

“I’LL SAY I’M HOME, I WON’T SAY I’M FREE”:

Persistent Barriers to Housing, Employment, and Financial Security for Formerly Incarcerated People in Low-Income Communities of Color

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I. INTRODUCTION. 24

II. CONTEXT: TRADITIONAL APPROACHES TO REENTRY. 35

 A. *Controlling Employer Access to Information About Conviction History*. 36

 B. *Rehabilitating People Who Are Convicted*. 42

 C. *Providing Employers Incentives to Hire Formerly Incarcerated People and Focusing on Community Development More Generally*. 45

III. USING CONVICTION HISTORY TO FILTER BORROWER CHARACTERISTICS 46

IV. LENDERS SHOULD BE ACTIVELY INVOLVED IN REENTRY EFFORTS BY AFFIRMATIVELY CREATING OPPORTUNITIES FOR HOMEOWNERSHIP AND SELF-EMPLOYMENT FOR FORMERLY INCARCERATED PEOPLE. 48

V. IMPLICIT AND EXPLICIT BARRIERS TO FINANCIAL SERVICES FOR FORMERLY INCARCERATED PEOPLE UNDER THE DODD FRANK MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT 51

VI. SOLUTIONS. 54

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When the avenues of wealth are opened to us we will become educated and wealthy, and then the roughest-looking [Black] man that you ever saw...will be pleasanter than the harmonies of Orpheus, and Black will be a very pretty color. It will make our jargon, wit—our words, oracles; flattery will take the place of slander, and you will find no prejudice in the Yankee whatsoever.

– John Rock, Abolitionist, pre-Civil War orator, successful Boston Dentist and lawyer, and the first African American attorney to plead before the U.S. Supreme Court

I. INTRODUCTION

On February 12, 2011, Reginald was released from the Louisiana State Penitentiary at Angola (Angola). After 28 years in prison Reginald left Angola with a \$10 check and the clothes on his back. As required by law, Reginald needed to immediately obtain a state identification card, which costs \$15. Ironically, he would need this \$15 identification card to cash his \$10 check. After nearly three decades in prison, Reginald walked out of Angola \$5 behind.

Over the next year, Reginald tried to find himself a job and an apartment to rent. With no credit history or savings account, no rental history, and no means to pay for a security deposit or the first month's rent, he spent the year living on his sister's couch looking for a job so that he could afford a place to live. Although he was being paid less than \$0.33/hour, Reginald worked nearly every day of the 28 years he was in prison. He also earned accreditation in carpentry and landscaping; however, he had no traditionally recognized work history and no ability to access fair and affordable financial services to start his own lawn-mowing operation to bring in income. Even after Reginald was finally able to secure a job and find a landlord that would rent to him, he spent over half his monthly salary on rent while also paying monthly fees to the Office of Probation and Parole. In a last ditch effort to maintain his apartment he took out a high-interest payday loan, which he could ultimately not afford to pay back.

Reginald was eventually evicted for falling behind on his rent and ended up in a homeless shelter. Shortly thereafter, he was arrested for violating the residency requirements of his parole. While back in jail Reginald said to me, "Of all the years I did in prison, since I've been home is the hardest time I've ever done." Reginald was ultimately re-released and he is back on parole. A few months ago I heard someone ask

Reginald what it is like to be free after so long, he replied, “I’ll say I’m home, I won’t say I’m free.”

Reginald’s experience is, unfortunately, not unique. In Louisiana, the state with the largest per capita prison population, nearly half of people released from prison will go back within five years.¹ This cycle of incarceration and its collateral consequences are even more startling when disaggregated on the basis of race. In New Orleans alone, one in seven Black men is in prison, on probation, or on parole.² One in four Black children born in New Orleans in 1990, had a father in prison before they turned fourteen – a factor that contributes significantly to a child’s likelihood of going to jail or prison at some point in her or his future.³ This cycle of incarceration thus impacts not only individuals, but also their families across generations.⁴

Numerous studies have concluded that the most important predictor of recidivism is access to gainful and stable employment.⁵ Unfortunately, research has also found dramatic unemployment rates amongst formerly incarcerated people, in some cases as high as 77 percent after

¹ LA. DEP’T OF PUB. SAFETY & CORR., *Recidivism in Adult Corrections, Percent Return*, in BRIEFING BOOK 51 (Mar. 2015), available at <http://www.doc.la.gov/wp-content/uploads/2009/10/Complete-Briefing-Book-July-2013.pdf>.

² Cindy Chang, *Louisiana Is the World’s Prison Capital*, TIMES-PICAYUNE, May 13, 2012, http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html.

³ Katy Reckdahl, *Mass Incarceration’s Collateral Damage: The Children Left Behind*, NATION, Dec. 16, 2014, <http://www.thenation.com/article/mass-incarcerations-collateral-damage-children-left-behind/>.

⁴ Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139:3 *Daedalus* 8 (Summer 2010).

⁵ NANCY LA VIGNE ET AL., URBAN INSTITUTE, *RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS, AND COMMUNITY GROUPS* 15 (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411767-Release-Planning-for-Successful-Reentry.PDF>; JEFFREY D. MORENOFF & DAVID J. HARDING, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, *FINAL TECHNICAL REPORT: NEIGHBORHOODS, RECIDIVISM, AND EMPLOYMENT AMONG RETURNING PRISONERS* 2 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/236436.pdf>; John M. Nally et al., *The Post-Release Employment and Recidivism Among Different Types of Offenders With A Different Level of Education: A 5-Year Follow-Up Study in Indiana*, 9 *JUST. POL’Y* J. 1, 6–7 (2012), available at http://www.cjcrj.org/uploads/cjcrj/documents/the_post-release.pdf; Cedric Richmond, *Louisiana Gives Former Inmates Little Chance To Start Over*, TIMES-PICAYUNE, Feb. 26, 2016, http://www.nola.com/politics/index.ssf/2016/02/louisiana_prison_reform.html (“Evidence suggests that we have moved past the point where increases in incarceration provide any additional public safety benefits. In fact, further prison growth will actually make us less safe. As we do the difficult work of undoing the unintended harm of the mass incarceration, we must fully examine the impacts felt by individuals, families and communities. Removing barriers to employment and allowing formerly incarcerated people to fully reenter society as productive citizens must remain a top priority.”).

the first year of release.⁶ Moreover, of those few able to find employment, like Reginald, 90 percent are earning incomes below the poverty line.⁷ In Louisiana alone there exist 389 restrictions on employment for people with felony records – over twice the national average.⁸

In addition to employment, there are also strong correlations between homelessness and incarceration: 1) homelessness increases your risk of incarceration, and 2) release from jail or prison increases your risk of homelessness.⁹ Research demonstrates a clear nexus between homelessness and contact with the criminal justice system.¹⁰ Further, it is a foregone conclusion that housing and employment are two of the most determinative factors affecting someone's likelihood of success after release from incarceration.¹¹ It is also clear, however, that on their own, these factors do not explain someone's likelihood of returning to prison after release.¹² Moreover, simply staying out of prison does not mean someone has been able to find and maintain financial security.

It is only when considered together that we can more fully understand how housing, employment, and financial security contribute directly to recidivism. Put simply, the inability of formerly incarcerated people to secure jobs stands directly in the way of their ability to secure

⁶ MORENOFF & HARDING, *supra* note 6, at 9.

⁷ *Id.*

⁸ Richard A. Webster, *Louisiana's Felons Face the Most Employment Obstacles in U.S.*, TIMES-PICAYUNE, Feb. 23, 2016, http://www.nola.com/politics/index.ssf/2016/02/louisiana_ex-felons_face_most.html.

⁹ See Stephen Metraux et al., *Incarceration and Homelessness*, in TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT 9-1, 9-6, 9-5 (2008), available at https://www.huduser.gov/portal/publications/pdf/homeless_symp_07.pdf (According to statistics compiled by the Bureau of Justice Statistics, 12 percent of prisoners expecting to be released “reported being homeless at the time of their arrest.” Additionally, another Bureau of Justice Statistics study “found that in 1998, 9 percent of state prison inmates reported living on the street or in a shelter in the 12 months prior to arrest. A California study . . . reported that in 1997, 10 percent of the state’s parolees were homeless.” This study also found that being in an urban environment compounds this risk, with 30–50 percent of all parolees—in cities such as San Francisco and Los Angeles—being homeless.)

¹⁰ *Id.* at 9-6, 9-7. (This correlation is further strengthened when considerations of age and mental illness are brought into the assessment. Studies have found the mental illness substantially increases someone's likelihood of ending up homeless, and additionally that as someone gets older they are more likely to end up homeless after release from prison.)

¹¹ NATHAN JAMES, CONG. RESEARCH SERV., OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 14-15 (2015), available at <http://fas.org/sgp/crs/misc/RL34287.pdf>.

¹² *Id.*

housing, their inability to secure housing directly impacts their ability to maintain a job, and their inability to get a job stands directly in the way of their ability to access financial services.¹³ Because of the increased risk of incarceration that stems from homelessness, the increased risk of incarceration that comes from joblessness, and the cyclical relationship between homelessness and joblessness, one’s likelihood of reoffending is positioned squarely at the intersection of access to housing, employment, and financial services.

Fortunately, the impact of housing and jobs on recidivism, and the dramatic racial disparity in mass incarceration have not gone completely unrecognized by the federal government. In 2012 the Equal Employment Opportunity Commission (EEOC) issued a report entitled, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.”¹⁴ The EEOC released this report on how to limit the use of conviction and arrest history in light of the extreme racial disparity in incarceration. The EEOC designed the report for multiple audiences including employers, employment agencies, labor unions covered by Title VII, job applicants, current employees, and EEOC enforcement staff.¹⁵

In 2011, former U.S. Department of Housing and Urban Development Secretary Shaun Donovan issued a letter to public housing authorities (PHAs) outlining the importance of providing “second chances” for formerly incarcerated individuals through access to public housing.¹⁶ PHAs are public agencies that administer access to

¹³ CATERINA GOUVIS ROMAN ET AL., URBAN INSTITUTE, *THE HOUSING LANDSCAPE FOR RETURNING PRISONERS IN THE DISTRICT OF COLUMBIA 10–11*, (2006), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411433-The-Housing-Landscape-for-Returning-Prisoners-in-the-District.PDF>.

¹⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964* (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (Under EEOC guidelines, as guided by the 2007 holding in *El v. Southeastern Pennsylvania Transportation Authority* from the Third Circuit Court of Appeals, unless an employer is able to demonstrate that someone’s conviction would compromise their ability to perform the minimum requirements for the job (i.e., “business necessity”) they are not permitted to exclude someone on the basis of their criminal history. Although this limits broad exclusions of people with conviction histories, employers still have significant latitude in defining what constitutes a “business necessity.”).

¹⁵ *What You Should Know About the EEOC and Arrest and Conviction Records*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm (last visited Apr. 19, 2016).

¹⁶ Letter from Shaun Donovan, Sec’y, U.S. Dep’t of Hous. & Urban Dev., to Pub. Hous.

government-subsidized housing for city and state governments. PHAs regulate access to Section 8 vouchers, a subsidy program that can be used in the private rental market, while also building and maintaining rental properties owned by the government itself. In 2016, current U.S. Department of Housing and Urban Development Secretary Julián Castro cautioned private landlords against blanket bans against people with felony convictions emphasizing the disparate impact on African Americans and Latinos.¹⁷

At the federal level, where the majority of housing subsidy dollars come from, there exist four explicit bars to housing access for people with prior convictions. These bars preclude from public housing individuals (1) who have manufactured methamphetamines on public housing property;¹⁸ (2) on the sex offender registry;¹⁹ (3) currently using illegal drugs;²⁰ and (4) whose behavior under the influence of alcohol or illegal drugs may threaten a building premise's health, safety, or peace.²¹ States, however, have full authority to discriminate on their own terms, so long as they do not discriminate against people in a federally protected class,

Auth. Exec. Directors (June 17, 2011), *available at* http://usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf.

¹⁷ U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 5 (2016), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf.

¹⁸ Denial of Admission for Criminal Activity or Drug Abuse by Household Members, 24 C.F.R. § 960.204(a)(3) (2016) (“The [Public Housing Authority (PHA)] must establish standards that permanently prohibit admission to the PHA’s public housing program if any household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.”).

¹⁹ *Id.* § 960.204(a)(4) (“The PHA must establish standards that prohibit admission to the PHA’s public housing program if any member of the household is subject to a lifetime registration requirement under a State sex offender registration program. In the screening of applicants, the PHA must perform necessary criminal history background checks in the State where the housing is located and in other States where household members are known to have resided.”).

²⁰ *Id.* § 960.204(a)(2)(1) (“The PHA must establish standards that prohibit admission to the PHA’s public housing program if the PHA determines that any household member is currently engaging in illegal use of a drug (For purposes of this section, a household member is “currently engaged in” the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current).”).

²¹ *Id.* § 960.204(a)(2)(ii), (b) (“The PHA must establish standards that prohibit admission to the PHA’s public housing program if the PHA determines that it has reasonable cause to believe that a household member’s illegal use or pattern of illegal use of a drug” or “abuse or pattern of abuse of alcohol” serves to “threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.”).

and give applicants an opportunity to dispute the accuracy of a criminal background check.²² Despite the fact that state housing authorities are only required to deny housing in limited circumstances, we have seen “crime-free ordinances” take off across the country, requiring landlords to conduct criminal background checks, and sometimes exclude people with prior convictions from the rental market entirely.²³

In response to this federal guidance on second chances for formerly incarcerated individuals, cities have begun to address the disparate impact of the criminal justice system on communities of color by passing laws that limit the use of conviction history in hiring decisions for public sector employment and rental applications for government subsidized housing.²⁴

Unfortunately, despite the fact that formerly incarcerated people can still be legally discriminated against in the rental market and job market on the basis of their conviction history, there is little discussion about the impact that conviction history has on one’s ability to access fair and affordable financial services to start a business or purchase a home.²⁵

²² *Id.* § 960.204(c) (“Before a PHA denies admission to the PHAs public housing program on the basis of a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the applicant with a copy of the criminal record and an opportunity to dispute the accuracy and relevance of that record.”).

²³ EMILY WERTH, SHRIVER CTR., THE COST OF BEING “CRIME FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 12–13 (2013), available at <http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf>.

²⁴ NAT’L EMP’T LAW PROJECT, NELP CRIMINAL RECORDS BULLETIN NOVEMBER 2014 (2014), <http://www.nelp.org/content/uploads/2015/03/NELP-Criminal-Records-Bulletin-2014.pdf> (St. Petersburg, Florida; Montgomery County, Maryland; Roanoke, Virginia; Lancaster, Pennsylvania; and St. Louis, Missouri recently removed conviction inquiries from applications for city and county employment.); Richard A. Webster, *HANO Hires VERA To Implement New Criminal Background Check Policy*, TIMES-PICAYUNE, Apr. 17, 2013, http://www.nola.com/politics/index.ssf/2013/04/hano_hires_vera_to_implement_n.html (“The Housing Authority of New Orleans announced at its board meeting on Tuesday [April 16, 2013] that it [had] hired the Vera Institute of Justice to help implement its new criminal background check policy for housing and employment. . . Under the new policy, the housing agency will only consider banning public housing residents from employment if their convictions are for conduct directly related to the particular position sought or indicates a potential danger to fellow employees or residents. Each conviction will be assessed based on its nature and gravity, and the amount of time that has elapsed since the conviction, among other factors.”).

²⁵ The Small Business Administration (SBA) and the Federal Housing Authority (FHA) insure loans for applicants with less-than-ideal credit histories. Both agencies also insure loans made for community development. Form 912 requests information including the applicant’s criminal history: whether the applicant is currently or has ever been “under indictment, on

With limited means to make a living, formerly incarcerated people have limited means to rent housing even when they can find a housing provider that will rent to them. Unable to get hired and unable to start their own businesses, formerly incarcerated people are effectively forced into unemployment or underemployment, homelessness or unstable housing, with few resources to find financial security.

In “New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex Offenders,” Taja-Nia Y. Henderson provides the first and only extensive analysis of the collateral consequences of conviction on one’s access to financial services.²⁶ Given the relationship between homeownership, business development, and wealth, Henderson writes, “[consideration of conviction history] is particularly prevalent (and troubling) in the context of mortgages and business loans.”²⁷ Henderson posits that because credit functions as a proxy for full citizenship, “a lender’s single decision to extend or deny credit to an individual thereby affects the terms on which that person engages with the world around her.”²⁸ Henderson goes on to outline how housing and employment access, in particular, are directly impacted by access to financial services. Barriers to these resources push people into substandard rental housing, low-wage jobs, and predatory lending, which entrap formerly incarcerated individuals in a cycle of poverty and financial vulnerability.²⁹

Through the lens of Cheryl Harris’ seminal article, “Whiteness as Property,” I extend Henderson’s research on barriers to financial services to analyze how the disproportionate impact of the criminal justice system impacts Black and Brown communities. In 1993, “Whiteness as Property” transformed the way we conceptualize the relationship between race and property. In the last twenty years this article has been applied to diverse contexts including: immigration, real property, the financial system, the entertainment industry, education, and most importantly

parole or probation” and whether the applicant has ever been arrested for a charge other than a moving violation and, if so, an inquiry into the nature of the crime for which the applicant was arrested. An arrest or a conviction will not automatically disqualify you. SMALL BUS. ADMIN., FORM 912: STATEMENT OF PERSONAL HISTORY (2013), https://www.sba.gov/sites/default/files/tools_sbf_finasst912.pdf.

²⁶ Taja-Nia Y. Henderson, Note, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237 (2005).

²⁷ *Id.* at 1244.

²⁸ *Id.* at 1246–47.

²⁹ *Id.* at 1250–53.

for the purposes of this comment, the criminal justice system and community economic development.³⁰

As Harris discusses, “the origins of property rights in the United States are rooted in racial domination.”³¹ In order to regulate property, the United States government created an exclusive system through which property and its resulting wealth could be accessed.³² Although formal (legal) equality has been largely achieved and it has become illegal to discriminate specifically on the basis of someone’s race in access to property, the customs that originally designed these systems continue to be replicated implicitly through facially race-neutral laws and policies. In particular, I argue that using conviction history to assess creditworthiness is a facially race-neutral practice preventing low-income communities of color from developing wealth.

Today, due to the disproportionate impact of the criminal justice system on low-income communities of color, using conviction history to determine risk in lending decisions excludes millions of people of color with felony records from financial services, and therefore from homeownership and from starting their own business.³³ Given the fact that

³⁰ See e.g., Deidre Keller & Anjali Sunay Vats, *Whiteness as (Intellectual) Property: Authorship and Transformativeness as Possession*, Paper Presentation at UCLA Law Critical Race Studies Conference, Oct. 3, 2014. (Sunay Vats and Keller examine copyright’s central trope for evaluating the existence of fair use, namely that of transformativeness, as the concept is used to protect economic, social, and political benefits associated with whiteness); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L. J. 817 (2000) (Tehranian explores the impact of the black/white paradigm of race theory and the resulting impact on determining whether someone is a naturalized citizen of a different race); Aleatra P. Williams, *Lending Discrimination, The Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601 (2015) (Williams explores the 2008 foreclosure crisis through the lens of race analyzing the deep impact the crisis had on wealth in communities of color); Isy India Geronimo Thusi, *Whiteness as Property and the Criminalization of Minority Schoolchildren*, Paper Presentation at UCLA Law Critical Race Studies Conference, Oct. 4, 2014 (Thusi explores the over-criminalization of students of colors to highlight the power “nonracial policies” have on maintaining white superiority and maintaining the property interests whites have in their whiteness).

³¹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993).

³² *Id.*

³³ Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case For Reforming Criminal Background Checks For Employment*, NAT’L EMP’T LAW PROJECT, MAR. 23, 2011, http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf (According to data compiled by the Bureau of Labor and Statistics and US Census Bureau, and analyzed by The National Employment Law Project, as many as 65 million Americans have criminal records).

formerly incarcerated people already face legal discrimination in the rental market and workforce, this exclusion further entrenches barriers to stable housing, employment, and financial security. Moreover, in communities that are home to large numbers of people with conviction histories, banks effectively “redline” low-income communities of color by considering conviction history in lending decisions.³⁴ Redlining refers to a practice used by the Federal Housing Administration (FHA) whereby mortgage insurance was denied on the basis of racial and ethnic composition of the neighborhood, without consideration of creditworthiness of individual applicants.³⁵ The FHA would do this by literally outlining in red majority African American neighborhoods on “residential security maps” used to guide underwriting decisions.³⁶ Redlining prevents communities from developing a strong economic base, and from developing wealth. As a result, low-income communities are kept in a cycle of poverty and incarceration.

In this comment, I argue that using someone’s conviction history to assess borrower characteristics and make lending decisions subordinates formerly incarcerated people as “others,” a category of people not worthy of financial services for no reason other than their conviction history. Harris explores the concept of “othering” as one of the key components of whiteness as property, “the ability to exclude *others* from the privileges inherent in whiteness.”³⁷ The courts and lawmakers have played and continue to play an active and crucial role in maintaining this dynamic, “determining who was or was not white enough to enjoy the privileges accompanying whiteness.”³⁸ This “othering” excludes formerly incarcerated people from pathways to financial services, homeownership, starting their own business, and in turn, from developing financial security and wealth.³⁹ As a result, formerly incarcerated people, their families, and their communities are kept in a cycle of poverty and incarceration.

³⁴ Henderson, *supra* note 25, at 1237.

³⁵ See 1934–1968: *FHA Mortgage Insurance Requirements Utilize Redlining*, FAIR HOUSING CTR. (last visited Apr. 17, 2016).

³⁶ Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, ATLANTIC.COM (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.

³⁷ Harris, *supra* note 30, at 1758 (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

In this paper, I utilize Henderson's research on barriers to financial services for formerly incarcerated people and Harris's theories on race and access to property to reconsider traditional approaches to prisoner reentry into civilian life. I first identify the limitations of expungement and "ban the box" strategies, which seek to curtail use of conviction history as a means to evaluate rental housing and job applications. I then argue that policy efforts should target helping formerly incarcerated people find autonomy and self-sufficiency by affirmatively creating access to financial services and opportunities to become business and homeowners. By creating pathways for formerly incarcerated people to become business and homeowners, I argue that we will not only stop the cycle of incarceration and greatly improve outcomes for formerly incarcerated people, but will also contribute directly to economic development and the cultivation of wealth in low-income communities of color.⁴⁰

Even if landlords did not consider conviction history, without access to financial resources, people coming home from prison remain unable to access housing until they have found employment and saved to cover a security deposit and a first month's rent. Without access to housing or employment, formerly incarcerated people are considerably more likely to return to prison.⁴¹ However, simply finding a low wage job in order to afford a place to rent will not on its own keep someone out of prison. Moreover, I argue, that defining success after prison as simply finding a low wage job in order to afford a place to rent unfairly and unwisely limits the potential of formerly incarcerated people, and maintains a cycle of poverty in the communities to which they return.

Many low-income communities have few opportunities to access higher education, even when financial aid is available.⁴² Prisons can thus

⁴⁰ Since the financial crisis of 2008 crisis critiques of homeownership as a means of accumulating wealth have intensified, with greater attention to the financial risks of carrying a mortgage. However, while these risks are significant, the ability to accumulate wealth is enhanced by becoming a homeowner as opposed to a renter. Although the financial returns of homeownership may be lesser today than in years previous, it is generally accepted that people who own homes can be left generally no worse off (but can sometimes see significant gains), while renters accumulate no equity in their home and are left with no return on their expenses. CHRISTOPHER E. HERBERT ET AL., JOINT CTR. FOR HOUS. STUDIES AT HARV. UNIV., IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS? (WAS IT EVER?) (2013), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/hbtl-06.pdf>.

⁴¹ LA VIGNE ET AL., *supra* note 6; MORENOFF & HARDING, *supra* note 6; Nally et al., *supra* note 6.

⁴² KATHERINE SAUNDERS, CENTER FOR POSTSECONDARY AND ECONOMIC SUCCESS, BARRIERS

sometimes serve as one of the few sources of education and post-secondary skill-based learning.⁴³ Access to financial services would enable formerly incarcerated people to bypass discrimination in rental housing and employment by leveraging the skills they gain in prison to create opportunities for self-employment and homeownership.⁴⁴

Therefore, instead of viewing a formerly incarcerated person as a liability and a felony record as something to be hidden, I argue that formerly incarcerated people can be assets to their communities.

The lending industry has no empirical basis to justify discriminating against someone based on conviction history because it has not actually measured the impact of a criminal conviction on creditworthiness.⁴⁵ This lack of empirical support makes consideration of conviction history in lending decisions particularly indefensible.⁴⁶ Moreover, given the magnitude of the consequences of not having access to financial services for historically low-income communities for color,⁴⁷ and given the potential formerly incarcerated people have to succeed when they have access to educational programming while in prison,⁴⁸ financial services should be

TO SUCCESS: UNMET FINANCIAL NEED FOR LOW-INCOME STUDENTS OF COLOR IN COMMUNITY COLLEGE I (2015), <http://www.clasp.org/resources-and-publications/publication-1/Barriers-to-Success-Unmet-Financial-Need-for-Low-Income-Students-of-Color.pdf>

⁴³ Fox Butterfield, Editorial, *Are Prisons our Social Safety Net?*, GAINESVILLE SUN, Aug. 2, 1992, available at <https://news.google.com/newspapers?nid=1320&dat=19920802&id=v3U-zAAAABAJ&sjid=Y-oDAAAABAJ&pg=2858,605158&hl=en>.

⁴⁴ CHRISTY VISHER ET AL., URBAN INSTITUTE, *EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES* (2008), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releases-in-Three-States.PDF>.

⁴⁵ Henderson, *supra* note 25, at 1260 (Henderson writes that, “Notably, neither the SBA nor the private banking industry has attempted to measure the relationship between criminal exposure and creditworthiness. Given the unavailability of empirical data measuring the relationship between criminal exposure and creditworthiness, it would appear that defendant lenders have few defenses to claims that any criteria prioritizing such exposure within the eligibility determination is prohibited by [Equal Credit Opportunity Act].”).

⁴⁶ *Id.*

⁴⁷ Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 275 (2008) (Lyles-Chockley writes that “The restrictions placed on credit yield further stigmatizing effects for the ex-offender. The availability of, and access to, financial services is central to modern citizenship. Credit opens economic and social opportunities and enables credit-holders to be fully participating consumers. As Robert Suggs explains, ‘exclusion or disadvantage in a significant economic sphere must create major distortions in political participation, popular culture, self-employment, personal income, and especially aggregate wealth.’”).

⁴⁸ LOIS M. DAVIS ET AL., RAND CORPORATION, *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED*

considered a crucial and necessary resource during the reentry process. With access to financial services, efforts to facilitate reentry and reduce recidivism should include strategies to help formerly incarcerated people leverage the skills and education they gained in prison to become homeowners and to start their own business.

The rest of this paper proceeds as follows. Part I sets the context for traditional approaches to reentry, focusing particularly on the limitations of efforts to “ban the box” and expunge criminal records. In Part II, given the correlations between incarceration and race, and between incarceration and access to housing and jobs, I explore why banks should not use conviction history to filter borrower characteristics. Part III makes a case for why lending institutions should instead be affirmatively supporting opportunities for homeownership and self-employment for formerly incarcerated people. Part IV identifies implicit and explicit barriers to the enjoyment of homeownership opportunities for formerly incarcerated people through an analysis of the Dodd Frank Act⁴⁹ and its subsequent amendments. Finally, in Part V, I address possible approaches to improve access to financial services, homeownership, and self-employment for formerly incarcerated people.

II. CONTEXT: TRADITIONAL APPROACHES TO REENTRY

Efforts to reduce recidivism have largely focused on removing the tens of thousands of legal restrictions and biases against people with conviction histories, particularly in employment.⁵⁰ Broadly there are four ways that policymakers currently focus efforts to improve access to employment during reentry. The first and most commonly used approach is to control employer access to information about prior convictions, such as by banning the box on job applications that ask applicants to

ADULTS, RAND CORPORATION (2013), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf (The authors’ findings support the premise that receiving correctional education while incarcerated reduces an individual’s risk of recidivating. They also found that those receiving correctional education had improved odds of obtaining employment after release).

⁴⁹ Dodd-Frank Wall Street Reform And Consumer Protection Act, 12 U.S.C. § 5301 (2010).

⁵⁰ Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, ABA JOURNAL (June 1, 2013, 10:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions (“[S]ince the mid-1980s, the number of official collateral consequences has expanded dramatically. Some estimates speculate that today’s ex-offenders could face up to 50,000 legally mandated collateral consequences, including restrictions on housing, employment, public benefits and immigration.”).

indicate whether they have ever been arrested or convicted of a crime.⁵¹ The second approach is to provide rehabilitation opportunities to people throughout the criminal justice process, such as pre-conviction, on probation, while in prison, or post-release.⁵² Third, policymakers provide employers with incentives to hire people with a conviction history.⁵³ The fourth, and I argue most effective approach, is to focus on community economic development in communities with high incarceration rates and create opportunities for formerly incarcerated people to find employment and housing through self-employment and homeownership. Throughout this comment I conceptualize community economic development to be the development of housing, jobs, and business opportunities with and for people living in historically low-income communities.⁵⁴

A. Controlling Employer Access to Information About Conviction History

As has already been discussed, efforts to facilitate reentry and stop the cycle of incarceration have focused largely on legal and explicit discrimination against people with prior convictions. As a result, in recent years we have seen a surge in efforts aimed at “banning the box,” which colloquially refers to situations where people have to disclose prior convictions. The “box” can automatically disqualify you from dozens of licensing programs, educational grants and small business development grants, housing rentals, and federally insured mortgages.⁵⁵

⁵¹ Memorandum from Nat'l Emp't Law Project on Implementation of California “Ban the Box” Legislation (AB 218) (July 1, 2014), *available at* <http://www.nelp.org/content/uploads/2015/03/NELP-California-AB-218-Ban-the-Box-Implementation-Survey-Memo.pdf> (With the passage of AB 218, California joined 70 cities and counties and 12 states in enacting the fair-chance hiring policy, known widely as “ban the box.”).

⁵² SARAH LAWRENCE ET AL., URBAN INSTITUTE, *THE PRACTICE AND PROMISE OF PRISON PROGRAMMING* 8 (2002), *available at* <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410493-The-Practice-and-Promise-of-Prison-Programming.PDF>.

⁵³ NAT'L EMP'T LAW PROJECT, *CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS* (2010), <http://nelp.org/content/uploads/2015/03/CitiesPaveTheWay.pdf>.

⁵⁴ *See* WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 378 (Duke Univ. Press ed., 2002).

⁵⁵ The Small Business Administration (SBA) and the Federal Housing Authority (FHA) insure loans for applicants with less-than-ideal credit histories. Both agencies also insure loans made for community development. Form 912 requests information including the applicant's criminal history: whether the applicant is currently or has ever been “under indictment, on parole or probation” and whether the applicant has ever been arrested for a charge other than a moving violation and, if so, an inquiry into the nature of the crime for which the applicant was arrested. An arrest or a conviction will not automatically disqualify you. SMALL BUS.

In constructing a policy to control access to information about prior convictions there are at least four guiding considerations. Under the privacy approach, policymakers must determine whether or not information about someone’s prior convictions should be used at all to judge an applicant.⁵⁶ Under the procedural approach, if applicants are required to disclose prior convictions, a policy can control at which point in the application process this information can be considered.⁵⁷ Under the nexus approach, regardless of when a prior conviction is considered, a policy can require some relationship between an applicant’s record and the position sought.⁵⁸ A final approach that will not be analyzed in this article considers whether to regulate the accuracy of information that credit-reporting agencies furnish to employers, lenders, and other application recipients.⁵⁹

In a case involving a policy of disqualifying any applicant with a conviction for any crime other than a minor traffic offense, the Eighth Circuit in *Green v. Missouri Pacific Railroad* addressed the “privacy approach” and the “nexus approach,” finding that in order to use conviction history an employer cannot use blanket bans.⁶⁰ Instead, the court created three factors employers should consider, which have come to be known as the *Green* Factors. These are: 1) the nature and gravity of the offense or conduct; 2) the time that has passed since the offense or conduct and completion of sentence; and 3) the nature of the job held or sought.⁶¹

The Equal Employment Opportunity Commission (EEOC) embraced the *Green* factors in its guidelines for employers considering arrest and conviction history. The EEOC added an “individual assessment,” where employers evaluate an applicant’s prior conviction in a broader context, considering the offense itself, their efforts to rehabilitate

ADMIN., FORM 912: STATEMENT OF PERSONAL HISTORY (2013), https://www.sba.gov/sites/default/files/tools_sbf_finasst912.pdf.

⁵⁶ Andrew Elmore, *Civil Disabilities in an Era of Diminished Capacity: A Disability Approach of the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991, 1013 (2014).

⁵⁷ *Id.*

⁵⁸ *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1296 (8th Cir. 1975).

⁵⁹ Louis Prieto et al., *Using Consumer Law to Combat Criminal Record Barriers to Employment and Housing Opportunity*, 44 CLEARINGHOUSE REVIEW J. OF POVERTY L. & POL’Y, 471, 473 (because the databases used by private criminal history background check companies are typically based upon nonpositive identification matches such as names and dates of birth, the risk of someone being inaccurately identified is much greater).

⁶⁰ *Green*, 523 F.2d at 1296.

⁶¹ *Id.* at 1298.

themselves, and what if any relationship the crime has to the nature of the employment.⁶²

Additionally, the EEOC offers some guidance relative to the procedural approach of controlling when information is made available, by recommending that employers not ask about convictions on job applications and instead wait until later in the hiring process, specifically, after a conditional offer is made.⁶³ Finding that an employer discriminated based on conviction history is much easier to prove when an employer rescinds an employment offer after receiving information about an applicant's conviction history. Although these reforms are often thought of as a "ban" on the use of conviction history, it may be more accurate to think of it as pushing the box back, because under this approach, conviction history eventually comes out and becomes available for employers to use in making hiring decisions.

The procedural approach, or policy efforts seeking to control when and how conviction history is used look a lot like treating conviction history as a civil disability – these policies provide protections similar to those included in the Americans with Disabilities Act.⁶⁴ This approach involves restricting an employer's access to information about prior convictions until after an employer decides someone is suitable for a job. Under this approach, employers are required to base a denial on an individual's actual inability to perform the job because of the individualized risk the applicant poses due to the nature of his or her conviction history.⁶⁵

⁶² "The facts or circumstances surrounding the offense or conduct; The number of offenses for which the individual was convicted; Older age at the time of conviction, or release from prison; Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct, The length and consistency of employment history before and after the offense or conduct; Rehabilitation efforts, e.g., education/training; Employment or character references and any other information regarding fitness for the particular position; Whether the individual is bonded under a federal, state, or local bonding program." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 18 (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

⁶³ "The Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." *Id.* at 13–14.

⁶⁴ Americans with Disabilities Act, 42 U.S.C. § 12101 (West 2008).

⁶⁵ Elmore, *supra* note 55, at 1013.

However, as evidenced by *Dempsey v. New York City Department of Education* policies that control an employer’s access to information about prior convictions, or control the way in which this information can be used in making employment decisions are often poorly enforced by the courts, giving great deference to employers, and little consideration to someone’s rehabilitative efforts.⁶⁶

Instead of simply limiting access to conviction history, we should remove it as an option altogether. Expungement and record-sealing are two possible ways to completely remove an individual’s conviction history from his or her record. Given the unique burden placed on communities of color by the criminal justice system and incarceration, one’s conviction history should be removed altogether.⁶⁷

However, if our goal is to limit racial discrimination in hiring, it can be argued that limiting employer access to conviction history will only lead to greater racial discrimination.⁶⁸ This discrimination results from employers using race as a proxy for conviction history, fostering racialized assumptions of criminal behavior.⁶⁹ In other words, without information to the contrary, employers may assume an applicant of color has been involved in the criminal justice system. According to Lior Jacob Strahilevitz, you can actually increase the number of black workers in

⁶⁶ In 2006, petitioner (Dempsey) applied for certification as a school bus driver. Under New York Correction Law §752 and §753 a prior conviction cannot be the sole basis of denying employment, unless there is a direct relationship between a prior conviction and the position sought. In connection with his application, Dempsey reported two drug-related felony convictions in 1990, and three misdemeanors, the most recent in 1993. Dempsey acknowledged that he had a heroin addiction that began at age 15 and continued until 1994, when he stopped using drugs and entered a treatment program that he successfully completed in 1995. He maintained that he had been drug free since then. He also maintained that he had been steadily employed (with one exception that was out of his control) over the years, primarily as a private bus driver transporting school aged children. Despite the over 13 years that had elapsed between this application and his prior convictions, his long and stable work history, and his excellent record of rehabilitation, the court on appeal upheld the Department of Education’s refusal to hire Dempsey. See *Dempsey v. N.Y.C. Dep’t of Educ.*, 969 N.Y.S.2d 452, 456 (2013); N.Y. CORRECT. LAW §§ 750–753 (McKinney 2016).

⁶⁷ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 533 (2010).

⁶⁸ Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 367 (2008) (Strahilevitz discusses a study by the Georgetown Public Policy Institute which found that employers who conducted criminal background checks on applicants were more than 50 percent more likely to hire African Americans than employers who did not—24 percent versus 14.8 percent, respectively).

⁶⁹ *Id.*

the workforce by making more information available so that employers⁷⁰ are able to differentiate between those with conviction histories and those without.⁷¹

Nevertheless, even if we remove the box, or expunge an applicant's criminal record, there are other barriers to formerly incarcerated people on applications for jobs and housing. These include gaps in work history, instability in housing, and no credit history. It is very easy, with or without a box on an application, to determine that someone has been incarcerated. Further, conviction history is not a protected class, meaning that discrimination based on conviction history does not grant individuals the right to sue under federal discrimination laws.

In order to illustrate the multifaceted ways in which formerly incarcerated people face collateral consequences beyond just "the box," I will lay out a hypothetical. To keep the reader aware that there are real people at the center of this discussion, I will refer to this person as Floyd.⁷²

Floyd was convicted 5 years ago for possession with intent to distribute marijuana. Thanks to the recent reforms of state sentencing guidelines, Floyd was recently paroled. Before he left prison, he met once with a counselor who gave him a few pamphlets about services in the area. Although thankful to no longer be in prison and thankful to still have family in his life, given that he has been incarcerated for 5 years at a prison 3 hours from his house,⁷³ Floyd has nowhere to stay upon re-

⁷⁰ *Id.*

⁷¹ This line of thinking is problematic because assuming someone has a criminal conviction on the basis of their race and denying them employment on the basis of this assumption could be considered a form of racial discrimination. This line of thinking also assumes that judging someone's capabilities as a worker on the basis of their conviction history is fair when someone actually does have a conviction history without further evidence that a prior conviction is actually dispositive of their ability to succeed as an employee. Ultimately, this theory ignores the idea that this type of discrimination could be a race neutral form of racial discrimination.

⁷² Floyd's story is a combination of experiences from people I have worked with over the years, and represent a common experience of people coming home from prison (and in like circumstances).

⁷³ DEMELZA BAER ET AL., URBAN INSTITUTE, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 13 (2006), http://www.urban.org/UploadedPDF/411289_reentry_portfolio.pdf (In their ongoing study of reentry, the Urban Institute has found that one of the greatest challenges to maintaining contact with incarcerated family members is the distant location of the prison. "Three-quarters of family members identified by respondents in the Illinois *Returning Home* sample reported that it was a challenge to stay in touch with their incarcerated family members because the prison was located too far away. For the two-thirds who did not visit

lease. Floyd’s family and friends either have no room for him or they are receiving a government subsidy for their housing and Floyd’s criminal record bars them from allowing him to sign onto their lease.⁷⁴ Because of Floyd’s prior felony conviction he is also prevented from getting his own Section 8 voucher, or from leasing a public housing unit. However, even if “ban the box” policies were put in place and Floyd’s conviction history were not considered in his application for a Section 8 voucher, or a public housing unit, he would be signing onto a multi-year waiting list because there is already a shortage of affordable housing in his community.⁷⁵

Even if Floyd got a Section 8 voucher, and was lucky enough to find a private landlord who would rent to someone with a prior felony conviction, he still has no income because he has no job, and as a result cannot make a security deposit or demonstrate that he will be able to pay rent. On top of that, he owes \$65 a month to the parole department for his supervision.

So Floyd joins the line in front of the homeless shelter every night in hopes of getting a bed. Floyd finds some job openings and eventually gets an interview after several rejections from employers that explicitly take conviction history into consideration, and deny applicants at the application stage. However, during the interview the employer notices that he has no address to put on the application. Fortunately, that type of instability does not trigger apprehension about Floyd and he actually gets hired. Unfortunately, every day that Floyd reports to work he runs the risk of not having a bed at the shelter because the shelter’s intake hour conflicts with Floyd’s work schedule. Quite often, if he cannot find a place on a friend’s couch, he has to sleep on the street. Coming into work the next day tired, unkempt and with all of his possessions, his co-workers and employer take notice.

their family members in prison, the median estimated travel time to the prison was four hours longer than those who visited, a possible indicator of why they did not visit.”).

⁷⁴ Although there exists only two lifetime bans on eligibility for government subsidized housing (sex offender registration, and production of methamphetamine on public housing property), rules in subsidized housing can be very strict and even minor arrests or criminal convictions can affect your application, your ability to join an existing lease, and your right to stay. See 42 U.S.C. § 13661(c) (1999) (giving Public Housing Authorities (PHAs) the power to deny people based on criminal activity).

⁷⁵ Keat Foong, *Cities Throughout the World Grapple with Affordable Housing Issues*, MULTI-HOUSING NEWS (Oct. 30, 2014), <http://www.multihousingnews.com/news/international/cities-throughout-the-world-grapple-with-affordable-housing-issues/1004109894.html>.

Before his first paycheck of the month he doesn't have money for the bus, and usually shows up late because he has to rely on friends for a ride or has to walk. Even after his first paycheck and the \$65 deduction for parole fees, Floyd does have bus fare, but per usual in low-income communities (where most homeless shelters are) the bus has a very inconsistent schedule. Needless to say, Floyd often shows up late to work. Eventually, he is fired.

Floyd is caught in an impossible situation. On top of the fact that he is already in debt before he even leaves prison, he doesn't have enough money, rental history, or projected income to rent a place to live, and he can't get any of these things because he has no job.

What is particularly ironic about this is that Floyd was the first person in his family to get his GED and vocational degrees in carpentry, horticulture, and landscaping. He was also the first person in his family to consistently hold a job for several years in a row, even though he only got paid \$.33 an hour by the prison. In a strange way, Floyd should have had more opportunities and more chances to succeed than people in his family who have never been incarcerated. Unfortunately, this is not the case for Floyd, or for most people in his situation. Instead, it seems that incarceration has a greater potential to destroy a family. Children with incarcerated parents are more likely to drop out of school, engage in delinquency, and subsequently be incarcerated themselves.⁷⁶ Incarceration is heavily concentrated within communities, as opposed to being evenly spread throughout the population. Thus, the cycle of incarceration not only has the potential to destroy a family, but an entire community.

B. *Rehabilitating People Who Are Convicted*

Arguments by employers against hiring people with a conviction history typically center on the risk these employees can pose.⁷⁷ In addition to concerns about formerly incarcerated workers disrupting the workplace and harming other workers because they may have a propensity for anti-social behavior (e.g. violence or theft), employers are

⁷⁶ SARAH SCHIRMER ET AL., *THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007*, at 1 (2009), http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

⁷⁷ Louis Prieto et al., *supra* note 58, at 473 (“Employers and landlords also fear potential negligence claims based upon the rationale that past criminal records are predictive of future behavior and therefore give notice of potential risk”).

specifically concerned about negligent hiring lawsuits.⁷⁸ Plaintiffs may bring negligent hiring suits against employers, and judges and juries may consider an offending employee’s prior convictions in evaluating an employer’s liability in deciding to hire them.⁷⁹

However, based on research, concerns about the risk of negligent hiring suits are exaggerated.⁸⁰ More importantly, whatever risk or cost does exist is negligible in comparison to the social benefit the community stands to gain, i.e. that it is *de minimis*. The social benefit in this case is that hiring people with a conviction history is an important factor in reducing recidivism rates.⁸¹ Putting aside questions about whether or not this responsibility should fall on employers in the first place, this argument is contingent upon the assumption that people returning home from prison would even meet the requirements for employment.

Even if records are expunged and cannot be used against people for purposes of employment, “fewer than half [of the people in prison] held a full-time job at the time of their arraignment; two-thirds come from households living under half of the official ‘poverty line’; [and] 87 percent have no postsecondary education.”⁸² Reginald, described at the beginning of this article, grew up in poverty and in an economically depressed community like the majority of people in prison. When he came home, he returned to this same economically depressed community, contributing to a cycle of incarceration and poverty. Rehabilitative programming can help stop this cycle.

Rehabilitating people with a conviction history presents several important considerations. First, policymakers must consider when rehabilitative programming will occur. Rehabilitative programming can be used as an alternative to incarceration (such as through a court diversion program), can be provided during incarceration, or can be provided after someone is released from incarceration. Second, in addition to

⁷⁸ *Id.* at 473.

⁷⁹ *Id.*

⁸⁰ *Id.* (“While fear of negligent-hiring lawsuits is a reason that is often cited by employers for their reluctance to hire persons with criminal records, upon closer examination this threat appears to be more myth than reality. According to a National Hire Network study of negligent-hiring claims, only 10 percent of claims filed in 2003 involved the hiring of persons with criminal histories and only 50 percent of those plaintiffs received favorable decisions.”).

⁸¹ LA VIGNE ET AL., *supra* note 6; MORENOFF & HARDING, *supra* note 6; Nally et al., *supra* note 6.

⁸² Loïc Wacquant, *Prisoner Reentry as Myth and Ceremony*, 34 DIALECTICAL ANTHROPOLOGY 605 (2010).

determining when rehabilitation will occur, policymakers must determine what programming is actually effective as well as how to judge programming effectiveness. Finally, policymakers should consider what the goals of rehabilitative programming should be. Programming can be skill-based, designed to mimic a vocational training program, or liberal arts based, focused on developing critical thinking skills, or both. Ultimately, policymakers must determine whether rehabilitative programming should be a mandatory requirement for people involved in the criminal justice system or if it should merely be offered as a voluntary option.

It is largely uncontroversial that rehabilitation should be an objective of the correctional system (at least for some offenses). Even among scholars who are seemingly diametrically opposed in their analysis of the social causes of poverty and mass incarceration, there is considerable consensus that involvement in the criminal justice system can be due to low levels of hard skills (e.g. industry specific skills) and soft skills, (e.g. interview skills, work ethic, conducting yourself in the workplace).⁸³ A lack of hard skills and soft skills impedes someone's ability to find and maintain employment and drives them towards anti-social behavior, and back to prison.⁸⁴ To remedy this, many scholars advocate for rehabilitative programming for people during incarceration and after release.⁸⁵

A study conducted by the Urban Institute found that people involved in prison-based educational, vocational, and work-related programs are more successful, upon release, where success is defined by factors such as committing fewer crimes, securing employment more often and for longer periods of time after release than nonparticipants.⁸⁶ However, this study also found that rehabilitative programming is more effective when individualized, as opposed to being provided indiscriminately

⁸³ See, e.g., Lawrence M. Mead, *Implementing Work Programs for Poor Men*, 40 POL'Y STUD. J. 575 (2012) (Mead discounts the idea that poverty is caused by a lack of economic opportunity, and a history of institutionalized racism and classism, and instead attributes poverty and mass incarceration to a "culture of poverty." This culture does not value work ethic or abiding by the law, and instead conditions individuals to make decisions not to work.); Western & Pettit, *supra* note 5 (Western looks to the dramatic racial inequality in incarceration and the social and economic inequality that is further entrenched in historically low income communities of color across generations.).

⁸⁴ See BRUCE WESTERN, THE HAMILTON PROJECT, FROM PRISON TO WORK: A PROPOSAL FOR A NATIONAL PRISONER REENTRY PROGRAM 27 (2008), http://www.brookings.edu/~media/Events/2008/12/05-prison-to-work/12_prison_to_work_western.PDF; Mead, *supra* note 82, at 578.

⁸⁵ See WESTERN, *supra* note 83; Mead, *supra* note 82.

⁸⁶ See, e.g., LAWRENCE ET AL., *supra* note 51, at 8.

without targeting specific needs.⁸⁷ Moreover, this study found that the issue is not whether programming occurs inside or outside of prison, but how well a correctional system is able to develop a continuum of care.⁸⁸

Although it appears to be without question that prison rehabilitative programming is advantageous, even if there were inexpensive and cost efficient ways to provide effective rehabilitative programming to currently and formerly incarcerated people, these individuals would still face significant post-incarceration barriers to housing and employment. Affordable housing and gainful employment opportunities rarely exist in the communities to which people return, and of what does exist, people with felony convictions are often ineligible. Further, for people of color who may already face discrimination on the basis of their race, this racial discrimination is then compounded by discrimination on the basis of a conviction history.

In Reginald’s experience, he did make significant gains in his education, and in his personal and professional development. He also held a job consistently for over two decades while he was in prison. Tragically, few people in his family and his neighborhood could say that much.

C. Providing Employers Incentives to Hire Formerly Incarcerated People and Focusing on Community Development More Generally.

Policies that aim to incentivize employers to hire people with conviction histories do so by: 1) removing the costs associated with hiring, such as limiting liability or providing insurance; or 2) allowing employers to realize some benefits from hiring people with conviction history through tax credits or subsidies, for example.⁸⁹ Although these policies arguably incentivize employers to hire formerly incarcerated people and thereby increase employment options, they can also be criticized as a form of corporate welfare because these employers are getting paid to hire a perfectly qualified employee. If there is no actual risk associated with someone’s conviction history, then subsidies, insurance, and tax breaks serve as a windfall for employers.

In the end, incentivizing employers is contingent upon industries even existing to hire people in the communities to which people return. When someone returns back to an economically depressed community,

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 10.

⁸⁹ NAT’L EMP’T LAW PROJECT, *supra* note 52.

as the majority of formerly incarcerated people do,⁹⁰ the only jobs available are often in the low-wage sector. Numerous studies have concluded that the most important predictor of recidivism or success upon release is post-release employment.⁹¹ Unfortunately, research has also found dramatic unemployment rates amongst formerly incarcerated people, in some cases as high as 80 percent after the first year of release.⁹² Moreover, of those few who are able to find employment, 90 percent are earning incomes below the poverty line.⁹³

In Reginald's experience, he left prison with no money (in fact, \$5 behind) with predatory lending as his only option for financial support. There were few jobs available and even when he got a job it was low-wage and he still ended up spending over half of his monthly salary on rent. So, in addition to his full time job he got two part time jobs. Unless there is serious attention paid to community economic development, and the development of affordable housing and opportunities for gainful employment in the communities where entanglement in the criminal justice system is concentrated, these communities will be unable to breakout of the "carceral lattice spanning the prison and neighborhoods deeply penetrated and constantly destabilized by the penal state."⁹⁴

For these reasons, reentry must be approached holistically. Reentry must first begin on the inside of prisons with opportunities for education. Then, we must remove barriers to existing affordable housing and available jobs by eliminating policies that consider someone's prior convictions. However, people cannot be excluded from jobs and houses that simply do not exist. Therefore, we must also build new affordable housing and develop businesses in the low-income communities to which formerly incarcerated people return.

III. USING CONVICTION HISTORY TO FILTER BORROWER CHARACTERISTICS

While there are over five million people under some form of correctional supervision on any given day, there are over 600,000 people released annually from state and federal prisons.⁹⁵ Success or failure,

⁹⁰ Wacquant, *supra* note 81; GOUVIS ROMAN ET AL., *supra* note 14, at 39 (populations with conviction histories are typically consolidated within low-income communities of color).

⁹¹ See, e.g., LA VIGNE ET AL., *supra* note 6; MORENOFF & HARDING, *supra* note 6; Nally et al., *supra* note 6.

⁹² See MORENOFF & HARDING, *supra* note 6, at 8.

⁹³ *Id.*

⁹⁴ See Wacquant, *supra* note 81, at 612.

⁹⁵ ALLEN J. BECK, STATE AND FEDERAL PRISONERS RETURNING TO THE COMMUNITY: FINDINGS

traditionally measured by whether or not individuals stay out of or return to prison, is highly correlated with the relative affluence of the neighborhood to which these individuals return.⁹⁶ There is also a strong correlation between the relative affluence of the neighborhood to which someone returns and the likelihood of finding stable employment.⁹⁷ This is not surprising given that most people coming home from prison require a lot of support services and resources, and disadvantaged communities have limited ability to provide these much needed resources.⁹⁸ Access to financial services in low-income communities is limited.⁹⁹ Furthermore, of the few financial services available, many of them are predatory.

One way to improve access to financial services in low-income communities is to reassess how creditors use conviction history to determine creditworthiness. Creditworthiness is a way to describe an “applicant’s willingness and ability to pay a debt”¹⁰⁰ and the “rights and remedies [available to a creditor] with respect to property available for debt payment.”¹⁰¹ Assessment of creditworthiness is largely guided by The Equal Credit Opportunity Act (ECOA), which prohibits discrimination based on race or color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), and the applicant’s receipt of income derived from any public assistance program.¹⁰² Conviction history is not a protected category, yet is often found on applications for financial services. Notably, the lending industry, including government and private entities such as the Small Business Administration, the Department of Housing and Urban Development, and the private banking industry, has not commissioned any study or attempted to measure the relationship between criminal history and creditworthiness, despite its pervasive use.¹⁰³

FROM THE BUREAU OF JUSTICE STATISTICS (2000), *available at* <http://www.bjs.gov/content/pub/pdf/sfprc.pdf> (The Bureau of Justice Statistics estimates that 585,400 prisoners were released in 2000).

⁹⁶ See MORENOFF & HARDING, *supra* note 6, at 12.

⁹⁷ *Id.*

⁹⁸ *Id.* at 39.

⁹⁹ See Henderson, *supra* note 25, at 1252.

¹⁰⁰ *Id.* at 1245, 1255.

¹⁰¹ *Id.*

¹⁰² FEDERAL DEPOSIT INSURANCE CORPORATION, COMPLIANCE EXAMINATION MANUAL, EQUAL CREDIT OPPORTUNITY ACT at V-7.1 (2015), <https://www.fdic.gov/regulations/compliance/manual/5/V-7.1.pdf>.

¹⁰³ See Henderson, *supra* note 25, at 1260.

Given what is at stake, even if conviction history could be determined to have some bearing on an applicant's ability to pay back debts, I argue that the vulnerability of formerly incarcerated individuals, and the potential benefits that non-predatory financial services can offer them, outweigh the risk. However, even if lenders were not able to consider someone's conviction history, these lenders would still be justified in assessing someone's ability to repay the loan based on employment history and perceived earning potential. As such, it is crucial to disrupt current perceptions of how people spend their time in prison, and how we view formerly incarcerated people.

IV. LENDERS SHOULD BE ACTIVELY INVOLVED IN REENTRY EFFORTS BY AFFIRMATIVELY CREATING OPPORTUNITIES FOR HOMEOWNERSHIP AND SELF-EMPLOYMENT FOR FORMERLY INCARCERATED PEOPLE.

Even if lenders, housing providers, and employers did not inquire about conviction history, or even if people who have a conviction history were considered a class protected from discrimination, the collateral consequences of incarceration would still act as a barrier to financial services. Put simply, there are a lot of ways to tell that someone has been in prison besides a formal record. Even a few days in jail can cost someone their job and their housing. Several years in prison stands as an obvious and difficult to explain gap in employment and rental history.

Although contact with the criminal justice system, and time in jail and prison can be a destructive force, there is an ironic and tragic opportunity that exists within them as well. Because of the many limitations of our public education system and the many barriers that exist to higher education for people living on a low income,¹⁰⁴ jails and prisons can be one of the few sources of higher education and skill-based learning for people living in low-income communities.¹⁰⁵

There are of course fundamental flaws in our correctional systems. Our state and federal prisons are plagued with violence.¹⁰⁶ When

¹⁰⁴ See SAUNDERS, *supra* note 41.

¹⁰⁵ See Butterfield, *supra* note 42.

¹⁰⁶ See Carly Schwartz, *California Prison Riot: 11 Wounded, 1 Shot In Folsom*, HUFFINGTON POST, Sept. 19, 2012, http://www.huffingtonpost.com/2012/09/19/california-prison-riot-el_n_1898716.html (reporting on a riot in a California prison that left incarcerated people and correctional officials injured); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES (2007)*, available at <http://bjs.gov/content/pub/pdf/svsfpri07.pdf> (presenting results of a national study on sexual violence in prison which found that almost five percent of people surveyed in state

compared to other government officials, prison administrators are given unparalleled autonomy and discretion, including the power to emotionally and physically abuse occupants.¹⁰⁷ The rehabilitative capacity of prisons is anything but sound or consistently effective. However, to say nothing positive happens in a prison or that there are no stories of success would be a disservice to the officials who have pioneered reform efforts,¹⁰⁸ and especially to the people who have paid their debts to society in prison, survived, and accomplished something during their time. According to research compiled by the Justice and Policy Center of the Urban Institute on people leaving prison in three states, 48% of respondents did not have a high school diploma or equivalency degree when they entered prison.¹⁰⁹ Upon release, 32% pursued their GED while in prison (if the opportunity was available), and 65% participated

and federal prisons experienced some form of sexual victimization while in custody).

¹⁰⁷ See Terrell Jermaine Starr, *Prison Guard ‘Beat Up’ Squad Accused of Killing Inmate: Why Prison Abuse is So Common and Overlooked*, ALTERNET, Sept. 3, 2015, <http://www.alternet.org/civil-liberties/prison-guard-beat-squad-accused-killing-inmate-why-prison-abuse-so-common-and> (Discussing procedures under the Prison Litigation Reform Act (PLRA) which make it difficult to pursue legal claims against correctional staff and correctional institutions. These procedures include requiring incarcerated people to exhaust all administrative remedies at the prison first, and requiring proof of physical injury for emotional abuse claims); See Natasja Sheriff, *A Tough Cell: US to Defend Solitary Confinement Use Before UN*, AL JAZEERA AMERICA (Nov. 11, 2014), <http://america.aljazeera.com/articles/2014/11/11/solitary-confinementinusunderunreview.html> (reporting on the continuing efforts by the United Nations, researchers, and prison activists to curb the use of prolonged isolation in corrections due to concerns that isolation triggers deep anxiety, paranoia, and hallucinations and is tantamount to abuse over and above punishments prescribed by the criminal courts). See David Ovalle, *Miami-Dade Prison Inmate Death in Shower Ruled Accident, Sources Say*, MIAMI HERALD, Jan. 22, 2016, <http://www.miamiherald.com/news/special-reports/florida-prisons/article56108525.html> (Reporting on the death of Darren Rainey after correctional staff locked him in a steaming shower. According to reports of other people incarcerated in this facility locking people in this shower was a common form of discipline).

¹⁰⁸ See Cindy Chang, *Re-entry Court Offers Opportunity for Young Convicts to Learn From Lifers*, THE TIMES-PICAUNE, July 25, 2011, http://www.nola.com/crime/index.ssf/2011/07/re-entry_court_offers_opportun.html; See Emily Lane, *High Demand for Louisiana Inmate Re-entry Program Prompts Tizzy in House Committee*, THE TIMES-PICAUNE, Mar. 20, 2014, http://www.nola.com/politics/index.ssf/2014/03/high_demand_for_inmate_re-entr.html (Reporting on a popular “Reentry Court” a workforce development program in the criminal court system that gives certain defendants an opportunity to learn a trade and complete an intensive social mentoring program while in prison).

¹⁰⁹ See *Employment after Prison: A Longitudinal Study of Releases in Three States*, URBAN INSTITUTE: JUSTICE POLICY CENTER, October 2008, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releases-in-Three-States.PDF>.

in educational programming and skill based learning.¹¹⁰ Based on this, I argue that not only should conviction histories not be used against people, but accomplishments during one's time in prison should be recognized and respected. Of course, in order to have one's time in prison be recognized and respected, an applicant would have to disclose her conviction history, which could invite bias and discrimination. However, not disclosing incarceration history in turn preempts one's ability to present evidence of skills and accomplishments gained in prison, thereby severely diminishing their employability. Although someone should not be discriminated against on the basis of their prior conviction, avoiding this discrimination should not demand that they hide their accomplishments.

Given the fact that prison is one of the few places that people living on a low income can acquire education and skills based training, formerly incarcerated people could be assets to their family and community. Unfortunately, with one out of every two people released from prison in the United States returning to prison within a year, the advanced skills that people gain in prison appear to get lost once these individuals return to the "free world."

Upon release from prison, no matter their achievements, formerly incarcerated people are met with discriminatory attitudes and policies which make it nearly impossible to find and maintain a job and a place to live. As a result, instead of offering promise, mass incarceration further entrenches a cycle of poverty in communities of color that costs taxpayers over 40 billion dollars every year.¹¹¹ However, according to research conducted by the Pew Center on the States, states could save over \$600 million if these returns to prison were cut by even 10 percent.¹¹² Because discrimination against formerly incarcerated people is legal, and even when seemingly prohibited, very challenging to regulate,¹¹³ I argue that in order to reduce recidivism we should instead be fostering opportunities for formerly incarcerated people to find self-sufficiency and autonomy. Instead of simply depending on landlords and employers to change their

¹¹⁰ *Id.*

¹¹¹ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 6 (July 2012), *available at* <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

¹¹² THE PEW CENTER ON THE STATES, THE STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 26 (Apr. 2011), *available at* https://www.michigan.gov/documents/corrections/Pew_Report_State_of_Recidivism_350337_7.pdf.

¹¹³ See Dempsey v. N.Y.C. Dep't of Educ., 969 N.Y.S.2d 452 (2013).

attitudes towards formerly incarcerated people, reentry efforts should promote homeownership and business development. Not only could this strategy be a means of keeping formerly incarcerated people from cycling back into prison, it may also be a means of uplifting the low-income communities to which they return. Instead of being the force that drags communities down, I posit that formerly incarcerated people can become the driving force behind community economic development.

By not addressing barriers to financial security, people are being forced back into prison and into poverty. With opportunities for vocational training and rehabilitation in prison and access to financial services to build their own businesses and become homeowners upon release, formerly incarcerated people can free themselves from dependence on the state – at no cost to taxpayers. With access to private institutional lending and fair and affordable financial services, formerly incarcerated people will no longer require access to social services upon release.

V. IMPLICIT AND EXPLICIT BARRIERS TO FINANCIAL SERVICES FOR FORMERLY INCARCERATED PEOPLE UNDER THE DODD FRANK MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT

Born from the Great Recession of 2008, the Dodd Frank Wall Street Reform and Consumer Protection Act contains sixteen major areas of financial reform, including mortgage lending.¹¹⁴ One of the primary causes of the 2008 financial crisis is attributed to the deterioration of credit standards in mortgage lending. Mortgages were increasingly given without evidence of an individual’s ability to repay, without consideration of debt-to-income ratios, with minimal or no credit history, and without documentation of income leading to a crippling amount of “subprime mortgages.”¹¹⁵ Between January 2007 and late 2009, the first three years of the foreclosure crisis, an estimated 2.5 million homes were foreclosed upon. Most of these foreclosures were on properties with mortgages that originated in the three years leading up to the crisis.¹¹⁶

¹¹⁴ Dodd-Frank Wall Street Reform And Consumer Protection Act, 12 U.S.C. § 5301 (2010).

¹¹⁵ CONSUMER FIN. PROT. BUREAU, PROPOSED AMENDMENTS TO THE ABILITY TO REPAY STANDARDS UNDER THE TRUTH IN LENDING ACT, DOCKET No. CFPB-2013-0002, at 6 (2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_concurrent-proposal_ability-to-repay.pdf.

¹¹⁶ DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 2 (2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

Continuing a long history of racial discrimination in the housing sector, these subprime mortgages were provided disproportionately to communities of color.¹¹⁷ In 1994, 70.2 percent of Caucasians and 42.6 percent of African Americans owned their own homes.¹¹⁸ By 2009, 74.5 percent of Caucasians and 46.8 percent of African Americans owned their own homes.¹¹⁹ During the years preceding the 2008 financial crisis, although African Americans were given greater access to home mortgages and homeownership, of the mortgages provided, 47 percent of African American borrowers were given subprime mortgages, compared to 22 percent of Caucasians.¹²⁰ Ultimately, 8 percent of mortgages for African Americans were ultimately foreclosed, compared to 4 percent of Caucasians.¹²¹

It is beyond dispute that there were unfair, unwise, and predatory decisions made when it came to allocating mortgages before 2008. As such, it would be unfair to conclude that the people who applied for these mortgages would not in other circumstances make successful homeowners.

Unfortunately, in response to these abuses, Congress enacted reforms simply making it harder for individuals to get mortgages and become homeowners, as opposed to making it easier for individuals to succeed as homeowners. The Dodd Frank Act and the Federal Housing Administration mortgage insurance requirements¹²² now strictly demand that applicants have two-years of uninterrupted employment and credit history in order to demonstrate “ability to repay.”¹²³

¹¹⁷ *Id.* at 6.

¹¹⁸ *Housing Vacancies and Homeownership, Historical Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/housing/hvs/data/histtabs.html> (follow “Table 16. Quarterly Homeownership Rates by Race and Ethnicity of Householder: 1994 to Present” to download data).

¹¹⁹ *Id.*

¹²⁰ See Williams, *supra* note 29.

¹²¹ *Id.*

¹²² See HUD Releases ‘Qualified Mortgage’ Definition, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/ HUDNo.13-187](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-187) (Under the Dodd Frank Act, The Department of Housing and Urban Development (HUD) was required to define a “qualified mortgage.” Under HUD’s Final Rule defining “qualified mortgage” you are required to have mortgage insurance for the life of the loan, regardless of down payment, or earned equity). A common form of mortgage loans for low-income applicants is provided by the Federal Housing Administration (FHA). Private Mortgage Insurance (PMIs), must be maintained until the mortgage balance falls below 80% of the value of the home.

¹²³ 12 C.F.R. § 1026.43(c) (2016) (In order to verify employment history the creditor must verify the consumer’s employment for the most recent two full years).

To verify employment and credit history, one must provide W2s and “employment records.”¹²⁴ It is unclear what counts as an employment record, though prison labor records are not explicitly contemplated. Individuals can petition that employment gaps shorter than six months for under statutory exemptions be disregarded.¹²⁵ Not surprisingly, incarceration is not one of these exceptions.

As can be expected, in order to demonstrate credit history, individuals must provide a standard “three repository merged credit report” (TRMCR). One can use non-traditional credit report requirements,¹²⁶ however these sources cannot completely make up for absence of a TRMCR.¹²⁷ These requirements automatically exclude people leaving prison for at least a period of two years – regardless of whether they have actually been working the entire time they are in prison or have other positive markers of creditworthiness.

In response to the stricter standards under the Dodd Frank Act, nonprofit community development corporations like Habitat for Humanity, and the Federal Housing Authority appealed to members of Congress to create an exception for their programs, which provide zero interest mortgages for low to moderate income people through their own in-house lending programs. Although the original legislation was amended to protect for Habitat for Humanity’s lending practices, other nonprofit lenders, and government mortgage programs for low to moderate income people, the final rule fails to fully remedy the problems faced by formerly incarcerated people.¹²⁸ Congress’s exemption thus further

¹²⁴ U.S. DEP’T OF HOUS. AND URBAN DEV., HOUSING HANDBOOK, § 4155.1 ch. 1.B.1.b MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE: BORROWER AUTHORIZATION FOR VERIFICATION OF INFORMATION (2013), http://portal.hud.gov/hudportal/documents/huddoc?id=4155-1_1_secB.pdf.

¹²⁵ U.S. DEP’T OF HOUS. AND URBAN DEV., HOUSING HANDBOOK, § 4155.1 ch. 4.D.1.d MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE: BORROWERS RETURNING TO WORK AFTER EXTENDED ABSENCES (2013), http://portal.hud.gov/hudportal/documents/huddoc?id=4155-1_4_secD.pdf.

¹²⁶ U.S. DEP’T OF HOUS. AND URBAN DEV., HOUSING HANDBOOK, § 4155.1 ch. 1.C.5.b MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE, NON-TRADITIONAL CREDIT REPORT (NTM-CR) REQUIREMENTS (2013), http://portal.hud.gov/hudportal/documents/huddoc?id=4155-1_1_secC.pdf.

¹²⁷ *Id.*

¹²⁸ The exemption adopted by the Bureau is limited to creditors or transactions with certain characteristics and qualifications that ensure consumers are offered responsible, affordable credit on reasonably repayable terms. *See* Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 12 C.F.R. § 1026 (2013); CONSUMER FIN. PROT. BUREAU, *supra* note 111, at 118.

“others” formerly incarcerated people and people with prior convictions, and low-income people generally. Instead of addressing the requirements for qualified mortgages and the ways in which these requirements operate to functionally exclude low-income people and formerly incarcerated people, the amendments simply exempt these programs from the requirements.¹²⁹ As a result, formerly incarcerated people and people living on a low-income are forced into a small pool of available options.

By not making lending services available equally, but instead creating a system whereby you need the benefits of wealth to attain wealth, and where conviction history can nearly foreclose your available (non-predatory) options for financial services, our economic system functionally excludes low-income communities of color, using policies that on their face make no mention of race.

VI. SOLUTIONS

Although it is all but a foregone conclusion that the criminal justice system is flawed and in need of repairs, its causes and collateral consequences go unaddressed. As I have discussed, the collateral consequences of conviction and incarceration on someone’s ability to become a homeowner and develop wealth is one area that is particularly ignored.

However, in order to adequately address reentry, and these collateral consequences, policymakers must first disaggregate the broader category of conviction to address the various ways people experience the reentry process. For example, policy-makers should separately consider re-entry issues that affect people in jail, prison, probation with no incarceration, or probation or parole after incarceration,

Next, policymakers should consider whether or not or to what extent conviction history bears on someone’s ability to succeed. Does conviction history actually help employers control their businesses’ exposure to risk? Does it have any bearing on someone’s ability to succeed

¹²⁹ The Bureau of Consumer Financial Protection adopted § 1026.43(a)(3)(v)(D) to provide an exemption where “: (1) the creditor is designated as a nonprofit organization under section 501(c)(3) of the Internal Revenue Code; (2) the extension of credit is to a consumer with income that does not exceed the limit for low- and moderate-income households as established pursuant regulations prescribed by the U.S. Department of Housing and Urban Development; (3) during the calendar year preceding receipt of the consumer’s application the creditor extended credit only to consumers with income that did not exceed the above limit; and (4) the creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit.” Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act, 12 C.F.R. § 1026 (2013).

as a homeowner? Policymakers should further define what a “successful reentry experience” means. Is it simply staying out of jail? Or successfully getting a job and a house?

Because there is evidence that people who have been in prison have gained important skills that can mitigate their credit risk, I argue that incarceration and the transition out of incarceration should be designed around helping individuals move beyond entry level employment and rental housing.¹³⁰ These remedies would look different depending on whether an individual is in state prison, federal prison, jail, on work release, or in a transitional work program.

Regarding work history, lending institutions as a whole must recognize the work experience and skills people gain in prison as meaningful on their face. In furtherance of this goal, work and education while in prison must be documented to reflect creditworthiness, wage identification (even if minimal), supervisor assessments, nature of work, necessary skills, and opportunities to advance.

To get lending institutions to recognize the potential in formerly incarcerated people and make financial services available to them, there must be a significant shift in the culture of banking and the attitudes of lenders towards the capabilities of formerly incarcerated people. Fortunately, lending institutions are incentivized to shift their perspectives in order to be compliant under by the Community Reinvestment Act (CRA), and appease regulators. Under the CRA, lending institutions are required to ensure they are meeting the credit needs of low and moderate-income neighborhoods.¹³¹ Based on an evaluation of a bank’s efforts to fulfill this obligation, the Office of the Comptroller of the Currency will “consider [the extent to which they are meeting the credit needs of low and moderate income neighborhoods] in evaluating and approving

¹³⁰ VISHNER ET AL., *supra* note 43 (In a 2008 Research brief published by the Urban Institute, researchers found in a sample of 740 men returning home from prison to three different states that “[a]bout half of the respondents (53 percent) reported holding a job during their incarceration. Nine percent had worked in the community in a ‘work release’ job, earning an average of 20 cents per hour. Many respondents (65 percent) also worked to learn new skills through education and employment programs while in prison. Thirty-two percent participated in a GED or other educational program if it was available, with 35 percent of those individuals who were offered or took an educational course earning a GED. Twenty percent of respondents said that no employment or education programs were offered to them in prison.”).

¹³¹ OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY REINVESTMENT ACT (Mar. 2014), <http://www.occ.treas.gov/topics/community-affairs/publications/fact-sheets/fact-sheet-cra-reinvestment-act.pdf>.

applications for charters, bank mergers, acquisitions, and branch openings.”¹³² For banks seeking to expand, financial services for formerly incarcerated people presents an opportunity to make a significant impact in low income communities of color, while simultaneously meeting their own regulatory requirements.

While in custody and on work release, people should be given the opportunity to earn necessary accreditations for skilled positions, empowering them – should they choose – to avoid being forced into the low-wage sector. By developing the necessary skills to become gainfully employed, formerly incarcerated people also have greater access to licensing from state agencies that typically require work experience and accreditations. With this type of licensing we can further improve access to employment, while also giving someone the means to become self-employed – if they also have access to capital through fair and affordable financial services. Under this approach formerly incarcerated people could have an opportunity not only for self-employment, but to create jobs for others in their communities, thus interrupting not only the cycle of incarceration, but also the cycle of poverty.

One example of a company that follows this model is Custom Optical, an eyeglass company in New Orleans, Louisiana. Custom Optical was started by Derrick Perique, a 31-year-old man who learned to be an optician while in prison at the Louisiana State Penitentiary at Angola on his fifth conviction for distribution of narcotics. While in prison he learned the trade, completed the necessary clinical hours, and earned an associate’s degree. Upon release he apprenticed at an established company, built a business model, and ultimately launched his own company. His first hire was a man with whom he was previously incarcerated.

A company like Custom Optical can also serve as a criminal justice resource by acting as both a reentry program and a diversionary program. These businesses provide not only an opportunity for employment for individuals returning home from prison, they can also provide opportunities for people who have not been to prison but who might also have limited opportunities because they live in a low income area. Additionally, businesses such as Custom Optical serve as a positive and aspirational model for the community.

¹³² *Id.*

Entry-level employment and rental housing are not enough to stop the cycle of incarceration. To truly stop this cycle we must enable the people and communities most impacted by incarceration to find financial security and wealth through homeownership and business development. People who have gone to prison, who have had a chance to further their education, learn a trade, or get sober—these are people who can do far more for their communities than merely focusing on staying out of prison by maintaining low wage jobs and paying rent, but they must be given real opportunities. Today’s policymakers must empower low-income communities to grow with the economy and to become homeowners and business owners. The first step must be to change the way we judge the capabilities of formerly incarcerated people.

