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AN END RUN AROUND EMPLOYMENT OBSTACLES: SMALL BUSINESS DEVELOPMENT PROGRAMS FOR RETURNING CITIZENS

BY DYLAN ROGERS ELLIOTT*

I. INTRODUCTION

The lives of two men, Wes and Clinton, demonstrate the importance of employment for returning citizens¹ during reentry and what happens if they cannot find work.² Wes's story became a national best-seller in *The Other Wes Moore*.³ Clinton's story is told in an academic work discussing criminal sanctions' impacts on families.⁴ Both illustrate the issue this comment confronts.

Semi-autobiographical and semi-biographical, *The Other Wes Moore* tells the stories of "two boys living in Baltimore with similar histories and an identical name: Wes Moore."⁵ While Wes Moore, the author, escaped a challenging childhood to graduate college, become a

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¹ This comment uses "returning citizens" to refer to those who have been incarcerated and are returning to society post-incarceration. "Returning citizen" is considered more inclusive and less stigma-associated than terms such as "ex-offender," "ex-prisoner," and "ex-felon." See Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 324, 325 n.4 (2019); *Unlocking the Second Prison: Changing our Words to Help Returning Citizens*, SHARED JUSTICE (Jul. 18, 2017) <http://www.sharedjustice.org/most-recent/2017/7/18/unlocking-the-second-prison-changing-our-words-to-help-returning-citizens>.

² See generally WES MOORE, *THE OTHER WES MOORE: ONE NAME TWO FATES* (2010) (demonstrating the importance of employment for returning citizens during reentry and what happens if they cannot find work); Donald Braman & Jenifer Wood, *From One Generation to the Next: How Criminal Sanctions Are Reshaping Family Life in Urban America*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 157, 171–74 (Jeremy West & Michelle Waul eds., 2003) (explaining criminal sanctions' impacts on families).

³ MOORE, *supra* note 2.

⁴ Braman & Wood, *supra* note 2, at 171–74.

⁵ MOORE, *supra* note 2, at xi.

Rhodes Scholar, and serve as a United States Army paratrooper,⁶ the “other” Wes Moore’s life led from a tumultuous childhood, through twists and turns, to a life sentence in prison for armed robbery.⁷

At one of those twists, the “other” Wes Moore turned his back on the drug trade and attended Job Corps,⁸ a federal program teaching job skills.⁹ Despite finding a craft—carpentry—that he enjoyed and found meaningful,¹⁰ Wes discovered that within a year of completing Job Corps the meager salaries he made in his collection of temporary jobs was not enough to support himself and his children.¹¹ Wes reluctantly reentered the drug trade to make the money needed to support himself and his children.¹²

Clinton’s story is similar. Upon his release from incarceration for selling drugs, Clinton was determined to legitimately support his family.¹³ For about six months Clinton achieved that goal working in a department store.¹⁴ Unfortunately, Clinton’s new life unraveled when the store closed and he lost his job.¹⁵ His subsequent job applications were rejected, which he blames on his forthrightness regarding his criminal record.¹⁶ Employer discrimination against returning citizens obstructs returning citizens from obtaining employment¹⁷ and it likely doomed Clinton’s reentry. Unable to find work, he transitioned from supporting his family to being supported by them.¹⁸ After several months with no job or paycheck, Clinton returned to “hustling” (selling drugs) to make money for himself and his family.¹⁹ Caught between his “commitment to [financially] help out” his family and his inability to find legal employment, Clinton ended up reincarcerated.²⁰

Wes Moore and Clinton’s stories go to the heart of a major obstacle facing returning citizens upon reentry: finding employment. In

⁶ *Id.* at xi, 135.

⁷ *Id.* at xi–ii.

⁸ *Id.* at 140.

⁹ *Id.* at 139.

¹⁰ MOORE, *supra* note 2, at 142–43.

¹¹ *Id.* at 145.

¹² *Id.*

¹³ Braman & Wood, *supra* note 2, at 171. The family Clinton was determined to support was sizeable and consisted of his sister, her two daughters, his longtime girlfriend, his daughter, and his granddaughter. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 172.

¹⁶ *Id.*

¹⁷ *See infra* Part II-A.

¹⁸ Braman & Wood, *supra* note 2, at 172.

¹⁹ *Id.*

²⁰ *Id.* at 173.

the United States, where 2.3 million people are incarcerated,²¹ over 600,000 people are released from prison each year.²² Employment is critical to whether a returning citizen will be able to avoid recidivating.²³ Avoiding recidivism is important for the wellbeing of the individual, their family, their community, and larger society.²⁴

This comment advocates small business development programs as a solution to the employment obstacles facing returning citizens. The programs will help returning citizens either develop their own small business or help them obtain employment with returning citizen owned businesses established through the program.²⁵ Part II explains the obstacles that prevent returning citizens from obtaining employment, and unemployment's effects on individuals, families, communities, and society. Part III considers existing approaches to remedying the obstacles and evaluates their shortcomings. Finally, Part IV advocates small business development programs as a workaround to Part III's incomplete solutions and proposes a hypothetical framework for what those programs should look like.

II. THE OBSTACLES TO EMPLOYMENT: COLLATERAL CONSEQUENCES, EMPLOYMENT DISCRIMINATION, AND THEIR IMPACTS

Collateral consequence and employment discrimination are obstacles that make it difficult, or outright impossible, for returning citizens to obtain employment during reentry. Inability to find work leads to an increased risk of recidivism for returning citizens.²⁶ When returning citizens recidivate, everyone suffers: recidivating individuals, families, communities, and society.²⁷ This section looks at the obstacles to employment, explains how those obstacles result in a higher likelihood of recidivism, and considers the damage this causes.

²¹ Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>. An estimated 1,316,000 are incarcerated in state prisons, 615,000 are incarcerated in local jails, and 225,000 are incarcerated in federal prisons and jails. *Id.*

²² E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, DEP'T OF JUSTICE (Dec. 11, 2016), <https://bjs.gov/content/pub/pdf/p15.pdf>. In 2015, 641,027 prisoners were released; in 2014, 636,346 prisoners were released. *Id.*

²³ See *infra* Part II-B.

²⁴ See *infra* Part II-C.

²⁵ See *infra* Part IV.

²⁶ Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 Syracuse L. Rev. 261, 265 (2014).

²⁷ See *infra* Part II-C.

A. OBSTACLES TO EMPLOYMENT: COLLATERAL CONSEQUENCES AND EMPLOYMENT DISCRIMINATION

Collateral consequences, of which employment discrimination is a subset,²⁸ ensure that individuals continue to feel the impact of a sentence after they have completed their term of incarceration. They are a “host of sanctions and disqualifications that can place an unanticipated burden on individuals trying to re-enter society and lead lives as citizens,”²⁹ taking the form of “penalties, restrictions, and disabilities” scattered throughout federal and state law.³⁰ Collateral consequences are infrequently part of the penal code, but instead are nestled in different statutes ranging from gun-ownership laws, to voting laws, to welfare requirements.³¹

Alternatively, employment discrimination is not a statutory measure, although some statutes forbid former prisoners from obtaining occupational licenses.³² Rather, employment discrimination consists of employers discriminating against returning citizens by either discouraging or outright rejecting returning citizen job applications because of criminal records.³³ Employment discrimination, and collateral consequences generally, has been criticized as unfair,³⁴ with Jeremy Travis, an advocate for criminal justice reform, describing the regime as a “brave new world, [in which] punishment for the original offense is no longer enough; one’s debt to society is never paid.”³⁵

Collateral consequences, despite their pervasiveness, are not a recent invention.³⁶ The ancient Athenians, Romans, and some Germanic

²⁸ Mullings, *supra* note 26, at 265.

²⁹ Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, NAT’L INST. OF JUSTICE (2013), <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

³⁰ Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008).

³¹ *Id.*

³² Mullings, *supra* note 26, at 268.

³³ Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: the FCRA and Title VII in Discrimination Against Persons with Criminal Records*, 12 SEATTLE J. Soc. Just. 109, 112–13 (2013).

³⁴ Mullings, *supra* note 26, at 265.

³⁵ Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 19 (Marc Mauer & Meda Chesney-Lind eds., 2002); *Jeremy Travis*, ARNOLD VENTURES, LLC, <https://www.arnoldventures.org/people/jeremy-travis/> (last visited Feb. 27, 2020).

³⁶ *See infra* text accompanying notes 37–38.

tribes all had punishments that excluded an individual from society forever.³⁷ These deprived the punished of certain rights associated with citizenship or membership in the community.³⁸ Such punitive concepts persisted through the medieval period and were incorporated into our nascent nation by our colonial ancestors.³⁹ What has changed is how prevalent they are in the United States.⁴⁰ Although modern contemporaries, such as England, Canada, and South Africa, impose collateral consequences, none do so on the same scale as the United States.⁴¹ The National Inventory of the Collateral Consequences of Conviction estimates that there are over 40,000 collateral consequences in the United States, with approximately 29,000 related to employment.⁴² Some “collateral consequences serve a legitimate public safety or regulatory function,” such as “prohibiting people convicted of assault or physical abuse from working with children,”⁴³ but others apply blindly, making no connection between crime and restriction, or ignoring the length of time elapsed since the conviction.⁴⁴ Efforts to reform collateral consequences should obviously focus on the latter, not the former.

Employment discrimination is similarly widespread: a study conducted in the 1990s of 3,000 employers in Atlanta, Boston, Detroit, and Los Angeles found that 20% of employers “definitely would not hire” an applicant with a criminal record and an additional 42% of employers “probably would not hire” an applicant with a criminal record.⁴⁵

³⁷ Travis, *supra* note 35, at 17.

³⁸ *Id.*

³⁹ *Id.*; *Project Description*, NAT’L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://cdpsdocs.state.co.us/ccjj/Resources/Ref/CollConsequenceProjDescrip-2012.pdf> (last visited Dec. 10, 2018).

⁴⁰ *See infra* text accompanying notes 41–42.

⁴¹ Mullings, *supra* note 26, at 265; *see* Wagner & Sawyer, *supra* note 21, for an estimation of how many Americans are incarcerated.

⁴² CSJ Justice Center, *Collateral Consequences Inventory*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=236%2C234%2C377&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1 (last visited Nov. 13, 2018). The approximation of 29,000 employment related collateral consequences was obtained by filtering “Consequence Type” by three filters: “Business licensure & participation,” “Employment & volunteering,” and “Occupational & professional licensure & certification.” *Id.*

⁴³ CSJ Justice Center, *About*, NAT’L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org/about/> (last visited Nov. 13, 2018).

⁴⁴ *Id.*

⁴⁵ Harry J. Holzer et al., *Working Discussion Paper for The Urban Institute’s Reentry Roundtable: Can Employers Play a More Positive Role in Prisoner Reentry?* 14 (Mar. 20–21, 2002) (Urban Inst. Reentry Roundtable), <https://www.urban.org/sites/default/files/publication/60761/410803-Can-Employers-Play-a-More-Positive-Role-in-Prisoner-Reentry-PDF>. The statistics cited were originally collected by Harry Holzer in the 1990s. *Id.* at 4 n.3.

A 2013 study found that 24% of responding Michigan employers would not consider applications from returning citizens “at all.”⁴⁶ Since an estimated 87% of employers rely on criminal background checks when evaluating applications,⁴⁷ it appears that employment discrimination against returning citizens is widespread. Furthermore, scholars suggest that employers’ unwillingness to hire returning citizens is higher today than in the past.⁴⁸

The obstacles to returning citizen employment are pervasive, existing as both official state discrimination against returning citizens and as unofficial private employer discrimination.⁴⁹ Such obstacles adversely impact a returning citizen’s chances of obtaining employment and increase the chance of recidivism.⁵⁰

B. WHY COLLATERAL CONSEQUENCES AND EMPLOYMENT DISCRIMINATION ARE PROBLEMS

Collateral consequences and employment discrimination are obstacles to a returning citizen’s chances of obtaining employment, which is widely considered critical to reentry success.⁵¹ Not only does failure to find employment mean returning citizens will struggle to pay for rent and other living expenses, it also means they are at a heightened risk of recidivating.⁵² Thus, a successful reentry hinges on whether a returning citizen can obtain a job.⁵³

As illustrated by Clinton’s story, successfully finding and retaining employment can separate a successful reentry process from an unsuccessful one.⁵⁴ Employment, important for paying the costs of living, also “helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness.”⁵⁵ Obstacles to employment are obstacles to productivity, healthy relationships, and self-esteem.⁵⁶ Clinton’s job allowed him

⁴⁶ Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AMERICAN BUS. L.J. 201, 226 (2013).

⁴⁷ Carlin & Frick, *supra* note 33, at 113.

⁴⁸ Hickox & Roehling, *supra* note 46, at 226 (comparing survey results from the 1970s against more recent studies of employer attitudes).

⁴⁹ See *infra* Part II-B.

⁵⁰ See *infra* Part II-B.

⁵¹ Joan Petersilia, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY, 112 (2003).

⁵² See *infra* text accompanying notes 54, 60.

⁵³ See *infra* text accompanying notes 54, 60.

⁵⁴ See *supra* Part I.

⁵⁵ Petersilia, *supra* note 51, at 112.

⁵⁶ See *infra* text accompanying notes 57–59.

to legally support himself and his family,⁵⁷ but when he lost it and returned to selling drugs he jeopardized his freedom and damaged his self-esteem and happiness.⁵⁸ Even though Clinton did it to support his nieces, selling drugs corroded his own his happiness.⁵⁹

Scholars agree employment is important for successful reentry because unemployment is widely considered to increase the likelihood of recidivism.⁶⁰ Although at least one study argued that employment does not significantly decrease the likelihood of recidivism over time,⁶¹ the “general agreement” is that “securing employment is a significant factor in whether there is recidivism.”⁶² John Nally, the Director of Education for Indiana’s Department of Correction, and his colleagues concluded “education and employment were the most important predictors of recidivism” and found uneducated (or under-educated) or unemployed returning citizens were more likely to recidivate.⁶³ The study, which followed 6,561 subjects for five years, found “employment status” was correlated with a 37.4% decrease in recidivism.⁶⁴

Despite their job-seeking efforts returning citizens face high unemployment rates.⁶⁵ The Prison Policy Initiative calculates that the national unemployment rate is a staggering 27.3%, in contrast to the general public’s unemployment rate of only 5.2%.⁶⁶ The Prison Policy Initiative contends that this unemployment rate is not for lack of trying by returning citizens: “formerly incarcerated people want to work, but

⁵⁷ Braman & Wood, *supra* note 2, at 171.

⁵⁸ *Id.* at 172–3.

⁵⁹ *Id.*

⁶⁰ Mullings, *supra* note 26, at 267; PETERSILIA, *supra* note 51, at 112 (stating “[r]esearch has empirically established a positive link between job stability and reduced criminal offending”); Dallan F. Flake, *When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U.L. REV. 45, 63 (2015) (stating “[a]lthough the relationship between employment and recidivism is complex, studies have consistently found that ex-offenders are less likely to recidivate if they are employed”).

⁶¹ See Stephen J. Tripodi et al., *Is Employment Associated with Reduced Recidivism?: The Complex Relationship Between Employment and Crime*, 54 INT’L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 706, 714 (2010). The authors of this study did find that employment does at least prolong the time it takes for a returning citizen to recidivate. *Id.* at 715–16.

⁶² Mullings, *supra* note 26, at 267.

⁶³ John M. Nally, et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5-Year Follow-Up Study in the United States*, 9 INT’L J. OF CRIM. JUST. SCI. 16, 16, 27 (2014).

⁶⁴ *Id.* at 26–27.

⁶⁵ See *infra* text accompanying note 65.

⁶⁶ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>. Although published in 2018, the study’s dataset is from 2008. *Id.*

face structural barriers to securing employment, particularly within the period immediately following release.”⁶⁷ The Prison Policy Initiative reaches this conclusion based on a nationally representative dataset that counterintuitively revealed returning citizens have higher unemployment rates than the general public, despite being more likely to be “active” in the labor market.⁶⁸ Given that being “active” in the labor market includes both working and “actively looking for work,” The Prison Policy Initiative concludes that many returning citizens are “actively looking for work,” but not finding employment, thus creating the high unemployment rate.⁶⁹ The Initiative describes this as a “counterproductive system of release and poverty,” which harms employers, the taxpayers, and returning citizens.⁷⁰

C. THE IMPACT OF RECIDIVISM ON INDIVIDUALS, FAMILIES, COMMUNITIES, AND SOCIETY

Unemployment makes post-incarceration life difficult for returning citizens and their families,⁷¹ particularly when unemployment leads to recidivism. Recidivism has significant consequences for individuals,⁷² families,⁷³ communities,⁷⁴ and society.⁷⁵ These crushing results emphasize why finding solutions that lead to employment for returning citizens is so important.

1. RECIDIVATING RE-EXPOSES INDIVIDUALS TO THE TRAUMA OF INCARCERATION

Recidivating means the individual will once again find themselves within the crushing grip of incarceration.⁷⁶ They will re-experience the trauma and stigma associated with being incarcerated, including the array of psychological harms that persist beyond the end of incarceration and create problems for the individual when they (again)

⁶⁷ *Id.*

⁶⁸ *Id.* “Among 24-44 year old” returning citizens “93.3% are either employed or actively looking for work, compared to 83.8% among their general population peers of similar ages.”
Id.

⁶⁹ *See Id.*

⁷⁰ *Id.*

⁷¹ *See supra* Part II-B.

⁷² *See infra* Part II-C(1).

⁷³ *See infra* Part II-C(2).

⁷⁴ *See infra* Part II-C(3).

⁷⁵ *See infra* Part II-C(4).

⁷⁶ *See infra* Part II-C(1).

attempt to reintegrate.⁷⁷ These harms can range from developing hyper-vigilant and suspicious tendencies,⁷⁸ to a diminished sense of self-worth and personal value,⁷⁹ to post-traumatic stress reactions.⁸⁰ Recidivating re-exposes individuals to the mental health and self-image deprivations experienced while in prison.⁸¹

When an individual recidivates, they are also likely to face a harsher punishment because of their prior criminal record.⁸² Sentencing regimes consider criminal history, as evidenced by the Federal Sentencing Guidelines' use of a criminal history score when calculating a sentence.⁸³ The federal regime converts prior convictions into points based on the severity and age of the prior conviction, among other factors, and adds them together to obtain a criminal history score, which is used in the calculation of a sentence.⁸⁴ Thus, recidivating leads to lengthier terms of incarceration, prolonging the time an individual is subjected to the traumas of incarceration.⁸⁵

2. RECIDIVISM DENIES FAMILIES FINANCIAL SUPPORT AND DAMAGES RELATIONSHIPS

Recidivism challenges family finances and damages familial relationships.⁸⁶ Losing a family member to prison means the family potentially loses a breadwinner, which can jeopardize finances and threaten food security.⁸⁷ Furthermore, “incarceration has a powerfully corrosive effect on family structure.”⁸⁸ This “corrosive effect” is seen in the relationships of romantic partners, as well as in the relationships between parents and children; married men’s chances of divorce increase when they are incarcerated,⁸⁹ while children experience a “variety of

⁷⁷ See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, Paper prepared for the “From Prison to Home” Conference 77 (Jan. 30–31, 2002), http://webarchive.urban.org/UploadedPDF/410624_PsychologicalImpact.pdf (discussing the psychological impact incarceration has and how that affects reentry).

⁷⁸ *Id.* at 81.

⁷⁹ *Id.* at 83.

⁸⁰ *Id.*

⁸¹ See *supra* text accompanying notes 78–80.

⁸² See *infra* text accompanying 83–84.

⁸³ See U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (U.S. SENTENCING COMM’N 2018).

⁸⁴ See *Id.*

⁸⁵ See *supra* text accompanying notes 77–84.

⁸⁶ Flake, *supra* note 60, at 65.

⁸⁷ See *id.*; See also Braman & Wood, *supra* note 2 at 169–70.

⁸⁸ Braman & Wood, *supra* note 2, at 170.

⁸⁹ See *id.*; See also Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 J. OF MARRIAGE & FAM. 721, 731 (2005) (stating “[t]he average

negative long-term effects”⁹⁰ These “long-term effects” include damage to the parent-child bond, as well as problems with academic success and in-school behavior.⁹¹ For families whose loved ones are caught in a cycle of reentry, re-arrest, and reincarceration, the process “can have devastating effects on family life and . . . child development.”⁹²

3. COMMUNITIES WHITHER IN THE FACE OF THEIR MEMBERS’ RE- INCARCERATION

Incarceration also damages the vitality of communities.⁹³ The “phenomenon” of reentry affects whole communities because “most incarcerated people come from and return to a small set of inner-city neighborhoods,” which means that incarceration’s effects are heavily concentrated in those communities.⁹⁴ This “fundamentally [undermines] community cohesion”⁹⁵ or generates a communal sense of stigma or low self-esteem.⁹⁶ As a result, community members withdraw from community life, depriving community institutions, such as local businesses and churches, of the people they need to remain open and successful.⁹⁷ Incarceration also leads to residential turnover in communities as residents move around, further damaging communal bonds and isolating residents.⁹⁸ Recidivism perpetuates communities’ exposure to these impacts beyond a community member’s first incarceration.⁹⁹

annual hazard rate for divorce is 4% among men who have not been incarcerated; incarceration is estimated to raise this risk to 13%.”).

⁹⁰ Flake, *supra* note 60, at 65.

⁹¹ See *id.* at 65–66; See also Ross D. Parke & K. Alison Clarke-Stewart, *The Effects of Parental Incarceration on Children: Perspectives, Promises, and Policies*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES, 189, 202–04 (Jeremy Travis & Michelle Waul eds., 2003).

⁹² Braman & Wood, *supra* note 2, at 158.

⁹³ See *infra* text accompanying notes 94–99.

⁹⁴ Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 285, 285 (Jeremy Travis & Michelle Waul eds., 2003).

⁹⁵ Flake, *supra* note 60, at 66.

⁹⁶ Dina R. Rose & Todd R. Clear, *Incarceration, Reentry, and Social Capital: Social Networks in the Balance*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 313, 314 (Jeremy Travis & Michelle Waul eds., 2003).

⁹⁷ *Id.*

⁹⁸ *Id.* at 316.

⁹⁹ See *supra* text accompanying notes 93–98.

4. SOCIETY

The costs of returning citizen unemployment and recidivism are not just confined to their families and communities.¹⁰⁰ The high cost of incarceration means that each time an individual recidivates there is a price to be paid by society.¹⁰¹ In 2016, incarceration cost the United States approximately \$1 trillion.¹⁰² The Vera Institute of Justice reports that the “average cost per inmate” varied wildly by state in 2015.¹⁰³ Of the 45 states that provided data, Alabama spent the least per inmate, \$14,780.00, while New York spent the most, \$69,355.00.¹⁰⁴ The average amount spent was \$33,274.00.¹⁰⁵ Increasing employment for returning citizens would save money:

A study conducted in Philadelphia concluded that employing just 100 more formerly incarcerated individuals would lead to a \$2 million reduction in the city’s correctional costs. A Florida study estimated that increasing employment for individuals released from state prisons by 50 percent would save the state \$86 million annually in costs associated with future recidivism. Similarly, Pew Research Center has suggested that if states could lower recidivism rates by just 10 percent, they could save an average of \$635 million annually.¹⁰⁶

The destructive impacts of returning citizen unemployment and recidivism on individuals, families, and communities is reason enough

¹⁰⁰ See *infra* text accompanying notes 102–07.

¹⁰¹ See *infra* text accompanying notes 102–07.

¹⁰² Neil Schoenherr, *Cost of Incarceration in the U.S. More Than \$1 Trillion*, WASHINGTON UNIV. IN ST. LOUIS THE SOURCE (Sept. 7, 2016), <https://source.wustl.edu/2016/09/cost-incarceration-u-s-1-trillion/>. “Federal and state governments spend \$80 billion annually to operate prisons and jails.” Michael McLaughlin, et al., *The Economic Burden of Incarceration in the U.S.* 6 (Concordance Inst. For Advancing Social Just., Working Paper No. C1072016, 2016). The Concordance Institute’s study attempts to calculate the aggregate societal cost of incarceration by calculating the costs to demographic groups such as families, children, and communities—groups “innocent of any wrongdoing.” The study estimates those costs, along with the direct costs of incarceration, total \$997 million. *Id.* at 18.

¹⁰³ *Prison Spending in 2015*, VERA INST. OF JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Nov. 14, 2018).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefited Your Company*, AM. CIV. LIBERTIES UNION (2017), https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf.

to act to mitigate the harms of collateral consequences and employment discrimination,¹⁰⁷ but the aggregated cost to society is yet another reason to act.¹⁰⁸

III. THE EXISTING EFFORTS TO REMOVE OBSTACLES TO EMPLOYMENT DO NOT DO ENOUGH

There are a variety of remedies intended to remove the obstacles preventing returning citizens from obtaining employment.¹⁰⁹ Unfortunately, those measures fail returning citizens because they leave them exposed to employment discrimination or require them to engage in lengthy and expensive litigation.¹¹⁰ This section looks at statutory reform efforts, expungement statutes, Ban the Box provisions, the Fair Credit Reporting Act (FCRA), and Title VII of the Civil Rights Act, and the ways they fail returning citizens.¹¹¹

A. STATUTORY REFORM LEAVES RETURNING CITIZENS EXPOSED TO EMPLOYMENT DISCRIMINATION

As previously discussed, many collateral consequences are statutes that create penalties, restrictions, and disabilities for returning citizens.¹¹² They are scattered throughout federal and state codes¹¹³ and number in the tens of thousands.¹¹⁴ Reforming these laws may still leave returning citizens exposed to employer discrimination, but their removal would mean that returning citizens could start their own businesses or find work with willing employers.¹¹⁵ While statutory reform alone cannot remedy all obstacles, if combined with a program like what this comment proposes, statutory reforms offer great promise.¹¹⁶

Fortunately, federal and state governments have taken steps to address statutory collateral consequences.¹¹⁷ Congress ordered the crea-

¹⁰⁷ See *supra* Part II-C(1)–(3).

¹⁰⁸ See *supra* text accompanying notes 100–07.

¹⁰⁹ See *infra* Part III-A–D.

¹¹⁰ See *infra* Part III-A–D.

¹¹¹ See *infra* Part III-A–D.

¹¹² See *supra* Part II-A.

¹¹³ See *supra* Part II-A.

¹¹⁴ *Collateral Consequences Inventory*, *supra* note 39.

¹¹⁵ See *infra* Part IV.

¹¹⁶ See *infra* Part IV.

¹¹⁷ See *infra* text accompanying notes 118–25.

tion of The National Inventory of the Collateral Consequences of Conviction¹¹⁸ to “collect and analyze the collateral consequences in place in each U.S. jurisdiction.”¹¹⁹ Meanwhile, the Obama Administration argued for re-evaluating occupational licensing requirements because of the disproportionate impact licensing restrictions can have on returning citizens, such as denying licenses due to any kind of criminal conviction, irrespective of a connection between the conviction and the license.¹²⁰ Finally, many states, including Delaware,¹²¹ Indiana,¹²² Nebraska,¹²³ and Maryland,¹²⁴ have reduced the ways in which criminal convictions can prevent returning citizens from obtaining occupational licenses.¹²⁵

B. BAN THE BOX APPLIES TOO NARROWLY AND POTENTIALLY INCREASES RACIAL DISCRIMINATION

Ban the Box is a movement seeking to ban employers from asking about prior convictions by “removing the conviction history check-

¹¹⁸ *Collateral Consequences Inventory*, *supra* note 39; Court Security Improvement Act of 2007, Pub. L. No. 110-177 § 510(a), 121 Stat. 2534, 2544 (2008).

¹¹⁹ *Collateral Consequences Inventory*, *supra* note 39.

¹²⁰ See DEP’T OF THE TREASURY OFF. OF ECON. POL’Y, THE COUNCIL OF ECON. ADVISERS, AND THE DEP’T OF LAB., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 5 (July 2015).

¹²¹ Licensing boards can no longer consider convictions older than 10 years and returning citizens may apply for a waiver of a prior felony conviction after only three years, as opposed to five. DEL. CODE ANN. TIT. 24, § 5107 (West 2018).

¹²² “Good character” and “moral turpitude” clauses were removed from licensing board requirements; licensing boards must limit disqualifying crimes to those “specifically and directly” related to the profession in which the applicant is seeking a license. 2018 Ind. Legis. Serv. P.L. 182-2018 (H.E.A. 1245) (West).

¹²³ Occupational licensing boards must render decisions as to whether a criminal conviction disqualifies an applicant within ninety days of receiving a preliminary application. NEB. REV. STAT. ANN. § 84-947(4) (West 2019).

¹²⁴ The Departments of Agriculture, Environment, Health, Human Services, Public Safety and Correctional Services, and Labor, Licensing, and Regulation cannot deny an occupational license or certificate application solely because of a prior, non-crime of violence, conviction unless the department determines there is a direct relationship between the prior conviction and the specific occupational license or certificate, or if issuing the license or certificate would “involve an unreasonable risk to property . . . safety . . . or welfare . . .” MD. CODE ANN., CRIM. PROC., § 1-209(a),(d) (West 2019).

¹²⁵ Adam Edelman, *Inmates Who Learn Trades are Often Blocked from Jobs. Now Something’s Being Done*, NBC NEWS (May 26, 2018), <https://www.nbcnews.com/politics/politics-news/inmates-who-learn-trades-are-often-blocked-jobs-now-something-n877666>.

box from a job application.”¹²⁶ Some versions of these “fair-chance hiring laws” require employers to wait longer in the application process before conducting criminal background checks.¹²⁷ The campaign to “ban the box” has become a popular one, with 35 states and 150 cities and counties adopting Ban the Box or fair-chance measures.¹²⁸ An estimated 258 million people in the United States live in a jurisdiction with a ban-the-box or fair-chance policy.¹²⁹ The Obama Administration put their weight behind the initiative, directing the Office of Personnel Management to modify rules, where they could, to delay inquiring into criminal history until later than the beginning of the hiring process.¹³⁰

Despite Ban the Box’s laudable goals, the initiative is problematic because it is narrow in scope and may lead to increased racial discrimination.¹³¹ First, Ban the Box statutes frequently only apply to public, not private, employers.¹³² Although some jurisdictions have taken efforts to expand Ban the Box policies to private employers, as of July 1, 2019, only 13 states and 18 cities and counties had done so.¹³³ More seriously, Ban the Box may lead to discrimination against applicants of color.¹³⁴ One recent study concluded that “BTB [Ban the Box] does appear to increase racial discrimination.”¹³⁵ That study showed before Ban the Box, white applicants received 7% more callbacks than similar black applicants, but that after Ban the Box laws were instituted the gap between white and black applicants grew to 43%.¹³⁶ Not only did white applicants see gains in their callback percentage, but black applicants saw a drop.¹³⁷ Furthermore, black applicants without a criminal record saw a substantial drop in callback rates after the adoption of Ban the

¹²⁶ Michelle Natividad Rodriguez, “*Ban the Box*” is a Fair Chance for Workers with Records, NAT’L EMP’T LAW PROJECT (Aug. 2017), <https://www.nelp.org/publication/ban-box-fair-chance-workers-records/>.

¹²⁷ Beth Avery, *Ban The Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP’T LAW PROJECT (July 1, 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Fact Sheet: President Obama Announced New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated*, THE WHITE HOUSE OFF. OF THE PRESS SECRETARY (Nov. 2, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

¹³¹ See *infra* text accompanying notes 132–38.

¹³² Mullings, *supra* note 26, at 282.

¹³³ Avery, *supra* note 127.

¹³⁴ See *infra* text accompanying notes 135–39.

¹³⁵ Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 QUARTERLY J. OF ECON. 191, 195 (2018).

¹³⁶ *Id.*

¹³⁷ *Id.*

Box laws.¹³⁸ Although Ban the Box's intentions are sound, it is not a viable solution if it exacerbates racial discrimination in hiring. This is especially true when people of color are disproportionately incarcerated.¹³⁹

C. EXPUNGEMENT STATUTES AND THE FCRA CANNOT PROTECT RETURNING CITIZENS FROM THE INTERNET OR ERRONEOUS REPORTING OF EXPUNGED RECORDS

Expungement statutes and the Fair Credit Reporting Act (FCRA) have been grouped together because of the similarities in how they operate and how they inadequately serve the needs of returning citizens.¹⁴⁰ Both statutes seek to regulate employer access to applicants' criminal records.¹⁴¹ Expungements do this by removing records and related documents of a criminal conviction from public accessibility.¹⁴² The FCRA regulates the "collection and dissemination of consumer reports" that are produced by Consumer Reporting Agencies (CRAs).¹⁴³ Employers that wish to use consumer reports, and the criminal conviction information they contain, as a background check must follow a series of steps, which include obtaining authorization of the applicant to conduct the background check, notifying the applicant of their rights under the FCRA before taking adverse action against the applicant, and providing the applicant with further information about their rights under the FCRA if the employer is going to take adverse action.¹⁴⁴

Unfortunately, the efficacy of expungements and the FCRA is limited by the internet and mistakes made by CRAs.¹⁴⁵ First, expungement statutes and the FCRA only apply to official criminal records.¹⁴⁶ This is problematic because criminal record information can proliferate

¹³⁸ *Id.*

¹³⁹ See *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Sept. 19, 2019).

¹⁴⁰ See *infra* text accompanying notes 142–60.

¹⁴¹ See *infra* text accompanying notes 142–44.

¹⁴² Lahny Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 159 (2011).

¹⁴³ Carlin & Frick, *supra* note 33, at 121.

¹⁴⁴ *Id.* at 123–5.

¹⁴⁵ See *infra* text accompanying notes 146–60.

¹⁴⁶ Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367, 380 (2018).

across the internet far beyond official databases,¹⁴⁷ at which point employers can locate and use the information to discriminate.¹⁴⁸ Such information is available via online news reports¹⁴⁹ and commercial mugshot databases, which may charge returning citizens hundreds of dollars to remove their mugshot from the database.¹⁵⁰ Furthermore, consumer reports provide criminal conviction information to employers because the FCRA permits criminal convictions to remain on reports,¹⁵¹ and because CRAs mistakenly include arrest records and expunged convictions.¹⁵² CRAs operate by obtaining criminal records from official databases, digitizing the records, and then making them available in background checks.¹⁵³ If a conviction is expunged after a CRA adds it to their database, and the CRA does not remove the conviction, then the record may be improperly disclosed.¹⁵⁴ This was the allegation of a 2010 class action lawsuit brought against LexisNexis, which resulted in a 2015 settlement paying \$1,000.00 each to 300 Pennsylvanians who received inaccurate background checks.¹⁵⁵ It is unclear how frequently CRAs make such mistakes, but the issue has been recognized by attorneys, scholars, and policy analysts,¹⁵⁶ as well as at least three other class

¹⁴⁷ *Id.* at 373.

¹⁴⁸ *See id.* at 374–75.

¹⁴⁹ Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 *COMMLAW CONSPPECTUS* 123, 136 (2010). It is easy to find old news stories via a newspaper's website, simple Google searches, or through databases such as LexisNexis Academic. *Id.*

¹⁵⁰ Westrope, *supra* note 146, at 374 (citing Peter Lowe, *Applicants' Mug Shots May Be Just a Click Away*, 19 *NO. 4 ME. EMP. L. LETTER* 1 (2013)).

¹⁵¹ Carlin & Frick, *supra* note 33, at 135; 15 U.S.C.A. § 1681c(a)(5) (2006).

¹⁵² Carlin & Frick, *supra* note 33, at 135–36.

¹⁵³ *Id.* at 121–22; Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, *N.Y. TIMES* (Oct. 17, 2006), <https://www.nytimes.com/2006/10/17/us/17expunge.html>.

¹⁵⁴ Liptak, *supra* note 153.

¹⁵⁵ Sharon M. Dietrich, *Preventing Background Screeners from Reporting Expunged Criminal Cases*, *CLEARINGHOUSE COMMUNITY* (Apr. 2015), <http://povertylaw.org/clearinghouse/stories/dietrich>. Dietrich notes that the \$1,000.00 payout, while one of the largest ever for a Fair Credit Reporting Act class action, does not replace the lost wages of class members. *Id.*

¹⁵⁶ Despite the apparent lack of available statistics on how frequently mistakes are made by CRAs, there does seem to be a consensus such mistakes are being made. *See* Liptak, *supra* note 153; Sarah Esther Lageson, *Policy Proposal: Enforce Private Sector Compliance with Criminal Record Expungement Orders*, *SCHOLARS STRATEGY NETWORK* (Nov. 13, 2018), <https://scholars.org/brief/policy-proposal-enforce-private-sector-compliance-criminal-record-expungement-orders>; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 *WIS. L. REV.* 321, 345 (2015); *Best Practice Standards: The Proper Use of Criminal Records in Hiring*, *LAW. COMM. FOR C.R. UNDER L.*, 14–15 (2013), available at <https://hirenetwork.org/sites/default/files/Best-Practices-Standards-The-Proper-Use-of-Criminal-Records-in-Hiring.pdf>.

action lawsuits similar to the LexisNexis suit.¹⁵⁷ The usefulness of expungements and the FCRA is limited by the breadth of information available on the internet and the mistakes of CRAs.¹⁵⁸ Furthermore, as the LexisNexis case shows, lawsuits are lengthy endeavors that can distract returning citizens from obtaining employment.¹⁵⁹ Solutions not contingent on returning citizens keeping their criminal records indefinitely hidden from employers are needed.¹⁶⁰

D. TITLE VII CLAIMS CAN ONLY BE USED BY SOME RETURNING
CITIZENS, IN ADDITION TO BEING “VIRTUALLY” IMPOSSIBLE TO
WIN AND TIME CONSUMING

Under a Title VII of the Civil Rights Act of 1964 claim, returning citizens may bring lawsuits alleging an employer discriminated against them because of a protected characteristic they possess—such as race, gender, or national origin.¹⁶¹ Claims typically take one of two forms:¹⁶² disparate treatment, in which the plaintiff alleges intentional discrimination,¹⁶³ and disparate impact, in which the plaintiff alleges that a facially neutral policy has a discriminatory impact.¹⁶⁴

To succeed under a disparate treatment claim the plaintiff has to show either “discriminatory animus” or, by inference, “that the employer’s decision was based on a prohibited characteristic.”¹⁶⁵ Such an inference is proven by showing that the plaintiff “was treated differently than similarly-situated persons outside of his protected class.”¹⁶⁶ The comparison between plaintiffs and the “similarly-situated persons” needs to be drawn very closely, which has made disparate treatment claims difficult to prove.¹⁶⁷

On the other hand, disparate impact claims require parties to progress through three stages of litigation.¹⁶⁸ First, the plaintiff makes a

¹⁵⁷ Dietrich, *supra* note 155. The cases Dietrich identifies are *Henderson v. HireRight Solutions Inc.*, *Roe v. Intellicorp Records Inc.*, and *Robinson v. General Information Services, Inc.* *Id.*

¹⁵⁸ *See supra* text accompanying notes 145–57.

¹⁵⁹ *See supra* text accompanying notes 155–57

¹⁶⁰ *See infra* Part IV.

¹⁶¹ Mullings, *supra* note 26, at 276.

¹⁶² *Id.* at 277.

¹⁶³ *Id.*

¹⁶⁴ Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L.R. 831, 840 (2014).

¹⁶⁵ Mullings, *supra* note 26, at 277.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 278.

¹⁶⁸ Pettinato, *supra* note 164, at 840.

prima facie case showing the employer used a facially neutral policy that had a racially discriminatory effect.¹⁶⁹ The theory is that because people of color are disproportionately incarcerated, a policy discriminating against returning citizens disproportionately impacts people of color, particularly black and Hispanic men.¹⁷⁰ If the plaintiff is able to show this then the employer must show a business necessity for the policy.¹⁷¹ Finally, the plaintiff will have to rebut the business necessity defense by showing that “another, less discriminatory policy is available that would equally fulfill the business necessity.”¹⁷²

Title VII claims are problematic because not everyone can use them, in addition to being difficult to win and time consuming.¹⁷³ Plaintiffs must be part of a disproportionately incarcerated racial group, which means not all returning citizens can utilize Title VII claims.¹⁷⁴ Even if a claim can be brought, the suits are nearly impossible to win: plaintiffs have lost “almost every case” since the 1980s.¹⁷⁵ Alexandra Harwin, a Title VII discrimination attorney and partner of Sanford Heisler Sharp, LLP, conducted a study which found only three cases in which returning citizen plaintiffs survived a motion for summary judgment, and no cases in which a returning citizen won after a trial on its merits.¹⁷⁶ Similarly, a study of all employment discrimination claims between 1979 and 2006 found that the plaintiffs’ win rate was only 15%.¹⁷⁷ Another study found that only 1% of federal job discrimination, harassment, and retaliation claims succeed in court.¹⁷⁸ Although those statistics are not specific to just returning citizen claims, they do reflect the “tough row to hoe”¹⁷⁹ facing them. Furthermore, even if there was a realistic chance of success, a Title VII claim means returning citizens are

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Pettinato, *supra* note 164, at 842–43; Mullings, *supra* note 26, at 276–77.

¹⁷⁴ Pettinato, *supra* note 164, at 840; Mullings, *supra* note 26, at 281.

¹⁷⁵ Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 12–13; Westrope, *supra* note 146, at 383.

¹⁷⁶ *Id.* at 12 n.59; Alexandra Harwin, SANFORD HEISLER SHARP, LLP, <https://sanfordheisler.com/team/alexandra-harwin/> (last visited Sept. 19, 2019).

¹⁷⁷ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009).

¹⁷⁸ Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST CO. (July 31, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits>.

¹⁷⁹ Clermont & Stewart, *supra* note 177, at 103.

expending some amount of time and resources necessary to bring a lawsuit.

IV. SMALL BUSINESS DEVELOPMENT PROGRAMS PROVIDE SOLUTIONS TO EMPLOYMENT OBSTACLES THAT BENEFIT RETURNING CITIZENS, FAMILIES, COMMUNITIES, AND SOCIETY

This comment advocates investing resources into the creation of small business development programs (SBD programs) to help returning citizens develop their own business or obtain employment with a business created through the SBD programs, bypassing the pitfalls of the measures discussed in Part III.¹⁸⁰ Unlike statutory reform, Ban the Box, expungement statutes, and the FCRA, SBD programs would not expose returning citizens to employment discrimination.¹⁸¹ SBD programs would also not require returning citizens to expend energy bringing lawsuits under the FCRA or Title VII.¹⁸² SBD programs would accomplish this by providing returning citizens a direct route to employment, meaning they would not need to apply for jobs with a potentially discriminatory employer or need to bring lawsuits.¹⁸³

SBD programs would decrease recidivism and increase the likelihood of successful reentry by providing access to employment, education, and a network of people successfully navigating reentry.¹⁸⁴ This proposal is inspired by existing organizations and programs, as well as recidivism research.¹⁸⁵ Two of those organizations are 501(c)3 non-profits that provide returning citizens with entrepreneurial training and assist with obtaining capital: Rising Tide Capital¹⁸⁶ and Defy Ventures.¹⁸⁷

¹⁸⁰ See *infra* Part IV-A(i).

¹⁸¹ See *infra* Part IV-B.

¹⁸² See *infra* Part IV-B.

¹⁸³ See *infra* Part IV-B.

¹⁸⁴ See *infra* Part IV-B.

¹⁸⁵ See *infra* text accompanying notes 144–48; See *infra* Part IV-B.

¹⁸⁶ Rising Tide Capital focuses its efforts not just on returning citizens, but on underserved urban neighborhoods. *Our Mission*, RISING TIDE CAPITAL, <https://www.risingtidecapital.org/about/> (last visited Sept. 14, 2019). The program consists of a twelve-week business academy, subsequent learning and coaching, and assistance obtaining capital. *Rising Tide Capital Annual Report 2017-2018*, RISING TIDE CAPITAL, 8, https://www.risingtidecapital.org/wp-content/uploads/2018/09/2017-18-Annual-Report_Optimized.pdf (last visited Sept. 14, 2019). Rising Tide Capital asserts they have 2,174 graduates, that 80% of businesses survive beyond the five years, and that within two years businesses see an 112% increase in average business sales and a 58% increase in average household income. *Id.* at 10–11.

¹⁸⁷ Defy Ventures provides education and entrepreneurship training for “Entrepreneurs-in-Training” while they are still incarcerated. *Defy Program*, DEFY VENTURES, <https://www.defyventures.org/our-story-main/our-programs> (last visited Sept. 14, 2019). Defy relies in part on

Other 501(c)3 non-profits, such as Mercy Corps Northwest¹⁸⁸ and the Prison Entrepreneurship Program¹⁸⁹ provide training and reentry support services.¹⁹⁰

There are also state-run programs attempting to cultivate returning citizen entrepreneurship.¹⁹¹ Oklahoma's Entrepreneurial Ex-Offenders Training and Support Program is an entrepreneurship-focused educational program for those still incarcerated.¹⁹² Maryland and Alabama both passed legislation requiring the establishment of pilot programs that provide training and funding to returning citizens for small business development, but those pilot programs expire at the end of 2020 and the

volunteers who vet the business proposals of "Entrepreneurs-in-Training" and select top proposals who will received \$500.00 from Defy and the opportunity to meet with potential investors. David Straus, *Defying the Odd: Prison Inmates are Taught How to Be the CEO of Their Own Lives* INC (July 25, 2018), <https://www.inc.com/david-straus/this-venture-company-of-second-chances-earns-its-own-second-chance.html>. Defy boasts that there are 143 graduate owned, incorporated businesses, and that at least 768 participants enrolled in and completed at least one of their post-release assignments. Andrew Glazier, *A Year In Review: A Letter from Defy's President and CEO*, DEFY VENTURES, <https://www.defyventures.org/static/uploads/files/annual-report-2019-final-19-02-01-wfrqbkdwbgng.pdf> (last visited Sept. 14, 2019).

¹⁸⁸ Mercy Corps Northwest's Lifelong Information for Entrepreneurs (LIFE) program provides a 32-week training program with the goal of "develop[ing] an entrepreneurial mindset and leverage[ing] the potential of self-employment [to] promote resilience, and economic stability." *Lifelong Information for Entrepreneurs (LIFE)*, MERCY CORPS NORTHWEST, <https://www.mercycorpsnw.org/reentry-transition-center/life/> (last visited Sept. 14, 2019). LIFE currently serves Oregon's only women's prison, but it hopes to expand to men's prisons, in addition to providing further post-release services. *Id*

¹⁸⁹ Prison Entrepreneurship Program (PEP) annually selects 500 men from over 10,000 candidates for their in-prison education and leadership academy, in which the men will develop their own business plan as part of a competition. *Empowering Innovation*, PRISON ENTREPRENEURSHIP PROGRAM, <https://www.pep.org/empowering-innovation/> (last visited Sept. 14, 2019). Following their release, program members are picked up from the prison's gates by PEP workers and have the option of living in one of five transition homes managed by PEP. *Releasing Potential*, PRISON ENTREPRENEURSHIP PROGRAM, <https://www.pep.org/releasing-potential/> (last visited Sept. 14, 2019). PEP graduates have access to an "eSchool" educational program, business centers, and help obtaining loans. *Transforming Communities*, PRISON ENTREPRENEURSHIP PROGRAM, <https://www.pep.org/transforming-communities/> (last visited Sept. 14, 2019).

¹⁹⁰ There is another non-profit organization that deserves recognition: Change the Hustle. Learning about the Philadelphia based organization was the author's initial catalyst for this comment. The organization sought to direct people from illicit enterprises towards "legal opportunities with high income potential and lower personal risk" by teaching participants business planning investor cultivation, and by assigning a mentor. Unfortunately, as of September 14, 2019, the organization, or at least its website, appears defunct: the domain name is available for purchase. The website address is provided here in case the website is restored. CHANGE THE HUSTLE, <http://changethehustle.com/> (last visited Sept. 14, 2019).

¹⁹¹ See *infra* text accompanying notes 192–95.

¹⁹² *Program Intent*, ST. OF OKLA., https://www.ok.gov/eeots/Program_Intent/index.html (last visited Sept. 15, 2019).

Maryland program at least has already been abrogated.¹⁹³ The District of Columbia Council passed legislation paving the way for the creation of the Incarceration to Incorporation Entrepreneurship Program in 2016, which would provide returning citizens access to training, mentorship, and capital.¹⁹⁴ Unfortunately, the program was not funded in either of Mayor Muriel E. Bowser's two budgets since its passage and, while facing automatic repeal not funded in the 2020 budget, was repealed in 2019.¹⁹⁵ Finally, there are efforts to create a similar federal program via H.R. 5078, the Prison to Proprietorship Act, and H.R. 5065, the Prison to Proprietorship for Formerly Incarcerated Act.¹⁹⁶ Both H.R. 5078 and 5065 have passed the House of Representatives and have been referred to the Senate's Committee on Small Business and Entrepreneurship.¹⁹⁷ Both acts focus on educational efforts.¹⁹⁸

The SBD programs proposed by this comment recognize that education and employment are important to reducing recidivism¹⁹⁹ by planning to teach returning citizens the skills needed to run a small business and to assist them in finding employment. The proposed SBD programs would additionally seek to "address the three main causal mechanisms linking imprisonment to unemployment: social stigma of incarceration, damage to human capital (i.e., job skills), and the erosion of social capital (i.e., personal connections and job networks)."²⁰⁰ Businesses developed with the help of SBD programs would address these mechanisms by showing that returning citizens can create and retain jobs, helping them cultivate the skills needed to be successful workers,

¹⁹³ MD. LABOR AND EMPLOYMENT CODE ANN. § 11-1201 *abrogated*; ALA. Code § 41-29-320 (2015). The text of both statutes is remarkably similar in structure, word choice, and pilot program timeframe. *Id.*

¹⁹⁴ 63 D.C. Reg. 10771 (Aug. 18, 2016); *see also* D.C. CODE § 2-1210.51-.55 (2016) (repealed 2019).

¹⁹⁵ Kevin Smith, *More Broken Promises on Returning Citizens*, WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/opinions/more-broken-promises-on-returning-citizens/2018/10/19/dd01f8ac-c5b7-11e8-b2b5-79270f9cce17_story.html; 63 D.C. Reg. 10771 (Aug. 18, 2016) (repealed 2019).

¹⁹⁶ Derek T. Dingle, *New Legislation Seeks to Help Formerly Incarcerated Launch Business*, BLACK ENTERPRISE (Dec. 2, 2019), <https://www.blackenterprise.com/prison-help-formerly-incarcerated-launch-businesses/>.

¹⁹⁷ Prison to Proprietorship Act of 2019, H.R. 5078, 116th Cong. (2019); Prison to Proprietorship for Formerly Incarcerated Act of 2019, H.R. 5065, 116th Cong. (2019).

¹⁹⁸ *Id.*

¹⁹⁹ Nally, et al., *supra* note 63, at 27 (stating "this study's results revealed that the offender's education and employment were the most important predictors of recidivism. Specifically, ex-offenders were more likely to be re-incarcerated if they were uneducated (or under-educated) or unemployed.").

²⁰⁰ Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 291 (2009).

and providing a network between returning citizens and businesses.²⁰¹ SBD programs would meet these needs by employing and educating returning citizens in small businesses where they will work alongside people that understand reentry's challenges.²⁰²

This section begins in Part IV-A by outlining a framework for how SBD programs could be structured,²⁰³ before discussing benefits of SBD programs for individuals, families, and communities in Part IV-B.²⁰⁴ Part IV-C concludes by discussing how costs and perpetuation of stigma are potential drawbacks of SBD programs.²⁰⁵

A. A POTENTIAL FRAMEWORK FOR HOW SBD PROGRAMS WOULD HELP RETURNING CITIZENS

This outline of a potential framework for SBD programs incorporates the educational and financial support elements of programs discussed above.²⁰⁶ The hypothetical SBD program framework suggested here is more ambitious than some of those existing programs in that it seeks to work with returning citizens from pre-release through establishment and growth of their small business (or through placement with a business that matches their skillset).²⁰⁷ The goal is to support returning citizens from the initial planning stages all the way through overcoming the initial financial obstacles to small business development.²⁰⁸

1. Phase One: Help Returning Citizens Develop a "Personal Business Plan"

The hypothetical SBD programs this comment envisions will first help returning citizens develop a "personal business plan" for their new lives, while still incarcerated.²⁰⁹ This will consist of three steps that focus on education and planning, like the entrepreneurship programs discussed above.²¹⁰ After identifying candidates likely to succeed in a small business development program, the hypothetical SBD programs

²⁰¹ See *infra* Part IV-B.

²⁰² See *infra* Part IV-B.

²⁰³ See *infra* Part IV-A.

²⁰⁴ See *infra* Part IV-B.

²⁰⁵ See *infra* Part IV-C.

²⁰⁶ See *infra* Part IV-A(1), (2), (3).

²⁰⁷ See *infra* Part IV-A(1), (2), (3).

²⁰⁸ See *infra* Part IV-A(1), (2), (3).

²⁰⁹ See *infra* Part IV-A(1).

²¹⁰ Programs such as Defy, PEP, LIFE, and Rising Tide Capital have all begun their work pre-release, and seemingly had success with this approach. See *infra* Part IV.

would work with individuals to envision ways their skills may translate to legal entrepreneurial enterprises. Second, the hypothesized SBD programs will help individuals develop tangible business plans that lend themselves to the individual's skills and strengths. Alternatively, for individuals who do not want to start a business, the SBD programs would place the individual with businesses already established through the SBD programs that need their skillset(s). Finally, an SBD program would educate and train individuals in the entrepreneurial skills they will need to succeed and thrive as small business owners. For example, in the case of the non-author Wes Moore, who honed carpentry skills as part of his Job Corps training,²¹¹ a theoretical SBD program, as proposed here, could have assisted him in either developing a comprehensive plan for a carpentry or construction business, or it would have identified an existing business that Wes Moore could have been placed with.²¹² Ideally, this would have meant Moore had a consistent job paying a livable wage.²¹³

2. *Phase Two: Work with Individuals and Legislatures to Overcome Statutory and Occupational Licensing Obstacles*

Returning citizens with entrepreneurial aspirations often face statutory and occupational licensing obstacles.²¹⁴ Under this proposed framework, the hypothesized SBD programs will help returning citizens overcome these obstacles by being required to lobby legislatures for reform and advocate before licensing boards. Working closely with the returning citizens, SBD programs will be able to identify and target the specific statutory and licensing provisions obstructing members of the SBD programs from starting businesses.²¹⁵

²¹¹ MOORE, *supra* note 2, at 142–43.

²¹² See *infra* Part IV-A(2), (3).

²¹³ The SBD programs this comment proposes would require the businesses they help establish to pay living wages; the SBD programs would provide financial support in the early days of the business' existences to make this a reality. See *infra* Part IV-A(iii).

²¹⁴ See *infra* Part III-A.

²¹⁵ The author has not found examples of small business development organizations advocating on behalf of returning citizens as proposed here. There are organizations lobbying legislatures for reform, and individual returning citizens have had success challenging licensing boards on an individual basis with the help of lawyers. Ashley Nerbovig, *License to Clip: A Movement to Let the Formerly Incarcerate Cut Hair and Drive Taxis is Gaining Ground*, THE MARSHALL PROJECT (July 10, 2018) <https://www.themarshallproject.org/2018/07/10/license-to-clip>. Rather than requiring SBD program members to individually obtain a lawyer and challenge a licensing board, this proposal seeks to streamline the process by unifying licensing advocacy and business planning in the same organization. *Id.*

These advocacy efforts may not require lengthy lobbying work to modify statutes.²¹⁶ In a jurisdiction like Kentucky, an occupational licensing applicant has the right to a hearing if their application is denied solely because of their prior conviction of a crime.²¹⁷ Where the jurisdiction permits evidence or testimony as to why an applicant should receive a license, the SBD program would advocate before the licensing board and explain why the prospective entrepreneur should receive a license, despite their criminal record.²¹⁸

The story of Mike Grennan provides an example of how this would work.²¹⁹ Grennan is a returning citizen who “piec[ed] together small construction gigs” following his release.²²⁰ Grennan wants to become a home-building contractor, but that requires an occupational license, something his state, Michigan, denies returning citizens.²²¹ An SBD program, as outlined here, would help Grennan develop a business plan and then overcome the statutory barriers by either lobbying for a statutory change or by advocating that Grennan receive an exemption from the state’s licensing agency or board.²²²

3. *Phase Three: Provide Initial Financial Support to Businesses*

Once the business plan is created and statutory barriers are overcome, capital will be needed to fund the business.²²³ The SBD programs proposed by this comment would not just help prospective entrepreneurs develop the skills to cultivate investment, but they would also provide financial assistance to subsidize businesses’ operation costs and the salaries of employees to a degree that would ensure employees received a living wage.²²⁴ Furthermore, business developed with the support of the proposed SBD programs would be required to pay living wages to

²¹⁶ See *infra* text accompanying notes 218.

²¹⁷ KY. REV. STAT. ANN. § 335B.030(1)(a)(2) (West 2017).

²¹⁸ See *infra* text accompanying notes 220–22.

²¹⁹ See *infra* text accompanying notes 220–22.

²²⁰ Edelman, *supra* note 125.

²²¹ *Id.*

²²² The author has not found examples of small business development organizations advocating on behalf of returning citizens as proposed here. There are organizations lobbying legislatures for reform, and individual returning citizens have had success challenging licensing boards on an individual basis with the help of lawyers. Nerbovig, *supra* note 215.

²²³ See *infra* text accompanying notes 227–31.

²²⁴ See *infra* text accompanying notes 226–36.

their employees. This would ensure the business could financially survive its infancy, in addition to paying its employees a legitimate and living wage.²²⁵

Financial assistance, potentially extensive, would need to be provided from state funds or private donors.²²⁶ Existing and proposed programs have recognized the importance of providing financial support, either through direct financial support or through assistance obtaining loans.²²⁷ The estimated cost of starting a small business ranges from a few thousand dollars²²⁸ to tens of thousands of dollars,²²⁹ and employee wages alone can quickly amount to tens of thousands of dollars.²³⁰ Thus, financial support for the fledgling businesses will be critical.

Federal law permits lenders to consider a small business loan applicant's criminal history when evaluating creditworthiness,²³¹ meaning it potentially permits discrimination based on criminal history. Given this reality, this comment argues that theoretical SBD programs should provide financial assistance to aspiring entrepreneurs to counteract the potential difficulty they will have in obtaining business funding. This comment envisions that such subsidization would not be indefinite but would decrease over time as the business became financially independent.

²²⁵ As the story of the non-author Wes Moore showed, legal employment that does not pay enough is not enough. *See supra* Part I.

²²⁶ *See infra* text accompanying notes 227–30. In an ideal world, the financial assistance would not be in the form of loans, because even loans at favorable interest rates represent future financial burden for businesses. *See also* Baskaran, *supra* note 1 (advocating for municipality created “Economic Justice Incubators,” instead of relying on 501(c)(3) nonprofits to support the entrepreneurial aspirations of returning citizens).

²²⁷ *See supra* text accompanying notes 184–95.

²²⁸ Caron Beesley, *How to Estimate the Cost of Starting a Business from Scratch*, MINORITY BUS. DEV. AGENCY U.S. DEP'T OF COMMERCE, <https://www.mbda.gov/news/blog/2011/11/how-estimate-cost-starting-business-scratch> (last visited Oct. 23, 2019).

²²⁹ *Id.* (citing an Ewing Marion Kauffman Foundation study from 2009 that asserted the average cost of starting a new business from scratch was just over \$30,000).

²³⁰ The annual salary of a fulltime employee at the federal minimum wage rate of \$7.25 working a forty-hour work week could be as high as \$15,080.00, before taxes. $((\$7.25) \times (8 \text{ hours per day}) \times (5 \text{ days per week}) \times (52 \text{ weeks per year}))$; *See also* Tina Amo, *How Much Money Will You Make Working a Minimum Wage Job?*, HOUSTON CHRON., <https://work.chron.com/much-money-make-working-minimum-wage-job-2022.html> (last visited March 9, 2020). There have been movements in recent years to increase minimum wages nationwide. Jacob Pramuk & John W. Schoen, *House Democrats Prepare to Push for \$15 Federal Minimum Wage, Setting up Clash with Big Businesses*, CNBC (Dec. 11, 2018, 12:44 PM), <https://www.cnbc.com/2018/12/11/house-democrats-will-push-for-15-per-hour-federal-minimum-wage.html>.

²³¹ Lyles-Chockley, *supra* note 200, at 275.

There is already precedent for federal government funding of reentry programs, although not on the same scale as proposed here.²³² The Second Chance Act authorizes federal grants to governmental and nonprofit organizations seeking to improve the reentry process.²³³ The act has funded many initiatives, including alternative courts, expanded access to substance abuse treatment, and career training for inmates.²³⁴ Given SBD programs would be started from scratch, and not just through an expansion of existing programs, the financial requirements would likely be very different (and much more extensive) than what The Second Chance Act has historically supported.²³⁵ However, The Second Chance Act, or something like it, may be one place to begin looking for financial resources.²³⁶

B. POTENTIAL BENEFITS ARE EMPLOYMENT, DISRUPTION OF THE RECIDIVISM CYCLE, AND REINVIGORATED COMMUNITIES

The potential benefits of SBD programs, if successful, include employment for returning citizens shortly after leaving prison, additional support structures for returning citizens during the process of reentry, and the opportunity for returning citizens to invest in and give back to their communities.²³⁷ When returning citizens reenter civilian life they face collateral consequences, employment discrimination,²³⁸ and a steep unemployment rate,²³⁹ despite employment being critical to returning citizen success.²⁴⁰ The result is a cycle of incarceration, unemployment, and recidivism.²⁴¹ By offering returning citizens employment promptly upon starting reentry, SBD programs would help break the vicious cycle of unemployment and recidivism and allow returning citizens to eschew reliance on time consuming remedies, such as Title VII

²³² See *infra* text accompanying notes 232–34.

²³³ *Second Chance Act Grant Program*, THE NAT'L REENTRY RES. CTR., <https://csgjustice-center.org/nrrc/projects/second-chance-act/> (last visited Dec. 13, 2018).

²³⁴ See Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L. L. REV. 249, 260 (2016).

²³⁵ An additional drawback is that the Second Chance Act requires recipients to be 501(c)(3) nonprofit organization. Baskaran, *supra* note 1, at 326.

²³⁶ See *supra* text accompanying notes 232–34.

²³⁷ See *supra* Part-II; See *infra* text accompanying notes 238–65.

²³⁸ Ewald & Smith, *supra* note 30, at 145–46; Lyles-Chockley, *supra* note 200, at 267–68; Mullings, *supra* note 26, at 265.

²³⁹ Couloute & Kopf, *supra* note 66.

²⁴⁰ Mullings, *supra* note 26, at 267; PETERSILIA, *supra* note 51, at 112; Flake, *supra* note 60, at 63.

²⁴¹ See *supra* Part II.

claims.²⁴² Breaking that cycle and decreasing recidivism should also lessen the collateral damage families and communities suffer.²⁴³ Returning citizens will return to society with a job that financially supports them,²⁴⁴ in addition to a work place that surrounds them with coworkers and bosses who understand the struggles of reentry, having gone through reentry themselves.²⁴⁵

Communities would benefit not just from decreased recidivism, but from SBD programs serving as a mechanism by which returning citizens would bring investment.²⁴⁶ Most incarcerated people come from and return to the same neighborhoods,²⁴⁷ and those communities pay a steep price for their residents becoming mired in the cycle of incarceration, unemployment, and recidivism.²⁴⁸ Peter Edelman, the Carmack Waterhouse Professor of Law and Public Policy at Georgetown University Law Center and the faculty director of the Georgetown Center on Poverty and Inequality,²⁴⁹ has proposed several elements that should be parts of policies to tackle concentrated poverty.²⁵⁰ The first is to bring jobs to neighborhoods that “pay enough to live on,” and the second is that job opportunities in regional economies should be made realistic possibilities for community members, in part through aggressive job training and placement strategies.²⁵¹ The SBD programs this comment has proposed would seek to incorporate Edelman’s elements and bring livable wages, job training, and job placement.²⁵²

The utility of the SBD programs this comment proposes can be illustrated by considering how they could potentially combat the lack of

²⁴² See *supra* Part II, Part III-D.

²⁴³ See *supra* Part II-B, Part II-C(2), (3).

²⁴⁴ See *supra* Part IV-A(3).

²⁴⁵ See *supra* Part IV-A(2); See also DEP’T OF BUSINESS AND ECONOMIC DEVELOPMENT, LABOR, LICENSING AND REGULATION, AND PUBLIC SAFETY AND CORRECTIONAL SERVICES, EX-OFFENDER BUSINESS DEVELOPMENT PROGRAM STUDY REPORT 14 (Oct. 1, 2014) (acknowledging the value of mentorship to returning citizen entrepreneurs, but not specifically mentors who are themselves returning citizens).

²⁴⁶ See *infra* text accompanying notes 247–65.

²⁴⁷ Cadora et al., *supra* note 94, at 285.

²⁴⁸ See *supra* Part II-C(3).

²⁴⁹ Peter B. Edelman, GEORGETOWN LAW <https://www.law.georgetown.edu/faculty/peter-b-edelman/> (last visited Sept. 18, 2019).

²⁵⁰ See *infra* text accompanying note 247.

²⁵¹ Peter Edelman, *Our History with Concentrated Poverty*, INVESTING IN WHAT WORKS FOR AM. CMTYS. <http://www.whatworksforamerica.org/ideas/our-history-with-concentrated-poverty/#.XbJUqraZN0s> (last visited Oct. 24, 2019). Edelman points out that simply creating jobs has historically failed as a standalone approach to neighborhood revitalization, so it is important that SBD programs not be seen as “fix-all” for disadvantaged communities. *Id.*

²⁵² See *supra* Part IV-A(1).

access to healthy food in Baltimore, Maryland.²⁵³ Food deserts or “Healthy Food Priority Areas,”²⁵⁴ areas where no healthy food options are available, plague many low-income communities.²⁵⁵ A 2015 study found a quarter of Baltimore’s residents, or 158,271 people, lived in a food desert, 30% of Baltimore’s school-aged children lived in food deserts, and 35% of black Baltimoreans lived in food deserts.²⁵⁶ The percentage of black residents living in food deserts was “disproportionately higher than all other racial and ethnic groups.”²⁵⁷ Only 8% of white residents lived in food deserts.²⁵⁸ A 2018 follow up study determined that while there had been some progress made, including about 5,000 fewer residents living in Healthy Food Priority Areas due to the opening of a new supermarket, children were the most likely of any age group to live in a Priority Area (28.3%) and black residents were still the most likely racial or ethnic group to live in a Priority Area (31.5%).²⁵⁹

A hypothetical SBD program, structured in the way this comment proposes,²⁶⁰ would identify returning citizens interested in developing a grocery business and assist them through the process of realizing this project.²⁶¹ The hypothetical SBD program would help the returning citizens develop the necessary business plans, ensure the returning citizens had access to the training needed, and provide the financial assistance needed to get the business started.²⁶² Once the business was up and running under the direction of returning citizens who

²⁵³ See *infra* text accompanying notes 254–65.

²⁵⁴ During conversations with Baltimore community groups, residents, and national leaders it was determined “food desert” has negative connotations, and in its place some now use “Healthy Food Priority Area.” Caitlin Misiaszek, et al., *Baltimore City’s Food Environment: 2018 Report*, JOHN HOPKINS CTR. FOR A LIVABLE FUTURE 11 (Jan. 2018), <https://clf.jhsph.edu/sites/default/files/2019-01/baltimore-city-food-environment-2018-report.pdf>. “Food desert” had been used in the earlier 2015 Baltimore City study, before being replaced in the 2018 follow up study. *Id.*

²⁵⁵ Michele Ver Ploeg, *Access to Affordable, Nutritious Food is Limited in “Food Deserts,”* U.S. DEP’T OF AGRIC. (Mar. 1, 2010), <https://www.ers.usda.gov/amber-waves/2010/march/access-to-affordable-nutritious-food-is-limited-in-food-deserts/>.

²⁵⁶ Amanda Behrens Buczynski et al., *Mapping Baltimore City’s Food Environment: 2015 Report*, JOHN HOPKINS CTR. FOR A LIVABLE FUTURE 23 (June 2015), <https://clf.jhsph.edu/sites/default/files/2019-02/Baltimore-Food-Environment-Report-2015-1.pdf>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Misiaszek et al., *supra* note 254, at 17.

²⁶⁰ See *supra* Part IV-A.

²⁶¹ See *supra* Part IV-A(1).

²⁶² Four factors contributing to an area being designated a Healthy Food Priority Area are 1) supply of healthy food, 2) household income, 3) vehicle availability, 4) distance to supermarket. Misiaszek et al., *supra* note 254, at 12–13. SBD program’s financial support will likely be particularly important for a business, like the one in this example, located in a low-income

had come through the SBD program, the SBD program would identify returning citizens working with the SBD program who may be interested in working for the established business.²⁶³ The hypothetical SBD program would then place those returning citizens with the created business, in accordance with the requirements set out above.²⁶⁴ If both the hypothetical SBD program and grocery store were successful then, theoretically, this would provide jobs for the employees²⁶⁵ and a source of healthy food for the community.

C. POSSIBLE DRAWBACKS

SBD programs would not be without potential drawbacks, such as cost and perpetuation of stigma.²⁶⁶ Funding the small businesses and supplementing employer salaries will not be inexpensive and may require tens or hundreds of thousands of dollars per business in the early stages.²⁶⁷ High price tags could make SBD programs a hard sell.²⁶⁸ The cycle of recidivism, however, alone has tremendous cost for the taxpayers, costing millions of dollars per year.²⁶⁹ “Recidivism-reducing programs” can, however, reduce recidivism and the amounts of money the state must spend on incarceration.²⁷⁰ Further study and experimentation is needed to see whether SBD programs could be such successful “recidivism-reducing programs” that help reduce incarceration spending. If successful, it is hoped such programs, despite their costs, would help

neighborhood. See Maurice Kulger, et al., *Entrepreneurship in Low-Income Areas*, OFF. OF ADVOCACY U.S. SMALL BUS. ADMINISTRATION, 6 (September 2017) (stating “[b]y the same token, low-income urban neighborhoods face a similar continuing cycle of poverty and social problems due to the lack of profitable businesses and jobs. Issues around higher crime rates, poor infrastructure, poor employee skills, and barriers to accessing debt and equity capital create major obstacles to the growth of businesses.”) (citing William Gartner and Subodh Bhat, *Environmental and Ownership Characteristics of Small Businesses and their Impact on Development*, 38 J. OF SMALL BUS. MGMT. 14 (2000)).

²⁶³ See *supra* Part IV-A(1).

²⁶⁴ See *supra* Part IV-A(1).

²⁶⁵ See *supra* Part IV-A(1).

²⁶⁶ See *infra* text accompanying notes 267–71.

²⁶⁷ See *supra* Part IV-A(3).

²⁶⁸ Washington, D.C.’s unrealized Incarceration to Incorporation Entrepreneurship Program called for a \$10 million non-lapsing fund to be used to implement, operate, and administer the program. Smith, *supra* note 195; see also 63 D.C. Reg. 10771 (Aug. 18, 2016) (repealed 2019).

²⁶⁹ See *supra* Part II-C(4).

²⁷⁰ See generally *Returns on Investments in Recidivism-reducing Programs*, THE COUNCIL OF ECONOMIC ADVISERS (May 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/05/Returns-on-Investments-in-Recidivism-Reducing-Programs.pdf> (last visited March 8, 2020).

reduce the need for incarceration spending, in addition to providing jobs and bringing businesses to underinvested-in-communities.²⁷¹

Another foreseeable drawback of the hypothesized SBD programs is that they may do little to mitigate the stigma and employer distrust returning citizens face. Incarceration carries a social stigma for the incarcerated²⁷² as returning citizens are relegated to a kind of underclass.²⁷³ Meanwhile, employers may fear hiring returning citizens because they believe they have a greater risk of workplace misconduct, are an unstable workforce, simply perform poorly, or expose the employer to negligent hiring lawsuits.²⁷⁴ By design, SBD programs seek to direct returning citizens away from having to apply to employers who would discriminate against returning citizens because of those stigmas and fears.²⁷⁵ The SBD programs this comment proposes do this because they want to offer returning citizens a route to employment that does not involve relying on their records remaining hidden or suing employers.²⁷⁶ If, however, SBD programs are directing returning citizens away from such employers then it is conceivable that the opportunities for returning citizens to work for employers and disprove employer assumptions about the dangers of hiring them will be reduced.²⁷⁷ Therefore, it is important to conceive of SBD programs not as the returning citizen unemployment silver bullet, but as one potential tool, among many,²⁷⁸ which could be used to mitigate the harms of returning citizen unemployment.

V. CONCLUSION

This comment seeks to offer an alternative employment route to returning citizens that does not require them to face down employment discrimination or launch lawsuits.²⁷⁹ There are other options returning citizens can use to mitigate the impacts of collateral consequences and

²⁷¹ See *supra* Part IV-B.

²⁷² Lyles-Chockley, *supra* note 200, at 291.

²⁷³ See *Nonviolent Drug Convictions: Stakeholders' Views on Potential Actions to Address Collateral Consequences*. U.S. GOV'T ACCOUNTABILITY OFF. 8 (Sept. 2017), <https://www.gao.gov/assets/690/687003.pdf>.

²⁷⁴ See Dylan Minor, et al., *Criminal Background and Job Performance*, 7 IZA J. OF LAB. POL'Y 1, 5 (2017). Although research into whether those fears are grounded is limited, the Minor study concludes that many concerns are not, but that some are. *Id.* at 18.

²⁷⁵ See *supra* text accompanying note 180; See also text accompanying note 271.

²⁷⁶ See *supra* Part III.

²⁷⁷ Admittedly, such a result cannot be quantified when there has been a dearth of study on programs similar to the SBD programs proposed here.

²⁷⁸ See *supra* Part III.

²⁷⁹ See *supra* Part IV.

employment discrimination, but they all possess limitations.²⁸⁰ This comment has shown the damage that results from denying returning citizens access to employment, has considered existing recourses, and has proposed an additional recourse.²⁸¹ SBD programs would benefit returning citizens, their families, their communities, and society by breaking the recidivism cycle and offering returning citizens a direct path to employment.²⁸²

²⁸⁰ *See supra* Parts III–IV.

²⁸¹ *See supra* I–IV.

²⁸² *See supra* Part IV.