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Occupational Licensing as a Barrier for People with Criminal Records: Proposals to Improve Anti-discrimination Law to Address Adverse Employment Impacts from the Criminal Legal System

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OCCUPATIONAL LICENSING AS A BARRIER FOR PEOPLE WITH CRIMINAL RECORDS: PROPOSALS TO IMPROVE ANTI-DISCRIMINATION LAW TO ADDRESS ADVERSE EMPLOYMENT IMPACTS FROM THE CRIMINAL LEGAL SYSTEM

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INTRODUCTION

In 1993, at 25 years old, Dawn Stephenson pled guilty to bank fraud.[1] Ms. Stephenson took steps to turn her life around: she went to community college, received an associate's degree in human services/mental health, and worked as a trauma coordinator at a medical center.[2] In 2010, Ms. Stephenson petitioned to have her criminal record expunged because she wanted to pursue a career in nursing and thought her criminal record would adversely impact her ability to get a nursing license.[3] She had not had a run-in with law enforcement since her original conviction.[4] To get more information about her potential for licensure, she called the New York State Division of Licensing Services, where a representative told her that

1. Stephenson v. United States, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015).
2. *Id.*
3. *Id.*
4. *Id.*

"generally, if you have a record, you can't be licensed."[5] Because of this, Ms. Stephenson decided not to continue her education in nursing.[6]

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Marc La Cloche grew up in New York City and a couple of years into his young adulthood, he was convicted of robbery in the first degree.[7] He served about 11 years in prison.[8] While incarcerated, Mr. La Cloche underwent barber training and found his passion: cutting hair.[9] Before his release in August 2000, he applied to a licensing board for a barber apprentice certification.[10] The board denied the application because of his "lack of good moral character" due to his criminal history, despite securing training for that specific vocation through a prison training program.[11] Mr. La Cloche appealed, and in June 2001, the administrative law judge (ALJ) found in Mr. La Cloche's favor because a barber's apprentice certificate does not require evidence of "good moral character"; the ALJ ordered the licensing agency to issue Mr. La Cloche a certificate.[12]

However, Mr. La Cloche was only able to work as a barber for a few months,[13] as the licensing agency appealed the ALJ's decision as a matter of law, reasoning that applicants are required, if requested, to present satisfactory evidence of "good moral character."[14] In a December 2001 decision, the Secretary of State reversed the ALJ's decision, revoked Mr. La Cloche's license, and remanded the record

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5. *Id.*

6. She was before the court because she wanted to expunge her record and pursue a career in her preferred field, nursing. *Id.* at 570. The court denied her request for expungement because her case was not an extreme circumstance. *Id.* at 571. The balancing test for expungement was between the government's need to maintain arrest records and the harm the records can cause citizens; Ms. Stephenson's case was not so extreme as to warrant an expungement. *Id.* at 567. Judge Raymond Dearie noted that while he would not expunge her record, he believed that she would be able to secure a nursing license because of her strong character and lack of recidivism. *See id.* at 571.

7. *See* Jennifer Gonnerman, *Banned from the Barbershop*, VILL. VOICE (Nov. 1, 2005), https://www.villagevoice.com/2005/11/01/banned-from-the-barbershop/ [https://perma.cc/LHA7-SS2G].

8. *See id.*

9. *See id.*

10. *See* La Cloche v. Daniels, 755 N.Y.S.2d 827, 828 (Sup. Ct. 2003).

11. *Id.*

12. *See id.*

13. *See* La Cloche v. Daniels, No. 403466/2003, 2006 N.Y. Misc. LEXIS 9379, at *3–4 (N.Y. Sup. Ct. June 1, 2006) (finding Mr. La Cloche worked for five months with his license).

14. *La Cloche*, 755 N.Y.S.2d at 828.

to the Office of Administrative Trials and Hearings.[15] Despite the remand from the Secretary of State, the administrative hearings office appeared to not hold a new hearing.[16]

After this decision, Mr. La Cloche commenced a proceeding to annul the Secretary of State's decision, arguing that "good moral character is not required for an apprentice's certificate."[17] The New York Supreme Court found that "good moral character" is an implicit requirement for the certificate, but that the state should not have considered his criminal conviction the sole reason for having inadequate moral character.[18] The court then remanded for a rehearing.[19]

At the rehearing in 2003, Mr. La Cloche submitted overwhelming evidence of good character through glowing references from his employers and landlord. He also submitted materials from his parole officer.[20] Despite Mr. La Cloche's efforts, Administrative Law Judge Roger Schneier found that Mr. La Cloche "failed to establish good moral character."[21] Judge Schneier stated that Mr. La Cloche had not given consistent testimony about one aspect of the robbery, so he had not shown sufficient remorse.[22] Mr. La Cloche did not recover his license.[23]

Continuing to persevere after four years of bureaucratic red tape surrounding a license that he was trained for while in prison, Mr. La Cloche appealed Judge Schneier's decision.[24] Sadly, before the court commenced proceedings for the appeal, Mr. La Cloche passed away.[25]

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Ms. Stephenson's and Mr. La Cloche's situations show some of the overshadowed impacts a criminal record can have on people's lives. Mr. La Cloche had unusual tenacity in navigating through the legal system to advocate for a license reflecting the skills he gained while incarcerated, and yet he was denied a license because of his criminal

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15. *Id.*
16. *See id.*
17. La Cloche v. Daniels, No. 403466/2003, 2006 N.Y. Misc. LEXIS 9379, at *4 (N.Y. Sup. Ct. June 1, 2006).
18. *Id.* at *4–5.
19. *Id.* at *5.
20. *Id.*
21. *Id.* at *5–6.
22. *Id.* at *6.
23. *See id.* at *7.
24. *See id.* at *6.
25. *See id.* at *6–7.

record. For Ms. Stephenson, the court believed she would ultimately be able to secure a nursing license, but because of licensing agents who told her that her record would be a barrier, she did not pursue the higher-paying job she originally strove for.[26] The hurdles these stories exemplify are not uncommon for people with criminal records who try to secure licenses, but the stories show an uncommon persistence. There are far greater numbers of people who do not have the resources to advocate for a license in their career of choice.

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The criminal legal system in the United States disproportionately punishes Black and Latinx communities.[27] A person's initial interaction with the criminal legal system can lead to widespread consequences not only on the criminal charge but also on other areas of life, including employment and licensure. Occupational licenses, a government-provided credential that allows people to work in their chosen profession, can increase a person's pay,[28] which is of significant importance for people with criminal records, who, on average, have incomes that are substantially below the poverty line.[29]

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26. *See* Stephenson v. United States, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015).

27. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012) [hereinafter EEOC GUIDANCE], https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [https://perma.cc/CAM5-JKHT].

28. *See* Jason Furman & Laura Giuliano, *New Data Show That Roughly One-Quarter of U.S. Workers Hold an Occupational License*, ARCHIVED OBAMA ADMIN. WHITE HOUSE WEBSITE: THE WHITE HOUSE BLOG (June 17, 2016, 10:30 AM), https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license [https://perma.cc/GQ3Y-76GH]; *see also* U.S. DEP'T OF TREASURY OFF. OF ECON. POL'Y, COUNCIL OF ECON. ADVISERS & DEP'T OF LAB., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 4 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [https://perma.cc/HFD3-YSLB] (finding that unlicensed workers earn 10 to 15% lower wages than similarly situated licensed workers). Further, in a study considering three occupations — childcare workers, opticians, and veterinary technicians — licensing increases average state-level wages. *See* Mark Gius, *The Effects of Occupational Licensing on Wages: A State-Level Analysis*, 13 INT'L J. APPLIED ECON. 30, 33 (2016).

29. *See* TERRY-ANN CRAIGIE, AMES GRAWERT & CAMERON KIMBLE, CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 18 (2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf [https://perma.cc/Q8KN-N3RT]. Formerly imprisoned people earn around $6,700 annually, whereas similarly situated peers who were not incarcerated earn around $13,800. *Id.* at 14.

In recent years, advocates have successfully lobbied to change policies around job application exclusions for people with criminal records.[30] Some jurisdictions, like New York City, have implemented "ban the box" legislation to prevent discrimination against people who have criminal records.[31] However, such legislation does not address the related issue of occupational licensing.

Anti-discrimination law as it currently exists is not well crafted to reach the indirect effects of the criminal legal system. Without a mechanism to address occupational licensing barriers for those with criminal histories or those with arrests, the full inclusion of people of color (specifically Black and Latinx folks) into the labor market as well as the societal pursuit of racial equity will be impaired. For that reason, this Note recommends adopting an amended version of New York City's Fair Chance Act (FCA) with modifications, including specific coverage of occupational licensing agencies within the anti-discrimination framework, increased data collection, limitations on requested information in background checks, and the creation of an arm within the licensing agencies that can provide predetermination admission or rejection recommendations. In this way, a modified and strengthened FCA could help address the racial equity harms that current anti-discrimination law doctrine cannot readily address.

To develop this argument, Part I provides background on occupational licensure and the impacts it has on people with criminal records or those with pending charges. Part II goes into further detail about national and local anti-discrimination laws and the limits and potential of those legal avenues. Part III then proposes amendments to the FCA to strengthen anti-discrimination laws for those with criminal records as it relates to licensure.

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30. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2 (West 2021); MASS. GEN. LAWS ANN. ch. 151B, § 4(9) (West 2018).

31. *See* N.Y.C., N.Y., Fair Chance Act, ADMIN. CODE §§ 8-102, 8-107 (effective Oct. 27, 2015); *see also* Opportunity to Compete Act, N.J. STAT. ANN. §§ 34:6B-11 to 34:6B-19 (West 2021); N.Y.C. COMM'N ON HUM. RTS., LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT AND EMPLOYMENT DISCRIMINATION ON THE BASIS OF CRIMINAL HISTORY
(2021) [hereinafter LEGAL ENFORCEMENT GUIDANCE], https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf [https://perma.cc/XB9A-LJGH].

I. OCCUPATIONAL LICENSURE AND PROBLEMS FOR PEOPLE WITH CRIMINAL HISTORIES

This Part outlines occupational licensure, the increase in licensure in the past 70 years, specific issues that people with criminal records face when securing licenses, and concerns specific to New Yorkers.

A. Occupational Licensure

i. What is Occupational Licensure?

A license is a grant of permission required by the government that allows a licensee to perform, among other things, certain job-related activities.[32] There are two main types of licenses: revenue-raising and regulatory.[33] A revenue-raising license's purpose is to raise revenue for the state.[34] A state, or municipality, uses its power to tax to charge a business or profession a fee in exchange for the license.[35] An applicant pays a fee and receives a license; there is usually no background check or inquiry into the competence of the applicant.[36] In contrast, regulatory licenses, also known as occupational licenses, are designed to protect the public interest by regulating occupations that involve the public's health, safety, and welfare.[37] Using its police powers, the state can require a license to participate in an occupation, business, vocation, trade, or calling.[38] Professions that state or local government agencies require workers to be licensed in New York

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32. *See* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 189 (1995); *see also* CHIDI UMEZ & REBECCA PIRIUS, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS 1, https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf [https://perma.cc/T2V5-XAAX] (last visited Oct. 27, 2021).

33. *See* May, *supra* note 32, at 189.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See Department of Labor: Occupations Licensed or Certified by New York State*, N.Y. ST., https://statistics.labor.ny.gov/lstrain.shtm [https://perma.cc/ECU8-5H5H] (last visited Oct. 3, 2021); *see also* Annie Zhang, Note, *Sanctioned Unemployment: The Impact of Occupational Licensing Restrictions on Ex-Offenders*, 57 WASH. U. J.L. & POL'Y 251 (2018). Doctors, lawyers, and dentists are some of the professions that require occupational licensure. *See Department of Labor: Occupations Licensed or Certified by New York State*, *supra*.

38. *See* May, *supra* note 32, at 190 (citing Republic Ent., Inc. v. Clark Cnty. Liquor & Gaming Licensing Bd., 672 P.2d 634, 637 (Nev. 1983)).

include barbers, lawyers, school bus drivers, architects, funeral service directors, plumbers, private detectives, and security guards.[39]

Licenses are mandatory.[40] They set standards for a field, including safety and quality for the workers who join that profession.[41] They are also time-limited, and "[v]iolation of the terms of the license can result in legal action."[42] If a worker does not hold the proper license, noncompliance penalties include fines, financial consequences, administrative or criminal offenses, or an unenforceable contract between the worker and the other party.[43] Notably, a license does not guarantee a job, rather it gives a worker permission to hold a job in a specified field.[44]

There are two general components to occupational licensing statutes: competency and character.[45] The competency component usually encompasses state or municipality-specific educational, training, testing, and other requirements to practice in their chosen field.[46] For example, taxi drivers in New York City, which are regulated by the Taxi and Limousine Commission, are required to get a background check, have a safe driving record, and complete several types of training, which includes driver training, a defensive driving course, and wheelchair assistance training.[47]

In contrast, character components tend to be vague and predicated on an applicant having "good moral character."[48] This poses the greatest challenge for people with criminal records, as there is no standard definition for what the character component entails, and many jurisdictions use it as a means to exclude people with convictions.[49]

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39. *See* Zach Herman, *The National Occupational Licensing Database*, NAT'L CONF. ST. LEGISLATURES (Mar. 24, 2020), https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx [https://perma.cc/DL4R-3EH6].

40. *See* UMEZ & PIRIUS, *supra* note 32, at 1.

41. *See id.*

42. *Id.*

43. *See* Zhang, *supra* note 37, at 256.

44. *See* May, *supra* note 32, at 189.

45. *See id.*

46. *See* UMEZ & PIRIUS, *supra* note 32, at 1.

47. *See About TLC*, N.Y.C. TAXI & LIMOUSINE COMM'N, https://www1.nyc.gov/site/tlc/about/about-tlc.page [https://perma.cc/G4L9-XJTR] (last visited Sept. 22, 2021); *see also Get a TLC Drivers License*, N.Y.C. TAXI & LIMOUSINE COMM'N, https://www1.nyc.gov/site/tlc/drivers/get-a-tlc-drivers-license.page [https://perma.cc/3WE4-H9A3] (last visited Sept. 22, 2021).

48. *See infra* Section I.B.i.

49. *See infra* Section I.B.i.

ii. Marked Increase in Licensure Since the 1950s

Since the 1950s, there has been a marked increase in occupational licensure in the United States.[50] As of 2018, approximately 21.8% of employed people have a license, as compared to 5% in 1950.[51] The increase stems from two related but separate trends. First, sectors that require licensure have seen major growth.[52] Service sector employees are more likely to be licensed, at 32%, than in the manufacturing or goods-producing sector, at 16%, and the service sector has grown in the past 70 years.[53] This accounts for one-third of the growth in licenses. Second, there is an increase in the number of licensed professions.[54] Examples of sectors that were not historically licensed, but now comprise occupations with the most licensed workers, are sales, management, and construction.[55]

There are no standardized federal occupational licensure requirements, which leads to varying standards across the country. For example, in California, a manicurist needs 3,239 hours of required experience while New York requires zero.[56] Further, some occupations are licensed in some states but are not in others, which impacts overall licensure rates across the country.[57] In New York State, 20.7% of the workforce is licensed, as compared to a low of 12.4% in South Carolina and a high of 33.3% in Iowa.[58] When controlling for differences in jobs and occupations across the country, the distribution of licenses remained similar.[59] This indicates that the

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50. *See* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 17.

51. *See* Evan Cunningham, *Professional Certifications and Occupational Licenses: Evidence from the Current Population Survey*, U.S. BUREAU LAB. STATS. (June 2019), https://www.bls.gov/opub/mlr/2019/article/professional-certifications-and-occupational-licenses.htm#_ednref1 [https://perma.cc/G8AS-GQZW]; *see also* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 17.

52. *See* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 17–22.

53. *See id.* at 19.

54. *See id.*

55. *See id.* at 21.

56. *See* Herman, *supra* note 39. New York has other requirements for a manicurist's license but has no mandate for required experience. *See id.*

57. *See id.* California requires licenses for electricians, pharmacy technicians, and general contractors, but not home inspectors, massage therapists, and athletic trainers. *See id.* In New York, home inspectors, massage therapists, and athletic trainers are licensed, whereas electricians, pharmacy technicians, and general contractors are not. *See id.*

58. *See* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 24.

59. *See id.* at 25.

job composition within states is not the primary reason for state licensing variances, rather it is how states license different occupations.[60] Relatedly, licensure variation across states can impact workers' opportunities to relocate across state lines.[61]

The increase in sectors with licenses is strategic. Professionalization through licensing can help practitioners gain legitimacy by theoretically improving quality and public safety while limiting the number of people with those sought out skills, which provides competition and financial benefit for the industry.[62] Licensing also provides educational requirements for those that hold the license.[63] Thus, licensing can provide an income boost because providers are able to charge more by nature of having a license.[64] Additionally, professional associations lobby for the creation of a license for a sector, and those associations are generally able to greater exercise political influence when compared to consumer groups.[65] Legislators usually do not have to grapple with the prospect of finding additional funding for the licensing boards, as licensing fees are the primary funding mechanism for the boards, which are often revenue neutral.[66] This provides a greater incentive for legislators to approve licensing initiatives.[67]

B. Specific Issues People with Criminal Records Face with Regards to Occupational Licensure

People who have contact with the criminal legal system can suffer civil penalties — which can include restrictions on public benefits, government assisted housing, voting rights, and occupational

60. *See id.* at 23–25.

61. *See* Herman, *supra* note 39.

62. *See generally* James Bessen, *Everything You Need to Know About Occupational Licensing*, VOX (Nov. 18, 2014, 10:26 AM), https://www.vox.com/2014/11/18/18089272/occupational-licensing [https://perma.cc/6CZE-7MQY]. *See also The Costs of Occupational Licensing*, INST. FOR JUST. (Nov. 2018), https://ij.org/report/at-what-cost/costs-of-occupational-licensing/#citation_12 [https://perma.cc/4GJP-6S7X].

63. *See* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 21–23.

64. *See id.* at 4 (explaining that consumers may pay 3–16% higher prices for goods, but the price increase does not necessarily reflect the quality of the goods and services).

65. *See id.* at 22.

66. *See id.* at 22–23.

67. *See id.* at 23.

licensure.[68] These denials and restrictions are not incorporated into a person's sentence, but rather are woven into societal and legal structures to limit the rights of people with criminal records.[69] While workers generally have barriers to licensure — such as education or training necessary to obtain licensure — there are also barriers specific to people with criminal records, including "good moral character" components, blanket bans, cost, and a general lack of transparency.[70] These issues can impact over 70 million people living in the United States with criminal records.[71]

i. "Good Moral Character" Component and Blanket Bans for People with Felonies

In *Hawker v. New York*, the Supreme Court established that the state can define the qualifications of licenses through its police power, that "good moral character" can be a prerequisite to licensure, and that the content of the conviction can be proof of quality of character.[72] This laid the groundwork for the most challenging aspect for people with records to secure licensure: the character component.[73] There is not a standard definition of "good moral character" across states, and the Supreme Court has noted how the term is "unusually ambiguous" and can be "a dangerous instrument

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68. *See* Runa Rajagopal, *Diary of a Civil Public Defender: Critical Lessons for Achieving Transformative Change on Behalf of Communities*, 46 FORDHAM URB. L.J. 876, 893 (2019); *see also* May, *supra* note 32, at 189.

69. *See* May, *supra* note 32, at 189.

70. *See infra* Section I.B.

71. *See* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/Q3A8-VE4G]. For reference, approximately the same number of people have four-year college degrees. *Id.*

72. 170 U.S. 189, 197 (1898) (upholding the denial of a physician's license to a man convicted of performing an abortion). The Court remarked:

> [I]f the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of res judicata, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

Id. at 196. Further, the Court stated: "Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class . . . ." *Id.* at 197.

73. *See* May, *supra* note 32, at 195.

for arbitrary and discriminatory denial" to occupational licensure.[74] Because of the lack of guidance on what a "good moral character" clause means, many licensing authorities interpret this clause as a ban for those with a criminal record.[75]

The "good moral character" component acutely impacts those with felony convictions. There are several different approaches states may take: (i) a felony conviction is an automatic disqualification;[76] (ii) it is evidence of the lack of a "good moral character,"[77] or (iii) it is important to consider if the conviction relates to the job the applicant seeks licensure for or if the conviction involves moral turpitude.[78] In approximately half of states, licenses can be denied for convictions of any kind, regardless of whether the conviction relates to their job or how long ago the offense occurred.[79] These varied standards and the lack of oversight from a central licensing agency may contribute to a lack of predictability and consistency.[80]

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74. *See* Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957). In *Konigsberg*, the issue related to a denial of a law license for suspicions of supporting the Communist Party. *See id.* at 273. The California Supreme Court did not produce a definition of "good moral character" for the Supreme Court to use, and counsel for the State produced a definition that was not supported in prior case law — all of which contribute to questions surrounding ambiguity. *See id.* at 263.

75. *See* Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 LAW & SOC. INQUIRY 1027, 1031–33 (2018); *see also* DEP'T OF THE TREASURY OFF. OF ECON. POL'Y ET AL., *supra* note 28, at 48–49.

76. For example, in Vermont, a license applicant may be rejected because of a "conviction of a felony, whether or not related to the practice of the profession." *See* VT. STAT. ANN. tit. 3, § 129a(a)(10) (2021). However, these blanket bans are against guidance promulgated by the U.S. Equal Employment Opportunity Commission (EEOC). *See* EEOC GUIDANCE, *supra* note 27.

77. For example, to become an accountant in Idaho, evidence of a lack of "good moral character" includes felony convictions. *See* IDAHO ADMIN. CODE r. 24.30.01.020(02)(a) (2021).

78. For example, in Michigan, a licensing board may consider the conviction as evidence of a lack of "good moral character" for felony convictions if the conviction relates to the activities authorized by the occupational license. *See* H.B. 4488, 100th Leg., Reg. Sess. § 2(a) (Mich. 2021).

79. *See* Rhode, *supra* note 75, at 1033; *see also* NAT'L CONF. OF STATE LEGISLATURES, THE STATE OF OCCUPATIONAL LICENSING: RESEARCH, STATE POLICIES AND TRENDS 8 (2017), https://www.ncsl.org/Portals/1/Documents/employ/Licensing/State_Occupational_Licensing.pdf [https://perma.cc/78CG-RSZ4].

80. *See generally* UMEZ & PIRIUS, *supra* note 32, at 3.

ii. Cost: Education, Training, and Application Fees

In addition to barriers sanctioned by the state, cost and educational barriers also have a disproportionate impact on applicants who have a criminal record. Costs associated with licensure — which include training, education, and application fees[81] — impact low-wage workers the most, as they must pay a larger proportion of their wages to licensing boards and training entities. People who have criminal records tend to make significantly less and have less wealth than similarly situated peers.[82] In the hopes of securing gainful employment, some people with criminal records may invest time and scarce resources into fulfilling prerequisites for licensure, like further education, and then find themselves denied because of their record.[83]

iii. Lack of Transparency Regarding Which Offenses Are Obstacles to Licensure

There are significant transparency issues with the license application itself. Some states have applications where it seems that any criminal history might impact eligibility, as they do not distinguish

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81. For example, securing a barbering license in New York requires an apprenticeship, education, or experience. Education can cost $5,600 for a 500-hour training course, in addition to $40 for an initial application, $40 to renew a license, $15 for a practical exam, and costs associated with a health examination by a physician. *See 500 Hour Master Barber Program*, AM. BARBER INST., https://www.abi.edu/courses/500-hours-barber-operator-program [https://perma.cc/AM2G-KPTJ] (last visited Sept. 19, 2021); *see also Barber*, N.Y. ST. DEP'T ST., https://dos.ny.gov/barber [https://perma.cc/VBS4-F8MB] (last visited Sept. 19, 2021). These costs do not include traditional cost of living expenses while a person is in school to secure the education necessary for a license.

82. Formerly imprisoned people earn around $6,700 annually, whereas similarly situated peers who were not incarcerated earn around $13,800. *See* CRAIGIE ET AL., *supra* note 29, at 14. People with a felony conviction not sentenced to imprisonment have a 22% reduction in annual income (i.e., comparing $29,400 to $23,000, which impacts 12.1 million people). *Id.* at 15. It is difficult to accurately determine data for people with a felony conviction that were sentenced to imprisonment, as it is unclear whether the decrease in annual income is due to (A) prolonged separation from the job market; (B) the stigma of having a criminal conviction alone; or (C) a combination of the two, and to what degree the factors weigh. *Id.* at 26. People with a misdemeanor conviction have a 16% annual income reduction when compared to peers (comparing $32,000 with $26,900 which impacts 46.8 million people). *See id.* at 15. Further, over the course of a lifetime, "[f]ormerly imprisoned Black and Latin[x] people suffer greater lifetime earnings losses — $358,900 and $511,500, respectively — than their white counterparts, whose losses amount to $267,000." *Id.* at 19; *see also* Ashley Nerbovig, *License to Clip*, MARSHALL PROJECT (July 10, 2018, 6:00 AM), https://www.themarshallproject.org/2018/07/10/license-to-clip [https://perma.cc/AFW5-W6GE].

83. *See* UMEZ & PIRIUS, *supra* note 32, at 3.

that only convictions relevant to the occupation at hand would be adversely considered.[84] This might have an unfavorable impact and deter qualified people from applying.[85] This was the hurdle that Ms. Stephenson faced: Ms. Stephenson ultimately stopped her pursuit of a nursing license because she thought the licensing board would view her offense conviction negatively.[86] Additionally, background check disqualifications "tend to have a chilling effect on people with records pursuing an occupation,"[87] and there is no current data that show how many people either apply and are rejected or are deterred because of the chilling effect. While there is no official record of how many people this chilling effect has deterred from pursuing their dreams, the consequences are greatly limiting.

C. Concerns for New Yorkers

Some of these issues are mitigated in New York, as 86% of people with a criminal record who applied in 2018 were granted licensure.[88] This approval number is higher than many other states in part because licensing agencies must analyze the conviction and if it relates to the license that the applicant seeks.[89] To deny an applicant a license based on their criminal record, a licensing agency must show that (i) there is a direct relationship between the criminal offense and the specific license sought or (ii) the issuance of the license would involve an unreasonable risk to property or the safety or welfare of the general public.[90]

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84. *See* MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP. L. PROJECT, UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 25, 37, 41 (2016), https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf [https://perma.cc/P64N-JEK7].

85. *Id.* at 25.

86. *See* Stephenson v. United States, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015).

87. RODRIGUEZ & AVERY, *supra* note 84, at 25.

88. *See* INST. FOR JUST. & OPPORTUNITY & CITY UNIV. OF N.Y., GETTING TO WORK WITH A CRIMINAL RECORD: NEW YORK STATE LICENSE GUIDES 1 (2020), https://justiceandopportunity.org/wp-content/uploads/2020/06/License-Guides_Final.pdf [https://perma.cc/SG7V-FPV7]. However, the state does not provide further information on the 86% statistic, particularly as it relates to which offenses are more often rejected, how many of those are misdemeanors versus felonies, the acceptance numbers per agency, or if there are patterns within the agencies as to which offenses are frequently denied.

89. *See* N.Y. CORRECT. LAW § 752 (McKinney 2021). *See generally* N.Y. EXEC. LAW § 296(15) (McKinney 2021).

90. *See* N.Y. CORRECT. LAW § 752 (McKinney 2021).

Many licensing agencies in New York require "good moral character," which creates issues for people with criminal records. To combat employment discrimination against people with criminal records, the state passed laws prohibiting discrimination on the basis of criminal history with limited exceptions.[91] However, as shown initially with Mr. La Cloche, who applied for a barbering license when these nexus laws were in effect, they do not preclude licensing agencies from rejecting applicants that demonstrate good character.[92] The bar for agencies to state how the criminal offense relates to the job at hand or has potential to cause risk to the public is relatively low. These initial agency determinations are rarely overturned by ALJs or the courts because of deference to licensing agencies.[93]

Despite New York State's nexus law, securing licensure is a problem for people with criminal records because of the lack of transparency. As illustrated with Ms. Stephenson in the Introduction, potential applicants might receive misguided information from the agencies as to how influential criminal records are to their application, and the applicant would then be dissuaded, despite their likelihood of approval, depending on the offense.[94] There are no estimates for how many people are deterred from seeking licensure, but this issue warrants further study and exploration, including potential Freedom of Information Law (FOIL) requests.[95]

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91. *Id.*

92. *See generally* La Cloche v. Daniels, No. 403466/2003, 2006 N.Y. Misc. LEXIS 9379, at *3 (N.Y. Sup. Ct. 2006).

93. An administrative agency is entitled to degrees of judicial deference, particularly when an agency is charged with the administration of a statute, if the Appeal Board's interpretation is supported by a rational basis. *See In re* Claim of Gruber, 674 N.E.2d 1354, 1358 (N.Y. 1996) (quoting Rosen v. Public. Emp. Relations Bd., 526 N.E.2d 25 (N.Y. 1988)).

94. *See* Stephenson v. United States, 139 F. Supp. 3d 566, 567 (E.D.N.Y. 2015) (stating Ms. Stephenson was told by a licensing agency that people with criminal records are generally unable to secure a nursing license, which resulted in Ms. Stephenson discontinuing her nursing education despite her strong character and lack of recidivism).

95. *See* RODRIGUEZ & AVERY, *supra* note 84, at 25. A FOIL request is a formal submission requesting information related to government records from New York State. *See Freedom of Information Law (FOIL) Request*, N.Y. ST., https://www.governor.ny.gov/freedom-information-law-foil-requests [https://perma.cc/7G4V-JJM8] (last visited Oct. 27, 2021).

i. License Suspensions Upon Arrest or Issuance of Desk Appearance Tickets

Summary suspension is a suspension of a license after an allegation — i.e., an arrest or issuance of a ticket[96] — before there is a full hearing on the matter. Rooted in administrative law, summary suspensions are separate from criminal charges but nonetheless prevent a person from working in their field while charges pend. For example, if an Uber driver is arrested, the arrest information is automatically sent to the New York State Division of Criminal Justice Services (DCJS).[97] From there, DCJS provides that information to a state licensing agency, the Taxi and Limousine Commission (TLC), whose Chairperson can then suspend a license.[98] Notably, prior to 2019, DCJS did not provide information related to the factual bases or allegations from the arrest, only the arrest charge itself.[99] The TLC Chair's determination derived from whether the charges, presuming they were true, constituted a substantial threat to public health or safety. However, after the Second Circuit's decision in *Nnebe v. Daus*, which challenged summary suspension procedures for taxi drivers, the Taxi and Limousine Commission reworked their frameworks so that they are not so narrowly construed.[100]

Mustafa Kamal's heartbreaking predicament exemplified this issue. Mr. Kamal was a licensed taxicab driver, and his license was suspended after he was issued a desk appearance ticket for "leaving the scene of a personal injury accident."[101] Because the standard of review for Rule 8-16(c), which governed the summary suspension

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96. A desk appearance ticket is a "written notice issued and subscribed by a police officer . . . directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense." N.Y. CRIM. PROC. LAW § 150.10(1) (McKinney 2021).

97. *See, e.g.*, *Criminal Justice Statistics*, N.Y. ST., https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm [https://perma.cc/4YZV-3594] (last visited Nov. 2, 2021) (explaining the role of DCJS). An example of one of the agencies that follows this practice is the Taxi and Limousine Commission. *See Notice of Promulgation of Rules*, N.Y.C. TAXI & LIMOUSINE COMM'N 2 (2020), https://www1.nyc.gov/assets/tlc/downloads/pdf/summary-suspension-rules-2020-12-02.pdf [https://perma.cc/GBU7-MYNX].

98. *See id.* Licensing agencies in New York City have this authority through Section 2303 of the New York City Charter and Section 19-503 of the New York City Administrative Code. *See* N.Y.C., N.Y., CHARTER ch. 65, § 2303(b)(5) (2021); N.Y.C., N.Y., CODE tit. 19, § 19-503 (2021).

99. *See* Nnebe v. Daus, 644 F.3d 147, 151 (2d Cir. 2011); *see also* Nnebe v. Daus, 931 F.3d 66, 83 (2d Cir. 2019).

100. *See* 510 F.Supp. 3d 179, 187 (S.D.N.Y. 2020).

101. *See* Taxi & Limousine Comm'n v. Kamal, OATH index No. 2607/10, at 1 (June 1, 2010).

proceedings, was so narrow — only allowing the ALJ to consider the charge itself — the ALJ upheld Mr. Kamal's suspension, as they could only take the ticket's allegations at face value and presume the charges were true.[102] Mr. Kamal was suspended solely for issuance of a ticket. As those who are issued tickets must wait months to be formally charged, this process left Mr. Kamal without a livelihood for an extended period of time.[103] This situation is in contrast with a person who is arrested and may have their charges dismissed immediately at arraignments or face, at maximum, a couple of weeks without a license.[104]

II. LIMITATIONS OF ANTI-DISCRIMINATION LAW TO REMEDY RESTRICTIONS FOR LICENSURE APPLICANTS OF COLOR WITH CRIMINAL RECORDS

This Part explores the potential for applicants of color with a criminal record to try to remedy licensing board discrimination through litigation using anti-discrimination law. This Part further compares the potential of using anti-discrimination laws to protect the corollary effects of the criminal legal system on occupational licensure: a federal anti-discrimination law, Title VII, a city anti-discrimination law, the New York City Human Rights Law (NYCHRL), and the merits of a due process claim for summary suspensions. First, the Author outlines the frameworks for Title VII claims of disparate treatment and impact. Next, the Author discusses the Second Circuit's approach to a similar case for discrimination based on criminal records but relating to job applications instead of license applications. The Author then analyzes the limitations of bringing a Title VII claim for occupational licenses. Last, the Author outlines relevant New York City-specific statutes that might further claims of discrimination, in addition to accounting for recent due process claims as they relate to summary suspensions.

A. Title VII and an Anti-Discrimination Approach

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[105] Having a

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102. *Id.* at 5. This decision was despite Mr. Kamal's witnesses observing a man attack Mr. Kamal's car. *See id.* at 2–3.

103. *Id.* at 2.

104. *Id.* at 5.

105. *See* EEOC GUIDANCE, *supra* note 27.

criminal record is not a protected status, meaning the EEOC only considers whether or not an employer's[106] reliance on a criminal record violates Title VII if there is an additional protected class that comprises the claim.[107] For example, if plaintiffs could show the existence of a link between a criminal record and race, they might be able to put forth a discrimination claim based on race. Title VII liability for employment discrimination is determined using two frameworks — either "disparate treatment"[108] or "disparate impact."[109]

An example of a successful disparate impact case is *Green v. Missouri Pacific Railroad*, where Buck Green, who is Black, filed a class action against Missouri Pacific Railroad (MoPac).[110] Green alleged the employer's policy violated Title VII in disqualifying applicants with a "conviction of any crime other than a minor traffic offense," which disqualified Black people at higher rates than whites and was not job-related.[111] The Eighth Circuit held that MoPac's policies violated Title VII.[112] Green used statistics, specifically

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106. Title VII applies to employers with 15 or more employees, but formerly incarcerated people may allege that "record-based employer hiring policies are analogous to record-based occupational licensing laws," so the laws themselves violate Title VII. *See* Zhang, *supra* note 37, at 264; *see also* 42 U.S.C. § 2000e(b). As explored later in this Note, the FCA makes more explicit that licensing agencies fall under the anti-discrimination statute, so a claim brought using the New York City Human Rights Law might be more successful. *See infra* Part III.

107. *See* EEOC GUIDANCE, *supra* note 27.

108. *Id.* Disparate treatment occurs when a plaintiff, or group of plaintiffs, can show that an employer treats a plaintiff differently because of their race, national origin, or another protected basis. *See* 42 U.S.C. § 2000e-2(a). If an employer received identical job applications from a white person and a Black person with the same criminal record, but the white applicants were referred for interviews and the Black applicants were not, this would be an example of treating applicants differently on the basis of race. *See* EEOC GUIDANCE, *supra* note 27. To satisfy a plaintiff's initial burden of proof, the plaintiff must show that (1) they belong to a protected class; (2) they applied and were qualified for a job or license for which the employer or agency was seeking applicants; (3) despite their qualifications, they were rejected; and (4) after rejection, the position remained open and the employer or agency continued to seek applicants. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). From there, the applicant must then show that the employer's reason was pretext for discrimination prohibited by Title VII. *See id.* at 804–05.

109. A class-based disparate impact discrimination claim, focused on effects and not on intent, occurs when a plaintiff shows the employer's seemingly neutral policy or practice disproportionately impacts a Title VII-protected group and the employer cannot demonstrate that the policy is related to the job and consistent with business necessity. *See* EEOC GUIDANCE, *supra* note 27.

110. 523 F.2d 1290, 1292–93 (8th Cir. 1975).

111. *Id.*

112. *Id.* at 1298–99.

MoPac's records of employment applications and rejections, to establish a disproportionate impact on Black applicants.[113] The three factors the court assessed when considering whether an exclusion is job-related and consistent with business necessity are: (i) the nature and gravity of the offense or conduct; (ii) how long ago the offense occurred and if the sentence is completed; and (iii) the nature of the job sought.[114] While this outcome might seem promising for people with criminal records who are barred from licensure, there are several complicating factors which would make the use of federal anti-discrimination law untenable.

i. Current Trends in Employment Law Cases

Within the last two decades, most claims of employment discrimination have been individual claims of intentional discrimination instead of class claims of disparate impact.[115] George Rutherglen, a scholar and Professor of Law at the University of Virginia, attributes this change to three primary trends: an increased burden when bringing class claims, more demanding procedural requirements for class claims, and increased doctrinal complexity.[116] The Second Circuit's recent holdings provide examples of these issues.

1. Legal Landscape in the Second Circuit for Disparate Impact Claims, Informed by EEOC Guidance and Mandala v. DTT

In 2012, the EEOC issued guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.[117] The EEOC noted that Black and Latinx people are disproportionately arrested at two to three times the number of the general population.[118] The data supported a finding that criminal record exclusions for job applicants have a

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113. *Id.* at 1294–96.

114. *See* EEOC GUIDANCE, *supra* note 27; *see also Green*, 523 F.2d at 1297–99.

115. *See* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 74–75 (5th ed., 2020).

116. *Id.* at 75.

117. *See* EEOC GUIDANCE, *supra* note 27.

118. *Id.* The EEOC also noted the disproportionate rate of incarceration based on race, where the "Department of Justice estimated in 2001 that 1 out of every 17 [w]hite men (5.9% of the [w]hite men in the U.S.) is expected to go to prison at some point in his lifetime," whereas the rate is "1 in 6 (or 17.2%)" for Latinx men, and "1 in 3 (or 32.2%)" for Black men. *Id.*

disparate impact based on race and national origin.[119] The EEOC provided an example in which an employer had an exclusion policy that automatically rejected applicants convicted of a crime — otherwise known as a blanket ban discussed in Part I.[120] The example company did not have a record of the reasons why it adopted the exclusion and does not have reasoning to show that convictions for all offenses are unacceptable for the jobs needed.[121] The EEOC stipulates that, based on those facts, joined with a disparate impact claim on a Title VII-protected basis, "the EEOC would find reasonable cause to believe the blanket exclusion was not job related and consistent with business necessity."[122] However, these findings do not necessarily translate to satisfying burdens of proof for a disparate impact claim.

There are no cases in the Second Circuit that deal directly with disparate impact or treatment claims, licensure applications, and criminal records. However, the Second Circuit recently heard *Mandala v. NTT Data, Inc.* that dealt with job exclusions for people with criminal records.[123] The Second Circuit considered an argument from Black men at a technology services provider, where their offers of employment were revoked because of past criminal convictions.[124] Plaintiffs filed a Title VII disparate impact class action against the technology services provider. The district court dismissed their complaint for failure to state a claim because plaintiffs could not provide statistics specific enough to their situation to represent the applicant pool in question.[125] The plaintiffs provided national statistics showing that Black people are arrested and incarcerated at higher rates than white people, relative to their share of the population — which is similar to the EEOC Guidance.[126] The majority held that national statistics do not represent the competitive candidate pool from which the employer selected, as the job required substantial education and technical credentials, which the national population does not reflect.[127]

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *See generally* 975 F.3d 202 (2d Cir. 2020).
124. *Id.* at 205.
125. *See id.*
126. *See generally* EEOC GUIDANCE, *supra* note 27.
127. *Mandala*, 975 F.3d at 211–12.

In his dissent, Judge Chin stated that the national statistics provided by plaintiffs were not sufficient to meet the burden of a motion to dismiss, and the majority opinion held the plaintiffs to a standard more akin to summary judgment.[128] The plaintiff's burden was to suggest an inference of disparate impact based on race, so that one could make an inference from the facts that an employer's practice disproportionately impacts a protected class.[129] Judge Chin stated that the reliance on national statistics was proper for the initial pleadings stage of litigation and the plaintiffs plausibly alleged that Nippon Telegraph and Telephone Public Corporation (NTT)'s policy had a disparate impact on Black job applicants in violation of Title VII.[130] Additionally, Judge Chin added that national statistics could be applicable in certain disparate impact cases, and this employer could conceivably qualify.[131] NTT is a "global" information technology services company, the plaintiffs were spread across the country, and there was no discussion about necessary education or training in the job description.[132] If NTT had a policy resulting in a disparate impact on Black people, it would be a national disparate impact.[133] After the decision, Judge Chin polled to rehear *Mandala en banc*, but the other circuit judges overruled him.[134]

In a separate case about intentional housing discrimination based on race, Judge Chin commented on his actions, noting that he had only polled to rehear a case once in ten years, but he felt that it was necessary in *Mandala* because the current holding held the plaintiffs to a higher "pleading standard in Title VII cases in disregard of controlling case law."[135] A notable aspect of this case is that the majority opinion did not mention the EEOC Guidance prohibiting blanket bans for people with criminal records. NTT had a blanket ban for people convicted of felonies, and yet there was no discussion of either the Guidance from the EEOC or the potential discriminatory nature of the ban itself.[136]

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128. *Id.* at 214–15.
129. *See id.*
130. *See id.*
131. *Id.* at 215–16.
132. *Id.* at 216.
133. *See id.* at 216–17.
134. *See generally* Mandala v. NTT Data, Inc., 988 F.3d 664 (2d Cir. 2021).
135. Francis v. Kings Park Manor, Inc., 992 F.3d 67, 83 (2d Cir. 2021). Judge Chin further noted, "In both [*Mandala*, an employment case, and *Francis*, a housing case], instead of drawing all reasonable inferences *in favor* of plaintiffs, the Court draws inferences *against* them." *Id.* at 84 (Chin, J., dissenting in part).
136. *See generally* Mandala v. NTT Data, Inc., 975 F.3d 202 (2d Cir. 2020).

2. Analysis: Various Limitations to Title VII Claims

If people with criminal records brought a Title VII claim against occupational licensing agencies, they would face several obstacles. First, unlawful employment practices encompassed in Title VII applies to employers, employment agencies, or labor organizations.[137] Courts would interpret the doctrine literally, therefore foreclosing an opportunity to sue licensing boards.

Second, employees, not independent contractors, can sue under Title VII, which widely limits the swath of people who can state a claim.[138] A recent decision in New York's Appellate Division classified Uber drivers as employees for unemployment insurance purposes, which is promising for drivers in New York City and may push legislators to consider a wider policy change but does not yet apply to conditions other than unemployment.[139] Currently, Uber and Lyft drivers in New York City are still independent contractors and would be unable to recover under Title VII.

Third, despite the EEOC's link between criminal records and Title VII protected classes based on race in their Guidance document, plaintiffs in *Mandala* were unable to state a claim because of their high burden of proof. Plaintiffs based their initial arguments on statistics and data promulgated by the EEOC, Department of Justice, and Department of Labor, which showed a general link between criminal records and race.[140] This was what was available to the plaintiffs at the time, as the employer's hiring records which detailed applicants and criminal records would only be uncovered in discovery. However, the court found that the plaintiffs did not demonstrate the composition of the applicant pool in question.[141] The Second Circuit effectively raised the pleading standard to a summary judgment standard, which has broad implications for future Title VII disparate impact claims. The types of data that the court expected plaintiffs to secure effectively bars people with criminal records to make these types of claims in the future, as there is no government-published information about people with criminal records in the workforce. Further, studies that estimate the number of people with criminal records in the workforce are speculative and

137. *See generally* 42 U.S.C. § 2000e-2.

138. *Id.*; *see, e.g.*, Levitin v. Nw. Cmty. Hosp., 64 F. Supp. 3d 1107, 1123–24 (N.D. Ill. 2014) (holding an employee can bring a Title VII claim and finding plaintiff was an independent contractor who could not bring such a claim).

139. *See In re* Lowry, 138 N.Y.S.3d 238, 239–41 (App. Div. 2020).

140. *See generally Mandala*, 975 F.3d.

141. *See id.* at 211.

not applicable to any specific area and any given industry. The employers, in these situations, are in the best position to provide this data during discovery. For these reasons, it is unlikely that a Title VII action would prevail.

B. Relevant New York Policy for Licensure Denials

New York City has a number of policies in place that limit the most harmful effects of discrimination against people with criminal records. With respect to licensure, it is illegal to have a blanket ban against people who have criminal records, and there are relevancy limitations where agencies cannot consider arrests that did not lead to convictions.[142] However, despite the passage of the Fair Chance Act, there are still gaps in the law for discrimination protections for people with criminal records who apply for licenses.

i. New York City Human Rights Law and Article 23-A

NYCHRL prohibits discrimination in employment, housing, and public accommodations. The law is loosely based on the parameters of Title VII but has a much more expansive scope of protected classes and provides further protections for employment issues.[143] For licensure purposes, NYCHRL explicitly defines "licensing agency" but does not explicitly include licensure in the employment context. However, as it is mentioned in the law, it may provide a broader context, and a more direct link, for bringing a claim based on a protected class against licensing agencies.

In general, licensure applicants have two choices if they want to make a discrimination claim about criminal records related to licensure.[144] The first would be similar to a Title VII disparate impact claim but would use the more expansive NYCHRL instead of Title

142. *See* N.Y. EXEC. LAW § 296(16) (McKinney 2021).

143. For example, protected classes under NYCHRL include age, immigration or citizenship status, color, disability, gender, gender identity, marital and partnership status, national origin, pregnancy, race, religion/creed, sexual orientation and status as a veteran or active military service member. *See Human Rights*, N.Y.C. HUM. RTS., https://www1.nyc.gov/site/cchr/law/the-law.page [https://perma.cc/4974-5XTJ] (last visited Sept. 10, 2021). For additional protections in employment, the NYCHRL has additional protected classes, including arrest or conviction record, caregiver status, credit history, pre-employment marijuana testing, unemployment status, sexual and reproductive health decisions, salary history, and status as a victim of domestic violence, stalking, and sex offenses. *See id.*

144. In general, if a person wanted to make a direct appeal of their licensure denial, they would submit an appeal to the NYC Office of Administrative Trials and Hearings (OATH). *See* N.Y.C., N.Y., Rules, tit. 35, § 68-11.

VII. This would address some of the concerns from the issues related to Title VII claims, specifically that licensing agencies are explicitly addressed in the statute, independent contractors are widely protected under NYCHRL, and that the traditional *McDonnell Douglass Corp. v. Green* burden-shifting framework for analyzing claims at the summary judgment phase does not apply to NYCHRL claims.[145] Addressing those barriers indicates that the NYCHRL would be more helpful when bringing a claim for occupational licensure.

The second, but much less likely, claim could be through the FCA, which amended the NYCHRL in 2015.[146] The FCA is a "ban-the-box" law, where employers, labor organizations, and employment agencies cannot "inquire about or consider the criminal history of job applicants prior to extending a conditional offers of employment."[147] However, the FCA does not explicitly apply to licensing agencies, as they do not extend offers of employment and only provide the certificate so that a worker could secure a job in a given field.[148] Despite this, under New York State's Article 23-A, a licensing agency cannot deny a license without either: (i) drawing a direct relationship between the applicant's conviction history and the prospective job; or (ii) showing that employing the applicant would involve an unreasonable risk to property or the safety or welfare of the public.[149]

An example of a more successful FCA claim, when compared to a Title VII claim, is *Millien v. Madison Square Garden Co.*[150] In *Millien*, plaintiffs filed a disparate impact suit using the NYCHRL

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145. *See* N.Y. EXEC. LAW § 296(16) (McKinney 2021); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Bennett v. Health Mgmt. Sys., Inc., 936 N.Y.S.2d 122 (App. Div. 2011) (holding that motions for summary judgment are limited, so long as plaintiffs can provide some justification that the nondiscriminatory reasons the employer provided are pretext, the motion for summary judgment will be denied); N.Y.C. COMM'N ON HUM. RTS., PROTECTIONS FOR INDEPENDENT CONTRACTORS & FREELANCERS FROM DISCRIMINATION AND HARASSMENT (2020), https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Independent_Contractor_One_Pager.pdf [https://perma.cc/F2TK-BA4G].

146. *See* Local Law No. 63, 2015 N.Y.C. Laws (2015) (to be codified as N.Y.C., N.Y. ADMIN. CODE tit. 8, § 8-102), https://www1.nyc.gov/assets/buildings/local_laws/ll63of2015.pdf [https://perma.cc/S7SS-AGVZ]; *see also* N.Y.C., N.Y., ADMIN. CODE § 2-04 (2021); N.Y.C., N.Y., Fair Chance Act, ADMIN. CODE §§ 8-102, 8-107 (effective Oct. 27, 2015).

147. LEGAL ENFORCEMENT GUIDANCE, *supra* note 31, at 5.

148. *See* N.Y.C. ADMIN. CODE §§ 8-107(9)(a)(3)–(11)(b).

149. *Id.*

150. No. 17-cv-4000 (AJN), 2020 U.S. Dist. LEXIS 141633 (S.D.N.Y. Aug. 7, 2020).

and the FCA.[151] The plaintiffs applied for jobs at Madison Square Garden and did not disclose criminal convictions on their application, but they were later revealed through a background check.[152] The plaintiffs made several arguments: (i) that the employer did not provide the background check to the applicants after criminal convictions were revealed, which is required by the Fair Credit Reporting Act; (ii) defendants violated the New York City Human Rights Law by failing to conduct an Article 23-A analysis, and (iii) defendant's practice of refusing to hire employees based on a failure to disclose their criminal record is discrimination against Black and Latinx applicants based on a disparate impact theory.[153] The class was certified, and the case settled for $1,300,000.[154] This provided relief for the plaintiffs, as they were able to avoid the hassle and expense of litigation and still settle for a significant amount. However, it does not produce case law that could further other similarly situated plaintiffs' goals down the road, as the court did not decide on the three issues.

ii. Analysis: Article 23-A Makes it Easier for Plaintiffs but Does Not Wholly Address Discriminatory Issues

Shifting the focus to discrete measures that employers do or do not satisfy by explaining the link between the direct relationship between criminal conviction and employment provides a clear standard to abide by. As Article 23-A does not have not a burden-shifting aspect like Title VII claims, the onus instead is on the employer or licensing agency to make that direct connection between the job duties and the conviction history, or demonstrate the unreasonable risk to property, safety, or welfare of individuals or the public. As one can see with the difference between *Mandala v. DTT* and *Millien v. Madison Square Garden*, plaintiffs have tools to secure a positive outcome when the employer has more requirements to prove that they *are not* discriminating because of a person's criminal record.

However, as long as employers and licensing agencies provide the analysis showing a direct relationship between criminal history and the job at hand as required by the FCA, they satisfy their statutory

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151. *Id.* at *5.

152. *Id.* at *6.

153. *Id.* at *5.

154. *Id.* at *9; *see also* Kevin Stawicki, *MSG to Pay $1.3M to End Criminal Background Check Suit*, Law360 (June 25, 2019, 8:56 PM), https://www.law360.com/articles/1172639 [https://perma.cc/9NPX-B2YA].

burden.[155] In practice, an Article 23-A analysis is not arduous. The plaintiffs in *Millien* were likely to prevail on their claim because the defendants wholly omitted performing that balance. However, if the company completed the balance but was arguably overbroad in its construction of what relates to business interest, it is not as clear that the plaintiffs would prevail, as courts are generally deferential to business and business interests.

C. Due Process, Summary Suspensions, and FCA Amendments

The New York City Council amended New York City's FCA, and amendments took effect in July 2021 to include protections for applicants and employees with pending arrests.[156] With the amendments, it is now unlawful for an employer to take adverse action against an applicant or employee based on a pending criminal accusation or arrest unless they can determine that there is a direct relationship between the accusation and the position, or reasonably assert that continued employment would involve an unreasonable risk to property or the safety or welfare of the public.[157] Because this amendment is so recent, it is unclear how it will be litigated and interpreted, but it more generally provides promise for people with open criminal cases. However, these amendments do not impact occupational licensing agencies and summary suspensions.

The *Nnebe* plaintiffs, taxi drivers in New York City, have participated in ongoing litigation related to summary suspensions for 15 years.[158] Through the years of litigation, the courts have grappled with drivers' due process rights when their license — and their ability to make a livelihood — is suspended based on a pending charge.[159] In a 2019 appeal, the Court determined that plaintiffs had a significant property interest that was implicated, and engaged in a balancing test of factors from *Mathews v. Eldridge*,[160] which included private interests, the risk of erroneous deprivation of the private interest, and

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155. N.Y.C., N.Y., Fair Chance Act, ADMIN. CODE §§ 8-102, 8-107 (effective Oct. 27, 2015).

156. *See* Local Law No. 4, 2021 N.Y.C. Laws (2021), https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Local-Law-4.pdf [https://perma.cc/U6CY-K6DV]; *see also* N.Y.C. ADMIN. CODE §§ 8-107(10)(b)–(c).

157. *See* N.Y.C. ADMIN. CODE §§ 8-107(10)(b)–(c).

158. *See, e.g.*, Nnebe v. Daus, 510 F. Supp. 3d 179 (S.D.N.Y. 2020); Nnebe v. Daus, No. 06-CV-4991 (KMK), 2006 U.S. Dist. LEXIS 58611 (S.D.N.Y. Aug. 6, 2006).

159. *See* Nnebe v. Daus, 931 F.3d 66, 70 (2d Cir. 2019).

160. 424 U.S. 319, 335 (1976).

the government's interest.[161] As the TLC operated at that time, it only focused on whether the *charge*, if true, would pose a direct and substantial threat, and did not perform an individualized determination based on the circumstances of the arrest.[162] This did not satisfy a drivers' due process right, and it violated the New York City ordinance that the TLC relies upon to operate.[163] The court found that individual circumstances are relevant to the statutory scheme, particularly when a driver is threatened with the loss of their income and livelihood.[164] Since 2019, the TLC has revised its summary suspension policies, but only insofar as to acknowledge and assess the conditions of one's arrest.[165] These procedures have increased the ability for drivers to secure their property and livelihoods, as in the past year, ALJs "recommended reinstatement of the driver's license in 14 out of the 19 hearings," which is far greater than when ALJs assessed the merits solely based on the face of the charge.[166]

III. PROPOSALS: ENVISIONING POTENTIAL POLICIES TO DECREASE EXCLUSION FOR THOSE WITH CRIMINAL RECORDS

Ultimately, these proposals hope to reconcile some of the more discriminatory impacts of laws around occupational licensure so that we can strive for a more equal society. Without stronger mechanisms to address discrimination in society today, the full inclusion of Black and Latinx people with criminal records into the labor market and the societal pursuit of racial equity will be impaired. To address these issues, the Author proposes amendments to the FCA. These amendments could help address the racial harms that present anti-discrimination law doctrine does not currently address.

To remedy the lack of channels in federal anti-discrimination law,[167] there are a number of policy considerations that states, municipalities, and agencies that control occupational licensure could implement. The FCA has been a useful tool to further strengthen the rights of people with criminal records when applying for jobs, and these proposals could be folded into an updated FCA, which includes protections for people applying for or with occupational licenses,

161. *See Nnebe*, 931 F.3d at 80 (citing *Mathews*, 424 U.S. at 335).
162. *Id.* at 82.
163. *See id.*; *see also* N.Y.C. ADMIN. CODE § 19-512.1(a).
164. *Nnebe*, 931 F.3d at 83.
165. *See* Nnebe v. Daus, 510 F. Supp. 3d 179, 188 (S.D.N.Y. 2020).
166. *Id.*
167. The lack of channels are outlined in *supra* Part II.A.i.2.

which other municipalities and states could adopt. The proposals fall into two general categories: directly decreasing the exclusion of people with criminal records and increasing transparency so that the process of securing a license is less opaque. Additionally, the proposals would make it easier for plaintiffs bringing a disparate impact claim based on race and criminal records, as in *Mandala*,[168] to garner data to satisfy the heightened pleading standard.

A. Limitations of Information Requested in a Background Check

Agencies could limit the types of record information requested in a background check, so that the information produced would be narrowly tailored in relation to the license applied. This could be organized in several ways.

A first could be by time: people who have been convicted are no more likely to commit another crime after nine years of non-recidivism when compared to the general population.[169] Based on this, licensing agencies can limit the scope of time to nine years prior, as those employees would be similar in "risk" to other members of the population. This would include people with felony convictions, which are the types of offenses that are most restricted in New York City's licensure scheme today. This change would likely have the most impact on New Yorkers with criminal records trying to secure licensure today.

The second proposal for a narrow tailoring is through the types of convictions on a person's record to the convictions that the employer already identified are relevant to their business. This would create clear expectations for applicants. For example, the Taxi and Limousine Commission could provide a list of crimes that would identify those that relate to operating a taxicab in their application materials, and only people with those stated convictions would be denied licensure. Any such list would need to be approved by an

168. *See generally* Part II.

169. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 250975, SPECIAL REPORT: 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 6 (2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf [https://perma.cc/B968-NB8J]. After nine years post-release with no subsequent arrests, only 1% of those released were arrested in the ninth year. *Id.* For context, at least 4.9 million people are arrested and booked in jail each year, which is less than 1% of the general population in the United States. *See* Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 26, 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/7WD2-WSAK].

external entity to preclude a significant risk: that employers might use this opportunity to widely exclude certain offenses so that they are protected if they want to later exclude an applicant. Certifying a list by an entity, which could be comprised of labor leaders and current drivers, would ensure increased transparency to applicants so that they know their chances of success before investing in training or education for a license.

Third, agencies could make explicit what information would be disclosed upon application. As it currently stands, dismissed charges or adjournments in contemplation of dismissal (ACDs) are not taken into consideration, but language on applications tends to not explicitly state what is included and is not. To be more transparent and help people decide whether they want to apply or not, the jurisdiction could mandate disclaimers at the beginning of each license application that states that only convictions are considered, and other instances, like ACDs and dismissed charges, are not seen in an applicant's application.

B. Predetermination of Admission or Disqualification

Another recommendation that increases transparency for applicants is to create an arm within the licensing agency to provide guidance on pursuing a license and whether the person would successfully achieve licensure based on their record. Arizona enacted similar legislation, where applicants can receive a predetermination on whether they would be disqualified.[170] This provides transparency to the process and allows applicants to avoid the expensive process of education and training for licensure with the risk that they could be denied. This would have to be done delicately, and the workers at the agency would need to be specifically trained to have sensitivity around criminal convictions, as Ms. Stephenson's example shows what can happen if people from the licensing board are not specific and accurate with the information they provide to the public.[171] Despite the potential for instances like the one Ms. Stephenson faced, having a dedicated body that would be able to provide recommendations would help potential applicants parse their chances at application and might lessen hesitancy from communities who would otherwise not apply.

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170. *See* UMEZ & PIRIUS, *supra* note 32, at 6.
171. *See supra* Part I.B.iii.

C. Increased Data Collection

Increased transparency with data on people with convictions would make federal and state disparate impact claims easier for plaintiffs. One option to address pleading issues on disparate impact is to mandate data collection through an existing government agency, such as parole boards, which already have contact with people reentering society, and publication for reentry so that there can be more information on how to adequately and accurately address issues that people reentering society are facing. However, there are privacy concerns with government tracking and collecting more data and information on people who have been incarcerated or who have criminal records. There are ways to collect this data in a less intrusive way, such as anonymizing the data collection and reports. This would also help not only with potential licensure claims but also job application claims. If the plaintiffs in *Mandala* had access to such data, their claim might have ultimately prevailed.

Another, easier, option is to mandate data collection from licensing boards to provide comprehensive summaries each quarter regarding applications and license grants. This information could include how many people applied for licensure, how many secured licenses, how many of those had criminal records, how many of those were felonies or misdemeanors, and the same for those denied. This would provide a more transparent process and could aid in the approval of more licenses for people with criminal records.

Additionally, there should be more studies on people who might pursue occupational licensure but are deterred by the levels of information they need to disclose about their record upon application. There is a dearth of data on this topic, and to make more informed policy, it would be useful to have more relevant information on why they are deterred so that agencies and advocacy groups can seek to remedy those issues.

D. Expansion of the Current FCA Amendments to Cover Summary Suspensions

The recent FCA Amendments, while still new, provide reassurance for people who become involved with the criminal legal system during their tenure at their jobs or upon applying to a new one. These same amendments should be expanded to encompass occupational licensure as well, where the FCA explicitly covers employers and occupational licensing agencies — both for the recent amendments and for more general protections surrounding people with criminal records.

CONCLUSION

Current anti-discrimination law does not meaningfully address the discrimination that Black and Latinx people with criminal records face in gaining employment. The legal regulation of people with criminal histories' lives has a disproportionate effect on Black and Latinx people, particularly as it relates to employment opportunities and occupational licensing. Without legal protections and remedies to combat those disproportionate effects, the full inclusion of Black and Latinx people into the labor market, particularly for higher-paying jobs, and the societal pursuit of racial equality will be impaired. As it currently stands, federal, state, and city anti-discrimination laws lack the depth to address these issues. State and city-level adoptions of an amended FCA, where barriers to occupational licensing are explicitly addressed, are common-sense proposals that would begin to address the unnecessary and day-to-day hardships that those with records face.