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## Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box

Katherine English  
Indiana University, katengli@iu.edu

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# Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box

KATHERINE ENGLISH\*

Each year, roughly 700,000 prisoners are released from their six-by-eight-foot cells and back into society.<sup>1</sup> Sadly, though, many of these ex-prisoners are not truly free. Upon returning to society, they often encounter several challenges that prevent them from resuming a normal, reintegrated lifestyle.<sup>2</sup> For many, the difficulties associated with reentry prove to be too much, and within a short three years of their release, two-thirds of ex-offenders are rearrested, reconvicted, and thrown back into the familiar six-by-eight-foot cell.<sup>3</sup> Recidivism might appear to be entirely the ex-offenders' fault, but ex-offenders are not solely responsible for these recidivism rates or the solution to this problem. Society must also understand and confront the challenges of the reentry process to "better serve prisoners, their families, their communities, and society at large."<sup>4</sup>

The topic of ex-offender reentry is part of a much broader discussion of criminal justice reform. Many people are dedicated to reforming the criminal justice system as a whole. One example of criminal justice reform is the movement towards reducing mass incarceration and shifting away from the retributive focus of incarceration.<sup>5</sup> There are also efforts to reduce the length of criminal sentences, as the recent reduction in sentences for some drug offenses demonstrates.<sup>6</sup> The House Judiciary

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\* J.D. Candidate, 2018, Indiana University Maurer School of Law; B.S., 2015, Indiana University School of Public and Environmental Affairs. My sincerest thanks goes to my family for giving me endless love and support; to my former boss Lena Hackett for introducing me to the topic of ex-offender reentry; to Professor Deborah Widiss for inspiring the topic of this Note and for assisting me throughout the writing process; and to the *Indiana Law Journal* staff for providing valuable suggestions and edits.

1. See DAN BLOOM, JOYCE FOUND., TRANSITIONAL JOBS REENTRY DEMONSTRATION 1 (2009); MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014); PAMELA K. LATTIMORE, SUSAN BRUMBAUGH, CHRISTY VISHER, CHRISTINE LINDQUIST, LAURA WINTERFIELD, MEGHAN SALAS & JANINE ZWEIG, NATIONAL PORTRAIT OF SVORI: SERIOUS AND VIOLENT OFFENDER REENTRY INITIATIVE 1 (2004).

2. See AMY L. SOLOMON, KELLY DEDEL JOHNSON, JEREMY TRAVIS & ELIZABETH C. MCBRIDE, URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 1 (2004). To compare, Norway has one of the lowest recidivism rates in the world at a two-year recidivism rate of twenty percent. Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> [<https://perma.cc/TWP8-VWLB>].

3. SOLOMON ET AL., *supra* note 2, at 1.

4. *Id.*

5. See JAMES AUSTIN, ERIC CADORA, TODD R. CLEAR, KARA DANSKY, JUDITH GREENE, VANITA GUPTA, MARC MAUER, NICOLE PORTER, SUSAN TUCKER & MALCOM C. YOUNG, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT (2013).

6. *What You Need To Know About the New Federal Prisoner Release*, MARSHALL PROJECT

Committee is also involved in reform efforts in its work on several bipartisan bills aimed at reforming many aspects of the criminal justice system.<sup>7</sup> However, these reform efforts will only truly work if ex-offender reentry works,<sup>8</sup> and one key piece to successful reentry is the focus of this Note: ex-offender employment.<sup>9</sup>

Because an ex-offender's unemployment status is the primary predictor of that individual's likelihood of recidivating,<sup>10</sup> this Note concentrates on the employment piece of the reentry picture. The majority of ex-offenders cannot find jobs after release from prison.<sup>11</sup> The individuals returning to society face several barriers to employment, such as being less educated than the average adult,<sup>12</sup> lacking work experience,<sup>13</sup> and combating the stigma attached to having a criminal record.<sup>14</sup> While the challenge of successful reintegration is multifaceted and not exclusively dependent on securing employment, strong policies directed at employing ex-offenders have the potential to make a meaningful difference, helping these individuals reenter society more effectively.

This Note examines two current policies aimed at employing ex-offenders. First, this Note assesses the Work Opportunity Tax Credit (WOTC), a federal tax credit that private employers can claim for hiring individuals of certain target groups.<sup>15</sup> One of these target groups is ex-felons released within the past year.<sup>16</sup> This Note analyzes whether the WOTC is achieving its goal of encouraging employers to hire chronically unemployed individuals such as ex-felons and recommends how to improve the WOTC.<sup>17</sup>

The second policy this Note examines is "Ban the Box," which aims to improve ex-offenders' job prospects by requiring employers to remove the criminal history

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(Oct. 29, 2015, 9:27 AM), <https://www.themarshallproject.org/2015/10/06/what-you-need-to-know-about-the-new-federal-prisoner-release> [<https://perma.cc/EP6Y-PLFH>] (describing an early release of approximately 6000 prisoners convicted of federal drug crimes "in an effort to reduce overcrowding and provide relief to drug offenders who received harsh sentences over the past three decades").

7. *Criminal Justice Reform Initiative*, HOUSE REPRESENTATIVES JUDICIARY COMMITTEE, <https://judiciary.house.gov/issue/criminal-justice-reform-initiative> [<https://perma.cc/2F4E-CJTT>] (explaining bipartisan bills aimed at sentencing reform, overcriminalization, prison reform, and more).

8. *See Why Recidivism Is a Core Criminal Justice Concern*, NAT'L INST. JUST. (Oct. 3, 2008), <https://www.nij.gov/topics/corrections/recidivism/pages/core-concern.aspx> [<https://perma.cc/8G6W-ET84>] (explaining that the issue of recidivism touches all areas of criminal justice).

9. *See infra* Part I.

10. Susan Lockwood, John M. Nally, Taiping Ho & Katie Knutson, *The Effect of Correctional Education on Postrelease Employment and Recidivism: A 5-Year Follow-Up Study in the State of Indiana*, 58 CRIME & DELINQ. 380, 382 (2012).

11. VERA KACHNOWSKI, RETURNING HOME ILLINOIS POLICY BRIEF: EMPLOYMENT AND PRISONER REENTRY 3 (2005).

12. SOLOMON ET AL., *supra* note 2, at 8.

13. *See id.* at 12.

14. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939 (2003).

15. *See infra* Part II.

16. *See infra* Part II.

17. *See infra* Part II.

check box from job applications.<sup>18</sup> Ban the Box legislation has recently received much attention in the press and in academic discussion because new research has reported that there are unintended negative consequences of the legislation.<sup>19</sup> The research has found that while Ban the Box has successfully helped ex-offenders secure employment, the legislation has also led to increased discrimination of young men of color, including those *without* a criminal record.<sup>20</sup> Given this negative research, this Note analyzes whether Ban the Box's approach to the ex-offender unemployment problem is the correct one.<sup>21</sup> Arguably, Ban the Box seeks to assist ex-offenders secure jobs by *hiding* their criminal history, whereas the WOTC seeks to assist chronically unemployed individuals by *acknowledging* their past.<sup>22</sup> The two pieces of legislation appear to have contradicting ways of achieving the same goal. This Note attempts to begin the discussion on how to improve these policies in order to work together to serve the goal of employing ex-offenders.<sup>23</sup>

Accordingly, Part I explains the barriers that ex-offenders face when seeking employment and the consequences of not securing a job. This Note explains how being unemployed—and thus increasing the likelihood of recidivism—not only impacts the ex-offender himself but also his family and society in general. Part II evaluates one of two current policies focused on employment, the WOTC, and makes recommendations for improvement. Part III discusses the recent debate on Ban the Box legislation, and Part IV examines the interplay between Ban the Box and the WOTC. This Note explains how Ban the Box research further demonstrates the desperate need for changing employers' hiring practices and argues that while the WOTC is not perfect, the WOTC's overall approach is a better way of tackling this goal.

#### I. EX-OFFENDER UNEMPLOYMENT

Ex-offenders struggle to secure employment post-release. In a survey of male prisoners returning to Chicago post-incarceration, only forty-four percent reported that they worked for at least a week in the first four to eight months after their release from prison.<sup>24</sup> Chicago is not unique concerning this matter; in fact, “[s]everal studies have tracked employment rates for former prisoners during the year following release, typically finding that fewer than half are employed at any point.”<sup>25</sup> The remainder of this Part will explain why ex-offenders have trouble finding jobs and the consequences of their unemployment.

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18. See *infra* Part III.

19. See, e.g., Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field of Experiment*, 133 Q.J. ECON. 191 (2018); 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, Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469.pdf> [<https://perma.cc/C3JU-6B55>].

20. See Agan & Starr, *supra* note 19; Doleac & Hanson, *supra* note 19.

21. See *infra* Part IV.

22. See *infra* Part IV.

23. See *infra* Part IV.

24. KACHNOWSKI, *supra* note 11, at 3.

25. BLOOM, *supra* note 1, at 6.

*A. Ex-Offenders' Barriers to Employment*

Many factors impact ex-offenders' job searches. First, there are what this Note refers to as internal barriers—those associated with the ex-offenders' attributes. For example, incarcerated individuals tend to be significantly less educated than the general population; a reported forty percent of inmates in state and federal prisons have neither a high school diploma nor a GED.<sup>26</sup> Another significant internal barrier is substance abuse. Three out of four individuals released from state prisons each year abuse alcohol and/or drugs.<sup>27</sup> Additionally, thirty-one percent of state inmates have a physical impairment or mental condition.<sup>28</sup> Because being incarcerated for perhaps many months or years means being out of the workforce for a long time, ex-offenders are also likely to lack work experience and a relevant skillset when seeking employment upon release.<sup>29</sup>

In addition to internal barriers to employment, ex-offenders face external barriers—those associated with employers and society generally. For instance, most ex-offenders return to distressed communities, making reintegrating and finding a job even more challenging.<sup>30</sup> Employers may also be apprehensive of hiring ex-offenders because of negligent hiring liability.<sup>31</sup> There are also statutory restrictions on hiring individuals with criminal records; all fifty states, to some degree, have restrictions on ex-felons working in public sector jobs.<sup>32</sup>

The stigma attached to being an ex-offender may cause employers to discriminate against these individuals during the hiring process.<sup>33</sup> There is little statutory protection for this type of discrimination. Title VII of the Civil Rights Act of 1964<sup>34</sup> does not explicitly prohibit pre-employment inquiries about an applicant's criminal history or the use of an applicant's criminal record when making hiring decisions.<sup>35</sup>

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26. SOLOMON ET AL., *supra* note 2, at 8.

27. INT'L INST. FOR ALCOHOL AWARENESS, MAKE EX-OFFENDER REENTRY A SUCCESS: ADDRESSING ACCESS TO ALCOHOL 1–2, <http://www.nafj.org/pdfs/policybriefreentryweb.pdf> [<https://perma.cc/KV9W-THZV>].

28. SOLOMON ET AL., *supra* note 2, at 11.

29. *See id.* at 12.

30. *Id.* at 1; DAN BLOOM, MDRC, EMPLOYMENT-FOCUSED PROGRAMS FOR EX-PRISONERS 10 (2006). According to an Urban Institute study of Baltimore-area ex-offenders, prisoners who recidivate tend to come from a concentrated set of a few communities, which have “above-average rates for unemployment, percent female-headed households, and percent of families living below the poverty level.” CHRISTY VISHER, NANCY LAVIGNE & JEREMY TRAVIS, URBAN INST. JUSTICE POLICY CTR., RETURNING HOME: UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY 5 (2004).

31. *See generally* Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1002 (2011) (providing background on employers' concerns of negligent hiring liability, explaining that “[u]nder state doctrines of negligent hiring and retention, employers have been liable to victims injured by an employee if the employer knew or should have known that its employee might render harm to another”).

32. Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J.L. & SOC. CHANGE 159, 171 (2011).

33. *See Pager*, *supra* note 14.

34. 42 U.S.C. §§ 2000e–2000e-17 (2012).

35. *See id.*; Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the*

However, the Equal Employment Opportunity Commission (EEOC) has issued guidance on proper use of an applicant's criminal records for employment decisions, explaining that an employer's use of criminal records in making employment decisions might violate Title VII of the Civil Rights Act of 1964.<sup>36</sup> The guidance distinguishes disparate treatment and disparate impact liability.<sup>37</sup> First, a Title VII violation may occur "when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability)."<sup>38</sup> Additionally, a violation may also occur when an employer has a policy or practice in which it uses criminal records in a manner that disparately impacts a Title VII-protected class, and the employer fails to show that the policy or practice is "job related for the position in question and consistent with business necessity (disparate impact liability)."<sup>39</sup> While these potential Title VII violations offer some protection to job-seeking ex-offenders, the EEOC's efforts to litigate such cases have been largely unsuccessful due to the difficulty of proving disparate impact.<sup>40</sup>

### *B. Consequences of Ex-Offender Unemployment*

Ex-offender unemployment impacts not only the ex-offender himself but also his family and society generally. When ex-prisoners return to society, they are likely returning to a family. The majority of ex-offenders are parents; more precisely, of the 700,000 individuals who are released from prison each year, approximately 400,000 are fathers and mothers.<sup>41</sup> While "[m]any parents who are discharged from prisons intend to reunite with their minor children," many do not "anticipate the difficulties associated with doing so."<sup>42</sup> One hardship is the struggle of finding a job, leading to economic instability and the inability to provide for themselves and their family.<sup>43</sup>

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*Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521 (2007).

36. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2012).

37. *Id.*

38. *Id.*

39. *Id.* at 1, 8. *See, e.g.,* EEOC v. Freeman, 778 F.3d 463, 463 (4th Cir. 2015) (giving an example wherein the EEOC failed to prove that the employer's use of applicants' criminal records had a disparate impact on black and male applicants).

40. *See, e.g., Freeman*, 778 F.3d at 463 (affirming summary judgment in favor of the employer because of the EEOC's failure to prove disparate impact); *see also* Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 980–90 (2013).

41. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., R40499, CHILD SUPPORT AND EX-OFFENDERS 1 (2009).

42. STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 7 (2009).

43. *See* Amanda Geller, *Paternal Incarceration and Father–Child Contact in Fragile Families*, 75 J. MARRIAGE & FAM. 1288, 1289 (2013).

When the returning parent is not the custodial parent, child support obligations are likely to come into play. About half of incarcerated parents have open child support cases, and in many states child support debt accumulates while in prison.<sup>44</sup> Noncustodial parents with child support obligations usually reenter society with at least \$20,000 in child support debt.<sup>45</sup> This financial situation creates even more pressure to find a job. Ultimately, the stress of not having a well-paying job causes many parents released from prison to generate illegal income and resume “their old way of life,” thus leading to the cycle of reoffending.<sup>46</sup> Because so many reentering individuals are parents, and their success affects their children’s well-being, improving ex-prisoners’ employment prospects is important for families.

Ex-offender unemployment has a huge impact on society as well, leading to increased crime and recidivism rates. To illustrate, an Indiana Department of Corrections (IDOC) study concluded that post-release employment status is the number one predictor of recidivism among ex-offenders after their release from IDOC custody: “Specifically, this study’s result demonstrated . . . that an unemployed offender was 1.5 times more likely to become a recidivist offender compared with an offender who was employed.”<sup>47</sup> In general, “higher levels of job instability have shown to lead to higher arrest rates,”<sup>48</sup> and as wages increase, crime decreases.<sup>49</sup> A White House report found that raising the minimum wage to twelve dollars per hour by 2020 would decrease crime by three to five percent.<sup>50</sup>

Indeed, while employment is not the only piece of the reentry picture, there is a connection between ex-offender unemployment, crime rates, and recidivism rates.<sup>51</sup> The fiscal costs of recidivism and of incarceration are an immense financial burden to society.<sup>52</sup> Incarcerating an inmate costs taxpayers approximately \$34,000 per inmate per year, making the total bill around \$80 billion per year.<sup>53</sup> Presently, two-

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44. VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, *STAYING IN JOBS AND OUT OF THE UNDERGROUND: CHILD SUPPORT POLICIES THAT ENCOURAGE LEGITIMATE WORK* 1 (2007); see also Geller, *supra* note 43, at 1290.

45. TURETSKY, *supra* note 44, at 1.

46. *Id.*

47. Lockwood et al., *supra* note 10, at 390.

48. SOLOMON ET AL., *supra* note 2, at 4; see also Jessica S. Henry & James B. Jacobs, *Ban the Box To Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL’Y 755, 755 (2007).

49. SOLOMON ET AL., *supra* note 2, at 4.

50. EXEC. OFFICE OF THE PRESIDENT, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 6 (2016); EXEC. OFFICE OF THE PRESIDENT, *RAISING THE MINIMUM WAGE: A PROGRESS UPDATE* 5 (2016).

51. See Lockwood et al., *supra* note 10; Peter Cove & Lee Bowes, *Immediate Access to Employment Reduces Recidivism*, REALCLEARPOLITICS (June 11, 2015), [http://www.realclearpolitics.com/articles/2015/06/11/immediate\\_access\\_to\\_employment\\_reduces\\_recidivism\\_126939.html](http://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html) [<https://perma.cc/ZX7A-3HSJ>]. But see Sam Schaeffer, *It Takes More than Just a Job To Reduce Recidivism*, LIVING CITIES (May 8, 2014), <https://www.livingcities.org/blog/564-it-takes-more-than-just-a-job-to-reduce-recidivism> [<https://perma.cc/6533-636F>].

52. BLOOM, *supra* note 30, at 2.

53. MELISSA S. KEARNEY, BENJAMIN H. HARRIS, ELISA JACOME & LUCIE PARKER, THE HAMILTON PROJECT, *TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES* 2 (2014); *Does the U.S. Spend \$80 Billion a Year on Incarceration?*, COMMITTEE FOR

thirds of ex-offenders recidivate within three years of their release,<sup>54</sup> but addressing ex-offender unemployment issues would help decrease crime rates, reduce recidivism rates, and diminish overall societal costs of incarceration. Ex-offenders' successful employment betters society. "When ex-offenders are productively engaged in their communities, working and supporting their families, the community is safer and their families are more economically secure."<sup>55</sup>

While benefiting their families and society, employing ex-offenders also, of course, benefits the ex-offenders themselves, setting them up for success rather than failure. "Workplace discipline . . . helps stabilize the lives of individuals, improving many aspects of their well-being."<sup>56</sup> Furthermore, "[b]y obtaining employment and gaining financial independence, former felons will be able to earn a living, care for their families, pay child support, reduce welfare, become tax-paying citizens, and reduce long-term unemployment."<sup>57</sup>

## II. THE WORK OPPORTUNITY TAX CREDIT

The Work Opportunity Tax Credit (WOTC)<sup>58</sup> might be one solution to the ex-offender unemployment problem. The WOTC is a tax credit that private employers can claim against their federal income tax liabilities by hiring members of eight targeted groups: ex-felons released within the past year; veterans; Temporary Assistance for Needy Families (TANF) recipients; Supplemental Nutrition Assistance Program (SNAP) recipients; Designated Community Residents; vocational rehabilitation referrals; Supplemental Security Income recipients; and summer youth employees living in Empowerment Zones.<sup>59</sup> The WOTC targets individuals who are chronically unemployed and "have been disadvantaged in their ability to participate in the workforce in part because of a lack of job experience."<sup>60</sup> The WOTC seeks to increase the chances that these disadvantaged individuals will find jobs, thus obtaining work experience and helping them secure stable jobs later.<sup>61</sup>

The amount of the tax credit that businesses may claim depends on the hired individual's target group, wage, and the number of hours worked during the first year

RESPONSIBLE BUDGET (Dec. 23, 2015), <http://crfb.org/blogs/us-spends-80-billion-year-incarceration> [https://perma.cc/E98E-8W4P]; *The Right Choices*, ECONOMIST (June 20, 2015), <http://www.economist.com/news/briefing/21654578-americas-bloated-prison-system-has-stopped-growing-now-it-must-shrink-right-choices> [https://perma.cc/4ZDM-5V4J].

54. BLOOM, *supra* note 1, at 1; DUROSE ET AL., *supra* note 1, at 1.

55. *Promote Workforce Strategies for Reintegrating Ex-Offenders*, CTR. FOR STUDY SOC. POL'Y, <http://www.policyforresults.org/poverty-economic/promote-workforce-strategies-for-reintegrating-ex-offenders> [https://perma.cc/N24C-U4CF].

56. PETER CAPPELLI, *ASSESSING THE EFFECT OF THE WORK OPPORTUNITY TAX CREDIT 3* (2011).

57. Heidi A. Hillyer, *Reducing the Rate of Prison Recidivism in Florida by Providing State Corporate Income Tax Credits to Businesses as an Incentive for Employment of Ex-Felons*, 21 BARRY L. REV. 105, 107 (2015).

58. I.R.C. § 51 (West Supp. 2017).

59. CHRISTINE SCOTT, CONG. RESEARCH SERV., RL30089, *THE WORK OPPORTUNITY TAX CREDIT (WOTC) 6-7* (2013).

60. CAPPELLI, *supra* note 56, at 10.

61. *Id.*

of employment.<sup>62</sup> The hired individual must work at least 120 hours during the first year of employment.<sup>63</sup> After the hired individual has worked at least 120 hours but less than 400 hours, the employer may claim a tax credit equal to 25% of the new hire's first year of qualified wages.<sup>64</sup> After the hired individual has worked more than 400 hours, the employer may claim a tax credit equal to 40% of the new hire's first year of wages.<sup>65</sup> There is also a maximum tax credit, based on the target group, that an employer may claim. For an ex-felon who worked at least 120 hours but less than 400 hours, for example, the employer may claim a maximum tax credit of \$1500.<sup>66</sup> For an ex-felon who worked more than 400 hours, the employer may claim a maximum tax credit of \$2400.<sup>67</sup> Also, the total of all WOTC credits claimed by an employer cannot exceed 90% of that employer's annual income tax liability.<sup>68</sup>

As the Congressional Research Service explains, determining whether an individual is WOTC-eligible can take two different routes: (1) an eligible group member obtains a certification from a participating agency and then uses it to market himself to an employer, or (2) an employer completes an IRS Form 8850 by the date it makes a job offer to an applicant believed to be WOTC-eligible.<sup>69</sup> The latter is the more common route of the two.<sup>70</sup>

The employer receives the WOTC tax credit for hiring individuals of the WOTC target groups who have obtained a WOTC certification. The number of people who receive a WOTC certification under the "ex-felon" target group is small compared to the number of people who get a certification under other WOTC groups. For example, in 2012, a total of 892,314 WOTC certifications were issued overall, but only 22,063 of these certifications were for ex-felons.<sup>71</sup> To compare, 602,540 certifications were issued to SNAP recipients.<sup>72</sup>

Despite the relatively small number of WOTC certifications issued based on ex-felon status compared to other target groups, it is still important to examine the WOTC in the ex-offender context. A significant point to highlight is this: it makes sense that there are more SNAP recipients obtaining WOTC certifications because there are millions more SNAP recipients than there are ex-felons who have been released from prison within the past year. For example, in August 2017, 21,374,050 households—not even individuals, but households—participated in SNAP.<sup>73</sup> This is much more than the 700,000 individuals who are released from prison each

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62. I.R.C. § 51; U.S. DEP'T OF LABOR, EMPLOYER'S GUIDE TO THE WORK OPPORTUNITY TAX CREDIT (2014).

63. I.R.C. § 51(i)(3)(B); U.S. DEP'T OF LABOR, *supra* note 62, at 4.

64. I.R.C. § 51(i)(3)(A); U.S. DEP'T OF LABOR, *supra* note 62, at 4.

65. I.R.C. § 51(i)(3)(A); U.S. DEP'T OF LABOR, *supra* note 62, at 5.

66. U.S. DEP'T OF LABOR, *supra* note 62, at 5.

67. *Id.*

68. SCOTT, *supra* note 59, at 9.

69. *Id.* at 9–10.

70. *Id.* at 9.

71. *Id.* at 11.

72. *Id.*

73. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: NUMBER OF HOUSEHOLDS PARTICIPATING (2017).

year.<sup>74</sup> Additionally, the number of felons in that 700,000 figure is likely even smaller, assuming some of those released individuals committed misdemeanors, not felonies. Also, some ex-felons might receive WOTC certification under another WOTC target group; for example, it is quite likely that many ex-felons are also SNAP recipients.<sup>75</sup> In short, while the WOTC affects higher numbers of people in other target populations, it does touch a significant number of ex-felons relative to how many are released within a year.<sup>76</sup> Moreover, the WOTC has the potential to impact even more ex-felons based on the recommendations made later in this Note.<sup>77</sup>

The WOTC is a temporary provision of the Internal Revenue Code, and so Congress must reauthorize it periodically. This Note examines whether the WOTC is meeting its goal of promoting ex-offender employment and whether it should be reauthorized. Unfortunately, the research on the WOTC is extremely limited and “has done little to assess whether these tax credits have met the goal of improving employment outcomes among the disadvantaged.”<sup>78</sup> Notably, Congress has reauthorized the program several times—even though there has not been a thorough study on the program’s effectiveness.<sup>79</sup>

In sum, the WOTC strives to offer a cost-effective way of encouraging employers to change their hiring practices and to hire chronically unemployed individuals, including ex-felons who have been released within the past year. The following Part evaluates the effectiveness of the WOTC and makes recommendations for improvement. To assess the WOTC’s effectiveness, a few other questions must be initially examined. Part II.A analyzes whether WOTC-participating employers actually hire more WOTC-targeted individuals than they would have without participating in the WOTC. Part II.B evaluates the cost-effectiveness of the WOTC. Finally, Part II.C explores whether many employers are participating in the WOTC in the first place.

#### *A. The WOTC Might Change Participating Employers’ Hiring Practices*

First, is the WOTC changing WOTC-participating employer practices? A Government Accountability Office (GAO)<sup>80</sup> study<sup>81</sup> addressed this question; the

74. *See supra* note 1 and accompanying text.

75. CAPPELLI, *supra* note 56, at 23.

76. SCOTT, *supra* note 59, at 11.

77. *See infra* Part II.D.

78. Sarah Hamersma, *The Effects of an Employer Subsidy on Employment Outcomes: A Study of the Work Opportunity and Welfare-to-Work Tax Credits*, 27 J. POL’Y ANALYSIS & MGMT. 498, 501 (2008).

79. *Id.* at 498. Interestingly, the reauthorization of the WOTC was recently at risk in the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The WOTC would have been repealed by section 3404 of the House bill. H.R. REP. 115-409, at 69 (2017). However, the Senate amendment to the bill had no provision that repealed the WOTC. H. REPT. 115-466, at 438 (2017). The final conference agreement did not follow the House bill provision that would have repealed the WOTC, so the WOTC survived the Tax Cuts and Jobs Act. *Id.*

80. GAO was originally established as the Government Accounting Office. Its name was changed in 2014. *Our Name*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about/namechange.html> [<https://perma.cc/BP4T-2RFX>].

81. U.S. GOV’T ACCOUNTING OFFICE, GAO-01-329, WORK OPPORTUNITY TAX CREDIT:

GAO's sample consisted of WOTC-participating employers in California and Texas.<sup>82</sup> The research concluded that "the tax subsidy was by far the factor motivating employers to hire WOTC eligible workers."<sup>83</sup> The study also estimated that "three-quarters of employers changed their employment practices in some way to accommodate WOTC recipients, and half changed training practices."<sup>84</sup> The fact that the employers would spend time and resources on changing their hiring and training practices is significant, according to Peter Cappelli, a Wharton School professor, because it shows that they are making these new efforts specifically to hire WOTC-certified individuals.<sup>85</sup> He explains, "These changes cost money. If employers would have hired applicants like the WOTC candidates even without their participation in the program, it is very difficult to understand why they went to the trouble of putting in these new practices."<sup>86</sup>

In 2001, however, the United States Department of Labor (DOL) conducted another study examining whether the WOTC changes participating employers' practices.<sup>87</sup> This study consisted of interviews of sixteen WOTC-participating employers across five states: California, Georgia, Maryland, Missouri, and Wisconsin.<sup>88</sup> The study concluded that "the tax credits play little or no role in [the 16 employers'] recruitment policies," suggesting that employers would have hired members of the target groups even if the programs were not available.<sup>89</sup> These sixteen employers "report[ed] very few changes in recruiting, hiring, or wage policy based on the subsidy."<sup>90</sup>

There are two primary concerns if the DOL study's findings are representative of the program as a whole. First, the findings are concerning from the taxpayers' perspective because this means that the employers are getting a windfall. They are able to claim this tax credit for employees they would have hired without the tax credit. Second, the goal of the program is to encourage employers to *change* their practices so that they hire individuals from WOTC target groups. DOL concluded that the WOTC program does not change employer's hiring practices. However, the DOL report's authors did acknowledge that the study was based on a small sample size and recommended that a study with a larger sample be conducted, as the study "raise[s] a question about the extent to which the tax credit is serving the purpose for which it is intended—to serve as an economic incentive to encourage employers to

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EMPLOYERS DO NOT APPEAR TO DISMISS EMPLOYEES TO INCREASE TAX CREDITS (2001).

82. CAPPELLI, *supra* note 56, at 26 (explaining the GAO study's conclusions); see GOV'T ACCOUNTABILITY OFFICE, *supra* note 81.

83. CAPPELLI, *supra* note 56, at 26; see GOV'T ACCOUNTABILITY OFFICE, *supra* note 81, at 2. In addition to receiving the tax credit, other factors that influenced employers included the need to address a labor shortage and the opportunity to be a good citizen. CAPPELLI, *supra* note 56, at 26.

84. *Id.*

85. *See id.*

86. *Id.*

87. SCOTT, *supra* note 59, at 12.

88. *Id.*

89. *Id.* (alteration in original).

90. Hamersma, *supra* note 78, at 501.

hire individuals from specified target groups whom they would not have hired *in the absence of the credit*.”<sup>91</sup>

The GAO and DOL studies had different results, and so it is not completely clear whether the WOTC is changing employer practices. Because of this uncertainty, this Note recommends, as the DOL researchers did, that the government needs to conduct more thorough research on the program. Congress continues to reauthorize a program that is not certain to change employer practices, a key part of the program’s goal.

In the ex-offender reentry context, this Note urges that a longitudinal study be conducted specifically on the WOTC-participating employees who are ex-felons. While the WOTC might aid ex-felons in finding employment shortly after their release, it is important to see what happens to WOTC-participating ex-felons in the longer term. For example, do the skills they obtain for the WOTC employment enable them to move on to higher paid jobs? Do they advance in the company?

### *B. The WOTC Is Cost-Effective for Employers and Taxpayers*

Another question that is important to ask in order to assess whether the WOTC is meeting its goal is whether the WOTC is cost-effective for employers and society. Many argue that from the employers’ standpoint, the costs of employing these disadvantaged individuals targeted by the WOTC are likely to be considerably higher than hiring individuals who are ineligible for the WOTC. “[T]he attributes of the targeted group[s]”—such as lacking work experience, education, and skills or being prone to substance abuse—“are those that make them more difficult and expensive to employ.”<sup>92</sup> These attributes likely require more extensive training, for example. However, even if employing these individuals necessitates additional expenses, the DOL’s research concluded “employers have a positive assessment of the WOTC . . . and that they view the subsidies as reimbursement for the added expenses of training and mentoring disadvantaged employees.”<sup>93</sup>

Another argument that hiring WOTC-targeted individuals is costly is that their relative lack of education, work experience, and skills, in addition to their increased risk of substance abuse problems, causes higher turnover rates for WOTC workers than those for non-WOTC workers.<sup>94</sup> Because many employers believe this, they worry about costs of recruiting, rehiring, and retraining individuals to replace former WOTC employees.<sup>95</sup> The state of Georgia conducted a study to examine actual turnover rates of WOTC workers.<sup>96</sup> The study compared WOTC employees to non-WOTC employees working the same jobs at a large employer in Georgia.<sup>97</sup> There might be a misconception that because of their attributes, WOTC-eligible individuals would be more likely to leave the company than non-WOTC individuals. However,

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91. SCOTT, *supra* note 59, at 12 (emphasis added).

92. CAPPELLI, *supra* note 56, at 10.

93. Hamersma, *supra* note 78, at 501.

94. See Jill Marie Gunderson & Julie L. Hotchkiss, *Job Separation Behavior of WOTC Workers: Results from a Unique Case Study*, 81 SOC. SERV. REV. 317, 338 (2007).

95. *See id.*

96. *See id.* at 321.

97. *Id.*

Georgia's research concluded that WOTC workers are *less likely* to leave the company than their non-WOTC counterparts and actually stayed with the employer longer than their non-WOTC counterparts.<sup>98</sup> Therefore, this research counters the misconception that WOTC employees have higher turnover rates and shows that WOTC-targeted individuals tend to be loyal employees to the companies willing to give them a chance.<sup>99</sup>

Notably, WOTC workers have a lower turnover rate despite the negative attributes associated with WOTC-eligible individuals. Cappelli expounds on this point, which the Georgia study omitted: WOTC participants are indeed different from the comparison non-WOTC group. That is to say, non-WOTC employees do not have the same set of negative attributes as the WOTC-eligible individuals, or else they would have qualified for the WOTC.<sup>100</sup> These negative attributes of the WOTC participants are precisely what make them eligible for the WOTC.<sup>101</sup> This is significant because, in theory, "the WOTC recipients should be relatively disadvantaged because of those attributes as compared to non-participants and should have worse outcomes, other things equal."<sup>102</sup> The fact that WOTC participants do not have worse workplace outcomes should be very encouraging. They are able to secure and retain employment longer than their counterparts *notwithstanding* beginning farther behind the start line than their peers.<sup>103</sup> These outcomes are important when addressing whether the program is cost-effective because the idea that WOTC-eligible individuals lead to inevitable rehiring and retraining costs is inaccurate.

The WOTC is also cost-effective for society.<sup>104</sup> Cappelli conducted a detailed analysis on the cost-effectiveness of the WOTC from society's perspective, and he suggests that the WOTC decreases welfare dependence.<sup>105</sup> Employing these targeted individuals results in some "public assistance that no longer needs to be paid."<sup>106</sup> As an illustration, the New York State Department of Labor conducted a study on the WOTC finding that two-thirds of WOTC-certified individuals received welfare and food stamps<sup>107</sup> and that the WOTC program resulted in "reduced expenditures on public service programs for recipients who move into jobs."<sup>108</sup> Two researchers estimate that savings from the reduced public assistance expenditures for an individual are double the cost of the maximum WOTC subsidy spent on an individual.<sup>109</sup> Additionally, the WOTC subsidy is a one-time payment, and the savings from it continue to accrue over time.<sup>110</sup>

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98. *Id.* at 337.

99. *Id.*

100. CAPPELLI, *supra* note 56, at 16.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.*

105. *Id.* at 24.

106. *Id.* at 23.

107. *Id.*

108. *Id.* at 21.

109. *Id.* at 24.

110. *Id.*

Cappelli also stresses that putting a concrete monetary value on many of the benefits of the WOTC is difficult,<sup>111</sup> but these benefits are extremely significant from the taxpayers' standpoint.<sup>112</sup> For example, according to the New York State Department of Labor study, reduced criminal conduct, reduced jail time, and reduced expenditures on vocational rehabilitation should be included as benefits to taxpayers.<sup>113</sup> Cappelli explains, "[B]ringing such individuals into the labor force expands labor supply, puts downward pressure on wages, and lowers the natural rate of unemployment. Another [benefit] is that the work-related experience and skill that targeted individuals receive improves their productivity, spilling over to benefit the economy as a whole."<sup>114</sup> Cappelli explains the taxpayers' perspective:

The benefits to taxpayers appear to exceed the costs of the program. This is the case *without* counting many positive aspects of the program that are difficult to quantify, such as reductions in crime, healthcare costs, and other social programs, and positive macro-economic effects. Beyond the goal of assisting disadvantaged job seekers, the WOTC program should also be seen as a cost-saving program for the government.<sup>115</sup>

In summary, "WOTC helps targeted workers move from economic dependency into self-sufficiency as they earn a steady income and become contributing taxpayers, while participating employers are able to reduce their income tax liability."<sup>116</sup> Thus, in addressing the question of whether the WOTC is cost-effective to employers and to society, "the answer seems to be decidedly positive."<sup>117</sup>

### C. Employers Are Not Using the WOTC

Another question that is important to ask in order to assess the WOTC is whether employers are even using the WOTC in the first place. Each year, employers claim about one billion dollars in tax credits under the WOTC.<sup>118</sup> This

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111. *See id.* at 23 ("There are a series of arguments for other, economy-wide benefits associated with moving individuals from chronic unemployment into jobs. One is that bringing such individuals into the labor force expands labor supply, puts downward pressure on wages, and lowers the natural rate of unemployment. Another is that the work-related experience and skill that targeted individuals receive improves their productivity, spilling over to benefit the economy as a whole. It is hard to put a value on these effects, and it might be fair to consider them as something like conceptual counterweights to other conceptual notions like deadweight loss that argue against wage subsidy programs.").

112. *Id.* at 21.

113. *Id.* at 24.

114. *Id.* at 23.

115. *Id.* at 28 (emphasis added).

116. *Work Opportunity Tax Credit*, U.S. DEP'T LABOR EMP. & TRAINING ADMIN. (Feb. 15, 2017), <https://www.doleta.gov/business/incentives/opptax> [<https://perma.cc/36QQ-77YC>].

117. CAPPELLI, *supra* note 56, at 25.

118. *Work Opportunity Tax Credit: Workforce and Community Partners*, U.S. DEP'T LABOR EMP. & TRAINING ADMIN. (Dec. 31, 2014), <https://www.doleta.gov/business/incentives>

might seem like a significant amount, but in reality, employer participation in the program is “surprisingly low.”<sup>119</sup> For example, looking at the welfare target groups, Professor Sarah Hamersma suggests that only one-tenth to one-third of eligible welfare recipients have actually obtained a WOTC certification.<sup>120</sup> Some reasons for low participation include “lack of information among firms, lack of firms’ interest in involvement with government programs, high transaction costs relative to benefits, or difficulty in identifying qualified workers.”<sup>121</sup> This low participation is unfortunate and is likely the principal reason the WOTC does not significantly increase the employment of WOTC-eligible individuals.<sup>122</sup> Cappelli, who answered the question of cost-effectiveness in the affirmative, also noted, “If we ask, has the WOTC program had a substantial effect on moving the typical targeted individual into jobs, the answer would appear to be only modestly so because of this low employer participation.”<sup>123</sup>

#### *D. Recommendations Regarding the WOTC*

As previously mentioned, this Note suggests conducting more thorough research on the question presented in Part II.A—that is, whether the WOTC is changing participating employers’ hiring practices. Second, to make the WOTC incentive more attractive, Congress should consider increasing the amount of the subsidy. The GAO study found that employers estimated that the WOTC subsidy made up for about forty-seven percent of employers’ costs of recruiting, hiring, and training WOTC workers.<sup>124</sup> Even though many argue that the WOTC is cost-effective for employers, only forty-seven percent cost coverage does not make WOTC participation appear worthwhile from the employers’ perspective: “[T]he subsidy is not big enough to cause many employers to shift their hiring decision to WOTC-eligible applicants. We know that is true because the program has only modest effects on improving the employment prospects of the average targeted individual: Not many employers participate.”<sup>125</sup> Increasing the amount of the subsidy could rectify this problem and encourage more employers to participate.<sup>126</sup>

In addition to the size of the subsidy, another area of the WOTC that this Note recommends improving is the paperwork involved. State WOTC coordinators have recommended that the paperwork and forms be simplified to make employers more inclined to participate.<sup>127</sup> In the GAO analysis, nearly half of WOTC-participating

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[/opptax/wotcCommunityPartners.cfm \[https://perma.cc/9H8U-XGNT\]](https://perma.cc/9H8U-XGNT).

119. Hamersma, *supra* note 78, at 501.

120. SARAH HAMERSMA, URBAN-BROOKINGS TAX POL’Y CTR., *THE WORK OPPORTUNITY AND WELFARE-TO-WORK TAX CREDITS 3* (2005).

121. Hamersma, *supra* note 78, at 501.

122. HAMERSMA, *supra* note 120, at 6.

123. CAPPELLI, *supra* note 56, at 25.

124. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 81, at 2.

125. CAPPELLI, *supra* note 56, at 27.

126. HAMERSMA, *supra* note 120, at 4.

127. SCOTT, *supra* note 59, at 11.

employers used consultants to handle the WOTC paperwork.<sup>128</sup> One recommendation to simplify the process would be to streamline and consolidate the forms.<sup>129</sup> If done effectively, this could be an easy fix that would attract more employers to the WOTC.

Another recommendation, both for the state and federal governments, is implementing a tax subsidy that is similar to the WOTC but solely targets ex-offenders. The WOTC's target group of "ex-felons" is a small subset of all the target groups the subsidy aims to help, and extra steps could be taken to target ex-offenders more exclusively. For instance, the WOTC "ex-felons" target group does not include "ex-offenders that were convicted of misdemeanors or ex-felons that were convicted or released more than a year from the potential employment date."<sup>130</sup> The WOTC ex-felon population could be broadened. For example, Illinois has implemented a tax credit that allows any employer that hires any number of "qualified ex-offenders" to apply for a credit amount equal to five percent of qualified wages paid or up to \$1500 per hire.<sup>131</sup> A "qualified ex-offender" must have been formerly incarcerated in an Illinois adult correction facility and hired within the first year of his or her release from prison.<sup>132</sup> This tax credit, therefore, does not require the worker to be an ex-felon.

### III. BAN THE BOX

Ban the Box is another policy that aims to help ex-offenders' employment prospects by mandating that employers remove from their hiring applications the check box that asks if applicants have a criminal record.<sup>133</sup> In other words, Ban the Box aims to delay the employer from inquiring about an applicant's criminal history until later in the hiring process after the ex-offender has had the opportunity to demonstrate his or her qualifications.<sup>134</sup> The goal of Ban the Box is similar to that of the WOTC—to help chronically unemployed individuals secure employment. Proponents of Ban the Box argue that including the check box on job applications "puts up a barrier for people who want to work, educate themselves, provide for their families, and lead healthy, productive lives."<sup>135</sup> President Obama

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128. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 81, at 17.

129. SCOTT, *supra* note 59, at 12.

130. LOUIS SARMIENTO, NW. LAW PROGRAM FOR PRISON REENTRY STRATEGIES, GOVERNMENT INCENTIVES FOR HIRING RETURNING PRISONERS 4 (2011), [https://www.law.northwestern.edu/legalclinic/prison/documents/Government\\_Sarmiento.pdf](https://www.law.northwestern.edu/legalclinic/prison/documents/Government_Sarmiento.pdf) [<https://perma.cc/U5RY-GST7>].

131. 35 ILL. COMP. STAT. ANN. 5/216 (West Supp. 2017).

132. *Id.*

133. *Ban the Box Campaign*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ban-the-box-campaign> [<https://perma.cc/5VTP-3J5V>].

134. *See id.*

135. LINDA EVANS, ALL OF US OR NONE, BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY 8 (2016), <http://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf> [<https://perma.cc/F9ZL-Y4KW>].

“banned the box” on federal government job applications,<sup>136</sup> and more than 130 cities and counties, as well as more than twenty states, have banned the box to some degree.<sup>137</sup>

Recent debate on ex-offender employment has focused heavily on the unintended negative consequences of Ban the Box. While state and local governments have been increasingly implementing Ban the Box, two recent studies<sup>138</sup> sparked a new conversation about Ban the Box policies. The studies claim that while Ban the Box certainly improves job prospects for ex-offenders, “this gain comes at the cost of encouraging a substantial increase in racial discrimination by employers.”<sup>139</sup> According to these studies, Ban the Box has adversely affected the employment prospects of young men of color, including those who do *not* have a conviction record.<sup>140</sup> Removing information about job applicants’ criminal records causes employers “to guess who the ex-offenders are, and avoid interviewing”<sup>141</sup> the individuals the employers think might have a criminal history,<sup>142</sup> thus discriminating against demographic groups that are more likely to have a criminal record: more often than not these are young men of color.

One of the two recent Ban the Box studies is discussed in a National Bureau of Economic Research publication.<sup>143</sup> The study examined data for 855,772 men aged twenty-five to thirty-four.<sup>144</sup> Approximately 60% of the sample of men had no

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136. Press Release, The White House, Fact Sheet: President Obama Announces New Actions To Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> [https://perma.cc/UT8C-WW8V]; Lane Anderson, *Even the Smallest Record Can Be a Life Sentence of Poverty*, DESERET NEWS (July 2, 2015, 6:00 AM), <https://www.deseretnews.com/article/865631622/The-main-reason-ex-offenders-wind-up-breaking-the-law-again.html> [https://perma.cc/2SRW-AA8S]; Gregory Korte, *Obama Tells Federal Agencies To “Ban the Box” on Federal Job Applications*, USA TODAY (Nov. 2, 2015) <http://www.usatoday.com/story/news/politics/2015/11/02/obama-tells-federal-agencies-ban-box-federal-job-applications/75050792> [https://perma.cc/2NTD-GMD9]; Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, ATLANTIC (Aug. 4, 2016), <http://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435> [https://perma.cc/F5ZX-HMGX].

137. EVANS, *supra* note 135, at 13; *see About, BAN THE BOX CAMPAIGN*, <http://bantheboxcampaign.org/about> [https://perma.cc/8M7Q-TWBA].

138. Agan & Starr, *supra* note 19; Doleac & Hansen, *supra* note 19.

139. Katie Vloet, “*Ban the Box*” Leads to Increase in Employer Racial Discrimination, U. MICH. NEWS (June 15, 2016), <http://ns.umich.edu/new/releases/23982-ban-the-box-leads-to-increase-in-employer-racial-discrimination> [https://perma.cc/PC9L-CY6Y].

140. MAURICE Emsellem & Beth Avery, NAT’L EMP’T LAW PROJECT, RACIAL PROFILING IN HIRING: A CRITIQUE OF NEW “BAN THE BOX” STUDIES I (2016), <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf> [https://perma.cc/7JMV-37XL].

141. Doleac & Hansen, *supra* note 19, at 2.

142. *Id.*; Wyatt Massey, *Ban the Box Increases Racial Discrimination, Study Says*, BALTIMORE SUN (July 30, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-ban-the-box-study-20160730-story.html> [https://perma.cc/T74P-FNEE].

143. Doleac & Hansen, *supra* note 19.

144. *Id.* at 13.

college degree,<sup>145</sup> and 46% of the men lived in jurisdictions that have adopted Ban the Box.<sup>146</sup> The researchers calculated the employment probability for these men on the basis of their race, ethnicity, and geographic location.<sup>147</sup> Next, they compared that probability with the actual percentage of men from each group who were employed.<sup>148</sup> The study concluded that banning the box reduced employment by 5.1% for young black men without a college degree and by 2.9% for young Hispanic men without a college degree.<sup>149</sup>

The other recent Ban the Box study was conducted by professors at the University of Michigan and Rutgers University.<sup>150</sup> This study consisted of sending approximately 15,000 fictitious job applications to employers throughout New York and New Jersey both before and after the adoption of Ban the Box legislation.<sup>151</sup> The professors' research concluded that Ban the Box

encourage[s] statistical discrimination on the basis of race: . . . . [T]he race gap in callbacks grows dramatically at the [Ban-the-Box]-affected companies after the policy goes into effect. Before [Ban the Box], white applicants to employers with the box received 7% more callbacks than similar black applicants, but [Ban the Box] increases this gap to 45%.<sup>152</sup>

Sonja Starr, one of the professors who conducted this study, said, “[W]hen it comes to [Ban the Box’s] goal, it has backfired.”<sup>153</sup> She continued, “Our results don’t necessarily definitively argue against Ban the Box . . . . It clearly has benefits for people with records . . . . But our results are very worrisome in terms of the effects for black male applicants, especially those without criminal records.”<sup>154</sup> Victoria Lipnic, Commissioner of the EEOC, stated, “[W]here, in fact, in the absence of a criminal background check an employer chooses to use race as a proxy for criminal history, *that employer is patently violating federal civil rights law.*”<sup>155</sup> However, actually proving that an employer has used race as a proxy for a criminal record is very hard to do.<sup>156</sup>

These two studies sparked much debate concerning Ban the Box policies. The National Law Employment Project responded to the findings, stating:

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145. *See id.*

146. *Id.*

147. *Id.* at 14–15.

148. *Id.* at 16–24.

149. *Id.* at 5.

150. Agan & Starr, *supra* note 19.

151. *Id.* at 1.

152. *Id.*

153. Vloet, *supra* note 139.

154. *Id.*

155. Victoria A. Lipnic, Comm’r, U.S. Equal Emp’t Opportunity Comm’n, Statement to U.S. Comm’n on Civil Rights, *The Impact of Criminal Background Checks and the EEOC’s Conviction Records Policy on the Employment of Black and Hispanic Workers* (Dec. 7, 2012), <https://www.eeoc.gov/eeoc/legislative/upload/appendices.pdf> [<https://perma.cc/EE9W-G38K>] (emphasis in original).

156. *See generally* Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001).

The core problem raised by the studies is not ban-the-box but entrenched racism in the hiring process, which manifests as racial profiling of African Americans as “criminals.” . . . The studies highlight the need for a more robust policy response to both boost job opportunities for people with records and tackle race discrimination in the hiring process—not a repeal of ban-the-box laws.<sup>157</sup>

Ban the Box proponents point to the progress the initiative has made. For example, after the implementation of Ban the Box in the District of Columbia, the city hired thirty-three percent more people with criminal records.<sup>158</sup> In 2011, Ban the Box took effect in Durham, North Carolina, and by 2014, “the overall proportion of people with criminal records hired by the City of Durham had increased nearly 7 fold.”<sup>159</sup> Looking at these numbers, the progress that Ban the Box has made cannot be ignored—but this progress is at the cost of increased racial profiling of men of color.

#### IV. THE INTERPLAY BETWEEN THE WOTC AND BAN THE BOX

When evaluating the pros and cons of Ban the Box, examining the interplay between Ban the Box and the WOTC is important. The two initiatives have the same overarching goal: to help disadvantaged individuals secure employment. However, the manner in which these two initiatives approach this goal is in conflict. Ban the Box seeks to improve ex-offenders’ employment prospects by essentially *hiding* or *delaying* inquiry into their criminal records. The WOTC, on the other hand, seeks to improve ex-felons’ (as well as other target groups’) employment prospects by *acknowledging* their criminal records and *encouraging* employers to hire these ex-offenders despite their criminal histories. Are these two approaches incompatible with each other, and if so, is one approach better than the other? Or is there a way in which they can work together effectively?

There do not appear to be any published studies that show how Ban the Box affects WOTC use. This Note hypothesizes that Ban the Box decreases the number of WOTC certifications for ex-felons. In jurisdictions that have Ban the Box, employers do not know at the initial hiring stage if applicants would be eligible for the WOTC as ex-felons. As a result of Ban the Box, employers do not learn about the applicant’s criminal history until later in the hiring process.<sup>160</sup> From an employer’s perspective, some argue that Ban the Box policies cost too much time, money, and resources before the employer realizes—after learning of an applicant’s criminal history—that the applicant does not meet the position’s background requirements, and therefore the applicant does not qualify for the job.<sup>161</sup>

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157. EMSELLEM & AVERY, *supra* note 140, at 1.

158. *Id.* at 4.

159. S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC 6, [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper-2.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf) [<https://perma.cc/X3H5-J7QL>].

160. *See id.* at 3; EMSELLEM & AVERY, *supra* note 140, at 1; Agan & Starr, *supra* note 19, at 6.

161. EASYBACKGROUNDS, EXPLORING THE FAIR CHANCE ACT: WHAT DOES “BAN THE BOX” LEGISLATION MEAN FOR YOUR COMPANY? 12; *Watch: Why Small Business Opposes Ban-the-*

Because Ban the Box advocates for delaying inquiry into applicants' criminal histories and the WOTC advocates for using ex-felon status as a marketing tool as a jobseeker, it is difficult to think of a way in which these two initiatives work effectively together. While Ban the Box is a well-intentioned plan, the research on it illustrates this nation's deeply rooted racial profiling problem and many employers' reluctance to hire individuals who have a criminal history.<sup>162</sup> This reluctance contributes to the cycle of recidivism.<sup>163</sup> However, the WOTC could potentially address this problem if more employers utilize it.<sup>164</sup>

Despite Ban the Box's problems, this Note does not recommend repealing Ban the Box legislation because of the progress it has made and because "[t]he nation cannot afford to turn back the clock on a decade of reform that has created significant job opportunities for people with records."<sup>165</sup> As a society, we should aim to change employers' hiring practices so that they are less fearful of hiring ex-offenders. Concealing important information about an applicant—his or her criminal record—while proven to help ex-offenders get hired, is not the right way to change employers' hiring practices. We should strive to live in a society where employers have the full picture of an applicant, including his or her criminal record, and nonetheless are encouraged to hire the individual. Perhaps this begins with educating employers on the issues outlined in Part I and on how to help these individuals succeed in the workplace. Employers will then be more prepared to hire these individuals, instead of playing guessing games or finding out late in the process that their applicant is an ex-offender. In sum, "[e]ncouraging employers to hire ex-offenders through incentives like income tax credits [such as the WOTC] will eliminate the need for 'Ban the Box' legislation."<sup>166</sup>

#### CONCLUSION

Current policies are not doing enough to promote employing ex-offenders. The research is clear: ex-offender unemployment fosters criminal behavior, and successful ex-offender employment decreases criminal behavior. That being the case, society has much to gain from successful employment of former prisoners. Conversely, society has much to lose if ex-offender employment is not taken seriously, and the staggering, costly recidivism rates will likely endure.

This Note has argued that if employers were more inclined to take advantage of the WOTC, there would be less of a need for legislation such as Ban the Box. To utilize the WOTC to its full potential, it is imperative for society to lessen the stigma attached to having a criminal record, thereby changing employers' attitudes towards hiring ex-offenders. Legislators, employers, and the public generally must recognize that ex-offenders cannot be relied on to fix the challenges of reentry themselves. The solution calls for a societal reform and requires an educated, informed public that

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*Box Legislation*, NFIB (Nov. 17, 2015), <http://www.nfib.com/article/watch-why-small-business-opposes-ban-the-box-legislation-71676> [<https://perma.cc/C7EJ-BUTU>].

162. See Agan & Starr, *supra* note 19; Doleac & Hansen, *supra* note 19.

163. See *supra* Part I (explaining ex-offender unemployment's impact on recidivism rates).

164. See *supra* Part II.

165. EMSELLEM & AVERY, *supra* note 140, at 1.

166. Hillyer, *supra* note 57, at 111.

understands the obstacles ex-offenders face when reentering society and seeking a job. Society ought to encourage employers to be willing, equipped, and ready to employ ex-offenders. Employment is only one component of the reentry process, but it just might be that successful ex-offender employment is the key to closing the revolving prison cell door.