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Lauren Wray  
*Touro Law Center*

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**“I WAS JUST A KID”: ADDRESSING THE COLLATERAL  
CONSEQUENCES OF A JUVENILE RECORD ON EMPLOYMENT**

*Lauren Wray\**

**ABSTRACT**

There is a common myth that juvenile records are confidential, when in fact only nine states fully prohibit public access to juvenile records. Landlords, employers, and educators in a majority of states may ask questions about a juvenile’s record. Studies have shown that employers are less likely to hire an applicant who has a juvenile delinquency, and that many employers may not be able to differentiate between a juvenile and adult record. This Note reviews the intersectional flaws of the New York juvenile justice system and the New York labor laws. Specifically, it evaluates policies New York has implemented with the intention of alleviating discriminatory hiring practices, such as New York Criminal Procedure Law 160.59 and of Ban the Box policies in areas of New York.

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\* J.D. Candidate 2022, Touro College Jacob D. Fuchsberg Law Center; University of Scranton, B.S. in Accounting, 2015. I would like to thank my Faculty Advisor, Meredith Miller, Notes Editors, Alyaa Chace, Dana Ortiz-Tulla, and Shannon Malone, and Professor Sepowitz for their continuous feedback and guidance in helping me prepare this Note for publication. I would also like to thank my family and fiancé for their endless support and encouragement throughout my law school journey.

## I. INTRODUCTION

In the United States, a juvenile record can affect a person's future employment opportunities. A survey involving 600 Los Angeles employers found that forty percent of employers "definitely" or "probably" would not hire an applicant who has a criminal record.<sup>1</sup> In 2018, the Prison Policy Initiative reported that formerly incarcerated people are unemployed at a rate five times higher than the general population.<sup>2</sup> In 2013, a study was done to test the impact of a juvenile delinquency background during the resume collection application process.<sup>3</sup> The study created fictitious applicants, half of whom spoke about juvenile delinquency on their resumes.<sup>4</sup> Applicants who disclosed their juvenile record were twenty-two percent less likely to receive a callback compared to those who had no record.<sup>5</sup>

There is a common myth that juvenile records are confidential because of the historic goal of the juvenile justice system, which is to protect children from the harsh results of adult proceedings (*e.g.*, overcrowded jails, harsh sentencing), the stigma of being a "criminal," and publicity.<sup>6</sup> The juvenile justice system was created with the understanding that children are different and less blameworthy than

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<sup>1</sup> Harry J. Holzer et al., *How Willing Are Employers to Hire Ex-Offenders?*, 23(2) FOCUS 40, 41 (2004), <http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf>.

<sup>2</sup> Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

<sup>3</sup> Melanie Taylor, *Adult Earnings of Juvenile Delinquents: The Interaction of Race/Ethnicity, Gender, and Juvenile Justice Status on Future Earnings*, 13 JUST. POL'Y J. 2, 4 (2013) (Stijn Baert and Elsy Vernhofstadt conducted a field experiment on labor market discrimination against former juvenile delinquents. This study only included White applicants).

<sup>4</sup> *Id.* (applicants with juvenile delinquency wrote "[i]n view of a trustful collaboration I wish to report that during my secondary education career I spent one year at an open detention center because of juvenile delinquency" on their applications).

<sup>5</sup> *Id.*

<sup>6</sup> RIYA SAHA SHAH, LAUREN FINE, JAMIE GULLEN, JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 6 (Juv. L. Ctr., 2014) [https://jlc.org/sites/default/files/publication\\_pdfs/national-review.pdf](https://jlc.org/sites/default/files/publication_pdfs/national-review.pdf); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring); OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996 36 (Nat'l Crim. Just. Ass'n, 1997), <https://www.ncjrs.gov/pdffiles/reform.pdf>.

adults.<sup>7</sup> However, over time in many states, juvenile records have become exponentially more accessible to the public, even though most juvenile court hearings are inaccessible to the public.<sup>8</sup>

Each state differs in its treatment of juvenile records. Most states do not provide automatic sealing or expunging of the record when the youth becomes an adult,<sup>9</sup> and others fail to provide opportunities for sealing or expungement.<sup>10</sup> The majority of states make juvenile records publicly available to some extent.<sup>11</sup> A juvenile record can affect a child's life in many ways, including affecting a child's ability to obtain higher education, housing, employment and other opportunities.<sup>12</sup> Riya Saha Shah, an attorney at the Juvenile Law Center, explained having a juvenile record is:

The . . . biggest barrier that comes into play [in] getting employment. . . . Even if [the record] appears as 'juvenile,' employers may not be able to differentiate between juvenile and adult records, or maybe don't care because they think a juvenile who commits a crime is the same thing as an adult who commits a crime.<sup>13</sup>

This Note will discuss the intersectional flaws of the New York juvenile justice system and New York labor laws. Part II of this Note will evaluate the history of the juvenile justice system. This part will explore the options a court has for a youth when he or she becomes of legal age to seal or expunge the juvenile record. Part II will also assess today's juvenile justice system and the policies that were implemented to reintegrate youth with society, such as the New York Family Court Act and New York Criminal Procedure Law 160.59 ("CPL § 160.59").

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<sup>7</sup> *Youth in the Justice System: An Overview*, JUV. L. CTR, <https://jlc.org/youth-justice-system-overview> (last visited Feb. 28, 2021).

<sup>8</sup> SHAH ET AL., *supra* note 6, at 11.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 14 (Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin).

<sup>12</sup> Jamaal Abdul-Alim, *Juvenile Records Often Have Lifelong Consequences: Experts Say*, JUV. JUST. INFO. EXCH. (June 29, 2015), <https://jjie.org/2015/06/29/juvenile-records-often-have-lifelong-consequences-experts-say/>.

<sup>13</sup> *Id.*

Part III will evaluate different policies New York has implemented to alleviate discrimination in hiring practices. Specifically, it will examine New York's unlawful discriminatory practice policy, and the implementation of Ban the Box policies in areas of New York. Finally, Part IV will examine solutions to eliminate employment discrimination against those with juvenile records such as requiring a court order for schools to access a student's juvenile record, revising CPL § 160.59 to allow record sealing of juveniles who were convicted of violent felony offenses but did not receive youthful offender treatment, and implementing a statewide Ban the Box policy.

## II. JUVENILE SYSTEM

### A. Overview of the U.S. Juvenile System

Prior to the early nineteenth century, courts would punish youths in the same overly crowded jails and penitentiaries as adults, including violent criminals and the mentally ill.<sup>14</sup> Although many youths were punished for noncriminal behavior, they were still placed in the overcrowded jails and penitentiaries because there were no other options.<sup>15</sup>

Opposed to the court system at that time, Thomas Eddy and John Griscom assembled the Society for the Prevention of Pauperism.<sup>16</sup> The Society for the Prevention of Pauperism pressured for a new system because it opposed housing youths and adults in the same prisons and jails.<sup>17</sup> As a result, the New York House of Refuge was established in 1825 to house poor youths who were viewed by authorities as on a delinquent path.<sup>18</sup> By the 1840s, approximately twenty-five facilities similar to the New York House of Refuge were constructed throughout the country.<sup>19</sup> These facilities quickly experienced the same issues of overcrowding and deteriorating conditions.<sup>20</sup> Nonetheless, the House of Refuge paved the way for

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<sup>14</sup> *Juvenile Justice History*, CTR. JUV. CRIM. JUST., <http://www.cjcj.org/education1/juvenile-justice-history.html> (last visited Oct. 30, 2021).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

reform, training, and industrial schools which are all part of the juvenile justice system today.<sup>21</sup>

The first juvenile court was established in Cook County, Illinois in 1899.<sup>22</sup> It led states to realize children were different from adults, more susceptible to change, and less blameworthy.<sup>23</sup> Previously, youths and adults were tried in the same criminal courts.<sup>24</sup> The juvenile courts were created to "spare juveniles from harsh proceedings of adult court, punitive and unseemly conditions of adult jails and penitentiaries, and the stigma of being branded 'criminal.'"<sup>25</sup> The courts provided individualized attention, rehabilitation, and protective supervision to the youth.<sup>26</sup> The courts had an informal process where judges exercised their own discretion on how each case was handled.<sup>27</sup> There was no legal representation for the youths, and the proceedings entailed an informal conversation between the youth and judge.<sup>28</sup>

The idea of a juvenile court spread throughout the country and led to uniting youth programs and institutions to form the juvenile justice system.<sup>29</sup> However, the absolute discretion of judges in the juvenile system led to inconsistencies in treatment.<sup>30</sup> By the 1950s and 1960s, public concerns rose about the effectiveness of the juvenile system.<sup>31</sup> Specifically, youths in similar circumstances were sentenced differently based on a judge's "mood, temperament, or personal philosophy."<sup>32</sup> This led to the United States Supreme Court formalizing the juvenile system through a series of decisions.<sup>33</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> OFF. OF JUV. JUST. AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996 36 (Nat'l Crim. Just. Ass'n, 1997), <https://www.ncjrs.gov/pdffiles/reform.pdf>.

<sup>26</sup> *Juvenile Justice History*, *supra* note 14.

<sup>27</sup> *Id.*

<sup>28</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>29</sup> *Juvenile Justice History*, *supra* note 14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Juvenile Justice History*, *supra* note 14. *See also In re Gault*, 387 U.S. 1, 54 (1967) (holding youth are constitutionally required to have the same due process rights as adults; including the right to an attorney and the right to confront witnesses brought against them).

In 1963, the Supreme Court held that any person criminally accused is entitled to counsel.<sup>34</sup> In 1966, the Supreme Court declared that juvenile courts could not act with “procedural arbitrariness” when deciding to waive jurisdiction and transfer a child to adult court.<sup>35</sup> When evaluating whether to waive jurisdiction, the youth is entitled to a hearing and counsel, and the juvenile court must provide a statement of reasons for its decision.<sup>36</sup> The following year, the Supreme Court ruled that juveniles had the same due process rights as adults, including the right of notice, counsel, and against self-incrimination.<sup>37</sup> In the 1970s, the Supreme Court held that the burden of proof for criminal adjudications is beyond a reasonable doubt<sup>38</sup> and that in accordance with the Double Jeopardy Clause of the Fifth Amendment, a child could not be tried in an adjudicatory hearing and subsequently a criminal trial.<sup>39</sup>

After the Supreme Court changed juvenile court proceedings, there was an increase in juvenile crime rates.<sup>40</sup> By the late 1980s, the public perceived the juvenile system as too lenient on crime.<sup>41</sup> As a result, state legislatures adopted “tough on crime” policies.<sup>42</sup> Tough on Crime policies created punitive legislative acts which allowed automatic transfer to adult court for certain crimes, mandatory sentences, and death and life sentences without the possibility of parole.<sup>43</sup> Also as a result of “tough on crime” policies, youth correctional facilities were overcrowded with deplorable conditions.<sup>44</sup>

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<sup>34</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>35</sup> *Kent v. United States*, 383 U.S. 541, 555 (1966). Juvenile courts had *parens patriae*, meaning that they functioned in a “parental” relationship which was supposed to provide guidance and rehabilitation for juveniles who entered the system. The Supreme Court found that some juvenile courts lacked the necessary personnel, facilities and techniques to function in a *parens patriae* capacity and were instead acting arbitrarily opposed to protectively.

<sup>36</sup> *Id.* at 557.

<sup>37</sup> *Gault*, 387 U.S. at 33-55.

<sup>38</sup> *In re Winship*, 397 U.S. 358, 368 (1970).

<sup>39</sup> *Breed v. Jones*, 421 U.S. 519, 541 (1975).

<sup>40</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>41</sup> *Juvenile Justice History*, *supra* note 14.

<sup>42</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>43</sup> *Juvenile Justice History*, *supra* note 14; *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>44</sup> *Juvenile Justice History*, *supra* note 14.

The new legislation exposed youths to the same experiences that initially prompted the creation of the juvenile court system.<sup>45</sup>

By the 1990s, youth incarceration rates began to decline but the harsh penalties remained.<sup>46</sup> In the 2000s, the Supreme Court reviewed a series of cases explaining the differences between juveniles and adults.<sup>47</sup> Reverting to the principles of the original juvenile justice system, the Court declared that juveniles are less mature and less responsible than adults.<sup>48</sup> "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."<sup>49</sup> Additionally, the Court stated juveniles' personality and character traits are "less fixed."<sup>50</sup> For these reasons, a juvenile's conduct is not as "morally reprehensible" as an adult's.<sup>51</sup>

Today, the primary goal of the juvenile justice system is still rehabilitation.<sup>52</sup> In most states, juvenile delinquency is defined "as the commission of a criminal act by a child who was under the age of eighteen at the time."<sup>53</sup> A majority of states allow youths to continue under juvenile court supervision until the age of twenty-one.<sup>54</sup> In many states, youth proceedings are closed to the public and educational programs are provided to the youth while incarcerated.<sup>55</sup> Numerous states and courts have begun viewing the juvenile justice system through a scientific lens and have adopted new rules and standards for youths throughout the system.<sup>56</sup>

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<sup>45</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>46</sup> *Id.*

<sup>47</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty for offenders under eighteen years old is prohibited under the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (holding the Eighth Amendment prohibited sentencing juveniles to life without parole for nonhomicide offenses, and juveniles must receive the opportunity for release); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding sentencing a juvenile to life imprisonment without parole for homicide crimes is a violation of the Eighth Amendment).

<sup>48</sup> *Roper*, 543 U.S. at 569.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 570.

<sup>51</sup> *Id.*

<sup>52</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



## B. Legislative Changes in the New York Juvenile System

After the formalization of the juvenile court system and the increase in juvenile crime rates, New York enacted the Juvenile Offender Acts of 1976 and 1978.<sup>57</sup> At this time, youths were no longer seen as vulnerable children but frightening “super-predators.”<sup>58</sup> Common phrases like “‘adult crime, adult time’ or ‘old enough to do the crime, old enough to do the time’” were spread throughout the media.<sup>59</sup> This ideology led to passing the Juvenile Offender Act of 1976 which radically changed the juvenile delinquency laws in New York.<sup>60</sup> The Act weighed the juvenile’s needs against the interest and safety of the community.<sup>61</sup> In addition, it created stricter penalties for adjudicating fourteen and fifteen-year-olds.<sup>62</sup> The Juvenile Offender Act of 1978 abolished the court’s power to waive criminal penalties, and violent crimes required mandatory incarceration.<sup>63</sup> The 1978 Act also lowered the age of criminal responsibility from sixteen to fourteen, and to thirteen for murder.<sup>64</sup> In the late 1990s, crime rates decreased but the harsh penalties remained.<sup>65</sup>

The latest legislative change occurred in 2017, when New York passed the Raise the Age Act,<sup>66</sup> which raised the age of criminal responsibility to eighteen.<sup>67</sup> Previously, sixteen and seventeen-year-olds were automatically treated as adults when they entered the

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<sup>57</sup> Sara V. Gomes, *New York's Raise the Age Law: Restoring the Juvenile Justice System Leaves Courts Legislating from the Bench*, 40 PACE L. REV. 456, 461 (2020).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1066-71 (2014).

<sup>61</sup> Gomes, *supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 462.

<sup>64</sup> *Id.*

<sup>65</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>66</sup> Proceedings Against Juvenile Offenders and Adolescent Offenders, N.Y. CRIM. PROC. L. § 722.

<sup>67</sup> *Raise the Age (RTA)*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/Criminal/RTA.shtml> (last updated Dec. 23, 2019).

criminal justice system.<sup>68</sup> The law moved all sixteen and seventeen-year-olds from adult facilities, such as Rikers Island, to facilities specialized for juveniles and adolescents that were age appropriate.<sup>69</sup> It also created a specialized new court system, called Youth Part.<sup>70</sup> Youth Part is a subsection of the State Supreme Court and it is where youth offenders are arraigned for felonies.<sup>71</sup> A judge may decide whether to move the case to Family Court or allow it to remain in Youth Part.<sup>72</sup>

### C. Juvenile Record

A youth's record begins as soon as he or she is arrested.<sup>73</sup> It commences with "police reports and charging documents, witness and victim statements, court-ordered evaluations, fingerprints, and sometimes even DNA samples."<sup>74</sup> A juvenile record may also include information about the child's family, social and behavioral health history, and prior engagements with the law.<sup>75</sup> Information in a juvenile record can create stigmas and barriers during reintegration.<sup>76</sup>

For example, the Common Application, which hundreds of universities and colleges use for online applications, asks specifically about juvenile adjudications.<sup>77</sup> Disclosing a juvenile record may lead to the denial of financial aid and housing.<sup>78</sup> In addition, youth who have been involved in the court system are less likely to graduate from high school, which can affect employment opportunities.<sup>79</sup>

Only nine states fully prohibit public accessibility of juvenile records.<sup>80</sup> In other states, a juvenile record may be easily accessible to

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<sup>68</sup> NYC CRIM. JUST., RAISE THE AGE IN NEW YORK CITY 6 (Oct. 2019) [http://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/11/Raise-the-Age-in-New-York-City\\_\\_.pdf](http://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/11/Raise-the-Age-in-New-York-City__.pdf).

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> SHAH ET AL., *supra* note 6, at 12.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Abdul-Alim, *supra* note 12.

<sup>78</sup> *Id.*

<sup>79</sup> Taylor, *supra* note 3, at 2.

<sup>80</sup> SHAH ET AL., *supra* note 6, at 12 (California (CAL. RULE OF CT., RULE 5.552); Nebraska (NEB. REV. STAT. § 43-2,108); New Mexico (N.M. STAT. § 32A-2-32);

a landlord, employer, or the general public.<sup>81</sup> Accessibility often depends on the juvenile's age, "the type of offense, or the number of offenses."<sup>82</sup> In Alaska, "a state or municipal law enforcement agency may disclose to the public information regarding a case as may be necessary to protect the safety of the public."<sup>83</sup> The statute is silent on who or how "public safety" is determined, leaving it unclear what cases the public can see.<sup>84</sup> Some states have broad policies on public availability of juvenile records.<sup>85</sup> For example, Connecticut allows a juvenile record to be public if the youth is arrested or charged with a felony.<sup>86</sup> Kansas allows all juvenile records of children ages fourteen and older to be publicly available.<sup>87</sup> Some states make juvenile records publicly available in all felony or violent offense cases.<sup>88</sup> Other states provide public access for misdemeanors.<sup>89</sup> Finally, seven states provide complete public access to all juvenile records.<sup>90</sup>

A common exception to all confidentiality policies is the release of information to school personnel.<sup>91</sup> Over thirty states allow the release of juvenile records to school personnel.<sup>92</sup> The criteria for

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New York (N.Y. FAM. CT. ACT § 381.3); North Carolina (N.C. GEN. STAT. § 7B-3000); North Dakota (N.D. CENT. CODE § 27-20-52); Ohio (OHIO REV. CODE ANN. § 2151.18); Rhode Island (R.I. GEN. L. § 14-1-64; R.I. GEN. L. § 14-1-30); and Vermont (VT. STAT. TIT. 33 § 5117)). These states may allow information to be shared between law enforcement and court personnel.

<sup>81</sup> SHAH ET AL., *supra* note 6, at 12.

<sup>82</sup> *Id.* at 13.

<sup>83</sup> *Id.* See ALASKA STAT § 47.12.310(c).

<sup>84</sup> SHAH ET AL., *supra* note 6, at 13. See ALASKA STAT § 47.12.310(c).

<sup>85</sup> SHAH ET AL., *supra* note 6, at 13.

<sup>86</sup> CONN GEN. STAT. § 46b-124.

<sup>87</sup> KAN. STAT. § 38-2309(b).

<sup>88</sup> SHAH ET AL., *supra* note 6, at 13. See, e.g., West Virginia (W. VA. CODE § 49-7-1(g)); Minnesota (MINN. STAT. § 260B.171, MINN. STAT. § 260B.163); Louisiana (LA. CHILD. CODE ART. 412).

<sup>89</sup> See Florida (FLA. STAT. § 985.04); Indiana (IND. CODE § 31-39-2-8).

<sup>90</sup> Arizona (ARIZ. REV. STAT. § 8-208(G), ARIZ. CONST. ARTICLE IV, § 22); Idaho (IDAHO CODE § 20-525A); Iowa (IOWA CODE § 232.147); Michigan (MICH. COMP. LAWS § 712A.28); Montana (MONT. CODE § 41-5-216); Oregon (OR. REV. STAT. § 419A.255); Washington (WASH. REV. CODE §§ 13.50.050(14)-(16)).

<sup>91</sup> SHAH ET AL., *supra* note 6, at 16.

<sup>92</sup> SHAH ET AL., *supra* note 6, at 16. Alabama (ALA. CODE § 12-15-134, ALA. CODE § 12-15-133); Alaska (ALASKA STAT. § 47.12.310(c)); Arkansas (ARK. CODE §§ 9-27-309(k)-(1)); Colorado (COLO. REV. STAT. § 19-1-304); Connecticut (CONN. GEN. STAT. § 10-233H); District of Columbia (D.C. CODE § 16-2331(c)); Florida (FLA. STAT. § 985.04 (1)); Georgia (GA. CODE § 15-11-82(e)); Illinois (705 ILL. COMP. STAT. 405/1-7); Indiana (IND. CODE 31-39-2-13.8.); Iowa (IOWA CODE § 232.147);

records to be released to schools vary among states.<sup>93</sup> In Alabama, Indiana, and Vermont, schools are required to obtain the court's permission prior to accessing juvenile information.<sup>94</sup> However, in some states, information will be released if it is "relevant to the school serving the juvenile."<sup>95</sup> In New York, schools may only use a juvenile record to help foster a successful reentry into the community or to execute a student's education plan.<sup>96</sup> New York requires the school to destroy the juvenile record when a student graduates and does not allow the juvenile record to be part of the student's permanent record.<sup>97</sup>

In addition to school officials, law enforcement, and court personnel, most states allow child welfare or human services agencies to access juvenile records.<sup>98</sup> These agencies are given access to the records solely to supervise or provide care for the youth.<sup>99</sup> Additionally, a majority of states allow the victim of a crime to access some information from the juvenile record.<sup>100</sup>

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Kansas (KAN. STAT. § 38-2310); Kentucky (KY. REV. STAT. § 610.340); Louisiana (LA. CHILD. CODE. ART. 412); Maine (ME. REV. STAT. TIT. 15 § 3308); Maryland (MD. EDUC. CODE § 7-303); Minnesota (MINN. STAT. § 260B.171); Mississippi (MISS. CODE § 43-21-255); Missouri (MO. REV. STAT. § 211.321); Montana (MONT. CODE § 41-5-215); New Jersey (N.J. STAT. § 2A:4A-60); New Mexico (N.M. STAT. § 32A-2-32); New York (N.Y. FAMILY ACT § 380.1); North Carolina (N.C. GEN. STAT. § 7B-3101); North Dakota (N.D. CENT. CODE. § 27-20-51, N.D. CENT. CODE § 27-20-52); Oklahoma (OKLA. STAT. TIT. 10A, § 2-6-102); Oregon (OR. REV. STAT. § 419A.255); South Carolina (S.C. CODE § 63-19-2020, S.C. Code § 63-19-2030); Tennessee (TENN. CODE. § 49-6-3051); Texas (TEX. FAM. CODE § 58.0051); Virginia (VA. CODE § 16.1-300, Va. Code § 16.1-301); Washington (WASH. REV. CODE § 13.50.050); Wisconsin (WIS. STAT. § 938.396, WIS. STAT. § 938.396(1) (a)(2)); Wyoming (WYO. STAT. § 14-6-203).

<sup>93</sup> SHAH ET AL., *supra* note 6, at 16.

<sup>94</sup> Vermont (VT. STAT. TIT. 33, § 5117); Indiana (IND. CODE 31-39-2-13.8); Alabama (ALA. CODE § 12-15-133).

<sup>95</sup> SHAH ET AL., *supra* note 6, at 17.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 18.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

#### D. New York Family Court Act

In New York, all juvenile delinquency cases are heard in Family Court.<sup>101</sup> As of October 1, 2019, a juvenile delinquent is defined as a person between the ages of seven and eighteen who “commits an act which would be a ‘crime’ if he or she were an adult, and is then found to be in need of supervision, treatment or confinement.”<sup>102</sup> Children who are at least thirteen years old may be treated as adults for more serious, violent crimes and tried in the Youth Part.<sup>103</sup> Under the Raise the Age Act, sixteen and seventeen-year-olds who are arrested for misdemeanors are considered juvenile delinquents.<sup>104</sup>

Article 3 of the New York Family Court Act (“FCA”) prescribes the policies and procedures for juvenile delinquency.<sup>105</sup> Juvenile cases are handled by Family Court as opposed to Criminal Court.<sup>106</sup> The purpose of the FCA is “(a) to determine whether a person is a juvenile delinquent and (b) to issue an appropriate order of disposition for any person who is adjudged a juvenile delinquent.”<sup>107</sup> The Family Court considers the needs and best interests of the juvenile and the need to protect the community.<sup>108</sup> In addition, the court is responsible to help the juvenile develop skills and habits to become a productive law-abiding member of the community.<sup>109</sup>

In New York, juvenile records are confidential.<sup>110</sup> All police records relating to a juvenile are kept separate from adult records and are not accessible to the public.<sup>111</sup> Some exceptions are allowed; for example, the child, and the child’s parent or guardian may have access

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<sup>101</sup> *Juvenile Delinquency*, NYCOURTS.GOV, [http://ww2.nycourts.gov/COURTS/nyc/family/faqs\\_juvenile.shtml](http://ww2.nycourts.gov/COURTS/nyc/family/faqs_juvenile.shtml) (last visited Feb. 28, 2021); N.Y. FAM. CT ACT § 302.1 (“The family court has exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent.”).

<sup>102</sup> *Id.*

<sup>103</sup> NYC CRIM. JUST., *supra* note 68, at 9.

<sup>104</sup> *Id.*

<sup>105</sup> N.Y. FAM. CT. ACT § 301.1.

<sup>106</sup> N.Y. FAM. CT. ACT § 302.1.

<sup>107</sup> N.Y. FAM. CT. ACT § 301.1.

<sup>108</sup> *Id.*

<sup>109</sup> Matter of A.B., 831 N.Y.S.2d 351, 351 (Fam. Ct. 2006).

<sup>110</sup> N.Y. FAM. CT. ACT §§ 380.1; 381.2.

<sup>111</sup> N.Y. FAM. CT. ACT § 381.3.

to the records.<sup>112</sup> After a youth is adjudicated and enrolled in school, the court notifies a designated education official of the adjudication.<sup>113</sup> The notice must be kept separate from the youth's school record and be permanently destroyed once the child leaves the school district.<sup>114</sup>

Provisions of New York's criminal procedure laws do not apply to the FCA.<sup>115</sup> However there are some similarities. Minors are still photographed and fingerprinted.<sup>116</sup> The fingerprints are then added into the law enforcement fingerprint database.<sup>117</sup> Under the FCA, fingerprints are only retained if a juvenile of the age of eleven or twelve is adjudicated based on what would constitute a class A or B felony.<sup>118</sup> If juveniles reach twenty or have been discharged from placement for at least three years and have no criminal conviction, then their fingerprints, photograph and other information are destroyed and removed from the division of criminal justice services, police department and any other law enforcement agency.<sup>119</sup>

After an "order of disposition," a juvenile may request that the court order the record to be expunged.<sup>120</sup> The FCA does not mention prohibiting a court from ordering an expungement of court records.<sup>121</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> N.Y. FAM. CT. ACT § 380.1.

<sup>114</sup> *Id.*

<sup>115</sup> N.Y. FAM. CT. ACT § 303.1.

<sup>116</sup> *Family Court Act, Article 3, Juvenile Delinquency Part 5, § 354.1: Retention and Destruction of Fingerprints of Persons Alleged to be Juvenile Delinquents*, L. OFF. OF STEPHEN BILKIS & ASSOC., PLLC, <https://familylawyer.1800nynylaw.com/family-court-act-article-3-juvenile-delinquency-part-5-354-1-ret.html> (last visited Oct. 25, 2020).

<sup>117</sup> *Id.*

<sup>118</sup> N.Y. FAM. CT. ACT § 354.1; *Family Court Act, Article 3, Juvenile Delinquency Part 5, § 355.3: Extension of Placement*, L. OFF. OF STEPHEN BILKIS & ASSOC. PLLC, <https://familylawyer.1800nynylaw.com/family-court-act-article-3-juvenile-delinquency-part-5-355-3-ext.html> (last visited Jan. 31, 2022). "Placement" refers to where the youth will "be sent to reside with his parents, a relative, or another appropriate residence such as with an agency authorized by the Commissioner of Social Services." *Id.*

<sup>119</sup> N.Y. FAM. CT. ACT § 354.1.

<sup>120</sup> *Family Court Act, Article 3, Juvenile Delinquency Part 7, § 375.3: Expungement of Court Records*, L. OFF. OF STEPHEN BILKIS & ASSOC. PLLC, <https://familylawyer.1800nynylaw.com/family-court-act-article-3-juvenile-delinquency-part-7-375-3-exp.html> (last visited Oct. 25, 2020).

<sup>121</sup> N.Y. FAM. CT. ACT § 375.3 ("Nothing contained in this article shall preclude the court's use of its inherent power to order the expungement of court records.").

When a record is expunged, it is destroyed.<sup>122</sup> The expungement of juvenile records promotes the purpose of the juvenile system, which is to protect a juvenile from future hardship or discrimination.<sup>123</sup> A juvenile must wait until he or she is at least twenty-one years old for potential expungement if the juvenile was adjudicated for a felony.<sup>124</sup> For example, the court decided to expunge a nineteen year old juvenile delinquency record because the former delinquent was now a forensic scientist and leading a law-abiding life; it was unnecessary to have further inquiries into her past acts.<sup>125</sup> However, not all juvenile records are expunged. “The power to expunge should not be indiscriminately employed, particularly where, for example, the adjudication which terminates the arrest is not [because of] complete innocence.”<sup>126</sup>

New York only allows the expunging of juvenile records through the Family Court Act.<sup>127</sup> If a youth’s case was heard in criminal court, and not the juvenile courts, his or her record cannot be expunged.<sup>128</sup>

A juvenile court judge may decline to expunge a record and instead seal the record.<sup>129</sup> There is a difference between having a record expunged and sealed.<sup>130</sup> When a record is sealed “the record still exists, but all related fingerprint and palmprint cards, booking photos, and DNA samples may be returned to you or destroyed (except

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<sup>122</sup> SHAH ET AL., *supra* note 6.

<sup>123</sup> *In re Dorothy D.*, 400 N.E.2d 1342, 1343 (N.Y. 1980) (“The Law Guardian argues that the harm generated by a court record may penalize the innocent by thwarting their career ambitions. It is contended that employers generally regard a record of complaint as a judgment of guilt with the result that applicants with court records are often automatically disqualified.”).

<sup>124</sup> N.Y. FAM. CT. ACT § 354.1.

<sup>125</sup> *Matter of Emily P.*, 96 N.Y.S.3d 831 (N.Y. Fam. Ct. 2019).

<sup>126</sup> *In re A.B.*, 2006 NYLJ LEXIS 5285, \*10 (deciding to seal the juvenile record but not expunge because the adjudication did not result from the youth’s complete innocence and no relevant factors were brought forth to show that if the court expunged the record, “it would be anything but an indiscriminate use of such power”).

<sup>127</sup> N.Y. FAM. CT. ACT § 375.3 (“Nothing contained in this article shall preclude the court’s use of its inherent power to order the expungement of court records.”).

<sup>128</sup> *Sealed Criminal Records*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/Criminal/sealedRecords.shtml> (last updated Aug. 26, 2019).

<sup>129</sup> *See Matter of Eric C. v. New York State Police*, 898 N.Y.S.2d 904 (App. Div. 4<sup>th</sup> Dept. 2010) (determining expungement was not appropriate and the record would be sealed because the investigation was not terminated due to complete innocence).

<sup>130</sup> *In re A.B.*, 2006 NYLJ LEXIS at \*10.

digital fingerprints are not destroyed if you already have fingerprints on file from a different unsealed case).<sup>131</sup> The Family Court Act allows for automatic sealing of a record when a delinquency proceeding results in favor of the child, unless within eight days, a party or the court moves that it would not be in the interest of justice for the record to be sealed.<sup>132</sup> If the delinquency proceeding does not result in favor of the child, the juvenile may still seek to have the record sealed by filing a motion with the court.<sup>133</sup> Sealing a record can help youths in their future endeavors; however, it cannot prevent someone from inquiring into the juvenile delinquency adjudication.<sup>134</sup> Riya Saha Shah from the Juvenile Law Center explained, "[t]he police collect a lot of information. All of [it] goes into their database. Employers can contact state police or a private database, and get information."<sup>135</sup> Therefore, "[h]aving a criminal record expunged is critical to future employment success, as employers are reluctant to hire ex-offenders, as they fear they will engage in criminal activity on the job or behave inappropriately."<sup>136</sup>

#### **E. Sealing of Certain Convictions, N.Y. Criminal Procedure Law § 160.59**

The Bureau of Justice Statistics conducted a study in 2019 and found that 33,503 people, between the ages of sixteen and seventeen, were arrested for stealing in New York in one year.<sup>137</sup> Fifty-six percent of those arrested had their records expunged.<sup>138</sup> Thirty-one percent of

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<sup>131</sup> *Sealed Criminal Records*, *supra* note 128.

<sup>132</sup> N.Y. FAM. CT. ACT § 375.1 ("In favor of" means that the petition is withdrawn, dismissed, adjusted by the probation department, or the presentment agency chooses not to proceed to petition.").

<sup>133</sup> *Id.*

<sup>134</sup> *Matter of Arturo R.*, 31 N.Y.S.3d 799, 806 (Fam. Ct. 2016) ("Respondent wishes to enter public service and the maintenance of the record in its unsealed state could hamper his future endeavors. While sealing will not necessarily prevent any and all future inquiries into the juvenile delinquency adjudication, no societal purpose would be served by denying this motion.").

<sup>135</sup> Abdul-Alim, *supra* note 12.

<sup>136</sup> Taylor, *supra* note 3, at 4.

<sup>137</sup> MEGAN KURLYCHEK, KIMBERLY MARTIN, MATTHEW DUROSE, IMPACT OF CRIMINAL RECORD SEALING ON STATE AND NATIONAL ESTIMATES OF OFFENDERS AND THEIR OFFENDING CAREERS 7 (Bureau of Just. Stat. 2019) <https://www.ojp.gov/pdffiles1/bjs/grants/250561.pdf>.

<sup>138</sup> *Id.*



those arrested had their records sealed.<sup>139</sup> Throughout the years, courts have allowed children to be tried as adults in criminal court.<sup>140</sup> When this occurs, the offender must follow criminal proceedings to request sealing a record.<sup>141</sup>

CPL § 160.59 provides “[a] defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or convictions sealed.”<sup>142</sup> Only certain felonies are allowed to be sealed.<sup>143</sup>

The purpose of the statute is to “eliminate unnecessary barriers to opportunity and employment that formerly incarcerated individuals face and to improve the fairness and effectiveness of the state’s criminal justice system.”<sup>144</sup> The statute allows sealing of eligible offenses.<sup>145</sup> However, it bars eligibility for those who have a sex offense, violent felony offense, or a class A felony offense.<sup>146</sup> The candidate seeking to have his or her record sealed cannot have previously obtained the maximum number of conviction sealings under CPL § 160.58 (conditional sealing of certain controlled substance, marijuana or specified offense convictions) or already obtained the maximum number of conviction sealings under this statute.<sup>147</sup> At least ten years must have passed since sentencing.<sup>148</sup> The candidate must have no “undisposed arrest or charge pending”<sup>149</sup> and not been convicted of a crime since entering a judgment of concealment.<sup>150</sup> In addition, the candidate cannot have “been convicted of two or more felonies or more than two crimes.”<sup>151</sup> The

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 3.

<sup>141</sup> *Id.*

<sup>142</sup> N.Y. CRIM. PROC. L. § 160.59.

<sup>143</sup> *Id.*

<sup>144</sup> *Press Release, ‘Governor Cuomo Announces Raise the Age Law that Seals Non-Violent Criminal Convictions Takes Effect October 7,’ Oct. 6, 2017*. NY State Div. of Crim. Just. Serv., [https://www.criminaljustice.ny.gov/pio/press\\_releases/2017-10-06\\_pressrelease.html](https://www.criminaljustice.ny.gov/pio/press_releases/2017-10-06_pressrelease.html) (last visited Oct. 30, 2021).

<sup>145</sup> *Id.*

<sup>146</sup> N.Y. CRIM. PROC. L. § 160.59(1)(a).

<sup>147</sup> *Id.* at §§ 160.59(3)(b), (c).

<sup>148</sup> *Id.* at § 160.59(3)(d).

<sup>149</sup> *Id.* at § 160.59(3) (e).

<sup>150</sup> *Id.* at § 160.59(3) (f).

<sup>151</sup> *Id.* at § 160.59(3) (h).

laundry list of requirements makes it difficult to carry out the statute's purpose .

In *People v. Doe*,<sup>152</sup> a woman pled guilty to an attempted second-degree robbery charge that occurred thirty-four years prior to her plea.<sup>153</sup> At the time of the crime, she was sixteen years old and eligible for youthful-offender treatment.<sup>154</sup> She was denied youthful-offender treatment by the sentencing court and was sentenced to probation for five years.<sup>155</sup> Since her conviction was a violent felony, her record could not be sealed and will, thus, appear during job related background checks.<sup>156</sup> The court acknowledged the unfair verdict and recommended that CPL § 160.59 should be amended to allow record sealing of those convicted of a violent felony offense, who were eligible for youthful offender treatment, and did not receive it.<sup>157</sup>

CPL § 160.59 does not eliminate all barriers formerly incarcerated people or juveniles face regarding employment.<sup>158</sup> With understanding how a criminal record can hinder opportunities for employment, the New York legislature enacted legislation to try to ease the burden of applying to jobs with the stigma of a record.<sup>159</sup>

### III. NEW YORK LABOR AND EMPLOYMENT LAWS

#### A. New York State Human Rights Law § 296

The purpose of New York's Human Rights Law is to ensure every individual "is afforded an equal opportunity to enjoy a full and productive life."<sup>160</sup> A division was created to ensure every individual has an equal opportunity to participate "in the economic, cultural and intellectual life of the state," and to "eliminate and prevent discrimination in employment."<sup>161</sup> The New York State Division of

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<sup>152</sup> 89 N.Y.S.3d 594 (2018).

<sup>153</sup> *Id.* at 595.

<sup>154</sup> *Id.* (stating that a person who is at least sixteen but less than nineteen years old at the time when the crime was committed is eligible for youthful-offender treatment which allows for automatic sealing of the youth's record at adjudication).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 602.

<sup>157</sup> *Id.* at 601.

<sup>158</sup> *See id.*

<sup>159</sup> *Press Release, supra* note 144.

<sup>160</sup> N.Y. HUM. RTS. § 290.3 (Consol. 2021).

<sup>161</sup> *Id.*

Human Rights investigates complaints and determines whether it is probable to believe that an applicant or employee was discriminated against because of a previous conviction record.<sup>162</sup> If probable cause is found, the complaint will be sent to an administrative law judge for a hearing.<sup>163</sup>

New York State makes it unlawful for an employer with ten or more employees to deny employment or take adverse action based on an applicant's conviction history unless "there 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 the employment or licensure "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."<sup>164</sup>

The New York State Correction Law provides eight factors for employers to weigh before considering an applicant's previous conviction.<sup>165</sup> Each factor must be considered and applied on a case-by-case basis.<sup>166</sup> The factors include the employer's consideration of the State's public policy to encourage employment and licensure of people with previous convictions; the relationship between the duties of the job and license or employment; if the previous criminal offense(s) will affect the applicant's fitness or ability to perform the job responsibilities; the time lapse since the criminal offense(s) occurred; the person's age at the time of the criminal offense(s); and the seriousness of the offense and any information regarding the rehabilitation and good conduct of the applicant.<sup>167</sup> If after properly weighing all the factors an employer decides in good faith that the previous criminal offense bears a direct relationship to the job responsibilities or poses an unreasonable risk to safety or welfare, the employer may lawfully deny the applicant the position.<sup>168</sup>

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<sup>162</sup> New York State Department of Labor, *Employers – New York State Department of Labor*, N.Y. STATE, <https://www.labor.ny.gov/careerservices/ace/employers.shtml> (last visited Feb. 5, 2021).

<sup>163</sup> *Id.*

<sup>164</sup> N.Y. CORRECT. L. § 752 (Consol. 2021); N.Y. HUM. RTS. § 296 (Consol. 2021).

<sup>165</sup> New York State Department of Labor, *supra* note 162.

<sup>166</sup> *Id.*

<sup>167</sup> N.Y. CORRECT. L. § 753 (Consol. 2021).

<sup>168</sup> New York State Department of Labor, *supra* note 162; *see Bonacorsa v. Van Lindt*, 523 N.E.2d 806, 811 (N.Y. 1988) (holding that employer did not abuse its discretion in denying the applicant a position because the employer correctly weighed the factors in NY Correct. Law § 753(1)).

An employer may inquire at any time during the application process or employment whether the applicant or employee has any prior convictions.<sup>169</sup> In addition, the employer may terminate an employee once misrepresentation of a prior conviction is discovered.<sup>170</sup> However, it is unlawful for an employer to ask about sealed convictions<sup>171</sup> because the purpose of sealing records is to restore the individual's record to its status before the arrest or prosecution.<sup>172</sup> Therefore, a sealed record should not disqualify or discriminate against a person when pursuing an occupation or profession.<sup>173</sup> These laws were put in place to help the reentry process for those with past criminal history.

### B. Ban the Box

Throughout the country, states have adopted "Ban the Box" policies in differing variations.<sup>174</sup> The purpose of the legislation is for employers to consider applicants for a job "without the stigma of a conviction or arrest record."<sup>175</sup> Ban the Box allows applicants to get past the initial phases of the hiring process by removing questions about an applicant's criminal history and delaying background checks until later in the process.<sup>176</sup> In 2015, President Obama endorsed Ban the Box legislation delaying conviction history questions for federal agencies.<sup>177</sup> In December 2019, the Fair Chance to Compete for Jobs Act of 2019 was passed.<sup>178</sup> Effective December 2021, the law requires most federal agencies and contractors to conditionally offer a job before requesting information on the applicant's arrest and conviction record.<sup>179</sup> In addition to the federal policy, thirty-seven states have

<sup>169</sup> N.Y. HUM. RTS. § 296 (Consol. 2021).

<sup>170</sup> N.Y. CORRECT. L. § 751 (Consol. 2021).

<sup>171</sup> N.Y. HUM. RTS. § 296 (16) (Consol. 2021).

<sup>172</sup> N.Y. CORRECT. L. § 160.60 (Consol. 2021).

<sup>173</sup> New York State Department of Labor, *supra* note 162.

<sup>174</sup> BETH AVERY, HAN LU, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES 2 (Nat'l Emp. L. Project 2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf> ("Nationwide, 35 states and over 150 cities and counties have adopted what is widely known as 'ban the box.'").

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

adopted Ban the Box laws for public-sector employment.<sup>180</sup> Additionally, fifteen states have prohibited conviction history questions in private employer job applications.<sup>181</sup> For example, California employers must conduct a multi-factor analysis as to whether the individual's criminal record justifies denying employment.<sup>182</sup> In addition, the District of Columbia and twenty-two cities and counties have created local Ban the Box laws for private employers.<sup>183</sup>

New York only has a statewide Ban the Box policy for public-sector employers.<sup>184</sup> In 2014, Governor Cuomo created the Council on Community Re-Entry and Reintegration to identify barriers facing formerly incarcerated people and recommend changes.<sup>185</sup> The Council provided twelve recommendations to the Governor, which he adopted.<sup>186</sup> This included adopting a fair chance hiring policy for New York State agencies.<sup>187</sup> Applicants to New York State agencies are not required to discuss or disclose information about conviction history “until and unless the agency has interviewed the applicant and is

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<sup>180</sup> *Id.* at 2. Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

<sup>181</sup> *Id.* at 3. California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

<sup>182</sup> Sachi Barreiro, *What Is a Ban-the-Box Law?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-is-a-ban-the-box-law.html> (last visited Feb. 28, 2021).

<sup>183</sup> AVERY & LU, *supra* note 174, at 3. The twenty-two cities and counties include: Austin (TX), Baltimore (MD), Buffalo (NY), Chicago (IL), Columbia (MO), Desoto (TX), Kansas City (MO), Los Angeles (CA), Montgomery County (MD), New York City (NY), Philadelphia (PA), Portland (OR), Prince George's County (MD), Rochester (NY), San Francisco (CA), Seattle (WA), Spokane (WA), St. Louis (MO), Waterloo (IA), Suffolk County (NY), and Westchester County (NY).

<sup>184</sup> AVERY & LU, *supra* note 174, at 2.

<sup>185</sup> Press Release, Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers With Criminal Convictions (Sept. 21, 2015), <https://www.inmateaid.com/information/governor-cuomo-announces-executive-actions-to-reduce-barriers-for-new-yorkers-with-criminal-convictions>.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

interested in hiring him or her.”<sup>188</sup> Governor Cuomo has stated Ban the Box practices create “a fairer and safer New York” but did not implement a statewide policy for the private sector.<sup>189</sup> However, some major cities in New York, including Buffalo and New York City, have implemented a Ban the Box policy in some form to private employers.<sup>190</sup>

### *I. New York City Fair Chance Act*

The Fair Chance Act (“NYCFCA”) makes it illegal for New York City employers to ask about a criminal record before making a conditional job offer.<sup>191</sup> The NYCFCA, which was enacted in 2015, states it is unlawful for an employer or employment agency to:

Declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction; Because of any person's arrest or criminal conviction, represent that any employment or position is not available, when in fact it is available to such person.<sup>192</sup>

It further states it is unlawful to inquire about pending arrest or criminal conviction.<sup>193</sup> After a conditional offer of employment is extended, the employer or agency may inquire into the applicant’s prior arrest or conviction history.<sup>194</sup> The NYCFCA applies to both public and private employers.<sup>195</sup>

In 2021, the NYCFCA was amended to add more restraints on receiving criminal history information from reporting agencies and

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Melissa Pascualini, *Ban the Box: Breaking Barriers to Employment in the Private Sector*, 37 HOFSTRA LAB. & EMPL. L.J. 255, 276 (2019).

<sup>191</sup> *Fair Chance Act*, NYC HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page> (last visited Feb. 25, 2021).

<sup>192</sup> N.Y.C. ADMIN. CODE § 8-107 11-a (1)-(2).

<sup>193</sup> N.Y.C. ADMIN. CODE § 8-107 11-a (3).

<sup>194</sup> N.Y.C. ADMIN. CODE § 8-107 11-b.

<sup>195</sup> *Fair Chance Act FAQ: How Does the New Law Work?*, COMTY. SERV. SOC’Y, <https://www.cssny.org/pages/fair-chance-act-faq-how-does-the-new-law-work> (last visited Feb. 28, 2021).

expanded the scope of who must follow the Act.<sup>196</sup> It requires employers to request the consumer reporting agencies to bifurcate reports so that criminal history is at the bottom of the report.<sup>197</sup> If the consumer reporting agency cannot bifurcate the report, the employer must have a way internally to review the criminal history information only after reviewing the applicant's non-criminal history first.<sup>198</sup> Driving history should be considered with criminal history.<sup>199</sup> Additionally, current employees who are convicted or arrested during employment cannot be discriminated against by the employer.<sup>200</sup> The employer must review the NYCFCFA factors before taking any action detrimental to the employee.<sup>201</sup> Employment agencies and independent contractors are required to follow NYCFCFA as well.<sup>202</sup>

The NYCFCFA allows applicants to “be judged on their merits before their mistakes.”<sup>203</sup> The purpose of the statute is to level the playing field for New Yorkers who have been arrested or convicted of a crime and to ensure they are “not overlooked during the hiring process simply because they have to check a box.”<sup>204</sup> The City thought hiring discrimination still occurred under New York Correction Law Article 23-A.<sup>205</sup> The NYCFCFA further eliminates discrimination against people who have criminal records.<sup>206</sup> It ensures that applicants are “considered based on their qualifications before their conviction histories.”<sup>207</sup>

The NYCFCFA encourages ex-offenders to apply for positions knowing that they will not be automatically written off because of a

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<sup>196</sup> Susan M. Corcoran et al., *New York City Issues Guidance on Fair Chance Act Amendments Effective July 29, 2021*, JACKSON LEWIS (Jul. 22, 2021), <https://www.jacksonlewis.com/publication/new-york-city-issues-guidance-fair-chance-act-amendments-effective-july-29-2021>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> NYC Comm'n on Hum. Rts. Legal Enf't Guidance on the Fair Chance Act, Loc. L. No. 63 (2015) 1, <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page> (last updated May 24, 2019).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2.

<sup>207</sup> *Id.*

checked box.<sup>208</sup> The statute also increases the probability of prior offenders obtaining gainful employment and receiving higher pay because the bias relating to the applicant's previous criminal history is eliminated.<sup>209</sup>

## 2. *Buffalo Bans the Box*

Similar to New York City, in 2013, Buffalo enacted a Ban the Box policy. Buffalo's ordinance states:

The City of Buffalo, its vendors, and any employer located within the City of Buffalo limits shall not ask questions regarding or pertaining to an applicant's prior criminal conviction on preliminary employment application. Consideration of the candidate's prior criminal convictions shall take place only after an application is submitted and to begin during an initial interview, or thereafter.<sup>210</sup>

The ordinance makes it discriminatory if both public and private employers inquire about a prior criminal conviction during the application process.<sup>211</sup> These prohibitions do not apply when applicants are applying for the Department of Police, Department of Fire, or other "peace officer" positions.<sup>212</sup> The law is also inapplicable when applying to any public or private school, or any "service provider of direct services specific to the care or supervision of children, young adults, senior citizens, or the physically or mentally disabled."<sup>213</sup>

## 3. *Private Employers Pledge to Ban the Box*

In April of 2016, President Barack Obama, along with nineteen companies, launched the Fair Chance Business Pledge.<sup>214</sup> The pledge

<sup>208</sup> Pascualini, *supra* note 190, at 261.

<sup>209</sup> *Id.*

<sup>210</sup> CITY OF BUFFALO, N.Y., THE CODE § 154-25 (2013), <https://ecode360.com/27607554>.

<sup>211</sup> CITY OF BUFFALO, N.Y., THE CODE § 154-27 (2013), <https://ecode360.com/27607554>.

<sup>212</sup> CITY OF BUFFALO, N.Y., THE CODE § 154-28 (2013), <https://ecode360.com/27607554>.

<sup>213</sup> *Id.*

<sup>214</sup> Press Release, The White House, FACT SHEET: White House Launches the Fair Chance Business Pledge (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the->



was “a call-to-action for all members of the private sector to improve their communities by eliminating barriers for those with a criminal record and creating a pathway for a second chance.”<sup>215</sup>

By signing the pledge, companies were “[v]oicing strong support for economic opportunity for all” and demonstrating their commitment to reducing barriers to a “fair shot at a second chance.”<sup>216</sup> These companies engage in practices like “banning the box” which delays viewing criminal history until later in the hiring process, or they do not engage in hiring practices that unnecessarily position jobs out of reach for those with criminal records.<sup>217</sup> The applicants’ criminal record is considered in the proper context.<sup>218</sup>

To ensure a fair chance, American Airlines implemented a Ban the Box policy and does not ask about a person’s criminal history until after the applicant accepts an offer.<sup>219</sup> The Coca-Cola Company stated it “recognize[d] that creating a pathway for a second chance is an important first step in creating successful, sustained re-entry into mainstream society.”<sup>220</sup>

In addition to changing the application process, companies can commit to taking other steps to provide ex-offenders with successful reentry.<sup>221</sup> To ensure fair decisions are being made regarding applicants with criminal records, companies can implement training for the human resources staff.<sup>222</sup> They can host job fairs, provide internships and ensure job training is available to individuals with criminal records.<sup>223</sup> Adding Ban the Box statutes and pledges are just one way to assist those with juvenile records to gain employment.

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press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge. (“Companies signing the pledge today include: American Airlines, Busboys and Poets, The Coca-Cola Company, Facebook, Georgia Pacific, Google, Greyston Bakery, The Hershey Company, The Johns Hopkins Hospital and Health System, Koch Industries, Libra Group, PepsiCo, Prudential, Starbucks, Uber, Under Armour [sic] /Plank Industries, Unilever and Xerox.”).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Take the Fair Chance Pledge*, The White House, <https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge> (last visited Nov. 22, 2020).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

#### IV. POLICY RECOMMENDATIONS

The purpose of the juvenile justice system is to rehabilitate youths and young adults so that they may reenter society.<sup>224</sup> In order to reintegrate back into society, juveniles should not have to worry about who has access to their records.<sup>225</sup> Although New York protects a juvenile's record from being released to the public, more can be done to ensure that the record does not affect a youth's reentry in society. Therefore, a court order should be required for schools and government agencies to receive access to the juvenile record. For government agencies, a record should be kept of the people who have access to a juvenile record. Ensuring restrictions on juvenile record distribution can decrease the risk of stigma, decrease the youth's future interaction with the juvenile justice system, and recidivism. To ensure this is done correctly, the state should impose monetary sanctions or penalties when a juvenile record is improperly used.<sup>226</sup>

Next, CPL § 160.59 should be amended. CPL § 160.59 requires ten years to pass before applying for a record sealing.<sup>227</sup> The purpose of CPL § 160.59 is to eliminate unnecessary barriers for formerly incarcerated people.<sup>228</sup> However, the statute falls short of its purpose by failing to assist those who were previously denied youthful-offender treatment and were sentenced as adults for felonies.<sup>229</sup> A mistake a youth made at least ten years ago should not be a barrier to advancing his or her life. Therefore, the statute should be amended to allow record sealing of those convicted of a violent felony offense, who were eligible for youthful-offender treatment at the time the offense was committed, and did not receive it. Allowing youths with violent felony offenses to have their records sealed allows them to have

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<sup>224</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>225</sup> See SHAH ET AL., *supra* note 6, at 17 (stating that schools and government agencies may have access to a juvenile's record).

<sup>226</sup> See, e.g., SHAH ET AL., *supra* note 6, at 21. ("In Alaska, a person who discloses confidential information is guilty of a class B misdemeanor. . . . In Colorado, 'anyone who wrongfully distributes juvenile records in knowing violation of the confidentiality provisions faces a fine of up to \$1,000.00.'").

<sup>227</sup> N.Y. CRIM. PROC. L § 160.59(3)(d).

<sup>228</sup> Press Release, *supra* note 144.

<sup>229</sup> See, e.g., *People v. Doe*, 89 N.Y.S.3d 594, 595 (2018).

an opportunity that they were denied by not being in the juvenile justice system.<sup>230</sup>

Finally, New York should implement a statewide Ban the Box policy. Although Governor Cuomo stated Ban the Box practices create “a fairer and safer New York,” a statewide policy including private sector companies has not been implemented.<sup>231</sup> New York State should adopt New York City’s Fair Chance Act which makes it unlawful for an employer to “declare, print, or circulate” any advertisement or publication which expressly limits employment opportunities because of a person’s arrest or criminal conviction history.<sup>232</sup> Second, the Act makes it unlawful for an employer to represent that a position is not available because of a person’s arrest or criminal conviction, when it is in fact available.<sup>233</sup> Finally, the Act makes it unlawful for an employer to inquire or make a statement regarding “the pending arrest or criminal conviction record of any person who is in the process of applying for employment” until the employer has “extended a conditional offer of employment to the applicant.”<sup>234</sup> Only after an employer extends a conditional offer of employment to the applicant can it inquire into an applicant’s arrest record, conviction record or conduct a criminal background check.<sup>235</sup>

## V. CONCLUSION

Nationwide, juvenile courts hear approximately 800,000 cases a year.<sup>236</sup> Although ninety-five percent of arrests are often for nonviolent offenses, “Black and Brown youth are 4.6 times more likely to be incarcerated for a nonviolent offense than White youth.”<sup>237</sup> A study showed that a criminal record is forty percent more likely to affect a Black American than a White American.<sup>238</sup> For example, “formerly incarcerated Black men have significantly lower hourly

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<sup>230</sup> See N.Y. FAM. CT. ACT § 357.1 (allowing for juveniles to request their records be sealed).

<sup>231</sup> Press Release, *supra* note 185.

<sup>232</sup> N.Y.C. ADMIN. CODE § 8-107 11-a(1).

<sup>233</sup> *Id.* § 11-a(2).

<sup>234</sup> *Id.* § 11-a(3).

<sup>235</sup> *Id.*

<sup>236</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>237</sup> FAILED POLICIES, FORFEITED FUTURES: REVISITING A NATIONAL SCORECARD ON JUVENILE RECORDS 2 (JUVENILE LAW CENTER 2020).

<sup>238</sup> *Id.*

wages (\$8.92/hour) than formerly incarcerated White (\$10.90/hour) and Hispanic (\$10.23/hour) men. Additionally, formerly incarcerated White men find jobs more quickly upon release (76 weeks) than Black (100 weeks) and Hispanic men (86 weeks).<sup>239</sup>

States fail to protect Black and Brown youth when they allow broad access to juvenile records or make expungement and sealing costly or inaccessible.<sup>240</sup> The broad access to juvenile records continues to contribute to the systemic discrimination of Black and Brown youth when they apply for education, employment, and housing.<sup>241</sup>

Previous offenders have trouble with employment after reentry for three reasons.<sup>242</sup> First, there is a stigma that comes with a criminal record which leads employers to not want to hire previous offenders.<sup>243</sup> Second, previous offenders have fewer job skills; and finally, previous offenders have fewer connections to employers.<sup>244</sup> Creating policies that mandate employers to view the applicant first without knowledge of the criminal record allows the applicant a fair chance of employment without stigma. In addition, creating stricter rules for who has access to juvenile records, amending CPL § 160.59 to allow for those who were eligible but did not receive youthful offender status, and implementing a state-wide Ban the Box policy for public and private sectors of New York can alleviate barriers faced by people with juvenile records. Alleviating these barriers has proven to be beneficial "for families, local communities, and the overall economy."<sup>245</sup> Everyone benefits when people are able to successfully reenter society.

The juvenile justice system was founded on the principle that youth are different from adults.<sup>246</sup> Youth are susceptible to change.<sup>247</sup> Therefore, someone should not be discriminated against for a decision made when he or she was just a kid.

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<sup>239</sup> Taylor, *supra* note 3, at 3.

<sup>240</sup> SHAH ET AL., *supra* note 6, at 38.

<sup>241</sup> FAILED POLICIES, *supra* note 237.

<sup>242</sup> Taylor, *supra* note 3, at 2.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> AVERY & LU, *supra* note 174.

<sup>246</sup> *Youth in the Justice System: An Overview*, *supra* note 7.

<sup>247</sup> *Id.*