

BRENNAN  
CENTER  
FOR JUSTICE

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January 17, 2013

To: Hon. Martin R. Castro, Chair  
U.S. Commission on Civil Rights  
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Hon. Michael Yaki, Commissioner  
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**Re: Comments of the Brennan Center for Justice on the Enforcement Guidance of the U.S. Equal Employment Opportunity Commissions, “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act”**

Dear Chair Castro and Commissioners:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”) is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. One of our primary goals is to end mass incarceration by ensuring that criminal justice policymaking is rational, efficient and fair, while achieving legitimate public safety goals.

In these comments, the Brennan Center provides data critical to the U.S. Commission on Civil Rights' (the "Commission") consideration of the Enforcement Guidance issued by the Equal Employment Opportunity Commission ("EEOC") on April 25, 2012 entitled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act" ("the Guidance").<sup>1</sup> We hope these comments will assist the Commission in understanding the comprehensive fiscal, economic, and social benefits of policies like the Guidance that guard against unreasonable discrimination in hiring based on criminal records.

With 2.3 million people behind bars, the United States incarcerates more people than any other nation and is suffering the consequences of mass incarceration. Mass incarceration leads, among other things, to masses of criminal records – records of arrests, charges, convictions, and prison sentences. More than 25 percent of the population has a criminal record.<sup>2</sup> The overly broad rejection by employers of job applicants with criminal records amplifies the already huge fiscal, economic, and social impact of mass incarceration, and has a disparate impact on people of color.

Although targeted by these discriminatory policies, the formerly incarcerated and communities of color do not suffer alone. All Americans are pulled down into this systemic quagmire. The inability to gain stable, respectable work, or to secure educational opportunities, leads directly to recidivism, reducing public safety. Policies that needlessly restrict a formerly incarcerated person's ability to work have had the unintended consequence of placing greater fiscal burdens on limited government resources. The loss of so many potential workers has a significant negative impact on the economy at large. Further, stable employment opportunities are one of the pillars upon which crime reduction policies must be constructed.<sup>3</sup> Failing to provide appropriate employment opportunities to those with criminal records will undoubtedly increase crime and incarceration rates and associated costs.

The Guidance legally and rightfully seeks to reduce these costs on the nation by placing reasonable and necessary limits on employers' use of arrest and conviction records when making

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<sup>1</sup> EEOC Enforcement Guidance, No. 915.002, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

<sup>2</sup> The 2.3 million figure is the sum of the total prisoners under the jurisdiction of state and federal correctional facilities at the end of 2011 (1,598,780) and the total number of people confined in county and city jails in June 2011 (735,601). E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 239808, PRISONERS IN 2011, 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 237961, JAIL INMATES AT MIDYEAR 2011, 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>. According to The National Employment Law Project (NELP) there were about 65 million Americans with some sort of criminal record in 2008. MICHELLE NATVIDAD RODRIGUEZ & MAURICE Emsellem, THE NAT'L EMP'T LAW PROJECT, 65 MILLION PEOPLE 'NEED NOT APPLY': THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 n.2 (2011), available at [http://www.nelp.org/page/-/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1). NELP estimated that this number accounted for approximately 27.8 percent of the adult population. *Id.*

<sup>3</sup> See, e.g., New York City Bar Ass'n, Legal Employers Taking the Lead: Enhancing Employment Opportunities for the Previously Incarcerated 7 (2008), available at [http://www.nycbar.org/pdf/report/Task\\_Force\\_Report08.pdf](http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf).

employment decisions. The guidance issues best practices to ensure that employers comply with Title VII of the Civil Rights Act of 1964.<sup>4</sup> The best practices seek to ensure that employers do not categorically exclude applicants based on any arrest or conviction record from their applicant pool and the American labor force. For example, it asks employers to ascertain the disposition of any arrest revealed by a criminal background, evaluate whether there is a connection between the arrest or conviction record and the employment opportunity, and institute a writing policy for screening applicants.

Mass incarceration – and the masses of criminal records accompanying this policy - “casts a long-lasting shadow over former inmates, reducing their ability to work their way up,”<sup>5</sup> preventing them from contributing to society and the economy, as well as inhibiting them from living with and caring for their families. In addition to the social stigma of having been in prison or having a conviction, the difficulties of re-entry are compounded by laws that allow employers to bar people with a criminal record from employment. As with incarceration in general, poor and low-income communities of color bear the brunt of these post-incarceration obstacles. Studies show time and again that people of color are far more likely to face employment discrimination based on criminal records than their white counterparts.<sup>6</sup>

The Guidance seeks to remedy the disparate impact discrimination based on criminal records has on people of color, reflecting the growing recognition that mass incarceration reverberates far beyond prison walls. As the testimony before the Commission at its December 7, 2012 hearing revealed, these requirements do not create onerous burdens on employers and are reasonable. They serve to ensure that employers make reasonable decisions on when to deny employment based on a criminal record and further public safety while protecting the rights of individuals and allowing all Americans to contribute to the labor force and our economy.

For these reasons and those stated below, the Brennan Center supports the EEOC’s efforts against blanket practices excluding those with a criminal record from employment. The EEOC’s guidance rightly allows employers to weigh the nature of the job, seriousness of the offense, and length of time since the offense occurred to make rational hiring decisions beneficial to applicants, employers, and the country.

## **I. The EEOC Guidance Helps Mitigate the Fiscal, Economic, Public Safety and Societal Costs of Mass Incarceration on the Country.**

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<sup>4</sup> EEOC Enforcement Guidance, *supra* n.1, at § VIII.

<sup>5</sup>THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 9 (2010), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Collateral%20Costs%20FINAL.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf).

<sup>6</sup> See, e.g., COLLATERAL COSTS, *supra* n.5 at 22 (“Job seekers with a criminal record are offered half as many positions as those without criminal records, and African American applicants receive two-thirds fewer offers.”); see also NEW YORK STATE BAR ASS’N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 48, 62 (2006) available at [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415).

By clearly providing guidelines to employers so that they do not irrationally and unreasonably discriminate against job applications based on the existence of a criminal record alone, the guidelines allow individuals to stay in their communities and continue to contribute to the economy and society. Discrimination based on criminal records is a direct consequence of mass incarceration. If nationwide policies did not bring so many people into the criminal justice system, so many Americans would not have arrest, conviction, or imprisonment records. The negative consequences to the country of mass incarceration and inability to gain or regain employment because of criminal records are the same. The EEOC guidance serves to mitigate these high fiscal, economic, public safety, and societal costs to the country at large.

### A. Barriers to Employment Have Negative Fiscal Effects

The U.S. currently spends at least \$70 billion each year on corrections, including incarceration, parole and probation, making it the fastest growing budgetary item after Medicaid.<sup>7</sup> This number represents a dramatic increase over the past few decades, more than quadrupling since the 1980s.<sup>8</sup> On an individual basis, each state spends an average of \$31,000 to keep an individual incarcerated for one year, ranging from \$14,603 in Kentucky to \$60,076 in New York.<sup>9</sup> By comparison, the government spends less than half that - about \$11,000 - to send a child to public school for one year, with a low of \$6,000 per student in Utah and a high of \$18,000 in New York and the District of Columbia.<sup>10</sup>

State governments bear the brunt of these costs, paying for upwards of \$50 billion of the country's total corrections expenditures out of their "general funds" – discretionary pools of money that legislators use to pay for education, healthcare, housing, public assistance, and prisons.<sup>11</sup> Because state spending for each of these services comes out of the general fund, money put towards corrections directly reduces the amount available for other priorities.<sup>12</sup> Thus, while the system of mass incarceration continues to expand, states' investment in education and other services declines, resulting in school closings, teacher layoffs, cutting of after-school programs, and rising tuition that puts college out of reach for many, all while "prison spending continues to grow."<sup>13</sup>

In addition to draining state and federal budgets, the criminal justice system directly increases the burden on public benefits.<sup>14</sup> "[C]riminal justice involvement is associated with *more*, rather

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<sup>7</sup> Re-Entry and Reintegration, *supra* n.6, at 55; NAACP, *Misplaced Priorities: Over Incarcerate, Under Educate* 13 (April 2011), available at [http://naacp.3cdn.net/01d6f368edbe135234\\_bq0m68x5h.pdf](http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf), at 12; Vera Institute of Justice, *The Price of Prison: What Incarceration Costs Taxpayers* (Mar. 1, 2012).

<sup>8</sup> Collateral Costs, *supra* n.5 at 2.

<sup>9</sup> *Price of Prisons*, *supra* n.7.

<sup>10</sup> NPR, Planet Money: How Much Does The Government Spend to Send a Kid to Public School?, available at <http://www.npr.org/blogs/money/2012/06/21/155515613/how-much-does-the-government-spend-to-send-a-kid-to-school>

<sup>11</sup> NAACP, *supra* n.7 at 12.

<sup>12</sup> NAACP, *supra* n.7 at 12.

<sup>13</sup> NAACP, *supra* n.7 at 13.

<sup>14</sup> Naomi F. Sugie, *Punishment and Welfare: Paternal Incarceration and Families' Receipt of Public Assistance*, Fragile Families Working Paper: WP11-09-FF, at 3 (2011) (emphasis in original).

than less, welfare provision—a relationship that runs counter to goals of policy development,”<sup>15</sup> such as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”). In recognition of the fact that “[a]fter release, offenders face substantial barriers to finding employment,” one study has shown that recent paternal incarceration, i.e. current incarceration or incarceration that ended within the previous two years, “is not only significantly associated with food stamps and Medicaid/SCHIP receipt but may also be causally related.”<sup>16</sup> With respect to food stamps, “the odds of a family [with recent paternal incarceration] receiving benefits” are up to 2.2 times “greater than the odds for a similar family [that] has not experienced recent paternal incarceration.”<sup>17</sup> As for Medicaid/SCHIP, “the odds of a family [with recent paternal incarceration] receiving benefits are about 1.7 times greater.”<sup>18</sup> Indeed, “[t]he effect of a recent incarceration on food stamps and Medicaid/SCHIP receipt is larger than the effect of loss of employment.”<sup>19</sup> Thus, using the criminal justice system to create barriers to re-entry into society and the economy forces the affected individuals to be more dependent on the government for basic needs because discriminatory employment policies prevent them from finding work and providing for themselves.

Mass incarceration and the correspondent barriers to employment also have a deleterious impact on federal, state and local tax revenues. For example, in a report prepared by the Economy League for Greater Philadelphia, it is estimated that if “100 currently unemployed formerly incarcerated individuals” obtained employment, their employment “would produce an additional \$1,900,000 in city wage tax revenue and \$770,000 in sales tax revenue over their post-release lifetimes.”<sup>20</sup> In addition, the “[t]otal lifetime wage tax collections for employed ex-offenders at each educational attainment level exceed the \$10,000 Philadelphia Reentry Employment Program (PREP) tax credit amount” provided by Philadelphia to employers that hire former inmates.<sup>21</sup>

## **B. Barriers to Employment Hurt the Economy**

While the United States spends billions of dollars to maintain this system of mass incarceration, it is simultaneously losing as much or more in revenue and labor due to restrictive employment practices that bar individuals with criminal backgrounds from obtaining stable employment. While discrimination based on criminal records and other barriers to employment present clear obstacles to any formerly incarcerated individual seeking employment, studies show that they disproportionately impact people of color. Thus, as explained at the Commission’s recent briefing, not only are black applicants half as likely as equally qualified white applicants to receive a callback or job offer, but black and Latino applicants with *no criminal record* fare no

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<sup>15</sup> *Id.* The PRWORA bars anyone convicted of a felony involving the possession, use, or sale of drugs from receiving cash assistance and food stamps for life.

<sup>16</sup> *Id.* at 6, 16.

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

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

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

<sup>20</sup> Economy League Greater Philadelphia, *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia*, Executive Summary (2011).

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

better than white applicants just released from prison.<sup>22</sup> When a person of color has a criminal record, the odds against him are multiplied: the chances of a black applicant with a criminal record of getting a job are reduced by 57 percent.<sup>23</sup>

The discriminatory impact of criminal records has quantifiable consequences for formerly incarcerated individuals and their families. Studies show that serving time in either prison or jail reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent.<sup>24</sup> When broken down to account for race, these numbers again reveal an overt discriminatory impact: while incarceration depresses the total earnings of white males by 2 percent, it decreases the earnings of Hispanic males by 6 percent and of black males by 9 percent.<sup>25</sup> Put in monetary terms, and considering that, before incarceration, more than two-thirds of male inmates are employed and more than half are the primary source of financial support for their children, the impact of incarceration on earnings is devastating. Indeed, studies show that “[b]y age 48, the typical former inmate will have earned \$179,000 less than if he had never been incarcerated.”<sup>26</sup>

Beyond the individual impact and stigma associated with a criminal record, mass incarceration and barriers to employment for those with criminal records place enormous burdens on the economy as a whole. Mass incarceration decreases productivity, decreases the quality and quantity of the labor force, depresses the level of education of the country, negatively impacts GDP and decreases the United States’ global competitiveness.

In terms of the work force, inmates lose the skills necessary to compete for well-paying and stable jobs. On an individual level, incarceration can reduce an individual’s marketable skills, obstructing his access to high-earning or high-mobility jobs. As a 2010 Center for Economic and Policy Research (“CEPR”) study determined, “Time behind bars can lead to deterioration in a worker’s ‘human capital,’ including formal education, on-the-job experience, and even ‘soft skills’” such as punctuality or customer relations. Incarceration can also lead to the loss of social networks that can help workers find jobs; and, worse, provide former inmates with new social networks that make criminal activity more likely.”<sup>27</sup>

Formal and informal employment policies further prevent formerly incarcerated individuals from re-entering the work force or contributing to society. State laws barring persons with any felony conviction from entire classes of employment, including education, childcare or related professions, further prohibit formerly incarcerated individuals from re-entering the workforce in

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<sup>22</sup> Testimony of Glenn E. Martin, Vice President of Public Affairs and the Director of the David Rothenberg Center for Public Policy (DRCPP) at The Fortune Society (Fortune), before United States Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers*, Dec. 7, 2012, at 3 (“Martin Testimony”).

<sup>23</sup> *Id.* at 3.

<sup>24</sup> Collateral Costs, *supra* n.5, at 1.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 12.

<sup>27</sup> John Schmitt & Kris Warner, Center for Economic and Policy Research, *Ex-offenders and the Labor Market* (Nov. 2010), at 8.

any meaningful way. This is so even though the crime of conviction may have no bearing on the person's fitness for the particular employment sought.<sup>28</sup>

Time spent incarcerated also decreases overall education levels by interrupting schooling and by preventing former prisoners from re-entering the school system once released. As one expert noted, “[b]y lengthening sentences, passing mandatory sentencing laws, curbing parole, reducing alternatives to incarceration and building new prisons, policymakers have created the conditions where hundreds of thousands of people with little schooling are coursing through the largest prison and jail system in the world, instead of being educated in world class high schools and top shelf public universities.”<sup>29</sup> While incarcerated, individuals are denied quality educational programming, creating yet another obstacle to gainful employment.<sup>30</sup> For younger inmates, the obstacle to education is often more overt: certain public schools simply refuse to enroll discharged inmates, thus denying young individuals with criminal records one of the most important factors to upward mobility.<sup>31</sup> Indeed, studies show that lack of a higher education degree directly correlates to unemployment.<sup>32</sup>

Lower educational levels also lead to lower incomes and less preferential jobs, which leads to a less-skilled overall American workforce and lowered GDP. Lowered income also means the formerly incarcerated and their families have less money to purchase goods. At a macro level, the proscription of the formerly incarcerated from much of the labor market compounds unemployment rates while reducing overall output of goods and services. The formerly incarcerated make up more than 6 million people in the U.S. at any given time, while approximately 1 million individuals are released from prison each year. The large number of those with convictions vying for a limited number of less appealing employment opportunities leads to greater levels of unemployment. In 2010, CEPR estimated that the formerly incarcerated “lower overall employment rates as much as 0.8 to 0.9 percentage points; male employment rates, as much as 1.5 to 1.7 percentage points; and those of less-educated men as much as 6.1 to 6.9 percentage points.”<sup>33</sup> CEPR determined that this exclusion of individuals from the workforce costs the US economy the “equivalent of 1.5 to 1.7 million workers,”<sup>34</sup> representing a loss of goods and services that reduced the gross domestic product (GDP) for the U.S. by \$57 to \$65 billion in 2008 alone.<sup>35</sup>

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<sup>28</sup> See Re-Entry and Reintegration, *supra* n.6, at 203-04, (“A comprehensive statutory and regulatory analysis showed that people with criminal records encounter a vast array of legal restrictions that bar them from a wide array of occupations and professions. More and more occupational bars are being imposed against people with various criminal convictions. There has been an expansion of prohibitions against hiring teachers, childcare workers, and related professionals with prior criminal records.”).

<sup>29</sup> Education & Incarceration, *supra* n.32, at 10.

<sup>30</sup> *Id.* (“To make matters worse, once in prison, our corrections systems are failing to provide the educational programming that this population needs, further hobbling the chances of ex-prisoners to re-enter the economy when they re-enter their communities.”).

<sup>31</sup> Re-Entry and Reintegration, *supra* n.6, at 120.

<sup>32</sup> *Id.* at 201 (noting that 22 percent of young men with a high school diploma or less were not working.); see also *id.* at 203 (“Among African American men, over 35% are not working, and among African American men who have not completed high school, 63% are not working.”).

<sup>33</sup> Ex-offenders and the Labor Market, *supra* n.27, at 14.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

The exclusion of millions of viable individuals from much of the workforce would always be a drain on the economy, but the impact is especially injurious as the nation attempts to recover from the recession and maintain our global competitive standing. As with incarceration, recessions have an especially deleterious impact on minorities, who are “often already at a disadvantage in terms of broader financial well-being.”<sup>36</sup> Most pointedly, African-American men with criminal records bear the brunt of recession-related barriers. A recent report indicates that black men “lead the unemployment surge, with an unemployment rate of 15.4 percent[ ] . . . as a result of a range of barriers to employment, including disproportionate employment in vulnerable industries and labor market discrimination.”<sup>37</sup> These “soaring” unemployment rates exacerbate the difficulties already facing vulnerable families that live in “communities plagued by poor educational outcomes, declining neighborhood quality, and high rates of incarceration.”<sup>38</sup>

Detroit’s history is illustrative of the impact mass incarceration and the corresponding obstacles to employment have on a city. In the late twentieth century, “Detroit sent more citizens to prison than any other city in Michigan, and the percentage of Detroit families living below the poverty line was also more than 72 percent higher than the state average. As one local paper put it: ‘The community los[t] the resources of its young men because so many are jailed.’”<sup>39</sup>

### C. Barriers to Employment Decrease Public Safety

Barriers to gainful employment also risk increased rates of recidivism and crime. For example, the New York State Bar Association has long acknowledged that the “chief factor which influences the reduction of recidivism is an individual’s ability to gain ‘quality employment.’”<sup>40</sup> Studies consistently reveal that those with stable employment in the year prior to their instant criminal charge are far less likely to recidivate (19.6 percent) than are those who are unemployed (32.4 percent).<sup>41</sup> In New York, studies show that 83 percent of people who violate the terms of their probation are unemployed at the time of the violation.<sup>42</sup> Noting that in New York, up to 60 percent of people formerly incarcerated are unemployed one year after release, the New York Bar Association has warned that, “[w]ithout employment, these individuals cannot meet their own families’ basic needs. Without guidance or other resources, many revert to their former criminal behavior. As New York City’s probation commissioner described: ‘[e]ither they work or they go back to jail.’”<sup>43</sup>

Denied access to legitimate employment, people often end up committing crimes for lack of other opportunities. High rates of unemployment are known causes of increased crime rates.

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<sup>36</sup> Collateral Costs, *supra* n.5, at 6.

<sup>37</sup> *Weathering the Storm: Black Men in the Recession*, *supra* n. 30 at 7 (“Over a third of young black men ages 16 to 19 in the labor market are unemployed. In fact, a recent report found that [8 percent](#) of black men have lost their jobs since November 2007”).

<sup>38</sup> *Id.* at 6.

<sup>39</sup> Heather Ann Thompson, Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History, *J. Am. Hist.*, Dec. 2010, at 713.

<sup>40</sup> Re-Entry and Reintegration, *supra* n.6.

<sup>41</sup> U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12 (May 2004), available at [http://www.ussc.gov/Research/Research\\_Publications/Recidivism/200405\\_Recidivism\\_Criminal\\_History.pdf](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf)

<sup>42</sup> Re-Entry and Reintegration, *supra* n.6, at 17.

<sup>43</sup> *Id.*



“Lack of employment is a significant risk factor for predicting criminal behavior,”<sup>44</sup> according to an Arizona county deputy chief. “When someone maintains employment, this demonstrates stability, provides a source for positive social interactions and provides a means for financial stability, including the ability to support a family and meet their financial obligations.”<sup>45</sup> Employment is an anchor to one’s community and a deterrent to recidivism.<sup>46</sup>

Indeed, studies have long indicated that a decrease in unemployment correlates directly to a reduction in crime. A 2006 study found that a 10 percent decrease in a state’s unemployment rate corresponded with a 16 percent reduction in property crime rates, leading its authors to conclude that, “between 1992 and 1997, ‘slightly more than 40 percent of the decline [in the overall property crime rate] can be attributed to the decline in unemployment.’” Similarly, noting that nine out of ten parole violators are unemployed, the New York City Bar has opined that, “[u]nemployment may in fact be the most serious of all contributors to the high rate of recidivism.”<sup>47</sup> As one expert has concluded, “[p]ublic officials can put more cops on the beat, pass tougher sentencing laws, and take other steps to reduce crime, but there are limits to how much these can do. We found that a bad labor market has a profound impact on the crime rates.”<sup>48</sup>

Recent state initiatives to reduce the costs and scope of mass incarceration while keeping crime rates down have proved successful. Thus, for example, as of 2011, Michigan, New Jersey, New York and Kansas managed to reduce incarceration rates and close bloated prisons and jails, saving their states millions of dollars. In all four states, crime rates dropped.<sup>49</sup> Along these lines, experts indicate that one way of keeping crime down and incarceration rates correspondingly low is to divert lower-risk offenders to a system of “high-quality community supervision, services and tough sanctions that reduces recidivism and enhances public safety while costing far less than prison.”<sup>50</sup>

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<sup>44</sup> Statement of Thomas O’Connell, Deputy Chief of Administration for the Maricopa County Adult Program in Jahna Berry, *Criminal Pasts Haunt Desperate Job Seekers*, The Arizona Republic, June 13, 2012 available at <http://www.azcentral.com/arizonarepublic/news/articles/2012/06/13/20120613criminal-pasts-haunt-desperate-job-seekers.html>

<sup>45</sup> Id.

<sup>46</sup> See Safer (“Because stable employment is associated with desistance from crime, the negative economic effects of incarceration may also contribute to recidivism.” Available at <http://www.saferfoundation.org/files/documents/Princeton-Effect%20of%20Incarceration%20on%20Employment%20and%20Wages.pdf> (citing (Sampson and Laub 1993; Uggen 2000))

<sup>47</sup> New York City Bar Association, *Legal Employers Taking the Lead: Enhancing Employment Opportunities for the Previously Incarcerated* 7 (2008), available at [http://www.nycbar.org/pdf/report/Task\\_Force\\_Report08.pdf](http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf).

<sup>48</sup> *Higher Crime Rates Linked to Low Wages and Unemployment, Study Finds*, Ohio State Research (2002), available at <http://researchnews.osu.edu/archive/crimwage.htm>.

<sup>49</sup> Misplaced Priorities, *supra* n.7, at 41.

<sup>50</sup> Collateral Costs, *supra* n.5, at 24.

#### D. Barriers to Employment Harm Society

Incarceration tears at the fabric of society – the family. It affects parents, spouses, and children – particularly in communities of color.

While national averages indicate that 30 percent of American youths have been arrested by the age of 23, the incarceration rates for African-American youth are almost five times those of their white counterparts.<sup>51</sup> Based on current rates of first incarceration, an estimated 1 out of 3 black males will enter state or federal prison during their lifetime, compared to 1 out of 6 Hispanic males and 1 out of 17 white males.<sup>52</sup> Proportionally, these numbers mean that “African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population.”<sup>53</sup> Broadly speaking, people of color do not commit crimes at higher rates than their white counterparts. These racial disparities result because of systemic discrimination and selective enforcement policies.<sup>54</sup>

According to one study, “more than 1.2 million inmates – over half of the 2.3 million people behind bars – are parents of children under age 18.”<sup>55</sup> This means that 1 in 28 children in the U.S., more than 3.6 percent, has a parent in jail or prison.<sup>56</sup> Again, people of color feature disproportionately within this population. For example, nearly half a million black fathers are incarcerated, representing some 40 percent of all incarcerated parents.<sup>57</sup> Moreover, 1 in 9 black children has a parent in prison or jail, a rate that has more than quadrupled in the past 25 years.<sup>58</sup>

Just as incarceration negatively impacts the individual prisoner’s ability to work and obtain education, parental incarceration directly affects family income and children’s educational opportunities.<sup>59</sup> According to the Pew Center, “more than two-thirds of men admitted to prison had been employed. Almost half—44 percent—of parents held in state prisons lived with their children prior to incarceration, more than half of imprisoned parents (52 percent of mothers and 54 percent of fathers) were the primary earners for their children.”<sup>60</sup> Obviously, incarcerated parents cannot maintain the economic support of their families. The impact of this decline in financial well-being is rarely overcome: one study revealed that the average child’s family income fell 22 percent during the year the father was incarcerated. While the family income rose

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<sup>51</sup> Testimony of Harry J. Holzer before United States Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers, Dec. 7, 2012.

<sup>52</sup> Martin Testimony, *supra* n.22.

<sup>53</sup> Testimony of Jeffrey Leigh Sedgwick, Ph.D., before United States Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy on the Employment of Black and Hispanic Workers, before the U.S. Commission on Civil Rights, Dec. 7, 2012, at 2.

<sup>54</sup> Misplaced Priorities, *supra* n.7, 10 (noting that African Americans are imprisoned for drug offenses at 13 times the rate of their white counterparts).

<sup>55</sup> Collateral Costs, *supra* n.5, 18.

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

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.* at 21.

<sup>60</sup> *Id.*

slightly following the father's release, it remained 15 percent lower than the year before incarceration.<sup>61</sup>

The effect of parental incarceration is long-lasting. Children of incarcerated parents struggle in school and face higher hurdles to upward mobility. According to studies, some “forty-two percent of children who start out in the bottom fifth of the income distribution remain stuck in the bottom themselves in adulthood. Having parents at the bottom of the income ladder is even more of a barrier for African Americans, 54 percent of whom remain in the bottom themselves as adults.”<sup>62</sup>

A parent's release from prison or jail does not necessarily reverse the downward trend. For example, failure to obtain employment due to formal or informal policies against hiring individuals with criminal records “almost certainly makes it harder for low-income non-custodial fathers with a child support order to make their payments on time, thus denying their families and children an important source of household income.”<sup>63</sup> Meanwhile, failing to make payments often puts the former inmate into arrears that may further reduce their future employment activity due to state-mandated withholding rates.<sup>64</sup>

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<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> *Id.* (citing Sorensen, Elaine et al. 2007, *Assessing Child Support Arrears in Nine Large States and the Nation*, Report for the Department of Health and Human Services; Cancian, Maria et al., *Discouraging Disadvantaged Fathers' Employment: An Unintended Consequence of Policies to Support Poor Families*, Institute for Research on Poverty Discussion Paper (2011)).

<sup>64</sup> Id.

## **II. Recommended Action**

The Brennan Center urges the Commission to:

- *Consider the myriad fiscal, economic, public safety, and societal effects of mass incarceration and corresponding barriers to employment when taking actions, making recommendations, or considering practices and policies on the legal and proper use of criminal background checks in hiring.*
- *Issue a Report and Recommendation supporting the EEOC Guidance and encouraging similar guidances to further mitigate against these costs.*
- *Encourage state and local governments to adopt similar policies that remove unfair and irrational barriers to employment for people with criminal records.*
- *Remain vigilant against unnecessary and costly discrimination based on criminal records.*

These actions will be a benefit to individuals, communities of color, and the nation as a whole. We hope these comments and the data they contain will assist the Commission as it considers the EEOC Guidance.

Sincerely,

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