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## A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry

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### Recommended Citation

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

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**A FEDERAL CERTIFICATE OF REHABILITATION PROGRAM:  
PROVIDING FEDERAL EX-OFFENDERS MORE OPPORTUNITY FOR  
SUCCESSFUL REENTRY**

*Lisa A. Rich<sup>1</sup>*

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1. Associate Professor of Law, Texas A&M University School of Law and former Director of Legislative & Public Affairs, United States Sentencing Commission. Thank you to Helen Mitchell and Roscoe Howard for their encouragement during the writing of this article. Thank you to my parents for their editorial assistance. Thank you also to Texas A&M University School of Law for providing financial support towards the completion of this article.

## I. INTRODUCTION

*The work of redemption reflects our values. It also reflects our national interests. Each year, approximately 650,000 prisoners are released from jail. Unfortunately, an estimated two-thirds of them are re-arrested within three years. The high recidivism rate places a huge financial burden on taxpayers, it deprives our labor force of productive workers, and it deprives families of their daughters and sons, and husbands and wives, and moms and dads.<sup>2</sup>*

*So many people who serve time never get a fair second chance . . . . It's never a level playing field for prisoners when they get out of jail.<sup>3</sup>*

Over the past year, there has been significant momentum, particularly at the federal level, toward significant criminal justice reform.<sup>4</sup> Policymakers from both parties have concluded that the ever-increasing numbers of people in prison or on some form of community supervision are not sustainable.<sup>5</sup> Prisons are overcapacity, former offenders are having trouble staying out of the system, and the impact on minority communities is disproportionately high.<sup>6</sup> The Obama Administration and advocacy groups have been pushing reform both in the Executive and Legislative

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2. *President Bush Signs H.R. 1593, the Second Chance Act of 2007*, OFF. PRESS SECRETARY (Apr. 9, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080409-2.html>.

3. Perry Bacon, Jr., *Obama Weighs in on Vick, Other Cultural Issues*, WASH. POST (Dec. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122704579.html> (commenting on the employment of quarterback Michael Vick by the Philadelphia Eagles after Vick's imprisonment).

4. See Rachel Bade, *Criminal Justice Reform Gains Bipartisan Momentum*, POLITICO (July 15, 2015), <http://www.politico.com/story/2015/07/criminal-justice-reform-gains-bipartisan-momentum-120125>.

5. See *id.*

6. See *id.*; see also Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), <http://washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/>; Ben Woflgang, *Obama Renews Push for Criminal Justice Reform*, WASH. TIMES (Sept. 17, 2015), <http://www.washingtontimes.com/news/2015/oct/17/obama-renews-push-criminal-justice-reform/>.

branches.<sup>7</sup> The Judicial branch likewise has been pressing for reform and challenging one-size fits all sentencing schemes.<sup>8</sup>

Despite the impressive dialogue that is now being undertaken with respect to criminal justice reform, the numbers remain significant: 1,561,500 people were under the control of state or federal correctional authorities in calendar year 2014.<sup>9</sup> This represents almost a one percent decline from the previous year,<sup>10</sup> yet it still remains that almost one in every 100 Americans remains in prison.<sup>11</sup> The Equal Employment Opportunity Commission, citing a Bureau of Justice Statistics report, suggests that if the current trends continue, “approximately 6.6 percent of all persons born in the United States in 2001 [could] serve time in state or federal prison during their lifetimes.”<sup>12</sup> And while national incarceration is trending down, federal

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7. See Bade, *supra* note 4.

8. See Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 3, 2015), [http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?\\_r=0](http://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html?_r=0); David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be"*, WHITE HOUSE (July 25, 2015), <https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be>.

9. See *U.S. Prison Population Declined One Percent in 2014*, BUREAU JUST. STAT. (Sept. 17, 2015), <http://www.bjs.gov/content/pub/press/p14pr.cfm>; see also Ian F. Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (noting that the United States has five percent of the world's population and twenty-five percent of its prison population).

10. See *U.S. Prison Population Declined One Percent in 2014*, *supra* note 9; see also BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 1 (2012), available at <http://bjs.gov/content/pub/pdf/p11.pdf> [hereinafter BJS 2011 Report] (discussing fluctuations in prison populations).

11. See Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), [http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?\\_r=0](http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?_r=0).

12. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PUB. NO. 915.002, EEOC ENFORCEMENT GUIDANCE: 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](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [hereinafter 2012 EEOC Enforcement Guidance] (citing BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 1974-2001 1 (2003)).

prisons, in particular, are still over-capacity.<sup>13</sup> Moreover, the significant incarceration rate in this country means thousands of individuals are being released annually to their communities.<sup>14</sup> The Federal Bureau of Prisons releases between 45,000 and 55,000 ex-offenders back into their communities annually.<sup>15</sup>

Despite the efforts of the federal criminal justice community, particularly the Bureau of Prisons, to provide employment and other skills services to offenders to assist in their reentry efforts, “[i]n some instances,” offenders “find themselves unable to utilize the skills and knowledge picked up in education [and other] programs while in prison.”<sup>16</sup> Moreover, studies indicate that up to sixty percent of former offenders are unemployed a year after their release from incarceration.<sup>17</sup>

Thus, one of the great paradoxes within the criminal justice system is that even when incarcerated people have access to education and training inside prison, too often restrictions on employment and on accessing government assistance when they are released mean that they cannot fully utilize the skills they have acquired while incarcerated.<sup>18</sup> “Although the

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13. See Charles Colson Task Force Report, *Transforming Prisons, Reforming Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* 16 (Jan. 2016), available at <http://colsontaskforce.org/cctf-final-recommendations/> (last visited Apr. 1, 2016) [hereinafter Colson Task Force Report].

14. See *Statement of Charles E. Samuels, Director of the Bureau of Prisons Before the U.S. House of Representatives*, U.S. H.R. COMMITTEE APPROPRIATIONS (Apr. 17, 2013), <http://appropriations.house.gov/uploadedfiles/hrg-113-ap19-wstate-samuelsc-20130417.pdf>.

15. See *id.* In addition, the Federal Bureau of Prisons releases another 20,000 offenders who are subject to deportation. These non-citizens, who represent a growing percentage of the federal prison population, are not the focus of this paper. See generally UNITED STATES SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2012), available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012>; Walter Pavlo, *Here's an Idea to Reduce the Deficit-Release Some Federal Inmates*, FORBES (Feb. 21, 2013), <http://www.forbes.com/sites/walterpavlo/2013/02/21/heres-an-idea-to-reduce-the-deficit-release-some-federal-inmates/#2715e4857a0b1892df3311a2>.

16. THE LEADERSHIP CONFERENCE EDUCATION FUND, *A SECOND CHANCE: CHARTING A NEW COURSE FOR RE-ENTRY AND CRIMINAL JUSTICE REFORM* 16 (2013), available at <http://www.civilrights.org/publications/reports/a-second-chance/a-second-chance-re-entry-report.html> [hereinafter 2013 LCEF Report].

17. See H.R. REP. NO. 110-140, at 2 (2007).

18. See 2013 LCEF Report, *supra* note 16, at 14.

relationship between crime and work is complex, most experts believe that stable employment is critical to a successful transition from prison to community.”<sup>19</sup> However, a large proportion of former prisoners are hard to employ due to low levels of education and work experience,” among other disabilities.<sup>20</sup> “In sum, many people enter the criminal justice system hard to employ and leave it even harder to employ.”<sup>21</sup> The current economic environment facing ex-offenders further heightens this critical problem with our criminal justice system.

Current economic conditions are not conducive to employment of ex-offenders absent assurances against recidivism or other employer incentives, and economic indicators suggest that economic conditions are not likely to improve significantly for this group without some sort of reform or further assistance.<sup>22</sup> The majority of employers who are hiring in the current economic climate are not inclined to hire ex-offenders, and even if they are, it is often for significantly less pay and fewer hours than those without a criminal record.<sup>23</sup> Moreover, those with criminal records often are precluded by federal, state, and local barriers from applying for a great number of employment opportunities.<sup>24</sup> One study conducted by the American Bar Association found literally thousands of statutes and regulations that contain consequences for a criminal conviction, many of

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19. SENGSOUVANH (SUKEY) LESHNICK ET AL., EVALUATION OF THE RE-INTEGRATION OF EX-OFFENDERS (REXO) PROGRAM: INTERIM REPORT I-2 (2012), available at [http://wdr.doleta.gov/research/Fulltext\\_Documents/ETAOP\\_2012\\_09.pdf](http://wdr.doleta.gov/research/Fulltext_Documents/ETAOP_2012_09.pdf) [hereinafter 2012 RExO Report].

20. *Id.*

21. *Id.* A study of state offenders, for example, notes that many offenders had informal work experience prior to being incarcerated, became more “formally employed shortly after release,” but within a couple of years “they were working at or below pre-incarceration levels.” Stephen Raphael, *The Employment Prospects of Ex-Offenders*, 25 FOCUS 21, 23 (Winter 2007-2008), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc252d.pdf>.

22. 2012 RExO Report, *supra* note 19, at II-3.

23. *Id.* at II-5, 6.

24. See Margaret Love & April Frazier, *Certificates of Rehabilitation and Other Forms of Relief from Collateral Consequences of Conviction: A Survey of State Laws*, ABA COMMISSION EFFECTIVE CRIM. SANCTIONS (Oct. 1, 2006), [www.reentry.net/library/attachment.149426](http://www.reentry.net/library/attachment.149426) (noting the problem with barriers to reentry); 2012 EEOC Enforcement Guidance, *supra* note 12, at 6 (noting that ninety-two percent of employers responding to the survey used criminal background checks for some or all of their job candidates).

them related to employment.<sup>25</sup> Even with increased efforts by the Obama Administration and many states to "ban the box" and discourage the use of criminal history as a barrier to employment early in the hiring process, the fact remains that formerly incarcerated individuals face enormous hurdles to their successful long-term reentry.<sup>26</sup> Thus, any formal documentation that an ex-offender is rehabilitated and a reliable workforce investment would be useful to reentry efforts.

A certificate of rehabilitation is typically a judicially or administratively granted acknowledgement that an ex-offender has successfully reintegrated into society, proven that he or she is committed to a law abiding future, and provides a level of assurance to an employer that the ex-offender is not a significant risk.<sup>27</sup> The certificate helps offenders overcome statutory and regulatory barriers to employment, thus opening up the potential availability of jobs to ex-offenders, including many vocational areas that are the focus of inmate skills training at federal facilities.<sup>28</sup> Unfortunately, even if federal ex-offenders meet the residency requirements for application to a state certificate program, the seriousness of their offense and often their significant criminal history, can preclude them from being considered for such relief.

For the vast majority of offenders, including federal ex-offenders, reentry is not an option; it will happen.<sup>29</sup> Thus, the purpose of this Article is to propose a new federal certificate of rehabilitation program. The creation of such a program not only would help the thousands of federal offenders released back into their communities every year overcome employment barriers but would also serve as a model for states to use in addressing the

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25. See *ABA Collateral Consequences Project*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <http://www.abacollateralconsequences.org/map/#> (last visited Apr. 1, 2016). As of April 2016, the Consequences Project has created an inventory of the collateral consequences, including employment barriers for seventeen states and the federal government. *Id.*

26. As of March 2016, twenty-one states, the District of Columbia, and 100 city and local governments had instituted some sort of preclusion on consideration of criminal history as a *threshold* matter when hiring. President Obama also has directed federal agencies to consider criminal history "later" in the hiring process. Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT'L EMP'T L. PROJECT 1 (Mar. 2016), available at <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> (last visited Apr. 1, 2016).

27. See Love & Frazier, *supra* note 24, at 2-6.

28. *Id.*

29. See 2013 LCEF Report, *supra* note 16, at 3-4.

need of their own burgeoning population of former offenders. In order to understand the magnitude of the problem, it is essential to understand the pool of offenders affected by their criminal history, the intent of the federal agencies to assist this disadvantaged group, and the barriers they face. This Article pulls from the most recent data and sources available to provide an in-depth picture of the problem so that suggested solution can be seen as a part of the whole.

Part I of this article presents a brief discussion of the policy focus that lead to passage of the Second Chance Act of 2007, the most significant piece of federal legislation to address reentry issues in order to provide the context for current re-entry initiatives; Part II provides the most recent information on the federal prison population, including current demographics, which provides the context for why federal offenders in particular may face hurdles to establishing rehabilitation for job purposes. Part III presents information on the Federal Bureau of Prisons and other federal agencies—including the role of federal probation officers and supervised release—involved in the reentry process, particularly as it relates to ex-offender employment training and reentry employment; Part IV examines the current economic and employment environment, particularly as it relates to ex-offenders; Part V provides an overview of current certificate rehabilitation programs, including their strengths and weaknesses and illustrates the disqualification of most federal offenders for such programmatic relief. The conclusion of this Article proposes a federal certificate of rehabilitation program as a stand-alone piece of legislation or as part of the reauthorization of the Second Chance Act of 2007.

## II. FOCUS ON REENTRY AND THE SECOND CHANCE ACT OF 2007

“When a person is convicted of a crime in the United States his legal status changes forever.”<sup>30</sup> It is well documented that incarceration can have negative effects on an offender’s employment opportunities in a number of ways.<sup>31</sup> Incarceration “can lead to a deterioration in a worker’s ‘human

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30. Love & Frazier, *supra* note 24, at 1.

31. See, e.g., 2012 EEOC Enforcement Guidance, *supra* note 12 (noting the particular burdens placed on minorities trying to enter the workforce as a result of criminal history); 2013 LCEF Report, *supra* note 16 (noting the civil and human rights issues that arise for ex-offenders as a result of their criminal history); and Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENT’G &



capital,' including formal education, and on-the-job experience, and even 'soft skills' such as punctuality or customer relations."<sup>32</sup> It also impacts social networking, preventing offenders from engaging in productive networks that could lead to lawful employment, and many times encouraging continued criminal activity networks.<sup>33</sup> And, of course, there is the stigma that a criminal conviction carries.<sup>34</sup> Moreover, as one Member of Congress noted,

. . . over half of the adult prisoners who are to be released around the country this year will be rearrested again and likely will return to prison. This cycle is overwhelming our prisons, and it is costing more than \$90 billion every year, \$50 billion as far as federal institutions are concerned."<sup>35</sup>

Thus, in order to understand the magnitude of the problem of large numbers ex-offenders trying to rebuild their lives in their communities, it is important to understand that the focus on reentry<sup>36</sup> issues at the national level is relatively recent.<sup>37</sup> Beginning in about 2000, policymakers at all levels began to recognize the need for substantial resources for the rapidly

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CORRECTIONS: ISSUES FOR THE 21ST CENTURY, NO. 7 (May 2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181413.pdf>.

32. John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, CTR. FOR ECON. & POL'Y RES. 8 (Nov. 2010), <https://perma.cc/ZP2P-TN9D> (citations omitted).

33. *Id.*

34. See *id.*; 2012 EEOC Enforcement Guidance, *supra* note 12, at 3; 2013 LCEF Report, *supra* note 16, at 2-3.

35. CONG. REC. 13564-01 (2007) (statement of Howard Coble). In fiscal year 2010, the cost of incarceration at the federal, state and local level was \$80 billion. *Statement of Attorney General Eric Holder to the American Bar Association on August 12, 2013*, DEP'T OF JUST., <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> (last visited Jan. 14, 2016).

36. Policymakers typically define "reentry" as the "return to the community of incarcerated individuals from America's jails and prisons, and their reintegration into society." H. R. REP. NO. 110-140, at 2 (2007).

37. Some states, particularly New York, focused on reentry issues during the 1960s and 1970s when many states and the federal government were rethinking criminal justice policy, but these occurrences were rare. See Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012) (examining the development of New York's certificates of relief and good conduct).

expanding numbers of former offenders attempting to reenter their communities every year.<sup>38</sup> The cost of ill-prepared ex-offenders reentering society was growing significantly.<sup>39</sup> “A prison record or felony conviction greatly lowers ex-offenders’ prospects in the labor market.”<sup>40</sup> In GDP terms, [the lowered employment rates of ex-offenders] cost the United States economy between \$55 and 65 billion in lost output in 2008 alone.<sup>41</sup> The share of ex-offenders in the working age population will likely rise substantially in the coming decades.<sup>42</sup> And “[b]ased on the growing body of knowledge about what barriers to re-entry look like and how they impact communities, [the Leadership Conference Education Fund] found that the economic and political marginalization of formerly incarcerated people now stand as among our era’s most critical civil and human rights concerns.”<sup>43</sup>

Faced with the growing economic and emotional burdens communities faced with ex-offenders trying to reintegrate into society, policymakers began to review criminal justice policy with an eye toward preparing former offenders for life after incarceration.<sup>44</sup> In particular, policymakers began to turn to community and faith-based leadership to fill voids in re-entry services.<sup>45</sup> It was becoming apparent that government alone could not provide all the necessary support for the ever-increasing numbers of ex-

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38. See, e.g., Reginald Wilkinson, *Offender Re-entry: A Storm Overdue*, CORRECTIONS Q. 2001, [http://www.drc.ohio.gov/web/Articles/Offender%20Reentry\\_%C2%A0%20A%20Storm%20Over.pdf](http://www.drc.ohio.gov/web/Articles/Offender%20Reentry_%C2%A0%20A%20Storm%20Over.pdf) (last visited Jan. 14, 2016) (describing efforts by academics and others to change the framework of criminal justice and corrections policy to focus on the needs of ex-offenders reentering society as gaining momentum).

39. See Schmitt & Warner, *supra* note 32, at 1.

40. *Id.* at 1. There is a small percentage of offenders whose job prospects may *improve* after incarceration if that time is truly rehabilitative or “leads to acquisition of additional educational/skills training.” *Id.* at 8 n.22.

41. *Id.* at 1 (looking at employment rates for federal and state ex-offenders in 2008 and noting that the United States economy lost between \$57 and 65 billion as a result of the under- or un-employment of these people).

42. *Id.* at 5.

43. 2013 LCEF Report, *supra* note 16, at 3. The economic downturn has significantly impacted ex-offenders. RExO Report, *supra* note 19, at ES-1. In addition to impacting the employment prospects for ex-offenders, see discussion *infra*, funding cuts to criminal justice and social services are further exacerbating offenders’ overall reentry efforts. *Id.* at II-7.

44. See, e.g., Second Chance Act of 2005, H.R. 1704, 109th Cong. (1st Sess. 2005).

45. *Id.*

offenders being released back to their communities annually.<sup>46</sup> Congressional leaders began to introduce legislation that would solidify reentry efforts at the national level and provide grants and other incentives for state and local governments to solidify their own reentry efforts.<sup>47</sup> In his 2004 State of the Union Address, President George W. Bush, brought the issue of reentry to the nation's attention: "[t]his year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work or a home or help, they are much more likely to commit crime and return to prison."<sup>48</sup>

The President and Members of Congress realized that "[w]hat kind of experience inmates have in prison, how we prepare them to rejoin society, and how we reintegrate them into the broader community when they get out are issues that profoundly affect the communities in which we live."<sup>49</sup> As part of his 2004 State of the Union agenda, President Bush proposed "a four-year, \$300 million Prisoner Re-Entry Initiative to expand job training and placement services, to provide transitional housing and to help newly released prisoners get mentoring, including from faith-based groups."<sup>50</sup> And

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46. *Id.*

47. *See, e.g.*, Second Chance Act of 2007, H.R. 1593, 110th Cong. (2nd Sess. 2007); Recidivism Reduction and Second Chance Act of 2007, S. 1060, 110th Cong. (1st Sess. 2007); Second Chance Act of 2004, H.R. 4676, 108th Cong. (2nd Sess. 2004); Second Chance Act of 2004, S. 2789, 108th Cong. (2nd Sess. 2004).

<sup>48</sup> George W. Bush, *State of the Union Address 2004*, WHITEHOUSE.ARCHIVES.GOV (Jan. 29, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/text/20040120-7.html>.

49. CONG. REC. S1893-1906 (statement of Sen. Leahy). Senator Leahy echoed the sentiments of many in Congress that "securing tough and appropriate prison sentences for people who break our laws" is important but "it is also important that we do everything we can to ensure that when these people get out of prison, they enter our communities as productive members of society, so we can start to reverse the dangerous cycles of recidivism and violence." *Id.* *See also*, CONG. REC. 13564-01 (statement of Rep. Coble) ("I am in agreement that stiff sentences serve a good purpose...But when we [see] growing numbers of ex-offenders returning to our prisons, something in the system is not working. Something...is flawed."); CONG. REC. 13654-01 (statement of Rep. Smith) (discussing need for tough sentences but obligation remains "to make sure [offenders] are rehabilitated and treated humanely.").

50. George W. Bush, *supra* note 48. The PRI was a supplement to the 2003 Serious and Violent Offender Re-entry Initiative (SVORI). H.R. REP. NO. 110-140, at 3 (2007). The SVORI was a "collaborative effort established in 2003 to improve outcomes for adult and juvenile inmates returning to their communities." *Id.* The SVORI provided grants to sixty-nine grantees in all fifty states, the District

he concluded his comments about the need to focus on reentry by noting that “America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”<sup>51</sup>

Congress held numerous hearings on issues associated with prisoner reentry, and legislation was introduced that ultimately became the Second Chance Act of 2007.<sup>52</sup> The Second Chance Act of 2007<sup>53</sup> culminated in “family-centered initiatives”<sup>54</sup> designed to “strengthen overall efforts to reduce recidivism, increase public safety, and help states and communities to better address the growing population of ex-offenders returning to their communities.”<sup>55</sup> According to its proponents, the Second Chance Act of 2007 said to reentering offenders that policymakers would “help prisoners reclaim their lives. In other words, it basically says: We’re standing with you, not against you.”<sup>56</sup>

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of Columbia, and the Virgin Islands. *Id.* The SVORI expired at the end of fiscal year 2005 and legislation that ultimately became the Second Chance Act of 2007 sought to build upon its successes. *Id.* at 2 n.5.

51. George W. Bush, *supra* note 48.

52. See, e.g., *DC Prisoner Re-entry Preparation: Hearing Before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia, H. Comm. on Oversight and Government Reform*, 2007 WL 3069293 (2007) (statement of Rep. Davis). “These men and women deserve a second chance to break the grip of a drug habit, a chance to support a family, to pay taxes, and to be self-sufficient. Many of these ex-offenders return to their communities unprepared and without the support they need to sustain their new lives.” *Id.* See also, *H.R. 1593, the “Second Chance Act of 2007”: Hearing before the Subcomm. on Crime, Terrorism and Homeland Security, H. Comm. on the Judiciary* (2007) (examining the purposes behind the legislation).

53. 42 U.S.C. § 17501 (2012).

54. “[O]ne of the most significant costs of prisoner re-entry is the impact on children, weakened ties among family members, and de-stabilized communities.” H.R. REP. NO. 110-140, at 2. The Second Chance Act of 2007 sought to ameliorate these effects, especially those on families. *Id.*

55. H. R. REP. 110-140, at 5 (2007). As Senator Brownback noted, the Second Chance Act of 2007 was holistic and provided “an incredible opportunity to reshape the way in which the Nation fights crime, addresses poverty, and provides safer communities.” CONG. REC. 1893-1906 (2007) (statement of Sen. Brownback).

56. *President Bush Signs H.R. 1593, the Second Chance Act of 2007*, WHITEHOUSE.GOV (Apr. 9, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080409-2.html>.

The Second Chance Act of 2007 created numerous grant and incentive programs for federal, state and local entities to focus efforts on reentering prisoners.<sup>57</sup> It focused on development of and support for programs that provided alternatives to incarceration (e.g., drug courts), expanded the availability of substance abuse treatment, strengthened families, and expanded comprehensive re-entry services.<sup>58</sup> For example, the Act created a grant program authorized out of the Department of Justice for state, local, and Indian tribes to provide technology career training to inmates.<sup>59</sup>

The Act also amended the Omnibus Crime Control and Safe Streets Act of 1968 in a number of ways, including defining what constitutes a satisfactory community reentry plan for grant purposes.<sup>60</sup> In order for a grantee to be found to have a successful prisoner reentry program, the plan must include (1) identifying employment opportunities and goals; (2) identifying housing opportunities; (3) providing any necessary drug treatment; (4) providing necessary mental health treatment; (5) providing necessary healthcare services; (6) providing any necessary family counseling; (7) providing case management services; (8) and identifying any other services necessary to the inmate.<sup>61</sup>

As discussed below in Part III, the Second Chance Act of 2007 also significantly changed the federal approach to reentry issues. The Act included directives to the various departments and agencies throughout the

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57. The Second Chance Act of 2007 authorized over \$175 million in grants to be administered through the Department of Justice in 2008-2009 “to improve the treatment of inmates and to help offenders reenter communities after they have served their prison sentences.” *See* Second Chance Act of 2007, H.R. 1593, 110th Cong. (2nd Sess. 2007); H.R. REP. NO. 110-140 at 11 (2007). It also authorized funds for the Department of Justice to assist state and local prosecutors to develop drug-treatment programs for offenders that would serve as alternatives to imprisonment. *Id.*

58. *Id.* at 2.

59. *Id.* at 18. Congress authorized \$5 million for the program in 2008-2009. *See* CONGRESSIONAL RESEARCH SERVICE, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 23 (2014). The Department of Justice, through the Bureau of Justice’s assistance, does offer limited grants in this area as exemplified by its 2013 grant proposal request, for which it sought to award up to \$750,000 per grant proposal beginning in October 2013. *See Second Chance Act Technology Career Training Program for Incarcerated Adults and Juveniles FY 2013 Competitive Grant Announcement*, U.S. DEP’T OF JUST. (Jan. 9, 2013), [https://www.bja.gov/Funding/13SCA\\_TechCareersSol.pdf](https://www.bja.gov/Funding/13SCA_TechCareersSol.pdf).

60. H.R. REP. NO. 110-140 at 23.

61. *Id.*

federal government to coordinate on strategies to employ ex-offenders, and it required significant focus on re-entry as a part of the Bureau of Prisons operating mission.<sup>62</sup>

### III. THE FEDERAL PRISON POPULATION

Because this paper focuses on the creation of a certificate of rehabilitation program that would benefit *federal* offenders, it is important to understand who these offenders actually are, including their demographics and the types of offenses they typically commit.

Although national incarceration rates have been declining annually since 2007,<sup>63</sup> the federal prison population remains significant, even after changes to federal drug trafficking laws.<sup>64</sup> The Federal Bureau of Prisons has been operating at overcapacity for years.<sup>65</sup> In 2015, the Federal Bureau of Prisons operated at twenty-three percent overcapacity.<sup>66</sup> The cost of incarceration for these individuals averaged \$30,169.85 per prisoner, or \$83.89 per day, a cost that continues to increase.<sup>67</sup>

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62. H.R. 1593 § 231.

63. See BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012-ADVANCE COUNTS 1 (July 2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf> [hereinafter BJS 2012 Report] (noting that the “U.S. prison population declined for the third consecutive year”).

64. See, e.g., BJS 2011 Report, *supra* note 10, at Table 2 (noting increase in federal prison population. Since 2010 and the enactment of the Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010), and other initiatives by the Department of Justice, the federal prison population has decreased to slightly less than 200,000 persons as of April 2016. See FEDERAL BUREAU OF PRISONS, INMATE STATISTICS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Apr. 1, 2016).

65. See FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2010, 4, available at <http://www.bop.gov/resources/pdfs/sob10.pdf> [hereinafter 2010 BOP Annual Report]; see also *Statement of Harley G. Lappin, Director of the Bureau of Prisons Before the U.S. House of Representatives*, U.S. H.R. COMMITTEE ON APPROPRIATIONS (Mar. 15, 2011), [http://appropriations.house.gov/\\_files/031511\\_bopdirectorstatement.pdf](http://appropriations.house.gov/_files/031511_bopdirectorstatement.pdf) [hereinafter BOP House Appropriations Testimony].

66. FEDERAL BUREAU OF PRISONS, FEDERAL INMATE POPULATION DECLINES (Oct. 2015), available at [https://www.bop.gov/resources/news/20151001\\_populationDecline.jsp](https://www.bop.gov/resources/news/20151001_populationDecline.jsp) (last visited Apr. 9, 2016).

67. See Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12523 (Mar. 9, 2015), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-03-09/pdf/2015-05437.pdf>. (codified at 28 C.F.R. § 505) (requiring the Bureau of

As of February 2016, 47.4 percent of federal offenders were serving sentences of at least 10 years.<sup>68</sup> Over 45 percent (46.5%) of the February 2016 federal prison population was imprisoned for a drug offense; 16.9 percent for a “weapons, explosives, or arson” offense; 9.2% for an immigration offense; and 7.9 percent for a “sex” offense.<sup>69</sup>

Examining federal inmates incarcerated in fiscal year 2015, the majority fell in Criminal History Categories I-III.<sup>70</sup> For those convicted of a federal drug trafficking offense in Criminal History Category I (little or no previous criminal history), the average (mean) sentence was 57 months compared to an average (mean) sentence of 73 months for an offender in Criminal History Category III.<sup>71</sup>

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Prisons to compile and report the annual costs of housing federal inmates). The Bureau of Prisons calculates this fee by dividing the number representing Bureau facilities’ monetary obligation (excluding activation costs) by the number of inmate days incurred for the preceding fiscal year, and then by multiplying the quotient by 365. *Id.* By comparison, in fiscal year 2010, the cost per prisoner was \$28,284.16 or \$77.49 per day. *See* 76 Fed. Reg. 57081 (Sept. 15, 2011), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-03-09/pdf/2015-05437.pdf> (last visited Apr. 8, 2016).

68. U.S. Bureau of Prisons, Sentences Imposed, *available at* [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sentences.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp) (last visited April 1, 2016).

69. *Id.*

70. UNITED STATES SENTENCING COMMISSION FISCAL YEAR 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 14 (2016), *available at* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table14.pdf> (last visited April 1, 2016). A “criminal history category” reflects an offender’s previous contact with the criminal justice system. The U.S. Sentencing Commission established six criminal history categories for federal Class A misdemeanor and felony offenses an assigned corresponding “points” that an offender may receive depending on their prior criminal history. These points are then totaled and, when combined with points assigned for a federal offenders offense of conviction, move an offender’s sentence across the federal sentencing guidelines table of months of imprisonment. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2 (2015) (explaining criminal history categories and the determination of an offender’s criminal history under the federal sentencing guidelines).

71. UNITED STATES SENTENCING COMMISSION FISCAL YEAR 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 14, *available at* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table14.pdf> (last visited April 1, 2016). Slightly more than twenty percent of federal offenders have criminal history that places them in Criminal History Categories IV-VI. *Id.* A drug trafficking offender in

The majority of federal offenders incarcerated in February 2016 ranged in age from 31-41,<sup>72</sup> and 93.3 percent were male.<sup>73</sup> Just over 58 percent (58.8) of this prison population is White; 37.7 percent is Black; 1.5 percent is Asian; and 2.0 percent is Native American.<sup>74</sup> Over three-quarters (77.6 percent) of this population are U.S. citizens.<sup>75</sup>

According to the United States Sentencing Commission, in fiscal year 2015, 45.3 percent of offenders for whom the Commission had education history<sup>76</sup> had less than a high school education.<sup>77</sup> Only 30.5 percent of the

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Criminal History Category IV has an average sentence of 82 months compared to 110 months for a non-career offender in Category VI. Thus, it is clear that an offender's criminal history impacts the length of sentence.

72. *Inmate Age*, U.S. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) (last visited April 1, 2016).

73. *Id.*

74. *Id.* The Bureau of Prisons does not use "Hispanic" as a racial category. *See id.* When the Bureau of Prisons breaks this prison population down by *ethnicity*, 33.7 percent of the population is Hispanic, 66.3 percent non-Hispanic. *Inmate Ethnicity*, U.S. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) (last visited April 1, 2016).

75. *Inmate Citizenship*, U.S. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_citizenship.jsp](https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp) (last visited April 1, 2016). These statistics demonstrate an important issue when discussing prison populations and policy impacts because while the Bureau of Prisons reports that its current prison population comprise three-quarters U.S. citizens, the United States Sentencing Commission's 2015 Sourcebook of Federal Sentencing Statistics indicates that 41.5 percent of offenders sentenced in fiscal year 2015 were non-citizens. U.S. SENTENCING COMMISSION FISCAL YEAR 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 9, *available at* <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table09.pdf> (last visited Apr. 1, 2016).

76. Pursuant to section 994(w)(3) of Title 28, United States Code, the chief judge of every federal district court must ensure that sentencing documentation is submitted to the United States Sentencing Commission within thirty days of a judgment being entered. The documentation sent to the Sentencing Commission includes, at a minimum, the charging instrument, the written plea (if there is one), the judgment and commitment order, the statement of reasons form, and the presentence report. 28 U.S.C. § 994 (w)(3); *see also*, U.S. SENTENCING COMMISSION FISCAL YEAR 2015 ANNUAL REPORT (describing the document submission process). The Commission uses these documents to collect, analyze, and report on federal sentencing trends and practices.

77. U.S. SENTENCING COMMISSION FISCAL YEAR 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 8, *available at*



federal prison population in fiscal year 2015 had a high school education.<sup>78</sup> In fiscal year 2015, 78.2 percent of those sentenced to a federal drug trafficking offense had a high school education or less at the time of their sentencing.<sup>79</sup> Similarly, of those offenders sentenced for a federal firearms offense, 82 percent had a high school degree or less at the time of their sentencing.

Thus, an examination of the current federal prison population shows that federal offenders, for the most part, have serious criminal history, insufficient education, and reflect an aging population. Any one of these factors could present an obstacle to gainful employment but the combination of impediments faced by federal offenders hinder their reentry efforts even more significantly. These offenders have spent a significant amount of time incarcerated, and face numerous challenges when they reenter society often because of the nature of their crimes, their demographics, and a weakened support system and economic opportunities as a result of challenging economic times.

#### IV. FEDERAL COORDINATION OF REENTRY EFFORTS

This Part provides an overview of the various skills and reentry programs available throughout a federal offender's contact with the criminal justice system, and discusses some of the key (and often underutilized or underfunded) programs available to encourage employment of offenders upon release. It is important to the understanding of the hurdles faced by federal ex-offenders trying to meaningfully reenter society to understand how the federal government approaches reentry once an inmate is incarcerated. It also is useful to understand what incentive and preventative programs the federal government has established to encourage employment from this disadvantaged group.

Reentry at the federal level is coordinated among a number of departments and agencies within the federal government.<sup>80</sup> These entities also coordinate with various state and local entities, including community and faith-based organizations, to provide re-entry assistance, including

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<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table08.pdf> (last visited Apr. 1, 2016).

78. *Id.*

79. *Id.*

80. *Federal Benefits Coordination*, FED. INTERAGENCY REENTRY COUNCIL (June 2014), [https://csgjusticecenter.org/wp-content/uploads/2014/06/Federal\\_Benefits.pdf](https://csgjusticecenter.org/wp-content/uploads/2014/06/Federal_Benefits.pdf) (discussing federal and state agency coordination).

employment assistance, to all offenders trying to reintegrate into their communities.<sup>81</sup> For example, the National Offender Workforce Development Partnership works to implement the goals of the Second Chance Act of 2007.<sup>82</sup> Its goal is “to establish collaborative strategies and joint programs that support the development of career opportunities and enhance the career-readiness of offenders to successfully transition to their communities.”<sup>83</sup>

The Federal Offenders Re-entry Group (FORGe) was established to “foster collaboration among federal agencies and with national organizations to equip federal defendants/offenders with the necessary skills and resources to succeed upon release.”<sup>84</sup> The organization’s primary goal is to ensure that offenders, and those assisting in their transition, know what best practices, alternatives, and assistance are available to returning offender.<sup>85</sup> The Federal Interagency Resource Council and Reentry Group (FIRC) was created to coordinate reentry efforts across the federal government.<sup>86</sup> FIRC seeks to recognize that “[r]eentry provides a major opportunity to reduce recidivism, save taxpayer dollars, and make . . . communities safer.”<sup>87</sup> “A chief focus of the Reentry Council is to remove federal barriers to successful reentry, so that motivated individuals . . . are able to compete for a job” among other things.<sup>88</sup>

The Second Chance Act of 2007 focused in particular on the

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81. *See, e.g., id.*

82. Donald E. Hargrove, *Offender Workforce Development Program*, OFF. FED. PUB. DEFENDER E. N.C., <http://nce.fd.org/offender%20workforce%20development%20presentation.pdf> (last visited Feb. 21, 2016).

83. DonaLee Breazzano, *Inmate Skills Development*, U.S. SENT’G COMM’N, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/Breazzano.pdf> (last visited Feb. 21, 2016) (containing slides presented at the Symposium on Alternatives to Incarceration) [hereinafter Breazzano Slides].

84. *Federal Offenders Reentry Group (FORGe)*, NAT’L INST. CORR., <http://nicic.gov/forge> (last visited Feb. 21, 2016).

85. *Id.*

86. FIRC coordinates the reentry efforts of 20 federal agencies, including assisting “those who return from prison and jail in becoming productive citizens.” *Federal Interagency Reentry Council*, COUNCIL ST. GOV’TS JUST. CTR., <https://csgjusticecenter.org/nrrc/projects/firc/> (last visited Feb. 21, 2016).

87. *Id.* (quoting Attorney General Eric Holder).

88. *Id.*

Departments of Labor and Justice.<sup>89</sup> For example, the Act directed the Attorney General and the Secretary of Labor to “implement programs to increase the hiring of prisoners, and to educate potential employers of the existing benefits for hiring former prisoners.”<sup>90</sup>

The Second Chance Act of 2007 created specific requirements for the Bureau of Prisons with respect to reentry.<sup>91</sup> The Act authorized a set-aside of \$10 million for the Bureau of Prisons’ efforts on inmate reentry.<sup>92</sup> Through the Act, Congress directed the Bureau of Prisons “to establish a comprehensive re-entry program” including incentives for participation.<sup>93</sup> As part of this effort, Congress directed the Department of Justice to conduct a thorough review of federal prisoner reentry.<sup>94</sup> The Act also amended 18 U.S.C. § 4042 to require the Bureau of Prisons to provide pre-release planning procedures to inmates to ensure eligibility for federal and state benefits.<sup>95</sup> The Act added three subsections to section 4042 requiring that pre-release planning focus on inmate familial relationships.<sup>96</sup>

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89. H.R. REP. NO. 110-140, at 19 (2007).

90. *Id.*

91. *Id.* at 11.

92. *Id.* The \$5 million authorized for each year would fund a new program that “would provide prisoners nearing the completion of their sentences with information about health and nutrition, finding employment, money management, social skills, and the availability of government resources.” *Id.* at 13.

93. *Id.* at 18.

94. *Id.* at 14.

95. 18 U.S.C. § 4042 (2012). Specifically, section 4042 was amended to require the Bureau of Prisons to include in its pre-release planning for inmate eligibility for programs “including benefits under the old-age, survivors, and disability insurance program under title II of the Social Security Act, the supplemental security income program under title XVI of such Act, the Medicare program under title XVIII of such Act, the Medicaid program under title XIX of such Act, and a program of the Department of Veterans Affairs under title 38.” H.R. REP. NO. 110-140, at 47-48.

96. See 18 U.S.C. § 4042(a)(6-8). Compare 18 U.S.C. § 4042 (a) (2006) (listing only (a)(1-5)). The Act also directed the Bureau of Prisons to assist inmates in obtaining documentation often needed for securing employment and housing including Social Security cards, drivers’ licenses, and birth certificates. H.R. REP. NO. 110-140, at 18.

*A. The Mission of the Federal Bureau of Prisons*

The stated mission of the Federal Bureau of Prisons “is to protect society by confining offenders in the controlled environment of prisons and community-based facilities. . . .”<sup>97</sup> “It is a strategic objective of the [Bureau of Prisons] to ‘provide productive work, education, occupational training, and recreational activities which prepare inmates for employment opportunities and a successful reintegration upon release. . . .’”<sup>98</sup> The Federal Bureau of Prisons remains committed to providing, among other things and when funds are available, “skills building programs we can afford, to offer inmates the opportunity to live crime-free lives.”<sup>99</sup> According to the Department of Justice, because virtually all federal offenders will reenter society at some point, the “[Bureau of Prisons] has a responsibility to offer program opportunities to inmates that provide the skills necessary for successful reentry into society.”<sup>100</sup> The Bureau of Prisons has numerous programs that assist an ex-offender throughout the incarceration process and into re-entry.<sup>101</sup>

*B. The National Reentry Affairs Branch and Federal Offenders*

The National Reentry Affairs Branch of the Federal Bureau of Prisons coordinates reentry and skills development initiatives for the inmate

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97. : OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS INMATE RELEASE AND TRANSITIONAL REENTRY PROGRAMS: AUDIT REPORT 04-16 1 (2004), <https://oig.justice.gov/reports/BOP/a0416/index.htm> [hereinafter BOP OIG 04-16 Report].

98. *Id.* at i; BOP House Appropriations Testimony, *supra* note 65, at 2.

99. *BOP Agency Pillars: Core Ideologies*, FED. BUREAU OF PRISONS, [http://www.bop.gov/about/agency/agency\\_pillars.jsp](http://www.bop.gov/about/agency/agency_pillars.jsp) (enter the link and then click on the tab named “Core Ideologies”) (last visited Feb. 21, 2016).

100. BOP OIG 04-16 Report, *supra* note 97, at i. The Bureau of Prisons employs a holistic approach to inmate incarceration similar to the three-pronged continuum used by SOVRI grantees. Services provided under the SOVRI continuum “[began] in prison, focus[ed] on re-entry preparation just prior to release and in the early months out of prison, and continu[ed] for a year or more” as ex-offenders integrated into their communities. *See* H.R. REP. NO. 110-140, at 3 (discussing the SOVRI program).

101. *Reentry Programs*, FED. BUREAU PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/reentry.jsp](https://www.bop.gov/inmates/custody_and_care/reentry.jsp) (last visited Feb. 20, 2016).

population.<sup>102</sup> According to the Bureau of Prisons, “apprenticeships and on-the-job training, available through occupational/vocational training . . . are proven contributors to work readiness and reduced recidivism.”<sup>103</sup> In 2010, “11,135 inmates were actively involved in [occupational training] programs, and inmates successfully completed 15,546 [occupational training] courses.”<sup>104</sup> As Bureau of Prisons representatives often state, its philosophy is that reentry begins on an offender’s first day of incarceration.<sup>105</sup>

Our agency has no control over the number of inmates who come into Federal custody, the length of their sentences, or the skills deficits they bring with them. We do have control, however, over the programs in which inmates can participate while they are incarcerated, and we can thereby affect how inmates leave our custody and return to their communities.<sup>106</sup>

### *C. Inmate Skills Initiative*

One significant component of the Bureau of Prison’s approach to an offender’s eventual reentry is the “inmate skills development initiative” (ISDI).<sup>107</sup> The ISDI “is a strategy the Bureau has undertaken to unify [its] inmate programs and services into a competency-based re-entry strategy.”<sup>108</sup> Its primary goal is “to enhance efforts to equip inmates with the necessary skills to succeed upon release to community.”<sup>109</sup> As a holistic

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102. 2010 BOP Annual Report, *supra* note 65, at 8.

103. *Id.* at 9-10.

104. *Id.* at 10. In addition to work training programs, the Bureau of Prisons is required to have a mandatory functional literacy program throughout the system for “mentally capable inmates who are not functionally literate.” 18 U.S.C. § 3624(f)(1) (2012). The term “functional literacy” is defined as an eighth grade equivalence (the average reading level for adults nationally) in reading and mathematics in a nationally recognized standardized test; functional competency or literacy on a nationally recognized criterion referenced test; or a combination of both. 18 U.S.C. § 3624(f)(3); Radice, *supra* note 37, at 766. English as a Second Language courses also are required. 18 U.S.C. § 3624(f)(4).

105. FEDERAL BUREAU OF PRISONS, THEN & NOW 2 (2015) (message from the Director), [https://www.bop.gov/resources/pdfs/BOP\\_ThenNow\\_2015\\_12.pdf](https://www.bop.gov/resources/pdfs/BOP_ThenNow_2015_12.pdf) (last visited Apr. 1, 2016).

106. BOP House Appropriations Testimony, *supra* note 65, at 6.

107. *Id.* at 11.

108. Breazzano Slides, *supra* note 83, at 1.

109. *Id.* at 2.

policy, as opposed to a specific program, ISDI is designed to assist the Bureau of Prisons in meeting its goals by reducing rates of prisoner misconduct, motivating participation in other programs, and demonstrating appropriate interaction with staff that yields an overall safer and more productive inmate environment.<sup>110</sup>

As part of the ISDI, an inmate's reentry skill sets are divided into and assessed in a number of major categories: academic, interpersonal, vocational/career, wellness, mental health, leisure, character, cognitive, and daily living.<sup>111</sup> Vocational skill sets evaluate an offender's employment history, career development, institution work history, and post-incarceration employment opportunities.<sup>112</sup> The evaluation starts at the beginning of an inmate's sentence and is "dynamically updated" throughout incarceration and shared with transition agencies.<sup>113</sup> Evaluations undertaken throughout an offender's term of imprisonment help target their individual occupational and educational needs.<sup>114</sup> These needs, if addressed meaningfully by administrators and the offender, can lead to a greater likelihood of successful reentry.<sup>115</sup> Some of the most important Bureau of Prisons educational and vocational programs are discussed below.

#### *D. BOP Vocational Training and Educational Requirements*

Numerous studies "support the hypothesis that inmate participation in occupational and educational programs leads to a reduction in recidivism and an increase in employment opportunities . . . ."<sup>116</sup> Bureau of Prisons

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110. *Id.*

111. *Id.* at 4-5.

112. *Id.* at 4.

113. Breazanno Slides, *supra* note 83, at 6. The entire process is computerized and an inmate's skills history and development are tracked through the Bureau of Prisons system. *Id.* at 7-9.

114. *See id.* at 7-9.

115. *See id.*

116. BOP OIG 04-16 Report, *supra* note 97, at 6 n.17 (citing Sarah Lawrence et al., *The Practice and Promise of Prison Programming*, THE URBAN INST. (May 30, 2002)). As the RExO May 2012 Report notes, employment alone does not guarantee that former prisoner will not recidivate. RExO May 2012 Report, *supra* note 19, at I-2. There is no definitive causal relationship between low employment and high recidivism, but "[l]egitimate employment may reduce the economic incentive to commit crimes, and also may connect ex-prisoners to social networks, role models, and daily routines." *Id.* at I-3. In fact, "[t]here are very few rigorous

policy requires that each of its institutions “provide occupational programs that allow interested inmates the opportunity to obtain marketable skills to enhance employment opportunities after release into the community.”<sup>117</sup> Each institution has its own program offerings,<sup>118</sup> but training programs are offered in the following occupational areas at least one federal institution: computer skills; business management; computer aided drafting; culinary skills; housekeeping; building management automotive and small engine repair; dentistry; horticulture and landscaping; barbering and cosmetology; small appliance repair; construction and carpentry; masonry; plumbing, electrical, and welding.<sup>119</sup> Occupational and vocational training programs are based on the needs of a specific institution’s inmate population, general labor market conditions, and institution labor force needs.<sup>120</sup>

### *E. Federal Prison Industries/UNICOR*

One of the Bureau of Prisons “most important reentry program[s]” is the Federal Prison Industries.<sup>121</sup> Federal Prison Industries (known by its brand name UNICOR) was created in 1934<sup>122</sup> with a “mission . . . to protect society and reduce crime by preparing inmates for successful reentry

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studies of employment-focused reentry models.” *Id.* Studies conducted in the 1970s and early 1980s—at the height of federal criminal justice reform initiatives—produced “generally discouraging results” and few employment-focused studies were conducted after. *Id.* That said, there remains a strong link between successful reentry and ex-offender employment. *See, e.g.,* Allan G. King & Rod M. Fliegel, *Conviction Records and Disparate Impact*, 26 ABA J. LAB. & EMP. L. 405, 405 (Spring 2011) (noting that “steady employment is a primary determinant of whether an ex-offender recidivates”) (citing Christopher Leggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000)).

117. BOP OIG 04-16 Report, *supra* note 97, at 5.

118. *Id.* at 9-10.

119. *Id.* at 9; *see also* BOP House Appropriations Testimony, *supra* note 65 (discussing inmate vocational programs).

120. BOP House Appropriations Testimony, *supra* note 65, at 10. All able-bodied prisoners in the federal system are expected to work in their assigned institution. BOP OIG 04-16 Report, *supra* note 97, at 10.

121. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, FEDERAL PRISON INDUSTRIES, INC. ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 1 (2012), *available at* <http://www.justice.gov/oig/reports/2012/a2013.pdf> [hereinafter FPI Audit Report].

122. Exec. Order No. 6917 (1934), *reprinted as amended in* 18 U.S.C. § 744 (1940).

through job training.”<sup>123</sup> Federal Prison Industries is “a self-sustaining federal government corporation [that] utilizes the funds generated by the sales of goods and services to fund . . . reentry program[s].”<sup>124</sup> Federal Prison Industries includes a number of industrial programs including: clothing and textiles; electronics; fleet management/vehicular components; graphics; industrial products; office furniture manufacturing; recycling activities; customer service and support.<sup>125</sup>

According to the Bureau of Prisons, participants in Federal Prison Industries programs are “24 percent less likely to return to a life of crime . . . .”<sup>126</sup> However, current economic conditions, budget cutbacks, and restricting legislation have significantly impacted Federal Prison Industries operations.<sup>127</sup> As a result, in fiscal year 2012, only 13,000 federal inmates participated in Federal Prison Industries activities.<sup>128</sup>

Finally, in addition to vocational training and special skills programs like Federal Prison Industries, Bureau of Prisons facilities maintain special “centers” for inmates to focus on employment opportunities upon release from incarceration.<sup>129</sup> The Employment Resource Centers (ERCs) “provide inmates planning for their release the opportunity and means to participate in job readiness activities.”<sup>130</sup> The ERCs allow inmates to access career and work-related materials in their facility, including “employment enhancement services.”<sup>131</sup> These ERCs contain information for inmates “to explore career options, prepare for job searches, write resumes and cover letters, and compile documentation required by prospective employers.”<sup>132</sup>

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123. FPI Audit Report, *supra* note 121, at 1.

124. *Id.*

125. BOP OIG 04-16 Report, *supra* note 97, at 10.

126. FPI Audit Report, *supra* note 121, at 1.

127. *Id.* at 1-2.

128. *Id.* at 1. This amounts to only eight percent of the federal prison population. See BOP House Appropriations Testimony, *supra* note 65, at 9. By comparison, in fiscal year 2002, Federal Prison Industries employed 21,778 federal inmates, or thirteen percent of the entire federal prison population. BOP OIG 04-16 Report, *supra* note 97, at 10.

129. 2010 BOP Annual Report, *supra* note 65, at 1.

130. UNICOR Employment Resource Center Guide, *available at* [http://www.unicor.gov/InmateTransition\\_EmploymentResourceCenterGuide.aspx](http://www.unicor.gov/InmateTransition_EmploymentResourceCenterGuide.aspx) (last visited Apr. 1, 2016).

131. *Id.*

132. 2010 BOP Annual Report, *supra* note 65, at 16.



They also provide training and guidance on interview techniques and preparing for open job fairs.<sup>133</sup>

Each ERC is created individually within an institution, and cooperation with outside resources is encouraged.<sup>134</sup> It also is recommended that ERCs maintain, at a minimum “a table, typewriter, a file cabinet, and some book shelves.”<sup>135</sup> Access to and use of computer labs is also recommended.<sup>136</sup> ERCs are instructed to have work-eligibility documents, such as I-9 forms,<sup>137</sup> available for inmates seeking employment upon reentry, and are encouraged to maintain employment opportunities and resources by geographic region.<sup>138</sup> ERCs set up “employment files” for inmates that include materials such as resumes, proof of citizenship, and acceptable picture identification.<sup>139</sup> Also included in the file are documents related to an inmate’s education including diplomas, vocational certificates, and “a transcript from each school attended, including one from the federal prison system.”<sup>140</sup>

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133. UNICOR Employment Resource Center Guide, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Id.*

137. I-9 forms, or Employee Eligibility Verification Forms, must be completed and retained by all employers for every employee hired, whether a United States Citizen or not, after November 6, 1986. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, INSTRUCTIONS FOR EMPLOYMENT ELIGIBILITY VERIFICATION (2013), *available at* <https://www.uscis.gov/sites/default/files/files/form/i-9.pdf>. The completion of I-9 forms by ex-offenders can be problematic. Documents used to verify identity included Social Security cards, drivers’ licenses, passports, and birth certificates that inmates often never had or have not had renewed during their incarceration. *Id.* at 1. As such, part of an inmate’s preparation for reentering society has to include obtaining necessary documentation for employment eligibility. This is yet another hurdle, in addition to overcoming their criminal history that makes it difficult for offenders to be gainfully employed after release. *See, e.g.,* H. Holzer, S. Raphael & M. Stoll, *Employment Barriers Facing Ex-Offenders*, THE URBAN INST. REENTRY ROUNDTABLE DISCUSSION PAPER 16 (May 19-20, 2003), *available at* <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410855-Employment-Barriers-Facing-Ex-Offenders.PDF> (discussing the efforts of “intermediary agencies” in assisting ex-offenders trying to enter the labor market by gathering documentation such as social security cards).

138. UNICOR Employment Resource Center Guide, *supra* note 130.

139. *Id.*

140. *Id.*

Thus the path of a federal offender's successful re-entry is shaped throughout the term of imprisonment. Evaluations of educational, vocational, medical, and emotional needs are made throughout the term of imprisonment and modifications made whenever possible to further develop an offender's skill sets.<sup>141</sup> Yet despite the demonstrated benefits of such an approach, and particularly of vocational skills training in preventing recidivism, the nearly \$7 billion requested for the Bureau of Prisons fiscal year 2014 budget is designated for "maximizing" and "maintaining" current Bureau of Prisons programs, not expanding them.<sup>142</sup>

### *F. Bureau of Prisons Transition to Reentry*

In addition to changing the Bureau of Prisons' focus on reentry efforts systemically, the Second Chance Act of 2007 also changed the prerelease custody authority of the Bureau of Prisons.<sup>143</sup> As amended, the director of the Bureau of Prisons "shall, to the extent practicable, ensure that a [federal] prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community."<sup>144</sup>

In calendar year 2014, the Bureau of Prisons released "more than 40,000 American citizens" back into their communities.<sup>145</sup> Although the Bureau of Prisons recognizes that reentry should begin on the first day of incarceration, the major preparation for reentry begins about eighteen months prior to an inmate's release.<sup>146</sup> During this last year-and-a-half of a federal prisoner's term of incarceration, a recommendation is made within

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141. See, e.g., U.S. DEPARTMENT OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS (2014), [https://www.bop.gov/resources/pdfs/legal\\_guide.pdf](https://www.bop.gov/resources/pdfs/legal_guide.pdf) (last visited Apr. 21, 2016) (discussing BOP's mission and its obligations under various federal statutes to provide educational, medical, vocational, and emotional support and development to prisoners under its jurisdiction).

142. BOP House Appropriations Testimony, *supra* note 64, at 2.

143. Second Chance Act of 2007, Pub. L. No. 110-199 (2008).

144. 18 U.S.C. § 3624(c) (as amended by the Second Chance Act).

145. Colson Task Force report, *supra* note 13, at 50. The Task Force terminology is important as it refers only to citizens released from imprisonment; more individuals under detainers were released from federal custody and turned over to the Immigration and Customs Service for deportation.

146. BOP OIG 04-16 Report, *supra* note 98.

the Bureau of Prisons regarding an inmate's referral to a Residential Reentry Center (RRC) (also known as a halfway house).<sup>147</sup>

Whether and when to refer an offender to an RRC is based on an individualized assessment of the inmate under section 3624, title 18, United States Code.<sup>148</sup> The determination of whether an inmate should be referred to an RRC and for what length of time includes consideration of five factors set forth in 18 U.S.C. § 3621(b) (Placement of Imprisonment) that also are used when making an inmate's initial prison placement.<sup>149</sup> The factors include, (1) the resources of the facility being contemplated; (2) the nature and circumstances of the offense(s); (3) the history and characteristics of the offender; (4) any statement by the court that imposed the sentence concerning the purposes for which the sentence to imprisonment was determined to be warranted, or recommending any type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the United States Sentencing Commission.<sup>150</sup> According to the

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147. See, e.g., FEDERAL BUREAU OF PRISONS, COMPLETING THE TRANSITION, INMATE TRANSITION, [https://www.bop.gov/about/facilities/residential\\_reentry\\_management\\_centers.jsp](https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp) (last visited Apr. 8, 2016). BOP has modernized its website to provide more user-friendly access to information, including statutory authority and other material related to the operation of RRCs. See *id.*

148. This section was significantly amended by the Second Chance Act of 2007. Prior to passage of the Second Chance Act, the Bureau of Prisons could move an inmate to an RRC for up to six months of the end of the term of imprisonment. The Second Chance Act expanded the availability of RRC confinement for a period of up to twelve months. 18 U.S.C. § 3624(c). See H.R. REP. NO. 110-140 (2007). It is Bureau of Prisons policy, however, that an offender be placed in an RRC for longer than six months "only in extraordinary circumstances." Jerry Vroegh, *Focus on Reentry*, U.S. SENT'G COMM'N, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/Vroegh.pdf> (last visited Apr. 8, 2016) [hereafter Vroegh Slides]; see also David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 261-62 (2011) (discussing statutory changes made by the Second Chance Act and Bureau of Prisons policy memorandum adhering to six-month placements only and arguing that this is a disservice to reentry efforts).

149. 18 U.S.C. § 3621(b).

150. *Id.*; see also, *Completing the Transition*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/facilities/residential\\_reentry\\_management\\_centers.jsp](https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp) (last visited Apr. 1, 2016). The United States Sentencing Commission issues advisory federal sentencing guidelines for the federal courts to use when determining a sentence pursuant to 18 U.S.C. § 3553(a). See 28 U.S.C. §§ 991, *et seq.* (setting forth the duties of the United States Sentencing Commission).

Bureau of Prisons, placement into RRCs is prioritized to “focus resources on offenders most likely to succeed.”<sup>151</sup>

Once a recommendation is made within an inmate’s Bureau of Prisons facility, the recommendation is forwarded to the warden.<sup>152</sup> The warden then forwards the recommendation to the community corrections manager, usually located near where an inmate is scheduled to be released into the community.<sup>153</sup> The Community Corrections Manager reviews the recommendation and forwards it to the appropriate RRC.<sup>154</sup> Ultimately, the RRC manager has the ultimate determination on whether an inmate may receive a placement in the facility.<sup>155</sup>

As part of their preparation for reentry into the community, approximately eighty percent of federal offenders are transitioned into RRCs to serve “the last few months of their sentences.”<sup>156</sup> The RRCs provide inmates a “structured setting” in the community from which they can begin their reentry” into the community.<sup>157</sup> RRCs provide “a supervised

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151. Vroegh Slides, *supra* note 148, at 4.

152. *Completing the Transition*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/facilities/residential\\_reentry\\_management\\_centers.jsp](https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp) (last visited Apr. 1, 2016).

153. *Id.*

154. *Id.*

155. *Id.*

156. “For the 12 months ending in March 2015, 78 percent of US citizens leaving BOP facilities were transferred to an RRC or home confinement.” 2010 BOP Annual Report, *supra* note 65, at 16; Colson Task Force Report, *supra* note 13, at 52. *See also*, 18 U.S.C. § 3624, which governs the release of inmates in Bureau of Prisons custody. Prior to passage of the Second Chance Act of 2007, federal district courts could, and did, sentence offenders directly to community confinement. The Second Chance Act of 2007 amended 18 U.S.C. § 3651 “to prohibit Federal judges from sentencing defendants to a community correction facility, reiterating that determination of where a Federal defendant serves their prison term rests solely with the Bureau of Prisons.” H. Rep. 110-140, 110th Cong., 1st Sess., at 20 (May 9, 2007). This was particularly important because under the Second Chance Act of 2007, the Office of Probation and Pretrial Services and the Administrative Office of the U.S. Courts were given authority to contract out supervision services. *See* 18 U.S.C. § 3672.

157. 2010 BOP Annual Report, *supra* note 65, at 16. Although not the subject of this Article, it is important to note the difficulty faced by the Bureau of Prisons in even establishing RRCs in a community. Over the past decade, communities have resisted placement of “halfway houses” in their midst because of the perceived dangers associated with having convicted criminals living in the community while

environment” and support services like job placement and counseling that offenders need during their transition back into the community.<sup>158</sup> In fiscal year 2010, for example, the Bureau of Prisons “community corrections field offices processed more than 40,000 referrals for Residential Reentry Center placements from both the Bureau of Prisons and United States probation.”<sup>159</sup> In July 2015, there were 10,533 individuals in RRCs.<sup>160</sup>

Inmates who transition through RRCs are “more likely to be gainfully employed and, therefore, less likely to recidivate than those released directly into the community from prison.”<sup>161</sup> In calendar year 2006, for example, 24,981 inmates were placed in RRCs.<sup>162</sup> Ninety percent (n=22,401) of them successfully completed their RRC terms.<sup>163</sup> The majority of federal offenders who successfully complete the term of imprisonment, including any time assigned to an RRC, are then moved on to federal supervised release.<sup>164</sup>

Problems remain, however, because despite the reforms included in the Second Chance Act, there remains “no unified case management system involving the BOP, RRCs, and US Probation” offices.<sup>165</sup> There are more

completing their incarceration. *Id.* This has made it difficult for some federal offenders to make even partial reentry in their communities. *Id.*

158. *Id.*

159. *Id.*

160. Kathleen M. Kenney, *Presentation at the U.S. Sentencing Commission’s Annual National Seminar on the Federal Sentencing Guidelines*, FED. BUREAU OF PRISONS, [http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/BOP\\_slides.pdf](http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2015/BOP_slides.pdf) (last visited Apr. 1, 2016). Another 4,135 inmates were on home confinement. *Id.* Pursuant to 18 U.S.C. § 3624(c), home confinement is limited to no more than ten percent or six months of a prisoner’s remaining sentence. 18 U.S.C. § 3624(c).

161. 2010 BOP Annual Report, *supra* note 65, at 16. The LCEF determined that on average, only about thirty percent of ex-offenders nationally are employed within two months of release. 2013 LCEF Report, *supra* note 16, at 14. This percentage is higher for federal inmates because of the role of supervised release. *See, e.g., Reentry Trends in the U.S.*, BUREAU JUST. STAT., <http://www.bjs.gov/content/reentry/fedtrend.cfm> (last visited Feb. 22, 2016).

162. Vroegh Slides, *supra* note 148, at 2.

163. *Id.*

164. *See, e.g., U.S. SENT’G COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1 (2010)*, available at [http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2\\_Federal\\_Offenders\\_Sentenced\\_to\\_Supervised\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf) [hereinafter USSC Supervised Release Rep.].

165. Colson Task Force Report, *supra* note 13, at 51.

than 200 RRCs nationwide and 122 federal prisons (in 94 judicial districts) each of which operates with a different approach to reentry.<sup>166</sup> Moreover, to “maximize their effectiveness, [RRCs] should . . . tailor conditions of supervision to individual needs and balance surveillance with treatment and services. These principles are not common in the operation of all federal [RRCs currently].”<sup>167</sup> Thus it is essential that formerly incarcerated individuals receive as much opportunity outside of the Bureau of Prisons system to successfully reenter their communities.

### *G. Federal Supervised Release*

In the federal system, there is no “parole.”<sup>168</sup> Instead, Congress “established supervised release,” a “‘unique’ type of post-confinement monitoring that is overseen by federal district courts with the assistance of federal probation officers,”<sup>169</sup> as part of its massive overhaul of the federal criminal justice system and sentencing policies of the Sentencing Reform Act of 1984.<sup>170</sup> The goal of supervision in the federal system “is the successful completion of the period of supervision during which the offender commits no new crimes; is held accountable for the victim, family, and community, and other court-imposed responsibilities; and prepares for continued success through improvements in conduct and condition.”<sup>171</sup> Offenders remain on “supervised release” after leaving the custody of the federal Bureau of Prisons and reentering society.<sup>172</sup> The Office of Pretrial and Probation Services of the Administrative Office of the United States

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166. *Id.*

167. *Id.* at 52.

168. Congress eliminated federal parole in 1984 as part of its overhaul of the federal criminal justice system. USSC Supervised Release Rep, *supra* note 164, at 1.

169. *Id.* (citing *Gozlon-Perez v. U.S.*, 498 U.S. 395, 407 (1991)) (discussing creation of supervised release for all Schedule I and Schedule II federal drug offenses); *see also* Office of Probation & Pretrial Services, *Mission*, U.S. CTS., <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> (last visited Feb. 22, 2016) (setting forth the goals and role of probation officers in the supervised release process).

170. Pub. L. No. 98-473.

171. *See, e.g., Guide to Judiciary Policy*, OFFICE OF PROBATION & PRETRIAL SERVS. 1, 4 (2010), [https://wvn.fd.org/pdf/Part\\_E%20109.pdf](https://wvn.fd.org/pdf/Part_E%20109.pdf) (discussing in Section 150 the overall goals of supervision).

172. USSC Supervised Release Rep., *supra* note 164, at 1.

Courts, in conjunction with the federal district courts, “provides community supervision for offenders convicted of federal crimes and conditionally released to the community.”<sup>173</sup>

At the time of the imposition of a sentence for a federal crime, the sentencing court *may*, and in many instances *must*, impose a term of supervised release after an offender’s release from federal imprisonment.<sup>174</sup> A sentencing court’s determination of whether and to what extent to impose a term of supervised release is based preliminarily on the seriousness of the offense committed.<sup>175</sup> When determining the appropriateness of supervised release, courts are instructed to look at the purposes of sentencing set forth in 18 U.S.C. § 3553(a).<sup>176</sup>

Courts are required to impose certain conditions on offenders if a term of supervised release is imposed, including that the offender will—

\*commit no further Federal, state or local offenses;<sup>177</sup>

\*not unlawfully possess or use controlled substances;<sup>178</sup>

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173. William Rhodes et al., *Recidivism of Offenders on Federal Community Supervision*, ABT ASSOCIATES (Dec. 21, 2012), <https://www.ncjrs.gov/pdffiles1/bjs/grants/241018.pdf> [hereinafter ABT 2012 Recidivism Study]. Federal community supervision “refers to the post-conviction period during which an offender is actively supported by a federal community corrections officer.” *Id.*; see also USSC Supervised Release Rep., *supra* note 164, at 1.

174. 18 U.S.C. §§ 3583(a)–3583(b).

175. 18 U.S.C. § 3583(b). Subsection 3583(b) provides terms of supervised release based on the “grade” of the offense as set forth in 18 U.S.C. § 3559(a). Although established by Congress during its criminal justice overhaul, the classification system is not widely used in the federal criminal justice system. USSC Supervised Release Rep., *supra* note 164. Thus, the federal courts generally look directly to statutory directives and the general nature of the offense to determine whether to impose supervised release. See *Id.* at 4-5. Moreover, the now-advisory federal sentencing guidelines direct that courts “shall order a term of supervised release to follow imprisonment[...]when a sentence of more than a year is imposed.” U.S.S.G. § 5D1.1; see also USSC Supervised Release Rep., *supra* note 164, at 52 (discussing requirements imposed on courts by federal sentencing guidelines).

176. 18 U.S.C. § 3583(c) (directing courts to examine the purposes of sentencing set forth in 18 U.S.C. §§ 3553(a)(1)-3553(a)(2), 3553(a)(4)-3553(a)(7)).

177. 18 U.S.C. § 3583(e).

178. This condition of supervised release is accompanied with submission to drug tests fifteen days after release, and at least two other drug tests throughout the term of supervised release. *Id.*; see also *Form Number: AO 245B*, ADMIN. OFFICE U.S.

\*pay restitution or a fine as such has been imposed at the time of sentencing.<sup>179</sup>

The court may also adopt other conditions of supervised release so long as they comport with the purposes of sentencing; involve “no greater deprivation of liberty than is reasonably necessary” to accomplish the purposes of sentencing; and are consistent with any policy statements issued by the United States Sentencing Commission.<sup>180</sup> Courts may modify conditions of supervised release throughout an offender’s term, and courts may revoke a term of supervised release if conditions or terms are broken.<sup>181</sup>

Included in the standard conditions of supervised release are the requirements that “the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons,” and “the defendant shall notify the probation officer at least ten days prior to any change in residence or employment.”<sup>182</sup> The federal courts use employment to ensure that “people will succeed on supervision because they’re gainfully employed” and, therefore, it becomes “less likely that they’ll resort to crime to support themselves.”<sup>183</sup>

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CTS. (Feb. 1, 2016), <http://www.uscourts.gov/forms/criminal-judgment-forms/judgment-criminal-case> [hereinafter *Form Number: AO 245B*]. The AO Form 245B is part of the judgment and commitment that accompanies every federal sentence imposed by district courts.

179. 18 U.S.C. § 3583(e).

180. *Id.* § 3583(e)(1-3); *see also Form Number: AO 245B, supra* note 178 (setting forth thirteen distinct conditions of supervision). In addition to the statutory and standard conditions of supervised release set forth in the Judgment and Commitment order, “[m]any federal districts use their own customized forms listing mandatory and standard conditions of supervised release.” USSC Supervised Release Rep., *supra* note 164, at 27.

181. 18 U.S.C. §§ 3583(e), 3583(g); *see also* USSC Supervised Release Rep., *supra* note 164, at 34-41 (discussing generally modification and revocation of supervised release).

182. *Former Number: AO 245B, supra* note 178, offenders are released into the community from which they were sentenced, federal offenders “shall not leave the judicial district without the permission of the court or probation officer.” *Id.*

183. C.T. Lowenkamp, et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, PSYCHOL. SERV. (Nov. 12, 2012), <http://www.ncbi.nlm.nih.gov/pubmed/23148771>. This study was conducted for the Office of Probation and Pretrial Services to assist it in creating a risk assessment model to use for categorizing the level of supervision required by offenders noted



Between fiscal years 2005 and 2009, according to data from the United States Sentencing Commission, courts imposed terms of supervised release on 297,959 federal offenders.<sup>184</sup> The average term of supervised release served by an offender during this time was forty-one months.<sup>185</sup> At the end of fiscal year 2014, "132,858 people were under [federal] post-conviction supervision."<sup>186</sup> In fiscal year 2014, the average cost of post-conviction supervision was \$3,909.00 per offender.<sup>187</sup>

#### H. Recidivism and Federal Offenders

Prisons affect recidivism by helping inmates acquire the skills needed to live crime-free lives after their release to society.<sup>188</sup>

To further provide context to the unique circumstances faced by federal ex-offenders seeking successful reentry, it is important to examine their rates of recidivism. As explained below, although many factors play a role in whether an ex-offender will recidivate, gainful, secure, and permanent employment has been shown to have a positive impact on an offender's

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the statistical significance of unemployment with an offender's likelihood to recidivate.

184. USSC Supervised Release Rep., *supra* note 164, at 49-50 n.232. In the twelve-month period ending December 31, 2012, the Office of Probation and Pretrial Services had a total of 131,714 offenders under supervision. *Federal Probation System, Persons Received for and Removed from Post-Conviction Supervision—During the 12-Month Period Ending December 31, 2012*, ADMIN. OFFICE U.S. CTS. (Dec. 2012), <http://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2012/12/31>. These numbers are slightly different than those maintained by the Office of Probation and Pretrial Services. ABT 2012 Recidivism Study, *supra* note 173, at 1. Between October 1, 2004, and September 30, 2010, according to its report, 245,362 offenders started a term of federal community supervision. *Id.* In the ABT 2012 Recidivism Study, 56,631 offenders were serving terms of probation, which is different than a traditional term of supervised release as probation is in lieu of an incarcerative sentence, whereas supervised release is not. *Id.* at 2. The remaining approximately 200,000 offenders in the study were on supervised release. *Id.* at 1.

185. USSC Supervised Release Rep., *supra* note 164, at 55, Table 1.

186. Colson Task Force Report, *supra* note 13, at 55 (citing Bureau of Prisons correspondence with the Task Force, 2016).

187. *Did You Know? Imprisonment Costs 8 Times More than Supervision*, ADMIN. OFFICE U.S. CTS. JUDICIARY NEWS (July 18, 2015), <http://www.uscourts.gov/news/2015/06/18/did-you-know-imprisonment-costs-8-times-more-supervision>.

188. 2010 BOP Annual Report, *supra* note 65, at 9.

likelihood to remain out of prison.

Recidivism in its simplest form is defined as “a tendency to relapse into a previous condition or mode of behavior; *especially* . . . relapse into criminal behavior.”<sup>189</sup> Depending on the nature of the study being conducted, criminal conduct after conviction and release that is counted as a recidivism event may vary.<sup>190</sup> It is also important to remember that recidivism studies are always looking at past populations of offenders to predict what the current population of offenders likely will do. It therefore is never a precise prediction of what might occur, even for an individual offender, because of the ever-changing nature of a prison population.<sup>191</sup> To understand the importance of a program such as a federal certificate of rehabilitation to the ability of an ex-offender to stay out of prison, it is necessary to understand basic recidivism, particularly at the federal level. A review of the recidivism rates of federal offenders demonstrates the importance of employment to an ex-offender’s chance at successful reintegration.

The Department of Justice estimates that every 1,000 releases of inmates back into society “result in 283 new crimes with victimization costs of over \$5 million and criminal justice costs of more than \$340,000.”<sup>192</sup> The

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189. *Recidivism*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/recidivism> (last visited Jan. 19, 2016).

190. See Patrick A. Langan, Ph.D. & David J. Levin, Ph.D., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf> [hereinafter 1994 Recidivists Rep.].

191. *Id.*

192. *Id.*; *Prisoner Re-entry: Issues and Answers*, CTR. FOR FAITH-BASED & COMMUNITY INITIATIVES, [https://www.doleta.gov/PRI/PDF/Prisoner\\_Reentry\\_Issues\\_Questions.pdf](https://www.doleta.gov/PRI/PDF/Prisoner_Reentry_Issues_Questions.pdf) (last visited Mar. 21, 2016) [hereinafter Ready4Work Issues & Answers]. The Ready4Work Initiative was created in 2003 as a three-year, \$25 million grant program for re-entry demonstrations through faith-based community organizations. Scott Shortenhaus, *Symposium on Alternatives to Incarceration Before the United States Sentencing Commission*, DEP’T OF LABOR (Jul. 2008), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/Shortenhaus.pdf> [hereinafter Shortenhaus Slides]. Jointly funded by the Departments of Justice and Labor, and P/PV, it ran eleven adult sites from 2003-2006 in Memphis, New York, Jacksonville, Houston, Milwaukee, Detroit, Oakland, Los Angeles, Philadelphia, and Washington, D.C. *Id.* By the end of the program, 4,482 offenders had been served by the program, and 2,543 (57 percent) had been employed. *Id.* at 4. And sixty-three percent retained a job for three consecutive months. *Id.* Although

Department of Justice further estimates that “recidivists commit, on average, at least two additional crimes before they are re-arrested, re-sentenced, and re-incarcerated.”<sup>193</sup> On average, offender recidivism can cost upwards of \$35,000 per recidivist.<sup>194</sup>

Unemployed ex-offenders are estimated to be three times more likely to return to prison than an employed offender.<sup>195</sup> The employment potential for ex-offenders is further hindered by the fact that most offenders (both federal and state) are released back into urban communities.<sup>196</sup> For those areas with large concentrations of federal offenders under supervision, or states closely bordered by other states, offenders often are re-arrested in other states than those in which they were released.<sup>197</sup> This puts increased pressure on those within the federal criminal justice community, such as probation officers, urban leadership, and faith-based community organizations, who assist with offender reentry to find viable employment for reentering offenders.<sup>198</sup>

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employment of any offender is positive, these numbers demonstrate how few offenders are served through such programs.

193. 1994 Recidivists Rep., *supra* note 190, at n.59.

194. *Id.*

195. Ready4Work Issues & Answers, *supra* note 192.

196. *See id.* Pursuant to 18 U.S.C. § 3624(d), BOP is authorized to provide a federal ex-offender with “suitable clothing,” an amount of money not to exceed \$500, and “transportation to the place of the offender’s conviction, to the prisoner’s bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.” 18 U.S.C. § 3624(d). *See also* Ian F. Haney, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1057 (2010) (discussing the return of ex-offenders to poor communities); Danny K. Davis, *America Should Believe in a Second Chance*, CONGRESSMAN DANNY K. DAVIS <https://davis.house.gov/second-chance-act/> (last visited June 11, 2016) (explaining that “[w]hen the prison door swings open, an ex-offender may receive a bus ticket and spending money for a day or two. Many leave prison to return to the same environment which saw them offend in the first place”).

197. ABT 2012 Recidivism Study, *supra* note 173, at 8.

198. Ready4Work Issues & Answers, *supra* note 192. Urban faith leaders have identified the problem of reducing recidivism as the most important issue facing urban communities. *Id.* This is particularly true as one recidivism study suggests “when other risk and protective factors are taken into account, the neighborhood where an individual returns for supervision is an important factor in the success of [their] supervision.” ABT 2012 Recidivism Study, *supra* note 173, at 18. “Offenders who return to neighborhoods that are seen as impoverished and transient have higher failure rates” for their reentry efforts. *Id.*

According to data from the Office of Probation and Pretrial Services, on average, about two-thirds of federal offenders successfully complete their terms of supervised release.<sup>199</sup> In calendar year 2010, for example, the Office of Probation and Pretrial Services closed 39,737 cases of offenders on supervised release.<sup>200</sup> Of those, 65.5 percent (n=26,039) closed without revocation.<sup>201</sup> The remaining 34.5 percent (n=13,698) ended in revocation.<sup>202</sup>

The Office of Probation and Pretrial Services classifies violations of the terms of supervised release into three types: “major violations” are for more serious criminal offenses (*e.g.*, drug trafficking, felon-in-possession); “minor violations” are less serious criminal offenses (*e.g.*, minor assault); and “technical violations” (*e.g.*, failed drug tests).<sup>203</sup> Of those who had their term of supervised release revoked in 2010, nearly twenty percent were revoked for a “technical violation.”<sup>204</sup> This is consistent for calendar years 2011 and 2012:

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199. See USSC Supervised Release Rep., *supra* note 164, at 61-62.

200. *Federal Probation System—Post-Conviction Supervision Cases Terminated With and Without Revocation, by Type—During the 12-Month Period Ending December 31, 2010*, ADMIN. OFF. U.S. CTS. (2011), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/E7ADec10.pdf> [hereinafter AOUSC 2010 E-7A Table].

201. *Id.*

202. *Id.*

203. See USSC Supervised Release Rep., *supra* note at 164, at 67 (explaining types of condition violations).

204. AOUSC 2010 E-7A Table, *supra* note 200.

2011 Statistics			2012 Statistics		
Offenders on Supervised Release		41,417	Offenders on Supervised Release		42,856
Successful Completion of Supervised Release		27,248 (65.8%)	Successful Completion of Supervised Release		28,202 (65.8%)
Revocation of Supervised Release		14,169 (34.2%)	Revocation of Supervised Release		14,654 (34.2%)
	Technical	8,042 (19.4%)		Technical	8,460 (19.7%)
	Minor	850 (2.1%)		Minor	858 (2.0%)
	Major	5,278 (12.0%)		Major	5,336 (12.5%)

Generally, offenders who do not successfully complete supervision because of violations of their conditions of supervised release, commit the violations “early in the supervision process.”<sup>205</sup> The Office of Probation and Pretrial Services has completed a comprehensive study of recidivism for those under federal supervision. The study found that 9.3 percent of the supervised release population included in the study recidivated for a major offense during the first year of supervision; 15.6 percent had done so by the second year; and 20.8 percent had recidivated by the third year.<sup>206</sup> According to the report, in 2014, 18.3 percent of those in the cohort had been “revoked.”<sup>207</sup> Similarly, according to one study of federal offenders, approximately thirty-eight percent of offenders studied recidivated within

205. USSC Supervised Release Rep., *supra* note 164, at 63 (noting that offenders barely make it to the halfway point of their terms of supervised release).

206. Laura M. Baber, *Inroads to Reducing Federal Recidivism*, 79 FED. PROBATION 3, 5 (Dec. 2015), available at <http://www.uscourts.gov/statistics-reports/publications/federal-probation-journal/federal-probation-journal-december-2015> (last visited Apr. 1, 2016).

207. *Id.*; see also Mitchell, *supra* note 148, at 237-38 (noting that without proper assistance, including employment assistance, up to two-thirds of offenders recidivate).

five years of commencing supervision.<sup>208</sup> Twenty-five percent were re-arrested and thirteen percent were revoked.<sup>209</sup> By comparison, approximately thirty-percent of offenders recidivate *while* on supervision.<sup>210</sup>

A report completed for the Department of Justice and the Administrative Office examined recidivism rates for these offenders.<sup>211</sup> At the time an offender enters federal community supervision, an estimated thirty-four percent are unemployed.<sup>212</sup> Fourteen percent of offenders have “skills or talents that could be used to improve [their] employment prospects and/or promote pro-social connections” necessary for successful reentry.<sup>213</sup>

Predicting recidivism is not without imprecision, although certain factors consistently weigh in favor of an offender’s likelihood to recidivate. One of these is offender unemployment.<sup>214</sup> “Unemployed offenders and offenders with basic needs (such [as] financial assistance, temporary housing, and/or transportation assistance) have higher re-arrest and revocation rates than their counterparts.”<sup>215</sup> Conversely, offenders with “marketable skills” (such as education, work skills, and/or life skills) are associated with “better outcomes” and lower recidivism rates.<sup>216</sup> Thus any program such as the one proposed in this Article that could capitalize on

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208. ABT 2012 Recidivism Study, *supra* note 173, at 8. For those offenders whose statutory convictions mandated imposition of supervised release, the U.S. Sentencing Commission found the average term was fifty-one months. USSC Supervised Release Rep., *supra* note 164, at 51. The average term of supervised release for those offenders without a mandate was thirty-five months during the time studied. *Id.* at 52.

209. ABT 2012 Recidivism Study, *supra* note 173, at 8.

210. *Id.* at 9.

211. *Id.* For purposes of this report, recidivism was defined as (1) a first arrest for a “serious crime”; (2) a revocation during the period of supervision; or (3) any failure (i.e., an arrest for a new crime or a revocation. *Id.* at iii. The study excluded “non-serious” events from the definition of recidivism such as: traffic violations, obstruction of justice, liquor law violations, public peace offenses, invasion of privacy offenses, and prostitution. *Id.* at 7. If a revocation resulted from the non-serious offense, however, the revocation was counted. *Id.* at 6.

212. *Id.* at 3.

213. *Id.*

214. *Id.* at 12-13.

215. *Id.* at 13. The House Report that accompanied the Second Chance Act of 2007 notes that between fifteen and twenty-seven percent of former offenders go to homeless shelters upon release from prison. H.R. Rep. No. 110-140 at 2.

216. ABT 2012 Recidivism Study, *supra* note 173, at 13.

skills federal offenders hone or obtain while incarcerated could significantly help prevent recidivism and ensure successful reentry. That was the very purpose of the Second Chance Act of 2007.

### *I. The Department of Labor and Other Federal Reentry Initiatives*

As mentioned above, the Second Chance Act of 2007 directed coordination among federal agencies on issues of prisoner reentry. The Department of Labor, in particular, has been actively involved in assisting ex-offenders with their reintegration into their communities.<sup>217</sup> The following are examples of programs available to assist ex-offenders and employers who hire them.

### *J. Reintegration of Ex-Offenders Initiative (RExO)*

The Re-integration of Ex-Offenders Initiative (RExO) launched in 2005 as a joint venture by the federal Departments of Labor and Justice.<sup>218</sup> The outline of the program was first mentioned in President George W. Bush's 2004 State of the Union Address.<sup>219</sup> The goal of the program was "to help America's prisoners by expanding job training and placement services, improving their ability to find transitional housing, and helping newly released prisoners get mentoring, including from faith-based groups."<sup>220</sup> Operated primarily by the Department of Labor, the program provided a series of pilot programs in twenty states and at thirty sites.<sup>221</sup>

Currently, the program assists communities heavily affected by the challenges associated with high numbers of ex-offenders seeking to reenter their communities following the completion of their sentences in mostly

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217. NOTICE OF AVAILABILITY OF FUNDS AND SOLICITATION FOR GRANT APPLICATIONS FOR REINTEGRATION OF EX-OFFENDERS—ADULT PROGRAM GRANTS, U.S. DEP'T OF LABOR EMP'T & TRAINING ADMIN. 1, 2 (2011), *available at* <https://www.doleta.gov/grants/pdf/sga-dfa-py-10-10-2011.pdf>.

218. 2012 RExO Report, *supra* note 19. The project was initially known as the Prisoner Reentry Initiative but changed its name under the Obama administration. *Id.* at 1. The RExO program currently operates in twenty-four urban areas throughout the country. *Id.* at II-4 (showing table of RExO program communities).

219. *President Bush Signs H.R. 1593, the Second Chance Act of 2007*, WHITEHOUSE.GOV (Apr. 9, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080409-2.html>. *See also* Shortenhaus Slides, *supra* note 192, at 6.

220. *Id.*

221. *Id.*

federal and state facilities.<sup>222</sup> RExO operates by funding employment-focused programs that include mentoring and capitalize on the strengths of faith-based and community organizations.<sup>223</sup>

Of all the types of assistance offered through RExO, employment services were the most utilized by offenders.<sup>224</sup> In its first two years, the program enrolled 12,900 former offenders in its reentry programs and 7,900 were placed in jobs.<sup>225</sup> Over eighty-six percent of offenders in the program in 2007-2008, for example, used the services.<sup>226</sup> In March 2008, 35,666 ex-offenders were participating in RExO programs.<sup>227</sup> During that time period, 8,082 initial job placements were made, with an initial hourly wage averaging \$9.41.<sup>228</sup> The average number of hours worked during the first six weeks of employment was thirty-six hours per week.<sup>229</sup> Sixty-six percent of those employed at the conclusion of their program participation retained their employment.<sup>230</sup> Average earnings for these offenders were \$10,447,<sup>231</sup> and the recidivism rate was fifteen percent, half the national average.<sup>232</sup>

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222. 2012 RExO Report, *supra* note 19, at ES-I, I-1.

223. *Id.* at I-1.

224. *Reintegration of Ex-Offenders (RExO) formerly known as Prisoner Reentry Resources*, U.S. DEP'T OF LABOR EMP'T & TRAINING ADMIN. 1, 8, [https://www.doleta.gov/PRI/PDF/Prisoner\\_Reentry\\_Resources.pdf](https://www.doleta.gov/PRI/PDF/Prisoner_Reentry_Resources.pdf) (last visited Mar. 16, 2016).

225. *Statement of President George W. Bush*, *supra* note 216.

226. Shortenhaus Slides, *supra* note 192, at 12.

227. *Id.*

228. *Id.* at 13.

229. *Id.* Typically a part-time worker is considered one who works thirty-five hours or less. *Part-Time Work*, INT'L LABOUR OFFICE (June 2004), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_170717.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_170717.pdf). The average for ex-offenders during 2008 indicates that ex-offenders were finding work that places them just above part-time status, on average. Shortenhaus Slides, *supra* note 192, at 13. The number of hours that ex-offenders may be working could drop in the foreseeable future if more employers restrict the number of hours worked in order to avoid healthcare coverage requirements under the Patient Protection and Affordable Healthcare Act of 2010, Pub. L. No 111-148, 124 Stat. 119 (2010).

230. Shortenhaus Slides, *supra* note 192, at 16.

231. *Id.* at 18.

232. *Id.* at 19.



*K. Federal Work Opportunity Tax Credit*

The federal government has a unique tax program to encourage employers to hire, among other target groups, ex-offenders. The Federal Work Opportunity Tax Credit is “available to employers for hiring individuals from certain target groups who have consistently faced significant barriers to employment.”<sup>233</sup> The Work Opportunity Tax Credit is not designed to create net job growth.<sup>234</sup> The idea behind the program is to increase the employment chances for those perpetually stuck in the program’s target groups.<sup>235</sup>

The program is a by-product of the 1996 Small Business Job Protection Act.<sup>236</sup> The credit is available to hire an “ex-felon” who “has been convicted of a felony; AND has a hiring date not more than 1 year after conviction or release from prison.”<sup>237</sup> The program was extended by Congress through December 31, 2013, as part of the American Taxpayer Relief Act of 2012,<sup>238</sup> and was extended again in December 2015, as part of the Protecting Americans from Tax Hikes Act of 2015.<sup>239</sup>

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233. *Work Opportunity Tax Credit*, U.S. DEP’T OF LAB. EMP’T & TRAINING ADMIN., <https://www.doleta.gov/business/incentives/opptax/> (last visited Jun. 7, 2016). Tax credits are awarded pursuant to 26 U.S.C. §§ 38 and 51.

234. Elizabeth Lower-Basch, *Rethinking Work Opportunity: From Tax Credits to Subsidized Job Placements*, BIG IDEAS FOR JOB CREATION 1 (2011), available at <http://www.clasp.org/admin/site/publications/files/Big-Ideas-for-Job-Creation-Rethinking-Work-Opportunity.pdf> (last visited Jun. 7, 2016).

235. *Id.* at 5.

236. Pub. L. No. 104-188, 110 Stat. 1755 (1996); Adele Burney, *Tax Breaks for Employers Who Hire Ex-Felons*, SMALL BUS. CHRON, <http://smallbusiness.chron.com/tax-breaks-employers-hire-felons-14421.html> (last visited Jun. 7, 2016).

237. *Work Opportunity Tax Credit: Eligible New Hires*, *supra* note 233. The 1996 Small Business Job Protection Act also required that the agency certifying an ex-offender determine that the ex-offender was “a member of a family which had an income during the 6 months immediately preceding the earlier of the month in which such income determination occurs or the month in which the hiring date occurs, which, on an annual basis, would be 70 percent or less of the Bureau of Labor Statistics lower living standard.” Pub. L. No. 104-188, §1201(d)(4), 110 Stat. 1755, 1769 (1996) (amending 26 U.S.C. § 51).

238. Pub. L. No. 112-240, 126 Stat. 2313 (2013). When authorization for the program ended for all targeted groups with the exception of veterans, state workforce agencies (that manage the program) continued to accept applications. *Id.* Section 309 retroactively reauthorized the program for ex-felons from December 31, 2011 (when authority for the program had expired) through the end of calendar year 2013. Currently, there are no bills in Congress that reauthorize the entire

Taxpayers annually claim approximately \$1 billion in tax credits under the Federal Work Opportunity Tax Credit program.<sup>240</sup> The amount of the tax credit given to employers depends on “the target group of the individual hired, the wages paid to that individual in the first year of employment, and the number of hours that individual worked.”<sup>241</sup> For example, a business that hires an ex-offender who works thirty-five hours per week for fifty weeks during the first year of employment could earn \$2,400 in tax credit for that individual.<sup>242</sup> The program is administered through state workforce agencies, and employers must be certified in order to participate in the program.<sup>243</sup>

#### *L. Federal Bonding Program*

The federal government also has created bonding programs to encourage employers to hire ex-offenders. The Department of Labor, for example, administers the Federal Bonding Program.<sup>244</sup> The program was created by the Department of Labor in 1966 “as an employer job-hire incentive that guaranteed the job honesty of at-risk job seekers.”<sup>245</sup> Reentering offenders most often are “not bondable under commercial [] dishonesty insurance policies” . . . thus an increasing number of persons seeking work are routinely denied jobs due to bonding being a barrier to

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Work Opportunity Tax Credit program, although there are bills that would reauthorize and expand tax credits for veterans groups. See Veteran Employment Transition Act, H.R. 2056, 113th Cong. (2013); Veterans Back to Work Act of 2013, H.R. 2133, 113th Cong. (2013); S.140, 113th Cong. (2013).

239. *Work Opportunity Tax Credit, Reauthorization Update*, *supra* note 233.

240. *Work Opportunity Tax Credit: Employers*, U.S. DEP’T OF LAB. EMP’T & TRAINING ADMIN., <https://www.doleta.gov/business/incentives/opptax/wotcEmployers.cfm> (last visited Jun. 7, 2016).

241. *Id.*

242. *Work Opportunity Tax Credit: WOTC Tax Credit Amounts*, U.S. DEP’T OF LAB. EMP’T & TRAINING ADMIN., <https://www.doleta.gov/business/incentives/opptax/benefits.cfm> (last visited Jun. 7, 2016). Basically, an employee who works 120 hours during the first year would allow the employer to take a tax credit of twenty-five percent of that employee’s salary. *Id.* If the employee worked 400 hours during the year, the tax credit is up to forty percent of the salary. *Id.*

243. *Id.*

244. *Program Background*, FED. BONDING PROGRAM, <http://www.bonds4jobs.com/program-background.html> (last visited Mar. 13, 2016).

245. *Id.*

their employment.<sup>246</sup> The Federal Bonding Program is available to employers free of charge.<sup>247</sup> Since its inception, the program has helped with 42,000 job placements of at-risk job seekers who were made immediately bondable.<sup>248</sup> Moreover, the program has had a nearly ninety-nine percent success rate.<sup>249</sup>

Similarly, UNICOR/Federal Prison Industries has a bonding program “for all federal prisoners who were released after February 1, 2006 and were employed by [Federal Prison Industries] at least six months, consecutively or cumulatively, during their incarceration.”<sup>250</sup> As with the Work Opportunity Tax Credit, former federal offenders are eligible to have their employer’s apply for the UNICOR bond only within the first year after their incarceration in a federal facility.<sup>251</sup> According to the program, “[e]ach former inmate is entitled to coverage for one job after completing their residence/program at a residential re-entry center.”<sup>252</sup> The program provides insurance coverage up to \$5,000.00 per ex-offender hired at no cost to the employer.<sup>253</sup> The bond purchased by UNICOR covers the employee for a period of six months.<sup>254</sup>

#### V. THE CURRENT ENVIRONMENT FACING REENTERING OFFENDERS

As the country continues to recover from the Great Recession,<sup>255</sup> the economic environment for ex-offenders remains tenuous. Moreover, while any participation and successful completion of occupational and educational

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246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *UNICOR Employment Resource Center Guide*, *supra* note 130.

251. *Employing Ex-Offenders*, FED. BUREAU OF PRISONS, [https://www.bop.gov/business/employing\\_exoffenders.jsp](https://www.bop.gov/business/employing_exoffenders.jsp) (last visited June 1,, 2016).

252. *Id.*

253. *UNICOR Employment Resource Center Guide*, *supra* note 130.

254. *Id.*

255. The Great Recession of 2008 resulted in significant financial crashes throughout the worldwide economy. A number of factors including mortgage manipulation, lack of government regulation in the financial industry, and general income inequality have all been listed as contributing factors to the recession. *See, e.g.*, RAGHURAM G. RAJAN, *FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY* (2011); Brian Domitrovic, *The Weak Dollar Caused the Great Recession*, FORBES (June 2, 2012), <http://www.forbes.com/sites/briandomitrovic/2012/03/13/the-weak-dollar-caused-the-great-recession/#7a33bb8d20c5>.

programs while incarcerated in the Bureau of Prisons marks success for a federal offender, the numbers presented by the Bureau of Prisons and other federal agencies represent a tiny fraction of the overall federal prison population. And although the Bureau of Prisons maintains awareness of labor market conditions,<sup>256</sup> many of its new or existing programs are not only in areas where the Department of Labor projects declines or slow growth, but also require some sort of state certification.<sup>257</sup> This section examines current economic indicators and suggests that the labor market for ex-offenders, and particularly federal ex-offenders, is likely to remain static if not shrink in the years ahead.

In his 2013 State of the Union address, President Obama acknowledged that the country has shed jobs consistently in the last decade, and called upon the nation to become a “magnet for new jobs and manufacturing.”<sup>258</sup> The problem for ex-offenders is that even if the country adds jobs more robustly,<sup>259</sup> research conducted by research scientists at the Massachusetts

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256. See discussion *supra* notes 116 through 120.

257. See 2010 BOP Annual Report, *supra* note 65, at 10. Areas touted in the annual report that the Department of Labor expects slow or no growth include: food service, animal handling, and welding. *Id.* Areas that will require a former inmate to obtain some form of occupational licensing include cosmetology, teacher’s aides, and personal training. *Id.*

258. *President Barack Obama 2013 State of the Union Address*, WHITEHOUSE.GOV (Feb. 12, 2013), <https://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>. Despite efforts to increase manufacturing in this country, it is a slow movement. As former Secretary of Labor Robert B. Reich notes, “American manufacturing is not ‘back,’ exactly. Rather, it’s undergone a transformation.” Robert B. Reich, *What America Needs Now*, PARADE MAG., Sept. 1, 2013, at 10.

259. In April 2016, the Bureau of Labor Statistics reported that nonfarm employment rose by 215,000 jobs in March 2016, “and the unemployment rate was little changed at 5.0 percent.” Bureau of Labor Statistics, Economic News Release, Employment Situation Summary, *available at* <http://www.bls.gov/ces/> (last visited June 2, 2016). In addition, the report noted that 1.7 million people were “marginally attached to the labor force,” meaning they wanted to work but had not searched for work in at least four weeks so were not counted in the unemployment statistics. *Id.* However, in April 2013, a private survey indicated that “U.S. companies added just 119,000 jobs in April, the fewest in seven months.” Christopher Rugaber, *Survey: Private Employers Add Just 119,000 Jobs in April*, ASSOCIATED PRESS (May 1, 2013), <http://www.seattletimes.com/business/survey-private-employers-add-just-119k-in-april/>. In areas most likely to

Institute for Technology, for example, suggests that “[t]he jobs that are going away aren’t coming back.”<sup>260</sup>

The jobs that have “disappeared” are primarily “middle-class” jobs, and their disappearance may further compress the labor market in lower strata occupations.<sup>261</sup> Of the 7.5 million jobs lost during the Great Recession, half of those were “middle-class” jobs that paid \$38,000-\$68,000.<sup>262</sup> However, only two percent of the 3.5 million jobs added since the summer of 2009 are in this bracket.<sup>263</sup> Seventy percent of the jobs added during that time were in low-pay industries.<sup>264</sup> Thus, those who had been working in typical “middle-class” positions, if they are going to find work at all, likely could be doing so in the lower occupational strata than they previously worked.<sup>265</sup> That, in turn, will further compress available opportunities for ex-offenders.<sup>266</sup>

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employ ex-offenders, the news was even starker. In April 2013, manufacturers *cut* 10,000 jobs while construction firms added only 15,000. *Id.* (emphasis added).

260. Bernard Condon & Paul Wiseman, *AP IMPACT: Recession, Tech Kill Middle-Class Jobs*, ASSOCIATED PRESS (Jan. 23, 2013) <http://news.yahoo.com/ap-impact-recession-tech-kill-middle-class-jobs-051306434--finance.html> (quoting Andrew McAfee of the Center for Digital Business at the Massachusetts Institute of Technology: “I have never seen a period where computers demonstrated as many skills and abilities as they have over the past seven years.”).

261. *Id.*

262. *Id.* According to the Bureau of Labor Statistics, these jobs typically would be those requiring at least some college education, although a degree would not be required. C. Brett Lockard & Michael Wolf, *Occupational Employment Projections to 2020*, BUREAU OF LAB. STAT. 90, <http://www.bls.gov/opub/mlr/2012/01/art5full.pdf> (last visited June 3, 2016). *See also*, Ann Norris, *Stuck in the Middle: Job Market Polarization*, Monthly Labor Review, *available at* <http://www.bls.gov/opub/mlr/2015/beyond-bls/stuck-in-the-middle-job-market-polarization.htm> (last visited June 3, 2016) (discussing recent study by the Brookings Institute that a large portion of middle class jobs have been lost and that the middle job market has become polarized).

263. Condon, *supra* note 260. In 2010, for example, thirty percent of occupations required a post-secondary degree, while sixty-nine percent required a high school degree or lower. Lockard & Wolf, *supra* note 262, at 85.

264. Condon, *supra* note 260.

265. Data suggests that these workers are increasingly dropping out of the labor market altogether. *See* Paul Wiseman & Jesse Washington, *Fed-up Americans Drop out of Job Hunt*, ASSOCIATED PRESS, Apr. 7, 2013 (quoting Heidi Sierholz, an economist at the Economic Policy Institute, “It’s the lack of job opportunities...that is keeping these workers from working or seeking work.”)

266. According to the Bureau of Labor Statistics, the trend for occupational growth also is not encouraging for ex-offenders. During the period 2010-2020,

According to analysis conducted by the Bureau of Labor Statistics, although job creation for those with a high school degree or lower will be the slowest during the period 2010-2020, it still will account for the greatest number of jobs created during that time.<sup>267</sup> Approximately 14 million new jobs could be created at that level, with the greatest number of jobs being retail sales, office clerks, and customer service representatives.<sup>268</sup> The Bureau of Labor Statistics projects that the number of construction jobs could grow in 2010-2020 timeframe but “this growth represents only a partial recovery of the jobs lost.”<sup>269</sup> The Bureau of Labor Statistics projects declining growth during this period in occupations such as electrical and electronic equipment assemblers, file clerks, food service managers, tool setters, and printing press operators.<sup>270</sup> Only a modest growth of zero to nine percent is projected for occupations such as furniture finishers, home appliance repairers, upholsterers, and welding, soldering, and brazing machine setters, operators, and tenders.<sup>271</sup> Loss of these jobs or a reduction in the availability of full-time employment in these employment categories will impact ex-offenders, and their reentry efforts.

Moreover, an analysis of the role of technology in the slow-growth in job creation suggests that those performing repetitive tasks are the most likely to see their jobs taken over by technology. President Obama even foreshadowed this conundrum in his 2013 State of the Union Address when he highlighted the growing role of three dimensional (3D) printing in

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overall expansion for all occupations is expected to be about 14.3 percent. Lockard & Wolf, *supra* note 260. BLS expects occupations that typically require a master’s degree for entry to grow the quickest at 19.1 percent. *Id.* Occupations that require a high school degree or its equivalent are expected to grow at 12.2 percent; and those requiring less than a high school degree at 14.1 percent. *Id.*; *See also* 2012 RExO Report, *supra* note 19, at II-6; Condon, *supra* note 257.

267. *See, e.g.*, C. Brett Lockard & Michael Wolf, Employment Outlook 2010-2020 Occupational Employment Projections to 2020 (Jan. 2012), <http://www.bls.gov/opub/mlr/2012/01/art5full.pdf> (discussing growth markets and areas in which labor likely will constrict through 2020).

268. *Id.*

269. *Id.* at 5.

270. *Occupation Finder*, BUREAU OF LAB. STAT., [http://www.bls.gov/ooh/occupation-finder.htm?pay=&education=High+school+diploma+or+equivalent\\*training=&newjobs=&growth=&submit=go](http://www.bls.gov/ooh/occupation-finder.htm?pay=&education=High+school+diploma+or+equivalent*training=&newjobs=&growth=&submit=go) (last visited Mar. 17, 2016).

271. *Id.* at n.14.

manufacturing and technology.<sup>272</sup> Thus while technology certainly is a boon to the general workforce, and advancements such as three dimensional printing will revolutionize manufacturing (as well as other areas), the fact remains that, ultimately, technology is streamlining the need for human performance out of the process.<sup>273</sup> As such, a former inmate already burdened with a criminal record, and likely little or no technological expertise, may have his or her job choices even more severely limited by the economic realities of the years to come.<sup>274</sup> Even if an ex-offender were

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“There are things we can do, right now, to accelerate this trend. Last year, we created our first manufacturing innovation institute in Youngstown, Ohio. A once-shuttered warehouse is now a state-of-the art lab where new workers are mastering the 3D printing that has the potential to revolutionize the way we make almost everything.”

*President Barack Obama 2013 State of the Union Address, supra* note 258. Three dimensional printing technologies vary but the basic technology involves building a three dimensional object with thinly sliced layers created by a printer depositing a thin stream of melted material to form each layer. *See What is 3D Printing? An Overview*, 3DPRINTER.NET, [www.3dprinter.net/reference/what-is-3d-printing](http://www.3dprinter.net/reference/what-is-3d-printing) (last visited Mar. 17, 2016). The applications of three-dimensional printing are rapidly expanding. *See id.* It has been used to create items such as dishwasher knobs, dimmer switches, batteries, and jewelry. Ann O’Leary, *Home 3-D Printers to Make Things You Need or Just Like*, N.Y. TIMES (June 19, 2013), [http://www.nytimes.com/2013/06/20/technology/personaltech/home-3-d-printers-to-make-things-you-need-or-just-like.html?\\_r=0](http://www.nytimes.com/2013/06/20/technology/personaltech/home-3-d-printers-to-make-things-you-need-or-just-like.html?_r=0).

273. For example, technological advancements have rendered certain jobs virtually extinct. These jobs include toll booth operators and utility meter readers. *See Condon, supra* note 260.

274. Lockard & Wolf, *supra* note 263. Another significant factor that could severely impact ex-offender employment opportunities are impending changes to healthcare under The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 119-124 Stat. 1025 (2010). According to a survey conducted by the U.S. Chamber of Commerce, seventy-one percent of small businesses surveyed said that the requirement that businesses employing fifty persons or more provide healthcare insurance to employees would be altering their hiring processes as a result. U.S. Chamber of Commerce, *Survey: Obamacare Grows More Unpopular with Small Businesses*, FREEENTERPRISE.COM (July 16, 2013), <http://www.freeenterprise.com/health-care/survey-obamacare-grows-more-unpopular-small-businesses> [hereinafter U.S. Chamber of Commerce Survey]. According to the survey, seventy-four percent of the small businesses that took part in the survey responded that they would cut full-time employees’ hours to

not saddled with criminal history, they face an uphill battle in a job market in which job seekers outnumber positions 2.7 to 1.<sup>275</sup> And as former Secretary of Labor Robert Reich noted, the manufacturing overhaul has “increased demand for higher-paid, skilled workers . . .”<sup>276</sup> “Our challenge now is to produce more workers who have . . . technical training.”<sup>277</sup>

The strain of an economy in recovery has become evident to those who work with ex-offenders. “The recent economic downturn placed additional pressures on ex-offenders.”<sup>278</sup> The “rise in unemployment stiffened the competition for [] jobs, which [many] felt were available to ex-offenders more easily.”<sup>279</sup> In a 2012 study of reentering offenders, those that did find employment, tended to do so in one of the following industries: construction, food service/hotel/hospitality, landscaping/lawn care, manufacturing, telemarketing, temporary employment, and warehousing.<sup>280</sup> Ex-offenders were more likely to obtain these types of jobs as they often “require few specialized job skills and relatively low levels of education.”<sup>281</sup>

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part-time to avoid the mandate, or would hire only part-time employees. *Id.* For purposes of the healthcare law, a part-time employee is one who works thirty hours or less. *See* Pub. L. No. 111-148. Twenty-four percent of the small businesses surveyed indicated that they would keep employment to under fifty people to avoid the mandate. U.S. Chamber of Commerce Survey, *supra*.

275. Jeanna Smialek, *Ex-convict Hurdle Draws U.S. Suits Against Employers*, BLOOMBERG NEWS (Jan. 30, 2014), *available at* <http://www.bloomberg.com/news/articles/2014-01-31/ex-convict-hire-hurdle-draws-u-s-suits-against-employers> (last visited Apr. 1, 2016).

276. Reich, *supra* note 258.

277. *Id.*

278. 2012 RExO Report, *supra* note 19, at ES-2.

279. *Id.* at II-5 (noting anecdotal reports from RExO participants about the lack of employment for offenders); *see also* Roberto Concepcion, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-employment Criminal Background Checks*, GEO. J. ON POVERTY L. & POL’Y, 231 (2012) (noting that current economic conditions have transformed the employment application process into “survival of the fittest”).

280. 2012 RExO Report, *supra* note 19, at II-8.

281. *Id.* at II-8. One “obvious” reason why these jobs—to the extent that they are, and remain, available for ex-offenders “is that relatively few other people are willing to pursue work in these industries because the jobs that are offered are low-paying, seasonal, and suffer from high turnover.” *Id.* at II-9.



Moreover, the study indicated that the employment search process took longer for ex-offenders than in past economies.<sup>282</sup>

Thus even with all of the training provided throughout their time in prison, and the efforts made by community, faith-based, and federal government advocates upon their release, federal offenders in particular are facing difficult economic circumstances likely to further impede their attempts at societal reintegration.

## VI. CERTIFICATES OF REHABILITATION

As evidenced in the previous sections, barriers to employment are significant for federal ex-offenders. Not only are few of them able to participate in true vocational skills programs while incarcerated (either because they choose not to participate, do not qualify, or, as is increasingly occurring, there is no funding for the programs), but many of them lack strong educational and social skills. The incredible catch-22 for a former inmate trying to reenter society is that employers do not hire offenders with criminal history because of concern for public safety, but doing so actually contributes to public safety issues because increased unemployment equates to greater likelihood for recidivism.<sup>283</sup>

A recent study of ex-offender employment, however, found there were four shared characteristics of employers who were more likely than not to hire ex-offenders.<sup>284</sup> The characteristics demonstrated singly or in some combination included: (1) lack of rigorous use of criminal background checks or lack of concern about ex-offender criminal history;<sup>285</sup> (2) ability

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282. *Id.* at II-6 (describing the RExO participants' timeline in securing employment). The economic environment and the difficulty in securing employment often means that ex-offenders are taking less desirable (low-wage, part-time, temporary) positions or being forced to seek more education or job training. *Id.*

283. *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks*, NAT'L EMP. L. PROJECT 2 (Mar. 2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf); *see also* 2013 LCEF Report, *supra* note 16.

284. 2012 RExO Report, *supra* note 19, at II-9.

285. As noted above, however, the use of criminal background checks has become prolific and the use of such monitoring likely will continue to increase, particularly if the number of people coming into contact with the criminal justice system continues to increase. *See 65 Million Need Not Apply*, *supra* note 284.

to relate to ex-offenders on a personal level; (3) proven positive experience hiring ex-offenders; (4) a small or locally-owned business.<sup>286</sup>

By contrast, employers identified as not hiring offenders have less distinct, observable characteristics.<sup>287</sup> “Many employers who do not hire ex-offenders (or rarely do so) do not have an explicit policy that bans hiring such employees—some may even profess a willingness to hire ex-offenders—but simply failed to hire members of this population as a matter of actual practice.”<sup>288</sup> These hiring or lack of hiring practices suggest that a certificate of rehabilitation program could increase employment opportunities for offenders because it would provide employers with a comfort level on the trustworthiness and dependability of the ex-offender and demonstrate that the ex-offender has, in fact, been rehabilitated as envisioned by the federal criminal justice system.

The next section provides a brief summary of the state certificate programs that are available to ex-offenders. What becomes clear is that 1) few states actually have true certificate of rehabilitation programs; 2) the process takes a significant period of time to complete; 3) applications are few as ex-offenders often are unaware the programs exist; 4) the numbers of applicants who successfully complete the process are few; and 5) the restrictions on who can obtain state certificates often preclude federal offenders, even if they are residents of the state, because of the nature of their criminal history (*e.g.*, repeat, felony offenders).

### *A. State Programs*

Virtually every state and the federal government have some sort of exception to at least some of the automatic barriers to employment that exist for ex-offenders.<sup>289</sup> These programs, however, tend to be under-utilized, overburdened, and result in time-consuming application processes that further delay an ex-offender’s opportunity to find meaningful employment

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286. 2012 RExO Report, *supra* note 19, at II-9-10. Unfortunately, small businesses are not hiring employees at significant rates. See U.S. Chamber of Commerce Survey, *supra* note 275, in which sixty-one percent of the small businesses surveyed said they were not hiring in the current economic climate.

287. 2012 RExO Report, *supra* note 19, at II-10-11. Another recent study noted that ninety percent of employers responding would not hire ex-offenders. 2012 EEOC Enforcement Guidance, *supra* note 12, at 6 n. 49.

288. 2012 RExO Report, *supra* note 19, at II-11; see also Shortenhaus Slides, *supra* note 192, at 4.

289. Love & Frazier, *supra* note 24, at 247.

in many occupational areas.<sup>290</sup> As noted in the introduction to this article, recent moves to “ban the box” and consider an individual’s skills and qualifications before considering their criminal past have gained momentum, even among private employers such as Target,<sup>291</sup> but they do not remove that history; only move its consideration further along in the process.

Moreover, only a handful of states—New York, Connecticut, Illinois, California, and New Jersey, administer the type of certificate program this Article envisions, and the success rates of those programs varies widely.<sup>292</sup> The following is a brief summary of the key state programs offering some type of rehabilitative program.

In New York, offenders have access to two types of certificates: a certificate of good conduct and a certificate from disabilities.<sup>293</sup> The certificates are administered either at the time of sentencing or by the parole board after release.<sup>294</sup> A certificate of relief from disabilities may be obtained for misdemeanors or a first-time felony. A certificate of good conduct may be obtained by repeat offenders.<sup>295</sup> The programs do not remove a conviction from an ex-offender’s record, but they do remove any automatic barrier to employment imposed by law simply because of the existence of a conviction. Moreover, the programs create a “presumption” of rehabilitation that employers and licensing boards must give effect, and they are judicially enforceable.<sup>296</sup> The process for obtaining a certificate can

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290. See, e.g., *Ohio Dept. of Rehab. & Correction Certificate of Qualification for Emp’t (CQE)*, OHIO.GOV <http://www.drc.ohio.gov/web/cqe.htm> (last visited Mar. 14, 2016).

291. See Jeanna Smialek, *Ex-convict Hurdle Draws U.S. Suits Against Employers*, BLOOMBERG NEWS (Jan. 30, 2014), available at <http://www.bloomberg.com/news/articles/2014-01-31/ex-convict-hire-hurdle-draws-u-s-suits-against-employers> (last visited Apr. 1, 2016); see also, Kathleen Baydala Joyner, *Lawyers Say Lawsuit Protection May Not Spur Hiring of Ex-Offenders*, DAILY REPORT (Feb. 7, 2014), available at [http://www.gjp.org/wp-content/uploads/Lawyers-Say-Lawsuit-Protection-May-Not-Spur-Hiring-of-Ex\\_Daily-Report\\_Feb.7.2014II.pdf](http://www.gjp.org/wp-content/uploads/Lawyers-Say-Lawsuit-Protection-May-Not-Spur-Hiring-of-Ex_Daily-Report_Feb.7.2014II.pdf) (discussing how employers still may not hire ex-offenders because they lack the requisite skills and training, not out of fear of hiring someone with a criminal history) (last visited Apr. 1, 2016).

292. Erin Kincaid & Alison Lawrence, *Ex-offender Employment Opportunities*, NAT’L CONF. OF ST. LEGISLATURES 2 (July 2011), <http://www.ncsl.org/documents/cj/pew/ex-offenderreport.pdf>.

293. See N.Y. Correct. Law § 700, *et seq.* (McKinney 2013).

294. *Id.*

295. *Id.* § 700.

296. *Id.* § 703-A.

take up to a year to complete and only about fifty percent of those applications handled by the New York Parole Board are granted.<sup>297</sup> Federal offenders may apply for a certificate in New York but they must be residents of the state, and demonstrate that they are suffering from a particular disability under New York law.<sup>298</sup>

Connecticut recently granted authority to its Board of Pardons and Paroles authority to grant a “certificate of employability,” a tool similar to that envisioned by this Article.<sup>299</sup> The certificate of employability does not expunge an ex-offender’s criminal record.<sup>300</sup> A certificate of employability “does not entitle such person to erasure of the record of the conviction of the offense or relieve such person from disclosing the existence of such conviction as may be required”<sup>301</sup> The process in Connecticut takes approximately one year,<sup>302</sup> and ex-offenders may apply after they have been in their communities for a minimum of 90 days.<sup>303</sup> Federal offenders are eligible to seek a provisional pardon so long as they are residents of the state.<sup>304</sup>

Illinois has a certificate program modeled on the New York system, but it is more limited. In Illinois, an ex-offender may seek a certificate of good conduct or certificate of relief from disabilities but only if the offender’s criminal history does “not include any offense or attempted offense that

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297. Love & Frazier, *supra* note 24, at 3.

298. *Id.*

299. *Id.*

300. *See Id.* § 54-130e (West 2016) (setting forth limitations of the certificates of rehabilitation); The Pardons Process: State of Connecticut Board of Pardons and Paroles, *available at* [http://www.ct.gov/bopp/lib/bopp/Pardons\\_Eligibility\\_Notice\\_9-1-15.pdf](http://www.ct.gov/bopp/lib/bopp/Pardons_Eligibility_Notice_9-1-15.pdf) (last visited Apr. 1, 2016).

301. Conn. Gen. Stat. § 54-130e (;); The Pardons Process: State of Connecticut Board of Pardons and Paroles, *available at* [http://www.ct.gov/bopp/lib/bopp/Pardons\\_Eligibility\\_Notice\\_9-1-15.pdf](http://www.ct.gov/bopp/lib/bopp/Pardons_Eligibility_Notice_9-1-15.pdf) (last visited Apr. 1, 2016).

302. *Id.*;

The Pardons Process: State of Connecticut Board of Pardons and Paroles, *available at* [http://www.ct.gov/bopp/lib/bopp/Pardons\\_Eligibility\\_Notice\\_9-1-15.pdf](http://www.ct.gov/bopp/lib/bopp/Pardons_Eligibility_Notice_9-1-15.pdf) (last visited Apr. 1, 2016).

303. The Pardons Process: State of Connecticut Board of Pardons and Paroles, *available at* [http://www.ct.gov/bopp/lib/bopp/Pardons\\_Eligibility\\_Notice\\_9-1-15.pdf](http://www.ct.gov/bopp/lib/bopp/Pardons_Eligibility_Notice_9-1-15.pdf) (last visited Apr. 1, 2016).

304. *See* Conn. Gen. Stat. § 54-130e (Provisional Pardons; Certificates of Rehabilitation).

would subject a person to registration under the Sex Offender Registration Act, the Arsonist Registration Act, or the Murderer and Violent Offender Against Youth Registration Act.”<sup>305</sup> Moreover, “‘eligible offender’ does not include a person who has been convicted of committing or attempting to commit a Class X felony, aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, aggravated domestic battery, or a forcible felony.”<sup>306</sup> A further limitation to the program is that the certificate of relief from disabilities creates a presumption of rehabilitation only with respect to twenty-seven enumerated occupational areas.<sup>307</sup> Federal offenders who meet the very strict requirements of the program could apply.<sup>308</sup>

California’s certificate of rehabilitation program is run through its judiciary. The certificate “may enhance a person’s potential for becoming licensed by state boards” and it serves as an official document to demonstrate an ex-offender’s rehabilitation, “which could enhance employment possibilities.”<sup>309</sup> The program does not remove the record of conviction,<sup>310</sup> and it does not permit the recipient to inform employers that no convictions exist.<sup>311</sup> An ex-offender does not become eligible to seek a certificate until five years after being released from imprisonment or parole.<sup>312</sup> Applicants are expected to “live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land.”<sup>313</sup> Federal offenders are not eligible to participate in the program.<sup>314</sup>

In New Jersey, the legislature concluded that it was “in the public interest to assist in the rehabilitation of convicted offenders by removing impediments and restrictions . . . .”<sup>315</sup>

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305. 730 Ill. Comp. Stat. 5/5-5.5-5 (West 2015, Current through P.A. 99-482 of the 2015 Reg. Sess.).

306. *Id.*

307. Love & Frazier, *supra* note 24, at 3.

308. *See id.*

309. *See* Cal. Penal Code § 4853 (West 2013); *Certificate of Rehabilitation and Pardon Packet*, SDCOURT.CA.GOV, <http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/FORMS/CRIMINALFORMS/PK T016.PDF> (last visited Mar. 21, 2016).

310. Cal. Penal Code § 4852.17 (West 2013)

311. *Certificate of Rehabilitation and Pardon Packet*, *supra* note 310.

312. Cal. Penal Code § 4852.03 (West 2013).

313. *Id.* § 4852.05.

314. *Certificate of Rehabilitation and Pardon Packet*, *supra* note 310.

315. New Jersey Rehabilitated Convicted Offenders Act, codified at N.J. Stat. Ann. §§ 2a:168A-1, et seq. (West 2013). The legislature also noted that it allowing

Offenders with two or fewer convictions may apply, and convictions more than ten years old are not considered.<sup>316</sup> However, there are certain limitations on the types of offenses that an ex-offender may have committed and still be eligible for the program.<sup>317</sup>

The certificate relieves employment barriers *except* those erected by the federal government, or for certain occupations such as lawyer or mortgage broker.<sup>318</sup> Certificates may be issued either by a court at the time of sentencing or an administrative body.<sup>319</sup> And an ex-offender must state with particularity the purpose of seeking the certificate; *i.e.*, the specific employment barrier the ex-offender wishes to overcome.<sup>320</sup> Unfortunately, as with many of the certificate of good conduct and rehabilitation programs currently available, the New Jersey State Parole Board indicates “it receives few applications pursuant to the Act.”<sup>321</sup>

Thus while states are trying to balance burgeoning ex-offender populations with tightened state budgets and dim employment prospects it is clear that much more needs to be accomplished with respect to ex-offender reentry. Rehabilitative efforts need to be more wide-spread, more uniform, and more accessible to ex-offenders. While having a waiting period to ensure that an ex-offender truly has committed to being a productive member of society, certificate of rehabilitation programs should not take a year or more to complete the review of an ex-offender’s application.

### *B. A Federal Certificate of Rehabilitation Program*

It is important that, as a matter of policy, policymakers “control expectations with regard to re-entry programming,”<sup>322</sup> however, any policy

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ex-offenders the ability to participate in educational and vocational training was essential. *Id.* Like New York, New Jersey addressed reentry issues in the 1960s and has worked to increase opportunities for ex-offenders residing in the state since then. *See Reentry: A Strategy for Safe Streets and Neighborhoods*, NJ.GOV 18, <http://www.nj.gov/oag/crimeplan/safe-reentry-plan.pdf> (last visited Mar. 21, 2016).

316. N.J. Stat. Ann. § 2a:168A-7(c)(2) (West 2013).

317. *Id.* § 2a:168-8.

318. *Id.* § 2a:168A-7(b).

319. *See id.* § 2a:168A-8.

320. *Id.*

321. *Reentry: A Strategy for Safe Streets and Neighborhoods*, *supra* note 316.

322. H.R. REP. NO. 110-140, at 3 (2007).

that encourages successful reentry of former offenders should be pursued.<sup>323</sup> The federal government should adopt fair hiring policies regulating federal employment and contracting that serve as a model for all employers.<sup>324</sup> “Policies designed simply to boost take-home earnings have only ‘limited impact’ on employment prospects for ex-offenders.”<sup>325</sup> Instead, federal and state governments could “institute policies that eliminate barriers faced by reentering offenders including: removing prohibitions in program participation, modifying and in some cases eliminating employment and licensing bans, providing regulatory guidance for employers’ assessment and screening of ex-inmates, and offering ex-prisoners incentives to avoid criminal activity.”<sup>326</sup> As Representative Danny K. Davis, Jr. noted during the deliberation on the Second Chance Act of 2007:

I am convinced that any serious effort to facilitate reentry of men and women with criminal records to civil society must be prepared to do two things. First, we must be prepared to help with drug treatment on demand for everyone who requests it. Second, we need to find work for ex-offenders. Programs won’t supply jobs. After ex-offenders have undergone rehabilitation and receive appropriate training, employers will have to open

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323. See Focus, *supra* note 32 (discussing benefits of encouraging successful reentry of former offenders); Schmitt & Warner, *supra* note 31 (discussing the need for governmental programs that support successful prisoner reentry).

324. Raphael, *supra* note 21, at 23; see also Concepcion, *supra* note 280; FEDERAL INTERAGENCY REENTRY COUNCIL, <http://csgjusticecenter.org/nrrc/projects/firc/> (last visited Mar. 7, 2016).

325. Raphael, *supra* note 21, at 25 (citing Steven Raphael, *Boosting the Earnings and Employment of Low Skilled Workers in the United States: Making Work Pay and Reducing Barriers to Social Mobility* (University of California, Berkeley, Working Paper, 2007)). As one of the federal system’s most well-known probation officers has noted, “[B]y far the number one fear that [federal ex-offenders] have is [finding] a job that they can make a living wage at.” OVERVIEW OF ALTERNATIVE SENTENCING OPTIONS IN THE STATE AND FEDERAL SYSTEMS 22 (2008), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/02\\_FINAL\\_Overview%20of%20Alternative%20SentencingOptions.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/02_FINAL_Overview%20of%20Alternative%20SentencingOptions.pdf) (documenting the remarks of Douglas Burris, Chief Probation Officer, Eastern District of Missouri). “Employment has been one thing that there’s been a real concentration on at the federal level, and the results have been absolutely amazing.” *Id.* at 23.

326. Raphael, *supra* note 21, at 25.

their hearts and put these men and women back in the workforce or they will surely end up back in prison.<sup>327</sup>

A certificate of rehabilitation program specifically for federal offenders would meet these criteria. A certificate of rehabilitation “generally encompasses an ‘official’ recognition that a criminal offender deserves to regain legal rights and status lost as a result of conviction, and has demonstrated reliability and good character over a period of time.”<sup>328</sup> The purpose of the certificate of rehabilitation program proposed in this Article is to demonstrate the latter so that ex-offenders have more opportunities in the labor force.

### *C. Why a Federal Certificate Program?*

In 1932, Justice Brandeis famously stated that: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>329</sup> However, throughout the 1970s in particular,

. . . everybody thought the states were the backwaters [of criminal justice policy] and that enlightenment came at the federal level. What the federal government was doing was taking the leadership in so many ways. And today the pendulum has swung. It’s very clear the states are indeed little laboratories, and that they are doing things the federal government can learn from.<sup>330</sup>

Given that a number of states have some form of certificate of rehabilitation program, and virtually every state and the federal government provide exceptions to statutory barriers to employment, a question may be

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327. Rep. Danny K. Davis, *America Should Believe in a Second Chance*, DAVIS.HOUSE.GOV <http://davis.house.gov/second-chance-act/> (last visited Mar. 21, 2016). It is estimated that over fifty percent of federal inmates used drugs regularly before being incarcerated, and up to seventy percent of state inmates had done so. H.R. REP. 110-140, at 2-3 (2007).

328. Love & Frazier, *supra* note 24, at 2 n.5.

329. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting).

330. OVERVIEW OF ALTERNATIVE SENTENCING OPTIONS IN THE STATE AND FEDERAL SYSTEMS, *supra* note 322, at 25.



why the federal government should take on such an exercise; should not the states retain the laboratory moniker in this situation? There are several answers that support the creation of such a program.

First, the federal corrections system is the largest correctional system in the country.<sup>331</sup> “The system for dealing with federal offenders has unique assets and challenges. . . . Once a promising or best practice has been identified, it can be tested in a variety of different settings and with different offender populations.”<sup>332</sup> Moreover, “[b]ecause the [federal corrections] system must be able to interface with fifty state services systems and thousands of local services systems, a practice that has been thoroughly tested in the federal system should be able to work, just about anywhere.”<sup>333</sup> A federal certificate program could address many of the logistical and substantive problems often associated with implementation of state certificate programs, and provide a model of reform for states. Thus, from a “state as laboratory” view, the creation of federal certificate of rehabilitation program would pose little risk to the rest of the country.

For example, in her article examining New York’s certificate of rehabilitation programs, Professor Radice noted four problems inherent in the system. First, the program lacks a clear burden of proof for establishing ex-offender rehabilitation.<sup>334</sup> Second, the program lacks any meaningful avenue for appeal -- an issue that the Equal Employment Opportunity Commission has noted is common in the area of ex-offender employment, particularly when an ex-offender job applicant disputes information in a criminal background check.<sup>335</sup> Third, the New York framework lacks a streamlined process that is simple enough for offenders to not only understand, but want to pursue. Fourth, there is a disconnect between the

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331. See, e.g., *Quick Facts*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/the-facts-with-sources> (last visited Mar. 22, 2016) (citing *Oversight of the Department of Justice: Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. On Appropriations* (2013) (statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf> (noting that nearly twenty-five percent of the Department of Justice’s annual budget is allocated to the Bureau of Prisons)).

332. *FORGe Mission*, NAT’L INST. OF CORRECTIONS, [http://static.nicic.gov/UserShared/2012-12-10\\_mission\\_of\\_forg\\_revisedfeb-12.pdf](http://static.nicic.gov/UserShared/2012-12-10_mission_of_forg_revisedfeb-12.pdf) (revised Oct. 26, 2012).

333. *Id.*

334. Radice, *supra* note 37, at 756.

335. *Id.*; EEOC Enforcement Guidance, *supra* note 12, at 5-7.

probation officers that are tasked with helping and overseeing ex-offenders, and the goals of the program.<sup>336</sup>

In New York State, the probation officers view their law enforcement efforts at odds at times with assisting ex-offenders in their rehabilitative efforts.<sup>337</sup> This is not the case in the federal system in which federal probation officers play an integral role in all phases of an individual's contact with the criminal justice system, including being heavily involved in efforts to ensure successful reentry.

A program for federal ex-offenders could be an extension of the current federal supervised release program. Because the federal judiciary, including its probation officers, are already heavily invested in an ex-offender's progression through the criminal justice system, they would be in the best position to determine if an offender truly has committed to rehabilitation. If they have not, then it is virtually impossible for an offender to successfully complete federal supervised release. Moreover, since the program could be made a follow-on to supervised release, there would already exist a mechanism for appeal of a court's decision not to grant the certificate of rehabilitation. Finally, as noted in Part III, *supra*, federal probation officers are extremely vested in the reentry efforts of federal ex-offenders. Thus a federal certificate of rehabilitation program likely would not encounter the same sort of resistance that Professor Radice notes in New York vis-à-vis the law enforcement duties or probation officers.

This program will not be successful, however, if the federal Probation and Pretrial Services division is not provided adequate resources to undertake its responsibilities. As noted in the 2016 Colson Task Force Report on Federal Corrections, "[many] of [its recommendations] will result in a shift of individuals from the BOP to supervision of US Probation. Without additional funding and staffing, that shift will drive up caseloads and possibly erode best practices."<sup>338</sup> The Colson Task Force recommends reinvestment funding and staffing priorities that could also include support for this program.<sup>339</sup>

Second, the federal government can learn from these programs, enhance their effectiveness, and promote their creation at the state level. As

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336. Radice, *supra* note 37, at 756.

337. *Id.*

338. Colson Task Force Report, *supra* note 13, at 55.

339. See *id.* at 76 (calling on Congress to reinvest savings from reduced prison capacity expenditures into US Probation for increased staffing, programs, and services).

noted above, most federal offenders will not qualify for existing state certificate of rehabilitation programs because of the nature of their offenses. Ensuring that a federal offender truly has been rehabilitated will encourage reluctant employers to hire from this particularly disadvantaged group. If more employers successfully hire federal ex-offenders than other employers likely will be encouraged to hire ex-offenders.

Third, state certificate of rehabilitation programs are administered in a hodge-podge manner with some being run by the courts, some by the parole and pardons board, and in some cases, both.<sup>340</sup> The federal certificate of rehabilitation program proposed in this Article would rest solely with the judiciary and it would be a proper exercise of judicial power to recognize an ex-offender's commitment to reentering society in a lawful manner.<sup>341</sup>

Under a federal certificate of rehabilitation rubric, a court would retain discretion to reject an applicant's request subject to a failure to meet articulated criteria, and an offender could appeal the decision. Such a system would properly shift the burden of disproving the ex-offender's rehabilitative efforts onto the government.<sup>342</sup> Such a program, therefore, creates a rebuttable presumption that the ex-offender has "paid" for the crimes committed and truly wishes to return to a lawful existence within the community.<sup>343</sup> Thus such a program remains consistent with the current federal system of supervised release. An ex-offender must successfully complete supervised release or risk returning to incarceration. The ex-offender already is being monitored by the courts via the Office of Probation and Pretrial Services,<sup>344</sup> thus the court could easily determine an ex-offender's progression towards rehabilitation. The uniqueness of the federal supervised release doctrine makes a certificate of rehabilitation model at the federal level perhaps even more workable than it is at the state level.

Fourth, even after the Supreme Court's landmark *Padilla v. Kentucky*<sup>345</sup> decision requiring counsel to advise clients of all collateral consequences associated with their conviction, notification of and protection for ex-offenders is piecemeal at best. As discussed previously in

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340. Love & Frazier, *supra* note 24, at 2 n.5.

341. *See, generally* Radice, *supra* note 37, at 756-65 (noting administrative issues with the New York program).

342. *See id.* at 757.

343. *See id.* at 770.

344. *See generally*, *Probation and Pre-trial Services- Supervision*, U.S. COURTS, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-supervision> (last visited Mar. 10, 2016).

345. 599 U.S. 356 (2010).

this Part, few offenders take advantage of the certificate programs available to them within states because they either are unaware of the program or are precluded from applying successfully because (1) they cannot meet residency requirements or (2) their criminal history or the nature of their offenses are not qualifying factors.

A federal certificate of rehabilitation program could solve these burdensome issues. First, because the Office of Probation and Pretrial Services already engages routinely with offenders transitioning from imprisonment to their communities, they could easily make federal ex-offenders aware of the availability of the certificate of rehabilitation program. Thus many more ex-offenders would be aware of their options than currently are. Second, the requirements of federal supervised release, including residency, regular contact with their probation officer, and employment help offenders create bonds to their community early in their reentry efforts.<sup>346</sup> Moreover, the average offender spends more than three years on supervised release.<sup>347</sup> Although they are not “off-paper”<sup>348</sup> as is required for most state certificate programs, they are fulfilling all the requirements that those programs require. Thus one way to further incentivize the successful completion of supervised release could be to make that time served count towards time computations for receipt of a certificate of rehabilitation.

Fifth, such a program could encourage employers to invest in the necessary technical training for the transformed manufacturing process in this country. “The vast assembly operations of the past have given way to high-tech precision manufacturing, producing sophisticated components like aircraft parts, medical devices, and lab-testing equipment.”<sup>349</sup> Secretary

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346. See *Probation and Pre-trial Services- Supervision*, *supra* note 345.

347. USSC SUPERVISED RELEASE REP., *supra* note 164, at 57 (noting that among all offenders studied, the average term of supervised release was 41 months).

348. “Off-paper” typically refers to an offender being released from any form of law enforcement oversight such as parole, probation, or supervised release. See, e.g., *Brigham City Police Department*, BRIGHAMCITY.UTAH.GOV, <http://brighamcity.utah.gov/police.htm> (last visited Mar. 14, 2016). State certificate of rehabilitation programs often require ex-offenders to have been without supervision from between three and five years before being eligible to apply for the program. See, e.g., *Certificate of Rehabilitation & Pardon Instruction Packet*, SUPER. COURT OF CAL. COUNTY OF SAN DIEGO, <http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/FORMS/CRIMINALFORMS/PKT016.PDF> (last visited Mar. 14, 2014).

349. Reich, *supra* note 258.

Reich advocates for programs that would provide vocational high-tech training for high school students similar to programs in Germany.<sup>350</sup> The “educational reconfiguration” could also be utilized for current offenders. And a certificate of rehabilitation would further assure employers in manufacturing that their investment in an ex-offender would not be misguided.

Sixth, such a program would be consistent with United States Equal Employment Opportunity Commission’s guidance to employers about hiring practices for ex-offenders. In its most recent enforcement guidance, the EEOC consolidated and updated its policies with respect to the use of arrest of conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.<sup>351</sup> Building on “long-standing court decisions and policy documents that were issued over twenty years ago,” the EEOC determined that more explicit guidance needed to be given to employers about the use of criminal records to screen for employment.<sup>352</sup> While recognizing that having a criminal record is not listed as protected basis under Title VII, its use can result in disparate treatment and disparate impact on ex-offenders, particularly those in minority groups.<sup>353</sup>

In the context of criminal background exclusions, courts have developed a factors test to determine whether such an exclusion is “job related and consistent with business necessity.”<sup>354</sup> These factors include (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct, and/or completion of the sentence; and (3) the nature of the job sought.<sup>355</sup> The mere fact that an ex-offender could

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350. *Id.* Secretary Reich notes that twelve million American students are expected to dropout of high school over the next decade so providing an “education reconfiguration could solve” the problems of lack of education and need for skilled manufacturers. *Id.*

351. *See* 2012 EEOC Enforcement Guidance, *supra* note 12.

352. *Id.* at 3.

353. *Id.* at 6.

354. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) (the “touchstone” is “business necessity” that “demonstrates a discriminatory employment practice must be shown to be necessary to safe and efficient job performance.”).

355. *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977); *see also* 2012 EEOC Enforcement Guidance, *supra* note 12, at 11-20 (discussing the factors and their consideration in the context of current criminal background use by employers). These factors are now referred to as the “*Green* factors.” *See* 2012 EEOC Enforcement Guidance, *supra* note 12.

potentially pose some risk is not necessarily sufficient to preclude them from across-the-board employment.<sup>356</sup>

A federal certificate of rehabilitation program could help employers assess the *Green* factors both when considering the use of criminal background exclusions in their general hiring practices, and with individual applicants seeking employment. First, a federal certificate granted after successful completion of federal supervised release would allow time to elapse between the offense and the possible employment. Second, certifying that an offender truly has rehabilitated could go a long way to assuring employers that there is little risk in hiring an ex-offender for that particular job, even if the nature of the job may pose hurdles for non-certified ex-offenders. Third, such a program could allow ex-offenders to overcome a business necessity of across-the-board employment exclusions based on employer fear of risk to co-workers or the public. In this sense, the certificate of rehabilitation could work in tandem with the currently available ex-offender bonding programs.

Finally, such a program should not raise preemption concerns in the states, as this program would merely supplement efforts already ongoing. States like California and Illinois that either prohibit federal offenders from applying or limit their eligibility do so for a variety of fiscal and policy reasons. By certifying a federal offender as rehabilitated, the federal government would simply be leveling the playing field in terms of access to employment. Moreover, such a program could overcome *federal barriers* to employment that still exist and which preclude former federal offenders from participating in New Jersey's rehabilitation program.

## VII. CONCLUSION

Despite reform efforts being undertaken across the country to minimize the number of individuals facing incarceration every year, the numbers of people with criminal history will not decrease significantly any time soon. With more and more ex-offenders trying to reenter society in tight economic environment, greater efforts must be undertaken to help these individuals succeed. Federal ex-offenders, in particular, often face

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356. See *El v. S.E. Penn. Trans. Auth.*, 479 F.3d 232, 235 (3d Cir. 2007) (finding that public transportation system's employment exclusion for all violent crimes, regardless of when the conviction occurred raised "reservations" with the court but ultimately the system was able to demonstrate the policy was consistent with business necessity).

significant hurdles to successful reentry because of the nature of their offenses and their lack of vocational and educational skills: any program that helps them find employment and stay out of the criminal justice system should be explored. A federal certificate of rehabilitation program would go a long way toward alleviating some these barriers, and would demonstrate that America is, indeed, the land of the second chance.