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## **Strategies for Full Employment Through Reform of the Criminal Justice System**

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Ronald Lewis is a 36-year-old African American father of three, who is taking classes during the day and working nights to support his family.<sup>1</sup> But in his effort to find more gainful employment in his hometown of Philadelphia, he has been plagued by a misdemeanor, dating back over a decade, that appears on his criminal record. Though he has been offered several positions, the offers were revoked after the employer was notified of his record.

This paper addresses the significant impact of the criminal justice system both on individuals like Mr. Lewis, who are most directly challenged in their job searches, and also on the nation's labor market and the larger economy as whole.

It is a timely topic, for several reasons. First, we have reached the point where over 70 million U.S. adults have a criminal record that can show up in a routine background check. These numbers disproportionately disadvantage people of color in those communities already hard hit by unemployment. Second, the inequities of the criminal justice system and the overwhelming costs of incarcerating nearly 2.4 million people and supervising another 5 million on probation and parole have sparked a "smart on crime" movement, drawing allies from across the political spectrum. Finally, with the job market picking up steam after the most severe economic downturn since the Great Depression, a genuine opportunity exists to embrace effective strategies that expand the job prospects of people with arrests and convictions on their records and reduce the number of people ensnared in the criminal justice system.

What follows is background about the criminal justice system's effect on the economy and labor market, and the impact of criminal background checks on an individual's employment. Without minimizing the challenge ahead, this paper also discusses promising reforms that have successfully reduced the record number of people caught up in the criminal justice system and expanded employment opportunities for those, like Mr. Lewis, who have a criminal record and struggle to find work.

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<sup>1</sup> "How Past Crimes May Drive Job Seekers Into Poverty," *PBS NewsHour*, January 23, 2015.

## The Vast Expansion of the Criminal Justice System

Since 1977, the number of adults in prison in the United States has grown by over 400 percent, reaching nearly 1.6 million in 2013.<sup>2</sup> When our 70,000<sup>3</sup> incarcerated youth are added in, and the 700,000<sup>4</sup> people serving time in jail, the total climbs to nearly 2.3 million. The United States puts more than 700 people in prison for every 100,000 residents, over five times more than other Western democracies.<sup>5</sup> And another 5 million people are on probation (sentenced to supervision instead of incarceration) or on parole (still under supervision after being released from prison).<sup>6</sup> The “War on Drugs”—where the response to the public health challenges of drug addiction and crimes associated with it became the arrest, conviction, and imprisonment of more and more individuals for drug offenses—continues to contribute significantly to the scale of arrests today.<sup>7</sup>

People of color have paid an especially heavy price for these law enforcement priorities. More than 60 percent of those incarcerated in America’s prisons are people of color.<sup>8</sup> African Americans are arrested for marijuana possession at four times the rate of whites, even though studies have consistently shown that African Americans do not use or sell drugs at higher rates.<sup>9</sup> In Washington, D.C. —where African American adults make up about half the adult population—more than nine out of 10 drug arrests are of African American adults.<sup>10</sup>

The criminal justice system consumes massive government resources: \$82 billion annually is spent on jails and prisons alone,<sup>11</sup> and expenses for the courts and policing bring the amount to more than \$250 billion per year.<sup>12</sup> About 11 percent of the public-sector workforce is employed in corrections, the courts, and policing, a higher share than is employed in health and public welfare.<sup>13</sup>

Has this multibillion-dollar investment made us any safer? Not especially. Research conducted since

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<sup>2</sup> Bureau of Justice Statistics, “Prisoners in Custody of State or Federal Correctional Authorities, 1997-98,” March 9, 2015; Bureau of Justice Statistics, “Prisoners Series,” 2000-2014, <http://www.bjs.gov/index.cfm?ty=pbse&sid=40>.

<sup>3</sup> M. Sickmund, T.J. Sladky, W. Kang, and C. Puzanchera, “Easy Access to the Census of Juveniles in Residential Placement,” National Center for Juvenile Justice, 2013, <http://www.ojdp.gov/ojstatbb/ezacjrp/>.

<sup>4</sup> Lauren E. Glaze and Danielle Kaebler, “Correctional Populations in the United States, 2013,” Department of Justice, December 2014.

<sup>5</sup> Peter Wagner, Leah Sakala, and Josh Begley, “States of Incarceration: The Global Context,” Prison Policy Initiative, June 2014; Jan van Dijk, John van Kesteren, and Paul Smith, *Criminal Victimization in International Perspective: Key Findings From the 2004-2005 ICVS and EU ICS* (The Hague: Book Juridische uitgevers, 2007).

<sup>6</sup> As of December 31, 2013, 4,751,400 people were on probation or parole; Glaze and Kaebler, “Correctional Populations in the United States, 2013.”

<sup>7</sup> Justice Policy Institute, “Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States,” 2001; Brennan Center for Justice, “Reforming Funding to Reduce Mass Incarceration,” 2013.

<sup>8</sup> T. Bonczar, “Prevalence of Imprisonment in the U.S. Population, 1974-2001,” Bureau of Justice Statistics, 2003.

<sup>9</sup> American Civil Liberties Union, *The War on Marijuana in Black and White*, 2012.

<sup>10</sup> Washington Lawyers Committee for Civil Rights and Urban Affairs, “Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation’s Capital,” 2013. Since non-African Americans make up the majority of D.C. residents, and drug use rates between different groups are about the same, most drug users are likely to be white or non-African American. See also Rend Smith, “Race Disparity in Drug Charges Is Getting Worse,” *Washington City Paper*, April 22, 2013.

<sup>11</sup> Leah Sakala, “Paying the Price of Mass Incarceration,” Prison Policy Initiative, 2014, <http://www.prisonpolicy.org/blog/2014/05/23/price-of-incarceration/>.

<sup>12</sup> Tracey Kyckelhahn, “Justice Expenditure and Employment Extracts, 2012—Preliminary,” NCJ 248628, Bureau of Justice Statistics, 2015.

<sup>13</sup> Robert Jesse Willhide, “Annual Survey of Public Employment and Payroll Summary Report: 2013,” U.S. Census Bureau, 2014.

the 1990s has shown that increasing the number of prisons and police and federal justice system funding has had little to no relationship to the crime drop.<sup>14</sup> In fact, crime rates have risen and fallen independent of incarceration rates.<sup>15</sup> In addition, a recent report by the Brennan Center for Justice showed that increased incarceration has been declining in its effectiveness as a crime control tactic for more than 30 years, and “its effect on crime rates since 1990 has been limited, and has been non-existent since 2000.”<sup>16</sup>

## The Impact of Criminal Records on the Labor Market

While the labor market is picking up for many U.S. workers, large segments of the workforce are still falling behind. For example, while the official unemployment rate for those actively looking for work in early 2015 stands at 5.5 percent, the African American unemployment rate is 10.4 percent, and the rate for African American teens (ages 16-19) is 30 percent, about double the rate of white teens.

What is the extent to which the proliferation of criminal records and criminal background checks contribute to unemployment and undermine the nation’s prospects of reaching full employment? The following discussion summarizes what recent research tells us about the employment challenges facing individuals who have come into contact with the criminal justice system, as well as the broader impact of the system on the economy.

### How many people potentially face the extra challenge of finding work because they have been arrested, convicted, or incarcerated?

- In 2010, nearly one in three U.S. adults—over 70 million people—had a serious misdemeanor or felony arrest or conviction that can show up on a routine criminal background check for employment. In contrast, nearly a decade earlier (in 2001), an estimated 42.5 million adults, or about 20 percent of the adult population, had a criminal record listed in a state criminal history record system.<sup>17</sup>
- According to a recent Kaiser Family Foundation/*New York Times*/CBS News poll of prime-working-age (25-54) men who were not employed either full time or part time, 34 percent said they had been convicted of a crime.<sup>18</sup> Nearly two-thirds (64 percent) of prime-age nonemployed men wanted to work and nearly half (45 percent) had looked for a job in the past year. Their share of the workforce has more than tripled since the late 1960s, to 16 percent.

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<sup>14</sup> Alfred Blumstein, ed., *The Crime Drop in America* (Cambridge University Press, 2005).

<sup>15</sup> Michael Mitchell and Michael Leachman, “Changing Priorities: State Criminal Justice Reforms and Investments in Education,” Center on Budget and Policy Priorities, October 2014, <http://www.cbpp.org/cms/?fa=view&id=4220>.

<sup>16</sup> Brennan Center for Justice, “What Caused the Crime Decline?” 2015.

<sup>17</sup> According to a Bureau of Justice Statistics survey of state criminal record repositories, in 2012 there were 100,596,300 subjects (“individual offenders”) in state systems with an arrest or conviction for a serious misdemeanor or felony (Bureau of Justice Statistics, “Survey of State Criminal History Information Systems, 2012,” January 2014, p. 2). To account for duplication of individual records in the survey of the state criminal record repositories (that is, individuals who may have criminal records in more than one state and deceased individuals who have not been removed from the state record systems), NELP conservatively reduced the number of individuals by 30 percent to arrive at a total of 70,417,410 individuals with state arrest or conviction records. The U.S. Census 2012 population estimate for those 18 years and over was 240,185,952 (U.S. Census Bureau, Population Division, “Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States, April 1, 2010 to July 1, 2012, June 2013). Based on these estimates, 29.3 percent of U.S. adults, or nearly one in three, have a criminal history on file with the states.

<sup>18</sup> Binyamin Appelbaum, “The Vanishing Male Worker: How America Fell Behind,” *New York Times*, December 11, 2014; Binyamin Appelbaum, “Out of Trouble, Out of Work,” *New York Times*, March 1, 2015.

- Various studies have estimated the number of working-age people (ages 18-64) who have a felony conviction specifically. The Center for Economic and Policy Research (CEPR) estimated that 12.3 million to 12.9 million working-age people had been convicted of a felony as of 2008.<sup>19</sup>
- Among working-age men who are not serving time in prison, the proportion that have a felony conviction doubled from 1980 to 2010, to 10 percent. For African American men, the rate more than doubled as well, reaching over 25 percent.<sup>20</sup>

### How often do employers rely on criminal history information in making their hiring decisions?

- According to employer surveys, almost 9 in 10 large companies conduct criminal background checks.<sup>21</sup> While felony convictions were most “influential” in determining the hiring decision of the employers surveyed (depending on the seriousness of the offense, from 74 percent to 96 percent of employers were influenced by a felony conviction), misdemeanors also play a key role in the hiring process (ranging from 26 percent to 60 percent, depending on the severity of the misdemeanor).
- Only about half of employers reported that they take into account the age of the offense in their hiring decision. Thus, even old criminal offenses can significantly disadvantage an individual’s job prospects, as in the case of Ronald Lewis.<sup>22</sup> In contrast, the research clearly documents that the probability of reoffending declines significantly with the amount of time that has passed since an individual’s last arrest or conviction.<sup>23</sup>
- Rigorous testing studies have attempted to determine the likelihood that an employer will call an applicant back for an interview when the person has a criminal record. Overall, the studies have found that applicants with a felony record are about half as likely to be called back for an interview as similarly situated applicants without a felony record.<sup>24</sup>

### How does the overall economy suffer when large numbers of people with a criminal record are locked out of the labor market?

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<sup>19</sup> John Schmitt and Kris Warner, “Ex-Offenders and the Labor Market,” Center for Economic and Policy Research, 2010; Christopher Uggen, Jeff Manza, and Melissa Thompson, “Citizenship and Reintegration: The Socioeconomic, Familial, and Civic Lives of Criminal Offenders,” *Annals of the American Academy of Political and Social Science* 605 (May 2006), pp. 281-310.

<sup>20</sup> Sarah Shannon, Christopher Uggen, Melissa Thompson, Jason Schnittker, and Michael Massoglia, “The Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010,” Princeton University, 2011, <http://paa2011.princeton.edu/papers/111687>; Appelbaum, “Out of Trouble, Out of Work.”

<sup>21</sup> Society for Human Resources Management, “Background Checking: The Use of Criminal Background Checks in Hiring Decisions,” 2012.

<sup>22</sup> Ibid.; see also EmployeeScreenIQ, “Survey Report 2013: Employment Screening Practices and Trends: The Era of Heightened Care and Diligence,” 2013, p. 10.

<sup>23</sup> In fact, the probability of being arrested is no greater for an individual who has been previously arrested for a crime compared to an individual in the general population, if the individual has not been arrested for three to seven years. The variation in the “redemption times” is dependent on the state and the nature of the individual’s previous offense (four to seven years for violent crimes, four years for drug crimes, three to four years for property crimes); Alfred Blumstein and Nakamura Kiminori Nakamura, “Extension of Current Estimates of Redemption Times: Robust Testing, Out-of-State Arrests, and Racial Differences,” National Institute of Justice, October 2012, p. 89.

<sup>24</sup> Devah Pager, “The Mark of a Criminal Record,” *American Journal of Sociology* 108 (5) (2003), pp. 937-75; Scott Decker, Cassia Spohn, Natalie Ortiz, and Eric Hedberg, “Criminal Stigma, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment,” U.S. Department of Justice, January 2014.

- Increasing the employment rates of people with criminal records, which increases the labor supply, will likely increase economic growth. The economy’s potential growth rate is partly a function of the growth of labor supply. In fact, the expected decline in the growth rate of working persons is one reason why many analysts, including those at the Congressional Budget Office (CBO), have significantly marked down their forecasts of future growth.<sup>25</sup> The Council of Economic Advisers (CEA) explicitly notes the importance of incarceration of minority men as a factor suppressing labor supply: “One of the leading explanations for this development is the steep rise in incarceration of young black males.” Thus, the policy interventions discussed here are decidedly pro-growth, potentially unleashing significant labor supply that can boost both potential and actual growth rates.
- The failure to employ the large population of people with felony convictions cost the United States about 0.4 to 0.5 percentage points of gross domestic product in 2008, or roughly \$57 billion to \$65 billion.<sup>26</sup>
- Serving time in prison reduces wages for men by approximately 11 percent, annual employment by nine weeks, and annual earnings by 40 percent.<sup>27</sup> By age 48, the typical person who has served prison time will have earned \$179,000 less than if he or she had never been incarcerated.
- For young people, \$4 billion to \$7 billion is lost each year due to the negative impact juvenile incarceration has on a young person’s lifetime earnings.<sup>28</sup>

**Given the severe racial and ethnic disparities in the criminal justice system, what is the impact of our arrest and incarceration practices on the employment prospects of communities of color?**

- According to a testing study, white men with a felony record were about half as likely as whites without a record to receive a callback after applying for work, while African Americans with a felony record were about one-third as likely to receive a callback as African Americans without a criminal history.<sup>29</sup> Moreover, African Americans *without* a criminal record were less likely to receive a callback than white applicants *with* a criminal record. (See Figure 1.)

FIGURE 1

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<sup>25</sup> This input to growth is also one reason why CBO scores comprehensive immigration reform as pro-growth: Reform is expected to boost the increase of labor supply, and thus GDP growth. These concerns have become particularly germane in recent years as the U.S. labor force participation rate fell sharply in the recession and weak recovery. It has recently stabilized, but at a historically low level. Some of that decline is reasonably assigned to demographic factors, largely baby boomers aging out of the workforce. But as the President’s Council of Economic Advisors has pointed out, about half of the decline is due to cyclical (weak demand) and structural factors, including the steep incarceration of young minority men (CBO, “The Slow Recovery of the Labor Market,” February 2014, Figure 11; CBO, “The Economic Impact of S.744, The Border Security, Economic Opportunity, and Immigration Modernization Act,” June 2013; CEA, “The Labor Force Participation Rate Since 2007: Cause and Policy Implications,” July 2014).

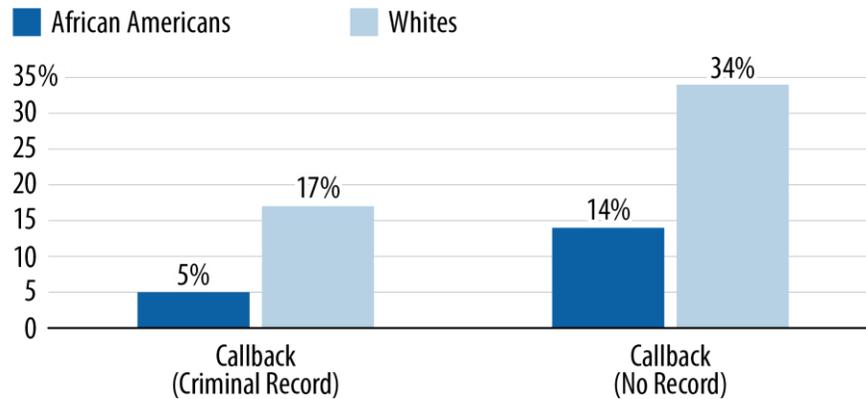
<sup>26</sup> Schmitt and Warner, “Ex-Offenders and the Labor Market.”

<sup>27</sup> Bruce Western and Becky Petit, “Collateral Costs: Incarceration’s Effect on Economic Mobility,” Pew Charitable Trust, 2010.

<sup>28</sup> Marc Schindler, Amanda Petteruti, and Jason Ziedenberg, “Sticker Shock: Calculating the Full Price for Youth Incarceration,” Justice Policy Institute, 2014.

<sup>29</sup> Pager, “The Mark of a Criminal Record.”

## The Impact of a Criminal Record on Interview Callbacks, by Race



Source: Devah Pager, "The Mark of a Criminal Record," 2003.

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- The CEPR study cited above found that the presence of a felony conviction lowered overall employment by between 0.3 and 2.8 percentage points, but the impact on African American men was much higher, ranging from 2.3 to 5.3 percentage points. More specifically, incarceration depressed the total earnings of white men by 2 percent, Latino men by 6 percent, and African American men by 9 percent.<sup>30</sup>

## Recommendations to Clear the Path to Full Employment

As documented above, decades of over-criminalization and mass incarceration have taken a heavy toll not just on the communities most directly impacted but also on the entire U.S. economy. Without minimizing the scope of the challenge ahead, the readiness in both red and blue states and even within the halls of an increasingly divided Congress to consider “smart on crime” efforts to reform the criminal justice system is an encouraging sign.

U.S. Senator Rand Paul (R-Ky.), Governor Nathan Deal (R-Ga.), Koch Industries, a group of conservatives who have affiliated under the banner “Right on Crime,” former House Speaker Newt Gingrich, and others on the right have joined forces with U.S. Senator Corey Booker (D-N.J.), the American Civil Liberties Union, Van Jones of Rebuild the Dream, and others on the left to advance an aggressive criminal justice reform agenda that has already produced significant gains, especially at the state level. The agenda includes measures focused on employment of people with criminal records.<sup>31</sup> Several major pieces of bipartisan legislation hold out the potential for reform in the new Congress as well.<sup>32</sup>

<sup>30</sup> Schmitt and Warner, “Ex-Offenders and the Labor Market.”

<sup>31</sup> Carl Hulse, “Unlikely Cause Unites the Left and Right: Justice Reform,” *New York Times*, February 18, 2015; Michael Hirsh, “Charles Koch, Liberal Crusader,” *Politico*, March/April 2015.

<sup>32</sup> Examples of bipartisan criminal justice reform legislation being considered in the 114th Congress include the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act (S. 467), the Record Expungement Designed to Enhance Employment (REDEEM) Act (S. 2567), the Justice Safety Valve Act

Building on this new wave of support, the following discussion summarizes some of the most promising policies that have kept more individuals out of the justice system, thereby reducing the number of people with a criminal record, and that have limited the specific barriers to employment that undermine the job prospects of people with a criminal record.

### **Strategies to reduce the number of individuals arrested, convicted, and incarcerated**

**Reduce the time served in prison, in jail, or on probation and parole:** Many states have taken significant steps to reclassify lesser felonies to misdemeanors, a policy that helps reduce the stigma associated with a criminal record while also limiting the time spent in prison, in jail, or on probation and parole. In 2014, 16 states adopted such reforms.<sup>33</sup> When a state reduces the time individuals are in prison or jail or on probation or parole, or reclassifies offenses, it reduces the impact of criminal justice contact on an individual's employment, frees up resources to support public-sector assistance for those looking for work or training, and increases the labor pool.

For example, California passed a ballot initiative to reclassify several low-level property offenses and simple drug possession from felonies to misdemeanors—effectively eliminating prison terms for some individuals and thus reducing the amount of time they are incarcerated. The California reforms will affect 40,000 people annually and reduce the prison population by about 5,000 people each year and the jail population by 10,000 to 30,000.<sup>34</sup>

There is strong bipartisan support in Congress for sentencing reform: The Justice Safety Valve Act, for example, would give federal judges the ability in appropriate cases to impose sentences below mandatory minimums, thus reducing the time that those convicted spend in prison.

**Divert more people from the criminal justice system:** “Diversion” can happen at the stage at which an individual is arrested or convicted, or even before he or she is sentenced. Instead of being formally processed, an individual who might otherwise have been arrested, convicted, and sentenced can receive a ticket, pay a fine, be referred to treatment, or agree to a set of alternative conditions. With new resources provided by the Affordable Care Act—where, for the first time, single people with criminal justice involvement can have their treatment and associated services paid for by Medicaid—state and local officials are looking to expand diversion options that provide treatment and help large numbers of people avoid formal justice system contact entirely.<sup>35</sup>

**Incentivize funding to expand treatment and alternatives to incarceration:** Some states and counties have prioritized reinvesting the savings from reduced incarceration into treatment and other services that help prevent crime. These models—sometimes called fiscal incentives—have been especially successful in the juvenile justice system, which saw a 45 percent decline in the rate of youth incarceration from 2001 to 2011 (more than 50 juvenile facilities have closed in the past five years).<sup>36</sup>

However, two major federal initiatives—the Community Oriented Policing and the Edward Byrne Memorial Justice Assistance Grant programs—still subsidize police and prosecution rather than policies

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(S. 619), and the Smarter Sentencing Act (S. 502).

<sup>33</sup> Sentencing Project, “The State of Sentencing 2014: Developments in Policy and Practice,” 2015.

<sup>34</sup> Center on Juvenile and Criminal Justice, “Proposition 47: Estimated Local Savings and Job Population Reductions,” September 2014.

<sup>35</sup> Center for Health and Justice, Treatment Alternatives for Safe Communities, “No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives,” 2013.

<sup>36</sup> Dick Mendel, “No Place for Kids,” Annie E. Casey Foundation, 2011.

that reduce criminal justice contact. In effect, they fund states and counties to bring more people into the criminal justice system at the arrest and conviction phase. By contrast, some analyses of California's Proposition 47 say that the reforms will save taxpayers \$300 million in criminal justice costs, with some of the savings to be directed to support mental health and substance treatment programs, increased school attendance, and victim services. In the past two years, Georgia, New York, Texas, and Oregon expanded fiscal incentives to encourage local courts to keep more people out of state prisons and serve more people in the community.<sup>37</sup>

### **Strategies to reduce barriers to employment**

While front-end reforms are key to reducing the number of people arrested, convicted, and incarcerated, there is also an urgent need to help the tens of millions of workers who have an arrest or conviction record find work. Several tested policies, including some federal laws already on the books, go a long way toward leveling the playing field for qualified people with criminal records to find work without compromising workplace safety or security. The challenge now is to seize the momentum for reform and reach a scale that responds to the new realities facing today's workforce.

**Enforce civil rights protections:** The first step in creating a fairer process for qualified workers with a criminal record to compete for jobs is to aggressively enforce Title VII of the Civil Rights Act of 1964 (Title VII), the law that regulates criminal background checks for employment.

Under the leadership of Attorney General Eric Holder's cabinet-level Reentry Council, which was formed in 2011, the Obama Administration has taken steps to coordinate federal policy and promote employer best practices. Of special significance, in 2012 the Equal Employment Opportunity Commission (EEOC) issued a landmark guidance reaffirming that criminal background checks are regulated by Title VII because of the significant "disparate impact" on people of color, who are protected against employment discrimination under federal law.<sup>38</sup>

The EEOC guidance is fundamental to an effective strategy because it directly addresses the core practices that routinely deny employment to people with criminal records. First, it makes clear that arrest records should not be considered by employers absent compelling reasons to do so. Second, it states that blanket restrictions against hiring people with criminal records, like job ads that say "no one with a felony need apply," violate the federal law. And finally, it sets forth a fair and common-sense standard of compliance, requiring employers to consider the age of the offense, whether the offense is directly related to the particular job, and any evidence of rehabilitation after the offense was committed.

The challenge now is to educate the business community and to enforce the policy among the half of employers that are either unfamiliar with the EEOC guidance or have not taken any action to comply with it.<sup>39</sup>

**Advance "fair chance" hiring protections:** Fair chance hiring policies have taken hold across the United States, with growing bipartisan support.

Fair chance hiring refers to a set of principles that ensure that applicants with criminal records are evaluated on the merits of their qualifications, not just on their criminal records. Thus, the principles

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<sup>37</sup> National Council on Crime and Delinquency, "Using Bills and Budgets to Further Reduce Youth Incarceration," 2013.

<sup>38</sup> U.S. Equal Employment Opportunity Commission, "EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," April 25, 2012.

<sup>39</sup> EmployeeScreenIQ, "Survey Report 2013," pp. 15-16.

“ban the box,” meaning that they remove the criminal history question from job applications and postpone the background check until later in the hiring process. Note that ban-the-box policies do not prevent an employer from conducting a criminal background check. Instead, the policy delays the inquiry until the individual has had an opportunity to more fully present his or her credentials for the job. In addition, fair chance hiring integrates the EEOC criminal record guidelines and strong background check standards of accuracy and transparency to protect workers against arbitrary treatment.

President Obama’s My Brother’s Keeper Task Force recently endorsed fair chance hiring while also making a compelling case for hiring reforms: “Our youth and communities suffer when hiring practices unnecessarily disqualify candidates based on past mistakes. We should implement reforms to promote successful reentry, including encouraging hiring practices, such as ‘Ban the Box,’ which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits as they reenter the workforce.”<sup>40</sup>

Republicans have also embraced fair chance hiring. Georgia Governor Deal signed an executive order in early 2015 removing the criminal history question from all state job applications. His order states: “‘Ban the Box’ hiring policies enhance Georgia’s reputation as the number one place in which to do business by increasing qualified applicant pools and improving the likelihood that the employer will identify the best candidate for the position.” In 2014, Governor Chris Christie of New Jersey signed legislation extending the policy to the state’s private employers. “[E]veryone deserves a second chance in New Jersey, if they’ve made a mistake,” Governor Christie said. “So, today, we are banning the box and ending employment discrimination.”

To date, 14 states and nearly 100 cities and counties have adopted fair chance hiring policies, and most of them (nine states and over 60 cities and counties) did so in the past two years. Major employers including Walmart and Target have removed the criminal history question from their job applications. Currently, over 100 million people live in a state or community covered by a fair chance hiring law.

Although data are limited, the available research indicates that these reforms can have a measurable impact on hiring decisions. Referring to the EEOC standards and ban-the-box policies, a recent study by Professor Christopher Uggen found that “[s]uch laws give jobseekers the chance to make contact with prospective employers—contact that this study suggests is crucial to the hiring process.”<sup>41</sup> And in those communities that have collected data, the evidence suggests the policy is working. For example, in Durham, N.C., the number of people with criminal records hired for jobs grew seven-fold in the four years since the city adopted the policy in 2010.<sup>42</sup>

In addition to New Jersey, five other states and a number of cities and counties have extended ban-the-box protections to private-sector employers. Advocates are calling on the Obama Administration to take executive action to apply fair chance hiring to federal contractors and to enact a series of reforms

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<sup>40</sup> The White House, “My Brother’s Keeper Task Force Report to the President,” May 2014, p. 10.

<sup>41</sup> Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland, and Hilary K. Whiteman, “The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment,” *Criminology* 52 (4) (2014), p. 650.

<sup>42</sup> Maurice Emsellem and Michelle Rodriguez, “Advancing a Federal Fair Chance Hiring Agenda: Background Check Reforms in Over 100 Cities, Counties, and States Pave the Way for Federal Action,” National Employment Law Project, January 2015, p. 6.

in the federal hiring process to reduce barriers to employment of people with criminal records.<sup>43</sup>

**Ensure that background checks are reliable and accurate:** The proliferation of background checks by employers is driven largely by the cheap and ready access to criminal history information provided by both the commercial background check industry and by public sources that collect unprecedented amounts of criminal history information. However, these background check reports produced for employment are often plagued with errors and mistakes, including the reporting of expunged records and dropped charges. Such poor reporting and misinformation cause irreparable harm to large numbers of qualified workers.<sup>44</sup>

Thus, an effective legal and policy response must ensure that the criminal history information accessed by employers is reliable and accurate. While the challenges of holding the line against the release of faulty criminal history information are significant, several strategies are proving effective. First, the Fair Credit Reporting Act (FCRA), which regulates background check companies, requires that the information produced for private employers be accurate and that the individual be provided an opportunity to verify its accuracy, just like with a credit check. Enforcement actions by the federal government in several high-profile cases are having an impact, which will be felt increasingly across the industry.<sup>45</sup> And under the new authority of the Consumer Financial Protection Bureau, more can be done to hold the private background check industry accountable under FCRA.

Second, states and the federal government can lead the way in ensuring that publicly generated criminal history information is accurate and complete before it is released for employment screening purposes. For example, the FBI generated 17 million background checks in 2012 for employment and licensing purposes—a six-fold increase in less than 10 years. But roughly half of the records were inaccurate, largely because arrest information was never updated to include the final outcome of the case.<sup>46</sup> Legislation has been introduced in Congress (S. 2567, H.R. 2865, H.R. 2999) that would require that any faulty records be tracked down and corrected using the same procedures that have been successfully tailored to resolving errors that show up under the Brady gun check program.<sup>47</sup>

**Reduce occupational licensing barriers:** In addition to commercial background checks conducted for private employers, extensive background checks have become a routine component of the thousands of federal and state laws that require certification or licensing for employment, often for entry-level occupations in growing fields such as health care and transportation. Indeed, according to a

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<sup>43</sup> Editorial, “Remove Unfair Barriers to Employment,” *New York Times*, February 28, 2015; Emsellem, “Advancing a Federal Fair Chance Hiring Agenda”; Rebecca Vallas and Sharon Dietrich, “One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People With Criminal Records,” Center for American Progress, December 2014, p. 35; All of Us or None, PICO National Network, “Formerly Incarcerated People Request an Executive Order to ‘Ban the Box,’” September 2014; PICO National Network, “Fulfilling the Promise of My Brother’s Keeper,” June 2014.

<sup>44</sup> National Consumer Law Center, “Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses,” April 2012; National Employment Law Project and Center for Community Change, “Wild West of Criminal Background Checks for Employment,” August 2014.

<sup>45</sup> For example, the Federal Trade Commission settled a \$2.6 million case against HireRight Solutions, one of the nation’s largest background check companies, for failing to ensure the accuracy of the reports as required by FCRA. Editorial, “Accuracy in Criminal Background Checks,” *New York Times*, August 9, 2012; “Background-Check Industry Under Scrutiny as Profits Soar,” *Crain’s New York Business*, June 23, 2013.

<sup>46</sup> Madeline Neighly and Maurice Emsellem, “Wanted: Accurate FBI Background Checks for Employment,” National Employment Law Project, 2013.

<sup>47</sup> Marc Levin and Vikrant Reddy, “The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime and Costs,” Texas Public Policy Foundation, July 2013, p. 6.

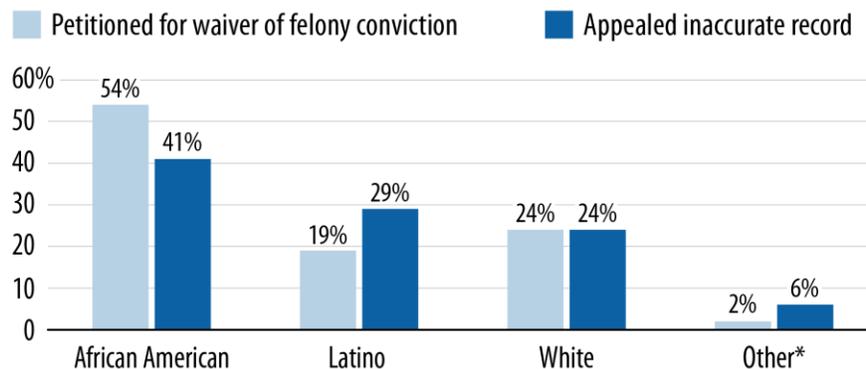
recent study, nearly 30 percent of the nation’s workforce is subject to occupational licensing or certification requirements regulated by law.<sup>48</sup>

However, these laws often impose broad criminal history restrictions, even including blanket and lifetime bans on employment. Thus, it is critically important to remove blanket restrictions in occupational licensing laws and expressly take into account the individual’s record of rehabilitation. A post-9/11 law that required all port workers to undergo an FBI background check to be certified to work at any of the nation’s ports incorporated these components in a model procedure.<sup>49</sup> The program required 3 million workers to be certified by the Transportation Security Administration (TSA), and disqualified anyone with a felony record dating back less than seven years.

Although the range of disqualifying offenses was broad, the process included a “waiver” procedure that allowed those individuals with a disqualifying record to produce evidence of rehabilitation. TSA granted nearly nine out of 10 (87 percent) of the waiver requests based on evidence of rehabilitation, thus allowing about 14,000 workers to keep their coveted port jobs. Significantly, African American port workers, who were disproportionately disqualified due to a felony record, were more than twice as likely as white workers to seek a disqualification waiver by TSA.<sup>50</sup> (See Figure 2.)

FIGURE 2

### Racial Impact of TSA's Port Worker Criminal Background Check Protections



\*Primarily immigrants.

Source: National Employment Law Project analysis of Transportation Security Administration data.

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**Expand “clean slate” protections:** In order to reward rehabilitation and prevent the release of criminal history information that is old or irrelevant to hiring decisions, expungement and sealing laws should be broadly expanded. According to the Vera Institute of Justice, more states are taking on this

<sup>48</sup> Morris Kleiner, “Reforming Occupational Licensing Policies,” Hamilton Project, January 2015.

<sup>49</sup> Maritime Transportation Security Act, 42 U.S.C. Section 70105.

<sup>50</sup> National Employment Law Project, “A Scorecard on the Post-9/11 Port Worker Background Checks,” July 2009.

issue and adopting “clean slate” remedies. Between 2009 and 2014, 23 states broadened their expungement laws, including a number of states that now allow for expungement of drug offenses and several nonviolent felonies after waiting periods of three to 10 years.<sup>51</sup> At the federal level, where there is no process to expunge federal cases, Senators Paul and Booker have introduced the REDEEM Act (S. 2567), which would allow for sealing and expungement of federal juvenile offenses and some nonviolent felonies as well.

## **Conclusion**

Decades of over-criminalization and mass incarceration have dealt a heavy blow to the nation’s workers and the U.S. economy. People of color have been especially hard hit, thus further undermining their prospects for gainful employment even at a time when the job market is finally improving for many workers.

However, public sentiment and political forces are finally shifting in favor of criminal justice reform, and a wave of promising state and local policies, such as California’s Proposition 47 and fair chance hiring laws, have moved the public debate and brought key stakeholders to the table, including the law enforcement community. With this paper, we seek to broaden the debate by engaging advocates for full employment and promoting a comprehensive agenda for reform.

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<sup>51</sup> Ram Subramanian and Rebecca Moreno, “Relief in Sight? States Rethink Collateral Consequences of Criminal Conviction, 2009-2014,” Vera Institute for Justice, 2014.