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## Let's Invest in People, Not Prisons: How Washington State Should Address Its Ex-Offender Unemployment Rate

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## Let's Invest in People, Not Prisons: How Washington State Should Address Its Ex-Offender Unemployment Rate

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Sara Taboada\*

### I. INTRODUCTION

*If we set up a system so that when somebody gets out of jail, it is practically impossible for them to find a place to live or find a job . . . then that doesn't just impact them—it impacts me.*<sup>1</sup>

At seventeen years old, Marquez Taylor pleaded guilty to a felony robbery.<sup>2</sup> After serving time in juvenile detention, Marquez completed a training course in information technology.<sup>3</sup> Later, he interned for six months at a Washington video game company.<sup>4</sup> When the internship ended,

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<sup>1</sup> Leah Sottile, *Unforgiven*, INLANDER (Oct. 25, 2010), <http://www.inlander.com/spokane/unforgiven/Content?oid=2133262> (quoting Elliot Bronstein) (emphasis added).

<sup>2</sup> Lynn Thomas, *Seattle May Limit Use of Crime Checks in Hiring*, SEATTLE TIMES (June 5, 2013), <http://www.seattletimes.com/seattle-news/seattle-may-limit-use-of-crime-checks-in-hiring/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Marquez searched for full time work.<sup>5</sup> He received three different job offers; however, when the employers learned about his criminal record, they revoked all three offers.<sup>6</sup> Frustrated, Marquez asserted, “I’ve proven that I’m responsible and accountable, that I have skills to offer a business, but I’m not given the opportunity to show that I can do the work.”<sup>7</sup>

By 2010, Carol had spent two decades bearing the brunt of her felony record.<sup>8</sup> When she was 26, Carol was arrested and sent to court-ordered rehab due to addiction issues.<sup>9</sup> After serving her time and kicking her addictions, she studied to become an insurance agent.<sup>10</sup> Although she passed the insurance agent exam “with flying colors,” the insurance commission denied her an insurance license because of her criminal record.<sup>11</sup> Rather than give up on the hope of a future, Carol decided to study nursing.<sup>12</sup> After a year and a half of taking the requisite courses, she discovered that she could not get a nursing license because of her prior record.<sup>13</sup> Like many others with a criminal record, Carol was simply trying to work towards a better future. However, the system refused to allow her to be anything but her past.<sup>14</sup>

Although ideologies are slowly shifting in favor of criminal justice reform, the stigma toward the currently or formerly incarcerated prevails. Some of the negative beliefs about current and ex-offenders<sup>15</sup>—that they are dangerous, deserving of all of the consequences of their actions, and

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<sup>5</sup> *Id.*

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

<sup>7</sup> *Id.*

<sup>8</sup> Sottile, *supra* note 1.

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

<sup>15</sup> In this article, “ex-offenders” means anyone with a prior criminal record ranging from a misdemeanor to a felony.

unchangeable—is plainly unjustified when we remind ourselves of the wide range of people that have entered and exited the criminal justice system. But even the most unforgiving members of our community would likely agree that less taxpayer money should be spent on the criminal justice system. Furthermore, all would agree effective steps should be taken to ensure that offenders, once released, do not reoffend.

While certain federal, statewide, and municipal initiatives strive to strike down some of the barriers that ex-offenders face in obtaining employment, ex-offenders in Washington State remain unemployed at an unacceptably high rate. Therefore, the legal framework that Washington has in place to help ex-offenders obtain employment is inadequate. Because obtaining employment after incarceration is strongly linked to a decreased chance of recidivism,<sup>16</sup> this article will (1) highlight the barriers that ex-offenders face when trying to obtain employment; (2) demonstrate the fiscal, community, and humanitarian benefits in hiring ex-offenders; and (3) address several solutions to remedy the ex-offender unemployment rate in Washington State.

First, the article will discuss the number of people incarcerated nationwide and in Washington State, and the financial ramifications that accompany incarcerating people and keeping ex-offenders unemployed. Second, the article discusses specific Washington State policies that hinder an ex-offender's chances of obtaining employment. Third, the article examines the empirical evidence strongly linking criminal records to a high probability of unemployment and other studies and anecdotal evidence that demonstrate ex-offenders are less likely to recidivate if they are able to obtain employment.

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<sup>16</sup> *Research on Reentry and Employment*, NAT'L INST. OF JUST., <http://www.nij.gov/topics/corrections/reentry/pages/employment.aspx> (last modified Apr. 3, 2013).

Thereafter, the article addresses federal, statewide, and municipal initiatives that attempt to remedy ex-offender unemployment. The article then discusses potential solutions to the Washington State ex-offender unemployment problem. First, Washington State should pass a statute that indemnifies employers if the employer hires an ex-offender that commits a tort, with certain limitations. Second, Washington State should give tax breaks to employers that hire ex-offenders. Third, Washington State should create a program that subsidizes the interest rates for small business and other business loans if the businesses agree to hire a certain number of ex-offenders. Fourth, Washington State should advertise these incentives for hiring ex-offenders to all employers throughout the state. Fifth, Washington should expand its work release program. Sixth, college level education should be afforded to individuals in prison who desire higher education. Finally, Washington should relax some of its licensing bans. The article concludes with other financial considerations related to ex-offender unemployment.

## II. COST OF THE PRISON SYSTEM AND BARRIERS TO EMPLOYMENT

*I have worked hard to turn my life around. I have remained clean for nearly eight years, I am succeeding in college, and I continue to share my story in schools, treatment facilities, and correctional institutions, yet I have nothing to show for it. [ . . . ] I have had numerous interviews and sent out more than 200 resumes for jobs which I am more than qualified. I have had denial after denial because of my felony.<sup>17</sup>*

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<sup>17</sup> AMY L. SOLOMON, IN SEARCH OF A JOB: CRIMINAL RECORDS AS BARRIERS TO EMPLOYMENT 42 (June 2012), available at <http://www.courts.wa.gov/subsite/mjc/docs/CrimRecordsasBarriertoEmployment.pdf> (quoting “Sam”).

### A. Financial Ramifications of the Prison System

The United States has the largest and most expensive prison system in the world.<sup>18</sup> In 2008, the United States had between 12 and 14 million ex-offenders of working age.<sup>19</sup> As described in detail later in this article, policies throughout the nation and in Washington State place significant hurdles for ex-offenders attempting to enter the workforce, creating a higher unemployment rate among ex-offenders in contrast to the general population. The resulting loss in national monetary output ranges between a staggering 57 and 65 billion dollars.<sup>20</sup>

Unless fundamental changes in criminal justice laws occur in the coming years, the number of ex-offenders will continue to rise in the decades to follow.<sup>21</sup> Furthermore, the number of ex-offenders will likely continue to trend towards increasing rates for people of color.<sup>22</sup> Although the number of incarcerated Whites has decreased by a third, the number of Blacks incarcerated has continued to rise, with African Americans comprising 40 percent of the incarcerated population.<sup>23</sup> Similarly, Latinos are also heavily represented in the prison population, comprising 20 percent of individuals incarcerated in 2008.<sup>24</sup> Additionally, because the average age of an imprisoned person is less than the average age of the general population,<sup>25</sup> we can expect a future surge of ex-offenders who will be willing, but likely unable, to join the workforce.

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<sup>18</sup> *The Prison Crisis*, AM. C.L. UNION, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited Apr. 3, 2015).

<sup>19</sup> JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RES., EX-OFFENDERS AND THE LABOR MARKET 1 (2010), *available at* <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

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

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 6, 9.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.*

The number of people in prison in Washington State and the cost to taxpayers is enormous. As of 2012, 17,000 people were serving time in Washington State prisons.<sup>26</sup> Planners in Washington State expect that 30–50 percent of released prisoners will return to prison within three years—an estimated 5,100 to 8,500 people.<sup>27</sup> Unfortunately, the majority of those released from prison will recidivate within a year of being out of prison.<sup>28</sup> Twelve adult prison facilities exist throughout Washington State, costing taxpayers approximately \$540,000,000 a year.<sup>29</sup> The rate of unemployment for ex-offenders in Washington State is 67 percent.<sup>30</sup> In comparison, the rate of unemployment in Washington State in general is six percent.<sup>31</sup> Additionally, akin to the racial disparity throughout the nation, 6.4 Black people are imprisoned for every White person.<sup>32</sup>

*B. Washington Laws that Hinder an Ex-offender's Financial Prospects*

**1. Legal Financial Obligations**

Washington's Legal Financial Obligations ("LFO") stemming from a criminal conviction hinder an ex-offender's chances of acquiring employment because an ex-offender cannot begin the process of vacating<sup>33</sup>

<sup>26</sup> KING CTY. PROSECUTING ATTORNEY'S OFFICE, INVESTING FOR NO RETURN 2 (2012), available at <http://www.scribd.com/doc/121293306/Final-PAO-Re-entry-Summit-Report-2012>.

<sup>27</sup> See *id.*

<sup>28</sup> *Id.* at 8.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Illinois and Nevada Have Largest Unemployment Rate Declines, October 2013 to October 2014*, BUREAU OF LAB. STAT., [http://www.bls.gov/opub/ted/2014/ted\\_20141128.htm](http://www.bls.gov/opub/ted/2014/ted_20141128.htm) (last visited Apr. 3, 2015).

<sup>32</sup> MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE & ETHNICITY 11 (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

<sup>33</sup> "If your conviction is vacated, the conviction will not be included in your criminal history for purposes of determining a sentence in any subsequent conviction."

his or her record until the LFOs are completely paid off. LFOs are imposed on offenders during sentencing.<sup>34</sup> Typically, the court will impose fees on court services, such as attorney fees.<sup>35</sup> Additionally, courts may impose restitution fines upon the offender on behalf of the offender's victim.<sup>36</sup> LFOs carry a hefty 12 percent interest rate and accrue interest from the time of judgment until the LFO is paid in its entirety.<sup>37</sup> The maximum LFO a court can impose is \$50,000; however, the average amount imposed on a felony case is \$2,540.<sup>38</sup> Nonetheless, a convicted person will likely pay significantly more than the original fine imposed—sometimes beyond the maximum of \$50,000—because of interest rates.<sup>39</sup>

Along with diminished employment prospects, a person leaving prison must also face the responsibility of paying a large amount of money that has accrued interest for the duration of the offender's time in prison. Although one may set up payment plans to pay off the debt, some people are unable to make payments as little as \$20 a month.<sup>40</sup> In fact, some reported that,

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Additionally, a person whose conviction has been vacated may state that he or she has never been convicted of a crime, including while responding to questions on employment or housing applications." *Washington Certificate of Discharge and Vacate Felony Convictions*, RECORDGONE, <http://www.recordgone.com/expungement-washington/certificate-of-discharge-and-vacate-felony-conviction/> (last visited Jan. 20, 2016).

<sup>34</sup> SEATTLE UNIV. SCH. OF LAW, LEGAL FINANCIAL OBLIGATIONS (LFOs): UNDERSTANDING HOW LFOs WORK 5 (2011), *available at* <http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/391CF18C-CE76-A252-E7CA-E57F02225472/472551SULF0Brochure.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 5.

<sup>38</sup> AM. CIVIL LIBERTIES UNION & COLUMBIA LEGAL SERVS., MODERN DAY DEBTORS' PRISONS: HOW COURT IMPOSED DEBTS PUNISH POOR PEOPLE IN WASHINGTON 4, (2014) *available at* <http://columbialegal.org/sites/default/files/ModernDayDebtorsPrison.pdf>.

<sup>39</sup> *See generally id.*

<sup>40</sup> KATHERINE BECKETT ET AL., THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 46 (2008) *available at*



faced with no job prospects, they contemplated turning to criminal activities to pay their legal fines.<sup>41</sup> Furthermore, failure to make payments can become the basis for a correctional violation, warrant, or re-arrest, thereby promoting the cycle of recidivism.<sup>42</sup> In some Washington counties even bench warrants<sup>43</sup> are issued upon LFO non-payment.<sup>44</sup>

However, a promising 2015 case, *State v. Blazina*, may change the way courts impose LFOs on indigent defendants.<sup>45</sup> In a consolidated case, two defendants argued that the lower courts erred when, in their sentencing documents, their respective judges included boilerplate language that claimed they had assessed the defendants' ability to pay when the judges made no such assessment.<sup>46</sup> Judges often assess LFO fees simply based on the nature of the crime.<sup>47</sup> However, courts are instead statutorily mandated to make an individualized inquiry into the defendant's ability to pay.<sup>48</sup> The court in *Blazina* made clear that records

must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs . . . [the court requires that courts] consider other

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<https://www.aclu-wa.org/sites/default/files/attachments/LFO%20Report%20%28WA%20Minority%20and%20Justice%20Comm.%20Report%29.pdf>.

<sup>41</sup> *Id.* at 44.

<sup>42</sup> BECKETT ET AL., *supra* note 40.

<sup>43</sup> "A bench warrant is used for attachment or arrest in a case of Contempt, which is the willful disregard or disobedience of an authority such as the court. A bench warrant is also issued when an indictment, which is a written accusation of a person's guilt for an act or omission, is handed down. A third instance where a bench warrant is issued is to obtain a witness who disobeys a subpoena, which is a command to appear at a specified time and place to present testimony upon a certain matter." *See Bench Warrant*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/bench+warrant> (last visited Apr. 3, 2015).

<sup>44</sup> BECKETT ET AL., *supra* note 40, at 45.

<sup>45</sup> *See generally* *State v. Blazina*, 344 P.3d 680 (Wash. 2015).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 683.

<sup>48</sup> *See* WASH. REV. CODE. § 10.01.060 (3) (2010).

important factors, such as incarceration and a defendant's other debts . . . when determining a defendant's ability to pay.<sup>49</sup>

Whether LFOs should be further modified or banned is beyond the scope of this article. However, the consequences of lingering LFOs on ex-offenders should be noted. Unless an individual has paid all of their LFOs, they cannot receive a certificate of discharge and apply to vacate their record.<sup>50</sup> The conviction will remain on the ex-offender's record, and a potential employer may gain access to the applicant's criminal past.<sup>51</sup> Employers tend to have negative attitudes regarding hiring ex-offenders; thus, employers are often reluctant to hire someone with a criminal record. LFOs require a steady income to be paid off but force ex-offenders to bare the stigma of their conviction until the fine is paid in its entirety.<sup>52</sup> Therefore, Washington's financial demands on ex-offenders coupled with an inadequate support system to help ex-offenders find employment further contributes to the cycle of unemployment and recidivism that persists throughout Washington State.

## 2. Non-automatic juvenile record sealing

Pre-2014, Washington's non-automatic sealing policy kept juvenile records public, further contributing to the ex-offender unemployment rate. Prior to 2014, all juvenile offense records where the case disposition occurred before June 12, 2014, remained open to the public until the juvenile offender successfully petitioned to have the record sealed.<sup>53</sup> In fact, Washington State sells juvenile criminal history to a number of private

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<sup>49</sup> *Blazina*, 344 P.3d at 680.

<sup>50</sup> BECKETT ET AL., *supra* note 40, at 54.

<sup>51</sup> *Id.* at 58.

<sup>52</sup> SEATTLE UNIV. SCH. OF LAW, *supra* note 34, at 5.

<sup>53</sup> COLUMBIA LEGAL SERVS., FAQ ON THE YOUTH OPPORTUNITIES ACT (HB 1651) 1 (2014), available at <http://columbialegal.org/sites/default/files/FAQ%20on%20the%20Youth%20Opportunities%20Act%204-9-14.pdf>.

companies that generate criminal background reports.<sup>54</sup> Generally, to be eligible to seal a juvenile record, a person must have neither criminal charges nor legal fees pending, and the person must have remained crime-free for 2 to 5 years.<sup>55</sup> However, even today, not all juvenile crimes are eligible for record sealing.<sup>56</sup>

For those convicted prior to the change in law but are eligible to seal their record, the sealing process remains cumbersome and may be costly.<sup>57</sup> First, one must gather all of their juvenile crime records from every Washington county where they received a juvenile conviction.<sup>58</sup> Next, one must determine whether their offenses are eligible to be sealed.<sup>59</sup> After completing various forms, the individual must schedule a hearing.<sup>60</sup> Next, an individual must produce various copies of court documents and deliver the motions and notices.<sup>61</sup> After appearing in court to approve one's record sealing, several copies of the court order must be sent to every private agency that has information regarding the juvenile conviction.<sup>62</sup> Because of this lengthy process, it is no surprise that only 8.5 percent of individuals with juvenile records eligible for sealing actually seal their record.<sup>63</sup> This is

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<sup>54</sup> TONY CALERO, OPEN JUVENILE RECORDS IN WASHINGTON STATE: PROCESS, EFFECTS, AND COST OF PROTECTIVE MECHANISMS 4 (2013), *available at* <https://juvjustice.org/sites/default/files/ckfinder/files/Examining%20Open%20Juvenile%20Records%20in%20Washington%20State.pdf>.

<sup>55</sup> TEAM CHILD, SEALING JUVENILE COURT RECORDS IN WASHINGTON STATE 4 (Aug. 2015), *available at* [http://www.teamchild.org/docs/uploads/SealingPacket2015rev\\_82015.pdf](http://www.teamchild.org/docs/uploads/SealingPacket2015rev_82015.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 1.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

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

<sup>63</sup> Amicus Curiae Brief of Columbia Legal Services at 5, *State v. S.J.C.*, 352 P.3d 749 (Wash. 2015) (No. 90355-7), *available at* <http://www.courts.wa.gov/content/Briefs/A08/90355-7%20Amicus%20%20Columbia%20Legal%20Services.pdf>.

exacerbated by the fact that many youthful ex-offenders mistakenly believe their record is automatically sealed upon their eighteenth birthday.<sup>64</sup>

Like adult records, juvenile court records can hinder a person's ability to obtain housing, education, and, notably, employment.<sup>65</sup> Many try to obtain a job, only to have their youthful indiscretion continuously haunt them during various phases of finding and obtaining employment.<sup>66</sup> Non-automatic sealing of juvenile records may explain why even though Washington's general unemployment rate in 2013 was only the 22nd highest in the nation, Washington was ranked number six in the number of unemployed 16 to 19 year-olds.<sup>67</sup> Furthermore, in the 20-to-24-year-old category, the unemployment rate in Washington ranked higher than the unemployment rates in all but 11 states.<sup>68</sup>

Sadly, Washington sold these juvenile records for sixty-nine cents per offender and amassed a measly \$19,000 in state revenue from these records.<sup>69</sup> However, one can safely assume that the cost to the ex-juvenile offender and the public far exceeded all of the records' monetary worth.

### 3. Ex-offender Prohibitions in Certain Occupations

Washington law prohibits government entities from denying occupational licenses or employment based solely on a criminal record, but multiple exceptions exist.<sup>70</sup> For example, becoming a barber, manicurist,

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<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.*

<sup>66</sup> Eric Sciliano, *To Seal or Not to Seal: WA's Battle Over Juvenile Records*, CROSSCUT (Jan. 27, 2014), <http://crosscut.com/2014/01/27/rights-ethics/118384/washingtons-never-ending-punishment-of-juveniles/?page=single>.

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

<sup>68</sup> *Id.*

<sup>69</sup> Linda Thomas, *The Real Cost of Selling Juvenile Records for Pennies Per Name*, MYNORTHWEST.COM (Apr. 14, 2013), <http://mynorthwest.com/646/2251996/The-real-cost-of-selling-juvenile-records-for-pennies-per-name>.

<sup>70</sup> WASH. REV. CODE. § 9.96A.020 (2009).

car dealer, and naturopath is impossible for a number of ex-offenders.<sup>71</sup> Past convictions can be the lawful basis of a non-hire or occupational license denial if the prior crime directly relates to the demands of the position, so long as the conviction occurred within ten years of the application.<sup>72</sup> Additionally, any crime can be considered but cannot be the basis of the denial of a multitude of occupations or occupational licenses.<sup>73</sup>

Two of the largest bans on ex-offender employment lie in occupations in law enforcement<sup>74</sup> and jobs that involve access to children or vulnerable adults.<sup>75</sup> For example, “crimes against children or other persons”<sup>76</sup> will bar a person from working in nursing homes and childcare facilities. Although some of the crimes listed under the definition are quite egregious (e.g., rape of a child)<sup>77</sup> and understandably should cause the employer to pause before allowing an ex-offender to attain the job, some of the crimes are more minor, like assault in the fourth degree (a gross misdemeanor)<sup>78</sup> and prostitution (a misdemeanor).<sup>79</sup> Additionally, those convicted of “crimes relating to financial exploitation” are barred from working in nursing homes.<sup>80</sup> Among the “crimes relating to financial exploitation”<sup>81</sup> are theft

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<sup>71</sup> For a list of many of the jobs some ex-offenders are barred from obtaining, see *Collateral Consequences*, COLUM. LEGAL SERVICES, [http://www.columbialegal.org/sites/default/files/CROP\\_Collateral-Consequences-List.pdf](http://www.columbialegal.org/sites/default/files/CROP_Collateral-Consequences-List.pdf) (last visited Jan. 15, 2016).

<sup>72</sup> OVERVIEW OF STATE LAWS THAT BAN DISCRIMINATION BY EMPLOYERS 3 (2009), available at [http://www.lac.org/toolkits/standards/Fourteen\\_State\\_Laws.pdf](http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf).

<sup>73</sup> WASH. REV. CODE. § 9.96A.020 (2009).

<sup>74</sup> WASH. REV. CODE. § 9.96A.030 (1973).

<sup>75</sup> WASH. REV. CODE. § 43.43.830 (2012).

<sup>76</sup> *Id.*

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

<sup>78</sup> WASH. REV. CODE. § 43.43.830 (2012); WASH. REV. CODE. § 9A.36.041 (1987).

<sup>79</sup> WASH. REV. CODE. § 43.43.830 (2012); WASH. REV. CODE § 9A.88.030 (1988).

<sup>80</sup> WASH. REV. CODE. § 43.43.842 (2014).

<sup>81</sup> WASH. REV. CODE. § 43.43.830(9) (2012).

in the second degree (a Class C felony) and theft in the third degree (a gross misdemeanor).<sup>82</sup>

#### 4. Ban on State-funded Higher Education for Inmates

Following the United States Congress's ban of prisoner Pell Grants in 1994,<sup>83</sup> the Washington State Legislature banned state financing of prisoner postsecondary education in 1995.<sup>84</sup> However, the same bill that banned higher education funding for prisoners required inmates who had not received a high school diploma to earn the equivalent of one in prison.<sup>85</sup> Additionally, the state encourages inmates to complete vocational training during their time in prison.<sup>86</sup> As such, nearly 3,000 of Washington's 17,000+ inmates are enrolled in basic education and vocational programs.<sup>87</sup> Despite this, the only available higher education programs within prisons are charitably funded and are only found in a select few Washington prisons.<sup>88</sup> For the inmates who do not reside in these prisons, the only way to receive a higher education is through a correspondence program that the inmates themselves must pay for.<sup>89</sup>

While vocational training in prison may increase chances of employment for some ex-offenders, a college education would likely amplify an ex-

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<sup>82</sup> WASH. REV. CODE. § 43.43.842 (2014).

<sup>83</sup> The Associated Press, *More Washington State Inmates Finding Their Way to College Behind Bars*, OREGONLIVE (Jan. 20, 2015), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/01/washington\\_state\\_prisons\\_bring.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/01/washington_state_prisons_bring.html) [hereinafter The Associated Press].

<sup>84</sup> Katherine Long, *Behind Bars, College is Back in Session in Some Prisons*, SEATTLE TIMES (Jan. 21, 2015), <http://www.seattletimes.com/news/behind-bars-college-is-back-in-session-in-some-washington-prisons/>.

<sup>85</sup> *Id.*

<sup>86</sup> The Associated Press, *supra* note 83.

<sup>87</sup> Seattle Times Staff, Editorial, *Lift State Ban on Higher-Education Funding for Prison Inmates*, SEATTLE TIMES (Mar. 4, 2013), <http://www.seattletimes.com/opinion/editorial-lift-state-ban-on-higher-education-funding-for-prison-inmates/>.

<sup>88</sup> The Associated Press, *supra* note 83.

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

offender's chances of employment even more, thus reducing the chances of the ex-offender recidivating. Because "[o]btaining a college education . . . is becoming increasingly important in today's knowledge-based, global economy,"<sup>90</sup> a bachelor's degree may open the door to more career opportunities than a vocational degree. While studies are currently pending regarding the exact effect of a college education on job opportunities for ex-offenders, a 2013 study found a strong correlation between college degrees and lowered recidivism.<sup>91</sup> Inmates who received a college education during prison were 43 percent less likely to recidivate.<sup>92</sup> Indeed, every dollar spent on an inmate's education yielded four to five dollars saved on the costs of re-incarceration.<sup>93</sup>

### III. RECIDIVISM AND UNEMPLOYMENT: EMPIRICAL EVIDENCE AND ANECDOTAL STORIES

Many sociologists have collected data and conducted experiments to determine whether a correlation exists between unemployment and recidivism. This section describes some of their findings and describes the stories of employers who have had positive experiences hiring individuals with criminal records.

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<sup>90</sup> JEANNE CONTARDO & MICHELLE TOLBERT, PRISON POSTSECONDARY EDUCATION: BRIDGING LEARNING FROM INCARCERATION TO THE COMMUNITY 2 (2008), available at [http://johnjay.jjay.cuny.edu/files/ContardoTolbert\\_Paper.pdf](http://johnjay.jjay.cuny.edu/files/ContardoTolbert_Paper.pdf).

<sup>91</sup> The Associated Press, *supra* note 83.

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

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

*A. The Stigma of a Criminal Record and Recidivism*

First, unemployment in general positively correlates with crime rates.<sup>94</sup> Using nationwide state data on unemployment crime rates spanning several years, and controlling for various other factors, one study found that unemployment rates are strongly predicative of property crimes such as robbery, burglary, larceny, and theft.<sup>95</sup> The same study attributed the decrease in property crimes during the 1990s to the decline in unemployment rates.<sup>96</sup> The study went on to note that crime rates are significantly higher in neighborhoods with higher concentrations of unemployment.<sup>97</sup>

Another study regarding employer attitudes demonstrates the depth of stigma that ex-offenders face upon attempting to enter the workforce.<sup>98</sup> Researchers interviewed 3,000 employers in several major cities.<sup>99</sup> They asked the employers their attitudes concerning several categories of people that tend to be stigmatized in hiring processes.<sup>100</sup> Some of the categories were welfare recipients, ex-offenders, and individuals with unstable work histories.<sup>101</sup> The study found that ex-offenders were the most stigmatized group among all: only 40 percent of employers were willing to hire ex-offenders.<sup>102</sup>

Furthermore, in a revealing study, sociologist Devah Pager found that applicants with a criminal record were significantly more likely to not

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<sup>94</sup> Steven Raphael & Rudolph Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. LAW & ECON. 259, 260 (2001).

<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.* at 281.

<sup>98</sup> SCHMITT & WARNER, *supra* note 19, at 9–10.

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

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

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.*



receive callbacks from an employer after a job interview.<sup>103</sup> Pager used two pairs of auditor teams, one Black team, and one White team.<sup>104</sup> The teams were randomly assigned to fifteen introductory job interviews per week.<sup>105</sup> During random interviews, some participants were directed to tell the interviewer they were previously convicted of felony possession of cocaine, which resulted in eighteen months of incarceration.<sup>106</sup> Irrespective of race, those who revealed the fake criminal record had callback numbers drastically lower than those who did not claim to have a prior record.<sup>107</sup> For the White teams, the callback numbers were reduced by 50 percent.<sup>108</sup> Pager found that the stigma of a criminal record was more damning to the Black teams. When the individual was Black, the callback rate was reduced to just ten percent. This is particularly salient for Washington State because there are 6.4 Blacks incarcerated for every White person.<sup>109</sup>

Additionally, other studies have found that unemployment and frequent job changes positively correlate with recidivism.<sup>110</sup> For example, one study conducted in Chicago found that unemployed ex-offenders are three times more likely to return to prison than employed ex-offenders.<sup>111</sup> Furthermore, this same study found that after one year out of prison, 60 percent of ex-offenders remained unemployed.<sup>112</sup>

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<sup>103</sup> Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J. L. & SOC. CHANGE 159, 169 (2011).

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

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

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> MAUER & KING, *supra* note 32, at 11.

<sup>110</sup> LEGAL ACTION NETWORK, NATIONAL BLUEPRINT FOR REENTRY 13 (2008), *available at*

[http://www.hirenetwork.org/sites/default/files/National\\_Blueprint\\_For\\_Reentry\\_08.pdf](http://www.hirenetwork.org/sites/default/files/National_Blueprint_For_Reentry_08.pdf).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

When former inmates are able to obtain employment, they are less likely to recidivate.<sup>113</sup> Through an analysis of data gathered from a now-defunct employment program for criminal offenders, one study compared recidivism for those randomly assigned to work programs to those who were not.<sup>114</sup> The study found “offenders who are provided even marginal employment opportunities are less likely to reoffend than those not provided such opportunities.”<sup>115</sup>

A program for inmates in North Carolina corroborates the study’s findings. Project Re-entry, a program in Forsyth County, North Carolina for former inmates, provides inmates soon to be released from prison with job training.<sup>116</sup> Specifically, the program teaches inmates how to prepare job applications, speak to potential employers about their criminal history, and conduct successful job interviews.<sup>117</sup> Project Re-entry does not exclude any former inmate based on the nature of their crime.<sup>118</sup> Despite this, only 13.9 percent of Project Re-entry’s participants return to prison within three years of release.<sup>119</sup> The program’s low recidivism rate is in stark contrast with the 67.5 percent recidivism rate that prevails throughout the nation.<sup>120</sup>

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<sup>113</sup> Greg Barnes, *Seeking Safety: What Keeps Hundreds of Inmates from Committing More Crimes in Fayetteville?*, WRAL.COM, <http://www.wral.com/seeking-safety-what-keeps-hundreds-of-released-inmates-from-committing-more-crimes-in-fayetteville-/13935877/> (last visited Oct. 5, 2014).

<sup>114</sup> 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, 532 (2000).

<sup>115</sup> *Id.*

<sup>116</sup> Barnes, *supra* note 113.

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

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

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

*B. Empirical Studies and Ex-offender Behavior With and Without Employment*

A lack of empirical evidence exists regarding the prevalence of employed ex-offenders committing criminal acts on the job or performing their jobs in a sub-par manner.<sup>121</sup> However, one study conducted in New Zealand found that individuals who committed crimes as juveniles were neither more apt to perform poorly at work nor commit crimes on the job in their twenties.<sup>122</sup> Nonetheless, the dearth of studies that note a correlation between poor work performance and ex-offender status seems to imply that employer fears about hiring ex-offenders are unsubstantiated.<sup>123</sup>

Furthermore, although one out of five violent crimes occurs in the workplace, no research suggests that ex-offenders commit a large number of these crimes.<sup>124</sup> For example, the most egregious crimes, like homicide, have a 93 percent chance of being committed on the job by nonemployee strangers.<sup>125</sup> Thus, employer fears that an ex-offender may commit a violent crime in the workplace seem to be unwarranted.

*C. Employer Stories*

Anecdotal stories often detail the value in hiring ex-offenders. The Chief Human Resources Developer of Wynn Resorts, Arte Nathan, advocates hiring ex-offenders, as it embraces “the true meaning of diversity.”<sup>126</sup> In fact, Mr. Nathan has hired ex-offenders since 1993 and staffed them at

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<sup>121</sup> Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 207 (2013).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 534 (2007).

<sup>125</sup> *Id.*

<sup>126</sup> Alana Roberts, *Wynn Exec Touts Benefits of Hiring Ex-Felons*, LAS VEGAS SUN (June 24, 2005), <http://www.lasvegassun.com/news/2005/jun/24/wynn-exec-touts-benefits-of-hiring-ex-prisoners/>.

various hotels throughout Las Vegas, Nevada, with “extreme” success.<sup>127</sup> Furthermore, he asserted what many empirical researchers suggest—if companies do not hire ex-offenders, they are left with limited options, including committing crimes.<sup>128</sup> Based on Mr. Nathan’s positive experiences, he advocates for other employers to “[t]ake a chance, whether you’re hiring 10,000 workers or 10.”<sup>129</sup>

Similarly, the City Manager of Little Rock, Arkansas, Bruce Moore, has also successfully hired ex-offenders.<sup>130</sup> Mr. Moore started an ex-offender pilot program, the Felon Re-entry Sidewalk Construction Program, and it has now become a permanent fixture in Little Rock.<sup>131</sup> The project, which improves the sidewalks of the city, received more than 200 applications from ex-offenders; ten were hired.<sup>132</sup> After working for the program for a year, Little Rock hired one of the ten ex-offenders as a full time city employee, and others in the program are now working in different areas of public works.<sup>133</sup> In fact, the success of the program has inspired others in Little Rock to create similar programs that specifically hire ex-offenders.<sup>134</sup> In discussing his reasoning for the program, Moore stated,

It’s more than just giving somebody a job. We’re really making a concerted effort to give individuals who’ve made a mistake in the past a second chance . . . . After they serve their time, if they want to be upstanding citizens, the public and private sectors should afford them those opportunities.<sup>135</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Erin Greer, *Reform and Revitalize*, AM. CITY & COUNTY (Jan. 3, 2014), <http://americacityandcounty.com/public-works/reform-and-revitalize>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

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

#### IV. CURRENT LAWS AND PROGRAMS DESIGNED TO IMPROVE PROSPECTS OF EMPLOYMENT FOR EX-OFFENDERS

Recognizing that ex-offender unemployment is a problem, both at the federal level and in Washington State, several laws and programs have been implemented to improve an ex-offender's chances of employment. This portion describes some of these programs and articulates why these efforts have been largely unsuccessful.

##### *A. Federal Tax Breaks*

Under a federal program, the Work Opportunity Tax Credit, employers can receive tax credits for hiring members of certain groups that face significant barriers in obtaining employment.<sup>136</sup> Members of these disadvantaged groups include public aid recipients, veterans, and ex-offenders.<sup>137</sup> After hiring an ex-offender, employers may receive up to \$2,400 in tax deductions, so long as the employer hired the former inmate within a year of his or her release.<sup>138</sup> However, a couple of problems exist with the program, which is why it is not particularly successful. First and foremost, the majority of employers are completely unaware that the program even exists.<sup>139</sup> Of course, if employers are unaware that the tax credit is available to them, they will not take advantage of the program's benefits. Second, the program does not offer enough money to incentivize businesses. Because many employers worry that an ex-offender employee

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<sup>136</sup> *WOTC Eligibility*, EMP'T SEC. DEP'T. WASH. STATE, <https://esd.wa.gov/about-employees/WOTC/eligibility> (last visited Oct. 3, 2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Work Opportunity Tax Credit*, U.S. DEP'T OF LABOR (Sept. 24, 2014), <http://www.doleta.gov/business/incentives/opptax/benefits.cfm>.

<sup>139</sup> Avi Brisman, *Double Whammy: Collateral Consequences of Convictions and Imprisonment for Sustainable Communities and the Environment*, 28 WM. ENVTL. L. & POL'Y REV 423, 440 (2004).

may be more likely to subject the employer to liability in lawsuits,<sup>140</sup> which may cost tens of thousands of dollars, if not more, \$2,400 is simply not enough to incentivize employers.

Third, the tax benefit program is not guaranteed. Congress sometimes allows the program to expire; however, Congress often retroactively reauthorizes the program to the date of expiration.<sup>141</sup> Nonetheless, without any guarantee of financial compensation, employers seeking to hire a candidate during a time where the tax credit is unavailable possess no financial incentive to hire someone with a criminal record.

#### *B. Washington Bonding Program*

The Employment Security Department of Washington State provides individual fidelity bonds to employers who are, or could be, denied fidelity insurance coverage because of an employee's status.<sup>142</sup> In sum, a fidelity bond is a kind of business insurance that protects an employer against monetary or physical losses caused by an employee's fraudulent or dishonest acts.<sup>143</sup> Ex-offenders are included among the categories of employees the insurance covers.<sup>144</sup> The program covers potential losses resulting from theft, forgery, larceny, and embezzlement.<sup>145</sup>

Although the Washington Bonding Program addresses some employer concerns regarding hiring ex-offenders, it does not adequately address all

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<sup>140</sup> Jennifer Leavitt, *Walking a Tight Rope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286 (2002).

<sup>141</sup> See *Work Opportunity Tax Credit*, EMP. SEC. DEP'T, WASH. STATE, <http://www-stage.esd.wa.gov/hireanemployee/resources/taxcredits/index.php> (last visited Jan. 25, 2016).

<sup>142</sup> *Washington Bonding Program*, EMP. SEC. DEP'T, WASH. STATE, <http://www.wa.gov/esd/oes/bond/default.htm> (last visited Sept. 10, 2014).

<sup>143</sup> *Fidelity Bond*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/fidelity-bond.asp> (last visited Apr. 3, 2015).

<sup>144</sup> *Washington Bonding Program*, EMP. SEC. DEP'T, WASH. STATE, <http://www.wa.gov/esd/oes/bond/default.htm> (last visited Sept. 10, 2014).

<sup>145</sup> *Id.*

employer fears. For example, the bonds only last for six months and do not cover employers for losses incurred due to job injuries, poor workmanship, or work accidents.<sup>146</sup> Additionally, the bonds do not cover employers for battery or other bodily injuries the employee causes.<sup>147</sup> The bonds only cover employers for amounts ranging from \$5,000 to \$25,000.<sup>148</sup> The amount of money allotted to the employer is inadequate in quelling employer fear because (1) many employers fear hiring ex-offenders because of potential negligent hiring claims<sup>149</sup> that could cost beyond the \$25,000 range, and (2) the bonds do not cover a broad category of potential losses.

### C. Work Release Programs

Work release facilities in Washington give some incarcerated people the opportunity to serve the remaining six months of their sentence in a facility that enables the person to find and retain employment.<sup>150</sup> During their time at the facility, participants may have some of their wages garnished to pay off any legal financial obligations.<sup>151</sup> Additionally, participants of the program are taught job skills, money management, and other life skills.<sup>152</sup> Some also receive access to addiction treatment services.<sup>153</sup>

The program is certainly well worth the tax dollars put in. In 2007, the Washington State Institute for Public Policy conducted a study to determine the efficacy of the program and found that the reduction in recidivism from those in the program resulted in \$3.82 worth of benefits for every tax dollar

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Leavitt, *supra* note 140, at 1286.

<sup>150</sup> DEP'T OF CORR., WORK RELEASE DATA SHEET 1 (2013) available at <http://doc.wa.gov/facilities/workrelease/docs/WRDataFactSheet.pdf>.

<sup>151</sup> *Id.*

<sup>152</sup> Wash. State Gov't, *Work Release in Washington*, YOUTUBE (Jul. 6, 2010), <https://www.youtube.com/watch?v=42WVPxAkYKQ>.

<sup>153</sup> DEP'T OF CORR., *supra* note 150.

spent.<sup>154</sup> Furthermore, in 2013, the average daily cost of incarceration was \$89.73; by comparison, the average daily cost of housing an offender in a work release program was \$76.39.<sup>155</sup>

Although the Work Release program enhances the chances of an ex-offender obtaining employment, the program has limited means, criteria, and availability to suit the needs of Washington State. Unfortunately, only four percent of those incarcerated are able to enroll and benefit from the program.<sup>156</sup> Moreover, stringent guidelines must be met in order for an offender to qualify, and the program simply does not have enough space or allocated funding to accommodate the close to 17,000 people incarcerated in Washington State.<sup>157</sup>

#### *D. Ban the Box Legislation*

On November 1, 2013, Seattle's Ban the Box ordinance took effect.<sup>158</sup> The ordinance forbids employers in the city of Seattle from inquiring about an applicant's criminal history during the initial application process.<sup>159</sup> Thus, the majority of job applications in Seattle cannot contain a portion that asks if the applicant has ever been convicted of a crime.<sup>160</sup> Under the ordinance, employers cannot exclude an applicant solely based on the applicant's criminal history, "unless the employer has a legitimate business reason for taking such action."<sup>161</sup> Moreover, the ordinance contains two stipulations for employers who forego hiring an applicant based on the

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> KING CTY. PROSECUTING ATTORNEY'S OFFICE, *supra* note 26, at 13.

<sup>157</sup> DEP'T OF CORR., *supra* note 150.

<sup>158</sup> *Seattle Passes Ban the Box Ordinance for Private Employers*, OPEN ONLINE, <http://www.openonline.com/Home/News-Events/News/News-Article-View/ArticleId/407/Seattle-Passes-Ban-the-Box-Ordinance-for-Private-Employers> (last visited Oct. 9, 2015) (hereinafter *Seattle Passes Ban the Box*).

<sup>159</sup> *Id.*

<sup>160</sup> SEATTLE, WASH. ORDINANCE § 14.17. 020 (2013).

<sup>161</sup> *Seattle Passes Ban the Box*, *supra* note 158.



applicant's criminal history: (1) the employer must hold open the applied-for position for a minimum of two business days; and (2) the employer must notify the applicant of the reasoning for not being hired. Despite these provisions, the employer remains free to ask about an applicant's criminal record or conduct a background check after the initial application process.<sup>162</sup>

Although Ban the Box legislation is certainly well intentioned, unfortunately, the legislation cannot significantly solve the ex-offender unemployment rate for several reasons. Among these reasons are the fact that the legislation (1) does not address employer aversion to negligent hiring claims; (2) still allows an employer to ask about an applicant's criminal history (albeit at a later stage of the hiring process); (3) is ambiguous regarding an employer's ability to use the internet to learn more about a potential employee; (4) does not address inferences that can be gathered from a candidate's application; and (5) is largely ignored on popular hiring websites such as Craigslist. Thus, Ban the Box seems to only prolong the inevitable—the non-hire of an ex-offender applicant.

First, research demonstrates that the difference in hiring between employers that conduct background checks and those that do not is essentially the same. Two criminologists conducted a study in Los Angeles to assess hundreds of employers' attitudes and hiring practices concerning ex-offenders.<sup>163</sup> Through phone interviews, the researchers asked employers if they perform background checks.<sup>164</sup> Additionally, the researchers investigated whether the employers were legally required to conduct criminal background checks or simply chose to do so.<sup>165</sup> Unsurprisingly, the

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<sup>162</sup> *Id.*

<sup>163</sup> Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 *CRIMINOLOGY & PUB. POL'Y*, 371, 397 (2008).

<sup>164</sup> *Id.* at 376.

<sup>165</sup> *Id.*

researchers found that employers legally required to conduct criminal background checks were significantly less likely to hire ex-offenders.<sup>166</sup> However, the rate of hiring for ex-offenders between employers that elect to conduct criminal background checks and those that simply do not conduct criminal background checks is essentially the same.<sup>167</sup> The ideology behind Ban the Box legislation is that knowledge of someone's criminal record will reduce the likelihood of employment; however, the study suggests that when employers elect to check an employee's criminal record, they do so to learn pertinent information about the candidate (e.g., the nature of the crime).<sup>168</sup> One of the motivations for finding this information is to assess whether the candidate's past may predict that the employee will be more likely to engage in behavior that could result in a negligent hiring lawsuit.<sup>169</sup> For those with a more extensive or violent criminal past, Ban the Box may do little to improve the chances of finding employment once a background check is conducted after the interview stage or if the employer asks whether the candidate has a criminal record. Thus, the study suggests that performing background checks may not have a significant effect on increasing employment for ex-offenders.<sup>170</sup>

The ambiguity in the language of the Seattle Ban the Box ordinance potentially contributes to its shortcomings because it is unclear to what extent using a search engine to look up a job candidate is forbidden. The ordinance defines criminal background check as "requesting or attempting to obtain, directly or through an agent, an individual's Conviction Record or Criminal History Record Information from the Washington State Patrol or

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 398.

<sup>168</sup> *Id.* at 374.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 397.

any other source that compiles and maintains such records or information.”<sup>171</sup>

Although most employers throughout the nation conduct background checks using private companies to discover an employee’s criminal record, using search engines to look up candidates (for general reasons) is becoming standard practice as well. In fact, one study found that 78 percent of job recruiters and human resource professionals use search engines to assess job candidates.<sup>172</sup> Rather than using the internet to glean a candidate’s past criminal record, job recruiters and human resource professionals often use search engines for other purposes, like ensuring that a candidate’s resume is accurate.<sup>173</sup> However, a casual internet search could yield, for example, a newspaper article detailing a person’s previous run-ins with the law, even if the criminal record was previously expunged.<sup>174</sup> In light of this, a journalist remarked, “getting out of Google’s grip is harder than clearing the legal record.”<sup>175</sup>

Given the language of the ordinance, it does not seem too far-fetched to speculate that an employer may use the internet to investigate a candidate’s criminal record under the pretext of using the search engine to verify a candidate’s work record. Alternatively, the employer could actually conduct an innocent search, only to inadvertently stumble upon the ex-offender’s former criminal case or newspaper article detailing the ex-offender’s past

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<sup>171</sup> SEATTLE, WASH., ORDINANCE § 14.17. 010 (2013) (emphasis added).

<sup>172</sup> CROSS-TAB, ONLINE REPUTATION IN A CONNECTED WORLD 8 (2010), available at [http://www.job-hunt.org/guides/DPD\\_Online-Reputation-Research\\_overview.pdf](http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf).

<sup>173</sup> Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. L. REV. 1397, 1432 (2012).

<sup>174</sup> See Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Records Irrelevant in the Digital Age?* 19 COMMLAW CONSPECTUS 123, 137 (2010).

<sup>175</sup> *Id.* (quoting Paul Silva, *Signs of Life — No Escape From Google’s Grip*, BEACH REP. (2009)).

actions. Should an employer be faced with a fine for violating the ordinance, the employer could argue that the definition of “criminal background check” does not apply because the employer never “request[ed] or attempted to obtain [the individual’s] conviction record or criminal history information”;<sup>176</sup> rather, the employer was simply trying to look at the details of the candidate’s LinkedIn and happened to find the criminal record. The prevalence of Google searching candidates<sup>177</sup> would certainly bolster an employer’s claim. This manner of circumventing the process coupled with employer attitudes and fears towards ex-offenders seem to negate the benevolent intent behind Ban the Box.

Additionally, regardless of the missing “box,” gaps in employment and listing certain places of employment on a resume could tip off an employer that the candidate has a criminal past. Certainly, gaps in employment could seem suspicious, and an employer may wonder why a candidate was unemployed for so long.<sup>178</sup> Simply being a person of color could lead to increased suspicion of a criminal background when gaps in employment are apparent because people often correlate criminality with race.<sup>179</sup> Furthermore, for those that list a correctional facility as an employer—perhaps because the correctional facility where they were incarcerated was their only employer—the removal of the box does nothing to hide the ex-offender’s past.

Moreover, internet postings, a major source of job advertisement, are rarely monitored to ensure compliance with Ban the Box. The National Employment Law Project (NELP) conducted a study where they examined Craigslist job postings.<sup>180</sup> Blanket bans against hiring a felon could run

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<sup>176</sup> SEATTLE, WASH., ORDINANCE § 14.17. 010, (2013).

<sup>177</sup> CROSS-TAB, *supra* note 172, at 8.

<sup>178</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 153 (2010).

<sup>179</sup> *Id.* at 152–53.

<sup>180</sup> *Id.* at 153.

afoul of Title VII of the Civil Rights Act (if the ban has a racially disparate impact), but the popular website contains hundreds of advertisements that contain outright bans on applicants with criminal records.<sup>181</sup> Thus, even though blanket bans on hiring ex-offenders may produce legal consequences for employers, with little enforcement on the internet to prevent the bans, it is unlikely that the threat of a fine will deter an employer from posting a discriminatory advertisement.

#### V. SOLUTIONS TO THE EX-OFFENDER UNEMPLOYMENT PROBLEM

*“Justice is not only the absence of oppression, it is the presence of opportunity.”<sup>182</sup>*

As discussed, employer attitudes and fears concerning hiring ex-offenders are what must be addressed in order to remedy the ex-offender unemployment rate, and incentivizing and indemnifying employers is what will likely stifle these fears. Therefore, I propose the following solutions to address the ex-offender unemployment rate: (1) indemnify employers for respondeat superior and negligent hiring tort claims, with some limitations; (2) create a tax benefit program for employers who hire ex-offenders; (3) devise a reduced loan interest program for small businesses that agree to hire a certain number of ex-offenders; (4) advertise all of the proposed incentives to employers throughout the state; (5) expand the work release program to all prisoners that will be released within their lifetime; and (6) fund college for inmates that desire higher education.

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<sup>181</sup> *Id.*

<sup>182</sup> *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July, 16, 2015), [http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html?ref=topics&\\_r=0](http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html?ref=topics&_r=0) (quoting President Obama).

*A. Indemnify Employers for Certain Tort Claims*

Employers who are assured that they will not be subject to tort claims based on the conduct of the ex-offender would likely be more willing to hire ex-offenders. Because employers have more money than the employee who happens to commit a tort, victims of workplace violence or workplace negligence often assert a claim against the employer rather than the perpetrator employee.<sup>183</sup> Furthermore, since ex-offenders are frequently unfavorably stereotyped,<sup>184</sup> employers often fear hiring ex-offenders, believing that an ex-offender will likely cause the employer financial injury. Rather than having the employer pay for these potential claims, Washington State should pay for these sorts of negligence claims to boost employment.

The most common torts that could subject an employer to liability in Washington State are respondeat superior claims and negligent hiring claims. According to the doctrine of respondeat superior, an employer may be held vicariously liable for the negligent actions of its employee where the employee was acting within the scope of employment at the time of the incident; however, liability for respondeat superior claims is limited to acts done in furtherance of achieving an employer's goals.<sup>185</sup> For example, a pizza place that provides delivery could be liable for an employee negligently running a red light and striking a pedestrian if the employee ran that red light in the course of delivering the pizza. In contrast, a Washington court held that because a truck driver's assault on a motorist was not within the scope of his employment, vicarious liability could not apply to the truck

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<sup>183</sup> Leavitt, *supra* note 140, at 1301.

<sup>184</sup> See *Ex-Offenders Need Job Opportunities, Not Stereotypes*, STAMFORD ADVOC. (Sept. 14, 2010), <http://www.stamfordadvocate.com/local/article/Ex-offenders-need-job-opportunities-not-658067.php>.

<sup>185</sup> See *Kaye v. Lowe's HIW, Inc.*, 242 P.3d 27, 34 (Wash. Ct. App. 2010) (commuting to and from work is not within the scope of one's employment).

driver's employer because the assault was not performed to further the truck company's goals.<sup>186</sup>

Establishment of a negligent hiring claim subjects an employer to a broader spectrum of liability. To establish a negligent hiring claim, a plaintiff needs to demonstrate that (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries.<sup>187</sup> Accordingly, negligent hiring claims do not necessitate a finding that the employer was acting within the scope of his occupation. Negligent hiring claims are often contingent on foreseeability.<sup>188</sup> If the harm that occurred to the plaintiff could not have been foreseen (e.g., an employee stabs a fellow employee, and the employee has no criminal record), then the employer will not be liable under a theory of negligent hiring. However, if the harm was foreseeable (e.g., an employee was previously convicted of a home robbery, and the circumstances of employment are such that he has access to people's homes, and the employee commits a robbery while on the job), then the employer may be liable under a theory of negligent hiring. Because employers and courts often rely on criminal records to assess "foreseeability" that could create liability, people with criminal records are often turned away from employment.<sup>189</sup> Thus, if Washington assures its employers that it will be Washington, not the employer, that will pay if a claim is asserted against the employer on behalf of the conduct of the employee, it is likely that more ex-offenders will be hired.

Certain statutory limitations should apply to strike a balance between community peace of mind, safety, financial interests, and the policy

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<sup>186</sup> See *Kuehn v. White*, 600 P.2d 679, 683 (Wash. Ct. App. 1979).

<sup>187</sup> See *Betty Y. v. Al-Hellou*, 988 P.2d 1031, 1033 (Wash. Ct. App. 1999).

<sup>188</sup> See *Ruschner v. ADT Sec. Sys., Inc.*, 204 P.3d 271, 278 (Wash. Ct. App. 2009).

<sup>189</sup> Leavitt, *supra* note 140, at 1302.

interests that underlie hiring ex-offenders. Many people would likely fear ex-offenders, especially those with particularly violent offenses, having access to their homes. Additionally, one could infer that an ex-offender who commits a tort within the confines of someone's home would likely subject the state to a large amount of monetary liability. Therefore, to balance all of these interests, Washington State should limit its assumption of liability to those jobs that do not involve unsupervised access to people's homes.

Although some may argue that taxpayers should not pay for the tortious conduct of an ex-offender because the possible expenses may be too high, Washington State already pays nearly \$47,000 per year per inmate, well above the federal average.<sup>190</sup> Furthermore, the absence of evidence indicating that ex-offenders are more likely than non-offenders to engage in tortious conduct demonstrates that these fears are unsupported.<sup>191</sup>

*B. Create a Washington Tax Benefit Program for Employers Who Hire Ex-Offenders*

In addition to tort indemnification, monetary incentives are likely to supersede the fears and negative attitudes that many employers have in regards to ex-offenders. Because people are incentive driven,<sup>192</sup> and because money is often the driving incentive for employers, it would behoove the legislature to create a monetary program that sparks employer interest in hiring ex-offenders. Washington already has over fifty tax

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<sup>190</sup> VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 10 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

<sup>191</sup> See Section III, part b.

<sup>192</sup> Kendra Cherry, *The Incentive Theory of Motivation*, ABOUT EDUC., <http://psychology.about.com/od/motivation/a/incentive-theory-of-motivation.htm> (last visited Apr. 3, 2015).



incentive programs that businesses can take advantage of.<sup>193</sup> In fact, some of these tax credits are already designed “to encourage the creation and preservation of family wage jobs, especially in areas with high unemployment.”<sup>194</sup> Since curbing high unemployment seems to already be one of the Department of Revenue’s goals, adding tax incentives for employers that hire ex-offenders seems to be a natural extension of existing tax break policy.

Washington should create and categorize the tax credit for hiring ex-offenders under existing business and operations (B&O) tax credits. The B&O tax is a tax imposed on Washington businesses based on the value of products, gross sales, or gross income of a business.<sup>195</sup> B&O tax breaks subtract some of the employer’s owed taxes, leaving more money in the pockets of employers at the end of the year. This proposed tax break, in conjunction with tort indemnification, would likely make the appeal in hiring an ex-offender much greater than it is today. Additionally, an employer may also take advantage of the federal Work Opportunity Tax Credit (if the credit is active), which may award the employer with an additional \$2,400 tax credit.<sup>196</sup> Thus, while other states, like California, have incentives of up to \$37,440 for hiring an ex-offender,<sup>197</sup> a one-time tax credit of \$3,000 for hiring an ex-offender and retaining his or her

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<sup>193</sup> See *Tax Incentives*, DEPT. OF REVENUE, <http://dor.wa.gov/content/FindTaxesAndRates/TaxIncentives/IncentivePrograms.aspx> (last visited Mar. 3, 2015).

<sup>194</sup> *Id.*

<sup>195</sup> *Business and Occupation Tax*, DEPT. OF REVENUE, <http://dor.wa.gov/content/FindTaxesAndRates/BAndOTax/#whatCredits> (last visited Apr. 3, 2015).

<sup>196</sup> *Work Opportunity Tax Credit*, EMP’T SEC. DEPT., WASH. STATE, <http://www.esd.wa.gov/hireanemployee/resources/taxcredits/index.php> (last visited Sept. 10, 2014).

<sup>197</sup> See *Hiring Credits and Vouchering*, CA.GOV, <http://www.hcd.ca.gov/financial-assistance/enterprise-zone-program/vouchering.html> (last visited Oct. 20, 2015).

employment for at least one year should sufficiently incentivize employers to open their doors to people with criminal records.

*C. Create A State-Subsidized Loan Interest Program for Businesses That Agree to Hire A Certain Number of Ex-Offenders*

Devising a state subsidized loan interest program for small businesses could help pique employer interest in hiring ex-offenders. Washington could also subsidize some of the interest on a loan for small businesses on the condition that the employer must hire a certain number of ex-offenders.

Currently, the interest rates on small business loans vary from as little as 3.42 percent<sup>198</sup> to rates as exorbitant as 60 percent.<sup>199</sup> After the great recession of 2008, many big banks became reluctant to give loans to small businesses.<sup>200</sup> Because small businesses have a crucial need for loans to start<sup>201</sup> and maintain their business, many small businesses turn to alternative lenders with high interest rates in order to finance business necessities.<sup>202</sup> To limit the potentially costly reach of this proposal, the loan interest subsidy should be limited to small business loans taken out by employers to start their businesses. This is congruent with the goal of employing ex-offenders because it is likely that an employer will need to staff his or her business with multiple employees at the beginning of the business rather than sometime in the middle. Additionally, the rate of interest to be subsidized should be capped somewhere between six and nine

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<sup>198</sup> Mark Prosser, *SBA Loan Rates-Current Interest Rates and How They Work*, FITSMALLBUSINESS.COM (Apr. 2, 2015), <http://fitsmallbusiness.com/sba-loan-rates/>.

<sup>199</sup> Paul Davidson, *Small Businesses Turn to Alternative Lenders*, USA TODAY (Nov. 13, 2012), <http://www.usatoday.com/story/money/business/2012/11/13/unconventional-business-loans/1650637/>.

<sup>200</sup> *Id.*

<sup>201</sup> Jennifer F. Bender, *The Average Interest Rate for Small Business Loans*, HOUSTON CHRON., <http://smallbusiness.chron.com/average-interest-rate-small-business-loans-15342.html> (last visited Oct. 9, 2015).

<sup>202</sup> Davidson, *supra* note 199.

percent in order to balance the interests that lie between generating appeal in hiring ex-offenders and monetary conscientiousness. However, for those employers who are unable to secure an interest rate that is within the average market rate, the state of Washington could pay up to the capped amount and the business owner could pay the difference.

Furthermore, the number of ex-offenders necessary to obtain the subsidized interest rate should be contingent on the number of employees that will be necessary for the proposed business. For example, a restaurant that needs cooks, dishwashers, servers, and bartenders will likely need to hire more ex-offenders than a boutique-clothing store, but both will receive a subsidized interest rate so long as they hire a proportional number of ex-offenders. Perhaps when employers notice that their fears of ex-offenders are unsubstantiated, employers may begin to change their perceptions about ex-offenders and other employers will also accept ex-offenders into the workplace.

*D. Extensively Advertise Monetary Incentives to Employers Throughout Washington State*

Regardless of the incentives, if employers are unaware of any of the proposed programs that should be implemented to address the ex-offender unemployment rate, they likely will not hire ex-offenders. For example, a significant number of employers were unaware of the federal Work Opportunity Tax Credit (previously discussed),<sup>203</sup> which can partially attribute to the program's lack of success in solving the ex-offender unemployment rate. Although advertisement of these incentives need not entail advertisements on television, the advertisements should be displayed on buses, park benches, or other visible spaces that Washington State currently advertises on. Additionally, the state should disperse mail and/or

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<sup>203</sup> Brisman, *supra* note 139, at 440.

electronic notices of these incentives to all businesses to ensure that the programs are well known throughout the state.

*E. Expand the Work Release Program*

Without proper job and life skills, it is unlikely that an ex-offender can retain employment for long. Therefore, Washington State should also expand its work release program. Rather than adhering to the prison model, which leaves those exiting prison off to fend for themselves upon release and leaves people unable to navigate the complexities of seeking employment, this program effectively gives people a head start towards attaining a better future.

As of 2013, the work release program only had capacity for 658 people<sup>204</sup> even though the Department of Corrections recognizes that for every dollar spent on the program, \$3.82 is returned to the state.<sup>205</sup> The work release program prepares ex-offenders to perform the skills they need to thrive, providing a smoother transition from prison back into society. For example, participants are given family skills training and are also taught how to maintain a budget.<sup>206</sup> Additionally, the program allows participants to earn money during their sentence so that once they are released they are able to purchase items necessary for finding and keeping a job, like a car or a deposit for an apartment.<sup>207</sup>

The expansion of the program should also include offenders who are not in the “minimum security status” (and thus deemed eligible for the program) category. Because most offenders who will be released need the support, services, and programs that work release offers, it would be wise to

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<sup>204</sup> DEP’T OF CORR., *supra* note 150.

<sup>205</sup> *Work Releases*, DEP’T OF CORR., WASH. STATE, <http://doc.wa.gov/facilities/workrelease/default.asp> (last visited Apr. 3, 2015).

<sup>206</sup> Wash. State Gov’t, *Work Release in Washington*, YOUTUBE (Jul. 6, 2010), <https://www.youtube.com/watch?v=42WVPxAkYKQ>.

<sup>207</sup> *Id.*

broaden the scope of eligibility. Like prison security categories (e.g., minimum security and maximum security), offenders could be categorized based on security levels and sent to work release facilities with others in their same security level. To work effectively, the work programs should meet the needs of all offenders, not just low security inmates. Although some may argue that this proposal could be dangerous to the public because these offenders would be able to leave the confines of work release to work, these individuals will be out on the streets in six months regardless of whether they participate in the program. A transition that will better prepare them for life outside of prison is better for everyone.

*F. Provide College Education to Inmates in Prison*

Washington State should lift the ban on state funded college education for inmates. According to a Washington State Institute of Public Policy study, every \$5,000 invested in an inmate's education yields a \$20,000 benefit in costs from fewer incarcerations and use of social services.<sup>208</sup> Even the federal government is taking note of the body of research detailing the savings that accompany educating inmates, which is why Education Secretary Arne Duncan and Attorney General Loretta Lynch launched a pilot program that gives inmates at a facility in Maryland access to federal Pell Grants that pay for college.<sup>209</sup> Secretary Duncan remarked, "We think this is a small, small investment that will pay extraordinary dividends. Not just financially. But in terms of making our streets and communities safer."<sup>210</sup>

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<sup>208</sup> Seattle Times Staff, *supra* note 87.

<sup>209</sup> See *The Plan to Give Pell Grants to Prisoners*, NPR (July 31, 2015), <http://www.npr.org/sections/ed/2015/07/31/428148089/the-plan-to-give-pell-grants-to-prisoners>.

<sup>210</sup> *Id.*

Some may argue that a free college education for an inmate is a “slap in the face” to those who struggle to send their kids to college.<sup>211</sup> Although it does seem a bit unfair that someone who has broken the law receives an education that other, law-abiding individuals must pay for, the taxpayers are already paying the cost of imprisonment and this proposal would not necessitate additional resources to finance prisoner education; rather, the proposal would simply allow Washington’s Department of Corrections to allocate *some* of its already allotted funding to higher education.<sup>212</sup> Additionally, the potential for increased community safety and humanitarian interests requires acknowledgment. Tanya Wilson, an inmate serving twenty years in prison asks, “[w]ho would you rather live beside? . . . a person that’s just getting out of prison who just sat in her cell and stewed, or do you want somebody who has transformed, who is educated, who will not be a drain on society?”<sup>213</sup>

#### G. Relax Some of the Licensing Bans

Finally, Washington should relax some of its bans on occupational licensing. As previously discussed, some of the largest bans on ex-offender employment lie in occupations involving access to children or vulnerable adults.<sup>214</sup> However, some of the crimes listed under this ban are fairly minor, like assault in the fourth degree (a gross misdemeanor),<sup>215</sup> prostitution (a misdemeanor),<sup>216</sup> theft in the second degree (a Class C felony),<sup>217</sup> and theft in the third degree (a gross misdemeanor).<sup>218</sup>

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<sup>211</sup> The Associated Press, *supra* note 83.

<sup>212</sup> However, any additional funding towards inmate college education is desirable based on the data suggesting this would save taxpayer money over the long term.

<sup>213</sup> *Id.*

<sup>214</sup> WASH. REV. CODE. § 43.43.830 (2012).

<sup>215</sup> WASH. REV. CODE. § 43.43.830 (2012); WASH. REV. CODE. § 9A.36.041 (1987).

<sup>216</sup> WASH. REV. CODE. § 43.43.830 (2012); WASH. REV. CODE. § 9A.88.030 (1988).

<sup>217</sup> WASH. REV. CODE. § 9A.56.040 (2013).

<sup>218</sup> WASH. REV. CODE. § 9A.56.050 (2009).

Washington should also consider that many of these crimes are typically correlated with poverty (e.g., theft) and victimization (e.g., prostitution).<sup>219</sup> Enlarging rather than restricting jobs for qualified people in these categories will likely lead to overall lowered recidivism.

## VI. OTHER CONSIDERATIONS

### *A. Long Term Benefits and Other Miscellaneous Savings*

Some may argue that this article's proposals are far too costly. Certainly, if Washington implemented these proposals today and employers took advantage of them, more money would likely be spent on offenders and ex-offenders. While this would initially swell Washington's budget, these proposals would likely save an enormous amount of money in the long term, as recidivism would decrease and money would be saved on the cost of incarceration, which is at an average of over \$46,000 per inmate per year.<sup>220</sup> Additionally, even if ex-offenders do not recidivate, if they cannot find jobs, they will likely turn to the resources that others in poverty turn to for survival—food programs like WIC, SNAP, TANF, and subsidized housing programs.<sup>221</sup> These programs are also funded with tax dollars. Instead, these tax dollars should be used to enable ex-offenders to provide for themselves and their families for the rest of their lives.

## VII. CONCLUSION

As this article illustrates, it is in all of our interests to assure that ex-offenders have a chance at obtaining employment: our streets will remain safer, taxpayer money will be saved and spent more efficiently, and one of

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<sup>219</sup> DAVID BJERK, THIEVES, THUGS, AND NEIGHBORHOOD POVERTY 1 (2010), *available at* [http://www.frbsf.org/economic-research/files/ThievesThugs\\_DavidBjerk.pdf](http://www.frbsf.org/economic-research/files/ThievesThugs_DavidBjerk.pdf).

<sup>220</sup> VERA INST. OF JUSTICE, *supra* note 190.

<sup>221</sup> For a complete list of programs, see generally WASH. STATE DEP'T OF SOC. & HEALTH SERVS., <https://www.dshs.wa.gov/> (last visited Apr. 3, 2015).

forgotten goals of the justice system—rehabilitation—may truly be achieved by the ex-offender. We must also acknowledge the wide spectrum of roles people with criminal records have beyond their “criminal” label. Often they are parents, friends, brothers, sisters, daughters, sons, and partners. Rather than allowing the label of criminal to supersede the other roles they possess, Washington should do its best to enable the criminal label to wear away, leaving behind only the positive roles and labels that each individual holds in their personal and public life.