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The Right to Reentry: A Look at the Unemployment Crisis for Individuals with Criminal Records and Tennessee's Efforts to Solve the Problem

*Taylor Flake-Lawson*¹

“Americans share a faith in simple dreams. A job with wages that can support a family. Health care that we can count on and afford. A retirement that is dignified and secure. Education and opportunity for our kids. Common homes. American dreams.”² As Americans, having the chance to achieve economic security and promotion is cherished.³ But what happens to that dream for those who have a criminal record? Nearly 600,000 persons are released from prison each year, and a grand total of almost 70 million Americans have a criminal record.⁴ As a result, reentry and reintegration⁵ efforts have increased with the hope of reducing recidivism.⁶ Though these efforts have increased, unemployment among persons with criminal records has only gotten worse. In an effort to help, states have enacted measures to help persons with criminal records gain employment. This paper examines the issue of unemployment among persons with criminal

¹ *Taylor Flake-Lawson is a Candidate for Doctor of Jurisprudence, Class of 2020. The foundation for this article is inspired by the advocacy skills instilled in her by her parents Derek and Sherita Flake. The underlying ideas presented here would not be possible without the lessons, nurturing and encouragement of Dr. Tracie Burke, and Professors Renee Allen and Sherley Cruz. To Professor Joy Radice, witnessing your dedication and diligence to your expungement clients motivated me in a way that words cannot express. Thank you for introducing me to the world of reentry, and for guiding me through my first expungement cases. To Taurys, whose impending release makes me question the utility of the American Criminal Justice System, thank you. To Professor Valorie Vojdik, thank you for your feedback and allowing me to explore this subject in our Civil Rights Actions course. Finally, to my beloved husband, David Lawson, your patience and unconditional love was the fuel that kept this project going, thank you.*

² Senator Barack Obama, Reclaiming the American Dream, Remarks in Bettendorf, Iowa (Nov. 7, 2007).

³ *Id.*

⁴ Dan Clark, *How Many U.S. Adults have a Criminal Record? Depends on How You Define It*, POLITIFACT (Aug. 18, 2017), <https://www.politifact.com/new-york/statements/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/>.

⁵ Reentry and reintegration are terms that are often used interchangeably but some argue that they have distinct meanings. Reentry is defined as “the process of leaving prison and returning to society.” All prisoners released experience reentry. “Reintegration” on the other hand, may not be experienced by all. It is described as “the end goal” to reentry. JEREMY TRAVIS, ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001).

⁶ David Muhlhausen, *Research on Returning Offender Programs and Promising Practices*, NATIONAL INSTITUTE OF JUSTICE (Jun. 12, 2018) <https://nij.ojp.gov/speech/research-returning-offender-programs-and-promising-practices>.

records by beginning at the roots of the problem: mass incarceration, overcriminalization and collateral consequences. This paper then examines the national unemployment problem for ex-offenders, and Tennessee's efforts to aid in the solution of the problem. Finally, this paper looks critically at its effects on the unemployment problem, the programs enacted and offers potential recommendations for improvement.

I. The Problem: Mass Incarceration, Overcriminalization and Collateral Consequences

The increase in mass incarceration, the prevalence of overcriminalization and the resulting consequences often leave those with criminal records with barriers to reintegrating into society that are often difficult to overcome. What caused this problem? One scholar has suggested that the urgency is driven by “mass criminalization, mass collateral consequences of criminal records, technological advances that make criminal records easily accessible, and a national obsession with viewing all aspects of people's pasts.”⁷ Today, over 2.2 million individuals are incarcerated in America.⁸ Additionally, one in three people have some type of criminal record in the United States.⁹ If these numbers seem high, then your instincts are correct. The United States incarcerates more individuals than any other nation in the world.¹⁰ The United

⁷ Jenny Roberts, *Expunging America's Rap Sheet In The Information Age*, 2015 WIS. L. REV. 321, 325 (2015).

⁸ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, THE BROOKINGS INSTITUTION (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf; *see also* SCOTT H. DECKER, CASSIA SPOHN, & NATALIE ORTIZ, NCJRS, *CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT* 1, 3 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (hereinafter *CRIMINAL STIGMA*).

⁹ Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

¹⁰ James Cullen, *The History of Mass Incarceration*, BRENNAN CENTER (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

States also has the highest prison population rate.¹¹ The eventual release of such a large portion of the United States population, presents a situation where many people spend months, and in many cases years living in a world much different than the one that they will see once released. Once released, those formerly incarcerated persons face immense barriers to overcome.

Similarly, overcriminalization lies at the root of the reentry problem.¹² The term “overcriminalization” refers to the “overuse and abuse of criminal law to address every societal problem and punish every mistake.”¹³ In the last 40 years, the federal criminal law has increased drastically in scope.¹⁴ Historically, federal criminal law focused on wrongful conduct.¹⁵ For example, things like murder, theft, and treason.¹⁶ Today, what is criminalized is far broader than the historical conduct that was deemed inherently wrong.¹⁷ The number of criminal offenses has increased from about 3,000 in 1980 to 4,450 in 2008.¹⁸ Congress isn’t the only body to blame for the increase, federal agencies, state and local legislatures also share the blame.¹⁹ At present, the number of statutes and regulations that make things a crime is so high that the Congressional Research Service, the American Bar Association and the United States Justice Department cannot count them all.²⁰

Finally, the collateral consequences that result from having a criminal record stand in the way of reentry.²¹ Collateral Consequences are defined as “the purportedly nonpunitive, noncriminal consequences that can flow automatically or as a matter of discretion from a

¹¹ *Id.*

¹² Roberts, *supra* note 6, at 325.

¹³ *Overcriminalization*, HERITAGE FOUNDATION, <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization>.

¹⁴ *Id.* Nearly 5,000 federal statutes, and over 300,000 regulations contain criminal penalties.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Overcriminalization*, *supra* note 12.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Roberts, *supra* note 6, at 325.

criminal conviction.”²² Today, having a criminal record comes with a seemingly endless list of collateral consequences.²³ So, not only are people serving sentences in prison, but when they have served their time, they face barriers that no other American must face.²⁴ Collateral consequences can affect a variety of life aspects.²⁵ Some include immigration, property rights, employment and public assistance.²⁶ Additionally, criminal records prevent people from having access to services like affordable housing, employment, food assistance and education.²⁷

The imposition of collateral consequences has increased exponentially.²⁸ With their increase, there is the *added* collateral consequence: *people*. The stigma associated with having a criminal record has been referred to as the “defining consequence of a criminal conviction.”²⁹ Having a criminal record is argued to be the equivalent of having a “perpetual badge of infamy.”³⁰

This added collateral consequence has a social and economic impact.³¹ These social and economic consequences are compounded with the emergence of technology which has made the effects of collateral consequences widespread.³² Today, people have access to a criminal record with the click of a button. This makes having a criminal record increasingly more difficult than in years past.³³ Fifteen to twenty years ago employers, landlords, or neighbors that wanted access

²² *Id.* at 327; see also *National Inventory Of Collateral Consequences of Conviction*, CSG JUSTICE CTR., <https://niccc.csgjusticecenter.org/about/> (last visited Apr. 12, 2020); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS STANDARD 19-1.1 (3d ed. 2004), <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf> (defining collateral consequences as “the indirect consequences that flow from federal and state criminal convictions”).

²³ Roberts, *supra* note 6, at 327.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 336.

²⁸ See MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLIGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 2 (2013).

²⁹ Wayne Logan, *Informal Collateral Consequences*, 88 WASHINGTON L. REV. 1103, 1106 (2013).

³⁰ *Id.*

³¹ *Id.*

³² Roberts, *supra* note 6 at 328.

³³ *Id.*

to a person's criminal record had more steps to take.³⁴ They had to go to the courthouse to view the physical paper, in sometimes several jurisdictions depending on the person.³⁵ As a result of a 2002 E-Government act, federal agencies and courts are being pushed to make criminal records available electronically.³⁶ As a result, several states have followed with the transition of physical criminal records to digital criminal records.³⁷

For many, having a criminal record is the “de facto informal basis for job denial” which in turn has an oppressive economic impact that for some acts as the largest hurdle to reentry.³⁸ And unfortunately, the oppressive economic impact is met with the inability to secure employment. While it seems fairly easy to get a criminal record, it is even harder to get rid of it and live life after getting one.³⁹

II. The Solution: The Rise of Reintegration and Reentry Projects

Now that the problem has been presented, it is time to take a look at the solutions. The solutions presented by legislatures and organizations fall into several categories, they range from things like Federal and State reentry task forces,⁴⁰ to reentry legislation aimed at helping persons successfully reintegrate into society,⁴¹ and grant funded reentry programs.⁴² With nearly 600,000

³⁴ *Id.*

³⁵ *Id.*

³⁶ James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. SAINT THOMAS L.J., 387, 401–02 (2006).

³⁷ *Id.*

³⁸ Logan, *supra* note 28, at 1107.

³⁹ *Id.*

⁴⁰ *Tennessee Criminal Justice Investment Task Force Releases Recommendations*, TENNESSEE OFFICE OF THE GOVERNOR (Dec. 19, 2019), <https://www.tn.gov/governor/news/2019/12/19/tennessee-criminal-justice-investment-task-force-releases-recommendations.html> (hereinafter *Task Force*); see also *Reentry Program*, U.S. DEPARTMENT OF JUSTICE (2018), <https://www.justice.gov/usao-wdwa/reentry-program>.

⁴¹ Tennessee has laws that regulate the expungement of conviction and non-conviction offenses, the restoration of voting rights, the restoration of gun rights, certificates of employability and driver's license reinstatement. See TENN. CODE ANN. §§ 40-32-101; 40-39-202; 55-50-501.

⁴² Reentry efforts organized by the UT Legal Clinic with grant funds are only one example of grant funded reentry efforts. *Legal Clinic Receives \$100,000 To Advance Expungement Efforts*, UNIVERSITY OF TENNESSEE COLLEGE

prisoners being released each year, efforts to provide reentry services have presented a viable solution to the problem.⁴³ In Tennessee, the types of reentry services vary. The state provides some reentry services for prisoners during their period of incarceration. Additionally, Governor Bill Lee has created a Criminal Justice Investment task force to improve public safety and further develop reentry efforts.⁴⁴

In Tennessee, the Tennessee Department of Corrections believes that reentry is important largely because it enhances the possibility of public safety.⁴⁵ They believe that reentry identifies “an individual’s risks and needs upon entry into the justice system and develops a system of treatment and programming throughout their incarceration, transition, and reentry into the community.”⁴⁶ Crime free reintegration hinges on a person’s ability to successfully reintegrate into society.⁴⁷ Successful reintegration happens when those formerly incarcerated have the opportunity to have economic security, employment, and access to resources.⁴⁸

III. The Unsolved Problem & Inadequate Remedies: Unemployment among Ex-Offenders

a. Issue Overview

OF LAW (May 31, 2019), <https://law.utk.edu/2019/05/31/legal-clinic-receives-100000-to-advance-expungement-efforts/>.

⁴³ JEREMY TRAVIS, ET AL., *supra* note 4.

⁴⁴ The committee is comprised of diverse leaders across the state of Tennessee. *Task Force*, *supra* note 39.

⁴⁵ *Reentry Programs and Services*, TENNESSEE DEPARTMENT OF CORRECTION, <https://www.tn.gov/correction/redirect---rehabilitation/reentry-services.html>.

⁴⁶ *Id.*

⁴⁷ CRIMINAL STIGMA, *supra* note 7, at 4.

⁴⁸ *Id.*

Though these efforts to provide support for ex-offenders exist, the largest hurdle for someone with a criminal record is often finding employment. Those who overcome the high hurdle of a criminal record in the workplace are undoubtedly change agents.⁴⁹ One year after release, about 75 percent of formerly incarcerated individuals are still unemployed.⁵⁰ The current rate of unemployment for formerly incarcerated people is 27 percent higher than the total United States unemployment rate during any historical period.⁵¹ If this rate of unemployment was mirrored in the general population, then it would be of great public concern.⁵² The unemployment rate is the highest within the first two years after release.⁵³

The issue is not that people in this category don't want to work, it's that there are "structural barriers" to gaining employment after release.⁵⁴ This high rate of unemployment cannot be explained by the overrepresentation of people of color in the system.⁵⁵ It's not race, it is their status as being someone who was formerly incarcerated.⁵⁶ There is a perpetual counterproductive cycle of punishment, release, and poverty.⁵⁷ Overall, this negatively impacts employers, jobseekers and taxpayers.⁵⁸ Finally, when those who have served time do get a job, they are often jobs that lack security, and high wages.⁵⁹ An analysis conducted by the Brookings Institution of the IRS data showed that formerly incarcerated individuals received a wage that put

⁴⁹ Dawn Turner Trice, *CPS: Good Conduct Certificate Not Good Enough*, CHI. TRIB. (July 29, 2010), <https://www.chicagotribune.com/news/ct-xpm-2010-07-29-ct-met-trice-cps-0728-20100728-story.html>.

⁵⁰ *Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company*, ACLU 4 (2017), [HTTPS://WWW.ACLU.ORG/SITES/DEFAULT/FILES/FIELD_DOCUMENT/060917-TRONE-REPORTWEB_0.PDF](https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf).

⁵¹ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE (July 2018) <https://www.prisonpolicy.org/reports/outofwork.html>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Couloute, *supra* note 50.

⁵⁸ *Id.*

⁵⁹ *Id.*

them below the poverty line.⁶⁰ Given this, there is an apparent gap between the applicant with the criminal record and the employer with the hiring power.

b. Through the Employer's Lens

Employers' concerns about hiring individuals that were formerly incarcerated stem from their desire to avoid any legal liability.⁶¹ There have also been additional concerns expressed about jobseekers in that category ability to perform the functions of the job consistently, and customer reactions.⁶² The most common of suits that employers tend to want to avoid are negligent hiring cases.⁶³ In negligent hiring cases, an employer can be held liable for harm that their employees inflict on to third parties when the employer knew or should have known of the employees propensity to cause harm, or if the risk would have been uncovered with a reasonable investigation.⁶⁴

On the opposite end of that concern, one federal Magistrate Judge in Maryland has argued that “no research has shown that workplace violence is generally attributable to employee ex-offenders or that hiring ex-offenders is causally linked to increased workplace violence.”⁶⁵

c. Inadequate Remedies

To create an incentive for employers to hire and set their concerns about the legal liability associated with hiring aside, states have begun to pass laws that limit employer liability for

⁶⁰ *Id.*

⁶¹ *Workers with Criminal Records*, SHRM (May 17, 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-CKI%20Workers%20with%20Criminal%20Records%20Issue%20Brief%202018-05-17.pdf>.

⁶² *Id.*

⁶³ Margaret M. Clark, *How to Address Negligent Hiring Concerns*, SHRM (Feb. 27, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx>.

⁶⁴ *Id.*

⁶⁵ *Georgia Still Waiting for Governor Deal to Ban the Box*, PARKS, CHESIN & WALBERT (Aug. 18, 2014), <https://www.atlantaemploymentattorneysblog.com/georgia-still-waiting-governor-deal-ban-box/>.

negligent hiring.⁶⁶ Generally, those types of laws fall into three categories, (1) evidentiary limitation, (2) restoration of rights certificate, and (3) presumption against liability.⁶⁷ With the evidentiary limitations, the opposing side would not be able to use the employee’s criminal history unless that criminal history directly relates to the facts underlying the claim.⁶⁸

The second category of legislation passed is restoration of rights certificates.⁶⁹ These certificates allow for a judge to enter an order for those who meet certain criteria.⁷⁰ That certificate creates a presumption of “due care” so long as the employer knew about the certificate at the time of hiring. Finally, the presumption against liability is the third category.⁷¹ Under this category, if an employer chooses to comply with the laws about criminal-background investigations, then in some circumstances there is a presumption against liability for negligent hiring cases.⁷²

Stepping aside from state-based incentives, the Federal Government has enacted some programs that help create an incentive for employers. One program is run by the Department of Labor. It provides six-month bonds on behalf of individuals who despite their criminal record are otherwise qualified for the position.⁷³ This incentive acknowledges the employer’s concerns about legal liability and gives employers the chance to give people a chance. If the employer retains the employee after six-months, they can apply for private bonding insurance.⁷⁴ This incentive has been used in about 50,000 job placements.⁷⁵

⁶⁶ Clark, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Clark, *supra* note 62.

⁷³ *The Federal Bonding Program*, NHES, <https://www.nhes.nh.gov/services/employers/documents/fbp-highlights.pdf> (last visited April 12, 2020).

⁷⁴ *Id.*

⁷⁵ *Id.*

Second, some employers have expressed concerns about customer reactions to hiring ex-offenders. Though these concerns exist, employers are concerned with how the hiring of these persons might impact the economic performance of their business. Finally, some employers have expressed concern about the jobseeker's consistency and ability to perform. Though these concerns exist, a survey has shown that employees that have a criminal record are generally retained at a much higher rate than those without a criminal history.⁷⁶ In turn, this can reduce an employer's retention, recruitment line item by around \$4,000 for low-skilled, white collar workers.⁷⁷

d. Employer Preference/Bias

Because of the concerns discussed previously, employers have reacted by employing based on preferences and bias that has no real consequences.⁷⁸ Employer preferences and bias exists for even the smallest offense to the largest. Evidence has demonstrated that jobseekers with a criminal record reduce callback rates by 50 percent, 28 percent for people without a criminal record to 15 percent for those with one.⁷⁹ Traditionally, employers have viewed ex-offenders as the least desirable applicants.⁸⁰ When we add in the issue of race in conjunction to criminal records, African Americans with a criminal record are 50 percent less likely to get a callback compared to white people.⁸¹ For even minor offenses, jobseekers with criminal records face hurdles. For example, a teacher in New York, faced immense struggles after a marijuana

⁷⁶ Peter Economy, *How Hiring Formerly Incarcerated People Can Give Your Business an Edge*, INC.COM (Nov. 15, 2020), <https://www.inc.com/peter-economy/from-incarceration-to-employment-how-hiring-formerly-incarcerated-people-can-give-your-business-an-edge.html>.

⁷⁷ *Id.*

⁷⁸ Christina Stacy & Mychal Cohen, *Ban the Box and Racial Discrimination*, URBAN INSTITUTE (Feb. 2017), https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf.

⁷⁹ Couloute, *supra* note 50.

⁸⁰ Adam Looney & Nicholas Turner, *supra* note 7, at 5.

⁸¹ *Id.*

conviction.⁸² Additionally, a woman in Maryland was denied a job at a school cafeteria because of an arrest in 1963 that did not result in a conviction.⁸³

When you look at employer's preferences on the national scale, the results get interesting. A survey conducted by SHRM revealed that 14 percent of Human Resources professionals said that they would be willing to hire someone with a criminal record.⁸⁴ Further, large portions of employers are "willing to work with individuals with criminal records. 55 percent of managers were willing, 15 percent were unwilling, 29 percent were in between."⁸⁵ While these preferences exist, about 82 percent of managers and 67 percent of HR professionals reported that they believed the "quality of hire" for jobseekers with criminal records to be either the same or higher for those without a criminal record.⁸⁶ These preferences presented by employers have no real consequences.⁸⁷ Employers who demonstrate racial bias in hiring face federal consequences.⁸⁸ Unlike, employers who demonstrate racial bias in hiring, employers who have biases against those with a criminal record, commit no violation of federal law.⁸⁹ The lack of consequences, combined with the lack of protections for those who have a criminal record, leave those with a record struggling to find employment.

IV. Taking a Closer Look: Tennessee's efforts to Bridge the Gap

⁸² *How this beloved NYC Teacher's Life was Turned Upside Down by a Bogus, Petty Marijuana Arrest*, HUFFINGTON POST (Dec. 9, 2013), http://www.huffingtonpost.com/2013/12/09/alberto-willmore_n_4412610.html.

⁸³ Gary Fields, *Retiree's Phantom Arrest Record is Finally Expunged*, WALL ST. J., (Nov. 1, 2014), <http://www.wsj.com/articles/retirees-phantom-arrest-record-is-finally-expunged-1417478846> (describing how a woman was denied a part-time job as a school cafeteria worker in Maryland's school system when a routine check turned up an arrest record from 1963 that did not result in a conviction).

⁸⁴ Clark, *supra* note 62.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Muhlhausen, *supra* note 5.

⁸⁸ *Id.*

⁸⁹ *Id.*

Tennessee lawmakers have implemented a law that was aimed at helping ex-offenders secure employment.⁹⁰ The law went into effect in July 2014.⁹¹ The effort was a bipartisan effort sponsored by State Senator Brian Kelsey (R) and State Representative Karen Camper (D).⁹² They wanted to ultimately to create a bill that would help felons find work.⁹³ They wanted to give people that had a criminal conviction the chance to get a certificate that would help address employers concerns about legal liability.⁹⁴ Their thoughts were that a “vetted and comprehensive certification process” would help encourage employers to hire those with criminal convictions.⁹⁵ And in turn, this would enhance community safety and provide a path to employment for more jobseekers.⁹⁶

The Tennessee Department of Correction (TDOC) believes that reentry begins at adjudication.⁹⁷ They go on to add that it is comprehensive, and encompasses rehabilitative services like “medical, behavioral health and substance use treatment, education, vocational training, religious and volunteer services, correctional counseling, and employment services and assistance.”⁹⁸

a. Certificates of Employability

⁹⁰ Lurene Kelley, *New Certification Law Seeks to Give Tennesseans with a Record a Better Chance in the Job Market*, SHELBY COUNTY PUB. DEF. OFF. (July 18, 2014), <http://defendshelbyco.org/new-certification-law-seeks-to-give-tennesseans-with-a-record-a-better-chance-in-the-job-market/>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Kelley, *supra* note 89.

⁹⁷ *Reentry Programs and Services*, TENN. DEP’T OF CORRECTIONS, <https://www.tn.gov/correction/redirect-rehabilitation/reentry-services.html> (last visited April 12, 2020).

⁹⁸ *Id.*

The legislation resulted in the imposition of a Certificate of Employability law. The law is codified in TCA 40-29-107.⁹⁹ Essentially, the certificate is an order issued by the local circuit court judge. In order for the judge to issue the order, the judge must find the following:

- (1) finding that the person has sustained the character of a person of honesty, respectability and veracity and is generally regarded as such by their neighbors, the court also must find that
- (2) Granting the petition will materially assist the person in obtaining employment or occupational licensing;
- (3) The person has a substantial need for the relief requested in order to live a law-abiding life; and
- (4) Granting the petition would not pose an unreasonable risk to the safety of the public or any individual.¹⁰⁰

In order to apply for the petition, you must do so through a written petition to the court as a part of the convicted felon's efforts to have their voting rights restored.¹⁰¹ In order to be eligible to receive the petition, the applicant must have been convicted of or pled to a nonviolent crime.¹⁰² Additionally, the applicant must be released or fulfilled all requirements associated with the conviction.¹⁰³ Those who apply for the certificate are required to give notice of the petition to the District Attorney and the United States Attorney of the county/district where the person resides.¹⁰⁴ The relevant prosecutors have the potential to contest the petition.¹⁰⁵ The District Attorneys also have to send notice to the victims for the crimes, so that they may have the potential to contest the petition.¹⁰⁶

b. The Value

⁹⁹ *Id.*; TENN. CODE ANN. § 40-29-107; There is no data available on the number of Tennesseans that hold a Certificate of Employability and there are no monitoring efforts in place to assess the practicality and usefulness of the certificates.

¹⁰⁰ *What is a Tennessee "Certificate of Employability"?*, JDSUPRA, <https://www.jdsupra.com/legalnews/what-is-a-tennessee-certificate-of-75621/> (last visited Dec. 13, 2019).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (including parole, probation, pretrial, or judicial diversion and community correction supervision).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Studies show that the absence of stable employment causes an increase in the likelihood of return to incarceration.¹⁰⁷ Those with criminal records need stable employment for the exact same reasons as those without a criminal record.¹⁰⁸ They still need to provide for family, follow their dreams, and add value to their communities.¹⁰⁹ A 2008 study found that individuals who earned \$10/hour or more two months after release were half as likely to return to prison, 8 percent recidivism rate.¹¹⁰ Those who earned \$7 per hour were at 16 percent.¹¹¹ Those that were unemployed had a 23 percent chance of returning to prison.¹¹² Additionally, those who are employed help create positive economic impacts like:

- (1) Increased earnings;
- (2) Increased tax revenue on the increased earnings;
- (3) No costs associated with criminal justice, social services agencies because the person is employed.¹¹³

Tennesseans who are granted the certificate will reap the benefits listed above.¹¹⁴ But they will also have a better chance at obtaining licenses and certifications that require a clean record.¹¹⁵ Having a certificate of employability does not require the agency to issue the certifications that their criminal record might block.¹¹⁶ Though the certificate doesn't force the agency to issue the license, having the license does help the issuing agency give a decision in

¹⁰⁷ Roberts, *supra* note 6, at 4.

¹⁰⁸ Couloute, *supra* note 50.

¹⁰⁹ *Id.*

¹¹⁰ CHRISTY VISHER ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES 8 (Oct. 2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ CITY OF PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 3, (Sept. 2011), <http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf>.

¹¹⁴ *What is a Tennessee "Certificate of Employability"?*, *supra* note 99.

¹¹⁵ *What is a Tennessee "Certificate of Employability"?*, *supra* note 99; see also Molly Mulroy, *How Tennessee laws keeps ex-offenders from getting good jobs*, MLK50 (Oct. 5, 2017), <https://mlk50.com/state-licensing-restrictions-keep-convicted-tennesseans-from-obtaining-jobs-a26e28242b38> (explaining that those licenses include barber and cosmetology, car sales license and polygraph examiners).

¹¹⁶ *Id.*

favor of the applicant.¹¹⁷ The agencies are still free to consider the circumstances of the convictions that are placing a hold on the license.¹¹⁸

Tennessee's efforts to help with the unemployment gap directly address employer's concerns.¹¹⁹ Employers are provided with a defense to negligent hiring or supervision claims that surface as a result of the employee's past convictions.¹²⁰ Also, to claim the defense, the employer must have known about the certificate at the time of hiring.¹²¹ This is helpful for employers because they will have an incentive to set aside their concerns about legal liability when hiring a person with the certificate.

c. The Hurdles

While the value exists, there are hurdles for both the certificate holder and the employer.¹²² The certificate applicant and holder faces the biggest issue, which is that applying for and obtaining the certificate requires employment.¹²³ Employers still have the latitude to have preferences in hiring.¹²⁴ Also, the certificate does not create immunity for an employer for negligence in hiring claims.¹²⁵ The employer still risks being liable for the employee's actions especially, if the employee demonstrates dangerous tendencies, or picks up new charges if the employer had knowledge of the tendencies/convictions and still chose to keep the employee on staff.¹²⁶

¹¹⁷ *What is a Tennessee "Certificate of Employability"?*, *supra* note 99.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Kelley, *supra* note 89.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

The hurdles for the applicant and holder largely stem from the difficulty associated with obtaining the certificate.¹²⁷ For those that desire to have the certificate, you have to petition the judge.¹²⁸ The process is lengthy, and it involves great care.¹²⁹ In most cases, the applicant will need a lawyer to apply.¹³⁰ This presents a grave financial barrier.¹³¹ An additional financial barrier is presented along with the cost of legal counsel, that barrier is the \$150 fine associated with obtaining the license.¹³² In addition to the financial hurdle, if a person obtains the certificate and later incurs new convictions, then the certificate can be revoked.¹³³

The hurdles faced by employers and applicants are so oppressive that they almost negate any value that the legislators intended to render. Employers have a justified interest in protecting their business from lawsuits. On the other end of the equation are jobseekers with criminal records. They too have a justified interest in securing gainful employment. The problem is that this equation does not balance out, and Tennessee's efforts with certificate of employability do not really help balance the equation. There are so many hurdles associated with the certificate, that seeking out the certificate has a burden that outweighs the value.

d. Recommendations for Improvement

Tennessee's certificate of employability statute is young, but it has room for improvement. The largest area where improvement is needed is in the accessibility of the form. Right now, the application for a certificate is lengthy and often requires the help of an attorney. Improvements

¹²⁷ *Id.*

¹²⁸ Kelley, *supra* note 89.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *What is a Tennessee "Certificate of Employability"?, supra* note 99.

to the form's accessibility will greatly impact its utility and overall impact. Second, lawmakers need to mandate data tracking for applicants. After a thorough search, no data exists on the number of applicants or certificate holders, which makes evaluating the certificates usefulness difficult. Finally, Tennessee should research and offer incentives to employers who chose to hire certificate holders.

V. Conclusion

With so many prisoners being released each year, reentry is the problem that we cannot ignore.¹³⁴ The unemployment among criminal record holders and formerly incarcerated individuals is also a problem that cannot be ignored. The effect of having a criminal record presents official and unofficial consequences that have social and economic consequences. As a result of these consequences, states have begun to enact legislation to help persons with criminal records secure employment. In Tennessee, the legislature's enactment of the certificate of employability has value, but the hurdles associated are high, leaving the unemployment problem unsolved.

¹³⁴ Adam Looney & Nicholas Turner, *supra* note 7.