. 245, THE ECONOMIC IMPACT OF PRISON LABOR 1–2 (1997), www.ncpa.org/pdfs/ba245.pdf [https://perma.cc/3MRJ-F4ZQ] (arguing increased use of prison labor could reduce taxes, help prevent recidivism, and improve the economy); George D. Bronson et al., *Barriers to Entry of Private-Sector Industry into a Prison Environment*, *in* PRIVATIZING THE UNITED STATES JUSTICE SYSTEM 325, 325–26 (Gary W. Bowman et al. eds., 1992) ("[T]he inmates receive positive gain by . . . [use of inmate labor]. They are able to learn work skills [and] earn additional income . . . ."); *see also* Kathleen E. Maguire et al., *Prison Labor and Recidivism*, 4 J. QUANTITATIVE CRIMINOLOGY 3, 3–4, 13–14 (1988) (highlighting "economic appeal" of prison labor and its usefulness in distracting prisoners from "idleness," but demonstrating through quantitative methods that prison labor does not significantly reduce instances of recidivism in convicts).

[132] Warren E. Burger, *More Warehouses, or Factories with Fences?*, 8 N.E. J. ON PRISON L. 111, 116 (1982).

[133] Whitehouse, *supra* note 108, at 89.

[134] George D. Bronson et al., *supra* note 129, at 326 (arguing that there is a rehabilitative benefit when prisoners are compelled to work to pay for their room and board).

incarcerated.[135] As noted by Noah Zatz, "prison industries generate $2 billion in revenue annually."[136] Momentarily setting aside the legal and ethical implications of prison labor,[137] the fact that corporations successfully benefit from the labor of imprisoned individuals raises the question of whether or not those same corporations should then be allowed to dismiss formerly incarcerated job applicants. For illustrative purposes, Table 1[138] below lists some prominent American-based companies with large employee bases that use prison labor *and* that also generally do not hire formerly incarcerated individuals.

[135] *See* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868 n.30 (2008) (citing employment statistics for inmates).

[136] *See id.* at 868–69 (citing CRIMINAL JUSTICE INST., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118, 124–25 (Camille Graham Camp ed., 2002)).

[137] One of the authors, Ifeoma Ajunwa, discusses the ethics of prison labor practices and the corporate social responsibility of private firms in another paper.

[138] This is not at all an exhaustive list and is being offered only for illustrative purposes.

TABLE 1: COMPANIES THAT USE PRISON LABOR AND FAIL TO EMPLOY THE FORMERLY INCARCERATED[139]

Company Name	Uses Prison Labor?	Employs Formerly Incarcerated?
McDonald's	Yes	Franchises—some will, others will not. No blanket bans.
Walmart	Yes	No, in most cases. The company reports that it does hire felons, but has extremely strict criminal background checks.
Victoria's Secret	Yes	Depends on the conviction.
AT&T	Yes	Requires that your conviction is at least 7 years old. Still are not considered a "felon friendly" employer.
Wendy's	Yes	Franchises—some will, others will not.
K-Mart	Yes	Depends on the conviction.
John Deere	Yes	No, in most cases.
Bank of America	Yes	No, in most cases.
State Farm	Yes	No, in most cases.

If prison labor is deemed an appropriate vehicle to enable prisoners to gain job skills, why then should companies, who ostensibly have benefited from those same job skills while a formerly incarcerated individual was behind bars, also have the power to reject the same individual when she presents herself in the private labor market? If prison labor is to serve any form of rehabilitative goal, then it stands to reason that formerly incarcerated individuals who have taken it upon themselves (or been compelled) to gain skills valuable in the labor market should have the equal opportunity to exercise those skills.

[139] Most of the data we could find on employment of the formerly incarcerated came from online search forums because policies against hiring the formerly incarcerated are not always publicized on company websites. The data for the companies listed can be found either at https://helpforfelons.org/companies-that-hire-felons [https://perma.cc/HN7V-A26T] or http://www.jobsforfelonshub.com/jobs-for-felons [https://perma.cc/RU32-NUAU].

In fact, one potential solution to private labor market discrimination against the formerly incarcerated might be recognizing the low-paid work that many of the incarcerated do on behalf of corporations. The state penal institutions that lease prisoners to such corporations could push for a contractual agreement which stipulates that corporations will abrogate policies that bar the formerly incarcerated from employment and that seek to inquire about criminal records, as those policies could have a chilling effect on formerly incarcerated job applicants.

This genre of contractual obligations finds legal precedent in the obligations that the government enforces on its private contractors, who must abide by higher standards of workplace diversity and ethics.[140] When it comes to removing the barriers to employment for the formerly incarcerated, some focus must be on dissuading private firms from discriminating against the formerly incarcerated. Note, for example, that the EEOC advised in a recent policy statement that using criminal background checks for employment purposes would violate the law if the checks are used to intentionally discriminate against minorities or if they have a demonstrably adverse discriminatory impact on minorities.[141] Consequently, employers are advised against using blanket criminal record checks in their hiring decisions; the checks should instead relate to "business necessity."[142] This focus on preventing private firms from discriminating against the formerly incarcerated has led to "Ban the Box" (BTB) movements in several states and cities, and as a result of such efforts, many cities have adopted policies that make it illegal for employers to include questions soliciting information about an applicant's criminal record at the initial application stage.[143]

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[140] Employers are required to meet certain affirmative action obligations if they do business with the federal government and are covered by the federal Rehabilitation Act of 1973 § 503, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Executive Order 11246, or the Jobs for Veterans Act. The threshold amounts for these laws typically begin at the $10,000-contract level, and compliance requirements increase as the amount of the contract and the size of the contractor's workforce increase. An affirmative action program is a management tool designed to ensure equal opportunity in recruiting, hiring, training, promoting, and compensating individuals. Affirmative action goes beyond equal employment opportunity measures, requiring employers to eliminate discriminatory conditions, whether inadvertent or intentional, and to treat all employees equally in the workplace. *See Government Contractors: What You Need to Know*, BLR https://www.blr.com/HR-Employment/Discrimination/Government-Contractors [https://perma.cc/9SKJ-FF3W].

[141] *See supra* note 37 and accompanying text.

[142] *Id*.

[143] *See* BAN THE BOX CAMPAIGN, http://bantheboxcampaign.org [https://perma.cc/C5TB-RRR3]; Pamela Q. Devata et al., *Trends in the "Ban the Box" Movement: Recent Developments in City Ordinances*, LABOR AND EMP'T LAW COUNSEL (2016) https://www.laborandemploymentlawcounsel.com/2016/05/trends-in-the-ban-the-box-movement-recent-developments-in-city-ordinances [https://perma.cc/A2G8-ME2V] (indicating that twenty-six

However, the efficacy of BTB policies is yet unproven, and some preliminary studies may even indicate that they have undesirable effects.[144] For example, a Yale Law School study on the BTB movement and its effects on employment discrimination found that employers who ask about criminal records are 63% more likely to call back an applicant if he has no criminal record.[145] Additionally, the study showed that BTB policies—where employers refrain from asking about criminal records at least until a conditional offer of employment is made—encouraged statistical discrimination on the basis of race.[146] Specifically, the study showed that, before BTB, white job applicants to employers who asked about criminal records "received 7% more callbacks than similar black applicants, but after BTB [that] gap grew to 45%."[147] These potential effects of the BTB policy point to another contractual solution for remedying private firm discrimination against the formerly incarcerated. Contracts between state or federal prisons and private corporations could mirror the diversity initiative imposed on federal contractors. In this way, private firms that make use of prison labor could be contractually required to employ at least some percentage of formerly incarcerated individuals.[148]

As discussed above, employment is crucial to reentry, regardless of whether or not the formerly incarcerated are seen as a special class. Thus, we must still consider carefully whether excluding the formerly incarcerated from gainful employment—without any scientific evidence supporting the benefits of such exclusions—serves the larger societal goal of reintegration after incarceration.

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cities and counties have adopted some form of BTB legislation as of 2016, including New York City, Philadelphia, San Francisco and Austin, Texas).

144 *See, e.g.*, Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, NAT'L BUREAU OF ECON. RESEARCH (July 2016) http://www.nber.org/papers/w22469#fromrss [https://perma.cc/HH6Y-BK9R]; Christina Stacy & Mychal Cohen, *Ban the Box and Racial Discrimination*, URBAN INST. (Feb. 2017) https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf [https://perma.cc/7Q3L-VYUZ].

145 Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 4 (2016), https://law.yale.edu/system/files/area/workshop/leo/leo16_starr.pdf [https://perma.cc/SPN4-D74C].

146 *Id.*

147 *Id.*

148 *See supra* note 140.

CONCLUSION

In Greek Mythology, Prometheus disobeys Zeus and steals fire for humans.[149] As punishment, Prometheus is chained to a rock in the Caucasus Mountains where, eternally, his liver is eaten daily by an eagle only to regenerate and be eaten again.[150] To our modern sensibilities, this type of perpetual punishment (in fiction) is exceedingly harsh. Yet, in the real world, our society has routinely condoned the collateral consequences of conviction, including labor market discrimination against the formerly incarcerated, which effectively punish, in perpetuity, the formerly incarcerated for the crimes that they have already paid a debt for. In so doing, our society has only undermined efforts to reintegrate the formerly incarcerated. Furthermore, given the significant numbers of racial minorities who have been incarcerated (some wrongfully), continued punishment in the form of collateral consequences seems not only particularly punitive, but also racially discriminatory. Indeed, the rejection of the formerly incarcerated by corporations that rely on prison labor appears hypocritical and without rational basis. Most of all, we should question whether a lack of equal opportunity for the formerly incarcerated on the labor market means their permanent designation as an economic underclass and whether this ultimately betrays the principles of fairness and equality foundational to American democracy.

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[149] J.M. Hunt, *The Creation of Man by Prometheus*, HELLENIC SOC'Y PROMETHEAS, INC., http://www.prometheas.org/mythology.html [https://perma.cc/HF62-97UE].

[150] *Aetos Kaukasios*, THEOI PROJECT (2000), http://www.theoi.com/Ther/AetosKaukasios.html [https://perma.cc/54FB-LWSL].