

MIND THE GAP: UNEMPLOYMENT DISCRIMINATION

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Joshua Cooper, a Florida resident, was only eight weeks away from his dream of serving his country in the military when he made a mistake that would haunt him for the rest of his life. At the age of 18, after a few minor scrapes with the police, he wrote a bad check at a bank. Some of the consequences were instant; for instance, he served three months of jail time before his trial and ultimately served a year and a half in jail after his conviction. Some of his consequences were more long lasting. Not only did he lose his chance to be in the military, but his whole future was ripped from him. He paints a grim picture. In some of his applications he had to divulge his conviction right away, leading to rejection after rejection. Often, when the employers did not know of his conviction right away, they would tell him how he was the most qualified candidate, but after discovering his conviction, would refuse to hire him. Most relevant to this essay, almost every employer asked why there was such a big gap on his resume, making it difficult for his period of incarceration to not become a big part of the interview. Ultimately, because he could not land above a minimum wage job with his conviction and resume gap, he was forced to give up on his dreams of having a career. Now at 29 years old, is forced to destroy his body as a cage fighter, risking his health for the entertainment of others in order to support his young son.¹

Similarly, there are scores of women who have faced questions about the gap on their resume that were the result of the time they took off to raise their child during their interviews. One mother

¹ Interview with Joshua Cooper, Cage Fighter (Apr. 1, 2017). Joshua notes that “the way things are right now . . . you cannot make a mistake when you’re young and grow out of it and become a better person in America today . . . when you make a mistake you lose you for the rest of your life and it will haunt you and the turn on to your family and your children because they have to pay for the mistakes that you made because it’s hard to provide for a family or child barely making any money.” *Id.*

notes that the interviewer pointed to the job before the resume gap and asked, in a snide tone of voice, “tell me about what you learned at this position . . . if you can remember back that far.”² Another mother was told in her rejection letter that although they loved her during the interview, the periods of unemployment and underemployment from her leave of absence to take care of her newborn special needs child lead to their decision not to hire her for the position.³ A third mother stated it was difficult to create a resume to try to hide the gap after being a stay-at-home mother for a year when applying to jobs.⁴ Overall, the complaints seemed to be consistent, either being denied a job due to the resume gap or having to cleverly rework the resume to hide the fact that they had cared for their own child.

According to the United States Equal Employment Opportunity Commission (EEOC), there is no federal law that protects against unemployment status, but the discrimination must be done consistently “without regard to race, color, national origin, religion, sex, disability, age, and genetic information.”⁵ The EEOC’s prohibited practices explicitly state that the employer may not discriminate against unemployment status.⁶ There is an exception to this, but only if the discrimination (1) does not “significantly disadvantage people of a particular race, color, national origin, religion or sex” and (2) it helps the employer “accurately identify responsible and reliable employees.”⁷ However, first and foremost, unemployment discrimination *does* significantly disadvantage people of a particular sex and a particular race or color. Second, in weighing discrimination against the ability to identify responsible employees, there are benefits to the employer to hiring unemployed individuals.

Specifically, a gap in employment on a resume, no matter the reason, can vitiate an employee’s chance of being hired and an employer may utilize this legal loophole to hire individuals with fewer periods of unemployment, statistically: married, white men.⁸

² Interview with Anonymous Jane Doe I, in New York (Apr. 1, 2017).

³ Interview with Anonymous Jane Doe II, in New York (Apr. 1, 2017).

⁴ Interview with Anonymous Jane Doe III, in New York (Apr. 1, 2017).

⁵ U.S. EQUAL EMP. OPPORTUNITY COMM’N, PRE-EMPLOYMENT INQUIRIES AND UNEMPLOYED STATUS, www.eeoc.gov/laws/practices/unemployed_status.cfm (last visited Apr. 2, 2017).

⁶ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5.

⁷ *Id.*

⁸ BUREAU OF LABOR STATISTICS, *Employment Characteristics of Families – 2015*

In this vein, women, particularly mothers in the workforce, are significantly disadvantaged because they are statistically more likely to have periods of unemployment on their resume due to time taken off for childcare.⁹ Additionally, unemployment discrimination based on resume gaps also seriously disadvantages certain races and individuals of color as well because blacks and Hispanics more likely to be arrested or convicted of crimes and are more likely to be pulled over in traffic stops¹⁰ and the ensuing incarceration leads to noticeable resume gaps.

Part I of this essay will discuss how an employer's ability to legally discriminate against periods of unemployment has a significant negative impact on women, through statistics concerning the choice that mothering has on wages and reentry into the workforce. Additionally, the essay will look at the negative impact on men of color due to statistically higher arrests, convictions, and periods of incarceration. In Part II, this essay will explore why current statutory protections are insufficient for working mothers and past convicts of particular races and color. Part III of this essay will look at the benefits of hiring these individuals. In Part VI, the essay will explore other states unemployment anti-discrimination laws and examine how similar laws have been implemented in other states and in New York City. Finally, Part V of the essay will look to the EEOC for recommendations.

(Apr. 22, 2016) <http://www.bls.gov/news.release/pdf/famee.pdf> (compare labor participation rates of 77.7 percent of black families to 80.1 percent of white families and 93.7 percent married fathers to 57.6 percent of married mothers). See also *Women in the Labor Force: A Databook*, Report 1052, at 2, BLS REPORTS (Dec. 2014) <https://www.bls.gov/opub/reports/womens-databook/archive/women-in-the-labor-force-a-databook-2014.pdf>. (“For men, those who were married had the highest labor force participation, 74.2%.”).

⁹ *Families and Living Arrangements*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/families/data/children.html> (last revised Oct. 30, 2014)

¹⁰ THE SENTENCING PROJECT, RACE AND THE CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES, at 4 (Aug. 2013) <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (noting that one study showed that although “white students were slightly more likely to have abused an illegal substance in the last month than a black student . . . black youth were arrested for drug crimes at rates more than double those of white youth.”).

I. THE SIGNIFICANT DISADVANTAGE TO GENDER AND RACE

A. *The Disadvantage to the Previously Pregnant*1. **The Glass Ceiling Is Being Held Up by a Maternal Wall**

As Joan C. Williams and Nancy Segal wisely noted in their article about family caregiving, “we all know about the glass ceiling, but many women never get near it; they are stopped long before by the maternal wall.”¹¹ After researching the impact of unemployment on gender and race, it is my opinion that maternal wall is built, in part, upon layer and layer of resume gaps created by building together the foundation for raising our children.

On the first criteria set out by the EEOC, unemployment discrimination, particularly for previous history of unemployment does “significantly disadvantage people of a particular . . . sex.”¹² A gap in employment history, even one born from raising a child, will often lead to a resume placed directly in the trash.¹³ While it is axiomatic to state that from a non-gendered based viewpoint parenting can be allotted to either sex, the census shows that there is still a gross disparity between the number of women and the number of men who take on the childcare role, with women five times more likely to stay at home.¹⁴ For women, these resume gaps may often be directly attributable to time taken off to raise a family.¹⁵ Government’s research shows that despite the progress

¹¹ Joan C. Williams & Nancy Segal, *Beyond The Maternal Wall: Relief For Family Caregiver Who Are Discriminated Against On The Job*, HARV. WOMEN’S L. J., at 78 (2004).

¹² See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5.

¹³ Susan Ireland, *How to Manage Red Flags on Your Resume*, JOB-HUNT, <http://www.job-hunt.org/resumes/managing-resume-red-flags.shtml> (last visited Sept. 4, 2016). See also Patricia Cohen, *A Child Care Gap in the Résumé: Whether to Explain or Not* N.Y. TIMES (May 19, 2016), http://www.nytimes.com/2016/05/20/business/economy/a-child-care-gap-in-the-resume-whether-to-explain-or-not.html?_r=0 (“If there’s a gap,” Professor Sharone said recruiters consistently told him, they are “going to go with someone without a gap.”).

¹⁴ U.S. CENSUS BUREAU, *supra* note 9. See also Belinda Luscombe, *Not As Many Dads Stay Home as You Think*, TIME INC. (Nov. 29, 2013), <http://healthland.time.com/2013/11/29/next-time-someone-tells-you-that-lots-of-dads-stay-home-too/>.

¹⁵ See EILEEN PATTEN, ON EQUAL PAY DAY, KEY FACTS ABOUT THE GENDER PAY GAP, PEW RESEARCH CENTER (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/> (“[W]omen were more likely to say they had taken career

of women in the workplace, that when it came to a survey of whether “women should work while they have preschool age children,” it was surprisingly, by a fairly large margin, more woman than men who agreed with this sentiment.¹⁶ In fact “As of 2002, 82 percent [of young women] believed that women with young children should work . . . with only roughly 50 percent of men agreeing.”¹⁷ The government posited that this, “may reflect the fact that woman recognize how difficult it is for them to reenter the labor force after stepping out for several years.”¹⁸

a. Statistically Speaking

First, it should be noted that statistics concerning unemployment do not account for every individual that does not have a job, since to be counted as “unemployed” an individual must be “available to work and actively looking for work, or on temporary layoff.”¹⁹ Second, research has shown that “joblessness” is linked to serious disease, and higher probability of suicide, and divorce.²⁰

With that in mind, the labor participation for employed mothers, including those actively seeking employment, was only 69.9% in 2015 as opposed to all fathers at 92.7% of men.²¹ Although some data shows that men marginally had a higher unemployment

interruptions to care for their family.”) *See also* Julie C. Suk, *Are Gender Stereotypes Bad For Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 64 (Jan. 2010) (“When women are the primary consumers of maternity or parental leave, employers have an incentive to discriminate against women, particularly mothers, in hiring and promotion.”).

¹⁶ EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ELEVEN FACTS ABOUT AMERICAN FAMILIES AND WORK 17 (Oct. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/womens_slides_final.pdf.

¹⁷ ELEVEN FACTS ABOUT AMERICAN FAMILIES AND WORK, *supra* note 15, at 17.

¹⁸ *Id.*

¹⁹ *See The Real Rate of Recovery, Part 1: Jobless Rate*, CEPR BLOG (Mar. 12, 2015), <http://cepr.net/blogs/cepr-blog/the-real-rate-of-recovery-part1-the-jobless-rate>; Drew Desilver, *What the unemployment rate does – and doesn’t – say about the economy*, PEW RES. CTR (Mar. 7, 2017), <http://www.pewresearch.org/fact-tank/2017/03/07/employment-vs-unemployment-different-stories-from-the-job-numbers/>.

²⁰ Dean Baker & Kevin Hasset, *The Human Disaster of Unemployment*, N.Y. TIMES (May 13, 2012), <http://www.nytimes.com/2012/05/13/opinion/sunday/the-human-disaster-of-unemployment.html>.

²¹ Bureau of Labor Statistics, *supra* note 8, at 11.

rate,²² when comparing mothers versus fathers, mothers had the larger unemployment rate.²³ Take a look at the Great Recession, between 2007 to 2009, where employment of young women was “8 to 9 percentage points below that of young men.”²⁴ In this study, a young woman was defined as between the ages of “25 to 26” in 2006 and “28 to 29” by 2009.²⁵ These ages correlate to the average age for childbirth and having a pre-school child, which is around 25 to 26, and particularly black and Hispanic women, who tended to have children slightly younger, at ages closer to 23 or 24, than white women.²⁶

Additionally, in 2015, single mothers were noted to be less likely to have an employed member in the household than single fathers or married-couple families.²⁷ There is a startling racial impact within this statistic. Hispanic and black households tend to be less likely to be married-couple household than white or Asian households, by 20% and 40% respectively.²⁸ Perhaps this plays into why “[b]lack and Hispanic families remained more likely to have an unemployed member in 2015 (12.0 percent and 9.7 percent, respectively) than white or Asian families (6.0 percent and 5.7 percent, respectively).²⁹ Despite these statistics, in 2015 black women were statistically more likely to be actively looking for work.³⁰ The EEOC acknowledged as far back as 2007 that there

²² *Dept of Lab. 2013 statistics on Mother and Families*, DEP’T OF LAB., www.dol.gov/wb/stats/mother_families.htm (last updated Aug. 2014) (see ‘chart 5’ comparing women’s unemployment rate of 7.1% to men’s 7.6%).

²³ *Id.*

²⁴ Bureau of Labor Statistics, *THE RECESSION OF 2007–2009*, at 9 (Feb. 2012) https://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

²⁵ *Id.*

²⁶ Rae Ellen Bichell, *Average Age of First-Time Moms Keeps Climbing in the U.S.*, NORTHEAST PUBLIC RADIO (NPR) (Jan. 14, 2013 12:03 AM), <http://www.npr.org/sections/health-shots/2016/01/14/462816458/average-age-of-first-time-moms-keeps-climbing-in-the-u-s>. (it should also be noted that unlike men, women may have to make decisions based on childbearing and jobs at a much younger age, due to fertility reasons). See ANNE-MARIE SLAUGHTERHOUSE, *UNFINISHED BUSINESS* 33 (2015).

²⁷ *Husband and wife employed in 48 percent of married-couple families in 2015*, BUREAU OF LABOR STATISTICS (May 02, 2016), <https://www.bls.gov/opub/ted/2016/husband-and-wife-employed-in-48-percent-of-married-couple-families-in-2015.htm>.

²⁸ JONATHAN VESPA ET AL., *POPULATION CHARACTERISTICS AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012*, at 3 (Aug. 2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

²⁹ Bureau of Labor Statistics, *supra* note 8, at 1.

³⁰ *Black Women in the Labor Force*, DEP’T OF LAB. (Feb. 2016),

was a “maternal wall’ that limits the employment opportunities of workers with caregiving responsibilities” and noted that the work-life conflicts “are perhaps felt most profoundly by lower-paid workers, who are disproportionately people of color.”³¹

b. That Pesky Long-Term Impact

For mothers who are currently unemployed, a New York Times article survey showed that out of all stay-at-home moms “only 73 percent of these succeeded in getting back in, and only 40 percent got full-time jobs.”³² Additionally, they “came back to jobs that paid, on average 16 percent less than those they had before.”³³ About a quarter of the women took jobs with lesser management responsibilities or had to accept a lower job title than the one they had when they left.”³⁴ A follow-up article by CNN looked at a survey that found that 38.3% of stay-at-home moms “said they wanted to return but were having difficulty getting back in and an ‘overwhelming’ 53.7% cited resistance to hiring because of their stay-at-home-status.”³⁵

Aside from the ability to find work, the resume gap has a profound impact on future earnings. According to the government, “women’s earnings growth levels off after they have their first child.”³⁶ This research was again validated by two Cornell professors who conducted research about the wage gap to prove the logic that gaps in employment to take care of family negatively impact long-term earnings.³⁷ Indeed, a Wall Street Journal article noted that the gender wage gap, even in 2014, was significantly smaller when the woman in question was unmarried and had no

https://www.dol.gov/wb/media/Black_Women_in_the_Labor_Force.pdf.

³¹ NAOMI C. EARP, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 5, NUMBER 915.002 (May 23, 2007), <https://www.eeoc.gov/policy/docs/caregiving.pdf>.

(looking to the average weekly earnings of black and Hispanics versus whites).

³² Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES (Aug. 7, 2013), <http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all&r=0>.

³³ *Id.*

³⁴ *Id.*

³⁵ Kelly Wallace, *Moms ‘Opting in’ to Work Find Doors Shut*, CNN (Aug. 13, 2013, 3:14 PM), www.cnn.com/2013/08/13/living/parents-mothers-opt-to-work/index.html.

³⁶ EXEC. OFF. PRESIDENT U.S., *supra* note 16, at 14.

³⁷ *See* Patten, *supra* note 15.

children.³⁸ The wage gap, the article posited, was tied significantly to having a family, and when the wages within an industry that allowed part-time work were looked at, there was little gap in wages at all.³⁹

Furthermore, statistics on aging women showcase how resume gap discrimination differs from normal unemployment discrimination, and how that gender discrimination can haunt a woman's career.⁴⁰ A labor economist noted that an elder woman is more likely to be subject to long-term unemployment because women's lives are "punctuated by time outside of the labor market – taking care of family, taking care of children."⁴¹ It's this punctuation that is the key difference between pure unemployment discrimination and gender discrimination, because he punctuated periods of unemployment often reveal an untold story that leads to subtle discrimination. So, what happens many years later when a resume is peppered with gaps in employment where working was simply not an economic option? Essentially, these resume gaps ultimately resolve in long-term gender discrimination, as highlighted in a statistic from the latest Federal Reserve Bank study that showed that half of women over 50 are long-term unemployed.⁴²

B. The Disadvantage to Race and Color

1. Unemployment Is Not Colorblind

The effects of unemployment discrimination are not just limited to women and mothers, they also have a racial impact, with a significant disadvantage to individuals of color, particularly young men of color. While generally, unemployment numbers may

³⁸ Mark J. Perry & Andrew G. Biggs, *The '77 Cents on the Dollar' Myth About Women's Pay*, WALL STREET J. (Apr. 7, 2014 6:58 PM), <https://www.wsj.com/articles/SB10001424052702303532704579483752909957472>.

³⁹ *See id.*

⁴⁰ Teresa Ghilarducci, *Why Women Over 50 Can't Find Jobs*, PBS NEWSHOUR (Jan. 14, 2016), <http://www.pbs.org/newshour/making-sense/women-over-50-face-cant-find-jobs/>.

⁴¹ *Id.*

⁴² *Long-Term Unemployment Affected Older Women Most Following Recession*, FED. RES. BANK OF ST. LOUIS (Nov. 17, 2015), <https://www.stlouisfed.org/on-the-economy/2015/november/older-women-recession-long-term-unemployment>.

appear to be dropping, a segment on Northeast Public Radio pointed out that this sign of economic recovery is limited to “people who are white, have good educations, and are tied to those sectors that are flourishing in the global economy.”⁴³ The segment continues by pointing out that the unemployment rate for blacks “is more than double the rate for whites,” regardless of whether there is a recession, or the economy is in recovery, and that the unemployment is “present at all levels of education.”⁴⁴ In fact, during the recovery, the black unemployment rate actually increased, which an economist theorized was because there was more competition from white jobseekers.⁴⁵ Further, in a recession black workers were “disproportionately [more] likely to lose their jobs as the business cycle weakens. . . .”⁴⁶ Black workers, in general, are statistically “less likely to have left their jobs voluntarily” than white workers, which means they are then precluded from eligibility for unemployment insurance between jobs.⁴⁷

Statistically speaking, unemployment is not kind, nor is it colorblind, as evidenced by the greater rates of unemployment for individuals based on race, particularly to black teenage males, an age category which extended all the way up to age twenty-five.⁴⁸ Additionally, blacks were found to be subject to longer durations of

⁴³ Sonari Glington, *Unemployment May be Dropping, but it's Still Twice as High for Blacks*, NPR, (Feb. 5, 2016, 4:22 PM), <http://www.npr.org/2016/02/05/465748249/african-americans-face-uncertain-reality-despite-low-unemployment-rate>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Drew Desilver, *Black Unemployment Rate is Consistently Twice that of Whites*, PEW RES. CTR. (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>.

⁴⁷ Nick Buffie, *The Problem of Black Unemployment: Racial Inequalities Persist Even Amongst the Unemployed*, CTR. FOR ECON. AND POL'Y RES. (Nov. 4, 2015), <http://cepr.net/blogs/cepr-blog/the-problem-of-black-unemployment-racial-inequalities-persist-even-amongst-the-unemployed>.

⁴⁸ See NAT'L JOBS FOR ALL COAL., UNEMPLOYMENT DATA – JANUARY 2017, (2017) <http://njfac.org/index.php/2017/02/03/unemployment-data-january-2017/> (showing the unemployment rate of African Americans as 7.7% and Hispanics at 5.9% as compared to whites at 4.3%, and teens at 15% with black teens at 26.9%). In 2014, this number was even higher, with the unemployment number for black teens being nearly 40%. See *Unemployment Rates are Higher for Young People, Minorities*, PBS NEWSHOUR (Feb. 8, 2014, 6:09 PM), <http://www.pbs.org/newshour/bb/unemployment-rates-higher-young-people-minorities/>.

unemployment, with 49.5% being categorized as long-term unemployed as opposed to the 41.7% of whites who were subject to long-term unemployment.⁴⁹ Therefore, a young, black jobseeker is more likely to have long periods of unemployment on their resume, and is likely to be significantly more disadvantaged by unemployment discrimination and the resume gap.

2. Unjust Incarceration

Another life changing event that can leave a sizeable gap on a resume is incarceration.⁵⁰ This life changing event leads to hard to explain periods of unemployment, as can be evidenced by the multitude of websites dedicated to explaining jail time on a resume, or during an interview.⁵¹ Additionally, this resume gap significantly disadvantages black men. Statistically there are more arrests and periods of incarceration for the average black male than the average white male. It has been noted that blacks are “overrepresented in the criminal Justice system” with “[t]he share of African Americans arrested . . . 2.2 times their portion of the population, while the percentage of whites arrested falls below their corresponding population share.”⁵² A look at the federal statistic bulletin shows that black prisoners had higher rates of

⁴⁹ See *The Color of Unemployment*, FACE THE FACTS USA (July 28, 2013), <http://www.facethefactsusa.org/facts/color-unemployment>.

⁵⁰ See PUB. SAFETY PERFORMANCE PROJECT, *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TR.'S (Nov. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates> (“The average length of time served by federal inmates more than doubled from 1988 to 2012, rising from 17.9 to 37.5 months . . . [f]or drug offenders, who make up roughly half of the federal prison population, time served leapt from less than two years to nearly five.”). See also ALMANAC OF POLY ISSUES, CRIM. SENT'G STAT.'S (last updated Aug. 2003), http://www.policyalmanac.org/crime/archive/criminal_sentencing_statistics.shtml (noting in 2000, that the average prison time in local prison was a little over six months, while in state court, inmates were likely to serve between a year and two and a half years).

⁵¹ See, e.g., Ralph Heibutzki, *How to Explain a Prison Absence on a Resume*, HOUS. CHRON., (last visited Oct. 24, 2017), <http://work.chron.com/explain-prison-absence-resume-21283.html>; David Zax, *When the Gap in Your Resume is Time Spent in Prison*, FAST COMPANY (Nov. 21, 2016), <https://www.fastcompany.com/3064529/when-the-gap-in-your-resume-is-time-spent-in-prison>.

⁵² Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply” The Case for Reforming Criminal Background Checks for Employment*, THE NATIONAL EMPLOYMENT LAW PROJECT, 5 (Mar. 2011) http://nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

imprisonment and longer prison sentences than the average white prisoner.⁵³ In fact, black males between the ages of 18 and 19 were found to be “more than 10 times more likely to be in state or federal prison than whites.”⁵⁴

The repercussions of resume gaps of unemployment due to incarceration are notable in terms of the ability to find future employment.⁵⁵ The Center for Economic and Policy Research noted that “[i]n addition to the stigma attached to a criminal record, these impacts include the erosion of basic job skills, disruption of formal education, loss of networks that can improve job-finding prospects, or deterioration of ‘people skills.’”⁵⁶ Research shows this has a particularly adverse effect on individuals of color:

[A] criminal record reduces the likelihood of a callback or employment offer by nearly 50%. But the penalty of a criminal record is significantly more severe for Blacks than Whites. Among Blacks without criminal records, only 14% received callbacks, relative to 34% of White noncriminals . . . In fact, even Whites with criminal records received more favorable treatment (17%) than Blacks without criminal records.⁵⁷

The EEOC has recognized this disadvantage to blacks and Hispanics as far back as 1985, stating that “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the

⁵³ See Ann Carson, *PRISONERS IN 2014*, U.S. DEP’T JUSTICE BULLETIN, NCJ 248955, 15 (Sept. 2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> (comparing, for instance, 2.7 % black male residents “compared to less than 0.5% of white males). See also Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, CENTER FOR ECONOMIC AND POLICY RESEARCH, 7 (June 2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf> (noting estimated prisoner demographics for 1960-2014).

⁵⁴ See Carson, *supra* note 53, at 15.

⁵⁵ *A Second Chance: Charting a New Course for Re-Entry and Criminal Justice Reform, Out of Prison, Out of Work*, THE LEADERSHIP CONFERENCE EDUCATION FUND, 16 (Oct. 2013) http://civilrightsdocs.info/pdf/reports/A_Second_Chance_Re-Entry_Report.pdf (noting most of the inmates were either unemployed or severely underemployed).

⁵⁶ Bucknor & Barber, *supra* note 53, at 8–9.

⁵⁷ The Leadership Conference, *supra* note 55, at 17.

population.”⁵⁸

II. THE INSUFFICIENCY OF CURRENT PROTECTIONS

Employers are prohibited under Title VII of the Civil Rights Act of 1964 (“Title VII”)⁵⁹ and the New York State Human Right’s Law (“NYHRL”)⁶⁰ from discrimination based on gender and race. Federal and state legislation has made strides towards protecting new parents in the workplace on state and federal levels⁶¹ and, under New York law, by expanding its definitions of protected class to include familial status.⁶² However, the state and federal laws are currently insufficient to protect against the significant disadvantage to women based on legal discrimination against gaps of unemployment on a woman’s resume. Similarly, Title VII and NYHRL do little to protect past convicts, who are disproportionately individuals of color, from discrimination based on inferences from gaps of unemployment that appear on resumes.

A. Federal Law

1. Failed Past Efforts and an Unsure Future

On a federal level, unemployment discrimination is not illegal despite former President Obama’s push for the Fair Employment

⁵⁸ EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (Feb. 4, 1987), https://www.eeoc.gov/policy/docs/convict1.html#N_9_.

⁵⁹ Title VII of the Civil Rights Act of 1963, 42 U.S.C. §§ 2000e, et seq. (2016) (“It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.”).

⁶⁰ New York State Human Rights Law, 15 N.Y. EXECUTIVE LAW §§ 290, et. seq. (Mckinney 2015) (noting it is illegal “to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, [Effective January 19, 2016: familial status,] or marital status.”)

⁶¹ Fair Labor Standards Act, 29 U.S.C. § 207(r) (2010). See also *Your Breastfeeding Rights in New York*, NEW YORK CIVIL LIBERTIES UNION, http://www.nyclu.org/files/publications/nyclu_pub_breastfeeding_rights.pdf (last visited October 24, 2017).

⁶² 15 N.Y. EXECUTIVE LAW §§ 290 et. seq.. See also Andrew Cuomo, *Guidance on Familial Status Discrimination for Employers in New York State*, NEW YORK STATE DIVISION OF HUMAN RIGHTS (last visited October 24, 2017), <http://dhr.ny.gov/sites/default/files/pdf/guidance-familial-status-employers.pdf>.

Opportunity Act of 2011.⁶³ The failed bill found that “denial of employment opportunities to individuals because they are or have been unemployed is discriminatory and burdens commerce” in many ways including leading to “higher payroll taxes for employers, cuts in benefits for jobless workers” and additionally burdened the public “health and welfare programs” and unemployment programs, as well as depressed “income, property, and other tax revenues” that the government relied on.⁶⁴ Former President Obama believed so strongly in this bill that even though the legislation failed in 2011, Obama ordered federal agencies “not to discriminate against the long-term unemployed. He also signed up 300 major companies . . . to pledge to hiring practices that give the jobless a fair shot.”⁶⁵

It is, as of yet, difficult to pinpoint President Trump’s take on unemployment discrimination. During his campaign President Trump posited that the current unemployment numbers did not reflect reality; however, he has been silent on the matter of installing additional protections against unemployment discrimination.⁶⁶ In terms of discrimination against convictions and race, President Trump has also not weighed in on racial discrimination in the workplace, although as a former businessman he has been sued for discrimination in the past.⁶⁷ His rhetoric has emboldened racist individuals to act on their

⁶³ H.R. 2501 (112TH): FAIR EMPLOYMENT OPPORTUNITY ACT OF 2011, <https://www.govtrack.us/congress/bills/112/hr2501> (last visited Oct. 24 2017) (“This bill was introduced on July 12, 2011, in a previous session of Congress, but was not enacted.”).

⁶⁴ H.R. 2501 (112TH): FAIR EMPLOYMENT OPPORTUNITY ACT OF 201, <https://www.govtrack.us/congress/bills/112/hr2501> (last visited Oct. 24, 2017).

⁶⁵ Jeffrey Stinton, *Hiring Bias against the Unemployed*, PEW CHARITABLE TRUST (Aug. 25, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/08/25/hiring-bias-against-the-unemployed-should-there-be-a-law>.

⁶⁶ See Tim Wostall, *Donald Trump Wants To Increase the Unemployment Rate By 1%, From 4.7% to 5.7%*, FORBES (Jan. 29, 2017), <https://www.forbes.com/sites/timworstall/2017/01/29/donald-trump-wants-to-increase-the-unemployment-rate-by-1-from-4-7-to-5-7/#1f33bb762246> (noting additionally that President Trump’s increase in number would include individuals in the economy who had no job and no interest in finding a job, such as retirees).

⁶⁷ See *Decades-Old Housing Discrimination Case Plagues Donald Trump*, NPR (Sept. 29, 2016), <http://www.npr.org/2016/09/29/495955920/donald-trump-plagued-by-decades-old-housing-discrimination-case> (noting a Fair Housing Act lawsuit for refusal to rent to black tenants in the 1970s.)

prejudice.⁶⁸

Finally, President Trump's child care and maternal leave plans, which ostensibly could help overcome some of the issues associated with the cost of childcare or inability to take leave, still have some glaring issues for impoverished mothers.⁶⁹ Essentially, compiled research from National Public Radio, the Associated Press and other sources state that the proposed child care plan would be a deduction rather than a credit, and, thus, would favor the wealthy, since "[m]ore than 40 percent of U.S. taxpayers don't make enough money to owe taxes to the federal government, meaning they would not benefit from a deduction."⁷⁰ Additionally, it was stated that the plan did not include paid family or paternity leave.⁷¹ Finally, the plan is not properly funded.⁷²

2. Flawed Federal Protections for Moms with Child-rearing Gaps

Currently, while certain federal statutes offer protections from discrimination by providing the right to take off for pregnancy or early child-rearing leaves, these statutes have severely limited protections when it comes to long-term discrimination against parenting.⁷³ Title VII has a fairly high standard to establish a

⁶⁸ Adam Edelman, *Donald Trump emboldens white supremacist groups with racism*, N.Y. DAILY NEWS (Dec. 10, 2015 1:38 PM), <http://www.nydailynews.com/news/politics/donald-trump-emboldens-white-supremacist-groups-racism-article-1.2461471>. Ironically, this could be a double-edged sword. If, on one hand, an employer is emboldened to be outwardly discriminatory and express their latent racism, it may make a Title VII case against the racism of the employer much easier to prove. See 42 U.S.C. § 200e et. seq. On the other hand, if an employer is emboldened to express their racism but is more subtle about their discrimination, such as using resume gaps to point to as a reason for not hiring an individual than this emboldened racism will not be helpful for bringing Title VII cases. See *infra* discussion on Title VII Standard.

⁶⁹ See Bobby Lewis & Alex Morash, *Four Reasons Trump's Parental Leave And Child Care Plan Doesn't Add Up*, MEDIA MATTERS FOR AMERICA (Sept. 13, 2016, 4:50 PM), <https://mediamatters.org/research/2016/09/13/four-reasons-trump-s-parental-leave-and-child-care-plan-doesn-t-add/213046>.

⁷⁰ Lewis & Morash, *supra* note 69.

⁷¹ *Id.*

⁷² *Id.* (stating also that President Trump's proposition to cover the cost through rooting out unemployment insurance fraud would be unable to cover the cost of any maternity leave).

⁷³ See, e.g., *Record v. Mill Neck Manor Lutheran Sch. for Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (citing Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 690 n.2 (1983)).

prima facie case of discriminatory hiring practices, particularly if the plaintiff has no direct evidence.⁷⁴ For example, plaintiffs without direct evidence of discrimination must show that 1) they belonged to a protected class; 2) they applied and were qualified for a job for which the employer was seeking applicants; 3) despite the qualifications, they were rejected; and 4) after the rejection, the position remained open and the employer continued to seek applicants with plaintiff's qualifications.⁷⁵ Moreover, "Title VII, as amended by the Pregnancy Discrimination Act, does not protect people wishing to take child-rearing leaves as opposed to women wishing to take pregnancy leaves," which leaves the protections provided by Title VII very slim, indeed.⁷⁶

It may still be possible, with little chance of success, to make a case under Title VII for discrimination due to a résumé gap through perceived caregiver status with a disparate treatment of women.⁷⁷ According to the EEOC, while "caregiver status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law."⁷⁸ However, to make a valid case, it would essentially have to be proven that men with résumé gaps or periods of unemployment were being hired while females were not.

Similar to other applicable childcare statutes, the Family Medical Leave Act (FMLA),⁷⁹ is also woefully insufficient for past unemployment. The FMLA only closes the resume gap for individuals who are currently employed by allowing protected paid or unpaid leave to close the gaps on the résumé.⁸⁰ This is because,

⁷⁴ See *McDonnell–Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See also *Murray v. Town of Stratford*, 996 F. Supp. 2d 90, 107 (D. Conn. 2014) (quoting *Johnson v. Conn. Dep't of Admin. Servs.*, 972 F. Supp. 2d 223, 253 (D. Conn. 2013)) ("A plaintiff seeking to prove that a discrepancy in qualifications supports an inference of pretext faces a formidable burden.").

⁷⁵ *McDonnell–Douglas*, 411 U.S. at 802.

⁷⁶ *Record*, 611 F. Supp. at 907.

⁷⁷ JENNY R. YANG, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES 24 (June 25, 2015), https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf.

⁷⁸ Yang, *supra* note 77.

⁷⁹ Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–2654 (2016).

⁸⁰ See *Family Medical Leave Act Employer Guide*, DEPT. OF LABOR, <https://www.dol.gov/whd/fmla/employerguide.pdf> (last visited April 2, 2017).

to be covered under the FMLA, an employee must work for an employer to which the FMLA applies and additionally: “have worked for that employer for at least 12 months; . . . have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and work at a location where at least 50 employees are employed at the location or within 75 miles. . . .”⁸¹ The disparity of treatment seems incongruous with the stated purpose of the FMLA. The FMLA’s stated purpose includes battling gender and child-rearing discrimination by protecting job security. However, the protections only extends to individuals employed by an entity covered under the FMLA, and not to individuals with unemployment gaps on their résumé caused by early child-rearing leaves.⁸²

Taking that time off makes sense too, since, with the current cost of childcare, unemployment for low-wage workers, particularly single mothers, becomes almost mandatory. The cost of childcare is prohibitively expensive and, often, returning to work is not economically feasible, even after any time allowed off under FMLA or private parental leave.

For instance, in New York, one-third of black families headed by a single *working* mother were in poverty.⁸³ Furthermore, studies show that “every family type can expect to pay around 10% of the income for every type of childcare,” and, most notably, single parents with more than one child pay nearly 100% of their income for center-based childcare.⁸⁴ Yes, a single mother in New York pays close to 100% of her income for childcare.⁸⁵

In New York, which is ranked “4th out of 50 states and the District of Columbia for most expensive infant care,” the average cost per year for an infant is \$14,144, and \$11,700 for a four-year-old.⁸⁶ For a minimum-wage worker, this percentage is as high 75%

⁸¹ *Family Medical Leave Act Employer Guide*, *supra* note 80, at 17.

⁸² 29 U.S.C. § 2601(b)(2).

⁸³ Black Women in the Labor Force, *supra* note 30.

⁸⁴ CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILD CARE 15–16, http://usa.childcareaware.org/wp-content/uploads/2016/12/CCA_High_Cost_Appendices_2016.pdf (last visited Oct. 15, 2016) (explaining that a single parent can expect to pay over 54% of income for just one child in center-based care and nearly all (99.6%) of it for two children, and that the cost of a year of care in a center for an infant is nearly double (94% greater) the cost of a year of tuition at a public college).

⁸⁵ CHILD CARE AWARE OF AMERICA, *supra* note 84, at 16.

⁸⁶ *The Cost of Childcare in New York*, ECON. POL’Y INST., <http://www.epi.org/child-care-costs-in-the-united-states/#/NY> (last updated Apr.

of the total family's income.⁸⁷ Keep in mind that childcare is the cost of another individual watching a child while the parent is at work; it does not take into account the other expensive essentials that are necessary in child-rearing. Therefore, since FMLA, if even applicable, only gives a maximum of twelve weeks off,⁸⁸ in the short-term, the cost-benefit analysis becomes a simple one.

There are similar issues with other solutions to legal discrimination of a resume gap. The government drew attention to issues caused by women being "more likely to take time off to have children" and suggested policies such as "paid family leave and flexible work arrangements."⁸⁹ Although paid family leave and flexible work arrangements may make it easier for individuals who can qualify for such arrangements, i.e., currently employed individuals, they would not shield discrimination against individuals who were unemployed, either because the family leave time was insufficient, or if the individual was unemployed at the time that the child was born.⁹⁰

3. Incarceration, Inequality, and the EEOC

Although Title VII purports to protect against racial inequality, there are some flaws when the issue is disparate impact as opposed to disparate treatment.⁹¹ Denying an individual a job based solely on conviction is illegal. As stated by the EEOC, "[t]he Commission continues to hold that, where there is evidence of adverse impact, an absolute bar to employment based on the mere fact that an

2016).

⁸⁷ See *id.*

⁸⁸ See U.S. DEP'T OF LABOR, *supra* note 80.

⁸⁹ EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *supra* note 16, at 14.

⁹⁰ See U.S. DEP'T OF LABOR, *supra* note 80.

⁹¹ See *Disparate impact*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant in a disparate-impact claim. — Also termed *adverse impact.*"); *Disparate Treatment*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability."). See also Lisa Guerin, *Disparate Impact Discrimination*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/disperate-impact-discrimination.html> (last visited Nov. 3, 2017) ("These cases rely heavily on statistics, data, and number crunching, which requires assistance from experts.").

individual has a conviction record is unlawful under Title VII.”⁹² However, this prohibitory ban is softened in many ways. First, “such a policy or practice is unlawful under Title VII” only “in the absence of a justifying business necessity.”⁹³ To prove business necessity, the organization must only show that it considered three factors, namely: “(1) [t]he nature and gravity of the offense or offenses; (2) [t]he time that has passed since the conviction and/or completion of the sentence; and (3) [t]he nature of the job held or sought.”⁹⁴ This is problematic on a range of levels, notably that criminal records are often misleading, and inaccurate.⁹⁵ Proposed federal legislation “to prohibit Federal agencies and Federal contractors from requesting that an applicant for employment disclose criminal history record information before the applicant has received a conditional offer, and for other purposes,” failed after its introduction in 2015.⁹⁶ However, this legislation would not have helped individuals on a national level outside of those working for the federal government anyway, since it is narrowed to “federal agencies” and “federal contractors,”⁹⁷ and it would not take away the resulting employment gap.

B. New York State Law

1. Insufficient Protection for Moms

On a state level, effective January 19, 2016, New York Human Rights law provides protection against discrimination based upon familial status, which includes “discrimination on the basis that they are, or in the process of becoming, the parent or guardian of one or more children.”⁹⁸ However, there are multitudes of

⁹² *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Feb. 4, 1987), https://www.eeoc.gov/policy/docs/convict1.html#N_9_.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Rodriguez & Emsellem, *supra* note 52. See also *infra* Part III.b. for further discussion.

⁹⁶ Fair Chance to Compete for Jobs Act of 2015, H.R. 3470, 114th Cong. (2015).

⁹⁷ *Id.*

⁹⁸ *Guidance on Familial Status Discrimination for Employers in New York State*, N.Y. DIV. HUMAN RIGHTS, at 2, <http://dhr.ny.gov/sites/default/files/pdf/guidance-familial-status-employers.pdf> (last visited Sept. 3, 2016). See also N.Y. EXEC. LAW § 296(1)(a)–(1)(d) (Consol. LEXIS through 2017).

limitations⁹⁹ on this cause of action, the strongest focusing on examining equal treatment of men and women,¹⁰⁰ and while normally, complete gender equality can be a strong positive policy,¹⁰¹ the resume gap is primarily an issue in the hiring process.

As discussed in Part I, a woman is more likely than a man to take off time to raise a child¹⁰² so an even-handed approach when comparing resumes gives a decided advantage to men with children over women with children,¹⁰³ simply because large gaps on the resume often indicate time taken off to raise a child and thus reveal a familial status. Gender discrimination cases are by themselves hard to prove, particularly when the gender discrimination is more systemic,¹⁰⁴ such as with resume gaps, than when it is a specific incident.¹⁰⁵ However, similar to Title VII, a cause of action could potentially be found under the NYHRL familial status protection if there was proof that the individuals

⁹⁹ These provisions are limited to employers with four or more employees. See N.Y. EXEC. LAW § 292(5). Additionally, “actions taken against an employee because of who their child is, or what that child has done, do not implicate familial status discrimination.” N.Y. DIV. HUMAN RIGHTS, *supra* note 98, at 3.

¹⁰⁰ Explicit limitations to the protection instruct that no new right to reasonable accommodation was created by the addition of familial status protection, so no employer is “required to accommodate the needs of the child or children, and is not required to grant time off for the parent because of a child’s needs, or to attend school meetings, concerts, sporting events, etc., as an accommodation,” unless similar time off is granted to other employees. N.Y. DIV. HUMAN RIGHTS, *supra* note 98, at 2–3.

¹⁰¹ Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 64 (2010) (noting that without a statute being applicable to both males and females “employers have an incentive to discriminate against women, particularly mothers, in hiring and promotion”).

¹⁰² U.S. Bureau of Labor Statistics, *supra* note 8.

¹⁰³ Michelle J. Budig, *The Fatherhood Bonus and The Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014), <http://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay>.

¹⁰⁴ Danielle Kurtzleben, *Why its hard for women to prove systemic discrimination in court*, VOX (Apr. 1, 2015 3:00 PM), <http://www.vox.com/2015/4/1/8326221/pao-sexism-data-silicon-valley>.

¹⁰⁵ See *Dowrich-Weeks v. Cooper Square Realty, Inc.*, 535 Fed. App’x 9, 13 (2d Cir. 2013); in reality, specific incidents of gender discrimination can be very hard to prove as well. Take for example hostile work environment claims under New York Human Rights Law, which follows Title VII in terms of the standard where “Conduct alleged to have created a hostile work environment must be more than episodic; it must be sufficiently continuous in order to be deemed pervasive.” See *id.* A single incident can only suffice to bring a claim if it is “extraordinarily severe.” *Cruz v. Coach Stores, Inc.*, F202.3d 560, 570 (2d Cir. 2000).

with resume gaps being overlooked were disproportionality women, or individuals with children.¹⁰⁶

2. Overlooking the Resume Gap for Incarcerated Individuals

The New York Human Rights Law also ostensibly protects from discrimination against previous convictions.¹⁰⁷ In fact, it directly speaks to hiring practices stating:

[T]here shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after leaftitlerng about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.¹⁰⁸

The section referred to notes two queries:¹⁰⁹

(1) [T]here is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.¹¹⁰

¹⁰⁶ See 15 N.Y. Exec. Law §§ 290, 296 (2014).

¹⁰⁷ N.Y. Exec. Laws § 296(15), (16) (2014).

It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses.

Id.

¹⁰⁸ N.Y. Exec. Laws § 296(15) (2014).

¹⁰⁹ N.Y. Corr. Law § 752 (1), (2) (2007).

¹¹⁰ The law goes on to outline that with this inquiry the employer: [S]hall consider the following factors: (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities

New York is a step up from some states, which as close as 2015 still imposed no limitation on the information in a criminal background check that can be considered.¹¹¹ New York State is not a ban-the-box state,¹¹² *i.e.* a state that has a law that bans “the criminal history box on initial hiring documents.”¹¹³ New York’s law does not restrict the information, but only “sets standard that an employer should follow when analyzing such information.”¹¹⁴ Nothing in the New York Correctional law or the New York Human Right’s law protects against the implicit bias against unemployment due to criminal convictions or drawing inferences from resume gaps about potential periods of incarceration.

III. THE MYTH OF UNEMPLOYMENT AND “BUSINESS NECESSITY”

A. *A Resume Gap has No Real Impact on Qualification*

On the second criteria put forth by the EEOC, a company may investigate unemployment status if it helps the employer “accurately identify responsible and reliable employees.”¹¹⁵ However, does a several year gap to raise children automatically make a woman irresponsible and unreliable? In fact, does a

necessarily related to the license or employment sought or held by the person. (c)The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities. (d) The time which has elapsed since the occurrence of the criminal offense or offenses. (e) The age of the person at the time of occurrence of the criminal offense or offenses. (f) The seriousness of the offense or offenses. (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct. (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

N.Y. Corr. Law § 753 (2007).

¹¹¹ Christina O’Connell, Note, *Ban The Box: A Call To The Federal Government To Recognize A New Form Of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2823 (2015) (noting California, Delaware, Nebraska, New Jersey, Maryland, and Illinois imposed no limitations).

¹¹² *See id.* at 2801 (“The goal of the ban-the-box movement is to promote job opportunities for persons with criminal records by limiting when an employer can conduct a background check during the hiring process and encouraging employers to take a holistic approach when assessing an applicant’s fit for a position.”).

¹¹³ *Id.* at 2829 n.241.

¹¹⁴ *Id.*

¹¹⁵ *See Pre-Emp’t Inquiries and Unemployed Status, supra* note 5.

several year gap for any reason, mothering, incarceration or otherwise, have a negative impact on business in general? A doctoral student in economics penned a paper theorizing that “the long-term unemployed were qualified for jobs,” they just were being ranked lower than other candidates.¹¹⁶ A CEO of a temp agency discussed in a Wall Street Journal blog that research showed that “candidates who lack the right skills are more likely to score an interview than a candidate who has the right skills but has been out of work for more than six months.”¹¹⁷

In Peter Cappelli’s book “Why Good People Can’t Get Jobs: The Skills Gaps and What Companies Can Do About It,” the author discusses various myths associated with unemployment.¹¹⁸ These myths include that there is not a “parsing supply” of unqualified workers, and additionally, that the issues may lay with a training gap, not a skills gap.¹¹⁹ A survey found that a majority of employees “were willing to get training even outside the workplace,” but the employers continued to be hesitant “because they did not know what skills would be relevant in the future.”¹²⁰ It logically follows that if skills change so rapidly within a field,¹²¹ a gap of unemployment, particularly years before the hiring process, has no relevancy to the applicant’s ability to learn the new, constantly changing skill sets. Indeed, a study in 2013, showed that unemployment discrimination “instantaneously occurs at the onset of unemployment, not months or years after skills may have begun to decay”¹²² indicating that discrimination for periods of unemployment and a skills gap have little to no correlation.

Another model, the 70:20:10 model¹²³ illustrates that 70% of

¹¹⁶ Matt Collette, *A new theory on long-term unemployment*, PHYS. (Dec. 13, 2012), <https://phys.org/news/2012-12-theory-long-term-unemployment.html>.

¹¹⁷ Jody Greenstone Miller, *Why I hire the unemployed*, W.S.J. (Jan. 28, 2014 2:16 PM), <http://blogs.wsj.com/atwork/2014/01/28/why-I-hire-the-unemployed>.

¹¹⁸ PETER CAPPELLI, *WHY GOOD PEOPLE CAN’T GET JOBS: THE SKILLS GAPS AND WHAT COMPANIES CAN DO ABOUT IT* (2012).

¹¹⁹ *Id.* at 41, 69 (noting that only 21% of employees had received any training between 2006 and 2011).

¹²⁰ *Id.* at 75.

¹²¹ *Id.*

¹²² E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1, 45 (2013) (“We’re finding that when there’s no evidence that skills have deteriorated, out-of-work job applicants are still at a disadvantage.”).

¹²³ Andrew Jefferson & Roy Pollock, *70:20:10 Where is the Evidence?*, ASSOCIATION FOR TALENT DEVELOPMENT BLOG (Jul. 8, 2014) <https://www.td.org/Publications/Blogs/Science-of-Learning-Blog/2014/07/70-20->

learning is on-the-job, 20% is from “mentoring or stretch assignments, and 10% is from formal or educational training.”¹²⁴ Notably, neither the analysis, nor the criticism of the analysis, leads to the conclusion that a skills gap comes from a period of unemployment.¹²⁵ Rather, the evidence shows that more skills will be learned at work, as opposed to before, despite relevant training, particularly if that relevant training is not formal educational training.¹²⁶

There are also notable benefits to hiring the unemployed, or previously unemployed. First, there are benefits to the economy as a whole. As President Obama put it, employment helps “spending behaviors in general” to the point that “[t]he discriminating employer is potentially contributing to the economy’s inability to really recover quickly.”¹²⁷ A CEO in a Wall Street Journal article noted that “[p]eople returning to the workforce can bring energy, fresh perspectives and loyalty” and that independent professionals, “to get and keep clients . . . had more varied and cutting-edge experience.”¹²⁸ Many articles point out that mothering can lend its own skill set and experience to the workforce, concluding that raising a child provides training in dependability, multitasking, time management, event planning, social media, and working through stress and illness.¹²⁹

B. But They Broke The Law! . . . Well, How about We Break the Cycle!?

Hiring individuals who have been previously incarcerated is important for business because it can help the economy, society,

10-Where-Is-the-Evidence (where there’s evidence though this model is criticized, particularly in the educational community for the short shrift it gives to formal education or training, it has been acknowledged to making “intuitive sense”).

¹²⁴ Jefferson & Pollock, *supra* note 123.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Kristen B. Frasch, *Push is on Against Long-Term-Unemployment Discrimination*, HUMAN RESOURCE EXECUTIVE ONLINE (Mar. 26, 2014), <http://www.hreonline.com/HRE/view/story.jhtml?id=534356854>.

¹²⁸ Greenstone, *supra* note 117.

¹²⁹ See Sharon K. Edwards, *10 Reasons You Should Hire a Stay-at-Home Mom*, HUFFINGTON POST BLOG (Jul 13, 2014 11:52 AM), http://www.huffingtonpost.com/sharon-kay-edwards/10-reasons-you-should-hire-a-stay-at-home-mom_b_5303793.html; Kristi Grigsby, *Why You Should Hire a Mom*, WORKING MOTHER (May 5, 2015), <http://www.workingmother.com/content/why-you-should-hire-mom>.

and the individual. First, it has been reported that “post-incarceration employment significantly lowers the chance of recidivism” meaning that not only are convicts less likely to commit the crime again at work but the chance of them committing any crime decreases, making society an overall safer place.¹³⁰ Second, criminologists posit that the chance of many convicts ever committing the crimes they went to jail for, particularly at a young age, at the work place is very remote.¹³¹ Third, the criminal record is often misleading and very inaccurate. They are notably difficult to interpret.¹³² In fact, FBI background checks were found to be “shockingly out of date 50 percent of the time . . . failing to reflect whether an arrest actually led to conviction.”¹³³ There is also an overall negative impact to the national economy. By allowing latent discrimination against convicts through unemployment discrimination, the labor market also suffers. Calculations suggest that “the population of former prisoners and people with felony convictions led to a loss of \$78 to \$87 billion in GDP in 2014.”¹³⁴ Employing ex-convicts would help lower this loss of gross domestic product and stimulate the economy.¹³⁵ Finally, under the Work Opportunity Tax Credit, there are tax incentives available to certain employers for hiring ex-felons, making it financially beneficial to employ ex-felons.¹³⁶

I. MODELS

A. *Other States*

On a state and local level, several locations within the United States have noted the impact of unemployment discrimination, including Oregon, Chicago, California, as well as Madison,

¹³⁰ BUCKNOR & BARBER, *supra* note 55, at 9; Rodriguez & Emsellem, *supra* note 52 (noting that post-incarceration employment significantly lowers the chances of recidivism).

¹³¹ Rodriguez & Emsellem, *supra* note 52, at 7.

¹³² *Id.* (noting that “they may include arrests that were dropped because of factual innocence.”).

¹³³ *Id.*

¹³⁴ Bucknor & Barber, *supra* note 53, at 14.

¹³⁵ *Id.*

¹³⁶ *Work Opportunity Tax Credit*, DEP’T OF LABOR, <https://www.doleta.gov/business/incentives/opptax/eligible.cfm> (last updated Jan. 18, 2017).

Wisconsin and New York City.¹³⁷

In 2012, Washington D.C. signed the Unemployment Anti-Discrimination Act of 2012,¹³⁸ which uniquely treats unemployed individuals as a protected class.¹³⁹ The Act's protections limit advertisements and hiring processes disqualifying or refusing to hire unemployed individuals based on their unemployed status. It also provides whistleblower protections.¹⁴⁰

Other states, across the board, focus on the limitation of language in advertisements. For example, very similar language concerning advertising is used in the New Jersey¹⁴¹ and Oregon¹⁴² statutes. This focus on advertising is crucial because it is easy to spot for the purposes of penalizing noncompliance and, even more importantly, as the National Employment Law Project points out, advertisements that broadly exclude currently unprotected classes may have a chilling effect on the pool of individuals considering submitting applications.¹⁴³

The rights of the employers are balanced against the employee in these statutes through certain exceptions, which include: (1) the ability for the employer to still tailor their advertisements to certain qualifications; (2) the ability to still post internal hiring provisions; and (3) the ability for employers to examine the reasons for unemployment in assessing ability to perform the job requirements.¹⁴⁴ These exceptions are significant because they showcase that the employer may still discriminate based on a lack of skills or training, and not solely on that individual's unemployment status.¹⁴⁵ However, these exceptions may lead to further legal discrimination, for example, allowing an employer to

¹³⁷ See Stinton, *supra* note 65.

¹³⁸ D.C. CODE § 32-1362 (2012).

¹³⁹ Jessica D. Fegan & Amy Miller, *Washington, D.C. Prohibits Discrimination Based on Unemployment Status*, LEXOLOGY (May 7, 2012), <https://www.lexology.com/library/detail.aspx?g=d08cfce3-8bb0-4c04-b8da-11f71c311005>.

¹⁴⁰ *Id.*

¹⁴¹ N.J. STAT. ANN. § 34:8B-1 (2011).

¹⁴² OR. REV. STAT. ANN. § 659A.550 (2012).

¹⁴³ Rodriguez & Emsellem, *supra* note 52, at 5. See also Davide B. Weisenfeld, *NYC Bans Discrimination Against Unemployed Job Applications*, XPERT HR, <http://www.xperthr.com/new/nyc-bans-discrimination-against-unemployed-job-applicants/9598/> (last visited November 4, 2016) ("A National Employment Law Project review found 150 job ads in 2011 that either were aimed at or limited to people currently working.").

¹⁴⁴ D.C. CODE § 32-1364 (a) – (c) (2012).

¹⁴⁵ *Id.*

examine the reasons may lead to employers being aware of marital status, familial status, and care-giving status.¹⁴⁶ Furthermore, there is still underlying sexism in the statute because it excludes domestic house workers, who are predominately female.¹⁴⁷

The protections of these statutes, with the advertising and unemployment status, are still focused on protecting the currently unemployed as opposed to the previously unemployed. The statutes do not provide for a private cause of action, so there is less of an incentive to come forth with complaints, since there would be no monetary reward, just punitive measures toward the employer. Despite these shortfalls, the state statutes at least raise awareness in employers of unemployment discrimination and its potential legal ramification, which is a first important step in correcting the disparate impact that comes from allowing hiring decisions to be predicated on gaps of unemployment on a résumé.

B. The New York City Model

New York City, in 2012, put forward legislation against unemployment discrimination in response to the statistic that approximately “372,000 people were unemployed” in the area, a number that disproportionately consisted of blacks and Hispanics.¹⁴⁸ At the time, Mayor Michael Bloomberg vowed to veto what he considered as misguided, and other opponents, including many business leaders say “that an employer has a right to consider what a person was doing before applying for a job, and that the legislation could spur numerous lawsuits by unsuccessful applicants and deter companies from hiring anyone at all.”¹⁴⁹ Mayor Bloomberg’s veto was overridden by an unprecedented “44 [to] 4” vote.¹⁵⁰ The New York City law¹⁵¹ took the next step in

¹⁴⁶ *Id.*

¹⁴⁷ See *Domestic Workers Across The World: Global And Regional Statistics And The Extent Of The Legal Protection*, INTERNATIONAL LABOUR OFFICE 21 (2013), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf (noting that the distribution of domestic workers by sex in 2010 was 83% female and 17% male).

¹⁴⁸ Winnie Hu, *When Being Jobless Is a Barrier to Finding a Job*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/nyregion/for-many-being-out-of-work-is-chief-obstacle-to-finding-it.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Local Civil Rights Restoration Act of 2005 (“Restoration Act”) N.Y.C. LOCAL L. NO 85 (2005), amended by N.Y.C. INT. NO. 814-A (2006).

protecting against unemployment discrimination. Similarly to the other states, it also “bans employers from stating or suggesting in [a] job advertisement that current employment is a prerequisite for employment.”¹⁵² However, unlike the other states that have enacted unemployment anti-discrimination laws, the statute protects against discrimination in both hiring *and* in compensation.¹⁵³ Additionally, the New York City law allows private rights of action¹⁵⁴ and allows not just disparate treatment claims, but also disparate impact claims.¹⁵⁵

This model is ideal because it protects not just the currently employed, but also the previously employed individuals by prohibiting compensation discrimination based on unemployment, which would presumably cover past periods of unemployment, so long as the candidates more recent work experience was at a similar level to other applicants.¹⁵⁶ Furthermore, despite Mayor Bloomberg’s fears concerning “numerous” lawsuits brought in New York City, only a handful have been brought and the cases are fairly difficult to win.¹⁵⁷

There is also a safe harbor exception built into the New York City regulation¹⁵⁸ as noted in a federal district court case, *Szewczyk v. City of New York*¹⁵⁹ whereby an employer is “allow[ed] . . . to question a candidate’s employment history if there is a

¹⁵² Cindy S. Minniti, *NYC may See More Unemployment Discrimination Suits*, LAW 360 (Jan. 15, 2015), <http://www.law360.com/articles/608388/nyc-may-see-more-unemployment-discrimination-suits>.

¹⁵³ *See id.* (stating that however, an employer “may also set compensation and other terms and conditions of employment based upon a candidate’s actual work experience” or give preference to internal hiring).

¹⁵⁴ *Id.* (noting that the private cause of action also allows recovery of “front and back pay, compensatory damages, uncapped punitive damages and attorneys’ fees.”).

¹⁵⁵ *See* Society for Human Resource Management, *EEO: General: What are disparate impact and disparate treatment?* (Aug 30, 2016), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disperateimpactdisparatetreatment.aspx> (“Disparate impact occurs when policies, practices, rules or other systems that appear to be neutral result in a disproportionate impact on a protected group . . . [d]isparate treatment is intentional employment discrimination.”).

¹⁵⁶ *See* Restoration Act, *supra* note 151.

¹⁵⁷ *See* Minniti *supra* note 152; Hu, *supra* note 148. *See also* Kelsaw, *supra* note 122 (noting disparate impact case are “disfavored by the court” and that plaintiffs would likely recover very little); *Szewczyk v. City of New York*, No. 15-cv-2468, 2016 WL 4742316, at *5-6 (S.D.N.Y. Sept. 9, 2016).

¹⁵⁸ N.Y.C. Admin. Code § 8-107(21)(1)(a)—(2)(b)(1).

¹⁵⁹ *Szewczyk*, 2016 WL 4742316.

‘substantially job-related reason’ for the consideration.”¹⁶⁰ Interestingly enough, this case specifically hinted that it was quite possible that discrimination against past resume gaps, as opposed to just current unemployment, may very well fall directly into the purview of the New York City statute.¹⁶¹ In this case, the plaintiff alleged the individual hiring her “asked questions about the length of her unemployment” and then “made unfavorable statements . . . about the gaps on her resume” and actually told her “that she would not be hired . . . because of those gaps.”¹⁶² The courts declined to exercise supplemental jurisdiction making this still a question of first impression.¹⁶³

IV. CONCLUSION AND RECOMMENDATIONS

As stated at the beginning of this paper, the EEOC’s prohibited practices state that the employer may not discriminate against unemployment status unless (1) it does not “significantly disadvantage people of a particular race . . . or sex” and (2) it helps the employer “accurately identify responsible and reliable employees.”¹⁶⁴ As discussed, statistics show that allowing discrimination based on a resume gap does disadvantage women, particularly mothers, and has a racial impact as well, due to the higher rate of incarceration of minorities. Additionally, there is no actual skill gap for unemployed individuals, particularly when the period of unemployment was quite a ways back.¹⁶⁵

The EEOC best practices guidelines include the suggestion that “[w]hen reviewing and comparing applicants’ or employees’ work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.”¹⁶⁶ The courts should look to this suggestion, and the implications of an employer focusing on

¹⁶⁰ N.Y.C. Admin. Code § 8-107(21)(1)(a)—(2)(b)(1).

¹⁶¹ *Szewczyk*, 2016 WL 4742316, at *6 (“These allegations indicate that the City might have trouble complying with its own vexing regulation.”).

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *Pre-Employment Inquires*, *supra* note 5.

¹⁶⁵ CAPPELLI, *supra* note 118, at 41, 69.

¹⁶⁶ *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EEOC, <https://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011).

interrupted service when considering whether there is gender discrimination in the hiring process. Additionally, the New York City model for unemployment anti-discrimination should be adopted in legislation for the whole state of New York because its wide protections would address the resume gap issue in a way the other state's solutions would not. Furthermore, the legislation in New York City has not adversely affected employers or business owners since it was enacted more than three years ago in the ways indicated by the opposition to the regulation, because of the low recovery and the difficulty to prove.

Finally, if New York City's model proves to be too protective, then at the very least, there should be "well-documented and transparent" employment decisions, and incentives through tax breaks for employers who self-report the number of applicants interviewed and number of resumes reviewed and why the applicants were rejected to the United States Department of Labor annually. The bottom line is that until some measure are taken, discrimination against women and minorities because of periods of unemployment on their resume will continue be legal, to the detriment of the individual and to society as a whole.