



HUMANIZING CRIMINAL RECORDS

Toward a View of the Whole Human Person

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Key Points

- Employment is a key factor in helping people with criminal records to turn their lives around. Yet the stigma of a criminal record makes it very difficult for these individuals to obtain employment.
- In order to break this vicious circle, some jurisdictions, especially in the US, have “banned the box” to prevent employers from asking job applicants about their criminal record early in the application process. The “box” refers to the checkbox on application forms asking the applicant to indicate whether they have a criminal record.
- The problem is that ban-the-box policies can have negative and unintended consequences: studies have shown that they can lead to lower employment rates for Black and Hispanic people, whether they have criminal records or not. Researchers hypothesize that when employers lack information about individuals’ criminal records, some default to assumptions about racial communities whose members are statistically more likely to have criminal records.
- The fundamental problem with criminal records is that they present only a partial picture of the person’s relationship with the criminal justice system. They list only arrests, convictions, and sentences, and they omit other information that would be useful to an employer making a hiring decision, such as the person’s behaviour while in prison or on parole, education and skills training obtained through the correctional system, and work placements and work releases.
- Governments should reform their criminal-record systems by giving people with criminal records the option of having this favourable information included directly in the results of their criminal record checks. This would not only provide a more accurate picture of the individual’s relationship with the criminal justice system, but also something closer to a view of the whole human person. By humanizing criminal records in this way, governments can offer employers a more complete picture of the person and help them to make a fairer assessment.

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Introduction

Criminal records—and how employers interpret them—have long been identified as a barrier to employment for those who carry them.¹ A criminal record can act as a stigmatic label that discourages an employer from hiring an individual who has one. Yet employment is an important part of curbing recidivism.² This presents a vicious circle for the nearly four million Canadians who have a criminal record:³ their criminal history makes it more difficult for them to find a job, but not having a job makes it more likely they will commit another crime.

As noted in this paper, it has become popular in some jurisdictions, especially in the United States, to deal with this problem by preventing employers from asking job applicants about criminal records, at least until the late stages of the job application process. These have become known as “ban-the-box” policies, so called because of the checkbox that applicants mark indicating that they have a criminal record. That said, this does not solve the root of the problem, which is that many employers still do not want to hire people with criminal records, and, in the absence of criminal-record information, try to find other ways to avoid hiring such employees, often with negative and unintended consequences.

The purpose of this paper is to propose a new structure for criminal records that would contribute to solving this problem by promoting a view of those who hold them not just as “ex-offenders” but as human beings with a complex relationship with the criminal justice system. The structure of this paper is as follows. First, it investigates the issue of criminal records and how employers interpret them. Through a survey of existing literature on this topic, it finds that employers tend to exaggerate the degree to which having a criminal record affects an employee’s ability to do a job. Second, it considers both the promise of and the potential problems with ban-the-box policies. The paper also examines some of the existing proposals for mitigating the issues associated with ban-the-box policies.⁴ Third and finally, it offers a new solution to the criminal-record debate and discusses some of the considerations in implementing the policy.

Ultimately, this paper’s contribution to this debate should not be reduced to a specific policy recommendation. While governments should pursue and implement this policy, it is important to understand that this policy is a particular instantiation of a general principle: that all actors in our economy should strive to see each other

¹ D. Pager, “The Mark of a Criminal Record,” *American Journal of Sociology* 108, no. 5 (2003): 937–75.

² R. Nauta, “Curbing Crime with Employment: Exploring Work as Crime Prevention for Canadians with Criminal Records,” Cardus, 2023, <https://www.cardus.ca/research/work-economics/reports/curbing-crime-with-employment/>.

³ Public Safety Canada, “Criminal Records,” Government of Canada, last modified March 18, 2020, <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/trnstn-bndrs/20191120/017/index-en.aspx>.

⁴ The first two sections of this paper were also extensively covered in the Cardus report “Curbing Crime with Employment: Exploring Work as Crime Prevention for Canadians with Criminal Records,” although the present report engages these themes in more detail. See pages 25–29 of this report.

as full human beings with a dignity that is worthy of respect. This includes how employers should see their employees and prospective employees, whether they have a criminal record or not. At the same time, structures imposed by governments affect how citizens interact with each other. That is the crux of this paper. Government structures, like the criminal-records system, should promote a full view of the human person. Insofar as they don't, governments must humanize them.

Criminal Records: Issues and Effects on Employment

The collection, storage, and dissemination of information about police and criminal records is complicated and decentralized in Canada. There are many different levels of criminal records, containing different kinds of information about criminal histories. While there is legislation at the federal and provincial levels governing this information, there is a great deal of inconsistency in practices from province to province and even from one police department to another.⁵ The following is a very brief overview highlighting the broad strokes of two examples of provincial frameworks governing the disclosure of criminal records.⁶

Police information and criminal records are stored in different ways, depending on the kind of information. Criminal records are stored nationally by the RCMP's Canadian Criminal Real Time Identification Services, which also includes fingerprints of those who have been charged with a crime.⁷ Local police services also maintain databases that may contain much more detailed information about an individual's history with the criminal justice system.

The John Howard Society of Ontario outlines four categories of information that may be disclosed on criminal records:

- **Convictions:** These are findings of guilt that result in sentencing, such as imprisonment or fines.
- **Absolute and conditional discharges:** These are findings of guilt that do not entail a formal conviction.
- **Proceedings not resulting in a finding of guilt:** These include acquittals, stays of proceedings, and withdrawn charges.

⁵ Canadian Civil Liberties Association, "False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada," 2014, <https://www.ccla.org/recordchecks/falsepromises>.

⁶ For a fuller analysis of criminal record practices across Canada, see Canadian Civil Liberties Association, "False Promises, Hidden Costs."

⁷ Royal Canadian Mounted Police, "Criminal Records," Government of Canada, <https://www.rcmp-grc.gc.ca/en/criminal-records>.

- Police contacts: These include arrests that did not lead to charges, mental-health apprehensions, and other contacts with police.⁸

Most criminal record checks for purposes of general employment will disclose only information about convictions. However, background checks for employment or volunteering involving children or other vulnerable persons may disclose some information from all of the above categories.

In Ontario, records are governed by the *Police Record Checks Reform Act*, which provides for three levels of record checks, each adding information to the previous one:

- Criminal record checks: In general, these disclose criminal convictions, except where a record suspension has been granted.
- Criminal record and judicial matters checks: In general, these disclose criminal convictions, absolute and conditional discharges for a specified period of time, and outstanding charges, warrants, and certain court orders.
- Vulnerable sector checks: These include all the information above, plus cases of “not criminally responsible on account of mental disorder” for a specified period of time. They may also include other matters that may be disclosed exceptionally, such as incidents in which the perpetrator targeted a vulnerable person.⁹

In British Columbia, the provincial government also distinguishes three levels, but they are different from those in Ontario:

- A statement that a criminal record exists: This simply indicates whether an individual has a criminal record, but it does not include detailed information.
- A partial record check: This includes personal information and a list of convictions.
- A full record check: This includes all of the above information and a list of non-conviction charges.¹⁰

In addition to legislation specifically overseeing police information and criminal records, there are other rules at multiple levels of government that govern the

⁸ John Howard Society of Ontario, “What are Police Records?,” February 26, 2018, <https://johnhoward.on.ca/download/what-are-police-records/>.

⁹ *Police Record Checks Reform Act, 2015*, SO 2015, c 30, <https://www.ontario.ca/laws/statute/15p30>. For a complete breakdown of the kinds of information each check contains in Ontario, see J. DeJong VanHof, “Vulnerable Sector Check Costs Remain a Barrier for Volunteers,” Cardus, 2022, table 1, <https://www.cardus.ca/research/spirited-citizenship/reports/vulnerable-sector-check-costs-remain-a-barrier-for-volunteers/>.

¹⁰ Government of British Columbia, “Criminal Record Checks,” <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/how-works/criminal-records/criminal-record-checks>.

disclosure and use of this information by both police forces and recipients of the information (such as employers). The *Youth Criminal Justice Act* seals, with some exceptions, the records of crimes committed by an individual while they were under the age of eighteen. Human-rights codes can place limits on the ability of an employer to discriminate based on the information contained in criminal records. Similarly, privacy laws may limit the extent to which police information can be shared and how it is used within an organization. Employment law and collective-bargaining agreements may also restrict the ability of an employer to ask about employees' criminal histories. In addition, individual police departments may have policies and guidelines that govern the disclosure and handling of information in their purview.

The common point among all criminal records is that they include at the very least adult criminal convictions for which a pardon or record suspension has not been granted. This may include low-level crimes and crimes committed during young adulthood. Criminal record checks for government jobs may even include, for a period of time at least, some crimes committed when the person was under the age of eighteen:¹¹ although information about youth convictions is available for only a limited period of time after the conviction, this may be a particularly important time for a young person when they are just starting out in the labour market.

In sum, a criminal record check may disclose a wide variety of information about an individual's previous interactions with the justice system. It may disclose much more than just convictions, depending on the timing and level of the check. As discussed further below, when provided to employers, this information can have a substantial negative effect on the likelihood that the individual will be hired.

Criminal Records and Employment

Finding and maintaining a job can have a significant impact on a person's desistance from crime. Research has demonstrated a significant, two-way relationship between crime and unemployment. That is, unemployment makes it more likely that a person will be involved in the justice system, and involvement in the justice system also makes it more likely that a person will be unemployed. Criminal records, although they are not the only factor in this relationship, play a significant part in making it more difficult for those who carry them to obtain employment.¹²

There is ample evidence to show a correlation between having been in prison and having challenges in the labour market. One study of Canadian individuals released from prison found that they were substantially less likely to report employment income on their tax forms. Of those who did report employment income, the average

¹¹ Department of Justice, "Youth Records," Government of Canada, <https://justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/pdf/recor-dossi.pdf>.

¹² Nauta, "Curbing Crime with Employment."

annual earnings were only \$14,000. Meanwhile, 41 percent reported receiving some form of income assistance.¹³

Studies from the US show similar trends among those involved in the justice system. A study of individuals released from prison in 2010 found that one-third of them were unable to find any employment in the subsequent four-year period. This study also noted that the results were worse for those from racial-minority communities compared to Caucasian people, although they were better for individuals convicted of drug offences than for other kinds of offences.¹⁴

Some researchers have also suggested that, even if someone with a criminal record succeeds in being hired somewhere, their criminal record may nonetheless place a glass ceiling that prevents them from promotion above a certain level.¹⁵ This would fall in line with the above research insofar as those with criminal records do not or cannot participate in the economy as much as they could or would like. It also suggests that the research above may underestimate the effect of a criminal record on the actualization of economic potential among those who carry one.

These studies tell a similar discouraging story: people with criminal records face significant challenges in the labour market.

The above studies vary in terms of the populations sampled. Some studied those with a criminal record in general. Others studied specifically those who had been to prison and had been released.

Nevertheless, these studies tell a similar discouraging story: people with criminal records face significant challenges in the labour market.

It is not clear from the foregoing research who is responsible for the poor economic performance of people with criminal records. Do correctional facilities fail to rehabilitate people while they are in prison?¹⁶ Is there something about the character of those previously involved in crime that makes it more difficult for them to participate legally in the economy? If so, to what extent is that character changeable? Is it employers who are preventing rehabilitated individuals from entering the labour

¹³ K.M. Babchishin, L.-A. Keown, and K.P. Mularczyk, “Economic Outcomes of Canadian Federal Offenders,” Public Safety Canada, 2021, <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2021-r002/>.

¹⁴ E.A. Carson, D.H. Sandler, R. Bhaskar, L.E. Fernandez, and S.R. Porter, “Employment of Persons Released from Federal Prison in 2010,” US Department of Justice, 2021, <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf>.

¹⁵ J. Griffith and T.C. Harris, “The Relationship Between Criminal Records and Job Performance: An Examination of Customer Service Representatives,” *Personnel Assessment and Decisions* 6, no. 3 (2020): 13–17, <https://doi.org/10.25035/pad.2020.03.003>.

¹⁶ One factor is that most of the sentences handed down are too short for incarceration in a federal correctional institution. In Canada, prison sentences of two years or more are served in a federal penitentiary, while prison sentences of less than two years are served in a provincial penitentiary. Federal institutions run by the Correctional Service of Canada generally have more rehabilitation programming, owing in part to the fact that inmates have enough runway on their sentence for the programming to have a significant effect. In contrast, those who are sentenced to shorter terms generally do not have the same access to programs. This includes those who, while they might spend a significant total amount of time in prison, receive short but frequent sentences; for these people, cycling through the prison system is not conducive to efforts at rehabilitation offered through it.

market? Do those involved in crime simply find it easier to commit crime than to earn an income? Or is there some other factor that explains this phenomenon? Or a combination of these?¹⁷

In a previous report, Cardus has contended that many of these factors are at play in explaining why these individuals have difficulty entering the labour market.¹⁸ Encouraging employment among this population will certainly involve working on all of these factors. This paper focuses in on one of those factors: the role of the employer in hiring people with criminal records and the role of government insofar as it influences the employer.

Hiring is a two-way decision: both employer and employee need to agree to the contract before it is in force. If either side declines the agreement, then it will not proceed. This is a good thing: it is a system that respects the will of each individual to dispose of their capital or labour as they see fit. It is also entirely appropriate for the employer to make judgements about potential employees and their fitness for work, just as it is appropriate for a prospective employee to make judgements about whether a given employer would be a good fit for them. A properly functioning labour market requires that, within certain bounds, employers and employees are free to contract with each other.

That does not mean that the perspectives of participants in the labour market—even the structures of the labour market itself—cannot be improved upon. Distortions can be introduced into the labour market where there are failures. The stigmatizing effect of criminal records can be understood as one such failure. This requires an investigation of the perspectives of employers on people with criminal records.

The Perspectives of Employers on People with Criminal Records

Studies have shown that employers are much less likely on average to want to hire an individual with a criminal record than they are to want to hire someone else, all other things remaining equal. For example, a seminal 2003 study by Devah Pager found that businesses were only half as likely to call a job applicant for an interview if they knew that the applicant had a criminal record.¹⁹

While one may lament the effect that this phenomenon has on people with criminal records, the perspective of employers must also be considered. Employers have an understandable desire to know the criminal histories of their prospective employees. There are many reasons why employers may want to know more, including:

¹⁷ There are theories of crime that lend support to any and all of these possible explanations for the low rates of economic participation among those who have been involved in crime. Self-control theory would explain why certain character traits might be resistant to rehabilitation, while economic choice theory would explain why incentives might act on someone such that they would return to a life of crime. For a full exposition of these and other theories, see the discussion in Nauta, “Curbing Crime with Employment.”

¹⁸ Nauta, “Curbing Crime with Employment.”

¹⁹ Pager, “The Mark of a Criminal Record.”

- They may believe that hiring someone with a criminal record could lead to criminal behaviour in the workplace and want to protect their businesses from such things as theft of machinery or equipment.
- Employers have a duty to protect current employees from harm. Employers may seek information about criminal histories, especially information about past violent crimes, in order to fulfill that duty. They may even feel a moral responsibility to do so. This is especially pertinent for businesses or organizations serving vulnerable persons.
- Employers may take a criminal record as a signal that the individual lacks certain qualities that make for a good employee. One theory of crime, for example, suggests that crime is primarily the result of underdeveloped self-control.²⁰ Employers may therefore see a criminal record as a warning sign that a job applicant does not possess this characteristic.
- Employers may also act on the belief that insurance companies may not cover actions by employees with a criminal background or that an insurance company may insist that the organization have a policy on criminal background checks as part of its risk-management strategy. However, a report by the Canadian Civil Liberties Association did not find hard evidence that this was in fact a widespread requirement by insurance companies in Canada.²¹

These reasons are, to some degree at least, fair and reasonable. The issue is not that employers make judgements on the fitness of prospective employees. As discussed above, that is an essential component of our economic system. Rather, the issue is whether employers are basing their decisions on correct information and accurate impressions of the effects of a criminal history.

In fact, many studies have shown that employers tend to overestimate the impact of a criminal record on the future performance of an employee. One study of ex-offenders in the US military found that they were more likely to be promoted to higher ranks more quickly than their non-offender counterparts. They were also no more likely to exhibit poor performance leading to dismissal compared to non-offenders.²² Similarly, another study found that people with criminal records fared just as well as others in customer-service jobs in job performance.²³ Yet another study found that individuals with criminal records in some industries scored better on workplace metrics than other workers in the same industries. For example, those with criminal records quit their jobs less frequently than other workers, leading

²⁰ M.R. Gottfredson and T. Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990).

²¹ Canadian Civil Liberties Association, “False Promises, Hidden Costs,” 38.

²² J.H. Lundquist, D. Pager, and E. Strader, “Does a Criminal Past Predict Worker Performance? Evidence from One of America’s Largest Employers,” *Social Forces* 96, no. 3 (2018): 1039–68.

²³ Griffith and Harris, “The Relationship Between Criminal Records and Job Performance.”

the authors to refer to the former group as an “untapped productivity pool.”²⁴ For customer-service occupations, they were also no more likely to be fired for cause than were those without criminal records.²⁵

Even to the extent that people with criminal records do recidivate, employers may overestimate how the recidivism affects them and their businesses. One study of 317 individuals who had previously committed crimes found that, while 40 percent of them recidivated in some way, only 8 percent committed a crime that directly and adversely impacted their employer.²⁶ While this may not allay the concerns of employers who justifiably do not want their employees committing crimes even outside of an employment context, it nonetheless suggests that employers may be exaggerating the risk to themselves and their businesses of hiring someone with a criminal record even if their employee recidivates.

There are other ways in which employers’ views of those with criminal records do not always match reality. For example, employers appear on average to misunderstand how age affects an individual’s propensity to commit crime. Analysis of the relationship between age and crime convincingly shows that older employed people previously involved in crime are much less likely to recidivate than their younger counterparts.²⁷ In fact, one literature survey suggested that growing older is the only factor in the literature that is “completely convincing” in its effectiveness at reducing crime.²⁸ Yet a 2019 survey of the literature on employers’ attitudes showed that they are more likely to overlook criminal transgressions among young job applicants than they are to overlook the same among older people—the opposite of what the data suggest they should do.²⁹

In short, employers’ perspectives on people with criminal records are not completely or always rationally tied to reality. As one group of researchers suggested, they tend to have “exaggerated fears” of hiring them.³⁰ Past behaviour is not prescriptive of future behaviour, yet the John Howard Society of Ontario cites evidence that some employers—as many as 15 percent of their sample—refuse any applicant with any

²⁴ D. Minor, N. Persico, and D.M. Weiss, “Criminal Background and Job Performance,” *IZA Journal of Labor Policy* 7, no. 8, (2018): 2, <https://doi.org/10.1186/s40173-018-0101-0>.

²⁵ Minor, Persico, and Weiss, “Criminal Background and Job Performance,” 32.

²⁶ K. Soothill, L. Humphreys, and B. Francis, “Middle-Class Offenders as Employees—Assessing the Risk: A 35-Year Follow-Up,” *Journal of Offender Rehabilitation* 52, no. 6 (2013): 407–20, <https://doi.org/10.1080/10509674.2013.813617>.

²⁷ C. Uggen, “Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism,” *American Sociological Review* 65, no. 4 (2000): 529–46, <https://doi.org/10.2307/2657381>.

²⁸ S. Bushway and P. Reuter, “Labor Markets and Crime,” in *Crime: Public Policies for Crime Control*, ed. by J.Q. Wilson and J. Petersilia, 2nd ed. (Oakland, CA: Institute for Contemporary Studies, 2002), 221.

²⁹ J. Griffith, C.B. Rade, and K.S. Anazodo, “Criminal History and Employment: An Interdisciplinary Literature Synthesis,” *Equality, Diversity and Inclusion: An International Journal* 38, no. 5 (2019): 505–28.

³⁰ Soothill, Humphreys, and Francis, “Middle-Class Offenders as Employees.”

criminal record whatsoever.³¹ Any employer that applies a veto on any applicant who has a criminal record is effectively treating that relationship between past and future behaviour as prescriptive.

Fundamentally, it is a problem if employers—or anyone for that matter—elevate one aspect of someone’s personal history to overshadow all other aspects. Truth about a person must consider not just the facts of their lives but also proportionality in those facts. This proportionality must include the degree to which a particular criminal history affects their ability to do the job for which they are applying. In the case of employers who dismiss those with criminal records out of hand, they are effectively elevating a conditional criterion to the level of an absolute criterion. A criminal record may be only one brushstroke on a canvas. It adds to the picture, but its significance depends on how it contributes to the overall portrait. It is important that employers treat it as such.

Fundamentally, it is a problem if employers—or anyone for that matter—elevate one aspect of someone’s personal history to overshadow all other aspects. Truth about a person must consider not just the facts of their lives but also proportionality in those facts.

“Ban-the-Box” Policies: Promise, Problems, and Proposals

The labour-market outcomes for individuals with criminal records outlined in the previous section are concerning. They suggest that the status quo is not succeeding at integrating them into the legitimate labour market, a condition that has been shown to correlate significantly with keeping away from crime.

Some have advocated for a ban on employers asking about criminal history on job applications. Instead, employers would be able to ask job applicants for this information only later in the interview process. This policy has come to be known as “ban-the-box,” referring to the checkbox on some job application forms that ask an applicant to confirm that they have—or don’t have—a criminal record.

³¹ John Howard Society of Ontario, “Help Wanted: Reducing Barriers for Ontario’s Youth with Police Records,” 2014, <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/johnhoward-ontario-help-wanted.pdf>; John Howard Society of Ontario, “Invisible Burden: Police Records and the Barriers to Employment in Toronto,” 2018, <https://policerecordhub.ca/en/invisibleburden/>.

The Promise of Ban-the-Box

Ban-the-box policies come in many shapes and sizes. They vary in the length of the delay. For example, the state of Hawaii, one of the first jurisdictions to implement a ban-the-box policy, prohibits an employer from asking about criminal records until a conditional offer of employment has been made. Even then, an employer in the state can rescind the offer of employment only if there is a rational connection between the job and the content of the criminal record.³² The US federal government's ban-the-box policy, introduced at the end of Barack Obama's presidency, also delays inquiries about criminal records until a conditional offer is made.³³

Ban-the-box policies need not be so strict. It is possible, for example, to delay the request for a criminal record only to the interview stage. The idea here would be that job applicants would at least get a chance to present themselves to employers face to face before the stigma of a criminal record influences the first impressions of the employer.

Ban-the-box policies also vary in terms of their scope in the kinds of employers that are subject to them. There are three levels; generally, the latter builds upon the former.

1. **Public sector:** At the lowest level, governments may impose ban-the-box policies on themselves, such that government departments and agencies cannot inquire about criminal records in the early stages of their own hiring. This was the policy introduced by the Obama administration: while the White House touted the policy as leading the way as a “model for all employers,” technically it affected hiring only in the federal government.³⁴
2. **Government contractors:** Next, governments may extend the ban to any company that has contracts with them.
3. **Private sector:** Finally, governments may extend the ban to all private corporations under the jurisdiction of the level of government imposing it. For example, in Canada, a federal ban-the-box policy would apply to the federally regulated private sector, and a provincial ban-the-box policy would apply to the provincially regulated private sector within a given province.³⁵

³² A. Hanks, “Ban the Box and Beyond: Ensuring Individuals with a Criminal Record Have Access to the Labor Market,” Center for American Progress, July 2017, <https://www.americanprogress.org/article/ban-box-beyond/>.

³³ White House, “Fact Sheet: White House Announces New Commitments to the Fair Chance Business Pledge and Actions to Improve the Criminal Justice System,” November 30, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments-fair-chance-business>.

³⁴ White House, “Fact Sheet.”

³⁵ For a further discussion, see C. Stacy and M. Cohen, “Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations,” Urban Institute, February 2017, https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf; J.L. Doleac and B. Hansen, “Does ‘Ban the Box’ Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden,” National Bureau of Economic Research Working Paper no. 22469, July 2016, <http://www.nber.org/papers/w22469>.

However, even within these three levels, there can be a wide variation of application. Inside government, for example, certain agencies or jobs might be exempt from ban-the-box rules. There would be greater sensitivity to criminal records in agencies such as the Correctional Service of Canada or those that deal with issues of national security, for example.

The US government initially contemplated exempting certain jobs for which an early criminal record check would be appropriate, including law-enforcement positions, high-profile positions of public trust, and positions where the job-application process prior to an offer of employment is very costly.³⁶ However, the Office of Personnel Management ultimately opted for a much stricter form of the policy, requiring agencies to seek a specific exemption to the policy even for law-enforcement positions.³⁷

In the private sector, certain industries or certain kinds of jobs might also be exempt from ban-the-box rules. For example, the government could grant exemptions for jobs that require work with children or other vulnerable populations.

The main point is to demonstrate that there are many different ways of configuring ban-the-box policies. At root, they all seek to do the same thing: to shield information about criminal records from employers until some point later than the initial job application. The goal is to get more people with criminal records into the later stages of the application process. The hope is that, when someone's criminal-record status is ultimately disclosed, the employer receives that information within a context of having met, interacted with, or even interviewed the person—and that this context would relativize the significance of the criminal record and thus lead to a greater likelihood of employment for them.

The Problems with Ban-the-Box

There is a strong case for ban-the-box policies. Once employers have access to criminal records, they will interpret them as they see fit, so it is understandable that advocates of these policies would want to prevent employers from getting that information in the first place.

Problems of Information

Unfortunately, the theory doesn't always translate into the intended results. Research has shown that the absence of information about criminal history does not prevent employers from making judgements about people on the basis of criminal history. In fact, it might be making their decisions worse.

³⁶ United States Office of Personnel Management, "Recruitment, Selection, and Placement (General) and Suitability: A Proposed Rule by the Personnel Management Office," May 2, 2016, <https://www.federalregister.gov/documents/2016/05/02/2016-10063/recruitment-selection-and-placement-general-and-suitability>.

³⁷ United States Office of Personnel Management, "Recruitment, Selection, and Placement (General) and Suitability: A Rule by the Personnel Management Office," December 1, 2016, <https://www.federalregister.gov/documents/2016/12/01/2016-28782/recruitment-selection-and-placement-general-and-suitability>.

One study conducted an experiment to measure the gap in call-back rates between Caucasian job applicants and Black job applicants in New York City and New Jersey before and after the implementation of ban-the-box policies. The researchers found that prior to ban-the-box, employers called Caucasian applicants for interviews 7 percent more often than similarly qualified Black applicants. However, after ban-the-box, Caucasian applicants were called back 43 percent more often.³⁸ In other words, after ban-the-box was implemented, the gap in call-back rates between similarly qualified Caucasian and Black applicants grew more than six-fold.

Similar results were found in another study that examined employment levels of young, low-skilled, Black and Hispanic men before and after ban-the-box policies came in. This study found that the probability of being employed decreased for each of these groups after the introduction of ban-the-box policies. It also found that the effects were more pronounced for Black men, a 5.1 percent drop, compared to Hispanic men, a 2.9 percent drop.³⁹

The authors of both studies identify essentially the same reason for these effects. They argue that, absent criminal-history data about individuals, employers seek proxies for this information—in this case, assumptions about racial groups. As discussed above, there is ample evidence that employers on average do not want to hire people with criminal records. It is not surprising, then, that they would seek to reduce the likelihood of hiring one. According to the reasoning in these two studies, therefore, employers appear to be making presumptions about individuals based on the average conviction rates for racial communities. In the words of one study, “employers are relying on exaggerated impressions of real-world racial differences in felony conviction rates.”⁴⁰

This has led some researchers, such as Jennifer Doleac, co-author of one of the reports mentioned above, to call for the abandonment of ban-the-box policies in favour of other measures to improve the employment prospects of those with criminal records.⁴¹ Others disagree, saying that these conclusions “should be viewed with skepticism” and that ban-the-box policies can still help to improve the lot of people with criminal records.⁴² But the studies outlined above have to be taken seriously. Whether or not employers’ perceptions are an accurate reflection of reality, their perceptions will nevertheless influence their behaviour. Unless these perceptions are corrected, employers will find ways to avoid taking on the perceived risk of hiring those with criminal records. These studies merely show how employers might do that—and the concerning results that arise when their information is restricted.

³⁸ A. Agan and S.B. Starr, “Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment,” *Quarterly Journal of Economics* 133 no. 1 (2018): 191–235, <https://doi.org/10.1093/qje/qjx028>.

³⁹ Doleac and Hansen, “Does ‘Ban the Box’ Help or Hurt Low-Skilled Workers?”

⁴⁰ Agan and Starr, “Ban the Box, Criminal Records, and Racial Discrimination,” 191.

⁴¹ J.L. Doleac, “‘Ban the Box’ Does More Harm than Good,” Brookings Institution, May 31, 2016, <https://www.brookings.edu/articles/ban-the-box-does-more-harm-than-good/>.

⁴² Hanks, “Ban the Box and Beyond.”

Problems of Uniformity

Ban-the-box regimes may also be too uniform. One study of work performance of individual with criminal records in different industries showed that they performed quite differently depending on the type of work in which they were engaged—and that they did particularly well in customer-service jobs compared to those in other jobs.⁴³ This suggests that there may be a better case for screening for criminal histories in some industries or jobs than in others.

As this same study pointed out, “not all workforces are the same,” yet ban-the-box policies generally “apply uniform rules to all employees and employers.”⁴⁴ Of course, this paper has already discussed how ban-the-box policies can vary in their scope of application from government to the private sector. There is no essential reason why they could not also vary in scope in terms of which industries they cover. However, a government that wishes to introduce ban-the-box either will have to draw a line somewhere to define the scope of the policy or will have to institute some means by which it grants exemptions to the policy. In the former case, there could be some jobs that fall on one side of the line or the other that could reasonably be included on the other. In the latter case, the decision-making on whether to apply the policy is deferred to some entity that is external to the employer: an entity that cannot know the needs of the employer as well as the employer itself. For example, in the case of the US government policy, a government agency wanting an exemption must seek one from the Office of Personnel Management. But does this office have a better handle on the job requirements of, say, an administrative clerk with a law-enforcement organization than the organization itself does?

This is not to say that there should be no role for external organizations in laying some guardrails for employment policies and holding employers responsible for upholding them. But it must be recognized that this is at best an imperfect substitute for correcting the misperceptions of employers that lead to decisions based on error. Something is lost when decision-making is taken out of the hands of those closest to the problem. Decisions taken at higher levels cannot be tailored as neatly to the unique circumstances of a situation. This may even exacerbate the problems of information outlined above, insofar as forcing employers into actions that they believe are counter to their best interests may inadvertently lead to worse decisions overall.

Existing Proposals to Fix or Replace Ban-the-Box

As discussed, the problems associated with ban-the-box raise significant concerns. As such, many studies have proposed other policies that could either replace ban-the-box or that could be implemented alongside ban-the-box to help mitigate some of its worst effects.

⁴³ Minor, Persico, and Weiss, “Criminal Background and Job Performance.”

⁴⁴ Minor, Persico, and Weiss, “Criminal Background and Job Performance,” 33.

Proposals to fix or replace ban-the-box can fit into five categories.

1. Provide More Information to Employers

This solution comes in many forms:

- Some advocate for more training and public education campaigns directed at employers on the facts about hiring people with criminal records. The intention behind these campaigns would be to change employers' perspectives by providing them with more accurate information about how those with criminal records can be good employees and thus encourage them to hire more of them. In a similar vein, some recommend establishing employer best practices, which would not ban the box itself but would encourage them to choose not to use it.⁴⁵
- Another category of proposals is focused on providing more information about individuals to convince prospective employers that they would be good employees. Jennifer Doleac has recommended the greater use of "employability certificates" as a tool for individuals with criminal records to show that they are suitable for hiring and for employers to protect them from lawsuits arising from hiring someone with a criminal record.⁴⁶ Similarly, researcher Angela Hanks has recommended that job applicants be allowed to show evidence of their rehabilitation, such as proof that they have complied with the terms of their probation or parole.⁴⁷
- Some researchers have also identified the need for greater accuracy in criminal records. Hanks has recommended that people with criminal records be given the opportunity to review their records to verify correctness.⁴⁸ Certainly, errors in criminal records could unnecessarily hamper the career prospects for some. Moreover, errors could reduce trust in the criminal-records system, including on the part of those with criminal records. While this proposal does not technically provide more information to employers, it would provide them with higher-quality information and thus represents a better information flow to employers.

2. Reduce Information to Employers Further

Some researchers have suggested that the problems with ban-the-box can be mitigated by further reducing employers' access to certain kinds of information that may cause them to discriminate against job applicants.

⁴⁵ Stacy and Cohen, "Ban the Box and Racial Discrimination."

⁴⁶ J.L. Doleac, "Increasing Employment for Individuals with Criminal Records," The Hamilton Project, October 2016, https://www.brookings.edu/wp-content/uploads/2016/10/es_20161021_prisoner_reentry_doleac.pdf.

⁴⁷ Hanks, "Ban the Box and Beyond."

⁴⁸ Hanks, "Ban the Box and Beyond."

- Some have suggested reducing racially identifying information in applications.⁴⁹ According to this thinking, if employers substitute racial profiling for criminal-record profiling, then both kinds of information should be eliminated. However, it is likely that some employers will find some other proxy for criminal records, just as they found race as a proxy in the first place.
- Some have recommended greater use of expungement of criminal-history information.⁵⁰ In 2021, the federal government announced it would make it easier to apply for and receive a record suspension (previously known as a pardon).⁵¹ A more open and easier-to-access system of record suspension could make it easier for people to apply for and obtain employment, if the system is carefully managed and targeted at those who are unlikely to recidivate.

3. Improve Employability of People with Criminal Records

Proposals to provide skills training and employment supports for those with criminal records fall into this category. This is a significant part of the mission of the Correctional Service of Canada, although rehabilitation programming can also take place in the community outside a formal institutional setting. The logic behind this recommendation is that employers are using criminal histories as an indicator of the likelihood that an individual will be a successful employee. As discussed above, there is evidence of fear among some employers that individuals with criminal records would not be employees who are as good, on average, as other prospective employees without criminal records. To the degree to which employers are making an accurate assessment of the ability of individuals with criminal records to succeed in the workplace, then one way to increase the likelihood that an employer will hire such a person is simply to make better workers of people with criminal records.⁵²

There is certainly a role for improving the employability of people with criminal records. However, it assumes that improving the job-readiness of those with criminal records will translate into better perceptions of them by employers. This may not necessarily be the case, especially given the evidence above that some employers treat a criminal record as a veto against hiring. For these employers, other efforts may be necessary to convince them that their perspective may be based on unfounded views. Thus, it may be necessary to combine these policies with public education campaigns directed at employers in order for the former to have a significant effect.

⁴⁹ Stacy and Cohen, “Ban the Box and Racial Discrimination.”

⁵⁰ Stacy and Cohen, “Ban the Box and Racial Discrimination.”

⁵¹ Public Safety Canada, “Government of Canada to Make Record Suspensions More Affordable,” news release, Government of Canada, December 21, 2021, <https://www.canada.ca/en/public-safety-canada/news/2021/12/government-of-canada-to-make-record-suspensions-more-affordable.html>.

⁵² Doleac and Hansen, “Does ‘Ban the Box’ Help or Hurt Low-Skilled Workers?”

4. Reduce Hiring Costs for People with Criminal Records

Whether employers' perspectives are based on real, exaggerated, or false views of those with criminal records, they nonetheless perceive that an employee with a criminal record is less desirable to them, on average, than one without. From an economic point of view, an employer may determine that a person with a criminal record is not worth hiring, especially if the employer determines that the marginal benefit of hiring the person is lower than a minimum wage or a fair wage imposed by the government. A solution, therefore, would be for governments to reduce the costs of hiring an individual with a criminal record, perhaps by offering a wage subsidy for any employer that does so. Such a policy already exists in the US, where the Work Opportunity Tax Credit provides a financial incentive to employers who hire members of certain targeted groups, including individuals who have been recently convicted or recently released from prison.⁵³

5. Improve Human-Rights Legislation and Increase Enforcement

There are already some protections against discrimination in matters of employment for those with criminal records. Typically, these are included in human-rights legislation. For example, section 5 of Ontario's *Human Rights Code* guarantees "a right to equal treatment with respect to employment without discrimination because of . . . record of offences."⁵⁴ However, "record of offences" is defined here as only those offences that have received a record suspension and offences under provincial legislation. In other words, there is no prohibition on employers' discriminating based on a crime that has not been pardoned. Some scholars have called for strengthening human-rights legislation to provide more tools to government agencies to enforce it.⁵⁵

There is merit to many of these five proposals. The purpose of this paper is not to propose a new policy *instead* of these. Indeed, many of the ideas discussed above would complement the policy recommendation of this paper rather well.

Humanizing Criminal Records: A Third Way

The discussion above has focused on two broad policy options—the status quo on criminal records, and ban-the-box policies to limit who can see them. Through this discussion, many serious issues have been identified with both of these options. This section proposes a new way of handling criminal records that applies the lessons learned from the empirical studies on these issues.

⁵³ Internal Revenue Service, "Work Opportunity Tax Credit," August 31, 2023, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit>.

⁵⁴ *Human Rights Code*, RSO 1990, c H.19, s 5.

⁵⁵ Stacy and Cohen, "Ban the Box and Racial Discrimination."

Fundamental Problems with Other Proposals

The problem with criminal records as they stand now is that they present an imperfect picture of the individual. Ideally, employers would see people as they are: human beings, equal in dignity, who are greater than the sum of the crimes captured by their criminal record. But as seen above, having a criminal record can lead employers to accentuate this one facet of a person's life above all other facets. In some cases, that is, those in which the criminal record is treated effectively as a veto against employment, this one facet is so accentuated as to overpower every other facet of an individual's personal history, character, and identity.

The problem with the criminal record is that it is a consolidated list of the decisions that are among an individual's worst in life. It is an incomplete picture of a human being. It is a litany of negativity against which scarcely anything else compares in its stigmatic intensity. It is no wonder that employers would treat it so negatively.

The solution offered by proponents of ban-the-box policies is to reduce the amount of information to which employers have access in the hiring process. But they

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cannot stop employers from wondering about an applicant's criminal record, with the result that some employers discriminate not on criminal-record status but on race as a proxy for it.

At the root of both the status quo and ban-the-box policies is a similar problem: some employers are failing to see the full humanity and the potential of the individual applying for a job. Instead, in both cases, these employers are basing their hiring decisions on one facet or another of a person's identity or personal history, instead of trying to see a fuller picture.

The perverse effects of reducing the information that employers can receive about criminal records are likely to carry through to other proposals

that seek to reduce information flow to employers. Eliminating racially identifying information from job applications may be a fine idea, but employers may seek other ways of assessing the likelihood of a criminal history: for example, by looking up the crime rate for the neighbourhood in which the applicant's address is located.

The proposals outlined above that seek to reduce information about individuals with criminal records should therefore be met with a degree of skepticism. Yet there remains a problem with how some employers interpret criminal records, with their "exaggerated fears" continuing to plague the employability of these individuals. The remainder of this paper will therefore focus on how to improve employers' judgement with respect to those with criminal records.

The proposals outlined above that *increase* the amount of information given to employers are worthy of consideration. Education campaigns to inform employers about the facts with respect to hiring people with criminal records are efforts in the right direction. The John Howard Society of Ontario has launched such education campaigns and has joined with businesses to create the Fair Chances Coalition to reduce the stigma associated with criminal records.⁵⁶ Jennifer Doleac’s proposal to use employability certificates and Angela Hanks’s proposal to allow individuals to show proof of rehabilitation are also ideas that should be explored, to encourage employers to see the criminal record within a fuller picture.

Beyond the fact that these proposals seek to increase the information flow to employers, they also have this in common: they provide additional information—either general information in the case of education campaigns, or specific information in the case of employability certificates and proofs of rehabilitation—that encourages the employer to consider a broader picture of a job applicant’s identity. They seek to offer perspective on criminal records and to provide additional tools to employers to come to just and fair assessments about the employability of people with criminal records. The next section builds on these proposals to consider another way to encourage employers to view the whole person behind the criminal record.

A Third Way

As discussed above, criminal records capture only those decisions that are among the worst of someone’s life. They do not capture the totality of a person, nor should they define a person.

More to the point, they do not even capture the totality of a person’s relationship with the criminal justice system. In reality, a person’s experience in the justice system incorporates much more than an enumeration of arrests, convictions, and sentences. It may include, for example, skills training or other educational programming undertaken through the justice system. It may include psychological and spiritual counsel or treatment for alcohol and substance abuse. It certainly includes an individual’s record of behaviour while in prison. It also extends beyond prison, to include how readily the formerly incarcerated person cooperates with parole officers.

All of these factors could tell a great deal about an individual’s history with the criminal justice system. Furthermore, they all potentially tell favourable stories about an individual’s interaction with it.

There are many other aspects of life in which a record is used to make judgements about a person’s or an entity’s fitness for one thing or another. A corporation’s financial health is determined by its general ledger. A person’s credit score is required for borrowing. In these cases, a balance is determined by a weighing of credits and debits. But in the case of criminal records, only the demerits—the “debit” side of

⁵⁶ John Howard Society of Ontario, “Fair Chances Coalition,” <https://www.fairchances.ca/>.

the ledger—are recorded. A full accounting of a criminal record ought to include both the debits and the credits. Anything less provides a lopsided presentation of the individual’s history with the criminal justice system.

Governments should therefore give people with criminal records the option of having the favourable information of their relationship with the justice system included directly in the results of their criminal record checks. Since governments provide criminal record check results, they should provide a more complete record of the individual’s relationship with the criminal justice system, provided that the person with the criminal record wishes to disclose the information.

This would result in a criminal record that lists in a systematic way the favourable elements of a person’s relationship with the criminal justice system alongside the unfavourable elements. It would provide context for an individual’s crimes directly within the criminal record itself. It would change the nature of criminal records to a more complete picture of the human being. And if an individual intends to be and is capable of being a good worker, then it would give them a chance to demonstrate this. In short, it would help to humanize criminal records and the people behind them.

Governments should give people with criminal records the option of having the favourable information of their relationship with the justice system included directly in the results of their criminal record checks.

Importantly, this proposal respects the decision-making role of employers while also seeking to correct some of the errors in their perspectives toward people with criminal records. After all, as discussed above, there are legitimate reasons why an employer may not want to hire a particular individual with a criminal record. The goal should be to ensure that these employers have the tools they need to make a sound judgement in hiring decisions following a fair assessment of the job applicant.

Yet it is important that employers’ “exaggerated fears” of hiring people with criminal records be corrected. This policy proposal is not intended to be a silver bullet for resolving this challenge. It will not alter employers’ perspectives overnight. The hope is rather that, over time, employers will see a richer mosaic of the characteristics of a prospective employee. Thus, this change to criminal records may be complemented with other policies that provide increased opportunities in the labour market to people with criminal records.⁵⁷

Neither would this proposal achieve a *complete* view of the human person behind the record. It is clear that this is restricted to the person’s relationship with the criminal

⁵⁷ The need for additional policies may be especially true of rehabilitation efforts for those who are imprisoned in provincial facilities or those who are not imprisoned at all. As previously noted, these individuals do not have the same access to programming as do their counterparts in federal prisons. Ensuring greater access and encouraging greater take-up of rehabilitation outside of federal prisons would not only have direct positive effects on the individuals but also provide more favourable interactions with the criminal justice system that could be captured on the humanized version of the criminal record proposed in this paper.

justice system, which represents only a part—perhaps even just a small part—of who the person is. Thus, this policy change would be a movement *toward* a view of the whole human person.

At the same time, the symbolic potential of this policy proposal should not be underestimated. The humanization of criminal records would represent a signal from the governmental authority that there is more to a person's complex relationship with the criminal justice system than just the list of their crimes. To this end, governments should also consider a renaming of criminal records to fit the new reality.

This would result in a criminal record that lists in a systematic way the favourable elements of a person's relationship with the criminal justice system alongside the unfavourable elements. ... It would change the nature of criminal records to a more complete picture of the human being.

Policy Considerations

As with any new policy, there are important policy details to consider. This section establishes a framework for considering some of them. It does not purport to flesh out the criteria to the level of detail necessary for full implementation of the proposed policy (many of these details would require coordination among different jurisdictions anyway), but it does seek to address at a high level a significant breadth of issues that governments implementing this policy would have to consider.

Information to Include

The additional information that could be included in a criminal record is potentially wide-ranging. Ideally, it should capture all the information that tells a meaningful story about the person's relationship with the criminal justice system. The following recommendations include some information that is already stored by various agencies, such as the Correctional Service of Canada, and other information that may require new systems of information collection.⁵⁸ As a starting point, a humanized criminal record could include the following:

- **Behaviour while in custody:** This could be a fact-based assessment or score of an inmate's comportment with fellow inmates and prison staff.

⁵⁸ Most of the information outlined here is associated with activity during incarceration, meaning that this policy recommendation may have the strongest effect for those who have been incarcerated. However, some of the information to be included on a criminal record could apply also to those who have criminal records but were never incarcerated. For example, participation in programs delivered through the justice system outside a correctional facility could be included in the criminal record for such a person.

- **Education and training programs:** This would encompass involvement in and completion of education and training programs while in prison. It could identify skills learned or courses taken. The Correctional Service of Canada offers basic adult education (that is, high-school equivalency) to all inmates, and it can facilitate access to post-secondary education for those who wish to pursue it at their own expense. Inmates can also obtain vocational certificates while in prison.
- **Work-placement programs:** The criminal record could include involvement in work-placement programs delivered through the justice system, including the length of the placement and the type of work conducted. This could include involvement in work programs that take place within a correctional institution as well as involvement in work-release programs outside of them.
- **Treatment programs:** Subject to privacy concerns, which are discussed below, the criminal record could include information about treatment programs for alcohol and drug abuse, and perhaps other treatments, undergone by the person through the justice system.

It must be acknowledged that including this information could be interpreted in at least two different ways. On the one hand, a prospective employer could look upon this as evidence of a commitment to rehabilitation and living a life free of addictive substances. On the other hand, another employer might see this as a red flag that the person had addictions in the past. That said, it is likely only to be a net positive in the case of someone with drug-related offences already listed on their criminal record. Either way, making the inclusion of treatment-related information optional on the criminal record should solve most of these concerns.

- **Spiritual care:** Subject again to privacy concerns, the individual may also benefit from showing that they have participated in spiritual care, such as chaplaincy services offered through the prison system⁵⁹ or by external organizations.⁶⁰ Research has shown that spirituality and religiosity can have positive effects in terms of reduced involvement in crime and other activities associated with crime.⁶¹ Therefore, this should be seen as a positive signal to employers.

⁵⁹ For example, see the Correctional Service of Canada's chaplaincy program: Correctional Service of Canada, "Chaplaincy Services," Government of Canada, last modified December 4, 2020, <https://www.csc-scc.gc.ca/chaplaincy/index-eng.shtml>.

⁶⁰ For example, see Prison Fellowship Canada, "Prison Fellowship Canada," <https://prisonfellowship.ca/>.

⁶¹ C. Roman and J.K. Roman, "Rehabilitation through Spirituality and Faith: Why Isn't the Prison and Reentry Reform Movement Focused on the Capacity Building of Responsive and Compelling Change Agents?," Berkley Center for Religion, Peace and World Affairs, Georgetown University, January 16, 2019, <https://berkeleycenter.georgetown.edu/responses/rehabilitation-through-spirituality-and-faith-why-isn-t-the-prison-and-reentry-reform-movement-focused-on-the-capacity-building-of-responsive-and-compelling-change-agents>.

- **Behaviour while on parole:** In the vast majority of cases, a person's relationship with the criminal justice system does not end when they are released from prison. They continue to have requirements placed upon them for parole. Cooperation with parole officers may be another proof point of rehabilitation and a favourable element to include on criminal records.

Information to Exclude

There are certain kinds of information that governments may wish to exclude completely. For example, there may be good reason to exclude information about how a person cooperated with investigators during the investigation of their case. On the one hand, this would be relevant information that would shed light on their relationship with the criminal justice system. On the other hand, the inclusion of this information could lead to a perverse incentive that would inadvertently encourage them to undermine their own criminal defence. While this might seem like a remote possibility, it may be wise to err on the side of caution and leave this information off the criminal record. Other kinds of information may fall into this same category. In implementing this policy, governments would need to consider the possibility of perverse incentives such as this one and decide whether to exclude that information.

Fact-based Information

It would be important for governments to include only fact-based information in this new form of criminal record. For the integrity of the system, the inclusion of favourable information must not be bought for a price or obtained through other illegitimate means. The factual basis of data and criteria guards against the possibility of corruption or appearance of unfair treatment.

Most of the types of information mentioned above are naturally of this type. For example, participation in and completion of skills training, education, work-placement programs, and spiritual care lend themselves very well to this type of analysis: either someone participated or they did not. It could be more difficult to measure considerations such as behaviour while in custody or on parole. Nevertheless, where they do not exist already, criteria can be established and measured.

It should be acknowledged that there is a remote possibility that including information about participation in prison education and programming could lead some inmates to participate in these programs simply because it will be visible on their criminal record. However, it would be unlikely that an inmate would participate in these programs to game the system only for the purpose of demonstrating something on a future criminal record. For one thing, it would involve a great deal of commitment for something the benefits of which would not be seen until after release from prison. Nevertheless, one might look with skepticism upon the hypothetical scenario of an inmate taking programs for less-than-ideal reasons. But drawing more attention to the post-incarceration benefits of active participation in programming such as skills

training would itself be a good thing. And in the case of a hypothetical inmate who is participating only to demonstrate something on a future criminal record, at least this inmate is oriented toward considering how they might re-integrate into the rest of society. Even that shows some forward-looking initiative to have a better life outside of prison.

Privacy Concerns

For most of the criteria outlined above, including them in a criminal record should be in the interests of the individual holding the criminal record. That said, there may be legitimate reasons why someone may find that including some of this information on their criminal record to be an intrusion into their privacy. This may particularly be the case for information about alcohol, drug, or other addiction treatments.

This concern is easily addressed by making the disclosure of this information optional, as is already contemplated by this policy. The individual could review this information as part of the exit process and decide what they would like to be disclosed. They could then have an opportunity to review this decision on a regular basis, with the understanding that the criminal record will always include the list of convictions that have not been expunged. In this situation, those with favourable information to report might elect to do so. At the very least, the choice would be in their hands.

One might be tempted to argue that all of the information outlined above (except perhaps information about treatments) should be included on the criminal record regardless of the individual's wishes. Recall that the purpose of this proposal is to provide employers with a fuller picture of human persons with criminal records. It may be tempting to follow this logic to an extreme, in which all information about what happens in the justice system is fair game for the criminal record. However, for certain things, people with criminal records have a reasonable expectation of privacy that should be respected.⁶² Allowing them to decide what information is included on their criminal records is a reasonable balancing of these interests.

Information-sharing Considerations

One thing that should not be overlooked in the implementation of a humanized version of criminal records is the impact on corrections- and police-information systems. These systems are already strained. The Canadian Police Information Centre database run by the RCMP has been plagued in the past by backlogs, outdated information, and inconsistencies with other police forces' data.⁶³ The federal government has recently highlighted the lack of interoperability between the National

⁶² It should also be noted that existing privacy legislation would govern the dissemination and use of this information within the justice system itself. This is another important safeguard against potential abuses of this information.

⁶³ B. Bureau, "RCMP Database Remains Out of Date, Police and Prosecutors Say," CBC News, March 10, 2015, <https://www.cbc.ca/news/politics/rcmp-database-remains-out-of-date-police-and-prosecutors-say-1.2989397>.

Repository of Criminal Records and other police databases across the country, noting that the sharing of criminal records must be processed manually.⁶⁴ Moreover, other attempts by the federal government to combine and systematize data systems, such as the Phoenix pay system, have led to serious problems.⁶⁵ However, this need to improve information systems should not be an impediment to humanizing criminal records. These issues should be surmountable, since modern technology can provide the tools to improve the sharing of relevant information between governments and police forces.

Uniformity Considerations

In Canada, the federal government runs the prisons for inmates sentenced to terms of two years or more, while the provincial governments are responsible for jails and prisons for inmates on remand or with sentences under two years. This means that there could be challenges in ensuring that information is recorded in consistent ways across different levels of government and different provinces. Furthermore, there can be inconsistencies in how police forces report criminal-record information already. This current inconsistency ought not to be an impediment to this policy, however. Police forces should be moving toward greater consistency of reporting anyway, as one way of ensuring that the information in criminal records is correct and up to date.

In an ideal world, this policy would be adopted by all governments with a coordinated strategy across the federation to ensure consistency of policy direction. However, in the more likely event that one jurisdiction implements this policy before others do, it will be important for jurisdictions that subsequently implement this policy to be aware of lessons learned and to coordinate their implementation strategies with other governments.

Exclusion of Information in Special Cases

There are some special cases where exclusion of information might be necessary. For example, if someone has been granted a record suspension for all prior convictions, then all the information from their criminal record should be omitted as well, including the favourable information outlined above. After all, if an otherwise-empty record included information about treatment programs or skills training in prison, it would inadvertently expose someone for having had a criminal record for which a record suspension had been granted. This situation could easily be accommodated by including a condition that information be revealed only if two conditions are met: (1) the results of a criminal record check reveal some conviction information already, and (2) the individual has consented to the release of the information, as discussed above in the section titled “Privacy Concerns.”

⁶⁴ Public Safety Canada, “Criminal Records.”

⁶⁵ Office of the Auditor General of Canada, “Report 1—Building and Implementing the Phoenix Pay System,” Government of Canada, 2018, https://www.oag-bvg.gc.ca/internet/English/att_e_43045.html.

It is evident that there is a wide array of issues to be addressed in humanizing criminal records in the way proposed by this report. Clearly, there would be more work to be done, including the development of detailed criteria for information to be included in criminal records, but the above section provides a framework for beginning this important work.

Conclusion

Employment is a reliable predictor of desistance from crime. Yet having a criminal record makes it more difficult for those who have one to find employment. Employers may have good reason in some instances not to hire a person with a criminal record, depending on the content of the record. But evidence has shown that employers tend to have inaccurate assumptions about applicants with criminal records, which result in a stronger reluctance to hire these individuals than the data would suggest is warranted. That said, banning the box, one of the most-touted policy options for countering this disinclination to hire, has serious problems of its own. Studies have shown that, in the absence of information about individual job applicants, some employers shift to group discrimination, leading to reduced employment rates for members—even those without criminal records—of racial groups with higher average conviction rates.

Part of the problem is that criminal records, as they are currently constituted, do not capture a complete view of an individual's relationship with the criminal justice system. This paper proposes a new way of thinking about criminal records that attempts to solve this problem. It recognizes that employers have a reasonable and justifiable desire to know if prospective employees have a criminal record, yet tend to give criminal records an outsized influence in their hiring decisions.

Governments should humanize criminal records by giving individuals with criminal records the option of including information about the favourable elements of their experience with the criminal justice system. This could include information about skills training and education, behaviour, treatment programs, and spiritual care. A more well-rounded picture of a person's involvement in the justice system may encourage employers to view the criminal record within a fuller context. At the very least, it would be a signal from government that people with criminal records cannot and should not be reduced to a list of the worst decisions of their lives.

While this paper makes a specific recommendation directed at public policymakers, it leads to a more general point directed as much to employers as to governments. They should look upon those with experience in the criminal justice system as whole persons, not simply as “ex-criminals.” They should recognize what they have to offer to society through their participation in the economy. Insofar as a job applicant's criminal history is relevant to the job they are applying for, the employer should recognize the complex relationship that that person has with the criminal justice system, seek a fuller picture of who they are, and ultimately behold the dignity that lies within them.

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